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Mandatory Employment Arbitration

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Abstract

This article offers a comprehensive overview of the academic literature concerning mandatory employment arbitration and existing empirical evidence. Proponents of mandatory employment arbitration contend mandatory arbitration provides access to justice to those excluded from the traditional civil litigation system. Conversely, opponents of mandatory employment arbitration assert that it is a coercive system that disproportionately benefits employers and disadvantages employees. Although these entrenched perceptions of mandatory employment arbitration are not new, an expanding body of recent empirical research provides fresh insights. The empirical literature reveals lower employee success rates and financial awards, longer case resolution times, and evidence of a repeat player effect in arbitration relative to civil litigation and, as a whole, tends to support arguments made by opponents of the forum. This article reviews the literature on the major debates surrounding employment arbitration and corresponding empirical evidence.

INTRODUCTION

The rise of mandatory arbitration is arguably the single most important development in US employment law and dispute resolution in the past three decades. Under mandatory arbitration, employers require employees, as a term and condition of employment, to agree to resolve any legal claims they have against the employer through an arbitration procedure set out in the contract that the employer has drafted, effectively barring the employee from access to the courts. From an insignificant practice in 1990, mandatory employment arbitration has become the predominant dispute resolution mechanism for employment rights today in the United States, with more employees being subject to mandatory arbitration than have access to the courts. Outside of the United States, mandatory employment arbitration is much less prevalent and subject to additional administrative hurdles (Chesnokova 2019). Mandatory employment arbitration is highly controversial; advocates tout it as a solution to the pathologies they see in the litigation system, whereas critics increasingly point to empirical literature showing it as an employer-dominated system that denies due process and undermines employees' ability to effectively vindicate their rights.

What does the US system of mandatory employment arbitration look like, how does it function, and what is its impact on the ability of employees to vindicate the rights guaranteed to them by statutes? Empirical research is key to answer these questions. In the early years of its development, empirical research on mandatory employment arbitration was sparse. This reflected in part the newness of the phenomenon, driven by a shift in Supreme Court decisions rather than a process of informed legislative policy making. But it also reflected the difficulty of accessing data on mandatory arbitration due to it being a process set up by contracts imposed by private-sector employers, administered by private arbitration organizations, and decided in the traditionally private forum of arbitration. No government agencies oversee and regulate the system, so no systematic public information and data were being collected on it.

Indeed, unlike civil litigation, arbitration proceedings and documents are not generally open to the public and are inaccessible to researchers and policy makers. And although as a matter of principle arbitration is not a confidential process—in that an arbitration clause in and of itself is not a confidentiality clause—as a private process, the employment arbitration system remains stubbornly opaque. Any review of the literature on mandatory employment arbitration must address this fact: The private nature of the forum situates it in an empirical desert. However, through careful research design and artful use of the limited public data that do exist, academics have created empirical oases from which to observe the institutional characteristics of mandatory employment arbitration. We describe the picture of mandatory employment arbitration that has emerged from these efforts and discuss what it tells us about this new system for resolving employment rights.

ADOPTION AND USE RATES

What do we know about the prevalence of arbitration? Despite its immense importance to public policy, access to justice, human resource management, and stakeholders, federal agencies do not routinely track the adoption and use of mandatory employment arbitration among American firms. However, academic studies have charted its rise since inception to today. The House of Representatives commissioned the first, and to our knowledge only, systematic governmental analysis of the prevalence of mandatory employment arbitration shortly after the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.* (1991). The US General Accounting Office's 1995 report established that 7.6% of firms had adopted mandatory employment arbitration (Gen. Account. Off. 1995). Later studies, using data from the early 2000s, estimated that a quarter or more of all nonunion employees in the United States were subject to mandatory arbitration agreements (Colvin 2008). According to a 2011 survey of Fortune 1,000 corporations, 37.8% of

firms reported using mandatory arbitration for employment disputes within the last three years (Stipanowich & Lamare 2014). In 2017, Colvin conducted a national-level survey of private-sector employers to measure the prevalence of mandatory employment arbitration and found that 56.2% of private-sector nonunion employees are subject to these arbitration procedures (Colvin 2019).

Surveys over the last three decades, though employing several different survey methodologies, have charted a clear "arbitration revolution" (Horton & Chandrasekher 2016). From less than 10% in the 1990s to more than 50% today, mandatory employment arbitration is now the predominate forum for the resolution of employment claims and likely covers more than 60 million workers. However, the increase in mandatory employment arbitration coverage has not coincided with proportional increases in workers arbitrating workplace disputes (Colvin 2019, Estlund 2018, Glover 2022, Gough 2016). As discussed in greater detail below, this suggests mandatory arbitration has tended to suppress access to justice.

In addition to the overall extent of mandatory employment arbitration, Colvin's (2019) survey further illuminates the contours of the employment arbitration landscape by presenting adoption rates by firm size, pay level, and employee demographics. While 53.9% of all firms, covering 56.2% of the workforce, mandated arbitration procedures for employment disputes, adoption rates varied by workforce size. Specifically, 49.8% of employers with fewer than 100 employees required arbitration, whereas 67.7% of employers with 5,000 or more employees required arbitration. This is consistent with the literature establishing that firm size is positively correlated with formalized human resource policies and access to more sophisticated legal strategies, like mandatory arbitration, to protect against legal liability.

