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TRENDS REGARDING
ARBITRATION AND EMPLOYMENT MATTERS

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For litigators and transactional lawyers, you must be aware of the law of the jurisdiction you are dealing with both when drafting the arbitration clause and trying to enforce the clause and defend against its enforcement.

Hypothetical or as later referred to in this paper, the Model Arbitration Clause frequently used in employment agreements:

"If a dispute arises with respect to any term of this Employment Agreement, any party to the dispute may request arbitration to resolve the dispute by notifying the other parties to the dispute in writing that arbitration is desired. In such event, the dispute shall be submitted to binding arbitration in Houston, TX in accordance with the commercial arbitration rules of the American Arbitration Association."

Issues to consider by the attorney include:

1. What state was the contract entered into and was there a choice law provision: e.g. any dispute arising under this agreement shall be governed by the law of Texas? Please consider whether or not either party really has a nexus to Texas. If neither party has significant contacts to Texas the clause may fail for that reason. If the employee has no nexus to Texas the courts my consider that issue also and depending upon the jurisdiction of the case, the decision whether that makes the clause unenforceable, that would depend upon the law the court ultimately uses to resolve that dispute.

2. Even though the AAA rules provide that the arbitrator shall have the power to decide jurisdictional issues, (does the state that has jurisdiction agree that the AAA commercial Arbitration Rules (Rule 7) as to the arbitrator determining his/her own jurisdiction shall govern the issue when without the AAA rule in place, the prevailing American rule is that jurisdiction is a gateway issue for the courts to decide.

What other factors does a court consider in deciding this issue:

1. Is there a meaningful waiver by the employee of her/his rights to a court (be it a jury or judge) to decide the issue. TIP: include in the clause additional language similar to— "The employee has specifically been advised that arbitration of disputes under this

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contract is a condition of employment and employment would not have been offered to the employee nor would the employee have been hired without the employee agreeing to this provision. The employee further specifically waives the right to a trial in a court of law and/or a jury trial. In this regard, consider using bold face and all caps type when using language to waive the trial and at that point in the agreement, have a signature line for the employee to acknowledge this paragraph in addition to signing the agreement.

2. Consider whether state law applies or the Federal Arbitration Act. The United States Supreme Court has made clear that the FAA (Section 3 of the Act) preempts any conflicting state law controls over any contrary state law. *See, e.g., Volt Info. Serv. v. Bd. Of Trs. Of Leland Standford Junior Univ.,* 489 U.S. 468, 478 (1989). *Accord Circuit City Stores, Inc. v. Saint Clair Adams,* 532 U.S. 105, 112 (FAA preemptive of state laws hostile to arbitration.). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626 (1985), the Court held that when the parties' agreement involves interstate commerce, arbitrability decisions are made by applying the applicable federal substantive law in the FAA. Arbitration should not be denied unless it can be said with "positive assurance" that the arbitration clause is not susceptible of an interpretation covering any aspect of the dispute. *See, e.g. United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960).

3. Courts often interpret the language in the Model Arbitration Clause—"any dispute arising under this agreement" as a broad form release. *See, e.g. Ferenc v. Brenner*, 927 F. Supp. 2d 537 542 (N.D. ILL. 2013).

4. A broad form release creates a heavy presumption of arbitrability under the FAA is particularly relevant when interpreting a broad arbitration clause of the sort shown above. *See, e.g., AT&T Tech., Inc. v Commc'ns Workers of Am.,* 475 U.S. 643, 650 (1986) holding that general presumption of arbitrability when interpreting broad clauses.

5. In analyzing the inquiry to be made, it is not whether a specific cause of action falls within or without an arbitration clause. Perhaps a more relevant question would be whether any of the factual allegations in dispute touch matters covered by the parties' agreement.

The matter is not resolved even with these precedents described above because some states disfavor the Model Arbitration Clause in favor of protecting the employee or :

New Jersey has issued some fairly recent decisions along this line of thinking. In *Atalese v. U.S. Legal Services Group, L.P.* 219 N.J. 430, 436 (2014), 99 A.3d 306, 309, *cert. denied* (2015), 135 S.Ct. 2804, 192 L.Ed.2d 847, a case involving a dispute

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