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INTRODUCTION

Economic inequality is a central challenge of our time. Much attention has rightly been given to the growth in income and wealth inequality in the United States, reaching levels not seen since the 1920s.[1] This rise in economic inequality has occurred in conjunction with a shift in the governance of the workplace with a decline in union representation to only 12.5% of the workforce in 2012.[2] Declining unionization is itself one of the factors leading to greater wage inequality[3] and a diminished political voice

† Martin F. Scheinman Professor, ILR School, Cornell University. The survey research project that led to some of the results reported in this paper was supported by a research grant to Cornell University from the Robert L. Habush Endowment of the American Association for Justice. I also gratefully acknowledge the contributions of the National Employment Lawyers Association (NELA) in providing access to its membership for the conduct of the survey and to its individual member attorneys who responded to the survey for their time and efforts in doing so. All claims, opinions, and errors in this paper are my own and do not represent those of the organizations that provided assistance for this research project.

1. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 Q.J. ECON 1, 35 (2003).

2. Press Release, Bureau of Labor Statistics, Union Members—2012 (Jan. 23, 2013).

3. *See* David Card, *The Effect of Unions on Wage Inequality in the U.S. Labor Market*, 54 IND. & LAB. REL. REV. 296 (2001) (finding through labor economic research that unions exert an equalizing effect on income by reducing the dispersion of wages).

for workers.[4] However it also has resulted in reduced access to justice in the workplace as fewer employees are now covered by the just cause provisions and strong grievance procedures traditionally provided by union negotiated collective bargaining agreements.[5]

In contrast to the growing concerns over income inequality, much less attention has been paid to the question of equality of justice in employment. By equality of justice in employment, I refer to equality in the ability of employees to have access to due process in regard to employment decisions affecting them and the ability to challenge adverse decisions. With the decline in union representation, the provision of justice in the workplace is increasingly dependent on individual employment rights enacted through statutes. Substantive individual employment rights have expanded, albeit slowly, over recent decades.[6] The number of individual rights claims made through government agencies and the courts increased over the same period that union representation and strike rates declined.[7] This expansion of individual employment rights provides a new basis for employees to achieve fairness in workplace decisions affecting them, supporting greater equality of justice in employment. Yet against this trend are countervailing forces pushing toward greater inequality in justice in the workplace. In particular, this article will examine the question of how the expansion of mandatory arbitration of individual employment rights affects equality of justice in the workplace.

Alternative dispute resolution ("ADR") procedures are often held out as having the potential to enhance equality of access to justice for employees.[8] By providing a balance between the interests of efficiency, equity, and participant voice, well-designed ADR procedures hold the promise of avoiding the pathologies of the litigation system, where cost and inefficiency can create genuine barriers to many employees bringing claims, and instead providing a greater range of employees with accessible

4. Frank Levy and Peter Temin emphasize the broader institutional and political role of unions and see their declining influence as a major factor increasing general economic inequality. Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* (MIT Dep't of Econs., Working Paper No. 07-17, 2007).

5. For discussions of the declining impact of union collective bargaining agreements and the resulting more limited coverage of the grievance and arbitration procedures found in unionized workplaces, see, for example, Michael J. Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization, and the Challenge to Industrial Relations Theory*, 45 INDUS. REL. 299 (2006); Alexander J.S. Colvin, *American Workplace Dispute Resolution in the Individual Rights Era*, 23 INT'L J. HUM. RESOURCE MGMT. 459 (2012).

6. *See* Piore & Safford, *supra* note 5; Colvin, *American Workplace*, *supra* note 5.

7. *See* Piore & Safford, *supra* note 5; Colvin, *American Workplace*, *supra* note 5.

8. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 561 (2001).

procedures.[9] However, it is important to recognize that ADR is not a generic category of procedures with identical or even similar effects on the processing of individual rights claims. Rather, the impact of ADR procedures on the process and outcomes of dispute resolution depends strongly on the institutional design and functioning of the procedures. When we examine a particular type of ADR procedure like mandatory arbitration, it is important to consider how the structure of the procedure affects the incentives and behaviors of the parties and the outcomes of the dispute resolution process.

In this Paper, I will examine the operation of mandatory arbitration as an employment dispute resolution system to investigate the degree to which it increases or decreases equality of access to justice in employment relations. To address this question, I will use a model of individual employment relations that encompasses four key components.

The first component is the structure of rights held by employees. This includes the substantive employment rights provided by federal or state law. It also includes the institutional structure of procedures for enforcement of these rights, such as the incidence and structure of mandatory arbitration procedures.

The second component is the sources of power available to employees. In the traditional labor relations realm, union collective bargaining and strike power provided employees with a source of countervailing power against employers. In the individual rights realm, the threat of litigation serves a similar role as a major source of employee power checking the workplace power and authority of employers. A key question regarding mandatory arbitration is to what degree it enhances or diminishes this source of employee power.

