The Business, Entrepreneurship & Tax Law Review

Volume 7 | Issue 2 Article 4

2024

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ABSTRACT

"As many frustrated empirical scholars have noted, it is [difficult] to obtain data regarding claims brought in either litigation or arbitration, and even when data is obtained, it is very [difficult to] compare the two sets of information."[1] Given the private nature of arbitration proceedings, not all data is readily available. Congress enacted the Federal Arbitration Act ("FAA") in 1925, governing and providing for "judicial facilitation of private dispute resolution through arbitration."[2] Since 1925, the use of mandatory employment arbitration clauses has grown dramatically. With such exponential growth has come heightened attention to the practice, resulting in robust debate on whether mandatory employment arbitration is truly fair for the employee. While arbitration provides many benefits for the employee, such as faster resolution and lower costs, criticism of arbitration from the employee standpoint has nevertheless persisted. A number of studies of employee win rates in arbitration have taken place, with statistics varying from survey to survey. The most recent set of data from the American Arbitration Association ("AAA"), however, reveals that employees prevail at a higher rate in mandatory employment arbitration proceedings than have been credited by prior studies. This variance in statistics could be attributed to the low number of arbitration cases that are analyzed in each study,[3] indicating larger studies are needed to put a definitive end to any debate. Although statistics tend to show a trend of higher success rates for employees through litigation, this can be attributed to other factors such as the low rate of lawyers willing to bring employment claims that do not have a high monetary amount attached and a high probability of prevailing on the claim. Generally speaking, attorneys are more likely to file lawsuits with a sufficiently high probability of winning, due to the time and expense associated with litigation.[4] Litigation, however, presents heightened risks such as losing the case, negative publicity, and the investment of time needed for a court case to work its way through trial and potential appeal. In contrast, arbitration presents lower risk, with albeit often lower reward for the employee. In addition to the greater speed and lower costs associated with arbitration, the fairness of results are an oft-overlooked positive to arbitration of employment disputes.[5]

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1. *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection* 80 BROOK. L. REV. 1309, 1323 (2015).

2. PACE University, *Student Project: Arbitration in the Entertainment Industry: Arbitration*, https://libraryguides.law.pace.edu (last visited Apr. 25, 2022).

3. *See* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 109 (2003).

4. *See* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1570 (2005).

5. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. Disp. Resol. 559, 564 (2001); *see also* Lewis L.

I. INTRODUCTION

Do mandatory arbitration clauses in employment contracts provide accountability of employers by ensuring opportunities for equitable outcomes for employees? This article will explore how mandatory arbitration clauses do provide a fair and more beneficial avenue for employees to resolve disputes in comparison to the alternative forum of litigation. A negative perception of mandatory employment arbitration clauses persists, with many critics of the practice arguing that it places employees at a disadvantage not found in the context of litigation. This article will consider the factors that have been put forth by opponents of mandatory employment arbitration, and will critically examine the arguments supporting negative perceptions toward mandatory employment arbitration. As this article demonstrates, statistical analysis reveals undisputable benefits of employment arbitration. An analysis of available statistics on employment arbitration versus litigation will include statistics from the American Arbitration Association ("AAA") to prove the benefits of arbitration that exist for employees. Transcripts from a Senate hearing and from Congress over the failed Arbitration Fairness Act ("AFA"), a bill which attempted to bar the use of mandatory arbitration for employment claims, will further add to the argument that arbitration in employment serves as a positive avenue for employee's to seek justice that has not been interrupted by congressional action. Additionally, court cases will be utilized in order to evaluate the view of the courts when it comes to mandatory employment arbitration clauses. Even as mandatory arbitration clauses have become more commonly used in employment contracts, the issue of their fairness nevertheless continues to be a subject of considerable debate in legal circles. This discussion aims to uncover and reflect the statistics demonstrating the fair nature and overall benefits of mandatory employment arbitration—not only for employers, but for the employees as well.

II. BACKGROUND

To fully understand the importance of arbitration as an alternative to litigation, it is important to understand its origins and structure in employment claims. The Federal Arbitration Act ("FAA") was passed by Congress in 1925 and governs the enforceability of employment arbitration claims.[6] The United States Supreme Court has sided with continuing the use of employment arbitration since its inception,[7] and through judicial opinions has shown a preference toward arbitration when compared to litigation of claims.[8] Cases from the United States Supreme Court, such as *Gilmer v. Interstate Johnson/Lane Corporation* which affirmed the use of arbitration for statutory claims. The case *Green Tree Fin. Corp.-Ala. v. Randolph* reinforced the standing given to arbitration in the FAA, and *Southland Corp. v. Keating*

Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30 (1998) (arguing that arbitration may serve employees' interests better than litigation).

6. *See* Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 6 (2014).

7. *See* Stacy A. Hickox, *Ensuring Enforceability and Fairness in the Arbitration of Employment Disputes*, 16 WIDENER L. REV. 101, 102 (2010).

8. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 275 (2009) (Stevens, J., dissenting) ("the Court has in a number of cases . . . [included] judicial reasoning espousing a policy favoring arbitration").

affirmed the constitutionality of the FAA.[9] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* from the United States Supreme Court reinforced the favoritism toward international arbitration, and reinforced the equality of the forums of arbitration and litigation.[10]Although acts such as the AFA and the Forced Arbitration Injustice Repeal Act ("FAIR") have attempted to highlight the negative effects of mandatory employment arbitration to push the enactment of limitations on employment arbitration, these attempts have been unsuccessful as the acts have failed to pass through both chambers of Congress. The AAA, along with its due process protocol, governs most arbitration hearings between the employer and employee; many statistics are available through the AAA which reflect employment arbitration claims results under the AAA.

