



# MEMORANDUM

TO:	AICP Members
DATE:	[INSERT DATE OF DISTRIBUTION]
RE:	Arbitration Agreements and Class Action Waivers for California <b>Non-Union Workers</b>

This memorandum outlines the necessary elements that Members must include in arbitration agreements provided to employees in California<sup>1</sup>. This document is for members who do not want to use the template arbitration agreement made available by AICP. If you adopt the template arbitration agreement provided by AICP, the template addresses each of these points. **Please note:** Members cannot mandate that union employees execute arbitration agreements without union consent. This means that you cannot make arbitration agreements a mandatory condition of employment without first negotiating the same with the relevant union. Generally speaking, employers may ask a union member to voluntarily sign an arbitration agreement but an employer cannot refuse to hire them, or fire them, if they refuse to do so.

Arbitration agreements are commonly used in the entertainment industry as a means of resolving disputes outside of court. Members can and should require arbitration agreements as a condition of employment for your non-union employees. Given the rise in wage and hour claims brought against production companies in California, arbitration agreements can serve as a strong first line of defense to reduce the liability exposure associated with a class action lawsuit. However, for such agreements to be legally binding and enforceable, they must meet specific criteria established under California law and federal standards. While the model agreement provides for arbitration through JAMS, members are free to choose a different arbitration provider of their choosing.

Failure to adhere to these requirements can result in a Court deeming an arbitration agreement unenforceable. In such cases, not only will it lead to costly litigation, but it may also nullify any class action waiver. If you decide to utilize your own arbitration agreement, the following sets forth the primary factors that courts consider when evaluating the enforceability of arbitration agreements in California.

Please note: While this is permissible in California, other States may prohibit this as a term of employment, so if using such forms in other states, you should seek counsel's advice on the specifics of what is permissible.

## **Key Factors for Enforceability**

1. **Mutual and Bilateral** – The arbitration agreement must explicitly require that both the employer and worker agree to arbitrate claims that they may have against each other. The language of the agreement should be unambiguous, and the terms must be clearly presented to all parties involved.
2. **Selection of Neutral Arbitrator** – The arbitration agreement must provide for the selection of a mutually agreed upon neutral arbitrator. If the parties cannot agree on an arbitrator, then the arbitration agreement must provide for a neutral arbitration selection process.
3. **Extent of Discovery in Arbitration** – The arbitration agreement provides for sufficient discovery to adequately arbitrate the parties' claims. Notwithstanding the foregoing, the parties may agree

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to less discovery than court procedures permit, so long as the parties can conduct enough discovery to maintain statutory claims.

4. **Relief Available to Parties** – The arbitration agreement must provide for all types of relief that would otherwise be available if the claims were to proceed in court.
5. **Written Award** – The arbitration agreement must have language requiring the arbitrator to issue a written award revealing the essential findings and conclusions on which the award is based.
6. **Arbitration Costs** – The arbitration agreement must not pose unreasonable fees or costs on the employee. This means that the employer must bear all costs specific to the arbitration process, including the compensation of the arbitrator and all administrative costs.
7. **Other Considerations** – Along with the foregoing, we would recommend that Members' arbitration agreements contain a severance provision in the event that there is some issue with the arbitration agreement that can be subsequently severed by the Court.
  - We would also recommend that an arbitration agreement be provided as a standalone document that provides workers with the opportunity to review it with an attorney before signing.
  - Your arbitration agreements should also include language indicating that the arbitration agreement is entered into, interpreted, and/or subject to the Federal Arbitration Act ("FAA"). The FAA governs contracts "involving commerce." The US Supreme Court has interpreted the term "involving commerce" in the FAA as the functional equivalent of "affecting commerce." The FAA's requirement of a nexus to interstate commerce is law and any contract that affects interstate commerce suffices.
  - Lastly, consider whether any language barriers exist that would otherwise prevent your workers from understanding the terms and conditions of the arbitration agreement. If you are unsure whether a worker lacks the ability to read or speak English, a Member should offer the worker an opportunity to review a translated copy of the arbitration agreement (e.g., a Spanish version).

### **Class Action Waiver**

California courts generally uphold class action waivers included in arbitration agreements, provided that such waivers are not unconscionable and do not violate public policy. In order for a class action waiver to be enforceable, the waiver must be clearly stated, and the agreement should explain the implications of waiving the right to participate in class or representative actions.

