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## Legal and Historical Background for Comparing Results of Employee Claims in Court and Arbitration

During most of the 19th and 20th centuries, American doctrine was "employment at will." Employers could lawfully "dismiss their employees at will … for good cause, for no cause or even for cause morally wrong." *Payne*, 81 Tenn. 507, 519-20 (1884).

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By the 1980s, all but a couple of U.S. states had judicially adopted one or more of three different legal theories to modify broad at-will employment rules (St. Antoine, 41 *U. Mich. Journal Law Reform* 783, 783-84 (2008):

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(1) Tort (contrary to public policy, *e.g.,* firing an employee for refusing to join price-fixing conspiracy);
(2) Contract (contrary to personnel manual, *e.g.,* "We will not discharge except for good cause"); and/or
(3) Contrary to implied covenant of good faith and fair dealing (much less common).

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The U.S. has remained one of the major industrial democracies in the world that have not ratified Convention 158 of the International Labor Organization (1982), which provides: “The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”

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Relying on common-law modifications of at-will employment, discharged workers won 75 percent of jury cases in California in the 1980s, with the average award about $450,000. Nationwide, single individuals recovered million-dollar jury awards for actual and punitive damages for wrongful discharges. St. Antoine, *supra*.

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Responding to these developments, many employers imposed so-called “mandatory arbitration.” To get or keep a job, employees would have to agree to arbitrate all legal work disputes rather than take them to court. This would apply even to claims based on federal or state statutes prohibiting discrimination because of race, sex, religion, national origin, age, disability, and so on.

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In the leading *Gilmer* case, 500 U. S. 20 (1991), the Supreme Court upheld (7-2) the validity of such waivers of the right to sue. The Court noted this did not affect the capacity of the EEOC to seek victim-specific judicial relief. See also *Pyett*, 556 U.S. 247 (2009) (union's right to waive).

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Mandatory arbitration applies to 56.2% of studied nonunion private-sector employees (extrapolating, over 60 million total employees). Economic Policy Institute, The Growing Use of Mandatory Arbitration 2 (2018).

My colleague Lew Maltby will report on our study of the actual operation of employment arbitration and our recommendations to make it truly voluntary and fair for all parties.

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# Arbitration Today

- Condition of Employment

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# Forced Arbitration Injustice Repeal Act (FAIR Act)

- Agreements to arbitrate must be:
- Voluntary
- Post-Dispute

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# The assumption that kills you is the one you didn't know you made

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# Employers will agree to arbitrate after the dispute arises

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# Timing of Employment Arbitration Agreements

**Pre-dispute 96%**

**Post-dispute. 4%**

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# Post-Dispute only arbitration= No employment arbitration

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# Employment Arbitration
# Employment Litigation

## Comparative Analysis

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# Research Keys

- Look at all 2019 and 2020 AAA Employment Arbitration Cases and Federal Court Employment Cases
- Consider all cases (including motions)
- Consider comparable cases

# Pre-trial Motions

- Motion to Dismiss
- Summary Judgment

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# Summary

I. Employees win more often in arbitration

II. Arbitration is faster

III. Arbitration provides access to justice in smaller cases

IV. Damages in arbitration are lower

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# Table I
# Comparative Results of Employment Arbitration and Employment Litigation
# All Cases

## Arbitration (2019-2020)

| Decided After Hearing | Employee Wins | Employer Wins |
|---|---|---|
| 488 | 152 (31%) | 336 (69%) |
| **Decided on Pre-Hearing Motions** | **Employee Wins** | **Employer Wins** |
| 323 | 0 (0%) | 323 (100%) |
| | | |
| | | |
| **Total** | **Employee Wins** | **Employer Wins** |
| 811 | **152 (19%)** | 659 (81%) |

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# Table I (cont.)
# Comparative Results of Employment Arbitration and Employment Litigation
# All Cases

## Court Litigation (2019-2020)

| Decided After Trial | Employee Wins | Employer Wins |
|---|---|---|
| 285 | 85 (30%) | 200 (70%) |
| **Decided on Motion to Dismiss** | **Employee Wins** | **Employer Wins** |
| 5,270 | 0 (0%) | 5,270 (100%) |
| **Decided on Summary Judgment** | **Employee Wins** | **Employer Wins** |
| 4,147 | 0 (0%) | 4,147 (100%) |
| | | |
| | | |
| **Total** | **Employee Wins** | **Employer Wins** |
| 9,702 | **85 (1%)** | 9,617 (99%) |

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# Settlements

- Some settlements are employee wins
- No data available of size of settlements
- Including settlements would diminish 19/1 ratio between win rates, but not eliminate it

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# Table II.
# Speedy Trial
# Length of Time from Filing to Resolution (Median)

| | Arbitration | Court Litigation |
|---|---|---|
| **Cases Tried** | 14.8 months | 31 months |
| **Cases Settled** | 9.7 months | 12 months |

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# Table III.
# Access to Justice
# Arbitration
# Minimum Damages to Support Expenses= $40K

| Number of Employee Wins | Number of Wins with Damages Less than $40K |
|---|---|
| 152 | 58 (38%) |

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# Table IV.
# Damages (median)

## Civil Rights Statutes

| | |
|---|---|
| **Arbitration** | $39K |
| **Litigation** | $406K |

## Fair Labor Standards Act

| | |
|---|---|
| **Arbitration** | $24K |
| **Litigation** | $123K |

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# Why?

- Larger cases go to court
- Median award in arbitration for cases large enough to litigate =
- $189K

# Punitive Damages

- Litigation- 85%
- Arbitration- 12%

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# Fair Labor Standards Act

- Double damages required unless employer had <u>good faith</u> and <u>reasonable</u> belief conduct was lawful

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Section 16(c)

# Discrimination

- Liquidated damages where employer knew or had reckless disregard for whether conduct was lawful

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Applies to disparate treatment cases

Hazen Paper v. Biggens

507 U.S. 604 (1993)

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# Bottom Line

- Arbitration should be retained
- Arbitration should be reformed

# Real Reform

- Voluntary arbitration
  pre-dispute or post-dispute
- Mandatory strong due process

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# Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA)

- Only post-dispute agreement to arbitrate is enforceable.

- Only the first step

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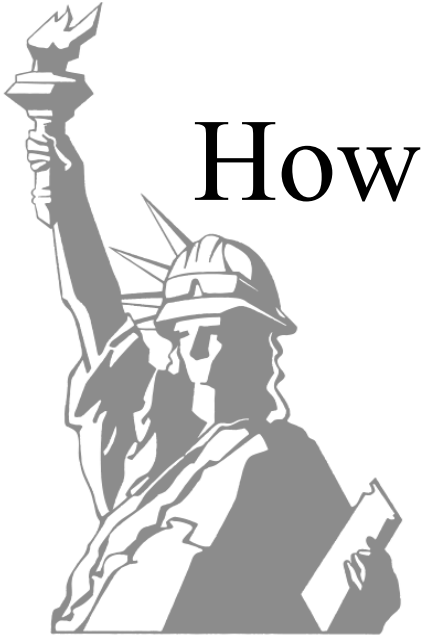

# How NAA Members Can Help

- Encourage labor to speak up
- Award appropriate damages.

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