



Mandatory Arbitration Agreement Drafting Checklist

A Lexis Practice Advisor® Practice Note by
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This checklist provides best practices and considerations for private employers drafting a mandatory arbitration agreement. This checklist addresses federal law and does not cover all potential state and local law distinctions.

For more information on drafting arbitration agreements, see [Drafting an Arbitration Clause](#) and Employment Law Deskbook § 27.04. For sample arbitration agreements and other forms and provisions related to arbitration agreements, see Employment Contracts – Waivers and Releases.

CONSIDER WHETHER ARBITRATION IS THE RIGHT CHOICE

Arbitration is often a more efficient, cost-effective alternative to litigation. While litigation can last for years, particularly if the findings are appealed, the arbitration process typically moves much more quickly. In addition, while litigation is carried out in a public forum, arbitration is conducted privately, thereby protecting the employer's confidentiality. However, arbitration is not advantageous in all circumstances.

Consider the following before opting to use an arbitration agreement:

- **The parties waive any right to a jury trial.** Avoiding a jury trial is often preferable for employers wary of runaway juries and unreasonable damages awards. However, you may want to preserve the employer's right to a jury if, for instance, the employer operates in a jurisdiction with a particularly pro-employer jury pool.
- **Arbitration often results in a divided outcome.** Because parties are less likely to agree upon a private arbitrator that is known to be pro-employer or pro-employee, arbitrators often "split the baby" and issue a partial award. Alternatively, in litigation, the employer may be able to obtain an outright dismissal of the case if it has a strong defense.
- **Arbitration awards cannot be appealed.** Arbitration awards cannot be appealed, and arbitrators are less bound by precedent than courts. Thus, if an arbitrator issues a decision that is inconsistent with the applicable laws or facts, the employer may have no recourse for the claim at issue.
 - **Grounds for overturning an arbitrator's findings.** While there is some opportunity for judicial review of arbitration awards, the grounds for overturning an arbitrator's finding are limited to specific statutory requirements, such as where the award was procured by fraud, there was evident partiality in the arbitrators, or the arbitrators engaged in misconduct or exceeded their powers. 9 U.S.C. § 10(a). Some courts will also vacate an award that was the result of a "manifest disregard of the law," but circuits are split on this issue. Compare *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) (recognizing validity of manifest disregard doctrine), with *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir.

2010) (rejecting manifest disregard doctrine as invalid). A manifest disregard of the law occurs where the arbitrator knows about the existence of a clearly governing legal principle but decides to ignore it or pay no attention to it. *A & G Coal Corp. v. Integrity Coal Sales, Inc.*, 2014 U.S. App. LEXIS 8719, *2-3 (2nd Cir. 2014). In practice, arbitrator findings almost always withstand judicial scrutiny.

- **Evidentiary and procedural rules differ from litigation.** The arbitrator has broad discretion to determine the rules of evidence and procedure. Unlike litigation, there is no right to discovery in arbitration. The arbitrator, in his or her discretion, will decide whether, and how much, discovery should be conducted. Assess whether it would be strategically advantageous to conduct formal discovery and adhere to the state or federal rules of evidence and/or civil procedure.
- **Arbitration can be costly.** While the cost of arbitration is typically less than the cost of litigation, the cost can still be significant, especially if the parties opt for multiple arbitrators. There is an upfront cost for the arbitrator(s), which, when added to the attorneys' fees and other expenses, may exceed the value of some claims.

ENSURE THE AGREEMENT IS ENFORCEABLE

Once an employer decides to have its employees sign an arbitration agreement, it must endeavor to draft an agreement that a court will enforce. Take the following measures to ensure the agreement will stand up to legal scrutiny and be enforced if challenged.

