Chicago-Kent Law Review

Volume 94 | Issue 1 Article 2

2-8-2019

The Metastasization of Mandatory Arbitration

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THE METASTASIZATION OF MANDATORY ARBITRATION*

ALEXANDER J.S. COLVIN†

INTRODUCTION[1]

Mandatory arbitration is a controversial practice in which a business requires employees or consumers to agree to arbitrate legal disputes with the business rather than going to court. Although seemingly voluntary in that the employee or consumer can choose whether or not to sign the arbitration agreement, in practice signing the agreement is required if the individual wants to get the job or to obtain the cellphone, credit card, or other consumer product the business is selling. Mandatory arbitration agreements are legally enforceable and effectively bar employees or consumers from going to court, instead diverting legal claims into an arbitration procedure that is established by the agreement drafted by the company and required as a condition of employment or of doing business with it.[2]

Much attention has focused on the use of mandatory arbitration agreements in consumer contracts, such as consumer financial contracts, cellphone contracts, and nursing home resident contracts and the implications of such agreements for consumer rights.[3] There is less awareness of the use of

* This article is based on the Kenneth M. Piper Memorial Lecture in Labor Law given at the Chicago-Kent College of Law on April 10, 2018. I would like to express my appreciation to the Piper family for supporting this lecture and the Chicago-Kent College of Law for hosting it.

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1. The study described in this paper was funded by a grant from the Economic Policy Institute (EPI). I gratefully acknowledge the support and assistance of the EPI staff on this project, in particular the valuable comments and suggestions of Heidi Shierholz and Celine McNicholas. I also want to thank the Survey Research Institute (SRI) at Cornell University and their staff for the hard work involved in administering the telephone survey for this study. An earlier version of the results of this survey was presented in a September 2017 report published by EPI. Alexander J.S. Colvin, *The Growing Use of Employment Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ [https://perma.cc/97XL-4QGH].

2. See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., PAPER NO. 414, THE ARBITRATION EPIDEMIC (2015) [hereinafter ARBITRATION EPIDEMIC], https://www.epi.org/publication/the-arbitration-epidemic/ [http://perma.cc/X6VL-8QVW], for a general discussion of the state of the law and practice around mandatory arbitration.

3. The Consumer Financial Protection Bureau conducted a study of the widespread use of mandatory arbitration in consumer financial contracts and proposed a rule limiting the use of class action

mandatory arbitration agreements in employment contracts, but it is no less of a concern for those workers affected by it. These mandatory employment arbitration agreements bar access to the courts for all types of legal claims, including employment discrimination and sexual harassment claims based on Title VII of the Civil Rights Act,[4] protections for employees with disabilities under the Americans with Disabilities Act,[5] rights to maternity and medical leaves based on the Family and Medical Leave Act,[6] and entitlements to minimum wages and overtime under the Fair Labor Standards Act.[7] If an employment right protected by a federal or state statute has been violated and the affected worker has signed a mandatory arbitration agreement, that worker does not have access to the courts and instead must handle the claim through the arbitration procedure designated in the agreement.

Mandatory employment arbitration is very different from the labor arbitration system used to resolve disputes between unions and management in unionized workplaces. Labor arbitration is a bilateral system jointly run by unions and management, while mandatory employment arbitration procedures are unilaterally developed and forced on employees by employers.[8] Whereas labor arbitration deals with the enforcement of a contract privately negotiated between a union and an employer, mandatory employment arbitration concerns employment laws established in statutes. Research has found that employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts.[9] Indeed, employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration service providers.[10]

waivers in these agreements, however the proposed rule was repealed by legislation signed by President Trump on November 1, 2017. *See* Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040); Arbitration Agreements, 82 Fed. Reg. 55500 (Nov. 22, 2017) (removing 12 C.F.R. pt. 1040). *See also* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [http://perma.cc/2R2J-SLSK]; Arbitration Agreements, 81 Fed. Reg. 32829 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040). Mandatory arbitration in nursing home resident contracts was the focus of a rule by the Obama administration banning their use. 42 C.F.R. § 483.70(n) (2016).

4. 42 U.S.C. §§ 2000e–2000e-17 (2012).

5. 42 U.S.C. §§ 12101–12217 (2012).

6. 29 U.S.C. §§ 2601–2654 (2012).

7. 29 U.S.C. §§ 201–219 (2012).

8. *See generally* HARRY C. KATZ ET AL., AN INTRODUCTION TO U.S. COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS, Ch. 12 (5th ed. 2017).

9. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5 (2011).

10. See ARBITRATION EPIDEMIC, *supra* note 2, at 18–23, for an overview of this research.

But how common and important is mandatory arbitration? If it only affected a small group of workers, it might be an interesting development of conceptual significance, but not a major shift in employment relations. Indeed, over the course of the 1990s and 2000s while debates over mandatory arbitration raged in legal and policy circles, they did not penetrate into the broader public consciousness. One might infer from this that mandatory arbitration had remained an issue of concern only with a narrow segment of the workforce among those few employers that decided to experiment with this practice. However mandatory arbitration has received broader attention in recent years, both in a series of important Supreme Court decisions and in popular media.[11] The question is whether this reflects a shift in the role of mandatory arbitration. Has it broken out from the narrower set of initial adopters to become a more widespread and consequential practice for employment relations? To put it more provocatively, the question that the study presented in this paper will seek to answer is whether there has been a *metastasization* of mandatory arbitration?

