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Characteristics and Professional Practices of Labor and Employment Neutrals

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I. INTRODUCTION

Labor arbitration has been a fixture of unionized workplaces for over half a century. Ubiquitous in contemporary collective bargaining agreements, labor arbitration enjoys wide acceptance by a variety of stakeholders – including unions, firms, academics, and public policy advocates. Employment arbitration has rapidly expanded since its inception in the 1990s. Today, scholars estimate over half of all nonunion private sector workers are subject to a mandatory employment arbitration clauses.[1] Unlike labor arbitration, adhesive employment arbitration remains a provocative institution.[2] To date, researchers, advocates and policy-makers have focused mainly on the outcomes within arbitration, analyzing the rates of employee plaintiffs win and the size of their monetary awards.[3] However, basic institutional characteristics of employment neutrals have been underexplored. This project seeks to continue the work of Colvin & Gough (2016) and Seeber & Lipsky (2004) by moving beyond an analysis of win rates and award amounts and describing the backgrounds and professional practices of employment neutrals and comparing these to the backgrounds and professional practices of labor neutrals.[4] This study advances the field by shining a light on the emergent, but underexplored, employment neutral profession and progressing our understanding of the evolving dispute resolution environment.

I further delve into labor and employment neutral practitioner views on debates surrounding employment arbitration. Scholars have identified a potentially alarming statistical relationship where employers who appear before an arbitrator multiple times experience more favorable outcomes relative to appearing before an arbitrator only one time.[5] This so-called repeat player effect has received substantial academic interest. However, it is a severe oversight that workplace neutrals themselves have not been given a voice in the contentious discussion over

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[1] *See* Mark Gough, *Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice? Advances in Industrial and Labors Relations in Managing and Resolving Conflict*, 105-134 (2016). Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration.* (2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

[2] *See* Mark, D Gough, *How Do Organizational Environments and Mandatory Arbitration Shape Employment Attorney Case Selection? Evidence from and Experimental Vignette.* INDUSTRIAL RELATIONS: A JOURNAL OF ECONOMY AND SOCIETY, 541-567, (2018);Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 345-364, (2007); Estreicher et. al. , *Evaluating Employment Arbitration: A Call for Better Empirical Research* 70 Rutgers University Law Review 375 (2018); Cynthia Estlund, i, 96 N.C. L. Rev. 679 (2018); Sam Estreicher, *Saturns for Rickshaws*, 16 Ohio State Journal on Dispute Resolution 559-570 (2001)

[3] *See* e.g. Colvin,. *An Empirical Study of Employment Arbitration: Case Outcomes and Processes.* 8 JOURNAL OF EMPIRICAL LEGAL STUDIES 1-23; see also Gough, *Tale of Two Forums: Employment Discrimination Outcomes in Litigation and Arbitration* INDUSTRIAL AND LABOR RELATIONS REVIEW (2020); Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 91-112, (2014).

[4] Gough, *supra* note 1, at 105-134; Seeber, et al., *The Ascendancy of Employment Arbitrators in U.S. Employment Relations: A New Actor in the American System?*, 44 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 719-756, (2004)

[5] *See generally*, Colvin, *supra* note 2 at345-364; Alexander Colvin,. *An Empirical Study of Employment Arbitration: Case Outcomes and Processes* 8 JOURNAL OF EMPIRICAL LEGAL STUDIES, 1-23, (2011).
Alexander J.S. Colvin, and Mark Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*,68 INDUSTRIAL AND LABOR RELATIONS REVIEW 1019-1042.

repeat player effects identified in the academic literature and other debates implicating due process in employment arbitration. This study seeks to expand on the existing empirical literature by reporting how neutrals themselves view some of the most provocative contemporary debates surrounding employment arbitration.

To illuminate the contours of the labor and employment neutral profession I gathered data on the following aspects: professional background and work histories, other work activities of part-time neutrals, and characteristics of their current professional neutral practices along with neutral perceptions of the fairness of employment arbitration.

After a description of the methods to generate the report in the proceeding section, the results are presented as follows: (1) Neutral Practice Types; (2) Neutral Demographics; (3) Neutral Practice Characteristics; and (4) Neutral Views on Employment Arbitration.

II. METHODS

In this study, I investigate the professional characteristics, networks, and perceptions of labor and employment arbitrators by surveying professional neutrals. The survey frame consisted of active employment arbitrators from the (i) American Arbitration Association (AAA) and (ii) JAMS compiled from the agencies' case reports and (iii) labor arbitrators from the National Academy of Arbitrator (NAA) member roster. JAMS and AAA are the largest arbitration providers in the U.S. and are jointly responsible for administering a majority— approximately 70% — of all employment arbitrations in the country.[6] Pursuant to state law, arbitration providers are required to report key information on all mandatory consumer arbitration conducted, including arbitrator names.[7] I were able to produce the universe of practicing AAA and JAMS employment arbitrators from these disclosures. Also included in the survey frame are NAA members, allowing us to assess the current state of neutral practice among the Academy's membership, as well as being able to identify differences between types of neutral practices. In total, our survey sampling frame (i.e. the list of names I sent our survey to) consisted of 1,243 unique arbitrators.

I administered the survey questionnaire during Summer of 2018 using a combined web-based and physical mailing method. For the web-based administration, arbitrators received an initial email requesting their participation with a link to the web-based survey instrument, as well as two follow-up reminders. I then mailed paper copies of the survey to non-respondents to solicit additional participation. This combination of web-based and traditional hard-copy mailing yielded 612 useable responses from practicing arbitrators, representing a response rate of 49 percent. However, among NAA members, our response rate approached 80 percent.

[6] A recent survey of employment plaintiffs' lawyers based on 1,258 responses, found that the American Arbitration Association was the administering organization in 50% of attorney respondents' most recent arbitration case and JAMS was named as the arbitration provider in 20% of cases. The remaining arbitrations were conducted Ad Hoc (i.e., no arbitration provider was used) or used a variety of smaller and local arbitration provider agencies.

