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Comparative Analysis of Employment Arbitration and Employment Litigation

Harry C. Katz
Jack Sheinkman Professor
School of Labor Relations
Cornell University

Thomas A. Kochan
George Maverick Bunker Professor of Management
Massachusetts Institute of Technology

Lewis L. Maltby
President
National Workrights Institute

Theodore J. St. Antoine
James and Sarah Degan Professor of Law Emeritus
University of Michigan Law School

David Sherwyn
John and Melissa Ceriale Professor
of Hospitality Human Resources
Cornell University

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EXECUTIVE SUMMARY

The purpose of our project is to compare the results of employment arbitration and court litigation.

Previous reports on this subject have been based on comparing the results of court trials and arbitrator decisions after a hearing. They do not consider the large number of cases resolved by pre-trial/hearing motion. We improve this methodology by examining the results of all cases decided by courts and arbitrators in both systems.

Our data on arbitration came from examining all employment decisions administered by the American Arbitration Association in the years 2019 and 2020. We compared these results to the outcomes on employment cases filed in all federal courts for the same two years.

Our analysis indicates that:

Employees win more often in arbitration

Employees won 19% of their cases in arbitration and 1% of their cases in court litigation.

Employees receive higher awards in litigation

Employees receive awards faster in arbitration

Employees with claims too small to litigate are often able to arbitrate

These findings indicate that arbitration should be preserved as a method of resolving employment disputes, with legal reform to ensure that the process is voluntary and fair. We provide a brief summary of the key provision required for such legislation.

Finally, we indicate the areas in which future research is needed to inform policy and law.

INTRODUCTION

Arbitration of employment legal disputes is a controversial issue which has been the subject of numerous studies.

Some recent studies have found arbitration to be inferior to courts in protecting employees' legal rights.

These studies, however, examine only the limited number of cases resolved by trial or arbitration hearing. They do not include the large number of cases resolved by pre-trial/hearing motion. Virtually all studies compare the results of all types of employment cases arbitrated and litigated rather than the results of cases involving the same cause of action.

Our project focuses on examining the data with a methodology that corrects both these problems.

We also examine the size of awards received by successful employee-plaintiffs, speedy trial, and the ability of employees to obtain access to justice.

METHODOLOGY

We obtained our data on arbitration by reading all American Arbitration Association (AAA) employment case awards for 2019 and 2020. We chose AAA data because it is the oldest and best-established arbitration provider and because its employment rules contain most of the due process standards we believe are required.

For litigation, we used all federal court employment cases[1] for the same years.

[1] Our database included cases involving discrimination on the basis of race, gender disability, national origin, religion, pregnancy and age. We also included cases under FMLA, retaliation, sexual harassment, section 1981, and wage and hour laws.

ANALYSIS

We examined the following variables for both AAA arbitration and court litigation:

Employee win rate

How often do employees succeed in actions against their employers?

Damages awarded

How much are employees awarded when they are successful?

Speedy trial

How long does it take for employees to get their award?

Access to justice

How many employees are able to afford to bring an action against their employer?

Employee Win Rate

The first question in comparing the success of employees in arbitration and litigation is the rate at which employees win in each system.

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%)[2]
Total	**Employee Wins**	**Employer Wins**
811	152 (19%)	659 (81%)

Court Litigation (2019-2020)

Decided After Trial	**Employee Wins**	**Employer Wins**
414	164 (40%)	250 (60%)
Decided on Motion to Dismiss[3]	**Employee Wins**	**Employer Wins**
7,862	0 (0%)	7,862 (100%)
Decided on Summary Judgment	**Employee Wins**	**Employer Wins**
6,378	0 (0%)	6,378 (100%)
Total	**Employee Wins**	**Employer Wins**
14,654	164 (1%)	14,490 (99%)

[2] In theory, either party can request that a case be resolved on a pre-hearing motion. In practice, however, cases decided on motions are virtually always decided in favor of the employer.

[3] A motion to dismiss argues that, even if the other party can prove its allegations, the party filing the motion is entitled to a judgment in its favor as a matter of law. A motion for summary judgment is filed after discovery. Such a motion argues that the evidence produced in discovery is legally insufficient to submit the claim to a jury. With either type of motion granted, the case is dismissed. While in theory either party can file such a motion, in practice they are granted virtually exclusively to employers.

AAA's caseload is significantly different than that of the federal judiciary. It includes not only statutory cases but also contract and tort cases. To conduct a more rigorous analysis, we compared the results of AAA cases in cases involving statutory disputes to cases involving cases under the same statutes in federal court.

