



## **NYSBA DISPUTE RESOLUTION SECTION**

### **REPORT ON PRE-DISPUTE AGREEMENTS TO ARBITRATE EMPLOYMENT CLAIMS**

(Adopted June 4, 2019)

#### I. Introduction

Recent New York State legislation and resolutions adopted by the American Bar Association reflect criticism of pre-dispute agreements to arbitrate employment disputes and the use of non-disclosure agreements to conceal sexual harassment claims, which is widely seen as a byproduct of arbitration. The purpose of this report is to describe the characteristics of employment arbitration and the relevant legislation and resolutions, to discuss employment arbitration's advantages and disadvantages relative to court litigation, and to consider ways to resolve or mitigate the concerns that have been raised.

#### II. General Background

Arbitration is a method of dispute resolution that is agreed to in a written contract between the parties. As a creature of contract, arbitration derives its authority from such agreements. For more than half of nonunion private sector employees in the United States, arbitration rather than litigation is the process required for resolving employment disputes. See A. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute Report (Apr. 6, 2018).

A divided U.S. Supreme Court has consistently upheld the validity of employer-mandated arbitration agreements to resolve future disputes, so long as employees' statutory rights are fully protected. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). Such arbitration agreements are uniformly held to be voluntary in the sense that, much like other contracts, they are presumed to have been knowingly entered into and meet the standards for enforceable contracts generally, if they have been adequately brought to the employee's attention. See, e.g., *Ragone v. Atl. Video at the Manhattan Ctr.*, 595 F. 3d 115 (2d Cir. 2010); *Isaacs v. OCE Business Servs., Inc.*, 968 F. Supp. 2d 564 (S.D.N.Y. 2013) (finding enforceable an arbitration agreement included in an employee handbook); see also *Wickberg v. Lyft, Inc.*, 356 F. Supp. 3d 179 (D. Mass. 2018) (Lyft driver bound by on-line enrollment process where click-wrap agreement required driver to agree to terms of service, which were appropriately conspicuous, to complete the registration process). In the employment context, employers typically present agreements to arbitrate future disputes at the time of hiring; however, arbitration may be agreed-to during the employment relationship or even after termination of the employment relationship. Under New York law, continued employment constitutes adequate consideration for an "at will" employee's agreement to arbitrate future disputes should they arise. See, e.g., *Matter of Ball v. SFX Broadcasting, Inc.*, 165 F. Supp. 2d 230 (N.D.N.Y. 2001); 2 Perillo & Bender, *Corbin on Contracts* § 6.2 (1993).

In arbitration, the parties participate in selecting an arbitrator who will conduct the proceeding, preside at the evidentiary hearing, and function as an impartial decision maker. The proceedings are governed by the parties' agreement, applicable provider rules (if any), and applicable law. The arbitrator's award is final and binding, aside from very limited options for judicial or other merits-based review of an award. In general, only where the arbitration process has been tainted by corruption, fraud, undue means, evident partiality, or arbitrator misconduct, or where the arbitrator has exceeded his or her powers, can an arbitrator's award be vacated under the Federal Arbitration Act. See 9 U.S.C. § 10(a). Judicial review of arbitrator awards is similarly limited under the NY CPLR. See N.Y. C.P.L.R. § 7511.

Arbitration of employment disputes is often described as “mandatory” in the sense that it is presented to employees as part of a broader employer promulgated program or related contract on a “take it or leave it” basis. It does not typically apply, for example, to executive employment agreements containing arbitration agreements that are negotiated on an arms-length basis.

### III. Recent Developments Concerning Arbitration and Non-Disclosure Agreements

#### A. Federal Legislative Developments

Several bills prohibiting employers from requiring employees to sign agreements to arbitrate future employment disputes (as well as consumer, franchise, civil rights, and antitrust claims) – including the Ending Forced Arbitration of Sexual Harassment Act, the Forced Arbitration Injustice Repeal Act, and the U.S. Fairness Arbitration Act – have recently been introduced in Congress.

In 2018, Internal Revenue Code § 162(q) was adopted, disallowing deductions of settlement payments and related attorneys' fees in cases involving sexual harassment or sexual abuse, where the settlement is subject to a nondisclosure agreement.