[7] For a detailed discussion of relevant state laws and the consumer arbitration report requirement, see Colvin, *supra* note 2.

III. RESULTS

A. *Neutral Types*

1. Neutral Practice Type

In the results that follow, I break down our statistics into separate categories of responses from exclusive labor neutral practitioners, exclusive employment neutral practitioners, and "multi-neutrals" who practice both labor and employment neutral work. Doing so allows us to identify ways in which the emerging employment arbitration profession is similar to or different from the more well-established labor arbitration profession as embodied in its leading professional organization, the NAA.

Table 1 shows the distribution of practice type among respondents. Approximately 32 percent of respondents indicated their neutral practices in the previous year focused exclusively on arbitration and/or mediation of union-management disputes. I label such respondents "Labor Neutrals." All labor neutrals in our sample, or 100 percent, are members of the National Academy of Arbitrators. Nearly a quarter of respondents, or 21 percent, indicated their neutral practices in the previous year consisted exclusively of non-union employment arbitration and/or non-union employment mediation. I label such respondents as "Employment Neutrals." No employment neutral is a member of the NAA in our sample. Finally, the largest group of respondents, comprising almost half, or 47 percent of our sample, consist of neutrals who have engaged in both labor arbitration and/or mediation and nonunion employment arbitration and/or mediation within the previous year. I refer to these respondents as "Multi-neutrals." Approximately three quarters, or 79 percent, of multi-neutrals are members of the NAA.

Table 1: Responses, by Practice Type

Practice Type	No.	%
Labor Neutral	195	32
Employment Neutral	129	21
Multi-neutral	288	47
Total	612	100

B. *Neutral Demographics*

2. Demographics

I begin by looking at the demographics of the labor and employment neutral profession. Table 2 reports demographic characteristics of survey respondents by practice type. One of the long-standing concerns in the arbitration profession is a lack of demographic diversity among arbitrators which is apparent in Table 2 across all neutral types. Indeed, labor and employment neutrals are homogeneous in terms of race and gender. Women comprise approximately one-fifth of neutrals across all practitioner types; only 17 percent of labor neutral, 20 percent of employment neutral, and 21 percent of multi-neutral respondents indicated they were female. The proportion of racial minorities within each practitioner type is even more lopsided; a mere 5 percent of labor

neutral, 4 percent of employment neutral, and 5 percent of multi-neutral respondents identified as racial minorities. That females and racial minorities are starkly underrepresented within the arbitration profession is not a novel finding; however, these trends deserve continued concern.

Table 2: Demographic Distributions, by Practice Type

	Labor Neutral (%)	Employment Neutral (%)	Multi-neutral (%)
Gender			
Female	17	20	21
Male	83	80	79
Race			
White, Non-Hispanic	95	96	95
Non-White	5	4	5
Age			
40 to 49	2	4	3
50 to 59	4	6	7
60 to 69	22	43	36
70 to 79	47	39	48
80 to 89	21	9	6
90 or over	1	0	0
Education			
JD	54	100	89
PhD	24	2	9
Location			
Northeast	49	25	38
Southeast	25	19	27
Midwest	37	25	35
Southwest	17	30	23
West	19	26	30
Canada	7	0	7
No.	**195**	**129**	**288**

The distribution of ages among practice types is further explored in Table 2. Only 6 percent of labor neutrals are under the age of 60 while almost one-quarter of all labor respondents, or 22 percent, are over the age of 80. The largest cohort of labor neutrals is represented in the 70 to 79 age range. Employment neutrals, as a demographic, are slightly younger than their labor neutral peers. Specifically, 10 percent of employment neutrals are under the age of 60, only 9 percent are over the age of 80, and the largest age demographic, representing 43 percent of respondents, is

those between the ages of 60 and 69. Multi-neutrals resemble employment neutrals on the tail ends of the age distribution but also resemble labor neutrals in that the largest age demographic, representing 48 percent of multi-neutral respondents, is those between 70 and 79. Arbitrators, and particularly those who practice labor arbitration exclusively, are an aging cohort working well into the typical retirement years found in the rest of the U.S. workforce.

The vast majority of arbitrators hold advanced degrees, either J.D.'s or Ph.D.'s. Table 2 shows 54 percent of labor neutrals hold a J.D. compared to 100 percent of employment neutrals and 89 percent of multi-neutrals. Nearly a quarter, or 24 percent, of labor neutrals obtained a Ph.D. while only 2 percent and 9 percent of employment neutrals and multi-neutrals hold a Ph.D., respectively. Educational background is one area where there is a clear difference between those who practice non-union employment arbitration and/or mediation and those who focus exclusively on union-management disputes. This is not particularly surprising as the skill sets, customer preferences, and cases heard in non-union employment arbitration increase the importance of formal legal training relative to labor arbitration where procedures and disputes can be less formal and legalistic.

I asked respondents "[i]n what region(s) do you practice as a neutral?" and report the results in Table 2. As respondents could select multiple regions, each column does not sum to 100. Almost half, 49 percent, of labor arbitrators reported practicing in the Northeast and over one-third, or 37 percent, practice in the Midwest, though only one-fifth, or 19 percent, practiced in the West. Multi-neutrals practices are concentrated in the Northeast, at 38 percent, the Midwest, 35 percent, and the West, 30 percent. Unionization rates are highest in the Northeast, Midwest, and West, so one would expect labor arbitrators to practice at higher rates in the West as well. But this is not the case. This data does not necessarily show that there is less labor arbitration occurring in the Western U.S.; rather, it may suggest that multi-neutrals are conducting labor arbitration at higher rates in the West. Employment Neutrals are more evenly dispersed through the U.S. and practice in the Southwest (30 percent), West (26 percent), Midwest (25 percent), Northeast (25 percent), and Southeast (19 percent). One notable relationship is that areas with a higher concentration of labor arbitration practices report lower concentrations of employment arbitration practice. While labor arbitrators are most likely to report practicing in the Northeast, Midwest, and the Southwest, employment arbitrators are least likely to report working in these same geographic areas. This may indicate the labor and employment arbitration are substitutes rather than complementary institutional practices.