A. Background of Mandatory Employment Arbitration

The FAA governs all employment contracts, with the exception of the transportation industry, and this distinction was clarified by the United States Supreme Court in *Circuit City Stores, Inc. v. Adams*.[11]The Supreme Court in *AT&T Mobility, LLC. v. Concepcion* held that the FAA preempts state law, and places arbitration agreements on equal footing with contracts. The FAA exists to place arbitration agreements on the same footing as contracts, while reversing longstanding judicial hostility toward arbitration agreements.[12] The AAA, known as the largest provider of alternative dispute resolution ("ADR") services in America,[13] has adopted rules on employment arbitration and a due process protocol.[14] This due process protocol ensures the right to arbitrate and/or mediate employment claims, the right of representation, a qualified mediator or arbitrator, and a binding award with a limited scope of review.[15] Other acts regarding employment arbitration have not been as successful, such as the AFA[16] and the FAIR,[17] which have both attempted to limit the scope of arbitration to extend to employment contracts. Although limited empirical data exists on employment arbitration, the criticisms towards arbitration can be disputed by recent statistics as well as other factors.

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9. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

10. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) ("A parochial refusal by the courts of one country to enforce and international arbitration agreement . . . would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."); *see also* James H. Call, *Arbitration Outcomes and Employer Size in the Context of the American Arbitration Association 2010–2020*, CUNY Academic Works 1*, 2* (2022).

11. *See* Circuit City Stores v. Adams, 532 U.S. 105, 109 (2001).

12. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)..

13. AM. ARB. ASS'N, *Employment Arbitration Rules and Mediation Procedures*, http://www.adr.org/sp.asp?id=32904#1 (last visited March. 31, 2021).

14. *See generally* AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (2023), https://www.adr.org/sites/default/files/EmploymentRules-Web.pdf.

15. *See* AM. ARB. ASS'N, EMPLOYMENT DUE PROCESS PROTOCOL 1–3, 5 (1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf.

16. H.R. 1020, 111th Cong. § 3(6) (2009).

17. H.R. 2953, 118th Cong. (2023).

III. EMPLOYMENT ARBITRATION VERSUS LITIGATION—A COMPARISON

The issue discussed is whether mandatory employment arbitration is a fair alternative to litigation for both the employees and the employers; a lack of empirical data in employment arbitration leaves room for legal debate on this issue. The data on mandatory employment arbitration agreements that has been analyzed is from the AAA. Study sets range from 2003 to 2006,[18] 2003 to 2007,[19] 2013 to 2014,[20] and 2017 to 2021.[21] Although data exists on outcomes of employment arbitration due to California law requiring public filings of certain information from arbitration service providers,[22] this dataset analyzes arbitration cases from across the United States.

A successful outcome in arbitration, as well as in litigation, will all depend on the specific facts of the individual claim. Due to this subjective nature of claims and outcomes, arbitration claims which have their own specific facts and characteristics are difficult to directly compare to the claims filed in litigation; different reasons could lead employees to choose arbitration than to choose litigation as their forum. No two cases are exactly alike, therefore, it would be nearly impossible to compare cases in arbitration to cases in litigation other than in a general sense. It is like comparing apples to oranges. Although certain proven statistics are in favor of arbitration, other statistics leave a gap between the employee's odds of prevailing in arbitration and prevailing in litigation. These statistics vary according to each study as well. The inability to compare identical cases that have gone through both litigation and through arbitration, to understand if the employee's odds would be statistically higher or lower in either forum, allows room for outside factors to explain the less favorable statistics that critics of arbitration highlight. Comparing win rates in a purely statistical sense without adjusting for the differentiating factors between arbitration and litigation, such as the salaries of employees bringing claims in each forum, the procedures of each forum, the types of claim in each forum, and other

18. *See* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 408 (2007) (analyzing a study of arbitration cases taken from "a sample of 2763 employment arbitration cases administered by the AAA from January 1, 2003, to September 30, 2006, which produced 836 employment arbitration awards.").

19. *See* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (analyzing a study of arbitration cases taken from "3,945 arbitration cases, of which 1,213 were decided by an award after a hearing, filed and reaching disposition between January 1, 2003 and December 31, 2007; . . . all the employment arbitration cases administered nationally by the AAA during this time period that derived from employer-promulgated arbitration procedures.").

20. *See* Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91,103 (2014) (analyzing a study of arbitration cases taken from "a web-administered survey, to which 521 practicing attorneys responded throughout October 2013. To increase the response rate, the survey was distributed by U.S. mail in December 2013 and January 2014, from which 175 additional responses were collected. In total, information was received from 478 employment discrimination cases reaching verdict through litigation and 208 employment discrimination case adjudicated in arbitration.").

21. AM. ARB. ASS'N, *Employment Arbitration under AAA Administration*, *AAA Consumer and Employment Arbitration Statistics*, https://www.adr.org/employment (last visited Apr. 25, 2022).

22. Cal. Civ. Proc. Code § 1281.96 (West 2007) (requiring private arbitration companies to release certain information regarding arbitration within five preceding years); *see also* Colvin, *supra* note 17, at 3–4 (explaining how the AAA complies with the Cal. Civ. Proc. Code § 1281.96 and provides the data on national arbitration claims, not just those in California).

variables, does not explain *why* the numbers are that way. Therefore, statistics taken at face value alone cannot prove the conclusion that arbitration is not fair for the employee.

A. Undisputed Benefits of Arbitration

Prior to disputing any negative view of mandatory arbitration for employment claims, it is important to articulate and compare the undisputed positive statistics pertaining to employment claims in arbitration. The following statistics and data prove the benefits of arbitration for employment claims. Benefits of mandatory employment arbitration include low arbitrator fees, access to a forum, a more rapid disposition and resolution for both the employee and the employer, the possibility of remaining employed, and reduced court dockets. Opponents and proponents of mandatory employment arbitration agree these benefits of arbitration exist as statistics consistently prove their existence without dispute.

