



*Journal of Empirical Legal Studies*  
Volume 8, Issue 1, 1–23, March 2011

# An Empirical Study of Employment Arbitration: Case Outcomes and Processes

*Alexander J. S. Colvin\**

Using data from reports filed by the American Arbitration Association (AAA) pursuant to California Code requirements, this article examines outcomes of employment arbitration. The study analyzes 3,945 arbitration cases, of which 1,213 were decided by an award after a hearing, filed and reaching disposition between January 1, 2003 and December 31, 2007. This includes all the employment arbitration cases administered nationally by the AAA during this time period that derived from employer-promulgated arbitration procedures. Key findings include: (1) the employee win rate among the cases was 21.4 percent, which is lower than employee win rates reported in employment litigation trials; (2) in cases won by employees, the median award amount was \$36,500 and the mean was \$109,858, both of which are substantially lower than award amounts reported in employment litigation; (3) mean time to disposition in arbitration was 284.4 days for cases that settled and 361.5 days for cases decided after a hearing, which is substantially shorter than times to disposition in litigation; (4) mean arbitration fees were \$6,340 per case overall, \$11,070 for cases disposed of by an award following a hearing, and in 97 percent of these cases the employer paid 100 percent of the arbitration fees beyond a small filing fee, pursuant to AAA procedures; (5) in 82.4 percent of the cases, the employees involved made less than \$100,000 per year; and (6) the mean amount claimed was \$844,814 and 75 percent of all claims were greater than \$36,000. The study also analyzes whether there is a repeat player effect in employer arbitration. The results provide strong evidence of a repeat employer effect in which employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases, which could be explained by various advantages accruing to larger organizations with greater resources and expertise in dispute resolution procedures. The results also indicate the existence of a significant repeat-employer–arbitrator pairing effect in which employees on average have lower win rates and receive smaller damage awards where the same arbitrator is involved in more than one case with the same employer, a finding supporting some of the fairness criticisms directed at mandatory employment arbitration.

---

\*408 Dolgen Hall, ILR School, Cornell University, Ithaca, NY 14853-3901; email: ajc22@cornell.edu. Colvin is Associate Professor of Labor Relations and Conflict Resolution, ILR School, Cornell University.

I thank participants in the Research Conference on Access to Justice: Empirical Perspectives, held at the NYU School of Law, November 2008 and the NYU 62nd Annual Labor Conference, June 2009, for their helpful comments. I also thank my graduate research assistants, Lauren Beauseigneur, Mark Gough, Ying Lu, and Paul Schwartz, for their hard work on this research project. The analysis in this article particularly benefited from valuable suggestions from Professor Martin Wells, *JELS* co-editor, and from an anonymous reviewer.

## I. INTRODUCTION

The expansion of arbitration of employment disputes represents a revolutionary change in the landscape of dispute resolution. The combination of rising levels of litigation in the employment area and the Supreme Court's 1980's reversal of its earlier rejection of the use of arbitration to resolve statutory claims produced a perfect storm of incentives for employers to adopt arbitration agreements as mandatory terms and conditions of employment. Advocates and critics have fiercely debated the question of whether the growth of arbitration represents a more efficient and equitable mechanism for resolving disputes that would otherwise clog the courts, or an imposition of a mandatory arbitration mechanism on unwitting employees that undermines the statutory rights designed to protect them (e.g., Estreicher 2001; Schwartz 2009; Sherwyn et al. 2005; Stone 1996). These debates have achieved a new intensity with the consideration by Congress of the proposed Arbitration Fairness Act (AFA), which would effectively bar mandatory predispute agreements to arbitrate employment and consumer claims.

Despite the intensity of focus on public policy issues relating to employment arbitration, solid empirical data on this topic have proven slow and difficult to gather. Part of the reason for this is the lack of publicly available data on arbitration. Most empirical research has had to rely on cases or files for which individual arbitration service provider organizations have provided access. The resulting data sets have tended to be relatively small in size and potentially lacking representativeness of the broader population of arbitration cases. In this article, I will describe the results of an analysis of a new large-scale data set based on publicly available information about employment arbitration cases administered by the American Arbitration Association (AAA). I will note at the outset that a significant limitation of existing empirical knowledge on arbitration is that this study, and much of the past empirical research, have been based on AAA data. Although the AAA is arguably the leading and largest player in the arbitration field, it also may be somewhat unrepresentative in its willingness to sign onto and monitor compliance with due process protocols on arbitration.

Employment arbitration grew dramatically in the wake of the 1991 *Gilmer* decision.<sup>1</sup> The proportion of workers covered by nonunion employment arbitration procedures now likely exceeds those covered by union representation (Colvin 2008). Indeed, recent estimates suggest that for perhaps a third or more of nonunion employees, arbitration, not litigation, is the primary mechanism of access to justice in the employment law realm (Lewin 2008). Yet our empirical knowledge of the nature of this system remains minimal at best. Basic questions such as the typical characteristics and outcomes of cases in employment arbitration remain to be definitively answered. Here, I move beyond past research by analyzing employment arbitration outcomes using a representative data set on 1,213 AAA cases from 2003–2007 that derive from employer-promulgated arbitration procedures. I present outcome statistics on key measures such as employee win rates, award amounts, arbitrator fees, and length of time to process cases. I then turn to the issue of whether there

---

<sup>1</sup>*Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991).

are repeat player effects in arbitration and, if so, whether we can identify possible explanations for them. Lastly, I examine the issue of self-representation by employees in employment arbitration.

## II. THE DATA

The data on employment arbitration in this study are based on arbitrator service provider filings required under California state law. Under the California Civil Procedure Code, organizations that provide arbitration services within the state are required to make available to the public certain prescribed information on arbitration cases administered by the service provider that involve consumers.<sup>2</sup> This provision applies to employment arbitration cases that are initiated under employer-promulgated agreements, as opposed to under individually negotiated agreements. The effect of this law is to override contracts that protect the presumptively private nature of arbitration and allow public access to information on arbitration outcomes. The provision prescribes what types of information need to be filed, including: the name of the employer; the name of the arbitrator; filing and disposition dates; amounts of claims; amounts awarded; and fees charged. At the same time, many other pieces of information, notably the name of the employee and the basis for the claim, are not included. More generally, the arbitration service providers are not required to provide the complete arbitration decision accompanying the award. Despite these significant limitations, the California Code filings provide a major new source of data on employment arbitration outcomes, which allows us to analyze a number of questions regarding this dispute resolution system.

In the present study, I analyze cases administered by the American Arbitration Association (AAA). The reason for focusing on the AAA is that it is the largest of the arbitration service providers in the employment arbitration field and has provided the most complete filings in this area. An additional advantage is that to comply with the California Code requirements, the AAA has included in its filings all employment arbitration cases under employer-promulgated procedures that it administers nationally. As a result, the AAA filings provide a much larger national data set that is not restricted to cases heard in California. Based on a comparison of arbitration service provider filings, those compiled by the AAA appear relatively comprehensive. A general problem with all filings in this area is that they contain some degree of missing data on particular variables. For example, although the California Code provision requires the service provider to include information on the employee's salary level, in many cases the parties decline to provide this information. Although some degree of missing data exists in all the service provider filings, the AAA filings include substantially fewer instances of missing data than those of other service providers. The nature of the data set also limits analysis to only those items that the California Code provision requires arbitration providers to report. For example, the data set does not include the state where the case occurred or the legal basis for the claim.

---

<sup>2</sup>Cal. Civ. Proc. Code § 1281.96 (West 2007).

Despite these limitations, the filings provide a more extensive source of data on employment arbitration than has previously been available to researchers.