Hearings/Trials

Previous research has focused on the percent of cases in which employees prevail after an arbitration hearing or a court trial. Table I shows that employees prevail 31% of the time in arbitration and 40% of the time in litigation. When comparing results on cases involving the same federal statutes, employees prevail in 36% of arbitration cases versus 40% of court cases, a difference that is not statistically significant.[4]

This perspective, however, ignores the results of cases which were resolved by motions without a hearing/trial. Almost 40% of cases in arbitration and 97% of cases in litigation were resolved in this manner. One cannot ignore so many cases and obtain an accurate picture of how the two justice systems perform.

We therefore examined the results of all cases in arbitration and court litigation, including those which were resolved by dispositive motions without a hearing/trial.

Dispositive Motions

When one considers cases decided in arbitration and court litigation, including those resolved by dispositive pre-trial motion, the picture changes dramatically.

Table II
Employee Win Rate/All Cases

Arbitration	**Court Litigation**
Total Cases	**Total Cases**
811	14,654
Employee Wins	**Employee Wins**
152 (19%)	164 (1%)

In arbitration, employees won 152 of the 811 cases decided by hearing or motion[5], a success rate of 19%. In court litigation, employees win only 164 of the 14,654 cases decided by trial or motion[6], a success rate of 1.1%.

[4] P=.14

[5] 488 cases decided by hearing and 323 decided by motion.

[6] 7,862 cases decided by motion to dismiss 6,378 decided by summary judgment, and 414 tried

Settlements

In both arbitration and court litigation, the majority of cases are not resolved by a decision by the court/arbitrator, but are settled. In arbitration, 80% of cases settle. In litigation, the settlement rate is 72%. Some settlements in both systems are for an amount substantial enough to be considered an employee win. Unfortunately, we know very little about settlements. Neither the federal court database nor the American Arbitration Association provides the amount for which a case was settled. Even if we had this data, it would not provide insight into whether the employee won the case without having a value for what the employee should have received, which is a matter of subjective opinion.

Given the 1% employee win rate in court litigation, any reasonable assumption regarding the number of settlements that are employee wins would reduce the disparity between the employee win rate in arbitration and litigation. For example, it is likely that employees in litigation that settle their cases after the employers' motion for summary judgment has been denied, receive a reasonable award. This constitutes 8% of all cases filed. Adding this to the 1% of cases in which employees prevail at trial increases the total employee win rate to 9%, far less than the employee win rate in arbitration based on hearings alone.

Even if every settlement were considered a win, it would not eliminate the disparity in win rate between arbitration and litigation. The win rate in litigation would increase from 1% to 73%. The win rate in arbitration would increase from 19% to 84%.

Damages

The second consideration is how much employees win in each system when they are successful.

It is commonly believed that juries are willing to grant larger damages than arbitrators, especially for non-economic injuries. Our research supports this view.

Table III
Damages (median)

Civil Rights Statutes	
Arbitration	$39K
Litigation	$406K

Fair Labor Standards Act	
Arbitration	$24K
Litigation	$123K

The difference in median damages may be influenced by the presence of cases in arbitration that are too small to litigate (See section below on access to justice). However, it is hard to believe that this factor can explain such a large differential.

Data concerning the size of settlements is not available in either database. However, attorneys make settlement decisions based upon expected outcomes at trial. There is no reason to believe that the relative size of settlements in arbitration and litigation is different than in hearings/trials.

Speedy Trial

We also examined how long it takes employees to obtain justice in arbitration and litigation. We examined how long it took to resolve both cases that went to trial/hearing and cases which settled. In both situations, arbitration resolved cases faster than litigation.

Table IV
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

Access to Justice

Our final consideration is how often employees are able to gain access to the system.

Numerous articles have claimed that the high cost of litigation prevents many employees with legitimate claims from obtaining access to court, and that lower costs in arbitration provide many such employees with access to justice.

We tested this hypothesis by examining how many AAA arbitrations involved amounts too small to bring in litigation.

Estimates of the minimum damages required to obtain an attorney to litigate a case vary widely. Howard reported a minimum of $60K.[7] With inflation, this number would now approach $100K.

Gough, based upon a nationwide survey of plaintiffs' attorneys in 2015, found minimum damages of $40K.

To be conservative, we used Gough's survey for our calculation. Even on this basis, a substantial number of AAA cases involved damages too small for the employee to have obtained access to justice in court.

Table V
Access to Justice

Arbitration	
Number of Employee Wins	**Number of Wins with Damages <$40K**
152	58 (38%)

Even on this conservative basis, over a third of the employees in AAA cases would have had no access to justice if arbitration were not available.

It has been suggested that this is the result of arbitrators awarding less to employees in comparable cases rather than arbitration being capable of handling smaller cases.

This suggestion is not supported by the available data. Colvin reviewed data reported to the state of California by the American Arbitration Association. This data includes the size of the employee's demand (which is not included in either of the datasets we used). Colvin found that 25% of the employment arbitration cases in the California/AAA database involved demands of $36K or less.[8]

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[7] Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50 Disp. Resol. J. October-December 1995, at 40.

