

AAA Employment Arbitration: A Fair Forum at Low Cost

The debate over whether mandatory employment arbitration forces employees to give up civil rights has raged for more than a decade virtually without empirical support on either side. Elizabeth Hill recently completed a statistical study of employment arbitration under the auspices of the American Arbitration Association. Her results indicate that mandatory employment arbitration is not biased in favor of employers and that it is fair and affordable to lower-income employees. The author summarizes the major findings of her study in this article.

BY ELIZABETH HILL

The debate over “mandatory” employment arbitration is one of the most important issues in arbitration and employment relations today. It has been the subject of three major Supreme Court decisions in the past decade, including a 2001 decision which held that “mandatory” arbitration agreements are generally enforceable.¹ Mandatory employment arbitration has also been the subject of a vigorous national lobbying effort aimed at limiting its use.² Surprisingly, the debate over the propriety of mandatory employment arbitration has been waged for a decade largely without the benefit of hard data describing it. Both critics and advocates of mandatory employment arbitration acknowledge the dearth in empirical research and agree that there is a need to fill the gap.³ This article describes my recent attempt to begin to fill that gap with a study of 200 employment arbitration cases, which were decided under the auspices of the American Arbitration Association (AAA), the largest independent provider of arbitration services in the United States. My research was not intended to prove a hypothesis, but to provide a comprehensive statistical description of AAA employment arbitration based on the data derived from the 200 individual awards. At the end of the day, my findings, which are detailed below, indicate that AAA employment arbitration is affordable and substantially fair to employees, including those employees at the lower end of the income scale.⁴

The Controversy Over “Mandatory” Employment Arbitration

What are commonly known as mandatory arbitration agreements are found in arbitration clauses in employment agreements or employment applications or in the arbitration policy of an employee handbook. A person who is seeking employment is required to sign an arbitration agreement, or an express acknowledgment of an arbitration policy in an employee handbook, before being hired. In this way, a prospective employee gives up the right to take employment-related disputes to court and agrees instead to arbitrate these claims with the employer. Consequently, once an employee is hired, disputes must be arbitrated, if they are not settled first. Most often, the arbitration agreement provides that the arbitrator’s decision is final and binding. Thus, it is enforceable in the courts and there is limited appeal.

The use of private employment arbitration has grown dramatically over the past decade. The percentage of employers in the private sector using employment arbitration increased from 3.6% in 1991 to 19% in 1997.⁵ Studies indicate that by 1998, 62% of large corporations had used employment arbitration on at least one occasion.⁶ Further, in just four years between 1997 and 2001, the number of employees covered by employment arbitration plans administered by the AAA grew from 3 to 6 million.⁷

Just as strong as the growth in private employment arbitration has been the opposition to it. Employees' advocates, civil rights' advocates and the plaintiff's bar strongly oppose the practice as unfair. In their view, employers unfairly take advantage of superior economic power to force prospective employees to sign away their constitutional rights to due process and trial by jury—hence the term mandatory employment arbitration.⁸

Employers have maintained that employees have sufficient economic power to voluntarily negotiate the terms of their employment. Moreover, employers believe that arbitration provides employees with a generally fair forum at relatively low cost, because most employees cannot afford to take their cases to court due to the high cost of an attorney.⁹ For the most part, both sides of the argument have remained unproven.

However, two studies do indicate that, in fact, lower-income employees cannot access the courts with employment-related claims. While the studies concern only employment discrimination claims, their findings are applicable to all employment-related claims.

The Dunlop Commission, an investigatory commission created by the U.S. Departments of Labor and Commerce in the early 1990s, determined that the majority of employees litigating employment discrimination claims in the courts were professional or managerial—*i.e.*, from the higher end of the income scale.¹⁰

A second study of employment discrimination claims also indicated that lower-income employees are excluded from the courts. This study, conducted in 1991 by William Howard, involved

a survey of 321 plaintiff's counsel.¹¹ It revealed that plaintiff's counsel would not take an employment discrimination case unless the case involved, on average, \$60,000 in provable damages. Provable damages are damages that are tangible and will definitely be collected if liability is established. For example, lost wages are provable damages, but damages for emotional distress are not. Howard's survey further established that once \$60,000 in provable damages was established, plaintiff's attorneys would accept a case with a contingency fee of, on average, 35%.