3. Neutral Work Histories

Table 3a: Rates of Work Experience, by Practice Type

	Labor Neutral (%)	Employment Neutral (%)	Multi-neutral (%)
Work History (Occupation)			
Law (Defense/Employer)	15	50	36
Law (Employee/Union)	13	20	32
Law (Other)	14	57	37
Academic	45	24	37
Government	37	35	31
Management	16	2	13

Union	11	-	9

Table 3b: Mean Work Experience, by Practice Type

Work History (Occupation)	Labor Neutral (years)	Employment Neutral (years)	Multi-neutral (years)
Law (Defense/Employer)	15	16	20
Law (Employee/Union)	9	16	16
Law (Other)	21	19	18
Academic	26	9	23
Government	13	12	9
Management	11	15	9
Union	9	-	7

What types of work have neutrals pursued over the course of their careers? Table 3a shows prior careers of labor neutrals, employment neutrals, and multi-neutrals. I asked respondents to indicate all previous job episodes, therefore, neutrals could select multiple prior careers, i.e. the categories sum to over 100 percent.

Differences between labor arbitrators, employment arbitrators, and multi-neutrals can again be observed in Table 3a and Table 3b. Labor arbitrators are almost twice as likely to have worked in academia and substantially less likely to have worked in law relative to employment neutrals. Labor arbitrators are most likely to have had some experience in academia and government service. Specially, 45 percent of labor arbitrators report having worked in academic employment and 37 percent report having worked in government service. Those labor arbitrators with work experience in academia have, on average, 26 years of experience, and those labor arbitrators with work experience in government have spent, on average, 13 years in government service. Employment neutrals are most likely to report experience in Law (Other) (57 percent) and practicing as a defense-side lawyer (50 percent). It is notable that not a single employment neutral respondent reported having experience working for a union compared to 11 percent for labor neutrals and 9 percent for multi-neutrals. Though only 2 percent of employment neutrals report having experience working in management compared to 16 percent of labor neutrals and 13 percent of multi-neutrals. Multi-neutrals, by some measures, have the most diverse work histories, with nearly one-third of multi-neutral respondents indicating experience practicing in each of the following areas: defense-side law, employee- or union-side law, in other areas of the law, in academia, and government.

Taken together, Tables 1 through 3 present a complex picture of labor, employment, and multi-neutrals. Regardless of practice type, neutrals are uniformly homogeneous in terms of race and gender. However, important distinctions are present between practice types in terms of education, geographic practice area, and work histories. One striking pattern that emerges is that multi-neutrals appear equally similar—and dissimilar—to both labor and employment neutrals. Rather than resembling either labor or employment neutrals, multi-neutral characteristics have their own distinct characteristics.

C. *Neutral Practice Characteristics*

4. Part-Time Status

What do the professional practices of neutrals look like? As an initial point of entry, our results indicate labor and multi-neutrals are nearly twice as likely to describe themselves as full-time relative to employment neutrals.

Table 4: Part-Time Status, by Practice Type

Part-Time Status	Labor Neutral (%)	Employment Neutral (%)	Multi-neutral (%)
Part-Time	39	69	31
Full-Time	61	31	69
No.	195	129	288

As seen in Table 4, a majority, 61 percent, of labor neutrals, just under one-third, 31 percent, of employment neutrals, and over two-thirds, or 69 percent of multi-neutrals consider themselves full-time neutrals. Table 5 further compares part-time and full-time neutrals by presenting sources of income by full-time status and practice type.

5. Sources of Income

Table 5: Source of Income (mean %), by Part-Time Status and Practice Type

Part-Time	Labor Neutral (%)	Employment Neutral (%)	Multi-neutral (%)
Neutral Work	59	31	65
Law	4	58	15
Academia	11	1	8
Writing	0	1	0
Other	6	5	8
Full-Time			
Neutral Work	89	89	94
Law	1	1	2
Academia	1	2	1
Writing	0	0	0
Other	4	4	3

Note: Columns may not sum to 100 but reflect responses as recorded

The percentage of income attributed to neutral work is consistent with neutrals' part-time status, on average. Full-time neutrals across practice types derive nearly all of their income from neutral work, on average. A majority of part-time labor neutral and multi-neutral income derives from their neutral work; however, only one-third of part-time employment neutral income is

attributed to their work in employment arbitration and mediation while over half of their income, 58 percent, is earned in legal practice. Table 5 suggests that part-time neutrals across practice types are not all part-time workers; rather, part-time neutral work appears to complement outside careers for many. This is further explored in Table 6 below.

6. Alternative Occupations

What other work do part-time neutrals pursue? Table 6 shows that among part-time labor neutrals, almost half, 48 percent, have no other occupation, 25 percent are occupied as academics in addition to their part-time arbitration practices and 24 percent practice law outside the scope of labor and employment law. The large proportion of part-time labor neutrals who do not pursue additional remuneration outside their neutral work may be explained by the relatively older population of labor neutrals. By contrast, over half of the employment neutrals who are part-time are practicing attorneys in their other work. Specifically, among employment neutrals, 40 percent practice defense- or employer-side law, 16 percent practice plaintiff- or employee-side law, and nearly half, 50 percent practice in other areas of the law. Fourteen percent of multi-neutrals practice defense- or employer-side law, only 8 percent practice plaintiff- or employee-side law and 36 percent indicate practicing in other areas of the law on a part-time basis. While institutional norms and formal rules prevent labor neutrals from actively practicing labor and employment law, it is noteworthy that employment and multi-neutrals are approximately twice as likely to represent employers than they are employees yet report working for unions at approximately four times the rate they work as managers.