[8] Colvin, *An Empirical Study of Employment Arbitration Case Outcomes and Processes,* Cornell University Library (2011)

CONCLUSION

Our analysis shows that employment arbitration carried out under the procedures and standards of the AAA produces very respectable outcomes and by some measures employment arbitration outcomes appear to be better than court litigation outcomes.

Recent prior research has been confined to the relatively small number of cases (3% in litigation and 60% in arbitration) that are resolved by trial or hearing (and omit the many cases resolved by pre-trial/pre-hearing motions). Our expansion to examine the outcomes of all cases decided on the merits in arbitration and litigation provides an improved method for evaluating the relative performance of the two systems.

From this perspective, employees win 19% of all cases decided by a AAA arbitrator versus 1% in court litigation.

A key finding of our analysis is that many cases are settled in both employment arbitration and litigation. It is possible that the prospect of larger awards produces more settlements that can be considered employee wins in litigation. But we have no data on settlement outcomes. We just don't know.

Our findings on damages mirror the findings of previous research that employees receive larger awards in court litigation than in arbitration. This may mean that arbitrators award successful employees less in comparable cases than courts. This would be a serious problem. It may mean that higher costs in litigation lead to plaintiff-side lawyers filing larger cases in court. Further research on this subject would also be valuable.

Another important finding is that arbitration provides access to justice for lower income workers whose cases are unlikely to command outcomes large enough to interest plaintiff lawyers.

Our final finding is that AAA arbitration is faster than litigation, leading to successful employees receiving their awards sooner.

Data limitations, however, make it impossible for us to be confident of detailed comparisons of the performance of employment arbitration versus court litigation. For example, we do not know how representative our analysis of certain categories of employment disputes that are addressed in employment arbitration hearings under AAA procedures are of other types of cases and cases that proceed through other forums. We suspect that there are more substantive due process protections in AAA hearings as compared to other forums. More evaluation of settlements and damage awards would also be valuable.

It is clear that public policy must ensure that if a dispute is proceeding through employment arbitration there should be clear and fair due process protections. A summary of the key due process requirements is attached to this report. With these protections in place we would be more confident that the very respectable outcomes from employment arbitration in the data analyzed in our study would be characteristic of employment arbitration generally.

Our study also shows that more analysis of employment arbitration and court litigation of employment disputes is needed. We shouldn't have to speculate whether studies like ours are truly representative of cases pursued in one resolution channel or the other or of the outcomes that result.

Subjects of Future Investigation

As in any study, there are limitations in the data we were able to obtain. There are factors that deserve future investigation.

These include:

Comparable Cases

Our study improved upon previous research by comparing the employee win rate in arbitration and court litigation for cases under federal employment statutes rather than all employment cases (which include contract and tort claims). This improvement, however, does not mean that the cases in the two systems are completely comparable. Further research into the specifics of cases to look for possible differences in the data sets would be valuable.

Effect of pre-filing settlements

Cases are sometimes resolved in both arbitration and litigation without filing a claim. Employees' attorneys generally send a demand letter to the employer prior to filing a complaint in court. In some cases, this leads to a settlement.

In arbitration, many employers have internal disputes resolution processes in which employees are required to participate prior to filing an arbitration claim.

The frequency of such informal resolutions could have a significant effect on the success rate of employees in each of the systems.

Appeals

Employers that lose court cases involving large awards frequently file appeals.
The grounds for appeal in arbitration are much narrower.

It would be valuable to investigate the relative frequency of successful appeals in both systems.

Settlements

The majority of cases in both arbitration and litigation settle. Some settlements are for substantial sums that can reasonably be considered an employee. Other settlements are for "nuisance value" in which the employee gets virtually nothing. Virtually nothing is currently known about the amount for which cases settle in either system or the extent to which the settlement represents a fair resolution.

Future research should include closer examination of settlements.

Damages

We found that damages in court litigation are higher under both civil rights statutes and the Fair Labor Standards Act. This is not surprising. Experienced advocates for both employees and employers have found that juries provide larger awards than arbitrators.

However, it is difficult to understand how the median damages in court litigation of civil rights cases can be the $406K we found. These cases involve statutes in which non-economic damages are capped at $300K (or less). To receive $406K, an employee would have to make $100K per year, have been out of work for a full year, and work for a company with more that 5,000 employees (to be eligible for the maximum cap). While such cases are not uncommon, it is difficult to understand how they would represent the median.

In addition, our study found that employees received much less in wage and hour cases. Damage calculations in such cases provide little room for discretion. It would be very surprising to find judges awarding five times as much as arbitrators in comparable cases.