The data set analyzed in this article includes all employment cases from the AAA California Code filings (what I will refer to henceforth as the AAA-CC filings) for the period January 1, 2003 through December 21, 2007. This produced a total of 5,592 cases. Of these, 1,647 were employment mediation cases administered by the AAA. For purposes of this analysis, I focused on the remaining 3,945 employment arbitration cases in the data set. Data on the individual cases were compiled from the filings by a team of four graduate students working under my supervision. I also separately rechecked the data for typographical and other errors. For many of the analyses conducted in this study, I focus on the 1,213 cases that resulted in awards, with the remainder of the cases being settled or withdrawn prior to the award stage. Cases were relatively evenly distributed across the five-year period of the study, though with some slow growth over this time period.<sup>3</sup> In the analysis below, I control for year-specific effects to check for possible changes over time in outcomes.

### III. ARBITRATION OUTCOMES

Given the relatively limited extent of existing information on employment arbitration, some of the most interesting questions relate to the basic descriptive outcomes from arbitration. Knowing what the mean and median outcomes of arbitration are will allow us to develop a general portrait of how this dispute resolution system operates. They also provide an initial basis for moving toward comparisons of litigation and arbitration outcomes. Whereas there have been increasingly sophisticated analyses of litigation and its outcomes in recent years (e.g., Clermont & Schwab 2004; Eisenberg & Schlanger 2003; Oppenheimer 2003), our understanding of arbitration has lagged behind. Although the present data do not allow a comparison of systematically matched cases in litigation and arbitration, to begin to compare across systems it is initially necessary to establish what the arbitration outcomes are.

#### A. *Win Rates*

One of the most basic questions in arbitration is who wins? Past research in this area has mostly used convenience samples of arbitration awards maintained by organizations like the AAA or the securities industry service providers. These studies tended to show relatively high employee win rates in arbitration. For example, early studies by Bingham (1998a), Maltby (1998), and Howard (1995) found employee win rates in the 65–75 percent range. More recent studies, including those by Bingham and Sarraf (2000), and by Hill (2003), found lower, though still substantial, employee win rates in the 40–45 percent range. Examining securities industry employment arbitration cases, Delikat and Kleiner (2003)

---

<sup>3</sup>The numbers of total cases reaching disposition by year were: 2003—294 cases; 2004—803 cases; 2005—906 cases; 2006—957 cases; 2007—982 cases. The reason for the smaller number in 2003 is that the data set includes only cases filed after January 1, 2003, so that many cases filed in 2003 did not reach disposition until 2004.

Table 1: Descriptive Statistics on Employment Arbitration and Litigation

	<i>Employment Arbitration (AAA-CC Data)</i>	<i>Federal Court Employment Discrimination (Eisenberg &amp; Hill)</i>	<i>State Court Non-Civil Rights (Eisenberg &amp; Hill)</i>	<i>California State Court Common-Law Discharge (Oppenheimer)</i>
Employee win rate	21.4% ( <i>n</i> = 1,213)	36.4% ( <i>n</i> = 1,430)	57% ( <i>n</i> = 145)	59% ( <i>n</i> = 117)
Median damages	\$36,500 (2005 \$)	\$150,500 (2005 \$176,426)	\$68,737 (2005 \$85,560)	\$296,991 (2005 \$355,843)
Mean damages	\$109,858	\$336,291 (2005 \$394,223)	\$462,307 (2005 \$575,453)	
<i>SD</i>	\$238,227		\$1,291,020	
Mean including zeros (2005 \$)	\$23,548	\$143,497	\$328,008	
Mean time to trial (days)	361.5	709	723	

NOTES: Conversions of award statistics to standard 2005 \$ amounts are provided to facilitate comparison. AAA-CC Data: Data set on all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association during the period January 1, 2003 to December 31, 2007. Data assembled by the author from reports filed by the AAA under California Code arbitration service provider reporting requirements. Eisenberg & Hill: Litigation statistics reported in Eisenberg & Hill (2003). Oppenheimer: Litigation statistics reported in Oppenheimer (2003).

found a similarly high 46 percent employee win rate. These employee win rates compare favorably to employee win rates found in litigation (see Table 1), ranging from the 33 and 36 percent employee win rates in federal court employment discrimination trials reported in studies by Delikat and Kleiner (2003) and by Eisenberg and Hill (2003), to the employee win rates in the 50–60 percent range found in studies of state court trials (Oppenheimer 2003). A note of caution in interpreting these findings, however, is that studies by both Eisenberg and Hill (2003) and by Bingham and Sharaff (2000) found that employee win rates were lower in cases based on employer-promulgated procedures than in cases based on individually negotiated contracts. Earlier studies tended to include both types of cases in the same sample, which would be likely to produce higher overall employee win rates given the greater likelihood of success under individually negotiated contracts, which often involve contractual claims by senior business executives.

What are the employee win rates in the AAA-CC filings data? To answer this question, it is necessary to make decisions about how to classify an employee “win.” Most generally, any case in which the employee receives some award represents a case in which the arbitrator has ruled in the employee’s favor on at least some aspect of his or her claim. On the other hand, if the employee receives an award, but the amount is relatively small and/or the award is much lower than the amount claimed, the employee might view the outcome of the case as unsuccessful. Taking a narrow view of an employee win as cases in which the employee receives all or at least some substantial portion of the amount claimed would produce a lower estimate of the employee win rate in arbitration. By contrast, using a broader definition of an employee win will increase the estimated win rate. To take a more arbitration-favorable approach in this study, I use a broad definition of an employee win as including any case in which some award of damages, however small, is made in favor of the employee. Using this

broad definition, the employees won 260 of the 1,213 cases in the AAA-CC filings that terminated in an award, corresponding to an employee win rate of 21.4 percent.

This employee win rate is substantially lower than that found in previous employment arbitration studies, which tended to use selective samples. It is also lower than employee win rates in litigation. However, it should be noted that we may be comparing apples and oranges here in that the characteristics of cases in arbitration may differ systematically from those in litigation. For example, it could be that arbitration contains more low-value cases than litigation. Different patterns of prehearing settlement may also affect the distribution of cases heard in each system. In the AAA-CC data set, 2,328 cases representing 59.1 percent of the sample were resolved by settlement. Settlement is also the predominant mode of disposition in litigation, with upward of 70 percent of all employment cases settling. Differences in which types of cases settle may serve to depress or to increase the arbitration win rate relative to litigation.<sup>4</sup> What this estimate tells us is the raw employee win rate in arbitration. The difference between this win rate and the employee win rate in litigation indicates that there exists an arbitration-litigation gap. The task for future research is then to analyze what factors may explain this gap and whether it is problematic from a public policy perspective. A useful analogy can be drawn to the male-female wage gap. An initial task in labor economics is to identify the existence and size of a gap between average male and female wages. Once such a gap is identified, the task becomes to understand the factors leading to the gap and the degree to which they represent more general labor market forces (e.g., differences in education and skill levels) or discrimination based on gender. Similarly, in employment dispute resolution research, the next task in analyzing the arbitration-litigation gap will be to determine the degree to which it is due to factors such as greater access to low-value claims or due to tendencies of arbitrators to favor employers in their decision making.

