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Schwab Arbitration Ruling Leaves Unanswered Questions, *PlanSponsor, ft. Tad Devlin*

Tad Devlin, partner with Kaufman Dolowich & Voluck in San Francisco, was quoted in an article written by Lee Barney for PlanSponsor published September 10, 2019.

The effect of the 9th Circuit decision on ERISA lawsuits is uncertain, and arbitration is not the perfect option plan sponsors may think.

The 9th U.S. Circuit Court of Appeals in August issued a ruling in the Michael F. Dorman et al vs. The Charles Schwab Corp. et al case that Schwab could enforce its retirement plan's arbitration clause requiring participants to file individual claims and to waive class-action claims. Legal experts say the case raises questions that should give plan sponsors pause before including an arbitration clause in their plan.

The court ruled that the plan expressly said all Employee Retirement Income Security Act (ERISA) claims should be individually arbitrated and that the plan also included a waiver of class action suits. Dorman's original suit accused Schwab of breaching its fiduciary duties by including poorly performing Schwab-affiliated funds in the plan. He brought the suit on his own, seeking class-action remedy for the plan in its entirety.

Arbitration not a perfect option

While, "generally, plan sponsors prefer arbitration to going to court," there are some downsides to arbitration, notes Tad Devlin, a partner with Kaufman Dolowich & Voluck in San Francisco. "For non-experienced practitioners, the ERISA statute can be a labyrinth, so this would weigh some plan sponsors in favor of going before a federal judge who has heard these types of claims," he says.

"Another disadvantage to arbitration is that it is confined to a limited review, and the arbitration award likely would be final and binding and can be very difficult to challenge or overturn," Devlin continues. "It can be almost impossible to challenge at the judicial level on a petition to vacate the award. To do so, the sponsor would essentially have to show the award decision was fraudulent or corrupt. On the other hand, in a judicial setting, you have at your disposal the district court, the court of appeals and the highest court in the land."

Devlin says sponsors should go a step further by having "all participants specifically sign off and acknowledge the arbitration provision, rather than have a claimant contend the arbitration provision language was somehow not reviewed because it was included in a 25-page document. Make sure all participants are fully versed on the clause's provisions, have them acknowledge that and send back to the sponsor a receipt that they agree to the language."