1. Low Arbitrator Fees

The employee incurs little to no arbitration fees during or after the course of arbitration. The average cost of the arbitrator fees in different studies have remained around $6,000; with the AAA capping the fee for the employee at $300.[23] The AAA under the "Employment/Workplace Fee Schedule" provides that the employee's fee shall not exceed $300.00, and the employer pays the arbitrator when certain circumstances are met.[24] In the study of AAA data from 2003 to 2006, the employer paid one hundred percent of the arbitrator's fees in 96.6% of the cases.[25] In the study by Alexander Colvin from 2003 to 2007, the employer paid one hundred percent of the arbitrator's fees in 97% of the cases.[26] This percentage remains true in the data reported by the AAA including years 2017 through 2021, where the employee paid a fee in only 1.4% of claims; none of these fees exceeded $100.00 for the employer.[27] This substantial burden of paying to access a forum is lifted from the employee allowing for the employee to bring claims that they may not otherwise have the finances to raise in litigation. The burden of paying is instead placed on the employer.

Low cost is a positive aspect the arbitration forum encompasses in comparison to litigation, which is largely attributed to the cost of discovery being 50% of the cost of litigation.[28] This cost is not prevalent in arbitration as discovery is more limited.[29] The median fee charged in the studied arbitration cases was $2,475.00, and the mean fee charged in the same arbitration cases was $6,340.00.[30] With this

23. *Employment/Workplace Fee Schedule*, AM. ARB. ASS'N (Nov. 1, 2020), https://www.adr.org/sites/default/files/Employment_Fee_Schedule.pdf.

24. *Id.*

25. *See* Colvin, *supra* note 18, at 424.

26. *See* Colvin, *supra* note 19, at 9; *see also* Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L. J. 289, 294 (2012).

27. AM. ARB.ASS'N, *supra* note 21.

28. Mark Fotohabadi, *How Much Does Arbitration Cost*, ADR TIMES (Oct. 2, 2023), https://www.adr-times.com/how-much-does-arbitration-cost.

29. *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 74 (2014).

30. *See* Colvin, *supra* note 19, at 9.

low risk of no-cost arbitration afforded to the employees, the drawbacks of pursuing litigation are eliminated and employees with weaker claims or with smaller claims have the option of choosing to pursue arbitration when they otherwise would not want to or be able to litigate a claim; this could be due to lack of guidance from an attorney because the proven barricade of a low number of attorneys not willing to take their low value claim, or because their claim is too small to go through the process of litigation. Claims in arbitration can run as low as under $1,000.00 according to the AAA statistics from 2017 to 2021.[31]

2. Access to a Forum

"Paul Tobias, one of the founders of the National Employment Lawyers Association ("NELA"), testified that the plaintiffs' employment bar turns away at least 95% of those employees who seek its help."[32] Many of these turned away claims will likely end up not being brought at all, or being brought *pro se* in litigation or arbitration, which will decrease the likelihood of the employee prevailing against the employer on the claim. Arbitration allows for access to a forum when a pathway to litigation may not be plausible, whether it be due to the claim amount being too small or due to an attorney not willing to take the case. Attorneys generally take on cases that will be worth their time, as they primarily work on contingency fees, and they will turn down claims with lower monetary value.[33] Coming from a source in 2007, litigation is estimated to not be an accessible forum for workers with a salary of under $60,000.00; lawyers typically require damages to exceed $65,000.00 to take on a case.[34] This threshold is harder to reach for those employees making under $60,000.00 a year,[35] and the median household income in that same year of 2007 was only $52,673.00.[36] Lewis Maltby, President of the National Workrights Institute, is an opponent of mandatory employment arbitration, but a couple dozen employees came to him with legitimate claims of wrongful treatment and upon Maltby reaching out to lawyers for assistance in these cases, only one employee was able to receive representation from a lawyer willing to take a claim.[37]

For claims to go to litigation, the attorney will consider both the merit and the size of the case before inputting time and resources into pursuing the case.[38] In one study, plaintiff attorneys agreed to represent only five% of employment

31. AM. ARB. ASS'N, *supra* note 21.

32. Maltby, *supra* note 3, at 107.

33. *Arbitration: Is it Fair when Forced?: Hearing Before the Comm. on the Judiciary*, 112th Congress 40 (2011) (statement of Christopher R. Drahozal).

34. *See* Colvin, *supra* note 20, at 416.

35. *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777, 783 (2003).

36. Jessica Semega, *Median Household Income for States: 2007 and 2008 American Community Surveys*, U.S. CENSUS BUREAU (Sept. 2009), https://www2.census.gov/library/publications/2009/acs/acsbr08-02.pdf.

37. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J. L. REFORM 783, 791 (2008).

38. Seth E. Lipner, *Is Arbitration Really Cheaper?*, FORBES (Jul. 14, 2009), https://www.forbes.com/2009/07/14/lipner-arbitration-litigation-intelligent-investing-cost.html?sh=554889434ed1.

discrimination suits brought to them by an employee.[39] The Equal Employment Opportunity Commission ("EEOC") also exists as a resource for representation for employees in litigation. The EEOC can investigate, and attempt to settle, charges of discrimination brought by employees against their employers.[40] When it comes to filing a lawsuit on behalf of the discriminated employee, "the EEOC considers several factors such as the strength of the evidence, the issues in the case, and the wider impact the lawsuit could have on the EEOC's efforts to combat workplace discrimination."[41] The EEOC, with their growing backlog of unresolved complaints,[42] focuses on larger cases or on "test cases."[43] This focus of the EEOC leaves the small employee, that does not have a large policy-changing claim, with no viable option to go through litigation with adequate representation. Considering the low acceptance rate for employees seeking representation in the forum of litigation, it is necessary to have a forum which not only has the benefit of low arbitrator costs, but is able to have the employee's claim heard in a more informal setting when an attorney or the EEOC will not take the claim.

