

# Winning Strategies in Arbitration

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# Winning Strategies in Arbitration

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# Winning Strategies in Arbitration

Clients want arbitration clauses that will be enforced and result in an expedient and cost-effective resolution to disputes in a confidential setting. Errors in drafting arbitration agreements can result in agreements that are not enforced or proceedings that are inefficient and costly. It is important for both in-house and outside counsel to know how to draft an arbitration agreement that will stand up to challenges, avoid ambiguities, and streamline the arbitration process. Whether arbitration agreements or clauses are used in consumer agreements, employment agreements or commercial agreements, the goals and purposes of alternative dispute resolution remain the same: cost effective, confidential and expedient. However, before drafting an arbitration clause or agreement, it is important for counsel to understand the business needs behind such agreements and who will be requested to enter into such agreements. It is also important to consider case law in the jurisdiction in which the agreement will be entered into and whether a choice of law clause of another state could be valid and more preferable.

Many recent cases have placed limitations on arbitration agreements that make these agreements more complex to draft and mandate certain equities for all parties involved. Some states have enacted limitations on arbitration agreements. For example, in Oregon, in the employment context, they may only be entered into with advance notice at least 72 hours before the employee is scheduled to begin work or upon bona fide advancement. The “notice period” was recently reduced from two weeks to 72 hours to give employers more flexibility. Furthermore, the agreement in Oregon must include specific acknowledgement language printed in bold type immediately above the employee’s signature to the arbitration agreement. The trend in case law and state statutes is to ensure fundamental fairness in the arbitration agreement, its procedures and cost allocation.

Since one of the bases under which a court can vacate an arbitrator’s award is “exceeding the arbitrator’s powers,” it is critical for an arbitration agreement to clearly set forth exactly what powers the arbitrator has, what disputes are governed by the arbitration agreement and what type of award the arbitrator is to issue. If these items are not clear in the arbitration agreement, there is an increased chance that the arbitrator’s award will be vacated for “exceeding powers.”

This presentation will cover 12 critical subject matter areas that should be addressed in any arbitration agreement to enhance its enforceability, cost effectiveness of the proceedings and a timely decision by the arbitrators.

## **I. Types of Disputes Governed and Not Governed by the Agreement**

Arbitration agreements must clearly specify the nature of the controversies that are subject to arbitration. If the drafter’s intent is to carve out only narrow circumstances that will be submitted to arbitration, leaving other matters to be pursued in litigation, very precise and defined terms should be utilized. On the other hand, if the drafter’s intent is to submit all disputes arising out of the relationship between the parties to arbitration rather than the court system, the agreement will need to define those disputes broadly. Definitions of words and phrases used help ensure an arbitration agreement will be interpreted in the way that the drafters intended.

For example, in the employment law context, if the employer wants all claims related to or arising out of the employment relationship to be resolved in arbitration, specific reference to statutory claims should be included to avoid an interpretation whereby claims subject to state fair employment agencies or the EEOC or Department of Labor are not left to the court system. See 14 *Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. 1456, 1465 (2009); *Gilmer vs. Interstates\Johnson Lane Corp.*, 500 US 20 (1991). It is important that the arbi-

tration agreement alters the forum but does not “forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Gilmer*, p. 26. Therefore, the arbitration agreement must be careful not to go too far and negatively impact the substantive rights of the parties to the agreement, but instead only govern the forum.

The agreement should also specify what, if any, claims are not covered by the agreement. For example, in an employment setting, a statutory benefit such as claims for workers’ compensation benefits or unemployment compensation cannot be arbitrated, and are subject to other governing entities’ procedural and substantive rights. It may be that in an employment or commercial setting the parties want claims for injunctive or other relief for disputes involving unfair competition, trade secrets, breach of confidentiality, non-competes or non-solicitations to be carved out of the arbitration agreement. Some businesses feel that such claims for injunctive or other equitable relief can be best handled by the court system through the use of temporary restraining orders and preliminary injunctions, which most courts handle on an extremely expedited basis. However, if in the particular jurisdiction in which the dispute arises, the court system is not speedy or adept at handling injunctive relief, then the parties may be better off to send even these matters to arbitration.

Also, many employment arbitration agreements attempt to carve out the employee’s right to file a discrimination charge with an administrative agency such as the EEOC or state fair employment agency. However, many of these carve out agreements prohibit the employee from making a monetary recovery through those administrative entities and require that any claims for monetary relief be pursued through the arbitration process. It is likely that such agreements cannot prevent someone from filing a claim with a government agency.

It should be clear that the clause survives the parties relationship, such as post-termination of employment. Many times the parties may execute multiple agreements to consummate one transaction (*i.e.*, employment of executive may include stock option plan, restrictive covenants, change of control plan and an employment agreement). Either the arbitration clause in one agreement should specify it covers all contracts or else a separate, identical clause should be included in each agreement. Clauses that are designed to defeat class actions should specifically state that and address issues of “collective” or other types of potential group actions.

Agreements should also specify reasonable timelines for filing an arbitration demand which can vary from actual statutes of limitation so long as the substantive rights of the parties are not unduly prejudiced or altered.

## **II. Agreement to Arbitrate the Controversy/Waiver of Rights to Litigate**

The arbitration clause must contain a clear agreement by the parties to arbitrate and to waive their rights to handle disputes in the judicial system. As a result, I generally recommend that arbitration agreements be stand-alone agreements and not buried in an employee handbook.

It is critical for the party with the most bargaining power and who has drafted the agreement to avoid any claims of duress in obtaining an agreement to the waiver of judicial rights. There must be a clear and unequivocal agreement to arbitrate the controversy and waive rights to proceed in a judicial forum. This is best obtained through a specific signature by both parties on the stand-alone agreement itself or in some other agreement that both parties sign. Since most employee handbooks disclaim that they are contracts, an attempt to include a binding arbitration clause within the handbook’s general provisions may not succeed.

If the intent is to keep the process secret, a clear confidentiality clause is needed with its scope defined.

The agreement should also specify who will decide arbitrability; a court or the arbitrator. If it is unclear, usually the court will decide. See *First Options of Chicago, Inc. v. Kaplan* 514 U.S. 938, 944-945 (1995).

### **III. Arbitration Forum**

The best arbitration agreements set forth which arbitration service will be used for the dispute. Some usual choices include the American Arbitration Association, the U.S. Arbitration & Mediation Service (USAM) or local arbitration services. This helps to lessen the chance of a dispute over which organization will govern the arbitration proceeding. The quality and quantity of the arbitrators, costs and procedures vary widely between various arbitration entities and states. Thus, it is important that the drafter be familiar with each of the arbitration entities under consideration and their widely varying policies and procedures for reference in the agreement. The parties can of course also agree to private arbitrators, in which case a selection method and qualifications should still be specified. Even if a particular service is specified, it is best to also state clearly what procedural or evidentiary rules will be used.

### **IV. Number and Qualifications of Arbitrators**

The parties also have to determine whether they want a single arbitrator or a panel of arbitrators. A panel of arbitrators, especially where each side picks one and those two select the third arbitrator, is sometimes perceived as more neutral, but obviously a three arbitrator panel significantly increases the cost of arbitration. If there are high dollar issues involved, the parties may not mind the additional cost. However, for more routine matters a single arbitrator will generally suffice and keep the arbitration cost effective.

Many arbitration agreements, especially if an arbitration organization is not specified, set forth the method of selection of the arbitrators. For example, each side or the organization could select several names and the parties then enter into a striking process. It is risky however, to leave the selection of an arbitrator to the “agreement of the parties” as frequently the parties are not able to agree upon an arbitrator or even a selection methodology. So the agreement should always specify a procedure for arbitrator selection. Another option is for each side’s selected arbitrator to confer on selection of a third and then step away and let the third arbitrator preside. Each arbitration organization has its own methods for the selection process.

The agreement should also address the qualifications of the arbitrator. For example, in an employment or an ERISA case, the employer may wish to specify that the arbitrators must have such experience. In a construction context, frequently non-lawyers in the industry are used as arbitrators. In complex business disputes, a CPA or other financial expert may be a good arbitrator selection.

An arbitrator’s schedule and availability should also be taken into account if timelines are critical. A three-person panel will be harder to schedule for proceedings and may cause delays. Connections between arbitrators on a panel may lead to a challenge based on bias. Multiple arbitrators also means the greater chance of conflicts and disclosure problems resulting in disqualification.

