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Arbitration is failing California employees

By Genie Harrison

How is arbitration working for California employees? The consensus among plaintiffs' lawyers is that it favors employers, consistent with Alexander J.S. Colvin's 2011 study, but we had no data after 2011, until now.

Frustrated with the lack of recent analysis, I committed the resources of my firm to solve the problem. For more than a year, I worked with associate attorney Mary Olszewska from my firm and expert statisticians Dr. Brian Kriegler and Melissa Daniel from EconOne to parse through five years' worth of data on California employment arbitration cases.

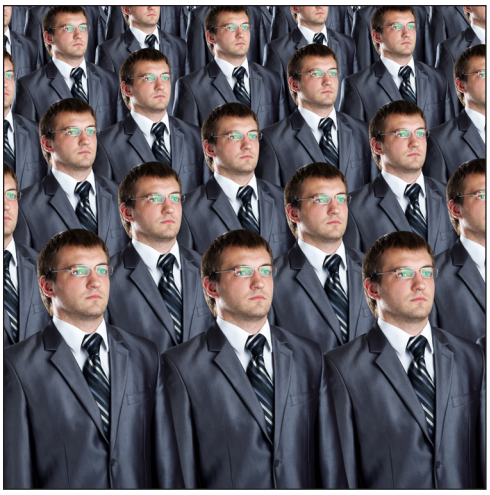
The data from 2012-2017 were drawn from information collected by the state's private arbitration companies pursuant to California Code of Civil Procedure Section 1281.96(a). We focused on the state's four largest arbitration companies — AAA, ADR, JAMS and Judicate West — to ensure that we had sufficient data for the analysis. Our intent was to determine if there were patterns, ambiguities or missing data; to assess the extent to which arbitration companies maintain data in accordance with state law; and to make data-driven recommendations based on our findings, if appropriate.

Section 1281.96(a) requires that private arbitration companies "collect, publish at least quarterly, and make available to the public ….., a single cumulative report" of certain information from every consumer arbitration over the past five years, including the following (where appropriate, the term "employee" has been substituted for "consumer party" and "employer" for "nonconsumer party"):

(4) Whether the [employee] or [employer] was the prevailing party….

(5) The total number of occasions … the [employer] has previously been a party in an arbitration [or (6) mediation] administered by the private arbitration company….

(7) Whether the [employee] was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any….



*The Economic Policy Institute and the Center for Popular Democracy projects that by 2024, **almost 83 percent** of the country's private, non-unionized employees will be hashing out complaints with their employers behind closed doors, an **increase of 56 percent** since 2017. Despite recent moves by Google and some others to abandon forced arbitration clauses in employment and sexual harassment disputes, arbitration clauses will continue to be the norm until the laws change. Thus, having good data about arbitration outcomes is critical. Without this information, **there is no way to identify repeat players**, connect the dots, and use market forces to push toward fairer outcomes.*

(8) The date the private arbitration company received the demand for arbitration the date the arbitrator was appointed, and the date of disposition….

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing…. [arbitration companies are required to record dismissals without hearing separately from settlements; the cases reported as dismissed should not include settlements.]

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any.

Notably, Section 1281.96 does *not require* that arbitration companies report the name of employers' attorneys or their firms. This is a giant gap: The employer's attorney is usually the repeat player in arbitrations. Employers may have a few arbitrated cases in any given year, but defense firms likely have *many* cases arbitrated in the same year, with the same arbitration companies and even the same arbitrators.

California Ethics Standards for Neutral Arbitrators in Contractual Arbitration Standard 12(d)(1) requires arbitrators to disclose when they have been offered *new* cases, whether as mediations or arbitrations, from any counsel in an ongoing consumer arbitration. These notices are sent individually in each case. Section 1281.96(a) does not require arbitration companies to record repeat player information, another large information gap in light of a tactic that is clearly being employed.

It has become standard practice for defense firms to hire a recently chosen arbitrator in *many* other cases, often as a mediator, quickly funneling huge sums to the arbitrator. During the pendency of one arbitration at my firm, disclosures showed that the defense firm in the case soon hired the same arbitrator as a mediator in at least eight other cases and as an arbitrator in two more cases, all in nine months. The daily mediation fees were $7,000, which meant a total of at least $56,000 in additional mediation fees to the arbitrator, plus an unknown amount in additional arbitrator's fees.

A colleague reported to me that in one of his cases involving the same defense firm as in mine, disclosures showed the firm hired the chosen arbitrator in 25 previous arbitrations and 36 mediations. Three of the prior 25 arbitrations went to hearing and all were decided in the firm's favor. In the eight months following the arbitrator's selection in my colleague's case, the defense firm hired the same arbitrator for an additional *14 mediations and eight arbitrations*. With

daily mediation fees of $8,000, the defense firm paid $288,000 in past mediation fees, $112,000 in post-selection mediation fees, and an unknown amount in arbitrator's fees in little more than two years. It is unacceptable that Section 1281.96 does not require arbitration companies to report the same information required by Standard 12(d)(1).

