NATIONAL ACADEMY OF ARBITRATORS

COMMITTEE ON THE STATE OF THE PROFESSION

2024 REPORT

I. Introduction

The Committee on the State of the Profession presents this report to the Academy in accord with its charge to assess and report annually on the state of the arbitration profession. [1]

The Committee was created in 2020 under the leadership of President Dan Nielsen, in the wake of ominous signs facing the profession, including the steady decline in the numbers of arbitration cases, the continuing decline in unionization, and concerns that the Supreme Court's decision *in Janus v AFSCME* (2018), would erode public sector bargaining. Decreases in NAA membership and attendance at our annual meetings, and the aging of labor arbitrators, also weighed on the Academy's concerns.

The current Committee first met in June 2023, soon after NAA President McKee named the committee members and appointed Josh Javits as Chair. Since the potential subject matter was quite broad, our initial task was to determine the scope of the Committee's work. After some discussion the Committee established subcommittees to cover essential subject matter areas. Leads were named for each subcommittee to manage the process of researching and writing the subcommittee reports. These were the subject areas and assigned teams:

1. *The Arbitrators*: arbitrator demographics, including diversity, NAA member composition
   Lead: Lisa Charles; Members: Bill McKee and Michael Green

2. *How Much Work*: case volume; referral agency statistics; new NAA applicant case numbers; impact of unionization, NLRB representation elections
   Lead: Debbie Gaines; Members: Carl Bosland, Lisa Kohn, Susan Panepento, and Rich Block

[1] Official description: *The State of the Profession Committee is responsible for annually assessing and reporting on the state of the arbitration profession. The Committee monitors developments across the profession, including trends in caseloads and appointments, survey data, reports of other Academy committees and significant caselaw developments, to produce a report in June of each year about the preceding calendar year, to be distributed to the membership and published on the web site and in ArbInfo. Special addenda may be generated to address significant developments between the end of the prior calendar year and the date of publication.*

3. *What Kind of Work*: US and Canada; emerging issues; industry distribution; labor/employment; consumer/business/construction/financial/international cases; interest arbitration/med-arb/fact-finding; external law developments; expectations of parties
   Lead: Will Hartsfield; Members: Sylvia Skratek, Paul Gerhart, and Louise Wolitz

4. *Legal Environment*: recent changes impacting the profession including standard of review; statutory dispute jurisdiction; FAA decisions; NLRB policy changes
   Lead: Lise Gelertner; Members: Rick Bales, Kevin Banks and Michael Green

5. *Recent Developments in the Practice*: virtual hearings; settlements; use of newer dispute resolution processes
   Lead: Howard Foster; Member: Alan Symonette

6. *Writing Committee*: Draft Report
   Lead: Josh Javits; Members: Howard Foster, Paul Gerhart, Lisa Kohn, ill McKee

The Committee conducted extensive research, including a review of prior NAA surveys, various NAA committees' reports, on-line data, agency public documents, and other sources. In addition, we submitted a series of questions to several key agencies and entities and then held group virtual meetings with them. Each agency and entity then conducted its own research and provided us with very helpful data and information. These resources included Arthur Pearlstein, Director of Arbitration, FMCS; Christine Newhall, Senior Vice President, AAA; Terri Brown, Director of Arbitration, NMB; and, Riva Parker, Airlines for America (Parker even conducted a special survey of her members for us).

The Committee's Report does not in any way cover all important issues affecting the profession. In fact, we identified several areas for which we believe it would be useful to follow up with studies to fill in gaps. We suggest that some of our academic members might wish to make proposals to the REF to pursue these areas.

Herewith an executive summary to facilitate access to the Report's essential findings.

Executive Summary

The Arbitrators

- AAA labor panel data suggests that in recent years the arbitration profession has become more female, more racially diverse, and more legally trained.

- NAA member data indicates a modest continued increase in the number of females. However, the nonwhite NAA membership increase has been smaller. This smaller increase may reflect the lower number of nonwhite attorneys in labor and employment specialties (based on ABA statistics), which typically serve as an important pool for future labor arbitrators

The Work - How much?

- *Agency volumes*:

- The major appointing agencies FMCS and AAA show significant decreases in arbitration cases filed or assigned over several decades.
- AAA: 2017 to 2022 decrease of 28% in cases administered
- FMCS: 2004 to 2022: decrease of 50% in cases filed
- AAA and FMCS show their data on the highest number of cases filed or assigned by State. The only States in common are Pennsylvania, Ohio, New York and Washington State. 60% of AAA cases are filed in these four states; 33 percent of FMCS cases are filed in these same four states.

