

The growing use of mandatory arbitration

Access to the courts is now barred for more than 60 million American workers

Report • By [Alexander J.S. Colvin](#) • September 27, 2017

Executive summary

In a trend driven by a series of Supreme Court decisions dating back to 1991, American employers are increasingly requiring their workers to sign mandatory arbitration agreements. Under such agreements, workers whose rights are violated can't pursue their claims in court but must submit to arbitration procedures that research shows overwhelmingly favor employers.

In reviewing the existing literature on the extent of this practice, we found that the share of workers subject to mandatory arbitration had clearly increased in the decade following the initial 1991 court decision: by the early 2000s, the share of workers subject to mandatory arbitration had risen from just over 2 percent (in 1992) to almost a quarter of the workforce. However, more recent data were not available. In order to obtain current data for our study, we conducted a nationally representative survey of nonunion private-sector employers regarding their use of mandatory employment arbitration.

This study finds that since the early 2000s, the share of workers subject to mandatory arbitration has more than doubled and now exceeds 55 percent. This trend has weakened the position of workers whose rights are violated, barring access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.

In October 2017, the Supreme Court will hear a set of consolidated cases challenging the inclusion of class action waivers in arbitration agreements. Class action waivers bar employees from participating in class action lawsuits to address widespread violations of workers' rights in a workplace. The Court will rule on whether class action waivers are a violation of the National Labor Relations Act; their decision could have wide-reaching implications for workers' rights going forward.

Key findings of this study

- More than half—53.9 percent—of nonunion private-sector employers have mandatory arbitration

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procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.

- Among private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures. Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.
- Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures—meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through collective legal action.
- Large employers are more likely than small employers to include class action waivers, so the share of *employees* affected is significantly higher than the share of employers engaging in this practice: of *employees* subject to mandatory arbitration, 41.1 percent have also waived their right to be part of a class action claim. Overall, this means that 23.1 percent of private-sector nonunion employees, or 24.7 million American workers, no longer have the right to bring a class action claim if their employment rights have been violated.

Introduction

Mandatory arbitration is a controversial practice in which a business requires employees or consumers to agree to arbitrate legal disputes with the business rather than going to court. Although seemingly voluntary in that the employee or consumer can choose whether or not to sign the arbitration agreement, in practice signing the agreement is required if the individual wants to get the job or to obtain the cellphone, credit card, or other consumer product the business is selling. Mandatory arbitration agreements are legally enforceable and effectively bar employees or consumers from going to court, instead diverting legal claims into an arbitration procedure that is established by the agreement drafted by the company and required as a condition of employment or of doing business with it.¹

Much attention has focused on the use of mandatory arbitration agreements in consumer contracts, such as consumer financial contracts, cellphone contracts, and nursing home resident contracts and the implications of such agreements for consumer rights.² There is less awareness of the use of mandatory arbitration agreements in employment contracts, but it is no less of a concern for those workers affected by it. These mandatory employment arbitration agreements bar access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act. If an employment right protected by a federal or state statute has been violated and the affected worker has signed a mandatory arbitration agreement, that worker does not have access to the courts and instead must handle the claim through the arbitration procedure designated in the agreement.

Mandatory employment arbitration is very different from the labor arbitration system used to resolve disputes between unions and management in unionized workplaces. Labor arbitration is a bilateral system jointly run by unions and management, while mandatory employment arbitration procedures are unilaterally developed and forced on employees by employers. Whereas labor arbitration deals with the enforcement of a contract privately negotiated between a union and an employer, mandatory employment arbitration concerns employment laws established in statutes. Research has found that employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts. Indeed, employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration providers.³

Background: The Supreme Court's role in the increased use of mandatory employment arbitration agreements

A crucial 1991 Supreme Court decision, *Gilmer v. Interstate/Johnson Lane*,⁴ upheld the enforceability of mandatory employment arbitration agreements, meaning that such agreements now had the potential to substantially change how the employment rights of American workers are protected. But the practical impact of mandatory employment arbitration depends on whether or not American businesses decide to require that their employees sign these agreements as a term and condition of employment. Research from the 1990s and 2000s found that mandatory employment arbitration was expanding and by the early 2000s nearly one-quarter of the workforce was subject to mandatory arbitration. However there was a lack of subsequent research tracking whether this growth trend had continued beyond the early 2000s and describing the current extent of mandatory employment arbitration (see literature review, next section below).