I. THE IMPETUS FOR MANDATORY EMPLOYMENT ARBITRATION

Although the Federal Arbitration Act (FAA)[12] dates back to 1925, through most of its history, its impact was largely confined to the enforcement of arbitration agreements and awards arising from contractual issues in commercial disputes, the original context for passage of the FAA. It was not until the 1980s that the reach of the FAA was extended more broadly as a result of a series of Supreme Court decisions announcing a liberal federal policy in favor or arbitration, endorsing its use to resolve statutory claims, and holding that it broadly preempted state law limitations on arbitration.[13]

The 1980s revolution in arbitration law initially did not involve the employment law area. As a result, employment arbitration in the nonunion workplace setting remained a relatively rare practice, mostly used to substitute for union grievance arbitration procedures. This changed with the crucial

11. *See, e.g.*, Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [http://perma.cc/G7W7-XS4U]; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [http://perma.cc/VPG6-VKS4].

12. 9 U.S.C. §§ 1–16 (2012).

13. *See* Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); ARBITRATION EPIDEMIC, *supra* note 2, at 18–23.

1991 Supreme Court decision in *Gilmer v. Interstate/Johnson Lane*,[14] upholding the enforceability of arbitration agreements covering statutory employment claims. *Gilmer* opened the door to mandatory employment arbitration agreements by allowing their use for the growing range of statutory employment rights.

Although *Gilmer* opened the door to its use, the practical impact of mandatory employment arbitration still depended on whether or not American businesses decided to require that their employees sign these agreements as a term and condition of employment. Research from the 1990s and early 2000s found gradually expanding use of mandatory employment arbitration.[15] However there has been a lack of subsequent research tracking whether this growth trend continued beyond the early 2000s and describing the current extent of mandatory employment arbitration.

The lack of basic data on the extent of mandatory arbitration is especially concerning given that recent years have seen a series of court decisions encouraging the expanded use of mandatory arbitration. In two key decisions, *AT&T Mobility LLC v. Concepcion*[16] (2011) and *American Express Co. v. Italian Colors Restaurant*[17] (2013), the Supreme Court held that class action waivers in mandatory arbitration agreements were broadly enforceable.[18] This meant that businesses could not only use mandatory arbitration agreements to bar access to the courts for individual claims, they could also use them to shield themselves from class action claims. This gave businesses an additional incentive to include mandatory arbitration agreements in employment and other contracts.

More recently, in 2018 the Supreme Court decided *Epic Systems v. Lewis*,[19] on the specific question of the enforceability of class action waivers in mandatory employment arbitration agreements. In this case, the central issue was whether requiring this waiver of the ability to use collective action to address employment law violations is a violation of the protections of the right to engage in concerted action contained in Section 7 of the National Labor Relations Act (NLRA).[20] The Supreme Court accepted the employer's

14. 500 U.S. 20, 23 (1991).

15. *See generally* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 410 (2008).

16. 563 U.S. 333 (2011).

17. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

18. *Id.* at 2312; *AT&T Mobility LLC*, 563 U.S. at 344.

19. Epic Sys. Corp. v. Lewis, No. 16-285, slip op. at 1–2 (U.S. May 21, 2018).

20. 29 U.S.C. §§ 151–169 (2012).

argument that such waivers are not a violation of the NLRA and are enforceable under the FAA.[21] This decision will likely encourage businesses to adopt mandatory employment arbitration and class action waivers even more widely.

II. EXISTING RESEARCH ON THE EXTENT OF MANDATORY EMPLOYMENT ARBITRATION

Despite growing attention to the issue of mandatory employment arbitration, there is a lack of good data on how widespread it has become. A 1992 academic study of conflict resolution procedures used by corporations in nonunion workplaces found that 2.1 percent of the companies surveyed included arbitration in their procedures.[22] The one major governmental effort to investigate the extent of mandatory arbitration was a 1995 GAO survey, which found that 7.6 percent of establishments had adopted mandatory employment arbitration.[23]

My own 2003 survey of conflict resolution procedures used in the telecommunications industry found that 14.1 percent of establishments in that industry had adopted mandatory arbitration.[24] Since larger establishments with more employees were more likely to have adopted mandatory arbitration, these procedures covered 22.7 percent of the nonunion workforce in the industry.[25]

The overall picture we have is one of mandatory employment arbitration expanding through the 1990s and early 2000s to more than a fifth of the workforce. The present study sought to determine whether this expansion has continued beyond 2003, how widespread mandatory employment arbitration is currently and what types of workers it most commonly covers.

21. *Epic Sys. Corp.*, slip op. at 24.

22. *See* Peter Feuille & Denise R. Chachere, *Looking Fair and Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27, 31 (1995).

23. U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7 (1995). The GAO's survey initially indicated that 9.9 percent of establishments had mandatory arbitration procedures, however on follow-up a number of them indicated that they had made mistakes in reporting, such as confusing labor arbitration procedures in unionized workplaces with nonunion mandatory employment arbitrations. Adjusting for these erroneous responses, only 7.6 percent of the establishments actually had mandatory employment arbitration.

24. *See* Colvin, *supra* note 15.