Table 6: Alternative Occupations of Part-Time Neutrals, by Practice Type

Occupation (Part-Time)	Labor Neutral (%)	Employment Neutral (%)	Multi-neutral (%)
Law (Defense/Employer)	0	40	14
Law (Employee/Union)	0	16	8
Law (Other)	24	50	36
Academic	25	4	22
Government	3	5	2
Management	3	5	2
Union	0	16	10
None	48	15	20
No.	**76**	**89**	**90**

Note: Full-time nuetral responses not included. Rows can sum to greater than 100 as multiple occupations can be selected.

7. Neutral Caseloads

What do neutral practices look like across the professions? Our results indicate clear differences among labor neutrals, employment neutrals and multi-neutrals. Specifically, Table 7 shows that almost the entirety, or 86 percent, of labor neutral practices are comprised of labor arbitration cases with approximately 10 percent of their neutral caseload attributed to labor mediation and other neutral work. A plurality, or 39 percent, of employment neutral practices are comprised of employment arbitration cases, but 29 percent of their neutral caseload consists of employment mediation. Multi-neutral practices are concentrated around labor arbitration, which represents 60 percent of their neutral caseload, but approximately one-quarter, or 26 percent, of their neutral caseload comprises employment mediation or arbitration.

Table 7: Distribution of Case Types, by Practice Type

	Labor Neutral (%)	Employment Neutral (%)	Multi-neutral (%)
Type of Neutral Work			
Employment Arbitration	--	39	14
Employment Mediation	--	29	12
Labor Arbitration	86	--	60
Labor Mediation	9	--	5
Other Nuetral Work	1	23	8

Note: Values do not sum to 100 but represent responses as recorded

There is significant variation in the labor arbitration, labor mediation, employment arbitration, and employment mediation caseloads among neutrals. Table 8 shows yearly caseload distributions by practice type. The average number of labor arbitration cases presided over by labor neutrals is 55 cases per year. However, a substantial minority of labor arbitrators, 20 percent, presided over less than 10 labor arbitration cases last year and 13 percent presided over 100 or more labor arbitration cases last year. The highest labor arbitration caseload reported by a labor neutral was 360 cases per year. In addition to arbitration cases, labor neutrals, on average, presided over 6 labor mediation cases per year. While the majority, 66 percent, of labor neutrals mediated less than 10 labor disputes (and exactly one-third did not mediate any labor cases), nearly one-third, or 34 percent, mediated between 10 and 24 labor disputes. The highest labor mediation caseload reported by labor neutrals was 24 cases per year. As with sources of income, arbitration, not mediation, comprises the majority of labor neutral caseloads.

Table 8: Distribution of Yearly Caseloads, by Practice and Case Type

Labor Neutrals	Labor Arbitration	Labor Mediation	Employment Arbitration	Employment Mediation
0-9	20%	66%	--	--
10-24	16%	34%	--	--
25-49	25%	--	--	--
50-99	27%	--	--	--
100+	13%	--	--	--
Population Mean (# of cases)	55	6		

Employment Neutrals	Labor Arbitration	Labor Mediation	Employment Arbitration	Employment Mediation
0-9	--	--	27%	6%
10-24	--	--	61%	50%
25-49	--	--	8%	17%
50-99	--	--	5%	21%
100+	--	--	--	6%
Population Mean (# of cases)			17	24

Multi-neutrals	Labor Arbitration	Labor Mediation	Employment Arbitration	Employment Mediation
0-9	7%	45%	37%	44%
10-24	20%	29%	50%	28%
25-49	31%	17%	9%	13%
50-99	24%	3%	3%	6%
100+	14%	6%	--	9%
Population Mean (# of cases)	52	20	15	27

Table 8 further shows that employment neutrals arbitrate 17 cases per year and mediate 24 cases per year, on average. The lower overall caseload is consistent with the higher rates of part-time neutrals within employment neutrals. Here again, however, the average caseload masks substantial variation within the caseloads of employment neutrals. Specifically, the majority, 61 percent, of employment neutrals preside over 10 to 24 employment arbitration cases per year, but 27 percent preside over less than 10 and 5 percent are selected in 50 to 99 employment arbitration cases per year. Employment neutrals, on average, mediate more cases than they arbitrate, where 21 percent mediated between 50 and 99 cases per year and an additional 6 percent mediated over 100 cases per year.

The labor arbitration caseload of multi-neutrals is similar to that of labor neutrals; however, multi-neutrals are more likely to have robust labor mediation practices. Likewise, the employment arbitration caseloads of multi-neutrals is similar to that of employment neutrals; however, multi-neutrals are less likely to have employment mediation caseloads of 50 or above relative to employment neutrals. One take away from Table 8 is that multi-neutrals appear to be taking on the

collective caseloads of labor neutrals and employment neutrals, presiding over similar counts of labor cases as labor neutrals in addition to similar counts of employment cases as employment neutrals.

8. Neutral Fees

What fees do neutrals charge for their services? I asked neutrals to record their standard fees for their work as mediators and arbitrators in both labor and employment disputes. I asked for hourly fees in employment disputes and daily fees in labor disputes reflecting the customary billing practices of neutrals in the U.S. Relatedly, I asked neutrals whether they served as a mediator or arbitrator in any dispute in which they did not charge any fees (i.e. they worked pro bono). Overall, 18 percent of neutrals responded they had worked pro bono in the past year. Broken down by practice type, only 7 percent of labor neutrals, 29 percent of employment neutrals, and 21 percent of multi-neutrals reported working pro bono at least once in the past year. Pro bono work is not common in labor neutral practices and is relatively more common among those who practice employment arbitration and mediation. This likely reflects the priority government agencies such as the Equal Employment Opportunity Commission and court-annexed ADR systems given to mediation which are not found in labor neutral practices.

