

# Labor and Employment 2019 Symposium

## Cutting-Edge Issues in Employment Arbitration

### Speakers

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### Materials

1. PowerPoint Presentation
2. Outline: **Pre-Dispute Agreements to Arbitrate Employment Claims**, David C. Singer, SingerADR (April 5, 2019)
3. Dorsey eUpdate: **U.S. Supreme Court Affirms (Again) the Validity of Class Action Waivers In Employment Arbitration Agreements** (May 21, 2018)  
**Available at:** <https://www.dorsey.com/newsresources/publications/client-alerts/2018/05/us-supreme-court-employment-arbitration-agreements>
4. **Employment Arbitration Rules and Mediation Procedures Rules** (Amended and Effective November 1, 2009; Introduction Revised October 1, 2017) from American Arbitration Association  
**Available at:** [https://www.adr.org/sites/default/files/EmploymentRules\\_Web2119.pdf](https://www.adr.org/sites/default/files/EmploymentRules_Web2119.pdf)
5. **Employment Dispute Arbitration Procedure: Employment Arbitration Cases** from International Institute for Conflict Prevention & Resolution, Inc. (CPR)  
**Available at:** <https://www.cpradr.org/resource-center/rules/arbitration/employment-arbitration-procedure/>
6. **Employment Arbitration Rules & Procedures (English)** from JAMS Mediation, Arbitration and ADR Services (Effective July 1, 2014)  
**Available at:** <https://www.jamsadr.com/rules-employment-arbitration/english>
7. **Policy on Employment Arbitration Minimum Standards of Procedural Fairness** from JAMS Mediation, Arbitration and ADR Services (Effective July 15, 2009)  
**Available at:** <https://www.jamsadr.com/employment-minimum-standards/>

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## Cutting-Edge Issues in Employment Arbitration

### Meet the Speakers:

**Christine Eskilsen, Managing Director, Chief Human Capital Officer, Piper Jaffray**

**David Lauth, Senior Associate General Counsel, Employment Law, UnitedHealth Group Incorporated**

**David Singer, Independent Arbitrator & Mediator, SingerADR**

**Melissa Raphan, Partner, Dorsey & Whitney LLP**

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## Mandatory Arbitration: Overview



- **Caselaw**
- **Legislation (state)**
- **Bills**
- **ABA resolutions**
- **Marketplace (businesses, law firms, press)**

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## UHG Policies

- **Description and Rationale**
- **Carve-outs**

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## Piper Policies

- **Description and Rationale**
- **Registered/non-registered**
- **Carve-outs**

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## Pros and Cons of Mandatory Arbitration

- **Class/collective actions vs. high volume filings of individual cases**
- **Single plaintiff cases**
- **Benefits generally of arbitration vs. court litigation**

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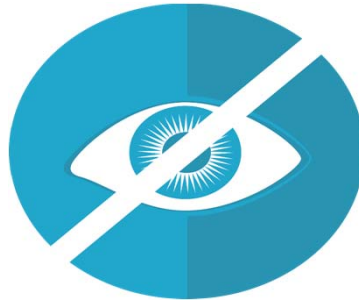
## Top Tips

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## Privacy and Confidentiality Are Not the Same

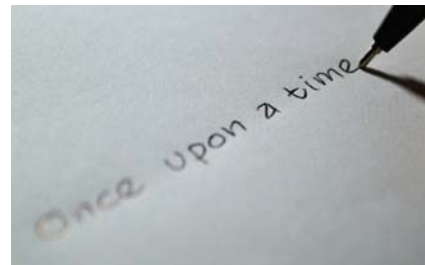
- Know Who is Bound by Confidentiality Obligations
- Get a Confidentiality Order from the Panel
- Protect Information in Disclosure or Presentation
- Think about the Award



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## Pleadings in Arbitration Need to be Different

- Notice Pleading is not Enough
- This is the Introduction to the Arbitrators
- Tell Your Story



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## The Preliminary Conference is key to a Successful Arbitration



- The Preliminary Conference is the Embryo for the Entire Process
- Preparation and Careful Attention are key to an efficient and expeditious process



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## Disclosures – Need to be Focused

- 80% of the cost of litigation is in discovery – think differently
- Don't assume you need depositions – consider using direct testimony as disclosure
- Carefully prepare for e-discovery



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## Motion Practice Can be costly

- Available
- Use with caution
- Be prepared to demonstrate why you will succeed by making a motion
- Protect your award



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## Behavior at the Hearing Needs to Reflect a Changed Environment

- Civility – toward counsel, witnesses and personnel
- It is a small room
- Candor
- Histrionics
- Avoid repetition



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# Questions



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## Labor and Employment 2019 Symposium

### Pre-Dispute Agreements to Arbitrate Employment Claims

David C. Singer, SingerADR

#### I. Introduction

The purpose of this report is to discuss the pros and cons of employers requiring arbitration agreements for future disputes in the employment context, following recent New York State legislation and resolutions adopted by the American Bar Association. The report will also address some common misconceptions about the process used in employment arbitration.