A lower-income employee would have difficulty meeting this standard for representation because provable damages in an employment discrimination case, indeed in any employment-related case, are based on earnings. Tangible damages are usually lost earnings. The lost earnings of an employee earning less than \$60,000 annually do not amount to \$60,000 until that employee has been out of work for more than one year. By the time such an employee has been out of work for a year, he or she might not be able to afford to pay the lawyer's expenses.

Even lawyers who represent employees on a contingency basis usually require that their expenses be paid up front. (Expenses might include such charges as the costs of travel, a stenographer's bill for creating a deposition transcript, the cost of copying documents, and phone bills.)

While the two studies discussed above concern only employment discrimination cases, they also indicate that lower-income employees cannot afford to take other employment-related claims to court. Provable damages for these claims are also rooted in earnings, making it difficult for lower-income employees to attract plaintiff's counsel. Moreover, other employment-related claims do not offer plaintiff's counsel the added attraction of recovering their attorney's fees from a defeated employer. Most statutes prohibiting employment discrimination permit a prevailing plaintiff to collect attorney's fees from the defendant-employer.¹² Consequently, lower-income employees are even less likely to access the courts if their employment-related claims are not based on discrimination.

Elizabeth Hill holds an L.L.M. in Labor and Employment Law (N.Y.U.) and is a Research Fellow at the Center for Labor & Employment Law at New York University School of Law. Ms. Hill has completed two empirical studies of mandatory employment arbitration. The second study, "Employment Arbitration and Litigation: An Empirical Comparison," written with Prof. Theodore Eisenberg of Cornell University School of Law, will be published by the Institute for Judicial Administration at NYU School of Law. Ms. Hill previously practiced litigation in New York City.

Thus, these studies substantiate the belief that lower-income employees generally do not have access to the courts. During my research, I discovered, however, that more than three-quarters of the employees arbitrating claims pursuant to mandatory arbitration agreements earned less than \$60,000 per year, *i.e.*, were of lower-income by the standard applied above.¹³ Thus, as a practical matter, when they agree to mandatory arbitration, they do not waive their right to trial. They cannot afford counsel. Since a trial is beyond their reach, arbitration may be the sole forum for their claims. Accordingly, this study of AAA cases focused on findings regarding these lower-income employees.

The Method of Research

The study was based on 200 awards randomly selected from a pool of 356 AAA employment dispute awards. The cases were initiated in 1999 and 2000 and decided between Jan. 1, 1999, and Nov. 5, 2000. The arbitration hearings took place in 35 states. One hundred and ninety-one cases involved a single arbitrator and the remaining nine cases involved a panel of three arbitrators. In three cases, the parties submitted a settlement agreement for the imprimatur of the arbitrator. These cases were considered to be employee wins because they provided for payments to the employees in settlement of their claims. Where there was an award on both the claim and counterclaim, the party with the larger award was considered the winner and the award amount was considered to be the difference between the two awards. Awards of equitable relief were considered to be wins for the recipients. If some equitable relief was granted to both parties, the recipient of the most relief was recorded as the winner, but awards were entered for both parties. The value of the relief was based on a common-sense assessment of the award. Monetary awards that did not describe the relief in dollars (*e.g.*, “pension benefits calculated pursuant to formula B in the 401(k) Plan”) were also entered as wins, though the relief was not entered in dollars.

The AAA database separates cases concerning employees arbitrating pursuant to mandatory arbitration agreements from those concerning employees arbitrating pursuant to arbitration agreements that were not initiated as a condition of hiring. Sixty percent of the cases involved employees arbitrating pursuant to mandatory arbitration agreements. Seventy-two percent of those employees arbitrating pursuant to mandatory arbitration agreements earned less than \$60,000.¹⁴ Accordingly, I used the AAA’s category of mandatory arbitration cases as a proxy for

cases concerning employees earning less than \$60,000. I refer to this group of employees as “lower-income employees.”

Arbitration Costs to Lower-Income Employees

The results of my study support the belief that arbitration can be affordable, even to lower-income employees. The following are my findings as to the cost of AAA arbitration for lower-income employees during 1999 and 2000.