#### B. New York State Legislative Developments

1. Effective July 11, 2018, CPLR § 7515 prohibits compelled arbitration of sexual harassment claims “except where inconsistent with federal law.”

2. Also effective July 11, 2018, CPLR § 5003-b and General Obligations Law § 5-336 prohibit nondisclosure provisions regarding the underlying facts and circumstances of sexual harassment claims, except where such a provision is the complainant's preference.

3. Multiple bills that, if adopted, would limit the use of arbitration in the employment context are circulating in the New York State legislature.

C. ABA Resolutions

1. ABA Resolution 302

At the ABA Midyear Meeting held on February 5, 2018, the ABA House of Delegates adopted Resolution 302, which urges all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.

2. ABA Resolution 300

At the ABA Annual Meeting held on July 27-August 7, 2018, the ABA House of Delegates adopted Resolution 300, which states:

RESOLVED, That the American Bar Association urges legal employers not to require mandatory arbitration of claims of sexual harassment.

3. ABA Resolution 107B

At the ABA Midyear Meeting held on January 24-25, 2019, the ABA House of Delegates adopted Resolution 107B, which states:

RESOLVED, That the American Bar Association urges legal employers not to require that, before a dispute arises, employees agree to pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, genetic information, or status as a victim of domestic or sexual violence.

D. Additional Developments

Multiple premier law firms are no longer requiring arbitration of some or all their employment disputes, resulting, at least in part, from pressure that has been applied at law schools to bar law firms that maintain pre-dispute arbitration policies from recruiting on campus. Moreover, multiple large employers, including Facebook and Amazon, have voluntarily removed pre-dispute arbitration clauses from their employment agreements and policies. In addition, all fifty state Attorneys General have condemned pre-dispute arbitration of sexual harassment claims.

IV. Advantages and Disadvantages of Employment Arbitration and Court Litigation

Both arbitration and court litigation of employment disputes have benefits and drawbacks. Despite extensive scholarly research and statistical analyses on the subject, true “apples-to-apples” comparisons of the two processes are difficult to make, as the methodologies and samples used in various studies lead to different conclusions.

A. Privacy and Confidentiality

Arbitration is a private proceeding. In contrast to court litigation, only individuals with a direct interest in the arbitration may attend the evidentiary hearing (unless the parties agree otherwise). The arbitrator and the arbitration provider are always bound by ethical obligations and rules to maintain the confidentiality of the arbitration. However, the parties, their counsel and third-parties who participate in the proceeding are not obligated to maintain confidentiality and may convey information regarding the arbitration to third-parties and publicly, unless they are prohibited from doing so by language in their employment arbitration agreements, by agreement of the parties or by order of the arbitrator. Thus, the common belief that arbitration is inherently a completely confidential process is inaccurate.

Parties to arbitration frequently enter into confidentiality agreements, similar to agreements entered into during court litigation, which provide that documents and other materials and information disclosed during the information exchange period shall remain confidential. Such confidentiality agreements, if non-negotiated, i.e., included in a “mandatory” arbitration agreement, can prevent disclosure of an employer’s alleged wrongdoing and accordingly fuel much of the criticism that employment arbitration lacks transparency.

To provide greater transparency, some arbitration provider rules provide that redacted employment arbitration awards are publicly available on searchable electronic databases. See, e.g., Rule R-38, AAA Employment Arbitration Rules. In addition, if a party seeks to confirm or vacate an arbitration award, the award itself is typically attached to the submitted court filings as an exhibit and, thereby, becomes publicly available on the court docket.

It should be noted that many employees, as well as employers, value the privacy or confidentiality afforded by arbitration. They may have no desire to publicize either their claims or their employers’ allegations, as they may contain highly personal and/or embarrassing information. In contrast, public testimony and publicly filed court pleadings, motions, and briefs may contain unflattering or salacious allegations that are readily accessible to the public and may harm an employee’s future employment prospects and reputation. See, e.g., *Canada v. Perkins Coie*, No. 18 Civ. 11635, slip op. (S.D.N.Y. Dec. 12, 2018) (Furman, J.) (refusing to keep documents sealed in a discrimination lawsuit despite a joint request by plaintiff and defendant).