25. *Id.*

A. Study Methods

To investigate the extent of mandatory employment arbitration, I conducted a national survey of private-sector American business establishments,[26] focusing on the use of mandatory arbitration for nonunion employees. The survey was conducted from March to July 2017 and had a sample size of 627, yielding a margin of error at 95 percent confidence of plus or minus 3.9 percentage points. The survey was funded by the Economic Policy Institute (EPI) and administered through telephone- and web-based methods by the Survey Research Institute (SRI) at Cornell University.

The study measured the extent of mandatory employment arbitration by surveying employers rather than by surveying employees because research has found that employees are often unaware of or fail to recall that they have signed arbitration agreements and may not understand the content and meaning of these documents.[27] The survey was limited to private-sector employers because public-sector employees typically have their employment regulated by specific public-sector employment laws and employment practices differ substantially between private- and public-sector employers. The survey focused on nonunion employees since unionized employees have their employment governed by collective bargaining agreements which provide for labor arbitration to resolve disputes. Although both are forms of arbitration, labor arbitration differs in many respects from mandatory employment arbitration and should not be included in the same category.[28]

The survey population was drawn from Dun & Bradstreet's national marketing database of business establishments. It was stratified by state population to be nationally representative. The survey population was restricted to private-sector business establishments of 50 or more employees and the analysis was restricted to procedures covering nonunion employees. The individual respondents were the establishment's human resources manager or whichever individual was responsible for hiring and onboarding employees. The reason for use of this individual as the person to respond to the survey

26. A business establishment means an individual business location or workplace, such as an office building or plant.

27. *See* Zev Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 401 (2008). The study found that a majority of Circuit City employees he interviewed were unaware that they had signed arbitration agreements or of the import of such agreements, even though the company had a longstanding policy of requiring its employees to sign mandatory arbitration agreements. Circuit City's arbitration policy had been the subject of an important case on the enforceability of these agreements decided by the Supreme Court in 2001.

28. One of the most important differences is that labor arbitration procedures are jointly established and administered by unions and management, in contrast to mandatory arbitration which is unilaterally established by the employer. In addition, most labor arbitration procedures do not bar employees from bringing statutory employment claims separately through the courts.

is that mandatory arbitration agreements are typically signed as part of the onboarding paperwork when a new employee is hired. As a result, the manager responsible for this process is the individual most likely to be knowledgeable about the documents the new employee is signing. Typical job titles of individual respondents included human resource director, human resource manager, personnel director, and personnel manager.

Participants were initially contacted by telephone and then given the option of completing phone or web versions of the survey. Follow-up calls were made to encourage participation. Where participants had provided email addresses, a series of emails were also sent to prompt completion of the survey. To encourage participation, respondents were offered the opportunity to win one of ten $100 Amazon gift cards in a raffle drawing from among participants in the survey.

Data collection started in March 2017 and was completed in July 2017. A total of 1,530 establishments were surveyed, from which 728 responses were obtained, representing an overall response rate of 47.6 percent. Some survey responses had missing data on specific questions; however, 627 respondents provided complete data on the key variables of interest. The response rate and sample size are similar to those obtained in past establishment-level surveys of employment relations and human resource practices.[29] The median establishment size in the sample is 90 employees and the average size is 226 employees. Most establishments are single-site businesses, while 38.2 percent are part of larger organizations. These larger organizations have an average workforce size of 18,660 employees. Overall, 5.2 percent of establishments in the sample are foreign-owned.

B. Study Findings

1. More than half of private-sector nonunion workers are subject to mandatory arbitration

On the central question of whether employees were required to sign a mandatory "agreement or provision for arbitration of legal disputes with the company," 50.4 percent of responding establishments indicated that employees in their establishment were required to enter into this type of agreement.

29. See Rosemary Batt & Alexander J.S. Colvin, *An Employment Systems Approach to Turnover: Human Resources Practices, Quits, Dismissals, and Performance*, 54 ACAD. MGMT. J. 695, 701–03 (2011), for a discussion of methodological issues in establishment level survey research. Use of the establishment level of observation in organizational survey research has been found to yield more reliable responses to workforce related questions. *See also* Barry Gerhart et al., *Measurement Error in Research on Human Resources and Firm Performance: How Much Error is There and How Does it Influence Effect Size Estimates?*, 53 PERSONNEL PSYCHOL. 803 (2000).

Although mandatory employment arbitration is usually established by having employees sign an arbitration agreement, typically at the time of hiring, in some instances businesses adopt arbitration procedures simply by announcing that these procedures have been incorporated into the organization's employment policies as part of the procedures for resolving workplace conflicts or grievances. An additional 3.5 percent of establishments had adopted mandatory arbitration using this second mechanism. Combined with the 50.4 percent of employers who require employees to sign an agreement at time of hiring, this means that a total of 53.9 percent of all establishments in the survey had adopted mandatory employment arbitration through one of these two mechanisms.