Be sure to research the potential arbitrators online, prior decisions if available, Listserv inquiries, etc.

### **V. Location of Arbitration/Telephonic Hearings**

Especially if the parties to the agreement are not in the same location, the drafter of the arbitration agreement should specify the location of the arbitration. However, if there is a divergence of bargaining power between the parties, the drafters should make sure not to select a venue for the arbitration that would be expensive or inconvenient for the other party. Such overreaching in agreements can result in them being invalidated or altered by the courts. The agreement should also provide for the handling of arbitrations or pre-hearing matters by telephone conference rather than in person in appropriate circumstances. Video conferencing is one other frequently used option.

The agreement should also specify where the hearing will take place. Again, to avoid claims of unfairness, a convenient forum should be specified. For example, in employment claims the location in which the employee resides is usually specified, rather than an employer's far away home office.

For example, for ERISA matters that are decided "on the record," usually via cross-motions for summary judgment, it is not necessary to have an evidentiary hearing. Oral argument on the parties' respective positions based on a jointly submitted administrative record can easily be handled in a few hour telephone conference hearing. Especially where the parties are located in different jurisdictions, this can go a long way to cutting the cost of arbitration. However, with respect to full-blown evidentiary hearings, it is generally best for the arbitrator to conduct the hearing in person so that he or she can observe the demeanor of the witnesses and conduct a more orderly examination and presentation of the evidence and witnesses.

## **VI. Arbitration Hearing Process**

If the parties select an arbitration entity to handle the arbitration, that organization will handle most administrative details and move the case along according to its own rules. The agency acts as a "buffer" between the parties and the arbitrator(s), thereby avoiding inadvertent ex parte contacts. However, all arbitration organizations do not necessarily set forth clear rules for the process of the arbitration hearing itself and any preliminary proceedings. Therefore, it is best for the arbitration agreement to set forth the parties agreement with respect to procedural matters such as timing of the arbitration, discovery, witnesses, submission of evidence, rules of evidence, etc.

Some arbitration agreements specify a truncated proceeding such as submitting witness statements in writing rather than producing witnesses live. Or, after the witness statement is read the witness can be produced solely for cross-examination or examination by the arbitrator to speed up the process. Some arbitration agreements place limits on or prohibit discovery altogether. So long as the parties' substantive rights are not unduly impacted, such procedural limitations are generally valid.

To keep the matter moving along quickly and meet the goal of cost efficiency, many arbitration agreements set strict time limits for filing of claims, discovery, the hearing date and a deadline for the arbitrator's award. Absent such timeliness and procedures for the arbitration specified in the agreement, the efficiency and expediency of the arbitration process cannot be assured. However, it is also a good idea to build in extensions of set timelines for unusual circumstances so long as such a provision cannot be used to endlessly delay and postpone deadlines unnecessarily.

Some arbitrators or entity rules prohibit or disfavor dispositive motions. Thus, the agreement should address that issue. The AAA, for example, has a rule governing dispositive motions which grants discretion. A party may want to specifically require consideration of dispositive motions and override AAA Rules in the agreement.

The agreement should specify which, if any, state or federal rules of evidence or discovery apply. Under AAA and some other arbitration entity rules, it is specified that the formal rules of evidence do not apply. These rules can be overridden by specific instructions in the agreement to the contrary.

This is another important reason that drafters must be aware of the rules promulgated by each arbitration entity before selecting an entity and whether the agreement should seek to override them. AAA for example, has several sets of rules that apply to differing types of disputes: commercial, employment, construction. These varying procedures should be evaluated as to which is best for the dispute. Some disputes contain elements of more than one type and thus the agreement should specify which set of rules will be used, for example is a dispute over independent contractor status governed by the employment or commercial rules?



Another procedural issue that should be addressed in the agreement is whether there will be a record of the proceedings, *i.e.* court reporter or audio/video taping. There are pros and cons to each for the type of dispute which need to be considered.

## **VII. Specification of the Arbitrator's Powers**

A well-drafted arbitration agreement should specify the nature and extent of the arbitrator's powers. Will it be the arbitrator, or court, who will determine arbitrability of the issues in controversy? Promoting cost efficiency and expediency, it is best to leave matters of arbitrability to the arbitrator, rather than a court. A court's initial determination of arbitrability of the issues defeats the purpose of confidentiality, expediency and cost effectiveness of the arbitration agreement. Therefore, the agreement should state that the arbitrator, not a court, will determine the nature and extent of the issues to be arbitrated under the terms and conditions of the agreement. This again highlights the necessity for having clearly defined scope of the arbitration provision to govern all possible disputes between the parties, if that is the intent. If procedural or evidentiary rules are not specified the agreement could state that the arbitrator will decide those issues.

## **VIII. Type of Award**

There are many types of awards that can be issued by arbitrators. The simplest is, of course, a ruling in favor of one party and awarding of any amount of damages, if that is an issue in the case. Arbitrators may also be requested to present their awards in writing and to give reasons. A fully "reasoned" award would include findings of fact, conclusions of law, as well as the ultimate determination.

Certain arbitration entity rules specify the type of award, again pointing out the importance of knowing an entity's rules and specifying which apply. Arbitrators should be instructed in the agreement to decide all of the issues including an award of non-monetary or monetary relief as called for under the terms of the agreement and claims of the parties. The agreement should state whether fees can be awarded and whether the arbitrator can decide that issue. The agreement should also specify whether the arbitrator has any role after issuance of the award such as enforcement of the ruling, as generally once the arbitrator has issued his or her award, their jurisdiction has ended. It is then up to the parties to seek enforcement of the award, or to challenge it, in the litigation system.

The agreement should also specify what remedies the arbitrator is allowed to issue, including injunctive relief, other equitable relief, out-of-pocket damages, emotional distress damages, attorney's fees and/or punitive damages. Again, the drafter must be careful not to impinge upon the underlying substantive rights of the other party by limiting the arbitrator's authority to award damages that the other party could obtain in court under the substantive law governing the dispute. In some disputes, remedies and recoveries can be limited. See *e.g. Investment Partners L.P. v Glamour Shots Licensing, Inc.*, 298 F3d 314 (5<sup>th</sup> Cir. 202) (re: waiver of punitive damages). But remedies cannot usually be altered in an employment claim.

## **IX. Costs and Fees**

Many arbitration agreements fail to delineate how the parties wish to handle administrative costs of the arbitration (entity fees, arbitrator's fees); their own costs and attorney fees and other related costs such as document production, subpoenas, witness expenses, etc. The well-drafted arbitration agreement will specify how the parties wish to handle each of these matters. In general, if the substantive legal rights of a party include the right to recover attorney fees, then those substantive rights should not be waived in the terms of the arbitration agreement. For example, an employee who brings a discrimination claim under state or fed-

eral statutes generally has a right to recover her attorney fees, if successful. Therefore, an employer should not overreach in the arbitration agreement by requiring that the parties pay their own attorney fees or waive rights to claim such fees. Most employment law arbitration agreements require the employer to pick up the full cost of the arbitration or the majority of the cost absent some small filing fee or some small amount of the cost of the arbitration (*i.e.*, \$1,000 or less) by the employee, so as not to significantly disadvantage the employee financially by asserting his or her rights to arbitration. Other agreements between parties with significant disparity of bargaining power or resources should also avoid cost and fee over-reaching. In a commercial setting it is normal for parties to split equally the costs. The agreement may also specify whether the arbitrator can apportion or reapportion those costs.

## **X. Briefing**

Detailed arbitration agreements usually include provisions that describe the briefing that will be allowed in connection with the arbitration. For example, will briefs be allowed on prehearing disputes such as discovery, motions, etc. Also, the arbitration agreement can set forth the scope and length of such briefing, such as limiting the number of pages for the brief or the types and times that briefing can be submitted. The agreement can also specify whether informal letter briefing is acceptable in lieu of more formalized pleading types of briefs. Instead of the usual judicial concept of opening briefs, response briefs and reply briefs, many arbitration agreements limit the parties to a pre-hearing brief and a post-hearing brief or allow simultaneous briefs and eliminate reply briefing. Again, the arbitration agreement should specify the timing of such briefing so as not to unduly delay a decision by the arbitrator if there is a lengthy period after the evidentiary hearing in which the parties can submit their closing briefs.

