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Presented by
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The Arbitration Process for Non-Subscriber Cases

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Steps to Take Before a Workplace Injury to Support Your Arbitration Policy

(The Best Defense is Good Recordkeeping)

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Be Prepared to Enforce Your Arbitration Agreement

- An Arbitration Policy is only as enforceable as your ability to prove its legality in Court.
- Take steps to ensure that a court will enforce your arbitration policy.
  - Is there a system in place to ensure all employees acknowledge the arbitration policy?
  - Are employee records audited to check for employee acknowledgments?
  - Are individual locations audited to ensure compliance with employee acknowledgments?
  - Are the employee acknowledgments stored in a secure location? Are they submitted to the corporate office? Records left in file cabinets at local branches will often "disappear" after an injury.
  - If you have a large local facility/branch with a person assigned to manage HR/policy records—is there a process in place to audit those files?
  - **ALL of these questions are based on past cases we have had.**
  - **Employers often do not realize that a local facility/branch is not maintaining records or following policy acknowledgment procedures until after an injury occurs.**

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Maintain Arbitration Policy and Training Documents, Not Just Acknowledgments

- Often, we will receive an acknowledgment or training record that shows an arbitration policy was acknowledged, but not supporting documentation.
  - A training history simply showing completion of the arbitration policy is insufficient to prove an agreement to arbitrate.
- You may need to enforce an arbitration policy years after it was acknowledged.
- Retain all copies and versions of arbitration policies, ERISA Plans, Summary Plan Descriptions, and training modules.
- Ensure that it is easy to identify which versions of arbitration documents (arbitration policy, ERISA Plan, SPD, training modules, etc.) apply on specific dates.
- We want to be able to show the judge what an employee viewed and received when they acknowledged the arbitration policy.
- If you have an online training module that employees use to acknowledge the arbitration policy, retain the training module.

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Getting Out of Court and Into Arbitration

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Federal Arbitration Act

- As a general rule, an ERISA occupational injury benefit plan will include a mandatory arbitration provision.
- The arbitration provision will also likely contain language specifying that arbitration under the plan is governed by the Federal Arbitration Act (FAA). 9 U.S.C. § 1 *et seq*.
- The Federal Arbitration Act validates an agreement to arbitrate that meets general contract requirements.
- The Federal Arbitration Act preempts state law barring arbitration but does not preempt state contract law. *Jack B. Anglin Co. Inc. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992).
- The Federal Arbitration Act also provides a mechanism for judicial enforcement of an arbitration award.

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FAA v. TAA

- Texas has a separate statutory arbitration scheme—The Texas Arbitration Act (TAA). TEX. CIV. PRAC. & REM. CODE § 171.001 et seq. However, the FAA almost always applies unless there are terms in the arbitration provision stating otherwise.
- In the unlikely event that the plan at issue in your case does not specify the choice of law for arbitration you should review both the FAA and TAA to determine if either or both statutory schemes apply to your case. In this situation always be cognizant that if the FAA applies it will preempt the TAA. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *Jones v. Halliburton Co.*, 583 F.3d 228, 234 (5TH Cir. 2009); *Miller v. Public Storage Mgmt, Inc.*, 121 F.3d 215, 217 (5th Cir. 1997); *Elis v. Schlimmer*, 337 S.W.3d 860, 862 (Tex. 2011). Generally, the FAA is broader and more defendant friendly.
- The TAA has been interpreted as allowing parties to an arbitration agreement to agree to appellate review. *Nafta Travelers, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011). This provides an avenue for appellate review beyond the very limited scope of review under the FAA (which cannot be altered by contract generally).
- The Fifth Circuit has applied both Federal and Texas law to issues of arbitrability so if in Federal court cite both Fifth Circuit and Texas appellate decisions to support your arguments. *See USHealth Grp., Inc. v. South*, 636 Fed. Appx. 194, 198 (2015). Likewise, as issues regarding arbitration may involve application of the FAA parties in a Texas court should cite to Fifth Circuit cases when appropriate.

