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Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes

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Abstract

[Excerpt] What do we know about mandatory arbitration and its impact? Some existing studies have examined samples of employment arbitration cases, usually obtained from the American Arbitration Association (AAA), which is currently the largest arbitration service provider in the employment area. Although some early studies found relatively high employee win rates and damage awards in arbitration, comparable to those in litigation, these results were mainly based on arbitration under individually negotiated agreements or in the securities industry and involved relatively highly paid individuals. More recent studies using larger samples of cases based on mandatory arbitration agreements find much lower employee win rates and smaller damage amounts than typical in litigation. Existing studies, however, have not been able to account for differences in the types of cases that are heard in arbitration. In particular, previous work has not been able to systematically compare outcomes in arbitration and litigation in the same study.

In this study, we take a new approach to investigating mandatory arbitration that allows us to do a systematic comparison of arbitration and litigation, accounting for key factors that differentiate between the types of cases brought in these forums. We do this by collecting survey data on a comparable sample of arbitration and litigation cases from attorneys involved in those cases. We also investigate the overall experiences of the attorneys in representing plaintiff employees in mandatory arbitration and litigation. The ability to obtain and finance legal representation is a crucial, yet understudied aspect of the system of enforcement of employment rights. Absent the ability to obtain effective representation, employees may be unable to pursue and win cases even where their statutory rights have been violated. One of the potential benefits held out for arbitration compared to litigation is that it could provide a cheaper, more accessible forum to allow employee claims to be heard and adjudicated. It is certainly the case that existing research indicates many limitations of the litigation system, particularly the relatively poor outcomes obtained by plaintiff employees compared to other litigants. What we are able to investigate empirically in this study is whether mandatory arbitration ameliorates some of the limitations of the litigation system or whether it is equally or even more limited in its accessibility.

Keywords

mandatory arbitration, dispute resolution, litigation, employment rights, outcomes

Disciplines

Collective Bargaining | Dispute Resolution and Arbitration | Labor and Employment Law | Unions

Comments

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Final Report to Sponsor:
The Robert L. Habush Endowment of the American Association for Justice

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Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes

Executive Summary

Analysis of 1256 survey responses from practicing attorneys who represent plaintiff employees in litigation and mandatory arbitration cases reveals that:

- Employee win rates are lower in mandatory arbitration cases than in litigation.
- Damage awards to successful plaintiff employees are lower in mandatory arbitration cases than in litigation.
- Settlement amounts are lower in mandatory arbitration cases than in litigation.
- The presence of a mandatory arbitration clause reduces the likelihood that the attorneys will accept a potential case for representation.
- Plaintiff attorneys viewed mandatory arbitration as having lower fairness, less adequate discovery, and are less willing to invest time and resources in a case where there is a mandatory arbitration clause.
- Cases brought in mandatory arbitration and litigation are generally similar in terms of type of discrimination alleged, adverse employment actions alleged, and defendant employer size, suggesting these factors do not explain the differences in outcomes between the two forums.
- However contrary to some claims, employees in mandatory arbitration cases tend to have higher salaries than those in litigation cases. This suggests that compared to litigation mandatory arbitration is not serving as a more effective forum for lower income employees to be able to pursue cases.
- The largest administering organization, representing almost half of all mandatory arbitration cases, is the American Arbitration Association (AAA). Cases administered by JAMS , and Ad hoc cases, with no administering agency, are the next two most common categories.
- In most cases, the employer pays 100% of the arbitrator's fees, but in a substantial minority of cases (17%) fees are split between the employer and the employee.
- Summary judgment motions are more common in litigation, but are now also filed in almost half of all mandatory arbitration cases, indicating that mandatory arbitration is becoming more procedurally complex. We also find that the lower employee win rate in mandatory arbitration was present even among cases that did not feature a summary judgment motion, indicating that this does not account for the differences in employee success rates between mandatory arbitration and litigation.

Acknowledgements

We gratefully acknowledge the financial support for this study from a research grant to Cornell University by the Robert L. Habush Endowment of the American Association for Justice. We also gratefully acknowledge the contributions of the National Employment Lawyers Association (N.E.L.A.) and the California Employment Lawyers Association (C.E.L.A.) in providing access to their membership for the conduct of the survey. We also greatly appreciate the time and effort of the many individual attorneys who responded to our survey. All claims, opinions, and errors in this reports are our own and do not represent those of the organizations that provided assistance for this research project.

Table of Contents and Figures

Part 1: Introduction

The rise of mandatory arbitration is a major transformation in how American employees and consumers enforce their rights. By cutting off access to the courts with no effective possibility of choice, mandatory arbitration pushes employees and consumers into an unfamiliar private forum to have their statutory and contractual rights determined. Despite the widespread impact of mandatory arbitration, we know remarkably little about this new forum, how it operates, and how it compares to litigation in the courts. This research project seeks to expand our knowledge of mandatory arbitration, focusing on its use in employment cases, comparing it to litigation, and providing critical information needed to evaluate public policies addressing its rise.

Mandatory arbitration of employment disputes dates back a little over two decades. The key event in its rise was the 1991 Supreme Court decision in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), where the court for the first time held that a claim based on a statutory employment right could be subject to arbitration. Although that case specifically involved the Age Discrimination in Employment Act, in the following years the courts extended this reasoning to apply to the full range of employment statutes, including Title VII of the Civil Rights Act of 1964, the centerpiece of American employment discrimination law. A key to understanding the nature of mandatory arbitration is that it is presented to employees as a term and condition of employment on an adhesive, take-it-or-leave-it basis. As with many other standard conditions of employment established as corporate policies, a prospective employee's only real alternative is to decline to take the job, something that few job-seekers are likely to consider doing. In its 2001 decision in *Circuit City v. Adams*, 532 U.S. 105 (2001), the Supreme Court affirmed that mandatory arbitration agreements could be included in employment contracts promulgated as mandatory terms and conditions. While the ability of mandatory arbitration agreements to exclude employees from access to the courts and require submission of all employment claims to arbitration is now settled law, the Supreme Court provided an additional incentive for employers to use mandatory arbitration in its 2012 decision in *AT&T v. Concepcion*, 489 U.S. 468 (2012), holding that a class action waiver in an arbitration

agreement could require that any claim had to be brought individually. Thus mandatory arbitration agreements with class waivers can now effectively bar consumers or employees from bringing class actions in either arbitration or litigation.

What do we know about mandatory arbitration and its impact? Some existing studies have examined samples of employment arbitration cases, usually obtained from the American Arbitration Association (AAA), which is currently the largest arbitration service provider in the employment area. Although some early studies found relatively high employee win rates and damage awards in arbitration, comparable to those in litigation, these results were mainly based on arbitration under individually negotiated agreements or in the securities industry and involved relatively highly paid individuals.[2] More recent studies using larger samples of cases based on mandatory arbitration agreements find much lower employee win rates and smaller damage amounts than typical in litigation.[3] Existing studies, however, have not been able to account for differences in the types of cases that are heard in arbitration. In particular, previous work has not been able to systematically compare outcomes in arbitration and litigation in the same study.

In this study, we take a new approach to investigating mandatory arbitration that allows us to do a systematic comparison of arbitration and litigation, accounting for key factors that differentiate between the types of cases brought in these forums. We do this by collecting survey data on a comparable sample of arbitration and litigation cases from attorneys involved in those cases. We also investigate the overall experiences of the attorneys in representing plaintiff employees in mandatory arbitration and litigation. The ability to obtain and finance legal representation is a crucial, yet understudied aspect of

[2] E.g. . Lisa B. Bingham, "Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases." 47(2) *Labor Law J.* 108 (1996); Lisa B. Bingham, "Employment Arbitration: The Repeat Player Effect." 1 *Employee Rights and Employment Policy J.* 189 (1997); Lewis L. Maltby, "Private Justice: Employment Arbitration and Civil Rights." 30 *Columbia Human Rights Law Rev.* 29, (1998); Michael Delikat and Morris M. Kleiner. 2003. "Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?" *Conflict Management*, Vol. V1, Issue 3, pp. 1-11.
[3] Alexander J.S. Colvin, "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" 11(2) *Employee Rights and Employment Policy J.* 405 (2007); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

the system of enforcement of employment rights. Absent the ability to obtain effective representation, employees may be unable to pursue and win cases even where their statutory rights have been violated. One of the potential benefits held out for arbitration compared to litigation is that it could provide a cheaper, more accessible forum to allow employee claims to be heard and adjudicated. It is certainly the case that existing research indicates many limitations of the litigation system, particularly the relatively poor outcomes obtained by plaintiff employees compared to other litigants.[4] What we are able to investigate empirically in this study is whether mandatory arbitration ameliorates some of the limitations of the litigation system or whether it is equally or even more limited in its accessibility.

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

Part 2: Methods

A major limitation of past research on mandatory arbitration is that studies examined arbitration case outcomes in isolation or with some general comparisons to other studies that examined litigation case outcomes. However these studies could not account for differences in which cases were taken to arbitration versus litigation, nor did they have sufficient information on the characteristics of the cases to be able to control for differences in the types of cases being heard in the two forums. Although on aggregate, the outcomes for employees appear much less favorable in mandatory arbitration than in litigation, it could be argued that these differences were due to selection effects where only the stronger cases were heard in litigation, whereas smaller and weaker cases were able to obtain a hearing in arbitration.[5] While it is not clear that selection effects could account for the large scale of differences in outcomes between mandatory arbitration and litigation, it is important to try to address this issue through alternate research methods.

In this study, we investigate the differences between mandatory arbitration and litigation by surveying attorneys who represent plaintiff attorneys in both of these forums. Plaintiff attorneys are an underutilized, but important sources of information on how cases are processed and resolved in mandatory arbitration and litigation. As key actors in cases brought in both mandatory arbitration and litigation, they have direct knowledge of the characteristics and outcomes of cases, as well as, crucially, the procedural stages before a case gets to an arbitration or a litigation hearing. Plaintiff attorneys are also important actors to study in their own right as it is their decisions on whether to accept a potential case that determines whether an employee is able to obtain legal representation.

An obvious limitation of surveying plaintiff attorneys is the danger of providing a one-sided perspective on what is occurring in mandatory arbitration or litigation. While recognizing this potential source of bias, we address it in a couple of ways. One is to

[5] See e.g. critiques in: Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-Dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001);
and David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STANFORD. L. REV. 1557 (2005).

focus most of our primary data collection on objective characteristics of cases rather than the subjective evaluations of the attorneys. Second, many of our key analyses involve comparisons of mandatory arbitration and litigation, using questions where any biasing of the responses are likely to be similar across the two forums, so that the comparisons are less affected by this potential biasing.

For our survey, we focused on attorneys likely to have experience representing employees in both mandatory arbitration and litigation. To do this we surveyed the populations of two major professional associations of plaintiff employment attorneys, the National Employment Lawyers Association (NELA) and the California Employment Lawyers Association (CELA). Both NELA and CELA generously provided access to their membership lists for this study. NELA is the largest national association of plaintiff attorneys specializing in the employment law area. We also included the CELA membership in this study due to the especially widespread use of mandatory arbitration activity in the state of California, so as to be able to better capture this phenomenon.