The potential costs of AAA arbitration during 1999 and 2000 were the filing fee, hearing fees, the arbitrator’s fees, and attorney’s fees. I refer to the filing, hearing and arbitrator’s fees, collectively, as “forum fees” because they comprise the cost of the arbitration forum, whereas attorney’s fees are the cost of counsel.

I found that 32% of lower-income employees paid nothing for arbitration. This group of employees paid no forum fees because the arbitrator reallocated their fees to the employer at the end of the arbitration hearing. They paid no attorney’s fees because they proceeded *pro se*, or because they were awarded attorney’s fees by the arbitrator.

Twenty-nine percent of lower-income employees paid only attorney’s fees for arbitration. All of their forum fees were reallocated to the employer by the arbitrator. The average attorney’s fee, based on all 200 cases, was \$6,776. This figure is the best estimate of their cost of arbitration. This figure needs further research, however, as there were only 12 awards of attorney’s fees to lower-income employees in the 200 case sample.

Considering the 32% group and 29% group above, we can see that the forum fees for both groups were entirely reallocated to the employer. Thus, a total of 61% of lower-income employees paid no forum-fees. The 32% group did not then pay for counsel, while the 29% group did pay for counsel.

An additional 13% of lower-income employees paid no attorney’s fees, but did pay some or all of the forum fees in the case. In order to estimate the cost of arbitration to these employees, I calculated the average amounts of the filing, hearing and arbitrator’s fees based on all 200 cases. The total of these average fees was \$2,292. This is a good estimate of the most that this 13% of lower-income employees paid for arbitration.

The final 26% of lower-income employees paid all of their attorney’s fees, as well as some or all of the forum fees for the case. Only 2% of this 26% group paid all of their forum fees, while the remaining 24% paid only a part of their forum fees. For the 2% group, the total cost of arbitration was \$8,540, based on the average attorney’s

fees and forum fees for the 200 case sample. For the remaining 24%, the average cost of arbitration was between \$6,776 and \$7,954.

Based on these figures, 55% of lower-income employees had average total arbitration costs between \$6,776 and \$8,540. This 55% is comprised of the 29% and 26% groups discussed above. Nevertheless, the costs of arbitration appear to be affordable to employees earning less than \$60,000 per year, assuming that they have been working during the pendency of the arbitration. These arbitration costs are affordable because most lower-income employees have agreed to representation on a contingency basis. Thus, attorney's fees should generally be affordable to lower-income employees. The remaining costs of arbitration—forum fees—averaged only \$2,292. Presumably, even lower-income employees can afford to pay them.¹⁵

Shortly after release of the results of this research, the AAA announced amendments of its rules of procedure, effective Nov. 1, 2002, to include reduction of employees' forum fees under mandatory arbitration agreements to a total of \$125.¹⁶ Going forward, there should be no more issue of affordability of forum fees for arbitration under the auspices of the AAA.

Civil Rights Cases: A Red Herring

A frequent criticism of employment arbitration has been that arbitrators are not competent to enforce federal statutory rights when claims of employment discrimination are made in arbitration. Studies indicate that this focus on civil rights cases is misplaced. Employment discrimination cases have not comprised more than 7% of the total pool of employment cases in any study of AAA employment arbitrations.¹⁷ In the instant study, only 7% (14 cases) of the 200 cases involved civil rights claims.¹⁸ Cases filed with the securities industry's self-regulatory organizations show similar results. An average of just 21 employment discrimination claims per year were filed with the combined arbitration forums of the New York Stock Exchange and the National Association of Securities Dealers between 1989 and 2001.¹⁹ The small number of civil rights cases that are arbitrated strongly suggests that this type of claim should not be the focus of opposition to employment arbitration.

Studies show that lower-income employees have no real access to trial, with the result that arbitration may be the sole forum for their claims.

Findings regarding the 14 civil rights cases in this sample are based on numbers too small to be statistically significant. Nevertheless, the awards generally appear to have been properly adjudicated. The majority of arbitrators properly applied the governing statutes and case law. In the three cases in which the claimants won, the arbitrators considered all of the statutory categories of damages. They awarded attorney's fees against the employers pursuant to statute, and considered, but ultimately rejected, awarding punitive damages.