### *B. Award Amounts*

When we turn to award amounts, similar patterns emerge in employment arbitration outcomes. Earlier studies tended to find relatively high average awards, broadly similar to those found in litigation. For example, in Delikat and Kleiner's study of securities industry employment arbitration outcomes, they found a median damage award of \$100,000 (\$117,227 in 2005 dollars<sup>5</sup>) and a mean damage award of \$236,292 (\$276,998 in 2005 dollars) for the 186 awards in their sample where the employee received some type of monetary damage award (Delikat & Kleiner 2003). These amounts were roughly comparable to the outcomes in a sample of federal court employment discrimination trials they examined, where the median damage award was \$95,554 (\$112,015 in 2005 dollars) and the mean award was \$377,030 (\$441,981 in 2005 dollars). The limitation of the comparison

---

<sup>4</sup>For a good discussion of these issues and how they may tend to inflate or deflate arbitration-litigation differences, see Schwartz (2009).

<sup>5</sup>Dollar amounts from earlier studies are converted to constant 2005 dollars so as to allow easier comparability to the results from the AAA-CC filings data. The year 2005 is chosen as the midpoint of the date range in the AAA-CC filings data.

made in the Delikat and Kleiner (2003) study is that it is not clear that a sample of securities industry arbitration cases, which are likely to involve more highly paid professional employees and contractual claims, is comparable to the broader population of employee litigants found in the general court system. By contrast, while Eisenberg and Hill (2003) find similar overall results for employment arbitration outcomes using a sample of AAA awards that included cases based on individually negotiated agreements, they also find relatively less favorable outcomes for employees where arbitration is based on an employer-promulgated procedure. This suggests that it is important to analyze separately cases based on the type of employer-promulgated procedures that have been the main subject of public policy debate, and that comprise the cases in the AAA-CC filings examined here.

In the AAA-CC filings data, there were 260 awards in which the employee received some amount of monetary damages. Among these cases, the median amount of damages awarded was \$36,500 and the mean award was \$109,858, with a standard deviation of \$238,227. The high mean compared to the median and relatively large standard deviation reflects the skewed nature of the distribution of arbitration awards, with a small number of large awards producing a high average outcome. Although average outcomes are commonly calculated based on cases in which an award is made, it is also informative to calculate the average outcome over all cases, including those in which zero damages are awarded. This provides an estimate of the expected outcome of the average case, including the chance of a zero recovery outcome. Calculated on this basis, the mean award amount for the 1,213 arbitration cases in the AAA-CC filings data where an award was made was \$23,548, with a standard deviation of \$119,003.

Although, as noted above, the data do not allow a standardized comparison of arbitration and litigation case outcomes, it is nonetheless informative to look at studies of employment litigation outcomes to arrive at a sense of the relative level of outcomes in the two systems and whether there is a gap to be explained. Studies by Eisenberg and his co-authors find relatively higher damage awards in employment litigation than those found here for employment arbitration (Eisenberg & Hill 2003; Eisenberg & Schlanger 2003). For example, in a sample of 408 federal court employment discrimination trials from 1999–2000, they found a median award of \$150,500 (\$176,426 in 2005 dollars). Similarly, in a study of California state court trial outcomes, Oppenheimer (2003) found a median award of \$296,991 (\$355,843 in 2005 dollars) for 69 common-law discharge cases in 1998–1999 and a median award of \$200,000 (\$239,632 in 2005 dollars) for 136 employment discrimination cases in 1998–1999. Although we cannot say what the difference would be if the same case were presented to an arbitral and a litigation forum, what we can say is that overall the median damage award in employment arbitration was 10.2 percent as large as the median award in common-law discharge cases and 15.2 percent as large as the median award in employment discrimination cases in Oppenheimer's study. By comparison, the median award in the employment arbitration cases I examined was 20.7 percent as large as the median federal court employment discrimination case award found by Eisenberg and co-authors. Although we should be cautious about comparing apples and oranges, it is striking that median awards in employment litigation are around five to ten times greater than median awards in employment arbitration. Being able to identify the rough order of magnitude of this gap does indicate the importance of taking future steps to identify the



causes for it, both as a matter of academic research interest and from a public policy perspective. Explaining this arbitration-litigation gap is of particular importance given that a key element of the majority's reasoning in *Gilmer v. Interstate/Johnson Lane* relied on the presumption that arbitration was acceptable "[s]o long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."<sup>6</sup>

### *C. Time to Resolution*

One area in which arbitration is widely considered to hold an advantage compared to litigation is in producing more timely resolution of claims. This is clearly a generally desirable feature of a dispute resolution procedure in that it reduces costs, provides quicker certainty in outcomes, and reduces the detrimental effect of the passage of time on the ability to fairly try cases. For employment cases, concerns about the negative effects of time delays in dispute resolution are heightened. For employees, employment cases often involve disruption of their existing employment situation and difficulty in finding equivalent alternative job opportunities. For the employer, delay may also be detrimental in producing ongoing disruption to its operations and attendant uncertainty about the status of personnel policies and practices that are implicated in the claim. Although not unusual for the courts in general, times to disposition in employment litigation continue to be substantial. Estimates indicate that cases typically take around two to two-and-a-half years to reach trial (see Table 1) in federal and state courts (Delikat & Kleiner 2003; Eisenberg & Hill 2003).

Analysis of the AAA-CC filings data indicates that time to hearing in employment arbitration is substantially faster than in litigation. The mean time to disposition for an employment arbitration case that resulted in an award was 361.5 days. Put alternatively, the time it takes to obtain a resolution after a hearing is about half as long in arbitration as in litigation. This is a substantial advantage for arbitration. In a comparison, however, it is also important to recognize that most cases in both litigation and arbitration are settled before a final hearing. Although this reduces the typical time to resolution in litigation, this is also true in arbitration. Among employment arbitration cases that were settled prior to an award, the mean time to disposition was 284.4 days. Lastly, it is not obvious that even with its reduced time to disposition that arbitration is sufficiently expeditious as would be desirable for an employment dispute resolution procedure. A year to resolve cases is still a relatively long period for a dispute to be ongoing both for employees who rely on their jobs for their primary source of income and for employers needing to move forward with their operations. Labor arbitration procedures in unionized workplaces have come under increasing criticism for similar delays that also commonly result in periods of close to a year before a hearing and award. In the case of labor arbitration, these delays have been driven by the relatively small cadre of experienced arbitrators acceptable to both unions and

---

<sup>6</sup>*Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, at 28 (1991), quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).



management. The results found here suggest that similar delays before hearing may be emerging in employment arbitration.

#### *D. Arbitration Fees*

A frequent criticism of employment arbitration is that arbitrators and service providers charge fees, which may be substantial, whereas filing fees for access to the courts are small by comparison. A major concern is that arbitration fees imposed on employees through employer-promulgated arbitration agreements will create a barrier preventing employee access to a forum for enforcing their statutory rights. The AAA-CC filings include data on arbitrator fees charged in the cases. Among all employment arbitration cases, the median fee charged was \$2,475 and the mean fee charged was \$6,340. However, this includes cases that were settled prior to a final hearing, where fees charged may have related only to the initial filings, case management conferences, and any preliminary motions. Among the cases that resulted in a final award following a hearing, the median fee charged was \$7,138 and the mean fee charged was \$11,070.

The overall amount of arbitration fees is an important consideration; however, the specific concerns were directed primarily at the possibility of individual employees having to bear substantial arbitration fees in order to protect their statutory rights. In the instance of employment arbitration administered under the auspices of the AAA, these concerns are mitigated by that service provider's adoption of an organizational policy of requiring employers that utilize its services to bear the costs of arbitration fees. Although organizational policies are not always universally reflected in actual practices, the AAA-CC filings data include information on the allocation of fees that allow a check on this question. Among these cases, the employer paid all arbitration fees 97 percent of the time, indicating that the employer-pays rule is generally being enforced in AAA employment arbitration cases.