#### II. Background

##### A. Recent Federal Legislative Developments

Several bipartisan bills designed to prohibit employers from requiring employees to sign agreements to arbitrate future employment disputes (as well as consumer, franchise, civil rights and antitrust claims) -- including the Ending Forced Arbitration of Sexual Harassment Act, the Forced Arbitration Injustice Repeal Act and the U.S. Fairness Arbitration Act -- have recently been introduced in Congress.

The U.S. tax law was amended to prohibit an employer from taking a business tax deduction for the amount of settlement money and legal fees incurred in defending a sexual harassment complaint if it insists on including a confidentiality provision in a settlement agreement against an employee's wishes.

##### B. Recent New York Legislative Developments

1. Effective July 11, 2018, § 7515 was added to Article 75 of the NY CPLR, prohibiting mandatory arbitration of sexual harassment claims "except where inconsistent with federal law."
2. Effective July 11, 2018, CPLR § 5003-b and General Obligations Law § 5-336 prohibit nondisclosure provisions regarding the underlying facts and circumstances of sexual harassment claims, except where such provision is the complainant's preference.

## **C. Resolutions of the American Bar Association (ABA)**

### **1. ABA Resolution 302**

On February 5, 2018, the ABA adopted Resolution 302, which urges all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation and intersectionality of sex with race and/or ethnicity.

### **2. ABA Resolution 300**

At the ABA Annual Meeting held July 27 – August 7, 2018, the ABA adopted Resolution 300, which states as follows:

**RESOLVED**, That the American Bar Association urges legal employers not to require mandatory arbitration of claims of sexual harassment.

### **3. ABA Resolution 107B**

At the ABA Midyear Meeting held on January 24-25, 2019, the ABA adopted Resolution 107B, which states:

**RESOLVED**, That the American Bar Association urges legal employers not to require that, before a dispute arises, employees agree to pre-dispute mandatory arbitration of claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, genetic information, or status as a victim of domestic or sexual violence.

## **III. Discussion**

### **A. Features of Arbitration**

#### **1. Arbitration Process**

Arbitration is a method of dispute resolution that is agreed to in a written contract between the parties. Agreements to arbitrate are almost always entered into prior to any dispute arising between the parties.

In the employment context, employers typically present agreements to arbitrate future disputes at the time of hiring; however, arbitration may be agreed to during the employment relationship or even after termination of the employment relationship. Under New York law, continued employment constitutes adequate consideration for an agreement to arbitrate future disputes should they arise.

Arbitration is typically the last step for resolving employment-disputes. The parties are encouraged and sometimes required to attempt to negotiate a resolution with the assistance of an employee relations representative, are then offered mediation with a third-party neutral mediator, and then finally arbitration.

In arbitration, the parties participate in the selection of a neutral arbitrator who conducts the proceeding, presides at the evidentiary hearing, and functions as an impartial decisionmaker. Arbitrations are governed by the parties' agreement, as well as applicable provider rules and applicable law. The award of an arbitrator is generally final and binding and there are very limited options for judicial or other merits-based review of an award.

## **2. Privacy and Confidentiality**

Arbitration is a private proceeding. In contrast to a court proceeding, only individuals with a direct interest in the arbitration may attend the evidentiary hearing (unless the parties agree otherwise). Although the arbitrator and the arbitration administrator are always bound by ethical obligations and rules to maintain the confidentiality of the arbitration, the parties and their counsel (as well as any third-parties who participate in the proceeding) are not obligated to maintain confidentiality and may convey information regarding the arbitration to third-parties and publicly, unless prohibited from doing so by their arbitration or other agreement.

Parties to an arbitration often agree separately that information disclosed during the information exchange period shall remain confidential by entering into confidentiality agreements, similar to agreements entered into during court litigation.

Under some arbitration provider rules, employment arbitration awards are publicly available on searchable electronic databases. See, e.g., Rule R-38, AAA Employment Arbitration Rules. In addition, if a party seeks to vacate an arbitration award, the award itself is typically attached to the submitted court filings.