## **XI. Representation**

Some arbitration agreements prohibit the parties from employing attorneys to represent them at the hearing. Others allow for a representative, but it must be a non-attorney representative. Such clauses are found in arbitration agreements covering minor legal disputes or in situations where organization beliefs eschew use of the legal system. For example, I have seen such arbitration agreements used by church-based organizations such as non-profits and educational institutions.

## **XII. Confidentiality**

While it is generally presumed that arbitration proceedings are not public, it is best for the agreement to specify that all matters related to the proceeding are confidential. This would include items such as the discovery, submissions to the arbitrators, pre-evidentiary hearings and motions, as well as the arbitration hearing itself and the award. Parties to an arbitration agreement should not necessarily assume that the entire process will remain confidential unless their agreement so specifies.

## **XIII. Conclusion**

Drafting an effective and enforceable arbitration agreement generally means that such agreements will be longer and more formidable-looking to the non-drafting party than in the past. However a brief, but ineffective, arbitration agreement will cause more problems than it avoids. There will be disputes over missing provisions, ambiguities, lack of definitions that may lead to the arbitration agreement being held to be unenforceable, pre-arbitration litigation, a prolonged or more expensive arbitration and subject any arbitration

award to greater legal challenges. Therefore, it is critical that business entities and their counsel who wish to institute arbitration agreements to govern disputes have extensive knowledge of proper drafting of an arbitration agreement to insure their success.

#### **XIV. Appendix**

Listing of selected arbitration drafting resources:

2A Am.Jur. Legal Forms 2d §23:95

205 Empl L Couns Article III

13 N.Y. Prac., Employment Litigation in New York Appendix 10.C Tex. Prac. Guide Employment Practice §2:221

Westlaw, Essential Facts: Employment Database, Appendix 11D Westlaw, Human Resources Guide Database §5:140

Westlaw, Guide to Employee Handbooks Database, Appendix G §G:1

Westlaw, Guide to HR Policies and Procedures Manuals Database, Appendix 6A American Arbitration Association – [www.adr.org](http://www.adr.org)

## XV. Attachments

### [COMPANY] ALTERNATIVE DISPUTE RESOLUTION AGREEMENT \*

In exchange for my employment or continued employment as well as the mutual promises contained in this Dispute Resolution Agreement, [Company] (“[Company]”) and I agree to use informal conciliation and confidential binding arbitration, instead of going to court, for dispute resolution of any civil or equitable claims of any nature, including claims now in existence or that may exist in the future: (a) that I may have against [Company], its affiliates, and/or their current or former employees; or (b) that [Company] and/or its affiliates may have against me. This Dispute Resolution Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

**1. Covered Disputes.** Without limitation, [Company] and I agree that any legal dispute arising out of or related to my employment (including those related to my application for employment, my employment or the termination of my employment) must be resolved using informal conciliation and final and binding arbitration and not by a court or jury trial. Such legal claims may include, but are not limited to, disputes concerning wage and hour law, compensation, leave, harassment, discrimination, retaliation, breaks or rest periods, uniform maintenance, expense reimbursement, training, discipline, termination, defamation, transfer, demotion, promotion and termination. It also includes, but is not limited to, any claims that come about through Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Worker Adjustment and Retraining Notification Act, Equal Pay Act, Americans with Disabilities Act, as amended, Family and Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, and any federal, state or local laws or regulations covering the same or similar matters or any aspect of the employment relationship, as well as any tort, negligence, or contractual claim. It also includes claims [Company] may have against me, such as for conversion or breach of fiduciary duty and other business torts like intentional interference or inducement to breach a contract.

Issues relating to this Dispute Resolution Agreement’s validity, enforceability, or interpretation of its prohibitions on class, collective, and representative proceedings, shall be exclusively for a court of competent jurisdiction to decide. Otherwise, [Company] and I agree that all other issues are for the Arbitrator to decide.

**2. Disputes Not Covered.** This Dispute Resolution Agreement does not cover any claims for workers’ compensation, state disability insurance, or unemployment insurance benefits. I can still bring claims to an administrative agency if the law says so. These would be claims like those before the Equal Employment Opportunity Commission (or state or local equivalent), the Department of Labor, the Securities Exchange Commission or the National Labor Relations Board. This Dispute Resolution Agreement does not prevent me from bringing those claims before an administrative agency, but it likewise does not excuse me from failing to bring such a claim if I am required to do so to exhaust my administrative remedies. Notwithstanding the foregoing, I agree that I will not seek any monetary compensation as a result of any proceeding arising from the filing of a charge (and/or participating in an investigation resulting from the filing of a charge) with the EEOC and/or state or local human rights agency, because I understand that if I believe I am owed any monetary compensation related to any charge I might file with the EEOC and/or state or local human rights agency, this Dispute Resolution Agreement provides the exclusive avenue through which I will seek it.

**3. Open Door Policy; Conciliation Before Arbitration.** Before either party submits a demand for arbitration to the other party pursuant to the procedure identified in this Dispute Resolution Agreement, and as a condition precedent to any demand for arbitration, that party must attempt to conciliate its claims.

(a) Open Door Policy or Employee Relations Department Complaint. I agree to utilize [Company]’s Open Door Policy or contact the Employee Relations Department (depending on the nature of the complaint) as

the first step in attempting to resolve any claims or potential claims. If my complaint relates to harassment, discrimination or retaliation based on race, age, color, ethnic background, national origin, religion, gender, sexual orientation, disability, genetic information, or any other category protected by law, I will report my complaint to the Employee Relations Department to allow the company an opportunity to investigate and respond to my concerns. If my complaint relates to any other type of dispute, I will follow the Company's Open Door Policy by raising the complaint with my direct supervisor, or if I feel more comfortable, the District Manager or a member of Human Resources (or, if I am a Home Office Employee, with my department manager). A copy of the Open Door Policy can be found in your Employee Handbook, a current version of which is on the \_\_\_\_\_ at <https://employees.crackerbarrel.com>. I understand that, although the Open Door Policy is available for any concern that I have regarding my employment, this Dispute Resolution Agreement relates only to covered claims involving legally protected rights.

(b) **Conciliation.** If (i) the Employee Relations Department has not completed its investigation within 30 calendar days or (ii) my dispute remains unresolved despite the Employee Relations Department's response or (iii) my dispute pertains to anything other than harassment, discrimination or retaliation (as mentioned above), was not resolved through the Open Door Policy, and involves a legal claim, I agree to participate in a telephonic conciliation meeting with [Company]. I understand I must do so in an effort to resolve the dispute before submitting my dispute to arbitration and as a condition precedent to making a demand for arbitration. For [Company], it agrees to contact me at my last known address or telephone number to attempt to conciliate any claim or potential claim it has against me. Regardless of who initiates the conciliation, I understand that I have the option that the telephonic conciliation can either be with me (or my legal representative) and a [Company] manager *or* with me (or my legal representative) and a [Company] manager using [Company]'s Dispute Resolution Manager *or* both. Any telephonic conciliation meeting with [Company]'s Dispute Resolution Manager shall take place within 30 calendar days of receipt of the request by either party. The parties may skip this conciliation step only by written, mutual consent. If the conciliation reaches impasse, the Dispute Resolution Manager will issue a Notice of Conciliation Impasse. If the Dispute Resolution Manager was not used, either party can declare an impasse after engaging in good faith discussions towards a resolution. If the dispute is not resolved through conciliation, the dispute may then proceed to arbitration pursuant to the procedure identified in this Dispute Resolution Agreement. All requests I make for conciliation shall be submitted to [Company] via an online request form obtained at <https://employees.crackerbarrel.com> or by telephone at \_\_\_\_\_. I can learn more about the details of the conciliation process in the company's Alternative Dispute Resolution (ADR) Policy located on the \_\_\_\_\_ at <https://employees.crackerbarrel.com>.

**4. Arbitration Is Exclusive Forum.** If resolution is not reached through conciliation, the parties agree that arbitration is the required and exclusive forum for the resolution of all disputes (other than disputes which by statute are not arbitrable) arising out of or in any way related to employment that may arise between an employee or former employee and [Company], its predecessors, successors and assigns, its current and former parent companies, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents.