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Case Law Overwhelmingly Favors Arbitration

- Both the Texas Supreme Court and the Fifth Circuit overwhelmingly favor arbitration. Whether your case is in a Federal or Texas state court a motion to compel arbitration is substantially likely to be granted. "Federal and state law strongly favor arbitration." *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 844 (Tex.). "[A] presumption exists in favor of agreements to arbitrate under the FAA." *Id*. citing *Marshall*, 909 S.W.2d at 900.
- Any doubts regarding an agreement must be resolved "in favor of arbitration." *Id*. "A party opposing an arbitration agreement bears the burden of defeating it." *Id*.
- The Fifth Circuit similarly notes "the Federal Arbitration Act expresses a strong national policy favoring arbitration of disputes, and all doubts concerning the arbitrability of claims should be resolved in favor of arbitration." *Wash. Mut. Fin. Group, LLC v. Bailey*, 264 F.3d 260, 263 (5th Cir. 2004).

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Arbitration can be a Condition of Employment Part 1

- Pursuant to the Texas Supreme Court, an arbitration clause may be accepted by an employee's continuing employment. *In re Hallibuton*, 80 S.W.3d 566, 569 (Tex. 2002).
- In that matter, the employee was provided notice of the company's dispute resolution program, which included binding arbitration as the exclusive remedy for resolving all disputes between the company and its employees. *Id* at 568.
- The notice also informed the employee that by continuing to work for the company, the employee would be accepting the program and its binding arbitration provision. *Id*. The Court held that the company's notice was unequivocal, and that the employee's conduct was an acceptance of that offer. *Id*.
- In *Halliburton* there was no dispute that the employee specifically had received notice. General postings or notices not sent directly to an employee are not the type of notice referred to.

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Arbitration can be a Condition of Employment Part 2

- Once the employee reported to work after the effective date of the new program, both the employee and the company "became bound to arbitrate any dispute between them." *Id*. (recognizing that even if the employee's employment ended shortly thereafter, "the promise to arbitrate would have been binding and enforceable on both parties."). The Court held a valid arbitration agreement existed between the parties. *Id*. at 573; *See also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 (5th Cir. 2004) (citing *Halliburton* to enforce arbitration of a claim under the Fair Labor Standards Act).
- In *in re Frank Kent Motor Company* the Texas Supreme Court held that an employer's threat to terminate an employee who refused to sign a jury waiver agreement was not coercion that invalidated the agreement. 361 S.W.3d 628, 632 (Tex. 2012).
- In an at will employment relationship, "when the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit." *Id*. at 631 quoting *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986).

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Electronic Acknowledgment of Arbitration Policy Part 1

- THIS IS WHERE MANY MOTIONS TO COMPEL ARBITRATION FAIL!
- Many non-subscribing employers now use electronic programs for employees to receive and acknowledge employment policies, including ERISA plans documents and accompanying arbitration policies.
- An electronic signature is a signature under Texas law. Tex. Bus. & Com. Code Sec. 322.09.
- The enforceability of electronic notifications of arbitration agreements is a developing area of the law. In *Firstlight Federal Credit Union v. Loya* the El Paso Court of Appeals addressed this issue directly. 478 S.W.3d 157 (Tex. App.—El Paso 2015, no pet.).
- In *Loya* the plaintiff received electronic notification of an arbitration policy that provided that the employee's continued employment was an agreement to arbitrate. The El Paso Court of Appeals applied *Halliburton* and held that the electronic notification of the arbitration policy coupled with the employee's continued employment constituted an agreement to arbitrate.

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Electronic Acknowledgment of Arbitration Policy Part

- The El Paso Court of Appeals has upheld the denial of a motion to compel arbitration in another electronic notification case where there was a fact issue as to whether the plaintiff received notice of the policy. *Kmart Stores of Texas, LLC et al. v. Ramirez*, 510 S.W.3d 559 (Tex. App.—El Paso 2016, pet. denied). A motion to compel arbitration should pre-emptively address a denial of receipt/signing the agreement.
- For an electronically signed document you cannot simply show the electronic signature, you must prove via evidence (affidavits and documents) that the electronic signature is the Plaintiff's signature.
- Explain the online system the employee used to acknowledge the arbitration policy and how the employee was the only person who could have executed the acknowledgment under their name.