The establishments that have adopted mandatory arbitration tend to be those with larger workforces. Adjusting for workforce size, overall 56.2 percent of employees in the establishments surveyed were subject to mandatory arbitration procedures. Extrapolating to the overall private-sector nonunion workforce, this corresponds to 60.1 million American workers who are now subject to mandatory employment arbitration procedures and no longer have the right to go to court to challenge violations of their employment rights.[30]

2. Many companies have adopted mandatory employment arbitration recently

For employers who have adopted mandatory arbitration, I asked them how recently they adopted this policy. Among the employers with mandatory employment arbitration, 39.5% of them adopted their policy within the last five years, i.e. from 2012 to the present, whereas 60.5% had adopted their policies more than five years ago. This cut-off date is important because it was in 2011 that the Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, deciding that class action waivers in the mandatory arbitration agreements were broadly enforceable.[31] Thus, there was a substantial growth in the adoption of mandatory employment arbitration during this five year period following the Supreme Court giving a green light to the use of mandatory arbitration clauses to bar class actions. Some of this growth was driven by newer, recently established companies deciding to adopt mandatory arbitration for their employees. But even among larger employers who mostly have been around for longer periods of time, many of them only

30. This estimate is based on the Bureau of Labor Statistics report, Union Members – 2016, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Jan. 26, 2017), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/QVJ4-J64E], which reports an overall private-sector workforce of 115.417 million, among which 8.437 million are union represented private sector workers, with the remainder of 106.980 million workers being nonunion.

31. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

adopted mandatory arbitration in the last five years. Census data indicates that only 10% of establishments with over 100 employers are less than five years old,[32] but the survey data indicates that 45.3% of these larger establishments adopted mandatory arbitration within the last five years, indicating that there has been a surge in adoption of mandatory arbitration even among larger, older companies.[33]

3. Larger companies are more likely to adopt mandatory employment arbitration than smaller companies

As mentioned above, the likelihood that an employer will adopt mandatory employment arbitration varies with the size of the employer. Whereas 53.9 percent of all establishments had mandatory arbitration, among establishments that were part of companies with 1,000 or more employees, 65.1 percent had mandatory arbitration, which is a statistically significant difference (at the $p<.05$ level) from the 50.5 percent of establishments with under 1000 employees that had mandatory arbitration. Breaking down employer size further in the table below, we see that it is the very largest employers who have the highest rates of adopting mandatory arbitration.

Table 1: Mandatory Arbitration by Size of Employer

Employer Workforce Size	**Mandatory Arbitration**
Fewer than 100 employees	49.8%
100 to 499 employees	49.2%
500 to 999 employees	59.3%
1000 to 4999 employees	61.8%
5000 or more employees	67.7%**

*Note: Adoption of mandatory arbitration in a category of establishments is significantly different from in other establishments at the: ** $p<.05$ level, * $p<.10$ level.*[34]

The results for size of employers adopting mandatory arbitration are also consistent with the findings of a recent study of the Fortune 100 companies by Imre Szalai.[35] Rather than using a survey methodology, Szalai examined the use of employment arbitration by these companies through a

32. *See generally* U.S. CENSUS BUREAU, BUSINESS DYNAMICS STATISTICS: ESTABLISHMENT CHARACTERISTICS DATA TABLES (2018), https://www.census.gov/ces/dataproducts/bds/data_estab.html [https://perma.cc/BHA8-DCZU].

33. *Id.*

34. Significance tests in this and subsequent tables indicate whether the proportion of establishments adopting mandatory arbitration in each sub-category is different from that in the rest of the sample.

35. *See* IMRE S. SZALAI, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES (2018).

search for cases involving these companies where they had sought to enforce mandatory arbitration agreements.[36] He was able to find 65 companies (or 65% of the Fortune 100) with cases involving employment arbitration agreements covering non-executive level employees.[37] This is strikingly similar to the finding in my survey of 67.7 percent of the largest category of employers (those with 5000 or more employees) that had adopted mandatory arbitration. The similar results obtained using these two very different methodologies provides support for the validity and reliability of the findings obtained in both studies.

The finding of higher adoption rates among larger employers fits with what we know about organizational policies and practices. In general, larger organizations with more sophisticated human resource policies and better legal counsel are more likely to adopt policies, like the use of mandatory employment arbitration, that protect them against legal liability.[38] They could also become trendsetters over time if smaller employers copy these practices that larger employers have proven to be effective in protecting employers against legal actions.

4. Mandatory arbitration by State

The incidence of mandatory employment arbitration varies across the country. The table below shows the percentage of establishments that have adopted mandatory employment arbitration procedures in each of the twelve largest states by population.[39]

36. *Id.* at 5.

37. *Id.* at 9–10.

38. *See, e.g.*, Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1545 (1992) (showing that larger organizations are more likely to adopt organizational policies designed to protect them from the impact of civil rights laws).

39. I only report the adoption rate for the twelve largest population states to ensure that there are a sufficient number of observations per state to provide reliable estimates—each of these states had at least twenty observations in the sample. Although the survey is national in coverage, the smaller states had fewer observations per state.

