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Massachusetts

Are mandatory arbitration provisions recognized in your state? If so, are there any limitations to its enforcement?

Mandatory arbitration provisions are recognized in Massachusetts. There are very few limitations to its enforcement as the Commonwealth of Massachusetts has a preference to enforce Arbitration provisions absent the clause not covering the dispute at hand, or no lawful relief being granted. The Massachusetts Uniform Arbitration Act, entitled “Validity of Agreements; Non-applicability to Collective Bargaining Agreements” states as follows:

“A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. The provisions of this chapter shall not apply to collective bargaining agreements to arbitrate, which are subject to the provisions of chapter one hundred and fifty, except as provided by the provisions of chapter one hundred and fifty-two.”ⁱ

I. Enforcement of Arbitration Agreements

The Act provides that if a party to the arbitration agreement denies the existence of the agreement to arbitrate, “the court *shall* proceed summarily to the determination of the issue so raised, and shall, if it finds for the applicant, order arbitration.”ⁱⁱ

Indeed the U.S. Supreme Court has stated: “[w]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that ‘an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.’”ⁱⁱⁱ Absent “positive assurance” that the clause in question does not cover the dispute at hand, or that no lawful relief can be granted, a motion to compel arbitration is not to be denied.”^{iv}

II. Judicial Review of Arbitration Award

The Massachusetts Court of Appeals held arbitration was mandatory under a clause stating disputes “shall be determined by binding arbitration conducted in Boston, Massachusetts, at the election of the aggrieved party.”^v There, the clause stating disputes “shall be determined by binding arbitration conducted in Boston, Massachusetts, **at the election** of the aggrieved party” and that nothing in agreement deprived either party of right to obtain injunctive or other equitable relief did not give to contractor as aggrieved party the right to elect between arbitration or litigation of

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dispute with landowner, but provided the contractor with a right to mandatory arbitration while also empowering an arbitrator to grant injunctive or other equitable relief at the request of either party. Reading the clause as entitling the aggrieved party to elect between arbitration or litigation would require court to ignore “shall,” and render superfluous the language on injunctive or other equitable relief and allow for multiple proceedings.^{vi}

III. Arbitration - Advantages and Disadvantages

Advantages

1. The dispute is typically resolved sooner because arbitration can be scheduled within a few months and discovery is less formal.
2. Arbitration may be less expensive than litigation because dispute may be resolved sooner and potentially with less discovery.
3. Arbitration is a private process meaning evidence, statements, and arguments are not public record.
4. It is common that agreements typically require that Massachusetts law govern disputes. In negligence type situations, Massachusetts is a modified comparative negligence jurisdiction, which means that a plaintiff that is more than 50% negligent in causing their injuries is barred from recovery; if the plaintiff’s negligence is 50% or less, their recovery will be reduced in proportion to their percentage of negligence.
5. Other types of agreement often provide that consider disputes shall be submitted to the American Arbitration Association (AAA) for resolution. AAA is a well-established organization with written procedures for discovery and other issues. However, AAA arbitration fees can be expensive.
6. The parties choose their arbitrator, who may be a practitioner with experience in the relevant area of law for the dispute.

Disadvantages

1. Arbitrators tend to favor plaintiffs and will likely make a monetary award whereas a jury trial may mitigate the potential for unfairness.
2. In some cases, arbitration can be as expensive as litigation.

What is your state’s law, if any, regarding gift cards, subscription services and loyalty programs?

Massachusetts has codified 12 CFR § 1005.20 for requirements of gift cards and gift certificates. A “Gift certificate” means a card, code, or other device that is: (i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount that may not be increased or reloaded in exchange for payment; and (ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.^{vii}

A “Store gift card” means a card, code, or other device that is: (i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (ii) Redeemable upon presentation at a single merchant or an affiliated group of merchants for goods or services.^{viii}

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A “General-use prepaid card” means a card, code, or other device that is: (i) Issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in a specified amount, whether or not that amount may be increased or reloaded, in exchange for payment; and (ii) Redeemable upon presentation at multiple, unaffiliated merchants for goods or services, or usable at automated teller machines.^x

