

OUT OF THE FRYING PAN, INTO THE FIRE

THE FEASIBILITY OF POST-DISPUTE EMPLOYMENT ARBITRATION AGREEMENTS

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May 2003

Executive Summary

Millions of Americans are now required to give up their right to take their employers to court in order to get a job. Thousands of employers require new employees to “agree” to take any legal dispute that may arise to private arbitration. The Supreme Court has not only approved such agreements, but has done so without requiring that arbitration be fair.

Civil rights advocates strongly oppose mandatory arbitration and argue that agreements to arbitrate should only be enforceable when made after a dispute has arisen. Congress is considering legislation that would outlaw pre-dispute employment arbitration agreements.

This report examines the likely impact of this proposed law and finds that it would harm the employees it is intended to help.

Analysis of data from the American Arbitration Association reveals that post-dispute agreements to arbitrate employment disputes are rare, despite the widespread availability of this option. Only about 6% of all employment arbitration comes from post-dispute agreements.

This would not change if the law were reformed to eliminate an employer’s ability to force employees into arbitration. Examination of business to business arbitration, where both parties generally have comparable bargaining power, shows that only 9% of AAA arbitration of such disputes arises from post-dispute agreements.

Interviews with management attorneys reveal the reasons for this scarcity. Many employers are willing to agree to arbitrate all cases on a pre-dispute basis in order to avoid a jury trial on the handful of cases that could result in multi-million dollar judgments. Once the dispute arises, however, employers generally have no incentive to arbitrate the run of the mill dispute. For example, 95% of the management attorneys we interviewed said they would not agree to arbitrate a dispute in which they could obtain summary judgment from a court. Since courts resolve 60% of all employment cases through summary judgment for the employer, this factor alone eliminates the possibility of a post-dispute agreement to arbitrate in slightly over half of all cases. Other management attorneys are reluctant to arbitrate when the employee does not have the financial means to pursue litigation, or for a variety of other reasons.

This evidence indicates that most employees will not be able to secure their employer’s agreement to arbitrate once the dispute arises. The vast majority of employment disputes, however, do not involve enough damages to support contingent fee litigation. This means that outlawing pre-dispute agreements to arbitrate will leave many employees with no access to justice.

This does not mean that we must accept arbitration as a condition of employment. Rather, we should allow pre-dispute agreements to arbitrate, but require that such agreements be voluntary. Unofficial coercion could be avoided in such situations by giving the employee the choice of dispute resolution systems after they have started work and keeping the decision in a confidential file, unavailable to line managers. Employers could also adopt a default policy of arbitrating disputes but allow the employee to opt-out before the dispute arises.

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Employment arbitration today is a unilateral decision made by management. The vast majority of employers who use arbitration require employees to “agree” to waive their right to a jury trial or lose their jobs.¹

This does not automatically mean that employees do not receive justice. At least since the development of consensus due process standards², empirical research has found that arbitration decisions from the American Arbitration Association compare favorably to those of federal courts.³ Employment arbitration providers, however, are not legally required to comply with these standards. This leaves many employees in the position of being contractually required to submit to arbitration under conditions that even employers agree are unfair. And even if all providers met the due process standards, compulsory arbitration would not be right. No one should be forced to waive a Constitutional right as a condition of employment, even if no tangible harm is done.

Employment rights advocates have fought this trend, largely unsuccessfully. Their arguments have been made forcefully and articulately by many, including the author.⁴ Having twice failed to persuade the Supreme Court that condition of employment arbitration is improper⁵, opponents of mandatory arbitration have turned to Congress.

¹ Interview with Robert Meade, American Arbitration Association Vice President, January 31, 2003.

² Prototype Agreement on Job Bias Dispute Resolution, 1995 Daily Lab. Rep. (BNA) No. 91, at D-34 (May 11, 1995)

³ Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 Ohio State Journal of Dispute Resolution __ (2003), Maltby, Private Justice: Employment Arbitration and Civil Rights, Columbia Human Rights Law Review, Vol. 30, Number 1, Fall 1998

⁴ See Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, 29 McGeorge L. Rev. 223 (1998); Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 Denv. U.L. Rev. 1017; Maltby, Paradise Lost- How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights, New York Law School Journal of Human Rights Volume XII part One Fall 1994.

Employee rights advocates have persuaded members of Congress to introduce legislation that would abolish arbitration as a condition of employment.⁶

But what are the alternatives? If we are not to have arbitration as a condition of employment, what will take its place?