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Enforcing Arbitration Agreement Against Non-Signatories

- Arbitration agreements are often challenged on grounds that the employee did not execute or receive notification of the agreement. A motion to compel arbitration and any response should also address how arbitration may be compelled if the employee did not execute/receive notice of the arbitration policy.
- An arbitration policy may be enforceable even if a party has not signed or received notice of the agreement containing an arbitration requirement (or denies the same). A non-signatory may be equitably estopped from avoiding an arbitration provision under direct beneficiary estoppel (which is recognized in Texas).
- For a non-signatory to be subject to direct beneficiary estoppel the non-signatory has to "embrace" the contract containing the arbitration provision (the ERISA Plan) in one of two ways:
  - Knowingly seeking and obtaining direct benefits under the contract (such as filing a claim for plan benefits); OR
  - Seeking to enforce the terms of that contract or asserting claims that must be determineD by reference to that contract (such as seeking ERISA benefits, but more commonly—filing an appeal of a denial of plan benefits).
- An employee who receives ERISA Plan benefits (medical treatment and/or wage benefits) is subject to direct beneficiary estoppel. This argument also helps address claims of non-receipt/non-agreement to the arbitration policy (as in the El Paso Kmart case).

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Invoking the Litigation Process: Get an Agreement for Discovery

- As set forth in detail above, courts generally love compelling cases to arbitration. However, a party can waive its right to arbitration if it has "substantially invoked the judicial process to the opponent's detriment." *In re Service Corp., Int'l*, 85 S.W.3d 171 (Tex. 2002). This generally is easily avoided so it is not discussed in significant detail here. Additionally, there is a "strong presumption against waiver." *Id*. Some general guidelines for avoiding invoking the judicial process:
  - Do not aggressively pursue litigation making the other side spend a lot of money. *Southwind Group, Inc. v. Landwehr*, 188 S.W.3d 730, 737 (Tex. App.—Eastland 2006, orig. proceeding); *Vine v. PLS Fin. Servs.*, 2017 U.S. App. Lexis 8833 (5th Cir. 2017).
  - Do not wait until right before trial. *Precision Builders, Inc. v. Olympic Group, LLC*, 642 Fed. Appx. 395 (5th Cir. 2016); *Republic Ins. Co. v. Paico Receivables*, LLC, 383 F.3d 341 (5TH Cir. 2004); *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008).
- This is generally an easy issue to avoid by obtaining an agreement between the parties to conduct discovery without waiving arbitration.
  - In a Texas case the parties can enter into a Rule 11 specifying discovery to be conducted.
  - In Federal court include language allowing discovery without waiving arbitration in the Joint Discovery Case Management Plan.

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The Arbitration Process

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Arbitration Process

ERISA occupational injury benefits plans overwhelming require arbitration through the American Arbitration Association (AAA). General overview of the arbitration process:

- Review the plan documents and arbitration policy operable to your case to determine any specific requirements for the arbitration proceedings.
- Many plans have language requiring the parties to mediate. The parties may mediate through AAA or outside of the AAA process generally.
- Once a case is filed with AAA a case manager is assigned who handles the administration of the case. The parties go through an arbitrator selection process leading to the appointment of an arbitrator.
- The appointed arbitrator is required to make disclosures to the parties of any potential conflicts at the beginning of the case and as it continues. Be sure to review the disclosure documents you receive from AAA! Parties are given a deadline to object to the arbitrator based on any disclosures.
- Once an arbitrator is selected, he/she holds a case management conference with the parties to establish the rules and deadlines. This is similar to the initial pretrial conference in Federal court. The parties should be prepared to discuss the facts to the case, discovery they will need, any special issues regarding the case, how much time they will need to prepare for arbitration, and how long and when the formal arbitration hearing will be.
- Pre-arbitration hearings with the arbitrator generally occur telephonically and the parties file documents with AAA electronically. The parties and the arbitrator may agree to a strict or loose application of either the Texas Rules of Civil Procedure, the Federal Rules of Civil Procedure, or neither.
- At the final arbitration hearing the arbitrator rules on all issues. Generally, the parties are permitted to offer post-hearing briefing to the arbitrator. AAA will then set a deadline for the arbitrator to issue the final award.
- Options for appealing an unfavorable arbitration award are extremely limited. Review the applicable plan documents and relevant case law carefully.

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Final Arbitration Hearing

- Final Arbitration Hearings are generally in person.
- Arbitrators will generally work with the parties to allow witnesses and corporate representatives to appear via zoom if needed.
- If a non-party witness is needed for the hearing the arbitrator will issue a subpoena to have the witness appear.
- Requesting and scheduling a court reporter is the best way to make sure all testimony from the hearing is preserved. Otherwise, the arbitrator and parties will be referencing their own notes as to testimony presented.
- Arbitrators may interrupt witnesses and pose direct questions to the parties and/or witnesses.
- Usually, the arbitrator takes all submitted evidence into consideration and does not exclude any evidence (even if it would be excluded in Court). Arbitrators are generally experienced former trial judges who weigh issues regarding evidence but want to see all available evidence. For the same reasons arbitrators almost never exclude expert witnesses.
- Generally, the parties submit post-hearing briefs or proposed awards/findings of facts and legal conclusions after the hearing.