**5. Applicable Rules.** Unless as otherwise provided in this Dispute Resolution Agreement, in any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association (AAA) will apply. Those differences include, but are not limited to, (a) the Arbitrator's fees and expenses, the costs of the hearing facilities, plus any costs owed to the AAA or the Arbitrator shall be paid by [Company]; (b) if I am the one filing the claim, [Company] will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I been able to file the claims in court but in no event will I be required to pay more than \$200.00; (c) as discussed below, the arbitration shall occur only as an individual action and not as a class,

collective, representative, or consolidated action; and (d) either party may apply to the arbitrator for injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved and either party may also, without waiving any remedy under this Dispute Resolution Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitrator (or pending the arbitrator's determination of the merits of the controversy), including to enforce any applicable contractual restrictive covenants. The AAA rules are available for review if you click on this website link: [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362) or can be sent to you by the Dispute Resolution Department if you call this number: \_\_\_\_\_.

**6. Location and Timing of Arbitration Hearing.** The arbitration shall take place in the city or county where I last worked or where I applied to work, unless the parties agree to have the Arbitration elsewhere. The arbitration hearing will start no later than six (6) months following the date of the selection of the arbitrator. However, the selected arbitrator may order the arbitration hearing rescheduled if mutually agreed to by [Company] and me (in writing) or if good cause is shown. Postponement and cancellation fees shall be payable, at the discretion of the arbitrator, by the party causing the postponement or cancellation. In the event the hearing cannot reasonably be completed in one day, the arbitrator will schedule the hearing to be continued on a mutually convenient date.

**7. Starting the Arbitration Process.** Within thirty (30) days following receipt of Notice of Conciliation Impasse, declaration by either party of impasse, or written notice of the parties' joint decision to not proceed with conciliation (or within the time otherwise required by the applicable statute of limitations, whichever is later), [Company] or I (whomever is initiating the arbitration proceeding) will send a written demand for arbitration to the AAA, with a copy to the other party. The written demand for arbitration to the AAA must be sent via email to [casefiling@adr.org](mailto:casefiling@adr.org), via fax to (877) 304-8457, or via hardcopy to 1101 Laurel Oak Road, Suite 100, Voorhees, New Jersey 08043. For the copy I send to [Company], I will send it to [Company]'s Dispute Resolution Manager at \_\_\_\_\_ by certified or registered mail, return receipt requested. For the copy [Company] sends to me, it will send it to my last known address by certified or registered mail, return receipt requested. The Arbitrator will resolve any disputes we have regarding the timeliness or propriety of the demand. The written demand for arbitration shall set forth a statement of the nature of the dispute, including the alleged act or omission at issue; the names of all persons involved in the dispute; the amount in controversy, if any; and the remedy sought.

**8. Legal Representation.** Both [Company] and I have the right to be represented by legal counsel of our choice and at our own expense. However, if I notify [Company] that I will not be represented by counsel at hearing at least thirty (30) days before the hearing date, [Company] also will not be represented by legal counsel at the hearing, unless otherwise prohibited by law.

**9. Discovery.** In arbitration, each party shall be permitted to take the following discovery at the requesting party's expense:

- (1) Three (3) depositions;
- (2) Fifteen (15) interrogatories (written questions); and
- (3) Fifteen (15) requests for document production.

Consistent with the expedited nature of arbitration and upon good cause shown, the arbitrator shall have the authority to limit the above discovery or order additional discovery.

**10. Witnesses & Exhibits.** At least fifteen (15) days before the start of the arbitration hearing, [Company] and I must provide each other and the arbitrator with a list of witnesses, including any expert witnesses, a brief summary of the testimony of each witness, and a list of all exhibits intended to be used at the hearing. Unless so ordered by the arbitrator, witnesses or exhibits which do not appear on these lists will not be allowed to testify or be introduced during the hearing.

**11. The Arbitrator's Decision.** Within 30 days after the hearing, each party will have the right to prepare a brief, a copy of which must be shared with the other party and filed with the Arbitrator. The Arbitrator shall issue a written decision within 30 days of receipt of the parties' briefs which shall include a statement of the arbitrator's findings of fact and conclusions of law. The Arbitrator may award any relief to either party to which [Company] or I may be entitled by law. Before issuing a decision on the merits of any claim, and as a condition precedent to issuing any such decision, the Arbitrator must first determine that the requirements of section 3 of this Dispute Resolution Agreement have been satisfied, or that compliance with section 3 was a legal impossibility. The award of the Arbitrator may be enforced under the terms of the Federal Arbitration Act (Title 9 U.S.C.) and/or under the law of any state to the maximum extent possible. If a court determines that the award isn't completely enforceable, it shall be enforced and binding on both parties to the maximum extent permitted by law.

**12. Judicial Action.** Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Dispute Resolution Agreement and to enforce an arbitration award. The prevailing party in such an action shall be awarded its attorneys' fees and costs.

**13. Class/Collective Action Waiver.** [Company] and I agree that any and all claims subject to arbitration under this Dispute Resolution Agreement may be instituted and arbitrated only in an individual capacity, and not on behalf of or as a part of any purported class, collective, representative, or consolidated action (collectively referred to in this Dispute Resolution Agreement as a "Class Action"). Furthermore, [Company] and I agree that neither party can initiate a Class Action in court or in arbitration in order to pursue any claims that are subject to arbitration under this Dispute Resolution Agreement. Moreover, neither party can join a Class Action or participate as a member of a Class Action instituted by someone else in court or in arbitration in order to pursue any claims that are subject to arbitration under this Dispute Resolution Agreement. It is the parties' intent to the fullest extent permitted by law to waive any and all rights to the application of Class Action procedures or remedies with respect to all claims subject to this Dispute Resolution Agreement, and it is expressly agreed between [Company] and me that any arbitrator adjudicating claims under this Dispute Resolution Agreement shall have no power or authority to adjudicate Class Action claims and proceedings. The waiver of Class Action claims and proceedings is an essential and material term of this Dispute Resolution Agreement, and [Company] and I agree that if it is determined by a court of competent jurisdiction that it is prohibited or invalid under applicable law, then this entire Dispute Resolution Agreement is unenforceable. Otherwise, if any other provision of this Dispute Resolution Agreement is held to be unenforceable by a court of competent jurisdiction, such provision shall be deemed voided; however, all remaining provisions of this Dispute Resolution Agreement shall remain in full force and effect.

I acknowledge and agree that my entering into this Dispute Resolution Agreement is a condition of my employment or continued employment with [Company]. This Dispute Resolution Agreement is not and shall not be construed to create any contract of employment for a specified duration, express or implied. This Dispute Resolution Agreement does not in any way alter the “at-will” status of employment with [Company], meaning that either I or [Company] may terminate the employment relationship at any time, with or without advance notice, and with or without cause, however, this Dispute Resolution Agreement will remain in full force and effect after my employment relationship with [Company] ends.

**I understand that, by entering into this Dispute Resolution Agreement, I am waiving my right to a jury trial and waiving any right I may have to bring any claim covered by this agreement as a Class Action (as defined herein), either in court or in arbitration, or to participate in such an action.**

\_\_\_\_\_  
(employee signature)

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
(date)

AGREED:

[Company] (on behalf of itself and its applicable subsidiaries/affiliates)

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\*Materials Courtesy of Dinsmore & Shohl



