

Emerging Case Law Supports Forum-Selection Clauses in ERISA Plans

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A recent decision by the Ninth Circuit upholds the enforceability of forum-selection clauses in ERISA plans. The case, *In re Becker v. United States Dist. Court*, No. 20-72805, 2021 WL 1219745 (9th Cir. Apr. 1, 2021), is in line with evolving case law trending towards the enforceability of forum-selection clauses in ERISA plan documents. The Ninth Circuit joins the Sixth and Seventh Circuits in this regard, and district courts in other circuits such as the Third and Fourth Circuits have also followed suit, although their respective circuit courts have yet to decide the issue.

We review the *Becker* case and identify reasons why plan sponsors should consider amending their plans to include forum-selection clauses below.

The *Becker* Case

In re Becker is a putative class action case brought by a former employee participant of the Wells Fargo 401(k) plan challenging its inclusion of certain Wells Fargo investment options as violative of ERISA's fiduciary duties and self-dealing rules. The plan's forum-selection clause identified the District of Minnesota as the appropriate and exclusive venue for plan disputes. Nevertheless, the participant brought the action in the Northern District of California.

Wells Fargo moved to transfer the case to the District of Minnesota based on the forum-selection clause, and the Northern District of California granted the motion, finding that "enforcement of the Plan's forum-selection clause [did] not contravene ERISA's venue provisions" and "the applicable public interest factors favor[ed] enforcement of the forum-selection clause."

The participant petitioned the Ninth Circuit for a writ of mandamus to rescind the district court's transfer order. The participant argued the forum-selection clause was inconsistent with ERISA's remedies provision, which provides for venue in any of the following districts:

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- where the plan is administered;
- where the breach took place; or
- where the defendant resides.

See 29 U.S.C. § 1132(e)(2).

The Ninth Circuit denied the petition and affirmed the lower court's holding that the forum-selection clause was enforceable. The court noted: "Courts are in near universal agreement: ERISA does not bar forum-selection clauses. We find no reason to disagree with their well-reasoned conclusion."

Considerations for Plan Sponsors

There are a variety of reasons why a plan sponsor may wish to specify permissible venues in its ERISA plan documents. For example, absent a venue selection in the plan, ERISA's very broad venue provision may permit participants to sue in distant and inconvenient venues. Specifying venue near the place the employer is located and/or the plan is administered may be substantially more convenient and less expensive than other possible venues. There are also substantive considerations, including:

- venues considered more plaintiff or defense friendly, and venues that apply varying substantive rules, like limitations periods, and
- nuances in how claims are decided and positions on issues such as whether administrative exhaustion is required for claims of statutory violations. Careful consideration of advantageous venues can pay large dividends in litigation by limiting forum shopping.

A note of caution is also appropriate. In *Becker*, the Ninth Circuit said: "Forum-selection clauses are valid *except in the rarest of circumstances*." (Emphasis added). Other courts have similarly left the door open to the possibility that a venue selection clause would not be enforced in extreme circumstances. For example, specifying venue in a very remote location – far removed from the plan or employer's operations – may create practical obstacles to litigation that may make enforcement of the provision more challenging.

Plan sponsors should review these and other considerations with ERISA counsel versed in litigation matters. Please contact your Groom attorney to connect with a member of our litigation team.

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