The lack of basic data on the extent of mandatory arbitration is especially concerning given that recent years have seen a series of court decisions encouraging the expanded use of mandatory arbitration. In two key decisions, *AT&T Mobility LLC v. Concepcion* (2011) and *American Express Co. v. Italian Colors Restaurant* (2013),⁵ the Supreme Court held that class action waivers in mandatory arbitration agreements were broadly enforceable. This meant that businesses could not only use mandatory arbitration agreements to bar access to the courts for individual claims, but they could also shield themselves from class action claims. This gave businesses an additional incentive to include mandatory arbitration agreements in employment and other contracts.

In October 2017, the Supreme Court will hear a consolidated set of cases (*Murphy Oil/Epic Systems/Ernst & Young*) challenging the enforceability of class action waivers in mandatory employment arbitration agreements.⁶ In this set of cases, the central issue is whether requiring this waiver of the ability to use collective action to address employment law violations is a violation of the protections of the right to engage in concerted action contained in Section 7 of the National Labor Relations Act (NLRA). If the Supreme Court

accepts the argument that such waivers are in violation of the NLRA, the Court's decision would effectively put an end to the use of class action waivers in mandatory employment arbitration agreements. However, if the Court sides with the employers' arguments in these cases, this will signal to businesses that the last potential barrier to their ability to opt out of class actions has been removed. This would likely encourage businesses to adopt mandatory employment arbitration and class action waivers even more widely.

Existing research on the extent of mandatory employment arbitration

Despite growing attention to the issue of mandatory employment arbitration, there is a lack of good data on how widespread it has become. A 1992 academic study of conflict resolution procedures used by corporations in nonunion workplaces found that 2.1 percent of the companies surveyed included arbitration in their procedures.⁷ The one major governmental effort to investigate the extent of mandatory arbitration was a 1995 GAO survey, which found that 7.6 percent of establishments had adopted mandatory employment arbitration.⁸

Colvin's 2003 survey of conflict resolution procedures used in the telecommunications industry found that 14.1 percent of establishments in that industry had adopted mandatory arbitration and that these procedures applied to 22.7 percent of the nonunion workforce in the industry (since larger establishments were more likely to have adopted mandatory arbitration).⁹

The overall picture we have is one of mandatory employment arbitration expanding through the 1990s and early 2000s to nearly a quarter of the workforce. This study seeks to determine whether this expansion has continued beyond 2003 and how widespread mandatory employment arbitration is currently.

Findings of this study

To investigate the extent of mandatory employment arbitration, we conducted a national survey of private-sector American business establishments, focusing on the use of mandatory arbitration for nonunion employees. The survey was conducted from March to July 2017 and had a sample size of 627, yielding a margin of error at 95 percent confidence of plus or minus 3.9 percentage points.

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

On the central question of whether employees were required to sign a mandatory "agreement or provision for arbitration of legal disputes with the company," 50.4 percent

of respondents indicated that employees in their establishment were required to enter into this type of agreement.

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

The establishments that have adopted mandatory arbitration tend to be those with larger workforces. Adjusting for workforce size, overall 56.2 percent of employees in the establishments surveyed were subject to mandatory arbitration procedures. Extrapolating to the overall private-sector nonunion workforce, this corresponds to 60.1 million American workers who are now subject to mandatory employment arbitration procedures and no longer have the right to go to court to challenge violations of their employment rights.¹⁰

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

As mentioned above, the likelihood that an employer will adopt mandatory employment arbitration varies with the size of the employer. Whereas 53.9 percent of all establishments had mandatory arbitration, among establishments that were part of companies with 1,000 or more employees, 65.1 percent had mandatory arbitration. In general, larger organizations with more sophisticated human resource policies and better legal counsel are more likely to adopt policies like mandatory arbitration that protect them against legal liability.¹¹ They could also become trendsetters over time if smaller employers copy these practices that larger employers have proven to be effective in protecting employers against legal actions.

Mandatory arbitration discourages employees from bringing claims when their rights are violated

Although around 60 million American workers are now subject to mandatory employment arbitration procedures, this does not mean that the number of workers arbitrating workplace disputes has increased correspondingly. It has not. Mandatory arbitration has a tendency to suppress claims. Attorneys who represent employees are less likely to take on clients who are subject to mandatory arbitration,¹² given that arbitration claims are less likely to succeed than claims brought to court and, when damages *are* awarded, they are

likely to be significantly smaller than court-awarded damages.¹³ Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney.

