Fairer, Faster, Better:
An Empirical Assessment of Employment Arbitration

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Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration

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Table of Contents

Executive Summary 4
Outcomes of Employment Arbitration and Litigation 6
Decided Cases 8
Amount Awarded 9
Time to Resolution 11
Characteristics of Employment Arbitration Cases 13
Methodology 15
Conclusion 16
About the Authors 17

1 Nam D. Pham is Managing Partner and Mary Donovan is a Principal at ndp | analytics. Lea Lassoued and Davide Sonzogni provided research assistance. The U.S. Chamber Institute for Legal Reform provided financial support to conduct this study. The opinions and views expressed in this report are solely those of the authors.

EXECUTIVE SUMMARY

Alternative dispute resolution (ADR) procedures have become more common over the last couple of decades as a means to resolve employment disputes in the workplace. One ADR method, employment arbitration, is an alternative to having a judge or jury decide an employment dispute through proceedings in court.

Arbitration has a long history as a method of resolving employment-related disputes. Arbitration has been recognized as a lawful method of dispute resolution at least since the Federal Arbitration Act was enacted in 1925. The Act requires federal and state courts to enforce and uphold arbitration agreements to the same extent as other types of contracts.

In 1995, the American Arbitration Association (AAA) developed the Employment Due Process Protocol, a new set of arbitration rules tailored for the employment context. Other ADR providers, such as Judicial Arbitration and Mediation Services, Inc. (JAMS), have followed suit and established their own employment arbitration procedures.

Employment arbitration is an adjudicative proceeding. Similar to the traditional litigation process, each party presents evidence and arguments to an arbitrator or a panel of arbitrators at a hearing. Unlike litigation, plaintiffs and defendants in arbitration typically are not limited to state or federal rules of evidence and the process can be more informal than traditional court-based litigation. After the evidence is presented, the arbitrator provides a written opinion. That decision, called an award, is final and is subject to deferential review in court.[2] The U.S. Supreme Court has noted that the arbitration process has many advantages compared to litigation, because it is faster, simpler, less expensive, less disruptive, and more flexible.[3] However, only a limited number of empirical studies have fully assessed and compared similar arbitrations and litigation.

Arbitration has a long history as a means of resolving employment-related issues, and it has gained popularity as a forum for resolving employment disputes since the mid-1990s. But there have been few empirical studies of the arbitration process. This report compiles, analyzes, and compares over 10,000 employment arbitrations with over 90,000 employment lawsuits in federal courts that terminated between 2014-18. These arbitrations and litigations exhibited a similar outcome pattern, in which three quarters were settled and only between 10%-14% ended with prevailing and losing parties. However, when cases proceeded to adjudication, plaintiffs, who almost always were employees, were more likely to prevail in arbitration than in litigation. During 2014-18, in decided cases, employee-plaintiffs prevailed in more than 32% of arbitrations but only 11% of litigations. Furthermore, prevailing employees typically won twice as much money in arbitration than in litigation. Employment arbitration also was faster than litigation.

2 See 9 U.S.C. §§ 10-11.

3 See, e.g., Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985); Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 123 (2001); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

This study compiled a large dataset of over 100,000 employment disputes to undertake an empirical analysis of employment arbitration in comparison to court-based employment litigation. We first compared the outcome pattern of all employment arbitration and employment litigation cases, whether initiated by employees or employers, that were terminated between 2014 and 2018. Then we compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018. The employment arbitration data came directly from AAA and JAMS, and the employment litigation data indirectly came from Lex Machina, a data provider that compiles litigation data from Public Access to Court Electronic Records (PACER)—the federal courts' system for accessing information about federal court cases.

Key findings of the report are:

1. **In general, the way most employment disputes are ultimately resolved does not vary between arbitration and litigation.** Nearly three-quarters of all employment disputes, whether instituted by employees or employers, or in arbitration or litigation, were settled. About half of the remaining cases were either dismissed, abandoned, or withdrawn; and the remaining cases were terminated with monetary and/or non-monetary awards. Only a small fraction (1.5%) of employment litigation cases filed in court reached trial.

2. **Employees are three times more likely to win in arbitration than in court.** Employees initiated and prevailed in 32% of all employment arbitrations that were terminated with awards during 2014-18. In contrast, employees initiated and prevailed in only 11% of all employment litigations that were terminated with judgments during the same period.