B. Inequality of Bargaining Power

The criticism of employment arbitration underlying the recent legislative efforts and ABA resolutions stems at least in part from concerns about unequal bargaining power between employers and employees, particularly where the employees have not had the opportunity to negotiate an individual contract. Indeed, an employee may not even know whether arbitration or litigation is preferable until an actual dispute with the employer has arisen.

Although supporters of compelled arbitration may acknowledge this power imbalance, they also note that such imbalances are not unique to the employment relationship, but exist in many commercial and other relationships, manifested for example in jury waivers, venue provisions, representations and warranties, pricing, terms of delivery, and other contractual provisions that often are non-negotiable. Moreover, the AAA, JAMS, CPR and perhaps other

arbitration providers have adopted employment arbitration due process protocols to ensure that employees receive the same rights and remedies available in court. (In contrast, FINRA has carved out statutory employment claims from its required arbitration protocols unless expressly agreed to post-dispute by all parties.)

C. Costs and Expenses

Most employment-related claims do not have high monetary value. Generally, it is expensive to commence a single-plaintiff court case and litigate it through trial. In contrast, arbitration proceedings generally are less costly to take through evidentiary hearing and arbitral award. See S. Estreicher, M. Heise, and D. Sherwyn, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *Stan. L. Rev.* 1557, 1564-69 (2005). Moreover, in cases where arbitration is required by the employer, an employer’s well-crafted arbitration policy and/or arbitration provider rules generally provide that employers shall pay all arbitration costs and arbitrator fees. This benefits employees and raises the costs for employers. See, e.g., AAA Employment Arbitration Rules and Mediation Procedures, <https://www.adr/sites/default/files/Employment%20Rules.pdf>. A 2012 study found that employers paid for 100% of the costs in 95% of disputes in arbitrations pursuant to compelled, employer-promulgated programs and procedures (less an employee-paid filing fee equivalent to a federal court filing fee (currently \$400 in the Southern and Eastern Districts of New York)). See A. Colvin and K. Pike, “The Impact of Case and Arbitrator Characteristics On Employment Arbitration Outcomes,” Nat’l Academy of Arbitrator Presentation (Minneapolis June 2012), available at <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1022&context=conference>. (However, provider rules are sometimes circumvented by cost-sharing provisions in employment arbitration agreements, which may or may not be enforced by the arbitrator.) Whatever the cause, some commentators have noted that arbitration is becoming more costly and, indeed, may not be less expensive than litigation. See, e.g., C. Coleman, *Is Mandatory Arbitration Living up to its Expectations? A View from the Employer’s Perspective*, *ABA J. of Lab. and Empl. L.*, Vol. 25, No. 2 (Winter 2010).

D. Ease of Navigating the Process/Pro Se Litigants

Many employees bringing employment claims are *pro se*. For example, approximately 25% of employment arbitrations at the AAA are brought by *pro se* claimants. See A. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, *J. of Empirical L. Studies*, Vol. 8, No. 1 (2011). In contrast, approximately 17% of plaintiffs in federal court employment litigation are *pro se*. For *pro se* individuals, it may be easier to navigate the more informal arbitration process with the arbitration provider’s case manager as a resource than participate in a court litigation, which may include full-blown discovery, motion practice, and a federal jury trial at which strict evidentiary and other rules are applied.

E. Speed and Efficiency

Arbitrations generally proceed more rapidly and efficiently than court litigation; this is beneficial to employees as well as employers. See S. Estreicher, M. Heise, and D. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, *Rutgers L. Rev.*, Vol.

70:375 (2018); R. Koenig, “What you need to know about Mandatory Arbitration,” U.S. News (July 9, 2018). Data compiled by the AAA shows that arbitration cases that settled lasted an average of 284.4 days and arbitration cases decided after an evidentiary hearing lasted an average of 361.5 days; this is significantly shorter than the duration of the average state and federal employment court cases. See A. Colvin, *supra* (2011), at 12.

