



The Future of Arbitration

**Paradise Lost?
The Risk of Mass Arbitration**

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Paradise Lost?

The Risk of Mass Arbitration

- 1 The Old Paradigm
- 2 Judo from The Plaintiffs' Bar
- 3 Response from AAA, JAMS, and Others
- 4 How Can Employers Avoid Becoming Targets?
- 5 How Can Targeted Employers Respond?

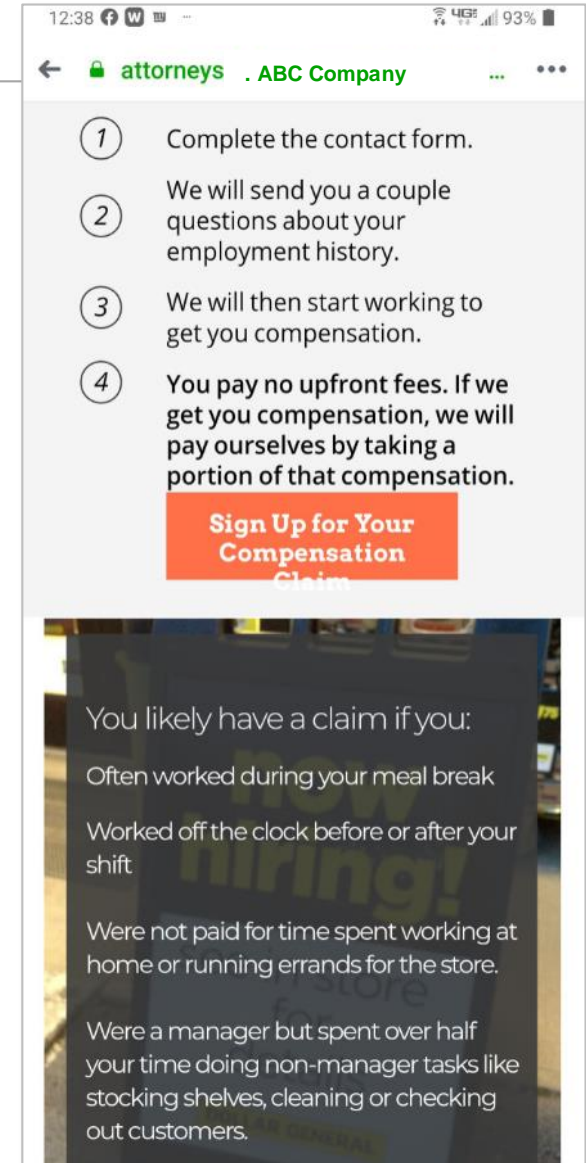


The Old Paradigm

- Arbitration agreements with all employees
- Individual arbitration only – no class or collective arbitration or litigation
- AAA or JAMS to administer arbitrations
- Company pays arbitration filing fees
- Company pays Arbitrator compensation

Judo from the Plaintiffs' Bar

- Run targeted online/social media ads
- Provide fast, easy, online sign-up
- Use online form to get claim info from employee
- File (or threaten to file) arbitration demands



Examples of Online Ads

**Have you been a victim
of wage theft by
ABC Company?**

**Contact us today for a free legal evaluation
of your pay and rights to overtime**

This advertisement features a white background with a dark, textured corner on the right side. The main text is centered and enclosed in a dark rounded rectangle. Below this, the contact information is also centered.

12:38 [social icons] 93%

← attorneys . ABC Company ...

- 1 Complete the contact form.
- 2 We will send you a couple questions about your employment history.
- 3 We will then start working to get you compensation.
- 4 You pay no upfront fees. If we get you compensation, we will pay ourselves by taking a portion of that compensation.

**Sign Up for Your
Compensation
Claim**

You likely have a claim if you:

- Often worked during your meal break
- Worked off the clock before or after your shift
- Were not paid for time spent working at home or running errands for the store.
- Were a manager but spent over half your time doing non-manager tasks like stocking shelves, cleaning or checking out customers.

This image shows a mobile application interface. At the top, there's a status bar with the time 12:38, social media icons, and a battery level of 93%. Below that is a navigation bar with a back arrow, the text 'attorneys . ABC Company', and a menu icon. The main content area contains a numbered list of four steps. Below the list is a prominent orange button with white text. At the bottom, there's a section titled 'You likely have a claim if you:' followed by a list of conditions. The background of the bottom section is a blurred image of a store interior.