- *NAA membership*:

- New standards introduced for membership in 2022

- In 2022, 18 applicants were considered, 14 were accepted. Only four of the 14 used the new alternative standard of service rather than the longstanding single criterion of the number of arbitration decisions rendered.

- *Union Density*:

- Union density is not the same as the amount of arbitration work but is clearly related
- BLS: 10 percent or 14.4 million union members overall
- private sector: 6 percent or 7.4 million members
- public sector: 32.5 percent or 7 million members
- in 1983 private sector was 16.8 percent and public sector was 36.7 percent

- *NLRB elections*:

- In December 2003 the NLRB adopted new election rules
- FY 2O23: unions won 76 percent of representation elections but only 43 percent of decertification elections

The Work – What Kind

- BLS projects a 5 percent growth in arbitration (of all kinds including commercial, construction, etc.) from 2022-2032, with 400 openings for new arbitrators per year.

- In Canada, along with a significant decrease in unionization rates, there has been a dramatic decline in arbitration awards at the federal and provincial level

- In the U.S. there has been a decrease in unionization since 1983, which is likely predominantly responsible for the decrease in arbitration cases.

- FMCS panels requested have declined by nearly 30 percent from 2017 (12,100) to 2023 (9,705).

- AAA filings declined by over 50 percent from 2012 (9,332) to 2022 (4,682). However, only about 10% of AAA filings in 2022 ended up in Awards.

- AAA statistics show increases in arbitrations and mediations for non-labor/employment cases (business, construction, etc.)

- NMB railroad arbitration (funded by the federal government) amounted to about 2,300 cases in FY 2022 with a heavy concentration of cases being arbitrated by a small number of arbitrators.

- FINRA filings for arbitration and mediation have decreased significantly recently.

- Newer subject matter for labor cases: COVID related issues spiked during the pandemic.

- Recent State and Federal laws have impacted employment arbitration. The Ending of Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021(EFASASHA) has reduced arbitration in these areas. Legislation requiring the protection of pregnant workers by requiring reasonable accommodations has protected nursing mothers. Protection from discrimination due to the use of AI in interviews has also been legislated.

- Party preferences on the conduct of arbitrators as reflected in NAA Annual Meeting presentations by parties :

- generally, do not intrude on parties' presentations at hearings (e.g., questioning by arbitrators)

- Efficient procedures are appreciated (e.g., do not automatically bifurcate arbitrability issues, order sequestration or suggest mediation before the hearing).

Legal Update

- This update covers significant legal decisions and changes affecting arbitration that occurred from late 2021 through 2023. Canada saw a big change in the standard of review of arbitration awards and an evolution in the state of the law on arbitrators' exclusive jurisdiction over statutory disputes in unionized workplaces. In the United States, the court decisions and legislation generating most of the major legal news arose under the Federal Arbitration Act (FAA), directly affecting employment arbitration and other non-labor types of arbitration. For labor arbitration, the judicial review standards and other related doctrines arising from the Steelworker Trilogy remained unchanged. In addition, the NLRB's policy on deferral to arbitration has remained unchanged since it reverted back to the *Spielberg/Olin* deferral standards in December 2019 in *United Parcel Services*, 369 NLRB No. 1 (2019). However, the NLRB reversed or changed many other doctrines that the Trump Administration Board had adopted.

The Practice of Arbitration: Recent Developments

- Video conferencing: the sudden enormous increase in the use of video conferencing for arbitration, caused by the onset of the Covid pandemic in March 2020, has been the dominant development in the practice.

- The rapid response of the NAA in establishing training for arbitrators and parties and developing best practices was instrumental in enabling workplace dispute resolution despite the enormous challenges of the pandemic.

- The immediate growth a video conferencing during the pandemic plateaued in 2022 and has now decreased to the point at which about half of arbitration hearings are virtual and half are in person. Whether the trend towards decreased Virtual hearings has leveled off for the long term or the trend will return to the pre pandemic in person status quo is unknown at this point.

- The benefits and efficiencies of virtual hearings, including decreased costs, greater pre-hearing planning, broader arbitrator selection options, etc., are unknown at this point. But the acceptance of virtual hearings as a credible option has clearly been established.