#### *E. Plaintiff Salary Levels*

Accessibility for low-income plaintiffs is a problem that has plagued the civil justice system. One of the potential advantages offered by arbitration is that its relative simplicity and speediness could reduce costs to use the system and thereby enhance accessibility. The argument has been made that whereas employment litigation requires relatively high potential claim amounts to justify financing of cases, arbitration will allow lower-value claims to reach a hearing (Estreicher 1997, 2001). Based on this reasoning, advocates for employment arbitration have argued that it will allow more low-income plaintiffs to enforce statutory employment rights. Responding to this line of argument, critics of employment arbitration have noted that claim amounts in employment disputes do not always correspond to differences in income levels and more generally have questioned the presumption of greater accessibility of arbitration.<sup>7</sup>

---

<sup>7</sup>Schwartz (2009) also advances a very interesting analysis of the relative incentives of the parties to choose between litigation and arbitration forums, suggesting that many of the assumptions about the value of mandatory arbitration in obtaining a tradeoff favoring accessibility for low-value claims are incorrect.

The AAA-CC filings data include information on plaintiff salary levels. In accord with the California Code filing requirements, the AAA data classify plaintiff salaries into three categories: \$0–\$100,000; \$100,001–\$250,000; and \$250,001 or greater. Although there is a relatively high frequency of missing data on this variable due to the failure of the parties to provide this information, plaintiff salary levels are included for 1,538 cases. For plaintiffs in these cases, 1,267 or 82.4 percent had salaries under \$100,000, 214 or 13.9 percent had salaries between \$100,001 and \$250,000, and 57 or 3.7 percent had salaries over \$250,001. These data indicate that the large majority of the plaintiffs in AAA employment arbitration cases had relatively modest salary levels.

Unfortunately, comparable data on salary levels in employment litigation are not readily available. There are frequent citations of anecdotal reports from plaintiff attorneys that potential claim amounts of as much as \$60,000 may be necessary to justify bringing a case forward in litigation. However, there is a dearth of good systematic research on this issue in employment litigation.

One interesting comparison is to look at the claim amounts in employment arbitration. This provides one indication of the degree to which large potential claim amounts may also be necessary to finance cases in employment arbitration. Although there is also a relatively high frequency of missing data on this variable, the AAA-CC filings data include reports of the amount claimed by the plaintiff. Overall, among the 1,736 cases in which this variable was reported, the median amount claimed was \$106,151 and the mean amount claimed was \$844,814. The mean in this instance is heavily skewed by a few very large claims. To get a better sense of the feasibility of low claim amounts in arbitration, it is useful to examine the left end of the distribution of claim amounts. The cutoff for the bottom quartile of the claim amount distribution (the 25th percentile) was \$36,000, meaning that three-quarters of all cases involved claims greater than that amount. Ten percent of the cases did involve claims of \$10,000 or less. However, overall, most cases in employment arbitration appear to involve sizable claim amounts.

How does plaintiff salary level relate to prospects for success in employment arbitration? Both employee win rates and award amounts are positively related to salary levels in employment arbitration (see Table 2). Whereas the employee win rate was 22.7 percent among plaintiffs with salary levels below \$100,000, this win rate rises to 31.4 percent for plaintiffs with salary levels between \$100,001 and \$250,000, and to a win rate of 42.9 percent for plaintiffs with salary levels over \$250,001.<sup>8</sup> Similarly, whereas for plaintiffs with salary levels below \$100,000 the mean award amount was \$19,069 (including zero damage award cases), for plaintiffs with salary levels between \$100,001 and \$250,000, the mean award amount was \$64,895, and for plaintiffs with salary levels over \$250,001, the mean award amount was \$165,671. Although this suggests a fairly strong relationship between employee salary levels and case outcomes, it should also be reiterated that there were a

---

<sup>8</sup>Albeit, we should exercise caution in overinterpreting the significance of the finding for the highest salary level group since it is based on a relatively small cell size of 14 observations.

Table 2: Employment Arbitration Usage and Outcomes by Salary Level

<i>Salary Level</i>	<i>% of All Plaintiffs</i>	<i>Win Rate</i>	<i>Mean Award</i>
Under \$100k	82.4	22.7%	\$19,069
\$100k–\$250k	13.9	31.4%	\$64,895
Over \$250K	3.7	42.9%	\$165,671

NOTES: Statistics reported are calculated from the AAA-CC data set of all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association during the period January 1, 2003 to December 31, 2007. This data set was assembled by the author from reports filed by the AAA under California Code arbitration service provider reporting requirements. There was a relatively low 39 percent response rate on the salary level question in the AAA-CC data.

substantial number of missing data on the salary variable, with the variable being reported in only 37 percent of cases that reached an award.<sup>9</sup>

#### IV. REPEAT PLAYER ISSUES

Issues related to repeat players have proven particularly controversial in studies of employment arbitration. In dispute resolution more generally, repeat players have long been identified as having advantages relative to one-shot participants in dispute resolution processes. These concerns are heightened in regard to employment arbitration because employers are systematically much more likely to be repeat players in arbitration. By contrast, it will be very rare for an individual employee to participate in employment arbitration more than once. This can be contrasted with forums such as labor arbitration where both participants, union and management, are typically repeat players. A particular concern is that arbitrators might tend to favor employers in employment arbitration in hopes of securing future business from these repeat players. If employers do derive some unfair advantage from being repeat players in employment arbitration, this could undermine the legitimacy of this forum for resolving statutory employment rights.

A series of studies by Lisa Bingham in the 1990s first raised to prominence concerns that employers had an undue advantage as repeat players in employment arbitration (Bingham 1995, 1996, 1997, 1998b). Although Bingham used relatively small samples of cases from AAA files, she found some evidence that employers who participated in multiple arbitration cases enjoyed greater success than those who participated in only a single case. Subsequently, Bingham’s findings have come under criticism from some other researchers

---

<sup>9</sup>The employee win rate was 24.7 percent with a \$30,889 mean damage award in cases where salary data were reported compared to 19.5 percent with a \$19,293 mean damage award in cases where salary data were missing, suggesting that there may be systematic differences in those cases with missing salary data. This does not necessarily indicate that these differences would affect the salary-outcomes relationship, but does certainly indicate the importance of trying to obtain better data on employee salaries in future research.

who note that her results showed only that regular participants in arbitration performed better, not that there was a bias by arbitrators seeking future business (Hill 2003; Sherwyn et al. 2005).

There are a series of different possible reasons for an employer repeat player advantage in employment arbitration. In analyzing the empirical evidence in this area, it is useful to begin by identifying these different explanations.

1. Larger employers, who are more likely to be repeat players, may enjoy advantages from greater resources available to devote to cases. This could include the ability to hire better defense counsel and more specialized in-house personnel devoted to dealing with legal claims.
2. Employers who are repeat players may develop greater expertise with the arbitral forum, which then works to their advantage in future arbitration cases.
3. Larger employers, who are more likely to be repeat players, may be more likely to adopt human resource policies that ensure greater fairness in employment decisions.
4. Larger employers, who are more likely to be repeat players, may be more likely to adopt internal grievance procedures that lead to the resolution of meritorious cases before they reach arbitration.

These first four explanations all relate to employer participation in multiple arbitration cases and/or general advantages accruing to size. They lead to a prediction of greater success for repeat employers in arbitration, but not a specific concern about repeat use of the same arbitrators to decide cases involving the same employer. By contrast, two other explanations relate specifically to repeat-employer–arbitrator relationships.

5. Arbitrators may be biased in favor of employers out of hope of being selected in future cases. This bias may be heightened by the employer typically paying the entire arbitrator fee and by the limited experience of employees with arbitration.
6. Repeat employers may develop expertise in identifying, and then selecting, employment arbitrators who tend to favor employers in their decision making. Lacking equivalent repeat player experience, employees will be less likely to be able to identify and then reject the pro-employer arbitrators.