It is commonly understood that arbitration is completely confidential. As explained above, that is a misunderstanding of the arbitration process.

## **3. Enforceability**

Arbitration is a creature of contract and derives its authority from the agreement of the parties. Employment arbitration agreements are uniformly held to be voluntary in the sense that, much like other contracts, they are knowingly entered into, meet the standards for enforcement of contracts generally, and have been adequately brought to the employee's attention. See, e.g. *Brownlee v. Town Sports International Holdings, Inc.*, 2019WL

149645 (N.J. App.). See also *Wickberg v. Lyft*, 2018 WL 6681791 (D. Mass.); (Lyft driver bound by on-line enrollment process where clickwrap agreement required driver to agree to terms of service, which were appropriately conspicuous, to complete the registration process).

## **B. Arbitration Required to Resolve Future Disputes**

Arbitration of employment disputes may be considered “mandatory” in the sense that it is offered as part of a broader employment or related contract on a “take it or leave it” basis. Opposition to mandatory arbitration is based, at least in part, on the perception that arbitration is unfair to employees, or that litigation is a preferred method of dispute resolution. There also is the belief that an employee may not know which method is better for her or him until an actual dispute with the employer has arisen.

## **C. Pros and Cons of Employment Arbitration**

The U.S. Supreme Court has consistently upheld the validity of employers requiring advance signing of arbitration agreements to resolve future disputes in the employment context, so long as employees’ statutory rights are fully protected. *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). The criticism of such agreements underlying the recent legislative efforts and ABA Resolutions described above reflects a belief that arbitration is secretive and results in worse outcomes for employees, as well as uneasiness over the negotiating power imbalance between employer and employee, particularly where the employee has not had the opportunity to negotiate an individual contract. Supporters of mandatory arbitration note that arbitration need not be secretive, and that power imbalances exist in relationships of all kinds, including commercial relationships (reflected by, for example, jury waivers, venue provisions, reps & warranties, price, terms of delivery, etc.); they are not unique to the employment relationship.

Putting aside the power imbalance that has required employees to accept arbitration provisions (i.e. “mandatory arbitration”), both arbitration and litigation of employment disputes have benefits and drawbacks. Despite extensive research and statistical analyses on the subject, true “apples to apples” comparisons of arbitration and litigation are difficult to draw, as the methodologies and conclusions to be drawn from various studies lend support to one or the other process.

## **D. Benefits of Arbitrating Employment Disputes**

- Most employment cases do not have high monetary value. Generally, it is prohibitively expensive to commence a single-plaintiff court case and litigate it through trial. In contrast, arbitration proceedings typically are significantly less costly to take through evidentiary hearing and arbitral award. See, Nielsen, Nelson and Lancaster, “Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States,” *Journal of Empirical*

Legal Studies 7(2): 175–201 (2010) In contrast, the purported advantages of court litigation may apply to a limited number of high-profile cases with large potential financial recovery and publicity value, such as those brought against Fox News and Madison Square Garden, which are not representative of employment cases in general.

- Studies have shown that the settlement rates of employment cases filed in court are higher than settlement rates for employment arbitrations. This may lend support to the conclusion that pursuing arbitration through award is more economically feasible.
- Many employees actually desire the confidentiality afforded by arbitration. They are not looking for a public airing because they do not want to relive the conduct that gave rise to the dispute.
- Many litigants bringing employment claims are *pro se*. For example, approximately 20% of employment arbitrations at the AAA are brought by *pro se* claimants. In contrast, approximately 17% of plaintiffs in federal court employment litigation are *pro se*, suggesting that it is easier to secure counsel in employment arbitrations than in employment litigations. For *pro se* individuals, it is easier to navigate the arbitration process than court litigation, including full-blown discovery, motion practice, and a federal jury trial.
- Arbitrations generally proceed more rapidly and efficiently than court litigation, which is beneficial to individual employees, as well as employers. See Colvin, A.J.S. (2011), *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*. <http://digitalcommons.ilr.cornell.edu/articles/577>; AAA Study, January 14, 2019.
- Dispositive motions, especially motions for summary judgment, are more likely to be permitted and granted in favor of employers in court litigation than in arbitration. This can be an advantage to employees in arbitration.
- Arbitration provider rules require employers to pay all arbitration costs and arbitrator fees in cases where arbitration is mandated by the employer, which raises the employer's costs and may therefore provide further incentive for the employer to settle.
- Scholars have argued that mandatory arbitration discourages potential claimants from coming forward and asserting claims in the first place, see e.g. C. Estlund, *The Black Hole of Mandatory Arbitration*, 96 North Carolina Law Review 679 (2018). However, litigating in federal court can also be daunting, given its rules permitting extensive and intrusive discovery, greater motion practice, and a public trial during which strict

enforcement of evidentiary and other court rules are applied. And an employee also may feel less protected due to the potential publicity inherent in court proceedings.