Table 2: Mandatory Arbitration by State

State (in order of population size)	Mandatory Arbitration
California	67.4%**
Texas	67.9%
Florida	53.6%
New York	55.0%
Illinois	42.3%
Pennsylvania	54.5%
Ohio	51.8%
Georgia	55.3%
North Carolina	70.0%*
Michigan	42.9%
New Jersey	40.5%*
Virginia	55.2%

*Note: Adoption of mandatory arbitration in a category of establishments is significantly different from in other establishments at the: ** p<.05 level, * p<.10 level.*

It is noteworthy that the two largest states, California and Texas, both have substantially greater rates of adoption of mandatory employment arbitration than the national average of 53.9 percent of establishments. California has long been viewed as a state where mandatory employment arbitration is especially common, a consequence of employers reacting to the relatively employee-protective environment of that state's employment laws by using mandatory arbitration to opt out of being subject to the state court system.[40] However, these results suggest that mandatory employment arbitration is equally common in Texas, where the state legal environment is generally considered to be more favorable to employers. Although for Texas we do not have enough evidence statistically to make a definitive conclusion as to the higher adoption rate for that state, these results do suggest that mandatory arbitration is not confined to the states with more employee-favorable employment laws. In general, the results show a widespread adoption of mandatory arbitration across the nation, with all of the 12 largest states by population having at least 40% of employers adopting mandatory arbitration

40. See Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR REV. 1019, 1026 (2015), for more detailed discussion of the state law environments affecting mandatory arbitration in California and Texas.

5. Mandatory arbitration by industry

Rates of imposition of mandatory arbitration also vary across different industries. The table below shows adoption of mandatory arbitration by industry (based on North American Industry Classification System (NAICS) code categories).

Table 3: Mandatory Arbitration by Industry

Industry[41]	**Mandatory Arbitration**
Construction	37.7%**
Manufacturing	52.9%
Wholesale Trade	52.9%
Retail Trade	57.1%
Transportation	51.3%
Information	59.1%
Finance, Insurance, and Real Estate	48.5%
Business Services	61.1%
Education and Health	62.1%*
Leisure and Hospitality	54.0%
Other Services	48.5%

*Note: Adoption of mandatory arbitration in a category of establishments is significantly different from in other establishments at the: ** p<.05 level, * p<.10 level.*

These results show that adoption of mandatory arbitration is particularly high in the education and health industry and relatively low in the construction industry. However more noteworthy is that mandatory arbitration appears to be relatively widespread, with penetration levels of close to or above half of establishments in all industries apart from construction.

Since the proportion of female and racial and ethnic minority employees varies significantly across industries, we can also look at whether the rate of imposition of mandatory arbitration varies with the composition of the workforce in the industry. Construction, an industry with a predominantly male workforce has the lowest rate of imposition of mandatory arbitration, whereas education and health, an industry with a more predominantly female workforce, has the highest rate of imposition of mandatory arbitration. Are

41. Classifications are based on two-digit NAICS codes. Industries with fewer than twenty observations in the dataset are not reported due to the small sample sizes being too small to yield reliable estimates.

employers in industries with more predominantly female or minority workforces more likely to adopt mandatory arbitration?

I can investigate this question further using data on the workforce compositions of different industries. Under the assumption that *within* an industry, men and women have the same likelihood of being subject to mandatory arbitration, I can estimate the share of men and women who are subject to mandatory arbitration agreements using gender breakdowns of employment by industry from Bureau of Labor Statistics data for 2016. Using this approach, I estimate that 57.6 percent of female workers are subject to mandatory arbitration, slightly higher than the rate for the overall population, and 53.5 percent of men are subject to mandatory arbitration.[42] Based on similar calculations, I estimate that 59.1 percent of African-American workers are subject to mandatory arbitration, 54.3 percent of Hispanic workers are subject to mandatory arbitration, and 55.6 percent of White-NonHispanic workers are subject to mandatory arbitration.[43] This indicates that overall female workers and African-American workers are the most likely to be subject to mandatory arbitration.

6. Mandatory arbitration by pay level

To investigate further the impact of workforce characteristics on the adoption of mandatory arbitration, I consider its relationship to pay levels. Are workers in higher wage or lower wage establishments more likely to have mandatory arbitration imposed on them? The survey included a question about the average pay level of workers in the establishment. In the table below, I report the percentage of workplaces with mandatory arbitration by the average pay level of workers in the establishment. Average pay levels are divided into quartiles and annual salaries converted to equivalent hourly wages for ease of comparison.

42. Estimates of the rate of mandatory arbitration coverage for minority and female workers was calculated based on publicly available data since these were not measured directly in the survey. Adjustments for industry employment levels and percentages of female, African-American, and Hispanic employees by industry are based on data provided in a survey from the Bureau of Labor Statistics. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2017), https://www.bls.gov/cps/lfcharacteristics.htm#laborforce [https://perma.cc/7NKS-NK2T]. A rate of coverage was calculated by summing across industries the product of the mandatory arbitration coverage rate for the industry and the number of female or minority workers in the industry, to calculate a total number of female or minority workers covered by mandatory arbitration, and then dividing by the total female or minority workforce size.

43. *Id.*

Table 4: Mandatory Arbitration by Pay Level

Average Wage Level	**Mandatory Arbitration**
Less than $13.00	64.5%**
$13.00-$16.99	52.9%
$17.00-$22.49	47.7%*
$22.50 and greater	54.1%

*Note: Adoption of mandatory arbitration in a category of establishments is significantly different from in other establishments at the: ** p<.05 level, * p<.10 level.*

It is the employers with the lowest paid workforces that are most likely to impose mandatory arbitration on their employees. This is a concern from a policy perspective because low paid employees are particularly vulnerable to infringements of their employment rights, with researchers having found widespread violations of wage and hour laws among these workers.[44]

7. Mandatory arbitration by employee education level

Another workforce characteristic that I asked about in the survey is the education level of the workforce. In the table below I categorize establishments by the most common education level of employees and look at how mandatory arbitration adoption rates vary by education level.