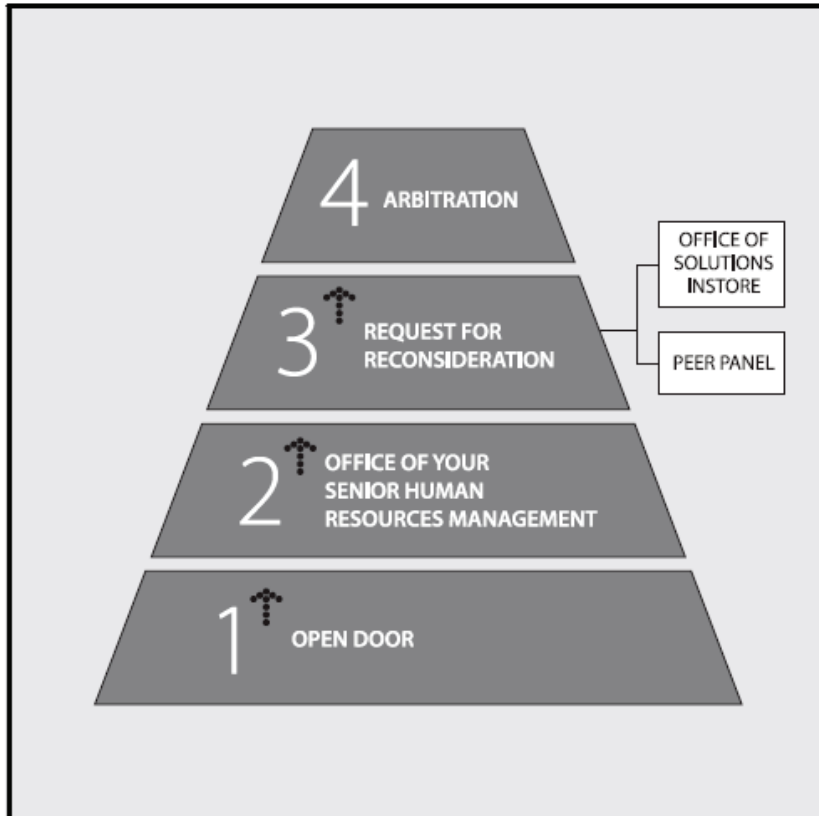


**PLAN DOCUMENT**  
EARLY DISPUTE RESOLUTION  
RULES AND PROCEDURES

June 1, 2014

If you need any accommodation to help you read and understand this Solutions InSTORE Plan Document, please call the Office of Solutions InSTORE at 1-866-285-6689.

Si le gustaría tener este Documento del Plan en español, favor de llamar el numero 1-866-285-6689.



At Macy's, Inc. and its subsidiaries and Business Units (the "Company") we care about our people. We know that from, time to time, employees can have problems at work. And even routine differences can get bigger when there are no resources to help resolve them.

In 2004, the Company set out to find a more effective way to resolve workplace disputes. We wanted a way that would benefit everyone involved. Our Open Door policy was a good place to start. Over the years, the Company has had a policy to help Employees handle problems by working directly with supervisors and/or Human Resources. To make this policy even better and improve its effectiveness, the Company added new features. Together with Open Door they became our Early Dispute Resolution Program: Solutions InSTORE.

We are convinced that a full internal review of differences is the quickest and most productive way to resolve disputes. It also maintains good working relationships and avoids unnecessary confrontations. So, Open Door (**Step 1**) continues to be the foundation of our Solutions InSTORE Program. It must be used before taking the next step.

If you are not satisfied with the result, you can request to have your issue reviewed by the Office of Senior Human Resources Management (**Step 2**). The Senior Vice President or another Human Resources executive who was not involved in the Open Door process will review your issue. They'll get back to you in writing. Steps 1 and 2 are available for any disputes relating to your employment with the Company.

If you are not satisfied with the result at Step 2, and you believe your situation involves legally protected rights, you can make a Request for Reconsideration (**Step 3**). Step 3 gives you the option, depending on the nature of your claim, of two methods to continue to seek resolution. One method is Peer Review. A panel of your peers decides the outcome of your dispute. The other method is review by a representative from The Office of Solutions InSTORE. This office is located in Macy's Employee Relations Department in Cincinnati.

In those relatively rare situations where, for whatever reason, your dispute cannot be resolved at Step 3 and you wish to pursue it further, Solutions InSTORE provides for a private, professional way to resolve it outside the Company. You can request Arbitration (**Step 4**), this process involves an Arbitrator. Who is a professional, neutral third-party selected by both you and the Company. After a hearing, the Arbitrator renders a final decision, unless appealed. The decision is binding on both the Company and you. Nothing in the Solutions InSTORE Program, however, prevents you from filing, at any time, a charge or complaint with a government administrative agency like the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor or the National Labor Relations Board.

Except in states calling for different election procedures, all Employees agree to be covered by Step 4 – Arbitration by accepting or continuing employment with the Company after the Effective Date. Employees are given the option to exclude themselves from Arbitration by completing an election form within 30 days of hire or, upon specific notice, other prescribed time frame. Until and unless an Employee chooses to be excluded from arbitration within the prescribed time frame, the Employee is covered by Step 4 – Arbitration. In other states, your election form will allow you to affirmatively choose whether you want to be covered by this final step- Arbitration.

The following explain how Solutions InSTORE works.

### **Step 1 – Open Door**

The Company's Open Door Policy encourages Employees to try to resolve any problems at work with their supervisors. If the Employee is unsatisfied with the supervisor's response or needs to talk to someone other than the supervisor, the Employee may take the problem to the next higher level of supervision, or the Human Resources department for advice or assistance.

### **Step 2 – Review by the Office of Senior Human Resources Management**

If the Employee is not satisfied with the result of a Open Door (Step 1), the Employee may go to Step 2, by filing a written request for review with the Manager of Step 2 claims within thirty (30) days of the Step 1 decision. It is then assigned to a Human Resources professional who will investigate the claim and review their decision with an Associate Relations Vice President or Senior Vice President of Human Resources. The complaint is referred to an appropriate HR Executive, one who was not involved at Step 1, who will conduct an impartial investigation. A written decision is then issued generally within forty-five (45) days of receiving the complaint. Along with the decision are instructions for pursuing Step 3 if the Employee is not satisfied with the results of Step 2.

Steps 1 and 2 are available for any disputes relating to your employment at the Company. Steps 3 and 4 are available only for covered claims involving legally protected rights. "Legally protected rights" means claims the Employee could raise in a court or before an administrative agency.

Nothing in the Solutions InSTORE Program, however, prevents any Employee from filing, at any time, a charge or complaint with a government administrative agency like the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, or the National Labor Relations Board.

### **Step 3 – Request for Reconsideration**

For covered claims involving legally protected rights, if the Employee is not satisfied with the results of Step 2, the Employee may go to Step 3 by contacting the Office of Solutions InSTORE within thirty (30) days of the Step 2 decision to file a written Request for Reconsideration. Step 3 involves two features the Employee may consider:

#### **1 – Peer Review**

Peer Review is available if the Employee's claim involves:

- A final warning or the final phase of written commitment to change or improve a performance issue, or
- Termination of employment,

and does not involve claims of harassment, discrimination, or other alleged statutory violations or issues arising from a reduction in force or layoff. If the Employee chooses Peer Review, a representative from The Office of Solutions InSTORE gives the Employee contact information for a division facilitator. The Employee has

ten (10) days to contact the facilitator. The facilitator arranges for a panel proceeding. A volunteer panel is assembled to review the Employee's complaint and render a decision. This panel consists of peers from the Employee's level, one (1) from the next management level and one (1) non-voting facilitator to manage the process. Panels always consist of at least three (3) voting members. The panel is assembled to review the Employee's complaint. A response is given within five (5) days of the conclusion of the panel proceedings.

A decision of the Peer Review panel that upholds the Employee's claim is final and binding on the Company. If the panel denies the Employee's claim, the Company will let the Employee know the procedures for continuing on to Step 4, if the employee has chosen to participate in Step 4.

## **2 – Review by the Office of Solutions InSTORE**

This feature is available for all covered claims involving legally protected rights. If the Employee chooses review by the Office of Solutions InSTORE, the Solutions InSTORE Program Manager will send to the Employee a confirmation that the complaint was received. A representative of the Office of Solutions InSTORE then conducts an investigation and provides the Employee with a decision in writing. The decision is generally provided within forty-five (45) days of receiving the Step 3 Request for Reconsideration. A decision that upholds the Employee's claim is final and binding on the Company. But, if the employee's claim is denied in any way and if the employee has chosen to be covered under Step 4, the Company will let the employee know the procedures for requesting a Step 4 arbitration.

## **Step 4 – Arbitration Rules and Procedures**

### **Article 1 – Individuals Covered**

This Plan Document applies, as of the Effective Date provided in Article 4, to the following individuals, provided that they are not covered by a collective bargaining agreement with Macy's:

Newly Hired Employees

- All Employees hired by Macy's with a first day of employment on or after June 1, 2014.