- Settlements: whether there is an increased propensity towards pre award settlements of cases is not known. However, FMCS and AA statistics suggest that less than 30 percent of the arbitration panels created end in arbitration decisions.

- In Canada there is some indication that an increased use of med-arb has impacted the incidence of pre-arbitration hearing settlements.

II. The Arbitrators

Introduction

For much of its history, which in its current form begins in the 1940s, the labor arbitration profession in the United States has comprised a demographically homogeneous group of predominantly white males. That homogeneity has begun to change, albeit slowly. In this section, we present data from the American Arbitration Association (AAA) Labor Panel and membership surveys of the National Academy of Arbitrators (NAA) to gain a more recent perspective on demographic diversity in the profession. The AAA data from 2017 and 2022 offer a broader view of labor arbitrators, since its panel includes both members and non-members of the NAA. The NAA data are based on membership surveys conducted by the ILR School at Cornell University in 2022 and 2015, and these data provide a narrower profile of the arbitrators whose longevity and acceptability lead the profession. Data from both sources show similar trends, in particular that gender and ethnic diversity is slowly changing the demographic character of the profession. In an effort to obtain still more perspective, we also made inquiries with the Federal Mediation and Conciliation Service (FMCS) and the National Mediation Board (NMB) to obtain similar data, but we found that those government agencies do not collect demographic data for the arbitrators on their panels.

The AAA Labor Panel: Arbitrator Demographics and Diversity

As shown in Table 1, there were 759 arbitrators on the AAA Labor Panel of Arbitrators in 2017, and these panel members were predominantly male and White. Specifically, 76 percent were identified as male and 24 percent as female. In addition, 91 percent were classified as White, and 9 percent as Black, Hispanic, Asian, or Other, a group we will collectively designate as People of Color in this report. The data also show that most arbitrators on the panel have advanced degrees, with 72 percent having law degrees.

Table 1: AAA 2017 Labor Arbitrator Demographics

	AAA Labor Panel
Gender	76% Male 24% Female

Race	91% White 9% People of Color
Education	72% Law Degree 27% Non-Attorney
Total Number	759

Table 2 provides the same data for the AAA Labor Panel in 2022. By that year the Panel had declined significantly to 554 arbitrators, but there was a modest increase in the gender and ethnic diversity of its membership. Specifically, 69 percent of the arbitrators identified as male and 27 percent as female. Also, 88 percent identified as White and 12 percent as People of Color. The data also show a continuing growth of attorneys in the arbitration profession, with arbitrators with law degrees increasing from 72 percent to 79 percent over the five-year period.

Table 2: AAA 2022 Labor Arbitrator Demographics

	AAA Labor Panel
Gender	69% Male 27% Female
Race	88% White 12% People of Color
Education	79% Law Degree 20% Non-Attorney
Total Number	554

In sum, the AAA panel data suggest that in recent years the arbitration profession has become somewhat more female, somewhat more racially diverse, and more legally trained.

Cornell Studies of NAA members

In 2022, researchers at Cornell University and Pennsylvania State University conducted a survey of NAA members, yielding 289 usable responses, a response rate of 43 percent. That survey found that 79 percent of the respondents were male and 21% were female (Katz *et al*., 2023). In 1999, an NAA Research and Education Fund survey of 462 NAA members, with a response rate of 86 percent of those eligible to participate (those who had arbitrated or mediated within the three years prior to the survey), found that 88 percent of NAA members were male and 12 percent were female. (Picher, Seeber, and Lipsky, 1999). As there is no reason to believe that there was non-response bias, i.e., that NAA members of one gender were less likely to respond than NAA member of the other gender, these data suggest that the percentage of arbitrators who are female increased over this 23-year period.

We also reviewed a Cornell survey of NAA members in 2015, which is summarized in Table 3. In that survey, 79 percent of the respondents identified as male and 21 percent as female, while 95 percent identified as White and 5 percent as People of Color. The total number of respondents and the percentage of them who were attorney and non-attorney was unclear from the data available at the time of this report.

Table 3: NAA members in 2015

	NAA Members
Gender	79% Male 21% Female
Race	95% White 5% People of Color
Education	Law Degree Non-Attorney
Total Respondents	Unclear

With respect to racial diversity, the 2022 Cornell survey found that 93 percent of respondents were white and 7 percent people of color, a modest increase in minority representation. While this survey shows no change in the gender make-up of survey respondents between 2015 and 2022, most other data suggest that the percentage of women in the profession was rising during this period.

