

Michigan

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

Yes. Michigan public policy has long and “overwhelmingly favor[ed] arbitration as an inexpensive and expeditious alternative to litigation.”ⁱ Notably, Michigan courts also “clearly favor keeping all issues in a single forum.”ⁱⁱ This stance further upholds “the traditional principles of freedom of contract.”ⁱⁱⁱ

When conflicts arise, pursuant to the Michigan Uniform Arbitration Act (MUAA), courts “shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”^{iv} Nonetheless, “an arbitration provision is unenforceable if it is not a binding contract.”^v

Therefore, in taking the first step of assessing whether an arbitration agreement indeed exists, courts apply general contract interpretation principles.^{vi} In application, the court’s “primary task is to ascertain the intent of the parties at the time they entered into the agreement ... by examining the language of the agreement according to its plain and ordinary meaning.”^{vii} Courts must also “interpret and enforce clear and unambiguous language as it is written.”^{viii}

However, state law regarding “generally applicable contract defenses,” like duress, unconscionability, or fraud can be relied upon to invalidate mandatory arbitration provisions when evidenced.^{ix} As such, Michigan courts have dissected the applicability of mandatory arbitration provisions in the context of numerous contract formation arguments. The following are a few illustrative examples of Michigan courts’ approaches to such claims.

- **Mutual Assent:** “A contract to arbitrate does not exist unless it was formed by the mutual assent of the parties.”^x Nonetheless, there is an overruling presumption that an individual who signs an agreement “knows the nature of the instrument ... and understands its contents.”^{xi} Therefore, an individual’s “mere failure to read an agreement” is an unavailing defense to the enforcement of an agreement’s arbitration.^{xii} In turn, Michigan courts have upheld mandatory arbitration provisions in light of evidence that a plaintiff “knowingly and voluntarily enter[ed]” the agreement.^{xiii} Further, courts have also upheld arbitration agreements where “it is evident from the express words of the agreement and plaintiff’s actions that the agreement did not lack mutual assent.”^{xiv}
- **Ambiguity:** In *Lebenbom*, the Michigan Court of Appeals was unpersuaded that the terms of the arbitration clause were ambiguous.^{xv} The Court reasoned that the contractual terms at issue were “not equally susceptible to more than one meaning” and “not in irreconcilable conflict with each other.”^{xvi} Thus, where the

agreement “read as a whole” reflected that the parties agreed that “any and all controversies ... would be submitted to and decided by arbitration,” the plaintiff’s ambiguity claim was unavailing.^{xvii}

- **Unconscionability:** The *Lebenbom* Court also noted that both procedural and substantive unconscionability must exist for a contract provision to be deemed unconscionable.^{xviii} The Court did not find procedural liability where there was no indication that the plaintiff was a “weaker party” with “no realistic alternative to acceptance of the [disputed] term.”^{xix} The Court further explained that when there is no evidence of “coercion, mistake, or fraud,” it is presumed that a party signing an agreement “know[s] the nature of the document” and “understand[s] its contents.”^{xx} The Court also did not find substantive unconscionability where there was “nothing in the language” of the mandatory arbitration provision that was “‘inherently unreasonable’ or such that it shocks the conscience.”

It is important to emphasize that in each decision cited, the court upheld the mandatory arbitration provision at issue.

Next, courts assess whether the disputed issue falls within the scope of the arbitration clause and whether the dispute is explicitly exempt from arbitration under the contract’s terms.^{xxi} As to both inquiries, courts refer to the language of the agreement entered.^{xxii}

Even where plaintiffs have turned to other statutes or acts to sidestep mandatory arbitration provisions, Michigan courts concluded in favor of upholding the agreement to arbitrate.

For instance, where plaintiffs claimed that an agreement to arbitrate statutory employment discrimination claims was “invalid as a matter of public policy,” the Michigan Court of Appeals held that arbitration provisions are valid where (1) the parties have a valid and binding agreement to arbitrate that covers the claims, (2) the statute does not prohibit such agreements, and (3) the arbitration provision “does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights.”^{xxiii}

Additionally, in 2018, the Michigan Court of Appeals further acknowledged that it is not bound to follow the Federal Trade Commission (FTC) rule “prohibiting compulsory, binding arbitration of MMWA [Magnuson-Moss Warranty Act] claims” due to the Michigan Supreme Court’s 2004 rejection of the FTC’s conclusion in *Abela v. Gen. Motors Corp.*, 469 Mich. 603 (2004).^{xxiv} Thus, binding arbitration clauses in such matters remain valid and enforceable in Michigan.^{xxv}