These latter two explanations should lead to a greater employer degree of success in cases where there is a repeat-employer–arbitrator pairing, even compared to repeat employer cases in general.

The large number of cases in the AAA-CC filings data set and the availability of four years' worth of data allow an improved analysis of the potential for either repeat employer or repeat-employer–arbitrator pairing effects. I begin by looking at repeat employer effects.

Overall, in the AAA-CC filings data set, 2,613 out of 3,941 or 66.3 percent of cases involved repeat employers, defined as any employer with more than one case in the data set. This indicates that a repeat employer is in fact the typical situation in employment arbitrations administered by the AAA. As predicted by the above arguments, repeat employers fared better in arbitration than one-shot employers, with the latter defined as those employ-

Table 3: Outcomes for Repeat Versus One-Shot Employers

	<i>One-Shot Employer</i>	<i>Repeat Employer</i>
	N = 367	N = 845
Employee win rate	31.6%	16.9%**
Mean award including zeros (2005 \$)	\$16,134	\$40,546**

NOTES: Statistics reported are calculated from the AAA-CC data set of all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association during the period January 1, 2003 to December 31, 2007. This data set was assembled by the author from reports filed by the AAA under California Code arbitration service provider reporting requirements. Win rates and mean damage awards are calculated for all cases in which an award was issued. Significance levels: + $p < 0.10$ ; \* $p < 0.05$ ; \*\* $p < 0.01$ , for differences between one-shot employer and repeat employer.

ers who participated in only one case in the data set (see Table 3). This definition may somewhat underestimate the size of any repeat employer effect since some of what are defined here as one-shot employers may have had other employment arbitration cases outside the time period of this study or involving arbitration service providers other than the AAA. Despite the conservative nature of the test, there is strong evidence of a repeat employer effect, with employees winning 31.6 percent of cases involving one-shot employers, whereas they won only 16.9 percent of cases involving repeat employers, which was a statistically significant difference ( $p < 0.01$ ). Similarly, whereas the mean damage award was \$40,546 in cases involving one-shot employers, the mean damage award was only \$16,134 in cases involving repeat employers, which was also a statistically significant difference ( $p < 0.01$ ). These results confirm earlier research indicating a repeat employer effect in employment arbitration. However, they are also consistent with explanations 1–4 for the repeat employer effect, described above, which do not implicate employer-arbitrator repeat effect bias.

To test for a repeat-employer–arbitrator pairing bias, I classified all cases where the same arbitrator heard more than one case involving the same employer. Two different approaches have been advocated in the literature for such classifications. In her research, Bingham (1998b) used a classification scheme that coded each appearance of a multiple pairing as a repeat-employer–arbitrator case. Sherwyn et al. (2005), by contrast, argue that the first instance in which the pairing occurs should not be classified as a repeat-employer–arbitrator case, only subsequent incidents of the same pairing. Their reasoning is that arbitrator bias will only emerge as reciprocation in second and subsequent cases where the arbitrator is selected by the same employer. Although I think there is some plausibility to this argument, my view is that in selecting an arbitrator a second and subsequent times, the employer will take into consideration the arbitrator’s decision in the initial case involving the employer. From the arbitrator’s side, if there is a temptation to be biased toward an employer in hopes of obtaining future arbitration business, the arbitrator can signal this to the employer by more employer-favorable decision making in the initial case for which the arbitrator is selected. Thus, if there is a repeat-employer–arbitrator bias, it should be

manifested in more favorable decisions toward employers in the first as well as subsequent cases involving a repeat-employer–arbitrator pairing. Following an approach that I have also taken in earlier research in this area (Colvin 2008), I initially proceed by classifying all cases involving a repeat pairing as repeat-employer–arbitrator cases. However, to explore the alternative approach advocated by Sherwyn et al. (2005), I also test the repeat-employer–arbitrator classification suggested by those authors, which is restricted to second and subsequent instances of the pairing.

Overall, in the AAA-CC filings data set, 624 out of 3,934, or 15.9 percent of cases involved repeat-employer–arbitrator pairings. This is a much larger group of repeat-employer–arbitrator pairings than examined in previous studies, reflecting the larger size and longer time period of the data available through the California Code filing requirements. Overall, employers were more successful in cases involving repeat-employer–arbitrator pairings. Whereas the employee win rate was 23.4 percent in cases that did not involve a repeat-employer–arbitrator pairing, the employee win rate was only 12.0 percent in cases involving a repeat pairing, which was a statistically significant difference ( $p < 0.01$ ). Similarly, whereas the average damage award was \$27,039 in cases not involving a repeat pairing, it was only \$7,451 in cases that involved a repeat-employer–arbitrator pairing, also a statistically significant difference ( $p < 0.05$ ). To more precisely identify possible explanations for the repeat player effect, it is useful to separately analyze the subset of cases involving repeat employers. To the degree that effects are due to a repeat-employer–arbitrator pairing effect rather than the more general advantages of repeat employers, they should be identifiable in this subpopulation. When the analysis is restricted to this subsample, the employee win rate is 12.0 percent for cases involving a repeat-employer–arbitrator pairing, compared to 18.6 percent for cases that do not involve a repeat pairing, which is a statistically significant difference ( $p < 0.05$ ). In this subsample, the mean award amount is \$7,451 for cases involving a repeat-employer–arbitrator pairing, whereas the mean award is \$19,146 for cases that do not involve a repeat pairing, though this difference is not statistically significant (see Table 4).<sup>10</sup>

Do these results change when we take the alternative approach to classifying repeat-employer–arbitrator pairings advocated by Sherwyn et al. (2005)? Using their alternative classification approach, the employee win rate is 11.4 percent with versus 22.6 percent without a repeat-employer–arbitrator pairing, which is a statistically significant difference ( $p < 0.01$ ). Similarly, the mean award amount is \$3,009 with versus \$25,865 without a repeat-employer–arbitrator pairing, which is also a statistically significant difference ( $p < 0.05$ ). When we restrict the analysis to the subsample of repeat employers, the employee win rate is 12.2 percent with versus 16.8 percent without a repeat-employer–arbitrator pairing ( $p < 0.10$ ) and the mean award amount is \$3,009 with versus \$18,370 without a repeat pairing ( $p < 0.10$ ), both of which are statistically significant (see Table 4). Overall, the use of the alternative classification approach produces slightly smaller differences in employee win rates and slightly larger differences in mean award amounts.

---

<sup>10</sup>The difference in award amounts is statistically significant at the 90 percent confidence level in a one-tailed test, but falls just short of the 90 percent level in a two-tailed test.

Table 4: Outcomes for Repeat-Employer–Arbitrator Pairings Compared to Other Repeat Employers

	<i>One-Shot Player</i>	<i>Repeat Player</i>
Repeat pairings among repeat employers (BC)	<i>n</i> = 628	<i>n</i> = 216
Employee win rate	18.6%	12.0%*
Mean award including zeros (2005 \$)	\$19,146	\$7,451
Repeat pairings among repeat employers (SEH)	<i>n</i> = 722	<i>n</i> = 123
Employee win rate	17.9%	11.4%+
Mean award including zeros (2005 \$)	\$18,370	\$3,009+

NOTES: Statistics reported are calculated from the AAA-CC data set of all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association during the period January 1, 2003 to December 31, 2007. This data set was assembled by the author from reports filed by the AAA under California Code arbitration service provider reporting requirements. For this analysis, the sample is limited to only repeat employers, that is, those participating in more than one arbitration case. The Bingham, Colvin (BC) classification includes all instances of pairings between a repeat-employer–arbitrator pairing. The Sherwyn, Estreicher, Heise (SEH) classification includes only second and subsequent instances of cases involving a repeat-employer–arbitrator pairing. Significance levels: + $p < 0.10$ ; \* $p < 0.05$ ; \*\* $p < 0.01$ , for differences between one-shot player and repeat player categories.