For purposes of Members' arbitration agreements, we would recommend that you have a separate section in your arbitration agreements devoted solely to the class action waiver. The section should have a separate header entitled "Class Action Waiver" and should explain what class claims are being relinquished via the class action waiver.

### **Individual and Representative PAGA Claims**

The California Private Attorneys General Act ("PAGA") allows aggrieved employees to step into the shoes of the California state labor law enforcement agencies and pursue civil penalties for Labor Code violations. PAGA claims can be brought on both an individual and representative basis. As our Members know, PAGA claims can expose employers to substantial financial liability because of the cumulative penalties and legal fees associated with representative PAGA actions.



On July 1, 2024, Governor Newsom signed legislation to reform PAGA which strengthens worker protections, encouraged further employer compliance, and streamlined litigation processes. Since the PAGA reform went into effect, class action waivers play an even more critical role given the interplay with representative PAGA claims. Specifically, the new PAGA reform impacts an individual's PAGA standing requisites. Based on the new reform, a plaintiff must have suffered the same kind of injury that other aggrieved employees suffered. Previously, an employee could sue under PAGA on behalf of themselves and others regardless of whether they suffered a Labor Code violation.

Based on the PAGA reform and prior court rulings, now if a plaintiff loses their individual PAGA claims in arbitration, they have essentially lost standing to proceed with their representative PAGA claims. This is a big win for employers as it strengthens the fact that employers are permitted to enforce arbitration agreements that seek to compel individual claims under PAGA to arbitration. As such, your arbitration agreements and class action waivers for non-union employees should be carefully drafted to adhere to California's guidelines to ensure that individual PAGA claims are arbitrated and that representative PAGA claims are stayed pending the arbitration of the individual claims. AICP would recommend that you consult with an employment attorney regarding the drafting of an enforceable arbitration agreement.

## **ARBITRATION AGREEMENT**

This Arbitration Agreement (“Agreement”) is made and entered into effective \_\_\_\_\_ by and between \_\_\_\_\_, its parent, subsidiaries and affiliates (collectively, the “Company”) and \_\_\_\_\_ (“Employee”)(individually referred to as “Party” or collectively as “Parties”).

WHEREAS, Employee and Company desire to resolve any and all disputes between them in the most expeditious and economical fashion possible, regardless of when such claims arose or the date they were asserted; and

WHEREAS, Employee and Company recognize and agree that arbitration of any and all disputes between them through binding, impartial arbitration is in the best interest of both Parties, in lieu of a jury or other civil trial;

NOW THEREFORE, in consideration of the mutual promises, covenants, and conditions set forth here, the Parties agree as follows:

1. Any and all claims or controversies arising out of Employee’s applications or candidacy for employment, employment with, or cessation of employment with the Company shall be resolved and administered by JAMS, pursuant to the JAMS Employment Arbitration Rules & Procedures (“Rules”) in effect at the time of arbitration (available at <http://www.jamsadr.com/rules-employment-arbitration/>). If any term or provision of the Rules conflicts with any term or provision of this Agreement, the term or provision of this Agreement shall prevail.

2. Except as otherwise provided herein, arbitration may be initiated by either the Employee or the Company, to be held in the County of California where the Employee last worked for the Company or a mutually agreeable forum. To the extent allowed by law, the claims which are subject to arbitration shall include, but not be limited to, any and all employment related claims or controversies, including without limitation, any claim of breach of contract, breach of employment agreement, breach of covenant of good faith and fair dealings, negligent supervision or hiring, wrongful discharge, claims for minimum and overtime wages, meal and/or rest period claims, inaccurate wage statement claims, breach of privacy claims, intentional or negligent infliction of emotional distress claims, fraud, defamation, and divulgence of trade secrets of any kind.

This Agreement is also specifically intended to provide for final and binding arbitration of claims that could be asserted under all state and federal anti-discrimination laws, including but not limited to the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Family and Medical Leave Act. Employee specifically agrees to arbitrate all claims for discrimination and harassment in employment on the basis of race, color, age, sex, religion, ancestry, national origin, marital status, sexual orientation, gender, gender identity, gender expression, mental disability, physical disability, veteran or military status, medical condition, genetic information, political activity, or any other statutorily-protected basis under the procedure set forth in the preceding paragraph and not through a court of law. It shall also include any and all claims Employee may have under the Fair Labor Standards Act, the California Labor Code, and the Industrial Welfare Commission Wage Orders, as well as any other state and federal statutes. This Agreement is further intended to apply to any claim Employee may have against any of the Company’s owners, officers, directors, employees, agents, managing agents, or any of its affiliated or related entities, and to any and all past and future employment relationships Employee may have with the Company regardless of job position or title.