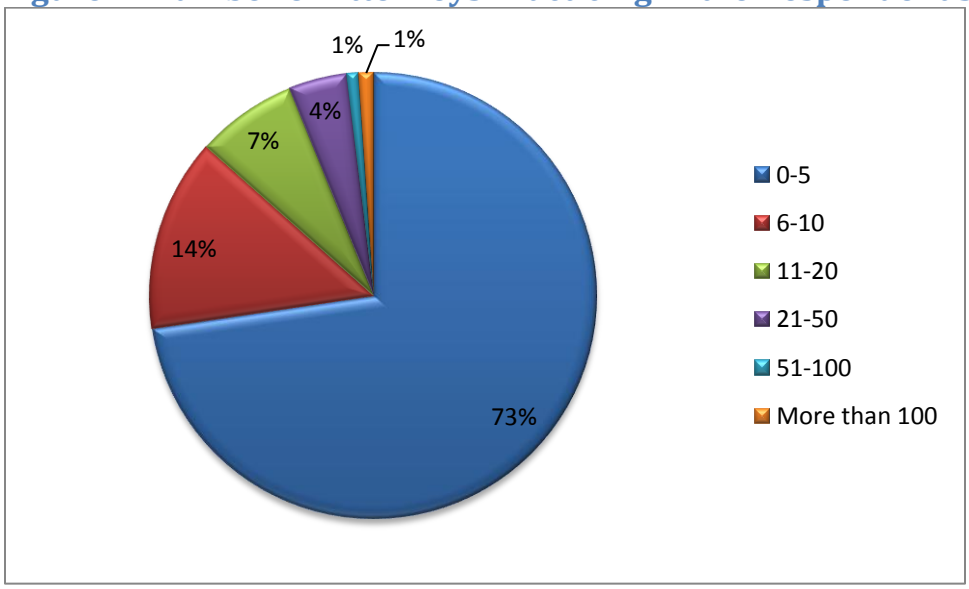
We administered our survey questionnaire in the Fall of 2013 using both web-based and paper mailings of the survey. For the web-based administration, potential respondents received an initial email requesting their participation with a link to the web-based survey instruments, as well as two follow-up reminder emails. We then also sent paper copies of the survey to potential respondents through the regular mail, with a follow-up reminder mailing again soliciting their participation. This combination of email/web-based and traditional hard-copy mailing of the survey produced a total of 1256 responses, representing a response rate of 47% of our surveyed population.[6]

[6] The complete rosters provided by NELA and CELA contain contact information for 2,056 and 976 member attorneys, respectively. However, 149 attorneys are members of both organizations and 192 entries were incomplete, out of date, or otherwise contained invalid contact information.

Part 3: Attorney Characteristics

We designed our survey sample to focus on active practitioners representing employee plaintiffs. Among our respondents, on average, 70% of their individual practice was dedicated to employment law matters, 92% of their employment-related caseloads involved representing employees, and they had 18 years of experience practicing employment law. The respondents mostly worked as solo practitioners or for relatively small law firms as seen in Figure 1.

Figure 1: Number of Attorneys Practicing in the Respondent's Firm



Our respondents included attorneys from all across the United States. We intentionally over-sampled California attorneys in order to be able to more deeply investigate what is happening in that state, which has seen particularly widespread adoption of mandatory arbitration.

Table 1: Most Common States in which Survey Respondents Practice

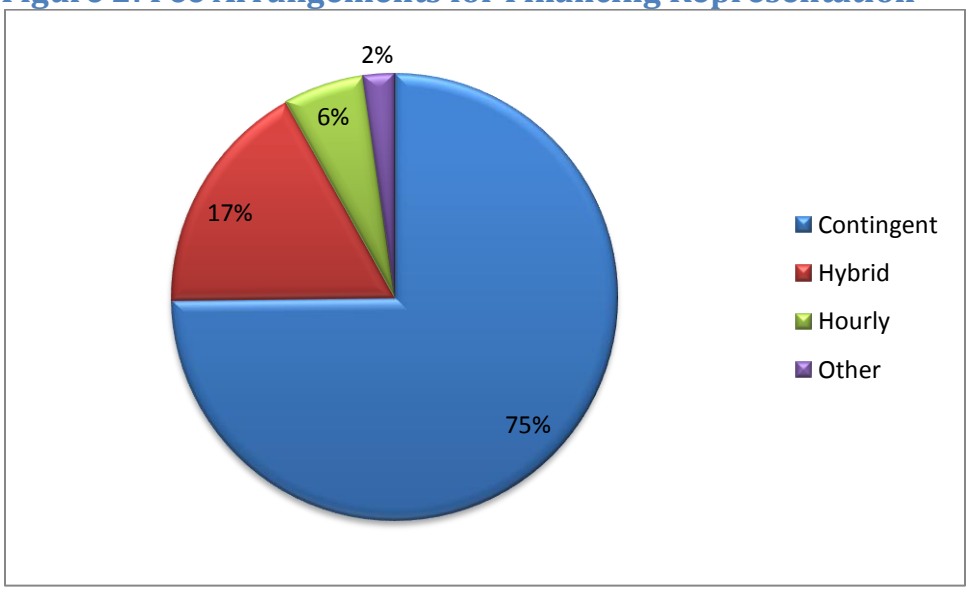
State	Count	% of Total
CA	294	31%
NY	61	6%
TX	45	5%
PA	38	4%
DC	36	4%
IL	35	4%
MO	32	3%
AR	30	3%
FL	28	3%
GA	23	2%

The respondents practice in state court, in federal court, before administrative agencies and in arbitration. The mixture of where the attorneys practice varies by state, with attorneys in some states mostly practicing in state court and in other states mostly in federal court. For example, on average attorneys in California filed 74% of their caseload in state court, but only 15% in federal court. By contrast in Georgia, attorneys on average filed 76% of their caseloads in federal court and only 8% in state court.

Part 4: Factors Affecting Ability to Represent Employees

What determines whether an attorney is able to take on a case for an employee who comes to him or her seeking representation? Most often regular employees seeking legal representation lack the funds to pay hourly fees for an attorney. This is understandable, as attorneys in our sample reported charging an average rate of $398 per hour.[7] As a result, in many cases in order to provide representation the attorney needs to finance the case him or herself through a contingency fee arrangement under which the attorney does not charge the client hourly fees but instead is paid a percentage of the amount recovered in the case. In our sample, on average 75% of the attorneys usually represented employees on a contingency fee basis, an additional 17% usually represented clients under a contingency fee hybrid where clients paid an upfront cost or reduced hourly rates in addition to a percentage of the amount recovered, and 6% usually charged hourly fees.

Figure 2: Fee Arrangements for Financing Representation



In order for a contingency fee arrangement to be financially viable for the attorney to undertake, the case must present some minimum amount of potentially provable

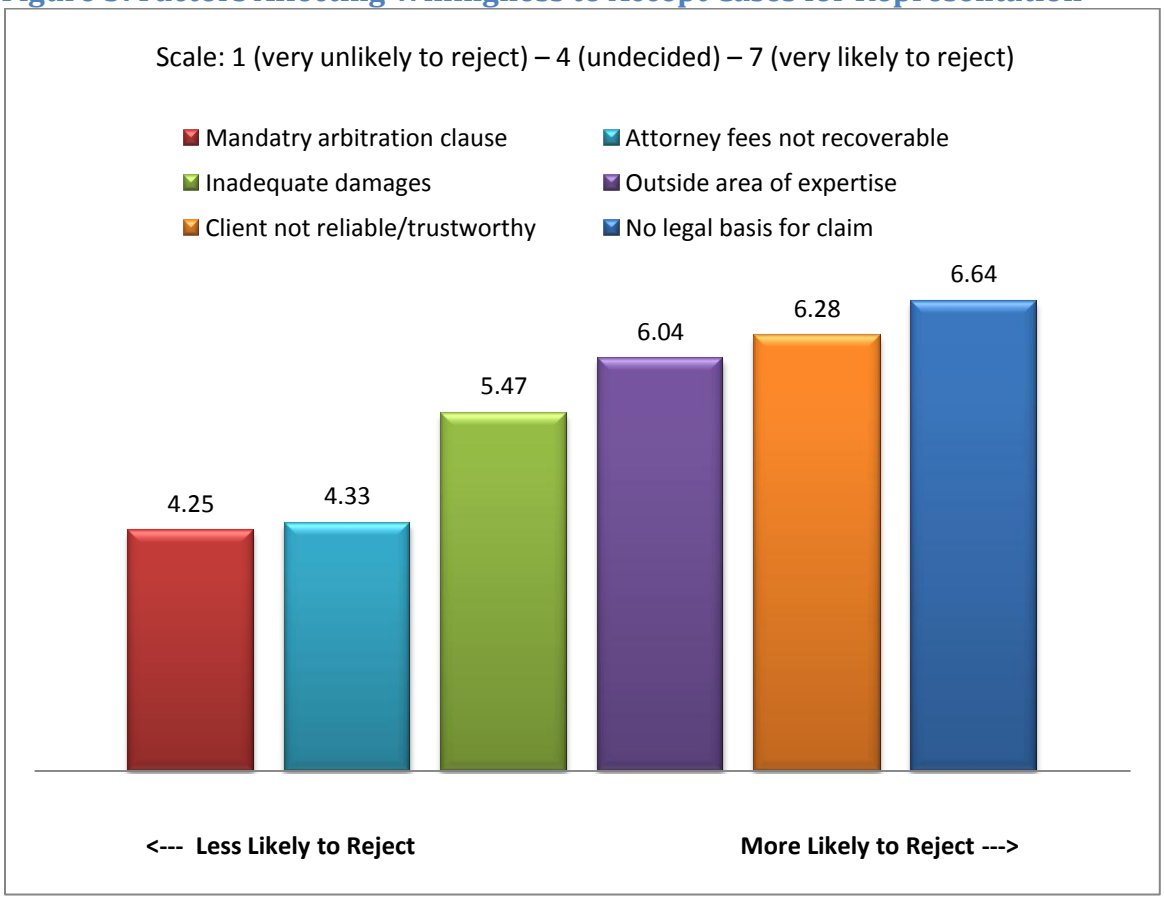
[7] Many respondents indicated that they charge based on a sliding scale. In such circumstances, the minimum hourly fee was recorded. Therefore, $398 constitutes the floor for the average hourly rate charged by respondent attorneys.

damages. We asked the respondents what minimum amount of potential settlement value or total damages, including attorney fees, would they need to see in a case to justify accepting it. On average, the attorneys indicated that they would need a minimum of $58,000 in potential settlement value or damages to justify accepting a case on a non-pro bono basis.

Beyond the basic economic calculation, a number of factors go into the process of deciding whether to accept a request for representation. We asked the attorneys to rate the impact the following factors have on their decision to reject a request for representation on a scale of 1 (very unlikely to reject for this reason) to 7 (very likely to reject for this reason).

Attorneys are most likely to reject requests for representation where there is no legal basis for the claim, where they perceive the potential client to be unreliable or untrustworthy, and where the case falls outside their area of expertise. Average attorney responses for these top three factors correspond to a response between "likely to reject for this reason" and "very likely to reject for this reason." Responses to the question of how the presence of a mandatory pre-dispute arbitration clause affected the likelihood of accepting a case averaged a score of 4.25, which corresponds to a response between "undecided whether to reject for this reason" and "somewhat likely to reject for this reason." Although not as severe as the negative impact of a lack of legal basis, an unreliable client, or a lack of expertise, the presence of arbitration does have a negative effect on case selection decisions similar to the effect of a situation where the type of claim did not permit recovery of attorney fees.