However, the general pattern of results is very similar across the two methodologies. How exactly the repeat-employer–arbitrator might operate in the area of signaling between the two sides is an interesting research question, but the alternative positions do not appear to have major effects on the outcomes.

Taken as a whole, the results indicate that there is a strong repeat employer effect in employment arbitration and a smaller, but significant, repeat-employer–arbitrator pairing effect.<sup>11</sup> Although the former effect appears to be larger, the latter is of greater concern from a policy standpoint. If the effect is due to either arbitrator bias or an employer ability to systematically select more employer favorable arbitrators, one should be concerned that the employment arbitration system is being slanted against employees in these cases. Although alternative explanations may be offered, it is also plausible that the results actually understate the extent of the repeat-employer–arbitrator pairing effect. In cases where employees are able to retain plaintiff counsel who are relatively experienced in this area and knowledgeable about employment arbitration, it is possible that these attorneys will enter into agreements with employer counsel to repeatedly use the same employment arbitrators in multiple cases where the arbitrators in question are acceptable to both sides. Put alternatively, where plaintiff counsel are able to act as a repeat player in arbitration, we would expect to see instances of repeat-employer–arbitrator pairings that reflect the existence of repeat players on both sides, akin to the situation commonly seen in labor arbitration. These relatively employee favorable repeat-employer–arbitrator pairings are likely to

<sup>11</sup>Research on the litigation process has also discussed the issue of repeat player advantages in that forum (Galanter 1974). However, the arguments raised in that setting focus more on the ability of the repeat player to influence the institutions and rules of the process, for example, through lobbying for or against statutory changes. Given that the parties are not directly involved in the selection of the judge in litigation, the same type of repeat player processes analyzed here for employment arbitration are not likely to be an issue in litigation and have not been the subject of comparable statistical analysis in empirical studies of employment litigation.



bias upward the level of employee success seen in repeat pairing cases overall. If it were possible to remove them from the sample, the remaining repeat pairing cases are likely to provide evidence of a stronger repeat-employer–arbitrator effect.

V. SELF-REPRESENTATION

One of the possible benefits of employment arbitration is that the relatively simplicity of the forum might make self-representation by employees more plausible than in litigation. Alternatively, given that arbitration is a private forum, one might also be concerned that self-represented employees will be more disadvantaged in arbitration than in the public forum of litigation where judges may view themselves as having a greater public obligation to protect the interests of the self-represented. The AAA-CC filings include data on whether employees in the cases were self-represented, allowing empirical analysis of questions related to this phenomenon. To what extent is self-representation used in employment arbitration? What is the effect of using counsel versus self-representation on outcomes in employment arbitration?

Overall, employees were self-represented in 980 out of 3,940 cases or 24.9 percent of the time. In cases where the employee was self-represented, the employee win rate was 18.3 percent versus an employee win rate of 22.9 percent in cases where the employee was represented by counsel (see Table 5), which was a statistically significant difference ( $p < 0.10$ ). This is not necessarily a particularly large difference in win rates given that there is likely to be a selection effect in which counsel can identify in advance cases where the employee is more or less likely to be successful. Turning to award amounts, the mean award received by self-represented employees was \$12,228 compared to a mean award of \$28,993

Table 5: Impact of Self-Representation on Employment Arbitration Outcomes

	<i>Represented by Attorney</i>	<i>Self-Represented</i>
Total cases	<i>N</i> = 2,960 (75.1%)	<i>N</i> = 980 (24.9%)
Employee win rate	22.9%	18.3%+
Mean award including zeros (2005 \$)	\$28,993	\$12,228*
Type of disposition		
Award	28.0%	40.3%
Settled	64.8%	41.8%
Withdrawn	6.6%	16.6%

NOTES: Statistics reported are calculated from the AAA-CC data set of all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association during the period January 1, 2003 to December 31, 2007. This data set was assembled by the author from reports filed by the AAA under California Code arbitration service provider reporting requirements. Significance levels: + $p < 0.10$ ; \* $p < 0.05$ ; \*\* $p < 0.01$ , for differences between represented by attorney and self-represented categories.

Table 6: Employee Win Rates by Self-Representation and Repeat-Employer–Arbitrator Pairings

	<i>Represented by Attorney</i>	<i>Self-Represented</i>
Nonrepeat pairing	24.4%	21.2%
Repeat-employer–arbitrator pair	14.7%	8.0%

NOTES: Statistics reported are calculated from the AAA-CC data set of all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association during the period January 1, 2003 to December 31, 2007. This data set was assembled by the author from reports filed by the AAA under California Code arbitration service provider reporting requirements.

for employees represented by counsel (see Table 5), which was a statistically significant difference ( $p < 0.05$ ). Again, there may be some selection effect here as plaintiff attorneys are unable financially to take on cases below a certain value threshold. Lastly, the lowest employee win rates occur in cases where there is a self-represented employee and a repeat-employer–arbitrator pairing. Whereas in the absence of an repeat-employer–arbitrator pairing, employees represented by an attorney win 24.4 percent of the time versus 21.2 percent of the time for self-represented employees, where there is a repeat-employer–arbitrator pairing, employees represented by an attorney win 14.7 percent of the time versus a win rate of only 8.0 percent for self-represented employees (see Table 6). This difference is statistically significant ( $p < 0.05$ ) and raises particular due process concerns that self-represented employees are being subject to repeat pairing bias effects.

These results suggest that while a substantial minority of employees use self-representation, in the large majority of instances employees are retaining counsel to represent them in employment arbitration. The cases in which employees do have representation by counsel are on average those in which they have a greater chance of success and recover larger damage awards. Thus employment arbitration appears to be a dispute resolution system predominantly based on employee representation by counsel, as is the case with litigation.<sup>12</sup> To the degree that representation by counsel continues to be difficult for many employees to obtain, due to factors such as low value of claims, lack of legal sophistication of employees, and limited resources of plaintiff attorneys, employment arbitration is providing at most a limited response to this problem.

## VI. REGRESSION ANALYSIS

To identify the independent effect of each factor on outcomes, I estimate regression models for employee wins and award amounts using the predictor variables discussed above. Employee wins is a dichotomous (yes-no) variable, which I estimate using a logit

<sup>12</sup>For example, Clermont and Schwab (2004) found that only 16.99 percent of employment litigation plaintiffs in the federal courts were self-represented.

model.<sup>13</sup> Award amounts is a continuous variable; however, it includes a large number of zero dollar award observations, where no liability was found, which complicates the analysis. I estimate two different models for this variable. First, I estimate a regression (OLS) model for award amount with the sample limited to those cases in which an award of greater than zero was made. This model can be thought of as modeling the damages awarded assuming liability is found. Then I estimate a regression (OLS) model for award amounts for all cases, including those in which zero damages are awarded.<sup>14</sup> This model can be conceptualized as estimating the expected outcome including both the chance of winning on liability and the amount of damages if successful. In addition to the problem of zero damage award cases, the distribution of award amounts is right-skewed and diverges from the normal distribution assumed in OLS models. To normalize the distribution, I use a square-root transformation.<sup>15</sup>

Table 7 presents the results of models in which the employee wins and award amount dependent variables are regressed on the repeat employer, repeat-employer–arbitrator pairing, and employee self-representation independent variables.<sup>16</sup> These models include dummy variables for year of decision to control for possible changes over time in outcomes.<sup>17</sup> Standard errors are clustered by employer to control for employer-specific effects. In the first model, for employee wins, I report both model coefficients and odds ratios, which represent the effect on the probability of the predicted outcome (an employee win) for a unit change in each predictor variable. The effect of the repeat employer variable is statistically significant in the model ( $p < 0.01$ ) and the odds ratio of 0.514 indicates that the chance of an employee win is 48.6 percent lower where the employer in the arbitration case is involved in more than one arbitration case in the data set. The effect of a repeat-employer–arbitrator pairing is also statistically significant in the model ( $p < 0.05$ ) and the odds ratio of 0.598 indicates that the chance of an employee win is 40.2 percent lower where the employer and the arbitrator are involved in more than once case together in the data set. Although the odds ratio for the self-represented employee variable is less than 1,

---

<sup>13</sup>For a discussion of logit models, see Long (1997).