- **Keep the agreement separate from the employee handbook.** To protect the employee's at-will status, the employer's handbook and the employee's acknowledgement of receipt likely state that the handbook does not create a contract of employment. In some jurisdictions, however, courts will interpret this disclaimer to preclude any legally enforceable obligations contained in the handbook, including the arbitration clause. For more information on methods of implementing the arbitration agreement, see *Employment Law Deskbook* § 27.04[3][a].
- **Provide sufficient consideration.** Require the employee to sign the arbitration agreement as a condition of hiring to ensure there is adequate consideration for the agreement. In the case of a current employee, jurisdictions vary on whether an employer must provide additional consideration beyond mere continued employment to create an enforceable contract. Consult state law when evaluating whether the employer must provide additional consideration to current employees.
- **Have both parties sign the agreement.** The employer and employee should each sign the arbitration agreement to demonstrate mutual consent. Simply acknowledging the agreement by e-mail may not be sufficient.
- **Make sure that the agreement is not unconscionable.** The terms of the arbitration agreement should not be so onerous or unfair such that a court may find the agreement unconscionable. For example, if the agreement shortens the statute of limitations or limits the arbitrator's ability to provide statutory remedies, it may not be enforceable. See *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175, 1178-79 (9th Cir. 2003). A court may also find the agreement unconscionable if employee-initiated claims are subject to arbitration but employer-initiated claims are not. *Id.* at 1173-74.
- **Do not amend the agreement unilaterally.** Remember that if you change the arbitration policy, it is best not to do so unilaterally. Any amendments should be acknowledged in writing by each employee and supported by consideration.

CLEARLY DEFINE THE TERMS AND SCOPE OF THE AGREEMENT

The arbitration agreement's language determines the terms and scope of the agreement. Carefully draft the

agreement to ensure that it is sufficiently narrow or broad to cover the disputes the employer envisions, contains any and all essential terms, and will survive any challenges to its enforcement.

To that end, consider the following measures:

- **Assess whether to require internal resolution efforts.** You may draft the agreement to require the parties to engage in good-faith efforts to resolve the dispute through internal management channels before arbitrating. Consider including reference to specific individuals or departments, such as Human Resources, that must be contacted before arbitration proceeds.
- **Evaluate whether to mandate pre-arbitration mediation.** You may also have the agreement require the parties to engage in non-binding mediation before arbitration proceeds. This may reduce costs by affording the parties the opportunity to discuss and resolve the dispute before relinquishing control to an arbitrator.
- **Determine the scope of the arbitration clause.** Consider whether the arbitration clause should be “broad” or “narrow.” A broad arbitration clause applies to all disputes between the parties to the contract that are “related to” or “connected with” the contract (e.g., “all claims relating to your employment or termination thereof.”). A narrow arbitration clause applies only to disputes “arising out of” the contract. While these phrases are understood to signify an intent to apply the clause broadly or narrowly, drafters intending a narrow application should be cautious, since ambiguities tend to resolve in favor of arbitration. If the parties intend for a clause to apply narrowly to only certain types of claims, consider specifically naming those claims.
 - **Do not arbitrate non-waivable claims.** Certain claims may not be arbitrated and should be excluded, such as workers’ compensation and unemployment compensation claims. See, e.g., *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 176 (2002). Additionally, the arbitration agreement cannot serve to negate the employee’s right to file an administrative charge with many state and federal agencies, such as the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *U-Haul Co. of California*, 347 NLRB No. 375, 377-78 (2006). Further, the arbitration agreement cannot prevent these agencies from filing a lawsuit against the employer. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002). Finally, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 prohibits pre-dispute arbitration of whistleblower claims brought under the Sarbanes Oxley Act, so you should explicitly exclude such claims. 18 U.S.C. § 1514A(e)(2).
 - **Do not arbitrate claims an employer would prefer to litigate.** Although most circuit courts have held that parties may seek injunctive relief from a court pending arbitration, consider explicitly excluding disputes in which the employer would want an injunction from the scope of the agreement. See, e.g., *Teradyne Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986); *Blumenthal v. Merrill Lynch*, 910 F.2d 1049, 1054 (2d Cir. 1990); *Performance Unltd. Inc. v. Questar*, 52 F.3d 1373, 1380 (6th Cir. 1995). For instance, if the employee is subject to any restrictive covenants, your client may want to seek injunctive relief in lieu of waiting for arbitration. Be sure to preserve the employer’s right to seek a preliminary injunction in a way that does not waive your client’s right to arbitrate the underlying contract dispute (e.g., by using language that grants a court authority to address only temporary injunctive relief). You may also provide for expedited arbitration rules or authorize the arbitrator to decide requests for emergency relief. For example, the American Arbitration Association (AAA) allows for emergency arbitration when the parties agree to adopt the [AAA Optional Rules for Emergency Measures of Protection](#) (see p. 27).
 - **Designate who is covered.** You should be clear to include parties with whom arbitration will be required, such as the employer’s subsidiaries, affiliates, partners, supervisors, service providers and employees.
- **Consider whether to use an established institution for arbitration.** The agreement should state what