Fairness of AAA Employment Arbitration

The plaintiff's bar and employees' and civil rights' advocates have long charged that employment arbitration is biased in favor of employers.²⁰

More recently, one critic alleged that the process is also biased against lower-paid employees.²¹ In order to evaluate these alleged biases, this study examined the rates at which the parties won their cases, compared the amounts of the parties' awards to the amounts of damages claimed, and looked at the rates at

which the arbitrators allocated forum fees and attorney's fees to the different parties. The results refute the allegations that employment arbitration is unfair to lower-income employees or to employees in general.

Employee Win Rates

In this study, employees won 43% of the cases, while employers won 57% of them. Just as this 7% difference in win rates is not great evidence of unfairness, neither are the number of cases underlying it. Employees won 86 cases and employers won 114. Only 14 cases comprise the difference.

These statistics, however, are not conclusive. We must take a closer look because employees cannot be considered as a uniform group. Sixty percent of employees were lower-income employees and 40% were higher-income employees.

At first blush, it appears that there is evidence of arbitrator prejudice against lower-income employees, but not against higher-income employees. Higher-income employees won 57% of their cases, while lower-income employees won 34% of their cases. A closer look at the lower-income employee cases, however, dispels the apparent evidence of bias.

As previously noted, 60% of the sample were lower-income employee cases. Fifty-five percent of those cases, however, presented claims that were inherently likely to be dismissed, regardless of any possible prejudices of the arbitrator. Approximately two-thirds of these inherently flawed cases involved “wrongful discharge” claims. In these cases, the law generally does not permit the employee to win. In 51 states, the law is that an employer may discharge an employee for any reason or no reason at all.²² Thus, an arbitrator should not permit an employee to win such a case, regardless of any personal bias.

The remaining third of the inherently flawed cases involved what I have named the “appellate effect.” The appellate effect is an above-average win rate for an employer, caused by the effective functioning of the employer’s in-house dispute resolution program. The program isolates and resolves claims with merit in-house, leaving meritless claims for final appeal to external arbitration with the AAA. The result is an AAA docket of meritless claims against that company, virtually all of which end up being dismissed. The cases in this sample that were subject to the appellate effect had little or no merit. There was no room for arbitrator prejudice to play a role in their dismissal.

If one removes the inherently flawed cases from the pool of cases involving lower-income employees, 45% of the original pool remains. There was no evidence of arbitrator bias in these remaining cases. Lower-income employees won 49% of these cases.

Employee Award Amounts

The award data indicated no arbitrator bias against lower-income employees or employees as a whole. If anything, the award data indicated a bias in favor of lower-income employees.

The average amount of damages awarded to an employer was \$54,960, while the average amount of damages awarded to an employee was \$172,690. Clearly, these statistics do not indicate bias against employees. These figures, however, also do not accurately assess bias between employers and employees. The awards to employers must be compared to higher-income and lower-income employees separately. Moreover, the awards must be evaluated in comparison to the amount of damages that were initially demanded by the party. The ratio of the average award to the average demand is the real measure of a party’s success and an arbitrator’s attitude. It is not possible, however, to compare arbitrators’ attitudes toward employers and the two groups of employees because there were not enough data in the sample regarding employers’ demands.

Accordingly, I compared arbitrators’ attitudes toward higher-income and lower-income employees only.

The \$242,038 average award to higher-income employees substantially exceeded the \$29,503 average award to lower-income employees. The relative sizes of the awards reflect the relative sizes of the demands made by the two groups. The average demand by high-income employees was \$505,763, while the average demand of lower income employees was \$50,593. (The difference in demands is correlated to the difference in the two groups’ incomes. Employees can only demand the income that they have lost.)

The accurate measure of bias is the award-to-demand ratio and it reveals no bias against lower-income employees. The award-to-demand ratio for lower-income employees was .58. The award-to-demand ratio for higher-income employees was .48. Arbitrators awarded lower-income employees a higher percentage of their demands than higher-income employees, indicating, if anything, a bias in favor of lower-income employees.

Allocation of Forum Fees

The AAA rules that were in effect in 1999 and 2000 provided that the claimant (usually the employee) should pay the filing fee, and that the hearing and arbitrator’s fees should be split between the parties.²³ The rules also provided that the arbitrator had discretion to reallocate forum fees, which is what the majority of arbitrators did in this sample. The reallocation of forum fees in lower-income employee cases shows a decided bias in favor of lower-income employees.