On an individual level, Colvin (2018) establishes that low-wage workers are subject to mandatory arbitration at higher rates than their higher-paid counterparts. Whereas 64.5% of employees earning less than $13 an hour were subject to arbitration, 52.9% of employees making $13 to $16.99 an hour, 47.7% of employees making $17 to $22.49 an hour, and 54.1% of employees making $22.50 or more were covered by mandatory employment arbitration clauses. In addition, mandatory arbitration was more common in industries with higher proportions of women and of African American workers. These results suggest that the imposition of mandatory arbitration falls more heavily on groups that have suffered structural disadvantages in the labor force.

One noteworthy aspect of the above research is that it is largely atheoretical. While these foundational empirical studies are vital for literature development, there is opportunity for future researchers to adopt theoretical perspectives to understand the precise reasons mandatory employment arbitration has proliferated over time, to explore how state-level legal environments affect adoption, or to explain and situate the demographic inequalities described above (see, for example, Staszak 2015, 2020).

PROVIDER AND ARBITRATOR CHARACTERISTICS

The American Arbitration Association (AAA) is the largest provider of employment arbitration services in the United States. It is a not-for-profit founded in 1926 following the enactment of the Federal Arbitration Act (FAA) and serves the entire United States and internationally. JAMS, formerly Judicial Arbitration and Mediation Services, Inc., is the second largest arbitration provider. Unlike AAA, JAMS is a for-profit entity, and many of its rostered neutrals are also shareholders. A little more than one-quarter of JAMS neutrals have an ownership stake in the company. Together, AAA and JAMS are estimated to administer approximately 70% of mandatory employment arbitrations in the country (Gough & Colvin 2020).

A review of the JAMS and AAA neutral rosters—the two largest arbitration providers in the United States—exposes a stark lack of demographic diversity within the employment arbitration

profession. Indeed, employment arbitrators are largely male and white (Gough 2020). Although women comprise a slight majority of the US population, women represent a disproportionate percentage of arbitrators: only 22% in the AAA and only 32% in JAMS. Even smaller providers, such as ADR Services, maintain rosters that are only 24% female. Likewise, 60% of the US population identifies as white, yet nearly 90% of employment arbitrators identify as white. Specifically, 87% of AAA arbitrators and 85% of JAMS arbitrators identify as white. Arbitration providers do not include arbitrator age in their disclosures; however, the distribution of arbitrator age skews older than the US workforce. A recent academic survey of AAA and JAMS employment neutrals revealed that only 10% of arbitrators were under the age of 60, 43% were between 60 and 69, 39% were between 70 and 79, and the remaining 9% were 80 or older (Gough 2021).

The law vests arbitrators with the awesome power of resolving private contractual disputes and those involving public, statutory rights such as Title VII, FMLA (Family and Medical Leave Act), FLSA (Fair Labor and Standards Act), ADA (Americans with Disabilities Act), and ADEA (Age Discrimination in Employment Act). And the reality is that arbitrators entrusted with this power are overwhelming white, male, and >60 years old. These demographic concerns are not unique to employment arbitration. LaRue & Symonette (2019, p. 3) reviewed current and historical members in the National Academy of Arbitrators, the nation's leading organization of labor arbitrators, and determined that "as of January 25, 2019 the Academy had accepted 1484 members over its 72 years; approximately 35 persons or 2.35% of that group were persons of color. Half of those persons of color have been admitted within the last 25 years." Lack of diversity can also be seen in the composition of federal judges, who are 71% white and nearly two-thirds male (Am. Const. Soc. 2022); however, juries provide a degree of representative diversity to the courts that is lacking in arbitration. The lack of racial and gender diversity among arbitrators relative to the characteristics of the workforce can plainly be framed as problematic and biased against women and members of racial minorities. Furthermore, roster diversity does not necessarily translate to a diversity of arbitrators actually presiding over cases, because parties have discretion to select from panels, and minority neutrals are selected at lower rates (Green 2020). Providers have recognized this issue and are taking limited positive steps, but researchers should continue to monitor diversity among arbitrators, understand factors contributing to the demographic composition of employment arbitration rosters and selection, and define and assess approaches to enhance diversity among arbitrators (see, generally, Chandrasekher 2021, Cole 2021).

CHARACTERIZING ARBITRATION OUTCOMES

What normative conclusions can be drawn from the widespread presence of mandatory employment arbitration? A logical starting point, and one of the most pressing questions in the employment arbitration arena, is whether and how arbitration affects employee outcomes and employee access to justice.

The last 20 years of literature on employment dispute resolution in arbitration and state and federal court has established clearly that when a dispute is taken to final adjudication in front of an arbitrator, judge, or jury, average plaintiff win rates and monetary damages are lower in arbitration relative to civil litigation. However, interpreting win rates and award amounts between arbitration and litigation is difficult. Does employment arbitration itself reduce the prospect of an employee plaintiff win and their monetary damages when they do? Or can these differences in employee outcomes be explained by variation in the types of cases, quality of representation, or other factors? This is difficult to untangle. Nevertheless, careful research and theorizing have isolated meaningful forum effects.