organization will administer the arbitration. The forum should provide for a neutral arbitrator, adequate discovery, and written arbitration awards. The employer may want to limit or cap statutory remedies but should do so cautiously. Some courts have held that limiting the statutory remedies available for a plaintiff renders the arbitration agreement unenforceable. See, e.g., *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998). Common organizations include JAMS, the AAA, and, for international arbitrations, JAMS International, the International Institute for Conflict Prevention & Resolution (CPR), the London Court of International Arbitration (LCIA), and the International Chamber of Commerce (ICC). Each organization has its own fees and rules, so it is worth researching different options to see what will fit with the needs of the employer. It is best not to specify a particular arbitrator in the agreement, as doing so could lead to accusations by employees that the arbitrator is biased.

- **Select governing procedural rules.** A mandatory arbitration agreement should identify the rules, procedures, and evidentiary guidelines to be applied. Many agreements opt for a particular forum's rules and procedures. If there are any rules that the parties want to opt out of (e.g., a limitation on discovery), state as much in the arbitration agreement. For example, if the forum's rules provide that the arbitrator determines the scope of discovery and there are no limitations, the parties may want to add limitations, such as one deposition per side, or no depositions.
 - **Specify rules in the absence of a forum.** If the agreement does not specify an organization to administer the arbitration, then reference the specific rules that will govern the arbitration, such as the Federal Rules of Evidence, or the Employment Arbitration Rules and Mediation Procedures of the American Arbitration Association (AAA). These rules include procedures for arbitrator selection and the hearing of evidence. If there is a conflict between the arbitration agreement and the rules that the agreement references, state that the agreement should govern. A copy of the applicable rules should be made available to employees bound by the agreement.
- **Require the arbitrator to issue a written decision.** The arbitrator should be required not only to issue a decision in writing, but to specifically set forth the legal and factual bases for the decision.
- **Select the number of arbitrators.** Each arbitration can be heard by one arbitrator or by a panel. Having one arbitrator limits costs, but it increases the potential for an unforeseen decision. Consider using a panel for larger claims, and a single arbitrator for smaller ones.
- **Determine the scope of the arbitrator's authority.** Consider the extent of the arbitrator's authority under the agreement to avoid unpredictability. For example, you can provide a "delegation provision" stating that the arbitrator shall have exclusive authority to resolve any dispute about the enforceability of the arbitration agreement itself. You can also specify whether the arbitrator has the authority to award punitive damages, or whether he or she can look beyond any disputed contract in arriving at a decision (e.g., by interpreting an applicable statute).
- **Decide whether to include class action waivers.** The NLRB has held that Section 7 of the National Labor Relations Act (NLRA) prohibits class or collective action waivers in mandatory arbitration agreements. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2289 (2012). Appellate courts are split on the issue. Compare *Lewis v. Epic-Systems Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016) (invalidating class action waiver), with *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (approving class action waiver). While the Supreme Court has ruled that a class action waiver is enforceable in a consumer arbitration agreement (see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)), the Court has not yet decided whether these waivers may be enforced by an employer against employees. On January 13, 2017, the Supreme Court granted certiorari in three cases that will decide whether mandatory arbitration agreements with class and collective action waivers are enforceable under the Federal Arbitration Act. See *Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst*

& Young, LLP, 834 F.3d 975 (9th Cir. 2016). Until the Supreme Court issues its decisions, exercise caution when deciding whether to include a class action waiver in an arbitration agreement, since it may render the agreement unenforceable.