Arbitrators reallocated all forum fees to the employer in 61% of the lower-income employee cases. They reallocated all or some part of the filing fee to employers in 85% of the cases, all of the hearing fees to employers in 71% of the cases and all of the arbitrator’s fees to employers in 70% of the cases. Moreover, arbitrators did not make reallocation dependent on the lower-income employee winning the case. Success of the employee increased the likelihood of reallocation by only 14%.

By reallocating forum fees to employers in the majority of the cases, arbitrators demonstrated a substantial bias in favor of lower-income employees and reduced the cost of arbitration. Many believe that employees should have to pay some part of the cost of arbitration in order to deter frivolous claims. On the other hand, there is the view that costs should not discourage a viable claim. The arbitrators in this sample straddled the two viewpoints by reallocating costs that the employee must originally have expected to pay.

Attorney's Fees

In litigation and arbitration, the prevailing party frequently seeks an award of attorney's fees from the adversary. They usually succeed where an award of attorney's fees is contemplated by a contract between the parties or by a statute governing the dispute, or where the judge or arbitrator determines that the adversary has misbehaved. Indeed, the arbitrators in this sample tended to award attorney's fees in cases alleging breach of contract or a violation of civil or other statutory rights. Therefore, in order to determine whether the arbitrators were biased in making awards of attorney's fees, I looked at the frequency of attorney's fee awards in cases alleging statutory and contract claims, rather than the frequency of these awards in all cases. The frequency of awards in these cases did not indicate any bias in favor of employers, but it did seem to indicate a bias in favor of higher-income employees.

Employers were awarded attorney's fees in 20% of their cases alleging contract or statutory claims. Higher-income employees were awarded attorney's fees in 42% of their cases alleging such claims. But lower-income employees were awarded attorney's fees in only 19% of the cases in which they alleged contract or statutory claims.

The disparity between the lower and higher-income employees' results, however, may have another explanation than arbitrator bias. It may be that it is easier to collect attorney's fees pursuant to an express contractual provision than pursuant to statute. If so, then it is notable that 60% of the mix of higher-income employees' contract and statutory claims were contract claims, whereas only 34% of lower-income employees' contract and statutory claims were contract claims.

The following data support the "appellate effect" theory. In this study, 34 cases involved a repeat player employer. Most of these repeat players were employers with nationally known names—large companies likely to process a relatively large number of cases. The employers in 74% of those cases (25 cases) maintained an in-house dispute resolution program culminating in AAA arbitration. The win-loss ratio for this 74% of cases was 3.2, a full 190% higher than the 1.3 win-loss ratio for employers overall. On the other hand, the remaining 26% of repeat employer cases (nine cases) involved employers who did not maintain in-house dispute resolution programs. Their win-loss ratio was only 1.25, just slightly below the 1.3 win-loss ratio for employers overall. In short, the repeat player effect does not exist where the repeat player does not maintain an in-house dispute resolution program. Thus, the effect appears to be the result of the selection processes of large employers' in-house dispute resolution programs, not merely the by-product of large employers' repeat appearances at arbitration.

The "Repeat Player Effect"

Critics of employment arbitration have relied heavily on the "repeat player effect," the sole empirically proven example of what appeared to be arbitrator bias against employees in arbitration. The effect, originally noted in a sample of AAA cases, occurs when employers who arbitrate more than once win more frequently than those who arbitrate only once.²⁴ The effect was present in this sample. The cause of the repeat player effect has never been established. Yet it is the cause that determines whether the effect is the symptom of a

fair or unfair process.

The repeat player effect is most commonly believed to be explained by the "repeat arbitrator theory." This theory is the belief that a repeat player employer chooses the same arbitrator for several arbitration cases, building a relationship with the arbitrator that causes the arbitrator to render biased rulings in favor of the repeat player employer.²⁵ In fact, the repeat arbitrator theory has no empirical support.

There is no support for the repeat arbitrator theory in this study either. There were only two cases in 200 that involved a second meeting between the same arbitrator and employer, or indeed, between any two entities attending or represented at the arbitration. Two cases is not a statistically significant incidence in a sample of 200 cases.

