

November 12, 2019

Kimberly Taylor
Senior Vice President, Chief Legal & Operating Officer
Judicial Arbitration and Mediation Services, Inc.
18881 Von Karman Ave.
Suite 350
Irvine, CA 92612

Re: Request for Information Regarding Arbitration of Employment-Related Claims

Dear Ms. Taylor,

We have learned that workers in our States and the District of Columbia (collectively, the “States”) have encountered several obstacles while attempting to arbitrate employment-related claims through Judicial Arbitration and Mediation Services, Inc. (“JAMS”). As State Attorneys General, our offices enforce consumer protection laws, and many of us enforce federal, state, and local laws that protect workers’ economic security, health, and safety. We also have an interest in the information requested as the chief law enforcement officers of States with laws that regulate arbitration organizations, which in some of our States include disclosure and publication requirements, such as District of Columbia Code § 16-4330 and California Code of Civil Procedure § 1281.96.

We are writing to bring to your attention the issues that we understand workers are facing when attempting to arbitrate employment-related claims through JAMS, and to request your assistance in helping us better understand both the scope and cause of these issues. Specifically, we are seeking more information regarding the following issues:

1. **Employer Non-Payment of Filing Fees.** We understand that JAMS has promulgated a set of rules that govern arbitrations involving employment-related claims (the “Employment Arbitration Rules”), which incorporate by reference an “Arbitration Schedule of Fees and Costs” that sets out filing fees for both the employee and the employer.¹ It is our understanding that these fees must be paid to commence the arbitration. We have learned that in circumstances where an employee makes an arbitration demand through JAMS and pays the filing fee—but the employer does not—the arbitration process is not commenced. In this circumstance, there is apparently no clear recourse for the employee to proceed in the arbitration process or otherwise compel their employer to participate in the proceeding, other than a costly legal action. Whether the employer’s failure to pay is intentional or not, we are concerned that an employee who is bound to arbitrate employment-related claims with their employer may be unable to resolve their claims in this event.

¹ See JAMS Employment Arbitration Rules & Procedures, *available at* <https://www.jamsadr.com/rules-employment-arbitration/english>; JAMS Arbitration Schedule of Fees & Costs, *available at* <https://www.jamsadr.com/arbitration-fees>

2. **Employment-Related Claims Filed by Workers Classified as Independent Contractors.** Employment Arbitration Rule 31(c) provides that where arbitrations are based on agreements that are “required as a condition for employment,” the “only fee that an employee may be required to pay is the initial JAMS Case Management Fee.” This limitation on an employee’s arbitration costs reflects JAMS’ policy that an “employee’s access to arbitration must not be precluded by the employee’s inability to pay any costs.”² However, in today’s labor market, there are occasions where, due to various factors, an employer will classify a worker as an “independent contractor” rather than an “employee.” It is thus common for workers classified by their employers as independent contractors to raise employment-related claims, such as those involving wage-and-hour issues, workplace conditions, or challenges relating to employment misclassification. We have learned of instances where JAMS arbitrators have declined to apply the cost protections of the Employment Arbitration Rules to employment-related claims raised by workers classified as independent contractors because those arbitrators construed the claims as business-to-business claims. In such instances, a worker raising an employment-related claim may be exposed to significantly higher costs such as an increased filing fee or a share of the arbitrator’s compensation—all simply because of the employer’s nominal classification of the employee as an independent contractor.³ We are concerned that such decisions impose significant costs that may discourage workers in our States from proceeding through the arbitration process to pursue employment-related claims.

We are concerned about the extent to which these barriers prevent workers in our States from fairly and expeditiously resolving employment-related claims through JAMS. This is particularly concerning given the significant number of workers who are subject to mandatory arbitration—one recent survey conducted in 2017 found that over half (53%) of nonunion private-sector employers had adopted mandatory arbitration procedures for employment-related claims.⁴ As States Attorneys General, we have a common interest in ensuring that workers in our States who are bound to arbitrate employment-related claims are actually able to do so in an impartial and timely manner.

To better understand these issues, we would like to gather the following information relating to JAMS policies and to the practices discussed above:

Requests for Information

1. In the event a claimant-worker makes an arbitration demand for an employment-related claim and pays the claimant filing fee, can the arbitration proceed if the respondent-

² JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, Standard No. 6, *available at* <https://www.jamsadr.com/employment-minimum-standards/>

³ *E.g.*, JAMS Arbitration Schedule of Fees & Costs, *available at* <https://www.jamsadr.com/arbitration-fees> (employee filing fee set at \$400 while ordinary “two-party matter[]” filing fee set at \$1,500); JAMS Comprehensive Arbitration Rule 31(c), *available at* <https://www.jamsadr.com/rules-comprehensive-arbitration/> (arbitrating parties “jointly and severally liable” for arbitrator compensation); JAMS Employment Arbitration Rule 31(c) (where arbitration is based on agreement required as condition for employment, no joint-and-several liability for arbitrator compensation).

