Mutual Agreement to Arbitrate Employment-Related Disputes (TN)

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This Standard Document provides sample language for a Tennessee-specific agreement to arbitrate employment-related claims. It complies with the Federal Arbitration Act and Tennessee law and is intended for use by employers with employees in Tennessee. This Standard Document has integrated drafting notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Arbitration is a method of dispute resolution that is an alternative to litigation in court. It is a private process binding on the parties. This agreement to arbitrate employment-related disputes includes optional terms that are different from the American Arbitration Association (AAA), JAMS, or other arbitration services' rules. For a comparison among these organizations, see AAA, JAMS, and CPR Comparison Chart.

ARBITRATION LAW

Arbitration clauses, whether in stand-alone agreements or contained within an employment contract, are generally governed by the Federal Arbitration Act (FAA) (*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).

Parties may contemplate enforcement of their arbitration agreement under state procedural statutory or common law (rather than the FAA) (see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (U.S. 2008)). The courts have typically enforced these agreements to apply state law, provided:

- The applicable state rules do not conflict with the FAA's primary objective to enforce agreements to arbitrate.
- The agreement to apply state procedural law (also referred to as arbitration law) is clear and express. Without this clear expression of intent, courts have found that federal arbitration law automatically applies. This general rule was established by the US Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, which held that a general choice-of-law provision contained in an agreement is insufficient

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to invoke state arbitration law (514 U.S. 52, 59-60 (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 Fund, 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).)

In Tennessee, arbitrators have all the powers articulated in the arbitration agreement (T.C.A. § 29-5-304). If the parties wish to retain some control over the process, they should specify in the agreement both:

- The precise scope of authority granted to the arbitrator.
- Any limits on that authority.

(*D&E Const. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518-19 (Tenn. 2001).)

Regardless of the terms of the arbitration agreement, the FAA does not cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. § 1). Therefore, the FAA does not cover employees "actually engaged in the movement of goods in interstate commerce" (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (U.S. 2001), quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)). Absent application of the FAA, Tennessee arbitration law applies and compels binding arbitration.

The FAA also does not apply to employment arbitrations under an arbitration clause in a collective bargaining agreement (CBA). Those arbitrations are governed by the National Labor Relations Act (NLRA) instead.

IS ARBITRATION DESIRABLE?

While courts generally enforce well-drafted mutual arbitration agreements, employers must make a strategic decision on whether to enter into arbitration agreements with

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employees. Employers have favored arbitration because it:

- Can eliminate private employment class actions for wage and hour, employment discrimination, and other labor and employment claims otherwise amenable to class or collective action.
- Can be more cost-effective.
- Can be faster.
- Provides a more confidential forum with less publicity than court proceedings.
- Can reduce the risk of a "runaway" jury with high punitive damages.
- Can be more convenient for the lawyers and witnesses on scheduling issues.

However, arbitration presents disadvantages because:

- Arbitration fees can be substantial, especially where the employer bears the full cost of arbitration.
- Discovery costs can remain high, especially in cases with multiple arbitrators and discovery motions, or involving substantial electronic discovery.
- Arbitrators can be less likely to grant dispositive motions, such as motions for summary judgment or motions to dismiss, increasing the likelihood that a claim can proceed to hearing.
- Arbitrators can be less likely to accept procedural defenses, such as statutes of limitations or laches.
- Arbitrators are more likely to allow hearsay and irrelevant evidence.
- Courts generally do not disturb an arbitrator's award, even if it is erroneous on the facts or the law, unless the arbitration agreement allows for expanded judicial review.

Practitioners must be aware that the scope and enforceability of arbitration agreements is a fluid area of the law and can change rapidly based on new legal decisions.

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.

Mutual Agreement to Arbitrate Employment-Related Disputes (TN)

This Mutual Agreement to Arbitrate Disputes ("**Agreement**") is made and entered into as of [DATE] (the "**Effective Date**") by and between [EMPLOYER NAME], a [STATE OF INCORPORATION OR LOCATION] [TYPE OF ENTITY], (the "**Employer**") and [EMPLOYEE NAME], an individual (the "**Employee**") (the Employer and the Employee are collectively referred to herein as the "**Parties**").

1. Intent of the Agreement. It is the intent of Employee and the Employer that this Agreement will govern the resolution of all disputes, claims and any other matters in question arising out of or relating to the Parties' employment relationship or termination of that relationship. The Parties shall resolve all disputes arising out of or relating to the Parties' employment relationship or termination of that relationship in accordance with the provisions of this Agreement.