The Appellate Effect

This study supports an explanation of the repeat player effect which I have named the "appellate effect." Repeat player employers isolate and resolve large numbers of meritorious employee claims through in-house dispute resolution programs, leaving only relatively meritless cases for appeal to AAA arbitration. The result is a AAA docket of meritless cases against that employer, which leads to an above-average win rate for that employer. In other words, the repeat player effect is caused, not by a lack of due process, but by a fair in-house process.

The following data support the "appellate effect" theory. In this study, 34 cases involved a repeat player employer. Most of these repeat players were employers with nationally known names—large companies likely to process a relatively large number of cases. The employers in 74% of those cases (25 cases) maintained an in-house dispute resolution program culminating in AAA arbitration. The win-loss ratio for this 74% of cases was 3.2, a full 190% higher than the 1.3 win-loss ratio for employers overall. On the other hand, the remaining 26% of repeat employer cases (nine cases) involved employers who did not maintain in-house dispute resolution programs. Their win-loss ratio was only 1.25, just slightly below the 1.3 win-loss ratio for employers overall. In short, the repeat player effect does not exist where the repeat player does not maintain an in-house dispute resolution program. Thus, the effect appears to be the result of the selection processes of large employers' in-house dispute resolution programs, not merely the by-product of large employers' repeat appearances at arbitration.

The appellate effect theory is further confirmed by a reading of the 25 individual cases

The study found that in a significant percentage of cases, the arbitrator re-allocated the employee's forum fees to the employer.

which do manifest the repeat player effect. They are indeed, of little or no merit.

Proceeding *Pro Se*

One-third of the lower-income employees in this study prosecuted their cases without legal representation. The data indicated that the arbitral forum was successfully navigated by these employees.

The win-loss ratio for both lower-income employees with representation and those who proceeded *pro se* was .50. Moreover, the employees *pro se* did not face less substantial opponents than the employees with counsel. The lower-income employees *pro se* defeated employers represented by 33 attorneys, six human resources representatives, and one corporate representative.

As to damages awarded and damages demanded, lower-income employees *pro se* fared as well as lower-income employees with counsel. Although the data on demands and awards was limited, both groups obtained 100% of the monetary damages they originally demanded. The fact that the \$67,174 average demand by the *pro se* group was less than the \$93,448 average demand by the group with counsel may indicate that lower-income employees made a decision to retain counsel when larger amounts of money were at stake.

In sum, these findings demonstrate that employees proceeding *pro se* understood their cases and the AAA arbitration procedure. They also indicate that the AAA rules were accessible to lay people.

The Speed of Arbitration

Arbitration is commonly believed to be a relatively speedy means of dispute resolution. The average length of arbitration, measured from the filing of the demand for arbitration to the date of

the award, was 8.2 months, based on this sample. However, an accurate measure of the length of arbitration cannot be based on this sample alone. As of Nov. 5, 2000, the termination date for the lengthiest arbitration in our sample, there were many cases initiated in 1999 and 2000 which had not yet terminated. Therefore, 8.2 months does not represent the true average length for all cases initiated in those years ending in awards. We must consider all cases which terminated in awards.

The AAA supplied me with data concerning all cases initiated in 1999 and 2000 which had terminated as of September 2002, whether by award or otherwise. Based on that data, I was able to estimate the average length of all cases initiated in 1999 and 2000 ending in an award. The average length was 16.5 months, or 494.6 days.²⁶

Length of the Hearing

The hearings ranged in length from one to 12 days and averaged two days. Eighty-nine percent of the arbitrators complied with AAA Rule 34, which requires that the arbitrator provides "written reasons" for the award.

Conclusion

Opposition to employer-sponsored employment arbitration is widespread, strong and based on the belief that it robs employees of the right to trial and supplants it with a kangaroo court dominated by employers' interests. However, research shows that lower-income employees have no real access to trial and that employment arbitration offers an affordable, fair, alternative adjudicative forum. Perhaps the results of this study will help move the debate away from the propriety of employment arbitration and toward the creation of better employment dispute resolution. ■

ENDNOTES

¹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (predispute employment arbitration agreements are enforceable under the Federal Arbitration Act); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) ("mandatory" arbitration agreements are generally enforceable); *EEOC v. Waffle House*, 534 U.S. 279 (2002) (predispute employment arbitration agreement did not bar the EEOC from bringing suit where the EEOC acted pursuant to a charge, and no arbitration or private lawsuit had been initiated).

