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Defense Strategies For Arbitration Agreements And Class Action Waivers

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LIVE CLE WEBINAR

Defense Strategies For Arbitration Agreements And Class Action Waivers:

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Celesq
November 2026

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TODAY'S SPEAKER



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Today's Agenda

I. **Key U.S. Supreme Court Rulings**
II. **Understanding The Mass Arbitration Process**
III. **Navigating The Rise Of Mass Arbitration**
IV. **Mandatory Arbitration Clauses In Employment Agreements**

Key Rulings



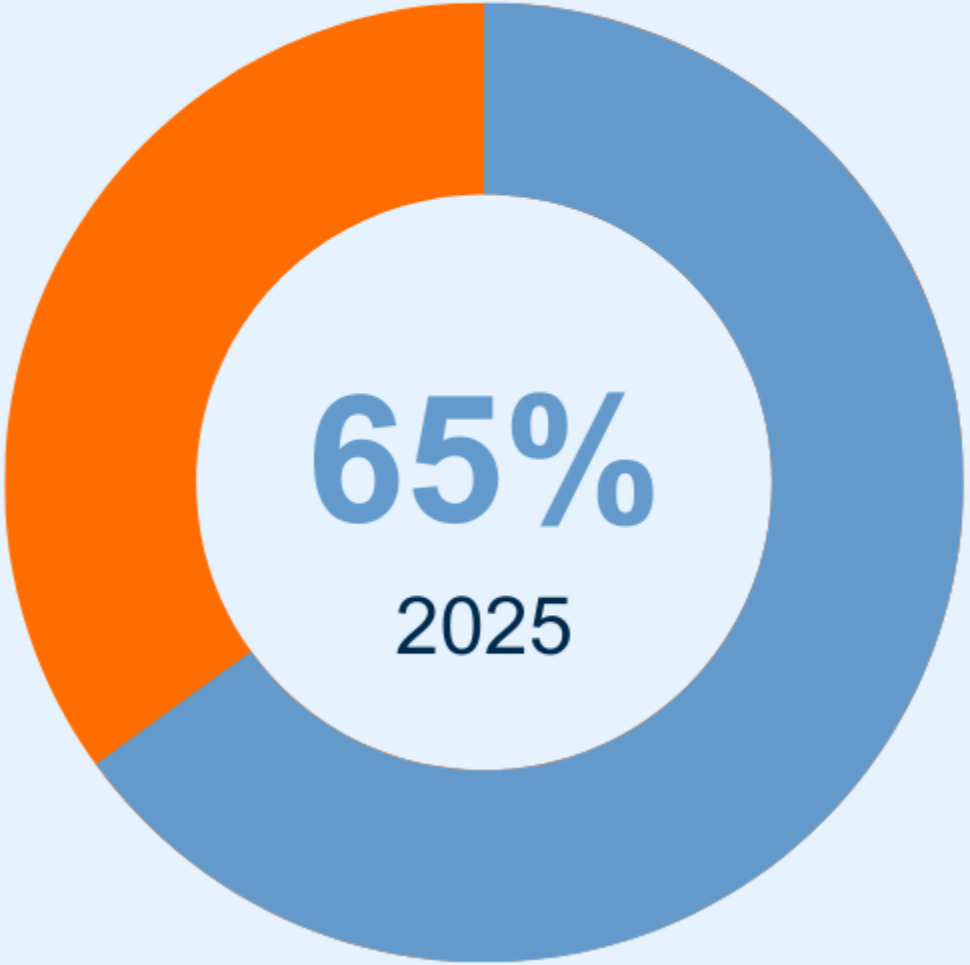
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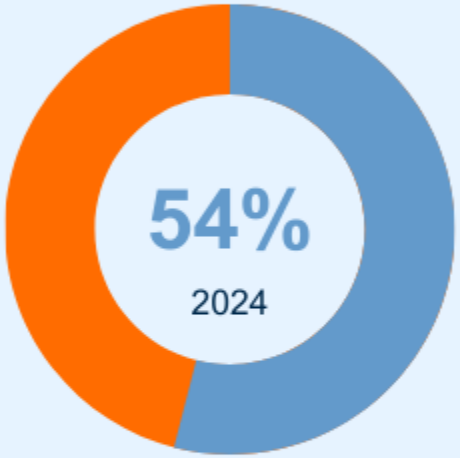
Arbitration Motions In 2025

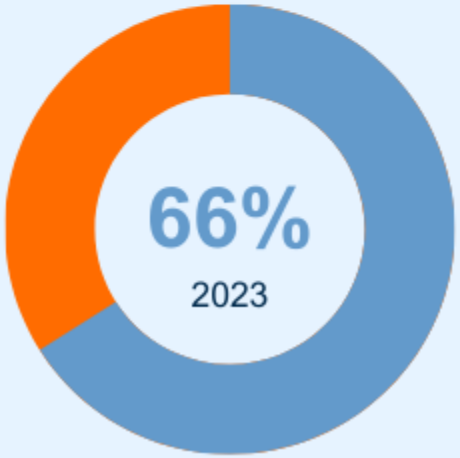
In 2025, courts issued 189 rulings on motions for arbitration; **122 motions were granted** and **67 motions were denied**.

