November 13, 2019

ATTORNEY GENERAL RAOUL REQUESTS INFORMATION ABOUT ARBITRATION PROCESSES TO HELP WORKERS RESOLVE EMPLOYMENT DISPUTES FAIRLY AND QUICKLY

Raoul, 11 AGs Request Data to Address Worker Concerns About Arbitration Proceedings

Chicago — Attorney General Kwame Raoul today joined a group of 12 state attorneys general calling on the nation's leading arbitration firms to provide information about obstacles workers face in resolving employment-related disputes. Mandatory arbitration clauses in employment contracts require work-related claims like wage-and-hour issues or disputes over workplace conditions to be resolved by privately-appointed individuals called arbitrators, rather than through the traditional court system. The attorneys general are concerned about the extent to which obstacles in the arbitration process, like prohibitive filing fees and stalled arbitration proceedings, may prevent workers from quickly and fairly resolving workplace disputes.

In the letters sent to the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS), the attorneys general highlight problems workers encounter during arbitration, including high costs and delayed arbitration proceedings. Raoul and the coalition are requesting documents and data to better understand the cause and scope of the issues and plan to work with these entities to ensure the arbitration process is as fair as possible to workers.

"Workers should not face unnecessary hurdles in resolving disputes with their employers," Raoul said. "Having access to more information about these obstacles will help ensure that workers are able to arbitrate employment-related claims in an impartial and timely manner and will promote enforcement of laws protecting workers' economic security and safety."

During arbitration proceedings, arbitrators hear from both parties, review the evidence, and make a ruling, though they are not subject to the rules that govern court proceedings. Many employment contracts include these mandatory arbitration clauses, especially for low-wage workers. In fact, one survey conducted in 2017 found that 53 percent of non-union, private-sector employers had adopted mandatory arbitration procedures.

The attorneys general are asking for information and documents about existing arbitration policies and data on suspended or terminated claims. Specifically, Raoul and the coalition seek to better understand complaints they have received from workers, which include:

- **Stalled arbitration proceedings if the employer does not pay the arbitration filing fee:** In order for arbitration to begin, AAA and JAMS require both the employee and the employer to pay a filing fee. If the employee pays the filing fee and the employer does not, arbitration does not begin, and there is no clear recourse for the employee to compel the process to proceed, other than costly legal action. The coalition is concerned that this leaves the employee - who is forced to use arbitration - unable to resolve their claims.
- **Higher arbitration costs for employees if they are classified as independent contractors:** When an employer classifies a worker as an "independent contractor" rather than an "employee," workers can face significantly higher filing fees where arbitrators view the claim as a business-to-business commercial dispute - rather than an employment dispute between employer and employee. This distinction is important, as AAA and JAMS set significantly higher filing fees for commercial disputes relative to employment disputes. However, workers classified as independent

contractors routinely bring employment-related claims, including those involving wage-and-hour, workplace conditions, or challenges to their employment classification. The coalition is thus concerned that treating these claims as commercial disputes imposes costs that discourage workers classified as independent contractors from proceeding in arbitration.

Attorney General Raoul is committed to protecting workers from unlawful and unfair employment practices. This spring, Raoul testified before the Congressional House Appropriations Labor, Health and Human Services, and Education Subcommittee about the wage theft crisis and the importance of states being able to partner with the federal government in enforcement efforts, and he has consistently opposed the Department of Labor's proposals that would undermine important employee protections. For example, Raoul opposed a federal proposal to narrow the interpretation of joint employment and has urged the federal government to crack down on non-compete and no-poach contract agreements. In March, the Attorney General's office announced a settlement with four fast food restaurants to end the use of the agreements, which limit fast food workers' abilities to change jobs. In addition, Raoul initiated legislation signed into law over the summer to establish a Worker Protection Unit within the Attorney General's office.

Joining Raoul in sending the letters are attorneys general from California, Colorado, Maryland, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Vermont, Washington and the District of Columbia.