3. **Employee-plaintiffs receive higher monetary awards in employment arbitration than in litigation.** Employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court. The median award to employee-plaintiffs was $113,818 in arbitration compared to $51,866 in litigation. The average award to employee-plaintiffs was $520,630 in arbitration compared to $269,885 in litigation. Furthermore, the award of the top 90th percentile was $668,998 in employment arbitration compared to $539,574 in litigation.

4. **Employment arbitration is quicker than litigation.** Employee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days (523 days in median). In contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days (532 days in median).

In sum, employees have a better chance of winning in arbitration than in litigation. Employees initiated and prevailed in 32.3% of all arbitration cases that terminated with awards during 2014-18 compared to only 11.3% in litigation. Employee-plaintiffs in arbitration received monetary awards approximately two times the amounts received in litigation, both in average and median values. And employment arbitration cases were resolved faster than court cases, both in average and median number of days. (Table 1)

Table 1.
Employee-plaintiffs had better chances to win, had higher monetary award values, and spent less time in arbitration than in litigation

	Cases that employees initiated and prevailed as % of all winning cases	Amount awarded	Time spent from initiation to termination with monetary awards
Arbitration	32.3%	$520,630 (average) $113,818 (median)	569 days (average) 523 days (median)
Litigation	11.3%	$269,885 (average) $51,866 (median)	665 days (average) 532 days (median)

OUTCOMES OF EMPLOYMENT ARBITRATION AND LITIGATION

An employment dispute, resolved either by arbitration or litigation, has three potential outcomes: (1) the dispute is settled at some point during the process on terms that can include monetary payments and/or non-monetary promises (the settlement details may or may not be disclosed publicly); (2) the dispute is dismissed, abandoned, or withdrawn during the process; or (3) the dispute ends in a decision by the adjudicator in favor of one or both sides. We analyzed and compared the outcome pattern between employment arbitration and litigation cases that were initiated by employees or employers and were terminated during 2014-18.

Arbitration. Among 10,486 employment arbitration cases that were terminated during 2014-18, 7,664 cases (73%) were settled; 1,792 cases (17%) were dismissed, abandoned, or withdrawn; and 1,030 cases (10%) resulted in decisions with monetary and/or non-monetary elements. (Table 2)

Table 2.
More than 73% of employment arbitration cases were settled and 10% terminated with decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	10,486	100.0%
Decision	1,030	9.8%
Settlement	7,664	73.1%
Dismissed/Withdrawn	1,792	17.1%

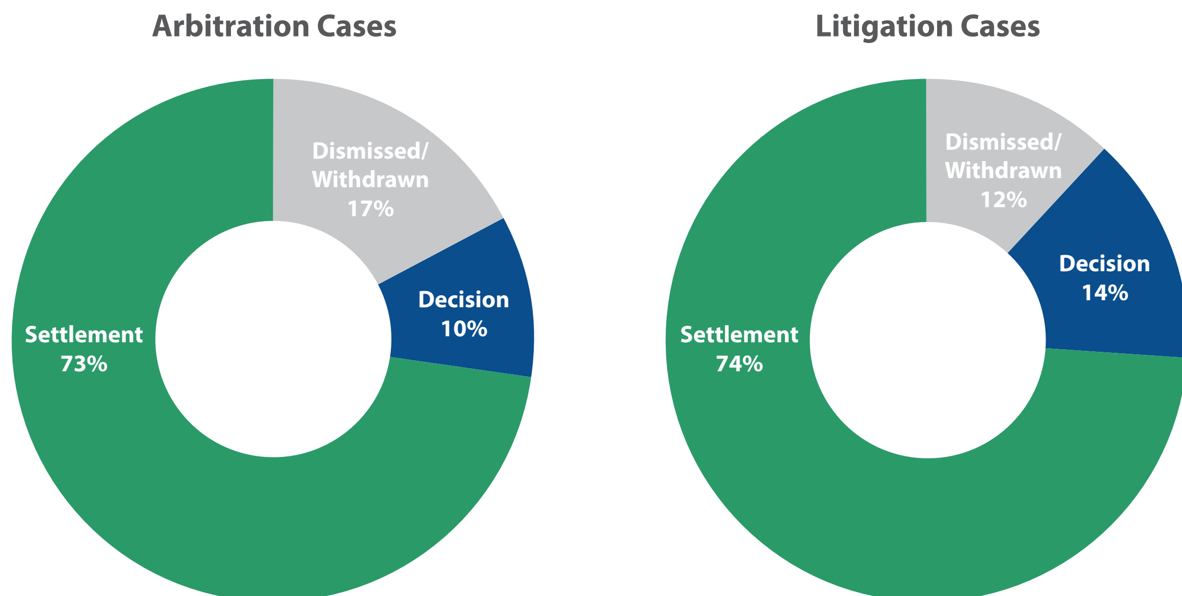
Litigation. During 2014-18, 90,758 employment cases were terminated in federal courts. Among these terminated cases, 66,927 (74%) cases were settled, 10,768 (12%) cases were dismissed, abandoned, or withdrawn, and 13,063 (14%) cases were terminated by court or jury determinations. (Table 3)