*"Macy's" means any division or subsidiary or operating unit or entity related to Macy's, Inc.*

Except in states calling for different enrollment procedures, all Employees are automatically covered by all 4 steps of the Program by taking or continuing a job with the Company. That means that all Employees agree, as a condition of employment, to arbitrate all disputes not otherwise excluded under the terms of the Plan, which were not resolved at Step 3. However, arbitration is a voluntary condition of employment. Employees are given the option of excluding themselves from Step 4 arbitration within 30 days of hire or, upon specific notice, other prescribed time frame. Issues at Step 4 are decided by a professional from the American Arbitration Association in an arbitration process, rather than in a court process. Arbitration thus replaces any right an employee might have to go to court and try their claims before a jury. Except in states calling for different enrollment procedures, Employees are covered by Step 4 unless and until they exercise the option to exclude themselves from arbitration. Whether an employee choose to remain covered by arbitration or to exclude himself or herself has no negative effect on the employee's employment.

Any Employee who experiences a break in service with the Company of sixty (60) days or less, or who transfers from one subsidiary, division or affiliated Macy's Company to another, remains covered by Step 4 Arbitration, unless the Employee previously excluded himself during the prescribed time period. If the Employee becomes re-employed with the Company following a break in service greater than sixty (60) days, the Employee is treated as a new hire and is given the opportunity to choose to be excluded from arbitration during the prescribed time period.

## **Article 2 – Claims Subject to or Excluded from Arbitration**

Except as otherwise limited, all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment, whether arising under federal, state or local decisional or statutory law ("Employment-Related Claims"), are covered claims and shall be settled exclusively by final and binding arbitration. Arbitration is administered by the American Arbitration Association ("AAA") under these Solutions InSTORE Early Dispute Resolution Rules and Procedures and the employment arbitration portion of the AAA's Employment Arbitration Rules and Mediation Procedures. Arbitration is held before a neutral, third-party Arbitrator. The Arbitrator is selected in accordance with these Solutions InSTORE Early Dispute Resolution Rules and Procedures. If there are any differences between the Solutions InSTORE Early Dispute Resolution Rules and Procedures and the employment arbitration portion of the AAA's Employment Arbitration Rules and Mediation Procedures, the Solutions InSTORE Early Dispute Resolution Rules and Procedures shall apply.

Arbitration applies to any and all covered disputes, controversies or claims whether asserted by the employee against the Company and/or against any employee, officer or other alleged agent of the Company. Arbitration also applies to any and all covered disputes, controversies or claims asserted against the Employee by the Company, any officer, or any other employee or alleged agent of the Company.

All unasserted employment-related covered claims as of June 1, 2014 arising under federal, state or local statutory or common law, shall be subject to arbitration. Merely by way of example, Employment-Related Claims include, but are not limited to, claims arising under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, including amendments to all the foregoing statutes, the Employee Polygraph Protection Act, state discrimination

statutes, state statutes, and/or common law regulating employment termination, misappropriation, breach of the duty of loyalty, the law of contract or the law of tort; including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/negligent infliction of emotional distress or defamation.

Claims by Employees that are required to be processed under a different procedure pursuant to the terms of an employee pension plan or employee benefit plan are not covered claims and shall not be subject to arbitration under Step 4. Claims by Employees for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) or under the National Labor Relations Act are also not covered claims and are not subject to Arbitration under Step 4. Statutory or common law claims made outside of the state employment insurance system alleging that the Company retaliated or discriminated against an Employee for filing a state employment insurance claim, however, are covered claims and shall be subject to arbitration.

Nothing in these Solutions InSTORE Early Dispute Resolution Rules and Procedures prohibits an Employee from filing at any time, a charge or complaint with a government agency such as the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and/or the National Labor Relations Board. However, upon receipt of a right to sue letter or similar administrative determination, the Employee's claim becomes subject to arbitration as defined herein.

### **Article 3 – Dismissal/Stay of Court Proceeding**

By agreeing to arbitration, the Employee and the Company agrees to resolve through arbitration all claims described in or contemplated by Article 2 above. This means that neither the Employee nor the Company can file a civil lawsuit in court against the other party relating to such claims. If a party files a lawsuit in court to resolve claims subject to arbitration, both agree that the court shall stay or, if appropriate, dismiss the lawsuit and require the claim to be resolved through the Solutions InSTORE Program.

If a party files a lawsuit in court involving claims that are, and other claims that are not, subject to arbitration, such party shall request the court to stay the litigation of the nonarbitrable claims and require that arbitration take place with respect to those claims subject to arbitration. The Arbitrator's decision on the arbitrable claims, including any determinations as to disputed factual or legal issues, shall be entitled to full force and effect in any later court lawsuit on any nonarbitrable claims.



#### **Article 4 – Effective Date**

As to any Individuals Covered (as defined in Article 1), the Solutions InSTORE Program is effective June 1, 2014.

#### **Article 5 – Time Limit to Initiate Arbitration**

Arbitration must be initiated in accordance with the time limits contained in the applicable law's statute of limitations. While an employee is not required to participate in Steps 1 through 3 of the Program before initiating arbitration, any period of time elapsed during which the Employee pursued his or her claims under Steps 1-3 of this Program, if any, is added on to the applicable limitations period.

#### **Article 6 – Commencement of Arbitration**

##### **a. Commencement of Arbitration Generally**

To initiate arbitration, the Employee or Company ("claimant") must give written notice to the other party and or person who is alleged to be liable in the dispute ("Demand for Arbitration"). A demand for Arbitration to the Company must be given by mail to the Office of Solutions InSTORE. A Demand for Arbitration to the Employee must be given by mail to the Employee's last known home address. If the claimant is the Company the Demand for Arbitration must be personally signed by a representative of the Company. If the claimant is an employee, the Demand for Arbitration must be personally signed by the employee.

The Demand for Arbitration shall include a statement of nature of the claim together with a brief description of the relevant facts and the remedies sought, including the amount of damages sought. If the claimant is an employee, the Demand for Arbitration shall also include the Employee's current address, location(s) or store(s) where the employee works or worked for the Company, and, if the employee is represented by an attorney, a statement that the designated attorney has been retained by the employee and is authorized to represent the employee in Arbitration.

- b. Commencement of Arbitration if the Employee has not participated in Steps 1 through 3.

If the employee has not participated in Steps 1 to 3 and is seeking reimbursement of attorney's fees under Article 15(b), the employee must provide the Office of Solutions InSTORE 15-days' advance notice of the employee's intent to initiate arbitration (the "Advance Notice").

The Advance Notice must be given by mail to the Office of Solutions InSTORE and must include a brief description of the dispute and a settlement demand. The Office of Solutions InSTORE will review the Advance Notice and inform the employee, before the expiration of the 15-day period, if it will accept the employee's settlement demand. The contents of the Advance Notice and any communications between the employee and the Office of Solutions InSTORE about it of the notice will be deemed confidential and will not be disclosed to the arbitrator.

The provision of the Advance Notice does not affect the employee's ability to initiate arbitration or the arbitrator's power to award the employee damages, including costs and attorney's fees, under the applicable law and in accordance with Article 16.

- c. Responses following a Claimant's Initiation of Arbitration

Unless otherwise agreed, the other party ("respondent") shall give its response within 30 days after initiation of the arbitration. The response shall state all available defenses, a brief description of relevant facts and any related counterclaims then known.

Unless otherwise agreed, within 30 days after such counterclaims are given, the Claimant shall give Respondent its response, including a brief statement of the claimant's defenses to and relevant facts relating to the counterclaims.

Claims and counterclaims may be amended before selection of the arbitrator and thereafter with the arbitrator's consent. Notices of defenses or replies to amended claims shall be given to the other party within 30 days after the amendment.

#### **Article 7 – Selection of an Arbitrator**

Both the Company and the Employee shall participate equally in the selection of an Arbitrator to decide the arbitration. After receiving and/or filing a Demand for Arbitration, the Solutions InSTORE Program Manager shall ask the American Arbitration Association to provide the Company and the Employee a panel of seven (7) neutral Arbitrators with experience deciding employment disputes.

The Company and the Employee then shall have the opportunity to review the background of the Arbitrators by examining the materials provided by the American Arbitration Association. Within seven (7) calendar days after the panel composition is received, the Employee and the Company shall take turns striking unacceptable Arbitrators from the panel until only one Arbitrator remains. The Employee and the Company will inform the American Arbitration Association of the remaining Arbitrator who will decide the dispute. However, if both parties agree that the remaining Arbitrator is unacceptable, a second panel will be requested from the American Arbitration Association and the selection process will begin again. If both parties agree no one on the second panel is acceptable, either party may request the American Arbitration Association to simply appoint an Arbitrator who was not on either panel.