3. Notwithstanding the provisions of this Agreement, Employee shall have the right to file a claim for workers' compensation and unemployment insurance benefits with the appropriate state agencies, unfair labor practice charges with the National Labor Relations Board, and administrative charges with the Equal Employment Opportunity Commission, California Department of Fair Employment and Housing, and any similar state agency. Unless otherwise required by applicable law, all other employment-related claims shall be resolved by final and binding arbitration and not by a jury in a court of law.

4. The Company shall bear those costs specific to the arbitration process, including the compensation of the Arbitrator. The Parties may be represented by their own attorneys in the arbitration proceeding and, except as may otherwise be required by law, shall be responsible for their own attorneys' fees and costs incurred in presenting their case to the Arbitrator. The Arbitrator shall render a written award within thirty (30) days after the matter is submitted for determination, and the award of the arbitrator shall be final and binding on the Parties.

5. The arbitration shall be held before a single arbitrator as agreed to by the Parties, who shall be an attorney at law and an experienced employment law arbitrator. The arbitrator can be selected through the Parties' mutual agreement. If an arbitrator cannot be mutually agreed upon, the Parties will utilize JAMS arbitration selection process, pursuant to the JAMS Employment Arbitration Rules & Procedures ("Rules") in effect at the time of arbitration (available at <http://www.jamsadr.com/rules-employment-arbitration/>). The list of arbitrators proposed by JAMS shall consist of those persons who are experienced in the Parties affairs.

The Parties are authorized to conduct discovery sufficient to adequately arbitrate the Parties' claims, including access to essential documents and witnesses, consistent with what would otherwise be available in a court of law. The Arbitrator shall have the power to award all legal relief available in a court of law, including any and all damages that may be available for any of the claims asserted. In addition, each of the Parties shall retain all defenses that they would have in a judicial proceeding, including defenses based on the expiration of the statute of limitations and that the damages being sought are not authorized or are excessive.

6. This Agreement is entered into under the Federal Arbitration Act, and shall be interpreted and construed in accordance with the law and procedures developed under the statutes.

7. Employee and Company enter into this Agreement freely and voluntarily and without any form of coercion, duress or undue influence. The Parties agree that by signing this Agreement they have entered into a binding legal agreement.

8. If for any reason, any provision of this Agreement is deemed by an arbitrator or a court of competent jurisdiction to be invalid, illegal, unenforceable, or otherwise invalid, all remaining provisions shall remain in full force and effect, insofar as they are consistent with existing law.

9. This Agreement supersedes any and all prior agreements or understandings between the Employee and the Company concerning the subject matter hereof and this Agreement, and constitutes the entire agreement between the Parties with respect thereto. This Agreement may be modified in writing only, duly executed by the Employee and an officer of the Company.

10. With the exception of representative PAGA claims, any claim purporting to be brought as a class action, collective action or representative action will be decided under this Agreement as an individual claim. Nonetheless claims brought by or against either the Employee or Company by similarly situated

parties, that are based upon a common set of factual allegations will be consolidated by JAMS for the purposes of arbitration, before one arbitrator, unless otherwise agreed to in writing by all parties, or determined to be unjust or unmanageable by the arbitrator.

### **CLASS ACTION WAIVER**

Employee and Company agree that each will not assert class action claims against the other in arbitration or otherwise. Employee and Company waive their right to bring, or participate in, any representative actions which may be waived, to the fullest extent permissible by law. Class action procedures will not apply in any arbitration pursuant to this Agreement. All individual claims under the Private Attorneys General Act, Labor Code §2698, *et. seq.* (“PAGA”) arising from or premised on violations personally sustained by any party to this Agreement (i.e., individual PAGA claims) must be submitted to binding arbitration pursuant to this Agreement. If, under applicable law, any representative PAGA claims exist, such representative PAGA claims cannot be waived and must be litigated in a civil court of competent jurisdiction and not in arbitration. Employee and the Company agree that litigation of any such representative PAGA claims shall be stayed pending the outcome of Employee’s individual claims in arbitration, including any individual PAGA claims.

COMPANY

EMPLOYEE

Signed: \_\_\_\_\_

Signed: \_\_\_\_\_

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

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_