

SENATE BILL NO. 165—SENATOR ROBERSON

FEBRUARY 17, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing arbitrators.
(BDR 3-44)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to arbitration; requiring, with certain exceptions, all arbitrators to be neutral and impartial; revising the qualifications for service as an arbitrator; revising certain provisions relating to disclosures by arbitrators; revising certain provisions relating to vacating awards in arbitral proceedings; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law, as set forth in the Uniform Arbitration Act of 2000 (NRS 38.206-38.248), recognizes the distinction between a neutral arbitrator and a nonneutral arbitrator. **Section 1** of this bill eliminates that distinction and instead requires all arbitrators to be neutral and impartial. However, **section 3** of this bill provides an exception to the requirements of **section 1** for parties who agree to the rules and procedures of an arbitral organization such as the American Arbitration Association if those rules or procedures require, under all circumstances, the appointment of a nonneutral arbitrator.

Existing law, under certain circumstances, prohibits a party to an arbitration agreement from agreeing to unreasonably restrict certain rights to disclosure by a neutral arbitrator. (NRS 38.217, 38.227) **Section 3** of this bill generally prohibits a party from agreeing to unreasonably restrict those rights to disclosure with respect to any arbitrator. If the parties have agreed to the rules and procedures of an arbitral organization and those rules or procedures require, under all circumstances, the appointment of a neutral arbitrator and a nonneutral arbitrator, **section 3** prohibits the parties from agreeing to unreasonably restrict those rights to disclosure with respect to the neutral arbitrator.

Existing law prohibits a party to an arbitration agreement from waiving or varying the effects of certain provisions of the Uniform Act, including, without limitation, a provision which requires a court to vacate an award made in an arbitral proceeding if there was evident partiality by a neutral arbitrator. (NRS 38.217, 38.241) **Section 3** of this bill generally expands this provision to require a court to



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vacate such an award if there was evident partiality by any arbitrator. If the parties have agreed to the rules and procedures of an arbitral organization which require, under all circumstances, the appointment of a neutral arbitrator and a nonneutral arbitrator, **section 3** requires a court to vacate such an award if there was evident partiality by a neutral arbitrator.

Existing law prohibits a person who has certain interests or relationships from serving as a neutral arbitrator. (NRS 38.226) **Section 5** of this bill prohibits such a person from serving as an arbitrator. However, because a party to an agreement to arbitrate or to an arbitral proceeding is authorized to waive this provision (NRS 38.217), the parties may choose to have a person with an interest or relationship described in **section 5** serve as an arbitrator.

Finally, **section 12** of this bill requires prospective application of the provisions of this bill to arbitration agreements unless the parties to an arbitration agreement or arbitral proceeding agree in a record that the provisions of the bill apply to an arbitration agreement entered into before October 1, 2011, the effective date of this bill.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 38 of NRS is hereby amended by adding thereto a new section to read as follows:

Except as otherwise provided in subsection 4 of NRS 38.217, all arbitrators must be neutral and impartial, including, without limitation, an arbitrator appointed unilaterally by a party to an agreement to arbitrate or to an arbitral proceeding.

Sec. 2. NRS 38.207 is hereby amended to read as follows:

38.207 As used in NRS 38.206 to 38.248, inclusive, *and section 1 of this act*, the words and terms defined in NRS 38.208 to 38.213, inclusive, have the meanings ascribed to them in those sections.

Sec. 3. NRS 38.217 is hereby amended to read as follows:

38.217 1. Except as otherwise provided in subsections 2 , ~~and~~ 3 ~~and~~ 4, a party to an agreement to arbitrate or to an arbitral proceeding may waive, or the parties may vary the effect of, the requirements of NRS 38.206 to 38.248, inclusive, *and section 1 of this act* to the extent permitted by law.

2. Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(a) Waive or agree to vary the effect of the requirements of subsection 1 of NRS 38.218, subsection 1 of NRS 38.219, NRS 38.222, subsection 1 or 2 of NRS 38.233, NRS 38.244 or 38.247;

(b) Agree to unreasonably restrict the right under NRS 38.223 to notice of the initiation of an arbitral proceeding;

(c) Agree to unreasonably restrict the right under NRS 38.227 to disclosure of any facts by a neutral arbitrator; or



(d) Waive the right under NRS 38.232 of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing under NRS 38.206 to 38.248, inclusive, *and section 1 of this act*, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

3. A party to an agreement to arbitrate or *to an arbitral proceeding* may not waive, or the parties may not vary the effect of, the requirements of this section or subsection 1 or 3 of NRS 38.216, NRS 38.221, 38.229, 38.234, subsection 3 or 4 of NRS 38.237, NRS 38.239, ~~38.241,~~ 38.242, subsection 1 or 2 of NRS 38.243, NRS 38.248 or 38.330.

4. A party to an agreement to arbitrate or to an arbitral proceeding may not waive, or the parties may not vary the effect of, the requirements of section 1 of this act unless the parties agree to the rules and procedures of an arbitral organization and those rules or procedures require, under all circumstances, the appointment of a nonneutral arbitrator.

Sec. 4. NRS 38.218 is hereby amended to read as follows:

38.218 1. Except as otherwise provided in NRS 38.247, an application for judicial relief under NRS 38.206 to 38.248, inclusive, *and section 1 of this act* must be made by motion to the court and heard in the manner provided by rule of court for making and hearing motions.

2. Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under NRS 38.206 to 38.248, inclusive, *and section 1 of this act* must be served in the manner provided by rule of court for the service of a summons in a civil action. Otherwise, notice of the motion must be given in the manner provided by rule of court for serving motions in pending cases.

Sec. 5. NRS 38.226 is hereby amended to read as follows:

38.226 1. If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitral proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

2. ~~[An]~~ *Except as otherwise provided in subsection 3, an individual who has a known, direct and material interest in the outcome of the arbitral proceeding or a known, existing and substantial relationship with a party may not serve as an arbitrator .* ~~[required by an agreement to be neutral.]~~



1 **3. If the parties have agreed, as described in NRS 38.217, to**
2 **the rules and procedures of an arbitral organization which**
3 **require, under all circumstances, the appointment of a nonneutral**
4 **arbitrator, the provisions of subsection 2 apply only to any**
5 **arbitrator who is appointed as a neutral arbitrator.**

6 **Sec. 6.** NRS 38.227 is hereby amended to read as follows:

7 38.227 1. Before accepting appointment, an individual who is
8 requested to serve as an arbitrator, after making a reasonable
9 inquiry, shall disclose to all parties to the agreement to arbitrate and
10 arbitral proceeding and to any other arbitrators any known facts that
11 a reasonable person would consider likely to affect the impartiality
12 of the arbitrator in the proceeding, including:

13 (a) A financial or personal interest in the outcome of the arbitral
14 proceeding; and

15 (b) An existing or past relationship with any of the parties to the
16 agreement to arbitrate or the arbitral proceeding, their counsel or
17 representatives, a witness or another arbitrator.

18 2. An arbitrator has a continuing obligation to disclose to all
19 parties to the agreement to arbitrate and arbitral proceeding and to
20 any other arbitrators any facts that the arbitrator learns after
21 accepting appointment which a reasonable person would consider
22 likely to affect the impartiality of the arbitrator.

23 3. If an arbitrator discloses a fact required by subsection 1 or 2
24 to be disclosed and a party timely objects to the appointment or
25 continued service of the arbitrator based upon the fact disclosed, the
26 objection may be a ground under paragraph (b) of subsection 1 of
27 NRS 38.241 for vacating an award made by the arbitrator.

28 4. If the arbitrator did not disclose a fact as required by
29 subsection 1 or 2, upon timely objection by a party, the court under
30 paragraph (b) of subsection 1 of NRS 38.241 may vacate an award.