Until recently, the empirical scholarship comparing outcomes between litigation and arbitration relied on descriptive statistics within each forum to demonstrate that the population of

cases adjudicated in arbitration receive smaller awards and lower win rates when compared to adjudicated cases in litigation. In a seminal 2011 study, Colvin analyzed 1,213 mandatory arbitration cases administered between 2001 and 2007 by the AAA and found that employees won 21% of their cases taken to verdict in arbitration and, where successful, were awarded median and mean monetary damages of $36,500 and $110,000, respectively. In a subsequent study of AAA data through 2014, Colvin & Gough (2015) found that employees won 19% of their cases adjudicated by an arbitrator, and the median and mean damages awarded to successful employee claimants were $49,000 and $135,000, respectively. In 2022 dollars, this would be more than $60,000 and $170,000, respectively. Chandrasekher & Horton (2019) analyzed employment win rates from AAA, JAMS, and ADR Services and found that employees prevailed in 22% of the 1,659 tried cases administered by the AAA, 31% of 310 tried cases administered by JAMS, and 59% of 174 tried cases administered by ADR services. An earlier study found an even lower win rate of 18% (Horton & Chandrasekher 2016).

Eisenberg & Hill (2003) investigated win rates and awards in federal and state court, finding that employee plaintiffs won in 36% of the 1,430 employment discrimination claims litigated in federal court and 44% of the 160 employment discrimination claims litigated in state court. They reported the mean damages awarded to successful plaintiffs in state court was over $200,000, which would be over $325,000 in 2022 dollars. Oppenheimer (2003) reported an employee win rate of 59% and mean damages of over $350,000 (or approximately $575,000 in 2022 dollars) in a sample of 117 common law discharge cases heard in California State Court. Using data from the 2005 Civil Justice Survey of State Courts, the average damages awarded in a random sample of employment verdicts in state courts across the United States were over $1,000,000 in 2022 dollars (Cohen 2008). Nielsen et al. (2010) analyzed a random sample of 1,672 employment discrimination cases disposed of in federal court between 1988 and 2003 and found an employee win rate of 33% and a median award at trial of $110,000, or over $150,000 in 2022 dollars after adjusting for inflation. In an analysis of jobs cases heard in federal court between 2009 and 2012, Gough (2016) found employment discrimination plaintiffs won in 32% of cases and received a median award amount of over $380,000, whereas wage and hour plaintiffs experienced a 56% success rate at trial and median awards of $81,000. A contemporary analysis of the universe of federal employment cases terminated between 2018 and 2022 reveals a plaintiff win rate of 37% for employment-related cases and a median award of approximately $338,000.[1]

A simple comparison of win rates and median and mean damages between arbitration and litigation across these various studies reveals a consistent pattern. Outcomes for employees are substantially better in litigation than in mandatory employment arbitration.

INTERPRETIVE DIFFICULTIES

That award amounts and employee win rates at trial are lower in arbitration than in litigation is widely accepted; however, the interpretation of these differences remains contentious. The first interpretive difficulty when comparing win rates between forums is agreeing on the definition of an employee "win rate" (Colvin 2011, Pham & Donovan 2022). Should a decision in an employee plaintiff's favor containing $0 or token $1 in damages be considered an employee win? And how should non-trial adjudications such as settlements and motions for summary judgment factor in? Most of the literature cited above defines employee win rates as nonzero monetary awards in

[1]The Federal Judicial Center provides a key database covering all civil cases filed in federal court. These data can be accessed through the following link: **https://www.fjc.gov/research/idb**.

arbitration and compares outcomes that are adjudicated after a full trial in litigation (i.e., summary judgments and settlements are not considered directly). However, pro-arbitration scholars have adopted alternative definitional approaches (see, for example, H. Katz & D. Sherwyn, manuscript forthcoming; Pham & Donovan 2022; Sherwyn et al. 2005).

A second interpretive difficulty arises due to inevitable selection effects between forums. Scholars must contend with the likelihood of systematic differences between the population of cases filed and ultimately disposed of in arbitration and civil litigation. For example, we know that the decision to promulgate mandatory arbitration is not random. Indeed, firms that require mandatory arbitration are relatively larger and often do so in combination with other human resource management practices (Colvin 2003, 2019; Stipanowich & Lamare 2014). Under this rationale, lower awards and win rates in arbitration may be expected, not because arbitration is unfair but because larger firms with sophisticated human resource management practices may be more likely to adhere to the law and/or settle meritorious cases before they are filed. Further, proponents claim arbitration is cheaper, faster, and more accessible than litigation, which may lead plaintiffs to pursue lower-quality and lower-value cases in arbitration (Estreicher 2001, Pham & Donovan 2022). Here again, we may observe lower win rates and awards in arbitration, not because arbitration is itself an inequitable forum but because of systematic differences between the types of cases being disposed in each forum.

In sum, interpreting summary statistics found within forums is fraught with theoretical and empirical difficulties and requires "epistemological humility" (Ware 2017). However, several studies have controlled for potential selection effects and support the contention that arbitration is in fact an inequitable forum for employees. Klass et al. (2006) presented 32 hypothetical termination decisions to labor arbitrators, employment arbitrators, and jurors and found that employment arbitrators were the least likely among the three groups to rule in favor of the hypothetical employee. Gough (2018) adopted a similar design in a survey of more than 900 plaintiff attorneys where the presence of an arbitration clause was randomly manipulated in an experimental vignette and found that arbitration clauses have an independent, negative effect on the settlement values of plaintiffs' cases and attorneys' willingness to accept clients on a contingency fee basis. Further, Gough (2021) controlled for several potential selection effects in a survey of 1,256 plaintiff attorneys about their most recent cases taken to trial in arbitration and litigation. Even when controlling for differences in procedural motions; claim types; and defendant, claimant, and counsel characteristics between arbitration and civil litigation, Gough (2021) found the odds of an employee win at trial increase by 71% in a federal jury trial, 184% in a state bench trial, and 146% in a state jury trial relative to arbitration. He further reported that relative to arbitration, monetary awards are 203% and 166% higher in federal and state jury trials, respectively.