Responses from AAA/JAMS and States

- **AAA/JAMS**

- Must pay filing fees for all cases
- New fee schedule only slight improvement

- **12 State AGs**

- Letter to AAA and JAMS seeking information about fee invoicing

- **California**

- SB707: arbitration invoices must be paid promptly or else Draconian penalties



How Can Employers Avoid Becoming Targets?

- Rescind existing arbitration agreements?
- Reconsider rolling out arbitration agreements?
- Revise revising existing arbitration agreements?



How Can Employers Avoid Becoming Targets?

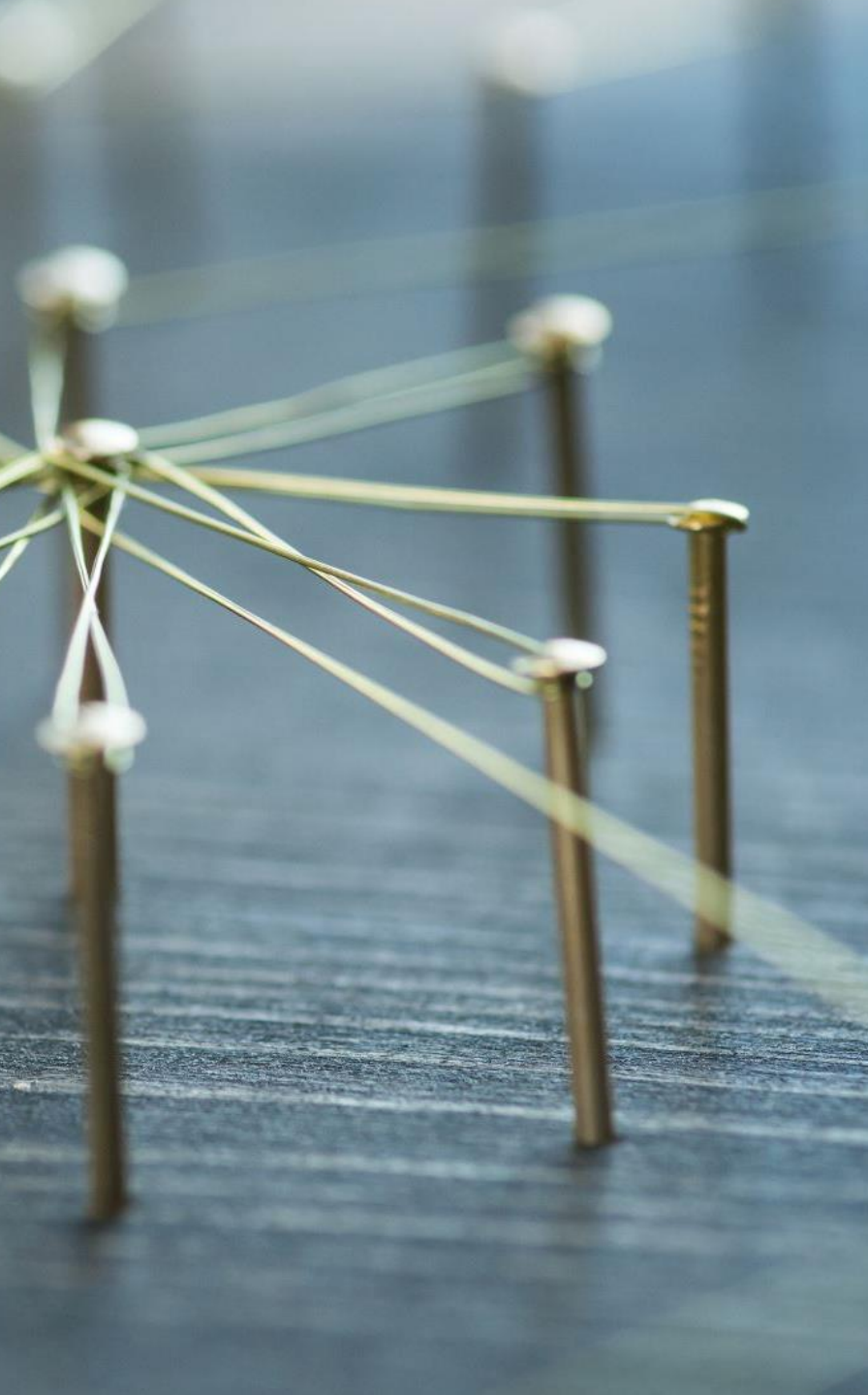
IMPORTANT CAUTIONS

- Potential revisions are legally untested
- Each has benefits and risks
- Some might render entire arbitration agreement unenforceable

How Can Employers Avoid Becoming Targets?