The vast majority of the plaintiffs' employment bar and civil rights attorneys argue that agreements to arbitrate should only be enforceable under two conditions:

1. The agreement is voluntary

Voluntary, in this context, means that both parties truly prefer to arbitrate the dispute, rather than take it to court. Voluntary does not mean that an employee who would prefer to litigate accepts arbitration because it is a condition of employment.

2. The agreement to arbitrate is made after the dispute arises.⁷

The argument in support of this requirement comes from fundamental law regarding waiver of Constitutional rights. A waiver, to be valid, must be both knowing and voluntary.⁸ "How can an agreement to waive one's right to resolve a dispute by jury trial be knowing," the plaintiffs' bar argues, "when the employee knows nothing about the dispute because it hasn't even arisen?"

The only way an employee can know the facts and circumstances of the dispute, in order to make a knowing waiver, is after the dispute has arisen.

This arrangement sounds wonderful, at least to the ears of a civil rights lawyer like myself. But would such a rule work in practice? Proponents of the rule assume, often unconsciously, that employers who currently insist on arbitration agreements before the dispute arises will be equally eager to sign such agreements after the dispute arises.

This may not be true. An employer's incentives regarding arbitrating an undifferentiated group of future disputes are quite different than an employer's incentives regarding a specific dispute whose contours are known. When a company considers all its future employment disputes, it sees a black hole that may contain a wide variety of financial risks. On the one extreme are disputes where the potential liability is too small for the employee to afford to litigate the case. A great many cases fall into this category. A 1995 survey of plaintiff employment lawyers found that an employee needed to have a minimum of \$60,000 in provable damages, not including pain and suffering or punitive

⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)

⁶ Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997)

⁷ See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, POLICY STATEMENT ON MANDATORY ARBITRATION, EEOC Notice no. 915.002 (1997), Patricia Ireland, President of the National Organization for Women, at <http://www.now.org>

⁸ See *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972)

damages, before an attorney would take the case.⁹ With inflation, that figure has probably increased to at least \$80,000. At the other extreme, the future may contain a dispute that could anger a jury to the point of rendering a multi-billion dollar punitive damage award that could bankrupt even a large company. Faced with this situation, many employers are willing to agree in advance to arbitrate everything. They are willing to create a risk of liability in the many cases they could have otherwise ignored in order to decrease the risk of a ruinous punitive damage award.¹⁰

The situation after the dispute arises is far different. The employer now knows whether the magnitude of the employee's damages, and their likelihood of prevailing at trial, enable the employee to obtain counsel and litigate the dispute. Where the employer knows that the employee has no credible threat of suing, the employer has no incentive to arbitrate. More precisely, it is in the employer's best interest to refuse to arbitrate.

Thus, it is possible that if the law were changed to allow only post-dispute agreements to arbitrate, the result would be that employees with smaller claims would be denied access to justice completely.¹¹

This issue has been raised by other legal scholars. Professor Samuel Estreicher argues that employee-plaintiffs (and their counsel) will only be willing to arbitrate cases in which arbitration gives them a competitive advantage. Employers will only arbitrate when the opposite is true. Thus, mutual agreement to arbitrate will be inherently rare.¹² This conclusion is supported by Kritzer's work showing that plaintiffs' lawyers are rational actors who only accept cases in which they believe the likely fee will enable them to profitably compensate them for the hours of work required.¹³ David Sherwyn of Cornell reaches the same conclusion by surveying plaintiff and defense attorneys regarding their inclination to arbitrate in three different employment dispute scenarios¹⁴. In no scenario did plaintiff and defense lawyers agree that arbitration was the best way to resolve the dispute.

⁹ William H. Howard, *Arbitrating Claims of Employment Discrimination*, Dis. Resol. J., Oct.-Dec. 1995, at 44.

¹⁰ The accuracy of employers' perception that arbitrators are less willing than jurors to award punitive damages is subject to debate. Unpublished empirical research has found little difference between the behavior of jurors and arbitrators when it comes to punitive damages. It is not all punitive damage awards, however, that employers are trying to avoid, only those which are large enough to cause the company catastrophic financial harm. Many management lawyers believe that these awards come primarily from juries.