<sup>14</sup>An alternative approach to estimating this distribution would be to use a tobit model, which is designed for dealing with truncated or censored normal distributions. However, tobit models can be problematic for distributions with large numbers of zero cases, as in this instance. In results not shown, I also tried estimating a tobit model for the same sample and variables. The results were very similar to those of the regression model reported here.

<sup>15</sup>An alternative is to use a logarithmic transformation; however, this introduces the problem in the model with the zero award cases that log zero equals infinity. Both the log and square-root transformations produced increases in normality of the distribution, with similar reductions in skewness and kurtosis. Given that the square-root transformation allows similar models to be estimated for the samples with and without the zero award cases, I have used this transformation in the results reported here.

<sup>16</sup>Given the general similarity of results between the two different classification approaches to repeat-employer–arbitrator pairings, in the regression models I report only the results using the approach I advocate above of classifying all cases involving the same employer and arbitrator pair as a pairing instance.

<sup>17</sup>A recent study found evidence of a downward time trend in claimant success in securities industry arbitration over a similar time period to the present study (Choi & Eisenberg 2009).

Table 7: Models Estimating Effects on Employee Win Probabilities and Award Amounts in Employment Arbitration

	<i>Employee Wins (Logit) [Odds Ratios]</i>	<i>Award Amounts (Without Zero Award Cases) (Sq. Root \$s) (OLS)</i>	<i>Award Amounts (Including Zero Award Cases) (Sq. Root \$s) (OLS)</i>
Repeat employer	-0.666** (0.173) [0.514]	-21.28 (28.23)	-35.87** (11.02)
Repeat-employer–arbitrator pairing	-0.513* (0.226) [0.598]	-54.16+ (28.64)	-20.72** (7.58)
Self-represented employee	-0.169 (0.176) [0.844]	-109.71** (28.55)	-26.39* (7.77)
Year of decision (2007 reference year)			
2003	0.128 (1.234) [1.137]	-71.57 (217.04)	-0.97 (73.04)
2004	-0.283 (0.203) [0.753]	-38.64 (36.81)	-17.24 (11.71)
2005	-0.446* (0.211) [0.640]	8.66 (41.96)	-14.51 (12.20)
2006	-0.151 (0.215) [0.860]	-1.39 (38.15)	-5.25 (13.09)
Constant	-0.504 (0.161)	306.72** (35.77)	101.12** (13.09)
Likelihood-ratio chi-sq [ <i>F</i> ]	43.08**	[4.71**]	[6.53**]
-2 * Log-likelihood [ <i>R</i> <sup>2</sup> ]	1210.2	[0.067]	[0.035]
<i>N</i>	1,210	259	1,210

NOTES: Statistics reported are calculated from the AAA-CC data set of all employment arbitration cases based on employer-promulgated procedures administered by the American Arbitration Association during the period January 1, 2003 to December 31, 2007. This data set was assembled by the author from reports filed by the AAA under California Code arbitration service provider reporting requirements. Significance levels: + $p < 0.10$ ; \* $p < 0.05$ ; \*\* $p < 0.01$ , standard errors in parentheses, odds ratios for the logit model in brackets. Standard errors were clustered by employer. The logit model predicts an employee win rate of 22.1 percent, compared to an actual employee win rate of 21.4 percent. This corresponds to a reduction in error of 20.7 percent compared to a naïve model predicting employer success in all cases.

suggesting a lower probability of an employee win, the effect of this variable is not statistically significant. The model also indicates that employee win rates were significantly ( $p < 0.05$ ) lower in 2006, but do not suggest a consistent time trend in the data.

The second model estimates award amounts for only those cases in which some nonzero amount of damages is awarded, that is, all the cases won by employees. This model represents the predictors of damage amounts assuming liability has been found. In this model, award amounts were significantly ( $p < 0.10$ ) lower for cases involving a repeat-employer–arbitrator pairing. Award amounts were also significantly ( $p < 0.01$ ) lower for cases where the employee was self-represented.

The third model estimates award amounts for all cases, including those in which the outcome is zero dollars, that is, no damages are awarded. This captures the effect of the predicted variables on the expected outcome, taking into account both the chance of winning some amount of damages and the size of the award where some damages are awarded. In this model, the expected award amount is significantly lower where: there is a repeat employer ( $p < 0.01$ ); where there is a repeat-employer–arbitrator pairing ( $p < 0.01$ ); and where the employee is self-represented ( $p < 0.05$ ). Given that this model of the overall outcome captures the effect of the zero award as well as positive damage award cases, it could be that the primary drivers of the effects are the findings of liability or no liability. However, it is noteworthy that the coefficients are all in the same direction as in the second model, which included only positive damage award cases, and that both the repeat-employer–arbitrator pairing and self-representation variables are statistically significant in both models. This suggests that the effects on the overall outcomes are being driven by the damages awarded as well as by the liability decisions.

These regression model results confirm and reinforce the simpler bivariate results presented earlier. There is strong evidence of a repeat employer effect producing outcomes favorable to employers in terms of lower employee win rates and overall award outcomes. This could be explained by the range of advantages discussed earlier that accrue to a large organization with greater resources and more experience in the arbitral forum. Of greater potential concern is the additional finding of strong evidence for a repeat-employer–arbitrator pairing effect in which employees tend to win less often and recover smaller amounts when the employer and the arbitrator are involved in multiple cases together. The existence of this effect even when we control for the repeat employer effect in the model indicates that the employer is receiving an advantage from choosing the same arbitrator in multiple cases. The evidence for a disadvantage for being a self-represented employee is more limited, though the finding of an effect on award amounts does suggest the importance of further investigation of the impact of representation or lack thereof.

## VII. CONCLUSION

In the often vociferous debates over employment arbitration, empirical research has at times been criticized as unable to answer the key policy questions implicated in the rise of this new system of dispute resolution.<sup>18</sup> Assuming any individual study will definitely resolve what are complex issues involving a multitude of factors and influences is to create an

---

<sup>18</sup>See, e.g., Ware (2001). For example, Ware notes that “[e]mpirical studies can tell us the relative levels of awards and process costs in arbitration and litigation, but that does not mean they can tell us the relative levels of awards and process costs in arbitration and litigation *in comparable cases*. The probative value we give to empirical studies should turn on our level of confidence that the studied cases going to arbitration are comparable to the studied cases going to litigation. And, in reality, nobody knows whether the cases going to arbitration are comparable to the cases going to litigation” (Ware 2001:755–56). Although I agree with Professor Ware’s concern that we should be cautious about issues of comparability of cases, and especially selection effects, I am more optimistic that well-designed empirical studies can begin to shed useful light on the nature of arbitration-litigation differences by identifying the influence of various relevant factors.

unrealistic expectation. In practice, empirical research is more typically accumulative in nature as studies gradually enhance our base of knowledge through which to make judgments about policy issues.