A “Loyalty, award, or promotional gift card” means a card, code, or other device that: (i) Is issued on a prepaid basis primarily for personal, family, or household purposes to a consumer in connection with a loyalty, award, or promotional program; (ii) Is redeemable upon presentation at one or more merchants for goods or services, or usable at automated teller machines; and (iii) Sets forth the following disclosures, as applicable: (A) A statement indicating that the card, code, or other device is issued for loyalty, award, or promotional purposes, which must be included on the front of the card, code, or other device; (B) The expiration date for the underlying funds, which must be included on the front of the card, code, or other device; (C) The amount of any fees that may be imposed in connection with the card, code, or other device, and the conditions under which they may be imposed, which must be provided on or with the card, code, or other device; and (D) A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain fee information, which must be included on the card, code, or other device.^x

A gift certificate, is defined as, sold, or offered to be sold and shall be valid for not less than 7 years after its date of issuance.^{xi} The date of issuance and the expiration date shall be clearly identified on its face, subject to section 75C of chapter 266, or, if an electronic card with a banked dollar value, clearly printed upon a sales receipt transferred to the purchaser of the electronic card upon the completed transaction, or otherwise made available to the purchaser or holder of the electronic card through means of an Internet site or a toll free information telephone line. A gift certificate not clearly marked with an expiration date or for which the expiration date is not otherwise made available as provided in this section shall be redeemable in perpetuity.

Once an expiration date has been reached, the issuer of the gift certificate shall not be subject to section 75. A purchaser or holder of a gift certificate which, by its terms, prohibits the purchaser or holder from adding value thereto and which has been redeemed for at least 90 per cent of its face value shall make an election to receive the balance in cash or continue using the gift certificate. A purchaser or holder of a gift certificate which, by its terms, authorizes the purchaser or holder to add value thereto and which has been redeemed in part, such that the value remaining is \$5.00 or less, shall make an election to receive the balance in cash or continue using the gift certificate. A gift certificate with a zero balance shall be void.^{xii}

Compliance with 12 CFR 1005.20 constitutes compliance with 209 CMR 31.20, provided, however, that a gift certificate, as defined in M.G.L. c. 255D, § 1, sold or offered to be sold shall be valid for not less than seven years after its date of issuance, or in accordance with M.G.L. c. 200A. 209 CMR 31.20 deals with Massachusetts adopting the federal Truth in Lending Act.

Other relevant portions of the Massachusetts Law include:

- Dormancy or inactivity fee. The terms “dormancy fee” and “inactivity fee” mean a fee for non-use of or inactivity on a gift certificate, store gift card, or general-use prepaid card.
- Service fee. The term “service fee” means a periodic fee for holding or use of a gift certificate, store gift card, or general-use prepaid card. A periodic fee includes any fee that may be imposed on a gift certificate, store gift card, or general-use prepaid card from time to time for holding or using the certificate or card.
- Activity. The term “activity” means any action that results in an increase or decrease of the funds underlying a certificate or card, other than the imposition of a fee, or an adjustment due to an error or a reversal of a

prior transaction.

- Exclusions. The terms “gift certificate,” “store gift card,” and “general-use prepaid card”, as defined in paragraph (a) of this section, do not include any card, code, or other device that is:
 - Useable solely for telephone services;
 - Reloadable and not marketed or labeled as a gift card or gift certificate. For purposes of this paragraph, the term “reloadable” includes a temporary non-reloadable card issued solely in connection with a reloadable card, code, or other device;
 - A loyalty, award, or promotional gift card;
 - Not marketed to the general public;
 - Issued in paper form only; or
 - Redeemable solely for admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services in conjunction with admission to such events or venues, either at the event or venue or at specific locations affiliated with and in geographic proximity to the event or venue.
- Form of disclosures
 - Clear and conspicuous. Disclosures made under this section must be clear and conspicuous. The disclosures may contain commonly accepted or readily understandable abbreviations or symbols.
 - Format. Disclosures made under this section generally must be provided to the consumer in written or electronic form. Except for the disclosures in paragraphs (c)(3) and (h)(2) of this section, written and electronic disclosures made under this section must be in a retainable form. Only disclosures provided under paragraphs (c)(3) and (h)(2) may be given orally.
 - Disclosures prior to purchase. Before a gift certificate, store gift card, or general-use prepaid card is purchased, a person that issues or sells such certificate or card must disclose to the consumer the information required by paragraphs (d)(2), (e)(3), and (f)(1) of this section. The fees and terms and conditions of expiration that are required to be disclosed prior to purchase may not be changed after purchase.
 - Disclosures on the certificate or card. Disclosures required by paragraphs (a)(4)(iii), (d)(2), (e)(3), and (f)(2) of this section must be made on the certificate or card, or in the case of a loyalty, award, or promotional gift card, on the card, code, or other device. A disclosure made in an accompanying terms and conditions document, on packaging surrounding a certificate or card, or on a sticker or other label affixed to the certificate or card does not constitute a disclosure on the certificate or card. For an electronic certificate or card, disclosures must be provided electronically on the certificate or card provided to the consumer. An issuer that provides a code or confirmation to a consumer orally must provide to the consumer a written or electronic copy of the code or confirmation promptly, and the applicable disclosures must be provided on the written copy of the code or confirmation.
- Prohibition on imposition of fees or charges. No person may impose a dormancy, inactivity, or service fee with respect to a gift certificate, store gift card, or general-use prepaid card, unless:
 - There has been no activity with respect to the certificate or card, in the one-year period