#### **Article 8 – Time and Place of Arbitration**

The arbitration hearing shall be held at a location within fifty (50) miles of the Employee's last place of employment with the Company, unless the parties agree otherwise. The parties and the Arbitrator shall make every effort to see that the arbitration is completed, and a decision rendered, as soon as possible. There shall be no extensions of time or delays of an arbitration hearing except in cases where both parties consent to the extension or delay, or where the Arbitrator finds such a delay or extension necessary to resolve a discovery dispute or other matter relevant to the arbitration.

#### **Article 9 – Right to Representation**

Both the Employee and the Company shall have the right to be represented by an attorney. If the Employee chooses not to be represented by an attorney during the arbitration proceedings, the Company will not have an attorney present during the arbitration proceedings.

#### **Article 10 – Discovery**

##### **a. Initial Disclosure**

Within fourteen (14) calendar days following the first conference with the Arbitrator, each party shall provide to the other party copies of all documents that the disclosing party has in its possession, custody or control and upon which the disclosing party will rely in support of the disclosing parties claims or defenses. However, the parties need not provide privileged documents that are protected from disclosure because they involve attorney-client, doctor-patient or other legally privileged or protected communications or materials.

Each party shall have a continuing obligation throughout the

discovery period to supplement its Initial Disclosures.

Upon written request, the Employee shall be entitled to a copy of all documents (except privileged documents as described above) in the Employee's "PERSONNEL FILE."

**b. Other Discovery**

**i. Interrogatories/Document Requests**

Each party may propound one (1) set of twenty (20) interrogatories (including subparts) to the other party. Interrogatories are written questions that the recipient must answer under oath. Such interrogatories may include a request for all documents upon which the responding party relies in support of its answers to the interrogatories. Answers to interrogatories must be served within twenty-one (21) calendar days of receipt of the interrogatories. This provision does not affect or in any way limit the ability of the parties to serve subpoenas on third parties, provided the requesting party makes a showing of need and secures the approval of the Arbitrator.

**ii. Depositions**

A deposition is a statement under oath that is given by one party in response to specific questions from the other party. It is usually recorded or transcribed by a court reporter. Each party shall be entitled to take the deposition of up to three (3) individuals witnesses of the parties choosing. The party taking the deposition shall be responsible for all associated costs, such as the cost of a court reporter and the cost of a transcript.

**iii. Additional Discovery**

Upon the request of any party and a showing of appropriate justification, the Arbitrator may permit additional relevant discovery, if the Arbitrator finds that such additional discovery is not overly burdensome, and will not unduly delay the conclusion of the arbitration.

### **c. Discovery Disputes**

The Arbitrator shall decide all disputes related to discovery including, but not limited to, disputes as to whether discovery is interposed for any improper purpose such as to harass, annoy, embarrass, needlessly increase the cost of arbitration or cause undue burden or unnecessary delay. Such decisions shall be final and binding on the parties. In ruling on discovery disputes, the Arbitrator need not follow but consult the discovery rules contained in the Federal Rules of Civil Procedure.

### **d. Time for Completion of Discovery**

All discovery must be completed within ninety (90) calendar days after the selection of the Arbitrator, except for good cause shown as determined by the Arbitrator. In order to expedite the arbitration, the parties may agree to initiate discovery prior to the appointment of the Arbitrator.

## **Article 11 – Hearing Procedure**

### **a. Witnesses**

Witnesses shall testify under oath, and the Arbitrator shall afford each party a sufficient opportunity to examine its own witnesses and cross-examine witnesses of the other party. Either party may issue subpoenas compelling the attendance of any other person necessary for the issuing party to prove its case.

### **i. Subpoenas**

A subpoena is a command to an individual to appear at a certain place and time and give testimony. A subpoena also may require that the individual bring documents when he or she gives testimony. To the extent authorized by law, the Arbitrator shall have the authority to enforce and/or cancel such subpoenas. Subpoenas must be issued no less than ten (10) calendar days before the beginning of an arbitration hearing or deposition.

The party issuing the subpoena shall be responsible for the fees and expenses associated with the issuance and enforcement of the subpoena, and with the attendance of the subpoenaed witness at the arbitration hearing.

## **ii. Sequestration**

The Arbitrator shall ensure that all witnesses who testify at the arbitration are not influenced by the testimony of other witnesses. Accordingly, unless the Arbitrator finds cause to proceed in a different fashion, the Arbitrator shall sequester all witnesses who will testify at the arbitration. However, the Arbitrator shall permit the Employee involved in the arbitration and the Company's designated representative to remain throughout the arbitration, even though they may or may not testify at the hearing.

## **b. Evidence**

The parties may offer evidence and materials that are relevant to the dispute and shall produce any and all non-privileged evidence that the Arbitrator deems necessary to a determination of the dispute. The Arbitrator need not specifically follow the Federal Rules of Evidence, although these rules may be consulted to resolve questions regarding the admissibility of particular matters.

## **c. Burden of Proof**

Unless the applicable law provides otherwise, the party requesting arbitration or the party filing a counterclaim has the burden of proving a claim or claims by a preponderance of the evidence. To prevail, the party bringing the arbitration must prove that the other's conduct was a violation of applicable law.

## **d. Briefing**

Each party shall have the opportunity to submit one (1) pre-hearing brief, and one (1) post-hearing brief, which is a written statement of facts and law, in support of its position. Submission of such briefs is not required, however, briefs shall be typed and shall be limited in length to twenty (20) double-spaced pages. In addition, a party may submit one (1) brief in support of a dispositive motion, the opposing party may submit one(1) brief in opposition of such dispositive motion, and the moving party may submit one (1) reply brief in response to any brief in opposition to the dispositive motion. These briefs shall be typed and shall be limited in length to twenty (20) double-spaced pages., except any reply brief shall be limited in length to 10 pages.

The state and federal procedural requirements for a dispositive motion do not apply to a dispositive motion filed under these rules. However, the arbitrator may require such submissions; in addition to the brief supporting a dispositive motion, that will aid his/her decision making.

**e. Transcription**

The parties may arrange for transcription of the arbitration by a certified reporter. The party requesting transcription shall pay for the cost of transcription.

**f. Consolidation**

**i. Claims**

The Arbitrator shall have the power to hear as many claims as a Claimant may have consistent with Article 2 of these Solutions InSTORE Early Dispute Resolution Rules and Procedures.

The Arbitrator may hear additional claims that were not mentioned in the Arbitration Request Form. To add claims, the Claimant must notify the other party at least thirty (30) calendar days prior to a scheduled arbitration. The additional claims must be timely, under the applicable law, as of the date on which they are added. The other party must not be prejudiced in its defense by such addition.

**ii. Parties**

The Arbitrator shall not consolidate claims of different Employees into one (1) proceeding and with respect to any claim, shall not issue relief on behalf of a group of Employees. The Arbitrator shall not hear an arbitration as a class, collective or other representative action. (A class or collective action involves representative members of a large group of individuals who claim to share a common interest and who seek relief on behalf of the group. A representative action is similar to a class or collective action and includes an action brought by representatives of a large group of individuals, such as representatives acting as private attorneys general, and who seek relief on behalf of the group or the general public.)

## **g. Confidentiality**

Unless prohibited by law, all aspects of an arbitration pursuant to these Solutions InSTORE Early Dispute Resolution Rules and Procedures, including the hearing and recording of the proceeding, shall be presumed confidential and shall not be open to the public. The only exceptions are : (i) to the extent both parties agree otherwise in writing; (ii) as may be appropriate in any subsequent proceeding between the parties; or (iii) as may otherwise be appropriate in response to a governmental agency, legal process, or as required by law. All settlement negotiations, mediations, and any results shall be confidential. The Arbitrator shall make the determination as to whether the arbitration proceedings will remain confidential based on the existing law of the jurisdiction and this provision.

## **Article 12 – Substantive Choice of Law**

The Arbitrator shall apply the substantive law, including the conflicts of law, of the state in which the Employee is or was employed. For claims or defenses arising under or governed by federal law, the Arbitrator shall follow the substantive law as set forth by the United States Supreme Court. If there is no controlling United States Supreme Court authority, the Arbitrator shall follow the substantive law that would be applied by the United States Court of Appeals and the United States District Court for the District in which the Employee is or was employed.