2. Mandatory Arbitration. Employer and Employee agree that any claim, complaint, or dispute that arises out of or relates in any way to the Parties' employment relationship, whether based in contract, tort, federal, state, or municipal statute, fraud, misrepresentation, or any other legal theory, shall be submitted to binding arbitration to be held in [LOCATION], Tennessee and administered by [NAME OF ARBITRATION ORGANIZATION] in accordance with [NAME OF ITS EMPLOYMENT ARBITRATION RULES] applicable 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 [NUMBER/LETTER]. The Rules may be amended from time to time and are also available online at [WEBSITE ADDRESS]. You can also call the [NAME OF ORGANIZATION] at [TELEPHONE NUMBER] if you have questions about the arbitration process. If the [NAME OF ORGANIZATION]

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Rules are inconsistent with the terms of this Agreement, the terms of this Agreement shall govern. The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the enforceability or formation of this Agreement and the arbitrability of dispute between the parties. The Arbitrator's decision shall be final and binding upon the Employer and Employee. Nothing in this provision shall preclude Parties from seeking provisional remedies in aid of arbitration from a court of competent jurisdiction.

DRAFTING NOTE: MANDATORY ARBITRATION

Arbitration agreements should specify the rules that govern the arbitration process and either:

- Attach a copy of the rules to the agreement.
- Notify the employee where the most recent version of the rules can be obtained.

This clause gives the arbitrator the power to determine the enforceability of the agreement, as well as the arbitrator's own jurisdiction and the arbitrability of any dispute. Arbitral institutions, such as the AAA, have rules that give the arbitrator this power. When there is no doubt that the arbitrator has this power, granted by either the arbitral rules or the express terms of an agreement, courts refer so-called "gateway" issues to the arbitrator and the chances of litigation are diminished (*Mid-South Maint., Inc.*, 2015 WL 4880855, at *16-17).

Whether a valid agreement to arbitrate exists between the parties is to be determined by the courts and if a complaint specifically challenges the arbitration clause on grounds, such as fraud or unconscionability, the court is permitted to determine its validity before submitting the remainder of the dispute to arbitration (*Taylor*, 142 S.W.3d at 284).

PROVISIONAL REMEDIES

Tennessee courts may generally grant provisional remedies in connection with an arbitration proceeding under the TUAA (attachment and preliminary injunction).

However, Tennessee courts may only stay an arbitration proceeding on a showing that there is no agreement to arbitrate (T.C.A. § 29-5-303). Federal courts sitting in Tennessee may consider a motion for an injunction in aid of arbitration under FRCP 65 or FRCP 64, which incorporates state law. There is no procedure in the Federal Rules for attachment. Federal courts apply the law of the state in which they sit (FRCP 64). For more information on attachment and preliminary injunctive relief in Tennessee, see and State Q&A, Provisional Remedies: Tennessee (W-000-3593).

To provide for the right to seek provisional relief in arbitration and avoid litigation in court, employers should consider incorporating the AAA's Employment Arbitration Rules, including the Optional Rules for Emergency Measures of Protection (see Practice Note, AAA Arbitration: A Step-By-Step Guide: Optional Rules for Emergency Measures of Protection (9-502-6707)), including the Optional Rules for Emergency Measures of Protection (see Practice Note, AAA Arbitration: A Step-By-Step Guide: Optional Rules for Emergency Measures of Protection (9-502-6707)). The AAA appoints a single emergency arbitrator within one business day of receiving the request for interim relief. The emergency arbitrator's powers stop once the regular arbitrator is appointed. To issue an interim award, the emergency arbitrator must be satisfied that immediate and irreparable loss or damage is likely to result in the absence of emergency relief and that the party seeking this relief is entitled to it. (AAA Employment Arbitration Rules, O-1, O-2, O-4.)

3. Covered Claims. This Agreement to arbitrate covers all grievances, disputes, claims, or causes of action (collectively, "**claims**") 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 the Employer and the termination thereof, including claims Employee may have against the Employer or against its officers, directors, supervisors, managers, employees, or

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agents in their capacity as such or otherwise, or that the Employer 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), claims for violation of any federal, state, local, or other governmental law, statute, regulation, or ordinance, including, but not limited to, all claims arising under Title VII of the Civil Rights Act, as amended, the Americans with Disabilities Act, as amended, the Family and Medical Leave Act, as amended, the Fair Labor Standards Act, as amended, the Equal Pay Act, as amended, the Employee Retirement Income Security Act, as amended, the Civil Rights Act of 1991, as amended, Section 1981 of U.S.C. Title 42, the Sarbanes-Oxley Act of 2002, as amended, the Worker Adjustment and Retraining Notification Act, as amended, the Age Discrimination in Employment Act, as amended, the Uniform Services Employment and Reemployment Rights Act, as amended, the Genetic Information Nondiscrimination Act, the [Tennessee Human Rights Act, the Tennessee Public Protection Act, the Tennessee Family Leave Act, the Tennessee Disability Act, the Tennessee Pay Equality Transparency Act, retaliation claims pursuant to the Tennessee Workers Compensation Act], all of their respective implementing regulations and any other federal, state, local, or foreign law (statutory, regulatory, or otherwise).