To investigate further, we reviewed the awards in 25 wage and hour decisions in arbitration to see if the arbitrator had awarded less than the FLSA calls for. We did not find any cases in which this occurred.

These two points do not indicate that our finding is incorrect. Employees who are successful in court receive larger awards than in arbitration. But they do suggest that the cases in our datasets may not be comparable. Further research into the relative size of awards in comparable cases is needed.

RECOMMENDATIONS

Congress should enact legislation preserving the right of employers and employees to voluntarily agree to enforce legal disputes with the strong due process protections called for in the following statement of principle.

Further research into the outcomes of employment arbitration and litigation should be conducted.

Employment Arbitration
Statement of Principle

We believe that arbitration, conducted fairly consistent with accepted standards for due process, has the potential to provide workers with increased access to justice.

The American judicial system generally provides justice. But it has two major limitations when it comes to providing justice to employees. The first is that litigation is expensive. Even by the most conservative estimates, a worker's claim typically must be worth at least $40,000 in order for an attorney to be willing to take her case on a contingency fee basis.[9] Many workers' claims, however, do not reach this level. Unless an administrative agency accepts their claim, such workers frequently receive no justice. In addition, some workers find themselves in communities or socioeconomic situations in which access to skilled employment attorneys is limited.

In addition, the federal judiciary is not receptive to employment civil rights claims. Many such cases are dismissed without a trial.

Because it is faster[10], less formal, and less expensive, arbitration has the potential to provide justice to many workers[11] who cannot afford to bring their claims in court. Arbitrators are also much less likely to dismiss an employee's claim without a hearing.

Workers who bring their claims to fair arbitration systems, such as those provided by collective bargaining and the American Arbitration Association, generally receive justice that compares favorably with the results of the judicial system.[12] Workers are more likely to prevail in arbitration than in court (especially when the effect of summary judgment, which is far less common in arbitration, is considered). They also receive justice more quickly. Successful employee-plaintiffs, however, generally receive higher damages in court than in arbitration, at least for non-economic damages such as emotional distress.

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[9] Gough, *Managing and Resolving Workplace Conflict,* edited by David Lewin et.al., Emerald Limited Publishing (2016).

[10] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Columbia Human Rights Law Review 1 (1998)

[11] We use the term worker to include not only individuals who meet the legal definition of "employee" but individuals who perform services for employers under comparable circumstances who do not meet all the requirements of this definition.

[12] Theodore J. St. Antoine, *Mandatory Arbitration, Why it's Better Than it Looks*, U. Mich. J.L. Reform 41, no. 4 (2008)

This does not mean that employment arbitration does not need reform. There are no statutory protections for employment arbitration. The protection provided through federal caselaw is woefully inadequate. Efforts to protect workers by states have been thwarted by the Supreme Court's broad construction of pre-emption under the Federal Arbitration Act.

Congress needs to act to eliminate abuses so that all workers who do not have the protections provided by collectively bargained contracts can obtain the benefits provided by quality arbitration systems.

In order for arbitration to provide justice to workers, the following principles are key:

1. Due Process

Arbitration procedures must provide strong due process protection. Arbitration need not duplicate all the components of a jury trial[13], but a much higher procedural standard than that required by federal case law is needed.

Most of the necessary due process standards can be found in the Employment Due Process Protocol.[14] The Protocol was created by a bipartisan group that included individuals from the civil rights, labor, and management communities.

The key due process protections that are required include:

a. Arbitrators must follow all applicable substantive law
b. Full legal remedies
c. Right to counsel
d. Impartial decision maker, which both parties participate equally in choosing
e. Payment of forum and arbitrator fees by the employer
f. Access to discovery

All of these protections should be provided for an agreement to arbitrate to be enforceable.

2. Voluntariness

As a matter of principle, arbitration should be the voluntary choice of both parties. Requiring individuals to sign an agreement to arbitrate as a condition of hiring does not meet the voluntariness standard.

The parties should be able to voluntarily choose to arbitrate at any time. Efforts to restrict enforceability to post-dispute agreements, while well intentioned, will have the effect of virtually

[13] For example, in arbitration the rules of evidence can be more informal than in court. Also, finality greatly benefits employees because they generally have fewer resources, so appellate review may be more limited.

[14] The Protocol contains a few provisions which time has shown should be improved, including who is responsible for the arbitrator's fee.

eliminating arbitration. Empirical studies demonstrate that parties rarely agree to arbitrate after a dispute has arisen because it is to one party's tactical advantage to refuse.[15] This is true not only in employment arbitration, but also in arbitration agreements involving two business entities.

3. Class and Collective Actions

The availability of class and collective actions is essential to making justice affordable for employees with very small claims. Class and collective action waivers should not be enforceable.

[15] Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements,* 30 William Mitchell Law Review 1 (2003)