Although scholars are correct to identify potential confounding variables, careful empirical studies provide strong evidence that mandatory arbitration in the employment context unduly disadvantages employee plaintiffs by relegating their claims to a forum that reduces the likelihood of a verdict in their favor and the size of their monetary awards. Scholars should continue to pursue research in this area in hopes of establishing a broader consensus.

REPEAT PLAYER EFFECTS

Whether large employers gain undue advantages due to their status as frequent users has been a standing concern within arbitration research. Galanter (1974) argued in his seminal work that regular participants in dispute resolution processes have systematic advantages over parties who are not regular participators. One advantage of repeat players is their likely status as large, sophisticated organizations associated with enhanced resources to pursue resolution of a case, ability to

hire better legal counsel, and experience and expertise within a given forum navigating the process of dispute resolution.

However, in employment arbitration, the presence of financial incentives creates heightened repeat player concerns. Although arbitrators are bound by the FAA, professional norms, and provider rules to remain neutral and impartial, there is a fear that arbitrators (even if just a small minority) will betray this neutrality in hopes of soliciting future business. Because employers are the party likely to be repeat players in employment arbitration, individual employee plaintiffs participating in their first (and likely only) case are potentially unduly disadvantaged (Chandrasekher & Horton 2019, Colvin 2011, Colvin & Gough 2015).

This is a unique feature of nonunion employment arbitration; in labor arbitration, for example, both management and the union are repeat players, each likely to act as equal and opposing institutional forces against repeat player biases. Perhaps plaintiff attorneys could also be considered repeat players in employment arbitration, but we are not aware of any literature empirically testing this. Colvin & Pike (2014) found that in a sample of employment arbitration cases, employers were represented by attorneys who specialize in employment law 76.6% of the time, whereas employees were represented by employment law specialist attorneys only 54.6% of the time. Among the 449 cases in their sample, just over half of the time (54.6%) the employer was represented by a law firm that was involved in multiple cases in the sample, whereas only 10.7% of the time employees were represented by law firms that were involved in more than one case in the same sample. Chandrasekher & Horton (2019) demonstrated that, at least in the consumer context, plaintiff-side lawyers experience empirically similar repeat player benefits to businesses. Taken together, these findings suggest that plaintiff-side lawyers can provide a countervailing force as a repeat player on the employee side, but employees are much less likely than employers to have representation by attorneys who have this capability (Chandrasekher & Horton 2019, Gough 2016, Gough & Taylor Poppe 2020).

The key empirical question is not only whether repeat employers do better in employment arbitration but also whether they gain an additional advantage from having selected the same arbitrator on multiple occasions (Colvin 2011). It should also be recognized that this type of repeat employer–arbitrator pairing advantage could arise even absent bias on the part of the individual arbitrator (Chandrasekher & Horton 2019, Colvin & Gough 2015). It could be that a repeat employer's greater experience with employment arbitration might allow it to be systematically better than a one-shot employee at selecting arbitrators more likely to rule in its favor. The repeat employer may observe tendencies in a particular arbitrator's handling of cases and decision-making processes that allow it to gain an advantage in how it presents future cases to that arbitrator. Although this would not suggest bias on the arbitrator's own part, it would nonetheless be problematic from a public policy perspective because it would suggest that the process of arbitrator selection in employment arbitration allows repeat employers to gain a systematic advantage over one-shot employees.

Though various repeat player effects have been identified in the literature, as discussed above, little empirical research explains the exact mechanisms at play. This led Ware (2017) to argue that scholars should take a comparative approach to the repeat player effect whereby the key questions should be not whether repeat player effects exist in arbitration but whether repeat player effects are more pronounced in arbitration relative to in litigation. Chandrasekher & Horton (2019) further investigated this issue and found evidence that repeat player effects are better explained by company-specific characteristics than by experience within arbitration. Scholars should continue this avenue of research to better understand the underlying reasons for repeat player effects and whether institutional characteristics of arbitration result in undue advantage accruing to repeat players.

IS ARBITRATION MORE ACCESSIBLE?

The strongest public policy argument in favor of mandatory arbitration holds that the traditional civil litigation system is inaccessible to most employees, particularly low-wage workers. Arbitration, it is argued, promises to provide an accessible, albeit imperfect, alternative for such claimants (Eigen & Sherwyn 2016, Estreicher 2001). For example, St. Antoine (2008, p. 794) argues,

> The vast majority of ordinary, lower- and middle-income employees. . .cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

The presumption that arbitration is more accessible than litigation, particularly for low-wage claimants, deserves serious consideration. But does the literature support the contention that arbitration provides access to justice to those who are barred from the civil litigation system? We investigate the accessibility of arbitration by evaluating the expediency of the process and the overall caseloads found in the respective forums.