## **Article 13 – Arbitrator Authority**

The Arbitrator shall conduct the arbitration. The Arbitrator shall have the authority to render a decision in accordance with these Solutions InSTORE Early Dispute Resolution Rules and Procedures, and in a manner designed to promote the efficient and fair resolution of disputes.

The Arbitrator's authority shall be limited to deciding the case submitted by the parties in the arbitration. No decision by an arbitrator shall serve as precedent in other arbitrations.

Arbitration does not alter the employee's employment status. The employee's employment status remains alterable at the discretion of the Company and/or terminable at any time, at the will of either the employee or the Company, with or without cause or prior notice. Accordingly, the Arbitrator shall have no authority to alter the employee's employment status by, for example, requiring the Company to have "cause" to discipline or discharge an employee.

The Arbitrator may not otherwise change the terms and conditions of an



employee's employment unless required by federal, state or local law, or as a remedy for the violation of applicable law by the Company with respect to the employee.

The Arbitrator shall have the power to award sanctions against a party and/or the party's attorney for failure to comply with these Solutions InSTORE Early Dispute Resolution Procedures, for any ground set forth in Rule 11 of the Federal Rules of Civil Procedure (as such rule may be amended), or for the violation of an order issued by the Arbitrator. These sanctions may be monetary and/or non-monetary. Monetary sanctions may include an order requiring the sanctioned party or attorney to reimburse the other party or attorney for the attorney's fees, costs, or other expenses incurred as a result of the conduct giving rise to the sanction. Non-monetary sanctions may include an order dismissing some or all of the claims asserted by the sanctioned party or excluding or limiting the evidence that the sanctioned party may present in the arbitration.

#### **Article 14 – Award**

Within thirty (30) calendar days after the later of the close of the hearing or the receipt of post-hearing briefs, if any, the Arbitrator shall mail to the parties a written decision. The decision shall specify appropriate remedies, if any, if a violation of law is found. If the Employee's claim arises under federal or state statutory law, the award should include findings of fact and conclusions of law; otherwise, the inclusion of such findings and conclusion

is at the Arbitrator's discretion. The parties to an arbitration shall be provided with a copy of the Arbitrator's award.

#### **Article 15 – Fees and Expenses**

##### **a. Costs Other Than Attorney Fees**

##### **i. Definitions**

Costs of an arbitration include the daily or hourly fees and expenses (including travel) of the Arbitrator who decides the case, the filing or administrative fees charged by the AAA, the cost of a reporter who transcribes the proceeding, and the expenses of renting a room in which the arbitration is held. Incidental costs include such items as photocopying or the costs of producing witnesses or proof.

## **ii. Filing Fee/Costs of Arbitration**

An Employee initiating arbitration shall pay the cost of arbitration up to a maximum of the least of one (1) day's base pay or One Hundred Twenty-Five Dollars (\$125), whichever is less. Upon filing the request for arbitration, the Employee shall remit such fee. The Company shall pay the remainder of the costs of the arbitration. The Company shall pay the entire filing fee should it initiate arbitration. Except as provided below, each party shall pay its own incidental costs, including attorney's fees.

The AAA has developed guidelines for waiving administrative fees. This Plan is subject to those guidelines.

## **b. Reimbursement for Legal Fees or Costs**

The Program does not infringe on either party's right to consult with an attorney at any time. If the Employee proceeded through Steps 1 to 3 before initiating arbitration, or provided the Company with the Advance Notice of the intent to initiate arbitration in accordance with Article 6(b), the Company will reimburse the employee for legal consultation and/or representation during Step 4 of the Program, at a maximum benefit of Two Thousand Five Hundred Dollars (\$2,500) in a rolling twelve (12) month period up to a lifetime maximum of \$5,000. If the employee has not consulted or is not represented by counsel, the Company will reimburse the employee for incidental costs up to a maximum of Five Hundred Dollars (\$500) in a rolling twelve (12) month period. The employee will not be entitled to reimbursement for legal services or incidental costs if the arbitrator determines the employee's claim in arbitration is frivolous. Any reimbursement to the employee will occur following the conclusion of the proceedings upon submission of the employee's bills for the costs of legal services or incidental costs. Nothing in this Article 15 shall have any effect on the arbitrator's authority to grant any relief under Article 16, below.

## **c. Shifting of Costs**

If the Employee prevails in arbitration, whether or not monetary damages or remedies are awarded, the filing fee shall be refunded to the Employee. The Arbitrator may (based on the facts and circumstances) also require that the Company pay the Employee's share of the costs of arbitration and incidental costs.

## **Article 16 – Remedies and Damages**

Upon a finding that a party has sustained its burden of persuasion in establishing a violation of applicable law, the Arbitrator shall have the same power and authority as would a judge to grant any relief, including costs and attorney's fees, that a court could grant, in conformance with applicable principles of common, decisional and statutory law in the relevant jurisdiction.

## **Article 17 – Settlement**

The parties may settle their dispute at any time without involvement of the Arbitrator.

## **Article 18 – Enforceability**

The arbitration agreement, the arbitration proceedings, and any award rendered pursuant to them shall be interpreted under, enforceable in accordance with, and subject to the Federal Arbitration Act, 9 U.S.C. § 1, et seq. regardless of the state in which the arbitration is held or the substantive law applied in the arbitration. If for any reason the Federal Arbitration Act is inapplicable to enforce this agreement, the parties agree it will be enforced under the governing state arbitration statute(s).

## **Article 19 – Appeal Rights**

The decision rendered by the Arbitrator shall be final and binding as to both the Employee and the Company. Either party may appeal the Arbitrator's decision to a court in accordance with the provisions of the Federal Arbitration Act, 9 U.S.C. § 1, et seq.

## **Article 20 – Severability/Conflict with Law**

In the event that any of these Solutions InSTORE Early Dispute Resolution Rules and Procedures are held to be unlawful or unenforceable, the conflicting rule or procedure shall be modified automatically to comply with applicable law.

In the event of an automatic modification with respect to a particular rule or procedure, the remainder of these rules and procedures shall not be affected. An automatic modification of one of these rules or procedures shall apply only in regard to the particular jurisdiction and dispute in which the rule or procedure was determined to be in conflict with applicable law. In all other jurisdictions and disputes, these Solutions InSTORE Early Dispute Resolution Rules and Procedures shall apply in full force and effect.

## **Article 21 – Cancellation or Modification of Dispute Resolution Rules and Procedures or Program**

The Company may alter these Solutions InSTORE Early Dispute Resolution Rules and Procedures or cancel the Program in its entirety upon giving sixty (60) days advance written notice to Employees. Any such alterations or cancellations shall be effective sixty (60) days after the written notice is given to Employees, will only apply prospectively, and will not apply to claims that have arisen or which the Company had notice of before the effective date of the alteration or cancellation. In the absence of such advance written notice, or if the claims arose or the Company has notice of the claims before the effective date of the alteration or cancellation, the Solutions InSTORE Early Dispute Resolution Rules and Procedures that covered the Employee before the alteration or cancellation shall govern.

## **Article 22 – Change in Control of Macy’s**

A change in control of the Company shall nullify and cancel the Employee’s agreement to be covered by Step 4 – Arbitration, respecting any claims the Employee may have arising after such change. A change in control will be deemed to have occurred if:

- i. Macy’s is merged, consolidated, or reorganized into or with another corporation or other legal entity unaffiliated with Macy’s, resulting in less than a majority of the combined voting power of the then- outstanding securities of the surviving or resulting corporation or entity immediately after such transaction being held in the aggregate by those who were entitled to vote in the election of directors of Macy’s (the “Voting Stock”) immediately prior to such transaction; or
- ii. Macy’s sells or otherwise transfers substantially all of its assets to another corporation or other legal entity and, as a result of such sale or transfer, less than a majority of the combined voting power of the then-outstanding securities of such other corporation or entity immediately after such sale or transfer is held in the aggregate by the holders of Voting Stock of Macy’s immediately prior to such sale or transfer.

## **Article 23 – Sale of Subsidiary or Division or Operating Unit**

Should Macy’s sell a subsidiary or division or operating unit of a subsidiary (through the sale of stock or substantially all of its assets) and such transaction includes transferring Employees to a third-party, a transferring Employee’s agreement to arbitration under this Program shall remain in effect as to any Employment-Related Claims arising prior to such sale but only as to claims against Macy’s or its subsidiaries or business units and shall be null and void as to any such third-party.

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