Table 9a and 9b report the median and mean fees charged by practitioners for employment and labor arbitration and mediation. The median and mean daily rates charged for labor arbitration among labor neutrals are $1,600 and $1,543, respectively. Multi-neutrals charge slightly higher daily fees for labor arbitration. This premium likely reflects the ability or willingness of multi-neutrals to pursue more lucrative employment arbitration and mediation cases. Interestingly, both labor neutrals and multi-neutrals charge higher rates for mediation than arbitration. Employment arbitration and mediation, when converted to a daily rate, command higher fees relative to labor arbitration and mediation. Specifically, employment neutrals charge a median rate of $425 an hour for employment arbitration work and $450 an hour for employment mediation work. Multi-neutrals charge comparable, but slightly lower hourly rates of $400 for employment arbitration and $425 for employment mediation. The premium demanded by employment neutrals relative to multi-neutrals is likely explained, at least in part, by the prevalence of legal practices among employment neutrals, giving them the ability to anchor their arbitration and mediation fees to the norms found for general legal services.

Table 9a: Median Fees, by Practice Type

Fees (median)	Labor Neutral	Employment Neutral	Multi-neutral
Type of Neutral Work			
Employment Arbitration (hourly)	--	$ 425	$ 400
Employment Mediation (hourly)	--	$ 450	$ 425
Labor Arbitration (daily)	$ 1,600	--	$ 1,800
Labor Mediation (daily)	$ 1,800	--	$ 2,000
No.	**195**	**129**	**288**

Table 9b: Mean Fees, by Practice Type

Fees (mean)	Labor Neutral	Employment Neutral	Multi-neutral
Type of Neutral Work			
Employment Arbitration (hourly)	--	$ 482	$ 431
Employment Mediation (hourly)	--	$ 499	$ 450
Labor Arbitration (daily)	$ 1,543	--	$ 1,941
Labor Mediation (daily)	$ 1,848	--	$ 2,357
No.	**195**	**129**	**288**

Fees charged by respondents vary across the different areas of neutral practice but also around demographic and geographic characteristics. Shown in Table 10 below, I see that female neutrals have higher median rates for employment arbitration and mediation than their male counterparts. One potential explanation is that there is higher demand for female neutrals in the employment arena due to the predominance of employment discrimination charges within that field. This explanation would be consistent with the trend I observe in labor fees where the median daily rate charged by females for labor arbitration and mediation is equal or lower to their male counterparts. Another potential explanation is that women are more skilled in employment matters, on average, than their male counterparts and, therefore, command higher wages. This trend is unusual as there is a well-documented wage gap favoring males across industries and occupations that is particularly stark among high-status professions. Further study is required to draw any definitive conclusions about this issue.

Like gender, I may expect fees of minority neutrals to predictably lag behind those of their white, non-Hispanic counterparts. This would be consistent with the overall pattern of wages across the U.S. economy. However, I observe minorities charge equal fees for employment arbitration services, lower fees for employment mediation services, higher fees for labor arbitration, and lower fees for labor mediation relative to their white counterparts. Here again, the pattern of neutral fees defies an easy explanation and does not map on to patterns seen in the U.S. economy overall.

Surprisingly, the youngest cohort, those age 40 to 49, of neutrals also report the highest fees for employment arbitration, employment mediation, and labor mediation. The highest rates for labor arbitration are charged by those age 50 to 59, the second youngest cohort. Further, only labor arbitration fees follow the normal life-cycle trend of wages raising with age, peaking, then declining as the end of one's career approaches. Indeed, I see the median daily fee for labor arbitration is $1,800 for those in their 40s, raising to $1,950 for those in their 50s, then declining from $1,800 for those in the 60s to $1,200 for the exceptional individuals working into their 90s. The median fees charged in the remaining categories peak for those in their 40s, reach a nadir for those in the 50s, then rise again and reach a general equilibrium for those in their 60s, 70s, and 80s.

I also present the median fees charged by full-time and part-time neutrals. Across case types, full-time neutrals charge higher median rates than those working part-time. This is one area where trends within the neutral profession are consistent with the trends in the broader U.S. economy. Median fees are also generally higher for those with J.D.s relative to those with Ph.Ds. This may reflect the higher fees charged by lawyers in the legal field relative to the fees commanded by Ph.D.s within academia.

Finally, Table 10 shows variation in median fees in different regions of the U.S. West Coast neutrals charge the highest median fees across case types. Specifically, West Coast neutrals charge $500 an hour in employment arbitration and mediation and a median daily fee of $1,850 for labor arbitration and a striking $2,400 for labor mediation. Rates in the Midwest are the lowest among all geographical regions. Specifically, neutrals practicing in the Midwest charge $350 an hour in employment arbitration, $375 an hour in employment mediation, $1,500 a day for labor arbitration and $1,600 a day for labor mediation.

