

# Arbitration under ERISA: A Roadmap for Enforcement

A Practical Guidance® Article by  
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As costly class action retirement plan litigation under the Employee Retirement Income Security Act (ERISA) proliferates, mandatory individual arbitration has become an increasingly appealing alternative for certain benefit plans. However, the benefits of arbitration can only be realized if it is enforceable.

The chart below highlights the most common reasons courts have refused to enforce mandatory individual arbitration in ERISA plans and offers potential solutions for overcoming these judicial obstacles:

Reasons for Not Enforcing Arbitration	Ways to Address
<b>With respect to claims brought on behalf of the plan (e.g., fiduciary breach), the plan has not agreed to arbitration.</b>	Include the arbitration provision in the plan document and reference the provision in the trust agreement if possible.
<b>Participants received no consideration.</b>	Include the arbitration provision in the plan as early as possible.  Specify that further benefits are conditioned on arbitration.  Make the arbitration provision expressly mutual.

<b>Participants have not agreed to arbitration.</b>	Include a requirement to arbitrate plan claims in employment, severance, or other agreements, although this may not be binding on the plan.
<b>Participants did not receive notice of the arbitration requirement.</b>	Ensure the arbitration provision is conspicuously included in the summary plan description or a summary of material modifications and is provided to all participants as early as possible.  Consider other overt methods of providing notice of the arbitration provision.
<b>Claims are not included in the scope of the arbitration provision.</b>	Ensure the arbitration provision broadly defines the parties and types of claims subject to the arbitration.
<b>Individual arbitration of fiduciary breach claims violates purposes of ERISA.</b>	Ensure the arbitrator can award all remedies under ERISA, including the removal of the trustee.  Make arbitration provisions as participant friendly as possible (e.g., pay for expenses, offer telephonic hearing, make venue convenient).

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### Practice Notes

- [Arbitration of ERISA Retirement Plan Disputes](#)

### Cases

- Cooper v. Ruane Cunniff & Goldfarb Inc., 990 F.3d 173 (2d Cir. 2021)
- Smith v. Bd. of Dirs. of Triad Mfg., 13 F.4th 613 (7th Cir. 2021)

### Treatises

- COMMENT: ERISA AND ARBITRATION: HOW SAFE IS YOUR 401(K)?, 64 DePaul L. Rev. 773

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## **B. David Joffe, Partner, Bradley Arant Boulton Cummings LLP**

David Joffe practices primarily in the areas of employee benefits and executive compensation law. He is the chair of the Employee Benefits and Executive Compensation Practice Group.

**Retirement Plans:** David advises clients on the design, implementation and administration of qualified and nonqualified benefit plans. He consults with plan sponsors, administrators and fiduciaries of private, governmental, multiemployer and church plans. David has experience with a variety of benefit plan arrangements, including traditional defined benefit pension plans; 401(k) and other thrift plans; profit-sharing plans; SIMPLE IRAs and SEPs; HR 10, money purchase or Keogh plans; volume submitter plans; and ESOPs. David counsels employers on the tax aspects of such plans, including qualification issues and reporting obligations, and he regularly advises on related ERISA issues, including reporting and disclosure requirements, participation and vesting rules, fiduciary duties, prohibited transactions and trustee obligations. His experience includes advising benefit plans on compliance with the VCOC and REOC requirements related to the "plan asset" rules.

**Health and Welfare Plans:** David routinely advises employers regarding welfare benefit plan issues (insured and self-funded), including the requirements under the Affordable Care Act, COBRA, HIPAA and other laws relating to group health, life, disability and retiree medical plans. As a related matter, he prepares and advises employers on Section 125 cafeteria plans, health and dependent care flexible spending arrangements, and Section 501(c)(9) VEBA trusts. He is routinely involved with disputes, including litigation, relating to benefit claims. David represents employers and fiduciaries on compliance issues and with audits conducted by the IRS, DOL, PBGC and other governmental agencies. He also advises sponsors and administrators on self-correction programs, including EPCRS and VFC.

**Executive Compensation:** David regularly counsels employers and executive management on compensation issues. He has extensive experience with deferred compensation arrangements (e.g., nonqualified deferred compensation plans, excess benefit and top hat plans, SERPs, golden parachutes, split-dollar agreements and rabbi trusts). He advises executives, as well as board members, on stock-based compensation issues. David is frequently involved in preparing executive compensation plans and individual executive employment and compensation agreements. He also works with employers on related employment tax issues, including tax reporting and withholding requirements.

## **Caleb Barron, Associate, Bradley Arant Boulton Cummings LLP**

Caleb Barron provides advice on a broad range of employee benefits and executive compensation matters for privately and publicly held companies, churches, universities and governmental entities. He prepares governing documents for retirement, deferred compensation and welfare plans, including 401(k) plans, 403(b) plans, 457 plans, defined benefit plans, employee stock ownership plans (ESOPs), bonus plans, incentive plans, medical plans, cafeteria plans and wrap plans. Caleb advises clients in the preparation and delivery of participant communications and disclosures required under ERISA, COBRA, HIPAA, the Affordable Care Act, and various provisions of the Internal Revenue Code, and has helped guide them through the many compliance issues that arise under the Affordable Care Act. He counsels employers seeking to provide alternative forms of compensation and benefits to key employees and executives, and helps them navigate complex compliance and drafting issues arising under Code Section 409A.

Caleb advises employers regarding benefits issues for major mergers and acquisitions and on state law issues that impact the administration of employee benefit plans, including those that regulate employee leasing arrangements and multiple employer welfare arrangements. Caleb regularly assists plan administrators in meeting their fiduciary and administrative responsibilities and provides advice in regard to benefit claims, litigation, prohibited transactions, and regulatory filings with the IRS and DOL. Caleb helps employers prepare for and navigate through benefit plan audits and penalty assessments by the IRS and DOL, including for failures to file Forms 5500 and for failures to offer health coverage in compliance with the Affordable Care Act. He also represents clients in preparing filings for determination letters with the IRS and correcting plan operational and qualification issues under the IRS employee plans compliance resolution system.

Caleb received his law degree (*summa cum laude*) from the University of Tennessee College of Law. While in law school, Caleb was recognized as a distinguished student attorney for his representation of not-for-profit and student-founded businesses in the business law clinic and served as a judicial intern to Justice Gary Wade of the Tennessee Supreme Court. Following law school, Caleb also served as a judicial clerk to Chief Judge J. Daniel Breen in the U.S. District Court for the Western District of Tennessee and as assistant general counsel for the Tennessee Department of Revenue.

Caleb serves on the board of the Nashville Repertory Theatre and enjoys taking in live theater with his family, among his many other hobbies.

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