SPEED

Arbitration has long been reputed as a faster alternative to civil litigation. For example, Chandrasekher & Horton (2019, p. 9) write, "The AAA epitomizes the rough-and-tumble model of alternative dispute resolution," and "speed is one of private dispute resolution's greatest virtues." Gough (2014, p. 123) writes, "Arbitration is almost certainly faster than civil litigation." And Sherwyn et al. (2005, p. 1572) note, "Unlike the win/loss comparisons, few dispute the assertion that arbitration is faster than litigation." However, a closer look at contemporary data calls for a qualification regarding arbitration's expediency: Arbitration is faster than litigation, on average, for the minority of cases taken to a trial verdict. This qualification is more than a mere technicality; it is a necessary correction to conventional wisdom because the data appear to show that, on the whole, cases are disposed of faster in litigation than in arbitration.

With access to publicly available data reported by arbitration providers and the Federal Judicial Center, docket times are relatively easy (and uncontroversial) to calculate. Specifically, we can access the universe of mandatory employment arbitration cases administered by the AAA and JAMS through their quarterly consumer arbitration disclosure reports. The Federal Judicial Center maintains a database of the universe of cases filed and disposed in federal court going back to the 1970s. As previous researchers have done, we can use these databases to calculate how much time elapses between filing and disposition in the two forums.

Figure 1*a*,*b* clearly demonstrates the limitations of describing arbitration as relatively speedy. Although it is true that cases taken to trial are resolved quicker in arbitration relative to litigation, tried cases represent a mere 1.8% of the approximately 175,0000 cases disposed in federal court, AAA, or JAMS between 2017 and 2022.[2] Settlements, in comparison, represent 69.5% of all dispositions in federal court, AAA, and JAMS during the same period. We argue the most meaningful comparison is found not in tried cases alone, or in settlements alone, but in the mean and median docket times for all dispositions. Specifically, 151,868 employment-related cases were disposed of

[2]Less than 1% of cases are taken to verdict in federal court, whereas approximately 8% and 6% are awarded after a hearing in AAA and JAMS, respectively. The higher proportion of cases taken to trial is one obvious factor explaining why the mean and median docket times are higher in arbitration.

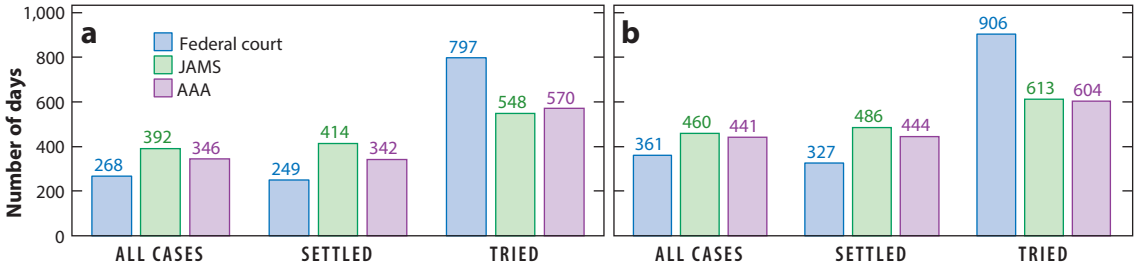

Figure 1

(*a*) Mean and (*b*) median docket time (days) by forum for cases disposed 2017–2022. Abbreviations: AAA, American Arbitration Association; JAMS, Judicial Arbitration and Mediation Services, Inc.

by any means (e.g., trial, summary motion, settlement, withdrawal) in federal court between 2017 and 2022,[3] whereas the AAA and JAMS disposed of 14,840 and 9,807 employment cases proceeding under mandatory arbitration clauses, respectively. **Figure 1*a*,*b*** reveals that the mean and median docket times for these 150,000+ cases in federal court were 361 and 268 days, respectively. The docket times for the 14,840 AAA cases were 441 days (mean) and 346 days (median), and for the 9,807 JAMS cases, 460 (mean) and 392 (median) days. A total of 1,297 cases were resolved after a full trial in federal court, 1,200 were resolved after a full hearing administered by AAA, and 567 were resolved after a full hearing by JAMS. The mean and median docket times for these cases were 906 and 797 days in federal court, 604 and 570 days for AAA, and 613 and 548 days for JAMS. These calculations are similar to those produced by Clermont & Schwab (2004), Eisenberg & Hill (2003), Colvin (2011), Colvin & Gough (2015), and Chandrasekher & Horton (2019) for each respective forum, though we believe these statistics need to be reframed and the emphasis shifted away from tried cases. Whereas a comparison of the small minority of cases resolved by a trial or hearing suggests that arbitration is much faster than litigation, a comparison of the full universe of cases, including all types of dispositions, indicates that cases are actually resolved faster in litigation than in arbitration.

These findings are supported by Gough (2016), who surveyed plaintiff lawyers and found that 40% viewed arbitration as having a "very negative" to "somewhat negative" effect on expediency of proceedings, 25% reported they were "undecided," and only 35% viewed arbitration as having a "somewhat positive" to "very positive" effect on expediency. Perhaps practitioners have understood what the literature has failed to bring in to focus: Although the small minority of tried cases in litigation have longer docket times, the average case filed in arbitration experiences docket times 20–30% longer than the average case filed in federal court.[4]

As in comparisons of win rates and award amounts, we should be careful to account for potential confounding variables in our interpretation of docket time as well. However, scholars should continue to research and reevaluate, where appropriate, the conventional wisdom that arbitration is a speedier alternative to litigation.