The present study has taken this approach in trying to extend our understanding of employment arbitration. The availability of a broader, more representative set of data about arbitration under employer-promulgated procedures by virtue of the California Code service provider reporting requirements allows a more accurate and complete picture to begin to emerge of the outcomes of mandatory employment arbitration. What are the key findings of this study regarding employment arbitration and what do they suggest are major future research needs? Estimates of employee win rates and damage award amounts based on the AAA-CC filings data indicate that arbitration outcomes are generally less favorable to employees than those from employment litigation. Although the AAA-CC filings do not provide sufficient information on case characteristics to identify further the factors explaining these differences, the identification of a sizable arbitration-litigation gap indicates the importance of future research that gathers additional data on cases that will help identify the factors leading to these differences. Arbitration does appear to produce relatively quicker resolution of employment claims, albeit not necessarily as quickly as would be ideal for either employee or employer needs.

On the closely debated issue of repeat player effects in arbitration, this study finds strong evidence of a repeat employer advantage and, more problematically, evidence of an advantage to employers in repeat-employer-arbitrator pairings. The existence of an employer advantage in repeat-employer-arbitrator pairings may reflect arbitral bias in some of these cases. More generally, it indicates limitations in the ability of the plaintiff attorney bar to play a substitute role as a repeat player on behalf of employees in employer arbitration akin to the role played by unions in labor arbitration. This is not to say that plaintiff attorneys never or cannot play this role, but that there may not be a sufficient number of plaintiff attorneys experienced in employment arbitration accessible to employees to be able to counteract employer advantages in this area. The results of this study also indicate that while employees are self-represented in a substantial number of arbitration cases, they tend to receive less favorable outcomes than employees represented by attorneys and representation by counsel is the more common situation in employment arbitration. The question of providing effective and accessible representation for employees continues to be an important issue for investigation in future research.

It is worth noting a limitation on the generalizability of these results in that the AAA is only one of a number of actors in the arbitration field and a potentially large number of arbitrations may be occurring ad hoc without any administering service provider. This study may be examining a best-case example in looking at arbitrations administered by the AAA. In addition to the limitations of our empirical knowledge of what is going on in these other settings in arbitration, there is a danger of a race-to-the-bottom phenomenon where businesses may feel an incentive to avoid service providers that support and enforce due process provisions. In this area, there is a potential role for either the courts or regulatory agencies to engage in some type of standard setting to ensure more uniformity in standards for employment arbitration.

For researchers, the California Code provisions requiring the disclosure of key information on arbitration cases is a good example of how public policy debates can become better informed through providing for enhanced public access to relevant data. If this approach were extended, we might be able to better answer some of the continuing important questions around employment dispute resolution. Additional information on the arbitration cases, such as the categories of claims being made and additional information on the characteristics of the employers and employees, would help identify what factors may explain the arbitration-litigation outcome gap identified in this study. Going beyond arbitration cases themselves, in many organizations, arbitration is only the last stage of a multistep internal grievance procedure. Some studies of individual companies have indicated that these internal grievance procedures play a major role in dispute resolution, filtering out many cases before they get to arbitration (Bales & Plowman 2008; Colvin 2004; Sherwyn et al. 2005). Yet we have only limited information on these procedures and how they operate. A requirement for disclosure of information on these procedures, akin to the California Code requirements for arbitration cases, would be invaluable to researchers in better understanding these procedures and fostering more informed public policy debates in this area.

## REFERENCES

- Bales, Richard A., & Jason N. W. Plowman (2008) "Compulsory Arbitration as Part of a Broader Employment Dispute Resolution Process: The Anheuser-Busch Example," 26 *Hofstra Labor & Employment Law J.* 1.
- Bingham, Lisa B. (1995) "Is There a Bias in Arbitration of Non-Union Employment Disputes?" 6(4) *International J. of Conflict Management* 369.
- (1996) "Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases," 47(2) *Labor Law J.* 108.
- (1997) "Employment Arbitration: The Repeat Player Effect," 1 *Employee Rights & Employment Policy J.* 189.
- (1998a). "An Overview of Employment Arbitration in the United States: Law, Public Policy and Data," 23(2) *New Zealand J. of Industrial Relations* 5.
- (1998b) "On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards," 29(2) *McGeorge Law Rev.* 223.
- Bingham, Lisa B., & Shimon Sarraf (2000) "Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference," presented at the Proceedings of the N.Y.U. 50th Annual Conference on Labor, New York.
- Choi, Stephen J., & Theodore Eisenberg (2009) "Punitive Damages in Securities Arbitration: An Empirical Study," *Cornell Legal Studies Research Paper* 1322482; *NYU Law & Economics Research Paper* 09-01.
- Clermont, Kevin M., & Stewart J. Schwab (2004) "How Employment Discrimination Plaintiffs Fare in Federal Court," 1(2) *J. of Empirical Legal Studies* 429.
- Colvin, Alexander J. S. (2004) "Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace," 13 *Advances in Industrial & Labor Relations* 71.
- (2008) "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" 11(2) *Employee Rights & Employment Policy J.* 405.
- Delikat, Michael, & Morris M. Kleiner (2003) "An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?" 58 *Dispute Resolution J.* 44.



- Eisenberg, Theodore, & Elizabeth Hill (2003) "Arbitration and Litigation of Employment Claims: An Empirical Comparison," 58(4) *Dispute Resolution J.* 44.
- Eisenberg, Theodore, & Margo Schlanger (2003) "The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis," 78 *Notre Dame Law Rev.* 1455.
- Estreicher, Samuel (1997) "Predispute Agreements to Arbitrate Statutory Employment Claims," 72 *N.Y.U. Law Rev.* 1344.
- (2001) "Saturns for Rickshaws: The Stakes in the Debate Over Pre-Dispute Employment Arbitration Agreements," 16 *Ohio State J. on Dispute Resolution* 559.
- Galanter, Marc (1974) "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95.
- Hill, Elizabeth (2003) "AAA Employment Arbitration: A Fair Forum at Low Cost," 58(2) *Dispute Resolution J.* 8.
- Howard, William M. (1995) "Arbitrating Claims of Employment Discrimination," 50 *Dispute Resolution J.* 40.
- Lewin, David (2008) "Employee Voice and Mutual Gains," presented at the Labor and Employment Relations Association (LERA) Proceedings. New Orleans, LA.
- Long, J. Scott (1997). *Regression Models for Categorical and Limited Dependent Variables*. Thousand Oaks, CA: Sage.
- Maltby, Lewis L. (1998) "Private Justice: Employment Arbitration and Civil Rights," 30 *Columbia Human Rights Law Rev.* 29.
- Oppenheimer, David Benjamin (2003) "Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities," 37 *U.C. Davis Law Rev.* 511.
- Schwartz, David (2009) "Mandatory Arbitration and Fairness," 84 *Notre Dame Law Rev.* 1247.
- Sherwyn, David, Samuel Estreicher, & Michael Heise (2005) "Assessing the Case for Employment Arbitration: A New Direction for Empirical Research," 57 *Stanford Law Rev.* 1557.
- Stone, Katherine Van Wezel (1996) "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s," 73 *Denver U. Law Rev.* 1017.
- Ware, Stephen (2001) "The Effects of *Gilmer*: Empirical and Other Approaches to the Study of Employment Arbitration," 16 *Ohio State J. on Dispute Resolution* 735.