

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

TO: [Client Name/Legal Department]

FROM: [Attorney Name/Law Firm]

DATE: [Insert Date]

RE: Multi-State Enforceability Advisory: Class Action Waivers in Employment/Consumer Agreements

1. PURPOSE

This advisory letter evaluates the current legal landscape regarding the enforceability of class action waivers within mandatory arbitration agreements across multiple jurisdictions. As your organization operates in several states, this letter highlights specific regional variations and risks.

2. FEDERAL OVERVIEW (FAA PREEMPTION)

Under the Federal Arbitration Act (FAA) and Supreme Court precedent (notably *AT&T Mobility LLC v. Concepcion* and *Epic Systems Corp. v. Lewis*), class action waivers are generally enforceable. However, state-specific contract defenses (unconscionability) and recent legislative shifts continue to create pockets of non-enforceability.

3. MULTI-STATE JURISDICTIONAL VARIANCES

- **California:** While class waivers are generally permitted under the FAA, the "Private Attorneys General Act" (PAGA) remains a unique challenge. Recent rulings (e.g., *Adolph v. Uber Technologies, Inc.*) allow plaintiffs to pursue non-individual PAGA claims in court even if individual claims are arbitrated.
- **Washington & New Jersey:** These states apply strict "unconscionability" tests. Waivers may be struck down if the agreement lacks a conspicuous "opt-out" provision or if the fee-shifting structures are deemed prohibitive to the claimant.
- **New York:** Recent legislative attempts to restrict arbitration in harassment cases have been largely preempted by the FAA, but courts remain rigorous regarding the "clear and unmistakable" evidence of intent to waive class proceedings.

4. CRITICAL ENFORCEABILITY REQUIREMENTS

To ensure maximum enforceability across all operational states, agreements must include:

- **Mutual Assent:** Clear evidence of electronic signature or physical acknowledgment.
- **Conspicuousness:** Bold or capitalized headers notifying the signer they are waiving their right to a jury trial and class participation.
- **Opt-Out Mechanism:** A 30-day window for the individual to opt out of the arbitration provision without adverse consequences.

- **Severability Clause:** A "poison pill" or "blow-up" clause specifying what happens to the class waiver if specific portions of the arbitration agreement are found invalid.

5. MASS ARBITRATION RISK

We advise the Client of the emerging trend of "Mass Arbitration," where plaintiffs' firms file thousands of individual arbitration demands simultaneously to trigger prohibitive administrative fees. We recommend updating the waiver to include a "Bellwether" or "Batching" protocol to manage these risks.

6. RECOMMENDATIONS

We recommend a comprehensive review of your current [Employment/Terms of Service] agreements to ensure compliance with the specific nuances of the jurisdictions noted above. Specifically, we suggest updating the choice-of-law provisions to minimize exposure to hostile state-level interpretations.

Please contact us to schedule a formal review of your updated templates.

Sincerely,

[Signature]