¹¹ This issue was first raised in my 2000 article in Columbia Journal of Human Rights (Maltby, Private Justice: Employment Arbitration and Human Rights, Columbia Journal of Human Rights Volume 30 Number 1 (2000))

¹² Estreicher, Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements, OHIO ST. J. ON DISP. RESOL. 559 (2001)

¹³ Kritzer, Rhetoric and Reality...Uses and Abuses...Contingencies and Certainties: The American Contingent Fee in Operation? Inst. for Legal Studies, Working Paper No. DPRP 12-2, 1996.

¹⁴ Sherwyn, Because it takes two: why post-dispute voluntary arbitration programs will fail to fix the problems associated with employment discrimination law adjudication, Berkeley J. of Emp. and Lab. Law (awaiting publication)

Plaintiff lawyers respond that employers' willingness to arbitrate would not be affected by the adoption of a "post-dispute only" rule.

Most of these discussions, however, have been theoretical. In order to reach conclusions, these theories must be tested against empirical data. This article will provide an empirical test.

I. Current Frequency of Post-Dispute Agreements to Arbitrate Employment Disputes

The most direct way to evaluate employers' willingness to arbitrate post-dispute is to examine the frequency with which they do it now.

We conducted this examination by analyzing the records of the American Arbitration Association. We reviewed the files of 312 AAA employment arbitrations for the year 2001 to determine when the agreement to arbitrate was made.¹⁵ In the majority of cases, this information was not present. There were 73 cases in which the timing of the agreement to arbitrate was indicated in the case file. In 58 of these cases (79%), the agreement to arbitrate was made prior to the dispute, almost always at the time of employment. In only 15 cases (21%) was the agreement to arbitrate made after the dispute arose.

Timing of Agreement to Arbitrate

Pre-Dispute	Post-Dispute
79%	21%

After we completed our manual review of individual files, the AAA increased the data retrieval capabilities of their computer system. At our request, AAA staff conducted a computerized analysis of their entire 2001 and 2002 caseload to determine the frequency of post-dispute arbitration agreements.

This analysis indicated that post-dispute agreements are even more rare. AAA found that only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).¹⁶

FREQUENCY OF POST-DISPUTE AGREEMENTS

2001	2002
6%	2.6%

¹⁵ This represents the total number of paper files of 2001 employment disputes located in the New York office of AAA.

¹⁶ Correspondence to the author from Ryan Boyle of AAA staff dated March 31, 2003.

It is impossible to say with certainty which of these results presents a more accurate picture of post-dispute agreements in employment arbitration. The fact that AAA's investigation involved their entire caseload suggests that the 2001 figure is closer to 6% than 21%.

There is also a near certainty of confusion in classifying individual cases as pre or post dispute agreements. For example, arbitration is frequently initiated by a letter from a lawyer for one of the parties. Such a letter often states that the decision to arbitrate was by agreement of the parties. This appears to be a post-dispute agreement. In some cases, however, the parties have "agreed" to arbitrate because a judge has rejected a challenge by the employee to the enforceability of a pre-dispute agreement. Unless the court order is included with the letter, it is impossible for the person classifying the case to know the truth. In most cases, the employee's attorney will not want this information disclosed to AAA and the arbitrator, and the employer's attorney will go along with this omission. Even if the court order is included in the submission to AAA, it is likely that the case administrator (or our researcher) may not put the pieces together. There are many additional ways in which a dispute submitted to AAA may disguise its true origin. In most, if not all, of these situations, the result is that a pre-dispute agreement is mistakenly classified as a post-dispute agreement.

Even if one could resolve the correct percentage of pre-dispute agreements for 2001, there remains the significant difference between AAA's number for 2001 and 2002.

After consultation with AAA staff, I estimate the frequency of pre-dispute arbitration at approximately 6%.

The infrequency of post-dispute agreements indicates that employers are generally unwilling to arbitrate once a claim has arisen and its specifics are known. This does not bode well for the ability of employees to obtain access to justice if only post-dispute voluntary agreements to arbitrate are enforceable.

One might challenge this implication by arguing that post-dispute agreements are rare because there is little opportunity for them today. Employers who use arbitration almost always make it a condition of employment. If employers were not allowed to force employees into arbitration as a condition of employment, the argument goes, many more disputes would result in post-dispute agreements.

