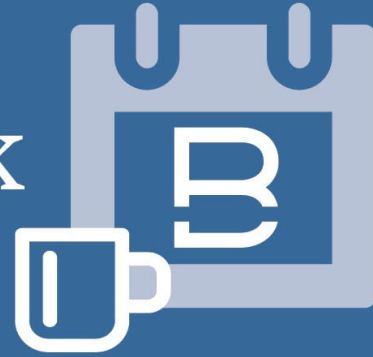


# The Work Week

Bassford Remele Employment Practice Group



**August 21, 2023**

Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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## **Advantages and Disadvantages of Employers Implementing Arbitration Agreements With Class and Collective Action Waivers**

[Bryce D. Riddle](#)

In 2017, the United States Supreme Court upheld the validity of employment contracts where employees give up their right to collective litigation against their employer in *Epic Systems Corp. v. Lewis*. Since at least that time, employers have weighed whether to have their employees sign arbitration agreements with class action and collective action waivers. Employers often include arbitration provisions in employment contracts to streamline dispute resolution processes and minimize legal risks, including avoiding class and collective actions and avoiding sympathetic juries. Such agreements offer tremendous value to employers in helping dismiss class or collective action lawsuits and instead arbitrate claims with a single individual.

While beneficial to employers, arbitration agreements with class and collective action waivers do not come without potentially significant downsides. To better assist with determining whether to implement arbitration agreements, the following advantages and disadvantages should be considered.

### **Advantages**

**1. Efficiency and Cost Savings:** One of the primary advantages of arbitration agreements with class action and collective action waivers is the potential for streamlined dispute resolution. Arbitration generally moves faster than traditional litigation, leading to quicker resolutions and reduced legal costs for both parties. Class action and collective action waivers prevent groups of employees from banding together in a single legal action, further minimizing legal expenses and complexity. It can also limit discovery and motion practice compared to disputes litigated in court.

**2. Privacy and Confidentiality:** Arbitration proceedings are typically private, unlike court cases which are open to the public. This confidentiality can be appealing to both employers and employees, as it shields sensitive information and disputes from public scrutiny. Confidentiality can also lead to more candid discussions between parties, potentially facilitating more productive resolutions.

**3. Predictability of Decision Makers:** Arbitration allows parties to select arbitrators with expertise in the relevant industry or legal field. This specialization can lead to more informed decisions and better outcomes compared to traditional court cases where judges may have limited knowledge about the intricacies of a particular business. This also avoids a decision driven by jury sympathies, “runaway juries,” and juries that do not understand the intricacies and nuances of the law.

**4. Avoiding Class and Collective Action Liability:** Class action and collective action waivers in arbitration agreements can shield employers from the financial and reputational damage that often accompanies large-scale lawsuits. By prohibiting groups of employees from forming class or collective actions, employers can avoid potentially significant financial losses and manage their legal risks more effectively.

### ***Disadvantages***

**1. Cost of Individual Arbitrations:** While avoiding class and collective actions may seem appealing insofar as avoiding potential exposure, the possibility of hundreds of thousands of arbitrations, particularly in jurisdictions where the employer must pay all of the arbitration fees applies, can have a drastic impact on a company’s bottom line. Both Uber and Door Dash, who have been the target of class and collective actions and who had arbitration clauses with class and collective action waivers, are now paying significant sums of money to individually arbitrate claims that otherwise could have been resolved through class action mechanisms. Depending on the causes of action, arbitration provisions could prove more costly than litigating class or collective actions.

**2. Inconsistent Outcomes:** Unlike court decisions that can set legal precedents, arbitration decisions are generally not publicly accessible and do not have the same level of consistency and predictability. This lack of uniformity can result in varying outcomes for similar disputes, making it challenging for employers to anticipate the potential consequences of arbitration agreements.

**3. Reduced Opportunities for Appeal:** Arbitration means the parties’ ability to appeal an arbitrator’s decision is diminished. In the event an unfavorable decision is made, it is likely that such a decision will be final.

**4. Reputation and Public Perception:** Enforcing arbitration agreements with class action and collective action waivers can lead to negative public perception. Employees, advocacy groups, and the media may view such actions as attempts to suppress workers’ rights and limit accountability. This negative reputation can harm a company’s brand image and make it less attractive to potential employees and consumers who prioritize ethical business practices.

**5. Regulatory Scrutiny:** Enforcing arbitration agreements with class action and collective action waivers can attract regulatory scrutiny, especially in jurisdictions that prioritize employee rights and fair labor practices. Government agencies may closely monitor companies that restrict employees’ ability to collectively address workplace issues, potentially leading to investigations, fines, and reputational damage.

**6. Employee Morale and Union Organizing Effects:** Mandatory arbitration agreements could create morale issues, which in turn could lead to attrition. Unions may also highlight mandatory arbitration

agreements in their organizing efforts, which in turn could present issues which an employer previously did not need to address.

The decision for employers to implement class and collective action waivers within arbitration agreements is a complex one that requires a thorough consideration of both advantages and disadvantages. While these waivers offer streamlined dispute resolution, reduced legal costs, and protection against the potential financial and reputational harm of large-scale class actions, it is crucial for employers to acknowledge the potential drawbacks, including costs of individually arbitrating claims on a large scale, inconsistent outcomes, negative public perception, and legal complexities that may offset the initial benefits.

If you need assistance in drafting or amending employment policies with respect to arbitration and class action waivers and whether to include them, the Bassford Remele Employment Law Practice Group is here to help!

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### **Women's Leadership Summit: *Reframing the Alpha Female***

Bassford Remele proudly announces its Second Women's Leadership Summit. Join us for an invigorating discussion with Minnesota women business leaders.

Our panelists will discuss what it means to be an "alpha female." Through this discussion, the panel will explore the conventional perceptions of women in leadership positions. What is working? What isn't? How can we dismantle the misconceptions, limitations, and often damaging tropes and stereotypes surrounding powerful women and reframe what it means to be an "alpha female?"

#### **PANELISTS**

- **Jessica Monson**, Chief Legal Officer, Caribou Coffee
- **Erikka Ryan**, Director of Equity, Inclusion and Foundations, Minnesota State Bar Association
- **Jennifer Thompson**, Regional General Counsel, Ames Construction
- **Lola Velazquez-Aguilu**, Vice President and Chief Legal Officer, Neuromodulation at Medtronic
- **Brook Mallak**, Claim Attorney, Minnesota Lawyers Mutual Insurance Company

*1.50 CLE credits will be applied for in Minnesota and Wisconsin*

**DATE** Tuesday, September 12, 2023 | Registration and Networking: 2:30-3:00 pm  
Summit: 3:00 – 4:30 pm Networking: 4:30 – 5:30 pm

**LOCATION** The Grand 1858 at Minneapolis Event Centers, 212 Second Street SE, Minneapolis  
(Complimentary Parking)

[RSVP HERE](#) or contact Janet Nelson, Marketing Director, [summit@bassford.com](mailto:summit@bassford.com) or 612.376.1656

**[DRESS FOR SUCCESS](#)** Bassford will be hosting a donation drive for Dress for Success, which believes in empowering every woman through employment. Dress for Success offers high touch, high impact career

and workplace skills development programs for low income women to help them achieve career advancement, career stability and economic stability. Donations can be brought to the summit.

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