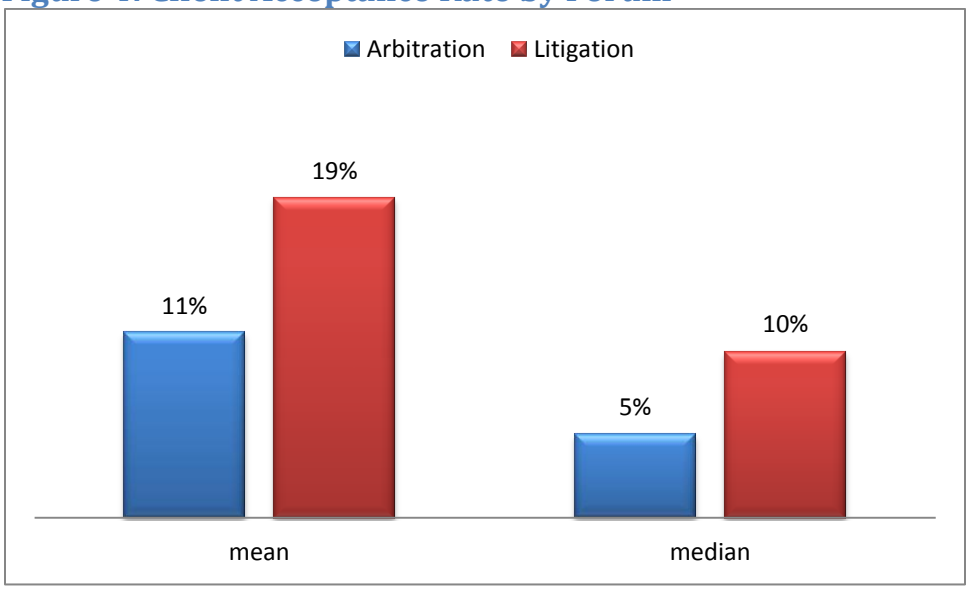
Figure 3: Factors Affecting Willingness to Accept Cases for Representation



Another perspective on the effect arbitration has on employee access to competent counsel can be gained by looking at the percentage of representation requests employment attorneys accept. While attorneys accept on average19% of potential clients for representation who contact them with disputes to be heard in civil litigation, on average they accept only 11% of potential clients who contact them with claims covered under a mandatory arbitration clause. The same relationship is observed in the median acceptance rates. The median and mean rates show that attorney acceptance rates for clients headed to arbitration are approximately half the acceptance rates for clients with claims to be heard in civil court. This indicates that attorneys are much more selective when deciding whether to take an arbitration case. Contrary to arbitration's reputation for accessibility, if plaintiffs covered by arbitration clauses have more difficulty securing

attorney representation, arbitration restricts, rather than expands, access to institutions of justice.

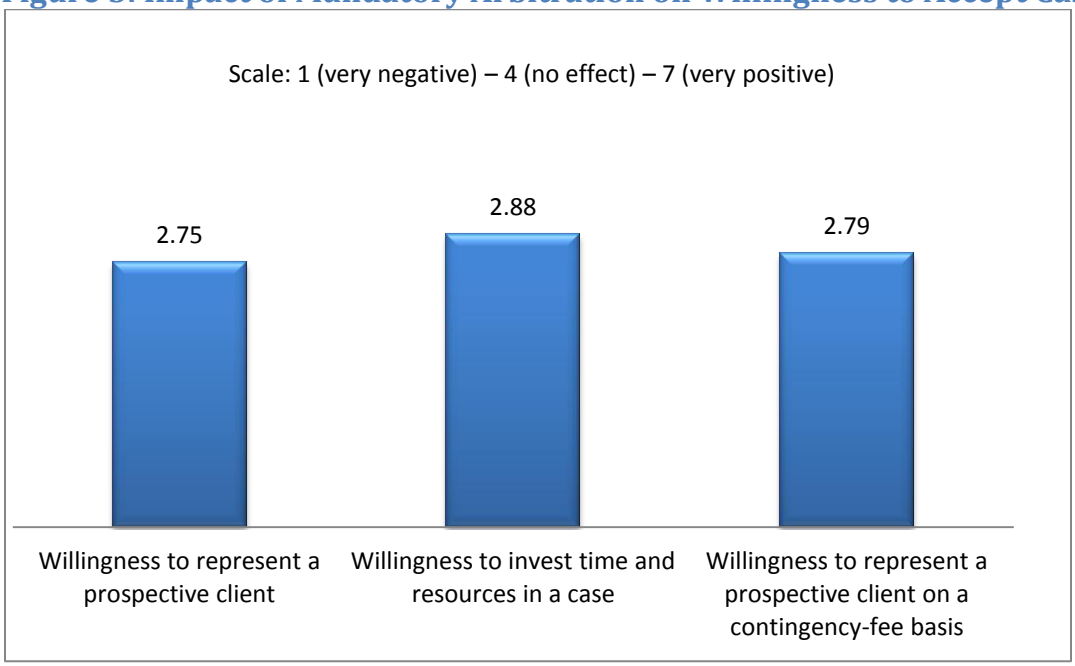
Figure 4: Client Acceptance Rate by Forum



Part 5: Attorney Perceptions of Mandatory Arbitration

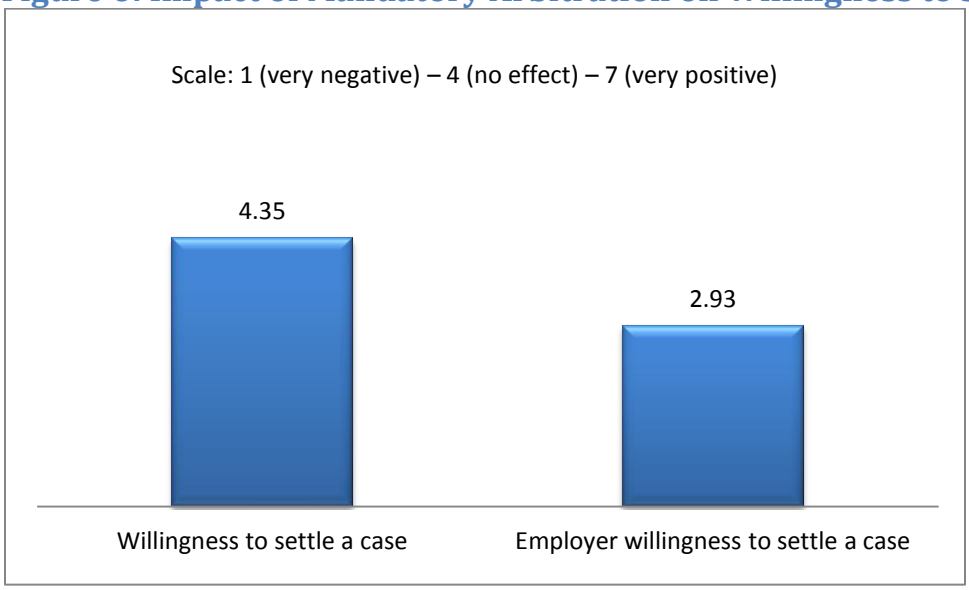
What do plaintiff attorneys see as the impact of mandatory arbitration clauses on their cases? Measured on a scale of 1 (very negative) to 7 (very positive), the attorneys we surveyed had a negative view of the impact of a pre-dispute mandatory arbitration clause on their willingness to represent a prospective client, their willingness to invest time and resources in a case, and their willingness to represent a prospective client on a contingency-fee basis. The average responses correspond to a rating between "negative" and "somewhat negative."

Figure 5: Impact of Mandatory Arbitration on Willingness to Accept Cases



We also asked the attorneys about how mandatory arbitration affected the likelihood of settling a case. They reported on average that mandatory arbitration made them slightly more willing to settle a case before a hearing. Interestingly, they also viewed the presence of mandatory arbitration as decreasing the willingness of employers to settle the case.

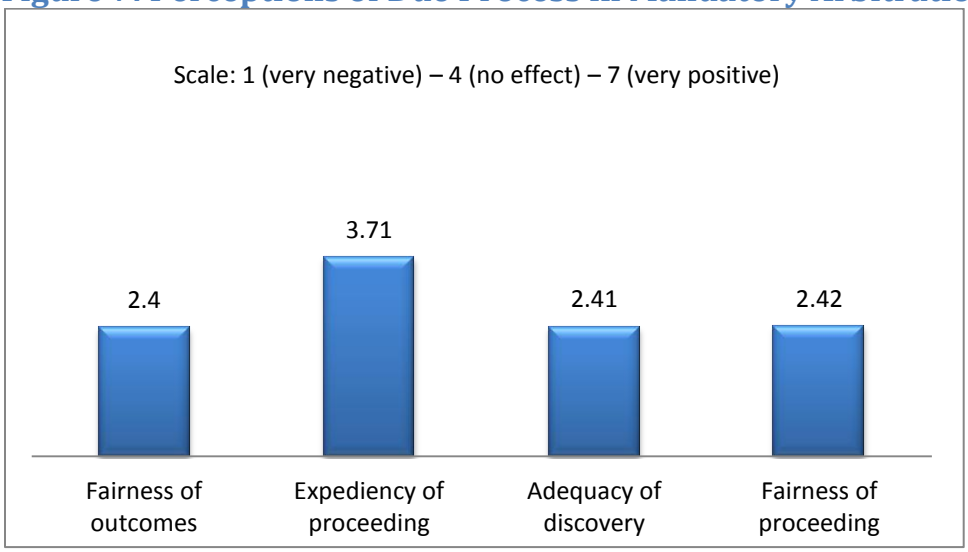
Figure 6: Impact of Mandatory Arbitration on Willingness to Settle Case



When asked about their perceptions of the impact of mandatory arbitration on different aspects of due process attorneys indicated that they viewed mandatory arbitration as having negative effects on adequacy of discovery, fairness of proceedings, and fairness of outcomes. The average response indicating the impact of mandatory arbitration on each of these factors was between "negative" and "slightly negative."

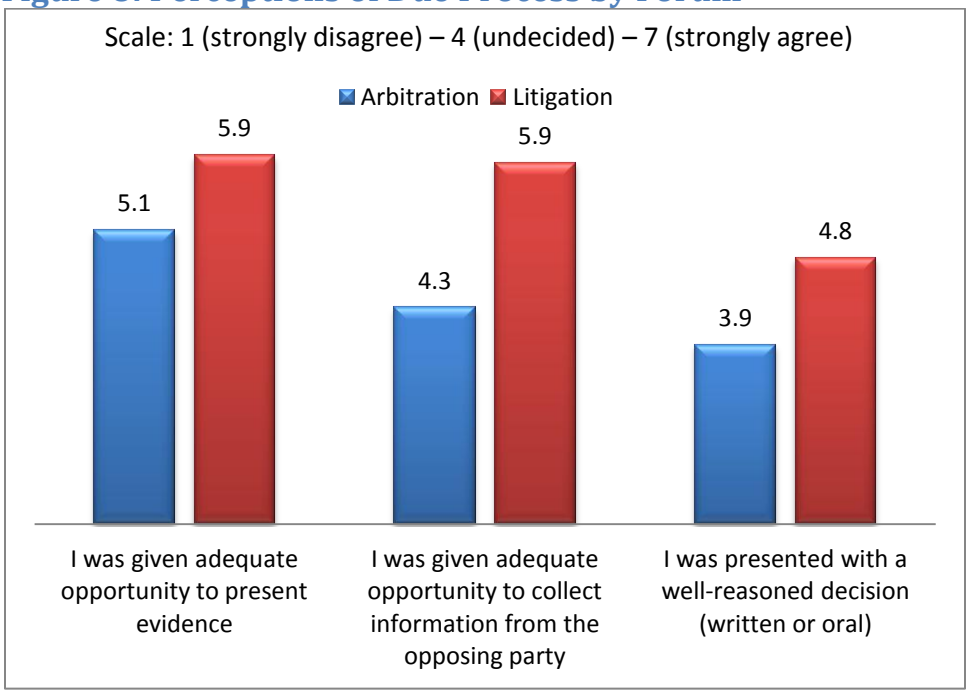
Despite the widely held perception that arbitration is quicker and more efficient than traditional litigation, attorneys view the presence of an arbitration clause as having between a somewhat negative and no effect on the expediency of proceedings, on average. This unexpected result may be better understood by looking at the entire distribution of responses. Specifically, while 38% of attorneys indicated arbitration has a very to somewhat negative effect on the expediency of proceedings, 26% indicated they were undecided, and 33% said arbitration has a somewhat to very positive effect. Of the 38% of attorneys who responded arbitration has a negative effect, several indicated that they are unaware of the existence of arbitration clauses until after they have already filed a claim in civil court and then the defendants filed a motion to compel arbitration. While the arbitration proceeding itself may be faster than litigation, because attorneys sometimes learn about such clauses late in the process arbitration clauses can have a negative impact on the expediency of the entire process.