The third component is the mechanism of employee representation. To effectively articulate and enforce individual employee rights, a well-functioning mechanism for providing representation to employees is critical. The key question here for mandatory arbitration is how it affects the availability of representation by plaintiff-side employment attorneys who provide the primary mechanism of representation in the individual employment rights litigation system.

The fourth component of the model is the pattern of employment relations in the workplace. An effective individual employment rights system does not operate in a vacuum, but rather functions by altering employment relations behaviors in the workplace. Put alternatively, beyond providing remedies for violations of individual rights, the system should also exert a deterrent effect that encourages organizations to uphold these

9. John W. Budd & Alexander J.S. Colvin, *Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice*, 47 INDUS. REL. 460 (2008).

rights in the first place. Regarding mandatory arbitration, the question is whether or not it produces employment relation patterns in the workplace that better protect individual employment rights.

These four components of the employment relations system interact to determine its effectiveness in protecting individual rights in the workplace. In the following Parts, I examine each of these components of the individual employment rights system in turn, using them to analyze the degree to which mandatory arbitration is enhancing or diminishing equality of access to justice in the workplace.

I.
THE STRUCTURE OF RIGHTS

When the Supreme Court first gave its imprimatur to the use of arbitration to resolve statutory employment rights in *Gilmer v. Interstate/Johnson Lane*[10], it stated explicitly that the decision did not represent an alteration of the substantive rights protecting employees. Quoting its earlier decision from *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, the majority commented that: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[11] Through the subsequent debates and judicial decisions around mandatory arbitration, this idea that the same substantive rights are to be applied in arbitration and in the courts has generally stayed constant. Instead, the debates have focused more on the question of whether, in applying these substantive rights, the decision-making of employment arbitrators differs from that of the courts, an issue to which I will return in the next Part.

Whereas the Supreme Court in *Gilmer* stated that arbitration did not modify the substantive rights of employees, it was equally clear in its decision that arbitration altered the structure of procedural rights by providing for an alternative forum for the resolution of claims. Indeed, an important policy justification given by the majority for enforcing agreements to arbitrate statutory claims was that, in arbitration, a party "trades the procedures and opportunities for review of the courtroom for the simplicity, expedition, and informality of arbitration."[12] We see this procedural contrast between litigation and arbitration in such features as more limited discovery, less frequent use of summary judgment motions, and less stringent application of the rules of evidence. Indeed, a central

10. 500 U.S. 20, 26 (1991).

11. *Id.* (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

12. *Id.* at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

characteristic of arbitration is that it provides less formal procedures than litigation.

In these and other respects, mandatory arbitration can be contrasted with litigation in terms of the structure of procedural rights. But mandatory arbitration also represents a structure of procedural rights different from other types of arbitration. Furthermore, there is substantial variation in procedures and structure within the landscape of mandatory arbitration itself.

As mandatory arbitration initially developed in the 1990s, a natural comparison was to the long-standing, well-established system of labor arbitration used in unionized workplaces. Labor arbitration has some similarities to mandatory arbitration in regard to its relative informality and speed of adjudication compared to the litigation system. Some labor arbitrators also serve as employment arbitrators. However, the institutional structures of these two types of arbitration differ substantially. Labor arbitration is the product of joint negotiation by the two parties to collective bargaining, whereas mandatory arbitration is implemented at the unilateral initiative of management. Further, the jointly negotiated provisions of the labor contract are the source of substantive rules in labor arbitration. The union also provides an institutionalized mechanism of representation in labor arbitration.

In many respects, the use of arbitration in individually negotiated employment contracts is a closer parallel to mandatory arbitration. Typically negotiated by executive-level or other highly compensated employees, many individual employment contracts contain arbitration clauses. Although similar to mandatory arbitration in their focus on individual employment relationships and disputes, these arbitration agreements are different in origin in that they are jointly negotiated and particular to the individual employment relationship, rather than applied to a group of employees.

Although less common than mandatory arbitration, individually negotiated arbitration is a widespread and distinctive dispute resolution system. In a study of all employment arbitration cases administered by the American Arbitration Association ("AAA") in 2008, Kelly Pike and I found that 124 of the 449 cases (27.6%) in our sample involved individually negotiated arbitration agreements, as opposed to the employer promulgated, mandatory arbitration procedures involved in the other 325 cases.[13] The individually negotiated arbitration cases were distinctive in featuring better-paid employees, more contractual than statutory claims, and a higher likelihood of attorney representation of the employee. Employees bringing

13. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 65 (2014).

claims through individually negotiated procedures also had much higher win rates (64.6%) and received relatively high average damages ($220,736).

Overall, these differences between mandatory and individually negotiated arbitration indicate a very different and more advantageous system of individual rights dispute resolution for those employees who have the bargaining power to individually negotiate their employment contracts and arbitration agreements. From an inequality of access to justice perspective, this comparison represents one way in which inequality in the process of individual employment rights dispute resolution tracks the general income inequality in society.

