Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

ERISA Arbitration, New Legal Theories To Be Tested In 2021

By **Emily Brill**

Law360 (January 3, 2021, 12:02 PM EST) -- In 2021, courts stand poised to consider whether employers can kick benefit plan mismanagement suits to arbitration and whether two novel theories in class actions over retirement plans hold water.

And attorneys expect to see even more significant Employee Retirement Income Security Act disputes in 2021, with benefits litigation only growing as a field.

"We've seen a significant uptick in the amount of lawsuits filed in the ERISA space in 2020, and that's been continuing unabated," said Melissa Hill, an employee benefits partner at Morgan Lewis & Bockius LLP. "My prediction is that that's not going to die down once we hit 2021."

Here, Law360 highlights six ERISA cases that attorneys will have their eyes on in the coming year.

7th Circ. Mulls ERISA Arbitration

In 2018 and 2019, the issue to watch in the ERISA litigation space was arbitration — specifically, whether plans could require workers to resolve fiduciary-breach claims through arbitration.

Two high-profile cases on the subject cleared the Ninth Circuit in those years: Munro v. USC, in which the court came down against forced arbitration, and Dorman v. Schwab, in which the judges allowed forced arbitration.

But the rulings left key questions unanswered, and benefits attorneys predicted the Ninth Circuit wouldn't have the last word on the subject of ERISA arbitration.

Those attorneys were right: Now, the Seventh Circuit is considering whether administrators can write mandatory consent-to-arbitration provisions into a benefit plan's summary plan document, requiring plan participants to resolve fiduciary-breach claims through arbitration.

The question arrives at the Seventh Circuit through a case accusing GreatBanc Trust Co. and Triad Manufacturing Inc.'s board of directors of violating ERISA by allowing Triad's employee stock ownership plan to purchase company stock at an inflated rate.

Triad's board attempted to compel arbitration in the suit in June, but an Illinois federal judge shot down

the request in August. Now, the board is fighting to overturn that decision, saying a clause in its employee stock ownership plan's summary document mandates arbitration of fiduciary-breach claims.

"I'm keeping an eye on this case because the arbitrability question is a really practical one for our clients when they're trying to figure out what they're going to do with their benefit plans," said Amanda Amert, an ERISA litigator and partner at Willkie Farr & Gallagher LLP. "Should we be putting an arbitration provision into our ERISA plan?"

The case is Smith v. Board of Directors of Triad Manufacturing Inc. et al., case number 20-2708, in the U.S. Court of Appeals for the Seventh Circuit.

9th Circ. Considers Auto-IRA Programs

The Ninth Circuit is set to hear oral arguments in February in a case that could determine the viability of auto-IRA programs, state-run initiatives that funnel parts of workers' paychecks into individual retirement accounts to help them save for their twilight years.

The first such program arose in Oregon in 2017, called OregonSaves. California, Connecticut, Oregon and Maryland are among the states that have adopted them since.

State officials sing the programs' praises, saying they will fill the gap in retirement savings for workers without 401(k)s or pensions. But a small California lobbying group called the Howard Jarvis Taxpayers Association has challenged the programs' legality, saying ERISA's preemption provision prevents states from creating auto-IRA programs.

The group lost at the district court, but it's hoping for better luck in the circuit court with its argument that the California Secure Choice Retirement Savings Program should be shut down.

"The Howard case will be an interesting one to watch, because it addresses the tension between ERISA's broad preemption powers, and the desire by states to provide retirement benefits to employees of small companies who may find it cost-prohibitive to sponsor their own programs," said Karen Ng, an employee benefits partner at Nixon Peabody LLP.

The case's outcome could determine the future of not only Secure Choice, but of OregonSaves and other states' programs, Ng said.

The Ninth Circuit's ruling will also provide insight into the scope of ERISA's preemption powers, which has been a hot topic in the courts recently.

The case is Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program, case number 20-15591, in the U.S. Court of Appeals for the Ninth Circuit.

Actuarial Theory Set For Trial

In December 2018, two plaintiffs' firms filed a spate of lawsuits putting forward a new theory: that companies violate ERISA when they use outdated information to calculate certain types of retirement benefits.