Figure 7: Perceptions of Due Process in Mandatory Arbitration



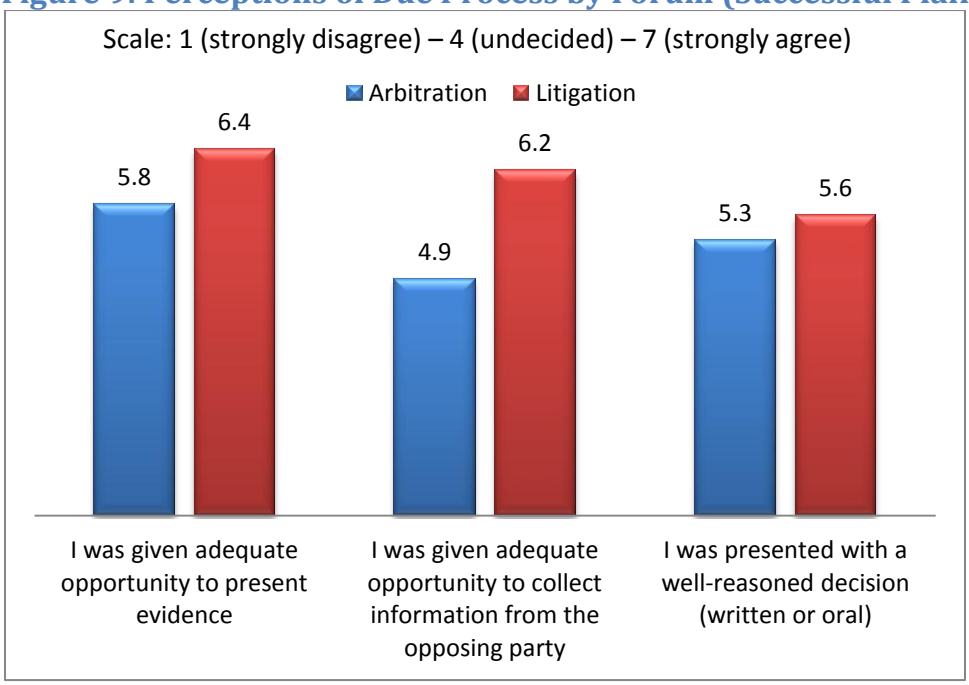
Additionally, if attorneys had taken an employment discrimination case to verdict or award in private arbitration and/or civil litigation, we asked them to what extent they agreed they were presented with a well-reasoned decision and given the opportunity to present evidence and collect information from the opposing party. On a scale of 1 ("strongly disagree") to 7 ("strongly agree"), along all dimensions attorneys gave higher ratings in cases reaching verdict in litigation compared to mandatory arbitration. The lowest average rating of 3.9, corresponding to a response between "somewhat disagree" and "undecided," was recorded in mandatory arbitration in response to the statement: "I was presented with a well-reasoned decision (written or oral)." The largest disparity between the two forums is found in attorney responses to the statement: "I was given adequate opportunity to collect information from the opposing party (i.e., discovery)." From a policy standpoint, this suggests that efforts to improve discovery in arbitration should be a priority. While many scholars have documented differences between the forums in the distributive aspects of justice (i.e, win rates and award amounts), this is an important finding because it shows that, relative to litigation, mandatory arbitration scores worse in perceptions of procedural justice as well.

Figure 8: Perceptions of Due Process by Forum



Even when restricting to successful cases only (i.e., cases adjudicated in favor of the employee), the differences in attorney perceptions of due process remain. Attorneys report a higher score for each individual due process element in litigation compared to arbitration. And like perceptions reported in Figure 7, the greatest disparity between attorney perceptions in Figure 8 appears in their responses to the adequacy of discovery. Even employment attorneys who successfully argue their case and receive a favorable verdict for their client report lower scores for due process metrics in arbitration compared to litigation.

Figure 9: Perceptions of Due Process by Forum (Successful Plaintiffs Only)



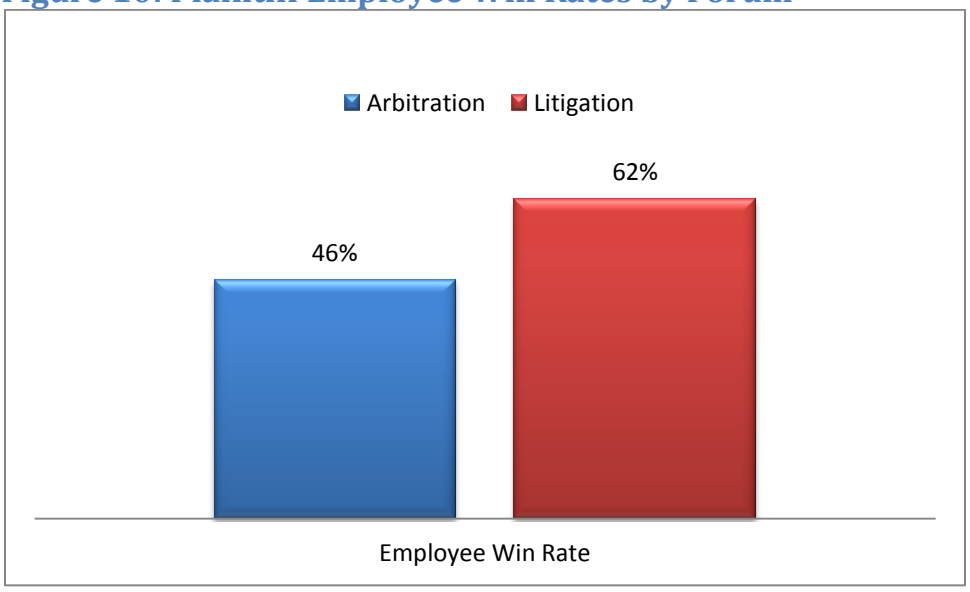
Collectively, these results confirm the general impression that attorneys who represent plaintiff employees have negative perceptions of mandatory arbitration. It also shows that attorney perceptions of due process are more negative in mandatory arbitration compared to litigation even where we control for the attorney's success in winning the case.

Part 6: Mandatory Arbitration and Litigation Outcomes

How do the outcomes compare between the mandatory arbitration and litigation cases in our sample? We asked the respondents to our survey a series of questions regarding the characteristics and outcomes of the most recent case they took to verdict or award in each forum, i.e. litigation and mandatory arbitration. To increase comparability across cases, we asked the respondents specifically about their most recent employment discrimination cases.[8]

The first, and most basic measure of success, is whether there is a finding of liability against the employer. Whereas there was a finding in favor of the plaintiff employee in 62% of the litigation cases, there was a finding in favor of the plaintiff employee in 46% of the mandatory arbitration cases. This result confirms past suggestions of a lower employee win rate in mandatory arbitration compared to litigation.

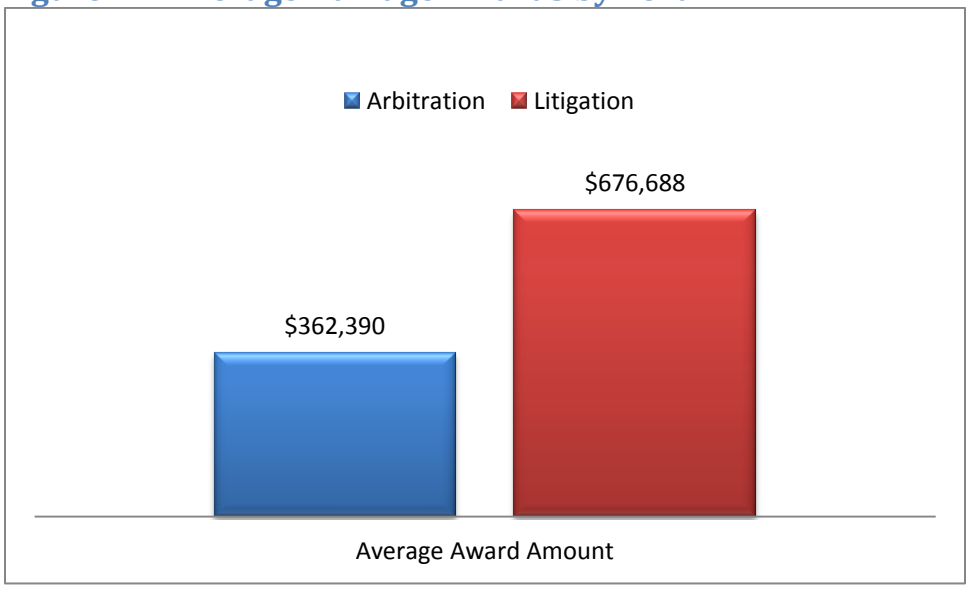
Figure 10: Plaintiff Employee Win Rates by Forum



[8] To further facilitate comparability cases involving class actions and employees as defendants were not included in this analysis. Arbitration cases proceeding under individually-negotiated or voluntary agreements were likewise excluded from the present analysis.

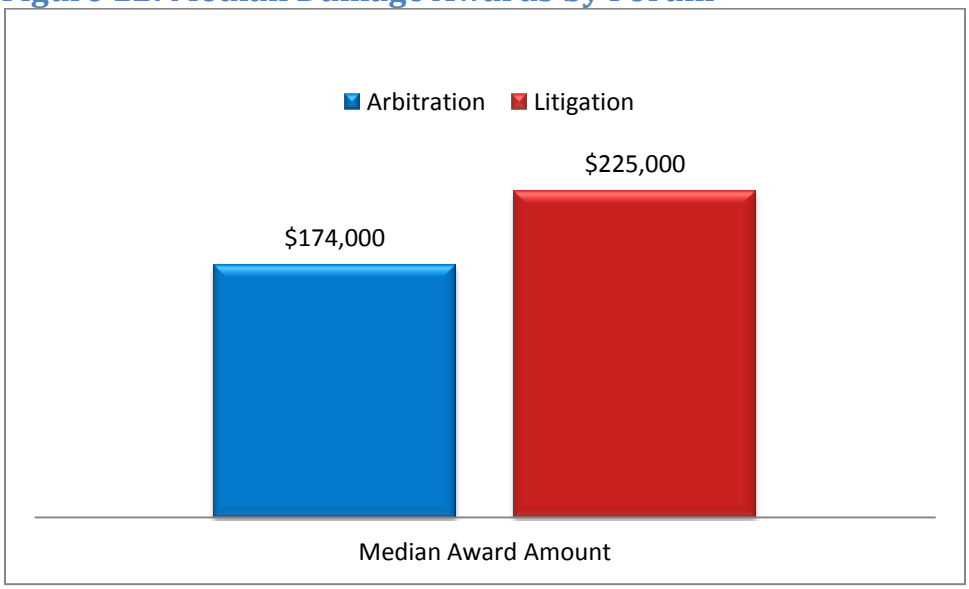
Beyond the initial finding of employer liability, we investigate the amounts of damages awarded to successful plaintiff employees in mandatory arbitration compared to litigation. We find that successful employees receive on average $362,390 in damages in mandatory arbitration compared to an average of $676,688 in damages in litigation.