Table 3.
Similarly, nearly 74% of federal court employment litigation cases were settled and 14% resulted in decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	90,758	100.0%
Decision	13,063	14.4%
Settlement	66,927	73.7%
Dismissed/Withdrawn	10,768	11.9%

Overall, the resolution pattern of employment disputes is similar between arbitration and litigation. Nearly three-quarters of all employment disputes (whether initiated by employees or employers) were settled regardless of the process (arbitration or litigation). Of the remaining cases, about half were either dismissed, abandoned, or withdrawn. About 10% of arbitration cases and 14% of litigation cases resulted in decisions, with monetary and/or non-monetary elements. (Figure 1)

Figure 1.
The general pattern of outcomes is similar between employment arbitration and litigation



DECIDED CASES

Employment disputes can be initiated by either the employee or employer and can be terminated with a decision in favor of the plaintiff, the defendant, or both. We reviewed all cases that terminated in a decision (in arbitration or in court) and calculated the share of employee-initiated cases in which the employee prevailed.

Arbitration. Among the 1,030 employment arbitration cases terminated by decisions during 2014-18, 776 cases identify a prevailing party. The information regarding the prevailing party in the remaining 254 cases was unknown or indicated that there were awards to both plaintiffs and defendants. Among these 776 cases identifying a single prevailing party, employees initiated and prevailed in 251 cases, accounting for 32.3%. (Table 4)

Table 4.
Employees initiated and won 32% of employment arbitration cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	776	100.0%
Employees initiated and prevailed	251	32.3%

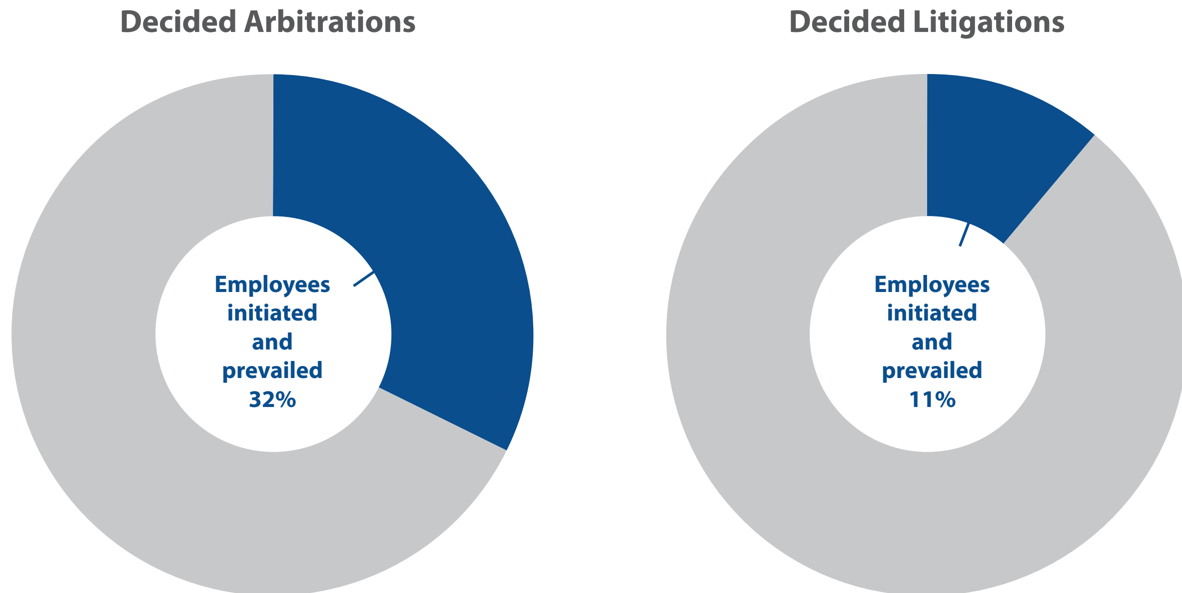
Litigation. All 13,063 federal court employment cases that terminated with decisions during 2014-18 have information regarding the prevailing party. Among these 13,063 cases, employees initiated and prevailed in 1,456 cases, accounting for 11.1%. (Table 5)

