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Arbitration or Court Suit: Which is Better for Employees?

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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Arbitration Fairness 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 Court Employment Cases
- Consider all cases (including motions)
- Consider comparable cases

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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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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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EFAA

- Only post-dispute agreement to arbitrate is enforceable.
- Only the first step

How NAA Members Can Help

- Encourage labor to speak up

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