Figure 11: Average Damage Awards by Forum



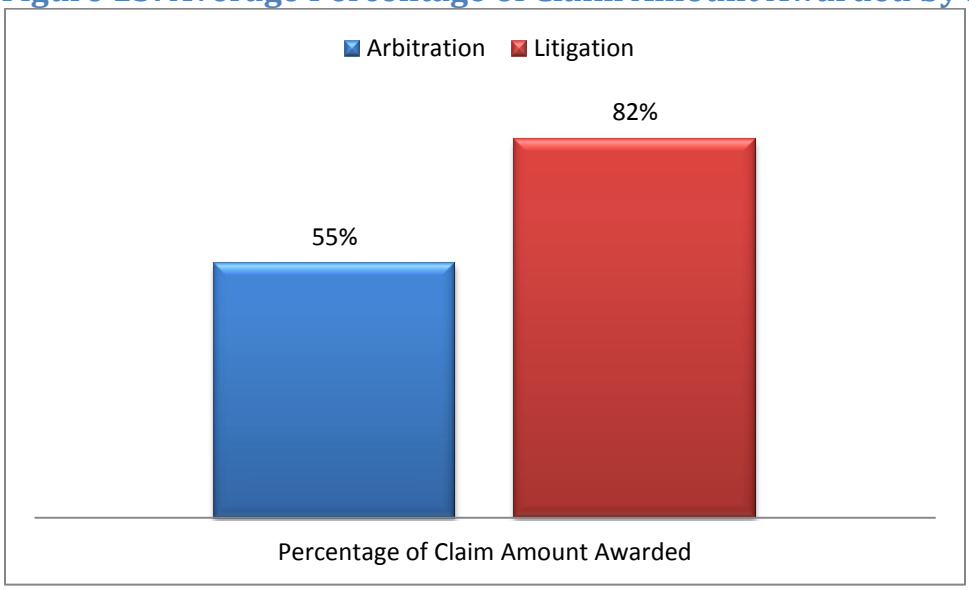
We also find similar, though smaller, differences in median or typical damage awards (i.e. half the damage awards are larger and half smaller than this amount), with a median of $174,000 in mandatory arbitration compared to $225,000 in litigation. This smaller difference looking at the median compared to the mean indicates that a significant part of the difference is that relatively large damage awards are less frequent in mandatory arbitration compared to litigation. This could have important public policy effects if the absence of large damage awards weakens the deterrent effects of employment discrimination law.

Figure 12: Median Damage Awards by Forum



Another metric to analyze award amounts and plaintiff success is to look at the percentage of the claim amount awarded. For example, it is dubious to describe a plaintiff as "successful" if they claim $250,000 in damages but are awarded $100. Similarly, looking only at the average size of awards rendered in arbitration and litigation may overlook important differences between the amounts of damages claimed. However, as seen in Figure 13, when a case is adjudicated in favor of an employee plaintiff they receive on average 55% of their claim amount in arbitration and 82% of their claim amount in litigation. This indicates that, even when controlling for the size of claimed damages, employees receive inferior outcomes in arbitration relative to litigation.

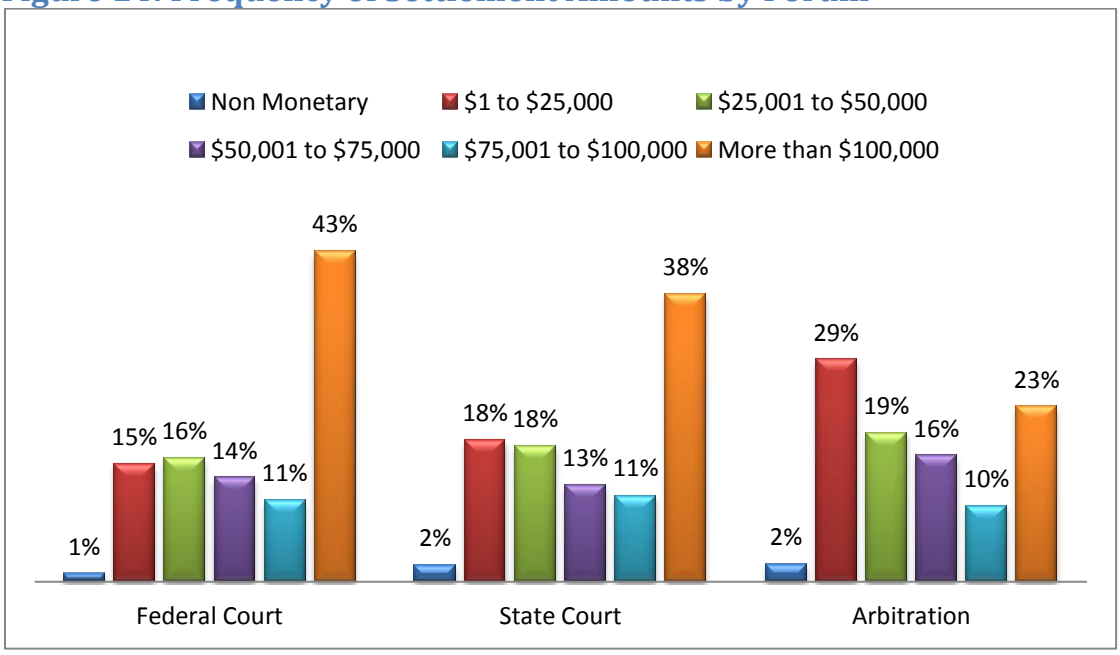
Figure 13: Average Percentage of Claim Amount Awarded by Forum



Employee success can also be measured by the size of voluntary settlements reached before final adjudication in mandatory arbitration and litigation. Previous studies have shown that settlements are the most common disposition in both forums, yet very little is known about the content of settlements in employment discrimination claims.[9] Attorneys were asked to report the number of cases settled within the past 12 months by forum and settlement size. The distributions of settlements across forums are presented in Figure 14. In accord with our previous findings on monetary award amounts and percentage of claim amount awarded, settlements in mandatory arbitration are, on average, lower than those found in cases in state and federal court. Specifically, 29% of settlements in mandatory arbitration were between $1 and $25,000, compared to 15% of settlements in federal court and 18% of settlements in state court that were reported to be between $1 and $25,000. With respect to large settlements, 23% of settlements in mandatory arbitration were above $100,000, whereas 43% and 38% of settlements in federal and state court, respectively, settled for over $100,000. It should also be noted that non-monetary awards are extremely rare across all forums.

[9] Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEGAL STUD. 429, 429 (2004); 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. OF EMPIRICAL LEGAL STUD. 175, 188 (2010).

Figure 14: Frequency of Settlement Amounts by Forum



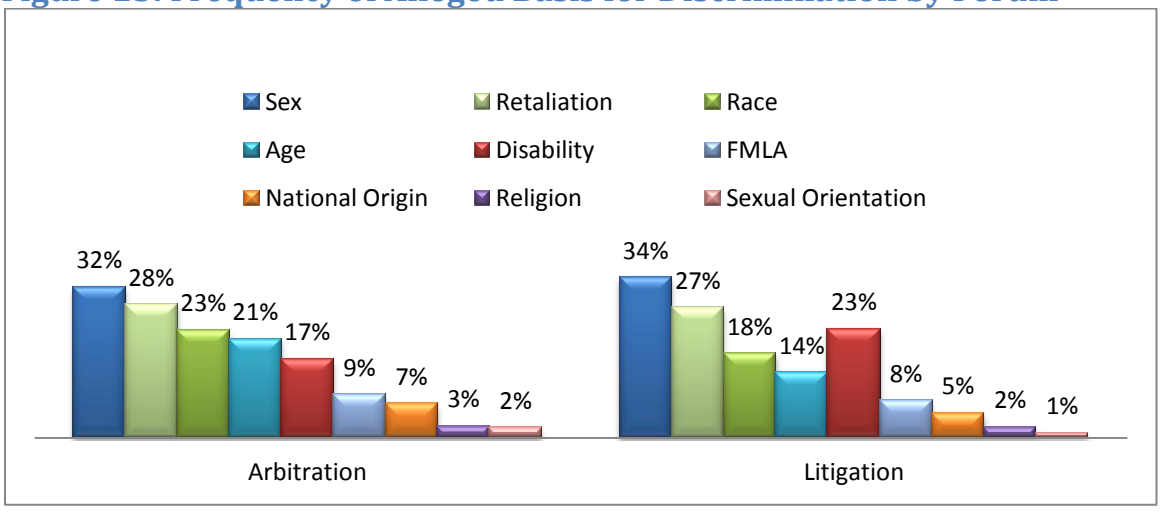
Reviewing employee win rates, damages, and settlement amounts exposes pronounced differences between mandatory arbitration and litigation. Compared to litigation, employee plaintiffs in mandatory arbitration are less likely to settle for high monetary amounts, less likely to receive a ruling in their favor at trial, and, when they are successful, they receive lower damages measured in absolute monetary values and percentage of claim amount awarded. While additional analyses need to be conducted to definitively attribute these differences to the arbitration forum, such uniform differences among multiple measures suggests mandatory arbitration provides inferior outcomes for employee plaintiffs pursuing employment discrimination claims.

Part 7: Comparison of Mandatory Arbitration and Litigation Case Characteristics

One of the limitations of past research on mandatory arbitration is the lack of systematic comparisons of the characteristics of the cases brought in mandatory arbitration to those brought in litigation. It could be argued that the differences in outcomes such as those we have identified can be explained by differences in the types of cases brought in the two forums. We address this in our survey by asking the respondents a series of questions about the characteristics of the mandatory arbitration and litigation cases whose outcomes were reported in the previous section. In this section, we report the results of these comparisons between litigation and mandatory arbitration.