November 12, 2019

Ann Lesser
Vice President - Labor, Employment, and Elections
American Arbitration Association
120 Broadway, Floor 21
New York, NY 10271

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

Dear Ms. Lesser,

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 the American Arbitration Association ("AAA"). 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 AAA, 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 AAA has promulgated a set of rules that govern arbitrations involving employment-related claims (the "Employment Arbitration Rules"), which include an Employment/Workplace Fee Schedule 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 AAA 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* AAA Employment Arbitration Rules, *available at* https://www.adr.org/sites/default/files/EmploymentRules_Web2119.pdf; AAA Employment/Workplace Fee Schedule, *available at* https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19.pdf

2. **Arbitrator Compensation Cost-Sharing Under Employment Arbitration Rules**. In addition to filing fees, the Employment/Workplace Fee Schedule also sets forth the mechanism for paying the arbitrator's compensation. The Employment/Workplace Fee Schedule provides that the employer "shall pay the arbitrator's compensation unless the employee or individual, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation. Arbitrator compensation . . . and administrative fees are not subject to reallocation by the arbitrator(s) except upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous."[2] We have learned that, notwithstanding this provision, some AAA arbitrators have ruled that claimant-workers must share costs and fees of arbitration with respondent-employers regarding employment-related claims pursuant to agreements entered into between the parties pre-dispute. We are concerned that this practice may discourage workers in our States from proceeding through the arbitration process by imposing significant costs that conflict with the provisions of the Employment/Workplace Fee Schedule.

3. **Application of Commercial Arbitration Rules to Employment-Related Claims Filed by Independent Contractors**. We understand that AAA has also promulgated a set of rules that govern arbitrations involving business-to-business claims (the "Commercial Arbitration Rules"), which include a Commercial Fee Schedule.[3] Consistent with the nature of business-to-business claims, the filing fees and cost-sharing rules under the Commercial Fee Schedule are substantially higher than those set out for employees in the Employment/Workplace Fee Schedule. In today's labor market, however, 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 as independent contractors to raise employment-related claims, such as those involving wage-and-hour issues, workplace conditions, or challenges relating to employment misclassification. The Commercial Arbitration Rules recognize that independent contractors may raise employment-related claims with employers, and provide that "[b]eginning October 1, 2017, AAA will apply the Employment Fee Schedule to any dispute between an individual employee or an independent contractor (working or performing as an individual and not incorporated) and a business or organization and the dispute involves work or work-related claims, including any statutory claims and including work-related claims under independent contractor agreements."[4] Notwithstanding this language, we have learned of instances where AAA arbitrators have applied the Commercial Fee Schedule to workers classified as independent contractors seeking to arbitrate employment-related claims. Again, we are concerned that this deviation from AAA rules imposes significant costs that may discourage workers in our States from proceeding through the arbitration process to pursue employment-related claims.

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[2] AAA Employment/Workplace Fee Schedule at 2 (emphasis added).

[3] *See* AAA Commercial Arbitration Rules, *available at* https://www.adr.org/sites/default/files/CommercialRules_Web_FINAL_1.pdf; AAA Commercial Arbitration Rules Fee Schedule, *available at* https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf

[4] *See* AAA Commercial Arbitration Rules at 10 n.1.

We are concerned about the extent to which these barriers prevent workers in our States from fairly and expeditiously resolving employment-related claims through AAA. 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.[5] 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 request the following information relating to AAA's 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-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 AAA 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 AAA provide any recourse to reimburse the claimant-worker's payment of the claimant filing fee? If so, please describe this process.

4. As set out in more detail in Issue No. 2 in this letter, AAA has promulgated an Employment/Workplace Fee Schedule that includes provisions relating to arbitrator compensation cost-sharing. Is this provision binding on AAA arbitrators? In the event a AAA arbitrator deviates from this provision, what recourse is available to arbitrating parties to enforce this provision?