The comparison to individually negotiated arbitration is also informative when considering which employees are covered by mandatory arbitration. Whereas individually negotiated arbitration arises by joint negotiation between the employer and the employee, the defining characteristic of mandatory arbitration is that it is the product of unilateral promulgation of the procedure by the employer as a term and condition of employment. As a result, the incidence of mandatory arbitration is not the product of calculation of desirability by the individual employee. Nor is it a product of general public enactment of a dispute resolution system to be available to all employees. Rather, whether any given employee must bring individual rights claims through a mandatory arbitration procedure depends on the decision of his or her employer to adopt the procedure for its employees.

If one views mandatory arbitration as a positive alternative to litigation, then this should suggest an overly-limited incidence of mandatory arbitration, as many employees would be denied its benefits due to the failure of their employers to adopt it. Conversely, if one views mandatory arbitration as an inadequate alternative to litigation, then many employees are denied the benefits of the public courts based on the particular, individual decisions of their employers. Whichever view one holds of mandatory arbitration, the resulting patchwork adoption of mandatory arbitration depending on the decisions of individual employers is producing a substantial degree of difference in the procedures available for resolving individual employment rights disputes.

Even amongst employers who have adopted mandatory arbitration, there is substantial variation in the structure of procedures. In designing the mandatory arbitration agreement, the employer chooses which, if any, arbitration service provider will administer the arbitration and the rules under which the arbitration will be conducted. Some arbitration service providers—notably the AAA which is currently the largest provider of employment arbitration services—have agreed to abide by certain due process protections in their procedures, including those set out in the Due

Process Protocol.[14] The AAA will decline to administer mandatory arbitrations that are not based on its standard rules, which among other provisions require that the employer pay the arbitrator fees and administrative costs apart from a small filing fee. From the plaintiff's perspective, it is advantageous to have mandatory arbitration administered by an arbitration service provider with a standard set of rules that can serve as a basis for due process protections.

However, an employer need not designate any service provider to administer arbitration, nor need they adopt any standard set of rules and procedures for the conduct of arbitration. In a survey of attorneys that represent plaintiff employees conducted by Mark Gough and myself, we found that the second most common category of arbitration administration after administration by the AAA was ad hoc cases, i.e. cases in which there was no service provider at all.[15] In ad hoc arbitration, the employer can use control over the design of the mandatory arbitration procedure to establish procedures that best serve its own interests. In extreme cases, the courts have stepped in to hold some agreements unenforceable on the grounds of unconscionability, where the procedures were so lacking in due process as to be impermissibly one-sided.[16] But to date, only a small number of cases have held arbitration agreements unenforceable on due process grounds. Our results indicate that these cases have not deterred a significant number of employers from using ad hoc arbitration in place of using an established service provider.

The most recent illustration of how mandatory arbitration can change the structure of procedures comes from the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,[17] which enforced an arbitration agreement that barred class actions and required all claims to be brought individually before an arbitrator. There was some initial question of whether that decision extended to mandatory arbitration in employment cases, and particularly, whether it conflicted with the National Labor Relations Act's section 7 protections for concerted activity. However, with the Fifth Circuit's recent reversal of the NLRB's *D.R. Horton* decision, it appears clear that the ability of mandatory arbitration provisions to bar class actions holds in employment cases.[18] This further illustrates how the structure of rules for enforcing employment rights now depends on the employer's decision whether to require mandatory arbitration.

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14. Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 174 (2005).

15. *See* Mark Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB L. 91 (2014).

16. *E.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 941 (4th Cir. 1999).

17. 131 S. Ct. 1740, 1753 (2011).

18. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 364 (5th Cir. 2013).

The picture that emerges overall is one in which the structure of rules for enforcement of individual employment rights does not parallel the general coverage of substantive rights found in the relevant statutes. Rather, the procedures used for enforcing these rights are the product of the calculations and decisions of individual employers as to how they wish to resolve conflict with their employees. Employees only participate in this decision if they possess unusually high levels of individual bargaining power, as do executive-level managers, or if they hold collective bargaining power through union representation. The result of this power imbalance is inequality between employees in the structure of their procedural rights for the enforcement of substantive employment rights.

II.
SOURCES OF POWER

Labor relations theory and policy have been concerned historically about issues of relative bargaining power between employers and employees. A number of factors tend to result in employees having relatively less bargaining power than employers. Whereas any individual employee represents only a small part of the labor force of a large employer, that employee's job usually represents the major source of income and economic security for the employee. As a result, the impact on the employee of losing that job is vastly greater than the impact on the employer of losing any individual employee. Individual employees also have greater personal investment in their current jobs and the specific skills they have developed, rendering mobility more costly.

The New Deal system of labor relations sought to address this inequality of bargaining power between employers and employees through establishing the terms and conditions of employment through collective bargaining. Where an individual employee lacks bargaining power, a collective group of employees could exert sufficient bargaining power to balance that of the employer. This bargaining power was premised on the ability of the unionized group of workers to use the economic weapon of the strike. By withholding its collective labor, the strike allows the union to put sufficient economic pressure on the employer to obtain favorable compromises at the bargaining table.