[3]These 151,868 federal employment cases can be broken down into employment discrimination (79,165), Employment Retirement Income Security Act (ERISA) (33,186), and Fair Labor Standards Act (FLSA) cases (39,517).

[4]Many of the same selection effects bedeviling the interpretation of win rates and awards between the forums should be acknowledged here as well. That cases spend fewer days on the docket in federal court, on average, could result from differences in case complexity and changes in actors' behavior (for example, a higher proportion of cases are taken to trial in arbitration than litigation).

CASELOADS

A second measure of accessibility is to directly assess the caseloads and filing rates of arbitration relative to litigation. Despite the touted benefits of arbitration, some researchers have argued that arbitration represents a complete "erasure" of employment rights and dispute resolution (Resnik 2015). If arbitration is more accessible, we should expect employees to file at higher rates compared to litigation; yet this is not what the literature shows.

The number of claims being filed in arbitration has increased over time. The AAA is the largest employment arbitration provider in the country, with studies estimating it administers roughly half of all arbitrations emanating from mandatory employment arbitration clauses (Chandrasekher & Horton 2019, Gough & Colvin 2020, Stone & Colvin 2015). Colvin (2011) finds that the AAA disposed of an average of 789 mandatory arbitration cases per year between 2003 and 2007. Horton & Chandrasekher (2016) find this rate nearly doubled to an average of 1,307 cases per year between 2009 and 2013. And the analysis above shows AAA cases continuing to grow: In the five-year period between 2017 and 2022, the AAA disposed of an average of 2,968 mandatory arbitration cases per year. If the AAA maintains a 50% market share, we can estimate that employees file a mere 5,936 mandatory arbitration cases with any arbitration provider each year across the United States. This admittedly crude estimate suggests that only 1 in 10,000 employees covered by mandatory arbitration clauses makes a claim in arbitration. How does this compare to claims made in litigation? Estlund (2018) presents evidence that employees subject to mandatory arbitration agreements file claims at alarmingly low rates compared to the rates employees file in court. She estimates that if they were filing at the same rate as we observe employees filing claims in the courts, we should observe between 315,000 and 722,000 claims filed in arbitration each year, yet the reality is orders of magnitude less. Although a majority of private-sector nonunion employees are now covered by mandatory arbitration procedures, we continue to see much larger numbers of employment cases filed in the courts than in arbitration. This suggests that the premise and promise of greater accessibility of arbitration have yet to be realized and may be a mirage. Scholars should continue to refine these estimations and assess whether employment arbitration is truly accessible or, as the above rudimentary calculations suggest, extinguishes employee claims.

CLASS ACTION WAIVERS AND MASS ARBITRATION FILINGS

In the seminal case *AT&T Mobility LLC v. Concepcion* (2011), the Supreme Court ruled that companies could unilaterally ban the right to engage in class actions by inserting class action waivers in contracts, in this case, a cell phone contract, even if state law deems such clauses unenforceable. More than a simple federal preemption case, *AT&T v. Concepcion* is noteworthy for opening the door to wide-scale adoption of class action waivers in contracts. In *American Express Co. v. Italian Colors Restaurant* (2013), the court ruled 5–3 that the FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds potential recovery. In *Epic Systems Corp. v. Lewis* (2018), the Supreme Court continued its embrace of class action restrictions in holding that class action waivers in employment contracts do not violate workers' right to collective action under the National Labor Relations Act (NLRA). This case establishes the primacy of the FAA over worker rights to engage in concerted activity as enumerated in the NLRA but has broader implications for consumer arbitration. *Epic Systems* is particularly noteworthy, as legal commentators have argued it elevated the FAA into a kind of superstatute: Where the FAA conflicts with rights granted by other federal statutes, the FAA will seemingly prevail. Consumers' rights to class and collective actions in arbitration were dealt yet another blow in *Lamps Plus*,

Inc. v. Varela (2019), in which the Supreme Court held that an ambiguous agreement cannot provide the necessary contractual basis for compelling class arbitration. The court ruled that they will "not infer consent to participate in a class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so. Silence is not enough." *Lamps Plus* effectively establishes that all arbitration agreements are, by default, agreements to arbitrate individually. An explicit class action waiver is not necessary. The opportunity to arbitrate on a class-wide basis is restricted to contracts that expressly and unambiguously allow class actions.

Colvin (2019) reported that 30.1% of companies that adopted mandatory employment arbitration included an explicit class action waiver. Given that larger firms included class action waivers at higher rates, Colvin estimated that 41.1% of employees covered by an arbitration agreement were also subject to class action waivers. These estimates translate to a minimum class action coverage rate of 23.1% for all private-sector nonunion employees, representing almost 25 million workers.

In response to class action waivers, enterprising plaintiff attorneys and consumers have adopted a strategy of mass arbitration filings (Glover 2022). By initiating individual arbitration proceedings en masse, employees and their attorneys attempt to force corporations to realize the cost of class action bans in mandatory arbitration agreements by making corporations pay for filing fees, which have approached tens of millions of dollars in several cases (Glover 2022). However, rather than participating in the arbitration process pursuant to clauses in contracts they unilaterally instituted, some firms have been refusing to pay these fees. And providers, therefore, have been refusing to administer the cases. Critics argue that employer resistance to mass arbitration filings demonstrates the "heads I win, tails you lose" aspect of employment arbitration. Employees cannot access the courts or engage in class actions but also face difficulty initiating arbitration proceedings due to corporate noncompliance and exploitation of provider rules.