⁴ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (2018), *available at* <https://www.epi.org/files/pdf/144131.pdf>

employer fails to pay the employer filing fee? If not, what recourse does the claimant-worker have to resolve their arbitration demand, other than a costly legal action?

2. What is the process, if any, by which JAMS terminates or suspends an arbitration proceeding due to a respondent-employer's failure to pay the employer filing fee?
3. In the event a claimant-worker's arbitration demand is terminated or unable to proceed due to the respondent-employer's non-payment of the employer filing fee, does JAMS provide any recourse to reimburse the claimant-worker's payment of the claimant filing fee? If so, please describe this process.
4. Where a worker classified as an independent contractor makes an arbitration demand for an employment-related claim, does JAMS maintain any policies on which rules (*e.g.*, Employment Arbitration Rules, Comprehensive Arbitration Rules, or other rules) are to be applied to such claims? If so, please describe these policies.
5. Does JAMS maintain any policies on whether the cost limitations set out in Employment Arbitration Rule 31(c) apply or do not apply to employment-related claims filed by workers classified as independent contractors? If so, please describe these policies.
6. Is JAMS taking any action to address any of the issues discussed in this letter? If yes, please describe steps and measures taken by JAMS.

Requests for Documents

1. All documents by which JAMS promulgates rules, maintains policies, or provides guidance relating to the payment or non-payment of filing fees in employment-related arbitration claims filed with JAMS.
2. Documents sufficient to identify all employment-related arbitration claims that have been suspended or terminated by JAMS due to the respondent-employer's failure to pay the employer filing fee. This identification should include, at a minimum, (i) whether the claimant-worker's annual wage fell below or exceeded \$100,000, (ii) whether the claimant-worker was represented by an attorney and, if so, identifying information for that attorney, (iii) the name(s) of the respondent-employer, (iv) the date JAMS received the demand for arbitration, (v) whether JAMS suspended or terminated the arbitration, and (vi) the date JAMS suspended or terminated the arbitration.
3. All documents by which JAMS promulgates rules, maintains policies, or provides guidance relating to the cost sharing of arbitrator compensation between arbitrating parties in employment-related arbitration claims filed with JAMS.
4. Documents sufficient to identify all employment-related arbitration claims where a JAMS arbitrator has required any share of the arbitrator's compensation to be borne by a claimant-worker. This identification should include, at a minimum, (i) whether the claimant-worker's annual wage fell below or exceeded \$100,000, (ii) whether the claimant-worker was represented by an attorney and, if so, identifying information for that attorney, (iii) the name(s) of the respondent-employer, (iv) the date JAMS received

the demand for arbitration, (v) the name of the arbitrator, the arbitrator's fee for the case, and the percentage of the arbitrator's fee allocated to each party, (vi) the date and disposition of the dispute, including the amount of the award and any relief granted, if any; and (vii) whether the claimant-worker was required to arbitrate due to a clause or agreement that was required as a condition of employment.

5. All documents by which JAMS promulgates rules, maintains policies, or provides guidance relating to whether the Employment Arbitration Rules' cost limitations for employees are to be applied to employment-related arbitration claims filed by workers classified as independent contractors.
6. Documents sufficient to identify all employment-related arbitration claims filed by workers classified by as independent contractors. This identification should include, at a minimum, (i) whether the claimant-worker's annual wage fell below or exceeded \$100,000, (ii) whether the claimant-worker was represented by an attorney and, if so, identifying information for that attorney, (iii) the name(s) of the respondent-employer, (iv) the date JAMS received the demand for arbitration, (v) the name of the arbitrator, the arbitrator's fee for the case, and the percentage of the arbitrator's fee allocated to each party, (vi) the date and disposition of the dispute, including the amount of the award and any relief granted, if any; (vii) whether the arbitration was subject to the Employment Arbitration Rules' cost limitations for employees (if not, please specify which rules and/or fee schedule were ultimately applied to the arbitration); and (viii) whether the claimant-worker was required to arbitrate due to a clause or agreement that was required as a condition of employment.

These requests for information and documents encompass the time period from January 1, 2017 through the present. We request that you provide your responses on or before December 16, 2019.

Please provide all responsive documents to the Office of the Attorney General for the District of Columbia, Attention: Randolph Chen and Alacoque Hinga Nevitt, Assistant Attorneys General, Public Advocacy Division, 441 Fourth Street N.W., Suite 630S, Washington, D.C. 20001. Written communications may be sent via email to randolph.chen@dc.gov and alacoque.nevitt@dc.gov.

Please let us know if you have any questions and thank you in advance for your prompt attention in this matter.

Sincerely,



Karl A. Racine
Attorney General for the District of Columbia



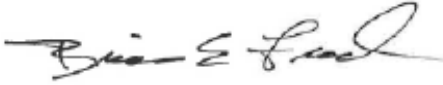
Xavier Becerra
California Attorney General



Philip Weiser
Colorado Attorney General



Kwame Raoul
Illinois Attorney General



Brian Frosh
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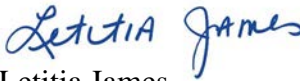
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