In the present era, where relatively few workers have access to union representation and collective bargaining, individual employment rights have become the new source of bargaining power for employees. While we often think of employment statutes as establishing a set of rules that determine what is or is not permissible in employment relations, translating the rights provided in these statutes into practices in the workplace involves a process of contested decision-making and negotiated implementation. For example, employers may not satisfy the legal requirement that employees cannot be

terminated because of age by simply deciding not to terminate employees based on age. Rather, the employer may need to take additional steps to prevent age-based discrimination. In a complex modern organization, where multiple actors may be involved in employment decisions, who will ensure that termination decisions are not based on age? What documentation will the organization require in termination decisions to ensure they are not age based? Will there be training of managers on discrimination issues? Suppose an employee alleges that he or she is being terminated based on age—how will the organization respond? Will there be some type of internal complaint procedure? Should the organization make a practice of offering some type of severance payment with a release of potential liability?

How the organization answers these questions will depend in significant measure on the potential legal consequences for violating employee rights. There may be direct financial consequences if there is a legal judgment against the employer. Whatever the outcome of any proceedings, there are likely to be substantial legal costs in defending against a claim. The time and attention of the organization's management may be consumed by the process of litigation, particularly because of discovery requirements and potential for depositions. In addition to being costly, litigation also brings uncertainty. The employer will have to consider the chances of success or failure in litigation and the incentives for settlement to avoid these risks. Litigation may be a low-frequency event, but it is also one that is high-risk, with the potential for substantial costs if the employer is unsuccessful.

These characteristics of the litigation process create a strong incentive for employers to manage their employment relations in a manner that reduces the potential for legal risks. Employers will treat employees more favorably in employment relations than they otherwise might, out of a concern to protect the organization's own interests in avoiding legal pressures. In this way, litigation operates as a source of bargaining power for employees in the individual rights era that parallels the role of strikes as the source of bargaining power for employees in the collective bargaining system of the New Deal era.

How does mandatory arbitration affect this source of employee power? A basic starting point in answering this question is to look at how mandatory arbitration compares to litigation in terms of case outcomes. A number of authors have examined litigation outcomes. A 2003 study by Professors Eisenberg and Hill reported employee win rates in employment discrimination trials of 36.4%.[19] The same study reported a higher employee

19. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (2003).

win rate of fifty-seven percent in a sample of state court, non-civil rights based employment cases. This latter win rate is similar to the fifty-nine percent employee win rate in California state court trials involving common law discharge-based claims found in research by Professor David Oppenheimer.[20] By contrast, my own research on outcomes of mandatory arbitration hearings found a 21.4% employee win rate amongst cases administered by the AAA.[21] Around half of all mandatory arbitration cases administered by the AAA involve employment discrimination claims, with the majority of the remainder involving non-civil rights, common law-based claims.[22]

Turning to damage amounts, we find similar differences in outcomes. Eisenberg and Hill reported a median damage award of $150,500 in federal court employment discrimination trials and a median damage award of $68,737 in state court non-civil rights employment trials.[23] Meanwhile, Oppenheimer found a median damage award of $296,991 in California state court common law discharge trials.[24] By contrast, I found a median award of $36,500 in mandatory arbitration cases administered by the AAA.[25]

An employer faced with the prospect of a dispute in either litigation or arbitration will be concerned about both the likelihood that the employee will prevail and the potential damages that will be awarded. Across a number of potential cases that the employer may face, the combination of the employee win rate and the potential damages provides an indicator of the overall economic impact of resolving this set of cases. A useful measure of this outcome is the average award amount calculated across all cases, including those where the employee loses and those where no damages are awarded. Looking at the results reported by Eisenberg and Hill, we find that this mean outcome is $143,497 for federal court employment discrimination trials and $328,008 for state court non-civil rights employment trials.[26] By contrast, I find that for mandatory arbitration cases administered by the AAA, the mean outcome across all awards is $23,548, approximately one-seventh of the mean outcome in the federal court trials and one-fifteenth the mean outcome in the state court trials. This much lower outcome reflects

20. David Benjamin Oppenheimer, *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 L. REV. 511, 535 (2003).

21. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

22. Colvin & Pike, *supra* note 13, at 68.

23. Eisenberg & Hill, *supra* note 19, at 50.

24. Oppenheimer, *supra* note 20.

25. Colvin, *Empirical Study*, *supra* note 21, at 7.

26. See inflation adjusted results calculated in Colvin, *Empirical Study*, *supra* note 22, at 5, based on the results reported in Eisenberg & Hill, *supra*, note 20.

the combination of the lower employee win rate at arbitration hearings and the smaller awards to employees in arbitration.

The figures presented so far are the raw, unadjusted outcomes of trials and arbitration hearings. They do not reflect differences in the likelihood of settling cases before trial, effects of summary judgments or appeals, or selection effects on the types of cases employees bring. Before considering these other factors further, however, it is worth observing the relatively large differences in these raw outcomes. To the degree that employers are motivated by the likelihood of a relatively large damage award in a trial, this motivation will decrease with mandatory arbitration because those damage awards, for whatever reason, are much smaller. This may, in turn, significantly impact other resolution processes, particularly settlement, which is the most common way cases are resolved in both litigation and mandatory arbitration.[27] If the mean damage award for cases proceeding to a hearing in mandatory arbitration is much lower than the mean damage award at trial, this will reduce employee bargaining power in settlement negotiations and be likely to produce lower settlement amounts, because the likely award, and thus the risk for employers, is not as great.