3. Faster Resolution

Another undisputed advantage of arbitration over litigation is the faster time frame arbitration provides in arriving at a resolution for both the employer and the employee. A faster resolution to the claim ties in with other aspects of the arbitration versus litigation comparison; "[t]he faster a claim is resolved, the lower the attorney's fees[,]"[44] and the faster the employee can focus on returning to work and earning an income for their family. The average time to the disposition of an employment arbitration claim is 361.5 days after a hearing; this is about half as long as the time to the disposition of an employment claim in litigation.[45] Cases that settle in arbitration reach disposition at an average of 284.4 days.[46] The AAA, the largest U.S. provider of ADR services,[47] provides a roadmap to arbitration proceedings, with the award being expected within 258 to 288 days.[48] In comparison, the average employment claim that goes through the process of litigation takes nearly twice as long.[49] This faster resolution helps to lower court costs and lowers the amount of time the employee is out of work.

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39. *See* Hill, *supra* note 35 (This data was found after a survey of 321 individual plaintiff attorneys found those attorneys "accepted only five percent of the employment discrimination suits to litigate.").

40. *Overview*, U.S. EQUAL EMPL. OPP. COMM'N, https://www.eeoc.gov/overview (last visited Apr. 25, 2022).

41. *Id.*

42. *See* ELIZABETH JOUN ET AL., REDUCING DELAY TO PROMOTE CIVIL RIGHTS: HOW ADMINISTRATIVE JUDGES AT THE EEOC CAN RESOLVE EMPLOYMENT DISCRIMINATION COMPLAINTS IN A FAIR YET EFFICIENT MANNER 4 (2018).

43. U.S. EQUAL EMPL. OPP. COMM'N, *supra* note 40.

44. *See* Malin, *supra* note 26, at 299.

45. *See* Colvin, *supra* note 19, at 12.

46. *Id.*

47. *See* Pat K. Chew, *Contextual Analysis in Arbitration*, 70 S.M.U. L. REV. 837, 841 (2017).

48. *AAA® Arbitration Road Map Reaching Resolution*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA197_Arbitration_Road_Map.pdf.

49. *See* Malin, *supra* note 26, at 294.

4. Continued Employment

The potential to remain employed is another advantage to using alternative dispute resolution processes, with arbitration as the final step, for resolving employment claims. The relationship between the employer and employee is rarely maintained following litigation, mostly due to the nature of litigation how one side typically comes out unhappy with the disposition. In contrast, alternative dispute resolution processes that lead to arbitration saw in excess of 75% of employees remain employed with the same employer following the resolution of the claim.[50] This statistic reflects a more positive outcome for both parties upon reaching a resolution. The quick and private forum of arbitration allows for the production of outcomes for claims without creating as strong of an adversarial relationship between the employer and the employee, leaving a relationship between the parties that can be salvaged and extended into the future. When a remedy can be found for the employee through the more effective forum of arbitration, it often allows the employee to receive a resolution to their claim and maintain their employment status. Allowing the employee to get back to work immediately instead of possibly losing more income through their time spent unemployed and searching for another job after a public dispute in litigation with their prior employer.

5. Court Dockets

The final advantage to highlight in favor of employment arbitration is that it frees up the court dockets, allowing for a more manageable load of claims to pass through the court systems. In Senate Hearing 111-396, former Senator from Alabama and former Attorney General of the United States Jeff Sessions argued in favor of arbitration in employment claims bringing forth the point that "[i]f every employment dispute . . . ends up in Federal court . . . we are really going to have a problem with the case loads in Federal court."[51][9] Arbitration allows for finality of awards, where appeals may lead to further backlog in the court system. As noted previously, the EEOC has been overburdened to the point where it has to assign levels of priority to cases, some of which may never see the court system due to the EEOC's backlog which had at one point surpassed 100,000 cases.[52] Arbitration serves as an avenue for employees and employers to reach a quick resolution to their claims, and to reduce the overcrowding of federal court dockets.

B. Opponents to Arbitration

Arbitration is a process that permits employees to seek relief through a means other than litigation. The litigation process is longer, more inconvenient for the employee, and in many instances difficult for employees to obtain an attorney to assist them with the litigation process. Arbitration is a more convenient, quicker, and cheaper means to achieve justice for the employee who brings a claim against the

50. *See* Colvin, *supra* note 18, at 440; David Sherwyn et al., *supra* note 4, at 1589.

51. *Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers From Discrimination?: Hearing before the Comm. on the Judiciary United States Senate*, 111th Cong. (2009).

52. *See* Antoine, *supra* note 37, at 792.

employer. In a study by Alexander Colvin of employment cases reported by the AAA over a four year period, Colvin stated that, in comparison to litigation, "employees' win rates are lower in arbitration . . . and . . . disputes are disposed of in a shorter time."[53] However, Colvin also found that "award amounts are less" for the employee.[54] Although mandatory arbitration clauses in employment agreements have their benefits, there are also potential negative connotations. These negative concerns argued by the opponents of mandatory employment arbitration can be explained away by other measures and rationality.