This argument might be persuasive if employers had "locked up" enough of the potential field of disputes. This, however, is not the case. While the frequency of arbitration clauses in standard employment agreements has increased dramatically in recent years, the large majority of employers still do not use them.¹⁷ There is more than ample opportunity for the vast majority of employers who do not use such arrangements to

¹⁷ According to the United States' General Accounting Office, only 19% of employers used mandatory arbitration agreements in 1997. Even these employers do not use arbitration for all disputes.

agree to arbitration after disputes arrive. They simply do not take advantage of this opportunity.

It is also possible that these lopsided numbers may be an artifact of the peculiar nature of employment arbitration today. The classic model of arbitration involves two parties mutually and voluntarily agreeing to resolve their dispute(s) (current or future) through arbitration rather than litigation. The parties also mutually agree upon who the arbitrator will be and the rules under which he or she will operate. There is little similarity between this model and current arbitration, in which virtually all the decisions are made by the employer. While it is difficult to articulate a process by which these changes could produce a dearth of post-dispute agreements to arbitrate, it is difficult to rule anything out with confidence in such a distorted situation.

II. Frequency of Post-Dispute Agreements to Arbitrate Disputes Between Businesses

Rather than argue about the arcane ways in which the power imbalances in today's employment arbitration might lead to the lack of voluntary post-dispute agreements, I chose to eliminate this variable from the analysis by examining another arbitration context where it does not exist. In business-to-business arbitration, there is generally at least rough equality of bargaining power. One seldom, if ever, hears complaints of arbitration clauses being forced upon small corporations by a more powerful business associate. If inequality of bargaining power is responsible for the absence of voluntary post-dispute agreements to arbitrate in the employment arena, that effect should disappear in business-to-business agreements.

We examined the relative frequency of pre and post-dispute agreements to arbitrate business disputes. Again, we used the data from the American Arbitration Association. Since AAA's entire business caseload would have overwhelmed our limited staff, we selected a limited, but representative, sample of B to B cases. This consisted of all 2001 cases resolved by AAA's Somerville, New Jersey office.

There were 78 such cases in which the timing of the agreement to arbitrate could be determined. Post-dispute agreements to arbitrate were slightly more common in this sample. In 71 cases (91%) the agreement to arbitrate was entered into before the dispute arose. In only 7 cases (9%) was the agreement to arbitrate made post dispute.

Timing of Agreement

Pre-Dispute	Post-Dispute
91%	9%

As with the employment data, we also conducted an automated analysis of all AAA business to business arbitrations for the year 2002.¹⁸ This showed that only 1.8% of such disputes were the result of post-dispute agreements. The remainder, over 98%, were the result of pre-dispute agreements.

Timing of Agreement

Pre-Dispute	Post-Dispute
1.8%	98.2%

Again, it is impossible to completely reconcile the 9% rate of post-dispute agreements from these two analyses. In light of the fact that the second analysis included the entire set of AAA business to business arbitrations, the correct answer is probably closer to 1.8% than 9%.

No matter how one interprets this data, however, one point is indisputable. Eliminating the element of power imbalances does not significantly increase the rate of post-dispute arbitrations. Post-dispute agreements to arbitrate employment disputes are rare, and would continue to be rare even in the absence of power imbalances.

While the data does not support the argument that post-dispute arbitration will provide access to justice for those who need it, this alone does not prove that my hypothesis is correct. An unwilling defense counsel is only one of many possible reasons why post-dispute arbitrations seldom occur. And even if one assumes that unwilling defense counsel is the explanation, economic hardball is not the only reason why they might decline to arbitrate. To completely understand the situation, one has to go behind the numbers and ask management employment lawyers about the reasons for their behavior.

We therefore interviewed 20 management employment lawyers.¹⁹ Each of these individuals is a member of the American Bar Association's Committee on Employee Rights and Responsibilities or the Montgomery County (Pennsylvania) Bar Association's Committee on Dispute Resolution. This group comes from both large and small firms in all parts of the country. The selection process, however, was not sufficiently sophisticated to consider this group a random sample that is representative of all management employment lawyers for statistical purposes. Therefore, only dramatic trends in the responses are meaningful.

¹⁸ It was not possible to conduct this analysis for 2001 because AAA did not collect data on business to business disputes at that time. Prior to 2002, business to business disputes were included within the category of commercial disputes.