65%
of motions for arbitration granted

35%
of motions for arbitration denied







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Introduction: The Rise of Mass Arbitration

- The **Federal Arbitration Act**, enacted in 1925, established an alternative dispute resolution system through which parties could resolve issues outside of court
- **Class Arbitration v. Mass Arbitration**
- Class action waivers and mandatory arbitration clauses in employment agreements have resulted in a surge of mass arbitrations against employers
  - A response to the arbitration clause defense
- Mass arbitration filings seek to leverage millions in mandatory arbitration fees to result in significant settlements
- Role of technology in evolving mass arbitration

Key Rulings

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)

- AT&T moved to compel arbitration under the terms of its contract with respondents and respondents opposed the motion contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed class-wide procedures.
- The district court denied AT&T's motion in light of *Discover Bank v. Superior Court* and the Ninth Circuit affirmed. At issue was whether the Federal Arbitration Act ("FAA"), 9 U.S.C. 2, prohibited states from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures.
- The Court held that, because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," quoting *Hines v. Davidowitz*, California's *Discover Bank* rule was preempted by the FAA. Therefore, the Court reversed the Ninth Circuit's ruling and remanded for further proceedings consistent with the opinion.

Key Rulings

- In recent years, the U.S. Supreme Court has held that arbitration agreements requiring waiver of class and collective actions are enforceable under the FAA and not precluded by the National Labor Relations Act ("NLRA"), and that arbitration on a class-wide basis cannot be compelled absent unambiguous consent
  - *Epic Systems Corp. v. Lewis, et al.*, 138 S. Ct. 1612 (2018)
  - *Lamps Plus, Inc. v. Varela, et al.*, 139 S. Ct. 1407 (2019)

Key Rulings

Southwest Airlines Co. v. Saxon, et al., 142 S. Ct. 1783 (2022)

- Although the Supreme Court applied the FAA's transportation worker exemption to preclude arbitration, it emphasized that the exemption is to be narrowly construed.
- This has been a high-impact ruling.

Key Rulings

Morgan, et al. v. Sundance, 596 U.S. 411 (2022),

- The Supreme Court relaxed the requirements to establish waiver of the right to arbitration by holding that a party seeking to establish waiver need not prove prejudice.
- **Post-*Morgan***
  - *Hill v. Xerox Business Services, LLC*, 59 F. 4th 457 (9th Cir. 2023)
  - *Alvarez, et al. v. Sheraton Operating Corp.*, 2023 U.S. App. LEXIS 6022 (9th Cir. Mar. 14, 2023)
  - *Quach v. California Commerce, Inc.*, 16 Cal.5th 562 (2024) (adopting Morgan's waiver standard under the California Arbitration Act)

Key Rulings

Viking River Cruises, Inc. v. Moriana, et al., 142 S.Ct. 1906 (2022),

- The Supreme Court held the FAA preempted California's rule barring individual arbitration of claims under California's Private Attorneys General Act ("PAGA").
- It also suggested in *dicta* that, once an individual PAGA claim is pending in arbitration, the plaintiff lacks standing to pursue non-individual PAGA claims.

Key Rulings

Post-*Viking River*

- The California Supreme Court took up the standing issue in *Adolph, et al. v. Uber Technologies, Inc*. 14 Cal.5th 1104 (Cal. 2023), and it disagreed.
- *Nickson, et al. v. Shemran, Inc*., 90 Cal.App.5th 121 (Cal. App. 2023)
- *Westmoreland, et al. v. Kindercare Educ. LLC*, 90 Cal.App.5th 967 (Cal. App. 2023)
- *Gentry, et al. v. Robert Half International, Inc*., 2023 Cal. App. Unpub. LEXIS 5886 (Cal. App. Oct. 3, 2023)
- *Heckman v. Live Nation Ent. Inc.* , 120 F.4th 670 (9th Cir. 2024)
- *Flores v. New York Football Giants Inc*. , 150 F.4th 172, 183 & n.49 (2d Cir. 2025)

Key Rulings

Uber Techs., Inc. v. Am. Arb. Ass'n, Inc., No. 15732 (N.Y. App. Div. April 14, 2022)