The suits zeroed in on the mortality tables, which estimate a person's likelihood of dying within the year.

Using old tables reduces the present value of benefits, ERISA plan participants argued in suits against PepsiCo Inc., U.S. Bancorp, MetLife, American Airlines and other companies.

This legal theory may be put to the test in a 2021 trial pitting Huntington Ingalls Industries Inc. against a class of company retirees. Though an exact date has not yet been set, a Virginia federal judge cleared the way for the case to proceed to trial in September.

The theory reflects the growing sophistication of the ERISA plaintiffs' bar, Amert said. It shows that plaintiffs' firms have increased their knowledge of ERISA plans' functioning to the point they can challenge niche elements of plan administration such as the actuarial assumptions used to calculate benefits, she said.

If the theory succeeds, more litigation challenging actuarial assumptions could be on its way, attorneys said.

"The interest rate assumption is also one that could be challenged separately from the mortality assumptions," said Mark Boyko, an ERISA plaintiffs' attorney at Bailey & Glasser LLP. "The issue in litigation now is whether the plan's calculations for alternative forms of benefits are actuarially equivalent to what the plan pays other pensioners. The plan may fail to provide actuarially equivalent benefits if it is using the wrong mortality table, the wrong interest rate or both."

The case is Herndon v. Huntington Ingalls Industries Inc. et al., case number 4:19-cv-00052, in the U.S. District Court for the Eastern District of Virginia.

Is Confidential Info A Plan Asset?

Another new ERISA class action theory put forward by the plaintiffs' bar alleges that workers' confidential financial information is a retirement plan asset, and misuse of that information constitutes a breach of fiduciary duty.

Federal judges in New Jersey and Texas are set to consider that theory in cases against ADP TotalSource Group Inc. and Shell Oil Co., respectively, this year. Both cases had reached the motion-to-dismiss stage by December.

The cases accuse the companies of violating ERISA by allowing their retirement plan recordkeepers to use workers' financial information in order to market them products.

The theory is another product of the ERISA plaintiffs' bar's growing sophistication, Hill said, and its success could portend more litigation challenging alleged misuse of plan assets.

"'What is a plan asset?' is really the question. If this theory gets traction by the courts, I think you're going to see an expanded interpretation from the plaintiffs' bar of what constitutes a plan asset," Hill said.

The cases are Harmon et al. v. Shell Oil Co. et al., case number 3:20-cv-00021, in the U.S. District Court for the Southern District of Texas, and Berkelhammer et al. v. ADP TotalSource Group Inc. et al., case number 2:20-cv-05696, in the U.S. District Court of the District of New Jersey.

Health Plan Litigation On The Rise

Benefits attorneys recommended keeping an eye on suits accusing health plans of breaching their fiduciary duties in 2021, reiterating a longtime prediction that this area of litigation is going to keep growing.

"My big-picture view is that the health benefit-related cases are going to keep going and keep getting bigger, because there's so much money being spent in this space right now," Amert said. "The sheer amount of dollars going through health plans is staggering."

One such type of case accuses insurers and third-party administrators of improperly withholding payments to medical providers, using the justification that the company had overpaid the provider in the past. Provider-side attorneys say the practice, called "cross-plan offsetting," violates ERISA.

The Eighth Circuit handed providers a win in cross-plan offsetting litigation in 2019, ruling that UnitedHealth Group Inc.'s use of the practice constituted a misinterpretation of employee health plan documents. But the circuit court's ruling left a key question unanswered: Is cross-plan offsetting illegal under ERISA?

The courts will get another chance to answer that question in a suit against UnitedHealth Group filed in Minnesota federal court, which had made it to the motion-to-dismiss stage by December.

The issue has implications for employers, who may want to reconsider allowing the insurers they work with to engage in cross-plan offsetting when it comes to their employees' health plan, "given the level of scrutiny that practice has come under," said Daniel T. Sulton, a member of the employee benefits practice group at Ogletree Deakins Nash Smoak & Stewart PC.

The case is Scott et al. v. UnitedHealth Group Inc. et al., case number 0:20-cv-01570, in the U.S. District Court for the District of Minnesota.

--Additional reporting by Danielle Nichole Smith. Editing by Neil Cohen.