

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).

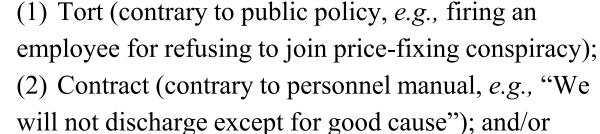




By the 1980s, all but a couple of U.S. states had judicially adopted one or more of three different legal theories to modify broad at-will employment rules (St. Antoine, 41 *U. Mich. Journal Law Reform* 783, 783-84 (2008):



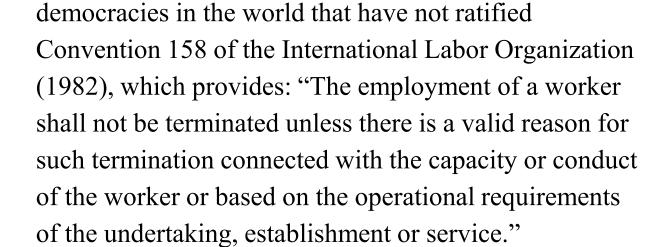




(3) Contrary to implied covenant of good faith and fair dealing (much less common).







The U.S. has remained one of the major industrial







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*.





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.



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).





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.



Arbitration Today

Condition of Employment





• Agreements to arbitrate must be:

Voluntary





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





Employers will agree to arbitrate after the dispute arises





Timing of Employment Arbitration Agreements

Pre-dispute 96%

Post-dispute. 4%





Post-Dispute only arbitration= No employment arbitration





Employment Arbitration Employment Litigation

Comparative Analysis







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



Consider comparable cases



Pre-trial Motions

Motion to Dismiss

Summary Judgment





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



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



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%)



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%)





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





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







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%)





Table IV Damages (median)

Civil Rights Statutes

Arbitration	\$39K
Litigation	\$406K
Ditigation	ψ1001

Fair Labor Standards Act

I all Labor	Staliaal as fict
Arbitration	\$24K
Litigation	\$123K



Bottom Line

- Arbitration should be retained
- Arbitration should be reformed





Real Reform

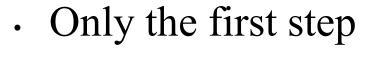
- Voluntary arbitration
 pre-dispute or post-dispute
- Mandatory strong due process





EFAA

• Only post-dispute agreement to arbitrate is enforceable.







• Encourage labor to speak up