¹⁹ Our initial plan was to collect data from these attorneys via a questionnaire. This would have made it possible to collect information from a larger sample of people. We drafted a questionnaire and reviewed it with both academics and members of the target audience. Both found it confusing. Several attempts to clarify the questions were unsuccessful. Consultation with a professional polling firm revealed that the information we sought was too conceptual and nuanced to be captured in a paper instrument. At this point, we decided to use personal interviews, which would allow us to probe more deeply and clarify when the interviewee did not understand the question.

Pre-Trial Motions

The first insight revealed by these interviews was a confirmation of the rarity of voluntary post-dispute employment arbitration. Not one of these 20 attorneys had ever been involved in such an arbitration. Plaintiffs' counsel had not offered them this option.

They were very forthcoming on how they would respond if given the opportunity to arbitrate an employment claim in the absence of a previous agreement to arbitrate. Their responses were not monolithic. While the list of factors they considered was relatively short, attorneys found different factors to be most influential in their decision making. In some cases, some attorneys found that the presence of a certain factor made them lean toward arbitration while other attorneys found the same factor a reason to litigate.

There were, however, strong patterns that emerged from these interviews.

Pre-trial Motions

The strongest pattern was unwillingness of management counsel to arbitrate when there is an opportunity to prevail on a pre-trial motion. All but one of the twenty attorneys we interviewed (95%) are not interested in arbitration when they believe the case can be won on a pre-trial motion. While most believed that arbitration was less expensive than litigation, they believed that the reduced cost of litigating only through pre-trial motions would be lower than the cost of arbitrating the dispute. They do not believe that they can resolve disputes through pre-trial motions in arbitration. This belief is correct, recent research confirms that summary judgment is extremely rare in arbitration.²⁰

Nor were our management attorneys concerned about their ability to identify the specific cases in which a motion would be successful. The relative clarity of the legal rules for granting motions played some part in this confidence. A larger factor was the known track records of individual judges. One judge cited, for example, has never denied a single employer's motion for summary judgment in over two decades on the bench.

In most cases, those we interviewed would prefer to litigate via motion even if they had to complete discovery and proceed by summary judgment. One attorney, however, would decline to arbitrate only if the case could be won on a motion to dismiss.

This factor alone would lead to the rejection of the majority of employee offers to arbitrate existing disputes. Currently, 60% of employee suits against their employers are lost on summary judgment.²¹ Employers' counsel's unwillingness to arbitrate any case

²⁰ Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, in *How ADR Works*, Brand (editor) BNA (2002). In this study, the author examined all AAA employment cases for the year 2000 for which there is a published opinion. There are 167 such cases. Not one of these 167 cases was decided by summary judgment.

²¹ Maltby, *supra note 8*.

which they can win on summary judgment leaves slightly less than half of employees seeking to arbitrate with any chance of success.

Economic Hardball

My initial concern was that employees with garden-variety claims that are not cost-effective for the private bar to litigate might find their employers unwilling to arbitrate. Why should an employer agree to arbitrate, and perhaps lose, when they could make the dispute disappear by saying “no”?

This factor turned out to have less impact than we anticipated. A majority of those we interviewed said they would be influenced by a would-be plaintiff’s apparent financial inability to maintain litigation. It was not, however, a large majority. Of the 20 management lawyers, 11 (55%) took this position if the employee were represented by counsel. Slightly more, 13 (65%), did so if the employee were pro se.

The other lawyers felt quite differently. Many expressed the view that, no matter what the apparent economics, a determined employee would ultimately find a lawyer who would take the case. Similarly, many were reluctant to ignore even the least established attorney with the fewest financial resources. To these management attorneys, Erin Brockovich is alive and well and they do not want to take a chance on meeting her. Even if the pro-se employee never obtained an attorney, these attorneys believe there is cause for concern. They believe that many employees are sufficiently angry, or need the money badly enough, to litigate without counsel. They also believe that the judge in such a case would help the employee through the system so that their case would be heard on the merits.

One attorney refused to engage in economic hardball out of principle. This person believed that it was a misuse of the legal process to use such economic leverage and something that they would not be willing to engage in.

Incendiary Facts

The attorneys we spoke to frequently mentioned one situation in which they would prefer to arbitrate. This was the existence of facts (or reasonable allegations) that would probably be admissible that could cause the trier of fact to be prejudiced against the employer. Eighty percent (80%) of the lawyers we interviewed prefer to arbitrate under these circumstances. They believe that arbitrators are more likely to keep negative facts in perspective and avoid emotional decisions than juries.