In contrast with the positive components of employment arbitration, the points made in opposition to employment arbitration are mostly in statistical terms which vary from study to study. These statistics lead to the perception that arbitration is a less friendly forum for the employee, however, comparing these statistics is also like comparing apples to oranges. Litigation and arbitration are two different forums, and the cases brought into each forum are composed of different facts and different monetary claim amounts. Although these forums both aim to resolve claims for the employee, all of the information on the claims brought into each forum are not provided in these studies previously conducted. Therefore, the reasoning behind these statistics is needed to fully understand the statistical gap between the employee favorability in arbitration and the employee favorability in litigation. Statistics used by those in opposition to mandatory employment arbitration include the statistics for employee win rates as well as statistics reflecting award amounts in arbitration versus in litigation. Discussed in this section are the statistics on arbitrator fees, length of time to disposition, employee win rates, and award amounts. Statistics have been pulled from the AAA and noted in prior empirical research studies. The following section will present the statistical evidence and will implement reasoning behind the claim that arbitration is a fair system for the employee by bringing forth the reasoning behind why the statistics differ between arbitration and litigation.

1. Employee Win-Rates

Opponents of mandatory employment arbitration put forth the argument that employee win rates in arbitration are statistically lower than employee win rates in litigation. Win rates for employees differ depending on the study that has been conducted throughout the decades in which employment arbitration has grown, since 1925. Studies conducted in the 1990s resulted in the employee winning an award in arbitration claims between 66% and 74% of the time.[55] In a study conducted with data from January 1, 2003 through December 31, 2007, the employee prevailed in arbitration with an award in 21.4% of the hearings.[56] In a more recent study containing data on arbitration cases that terminated with awards between 2014 and 2018, the employees won 32.3% of the time in comparison to litigation where the employee prevailed only 11% of the time.[57]

53. Chew, *supra* note 47, at 843.
54. *Id.*
55. *See* Colvin, *supra* note 18, at 412.
56. *See* Malin, *supra* note 26, at 295.
57. *See* Nam D. Pham, *An Empirical Assessment of Employment Arbitration*, 16 J. L. ECON. & POL'Y 45, 48 (2021).

Upon analyzing the 2021 AAA Dataset's employer promulgated employment disputes, 1,061 claims passed the settlement stage and resulted in awards after the arbitration process. Out of these 1,061 awards, the employee prevailed 439 times while the business prevailed 622 times; meaning the employee win rate in this dataset is 41.37%. These statistics from 2017 through 2021 present more current representations of arbitration and a tighter gap between the percentage of employee success in arbitration versus litigation. Since these statistics have varied over the years, there is room for proponents and opponents of mandatory employment arbitration to attempt to form an argument. This discussion aims to reinforce the statistics that show an equivalent, or higher, win rate for employees in arbitration over litigation and disprove the statistics that create an illusion that arbitration is anything other than a fair forum for employees. Statistics showing employees with a lower win rate in arbitration than in litigation can be attributed to many factors including the types of claims brought forth,[58] types of plaintiffs, the pre-hearing process, and other variables.

a) Types of Claims

Data on the basis for the claims brought forth in arbitration is not reported by the AAA,[59] therefore there is no ability to assess what claims might be denied more than others in arbitration. Differing claims will result in varying outcomes. The current 2021 AAA Dataset does not show details on the claims, but it does assign them a subcategory.[60] For instance, the employee prevailed only 27.5% of the time in the subcategory of "education". On the other hand, in the subcategory of "technology", the employee prevailed 74.4% of the time. Another example is one study that showed "employee claimants won 68.8 percent in cases based on individual contracts, employee claimants only won 21.3 percent of the cases based on personnel manuals."[61] Factors that are present in each employment claim can be attributed to either increased odds or decreased odds of a favorable outcome for the employee. Again, comparing litigation to arbitration is like comparing apples to oranges, because claims will not be identical and claim types may be brought more in one forum than they are brought in the other. However, there is data available which shows statistically significant differences with employees prevailing in different categories of claims.

b) Pre-Hearing Settlements

More incentive for the employer to settle prior to litigation exists because of the negative attention litigation could bring to the employer, higher costs and legal fees in trial, and other negative factors. Frameworks that employers have in place prior to moving the claim to arbitration, such as mediation, can lead to a resolution for both parties and negate a need for any further ADR. This can be an influencing

58. *See* Colvin, *supra* note 18, at 413.
59. *See* Colvin, *supra* note 19, at 2–3.
60. AM. ARB. ASS'N, *supra* note 21.
61. *See* Colvin, *supra* note 18, at 408, 413 ("a sample of 2763 employment arbitration cases administered by the AAA from January 1, 2003 to September 30, 2006, which produced 836 employment arbitration awards.").

factor behind statistics that are reflecting a lower win rate for employees in arbitration. For instance, "Hill found that employee win rates in arbitration were lower [where] the employer had some type of internal grievance procedure steps prior to arbitration."[62] Weaker claims that were not able to be settled then still were able to proceed to arbitration, while the more credible claims were settled through alternatives such as mediation.[63] Allowing the employee and the employer to engage in internal grievance procedures can allow both parties to fully discuss their disagreements without the adversarial nature of litigation. When there are no means to reconcile disputes through ADR or other settlements, the claims of the employees will be more likely to go to litigation. Attorneys then chose strong cases to represent in litigation, which can lead to stronger, and larger, claims being filtered to litigation.

c) Attorneys Taking Stronger Claims to Litigation

The notion that employee win rates are higher in litigation than in arbitration can be justified with this reason as well: an employee, along with their attorney, are less willing to file an employment case in court to proceed with litigation unless they have assessed all the facts and all other options, and found a high probability of winning on the claim in litigation against the employer. The attorney's responsibility to the potential client, or the former employee, is to counsel the client to make the best decision for their desired outcome; the attorney does this by laying out the options and presenting to the client whether they will have a high likelihood or low likelihood of prevailing with their claim in litigation. In addition to the fact that litigation is typically pursued by attorneys once good chances of prevailing have been established, many employees who go through arbitration as a relief for their employment disputes do so *pro se*. In contrast to litigation, arbitration has approximately 24.9% more claims brought *pro se*, meaning the employee does not have an attorney to represent them but they rather represent themselves.[64] The current "AAA Consumer and Employment Arbitration Statistics Report" represents the time period from January 1, 2017 to December 31, 2021 ("2021 AAA Dataset").[65] In a review of employer promulgated arbitration claims from this statistics report provided by the AAA, it is unclear whether the employees did or did not have legal counsel. However, the attorney fees for the consumer are listed as one dollar or higher for 328 of the 1061 cases. Out of these 328 cases, the employee was the prevailing party in 325 of the claims.