Table 5: Mandatory Arbitration by Education Level

Typical Education Level	**Mandatory Arbitration**
Some high school	52.0%
High school	53.1%
Some college	51.2%
College degree	58.9%

*Note: Adoption of mandatory arbitration in a category of establishments is significantly different from in other establishments at the: ** p<.05 level, * p<.10 level.*

This comparison indicates that there is relatively little difference at lower education levels. Adoption of mandatory arbitration is slightly more common for workforces with higher education levels, but the differences are not statistically significant.

44. *See* ANNETTE BERNHARDT ET AL., THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET 1–3 (Bernhardt et al. eds., 2008).

8. Class action waivers in mandatory arbitration

Although class action waivers are one of the most controversial features of mandatory arbitration procedures, it is important to recognize that mandatory arbitration agreements do not necessarily include class action waivers. Among the survey respondents whose companies had mandatory arbitration procedures, 30.1 percent included class action waivers. These tended to be in establishments with larger workforces, so overall 41.1 percent of employees covered by mandatory arbitration procedures were also subject to class action waivers. Relative to the overall workforce, including both those covered and those not covered by mandatory arbitration, these estimates indicate that 23.1 percent of all private-sector nonunion employees are subject to class action waivers in mandatory arbitration procedures, corresponding to 24.7 million American workers.

The finding that many employers who have adopted mandatory employment arbitration have not included class action waivers in their procedures stands in contrast to the situation with consumer financial contracts, which the CFPB found almost always include class action waivers along with mandatory arbitration.[45] One explanation for the lower use of class action waivers in the employment setting was the ongoing legal uncertainty about their enforceability prior to the Supreme Court's decision in *Epic Systems v. Lewis*.[46] Given the upholding of the use of class action waivers in mandatory employment arbitration procedures in that decision, resolving the uncertainty in this area, we should now expect an increase in the proportion of mandatory arbitration procedures that include class action waivers. In addition, it is reasonable to expect greater numbers of employers overall adopting mandatory arbitration in order to take advantage of the opportunity of using class action waivers that would be unavailable outside of the arbitral context.

9. Mandatory arbitration coverage and claim filing rates

Although around 60 million American workers are now subject to mandatory employment arbitration procedures, this does not mean that the number of workers arbitrating workplace disputes has increased correspondingly. It has not. Mandatory arbitration has a tendency to suppress claims. Attor-

45. The Consumer Financial Protection Bureau's Arbitration Study found that over 90 percent of consumer financial contract arbitration clauses that it studied contained class action waivers. CONSUMER FIN. PROT. BUREAU, *supra* note 3, at 37.

46. Epic Sys. Corp. v. Lewis, No. 16-285, slip op. at 24 (U.S. May 21, 2018).

neys who represent employees are less likely to take on clients who are subject to mandatory arbitration,[47] given that arbitration claims are less likely to succeed than claims brought to court and, when damages *are* awarded, they are likely to be significantly smaller than court-awarded damages.[48] Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney.

The number of claims being filed in employment arbitration has increased in recent years. In an earlier study I conducted with Mark Gough, we found an average of 940 mandatory employment arbitration cases per year being filed between 2003 and 2013 with the American Arbitration Association (AAA), the nation's largest employment arbitration service provider.[49] By 2016, the annual number of employment arbitration case filings with the AAA had increased to 2,879.[50] Other research indicates that about 50 percent of mandatory employment arbitration cases are administered by the AAA.[51] This means that there are still only about 5,758 mandatory employment arbitration cases filed per year nationally. Given the present study's finding that 60.1 million American workers are now subject to these procedures, this means that only 1 in 10,400 employees subject to these procedures actually files a claim under them each year. Cynthia Estlund has compared these claim filing rates to employment case filing rates in the federal and state courts.[52] She estimates that if employees covered by mandatory arbitration were filing claims at the same rate as in court there would be between 206,000 and 468,000 claims filed annually, i.e. 35 to 80 times the rate we currently observe.[53] These findings indicate that employers adopting mandatory employment arbitration have been successful in coming up with a mechanism that effectively reduces their chance of being subject to any liability for employment law violations to very low levels.

47. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 82–85 (2014).

48. Colvin & Gough, *supra* note 40, at 1031–35.

49. *Id.* at 1027 (reporting that 10,335 claims were filed with the AAA over the 11-year period from 2003 to 2013).

50. *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 690 (2018).

51. *See* ARBITRATION EPIDEMIC, *supra* note 2, at 17.

52. Estlund, *supra* note 50.

53. *Id.*

III. THE IMPACT OF THE EXPANSION OF MANDATORY ARBITRATION

The expansion of mandatory arbitration is a dramatic shift in the nature of American employment relations. At the beginning of the 1990s, this was an unusual practice, affecting a very small percentage of employees.[54] Today, as this study has shown, it is a widespread employment practice, affecting most nonunion employees. What does this change mean for employment relations and the protection of workplace rights?