The raw comparisons do not take into account procedural differences between litigation and mandatory arbitration. Employers may be more likely in litigation to defeat claims on summary judgment or to overturn unfavorable trial decisions on appeal. Research by Clermont and Schwab on employment litigation in the federal courts showed that, compared to other litigants, plaintiff employees tend to do relatively poorly in summary judgment motions and in appeals.[28] While summary judgment motions have historically been less common in arbitration, Kelly Pike and I found in recent research that they were used in one quarter of the mandatory arbitration cases that we examined.[29] Employers succeeding in winning dismissal of the case in over half of these motions,[30] suggesting that the differences from litigation in this area are diminishing. Further evidence of this trend comes from a survey of plaintiff employment attorneys that Mark Gough and I conducted in 2013. We asked the respondents questions about the most recent case that they had handled in arbitration that resulted in an award. In fully fifty-four percent of the 148 cases that proceeded to arbitration, a motion for summary judgment was filed.[31]

A broader source of potential differences in trial and arbitration hearing outcomes is the possibility of selection effects in the types of cases

27. *Id.* at 17.

28. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEGAL STUD. 429, 429 (2004).

29. Colvin & Pike, *supra* note 13, at 72.

30. *Id.*

31. *See* Gough, *supra* note 15, at 108.

that are brought through each forum. These selection effects arise on either the employee or the employer side. On the employee side, there may be a selection effect arising from the degree to which employees find mandatory arbitration to be a more or less amenable forum for bringing claims as compared to litigation. If mandatory arbitration is a relatively more accessible forum, then more employees might bring cases through it, and the overall pool of cases in arbitration might include cases with smaller damage awards at stake and claims that are harder to prove.[32] The relative accessibility of mandatory arbitration will, however, depend on how it affects the ability of employees to obtain and finance representation by counsel, or to act pro se, which will be the focus of the next Part.

There also may be selection effects on the type of cases brought in mandatory arbitration on the employer side. If mandatory arbitration is introduced in combination with internal grievance procedures and other preliminary ADR steps, then the cases that ultimately proceed to arbitration may represent weaker, lower-value claims. I will return to examine this possibility later in this Paper.

III.
MECHANISMS OF REPRESENTATION

For effective vindication of individual employment rights, there must be a mechanism of representation for employees bringing claims. In the litigation system, the plaintiffs' bar provides this basic function of expert advice and representation, assisting employees in bringing claims under the often complex structures of employment statutes. Certainly, the difficulties associated with establishing claims of employment discrimination typically require expert representation. But even seemingly straightforward claims such as wage and hour law violations can often implicate more legally complex issues, such as whether the claimant is in fact an employee or an independent contractor. In addition, many individual wage and hour claims are relatively small in size and so can only effectively be brought when aggregated with other similar claims in a class action. Such a suit would also require expert legal representation.

One of the hopes for mandatory arbitration was that it would increase accessibility by providing a relatively simple forum where employees would be able to bring claims effectively without representation. In litigation, around one fifth of claims are brought pro se. However, pro se claimants tend to have relatively low rates of success.[33] Rates of pro se

32. Estreicher, *supra* note 8, at 563-64; *see* David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STANFORD. L. REV. 1557, 1565-67 (2005).

33. Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J.

claims are higher in mandatory arbitration, but still represent only 24.9% of all mandatory arbitration claims.[34] These pro se claims in mandatory arbitration tend to be smaller in size, and employees bringing them are less likely to obtain a settlement. If they do proceed to a hearing, pro se employees are also less likely to be successful than employees who are represented. While self-representation is an interesting issue, the evidence indicates that it only occurs in a minority of cases in mandatory arbitration. As in litigation, representation by legal counsel is the predominant way in which employees bring cases in mandatory arbitration. The key question, then, is how mandatory arbitration affects the ability of employees to obtain representation.

What do we know about who is representing employees in mandatory arbitration? In a recent study I conducted with Kelly Pike, we collected data on employee representation in 325 mandatory arbitration cases administered by the AAA in 2008.[35] We found that amongst the attorneys representing employees in these cases, 56.7% included employment law as one of their primary practice areas.[36] The remainder typically were general litigation practitioners that did not specialize in employment cases. By contrast, 76.6% of the employers' counsel in these same cases were primarily employment law practitioners.[37]

The lower degree of employment law specialization on the employee side suggests that employees may be receiving less expertise in representation than their employer counterparts. Further reinforcing this concern, in 54.6% of the cases we examined, the law firm representing the employer was also handling one or more additional cases in our sample.[38] By contrast, amongst the law firms representing employees, only 10.7% handled two or more cases in our sample.[39] Not only are employers more likely to be represented by employment law specialist counsel, they are likely to be represented by firms with greater experience with mandatory arbitration itself.