In comparison, employees prevailing in litigation are particularly low in comparison to plaintiffs who file other claims. For example, in a study of cases dated 1979 to 2006, "plaintiffs won 15% of employment cases in federal district courts, whereas plaintiffs in other types of cases won 51% of the time."[66] Many attorneys do not take a case if the claim has a low outcome or a low monetary value attached to the claim. Plaintiffs' lawyers typically only take cases they think they have a high probability of prevailing in, because these lawyers operate in a for-profit industry.[67] When lawyers only take on the employment claims of clients who have a high

62. Colvin, *supra* note 18, at 439.
63. *Id.*
64. *See* Colvin, *supra* note 19, at 16.
65. AM. ARB. ASS'N, *supra* note 21.
66. *See* Malin, *supra* note 24, at 291.
67. S. COMM. ON THE JUDICIARY, *supra* note 33, at 157.

probability of prevailing in litigation, the seemingly "higher odds" of the employee prevailing in litigation versus prevailing in arbitration become diminished due to this factor. What appears to be a more successful path to victory through litigation is in reality tactful attorneys, or even the EEOC, picking cases to assist through litigation due to their high probability of prevailing.

2. Award Amounts

Award amounts are another statistic that is analyzed when comparing fairness for the employee in arbitration versus litigation. There is a claim from opponents of mandatory employment arbitration that the awards in litigation are higher for employees than awards in arbitration.[68] Older studies show a lower award amount allotted to the employee in arbitration than in litigation. One number reported in a 2014 article was an average of $23,548.00 awarded in mandatory arbitration cases.[69] However, the 2021 AAA Dataset reflects an average award amount of $167,698.42 in claims which the employee prevailed.[70] In a study of litigation and arbitration outcomes from 2014 to 2018, the average awarded to employees in arbitration was $520,630.00 compared to the $269,885.00 average awarded to employees in litigation.[71] Monetary awards can be skewed due to incredibly high award amounts, or when there are many award amounts of zero in the dataset. For instance, the median award in the 2014 to 2018 data was $113,818.00 compared to the median award in litigation being $51,866.00; a stark contrast to the averages of $520,630.00 and $269,885.00 in arbitration and litigation respectively.[72] Many factors can contribute to this gap in award amounts that are seen in some studies. For instance, attorneys work double the time in litigation for an employee as it takes two years for an outcome in litigation instead of the one year it takes in arbitration. Therefore, the attorney's hourly cost or contingent fee will likely be higher in litigation than in arbitration; leading to a large portion of the seemingly higher cost awarded in litigation to go to covering legal costs and fees. It would logically follow that other factors such as income levels and award demands also contribute to studies that report a lower award amount in arbitration.[73]

a) Attorneys and Legal Costs

Some studies show arbitration awards averaging less than litigation.[74] Attorneys primarily take on cases that will be worth their time investment, and turn down claims with lower monetary value; this factor can influence the statistics to reflect a lower award amount in arbitration.[75] "In order for a member of the private bar to accept a civil case against an employer, there must be provable economic damages

68. Call, *supra* note 10, at 4.
69. *See* Colvin, *supra* note 29, at 80.
70. AM. ARB. ASS'N, *supra* note 21.
71. *See* Pham, *supra* note 57, at 47.
72. *Id.* at 47–48.
73. *Arbitration: Is it Fair when Forced?: Hearing Before the Comm. on the Judiciary, 112th Congress 15 (2011)*
74. Gough, *supra* note 20, at 107.
75. *See Arbitration: Is it Fair when Forced?: Hearing Before the Comm. on the Judiciary*, 112th Congress 157 (2011)

. . . of at least $75,000."[76] A number that has increased in recent years with respect to inflation. Since arbitration takes half the time to reach disposition in comparison to litigation, it will also accrue half the back pay for the employee in the final award amount for the employee. Double the time arguing the claim, means double the amount of back pay for the employee; therefore, since litigation takes double the time to resolve and the employee is out of work during this time, the employee would receive double the amount of back pay they would receive in arbitration if they prevail on the claim.

"Attorney's fees are not governed by the AAA rules on arbitration" but are governed by the employment contract agreed upon by the parties.[77] Data is not available to assess the average cost employees spend on attorneys in arbitration, however, one report by Elizabeth Hill in 2003 analyzes twelve attorneys' fees that were awarded in arbitration with the average award amounting to $6,248.00.[78] Attorneys' contingency fees take away from a large portion from the award the employee receives in litigation as well. On average, lawyers in employment cases work on a 35% contingency fee.[79] For the attorney to take on representing a client there must be decent odds of success for the employee's claim,[80] especially considering the time consuming process of litigation. Although the employee is not required to employ an attorney for their arbitration claim, the attorney will more than likely work on an hourly basis opposed to working on contingency.[81] Again, arbitration claims can be as low as $1,000.00.[82] Arbitration includes less work than litigation for the attorney with less discovery and less time to disposition, therefore, the hours the attorney works will be less and the employee will incur a lesser cost than they would in litigation.[83] The median savings in America in 2019 was $5,300.00,[84] and the median account balance for an American with a high school education was even less at $2,050.00;[85] access to a low-cost forum is crucial for the working American. Paying substantial attorney fees based on an hourly rate is not a possibility for some Americans, especially considering the many hours attorneys work to bring an employment claim to litigation.