In an earlier study, Colvin and Gough (2015) found that an average of 940 mandatory employment arbitration cases per year were being filed with the American Arbitration Association (AAA), the nation's largest employment arbitration service provider.¹⁴ Other research indicates that about 50 percent of mandatory employment arbitration cases are administered by the AAA.¹⁵ This means that there are only about 1,880 mandatory employment arbitration cases filed per year nationally. Given the finding that 60.1 million American workers are now subject to these procedures, this means that only 1 in 32,000 employees subject to these procedures actually files a claim under them each year. These findings indicate that employers adopting mandatory employment arbitration have been successful in coming up with a mechanism that effectively reduces their chance of being subject to any liability for employment law violations to very low levels.

In addition to losing their right to private legal action, nearly 25 million of these workers are also prohibited from participating in class action suits

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

The finding that many employers who have adopted mandatory employment arbitration have not included class action waivers in their procedures stands in contrast to the situation with consumer financial contracts, which the CFPB found almost always include class action waivers along with mandatory arbitration.¹⁶ One explanation for the lower use of class action waivers in the employment setting is the ongoing legal uncertainty about their enforceability given the NLRA issues that the Supreme Court will be deciding in the upcoming *Murphy Oil/Epic Systems/Ernst & Young* cases.

Conclusion: Mandatory arbitration is a growing threat to workers' rights

Mandatory employment arbitration is the subject of fierce legal and policy debates. There is growing evidence that mandatory arbitration produces outcomes different from those of litigation, to the disadvantage of employees, and suffers from due process problems that give the advantage to the employers who impose mandatory arbitration on their workers.¹⁷ What has been less clear is how widespread the impact of mandatory employment arbitration is. In the consumer arena, the CFPB's 2015 study showed that mandatory arbitration clauses are common, being included in a majority of credit card, prepaid card, student loan, and payday loan agreements.¹⁸ By contrast, in the employment arena our knowledge of the extent of mandatory arbitration was limited to a few surveys from the 1990s and early 2000s, the latter of which suggested that nearly a quarter of employees might have been subject to mandatory arbitration by that point in time.

The study described in this report shows that mandatory employment arbitration has continued to grow in extent, and now, in 2017, in over half of American workplaces, employees are subject to mandatory arbitration agreements that take away their right to bring claims against their employer in court. This represents a dramatic and important shift in how the employment rights of American workers are enforced. Rather than having their rights adjudicated through the public courts and decided by juries of their peers, more often now American workers have to bring claims—claims that are based on statutes enacted by Congress or state legislatures—through arbitral forums designated by agreements that their own employers drafted and required them to agree to as a condition of employment.

The employment conditions experienced by the American worker have changed dramatically in recent decades as labor standards and their enforcement have eroded, union representation has declined, and the wage-suppressing effects of globalization have been amplified by an overvalued U.S. dollar and trade agreements that have eroded workers' power. Against this backdrop of increased economic risk and uncertainty for workers and the disruption of traditional protections, laws protecting employment rights such as the minimum wage, the right to equal pay, and the right to a safe workplace free of harassment or discrimination based on race, gender, or religion have become increasingly important as a workplace safety net. However, these protections are at risk of being undermined if there is no effective means of enforcing them.

Mandatory employment arbitration has expanded to the point where it has now surpassed court litigation as the most common process through which the rights of American workers are adjudicated and enforced. It is likely to become an even more widespread practice if the Supreme Court upholds the enforceability of class action waivers in its October 2017 decision. In fact, if the Court rules in favor of the employers in these cases, imposing mandatory arbitration with class action waivers is likely to become the predominant

management practice and workers will find it exponentially more difficult to enforce their rights going forward.

About the author

Alexander J.S. Colvin is the Martin F. Scheinman Professor of Conflict Resolution and Associate Dean for Academic Affairs, Diversity, and Faculty Development at the ILR School, Cornell University. His research and teaching focuses on employment dispute resolution, with a particular emphasis on procedures in nonunion workplaces and the impact of the legal environment on organizations.