Table 5.
Employees initiated and won only 11% of employment litigation cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	13,063	100.0%
Employees initiated and prevailed	1,456	11.1%

Overall, both employment arbitration and litigation cases had a small chance of terminating with decisions: 10% for arbitration and 14% for litigation. However, an employee is much more likely to win in arbitration than in litigation. For employment disputes that terminated with awards to one party during 2014-18, employees initiated and prevailed 32% of the time in arbitration compared to only 11% in litigation. In other words, the chances for employees to win in employment arbitration were three times higher than in court. (Figure 2)

Figure 2.
The chances for employees to win in employment arbitration were three times higher than in litigation



AMOUNT AWARDED

Employment arbitration and litigation can be resolved with monetary and non-monetary awards to plaintiffs, defendants, or both. We calculated and compared the distribution of monetary award amounts to employees who prevailed in employee-initiated cases in arbitration and litigation.

In employee-plaintiff arbitration cases that terminated with monetary awards, prevailing employees received approximately two times the amount that employee-plaintiffs received in cases litigated in court. Among employment arbitration cases that terminated during 2014-18, the median and average awards to employee-plaintiffs were $113,818 and $520,630, respectively. The first and third quartile of award amounts were $23,118 and $295,936, respectively. The award amounts were at least $668,998 for the top 10% of employment arbitration cases awarded to employees who initiated the claims. During the same period, the median and average amounts awarded to employees who initiated employment litigation were $51,866 and $269,885, respectively. The first and third quartile of award amounts were $15,750 and $178,440, respectively. The award amounts were at least $539,574 for the top 10% of employment litigation cases awarded to employees who initiated the claims. (Table 6)

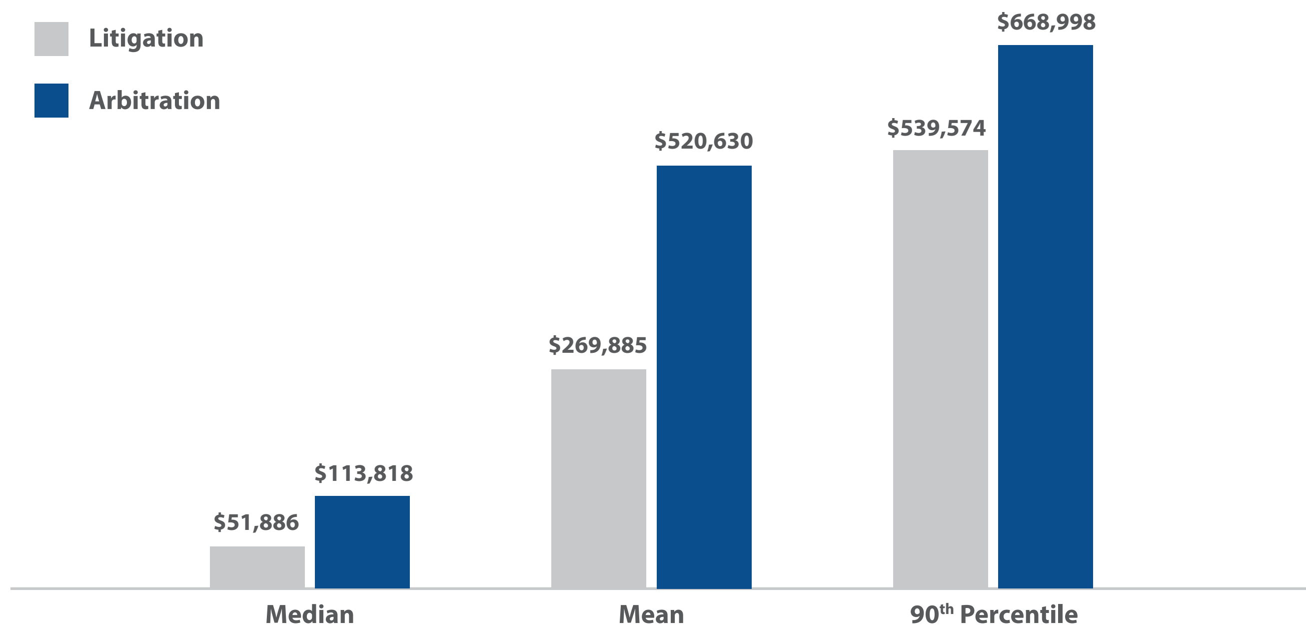
Table 6.
Award amounts to employee-plaintiffs were higher in arbitration than in litigation

