

# Paper: Outcomes vary for workers who 'lawyer up' in employment arbitration disputes

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A worker who retains legal counsel to litigate a workplace dispute in arbitration doesn't account for the potentially countervailing effect of employers hiring their own legal counsel, says new research co-written by U. of I. labor professor Ryan Lamare. Credit: L. Brian Stauffer

Conventional wisdom dictates that workers who "lawyer up" in

workplace disputes would be more likely to improve their chances at securing a better outcome, but in an alternative dispute resolution context such as arbitration, employers can all but cancel out those positive effects, says a new paper by a University of Illinois expert who studies labor and employment arbitration.

An [employee](#) who retains legal counsel to litigate a workplace conflict doesn't account for the potentially countervailing force of employers hiring their own representatives or for differences in [attorney](#) characteristics, which tend to favor the deep-pocketed [employer](#), said J. Ryan Lamare, a professor of labor and employment relations at Illinois.

"There's this idea that employers are sometimes perceived as unleveling the playing field by taking advantage of the institutional structure of arbitration," Lamare said. "One of the counterarguments to that is employees don't have to go it alone in arbitration. They think they can hire an attorney who can essentially level the playing field. But there are pitfalls to that strategy, too."

The question of whether employees can level the playing field in arbitration by hiring attorneys is of particular interest since employees are often required to waive their right to sue their employers in court and are frequently forced to go to arbitration—even when dealing with issues as severe as discrimination or sexual harassment on the job, Lamare said.

"These policies have led to mass protests at companies like Google, and states such as California have considered banning arbitration for these types of employment disputes," he said. "If employees can use lawyers to shield them from the negative aspects of arbitration, this might calm the nerves of those who see the system as unfair. Alternatively, if lawyers are ineffectual in arbitration, this would lend support to those who want to limit arbitration usage."

Lamare analyzed employment arbitration awards rendered under the Financial Industry Regulatory Authority system for cases filed between 1986-2007. He found that hiring a lawyer benefits employees only in the rare instances when employers do not retain an attorney.

Conversely, when employers used an attorney in arbitration but employees did not, the employer benefited substantially. When both sides retained attorneys, however, the effects were statistically identical to those cases in which neither side hired lawyers, according to the paper.

"What people forget is that employers can also hire lawyers, and they can act in ways that offset the effects of the employee's attorney," Lamare said. "They roughly cancel each other out—and the employee has paid a lot of money out of their own pocket for representation. That alone is a negative outcome that's detrimental to employees."

Firms also have far more experience going through arbitration than employees, giving them a huge advantage, Lamare said.

"The firm goes through arbitration many times, and as a part of that experience, the firm becomes better or is able to game the system better than the employee who only goes through it once," he said.

For employees, hiring any random [lawyer](#) isn't enough to level the playing field. Attorney skill and specialization matter, but there are no guarantees—even with a "good" attorney, Lamare said.

"I find that higher-skill attorneys produce better outcomes in arbitration, but it may be the case that higher-skill attorneys attach themselves to better claims, more winnable cases," he said.

To control for that, Lamare accounted for as many different factors as

possible in the types of claims that went to arbitration by examining lawyers' biographical records to determine attorney quality differences and their effects on outcomes conditional on both sides having legal counsel.

He found that employee and employer attorney characteristics differ and the contrast has grown more pronounced over time. The difference can affect awards, particularly for employees.

"The bottom line is: Simply hiring an attorney won't redress systematic imbalances within employment arbitration," he said. "Lawyers are certainly important to the system and certain types of representatives can affect the outcomes of [arbitration](#). But inequalities persist, and attorneys vary—sometimes greatly—in the substantive value they add when they represent employees.

"Employees should not assume that they can overcome systemic power inequalities simply by hiring an attorney."

The paper was published in the journal *ILR Review*.

**More information:** J. Ryan Lamare. The Devil Is in the Details: Attorney Effects on Employment Arbitration Outcomes, *ILR Review* (2019). [DOI: 10.1177/0019793919877404](https://doi.org/10.1177/0019793919877404)

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