- Dispute originated from Uber's waiver of delivery fees for Black-owned businesses featured on its app
- 31,000 claimants, who paid delivery fees to non-Black-owned restaurants, filed arbitration demands
- Uber's terms and conditions stipulated a binding arbitration clause under the AAA's consumer arbitration rules ("CARs")
  - Under the CARs, Uber was required to pay a **$500** filing fee, a **$1,400** case management fee and a **$1,500** arbitrator fee – *for each individual case* – which brought the invoice to $91 million
- AAA invoked arbitration rule California Code of Civil Procedure §§ 1281.97 to 1281.99
- Appellate Division of the New York Supreme Court struck down Uber's challenge to the enormous fees charged

Key Rulings

Wallrich, et al v. Samsung Electronics America, et al, No. 23-2842 (7th Cir. Nov. 8, 2023)

- Samsung received 50,000 arbitration demands in 2022, it refused to pay the filings fees, and the AAA closed the matter
- Claimants then sued to force Samsung to honor the terms of its arbitration provision and pay the filing fees
- Samsung argued that there were no valid arbitration agreements between the company and many of the claimants, that the mass action violated the class action waiver, and that the court did not have the power to compel arbitration
- The court disagreed and found Samsung responsible for the $4 million (plus) in initial filing fees
- Oral arguments in February 2024 to determine whether the Seventh Circuit should reverse the district court's decision
- Panel expressed skepticism that a spreadsheet of the claimants' contact information and claim dates was sufficient proof of an agreement

Key Rulings

Smith v. Spizzirri, 601 U.S. 472 (2024),

- The Supreme Court issued a unanimous decision holding that, when a district court determines that a plaintiff's claims are arbitrable, the district court does not have discretion to dismiss the lawsuit.

Key Rulings

Bissonnette, et al. v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024)

- The Supreme Court issued another decision regarding the FAA's transportation worker exemption. The Supreme Court again cautioned that the exemption does not apply in "limitless terms" and, instead, applies only where workers play "a direct and necessary role in the free flow of goods across borders."
- The Supreme Court granted certiorari last year in yet another transportation worker exemption case, *Flower Foods, Inc. v. Brock, et al*., No. 24-945, 2025 U.S. LEXIS 3947 (U.S. Oct. 20, 2025), to decide whether a worker engaged solely in intrastate commerce can be exempt from the FAA's requirements.

Key Arbitration Rulings

Coinbase, Inc. v. Suski, et al., 144 S. Ct. 1186 (2024),

- In 2024, the U.S. Supreme Court issued its decision holding that, where parties have agreed to two contracts – one sending disputes regarding arbitrability to arbitration, and the other sending disputes regarding arbitrability to the courts – a court (and not an arbitrator) must decide which contract governs.



Understanding The Mass Arbitration Process

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Understanding The Mass Arbitration Process

Settlement and Arbitration

- *Settlement*
  - Mediation and settlement negotiations
  - Selection of Arbitrator
  - Drafting and preparation of a mediation statement
  - Individual settlement with a simple settlement and release agreement
- *Arbitration*
  - Motion to compel arbitration
  - Reply and hearings / oral arguments
  - Appeals of arbitration rulings

Overview of the Mass Arbitration Process

- The AAA defines mass arbitration as arbitrations with 25 or more similar demands fro arbitration, filed against or on behalf of the same party or related parties, with consistent or coordinated representation across all cases
- The Mass Arbitration rules apply when the definition of mass arbitration is met and either the AAA's employment and workplace fee schedule or the consumer fee schedule applies to the arbitration
- If there are thousands of claimants, initial filing fees can amount to millions of dollars, which must be paid **before** any arbitrator has a chance to assess the validity of the claims
  - These upfront costs can pressure early settlement of claims

Leveraging Mass Arbitration Into Early Settlements

- In 2021, the AAA amended the mass filing rules to streamline the administration of large volume filings involving the same or related parties and party representative(s)
- While arbitrating claims is typically more cost effective than litigation, corporate defendants can face significant financial burdens due to the filing and administrative fees of mass arbitration, as well as the challenges of conducting due diligence when faced with thousands of claimant numbers

AAA's Amended Rules

The **American Arbitration Association** has amended its Mass Arbitration Supplementary Rules and fee schedules, effective January 15, 2024

Notable Changes:

- **Reduced Friction:** New attestation requirements help ensure accurate filings (MA-2) and pleadings (MA-4(a)), minimizing delays and unnecessary complexities
- **Streamlined Process:** Virtual hearings are now the preferred method, leveraging technology for increased efficiency and accessibility (MA-5)

AAA's Amended Rules

Notable Changes:

- **Process Efficiency:** An expanded Process Arbitrator role tackles potential hurdles early—such as including the parties' filing requirements and contractual conditions precedent, the process for selecting merits arbitrators, and the locale of merits hearings—allowing parties to focus on substantive issues (MA-6(c))
- **Review of Process Arbitrator Decisions:** Due to legal developments in mass arbitration administration, Rules now empower individually appointed merits arbitrators to review process arbitrator rulings using an abuse of discretion standard (MA-6(j))