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration (247 cases)	$520,630	$23,118	$113,818	$295,936	$668,998
Litigation (1,446 cases)	$269,885	$15,750	$51,866	$178,440	$539,574

Overall, employee-plaintiffs received higher awards, both in median and mean values, in arbitration than in litigation: (Figure 3)

- The median award for employee-plaintiffs in employment arbitration was nearly 120% higher than litigation, $113,818 compared to $51,866.
- The average award for employee-plaintiffs in employment arbitration was 93% higher than litigation, $520,630 compared to $269,885.
- The top 10% of awards to employee-plaintiffs in employment arbitration was 24% higher than litigation, beginning at $668,998 compared to $539,574.

Figure 3.
Employees received higher awards in employment arbitration than in litigation



TIME TO RESOLUTION

Another important feature of arbitration is that it resolves cases faster than litigation. We calculated and compared the dispute-processing time from initiation to termination for disputes initiated by employees in arbitration and litigation. Time was measured by days from the filing date to the termination.

Arbitration. The median and average number of days from initiation to termination were 523 and 569, respectively, in cases where employees initiated and prevailed during 2014-18. The bottom quartile and the third quartile were 397 days and 686 days, respectively. 10% of arbitration cases that employees initiated and in which they prevailed with awards required at least 844 days. (Table 7)

Table 7.

The average employment arbitration case terminated with awards in 569 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration cases where employees initiated and prevailed (251 cases)	569	397	523	686	844

Litigation. The litigation process has many steps and therefore requires time. Half of cases that employees initiated in litigation in federal courts and prevailed during 2014-18 required at least 532 days, with an average of 665 days. 10% of litigation cases that employees initiated and terminated in courts with awards required at least 1,283 days. (Table 8)

Table 8.

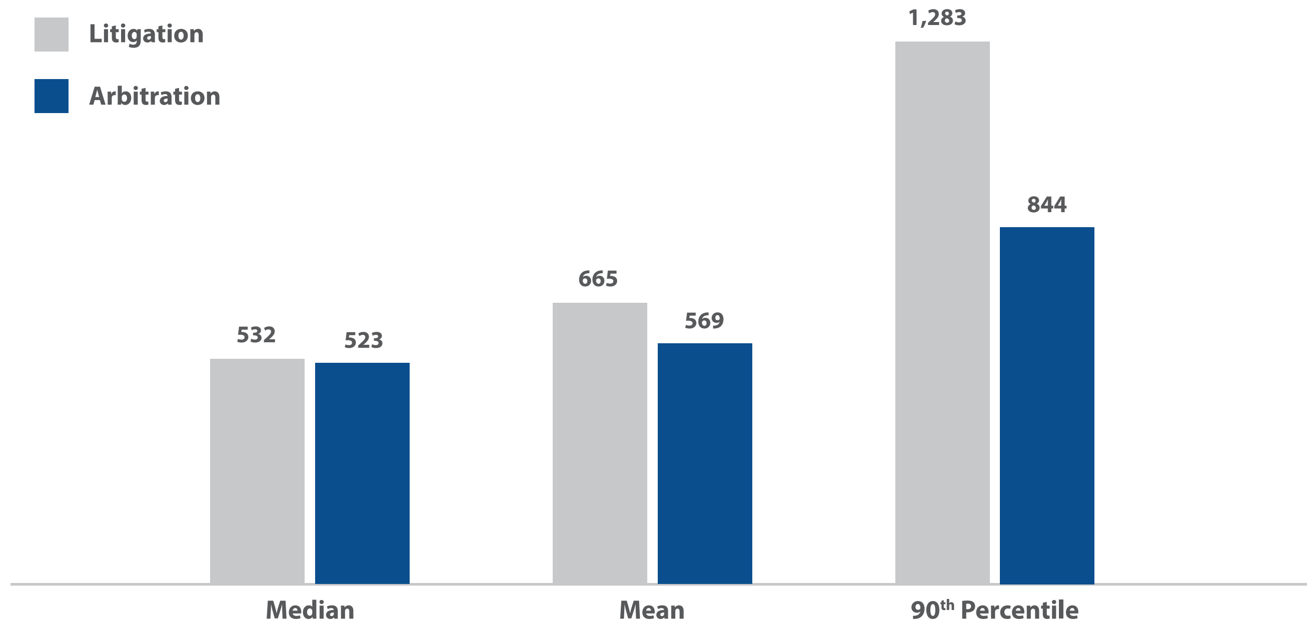
The average time for litigation to terminate with monetary awards was 665 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Litigation cases where employees initiated and prevailed (1,453 cases)	665	274	532	867	1,283