31 5. ~~[An]~~ **Except as otherwise provided in subsection 6, an**
32 **arbitrator** ~~[appointed as a neutral arbitrator]~~ who does not disclose a
33 known, direct and material interest in the outcome of the arbitral
34 proceeding or a known, existing and substantial relationship with a
35 party is presumed to act with evident partiality for the purposes of
36 paragraph (b) of subsection 1 of NRS 38.241.

37 6. **If the parties have agreed, as described in NRS 38.217, to**
38 **the rules and procedures of an arbitral organization which**
39 **require, under all circumstances, the appointment of a nonneutral**
40 **arbitrator, the provisions of subsection 5 apply only to any**
41 **arbitrator who is appointed as a neutral arbitrator.**

42 7. If the parties to an arbitral proceeding agree to the
43 procedures of an arbitral organization or any other procedures for
44 challenges to arbitrators before an award is made, substantial
45 compliance with those procedures is a condition precedent to a



1 motion to vacate an award on that ground under paragraph (b) of
2 subsection 1 of NRS 38.241.

3 **Sec. 7.** NRS 38.241 is hereby amended to read as follows:

4 38.241 1. Upon motion to the court by a party to an arbitral
5 proceeding, the court shall vacate an award made in the arbitral
6 proceeding if:

7 (a) The award was procured by corruption, fraud or other undue
8 means;

9 (b) There was:

10 (1) ~~[Evident]~~ *Except as otherwise provided in subsection 5,*
11 *evident* partiality by an arbitrator ; ~~[appointed as a neutral~~
12 ~~arbitrator.];~~

13 (2) Corruption by an arbitrator; or

14 (3) Misconduct by an arbitrator prejudicing the rights of a
15 party to the arbitral proceeding;

16 (c) An arbitrator refused to postpone the hearing upon showing
17 of sufficient cause for postponement, refused to consider evidence
18 material to the controversy, or otherwise conducted the hearing
19 contrary to NRS 38.231, so as to prejudice substantially the rights of
20 a party to the arbitral proceeding;

21 (d) An arbitrator exceeded his or her powers;

22 (e) There was no agreement to arbitrate, unless the movant
23 participated in the arbitral proceeding without raising the objection
24 under subsection 3 of NRS 38.231 not later than the beginning of
25 the arbitral hearing; or

26 (f) The arbitration was conducted without proper notice of the
27 initiation of an arbitration as required in NRS 38.223 so as to
28 prejudice substantially the rights of a party to the arbitral
29 proceeding.

30 2. A motion under this section must be made within 90 days
31 after the movant receives notice of the award pursuant to NRS
32 38.236 or within 90 days after the movant receives notice of a
33 modified or corrected award pursuant to NRS 38.237, unless the
34 movant alleges that the award was procured by corruption, fraud or
35 other undue means, in which case the motion must be made within
36 90 days after the ground is known or by the exercise of reasonable
37 care would have been known by the movant.

38 3. If the court vacates an award on a ground other than that set
39 forth in paragraph (e) of subsection 1, it may order a rehearing. If
40 the award is vacated on a ground stated in paragraph (a) or (b) of
41 subsection 1, the rehearing must be before a new arbitrator. If the
42 award is vacated on a ground stated in paragraph (c), (d) or (f) of
43 subsection 1, the rehearing may be before the arbitrator who made
44 the award or the arbitrator's successor. The arbitrator must render



1 the decision in the rehearing within the same time as that provided
2 in subsection 2 of NRS 38.236 for an award.

3 4. If the court denies a motion to vacate an award, it shall
4 confirm the award unless a motion to modify or correct the award is
5 pending.