- ending on the date on which the fee is imposed;
- The following are stated, as applicable, clearly and conspicuously on the gift certificate, store gift card, or general-use prepaid card:
 - (i) The amount of any dormancy, inactivity, or service fee that may be charged;
 - (ii) How often such fee may be assessed; and
 - (iii) That such fee may be assessed for inactivity; and
 - Not more than one dormancy, inactivity, or service fee is imposed in any given calendar month.
- Prohibition on sale of gift certificates or cards with expiration dates. No person may sell or issue a gift certificate, store gift card, or general-use prepaid card with an expiration date, unless:
 - The person has established policies and procedures to provide consumers with a reasonable opportunity to purchase a certificate or card with at least five years remaining until the certificate or card expiration date;
 - The expiration date for the underlying funds is at least the later of:
 - (i) Five years after the date the gift certificate was initially issued, or the date on which funds were last loaded to a store gift card or general-use prepaid card; or
 - (ii) The certificate or card expiration date, if any;
 - The following disclosures are provided on the certificate or card, as applicable:
 - The expiration date for the underlying funds or, if the underlying funds do not expire, that fact;
 - A toll-free telephone number and, if one is maintained, a Web site that a consumer may use to obtain a replacement certificate or card after the certificate or card expires if the underlying funds may be available; and
 - Except where a non-reloadable certificate or card bears an expiration date that is at least seven years from the date of manufacture, a statement, disclosed with equal prominence and in close proximity to the certificate or card expiration date, that:
 - (A) The certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and;
 - (B) The consumer may contact the issuer for a replacement card; and
 - No fee or charge is imposed on the cardholder for replacing the gift certificate, store gift card, or general-use prepaid card or for providing the certificate or card holder with the remaining balance in some other manner prior to the fund's expiration date, unless such certificate or card has been lost or stolen.
 - Additional disclosure requirements for gift certificates or cards. The following disclosures must be provided in connection with a gift certificate, store gift card, or general-use prepaid card, as applicable:
 - Fee disclosures. For each type of fee that may be imposed in connection with the certificate or card (other than a dormancy, inactivity, or service fee subject to the disclosure requirements under paragraph (d)(2) of this section), the following information

must be provided on or with the certificate or card:

