Mandatory Arbitration of Employment-Related Claims (TN)

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This Standard Clause provides sample language for a Tennessee-compliant mandatory arbitration provision of employment-related claims that can be incorporated into a written employment agreement or employee handbook. This Standard Clause has an integrated drafting note with explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

An arbitration clause, whether in a stand-alone agreement or contained within an employment contract, is generally governed by the Federal Arbitration Act (*Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 82-84 (Tenn. 1999)). However, when contract formation is at issue, state law applies to determine whether there is a valid contract (*Mid-South Maint., Inc. v. Paychex Inc.*, 2015 WL 4880855, at *15 (Tenn. Ct. App., Aug. 14, 2015)). For more information on the FAA, see Practice Note, Understanding the Federal Arbitration Act (0-500-9284).

Employers can use mandatory arbitration provisions where they wish to resolve employment-related disputes by binding arbitration, rather than in court. Mandatory arbitration provisions of employment-related claims, including statutory claims for discrimination, are enforceable in Tennessee if the provisions are part of a valid and enforceable agreement (*Allen v. Tenet Healthcare Corp.*, 370 F. Supp. 2d 682, 686 (M.D. Tenn. 2005) and *Davis v. Reliance Elec.*, 104 S.W.3d 57, 58-59 (Tenn. Ct. App. 2002)).

Parties may contemplate enforcement of their arbitration agreement under state procedural statutory or common law (also referred to as arbitration law) (see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (U.S. 2008)). However, the intent to replace the FAA with state law must be clearly expressed (*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-60 (U.S. 1995)).

In Tennessee, arbitration clauses must also comply with the Tennessee Uniform Arbitration Act (TUAA) (T.C.A. §§ 29-5-301 through 29-5-320). Arbitration agreements are presumptively valid, enforceable, and irrevocable in Tennessee (T.C.A. § 29-5-302(a)). Courts, not arbitrators, resolve disputes regarding whether:

- A valid agreement to arbitrate exists.
- The dispute falls within the scope of the agreement.

(*Tanner v. Am. Bondholder Found, LLC*, 2013 WL 6384543, at *2 (M.D. Tenn. Dec. 6, 2013).)

For more information on the relationship between federal and state arbitration

law, see Practice Note, Understanding US Arbitration Law (4-500-4468).

Key differences between federal and Tennessee arbitration law include that:

- Under the FAA, the court decides matters of arbitrability unless the parties agree that the arbitrators should resolve those matters. Under the TUAA, courts always decide issues of arbitrability. (*Barclay v. Kindred Healthcare Operating, Inc.*, 2009 WL 2615821, at *3 (Tenn. Ct. App. 2009).)
- Tennessee strictly construes the grounds for vacatur as being limited to the criteria in T.C.A. § 29-5-313 (*Warbington Const., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 858 (Tenn. Ct. App. 2001)).
- The TUAA permits vacatur of an award only where the arbitrators exceeded their powers (T.C.A. § 29-5-313(a)(1)(C)). The FAA permits vacatur on the broader grounds that the arbitrators either:
  - exceeded their powers; or
  - so imperfectly executed their powers that a mutual, final, and definite award on the subject matter submitted was not made.

  (9 U.S.C. 10(a)(4) and *Khan v. Regions Bank*, 461 S.W.3d 505, 510-11 (Tenn. Ct. App. 2014).)
- The TUAA expressly disallows vacatur of an award on the ground that the relief could not or would not be granted by a court. The FAA does not include that limiting language. (T.C.A. § 29-5-313(2) and *Khan*, 461 S.W.3d at 511.)
- Federal courts allow arbitration of fraudulent inducement claims under the FAA while Tennessee courts do not (*Taylor v. Butler*, 142 S.W.3d 277, 283 (Tenn. 2004)).
- Under Tennessee law, an arbitration clause is not enforceable unless the parties sign or initial it if the arbitration agreement relates to:
  - farm property;
  - structures or goods; or
  - a party's structures or property used as a residence.

  (T.C.A. § 29-5-302(a).)

Employers may view certain aspects of the Tennessee law as advantageous or may wish to preserve the FAA's approach. The agreement should therefore specify the precise scope of authority granted to the arbitrator and any limits on that authority.

UNCONSCIONABILITY

Mandatory provisions are often attacked on grounds of unconscionability, that is, that the procedure in which an agreement to arbitrate was obtained and the substantive terms of the agreement are inherently unfair and should invalidate the agreement. Tennessee law does not distinguish procedural from substantive unconscionability. An agreement is unconscionable where both:

- The inequality of the bargain is so manifest that it is likely to shock the judgment of a person of common sense.
- The terms are so oppressive that no reasonable person is likely to make them and where no honest and fair person is likely to accept them.

(*Trinity Indus., Inc. V. McKinnon Bridge Co., Inc.*, 77 S.W.3d 159, 170-71 (Tenn. Ct. App. 2001).)