- **Include a survival clause.** To avoid a finding that the arbitration requirement ends when the agreement terminates, include a provision explicitly stating that the duty to arbitrate survives the termination of the contract.
- **Determine a venue.** This is an important issue for the employer since forcing management personnel to arbitrate a dispute in a distant venue can disrupt the employer's business. The location should have some relation to the employee's regular work location.
- **Include a choice of law provision.** Consider whether the agreement should be governed by federal or state law. To alleviate the chance of conflict between different states' laws, you should designate the state law that will govern any dispute. The choice of law should bear some relationship to the parties (e.g., the state where the employee works).
- **Include a confidentiality clause.** Mandatory arbitration agreements should contain a confidentiality provision covering any arbitral proceedings, as one of the key benefits of such an agreement is the employer's ability to avoid unwanted publicity.
- **Include a jury trial waiver.** In the unlikely event that a court rules that a mandatory arbitration agreement is unenforceable, consider adding a clause stating that the parties mutually agree to waive any right to a jury trial.
- **Consider a fee-shifting provision.** Fee-shifting provisions require the losing party to pay attorney's fees. Depending on the employer's risk aversion, you may wish to have the parties share the cost of the arbitrator. On the other hand, a fee-shifting provision may pressure an employee to resolve a dispute before attorneys rack up fees adjudicating the matter. Other fee arrangements include splitting the fee equally among all parties or having the arbitrator award fees per statute (e.g., Title VII). Always consult state law on this issue, since the law may obligate the employer to pay the arbitrator's fee. See, e.g., *Armendariz v. Foundation Health Psychare Services Inc.*, 24 Cal. 4th 83, 113 (2000).
- **State that the employee's at-will employment status is unchanged.** Since the arbitration agreement is a contract, include a clause that states that entering into the agreement in no way alters the employee's status as an at-will employee.

CONSIDER INTERNATIONAL ARBITRATION FOR MULTINATIONAL EMPLOYERS

For multinational employers, arbitration agreements may be even more valuable. Without such an agreement, the venue and applicable law are often in doubt when a dispute arises. Thus, an international arbitration agreement should explicitly address venue and choice of law, as well as how the award will be enforced.

The International Bar Association provides [guidelines](#) for drafting international arbitration agreements. These guidelines provide, among other things, details regarding selecting a language, determining the scope of the agreement, and choosing arbitration rules.

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Holly H. Weiss is a partner with Schulte Roth & Zabel, where she focuses her practice on the representation of employers in all aspects of employment law and employee relations. She also serves as co-head of the Cybersecurity Group. Holly litigates disputes involving restrictive covenants, ERISA claims, executive compensation, employment agreements, statutory employment discrimination claims, and common law tort and contract claims in federal and state courts, before administrative and government agencies and in arbitral forums. She advises employers on employment law compliance, best practices, human resources matters, hiring and termination, and litigation avoidance; drafts and negotiates employment agreements, separation agreements, data security and privacy policies and other employment-related agreements; and provides training and conducts investigations. Holly has extensive experience in designing anti-sexual harassment training programs, policies and procedures and considerable expertise about employer obligations and best practices with respect to sexual harassment and discrimination in the workplace.

Holly is ranked as a leading lawyer by *The Best Lawyers in America*. A recognized thought leader, Holly has authored or co-authored numerous articles of interest to employers, recent examples of which include "SCOTUS to Decide If the Federal Arbitration Act Exemption for Transportation Workers Extends to Independent Truckers," appearing as part of the regular column she co-authors for the *New York Law Journal*. She also authored or co-authored the *SRZ Client Alerts* "New York State and City to Mandate Anti-Sexual Harassment Training for Private Employers," "US Supreme Court Narrowly Defines Whistleblowers Entitled to Anti-Retaliation Protection" and "Cybersecurity Risks and Considerations for Plan Sponsors to Protect Employee Benefit Plans." In addition, Holly is a co-author of *Hedge Funds: Formation, Operation and Regulation*, published by ALM Law Journal Press. A highly sought-after speaker, Holly recently spoke at New York University's 21st Annual Employment Law Workshop for Federal Judges, discussed "Employment Practices and Employee Onboarding" at the Managed Funds Association's Legal & Compliance 2018 conference and served as a panelist at CFA Society New York's Current Trends in Compensation and Talent Management seminar. Holly earned a J.D. from the University of Virginia School of Law and a B.A. from Emory University.

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