DRAFTING NOTE: COVERED CLAIMS

Tennessee courts have consistently found that employment-related claims may be subject to mandatory arbitration (see, for example, *Allen v. Tenet Healthcare Corp.*, 370 F. Supp. 2d 682, 685-86 (M.D. Tenn. 2005) and *Davis v. Reliance Elec.*, 104 S.W.3d 57, 58-59 (Tenn. Ct. App. 2002)).Tennessee law does not permit arbitration of fraudulent inducement claims under the TUAA. However, if the parties agree to arbitrate a fraudulent inducement claim, it must be submitted to arbitration under the FAA despite the prohibition under Tennessee law (see *Frizzell*, 9 S.W.3d at 84). For more information on possible claims under the THRA, see State Q&A, Anti-Discrimination laws: Tennessee (9-521-1012).

Although US courts tend to interpret the scope of arbitration agreements broadly, unnecessarily restrictive language can lead to disputes over which disputes are arbitrable. For example, the expression "arising out of or relating to" may seem redundant, but a court may find a dispute nonarbitrable if the phrase "relating to" is not included. For instance, the Second Circuit has denied the arbitration of employment discrimination claims where the arbitration clause required the arbitration of disputes "arising under this Agreement" (*White v. Cantor Fitzgerald, L.P.*, 393 F. App'x 804, 805 (2d Cir. 2010)).

The US Supreme Court has held that arbitration of a statutory claim can be enforced only if a prospective litigant may effectively vindicate the litigant's statutory rights in the arbitral forum (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (U.S. 1985) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (U.S. 1991); see also *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998)).

Under Tennessee law, there is no specific test to determine if a dispute falls within the scope of an arbitration clause. In determining whether a claim falls with the scope of arbitration, Tennessee courts consider both:

- The contract's language, including any choice of law provision.
- General law applicable to the arbitration clause.

(*Mid-South. Maint. Inc.*, 2015 WL 4880855, at *4.)

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4. Claims Not Covered. Claims not covered by this Agreement are claims for workers' compensation, unemployment compensation benefits, or any other claims that, as a matter of law, the Parties cannot agree to arbitrate. Nothing in this Agreement shall be interpreted to mean that Employee is precluded from filing complaints with the Human Rights Commission, the Tennessee Department of Labor and Workforce Development, the federal Equal Employment Opportunity Commission, U.S. Department of Labor, the Office of Federal Contract Compliance Programs, or the Board.

DRAFTING NOTE: CLAIMS NOT COVERED

Certain types of claims are generally not subject to arbitration, such as claims for:

- Workers' compensation benefits.
- Unemployment benefits.
- National Labor Relations unfair labor practice charges.

Federal regulations prohibit employers with federal contracts of $1 million or more from requiring their employees to enter into pre-dispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act of 1964 (Title VII) or from torts related to sexual assault or harassment. Arbitration agreements for these claims are enforceable if:

- The employee voluntarily agrees to arbitrate the claims after the dispute arises.
- The employee is covered by a CBA.
- The employee or independent contractor entered into the arbitration agreement before the employer bid on the federal contract covered by this order, unless the agreement is subject to renegotiation, replacement, or can be changed by the employer after the federal contract is awarded.

(Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (July 31, 2014).)

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.

5. Waiver of Class Action and Representative Action Claims. Except as otherwise required under applicable law, 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. Notwithstanding anything to the contrary in the [NAME OF ITS EMPLOYMENT ARBITRATION RULES], and the general grant of authority to the arbitrator in paragraph 1 of the power to

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determine issues of arbitrability, the arbitrator shall have no jurisdiction or authority to compel any class or collective claim, to consolidate different arbitration proceedings, or to join any other party to an arbitration between Employer and Employee.

DRAFTING NOTE: WAIVER OF CLASS AND REPRESENTATIVE ACTIONS

Several recent decisions by the US Supreme Court have upheld the use of class action waivers in individual arbitration agreements. 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)). For more information on class arbitration waivers, see Standard Clause, Class Arbitration Waiver (US) (3-518-9047).