² Recently passed California legislation requires substantially increased disclosure by arbitrators. See Calif. Code

Civ. Proc. §§ 1281.85, 1281.9. And proposed federal legislation would render all employment arbitration agreements unenforceable. See Section 3(a) of S. 2435, 107th Cong., 2d Sess. (May 1, 2002) and of H.R. 2282, 107th Cong., 1st Sess. (June 21, 2001) which states, "Any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable."

³ See, e.g., Lisa Bingham & Denise Chachere, "Dispute Resolution in Employment: The Need for Research, Employment Dispute Resolution and Workers Rights," ch. 4 in A.E. Eaton &

J.H. Keefe, eds., *Employment Dispute Resolution and Worker Rights in a Changing Work Place*, Industrial Relations Research Ass'n 1999); Samuel Estreicher, "Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements," *Ohio State Journal on Dispute Resolution*, vol. 16 (2001) pp. 559, 564, 566 (hereafter "Saturns"); David Lewin, "Dispute Resolution in Non-union Organizations: Key Empirical Findings," in Samuel Estreicher, ed., *N.Y.U.'s 53rd Annual Conference on Labor* (Aspen Publishers 2003) (hereafter Estreicher); Deborah Hensler, "ADR Research at the Crossroads," *Journal of Dispute Resolution*

(2000), p. 71.

⁴ The complete results of this research project are to be published this April by the *Ohio State Journal of Dispute Resolution*, vol. 18, no. 3 (2003). They will also be published in Estreicher, *supra* n. 3.

⁵ Peter Feuille & Denise Chachere, "Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces," *Journal of Management*, vol. 21 (1995), pp. 27-42; U.S. General Accounting Office, "Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace," GAO/GGD-97-157 *ADR in the Workplace*, (1997)(GAO found 19% of employers surveyed were using arbitration to resolve employment disputes).

⁶ David Lipsky & Ronald Seeber, "In Search of Control: The Corporate Embrace of ADR," *University of Pennsylvania Journal of Labor & Employment Law*, vol. 1, no. 1 (1998), pp. 133-159; see also *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (Cornell/ PERC Institute on Conflict Resolution, Cornell University); see also "Patterns of ADR Use in Corporate Disputes," *Dispute Resolution Journal*, vol. 5, no. 1, (1999), 66-71.

⁷ American Arbitration Association (AAA), National Rules for the Resolution of Employment Disputes (eff. June 1, 1997) at 1; Author's interview with Robert Meade, AAA senior vice president, in New York City, on Jan. 14, 2002.

⁸ See, e.g., Jean Sternlight, "Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration," *Washington University Law Quarterly*, vol. 74 (1996), p. 637; Reynolds Holding, "Private Justice," *San Francisco Chronicle*, Oct. 8, 2001, at A15, 2001 WL 3416493; Reginald Alleyne, "Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum," *Hofstra Labor Law Journal*, vol. 13 (1996), pp. 381, 403, 426; Bryant Garthy, "Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution," *Yale Law Journal*, vol. 88 (1979), pp. 916, 929-930; Robert Gorman, "The Gorman Decision and the Private Arbitration of Public-Law Disputes," *University of Illinois Law Review* (1995), pp. 635, 669; Lewis L. Maltby, "Private Justice: Employment Arbitration and Civil Rights," *Columbia Human Rights Law Review*, vol. 30 (1998), p. 29, 49-50.

⁹ See, e.g., "Saturdays," *supra* n. 3.

¹⁰ U.S. Dept. of Labor Report, *Report and Recommendations: Commission*

on the Future of Worker-Management Relations (December 1994).

¹¹ William Howard, "Arbitrating Claims of Employment Discrimination," *Dispute Resolution Journal*, vol. 49 (Oct.-Dec. 1995), p. 40.

¹² See, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)), Americans with Disabilities Act of 1990 (42 U.S.C. § 12117), Age Discrimination in Employment Act of 1967 (29 U.S.C. § 626) and Equal Pay Act of 1963 (29 U.S.C. § 216(b)).