One way of thinking about the scale of change that has occurred is to compare it to another major shift occurring in employment relations, the decline of union representation. The declining proportion of American workers represented by labor unions has transformed the labor relations landscape in recent decades.[55] Relatively few workers now have their terms and conditions of employment determined by collectively negotiated labor contracts. This means that few employees benefit from the just cause protections and grievance arbitration systems that unions negotiate as an alternative to the default employment-at-will rule.[56] Labor unions' reduced bargaining power is one of the factors behind stagnating working and middle class wages.[57]

The decline in the percentage of American workers who are union members over the last half-century has been steady and dramatic:

Table 6: Union Membership by Year[58]

	Union Membership
1945	35.5%
1955	33.2%
1965	28.4%
1975	25.5%
1985	18.0%
1995	14.9%
2005	12.5%
2015	11.1%

The trend of declining union membership rates is clear and its implications for the economy, society, and politics much discussed. Yet, the rate of

54. Feuille & Chachere, *supra* note 22.

55. *See generally* THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (2d ed. 1994).

56. KATZ ET AL., *supra* note 8, at 292–303.

57. JAKE ROSENFELD, WHAT UNIONS NO LONGER DO (2014).

58. KATZ ET AL., *supra* note 8, at 120.

decline in union membership is much smaller than the rate of increase in mandatory arbitration. Whereas in the 50 years from 1965 to 2015, the union membership rate declined by 17 percentage points, in only 25 years from 1992 to 2017 the rate of mandatory arbitration coverage grew by 54 percentage points.[59] Judged by comparison to the undoubtedly important long-term decline in organized labor, the growth of mandatory arbitration is clearly also a major, transformative development in American employment relations.

What does the rise of mandatory arbitration mean for how we think about employment law and individual rights in the workplace? Mandatory arbitration emerged during a period of expanding individual employment rights and growing pressures on employers from litigation. The first wave of individual employment rights came in the 1960s with the passage of Title VII of the Civil Rights Act[60] in 1964 and the Age Discrimination in Employment Act[61] in 1967. These were followed shortly after by the Occupational Safety and Health Act[62] in 1970 and the Employee Retirement Income Security Act[63] in 1974. The 1970s and 1980s saw an expansion of employment laws passed at the state level and a growing number of exceptions to the employment-at-will doctrine being recognized by state courts. Another surge of federal activity in the employment rights area occurred at the end of that decade with the passage of the Worker Adjustment and Retraining (WARN) Act[64] in 1989, the Americans with Disabilities Act (ADA)[65] in 1990, the Civil Rights Act of 1991,[66] and the Family and Medical Leave Act (FMLA)[67] in 1993. Taken together, these changes in the employment law environment provided employees with a broad range of potential workplace rights claims they could make and presented employers with a range of new threats of litigation and liability. It is at this same point in time that the Supreme Court's shifting doctrines around arbitration presented employers with the opportunity to reduce their exposure to litigation in the courts through the adoption of mandatory arbitration for their workforces. The *Gilmer* decision in 1991 opened the door to the expansions of mandatory arbitration in the

59. As discussed earlier, the best survey evidence we have indicates a 2 percent coverage rate in 1992 and the present study findings a 56 percent coverage rate in 2017.

60. 42 U.S.C. §§ 2000e–2000e-17 (2012).

61. 29 U.S.C. §§ 621–634 (2012).

62. 29 U.S.C. §§ 651–678 (2012).

63. Pub. L. No. 93-406, 88 Stat. 829 (1974).

64. 29 U.S.C. §§ 2101–2109 (2012).

65. 42 U.S.C. §§ 12101–12213 (2012).

66. 42 U.S.C. §§ 1981 (2012).

67. 29 U.S.C. §§ 2601–2654 (2012).

1990s and 2000s just at the time that workplace rights were being expanded by the new employment statutes passed in 1989-1993.

How did the expansion of mandatory arbitration affect the landscape of employment rights enforcement through litigation? During the 1990s, immediately following the *Gilmer* decision, there did not appear to be any negative effect on litigation activity. By contrast, employment litigation was expanding rapidly during this period, with the number of employment discrimination lawsuits filed in federal courts growing from 8,937 cases in 1987 to 23,317 cases in 1998.[68] This growth in employment litigation would suggest limited or no impact for mandatory arbitration. However, although mandatory arbitration was expanding in the 1990s, it still covered a relatively small percentage of workers. Even by 2003, the survey that I conducted that year only found 22.7 percent of nonunion employees covered by mandatory arbitration, meaning that over three-quarters of employees were still able to access the courts.[69] It is only when we get to the later 2000s and 2010s when the growth of mandatory arbitration had expanded further do we start getting to the point where a sufficient proportion of employees were covered by the practice to potentially make a dent in litigation rates. Interestingly, employment discrimination litigation rates levelled off and declined during this period, despite the overall growth in the population. In 2012, only 16,789 employment discrimination lawsuits were filed in the federal court, a decline of over 6,000 from the 1998 total.[70]

The decline in employment discrimination litigation rates from 1998 to 2012 could well be a function of increasing numbers of employees being covered by mandatory arbitration procedures and their potential legal claims being diverted out of the courts. It should be noted, however, that the number of wages and hours claims increased during this same period, growing by 388 percent from the 1997-2013.[71] This trend though may not continue. Many wages and hours claims are brought as collective or class actions, taking advantage of the relative similarity of claims brought by groups of employees subject to the same workplace rules governing wage rates, overtime, or break allowances. Until the 2010s, it was unclear whether the ability to require claims be brought in arbitration through mandatory arbitration procedures would affect the ability of employees to proceed on a collective or class basis. However with the Supreme Court's 2011 decision in *AT&T Mo-*

68. KATZ ET AL., *supra* note 8, at 79.
69. Colvin, *supra* note 15.
70. KATZ ET AL., *supra* note 8, at 79.
71. *Id.*

bility LLC v. Concepcion upholding class action waivers in consumer arbitration[72] and now its 2018 decision in *Epic Systems v. Lewis*, confirming the enforceability of class action waivers in employment arbitration,[73] employers are now able to use mandatory arbitration procedures to avoid the danger of being subject to collective or class action wage and hours claims. If, as anticipated here, an increasing proportion of employees are covered by mandatory arbitration procedures that include class action waivers, we should expect to see a resulting decline in wage and hour claims similar to the decline already seen in employment discrimination litigation.