Revision options (but see cautions slide!):

1. Require pre-arbitration direct conciliation
2. Forbid cookie-cutter arbitration demands
3. Require special procedures for mass arbitration
4. Use alternative arbitration provider
5. Allow employer to rescind or waive arbitration if faced with a portfolio of claims
6. Increase claimant share of arbitration cost
7. Carve out types of claims low employer to rescind or waive most likely to give rise to mass arbitration
8. Carve out small claims



Industries & Employers with Greatest Exposure to Mass Arbitration

- Companies that use independent contractors in states with stringent test for IC status (CA, MA)
 - Gig / sharing economy
 - Certain white collar jobs where IC status is common (insurance, finance industry, computer programming)
- Employers that use arbitration to shield from wage claims from entry-level workers
 - Retail
 - Manufacturing
- Companies employing licensed professionals whose contact information is publicly available
 - Health care
 - Mortgage lending



How Can Targeted Employers Respond?

Refuse to pay arbitration fees?

- May lead to sanctions or order to pay massive fees, especially in California
- May lead to invalidation of agreement to arbitrate
→ class or collective action in court



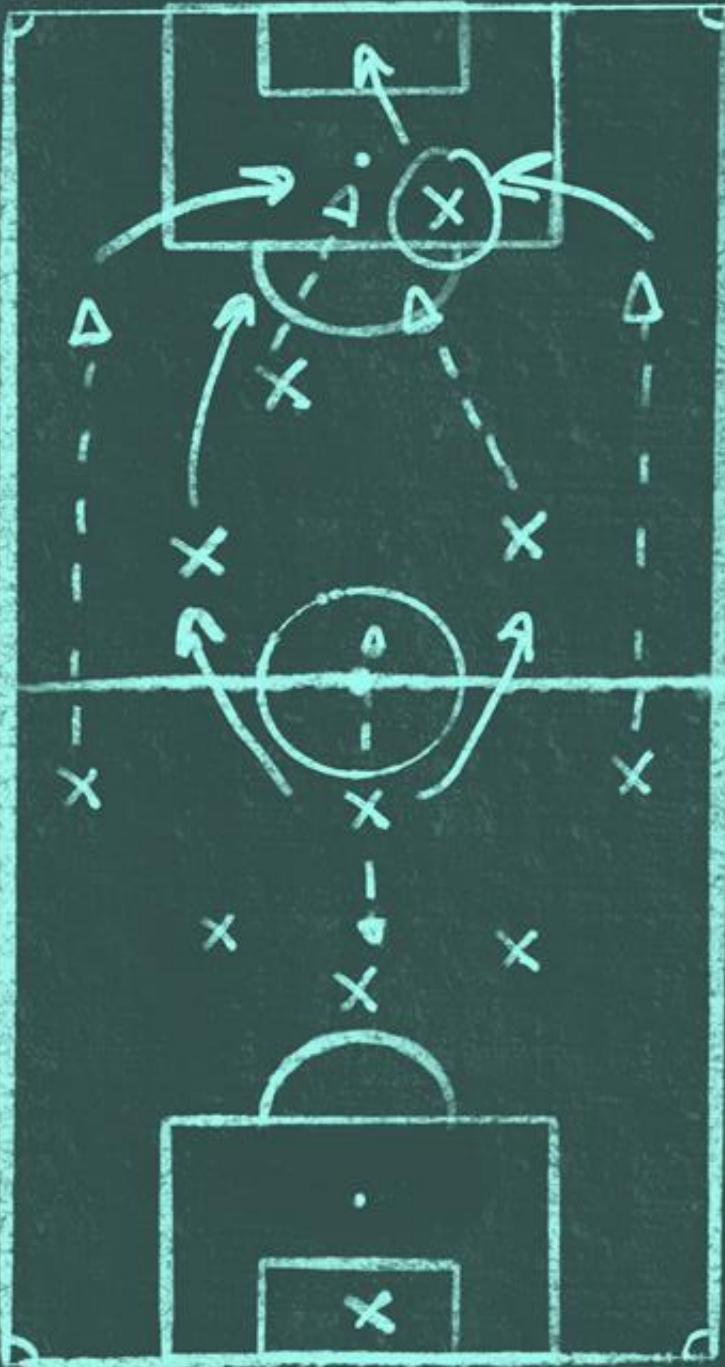
How Can Targeted Employers Respond?