¹³ See *infra* n. 14.

¹⁴ It was possible to extrapolate employees' income from the content of the awards. Some awards included information about wages or salary. Other awards provided information about the employee's occupation, which was matched with the national average wage for that occupation provided by the Bureau of Labor Statistics' National Employment and Wage Data from the Occupational Employment Statistics Survey by Occupation, 2000.

¹⁵ It bears mention that since the conclusion of this study, the AAA has amended its employment rules to limit the forum fees payable by employees arbitrating pursuant to mandatory arbitration agreements to \$125. This rule change eliminates any question of high cost of forum fees for AAA arbitration.

¹⁶ American Arbitration Association, National Rules for the Resolution of Employment Disputes (eff. Nov. 1, 2002).

¹⁷ See Lisa Bingham, "Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases," *Labor Law Journal*, vol. 47 (1996), p. 108, 115 (only 1.8% of a pool of AAA cases filed in 1993 contained civil rights claims); Lewis Maltby, *supra* n. 8, at 49-50 (only 13 of all the AAA cases filed in 1996 alleged employment discrimination).

¹⁸ Fourteen is the number of viable civil rights claims. In addition to these 14 claims, there were 19 cases that alleged a civil rights claim but did not allege a single fact in support of the claim. There were also three civil rights claims that were time barred.

¹⁹ Michael Delikat & Morris Kleiner, "An Empirical Study of Dispute Resolution Mechanisms for Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?" in Estreicher, *supra* n. 3.

²⁰ See *supra* n. 8.

²¹ Lisa Bingham, "Employment Arbitration: The Repeat Player Effect," *Employee Rights & Employment Policy Journal*, vol. 1 (1997), p. 189.

²² At-will employment is no longer the law in Montana. Mont. Code Ann. §. 39-2-901 *et. seq.*

²³ AAA National Rules for the Resolution of Employment Disputes (eff. Jan. 1, 1999), Rule 39.

²⁴ See *supra* n. 21.

²⁵ *Id.*

²⁶ I estimated the average time from demand to award by estimating the length of the individual cases which might have been included in a sample of all awards initiated in 1999 and 2000, assuming all cases initiated in 1999 and 2000 were completed. The average time from demand to award in my pool of 200 awards was 246.97 days, or 8.2 months. My 200 awards represented the pool of 356 awards rendered from the total pool of cases initiated in 1999 and 2000 on or before Nov. 5, 2000. Between Nov. 5, 2000, and Sept. 1, 2002, an additional 429 awards were rendered. Imagine that my sample were expanded to include a sample of these 429 awards. The original 200 awards comprised 56% of the 356-award pool. Therefore, the additional sample of the 429 awards would be 56% of 429, or 240 additional awards. The additional sample of 240 awards would be divided into two groups of 120 each, because I estimate that approximately half of them would have been initiated in each of 1999 and 2000. I make this estimate because 1,340 cases of the total pool were initiated in 1999 and 1,372 cases were initiated in 2000. I don't know when during each year these 240 cases would have been initiated, so I estimate that the initiation dates would average at the mid-points: June 1, 1999, and June 1, 2000. I don't know when these cases would have ended in awards, but I know that the awards were rendered sometime after Nov. 5, 2000, and on or before Sept. 1, 2002. So I chose an approximate mid-point of Nov. 1, 2001. Therefore, I added two groups of estimated individual awards to my sample. Group one consisted of 120 cases initiated on June 1, 1999, and terminated in an award on Nov. 1, 2001. Group two consisted of 120 cases initiated on June 1, 2000, and terminated in an award on Nov. 1, 2001.

Averaging these two groups of estimated additional awards and my original sample, the average time from demand to award was 16.5 months, or 494.6 days. As of Sept. 1, 2002, there were only 103 cases initiated in 1999 and 2000 that were still pending. Of the 2,613 cases which were terminated as of Sept. 1, 2002, only 34%, or 885, ended in an award. Assuming that only 34% of the pending 103 cases resulted in an award, there were only 35 awards outstanding. Thirty-five awards comprise less than 8% of the 440 awards supporting my estimate. Accordingly, the estimate is sound.