Take, for example, Postmates, a company that provides on-demand grocery and take-out delivery services. Postmates included a mandatory arbitration provision with a class action waiver in its contract with delivery drivers. By 2020, more than 10,000 drivers filed individual arbitration demands claiming they had been improperly classified as independent contractors. However, Postmates refused to pay the required forum fees to proceed with arbitration. The Ninth Circuit ordered Postmates to pay their required forum fees, and the company ultimately reached a $32 million settlement.

Postmates is far from the only example of corporations receiving en masse demands for arbitration and subsequently refusing to pay. In April 2020, a federal judge ordered another food delivery company, DoorDash, to pay almost $10 million in arbitration forum fees it had been resisting to begin arbitrating 5,010 cases brought by delivery drivers. In response, DoorDash introduced new provisions into its arbitration agreement requiring disputes be arbitrated through the Institute for Conflict Prevention & Resolution (CPR), which adopted mass arbitration protocols favorable to DoorDash. It subsequently came to light that DoorDash was involved in reviewing and editing CPR's mass arbitration protocols. Businesses can shop for—and influence—provider rules that best suit their interests and unilaterally impose these rules on consumers.

Arbitration service provider rules can be exploited in individual proceedings as well. First, consumer contracts can list an arbitration service provider while promulgating rules and procedures contrary to the service provider's rules. For example, if a business's terms of use designate the AAA as the arbitration service provider but the terms of use do not comport with the AAA's rules, the AAA will simply administratively close the case. And although the AAA putatively requires companies to preregister their contracts, their website lists fewer than 800 preregistered clauses between 2014 and 2022. By comparison, more than 11,000 unique business names appear in the AAA's consumer arbitration disclosure report covering the years 2017–2022.

Businesses can further exploit service provider rules by refusing to pay required administration fees, as in the Postmates and DoorDash examples above. Neither AAA nor JAMS allows for default judgments for nonpayment of fees. Therefore, in the case of nonpayment, the consumer party can front the business's share of administrative fees, go to court to seek an order requiring the business to pay the fees, or withdraw from arbitration and attempt to pursue their claim in court. At a minimum, this presents additional procedural hurdles, wasted time, and expenses. At worse, it can be framed as clear abuse of the employer prerogative (Glover 2006, 2022; Racabi 2022).

CONCLUSION

This article represents a broad overview of the academic literature on mandatory employment arbitration. Employment arbitration has grown exponentially over the last three decades, from affecting less than 10% of the nonunion workforce in the 1990s to more than half today. Proponents of mandatory arbitration continue to describe it as an avenue to provide access to justice to those who are foreclosed from the civil litigation system. Opponents of mandatory arbitration contend it is a coercive forum that unduly advantages employers at the expense of employees. These conceptions of employment arbitration are not new, but the growing trove of empirical scholarship is (relatively speaking). And the empirical evidence demonstrating lower employee win rates and monetary awards, longer docket times, smaller caseloads, and repeat player effects in arbitration increasingly supports opponents' conception of the forum.

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LITERATURE CITED

Am. Const. Soc. 2022. *Diversity of the federal bench*. Rep., Am. Const. Soc., Washington, DC. **https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/**

American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013)

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

Chandrasekher A. 2021. *An empirical investigation of diversity in U.S. arbitration*. Work. Pap., Univ. Calif., Davis. **https://ssrn.com/abstract=3903718**

Chandrasekher AC, Horton D. 2019. Arbitration nation: data from four providers. *Calif. Law Rev.* 107:1–66

Chesnokova S. 2019. Arbitration of employment claims globally. *Employer Report*, June 21. **https://www.theemployerreport.com/tag/international-arbitration/**

Clermont KM, Schwab SJ. 2004. How employment discrimination plaintiffs fare in federal court. *J. Empir. Legal Stud.* 1(2):429–58

Cohen TH. 2008. General civil jury trial litigation in state and federal courts: a statistical portrait. *J. Empir. Legal Stud.* 5(3):593–618

Cole SR. 2021. Arbitrator diversity: Can it be achieved? *Wash. Univ. Law Rev.* 98:965–95

Colvin AJS. 2003. The dual transformation of workplace dispute resolution. *Ind. Relat.* 42(4):712–35

Colvin AJS. 2008. Empirical research on employment arbitration: Clarity amidst the sound and fury? *Empl. Rights Employ. Policy J.* 11(2):405–47

Colvin AJS. 2011. An empirical study of employment arbitration: case outcomes and processes. *J. Empir. Legal Stud.* 8(1):1–23

Colvin AJS. 2018. *The growing use of mandatory arbitration*. Rep., Econ. Policy Inst., Washington, DC. **https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/**

Colvin AJS. 2019. The metastisization of mandatory arbitration. *Chicago-Kent Law Rev.* 94(1):3–24

Colvin AJS, Gough MD. 2015. Individual employment rights arbitration in the U.S.: actors and outcomes. *Ind. Labor Relat. Rev.* 68(5):1019–42

Colvin AJS, Pike K. 2014. Saturns and Rickshaws revisited: What kind of employment arbitration system has developed? *Ohio State J. Dispute Resolut.* 29(1):59–83