F. Motion Practice

Dispositive motions, especially motions to dismiss and/or for summary judgment, are more likely to be permitted and subsequently granted in favor of employers in court litigation than in arbitration. See M. Weber, “Employment Arbitration: A Practical Assessment of Advantages and Disadvantages,” N.Y.L.J. (Nov. 27, 2017). This means that employees in arbitration are more likely to proceed to an evidentiary hearing, with the opportunity to testify in support of their claims and confront witnesses. However, it may also mean that non-meritorious claims are permitted to proceed to an arbitral award, contributing to the smaller number of claimants who ultimately prevail in arbitration as compared to court litigation.

G. Encouraging Parties to Assert Claims

Some have argued from case load statistics that requirements to arbitrate discourage potential claimants from coming forward and asserting claims. See C. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N. C. L. Rev. 679 (2018). However, litigating in federal court may also be daunting, given court rules permitting extensive and intrusive discovery, greater motion practice, and a public trial during which strict enforcement of evidentiary and other rules are applied. Employees may also feel vulnerable because court proceedings are open to the public.

H. Selection of the Decision Maker

The parties are permitted to choose their decision maker in arbitration. Prior to selection, they can inform themselves regarding potential arbitrators, including reviewing resumes, making personal inquiries and reading publicly available writings and arbitration awards of the potential arbitrators. Parties are also free to select arbitrators who are experienced in employment law and even experts in the particular issues raised in the arbitration. In contrast, in court litigation, the judge is randomly assigned to the parties with no opportunity for their input.

Some critics of arbitration contend that employers are advantaged in arbitrator selection because they are more likely to have prior experience with the arbitrator pool (the “repeat player” issue) and the arbitration process generally. See L. Bingham, *The Repeat Player Effect*, Employee Rights & Policy J., Vol. 1 (1997); A. Colvin, *supra* (2011), at 12. Similarly, arbitrators themselves may be biased in favor of employers based on the hope of being selected by them for future arbitrations. See id. Studies have produced some evidence that employers who have participated in multiple arbitrations were more successful in arbitration than those who have participated in only a single arbitration. See id. at 11.

I. “Win Rates”

Statistics regarding “win rates” may be misleading because weak claims in arbitration may not have been “weeded out” by summary judgment motions and, thus, may be less

meritorious than those tried in court. *See* S. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 Ohio St. J. on Disp. Res. 735, 755-56 (2001) (cautioning that empirical studies contrasting employment arbitration with employment litigation should be considered carefully given that such studies do not necessarily gauge the outcomes of comparable cases); S. Estreicher, M. Heise, and D. Sherwyn, *supra* (2018), at 394-97 (noting that cases that go to trial are not representative of the general nature of employment law claims, partly because lawyers agree to represent clients in cases that they believe will be resolved favorably). In a study analyzing 3,945 arbitration cases, the employee win rate was 21.4%, a rate lower than the win rates reported in employment litigation. *See* K. Stone and A. Colvin, Economic Policy Institute Briefing Paper #414 (Dec. 7, 2015). Another study concluded that employees prevailed in 19.1% of AAA-conducted arbitrations that were resolved between 2003 and 2013, compared to 29.7% of plaintiffs who prevailed in federal employment discrimination cases, 57% of state non-civil rights employment cases, and 50% of California wrongful discharge cases. *See* C. Estlund, *supra* (2018), at 101, 110; *cf.* S. Estreicher, M. Heise, and D. Sherwyn, *supra* (2018), fn. 51 (22.4% win rate in arbitration).

#### J. Higher Recoveries by Employees

Studies show that court litigation yields higher recoveries for employees than arbitration, and that jury verdicts in particular are higher on average than awards in arbitration. *See* A. Colvin, *supra* (2011); K. Stone and A. Colvin, *supra*. Based on the potential for larger recoveries in litigation, employment cases may also have higher settlement value if brought in court. As noted above, the size of recoveries may be impacted by fewer dismissals on summary judgment in arbitration than in court litigation, resulting in a higher percentage of weaker cases going to a final award in arbitrations.

