

# ARE “FORUM SELECTION CLAUSES” ENFORCEABLE?

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Under the Employee Retirement Income Security Act of 1974 (ERISA), an aggrieved participant or beneficiary may file suit against the plan and its fiduciaries (a) where the plan is administered, (b) where the breach took place, or (c) where the defendant resides or may be found. When a company has employees, former employees, participants, or beneficiaries in multiple states, employer and fiduciaries are likely to find themselves facing suit in multiple forums that are neither familiar nor convenient. In the ERISA context, a forum selection clause is a plan document/SPD provision that attempts to avoid suits in multiple or inconvenient jurisdictions by requiring that all legal actions involving the plan be commenced in the courts of a specified jurisdiction. For example, a company that has its corporate headquarters in Western New York, and that administers its plan through employees or other parties who reside in the area, will likely want the plan document to require that all actions involving the plan be commenced in the courts located in the County of Erie, State of New York. Such a clause, *if enforceable*, would prevent participants and beneficiaries from bringing suits in other jurisdictions, even when the other venue would be a proper venue under ERISA.

In a recent case, the U.S. Court of Appeals for the Eighth Circuit ruled against a participant who claimed that a forum selection clause in her employer’s ERISA plan contravened ERISA and, therefore, was unenforceable. The plan provision at issue provided that “any action by any Plan Participant relating to or arising under this Plan shall be brought and resolved only in the U.S. District Court for the Eastern District of Missouri.” The participant, a long-time resident of Arizona with no connection to Missouri, filed suit in the U.S. District Court for the District of Arizona when her disability benefits were terminated. Arguing that the forum selection clause in the plan was binding, the defendants asked the court to transfer venue to the District Court in Missouri. The Arizona court agreed and entered an order transferring the case to the Eastern District of Missouri even though the Missouri court was more than 1,000 miles away from where the participant lived. Following the transfer, the participant asked the Missouri court to transfer the case back to Arizona. The Missouri court denied her motion. The U.S. Court of Appeals for the Eighth Circuit declined to reverse the order of the Missouri court. *In re: Lorna Clause* (8<sup>th</sup> Cir., 2016).

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While the majority of courts have upheld the enforceability of forum selection clauses, federal district courts in Maine and Illinois recently arrived at a different conclusion, striking down the clauses at issue. We should also note that the U.S. Department of Labor has consistently taken the position that ERISA flatly prohibits forum selection clauses like the one at issue in *In re: Lorna*. We are sure that the enforceability of forum selection clauses will continue to be the subject of litigation, so the matter is far from resolved. Until the final word is written, most ERISA plans should contain forum selection clauses. Employers and fiduciaries should address this issue with employee benefits counsel.