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ERISA Class Actions After Epic Systems: Challenges and Potential Opportunities for Plan Sponsors

Impact on Benefit Claims, Fiduciary Breaches, and Class Certification;
Arbitration Clauses for Retirement Plans

TUESDAY, DECEMBER 4, 2018

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ERISA Class Actions After *Epic Systems*

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Overview

- In May 2018, the Supreme Court held in *Epic Systems Corp. v. Lewis* that agreements requiring employees to arbitrate employment-related claims on an individual basis are enforceable under the Federal Arbitration Act (FAA), and do not violate the National Labor Relations Act (NLRA).
- *Epic Systems* continues the history of courts' favorable treatment of arbitration.
- What does *Epic Systems* mean for the arbitrability of claims brought under the Employee Retirement Income Security Act of 1974 (ERISA)?

Epic Systems Corp. v. Lewis (2018)

- Background:
  - Employee plaintiffs signed agreements requiring individualized arbitration proceedings for employment disputes.
  - When they later brought FLSA and related state law claims through class or collective actions in federal court, Epic Systems moved to compel individual arbitration pursuant to the agreements.
- Issue: Whether an agreement that requires an employer and an employee to resolve employment-related issues through individual arbitration, and waive class and collective proceedings, is enforceable under the FAA, notwithstanding the NLRA.

Epic Systems Corp. v. Lewis (2018)

- Held: Such arbitration agreements are enforceable.
  - Liberal federal policy favoring arbitration agreements
  - Class and collective proceedings not covered by FAA's savings clause
  - Court declined to defer to the National Labor Relations Board's (NLRB) interpretation of FAA

Epic Systems Corp. v. Lewis (2018)

- Plaintiffs presented three arguments:
  - The FAA's savings clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," and applies to agreements that violate other laws (like the NLRA).
  - The arbitration agreements violate Section 7 of the NLRA, which protects "concerted activities."
  - The Court must defer to the NLRB's most recent interpretation that the NLRA made class action waivers invalid under the FAA.

Epic Systems Corp. v. Lewis (2018)

- The FAA's savings clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."
- Court's Response: the clause recognizes only generally applicable contract defenses (fraud, duress, unconscionability, etc.), not defenses that target arbitration.

Epic Systems Corp. v. Lewis (2018)

- The arbitration agreements violate Section 7 of the NLRA, which protects "concerted activities," which include:
  - Right to self-organization
  - Right to form, join, or assist labor organizations
  - Right to bargain collectively
  - Right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
- Court's response: Section 7 focuses on the right to organize unions and bargain collectively; it doesn't mention class or collective action procedures or indicate an intent to displace the FAA.

Epic Systems Corp. v. Lewis (2018)

- The Court must defer to the NLRB's most recent interpretation that the NLRA made class action waivers invalid under the FAA.
- Court's response: Court does not owe deference because the NLRB did not just seek to interpret the NLRA, but to interpret it in a way that limits the work of the FAA, a law which the NLRB does not administer.

Arbitration of ERISA Claims

- Overall, courts have held that arbitration clauses can be enforced in the context of ERISA claims.
  - *See, e.g.*, *Prime Health Care Services-Landmark LLC v. United Nurses and Allied Professionals Local 5067*, 848 F.3d 41 (1st Cir. 2017) (ERISA preemption issue was arbitrable).
- There are some regulatory limitations on arbitration for health and disability claims.
  - DOL claim regulations:
    - Plan can have mandatory non-binding arbitration but only as part of claim appeal process; and
    - Plan can have voluntary binding arbitration post-appeal. 29 C.F.R. Section 2560.503-1(b)(4).

Arbitration of ERISA Claims

- ERISA provides three remedies for plan participants:
  - Claims for additional plan benefits arising under ERISA Section 502(a)(1)(B)
    - Individual claims based on entitlement under terms of ERISA plan.
  - Claims for breach of fiduciary duty to make the plan whole for any losses under ERISA Section 409 (enforced through Section 502(a)(2))
    - Can only be brought in representative capacity on behalf of the ERISA plan.
  - Claims for breach of fiduciary duty seeking to enforce the terms of the plan or other appropriate equitable relief under ERISA Section 502(a)(3)
    - Individual or class oriented.
    - Based on violation of ERISA or the plan or enforcement of ERISA or the plan.

Epic Systems' Effect on ERISA Claims

- Claims brought under ERISA 502(a)(1)(B) and 502(a)(3) are brought individually by plan participants on their own behalf. After *Epic Systems*, such claims are likely to be subject to arbitration agreements and class action waivers.
- Fiduciary breach claims under ERISA 502(a)(2), however, are brought on behalf of a plan, rather than a plaintiff seeking personal relief.
- This leaves the question: can employers force employees to individually arbitrate fiduciary breach claims under ERISA?

Munro v. Univ. of So. Cal. (C.D. Cal. 2017)

- Background:
  - Plaintiff employees signed mandatory arbitration agreements when they started employment at the University of Southern California (USC).
  - Filing on behalf of the school's retirement plans, plaintiffs brought a class action against USC alleging claims for breach of ERISA's fiduciary duties.
  - USC moved to compel arbitration pursuant to the arbitration agreements.
- Held:
  - Arbitration agreements are generally enforceable for ERISA claims.
  - But, not enforceable where claims are brought on behalf of the plan.