Working on a contingency fee is still a possibility for arbitration claims, however, statistics lack in this area to come to a definitive conclusion on the primary basis for attorney's fees in arbitration. According to the 2021 AAA Dataset, the employer represented themselves *pro se* in 13.56% of the cases[86] while, according to a source from 2014, about 20% of employees represent themselves *pro se* in

76. Lewis L. Maltby, *supra* note 3, at 106–107 (citing William M. Howard*, Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50 DISP. RESOL. J. 40, 44 (1995).

77. *See* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 821 (2008).

78. *Id.* at 821–22.

79. *See* Hill, *supra* note 35, at 783.

80. *See* Colvin, *supra* note 29, at 84.

81. Lipner, *supra* note 38.

82. *See* AM. ARB. ASS'N, *supra* note 21.

83. Lipner, *supra* note 38.

84. BD. OF GOVERNORS OF THE FED. RSRV. SYS., SURV. OF CONSUMER FIN., 1989-2019 (Nov. 04, 2021), https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Transaction_Accounts;demographic:all;population:1;units:median.

85. Tyler Parker, *A Look at the Average American's Savings*, FIRST REPUBLIC (Jan. 13, 2022), https://www.firstrepublic.com/insights-education/a-look-at-the-average-americans-savings.

86. AM. ARB. ASS'N, *supra* note 21.

litigation.[87] In contrast, arbitration results in zero arbitrator fees for the employee 97% of the time.[88] The increased legal fees in litigation will devalue the award amount received in litigation because a large portion of the award will go towards covering the attorney's fees and other costs, which the employee would incur either no fees or substantially less fees in arbitration.

b) Award Demands

Between the years 2014 to 2018, half of the employment claims that were terminated in arbitration were lower than $150,000.00, and 30% of employment cases that were terminated in arbitration during 2014 to 2018 had claims of $70,000.00 or less.[89] This is comparable to the 2021 AAA Dataset; 42% of all claims that ended in award had a demand from the employee for $150,000.00 or less and 27.5% of claims had an employee demanding an award of $75,000.00 or less. Employees are demanding less in arbitration than in litigation, therefore, it logically follows that employee awards would be more in litigation because the demand amounts are higher. This could be due in part to the majority of employees who execute their claims in arbitration having salary levels below $100,000.00.[90] Research on this subject has shown that around 80% of employees that file in arbitration have incomes below $100,000.00.[91]

c) Incentive to Settle

Defending an employment litigation imposts a high cost upon the employer, therefore, there is a high incentive for the employer to settle with the employee. To defend an EEOC charge, it costs employers between $4,000.00 and $10,000.00.[92] If the case is taken to summary judgment, it could cost the employer over $75,000.00.[93] Finally, to defend a case at trial, it takes between $125,000.00 to an excess of $500,000.00 to defend a case at trial.[94] These prices can encourage the employer to settle, and from saving the employer these litigation costs, it can drive up the settlement amount for the employee.

3. Repeat Player

A final argument of those opposed to arbitration is that employers who are "repeat players" will therefore have an advantage in the arbitration process and make it more difficult for the employee to prevail. A "repeat player" is someone who repeatedly has arbitration claims, therefore, larger employers are often more likely to be a repeat player than employees themselves.[95] There are several explanations

87. See Colvin, *supra* note 29, at 82.
88. *See* Colvin, *supra* note 19, at 9.
89. *See* Pham, *supra* note 57, at 47.
90. *Id.* at 60.
91. *Id.* at 47; *see also* Colvin, *supra* note 18, at 405; *see also* Colvin, *supra* note 19, at 10 (80 percent is an average of these three studies on salary levels below $100,000).
92. Sherwyn et al., *supra* note 4, at 1579.
93. *Id.*
94. *Id.*
95. *See* Colvin, *supra* note 19, at 11.

as identified by Alexander Colvin in his empirical analysis: (1) larger employers may have more resources to devote to dealing with legal claims; (2) "[e]mployers who are repeat players may develop greater expertise with the arbitral forum," working to their advantage in future claims; (3) larger employers "may be more likely to adopt human resource policies that ensure greater fairness in employment decisions;" and (4) "[l]arger employers . . . may be more likely to adopt internal grievance procedures that lead to the resolution of meritorious cases before they reach arbitration."[96]

Colvin further adds two more explanations for repeat players faring better in arbitration than in litigation which must be disputed: (5) "[a]rbitrators may be biased in favor of employers out of hope of being selected in future cases"; and (6) "[r]epeat employers may develop expertise in identifying, and then selecting, employment arbitrators who tend to favor employers in their decision making."[97] The fifth explanation, that arbitrators may be more favorable to the employers in hopes of being hired again for future claims with that employer, can be dispelled by the rules of the American Arbitration Association. The "Employment Arbitration Rules and Mediation Procedures" as laid out by the AAA under qualifications for arbitrators reads that an arbitrator "shall have no relation to the . . . parties or their counsel that may create an appearance of bias."[98] Additionally, an arbitrator "shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including . . . any past or present relationship with the parties or their representatives."[99] Studies indicate that arbitration experience, not arbitrator bias, contributes to the repeat player having a higher chance of success in arbitration claims.[100] "Lacking equivalent repeat player experience, employees will be less likely to be able to identify and then reject the pro-employer arbitrators."[101]

Additionally, grounds for appeal also exist in arbitration under the FAA if "there was evident partiality or corruption in the arbitrators."[102] By analyzing the AAA statistics on employer promulgated arbitration from 2017 to 2021, 872 of the 1062 cases that resulted in award had an employer that was a repeat player. Of those 872 cases, the employee prevailed 42.3% of the time; in contrast, employees prevailed 36.84% of the time when the business only had one case involving them. This data shows a reverse effect of previously argued repeat player effect in the arbitration system.