Table 10: Median Fees, By Demographic Characteristics and Practice Type

	No.	Employment Arbitration	Employment Mediation	Labor Arbitration	Labor Mediation
Gender					
Female	119	$ 450	$ 450	$ 1,600	$ 1,800
Male	487	$ 400	$ 418	$ 1,600	$ 2,000
Race					
White	584	$ 400	$ 450	$ 1,600	$ 2,000
Non-White	28	$ 400	$ 400	$ 1,750	$ 1,800
Age					
40 to 49	18	$ 525	$ 500	$ 1,800	$ 2,400
50 to 59	36	$ 388	$ 350	$ 1,950	$ 1,900
60 to 69	200	$ 400	$ 450	$ 1,800	$ 2,000
70 to 79	277	$ 400	$ 450	$ 1,600	$ 2,000
80 to 89	68	$ 350	$ 450	$ 1,500	$ 2,000
90 or over	8	--	--	$ 1,200	--
Part-Time Status					
Part-Time	255	$ 375	$ 375	$ 1,500	$ 1,800
Full-Time	357	$ 450	$ 450	$ 1,800	$ 2,000
Education					
JD	490	$ 400	$ 450	$ 1,700	$ 2,000
PhD	76	$ 375	$ 450	$ 1,400	$ 1,550
Location					
Northeast	237	$ 450	$ 450	$ 1,800	$ 2,000
Southeast	151	$ 350	$ 385	$ 1,600	$ 2,000
Midwest	205	$ 350	$ 375	$ 1,500	$ 1,600
Southwest	140	$ 450	$ 450	$ 1,625	$ 2,000
West	156	$ 500	$ 500	$ 1,850	$ 2,400

Note: Canadian wages are removed from this analysis

IV. EMPLOYMENT ARBITRATION: VIEWS AND CONTROVERSIES

The appropriateness, growth, and effect of employment arbitration have been provocative topics since the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnston Lane Corp.* In this section, I report employment arbitration case characteristics and the opinions of neutrals on aspects relating to the propriety of employment arbitration.

Scholars have been studying case outcomes in employment arbitration since its inception. Early studies reported relatively high employee win rates and award amounts; however, contemporary studies report bleaker outcomes for employee plaintiff win rates and award amounts in arbitration relative to their litigating counterparts. Much of what I know about outcomes in arbitration, however, comes from investigating cases from a single source: the American Arbitration Association (AAA). But what can I say about the employment arbitration landscape outside the AAA? And, of greater novelty, what can I say about neutrals' own views of and experiences with employment arbitration?

A. *Neutral Perceptions of Employment Arbitration*

As an entry point into neutral perceptions of employment arbitration, neutrals responded to several opinion questions about the fairness and propriety of employment arbitration on a Likert scale. Table 14 presents the mean and median responses to these questions. The Likert scale was coded as follows: "Strongly Disagree," coded as 0, "Disagree," coded as 1, "Neither Agree Nor Disagree," coded as 2, "Agree," coded as 3, and to "Strongly Agree," coded as 4.

In addition to interpreting the simple mean or median response to each question, it is informative to compare responses across neutral type. One stark, if not expected, finding is that labor neutrals tend to have more negative perceptions of employment arbitration than employment neutrals. However, multi-neutrals, neutrals who practice in both the labor and employment fields, resemble neither employment nor labor neutrals; multi-neutrals consistently have their own institutional characteristics. The largest differences between labor and employment neutrals appear in their perceptions of extant arbitration providers, such as JAMS and the AAA. Labor neutrals have more negative views that arbitration providers "adequately protect against the threat of arbitrator bias," "ensure adequate due process protections to all parties," and "ensure every arbitrator on their rosters is fully qualified and competent" relative to their employment and multi-neutral counterparts. These differences are statistically and practically significant.

Labor neutrals further are less likely than employment neutrals (and multi-neutrals) to agree that "[employment arbitration] is an employee-friendly forum." Indeed, the median response for labor neutrals was "Somewhat Disagree" whereas the median response for employment and multi-neutrals was "Neither Agree Nor Disagree." Labor neutrals are also more likely to agree that "[employment arbitration] is an employer-friendly forum" relative to employment and multi-neutrals. While I may expect neutrals practicing employment work to have more positive perceptions of employment arbitration than those practicing labor work exclusively, *it is noteworthy that those who practice as employment or multi-neutrals are more likely to agree, on average, that employment arbitration is an employer-friendly forum than an employee-friendly forum.* While there are no differences in the median responses, the mean response to "[employment arbitration] is an employer-friendly forum" are 1.97 and 2.19 for employment and multi-neutrals, respectively, but the average response to "[employment arbitration] is an employee-friendly forum" are 1.69 and 1.56, respectively. These differences are statistically significant and show that

even neutrals practicing in the employment arena view differences between the employee- and employer-favorability of the employment arbitration forum.

Table 14: Perceptions of Employment Arbitration, by Practice Type

	Labor Neutral Mean (Median)	Employment Neutral Mean (Median)	Multi-neutral Mean (Median)
Arbitration providers, such as JAMS and the AAA, adequately protect against the threat of arbitrator bias.	1.8 (2)	2.8 (3)	2.2 (2)
Arbitration providers, such as JAMS and the AAA, ensure adequate due process protection to all parties.	2.0 (2)	3.1 (3)	2.5 (3)
Arbitration is an employer-friendly forum.	2.4 (2)	2.0 (2)	2.2 (2)
Arbitration is an employee-friendly forum.	1.4 (1)	1.7 (2)	1.6 (2)
Arbitrator awards should be public, similar to proceedings in civil court.	1.4 (1)	1.7 (2)	1.5 (2)
Negative public perceptions of employment arbitration reduce overall demand for arbitration services.	2.1 (2)	1.4 (1)	1.8 (2)
Arbitrators have a financial incentive to favor employers.	2.0 (2)	1.9 (2)	1.8 (2)
Arbitration providers, such as JAMS and the AAA, ensure every arbitrator on their rosters is fully qualified and competent.	2.0 (2)	2.5 (3)	2.1 (2)
No.	**164**	**123**	**276**

B. *Neutral Views on the Repeat Player Effect*

An enduring chorus of critics charge employment arbitration, and employment arbitrators, as inherently corruptible and susceptible to repeat player bias. The specter of the so-called "repeat player bias" draws its essence from game theory: given that employer repeat players have the prerogative to choose, or at least influence, who arbitrates a given case, arbitrators are feared to have an incentive to betray their neutrality and issue favorable decisions to repeat players with hopes that employers will select them to arbitrate future disputes.[8] An employer's ability to pick an arbitrator, or at least an arbitrator provider, is furthered by their ability to unilaterally structure the arbitration agreement in employer-promulgated agreements; this obviously gives employers a distinct advantage over employees. By asking employment arbitrators themselves why repeat employers fare better in arbitration than non-repeat employers, I hope to expand on the empirical scholarship which simply identifies a repeat player effect (but cannot confidently explain why I see it).

