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Bills to Ban Arbitration Clauses Reappear in House, Senate

The legislation would prohibit arbitration of claims and discretionary clauses in all ERISA-covered plans.

Reported by REMY SAMUELS

Bills were recently introduced in the U.S. House of Representatives and the U.S. Senate that would make mandatory arbitration clauses unenforceable in ERISA-covered plans.

If passed, it would mean that all retirement plans covered by the Employee Retirement Income Security Act would be banned from requiring pre-dispute arbitration as a condition of joining the plan. The bills would also eliminate discretionary authority for plan administrators in providing benefits.

Mandatory arbitration clauses require participants to resolve disputes with the plan or the employer through arbitration instead of the legal system. Many plan sponsors have added arbitration provisions, often in combination with class action waivers, to their ERISA plans in order to limit litigation costs. The Department of Labor reported last year that more than 60 million workers were subject to mandatory arbitration.

Representative Mark DeSaulnier, D-California, introduced H.R.9820 in the House, and Senator Tina Smith, D-Minnesota, introduced S.5169 in the Senate on September 25.

The House bill was referred to the House Committee on Education and the Workforce, and the Senate bill was referred to the Senate Committee on Health, Education, Labor and Pensions.

Both bills propose to amend ERISA to make any mandatory pre-dispute or "coerced post-dispute" arbitration clause, class action waiver, representation waiver or discretionary clause with respect to a plan unenforceable. It would prohibit any such clause or waiver from being included in a plan document or other agreement with plan participants.

According to H.R.9820, participants and beneficiaries would still be able to consent to arbitration after a dispute arises, as long as the participant was not coerced into agreeing to arbitration, the participant is informed in writing of their right to refuse to agree without facing retaliation, and the participant has a 45-day waiting period to agree to arbitration.

The House bill also states that no covered provision related to a plan, other than a multiemployer plan, that gives discretionary authority in benefit determinations or plan interpretations is enforceable. The bill would also prohibit discretionary clauses in single-employer plans.

Plans would have one year to comply with the regulations.

A similar bill was introduced in the House in May 2022 as part of the Mental Health Matters Act. The House passed the bill, and it was referred to the HELP Committee in the Senate.

Congress is currently in recess until after November elections.

The administration of President Joe Biden had previously come out in support of the 2022 legislation, suggesting Biden would sign it if it passed in the Senate.

The law firm Morgan Lewis & Bockius LLP and the U.S. Chamber of Commerce, an advocacy group, voiced opposition to the bill, arguing it would encourage costly litigation and frivolous lawsuits, since many weaker cases are filtered out by the more expedited arbitration process.

Andrew Oringer, a partner in the Wagner Law Group, says the arbitration issue under ERISA is significant because its implications not only question whether plaintiffs should have access to the courts, but also question whether, as a practical matter, class actions can go forward.

Oringer points out that if class action lawsuits are unavailable, cases may become less appealing to plaintiffs' lawyers, as attorneys make an investment in the cases they bring, so if the potential recovery does not extend to a broad class, the case may become less worthwhile to pursue.

He added that some plans not only require arbitration, but also attempt to foreclose class actions.

"Interestingly, because a number or ERISA fiduciary claims, even if not fashioned as class actions, are essentially brought on behalf of the plan as a whole, even though nominally brought by one or more plan representatives, it will be interesting to see how things ultimately shake out if class actions become harder to bring," Oringer says.

Meanwhile, courts continue to disagree over the enforceability of mandatory arbitration provisions containing class action wavers. For example, the U.S. 3rd, 7th and 10th Circuit Courts of Appeal have refused to enforce arbitration clauses that prospectively waive remedies under ERISA, whereas the 9th Circuit and some district courts in other circuits have enforced the arbitration of claims seeking plan-wide relief under ERISA.

The U.S. Supreme Court also declined to review the 3rd and 10th Circuits' decisions in October 2023 cases in which the appeals courts held arbitration provisions unenforceable.

"It remains to be seen whether Congress will coalesce in favor of preventing a plan sponsor from requiring arbitration in an ERISA plan," Oringer notes. "Until then, or until the Supreme Court resolves the issue, the issue will remain as clear as mud."

Tags arbitration, mandatory arbitration, reitrement plan legislation

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