On the employee side, this data captures the wide variation in the nature of representation in mandatory arbitration. According to the data, one quarter of employees proceed pro se. Another third of employees are represented by counsel, but by an attorney for whom employment law is not

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OF EMPIRICAL LEGAL STUD. 175, 188 (2010) (finding in a study of employment discrimination cases filed in federal district courts that "[o]ne in five plaintiffs . . . operat[es] pro se over the course of the lawsuit, and they are almost three times more likely to have their cases dismissed, are less likely to gain early settlement, and are twice as likely to lose on summary judgment").

34. Colvin, *Empirical Study*, *supra* note 21, at 16.

35. Colvin & Pike, *supra* note 13, at 65.

36. *Id.* at 70.

37. *Id.*

38. *Id.*

39. *Id.*

his primary practice. Fewer than half of employees at arbitration hearings are represented by an attorney who specializes in employment law as a primary practice area.[40]

What drives the ability of employees to obtain representation in these cases? In employment litigation, the key mechanism is the availability of contingency fee arrangements. For most employees, paying for representation on an hourly-fee basis is beyond their financial means. This is particularly the case given that most employment cases arise in the context of termination, where the employee has just lost his or her primary source of income.[41] Under a contingency fee arrangement, the plaintiff attorney takes on the financing of the case by assuming the risk of the success or failure. There are obvious limitations to this mechanism. It requires that a case provide a sufficient prospect of success and potentially recoverable damages for the plaintiff attorney to make the investment in handling the case. However, it also provides a self-financing mechanism for bringing cases that extends representation to large numbers of employee plaintiffs who would otherwise be unable to proceed with claims.

How does mandatory arbitration affect the ability of employees to obtain representation through this mechanism? It is important to recognize that plaintiff attorneys look across the full set of cases they handle to consider the potential outcome of contingency fee arrangements. Since their payment is a percentage of the damages where successful, and therefore receive nothing if their advocacy is unsuccessful, they must consider the likely average recovery across all cases. As a result, the key outcome to consider for a contingency fee arrangement is the mean damages across all cases, i.e. the overall outcomes examined in the previous Part. For a plaintiff attorney contemplating contingency fee arrangements, the mean damage outcome cited of $143,497 for federal court employment discrimination trials and $328,008 for state court non-civil rights employment trials would be the relevant amounts on which to calculate the potential recovery. With these average economic outcomes, a contingency arrangement of thirty percent or forty percent would provide a recovery substantial enough (in the $50,000-$100,000 range) to justify attorney financing of what could be a relatively long and complex employment case. By contrast, when we consider the mean outcome of $23,548 for mandatory arbitration cases, a similar contingency fee arrangement would only produce a potential return of approximately $10,000, a much smaller sum for the attorney. It might still be worthwhile for the attorney to take on the case if the forum and the case were simpler than in litigation, but if the case

40. *Id.*

41. See Nielsen et al., *supra* note 33, at 200, who report that 60.5% of the employment cases they analyzed involved firings

required an investment of more than a few thousand dollars, it would no longer be economically feasible for the plaintiff attorney to accept this case.

The danger is that relatively low win rates and damage amounts will discourage plaintiff attorneys from taking on many cases under mandatory arbitration procedures. As a result, we may see a negative selection effect in which the lack of accessible representation results in fewer cases brought where mandatory arbitration is required. To investigate whether mandatory arbitration has a negative effect on the likelihood of attorney representation, Mark Gough and I conducted a survey of employment attorneys who were members of either the National Employment Lawyers Association or the California Employers Association. Using the membership of these associations as our survey populations allows us to focus on attorneys who specialize in the representation of employees.[42] Using a combination of internet and mailed surveys, we collected 480 responses in the fall of 2013.

The survey asked attorneys responding what percentage of potential clients with employment claims they agreed to represent. On average, the attorneys accepted 15.8% of potential clients whose cases could proceed to litigation. By contrast, they only accepted 8.1% of potential clients who were covered by mandatory arbitration agreements. This finding supports the above analysis, suggesting that it is less financially feasible for attorneys to represent employees where there is a mandatory arbitration agreement due to the reduced likely damage outcomes. It indicates that rather than increasing accessibility, mandatory arbitration reduces the ability of employees to bring cases because they are less likely to find representation by attorneys.

These findings are concerning from an equality of access to justice perspective. One of the strongest public policy arguments in favor of ADR is that it may help reduce the barriers to access in the litigation system. Employment attorneys find that these barriers in litigation prevent them from taking many cases, due to the lack of provable damages that would allow them to make and recover the necessary investment. However, our results indicate that rather than increasing access, mandatory arbitration makes it less likely that plaintiff attorneys will be able to accept a case representing an employee. The reduced damages awarded and lower prospects of success common to arbitration cases appear to overwhelm any benefit from greater simplification of the procedures, with regard to whether representation will be available. While ADR would ideally reduce inequality in access to justice by allowing more employees to bring claims, what we have found is that it increases inequality in access to justice by reducing the effectiveness of the mechanism of representation by employment attorneys.