Ultimately, in Michigan, “[d]oubts should be resolved in favor of arbitration” and “[t]he burden is on the party seeking to show nonarbitrability.”^{xxvi} However, it should also be noted that if an arbitration agreement falls under the Federal Arbitration Act (FAA), state courts will apply the FAA “to the extent that [state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”^{xxvii}

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

GIFT CARDS:

Pursuant to Section 3e of the Michigan Consumer Protection Act, retailers are prohibited from the following in relation to gift certificates or gift cards issued for retail goods or services.^{xxviii}

- (a) Refuse to accept a gift certificate for goods or services used or bought for use primarily for personal, family, or household purposes, including, but not limited to, goods or services advertised on sale or pursuant to a liquidation or closeout. This subdivision does not apply if the gift certificate has an expiration date that does not violate section 3g and it is presented for redemption after that expiration date;
- (b) In any manner restrict the holder of a gift certificate from using the gift certificate in a manner consistent with the stated terms and conditions of the gift certificate;
- (c) Alter any term or condition of a gift certificate after it is issued;
- (d) If a gift certificate has any terms or conditions, fail to disclose the terms and conditions to a prospective purchaser by doing any of the following:
 - (i) *If a gift certificate is offered for sale by mail, conspicuously stating in the offer that “terms and conditions are applied to gift certificates and gift cards.”*
 - (ii) *If a gift card is offered for sale by electronic, computer, or telephonic means, including a statement that “terms and conditions are applied to gift certificates or gift cards” before the prospective purchaser is able to purchase the gift certificate or conspicuously including that statement in the electronic message offering the gift certificate for purchase;*
- (e) If a gift certificate has any terms or conditions, fail to disclose the terms and conditions by conspicuously printing the terms and conditions on 1 of the following:
 - (i) The gift certificate;
 - (ii) The envelope or packaging containing the gift certificate, *if a toll-free telephone number to access the terms and conditions is printed on the gift certificate;*
 - (iii) A separate printed document delivered to the purchaser, *if a toll-free telephone number to access the terms and conditions is printed on the gift certificate;*
- (f) If a gift certificate has any terms and conditions, fail to include in any advertisement or promotion for the gift certificate a notice that states that “terms and conditions are applied to gift certificates and gift cards;” and
- (g) If the value of the gift certificate or remaining balance is less than the purchase prices of goods or services, refuse to accept the gift certificate and apply it to the purchase price of the goods or services.

Furthermore, under Michigan law, retailers “shall not charge an inactivity fee or other service fee to a consumer for the possession or use of a gift certificate.”^{xxix} Notably, the statute specifies that a “service fee” does not include any fees charged to or paid by the consumer for the sale of the gift certificate, “unless the fee is deducted or debited from the face value of the gift certificate.”^{xxx}

Additionally, retailers are prohibited from selling consumers gift cards or gift certificates that expire “within a period of less than 5 years.”^{xxxi} However, a retailer is able to refuse a gift card issued more than five years ago, so long as the terms and conditions were “clearly and conspicuously disclosed and one of those terms and conditions was an expiration date of at least five years.”^{xxxii}

SUBSCRIPTION SERVICES:

Michigan does not have any statutes addressing subscription services in a way that is relevant to retailers.

LOYALTY PROGRAMS:

Michigan does not have any statutes specifically regulating loyalty programs. However, contract principles will generally apply to consumer disputes arising out of agreements to participate in such programs. While case law in this area is sparse, the Michigan Court of Appeals directly addressed this issue in 2018.

In *Galea*, the plaintiff claimed that she did not voluntarily participate in the defendants' employee friends discount program and never received a discount on her vehicle pursuant to the program.^{xxxiii} As such, the plaintiff claimed that the arbitration agreement included on the "Pricing and Acknowledgement" form for the program was inapplicable.^{xxxiv} Notably, this form contained the plaintiff's signature.^{xxxv}

Nonetheless, the plaintiff claimed that she did not voluntarily agree to the arbitration provision.^{xxxvi} However, for reasons touched upon in the preceding question as to binding arbitration provisions, the plaintiff's arguments were unavailing. Her signature appeared on a document that "clearly state[d] in conspicuous language and font that [she] is entering into an agreement to arbitrate in exchange for a friends and family discount."^{xxxvii} Furthermore, the plaintiff never denied signing the document and never claimed that her signature was a product of duress.^{xxxviii} Therefore, the Court determined that the arbitration agreement associated with the discount program was "valid and enforceable."^{xxxix}

What is your state's law, if any, regarding safeguarding consumer credit card or other private data (i.e., cyber security)?