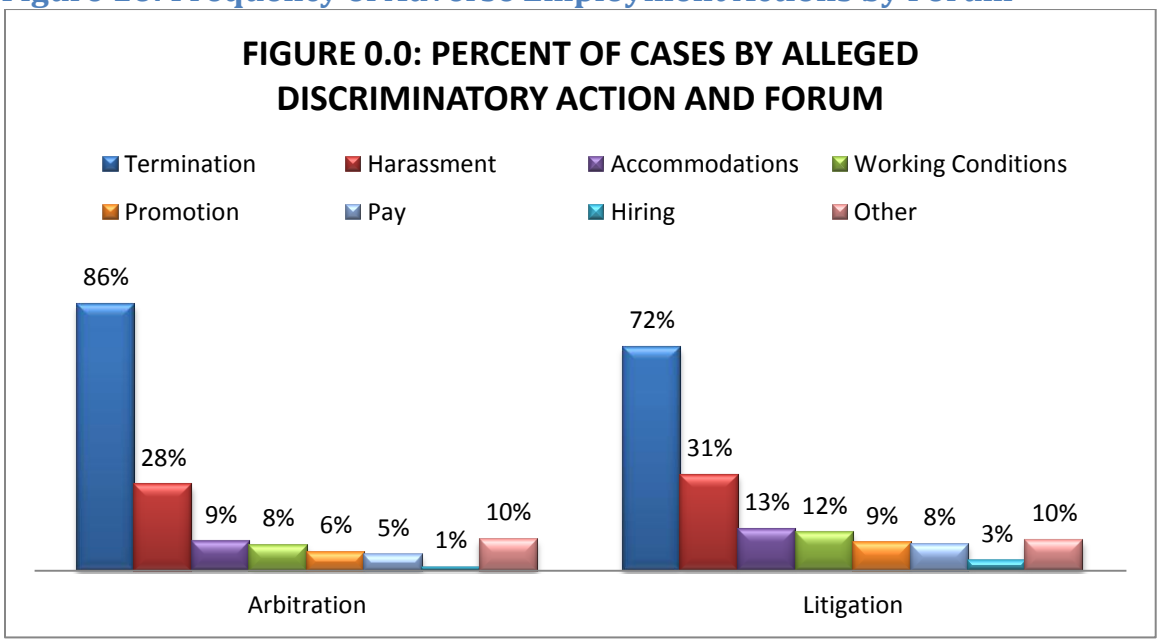
First, we asked attorneys about the legal basis for their most recent employment discrimination case in each forum. The legal basis for discrimination alleged in the two forums is relatively similar, with sex being the most common type of discrimination alleged followed by retaliation. There are some small differences, with age discrimination alleged in 21% of arbitration cases but only 14% of litigation cases and disability discrimination alleged in 17% of arbitration cases but 23% of litigation cases. The percentages reported in Figure 15 sum to over 100% because a case can include more than one alleged basis for discrimination

Figure 15: Frequency of Alleged Basis for Discrimination by Forum



Second, we asked about what types of adverse employment actions are alleged in each forum. As with the alleged basis for discrimination, the percentages in Figure 16 exceed 100% because a case can allege multiple adverse employment actions. In both litigation and mandatory arbitration, the most common type of adverse employment action alleged is termination, with harassment as the second most common alleged action. Allegations of discrimination in accommodations, working conditions, promotion, pay and hiring appear in roughly equal proportions as well.

Figure 16: Frequency of Adverse Employment Actions by Forum

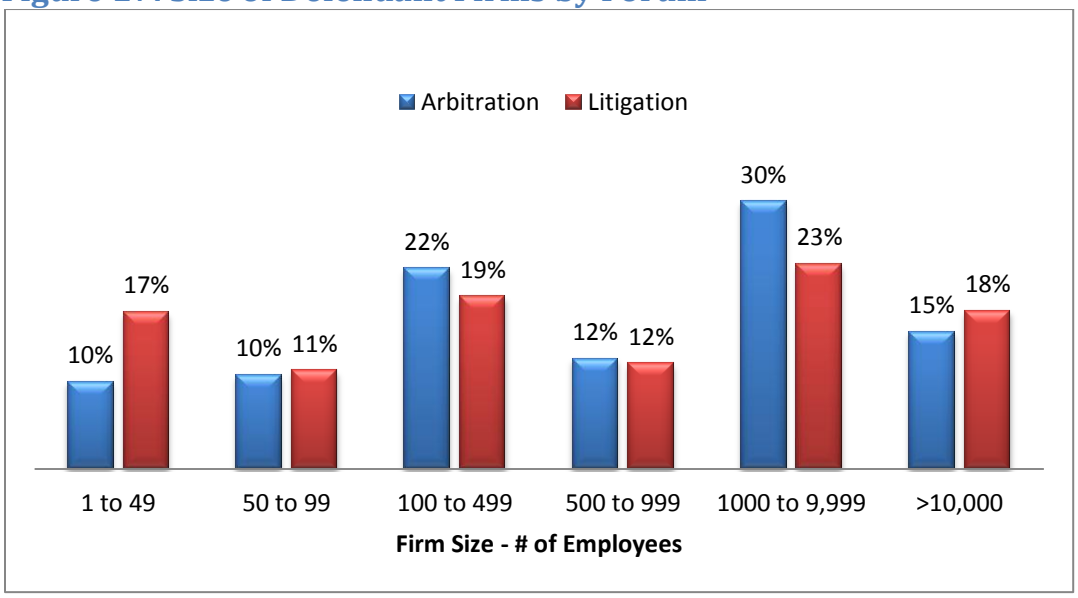


Taken together, the distributions of the types of discrimination and the types of adverse employment actions alleged do not indicate any major difference in the characteristics of the cases brought in each forum that are likely to explain the inferior outcomes in mandatory arbitration compared to litigation reported in Part 6.

Are there differences in other case characteristics between arbitration and litigation? With respect to the size of the defendant employer, employees in mandatory arbitration and litigation cases on average worked for similar size firms. While the distributions are

similar, employment discrimination claimants in arbitration are less likely to have been employed by very small employers (those with 1 to 49 employees) and very large employers (those with 10,000 or more employees). One of the arguments advanced to explain differences in outcomes between the two forums is that firms adopting mandatory arbitration will be larger ones with more sophisticated human resource policies and internal grievance procedures that filter out meritorious cases before they turn into legal disputes. Our finding of an overall similarity of the size distributions of defendant employers in mandatory arbitration and litigation is evidence against this argument.

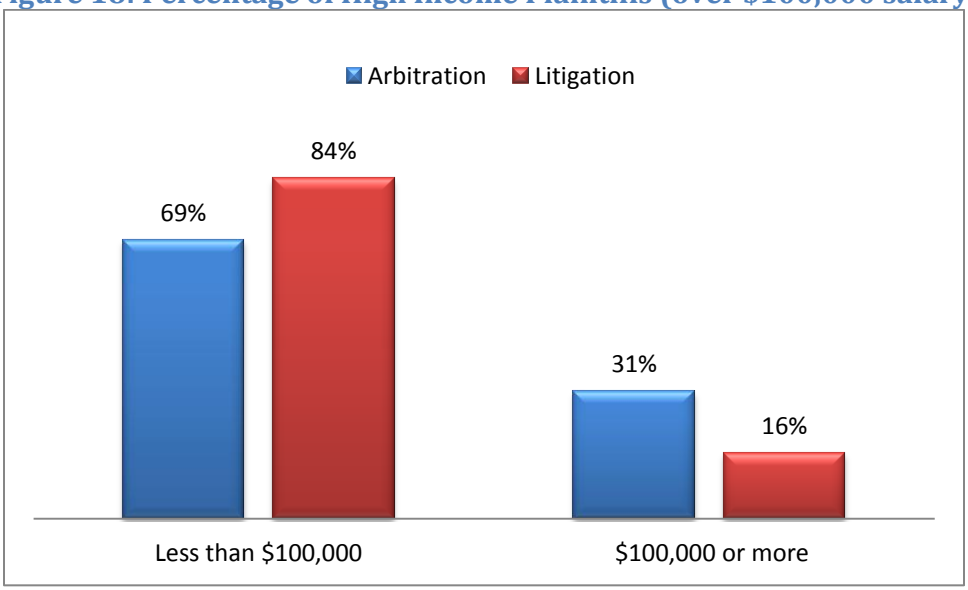
Figure 17: Size of Defendant Firms by Forum



The income levels of plaintiff employees is an important issue to examine, because one of the major public policy arguments advanced in favor of mandatory arbitration is that it could provide greater accessibility for lower income employees who are unable to bring cases through the complex and expensive litigation system. However in contrast to this prediction, we find that plaintiffs in mandatory arbitration are more likely to have higher income levels than plaintiffs in litigation. As shown in Figure 18, whereas 69% of plaintiffs in mandatory arbitration had incomes under $100,000 per year, 84% of plaintiffs in litigation had incomes of under $100,000 per year. This suggests that it is litigation rather than mandatory arbitration that is the more accessible forum to lower

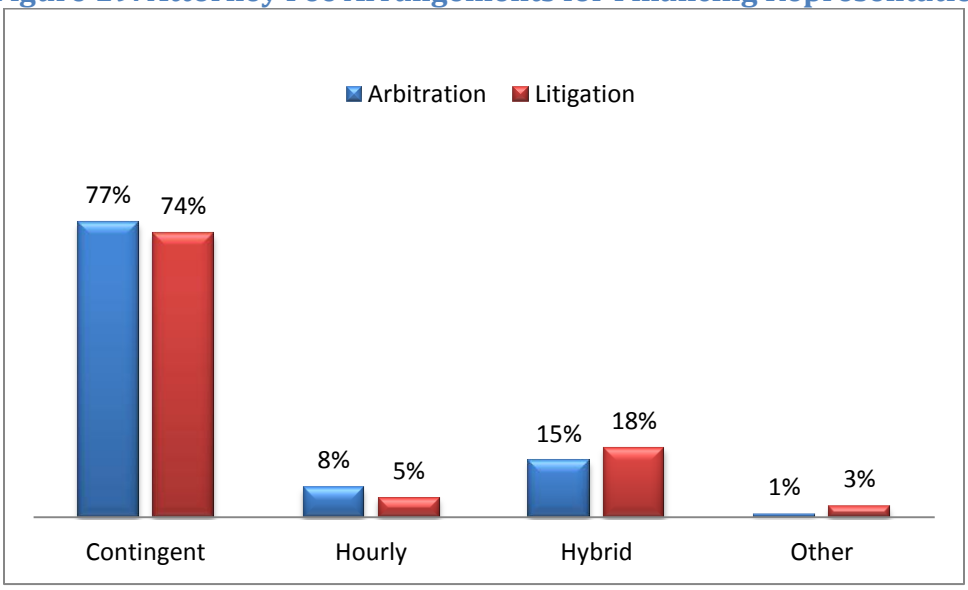
income employees. Alternatively, perhaps arbitration agreements are more likely to cover higher salaried employees. However, even if this were true, the argument that mandatory arbitration expands access to justice to lower income employees remains dubious if those that allegedly stand to benefit from arbitration are not covered by arbitration clauses.

Figure 18: Percentage of High Income Plaintiffs (over $100,000 salary) by Forum



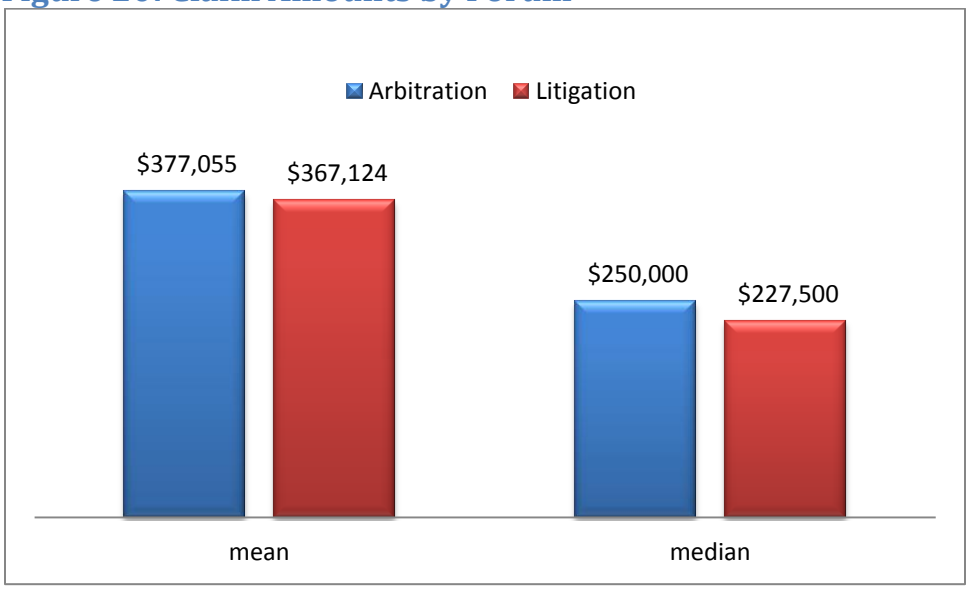
In addition to the characteristics of the plaintiff and defendant, we also asked about the arrangements for representation of the employee. In both the litigation and mandatory arbitration cases, most cases were handled on a contingency fee rather than an hourly fee basis. Pure contingency arrangements were found in 77% and 74% of the reported arbitration and litigation cases, respectively. Hybrid arrangements, where employees pay an upfront cost or reduced hourly charges in addition to a contingency arrangement comprised an additional 15% and 18% of arbitration and litigation cases, respectively. Finally, employee financed their cases on an hourly basis in 8% of arbitration and 5% of litigation cases.