Four attorneys, however, were largely unaffected by the presence of such facts. One attorney prefers to litigate when there are bad facts. He believes that if the facts’ probative value is outweighed by the prejudice they would cause, that a judge will grant a motion in limine. Even the risk of having the motion denied did not change his opinion. Unlike the others, he believed that arbitrators, being human, would be prejudiced almost as much as a jury. The other three do not prefer to litigate in these circumstances, but do

no believe that difficult facts require them to arbitrate. They choose to litigate or arbitrate based on other factors.

Clients

The attorney, of course, does not make the final decision on whether to accept an offer to arbitrate. The employer must also agree.²²

In some situations, this might be little more than a formality. The decision is a matter of professional expertise, and the employer trusts the attorney's professional judgment.

Arbitration is different. Many employers view this as a matter of corporate policy. They consider their attorney's opinion, but make the decision themselves. The lawyers we spoke with confirmed that many of their clients have strong views on arbitration that trump the recommendation of counsel when they differ. Of these lawyers, 30% considered their employer clients as opposed to arbitration and unlikely to agree to arbitrate even if this were the advice of counsel. The other 70% considered their clients as varied. Some clients strongly pro-arbitration, some are strongly opposed, and some decide based on the circumstances of the individual case.

One factor that frequently came up in our discussions is the reluctance of many clients to evaluate their cases pragmatically in the beginning of a dispute. The same dynamic that makes clients refuse to consider settlement at the beginning of a case often leads them to refuse to arbitrate.

Beyond these general attitudes about arbitration, employers may view the economic leverage issue discussed earlier differently than their attorneys. None of the attorneys we spoke to had conducted even the most rudimentary cost-benefit analysis. None knew the frequency with which a crusading lawyer takes on a case that isn't financially viable. Nor do they know how often a pro-se employee manages to litigate a case. At best, their perception of every dispute as a significant risk is an unquantified belief based upon experience. At worst, it is a manifestation of the risk adverse nature of management counsel.

Corporate attorneys have a long history of great concern over minor risks. For example, they are extremely concerned about the risk of liability for defamation by reference check. Yet, the actual risk of liability in such situations is almost too small to measure.²³ If the attorney's willingness to arbitrate rather than play hardball comes from an exaggerated sense of caution rather than a realistic calculation of the risks, the client may not agree.

²² There are situations in which a corporate client authorizes the attorney to make specific decisions. This is generally rare, however, and there is no reason to believe that the decision on whether to arbitrate is an exception. None of the attorneys we interviewed believed that their clients would delegate this decision.

²³ Halbert, Reference Check Gridlock: A Proposal for Escape, 2 Empl. Rts. & Employ. Pol'y J. 395 (1998)

The one attorney who refused to use economic leverage out of a sense of fair play may also find himself overruled by his client.

It is important to note that the attorney is required to tell their client about their belief that the would-be plaintiff (with or without counsel) is financially unable to pursue litigation. Rule 1.4 of the ABA Rules of Professional Conduct requires an attorney to review all important aspects of matter with the client in order for the client to make informed decisions regarding the representation. In another paragraph, the Rule requires the attorney to “provide the client with facts relevant to the matter”. The other party’s ability to pursue a lawsuit is clearly an important point that is relevant to the client’s decision. This clear-cut reading of Rule 1.4 is supported by no less an authority than Professor Stephen Gillers, the dean of American legal ethics.²⁴

Analysis

However ideal it may sound in theory, the data strongly suggest that enforcing only post-dispute agreements to arbitrate employee disputes will not work well in practice. To be sure, there are some employees who would be better off waiting to see the specifics of their dispute and then opting for a jury trial rather than arbitration. These are employees with a strong case and several hundred thousand dollars in potential damages.²⁵

In the vast majority of cases, however, litigation is not cost-justified. These employees need arbitration to receive justice.

It has been claimed that such employees will be able to secure their employers’ agreement to arbitrate on a post-dispute basis.

Examining the data on post-dispute arbitrations, however, strongly suggests that employees with run of the mill employment disputes will find their employers unwilling to arbitrate. Despite ample opportunity, employers seldom agree to post-dispute arbitration today. Only one in twenty employment arbitrations today is the result of a post-dispute agreement. This is not a reflection of power imbalances that might be eliminated by a “post-dispute voluntary rule”. In business-to-business arbitration, where parties generally have comparable bargaining power, the rate of post-dispute agreements is no higher.

