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The Ninth Circuit Abandons 35 Years of Precedent by Enforcing Arbitration Clause in ERISA Benefit Plan

Thirty-five years after deciding that arbitration clauses in employee benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) were unenforceable, the U.S. Court of Appeals for the Ninth Circuit has reversed itself by approving the use of mandatory arbitration clauses and class action waivers in ERISA-governed benefit plans in *Dorman v. Charles Schwab Corp.* The *Dorman* decision joins several other federal appellate courts in allowing ERISA plan sponsors to adopt plan terms that limit participants to the use of individual arbitration as the sole forum for resolving certain benefits claims. This update provides additional background on the *Dorman* decision and identifies new issues for plan sponsors in the Ninth Circuit.

Background

Before *Dorman*, ERISA benefit plans operating in the Ninth Circuit were subject to the circuit's long-standing decision in *Amaro v. Continental Can Co.*, which held that mandatory arbitration clauses in such plans were unenforceable due to arbitrators' general lack of "competence" with ERISA issues. The Ninth Circuit has now changed this position in *Dorman*.

The *Dorman* decision also addresses whether mandatory arbitration provisions in ERISA benefit plans could preclude plan participants from bringing class action suits under ERISA on behalf of the plan. *Dorman* concerned a claim for benefits under ERISA Section 502(a)(2), which provides that participants may pursue claims on behalf of a plan as a whole. According to the court, such claims are individual in nature and thus may be subject to a plan's mandatory arbitration clause because the plan consented to resolution of the claim through arbitration by its own terms, and because the individual consented by virtue of participating in the plan with an arbitration clause.

Plan Design Considerations

Dorman raises several issues for ERISA plan sponsors with operations within the Ninth Circuit, including the following:

- If the plan already contains an arbitration clause based on decisions from other federal courts, the plan's terms or administration may require modification in response to *Dorman.*
- For plans without an arbitration clause, analysis specific to each sponsor may be necessary to determine whether arbitration is the preferred form for resolving plan benefit claims.
- Adding an arbitration clause to an ERISA-governed plan might result in a challenge to an arbitrator's determination in a federal circuit that does not hold that such clauses are enforceable or that has not ruled on the issue.
- If a plan sponsor decides to add a binding arbitration clause into its ERISA plan document, the level of detail in the clause will need to be evaluated. Factors to be considered include whether plan participants will have any right to appeal the arbitrator's determination, whether plan participants should be required to waive their ability to participate in a class-action claim, whether the arbitrator must be knowledgeable in

ERISA issues, and whether the plan will be responsible for arbitration costs if the participant prevails.

ERISA plan sponsors should consult with experienced legal counsel as they weigh the pros and cons of adopting a binding arbitration clause and, if they choose to proceed, as they draft the clause.

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