Michigan does not have a comprehensive consumer privacy law. However, Michigan does have a general data breach notification statute, MCL 445.63 and 445.72. It applies to any person, legal entity, or agency that owns or licenses data included in a database. MCL 445.72(1). The statute also imposes certain obligations on any person, legal entity, or agency that maintains a database that includes data the person or agency does not own or license. MCL 445.72(2). The statute includes exceptions for: (1) Financial institutions that are subject to and in compliance with applicable interagency regulatory guidance provided at 70 Fed. Reg. 15,736 (March 29, 2005) (MCL 445.72(9)), and (2) Entities covered by and in compliance with the Health Information Portability and Accountability Act of 1996 (MCL 445.72(10)).

The general breach notification statute protects Michigan residents' "personal information," defined as a first name or initial with last name linked to one or more of the following data elements: (A) Social Security number; (B) Driver license number or state personal identification card number; or (C) Demand deposit or other financial account number or credit or debit card number in combination with any security code, access code, or password required to access the account. See MCL 445.63(r). The definition of "personal information" excludes information lawfully made available from federal, state, or local government records. MCL 445.72(17).

Under Michigan's general breach notification statute, if a covered entity maintains a database that includes data it does not own or license and discovers a security breach, it must notify the information's owner or licensor of the security breach, unless the entity or licensee determines that the security breach has not or is not likely to cause a Michigan resident to suffer substantial loss or injury or identity theft. MCL 445.72(2).

In Michigan, a covered entity's breach notification obligations are triggered when it discovers a "security breach," which is the unauthorized access and acquisition of data that compromises the security or confidentiality of computerized personal information maintained by a person or agency as part of a database of personal

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information regarding multiple individuals and the data is either: (A) Unencrypted and unredacted, or (B) Encrypted, if the person accessing and acquiring the information had unauthorized access to the encryption key. See MCL 445.63(b), (e), and 445.72(1).

The statute excludes unauthorized access to data by the covered entity's employee or other individual if all of the following criteria are met: (1) The employee or individual acted in good faith; (2) The access was related to the entity's activities; and (3) The employee or individual did not misuse or disclose any personal information to an unauthorized person. MCL 445.63(b).

Notably, Michigan's general breach notification statute does not include a private right of action but explicitly notes that it does not eliminate other remedies available by law. See MCL 445.72(15). Michigan's attorney general or prosecuting attorney may bring an action for any knowing failure to provide required notice of a security breach to recover a civil fine of up to \$250 for each failure and \$750,000 for multiple failures arising from the same security breach. MCL 445.72(13), (14).

Furthermore, many states have adopted generally applicable statutes that require non-governmental entities to protect and limit their use of Social Security numbers ("SSNs"). These statutes are in addition to state-level data security, data disposal, and data breach notification laws that generally protect personal information.

Michigan has a social security number privacy act, MCL 445.81 to 445.87, which applies prohibitions to all or more than four sequential digits of a SSN. Additional prohibitions include: (1) Using all or more than four sequential digits of SSN as the primary account number for an individual; and (2) Visibly printing all or more than four sequential digits of SSN on any identification badge or card, membership card, or permit or license. In Michigan, although solicitation or collection of SSNs is not prohibited, SSN protection or privacy policy is required with exceptions for those subject to and in compliance with the Fair Credit Reporting Act (FCRA) or the Gramm-Leach-Bliley Act (GLBA).

What is your state's law, if any, regarding the collection and handling of financial information?

Many states have enacted laws that require those who collect and maintain personal information to securely dispose of the data when they no longer wish to retain it. These state obligations apply in addition to sector-specific federal laws, including the Federal Trade Commission's Disposal Rule (16 C.F.R. §§ 682.1-682.5) and obligations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

In Michigan, MCL 445.63 and 445.72a governs the destruction of personal information by person or agency. MCL 445.63(r) defines "personal information" as the first name or first initial and last name linked to (i) Social Security number; (ii) Driver's license or state identification card number; or (iii) Demand deposit or other financial account, credit card, or debit card number with any required security or access code or password that permits access to any of the resident's financial accounts.

Under MCL 445.72a(4), individuals, businesses, and government agencies must destroy or arrange for the destruction of personal information by shredding, erasing, or otherwise modifying the data so that it cannot be read, deciphered, or reconstructed through generally available means. Exceptions and safe harbors include those subject to and in compliance with: (1) Federal laws concerning the disposal of records containing personal information; and (2) The Michigan Insurance Code of 1956 (MCL 500.100 to 500.8302).

