I. Are pre-injury waivers/releases of claims for injury or death enforceable in Pennsylvania?

Yes - pre-injury waivers or releases of claims for injury or death are enforceable in Pennsylvania as long as they (1) do not contravene public policy; (2) are between two persons relating to their own private affairs; (3) are the result of bargaining and not the product of an adhesion contract. See, Topp Copy Prods., Inc. v. Singletary, 533 Pa. 468, 471, 626 A.2d 98, 99 (1993); see also, Hinkal v. Pardoe, 2016 PA Super 11, 133 A.3d 738, 2016 Pa. Super. LEXIS 32 (Pa. Super. Ct., 2016) (upholding release in gym membership agreement despite its location on reverse side of form). Contracts providing for immunity from liability for negligence are strictly construed and must spell out the parties’ intention with specificity and particularity. See, Topp Copy Prods., 533 Pa. at 471, 626 A.2d at 99; see also, Feleccia v. Lackawanna Coll., 2017 PA Super 44 (2017)(finding language insufficient to relieve party of consequences of its own negligence). Recognizing that the law disfavors exculpatory contracts generally, there can be no questions concerning the intent of the parties and the clause will be construed against the party seeking indemnity, who also bears the burden of establishing the enforceability of the agreement. See, Topp Copy Prods., Inc., 533 Pa. at 471, 626 A.2d at 99. Despite this, employees are encompassed by a release which only mentions the employer unless there is an express indication that employees are removed from the protection of the release . Tayar v. Camelback Ski Corp., 616 Pa. 385, 395; 47 A.3d 1190, 1196-1197 (2012).

There are limitations to the enforceability of these waivers. For example, an attempted release of reckless conduct is against public policy. Tayar, 616 Pa. at 405; 47 A.3d 1190 (2012) (“there is a dominant public policy against allowing exculpatory releases of reckless behavior, which encourages parties to adhere to minimal standards of care and safety”). Also, with respect to minors, Pennsylvania statutory law provides that only an “individual 18 years of age and older shall have the right to enter into binding and legally enforceable contracts...”. 23 Pa.C.S. § 5101. Therefore, a pre-injury release entered into by parents or legal guardians on behalf of a minor or by the minor him/herself may be voidable. See, Simmons v. v. Parkette Nat’l Gymnastic Training Center, 670 F. Supp. 140, 143-144 (E.D. Pa. 1987)(acknowledging a lack of binding precedent under Pennsylvania law, but concluding that parents could not bind a minor plaintiff by signing a pre-injury release and further predicting that the Pennsylvania courts would not bind the minor plaintiff to the pre-injury release she also signed); see also, Milicic v. Basketball Mktg. Co., 2004 PA Super 333, P. 12, 857 A.2d 689, 695 (2004)(relying on Simmons to grant preliminary injunction relating to an endorsement deal signed by an NBA prospect when he was 16 years old).

II. Are pre-injury waivers of jury trials enforceable in Pennsylvania?

Yes – pre-injury waivers of jury trials can be enforced in Pennsylvania. See, e.g., Taylor v. Extendicare Health Facilities, Inc., 147 A.3d 490, 508 (Pa. 2016)( “While one's right to a jury trial may be waived, it is not at all apparent that signatories to arbitration agreements are aware that they waive their right to a jury trial upon the execution of an arbitration agreement”); MacPherson v. Magee Mem. Hosp. for Convalescence, 128 A.3d 1209, 1221-1222 (Pa. Super. 2015)(Noting a conspicuous, large, bolded notification that the parties, by signing, are waiving
the right to a trial before a judge or jury and commenting: “Indeed, that is the purpose of arbitration.”).

III. Are agreements restricting claims for injury or death to binding arbitration enforceable in Pennsylvania?

Yes – the cases addressing enforceability of arbitration agreements in Pennsylvania, closely related to the issue of waiving a jury trial, have found that such agreements are generally enforceable. See, e.g., Taylor, 147 A.3d at 508 & 512-513 (applying the Federal Arbitration Act (FAA), but remanding the case for a determination whether there were applicable contract defenses to the clause); MacPherson, 128 A.3d at 1219 (citation omitted) (test is to first determine whether valid agreement exists and, if so, whether dispute is within the terms of that agreement). There is no categorical rule prohibiting arbitration of any particular types of claims. General contract principles such as fraud, duress or procedural or substantive unconscionability along with constitutional protections and public policy considerations will be applied. However, these issues are decided very narrowly on a case-by-case basis. Taylor, 147 A.3d at 509. In situations where a decedent had signed such an agreement, it may be found valid as against the personal representative of the estate of the decedent, but it may not be enforceable against the decedent’s beneficiaries for their individual claims. MacPherson, 128 A.3d at 1226-1227 (citation omitted) (distinguishing enforceability of arbitration agreement against estate representative from individual claims enjoyed by enumerated beneficiaries in wrongful death actions).