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Differences Between Arbitration and Court

- Formality
  - Arbitration is often a more informal process, with less procedural rules than litigation in Court.
  - Parties often do not have to file formal motions for small disputes. You can simply email the arbitrator about an issue that comes up.
  - Generally, all hearings, except for the final hearing, are telephonic.
- Cost Differences
  - Because the process is more informal normal litigation costs can be lower.
  - HOWEVER, arbitrator fees are HIGH. In demand arbitrators know that they are sought after and can charge very high hourly rates. Expect to spend at least $30,000 on arbitrator fees in certain cases that go to hearing.
  - If a case settles before the deadline to cancel a hearing you can recover any unused fees paid. AAA will send a refund check.
- Timeframe
  - Cases generally go to hearing within 18 months, unless complex medical issues and substantial medical experts are involved.
- Power of the Arbitrator
  - The FAA distinguishes between an arbitrator's powers in discovery and at the formal hearing.
  - An arbitrator's powers to directly compel discovery can be limited if a witness/third party is extremely resistant. An arbitrator can compel witnesses to appear for formal hearing.
  - The Arbitrator's final ruling is extremely hard to overturn.

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Liability Issues in Arbitration

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Defenses NOT Available to Nonsubscribers

- Texas Labor Code § 406.033 prohibits nonsubscribers from asserting certain common law defenses to a suit to recover damages for a personal injury claim filed by an employee.

- A nonsubscriber may not assert:
  - The employee was guilty of contributory negligence
  - The employee assumed the risk of injury or death
  - The injury or death was caused by the negligence of a fellow employee

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Defenses Available to Nonsubscribers

Texas Labor Code § 406.033 provides that nonsubscribers can assert the following defenses:

- The employee intended to bring about the injury
- The employee was injured while intoxicated
  - Proving intoxication can be difficult
  - Merely failing a drug test is often insufficient to prove intoxication alone
  - Intoxication is not a bar to an employee's claim, but a defense for which the employer will have the burden of proof
  - A toxicologist may need to be retained to prove intoxication
  - Often drug tests do not show the actual level of a drug/alcohol, only a positive result at the testing threshold
- While a nonsubscriber may not argue contributory negligence it may assert that the employee is the sole cause of his injuries. *Brookshire Bros. v. Waggner* (Tex. App.—Tyler 1998, pet. denied)

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Defending an Employee's Personal Injury Claim

- In order to prove liability, an employee must prove that an employer violated a duty owed by the employer to the employee.
- In *Austin v. Kroger* the Texas Supreme Court addressed the duties an employer owes to employees.
- "An employer has a duty to use ordinary care in providing a safe workplace." *Kroger* citing *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 754, 18 Tex. Sup. Ct. J. 398 (Tex. 1975). "It must, for example, warn an employee of the hazards of employment and provide needed safety equipment or assistance." *Id*.

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Open/Obvious/Known Hazards

- The duty to provide a safe workplace does not require eliminating dangerous conditions that are open, obvious, or known to an employee.
- A useful defense is to show that any alleged hazards and/or dangerous conditions were open, obvious and known to the employee.
  - Job Description
  - Normal duties and responsibilities
  - Training
  - Safety Policies and Procedures

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Premise Liability Claims
The Necessary Use Exception

- There is no duty to warn of an open and obvious danger subject to the necessary use exception.
- The Necessary Use Exception applies when:

  1. It was necessary that the employee use the unreasonably dangerous premises, and

  2. The employer should have anticipated that the invitee was unable to avoid the unreasonable risks despite the employee's awareness of them.
- Example: An unsafe stairwell that is the only path that may be taken.
- Whether a premises liability or negligent activity case, we always want to argue that there were safe alternatives available to the employee to complete their job tasks. This is why being able to prove an employee received safety policies and training is important.

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Tackling Common Liability Allegations

- Employees will often allege:
  - The necessary use exception applies because there was no reasonable safe alternative.
  - The employer failed to warn of the hazardous condition.
  - The employer failed to provide adequate training.
  - The employer failed to provide necessary safety equipment.
  - The employer failed to provide necessary supervision and/or assistance to perform a task.
- The best defense against such allegations is to have employment policies and safety procedures in place that minimize an employer's susceptibility to such allegations.

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