Overall, the processing time for employees to win awards in arbitration is less than in litigation. The average processing time from initiation to completion was 569 days in employee-plaintiff arbitration cases compared to 665 days in employee-plaintiff litigation cases. The median processing time was 523 days in employee-plaintiff arbitration cases compared to 532 days in employee-plaintiff litigation cases. The processing time of the 90th percentile started from 844 days in arbitration compared to 1,283 days in litigation. (Figure 4)

Figure 4.

Employee-plaintiff employment disputes required fewer days in arbitration than in litigation



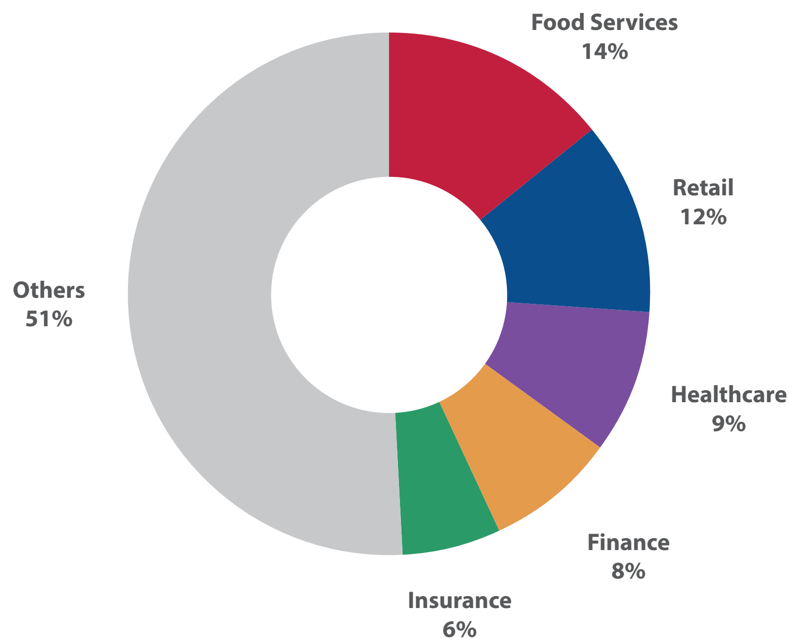
CHARACTERISTICS OF EMPLOYMENT ARBITRATION CASES

Half of the employment arbitration cases that were terminated during 2014-18 were concentrated in five industries: food services, retail, healthcare, finance, and insurance.

Both food services and retail industries have higher numbers of small businesses, part-time employees, and lower-income employees. (Figure 5)

Figure 5.

Employment arbitration spans across industries, with more than 25% of arbitrations concentrated in food services and retail industries