Section 1281.96(b) requires that arbitration information be reported: "in a format that allows the public to search and sort the information using readily available software, and shall be directly accessible from a conspicuously displayed link on the Internet Web site of the private arbitration company with the identifying description: 'consumer case information.'"

The ability for the public to search and sort the information using readily available software presumes the data are both accessible and meaningful. However, the data made available by the arbitration companies were not useable by my office with standard Excel software; it crashed our systems and was impossible to use despite our best efforts. Expert statisticians at EconOne had to clean data and write algorithms in order for the data to be useful, spending close to 100 hours on the project. Data this complex and unusable fail to comply with Section 1281.96(b).

I believe that arbitration companies do their best to record report data as required by the law. However, absent a single well-designed platform the data are not recorded consistently across, or within, the arbitration companies. It is thus impossible for lawyers and the public to make fully informed decisions about arbitration. California needs a standardized, web-based system into which arbitration companies input data in a consistent, useable format to render real-time, accessible analysis, which would help market forces hold the arbitration system accountable.

Though the data were messy, EconOne's work yielded significant results: Arbitration outcomes varied significantly across the four arbitration companies; there were gaps and inconsistencies in each arbitration company's data file; and certain information — required by law — was completely missing. Colvin's 2011 analysis of AAA's California employment arbitration data showed that results skewed in favor of the employers paying arbitrators' fees, especially repeat player-arbitrator combinations. This is still occurring; data from AAA are compelling.

From 2012-2017, almost 47 percent of AAA's employment arbitrations involved Macy's as the defendant (1,710 cases). While AAA's other employment cases (1,936 cases) had a 7.5 percent dismissal rate, *Macy's plaintiffs faced a whopping 93 percent rate of dismissal*. This flip of the dismissal rate cannot be explained by the operation of chance. The bad news for Macy's plaintiffs at AAA did not end with dismissal rates. When Macy's plaintiffs prevailed, their average award was only $87,000, compared with an average award of $328,000 to prevailing non-Macy's plaintiffs.

By contrast, the other arbitration companies' employment arbitration data show dismissal rates and average awards of: 5.5 percent and $136,700 at ADR; 2.3 percent and $214,500 at JAMS; negligible and $328,600 at Judicate West.

The private arbitration system yields thousands of dollars in arbitration fees per case — all paid by employers — providing excellent revenue to f*or-profit* arbitration companies. Although some arbitrators unquestionably disregard the personal economic consequences of their decision making, many do not: The data consistently show that arbitration outcomes favor the defendants and defense firms that pay the bills. To make matters worse, arbitrators are not required to follow the law, and there is little opportunity to appeal an arbitrator's ruling. Coupled with data about arbitration outcomes, it is no wonder that the system seems so unfair.

Nor is arbitration faster than litigation. The average length of arbitrations from 2012-2017 ranged from 430 to 570 days from the date of filing, 14 to 19 months. In comparison, according to California's 2018 Court Statistics Report, civil unlimited cases from 2007-2017, which includes most employment cases, resolved at average rates of 75 percent within 12 months; 85 percent within 18 months; and 100 percent within 24 months. The length of cases is the same for at least 85 percent of cases, whether they are in litigation or arbitration, and the remaining 15 percent of litigated matters are resolved only six months later than the longest arbitration date.

In parallel with our data project, I recently joined other women trial lawyers for the American Association for Justice's Women's Lobby Day, in Washington D.C., to advocate on behalf of the Forced Arbitration Injustice Repeal Act. The FAIR Act would make unenforceable pre-dispute arbitration agreements between employers and employees or independent contractors "arising out of or related to the work relationship or prospective work relationship between them." The FAIR Act would level the playing field by restoring the rights of employees to have their cases heard in court, with all the protections afforded by our justice system.

I used the data from my arbitration analysis to explain to legislators that results from for-profit arbitration companies vary significantly and can skew in favor of economic powerhouse repeat players. I shared the story of my client, Sandeep Rehal, formerly Harvey Weinstein's personal assistant, who was required to sign a pre-dispute arbitration agreement by a company that knew Weinstein had been victimizing women for years, something Ms. Rehal didn't know.

The Economic Policy Institute and the Center for Popular Democracy projects that by 2024, almost 83 percent of the country's private, non-unionized employees will be hashing out complaints with their employers behind closed doors, an increase of 56 percent since 2017. Despite recent moves by Google and some others to abandon forced arbitration clauses in employment and sexual harassment disputes, arbitration clauses will continue to be the norm until the laws change. Thus, having good data about arbitration outcomes is critical. Without this information, there is no way to identify repeat players, connect the dots, and use market forces to push toward fairer outcomes.

If we expect arbitration company data to be valuable, Section 1281.96 should be amended to do the following:

- Include attorney names and law firms for the employer
- Require recording each instance where an arbitrator is hired again, in any capacity, by any party or their counsel
- Standardize recording names of arbitrators, law firms, and attorneys
- Provide sub-categories of employment cases, such as Discrimination, Sexual Harassment, Retaliation, Wage/Hour

Arbitration is a bad deal for California employees. Short of preventing it altogether, CCP Section 1281.96 must be revised to begin leveling the playing field.

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