SEVERABILITY

Where an arbitration agreement contains both enforceable and unenforceable provisions, Tennessee courts may either:

- Refuse to enforce the contract.
- Enforce the remainder of the contract without the unenforceable term.

(*Taylor*, 142 S.W.3d at 285.)

Employers should provide for severance of unenforceable provisions to ensure that the agreement to arbitrate is preserved.

WAIVER OF CLASS AND REPRESENTATIVE ACTIONS

Several recent decisions by the US Supreme Court and the Sixth Circuit have upheld the use of class action waivers in individual arbitration agreements. In 2011, the US Supreme Court held that a California state rule prohibiting class action waivers was preempted by the FAA (*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (U.S. 2011)). In *American Express Co. v. Italian Colors Restaurant*, the Court held that an arbitration

agreement that waives the right to proceed on a class basis is enforceable even if the plaintiff's cost of individually arbitrating the claim exceeds the potential recovery (133 S. Ct. 2304 (U.S. 2013); see also, *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett,* 734 F.3d 594, 600 (6th Cir. 2013)).

Therefore, a waiver of the right to proceed collectively in arbitration should be provided for in the separation agreement. However, employees cannot waive their right to proceed collectively unless the agreement contains an enforceable arbitration provision (see Legal Update, Collective Action Waiver Not Permitted in Separation Agreement Outside of Arbitration Context: Sixth Circuit (1-577-0545)). For more information on class arbitration waivers, see Standard Clause, Class Arbitration Waiver (US) (3-518-9047).

ARBITRABILITY

In *Rent-A-Center West v. Jackson*, the Supreme Court considered whether courts must hear claims that an arbitration agreement is unconscionable, even when the parties have clearly and unmistakably assigned that authority to the arbitrator (130 S. Ct. 2772 (U.S. 2010)). The court held that a challenge to the validity of an arbitration agreement containing a provision delegating that authority to the arbitrator must be decided by the arbitrator and not a court. Clauses that refer to the rules clearly and unmistakably assigned issues of arbitrability to the arbitrator because the AAA rules provide that arbitrators have jurisdiction to decide arbitrability (see Employment Arbitration Rules & Mediation Procedures, Rule 6).

DRAFTING CONSIDERATIONS

An arbitration provision can be used with prospective, current, and separating employees by including the provision in a job application, employment agreement, or separation agreement. To minimize a potential claim of procedural unconscionability, the employee signing the agreement should be provided with a copy of the arbitration rules or website address or telephone number where the information may be obtained.

Arbitration under the AAA's Employment Arbitration Rules & Mediation Procedures adequately protects an employee's rights to discovery (see, for example, *Tillman v. Macy's, Inc.*, 735 F.3d 453, 456 (6th Cir. 2013)). In choosing arbitral rules, employers should ensure that the rules so enable the arbitrator or specify that the arbitrator has this power in the arbitration clause.

Employers should take special care to ensure that the employee receives sufficient notice of the arbitration policy and accepts it. In Tennessee, an otherwise enforceable written agreement containing an arbitration clause does not have to be signed if manifestation of assent can be established (*T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 871 (Tenn. Ct. App. 2002)). However, the parties must sign or initial the arbitration clause if the arbitration agreement relates to either:

- Farm property.
- Structures or goods.
- A party's structures or property used as a residence.

(T.C.A. § 29-5-302(a).)

Employers should provide a space for the individual to initial and specifically acknowledge the mandatory arbitration provision, especially where the provision is contained in a multi-page agreement, to reduce the chances of the provision being successfully challenged by an employee.

If an employee handbook includes a mandatory arbitration provision, employers should place the provision apart from the rest of the handbook together with the at-will acknowledgment form that should be signed by employees and given to the employer (see Standard Document, Employee Handbook Acknowledgment (7-500-4363)).

Section 9 of the FAA permits the entry of judgment on an arbitration award only if the parties have agreed that a court judgment is to be entered on the award. Some US courts have held that this language is required by Section 9 of the FAA (see, for example, *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433 (2d Cir. 2004)). Although the agreement to enter judgment can be implied from the facts and circumstances, it is good practice to include the statement "judgment on the award rendered by the

arbitrator may be entered in any court having jurisdiction thereof."

For additional provisions relating to employment arbitration and more detailed drafting notes, see Standard Document, Mutual Agreement to Arbitrate Employment-Related Disputes (TN)

EEOC CHALLENGES

The Equal Employment Opportunity Commission (EEOC) has recently begun challenging what it believes are overly broad arbitration clauses. In *Equal Employment Opportunity Commission v. Doherty Enterprises*, now pending before the U.S. District Court for the Southern District of Florida in West Palm Beach, the EEOC alleges that the employer violated Section 707 of Title VII (42 U.S.C. § 2000e-6), which makes unlawful employer practices that amount to a pattern or practice of resistance to Title VII rights (No. 9:14-cv-81184-KAM (S.D. Fla. Sept. 18, 2014) and see EEOC Sues Doherty Enterprises over Mandatory Arbitration Agreement). Specifically, the complaint alleges that by requiring all applicants and employees to submit all employment-related claims to binding arbitration, they effectively waive their rights to file discrimination charges with the EEOC. The EEOC has survived a motion to dismiss in this case (*Equal Emp't Opportunity Comm'n v. Doherty Enters.*, 126 F. Supp. 3d 1305, 1313 (S.D. Fla. 2015)).