6. Waiver of Trial by Jury. The Parties understand and fully agree that by entering into this Agreement to arbitrate, they are giving up their constitutional right to have a trial by jury, and are giving up their normal rights of appeal following the rendering of the arbitrator's award except as applicable law provides for judicial review of arbitration proceedings.

DRAFTING NOTE: WAIVER OF TRIAL BY JURY

A party resisting a motion to compel arbitration may request a jury trial on the issue of whether the parties actually agreed in writing to arbitrate (9 U.S.C. § 4). However, clear waivers of jury trial are enforceable in Tennessee (*Allen*, 370 F. Supp. 2d at 685).

7. Claims Procedure. Arbitration shall be initiated upon the express written notice of either party. The aggrieved party must give written notice of any claim to the other party. Written notice of an Employee's claim shall be mailed by certified or registered mail, return receipt requested, to the Employer's [NAME OF PERSON OR POSITION] at [ADDRESS] ("**Notice Address**"). Written notice of the Employer's claim will be mailed to the last known address of Employee. The written notice shall identify and describe the nature of all claims asserted and the facts upon which such claims are based. Written notice of arbitration shall be initiated within the same time limitations that Tennessee law applies to those claim(s).

8. Arbitrator Selection. The Arbitrator shall be selected as provided in [NAME OF ORGANIZATION] Rules and Procedures.

9. Discovery. The Arbitrator shall have the authority to set deadlines for completion of discovery. The Arbitrator shall decide all discovery disputes.

DRAFTING NOTE: DISCOVERY

The employment rules of arbitral institutions provide for effective discovery. The AAA rule, for example, provides that "[t]he arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited

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nature of arbitration." (AAA Employment Rules, Rule 9.)

Where a party moves to compel arbitration under the TUAA, discovery is appropriate if it is limited to matters raised in the motion. However, the trial court must stay all other proceedings, including discovery that is unrelated to the issue of arbitrability. (*Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade*, 404 S.W.3d 464, 468 (Tenn. 2013).)

10. Substantive Law. The Arbitrator shall apply the substantive state or federal law (and the law of remedies, if applicable) as applicable to the claim(s) asserted. Claims arising under federal law shall be determined in accordance with federal law. Common law claims shall be decided in accordance with Tennessee substantive law, without regard to conflict of laws principles.

11. Motions. The Arbitrator shall have jurisdiction to hear and rule on prehearing disputes and is authorized to hold prehearing conferences by telephone or in person as the Arbitrator deems necessary. The Arbitrator shall have the authority to set deadlines for filing motions for summary judgment, and to set briefing schedules for any motions. The Arbitrator may allow the filing of a dispositive motion if the Arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case. The Arbitrator shall have the authority to adjudicate any cause of action, or the entire claim, pursuant to a motion for summary adjudication and in deciding the motion, shall apply the substantive law applicable to the cause of action.

DRAFTING NOTE: MOTIONS

Arbitrators may consider dispositive motions if the parties have the opportunity to submit evidence on the motion. In arbitrations under the Financial Industry Regulatory Authority (FINRA) Code of Arbitration Procedure Rules for Industry Disputes (Industry Code Rules), arbitrators are discouraged from granting dispositive motions (see Industry Code Rule 13504).

12. Compelling Arbitration/Enforcing Award. Either party may ask a court to stay any court proceeding, to compel arbitration under this Agreement, and to confirm, vacate, or enforce an arbitration award. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

DRAFTING NOTE: COMPELLING ARBITRATION/ENFORCING AWARD

COMPELLING ARBITRATION

Under the FAA there exists a presumption to resolve ambiguities in favor of arbitration. Under the TUAA, there is also a presumption to resolve ambiguities in favor of arbitration. However, the presumption does not apply to disputes concerning whether the parties agreed to arbitrate (T.CA. § 29-5-302 and *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 376-77 (6th. Cir. 2005)).

To challenge an agreement's validity, employees have invoked theories including:

- Lack of assent.
- Lack of consideration.
- Unconscionability.

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A well-drafted agreement defeats those arguments. For example, courts have found:

- 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:
  - farm property;
  - structures or goods; or
  - a party's structures or property used as a residence.

  (T.C.A. § 29-5-302(a).)
- A mutual promise to arbitrate constitutes sufficient consideration to support an arbitration agreement (*Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 358 (Tenn. Ct. App. 2001)).
- An arbitration agreement is likely enforceable if it contains a severability clause that voids any terms that are determined to be invalid but keeps the remainder of the agreement in place (*Chapman v. H & R Block Mortg. Corp.*, 2005 WL 3159774 at *8 (Tenn. Ct. App. 2005)).

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).)