ⁱ *Rembert v. Ryan's Fam. Steak Houses, Inc.*, 235 Mich. App. 118, 123 (1999) (emphasis added).

ⁱⁱ *Wilson Motors Inc. v. Credit Acceptance Corp.*, No. 295409, 2011 WL 1005127 (Mich. Ct. App. Mar. 22, 2011) (quoting

Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC, 276 Mich. App. 146, 163-164 (2007)).

ⁱⁱⁱ *Id.* at 123 (emphasis added).

^{iv} MCL § 691.1686(2); *PNK Servs., LLC v. M.D. Med. Distribution, LLC*, No. 2:20-CV-12320, 2021 WL 5864017 (E.D. Mich. Apr. 16, 2021).

^v *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405, 413 (1996) (emphasis added).

^{vi} *Galea v. FCA U.S. LLC*, 323 Mich. App. 360, 369 (2018) (citing *Horn v. Cooke*, 118 Mich. App. 740, 744-745 (1982) (emphasis added); see also *Altobelli v. Hartmann*, 499 Mich. 284, 295 (2016) (holding the same).

^{vii} *Altobelli*, 499 Mich. at 295 (2016).

^{viii} *Beck v. Park W. Galleries, Inc.*, 499 Mich. 40, 46 (2016).

^{ix} *Elete Enterprises, L.L.C. v. Gen. Steel Corp.*, No. 278946, 2008 WL 4649113, at *4 (Mich. Ct. App. Oct. 21, 2008)

^x *Galea v. FCA U.S. LLC*, 323 Mich. App. 360, 369 (2018).

^{xi} *Id.* (citing *Watts v. Polaczyk*, 242 Mich. App. 600, 604 (2000)).

^{xii} *Id.*

^{xiii} *Id.*

^{xiv} *Peterson v. Art Van Furniture*, No. 233745, 2003 WL 1985262, at *5 (Mich. Ct. App. Apr. 29, 2003).

^{xv} *Lebenbom v. UBS Fin. Servs., Inc.*, 326 Mich. App. 200, 216 (2018).

^{xvi} *Id.* (citing *Barton-Spencer v. Farm Bureau Life Ins. Co. of Michigan*, 500 Mich. 32, 40 n. 18 (2017)).

^{xvii} *Id.* at 216-217.

^{xviii} *Id.* at 217 (citing *Clark v. DaimlerChrysler Corp.*, 268 Mich. App. 138, 143-144 (2005)).

^{xix} *Id.* at 219 (quoting *Liparoto Constr., Inc. v. Gen. Shale Brick, Inc.*, 284 Mich. App. 25, 30 (2009)).

^{xx} *Id.* at 218-219 (quoting *Clark*, 268 Mich. App. at 144-145).

^{xxi} *Registered Nurses v. Hurley Med. Ctr.*, No. 343473, 2019 WL 1746846, at *1 (Mich. Ct. App. Apr. 18, 2019) (citing *Burns v. Olde Discount Corp.*, 212 Mich. App. 576, 580 (1995)) (emphasis added).

^{xxii} *Id.* at *4.

^{xxiii} *Rembert*, 235 Mich. App. at 156.

^{xxiv} *Galea*, 323 Mich. App. at 374 (emphasis added).

^{xxv} *Id.* at 365 (emphasis added).

^{xxvi} *Rembert*, 235 Mich. App. at 129.

^{xxvii} *Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-77 (1989).

^{xxviii} MCL § 445.903e.(1)(a)-(g) (emphasis added).

^{xxix} MCL § 445.903f (emphasis added).

^{xxx} *Id.*

^{xxxi} MCL § 445.903g (emphasis added).

^{xxxii} *Gift Cards & Gift Certificates*, MICHIGAN DEPT. OF ATTORNEY GENERAL, <https://www.michigan.gov/ag/consumer-protection/consumer-alerts/consumer-alerts/shopping/gift-cards-certificates#:~:text=That%20means%20a%20merchant%20that,or%20when%20value%20was%20added> (last visited December 15, 2022) (emphasis added).

^{xxxiii} *Galea*, 323 Mich. App. at 368.

^{xxxiv} *Id.* at 366-367.

^{xxxv} *Id.* at 366.

^{xxxvi} *Id.* at 367.

^{xxxvii} *Id.* at 369.

^{xxxviii} *Id.*

^{xxxix} *Id.* at 365.