5. As set out in more detail in Issue No. 3 in this letter, AAA has promulgated Commercial Arbitration Rules that provide AAA will apply the Employment/Workplace Fee Schedule toward employment-related claims raised by workers classified as independent contractors. Is this provision binding on AAA arbitrators? In the event a AAA arbitrator deviates from this provision, what recourse is available to arbitrating parties to enforce this provision?

6. Is AAA taking any action to address any of the issues discussed in this letter? If yes, please describe steps and measures taken by AAA.

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

Requests for Documents

1. All documents by which AAA promulgates rules, maintains policies, or provides guidance relating to the payment or non-payment of filing fees in employment-related arbitration claims filed with AAA.

2. Documents sufficient to identify all employment-related arbitration claims that have been suspended or terminated by AAA 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 AAA received the demand for arbitration; (v) whether AAA suspended or terminated the arbitration; and (vi) the date AAA suspended or terminated the arbitration.

3. All documents by which AAA 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 AAA.

4. Documents sufficient to identify all employment-related arbitration claims where a AAA arbitrator has required any share of the arbitrator's compensation to be borne by the claimant-worker absent a determination that such cost-sharing was agreed upon by the arbitrating parties post-dispute, the claim was filed for purposes of harassment, or the claim was patently frivolous. 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 AAA 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; and (vi) the date and disposition of the dispute, including the amount of the award and any relief granted, if any.

5. All documents by which AAA promulgates rules, maintains policies, or provides guidance relating to the relevant fee schedule to be applied to employment-related arbitration claims filed by workers classified as independent contractors.

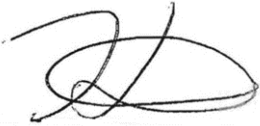
6. Documents sufficient to identify all employment-related arbitration claims filed by workers classified as independent contractors. This identification should include, at a minimum, (i) whether the claimant-worker's annual wage fell below or exceeded $100,000; (ii) whether the claimant-worker was represented by an attorney and, if so, identifying information for that attorney; (iii) the name(s) of the respondent-employer; (iv) the date AAA 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 arbitration is/was subject to the Employment Arbitration Rules and Fee Schedule or the Commercial Arbitration Rules and Fee Schedule.

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.

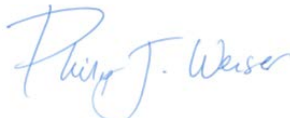
Please provide all responsive documents to the Office of the Attorney General for the District of Columbia, Attention: Randolph Chen and Alacoque Hinga Nevitt, Assistant Attorneys General, Public Advocacy Division, 441 Fourth Street N.W., Suite 630S, Washington, D.C. 20001. Written communications may 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 to this matter.

Sincerely,


Karl A. Racine
Attorney General for the District of Columbia

Xavier Becerra
California Attorney General


Philip Weiser
Colorado Attorney General

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Minnesota Attorney General

Gurbir S. Grewal
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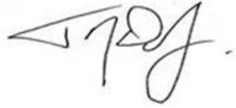
Letitia James
New York Attorney General

Josh Shapiro
Attorney General
Commonwealth of Pennsylvania



Thomas J. Donovan, Jr.
Vermont Attorney General

Bob Ferguson
Washington State Attorney General

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. **<u>Employer Non-Payment of Filing Fees</u>**. 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.

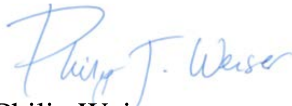
Please provide all responsive documents to the Office of the Attorney General for the District of Columbia, Attention: Randolph Chen and Alacoque Hinga Nevitt, Assistant Attorneys General, Public Advocacy Division, 441 Fourth Street N.W., Suite 630S, Washington, D.C. 20001. Written communications may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



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Brian Frosh
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Massachusetts Attorney General

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Minnesota Attorney General

Gurbir S. Grewal
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Bob Ferguson
Washington State Attorney General