- Public testimony and publicly filed court pleadings, motions, and briefs may contain unflattering or salacious allegations which are accessible to internet trolls and may harm an employee's future employment prospects and reputation.
- The parties participate in the selection of the arbitrator; in contrast, in court litigation, the judge is randomly assigned to cases. However, some may oppose requiring employees to arbitrate future disputes in the employment area because they believe that the arbitrators may be selected from a panel chosen by the employer.

#### **E. Benefits of Court Litigation for Employment Disputes**

- Studies have shown that claimants' "win rates" in arbitration are lower than employee win rates in trials, and that awards in arbitration are lower, on average, than jury verdicts, see Colvin, A.J.S. (2011), *supra*; Stone and Colvin, *Economic Policy Institute Briefing Paper #414* (2015). Such statistics, however, may be misleading because claims brought in arbitration may be smaller than those brought in court. See S. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, *Ohio State Journal on Dispute Resolution*, Vol. 16, p.735 (2001). Cf. Estreicher, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, *Rutgers L. Rev.* Vol. 70:375 (2018).
- Based on the potential for larger recoveries in litigation, employment cases may have higher settlement value if brought in court. However, as already noted, there may be multiple explanations for such statistics. Litigation allows an employee who survives summary judgment to present her or his case to a jury. This may be viewed as a benefit because of the potential for large monetary judgments juries sometimes award. However, dispute resolution clauses that provide for litigation may also include jury waivers. In addition, trial and appellate judges retain the ability to reduce jury awards that they deem excessive.
- Litigation includes the opportunity to appeal a court's decision or jury verdict. This provides added protection in cases that have been wrongly decided, but also increases costs and delays the final outcome. Litigation affords clear and consistent rules of procedure and evidence. In certain circumstances, a party may benefit from strict enforcement of such rules.

- Trials allow plaintiffs the opportunity to assert and pursue their claims in public courtrooms, which furthers transparency and public awareness of alleged misconduct.

## **F. Alternative Ways to Address Concerns That Have Been Raised**

### **1. Opt-out Provisions**

Employers could consider offering employees the opportunity to opt out of agreements to arbitrate when they are first offered, or at a later stage, which would remove the “mandatory” aspect of employment arbitration. However, some fear that opting out would brand an employee as troublesome, deterring her/him from choosing to do so. Alternatively, offering the opportunity to opt out after a dispute has arisen would allow employees greater flexibility; however, it would also remove a degree of predictability valued by employers.

### **2. Additional Consideration**

Employers could offer additional compensation or other benefits in return for an employee’s agreement to mandatory arbitration.

### **3. Limitations on Confidentiality**

As noted above, non-disclosure agreements are already prohibited in sexual harassment settlements in New York, unless requested by the complainant, to promote transparency. Further restrictions on confidentiality agreements could alleviate the criticism that arbitration allows employers to hide damaging evidence from public view.

### **4. Removal of Class Action Waivers**

Class action waivers that are added to arbitration clauses have compounded the criticism of arbitration. Employers may consider eliminating such waivers from their employment contracts and policies.

### **5. Repeat Player**

- Curtail the “Repeat Player” effect, which some scholars contend has advantaged employers, while others disagree.
- Ensure that substantive and procedural rights (both statutory and non-statutory) of the employee are retained in arbitration.
- Require that arbitrations are venued where the employee lives or works.

#### **IV. Conclusion**

Policy matters involving pre-dispute agreements to arbitrate are more properly resolved through legislation and through the marketplace, as is already occurring: a number of premier law firms are no longer requiring arbitration of some or all employment disputes; pressure is being applied to law schools to bar firms that require pre-dispute arbitration policies from recruiting on campus; and all fifty Attorneys General of the United States have condemned pre-dispute arbitration of sexual harassment claims.

Whether sexual harassment claims should be singled out as “non-arbitrable” in contrast to claims of other categories of discrimination, as the Attorneys General and New York’s recent laws do, is a question beyond the scope of this Report. Similarly, whether New York law firms should choose to comply with CPLR § 7515’s ban on mandatory arbitration of sexual harassment claims or consider the ban preempted by federal law, is a question best left to their judgment, as is their decision regarding whether to require arbitration of employees’ claims of all types of discrimination.