Eigen ZJ, Sherwyn D. 2016. Deferring for justice: how administrative agencies can solve the employment dispute quagmire by endorsing an improved arbitration system. *Cornell J. Law Public Policy.* 26(2):1

Eisenberg T, Hill E. 2003. Arbitration and litigation of employment claims: an empirical comparison. *Dispute Resolut. J.* 58(4):44–55

Epic Systems Corp. v. Lewis, 584 US __ (2018)

Estlund C. 2018. The black hole of mandatory arbitration. *N.C. Law Rev.* 96:679–709

Estreicher S. 2001. Saturns for rickshaws: the stakes in the debate over predispute employment arbitration agreements. *Ohio State J. Dispute Resolut.* 16:559–70

Galanter M. 1974. Why the "haves" come out ahead: speculations on the limits of legal change. *Law Soc. Rev.* 9(1):95–160

Gen. Account. Off. 1995. *Employment discrimination: Most private sector employers use alternative dispute resolution*. Rep. GAO/HEHS 95–150, Gen. Account. Off., Washington, DC

Gilmer v. Interstate/Johnson Lane Corp., 500 US 20 (1991)

Glover JM. 2006. Beyond unconscionability: class action waivers and mandatory arbitration agreements. *Vanderbilt Law Rev.* 59:1735–70

Glover JM. 2022. Mass arbitration. *Stanford Law Rev.* 74:1283–392

Gough MD. 2014. The high costs of an inexpensive forum: an empirical analysis of employment discrimination claims heard in arbitration and civil litigation. *Berkeley J. Employ. Labor Law* 35(1–2):91–112

Gough MD. 2016. Employment lawyers as gatekeepers: how employment arbitration affects employee access to justice. *Adv. Ind. Labor Relat.* 22:105–34

Gough MD. 2018. How do organizational environments and mandatory arbitration shape employment attorney case selection? Evidence from an experimental vignette. *Ind. Relat.* 57(4):541–67

Gough MD. 2020. Characteristics and professional practices of labor and employment arbitrators. *Arbitr. Law Rev.* 12:117–38

Gough M. 2021. A tale of two forums: employment discrimination outcomes in arbitration and civil litigation. *Ind. Labor Relat. Rev.* 74(4):875–97

Gough MD, Colvin AJS. 2020. Decision-maker and context effects in employment arbitration. *Ind. Labor Relat. Rev.* 73(2):479–97

Gough MD, Taylor Poppe ES. 2020. (Un)Changing rates of pro se representation in federal court. *Law Soc. Inq.* 45(3):567–89

Green MZ. 2020. Arbitrarily selecting black arbitrators. *Fordham Law Rev.* 88:2255–87

Horton D, Chandrasekher AC. 2016. Employment arbitration after the revolution. *DePaul Law Rev.* 65(457):457–60

Klass BS, Mahony D, Wheeler H. 2006. Decision-making about workplace dispute: a policy-capturing study of employment arbitrators, labor arbitrators, and jurors. *Ind. Relat.* 45(1):68–93

Lamps Plus, Inc. v. Varela, 587 US ___ (2019)

LaRue H, Symonette A. 2019. *Diversity and inclusion in arbitrator selection or "I select who I know."* Pap., Am. Bar Assoc., Chicago. **https://www.americanbar.org/content/dam/aba/events/labor_law/2019/annual-conference/papers/diversity-and-inclusion-in-arbitrator-selection.pdf**

Nielsen LB, Nelson RL, Lancaster R. 2010. Individual justice or collective legal mobilization? Employment discrimination litigation in post-civil rights United States. *J Empir. Legal Stud.* 7:175–201

Oppenheimer DB. 2003. Verdicts matter: An empirical study of California employment discrimination and wrongful discharge jury verdicts reveals low success rates for women and minorities. *Univ. Calif. Davis Law Rev.* 37:535–49

Pham ND, Donovan M. 2022. *Fairer, faster, better III: an empirical assessment of consumer and employment arbitration*. Rep., Inst. Legal Reform, US Chamb. Commerce, Washington, DC

Racabi G. 2022. Abolish the employer prerogative, unleash work law. *Berkeley J. Employ. Labor Law* 43(1):79–138

Resnik J. 2015. Diffusing disputes: the public in the private of arbitration, the private in courts, and the erasure of rights. *Yale Law J.* 124:2804–939

Sherwyn D, Estreicher S, Heise M. 2005. Assessing the case for employment arbitration: a new direction for empirical research. *Stanford Law Rev.* 57:1557–91

St. Antoine TJ . 2008. Mandatory arbitration: why it's better than it looks. *Univ. Mich. J. Law Reform* 41(4):783–812

Staszak S. 2015. *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment.* Stud. Postwar Am. Political Dev. Oxford, UK: Oxford Univ. Press

Staszak S. 2020. Privatizing employment law: the expansion of mandatory arbitration in the workplace. *Stud. Am. Political Dev.* 34(2):239–68

Stipanowich TJ, Lamare J. 2014. Living with ADR: evolving perceptions and use of mediation, arbitration, and conflict management in Fortune 1,000 corporations. *Harvard Negot. Law Rev.* 19:1–68

Stone KVW, Colvin AJS. 2015. *The arbitration epidemic.* Brief. Pap. 414, Econ. Policy Inst., Washington, DC

Ware S. 2017. The centrist case for enforcing adhesive arbitration agreements. *Harvard Negot. Law Rev.* 23:29–121