Methodological appendix

To measure the current extent of mandatory employment arbitration, we conducted a national-level survey of private-sector employers. The survey was funded by the Economic Policy Institute and administered through telephone- and web-based methods by the Survey Research Institute (SRI) at Cornell University.

The study measured the extent of mandatory employment arbitration by surveying employers rather than by surveying employees because research has found that employees are often unaware or fail to recall that they have signed arbitration agreements and may not understand the content and meaning of these documents.¹⁹ The survey was limited to private-sector employers because public-sector employees typically have their employment regulated by specific public-sector employment laws and employment practices differ substantially between private- and public-sector employers. The survey focused on nonunion employees since unionized employees have their employment governed by collective bargaining agreements, which provide for labor arbitration to resolve disputes. Although both are forms of arbitration, labor arbitration differs in many respects from mandatory employment arbitration and should not be included in the same category.²⁰

The survey population was drawn from Dun & Bradstreet's national marketing database of business establishments. It was stratified by state population to be nationally representative. The survey population was restricted to private-sector business establishments of 50 or more employees, and the analysis was restricted to procedures affecting nonunion employees. The individual respondents were the establishment's human resources manager or whichever individual was responsible for hiring and onboarding employees. The reason for use of this individual as the person to respond to the survey is that mandatory arbitration agreements are typically signed as part of the onboarding paperwork when a new employee is hired. As a result, the manager responsible for this process is the individual most likely to be knowledgeable about the documents the new employee is signing. Typical job titles of individual respondents included human resource director, human resource manager, personnel director, and personnel manager.

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

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

Endnotes

1. For a general discussion of the state of the law and practice around mandatory arbitration, see Stone and Colvin 2015.
2. The Consumer Financial Protection Bureau conducted a study of the widespread use of mandatory arbitration in consumer financial contracts and has proposed a rule limiting the use of class action waivers in these agreements. Mandatory arbitration in nursing home resident contracts was the focus of a proposed rule by the Obama administration banning their use.
3. For an overview of this research, see Stone and Colvin 2015, 18–23.
4. 500 U.S. 20 (1991).
5. *AT&T Mobility LLC v. Concepcion* 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant* 133 S. Ct. 594 (2013).
6. *NLRB v. Murphy Oil USA, Inc.*, No. 16-307; *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300. For more about the *Murphy Oil/Epic Systems/Ernst & Young* cases and the implications of the pending Supreme Court decision, see McNicholas 2017.
7. See Feuille and Chachere 1995, 31.
8. GAO 1995. The GAO's survey initially indicated that 9.9 percent of establishments had mandatory arbitration procedures; however, on follow-up a number of them indicated that they had made mistakes in reporting, such as confusing union labor arbitration procedures with nonunion mandatory employment arbitrations. Adjusting for these erroneous responses, only 7.6 percent of the establishments actually had mandatory employment arbitration.
9. See Colvin 2008.

10. This estimate is based on the Bureau of Labor Statistics report “[Union Members – 2016](#),” released January 26, 2017, which reports an overall private-sector workforce of 115.417 million, among which 8.437 million are union-represented private-sector workers, with the remaining 106.980 million workers being nonunion.
11. See, e.g., Edelman 1992, showing that larger organizations are more likely to adopt organizational policies designed to protect them from the impact of civil rights laws.
12. See Colvin 2014.
13. See Colvin and Gough 2015.
14. See Colvin and Gough 2015 (1027), reporting that 10,335 claims were filed with the AAA over the 11-year period from 2003–2013.
15. See Stone and Colvin 2015, 17.
16. The Consumer Financial Protection Bureau’s Arbitration Study found that over 90 percent of consumer financial contract arbitration clauses that it studied contained class action waivers (CFPB 2015).
17. See Stone and Colvin 2015.
18. CFPB 2015.
19. A study by Zev Eigen (2008) found that a majority of Circuit City employees he interviewed were unaware that they had signed arbitration agreements or of the import of such agreements, even though the company had a longstanding policy of requiring its employees to sign mandatory arbitration agreements and even though Circuit City’s arbitration policy had been the subject of an important case on the enforceability of these agreements that was decided by the Supreme Court in 2001.
20. One of the most important differences is that labor arbitration procedures are jointly established and administered by unions and management, in contrast to mandatory arbitration, which is unilaterally established by the employer. In addition, most labor arbitration procedures do not bar employees from bringing statutory employment claims separately through the courts.

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