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Ninth Circuit Determines Employment Agreement Does Not Require Arbitration of Certain ERISA Claims

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On July 24, 2018, the Ninth Circuit Court of Appeals ruled in *Munro v. University of Southern California*, No. 17-55550, that an employer/fiduciary of a 401(k) plan cannot force a fiduciary breach claim under Employee Retirement Income Security Act (ERISA) section 502(a)(2) into arbitration. In the case, the named plaintiffs signed mandatory arbitration agreements as part of their employment. The employees agreed to arbitrate "all claims . . . that Employee may have against the University or any of its related entities . . . and all claims that the University may have against Employee." The court held that these agreements only applied to claims made by or against the employees and did not require arbitration of claims made under ERISA section 502(a)(2) because such claims are made on behalf of the benefit plan and are not individual claims.

Interestingly, the court declined to address the plaintiffs' contention that section 502(a)(2) claims are inarbitrable as a matter of law. Instead, the decision narrowly rested on the court's determination that the arbitration agreements in that case did not extend to claims brought on behalf of a benefit plan, but only to claims brought by the individual employees on their own behalf. That appears to leave open the possibility that a more broadly worded arbitration agreement might, at least in the right circumstances, force arbitration of section 502(a)(2) claims. There is also nothing in *Munro* to suggest that other ERISA claims would not be arbitrable under similar agreements where the claims are brought by plan participants individually rather than as representatives of the plan.

Munro was a closely watched case as employers and benefit plans are increasingly utilizing mandatory arbitration agreements and class action waivers. There is another case on deck at the Ninth Circuit in which a benefit plan document itself contained a mandatory arbitration clause. The point of including the clause in the plan document is to demonstrate the plan's consent to arbitration so that any suits brought on behalf of the plan under section 502(a)(2) would be subject to arbitration. However, the district court declined to enforce the arbitration provision because it was not enacted until after the named plaintiff ceased his participation in the plan. The court went on to say the clause would not be enforceable in any event because a plan sponsor cannot waive the rights of the plan.

Another potential battlefield in the ERISA arbitration context is whether health and disability claims are arbitrable. The ERISA statute does not address arbitration but U.S. Department of Labor (DOL) regulations do severely limit arbitration of health and disability claims. Essentially, the regulations prohibit binding arbitration during the claim review process and prohibit mandatory arbitration after

the claim process is exhausted. After the Supreme Court of the United States' decision in *Epic Systems Corporation v. Lewis*, in which the Supreme Court declined to follow National Labor Relations Board regulations limiting arbitration of certain claims, there may be challenges to the DOL's ability to limit arbitration with regard to ERISA health and disability claims. Certainly these are early skirmishes in what is likely to be a long-running nationwide debate over arbitration of ERISA claims.

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