Figure 19: Attorney Fee Arrangements for Financing Representation by Forum



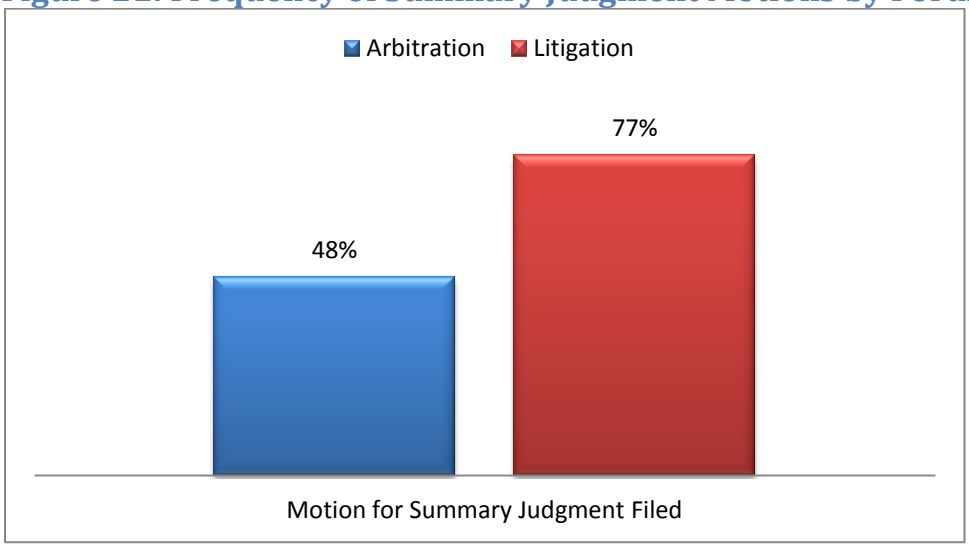
If mandatory arbitraiton is a forum that is more accessible for lower value cases, we might expect to find this reflected in differences in the claim amounts between the two forums. However we find that both the average and median claim amounts in mandatory arbitration and litigation are almost identical, with an average claim of $377,055 in mandatory arbitration compared $367,124 in litigation and a median claim of $250,000 in mandatory arbitration compared to $227,500 in litigation. This provides additional strong evidence that the types of claims being brought in the two forums are similar and differences between the types of claims do not explain the differences in outcomes that we find between mandatory arbitration and litigation.

Figure 20: Claim Amounts by Forum



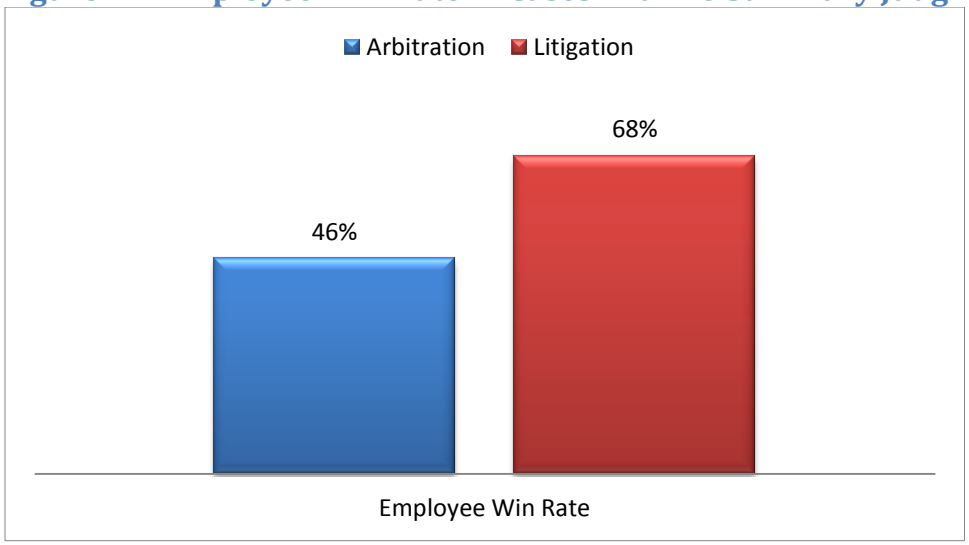
One often observed difference between litigation and arbitration is the relative frequency of summary judgment motions in litigation compared to their rareness in arbitration. Our results indicate that summary judgment motions were more common in the litigation cases. However, summary judgment motions were surprisingly common in mandatory arbitration, being filed in almost half of all cases. This difference between litigation and mandatory arbitration appears to have narrowed substantially compared to conventional wisdom.

Figure 21: Frequency of Summary Judgment Motions by Forum



Does this difference in the frequency of summary judgment motions explain the differences in outcomes between mandatory arbitration and litigation? In Figure 22, we compare the employee win rates by forum in those cases where there was no motion for summary judgment. Taking out the potential filtering effect of summary judgment motions, we find a slightly more dramatic difference in outcomes with employees doing less well in mandatory arbitration compared to litigation. This indicates that the differences in outcomes between mandatory arbitration and litigation do not appear to be the result of a selection effect arising from differences in summary judgment motion incidence between the forums.

Figure 22: Employee Win Rate in Cases with No Summary Judgment Motion



Part 8: Arbitration Administration

As a private contractual process, arbitration's characteristics may vary depending on the nature of the agreement and the administering organization. We asked a series of questions to investigate the characteristics of the arbitration agreements and administering organizations.

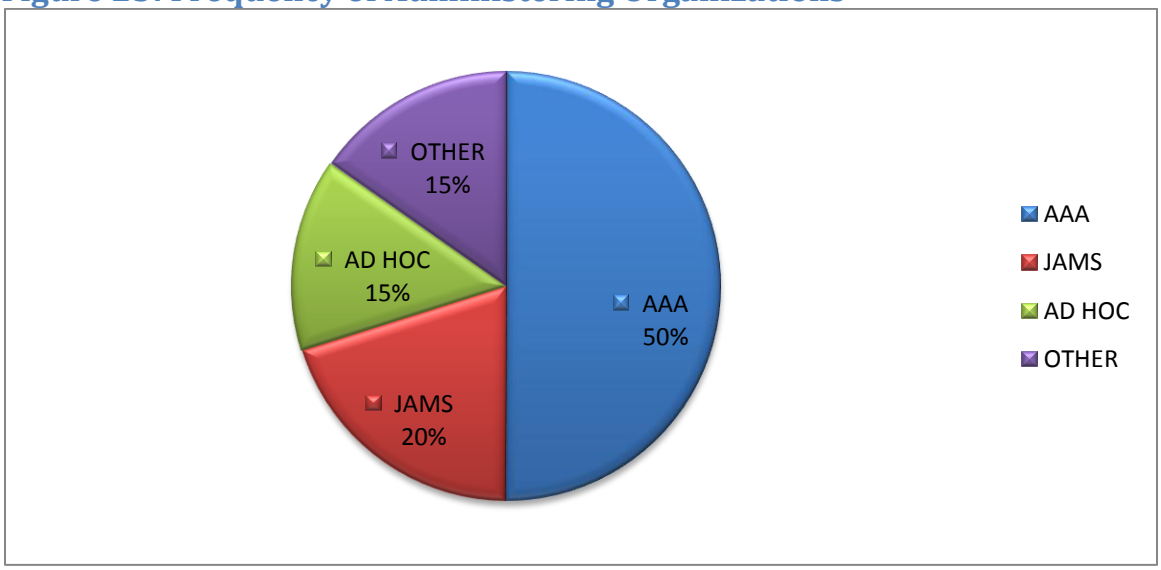
An initial question we asked concerning the arbitration cases in our sample is whether the arbitration clause in question was mandatory versus voluntary or individually negotiated. We included this question because rather than being mandatory adhesive contracts, some arbitration agreements are bilaterally negotiated by employees with individual bargaining power, such as corporate executives. Also, there are some arbitration cases that are the product of voluntary, post-dispute agreements to arbitrate. Our results indicate, however, that these latter two groups of individually negotiated and voluntary arbitration cases are a relatively small proportion of the total number of employment arbitration cases. We find that 93% of cases in our sample were the product of mandatory arbitration agreements. To focus our analysis on the impact of mandatory arbitration, in our reported results, we only looked at these cases that were the product of mandatory arbitration agreements, excluding the cases that were the result of individually-negotiated or voluntary agreements.[10]

Many arbitration agreements designate an organization to administer the arbitration proceedings, including providing a roster of potential arbitrators for selection to arbitrate the case. Our results indicate that the most commonly used administering agency is the American Arbitration Association (AAA), which administered half of the employment arbitration cases in our sample. The second most common administering agency is JAMS. In some other agreements, the procedure does not designate any administering organization and instead the arbitration is conducted on an ad hoc basis. The next most common category is this type of ad hoc case where there was no administering agency

[10] In addition to dropping individually-negotiated agreements, we dropped cases where the employer is listed as the claimant, cases involving class actions, and cases where the arbitration was conducted by a public agency such as the FMCS, FINRA, or US DOL.

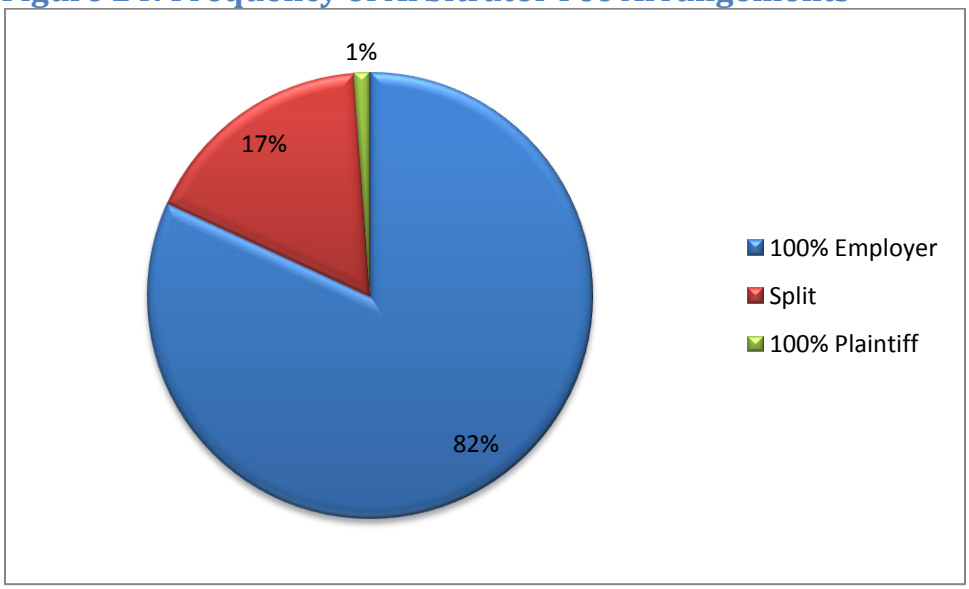
overseeing the arbitration proceedings. The remaining 15% of cases were administered by smaller organizations such as Judicate West, ADR Services, PMA, and others.

