Workplace discrimination claims fare poorly in arbitration, study says

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Employee discrimination claims largely received worse outcomes in arbitration than other work-related disputes such as wrongful termination or breach of contract, according to new research co-written by U. of I. labor professor Ryan Lamare. Credit: L. Brian Stauffer

The use of arbitration to adjudicate worker complaints – and avoid

costly litigation through the slow, unwieldy public court system – has been a controversial practice since its usage began to increase in the 1990s. And according to a new paper co-written by a University of Illinois expert in workplace dispute resolution, certain types of cases fare worse than other types that are resolved through arbitration.

Employee discrimination claims largely received worse outcomes in arbitration than other work-related disputes such as wrongful termination or breach of contract, says new research from J. Ryan Lamare, a professor of labor and employment relations at Illinois.

Following the passage of anti-discrimination laws such as Title VII of the 1964 Civil Rights Act, employees commonly adjudicated workplace claims through litigation. But over the past three decades, the U.S. Supreme Court has sought to expand the use of private arbitration as an alternate dispute-resolution mechanism, Lamare said.

"We live in a world in which justice has been privatized," he said. "We used to have public forums for the resolution of workplace disputes. If you felt like you were discriminated against in the workplace, you would go the public court system and sue the company to get a resolution. Since the 1990s, however, we have increasingly privatized those arrangements."

The paper, published in the journal ILR Review, analyzed all employment arbitration awards for cases filed between 1991-2006 in the financial services industry and studied whether differences in the type of allegation affected award outcomes.

Lamare and co-author David B. Lipsky of Cornell University found that cases involving discrimination had a win rate of 51.3 percent while statutory nondiscrimination and nonstatutory claims had win rates of 64.7 percent and 63.9 percent, respectively.

"Arbitration's proponents argue that it facilitates a faster, cheaper and more flexible alternative to resolving employment disputes than litigation, while its opponents argue that it doesn't provide a level playing field for employment disputes," Lamare said. "Our data suggest that although arbitration offers efficiencies, there is indeed a nonlevel playing field, in which the type of claim you bring into the system affects your likelihood of success."

The Supreme Court decisions that were used to expand arbitration in the workplace had their origin in the securities industry.

"The major case" – 1991's Gilmer v. Interstate/Johnson Lane Corporation – "came out of the financial industry, which makes our data set and results that much more relevant, because they come from the same industry," Lamare said. "In the Gilmer case, the court said that as long as a securities dealer can effectively resolve his complaint in arbitration in a manner akin to what he could expect out of the court system, arbitration is a perfectly acceptable substitute for using the court system for any source of discrimination complaints."

But the public court system probably isn't much better for anti-plaintiff effects in workplace discrimination cases, Lamare said.

"We find that discrimination claims fare poorly in arbitration – but that doesn't necessarily mean that they would have fared any better in the courts," he said. "When companies allow a discrimination complaint to leave the system – as many firms in the financial industry did in 1999, by introducing voluntary arbitration for discrimination claims – many plaintiffs actually decided to stay in arbitration, which implies that they felt there was value in resolving their complaints that way.

"In effect, people are making a choice between two pretty bad systems."

If arbitration were uniformly bad for women and other protected classes relative to the court system, "you would expect to see all the complaints vacate that system as soon as they were able to," Lamare said.

"But we don't see that. There's evidence that sits on the fence about whether arbitration is good or bad for discrimination complaints. It seems to be bad, but there's not necessarily an obviously better system out there for it."

The good news, according to the paper: Arbitration systems are capable of meaningful self-reform.

"Arbitration systems present a really unique opportunity in that they're private, and the system's administrator controls the rules of the system and how those rules are written," Lamare said. "That makes the arbitration system far more adaptable than the public court system. One positive story that we point to in our paper is that the Financial Industry Regulatory Authority system accepted that it had a problem with discrimination, and recognized that people were doing poorly in it, and they were able to change the system in response.

"The court system is incapable of moving that quickly in response to such problems. So that's a real positive for arbitration: If it knows it's in a bad spot, it can adjust."

More information: J. Ryan Lamare et al. Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry, *ILR Review* (2018). DOI: 10.1177/0019793917747520

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