As an initial matter, I asked neutrals if they were familiar with the so-called "repeat player effect." As reported in Table 15 below, 64 percent of all respondents were familiar with the repeat player effect, with employment and multi-neutrals having more familiarity than labor neutrals. This finding is not unsurprising; the repeat player effect is a widely cited concern in public policy debates and it is to be expected that neutrals who practice in the employment realm will be widely informed of contemporary debates.

[8] *See generally*, Bisom-Rapp, Susan, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959-1049 (1999); Colvin, Alexander J.S., *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 JOURNAL OF EMPIRICAL LEGAL STUDIES 1-23 (2011); Colvin, Alexander J.S. and Mark Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUSTRIAL AND LABOR RELATIONS REVIEW 1019-1042 (2015).

Table 15: Awareness of Repeat Player Effect, by Practice Type

	Labor Neutral	Employment Neutral	Multi-neutral	**Total**
Yes	53%	63%	71%	**64%**
No	47%	37%	29%	**36%**

Note: The exact question posed to respondents reads: "Have you heard of the so-called "repeat player effect" in employment arbitration?

Familiarity with the repeat player effect should not be interpreted as neutral support for its underlying premise. Indeed, I asked neutrals to offer heir qualitative responses to the following prompt: "Repeat player effects" in employment arbitration relate to the statistical trend where employers who appear before the same arbitrator on multiple occasions experience more favorable outcomes than employees and employers who appear before an arbitrator only once. Some scholars have (provocatively) interpreted this as evidence of arbitrator bias while others have cautioned against this interpretation. In your view, what is being missed, overlooked, or ignored in current discussions surrounding the "repeat player effect"?

Respondents who generally agreed that the repeat player effect was worthy of concern offered comments along the following lines:

> "Employers - not employees are repeat "customers." Therefore, they are more familiar with "idiosyncrasies" of arbitrators. Advocates are for the most part judged by those who hire them based on their success rate - win/loss record. Thus, if they lose, they are more apt to avoid that arbitrator in the future"

> "Repeat Player Effects are more likely in employment arbitration because the arbitrator may consider it more likely that an employer will again retain the arbitrator's services than will the employee/employee's representative."

> "Go figure, financial incentives are in play when a 'neutral' agrees to be paid to adjudicate in a nonconsensual, unfair forum."

Other respondents expressed skepticism toward repeat player effect concerns and offered comments such as:

> "Parties select arbitrators who can ensure a fair hearing. An arbitrator who often rules for one side only on cases in which the facts don't support such a ruling will not be very successful arbitrators."

> "At least in California, the Arbitrator is required to disclose the number of arbitrations he/she has had with the parties and the parties then have an opportunity to disqualify the Arbitrator if they believe he/she has had too many cases with one party or another."

> "The fact that representatives who regularly appear before the same arbitrator learn about the arbitrator's preferences in terms of how to run a proceeding and also may

> understand better than a non-repeat player how to get the arbitrator to understand her or his position."
>
> "Both lawyers who represent employees and lawyers who represent employers maintain "books" on arbitrators and both must join in any appointment. Thus, competent legal representation constitutes a practical safeguard against the appointment of biased arbitrators."

Others, still, offered assessments such as:

> "To the extent the statistics are as stated, though I do not know this to be true, it is more likely because employers have more information about arbitrators because they are repeat players, where as plaintiff's lawyers are unlikely to be in the system on a repetitive basis. To solve this problem more information should be available to plaintiff's lawyers so that they can make equally informed arbitrator selection decisions."
>
> "I have heard of the allegation but have no evidence that it actually occurs."
>
> "Sometimes, it is simply a matter that an arbitrator routinely finds that an employer has been successful. Of course, there are arbitrators who are more management biased or employee biased, but I believe that this is a minority."

Neutral views on employment arbitration are varied; however, there are some clear takeaways from neutral responses. First, neutrals can agree on a "repeat player effect" and disagree as to its cause. Indeed, some arbitrators implicate otherwise benign, natural advantages inuring to repeat clients while others identify corrupt or venial practitioners. Second, there is a clear need for greater communication among neutrals themselves and between the neutral and scholarly community. That at least some neutrals are unaware of the empirical findings giving rise to repeat player concerns indicates the social scientists behind the research are not engaging with one of the key stakeholders in this arena. Further, it appears not all neutrals agree on the existing protections and regulations in place which may ameliorate repeat player effects.

C. *Labor Arbitrator Interest in Employment Arbitration*

Despite relatively negative sentiments concerning employment arbitration, on average, there is a contingent of labor neutrals interested in becoming multi-neutrals by breaking into employment neutral work. Table 16 presents labor neutral interest in starting to conduct employment arbitration cases. Of the 193 labor neutrals who responded, only 35 percent, or 68 labor neutrals, expressed an interest in pursuing employment arbitration cases. Remember, however, that a large proportion of the Academy is already engaged in employment neutral activity and referred to throughout this report as multi-neutrals. Table 16 does not necessarily reflect the views of Academy members as a whole but does show nontrivial interest from Academy members who are currently practicing exclusively as labor neutrals.