Figure 23: Frequency of Administering Organizations



A much discussed issue about mandatory arbitration procedures is who pays the arbitrator fees. In our sample, in the majority of cases, or 82%, the employer paid 100% of the arbitrator fees for the case. This result likely reflects the AAA and JAMS having adopted a rule in their employment arbitration procedures that the employer is required to pay 100% of the arbitrator fees in cases brought under mandatory arbitration clauses. However it is noteworthy that in 17% of cases the arbitration fees were split. This suggests that in a substantial minority of cases, employees continue to pay a portion of arbitrator fees, which may serve as a barrier to access.

Figure 24: Frequency of Arbitrator Fee Arrangements



Part 9: Conclusion

This research project has sought to shine new light on the important and growing, but understudied, practice of mandatory arbitration. It breaks new ground by examining the experiences of plaintiff attorneys who represent employees in both mandatory arbitration and litigation. Our results provide systematic comparisons of the processes and outcomes of bringing employment cases in mandatory arbitration and litigation. We find that employees overall obtain less favorable outcomes in mandatory arbitration than they do in litigation, including lower win rates and smaller damage awards and settlement amounts. Our survey results allow us to investigate some of the possible explanations for these differences between mandatory arbitration and litigation. Arguments that lower employee win rates and damage amounts are due to greater accessibility of mandatory arbitration allowing more marginal and lower value cases to be brought by employees are not supported by our results. Claim amounts and case characteristics were generally similar across the two forums. We also find that attorneys are less likely to accept cases for representation where there is a mandatory arbitration clause in place. Further undermining the accessibility argument for mandatory arbitration, we find that employees in mandatory arbitration cases tend to have higher incomes than do employees in litigation cases. This indicates that mandatory arbitration is not serving as a more accessible forum for lower income employees.

Appendix 1: Case Characteristics by Forum

	Distribution		
	Overall	**Arbitration**	**Litigation**
N	**911**	**275**	**636**
	100%	30%	70%
Case Merit			
Mean	5.44	5.51	5.42
Summary Judgment			
Yes	68%	48%	77%
No	32%	52%	23%
Statutory Basis for Claim			
Sex	33%	32%	34%
Disability	21%	17%	23%
Race	19%	23%	18%
Religion	2%	3%	2%
Age	16%	21%	14%
National Origin	6%	7%	5%
FMLA	8%	9%	8%
Sexual Orientation	1%	2%	1%
Retaliation	28%	28%	27%
Alleged Discriminatory Action			
Termination	77%	86%	72%
Harassment	30%	28%	31%
Working Conditions	11%	8%	12%
Accommodations	12%	9%	13%
Hiring	3%	1%	3%
Promotion	8%	6%	9%
Pay	7%	5%	8%
Other	10%	10%	10%
Plaintiff Gender			
Female	56%	51%	58%
Male	44%	49%	42%
Plaintiff Occupation			
Clerical/Blue Collar	24%	16%	27%
Service	17%	17%	18%
Professional	13%	39%	23%
Manager	29%	20%	15%
Other	18%	7%	15%
Plaintiff Race			
African American	19%	17%	20%
Asian	5%	8%	3%
Caucasian	60%	58%	61%
Hispanic	11%	12%	11%
Other	4%	5%	4%
Plaintiff Salary			
Less than $100,000	79%	69%	84%
$100,000 or more	21%	31%	16%
Plaintiff Tenure			
< 6 months	6%	3%	7%
6-11 months	7%	6%	8%
1-3 years	26%	31%	25%
> 3 years	60%	60%	60%
Plaintiff Firm Size			
1 to 49	15%	10%	17%
50 to 99	11%	10%	11%
100 to 499	20%	22%	19%
500 to 999	12%	12%	12%
1000 to 9,999	25%	30%	23%
>10,000	17%	15%	18%

Appendix 2: Employee Win Rates by Forum and Case Characteristics

	Employee Win Rate	
	Arbitration	Litigation
N	**275**	**636**
Overall	**46%**	**62%**
Summary Judgment		
Yes	47%	60%
No	46%	68%
Statutory Basis for Claim		
Sex	43%	64%
Disability	50%	61%
Race	55%	55%
Religion	57%	36%
Age	36%	53%
National Origin	65%	42%
FMLA	48%	62%
Sexual Orientation	67%	71%
Retaliation	45%	67%
Alleged Discriminatory Action		
Termination	47%	62%
Harassment	50%	69%
Working Conditions	78%	58%
Accommodations	42%	60%
Hiring	33%	48%
Promotion	47%	56%
Pay	57%	63%
Other	68%	60%
Plaintiff Gender		
Male	49%	62%
Female	43%	62%
Plaintiff Occupation		
Clerical/Blue Collar	45%	67%
Service	43%	58%
Professional	47%	60%
Manager	40%	60%
Other	63%	60%
Plaintiff Race		
African American	52%	57%
Asian	52%	65%
Caucasian	46%	63%
Hispanic	24%	64%
Other	62%	39%
Plaintiff Salary		
< $100,000	48%	63%
> $100,001	43%	58%
Plaintiff Tenure		
< 6 months	25%	67%
6-11 months	33%	62%
1-3 years	51%	64%
> 3 years	44%	60%
Plaintiff Firm Size		
1 to 49	40%	71%
50 to 99	64%	71%
100 to 499	44%	49%
500 to 999	33%	63%
1000 to 9999	49%	62%
>10,000	48%	62%

Appendix 3: Award Amounts in Successful Cases by Forum and Case Characteristics

	Monetary Award			
	Arbitration		Litigation	
N	**114**		**355**	
	Mean	**Median**	**Mean**	**Median**
Overall	**$362,390**	**$174,000**	**$676,688**	**$225,000**
Summary Judgment				
Yes	$289,452	$172,000	$695,515	$250,000
No	$428,033	$187,500	$630,955	$144,000
Statutory Basis for Claim				
Sex	$394,646	$150,000	$680,688	$200,000
Disability	$326,389	$167,500	$516,059	$200,000
Race	$229,417	$174,000	$719,450	$300,000
Religion	$156,000	$156,000	$2,660,000	$2,660,000
Age	$622,421	$350,000	$584,574	$323,000
National Origin	$245,085	$205,000	$498,333	$433,500
FMLA	$112,091	$117,000	$558,167	$171,000
Sexual Orientation	$514,000	$165,500	$748,000	$250,000
Retaliation	$280,769	$175,000	$789,793	$330,000
Alleged Discriminatory Action				
Termination	$374,514	$185,000	$689,898	$250,000
Harassment	$324,512	$165,000	$946,872	$280,000
Working Conditions	$304,667	$200,000	$538,320	$320,000
Accommodations	$425,800	$131,000	$756,671	$210,000
Hiring			$474,650	$165,000
Promotion	$538,571	$400,000	$789,768	$335,000
Pay	$251,667	$203,000	$704,048	$210,000
Other	$316,917	$187,500	$510,695	$250,000
Plaintiff Gender				
Male	$393,929	$192,500	$781,102	$300,000
Female	$329,724	$172,000	$603,747	$175,000
Plaintiff Occupation				
Clerical/Blue Collar	$149,194	$121,000	$488,271	$164,000
Service	$634,650	$167,000	$1,101,901	$295,000
Professional	$341,200	$150,000	$678,082	$200,000
Manager	$431,294	$300,000	$868,380	$377,500
Other	$134,941	$80,000	$451,937	$150,000
Plaintiff Race				
African American	$251,001	$172,000	$685,746	$217,500
Asian	$428,050	$275,000	$625,583	$237,500
Caucasian	$433,906	$175,000	$744,114	$230,000
Hispanic	$258,875	$192,500	$ 444,548	$212,000
Other	$150,625	$118,500	$ 154,714	$110,000
Plaintiff Salary				
< $100,000	$250,297	$150,000	$557,774	$200,000
> $100,001	$649,626	$394,500	$1,339,522	$675,000
Plaintiff Tenure				
< 6 months	$212,500	$212,500	$354,817	$150,000
6-11 months	$158,000	$77,000	$285,613	$200,000
1-3 years	$325,859	$150,000	$720,193	$165,500
> 3 years	$412,483	$185,000	$754,086	$300,000
Plaintiff Firm Size				
1 to 49	$333,300	$325,000	$418,103	$125,000
50 to 99	$191,258	$117,000	$309,859	$200,000
100 to 499	$353,182	$195,000	$435,087	$237,500
500 to 999	$160,550	$167,500	$870,387	$442,000
1000 to 9999	$383,286	$200,000	$857,319	$225,000
>10,000	$486,184	$152,000	$1,140,599	$643,500

Appendix 4: Percentage of Claim Amount Awarded in Successful Cases by Forum and Case Characteristics

	% of claim Awarded			
	Arbitration		Litigation	
N	69		174	
	Mean	Median	Mean	Median
Overall	**55%**	**43%**	**82%**	**75%**
Summary Judgment				
Yes	51%	36%	79%	70%
No	58%	50%	90%	100%
Statutory Basis for Claim				
Sex	58%	45%	71%	60%
Disability	40%	35%	80%	75%
Race	43%	28%	86%	80%
Religion	41%	41%	67%	67%
Age	52%	43%	74%	68%
National Origin	29%	28%	90%	75%
FMLA	63%	69%	70%	63%
Sexual Orientation	160%	160%	88%	100%
Retaliation	59%	48%	92%	92%
Alleged Discriminatory Action				
Termination	52%	38%	84%	80%
Harassment	46%	33%	74%	60%
Working Conditions	52%	17%	67%	62%
Accommodations	43%	51%	65%	50%
Hiring			104%	120%
Promotion	119%	160%	76%	69%
Pay	34%	32%	77%	89%
Other	87%	86%	66%	54%
Plaintiff Gender				
Male	47%	33%	77%	73%
Female	63%	60%	85%	78%
Plaintiff Occupation				
Clerical/Blue Collar	39%	28%	82%	69%
Service	55%	54%	94%	100%
Professional	89%	100%	89%	67%
Manager	55%	47%	84%	76%
Other	46%	43%	66%	63%
Plaintiff Race				
African American	66%	38%	86%	93%
Asian	49%	32%	155%	188%
Caucasian	59%	53%	77%	71%
Hispanic	37%	30%	80%	80%
Other	19%	19%	18%	18%
Plaintiff Salary				
< $100,000	53%	43%	82%	75%
> $100,001	59%	43%	78%	75%
Plaintiff Tenure				
< 6 months	21%	21%	79%	89%
6-11 months	16%	16%	77%	70%
1-3 years	51%	36%	74%	64%
> 3 years	59%	50%	86%	85%
Plaintiff Firm Size				
1 to 49	91%	81%	80%	70%
50 to 99	52%	38%	92%	92%
100 to 499	48%	36%	96%	88%
500 to 999	64%	100%	99%	100%
1000 to 9999	58%	50%	61%	60%
>10,000	40%	33%	73%	65%