42. *See* Gough, *supra* note 15, at 102-03.

IV.
PATTERNS OF EMPLOYMENT RELATIONS

The processing and resolution of individual cases is only a part of the role of employment litigation in employment relations. Enforcement of employment laws has a broader purpose, and impacts the patterns of employer behavior. For example, beyond providing retrospective justice to a victim of discrimination in the workplace, an important purpose of litigating a case is to deter future discriminatory conduct and encourage fairer employment practices. The characteristics of the American system of employment litigation described earlier are particularly suited to this objective. Cases are often long and procedurally complex to bring, but, as discussed, the prospect of relatively large damages provides a source of bargaining power on the employee side and creates a strong incentive for employers to take proactive measures to avoid the dangers of litigation.

How does mandatory arbitration affect the process through which enforcement of employment law produces changes in patterns of employment relations and management behavior in the workplace, especially where mandatory arbitration reduces legal pressures on the employer, as discussed earlier? Although there are no existing empirical studies that directly test this issue, a recent study by Zev Eigen and Adam Seth Litwin raises some interesting questions.[43] Eigen and Litwin examined the workplace justice perceptions of employees before and after the adoption of an organizational dispute resolution procedure that included mandatory arbitration. They found mixed effects. Employee perceptions of procedural justice in the workplace decreased after the adoption of the procedure.[44] But, conversely, perceptions of informal, interpersonal justice in the workplace increased after the adoption of the procedures.[45] Eigen and Litwin ascribe these different reactions to employees reacting positively to individual manager efforts to handle problems at the workplace level, but negatively to the centrally implemented formal procedure.

As with many employers, the organization studied here did not introduce mandatory arbitration on its own, but rather as part of a system of internal grievance procedures that included a number of preliminary steps before arbitration.[46] This makes the assessment of the effect of mandatory arbitration itself more complex. A number of authors have written favorably of the potential for internal grievance procedures to enhance fairness when

43. Zev Eigen & Adam Litwin, *Justice or Just Between Us? Empirical Evidence of the Tradeoff Between Procedural and Interactional Justice in Workplace Dispute Resolution*, 67 INDUS. & LAB. REL. REV. 171 (2014).

44. *Id.* at 171-72.

45. *Id.* at 192-93.

46. *Id.* at 181.

they include steps that must be taken prior to arbitration itself.[47] Some have argued that the potential for these procedures to produce settlement of meritorious claims prior to arbitration may account for lower employee success rates in mandatory arbitration, because only weaker cases proceed to arbitration.[48]

Some of my own research has examined the adoption and operation of internal grievance procedures and their relationship to mandatory arbitration. Many organizations that require mandatory arbitration of employment disputes also have multi-step internal grievance procedures. In an analysis of survey data of organizations in the telecommunications industry, I found that mandatory arbitration as the final step of a non-union grievance procedure was associated with higher usage by employees compared to procedures with only managerial decision-makers.[49] This provides some evidence in support of what has been dubbed the appellate effect, whereby internal procedures may be resolving cases before arbitration, affecting the mixture of cases that ultimately reach arbitration in the first place. However, there is no requirement that organizations adopt any particular type of internal grievance procedures in conjunction with mandatory arbitration. Indeed, an employer can simply require employees to agree to arbitrate any potential legal claim without providing any type of internal appeal procedure apart from arbitration. To the extent that employers adopt mandatory arbitration without associated internal procedures, this will reduce the size of an appellate effect on the types of cases reaching mandatory arbitration.

It is also not obvious that the inclusion of mandatory arbitration is needed to promote effective internal grievance procedures. An organizational example is instructive here. One of the leading examples of a company adopting a particularly extensive internal grievance procedure including mandatory arbitration was the diversified auto parts and aerospace firm TRW.[50] The company experienced an upsurge in employment litigation following the downsizing of its aerospace division in the early 1990s.[51] In response to and inspired by the recent *Gilmer* holding, it adopted mandatory arbitration for its employees beginning in 1994.[52] However, in addition to adopting mandatory arbitration, it conducted a

47. *E.g.*, DAVID B. LIPSKY, RONALD L. SEEBER & RICHARD FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT (2003); Sherwyn et al., *supra* note 32.

48. Sherwyn et al., *supra* note 32.

49. Alexander J.S. Colvin, *The Dual Transformation of Workplace Dispute Resolution*, 42 INDUS. REL. 712, 732 (2003).

50. The following description of TRW's procedure is based on the case study described in: Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, 13 ADVANCES IN INDUS. & LAB. REL. 71 (2004).