6 *5. If the parties have agreed, as described in NRS 38.217, to*
7 *the rules and procedures of an arbitral organization which*
8 *require, under all circumstances, the appointment of a nonneutral*
9 *arbitrator, the provisions of subparagraph (1) of paragraph (b) of*
10 *subsection 1 apply only to any arbitrator who is appointed as a*
11 *neutral arbitrator.*

12 **Sec. 8.** NRS 38.244 is hereby amended to read as follows:

13 38.244 1. A court of this state having jurisdiction over the
14 controversy and the parties may enforce an agreement to arbitrate.

15 2. An agreement to arbitrate providing for arbitration in this
16 state confers exclusive jurisdiction on the court to enter judgment on
17 an award under NRS 38.206 to 38.248, inclusive ~~[]~~, *and section 1*
18 *of this act.*

19 **Sec. 9.** NRS 38.247 is hereby amended to read as follows:

20 38.247 1. An appeal may be taken from:

- 21 (a) An order denying a motion to compel arbitration;
22 (b) An order granting a motion to stay arbitration;
23 (c) An order confirming or denying confirmation of an award;
24 (d) An order modifying or correcting an award;
25 (e) An order vacating an award without directing a rehearing; or
26 (f) A final judgment entered pursuant to NRS 38.206 to 38.248,
27 inclusive ~~[]~~, *and section 1 of this act.*

28 2. An appeal under this section must be taken as from an order
29 or a judgment in a civil action.

30 **Sec. 10.** NRS 280.190 is hereby amended to read as follows:

31 280.190 1. The committee shall:

32 (a) Direct the department to prepare and shall approve an annual
33 operating budget for the department.

34 (b) Submit the budget to the governing bodies of the
35 participating political subdivisions before May 1 for funding for the
36 following fiscal year.

37 (c) Direct the department to prepare and shall adopt the funding
38 apportionment plan provided for in NRS 280.201 and submit the
39 plan before February 1 to the governing bodies of the participating
40 political subdivisions for approval. The governing bodies shall
41 approve or reject the plan before March 1.

42 2. If any of the governing bodies fails to approve the
43 apportionment plan, the plan or any disputed element thereof must
44 be submitted to an arbitration panel for resolution. The governing
45 body of each participating political subdivision shall name one



1 arbitrator to the panel, who must reside within this State. If this
2 results in an even number of arbitrators, the arbitrators so named
3 shall, by majority vote, select an additional arbitrator, who must
4 reside within this State and who shall serve as chair of the panel.
5 The department shall provide such advice and technical and clerical
6 assistance as is requested by the panel. The panel must make its
7 decision and submit it to the participating political subdivisions
8 before April 1. When submitted, the decision is final and binding
9 upon the participating political subdivisions. Except as otherwise
10 provided in this section, the provisions of NRS 38.206 to 38.248,
11 inclusive, *and section 1 of this act* apply.

12 **Sec. 11.** NRS 676A.540 is hereby amended to read as follows:
13 676A.540 1. An agreement must:

- 14 (a) Be in a record;
15 (b) Be dated and signed by the provider and the individual;
16 (c) Include the name of the individual and the address where the
17 individual resides;
18 (d) Include the name, business address and telephone number of
19 the provider;
20 (e) Be provided to the individual before the individual assents to
21 the agreement; and
22 (f) Disclose:

23 (1) The services to be provided, including, without
24 limitation, whether the provider will provide credit counseling,
25 develop and implement a debt-management plan, provide debt
26 settlement services or provide any combination of these services;

27 (2) The amount, or method of determining the amount, of all
28 fees, individually itemized, to be paid by the individual;

29 (3) If the agreement contemplates that the provider will
30 develop and implement a debt-management plan or provide debt
31 settlement services, the schedule of payments to be made by or on
32 behalf of the individual, including the amount of each payment, the
33 date on which each payment is due and an estimate of the date of the
34 final payment;

35 (4) If the agreement contemplates that the provider will
36 develop and implement a debt-management plan and a plan provides
37 for regular periodic payments to creditors:

38 (I) Each creditor of the individual to which payment will
39 be made, the amount owed to each creditor and any concessions the
40 provider reasonably believes each creditor will offer;