Interviews with management employment attorneys demonstrate that reluctance of employers and their attorneys to arbitrate is the source of these low numbers. Some attorneys are simply averse to arbitration generally. Virtually all management attorneys we spoke to will not arbitrate where the case could be resolved in court on summary judgment. Others refuse to arbitrate when they believe the employee cannot afford to

²⁴ E-mail communication to Gillers on February 28, 2003.

²⁵ Even this point of virtually universal agreement, however, appears less certain in light of the current research. For example, an as yet unpublished article by Theodore Eisenberg (of Cornell University) and Elizabeth Hill presented at the NYU Employment Arbitration Conference in November 2002 found that there was no significant difference in punitive damage awards by arbitrators and juries.

pursue litigation. And even when the attorney would choose to arbitrate, the client often says no.

The end result of changing the law so that only post-dispute agreements to arbitrate are enforceable might well be that most employees with legitimate claims would receive no justice at all.

This does not mean that we must accept the current regime of arbitration as a condition of employment. There are other alternatives that deserve serious consideration. The first is pre-dispute voluntary agreements. After a new employee is hired, she generally fills out a number of forms. Many of these involve choices on the employee's part, such as which of several medical plan options the employee prefers. An employer could provide a form at this time allowing the employee to choose between the employer's arbitration system and maintain their existing right to litigate for future disputes.

Such a system would work well in practice. The employee would already have been hired, but not have had time to begin performing the job. This would make it extremely difficult for the employer to escape liability if it terminated the employee for making the "wrong" choice.²⁶ Concerns about more subtle retaliation could be addressed by maintaining these forms in a secure location where they would not be accessible to line management.²⁷

The newest alternative, first discussed at the 2003 meeting of the American Bar Association's Section on Dispute Resolution, is for employers to maintain an arbitration system, but allow employees to opt out at the time of employment.²⁸

While such a system is not as respectful of employee choice as the former alternative, it does have much to recommend it. Traditional discussion of employment arbitration assumes that employees have a preference for maintaining their traditional legal remedies and that employers use their financial muscle to force them to accept arbitration.

This model is highly suspect. Most employees start a new employment relationship with enthusiasm and optimism. The situation is something like a honeymoon. Future difficulties are the farthest thing from the employee's mind. Even if an employee were

²⁶ An employer in an at-will relationship would not incur liability for such a termination. However, an employer who desires the good will of having its arbitration system considered voluntary will have to make statements to employees that create a contractual exception to employment at will.

²⁷ It is possible that senior management could still obtain access to these dispute resolution choice forms. However, it does not appear that this would often occur. Human Resource professionals have a professional ethos that requires proper management of private employee data. If an HR professional were forced to choose between doing the right thing and keeping their job, most would capitulate (as would any other profession). Such a threat, however, could only be made by someone who outranked the head of HR. In most companies, only a handful of very senior executives could meet this criterion. Anecdotal evidence (primarily from the field of medical information) suggests that while HR executives are occasionally strong-armed, it happens only on the rare occasion where a very senior manager believes that they have a compelling financial need for the employee information. In the absence of a pending dispute, this situation would not exist.

²⁸ Haydock, Consumer Justice Through Arbitration, American Bar Association (audiotape)

asked whether she prefers to arbitrate or litigate potential future disputes, it is unlikely that she would have a preference, especially in light of the fact that most people know very little about either employment arbitration or litigation.

In a situation where most people have not thought about what they want, the perspective of default position analysis is very useful. Instead of pretending that employees know what they want, admit that most of them don't and select a default position that represents what most people would choose if they were to make an informed decision.

The literature on relative outcomes of employment arbitration and litigation consistently shows that employees as a whole receive more in arbitration than litigation.²⁹ Under these circumstances, the correct default position may well be arbitration. Employees who have a preference for litigation could freely choose that option.

These are only two possible models for voluntary pre-dispute agreements to arbitrate. Others are waiting to be discovered.

Conclusion

The problems of arbitration as a condition of employment will not be solved by changing the law to enforce only post-dispute agreements to arbitrate. This change would leave majority of employees who need arbitration to obtain justice empty handed. This is far worse than the situation we face today.

Rather than change from one unacceptable option to another, we need to develop models for voluntary pre-dispute agreements to arbitrate.

²⁹ Eisenberg, *supra note 21*, Maltby, *supra notes 8,16*.