The arbitration clause in this Standard Document makes no mention of charges filed with the EEOC or similar federal or state agencies. Although any decision at the district court level in this case is not likely to be precedent setting, courts may look to it for guidance on similar questions.

BRACKETED TEXT

Counsel should replace bracketed text in ALL CAPS with information specific to the particular circumstances. Bracketed text in sentence case is optional or alternative language that counsel should include, modify, or delete, as appropriate. A forward slash in bracketed text indicates that counsel should choose from among two or more alternative words or phrases.

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[In the event that the [EMPLOYER NAME] hires you,] [the/The] Parties agree that any dispute, controversy, or claim arising out of or related to in any way to the Parties' employment relationship or termination of that relationship, including this Agreement or any breach of this agreement, shall be submitted to and decided by binding arbitration in [CITY/COUNTY/STATE]. Arbitration shall be administered under the laws of the [NAME OF ARBITRATION ORGANIZATION] in accordance with [NAME OF ORGANIZATION EMPLOYMENT RULES] in effect at the time the arbitration is commenced. A copy of the current version of the [NAME OF ORGANIZATION EMPLOYMENT RULES] is attached hereto as Exhibit A. The rules are also available online at [WEBSITE ADDRESS]. You may also call the [NAME OF ORGANIZATION] at [TELEPHONE NUMBER] if there are questions about the arbitration process. Discovery in any arbitration proceeding shall be conducted according to the [NAME OF ORGANIZATION EMPLOYMENT RULES]. [To the extent not provided for in the [NAME OF ORGANIZATION EMPLOYMENT RULES], the Arbitrator has the power to order discovery upon a showing that discovery is necessary for a party to have a fair opportunity to present a claim or defense.]

This Agreement to arbitrate covers all grievances, disputes, claims, or causes of action that otherwise could be brought in a federal, state, or local court or agency under applicable federal, state, or local laws, arising out of or relating to Employee's employment with [EMPLOYER NAME] and the termination thereof, including claims Employee may have against [EMPLOYER NAME] or against its officers, directors, supervisors, managers, employees, or agents in their capacity as such or otherwise, or that [EMPLOYER NAME] may have against Employee. The claims covered by this Agreement include, but are not limited to, claims for breach of any contract or covenant (express or implied), tort claims, claims for wages or other compensation due, claims for wrongful termination (constructive or actual), claims for discrimination or harassment (including, but not limited to, harassment or discrimination based on race, age, color, sex, gender, national

origin, alienage or citizenship status, creed, religion, marital status, partnership status, military status, predisposing genetic characteristics, medical condition, psychological condition, mental condition, criminal accusations and convictions, disability, sexual orientation, or any other trait or characteristic protected by federal, state, or local law), and claims for violation of any federal, state, local, or other governmental law, statute, regulation, or ordinance.

Employee and Employer expressly intend and agree that: (a) class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Agreement; (b) each will not assert class action or representative action claims against the other in arbitration or otherwise; and (c) Employee and Employer shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person. Further, Employee and Employer expressly intend and agree that any claims by the Employee will not be joined, consolidated, or heard together with claims of any other employee.

Any arbitral award determination shall be final and binding upon the Parties. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

If any provision of this agreement to arbitrate is adjudged to be void or otherwise unenforceable, in whole or in part, the void or unenforceable provision shall be severed and such adjudication shall not affect the validity of the remainder of this agreement to arbitrate.

This agreement to arbitrate shall survive the termination of Employee's employment. It can only be revoked or modified in writing signed by both Parties that specifically states an intent to revoke or modify this agreement to arbitrate and is signed by [EMPLOYER'S DESIGNATED PERSON OR TITLE].

By executing this Agreement the Parties represent that they have been given the opportunity to fully review, and comprehend the terms of this Agreement. The Parties understand the terms of this Agreement and freely and voluntarily sign this Agreement. Each party fully understands and agrees that they are giving up certain rights otherwise afforded to them by civil court actions, including but not limited to the right to a jury trial.

_____ **By initialing here, Employee acknowledges [he/she] has read this paragraph and agrees with the arbitration provision herein.**

Based in part on "Mutual Agreement to Arbitrate Employment-Related Disputes (CA)" by James A. Goodman and Amy B. Messigian, Epstein Becker & Green, P.C.

Bob Horton and Kimberly S. Veirs of Bass, Berry & Sims, PLC also contributed to this Standard Document.

08-17