Munro v. Univ. of So. Cal. (9th Cir. 2018)

- The Ninth Circuit upheld the district court's denial of USC's motion.
  - The clause requiring arbitration of all claims the employee may have against the university did not cover the fiduciary breach claim, which is only brought on behalf of the plans, not the employees, and the plans did not consent to arbitration.
  - ERISA fiduciary breach claims comparable to a qui tam suit, in which the plaintiff brings suit on behalf of the United States government for redress of injury done to the government.
- Because the agreements in question applied only to individual employee claims, the court did not take up the plaintiffs' argument that section 502(a)(2) claims are inarbitrable as a matter of law.
- USC plans to file petition for cert.

Munro v. Univ. of So. Cal. (9th Cir. 2018)

- The Ninth Circuit ruling solidified the question of whether a plan participant can be required to arbitrate ERISA 502(a)(2) claims, which had already been addressed in lower court cases.
  - *See Cryer v. Franklin Templeton Res., Inc.* (N.D. Cal. 2017) ("a plan participant cannot settle, without the plan's consent, a 502(a)(2) breach of fiduciary duty claim.")
  - *See Dorman v. Charles Schwab & Co. Inc.* (N.D. Cal. 2018) (plaintiff "cannot waive rights that belong to the Plan, such as the right to file this action in court.")

Brown v. Wilmington Trust, N.A. (S.D. OH 2018)

- On the same day of the Ninth Circuit's ruling in *Munro*, a district court denied arbitration of an ERISA fiduciary breach claim brought on behalf of an Employee Stock Ownership Plan ("ESOP").
- Background:
  - Plaintiff was an employee of Henny Penny Corporation and participant in Henny Penny's ESOP. She left Henny Penny in May 2016 and cashed out of the ESOP in November 2016.
  - In January 2017, the Plan was amended to include an arbitration procedure covering ERISA fiduciary breach claims and a class action waiver.
  - In July 2017, Plaintiff filed suit against Wilmington Trust on behalf of the Henny Penny ESOP and on behalf of a class of similarly situated participants, alleging various causes of action under ERISA.
  - Wilmington Trust moved to compel arbitration pursuant to the ESOP amendment made in January 2017.

Brown v. Wilmington Trust, N.A. (S.D. OH 2018)

- Background:
  - Plaintiff argued that she was not subject to the arbitration clause because, among other things:
    - She did not agree to arbitrate, given that the provision was added after she left Henny Penny.
    - Her claims fell outside of the arbitration provision.
- Held:
  - Fiduciary breach claim under ERISA was not subject to arbitration, despite the existence of an arbitration provision in the ESOP plan.

Brown v. Wilmington Trust, N.A. (S.D. OH 2018)

- Plaintiff's claims were not subject to arbitration provision in plan document because she had left the company before it was added.
- Even if plaintiff had agreed to arbitration, the provision no longer applied to her because she was no longer a plan participant.
  - Provision applied only to covered claims asserted by "claimants" as defined in the plan document.
  - Plaintiff was no longer a covered "claimant" after she cashed out of the ESOP.

Dorman v. Charles Schwab & Co. (N.D. Cal. 2018)

- ERISA fiduciary suit against 401(k) plan fiduciaries.
- Plaintiffs signed arbitration agreements as part of their employment.
- The 401(k) plan also contained an arbitration provision.
- Defendant moved to compel arbitration but motion was denied.
- Held:
  - Plan provision was not enforceable because it was not enacted until after plaintiff ceased to be a participant.
  - Court suggests plan arbitration clause may not be enforceable anyway.
  - Individual arbitration agreement does not operate to waive rights of the plan under Section 502(a)(2).
- Denial of motion to compel arbitration is on appeal to the Ninth Circuit.

Do fiduciary breach claims have to be class actions?

- Another question raised by *Epic Systems* and subsequent ERISA arbitration cases is whether a fiduciary breach claim must be tried as a class action.
- Because Section 502(a)(2) allows a plaintiff to recover on behalf of the plan, presumably a single plaintiff can obtain relief for all plan participants without a class action.
- For this reason, class action waivers for ERISA claims may be less impactful than in some employment claims.

Recommendations

- Post-*Epic Systems*, it appears that arbitration agreements and class waivers covering ERISA claims are generally valid and enforceable.
- However, arbitration of ERISA claims may not be right for every employer.
- Employers should consider whether they want to arbitrate fiduciary breach claims, because arbitration eliminates certain advantages and protections provided by the judicial system.
  - Pros of arbitration:
    - Less expensive
    - Decisions can be kept confidential
    - More informal than litigation
  - Cons of arbitration:
    - Limited review of arbitration rulings
    - Arbitrators not bound by precedent
    - No issue preclusion

Recommendations

- Employers seeking to arbitrate ERISA 502(a)(2) claims should amend their employment agreements and plans to mandate arbitration with a class action waiver.
- Include broad language covering claims brought by the employee on behalf of the plan or other third parties.
- Include language covering claims brought by former employees and participants.

Thank You

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