41 (II) The schedule of expected payments to each creditor,
42 including the amount of each payment and the date on which it will
43 be made; and



(III) Each creditor that the provider believes will not participate in the plan and to which the provider will not direct payment;

(5) If the agreement contemplates that the provider will develop and implement a debt-management plan or provide debt settlement services, how the provider will comply with its obligations under subsection 1 of NRS 676A.630;

(6) That the provider may terminate the agreement for good cause, upon return of unexpended money of the individual;

(7) That the individual may cancel the agreement as provided in NRS 676A.550;

(8) That the individual may terminate a plan at any time without incurring any liability as provided in subparagraph (4) of paragraph (a) of subsection 4;

(9) That the individual may contact the Commissioner with any questions or complaints regarding the provider; and

(10) The address, telephone number and Internet address of the website of the Commissioner.

2. For purposes of paragraph (e) of subsection 1, delivery of an electronic record occurs when it is made available in a format in which the individual may retrieve, save and print it and the individual is notified that it is available.

3. If the Commissioner supplies the provider with any information required under subparagraph 10 of paragraph (f) of subsection 1, the provider may comply with that requirement only by disclosing the information supplied by the Commissioner.

4. An agreement must provide that:

(a) The individual has a right to terminate the agreement at any time, without penalty or obligation or the payment of any termination fee, by giving the provider written or electronic notice, in which event:

(1) The provider will refund all unexpended money that the provider or its agent has received from or on behalf of the individual for the reduction or satisfaction of the individual's debt;

(2) With respect to an agreement which contemplates that creditors will settle debts for less than the principal amount of the debt, the provider will refund 65 percent of any portion of the set-up fee that has not been credited against the settlement fee;

(3) All powers of attorney granted by the individual to the provider are revoked and ineffective; and

(4) The provider will cease charging a monthly service fee, other than a monthly service fee which became due before the termination of the agreement;



(b) The individual authorizes any bank in which the provider or its agent has established a trust account to disclose to the Commissioner any financial records relating to the trust account;

(c) The provider will notify the individual within 5 days after learning of a creditor's final decision to reject or withdraw from a plan and that this notice will include:

(1) The identity of the creditor; and

(2) The right of the individual to modify or terminate the agreement; and

(d) The individual may terminate a plan at any time without incurring any liability.

5. If an agreement contemplates that the provider will provide debt settlement services, the agreement may confer on a provider a power of attorney to settle the individual's debt for not more than 50 percent of the outstanding amount of the debt. The agreement may not confer a power of attorney to settle a debt for more than 50 percent of that amount, but may confer a power of attorney to negotiate with creditors of the individual on behalf of the individual. The agreement must provide that the provider will obtain the assent of the individual after a creditor has assented to a settlement for more than 50 percent of the outstanding amount of the debt.

6. An agreement may not:

(a) Provide for application of the law of any jurisdiction other than the United States and this State;

(b) Except as permitted by section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, or NRS 38.206 to 38.248, inclusive, *and section 1 of this act*, contain a provision that modifies or limits otherwise available forums or procedural rights, including, without limitation, the right to trial by jury, that are generally available to the individual under law other than this chapter;

(c) Contain a provision that restricts the individual's remedies under this chapter or law other than this chapter; or

(d) Contain a provision that:

(1) Limits or releases the liability of any person for not performing the agreement or for violating this chapter; or

(2) Indemnifies any person for liability arising under the agreement or this chapter.

7. All rights and obligations specified in subsection 4 and NRS 676A.550 exist even if not provided in the agreement. A provision in an agreement which violates subsection 4, 5 or 6 is void.

Sec. 12. The provisions of sections 1 to 11, inclusive, of this act govern an agreement to arbitrate:

1. Made on or after October 1, 2011; and



- 1 2. Made before October 1, 2011, if all the parties to the
- 2 agreement or to the arbitral proceeding so agree in a record.