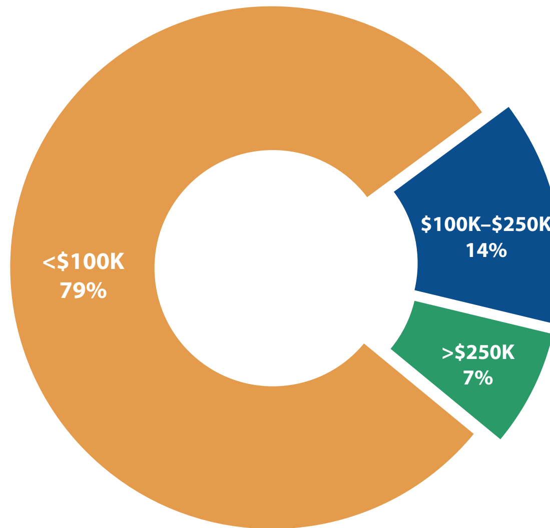


Employees across salary levels use arbitration to resolve their employment disputes. Over 79% of employees who initiated employment arbitration had annual salaries under $100,000 at the time of the dispute. For comparison, over 70% of U.S. households earned less than $100,000 per year in 2017.[4] About 14% of employees involved in employment arbitration had annual salaries between $100,000 and $250,000 and 7% had annual salaries above $250,000. (Figure 6)

4 U.S. Census Bureau, Households by Total Money Income, Race, and Hispanic Origin of Household: 1967 to 2017.

Figure 6.

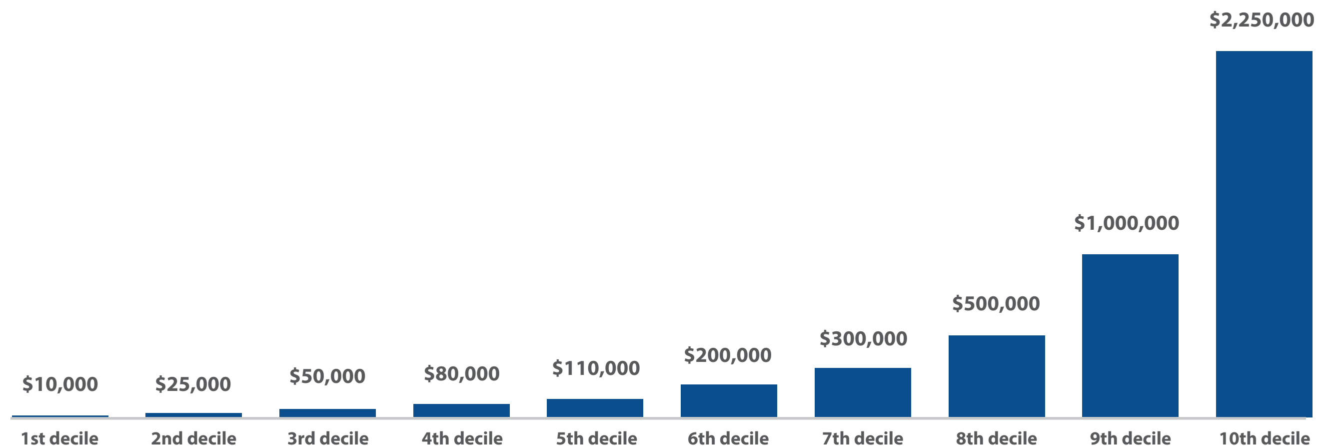
79% of employees who initiated employment arbitration earned less than $100,000 a year



Among those 10,486 employment arbitration cases terminated during 2014-18, AAA and JAMS reported the amount claimed for about one-third of all cases. The dollar amount claimed in these 3,550 cases ranges from several thousands of dollars to tens of millions of dollars. The median claim amount was $150,000 and the mean was $947,000. The median amount claimed of the lowest 10% was $10,000 and the top 10% was $2.25 million. (Figure 7)

Figure 7.

Employment arbitration claims ranged from several thousands to tens of millions of dollars



METHODOLOGY

This study compiled employment arbitration data from AAA and JAMS reports and employment litigation data in federal courts from PACER records to construct a large database to compare employment arbitration and employment litigation. Our dataset contains arbitration and litigation cases that were initiated by either employees or employers and were terminated during 2014-18. Using the data, we first compared the outcomes (decisions, settlement, or dismissed/withdrawn) of all employee-initiated and employer-initiated cases between arbitration and traditional employment litigation. We then compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018.

Arbitration Data. Our analysis of employment arbitration cases relies on two data sources – American Arbitration Association (AAA), the largest provider of employment arbitration services, and Judicial Arbitration and Mediation Services, Inc. (JAMS).[5]

We downloaded data directly from the AAA and JAMS websites in January 2019. We combined both AAA and JAMS employment arbitration data for our analysis. Both AAA and JAMS provide data for arbitration cases terminated during 2014-18. AAA does not provide data of employment arbitration terminated prior to 2014. JAMS employment arbitration data prior to 2014 are incomplete and we therefore did not include them in our analysis. AAA and JAMS do not provide data for on-going employment arbitration cases. We removed employment arbitration cases with missing data on the initiating party and/or outcome.