IV. CONCLUSION

Employee win rates in arbitration "compare favorably to employee win rates found in litigation."[103] Arbitration and litigation both provide a fair chance of achieving relief and justice for the employee, however, additional benefits are

96. *Id.* at 18.
97. *Id.* at 18–19
98. *Emp't: Arb. Rules and Mediation Procedures*, AM. ARB. ASS'N (Nov. 1, 2009) (revision date, Oct. 1, 2017), https://adr.org/sites/default/files/EmploymentRules_Web_2.pdf.
99. *Id.* at 16.
100. *See* Sherwyn et al., *supra* note 4, at 1570.
101. *See* Colvin, *supra* note 19, at 19.
102. 9 U.S.C. § 10(a)(2) (1947).
103. *See* Colvin, *supra* note 19, at 6.

provided to the employee through the forum of arbitration. The benefits arbitration provides to the employee cannot be disputed as the statistics and studies consistently admit to arbitration providing the employee a quicker, cheaper, and more convenient avenue to a disposition in comparison to litigation. With all the proven benefits of arbitration, it is not only as fair as litigation proceedings, but it affords more benefits to the employee. These benefits of arbitration contribute to why the United States Supreme Court, and Congress, continues to side with continuing the use of mandatory employment arbitration. Members of Congress have addressed the fairness in arbitration during hearings concerning the Arbitration Fairness Act of 2009. Although this bill was intended to prohibit mandatory arbitration provisions in employment agreements, Congress withheld it from coming to the floor for a vote. The bill was again brought up in 2018, however, the bill was read twice and referred to committee but never made it past a vote of Congress.[104] Senator Jeff Sessions of Alabama, in a Senate Hearing before the United States Committee on the Judiciary, argued against the statement that arbitration is automatically a disadvantage to an employee. Sessions cited the fact that a survey of the AAA reflected "employees won 63 percent of the cases in arbitration and that same year only 14 percent of the employees bringing claims in Federal court prevailed."[105] Further arguing that the caseloads would drastically increase if all employment claims ended up in Federal court, which is not the purpose of the Federal courts.[106] Are mandatory employment arbitration clauses in employment agreements so unfair that it requires an act of Congress, such as the Arbitration Fairness Act, to prohibit them? After reviewing the transcripts of committee hearings and seeing the dismissal of the bill in both 2009 and in 2018, it appears the answer to that question is not only no, but mandatory arbitration generally comes out in favor of the employee.

With a better understanding of the benefits of arbitration in comparison to the costly and lengthy process of litigation, employees will come to the conclusion that mandatory arbitration is a beneficial means of resolving disputes for the employee and will lead to a fair and just outcome. Arbitration permits a forum for employees at little to no cost, which is beneficial to employees who may not have funds to bring the claim and have their grievances heard otherwise; permitting access to a forum for all employees when litigation may not be possible. Allowing employees to take advantage of an avenue to resolve disputes when they otherwise would have not filed a case, or not been able to find an attorney to take the case, brings justice to those who might otherwise have been denied that option.[107] This is consistent with a culture in which employees are valued and treated fairly.[108] Arbitration disputes are resolved in half the time of disputes in litigation, and are more convenient as the employee does not have to dedicate time away from work to appear in court, sometimes even allowing online claims resolution.[109] Arbitration low-risk monetary investment and quick relief are benefits that litigation cannot provide to the

104. S. 2591, 115th Cong. (2018).

105. *Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers From Discrimination?: Hearing before the Comm. on the Judiciary United States Senate*, 111th Cong., 5 (2009).

106. *Id.*

107. Maltby, *supra* note 3, at 116–17 .

108. Patrick J. Bannon et al., *Are Arbitration Agreements Fair and Consistent With Company Culture?*, SEYFARTH (Feb. 11, 2021).

109. *See supra* note 33, at 158.

employee. Employees and employers also continue working together at a higher rate than employees and employers who have their disputes settled through litigation.

Mandatory employment arbitration clauses are on the rise, with nearly 54% of nonunion, private sector employers implementing them in their employment contracts.[110] This is a stark increase from the 2% of employers implementing mandatory employment arbitration clauses in 1992.[111] Mandatory arbitration provisions in employment agreements are here to stay as implied through current statistics, congressional hearings, failed legislation to ban mandatory employment arbitration, and the speedy forum for any employee to achieve relief. The EEOC seemingly admitted to this statement when they "issued a press release announcing that it had rescinded a 22 year-old policy that strongly opposed the use of mandatory binding arbitration of employment discrimination claims" on December 17, 2019.[112] Mandatory arbitration in employment agreements remains a fair forum, and a more effective forum, which allows employees to seek justice when they feel they have a claim against their employer. Arbitration merely changes the forum in which the claim is heard; it does not deprive the employee's claim from being heard. In conclusion, mandatory arbitration clauses do provide a fair, and more beneficial, avenue for employees to resolve disputes in comparison to the alternative forum of litigation.

110. Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, BLOOMBERG L. (Oct. 28, 2021) https://news.bloomberglaw.com/daily-labor-report/mandatory-arbitration-at-work-surges-despite-efforts-to-curb-it.

111. *Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows: Hearing Before the H. Comm. on the Judiciary* (2021)(Statement of Myriam Gilles, Professor Cardozo Sch. of L.).

112. *Rescission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment,* EQUAL EMPL. OPP. COMM'N (last visited Apr. 25, 2022), https://www.eeoc.gov/newsroom/eeoc-releases-policy-statement-mandatory-binding-arbitration.