CHALLENGING ARBITRAL AWARDS IN COURT

The FAA provides several grounds for vacating an award including that:

- The award was procured by corruption, fraud, or undue means.
- There was evident partiality or corruption in the arbitrators.
- The arbitrators were guilty of misconduct in refusing to postpone the hearing on sufficient cause shown or refusing to hear evidence pertinent or material to the controversy or of any other misbehavior that prejudiced the rights of a party.
- The arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made.

(9 U.S.C. § 10(a).)

Courts may also set aside an award made in "manifest disregard" of the law (*Warbington Constr. v. Landmark*, 66 S.W.3d 853, 857 (Tenn. Ct. App. 2001)). This is an extremely high burden that essentially requires the award to "fly in the face" of clearly established legal precedent (*Merrill Lynch v. Jaros*, 70 F.3d 418,421 (6th Cir. 1995) and *Landmark*, 66 S.W.3d at 857). Tennessee courts have declined to adopt this standard because the courts severely limit judicial review of arbitration awards in Tennessee (*Landmark*, 66 S.W.3d at 859). However, the Sixth Circuit still considers manifest disregard a valid common law vacatur standard (*Shafer v. Multiband Corp.*, 551 F. App'x 814, 819 n.1 (6th Cir. 2014); see also *Meyers Assocs., v. Goodman*, 2014 WL 5488761, at *5 n.11 (M.D. Tenn. Oct. 29, 2014)).

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 Section 9 of the FAA requires this language (see, for example, *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433 (2d Cir. 2004)). Although the agreement to enter judgment may be implied from the facts and circumstances, employers should include the statement "judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

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Similarly, under the TUAA, courts vacate an arbitration award only if:

- The award was procured by corruption, fraud, or other undue means.
- The court finds evident partiality by an arbitrator, corruption by an arbitrator, or misconduct by an arbitrator that prejudiced the rights of a party.
- An arbitrator refused to postpone the hearing on showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to the TUAA and substantially prejudiced the rights of a party.
- An arbitrator exceeded the arbitrator's powers.
- There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection before the beginning of the arbitration hearing.

(T.C.A. § 29-5-313(a)(1).)

13. Arbitration Fees and Costs. Employer shall be responsible for the arbitrator's fees and expenses. Each party shall pay its own costs and attorneys' fees, if any. However, if any party prevails on a statutory claim that affords the prevailing party attorneys' fees and costs, or if there is a written agreement providing for attorneys' fees and costs, the Arbitrator may award reasonable attorneys' fees in accordance with the applicable statute or written agreement. The Arbitrator shall resolve any dispute as to the reasonableness of any fee or cost that may be awarded under this paragraph.

DRAFTING NOTE: ARBITRATION FEES AND COSTS

Courts are more likely to enforce arbitration agreements that provide that the employer pays for the arbitrator's fees and expenses, as provided in this Standard Document. Unless the agreement is with a highly compensated executive, to avoid challenges, employers generally should agree to pay the full cost of the arbitrator's fees.

The AAA distinguishes in its arbitration rules between employer-promulgated plans and individually negotiated contracts and agreements. For the former, employers must pay the arbitrator's compensation unless the employee agrees, post-dispute, to pay a portion of the arbitrator's compensation. For the latter, the rules provide for splitting costs, subject to reallocation in the award. On filing a demand for arbitration, the AAA makes an initial administrative determination on whether the dispute arises from an employer-promulgated plan or an individually negotiated employment agreement. In making its determination, the AAA considers:

- Whether the employer appears to have drafted a standardized arbitration clause with its employees.
- The ability of the parties to negotiate the terms and conditions of the parties' agreement.

Use of the AAA rules should reduce the risk that the court can find the arbitration costs excessive.

Unless otherwise provided in the arbitration agreement, the arbitrators' expenses and fees, together with other expenses incurred in the conduct of the arbitration, must be paid as provided in the award (T.C.A. § 29-5-311). This does not apply to attorneys' fees. Attorneys' fees may be awarded where the parties' contract provides for this recovery (*Lasco Inc. v. Inman Constr. Corp.*, 467 S.W.3d 467, 475 (Tenn. Ct. App. 2015)).

14. Term of Agreement. 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 and is signed by [EMPLOYER'S DESIGNATED PERSON OR TITLE].

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15. Severability. 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.

DRAFTING NOTE: 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.

16. Voluntary Agreement. 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.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

[EMPLOYER NAME]

By _____

Name: [NAME OF EMPLOYER REPRESENTATIVE]

Title: [TITLE OF EMPLOYER REPRESENTATIVE]

EMPLOYEE

Signature: _____

Print Name: _____

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.

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