- (i) The type of fee;
 - (ii) The amount of the fee (or an explanation of how the fee will be determined); and
 - (iii) The conditions under which the fee may be imposed.
- Telephone number for fee information. A toll-free telephone number and, if one is maintained, a Web site, that a consumer may use to obtain information about fees described in paragraphs (d)(2) and (f)(1) of this section must be disclosed on the certificate or card.
- Compliance dates
 - (1) Effective date for gift certificates, store gift cards, and general-use prepaid cards. Except as provided in paragraph (h) of this section, the requirements of this section apply to any gift certificate, store gift card, or general-use prepaid card sold to a consumer on or after August 22, 2010, or provided to a consumer as a replacement for such certificate or card.
 - (2) Effective date for loyalty, award, or promotional gift cards. The requirements in paragraph (a)(4)(iii) of this section apply to any card, code, or other device provided to a consumer in connection with a loyalty, award, or promotional program if the period of eligibility for such program began on or after August 22, 2010.
- Temporary exemption
 - (1) Delayed mandatory compliance date. For any gift certificate, store gift card, or general-use prepaid card produced prior to April 1, 2010, the mandatory compliance date of the requirements of paragraphs (c)(3), (d)(2), (e)(1), (e)(3), and (f) of this section is January 31, 2011, provided that an issuer of such certificate or card:
 - (i) Complies with all other provisions of this section;
 - (ii) Does not impose an expiration date with respect to the funds underlying such certificate or card;
 - (iii) At the consumer's request, replaces such certificate or card if it has funds remaining at no cost to the consumer; and
 - (iv) Satisfies the requirements of paragraph (h)(2) of this section.
 - (2) Additional disclosures. Issuers relying on the delayed effective date in § 1005.20(h)(1) must disclose through in-store signage, messages during customer service calls, Web sites, and general advertising, that:
 - (i) The underlying funds of such certificate or card do not expire;
 - (ii) Consumers holding such certificate or card have a right to a free replacement certificate or card, which must be accompanied by the packaging and materials typically associated with such certificate or card; and
 - (iii) Any dormancy, inactivity, or service fee for such certificate or card that might otherwise be charged will not be charged if such fees do not comply with section 916 of the Act.

- (3) Expiration of additional disclosure requirements. The disclosures in paragraph (h)(2) of this section:
 - (i) Are not required to be provided on or after January 31, 2011, with respect to in-store signage and general advertising.
 - (ii) Are not required to be provided on or after January 31, 2013, with respect to messages during customer service calls and Web sites.
- Emerging areas of law dealing with gift cards, subscription services and loyalty programs include gaming and marijuana.
 - 935 MA ADC 500.105 provides regulation for Marijuana Advertising. In relevant part, it is prohibited through the marketing of free promotional items including, but not limited to, gifts, giveaways, discounts, points-based reward systems, customer loyalty programs, coupons, and “free” or “donated” Marijuana, except as otherwise permitted by 935 CMR 500.105(4)(a)9. and except for the provision of Brand Name take-away bags by a Marijuana Establishment for the benefit of customers after a purchase is completed.
 - 205 MA ADC 139.05 provides reports and information shall be compiled and maintained by gaming licensee. Data derived from gaming licensee's player card/rewards card/loyalty program, cashless wagering system, player tracking software, or similar information systems including:
 - (a) Pursuant to M.G.L. c. 23K, §§ 21(a)(15) and 29, the amount of money spent and lost on gaming (excluding the value of promotional gaming credits played, but including any amounts that were subject to discretionary discounting for marketing or other similar purposes) by patrons at the gaming establishment who have been issued a player card or rewards card or who participated in a cashless wagering system, aggregated by, at a minimum, the patron's age, gender and home zip code provided by the patron and compiled on an annual basis or as otherwise directed by the commission.
 - (b) Pursuant to St 2011, c. 194, § 97, information, compiled by year, on player characteristics for patrons of the gaming establishment including, but not limited to, gender, age and region of residence, player behavior including, but not limited to, frequency of play, length of play, speed of play, denomination of play, amounts wagered at the gaming establishment and, if applicable, number of lines or hands played and characteristics of games played including, but not limited to, reel configuration, return-to-player or RTP, volatility index and denomination.

ⁱ G.L. c. 251, § 1

ⁱⁱ *Id*, see also *Wexler Constr. Co. Inc.*, 12 Mass. App. Ct. 160, 163 (1981).

ⁱⁱⁱ See, *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)

^{iv} See, *Barnstead v. Ridder*, 39 Mass. App. Ct. 934, 935 (1996), quoting *Massachusetts Coalition of Police, Local 165, AFL-CIO v. Northborough*, 416 Mass. 252, 256 (1993)

^v See, *Kingstown Corp. v. Black Cat Cranberry Corp.*, 65 Mass.App.Ct. 154 (2005)

^{vi} *Id*

^{vii} 12 CFR § 1005.20

^{viii} *Id*

^{ix} *Id*

^x *Id*

^{xi} M.G.L. c. 255D, § 1

^{xii} *Id*