

## RISK &amp; COMPLIANCE

# Pros and Cons of Mandatory Arbitration Provisions

*Including these in employee and student contracts allows schools to avoid the court system. But is it the right move for your school?*



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Each year when preparing enrollment and employment contracts, many independent schools confront the same question: Should the contracts include mandatory arbitration provisions? Such provisions require the resolution of disputes not through the court system, but via private arbitration.

There is no one-size fits all answer to this question, but another, more fundamental question can help. What are the school's goals for resolving disputes? Identifying some of the benefits and drawbacks of arbitration may help you determine if it will advance your school's goals.

## GOALS ADVANCED BY ARBITRATION

- **Promoting confidentiality:** School litigation can involve sensitive issues regarding student, parent or faculty conduct. Arbitration promotes greater confidentiality because dispute-related documents are submitted to a private arbitrator, rather than filed with the court. Consequently, the press and general public cannot readily access the materials. When both sides desire to keep the matter private, arbitration can help ensure that confidentiality is maintained. Keep in mind, however, that arbitration typically does not prevent a disgruntled employee or parent from speaking out about the dispute.
- **Avoiding class litigation:** One reason large companies often prefer arbitration is that properly drafted arbitration provisions potentially bar class-action lawsuits. Class

actions permit large numbers of plaintiffs to band together to sue, and tend to be highly distracting and expensive. Schools are generally at lower risk of being sued on a class-wide basis, but if you are concerned about a potential class action, arbitration may be worth considering.

- **Speed/lower attorney fees:** Traditionally, disputes typically resolved more quickly in arbitration than the court system, often resulting in lower attorneys' fees. In recent years, we have seen the arbitration process grow longer, with a corresponding increase in attorneys' fees. Still, particularly in states where the court system is struggling with budget cuts and case backlogs, arbitration remains a more efficient process.
- **Waiver of jury trials:** Does the concept of a jury resolving your case fill you with dread? If so, arbitration may be for you. In arbitration proceedings, a lawyer or retired judge serves as both judge and jury, resolving all issues in the case.

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## POTENTIAL DOWNSIDES TO ARBITRATION

- **No appellate review:** If a judge makes a legal mistake in conducting a trial, the injured party can appeal that decision to a higher court. But what happens if an arbitrator makes a legal mistake? Unfortunately, the injured party is almost certainly out of luck. The arbitration process provides virtually no grounds for appeal.
- **Limits on discovery:** In litigation, "discovery" means obtaining information from others through depositions, document requests and other means. This process tends to be more limited in arbitration proceedings. That's just fine in many cases, and can promote a more cost-effective resolution of the dispute. But arbitration may not be appropriate if you want to preserve the right to substantial discovery, particularly from individuals or organizations who are not parties to the arbitration proceeding.



- **Higher initial costs/arbitrator fees:** Arbitration imposes higher initial filing fees and requires the parties to pay for the arbitrator's time by the hour. In cases involving large dollar amounts, these increased costs may not be material. But in smaller cases, such as one in which a school is suing a parent to collect \$10,000 under an enrollment agreement, the filing and arbitrator fees may exceed the entire amount in dispute. Thus, arbitration may be less appropriate if the school anticipates that most litigated disputes will involve relatively small dollar amounts.
- **Limitations on cost-shifting:** Some states greatly limit the ability of parties to share the costs of arbitration or shift attorneys' fees or costs to the party who loses the case. In California, for example, an employer must pay 100 percent of the costs of the arbitration (e.g., filing fees, arbitrator's hourly fees) for most

disputes with employees. Again, this adds to the potential costs that the school must bear in arbitration.

- **Enforceability concerns:** Laws in some states may give parents or employees grounds to contest the enforceability of arbitration agreements. Litigating whether a court will require parties to arbitrate may by itself involve substantial cost.

Assessing your goals for dispute resolution will help you make an informed choice regarding whether arbitration is right for your school. Consult with legal counsel when making this decision, as drafting enforceable arbitration provisions raises tricky legal issues that are highly dependent on the laws of each state. **N**

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