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Conflicting rulings prompt call for ERISA guidance

Cintas asks high court to end confusion over court vs. arbitration

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Jordan Mamorsky said the Cintas petition 'does not appear to address any obvious circuit splits.'

Cintas petitioned the Supreme Court to end the confusion over whether ERISA cases should be handled in court or by arbitration.

Amid a legal landscape littered with conflicting court rulings, the U.S. Supreme Court has been asked to establish guidelines for when arbitration rather than a court is the proper venue for an ERISA dispute.

"This court's intervention is urgently needed," said the petition for review filed Sept. 8 by Cintas Corp., Mason, Ohio, which has lost attempts at the District Court and appeals court levels to compel arbitration in an ERISA complaint filed by two former employees in a company 401(k) plan.

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"National uniformity is crucial in this area because many employers have employees based in jurisdictions throughout the country," said the review request — formally called a petition for a writ of certiorari — in the case of Cintas Corp. et al. vs. Hawkins et al.

"The uniform treatment of claims brought by ERISA plan beneficiaries is a matter of congressional policy," said the review request. "The issue could not be more cleanly presented because the language of the arbitration agreement here is unambiguous and comprehensive, leaving no room for doubt that the parties intended all ERISA claims that employees might bring to be subject to arbitration."

Cintas petitioned the Supreme Court because it disputed an April ruling by the 6th U.S. Circuit Court of Appeals, Cincinnati. Appeals court judges rejected the use of arbitration, noting the key factor was the absence of the Cintas 401(k) plan's consent to arbitration. Consent here means the 401(k) plan document didn't contain a specific arbitration requirement to settle ERISA disputes. Cintas said individual employment agreements governing arbitration are all that is needed.

"The arbitration provisions in these individual employment agreements — which only establish the plaintiffs' consent to arbitration, not the plan's — do not mandate that these claims be arbitrated," said the ruling by a three-judge panel of the appeals court. "The actions of Cintas and the other defendants do not support a conclusion that the plan has consented to arbitration."

The appeals court upheld the January 2021 pro-participant ruling by a U.S. District Court judge in Cincinnati who rejected the Cintas argument for arbitration. Plaintiffs had alleged that fiduciaries violated ERISA because the plan only offered actively managed investments rather than cheaper index-based investments and because the plan charged "imprudently expensive" record-keeping fees. The plaintiffs, who are seeking class-action status, filed their complaint in December 2019.

In its Supreme Court petition, Cintas attacked the 6th Circuit opinion as "wrong" and argued that the plan "included in its contracts with its employees an agreement to arbitrate any disputes related to their employment. That agreement expressly covered claims arising under ERISA."

Arbitration isn't prohibited in ERISA complaints, but the Cintas case is just part of the differing court rulings about arbitration in allegations of fiduciary mismanagement. For example, **the 9th U.S. Circuit Court of Appeals, San Francisco,** said a sponsor could arbitrate an ERISA dispute because an arbitration provision was contained in a 401(k) plan document. But the same court rejected another petition because the arbitration provision was part of an individual's employment agreement.

Yet, the 7th U.S. Circuit Court of Appeals, Chicago, acknowledged that even though a sponsor had an arbitration provision in a plan document, the court rejected arbitration because the document's wording didn't sufficiently protect participants' ERISA rights. Also, courts are wrestling with several **other questions** about arbitration in ERISA cases.

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Will they or won't they

ERISA attorneys who represent sponsors in ERISA cases said they weren't sure if the Supreme Court would agree to hear the Cintas case.

"It is impossible to tell, but the rate of success on petitions for certiorari is typically less than 5% on an annual basis,"said Jordan Mamorsky, of counsel at the Wagner Law Group. The Supreme Court is often asked to review cases for which petitioners allege that different appeals courts produce different opinions — circuit splits — on specific issues.

The Cintas petition to the Supreme Court asserts that the 6th Circuit ruling conflicts with three different appeals court rulings on ERISA cases in 1991, 1996 and 2000.

These decisions allowed ERISA claims "to be the subject of enforceable arbitration agreements … without regard to whether the plan is a party to the agreement," the Cintas petition said. "The participants' agreement to arbitrate ERISA claims is sufficient."

These three decisions didn't discuss "whether the plan had consented to the arbitration agreement or not in a case where a participant brings (an ERISA) claim to seek relief on behalf of the plan," said Mr. Mamorsky, who is based in Chicago. "These cases hold generally that arbitration agreements that cover legal rights to bring claims pursuant to alleged statutory violations of ERISA are enforceable. This is not in dispute in Cintas or in other similar cases."

In Mr. Mamorsky's opinion, "on its face, the (Cintas) petition does not appear to address any obvious circuit splits."

Joseph J. Torres, a Chicago-based partner at Jenner & Block, said the "likelihood is low" the Supreme Court will review the Cintas case.

"Everyone agrees that as a general matter ERISA claims can be arbitrated," he said. "The question is what vehicle can be extended to cover claims for the plan."

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One way to "sidestep" a Cintas-like dispute, is for sponsors to make sure an arbitration agreement is written into the plan document, he said.

Putting an arbitration agreement in an employee handbook "leads to a greater risk of it not being enforced" in an ERISA complaint, given court rulings on placing arbitration provisions in plan documents, said Nancy Ross, a Chicago-based partner at Mayer Brown LLP.

Ms. Ross, describing federal courts' differing views as "exceptionally confusing," isn't sure if the Supreme Court justices will review the Cintas case. If they are on the fence, they will most likely ask the Department of Labor for its opinion, Ms. Ross said. Justices periodically request opinions from government agencies.

The Labor Department has commented only once in a dispute between a sponsor and a plaintiff over arbitrating an ERISA complaint.

"The Secretary (of Labor) has a substantial interest in ensuring that participants are not forced to arbitrate under agreements that prohibit the plan-wide remedies that ERISA provides," said a DOL amicus brief filed in June in the case of Cedeno vs. Argent Trust Co. et al. now before the 2nd U.S. Circuit Court of Appeals in New York.

The DOL "is not here contending that ERISA claims are categorically non-arbitrable," said the amicus brief, which supported the plaintiff.

However, "a participant cannot be compelled to arbitrate if they are deprived of the full range of ERISA remedies that would be available had they brought the same claim in federal court," the DOL said.

In this case, a U.S. District Court in New York issued a pro-plaintiff ruling in November 2021 saying an employee stock ownership plan's arbitration clause was unenforceable because it didn't protect participants' ERISA rights. A participant in an ESOP run by Strategic Financial Solutions LLC, New York, sued Argent Trust Co., Atlanta, and other fiduciary defendants in November 2020, alleging ERISA violations by purchasing ESOP shares at higher than a fair-market price, thus harming participants' investments.

ERISA attorney Carol I. Buckmann agreed with Ms. Ross that if the justices are interested in the Cintas case, they will first ask for guidance from the DOL.

"The arbitrability of ERISA fiduciary breach claims is a really important federal issue," said Ms. Buckmann, founding partner of the New York law firm Cohen & Buckmann PC. "The

court may well decide it is important to clarify the rules and have one nationwide standard."

Ms. Buckmann predicted that if the Supreme Court agrees to hear the Cintas case, " it will end up ruling that ERISA arbitration is permissible and then clarify who must consent."

In the meantime, Ms. Buckmann tells clients who want to compel arbitration of ERISA complaints to put a carefully-worded provision in a retirement plan document.

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