Table 16: Labor Neutral Interest in Employment Arbitration

Interest in Employment Arbitration	No.	%
Yes	68	35
No	125	65
No.	**193**	**100**

Labor neutrals who expressed interest in pursuing employment arbitration were asked to identify any barriers to doing so. Table 17 shows that labor neutrals are open to employment arbitration work but report high rates of general uncertainty surrounding breaking into the field. Specifically, 68 percent of labor neutrals with an interest in employment arbitration report that they do not know how to get parties to select them as neutrals in such cases. Likewise, 43 percent of respondents reported "I have no idea how to break into the field." Labor neutrals interested in employment arbitration further expressed deficits in their knowledge of employment arbitration hearings and employment law at relatively high rates. This implies the National Academy of Arbitrators can support this subpopulation of their membership through offering broad, introductory training and guidance.

Table 12: Perceived Barriers to Entry into Employment Arbitration Practice (Labor Neutrals Only)

Perceived Barrier	Labor Neutral (%)
I do not know how to get parties to choose me as an employment arbitrator	68
I have no idea how to break into the field	43
I need more training in how employment arbitration hearings are conducted	28
I need more training in employment law before I can conduct employment arbitration cases	21
There is too much pre-hearing motions or discovery practice	21
I am too busy to take on new types of cases	15
I need more training in litigation practices, such as discovery and motion practice, before I can conduct employment arbitration cases	15
There is too much travel involved in employment arbtiration	2
No.	**68**

Note: Responses do not sum to 100 percent as multiple selections were soliticted.

D. *Employment Arbitration Practices*

How are employment arbitrators appointed? Our results, reported in Table 18, indicate that the AAA roster is the most common source of appointment as an employment arbitrator, with almost two-thirds (62%) of appointments coming through the AAA roster. While the AAA is also the most frequent source of appointments for NAA members practicing employment arbitration, they also receive more direct appointments (38% v. 20% for non-NAA members). This may be

due to the reputational strength of NAA members who are often well known to advocates from their past work.

Table 18: Methods of Appointment in Employment Arbitration

	Employment Neutral (%)	Multi-neutral (%)
Type of Appointment		
Direct Appointment	20	38
Standing Panel	3	5
AAA Roster	62	45
JAMS Roster	9	1
Court Referral	2	1
Other	4	9

Within the general domain of employment arbitration, there is a range of different types of cases. As indicated in Table 19, the most common type of cases is those deriving from mandatory, employer promulgated procedures. These comprise over half of the employment arbitration caseload for both employment arbitrators (70%) and NAA members (61%) who practice employment arbitration. The other substantial category of cases is those brought under individually-negotiated agreements, typically involving higher paid executives. About a fifth of all cases fall in this category. Relatively few employment arbitration cases are brought under post-dispute or voluntary agreements, only 3% of cases for non-NAA members in this category. This result supports arguments suggesting that post-dispute arbitration agreements are relatively rare and procedures that make arbitration a voluntary post-dispute decision will be infrequently used.

Table 19: Type of Employment Arbitration Clause, by Practice Type

	Employment Neutral (%)	Multi-neutral (%)
Type of Arbitration Clause		
Mandatory (Employer-Promulgated)	70	61
Individually Negotiated Agreements	19	20
Post-Dispute/Voluntary	3	8
FINRA	4	3
Other	2	8

V. DISCUSSIONS AND CONCLUSIONS

Our findings provide a picture of the developing employment arbitration profession and how it is similar to but also different from labor arbitration, as embodied in its leading professional organization, the National Academy of Arbitrators. One of the most striking findings is the prevalence of multi-neutrals, practitioners engaged in both labor and employment arbitration and/or mediation. Of the 612 neutrals surveyed, almost half, or 47 percent, reported practicing within both domains. Categorizing neutrals into the binary categories of "labor" and "employment" appears to be untenable and glosses over the nuance that is found within the profession.

Regarding the basic demographics of the profession, employment neutrals and multi-neutrals are *slightly* more diverse than labor neutrals in terms of gender; however across all types the large majority of neutrals are white, non-Hispanic males. If the profession is to be more representative of the population of employees who appear before it, then it is important that efforts be made to encourage greater diversity in the ranks across practice types. In the area of professional backgrounds, the results indicate employment neutrals are two to three times more to have worked or be currently engaged in legal careers representing employers relative to legal careers representing employees or unions. This is not so for labor or multi-neutrals. It may well be that many of these neutrals are able to put aside their past or alternative career orientation on the employer side when they engage in their neutral work, but it is a concern that employer-side backgrounds are two to three times as prevalent as employee-side backgrounds in the employment neutral profession. If employment arbitration is to be viewed as a neutral profession, then it is important that greater efforts be made to achieve balanced representation from both sides of the employment relationship. These concerns are amplified when you consider that a majority, 58 percent, of part-time employment neutral income is derived from their legal work.

A surprising finding is that among the employment neutrals surveyed, only 31 percent of consider themselves full-time mediators and arbitrators. This suggests that the volume of employment arbitration and mediation work may not be sufficient to provide for full caseloads for many practitioners, particularly given the prevalence of multi-neutrals. As yet, employment arbitration has not provided the type of caseloads supporting a cadre of full-time professional neutrals to the same degree as has labor arbitration. For getting access to cases, our results also indicate that the AAA roster is the key source for employment neutrals, indicating the importance of that organization to the emerging profession.

There are intensive debates about due process and fairness in employment arbitration. Our results provide some support for both sides of these debates. I find limited evidence that labor neutrals, employment neutrals, or multi-neutrals, on the whole have substantial concerns about all aspects of due process or the organizations governing the cases employment arbitrators decide. However, I do find labor arbitrators are most likely to be concerned about the fairness of employment arbitration and that even those who practice employment arbitration – both employment neutrals and multi-neutrals--are more likely to agree, on average, that employment arbitration is an employer-friendly forum than an employee-friendly forum. This suggests there is room for institutional reforms and safeguards to ensure the long-term viability and fairness of this area of neutral practice.