51. *Id.*

52. *Id.*

more general overhaul of its existing internal grievance procedures to ensure that all of its operating units had well-developed, effective procedures. These procedures included more informal lower level complaint procedures, peer review panels in some units, and mediation using external third-party neutrals.[53]

The result was a complex set of internal procedures that was used frequently by employees to resolve many workplace disputes. The enhancement of these internal procedures was certainly inspired in part by the organizational review process directed at adopting mandatory arbitration. Yet, in practice, this internal dispute resolution system operated with very little involvement of its arbitration element. In the initial three years of operation, only three out of seventy-two cases that reached the mediation stage subsequently proceeded to arbitration.[54] Furthermore, the form of arbitration that TRW adopted was one in which the decision was non-binding on the employee, allowing subsequent appeal to the courts.[55]

TRW provides a good example of a particularly effective internal grievance procedure. It retains arbitration in a form different from the standard type of mandatory arbitration that bars access to the courts, and in practice arbitration is rarely used to resolve cases. Well-designed internal grievance procedures can be a useful element in extending due process rights in the nonunion workplace, but the evidence from the best practices examples in this area suggests that it is not necessary to implement mandatory arbitration to have effective internal procedures.

More generally, one should not extrapolate too far from the types of best practice examples, examples for which it is often easier to gather data. In addition to examples like TRW and other companies that have included due process protections in arbitration and implemented well-developed internal grievance procedures,[56] there are also organizations that allow for substantial due process deficiencies in their arbitration procedures and lack pre-arbitration steps involving mediation and/or internal grievance procedures. As a general matter, we know much less about these organizations because they are less willing to be studied. As a result, we learn of their existence more often through cases challenging their procedures, such as the notorious *Hooters* arbitration procedure, which was held to be unenforceable due to its many due process deficiencies.[57]

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53. *Id.*

54. *Id.* at 86.

55. *Id.*

56. *See, e.g.*, Sherwyn et al., *supra* note 32; Richard A. Bales & Jason N.W. Plowman, *Compulsory Arbitration as Part of a Broader Dispute Resolution Process: The Anheuser-Busch Example*, 26 HOFSTRA LAB. & EMP. L.J. 1 (2008).

57. *E.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 941 (4th Cir. 1999).

The larger point is that there is wide variation in the practices and procedures that companies adopt. It is the case that some companies do adopt fair ADR procedures that should be encouraged. Others provide little or nothing in the way of internal due process rights for their employees. The problem with allowing the employer the discretion to decide whether or not to adopt procedures, and in what form these procedures should be adopted, is that it encourages variation in the quality of due process rights that employees enjoy, and promotes inequality of access to justice in the workplace. In practice, who an employee works for determines how that employee's rights to fair treatment in employment are protected.

CONCLUSION

I began by posing the question of how mandatory arbitration affects equality of access to justice in the workplace. Mandatory arbitration changes the landscape of employment dispute resolution in a number of important ways, including by altering the impact of employment laws. The analysis I present addresses how mandatory arbitration affects four key components of employment relations and individual rights in the workplace.

First, mandatory arbitration changes the structure of rules by which individual employment rights are enforced. The process of enforcing individual rights in the workplace becomes subject to the employer's choice of whether or not to adopt mandatory arbitration and of how any procedure that is adopted is structured. Beyond producing inequality in whether employees have access to the courts, the employer's decisions determine the type of arbitration procedure that is adopted, whether an arbitration service provider administers the procedure, the specific provider of the arbitration procedure, and even whether employees are able to bring a class action.

Second, mandatory arbitration changes the relative bargaining power of employees attempting to enforce their individual rights. Whereas a key feature of litigation is that it exposes the employer to the risk of potentially large damage awards, mandatory arbitration reduces the degree to which the employer is subject to this source of pressure. There are a number of important procedural differences that may affect the mixture of cases brought in arbitration versus litigation. But the overall picture in mandatory arbitration is that the risk of employees receiving large damage awards similar to those in litigation is substantially reduced.

Third, the smaller potential payoffs to employees disrupt the mechanism of representation in employment cases. In employment litigation, contingency fee arrangements allow a broader set of employees to obtain representation by attorneys who finance the cases themselves. Representation would be beyond the financial means of many individual

employees if they had to pay standard hourly fees. In mandatory arbitration, the lower economic damages reduce the potential payoffs from contingency fee arrangements, creating a barrier to representation. We find evidence of this in lower rates of acceptance of potential cases by attorneys under mandatory arbitration.

Fourth, the adoption of mandatory arbitration has mixed effects on the organization of internal conflict resolution procedures. Some employers do choose to enhance their internal conflict resolution procedures alongside of adopting mandatory arbitration. Many of these procedures provide avenues for appeal that resolve significant numbers of potential cases without the necessity of invoking arbitration. But there is also substantial variation in whether employers adopting mandatory arbitration also use internal conflict resolution procedures, as well as variation within the types of procedures they adopt in the workplace.

Overall, the picture that emerges is one in which mandatory arbitration disrupts existing mechanisms for enforcement of individual employment rights. If arbitration provided a more effective and accessible mechanism of enforcement, then this might be a trade-off worth making. However, the evidence examined here suggests that it results in both wide variation in how employment rights are protected among companies and significant barriers to the effective bringing of claims against employers. The result is that, rather than enhancing equality, mandatory arbitration exacerbates inequality in access to justice in the workplace.