#### K. Jury Trials

Court litigation allows employees who survive motions to dismiss or for summary judgment to present their cases to a jury. This may be viewed as a benefit because juries provide a cross-section of life experiences. However, dispute resolution clauses that provide for litigation may also include jury waivers. In addition, trial and appellate judges retain the authority to reduce jury verdicts that they deem excessive. Moreover, statistics showing large jury verdicts may be misleading because claims in arbitration may have lower damages potential than those brought in court. *See* S. Ware, *supra* (2001), at 735.

#### L. Right of Appeal

Litigation includes the opportunity to appeal a court decision or a jury verdict. This provides a potential added layer of protection in cases that may have been wrongly decided. But it also increases costs and delays the time to finality, both of which can be addressed by selecting arbitration as the dispute resolution mechanism. For those who wish appellate, merits-based review of arbitration awards, all major arbitration providers offer optional appellate arbitration rules and procedures that the parties can adopt, either pre- or post-dispute, under which such agreed-upon review can be obtained.

M. Rules and Procedures

Litigation affords clear and consistent rules of procedure and evidence. In certain circumstances, a party may benefit from strict enforcement of such rules. At the same time, parties in arbitration may feel that they benefit from the more relaxed application of procedural and evidentiary rules.

N. Transparency for the Public

Trials allow plaintiffs to assert and pursue their claims in public courtrooms, which furthers transparency and public awareness of alleged misconduct. This may be viewed as a benefit or a disadvantage, creating a tension between the interests of the parties themselves and the public interest in identifying sexual predators and other wrongdoers. The advantage of transparent court litigation may benefit employees who have high-profile cases with the potential for substantial financial recovery and publicity value, such as those brought recently against Fox News and Madison Square Garden. However, such cases are not representative of employment cases in general.

V. Alternative Ways to Address Concerns that Have Been Raised about Employment Arbitration

There are potential steps that could be taken by employers to address concerns that have been raised regarding employment arbitration. Some of the ideas set forth below already have been implemented by some arbitration providers. The following list is not intended to be exhaustive.

A. Adopting Opt-Out Provisions

Employers could consider offering employees the opportunity to opt out of agreements to arbitrate when they are first offered, or at a later stage, which would remove any “mandatory” aspect of employment arbitration. However, some employees may fear that opting out would brand them as troublesome, deterring them from choosing to do so. Alternatively, offering the opportunity to opt out after a dispute has arisen would allow employees greater flexibility, although it would also remove a degree of predictability valued by employers.

B. Limiting Confidentiality

Restricting the ability to include confidentiality provisions in arbitration agreements, perhaps on public policy or unconscionability grounds, could alleviate a major criticism of arbitration, namely, that the process permits employers to hide damaging evidence from public view. Nondisclosure agreements are now prohibited in sexual harassment settlements in New York, unless requested by the complainant, to promote transparency.

C. Removing Class Action Waivers

Class action waivers that are added to arbitration clauses have compounded the criticism of arbitration, notwithstanding that they have been consistently upheld by the U.S. Supreme Court. See, e.g., Lamps Plus, Inc. v. Varela, No. 17-988 (U.S. Apr. 24, 2019); Stolt-Nielsen S.A.

v. Animal Feeds Int’l Corp., 559 U.S. 662 (2010). Employers may consider eliminating such waivers from their employment contracts and policies.

D. Addressing the “Repeat Player” Issue

Perhaps curtailing the “repeat player” effect by limiting the number of cases involving the same party that arbitrators may accept, mandating fuller disclosure requirements, and/or ensuring that rosters of employment arbitrators are neutral, diverse, and balanced could reduce the criticism that arbitration favors employers.

E. Ensuring Due Process

Ensuring that substantive and procedural rights and fundamental due process and fairness – both statutory and non-statutory – of the employee are retained in arbitration is key to instilling confidence in the process. See Gilmer, *supra*.

F. Revising Venue Provisions

Requiring that arbitration hearings take place where employees live or work (already required by arbitration providers that have adopted due process protocols) may be advisable.

G. Providing Additional Consideration to Employees

Requiring that employers offer their employees consideration that is separate and in addition to continued employment and not otherwise available to employees generally in exchange for the employees’ agreement to arbitrate future disputes – such as additional paid leave days, compensation or insurance benefits – could diminish the “take it or leave it” nature of many employment arbitration agreements.

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