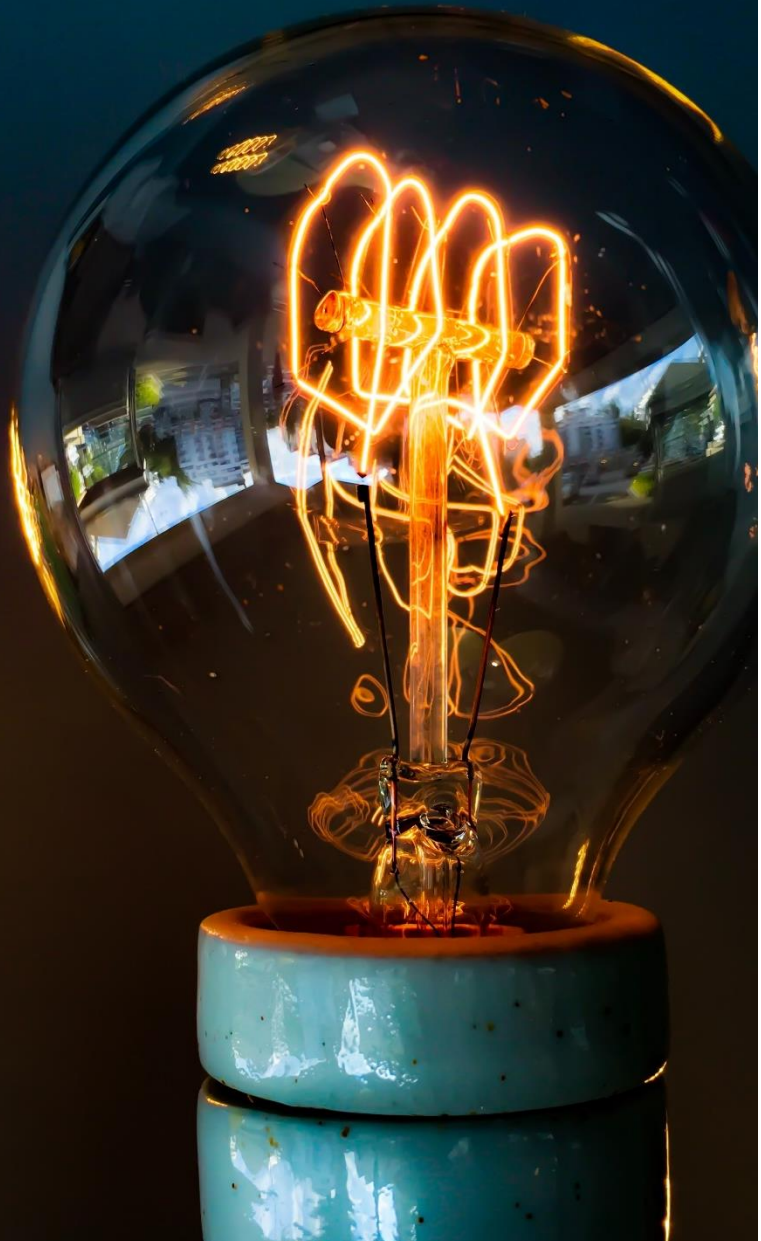
Pay arbitration fees and arbitrate numerous claims?

- Ultimate game of chicken with plaintiffs' firm regarding ability to handle litigation
- Even a completely successful defense of a few hundred arbitration demands will consume millions of dollars in filing fees and arbitrator's fees
- Plaintiffs' firms are beginning to coordinate and cooperate to litigate mass portfolios against large corporate law firms
- Arbitration providers likely lack capacity to litigate large number of claims in parallel
- Logistics challenges in managing hundreds or thousands of small claims
- Bellwether approach mitigates many problems but may require cooperation from claimants

How Can Targeted Employers Respond?

- Strike back at plaintiffs' firm?
 - Ethics issues regarding solicitation practices used to build portfolios?
 - Ethics issues regarding representing large number of interrelated clients with differing interests?
 - Tort claims for inducing employees to breach agreement not to bring class proceeding?
 - Tort claims for defamatory advertising?
- Try to block claimants from participating in prohibited group proceeding?





How Can Targeted Employers Respond?

Settle?

- Unique logistics to settlement with large number of individuals
- 100% participation unlikely
- Use of blow-up clauses and dispute resolution fund to increase participation
- No insulation against additional claims being brought by additional individuals or same individuals in subsequent claim
- Some claimants may have signed up with multiple plaintiffs' firms



thank you

**For additional information,
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