AAA's Amended Rules

Fee Schedules Amendments:

- **Early Resolution Opportunities:** A flat Initiation Fee of $3,125 for individuals and $8,125 for businesses covers an administrative review of the filing, an administrative conference call with the AAA, and appointment of a Global Mediator and/or Process Arbitrator, facilitating quicker settlement analysis and discussions
- **Cost Predictability:** Staged fees beyond the Initiation Fee provide transparent and manageable expenses as cases progress

AAA's Amended Rules: Effect on Defense Strategy

Automatic Mediation

- Previously, parties would typically agree to stay the filing of demands while they attempt to reach a solution
- Now, the AAA's amended rules provide for the automatic appointment of an AAA mediator in a mass arbitration, with no stay of proceedings and mediation to be held within 120 days

AAA's Amended Rules: Effect on Defense Strategy

Formalized Authority of Process Arbitrators

- The amended rules provide that the process arbitrator must resolve issues regarding whether subsequently filed cases are part of the same mass arbitration and whether previous rulings are binding on subsequent filed arbitrations
- This update further facilitates predictability in the administration of mass filings and ensures subsequent batches of claims can be efficiently processed

JAMS Mass Arbitration Procedures and Guidelines

Effective May 1, 2024

Procedure 1: Scope of Procedures

- Mass Arbitration defined as 75 or more similar Demands for Arbitration
- Not applicable to class action arbitrations

Procedure 2: Filing Requirements

- Demand for Arbitration Form and applicable arbitration agreement must be submitted for each Claimant, “accompanied by a sworn declaration from counsel averring that the information in the Demand is true and correct to the best of the representative’s knowledge”

JAMS Mass Arbitration Procedures and Guidelines

Procedure 3: Process Administrator

- Determine whether "applicable conditions precedent have been met and, if applicable, how the Parties can meet the conditions precedent and how to proceed if they have not met those conditions precedent"
- Whether to consolidate the Demands or claims in the Mass Arbitration
- Evaluate individualized proceedings based on specific facts

JAMS Mass Arbitration Procedures Fee Schedule

Updated July 6, 2026

Non-Refundable Filing Fee

- $8,000 (regardless of the number of cases) for claim or counterclaim
- Employer-promulgated plans: maximum of $2,500 employees may be required to pay
- Pre-dispute arbitration clauses: maximum of $2,500 consumers may be required to pay

Case Management Fee

- 13% of Professional Fees

Arbitrator Appointment Fee

- One arbitration filing fee ($2,500 for two-party matter; $4,000 for three or more parties)



Navigating The Rise of Mass Arbitration

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Mitigating Risk Of Mass Arbitration

Add or update arbitration agreements

- Reference and consider latest mass arbitration rules (*e.g.*, from AAA, JAMS, etc.)
- Add pre-dispute informal resolution clause
- Add mass arbitration protocol (*e.g.*, provisions for bellwether proceedings, mediation, escape hatch to return to court, staging of subsequent bellwether proceedings, streamlined discovery)

- *Wallrich v. Samsung Electronics America, Inc.*, 2024 WL 3249646, at *9 (7th Cir. July 1, 2024)





Mandatory Arbitration Clauses In Employment Agreements

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Mandatory Arbitration Clauses in Employment Agreements

- Require pre-dispute resolution before filing an arbitration demand
- Require individualized information to initiate an arbitration demand
- Authenticate arbitration agreements on individualized proof
- Revise arbitration agreements to provide companies the right to opt out of arbitration and proceed in court if number of arbitration claims exceed a set limit
- Sequence mass arbitration claims to prevent simultaneous assessment of case administration fees

thank you

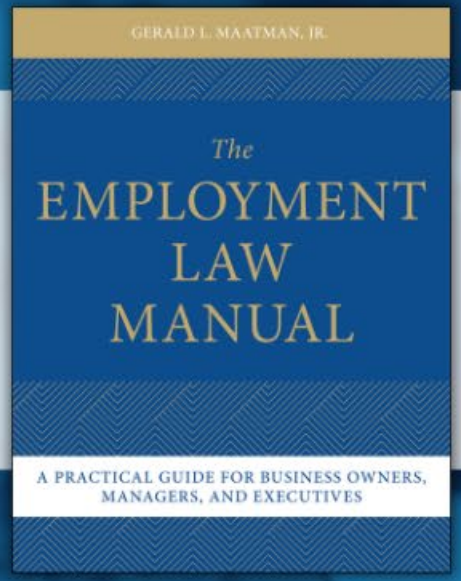


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