How will a workplace landscape increasingly dominated by mandatory arbitration procedures affect the enforcement of individual employment rights? One implication is that the balance of power in employment rights conflicts will shift in favor of employer interests. Previous research has found that employees are less likely to win cases in mandatory arbitration than they are in litigation and tend to recover lower damages when they are successful.[74] We have also seen that mandatory arbitration is plagued by repeat player effects where employers who have larger numbers of cases in arbitration tend to win more often, particularly where they have multiple cases heard by the same arbitrator.[75]

Another implication is that there will be greater variability in how employment rights are protected. Mandatory arbitration is a procedure adopted at the discretion of the employer; as shown in this study, some employers choose to use it, others do not. The result is variation across the economy from employer to employer in whether employees have access to the courts or are required to bring claims to arbitration. There will also be variation in the quality of the arbitration procedures that employers require employees to agree to. As discussed here, some bar employees from bringing class actions, other permit them. Some procedures specify that arbitration will be administered by a relatively reputable arbitration service provider with rules and procedures that incorporate generally accepted due process standards, but other procedures either use less well known or well accept service providers or use no service provider at all. The result is that the quality of the arbitration procedures that employees are subjected to can vary widely from workplace to workplace. This concern about variable quality of justice applies equally to the individual arbitrators deciding cases. Some may be genuine third party neutrals whose professional practices are based on their acceptability to both

72. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).
73. Epic Sys. Corp. v. Lewis, No. 16-285, slip op. at 1–2 (U.S. May 21, 2018).
74. Colvin, *supra* note 15, at 5.
75. Colvin & Gough, *supra* note 40, at 1031–35.

sides in disputes. Others are often advocates, most frequently employer side counsel, who arbitrate cases on a part-time basis—representing management one day, deciding employment rights cases the next.[76]

CONCLUSION

Mandatory employment arbitration is the subject of fierce legal and policy debates. There is growing evidence that mandatory arbitration produces outcomes different from those of litigation, to the disadvantage of employees, and suffers from due process problems that give the advantage to the employers who impose mandatory arbitration on their workers.[77] What has been less clear is how widespread the impact of mandatory employment arbitration is. In the consumer arena, the CFPB's 2015 study showed that mandatory arbitration clauses are common, being included in a majority of credit card, prepaid card, student loan, and payday loan agreements.[78] By contrast, in the employment arena our knowledge of the extent of mandatory arbitration was limited to a few surveys from the 1990s and early 2000s, the latter of which suggested that nearly a quarter of employees might have been subject to mandatory arbitration by that point in time.

The study described here shows that mandatory employment arbitration has continued to grow in extent and now in over half of American workplaces employees are subject to mandatory arbitration agreements that take away their right to bring claims against their employer in court. This *metastasization* of mandatory arbitration from a practice among a relatively small segment of employers to something that affects most American workers represents a dramatic and important shift in how employment rights are enforced. Rather than having their rights adjudicated through the public courts and decided by juries of their peers, more often now American workers have to bring claims—claims that are based on statutes enacted by Congress or state legislatures—through arbitral forums designated by agreements that their own employers drafted and required them to agree to as a condition of employment.

The employment conditions experienced by the American worker have changed dramatically in recent decades as union representation has declined, employment in traditionally high wage blue-collar industries has fallen, and the combination of globalization and financialization has exerted downward

76. Mark D. Gough & Alexander J.S. Colvin, Decision-Maker and Context Effects in Employment Arbitration (July 26, 2018) (unpublished manuscript) (on file with the International Labor and Employment Relations Association 18th World Congress, Seoul, South Korea).

77. *See* ARBITRATION EPIDEMIC, *supra* note 2, at 3.

78. CONSUMER FIN. PROT. BUREAU, *supra* note 3.

pressures on labor costs. Against this backdrop of increased economic risk and uncertainty for workers and the disruption of traditional protections, laws protecting employment rights such as the minimum wage, the right to equal pay, and the right to a safe workplace free of harassment or discrimination based on race, gender, or religion have become increasingly important as a workplace safety net. However, these protections are at risk of being undermined if there is no effective means of enforcing them. For all the limitations of the courts, litigation has been a vital mechanism for enforcing employment rights, particularly in an era of reduced government agency resources.

The metastasization of mandatory employment arbitration has resulted in it now surpassing court litigation as the most common process through which the rights of American workers are adjudicated and enforced. The rise of this problematic practice needs to be given much greater attention in employment policy discussions. If the Supreme Court does not reverse its trend of supporting mandatory arbitrations, it will be necessary for Congress to act to ensure that American workers have an effective means of enforcing the rights they have been promised.