Our dataset contains 7,601 employment cases from AAA and 2,885 employment cases from JAMS, totaling 10,486 arbitration cases that terminated during 2014-18. The employer and employee in each case were assigned as plaintiff and defendant depending on the initiating party. 1,030 cases were recorded as terminating in awards, of which 776 had awards either only to the plaintiff or only to the defendant; the remaining cases had awards to both parties or failed to indicate which party prevailed. Of those 776 cases, 251 were initiated by employees. When analyzing award amounts, cases with the amount recorded as "0" are included and cases where the value is missing are excluded.

Litigation Data. Our analysis of litigation cases relies on 90,758 federal court cases that terminated during 2014-18. We downloaded litigation data from the Lex Machina portal in January 2019. Lex Machina is a database that collects and organizes federal court data from the federal courts' Public Access to Court Electronic Records (PACER) system.

Our analysis excludes class actions and cases where the plaintiff was a government agency, as these claims are not comparable to private party employment arbitration. Additionally, cases terminated with a consent judgment were classified as "settled cases" instead of "awarded cases" because they embody settlements between the parties. This reclassification was applied to 144 cases (1.1% of all awarded cases). After removing consent judgments, we identified 13,063 awarded cases (i.e., defendant or plaintiff wins). Of these,

5 AAA Consumer and Employment Arbitration Statistics, available at https://www.adr.org/consumer and JAMS Consumer Case Information, available at https://www.jamsadr.com/consumercases/

4,303 cases have monetary damage amounts. These damages are referred to as "monetary awards" throughout the report. Due to missing data, there is a negligible discrepancy between the total number of cases used to analyze the award amount and the total number of cases used to analyze the duration from initiation to award. Of the 13,063 awarded cases, plaintiffs won 1,711. To determine the number of employee-initiated cases, we manually classified cases won by the plaintiff based on the names of the plaintiff and defendant. Plaintiffs or defendants with companies or organizations in the name were labeled "company," individuals were labeled "employee."

CONCLUSION

The empirical evidence shows that employment arbitration is an effective process for resolving employment disputes. While litigation is a long and often burdensome process with many rules and requirements, arbitration is simpler and more flexible. We used a large dataset from the largest employment arbitration providers and a national litigation database to analyze and compare arbitration and litigation in recent years. Analysis of that evidence shows that arbitration yields better results for employee-plaintiffs. Arbitration is faster than litigation, taking 569 days, instead of 665 days, on average for employee-plaintiffs to obtain an award. Importantly, employee-plaintiffs fare better in arbitration, winning 32% compared to 11% of awarded cases for litigation. Moreover, monetary awards for employee-plaintiffs in arbitration were 93% higher than litigation on average. In sum, arbitration is faster and more favorable to employees than litigation.

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Nam D. Pham is Managing Partner of ndp | analytics, a strategic research firm that specializes in economic analysis of public policy and legal issues. Prior to founding ndp | analytics in 2000, Dr. Pham was Vice President at Scudder Kemper Investments in Boston. Before that he was Chief Economist of the Asia Region for Standard & Poor's DRI; an economist at the World Bank; and a consultant to both the Department of Commerce and the Federal Trade Commission. Dr. Pham is an adjunct professor at the George Washington University. Dr. Pham holds a Ph.D. in economics from the George Washington University, an M.A. from Georgetown University; and a B.A. from the University of Maryland. He is a former member of the board of advisors to the Dingman Center for Entrepreneurship at the University of Maryland, Smith School of Business and the Food Recovery Network.

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About ndp | analytics
Founded in 2000, ndp | analytics produces reports and products through the rigor of quantitative analyses. Our work is rooted in economic fundamentals that construct deliverables that appeal to a broad audience through clear messaging. Our firm has advised the business community on the economic impacts of a wide-range of public policies, developed comprehensive research-based advocacy programs, established benchmarks across industries, and assessed the costs and benefits of major legislation and regulations. The work our team has conducted has been prominently cited in numerous channels including the Economic Report of the President to Congress, national media outlets, reports from government agencies, Congressional testimonies, and by Members of Congress. We provide support to a diverse group of clients including trade associations, corporations, law firms, multilateral organizations, and government agencies.