Table Four: NAA members in 2022

	NAA Members
Gender	79% Male 21% Female
Race	93% White 7% People of Color
Education	74% Law Degree 16% Non-Attorney
Total Respondents	289

In 1999, an NAA Research and Education survey of 462 NAA members, with a response rate of 86 percent of the Academy's active membership, found that 88 percent of NAA members were male and 12 percent female. (Picher, Seeber and Lipsky, 1999). Thus, assuming no non-response bias, the 1999 and 2022 surveys suggest that the representation of women in the Academy increased from 12 percent to 21 percent. These percentages are generally consistent with the results of a 2021 NAA DEIB survey of 400 labor and employment arbitrators, which included, but was not limited to, NAA members. The DEIB survey found that 83 percent of "labor neutrals," 80 percent of "employment neutrals," and 79 percent of "multi-neutrals" (that is, neutrals "engaged in both labor and employment arbitration) and "mediation" were male (NAA, 2022, pp.22-23). In sum, the data seem to establish that over the past two decades the Academy has had some success in increasing the percentage of women among its members.

On the other hand, the picture is not quite the same for non-white arbitrators. As noted, the 2022 Cornell survey found that 93 percent of the respondents were white and 7 percent were non-white (Katz *et al*, 2023). The 1999 REF results found that 95 percent of the respondents of the Academy were white and 5 percent were non-white (Picher, Seeber, and Lipsky, 1999). These results suggest that over the 23-year period between the two Cornell surveys, while female membership in the NAA has increased markedly, non-white membership in the NAA has grown much more modestly. This raises the question of why the NAA membership of one traditionally underrepresented demographic, females, has increased, while the NAA membership of another traditionally underrepresented demographic, non-whites, has not.

American Bar Association Surveys

One possible way to gain insight into this question is to consider a major "source of supply" of NAA members - the legal profession. Since a substantial majority of arbitrators have law degrees, we also analyzed demographic data on attorneys generated by the American Bar Association (ABA). In 2010 the ABA conducted a survey of the United States attorney population and found that 89 percent identified as White and 11 percent as People of Color. A decade later, in 2020, another ABA survey found that the ethnic diversity of attorneys improved slightly, with 86 of respondents identifying as White and 14 percent as People of Color. In addition, the survey also found an increasing representation of non-whites in law firms. Between 2009 and 2019, the percentage of non-white associates in law firms increased from 19.7 percent to 25.4 percent and the percentage of non-white partners in law firms increased from 6.1 percent to 9.6 percent (American Bar Association, 2020, p. 42).

The ABA published another survey of the legal profession in 2023, with results from 2022 (American Bar Association, 2023-2). In 2022, 79 percent of the respondents were white and 21 percent were nonwhite. In 2022, the percentage of non-white partners had increased to 11.4 percent and the percentage of non-white associates had increased to 28.3 percent.

Additional ABA data show that, from 2013 to 2023, the percentage of lawyers who were female increased by about 5.3 percentage points, from 29 percent to 34 percent. In addition, the percentage of lawyers who were nonwhite increased by 10.1 percentage points, from 11.3 percent to 21.4 percent. (American Bar Association-2, 2023, p. 110)

While the representation of nonwhites in the legal profession in general is increasing, however, there is some indication that this is not the case for lawyers practicing in the labor and employment area, the most likely source of (future) labor arbitrators. Anecdotes collected by Sawicki (2022) suggest non-whites are underrepresented in the labor and employment bar.

In 2023, the ABA Diversity, Equity, and Inclusion Center analyzed ABA demographics using self-reported responses from the ABA member database (American Bar Association, 2023-1). The analysis found that, in the Labor and Employment member practice group, 3.2 percent of respondents to the questionnaire identified themselves as African American/Black and 2.2 percent as Hispanic/Latino. (American Bar Association, 2023-1). Among all lawyers, however 5.1 percent identified themselves as African American/Black and 3.7 percent as Hispanic/Latino, among other

underrepresented groups. Of those responding to the question, 84.6 percent identified themselves as white (American Bar Association, 2023-1). These data suggest that Black and Latino attorneys are less likely to practice labor and employment law than in other practice areas.

The ABA data must be interpreted with caution. Of the lawyers in the ABA database in the labor and employment practice group, 67.8 percent did not provide their race or ethnicity. In addition, only 37 percent of all attorneys responded to this question (American Bar Association, 2023-1). Nevertheless, these data are interesting as, at the least, they suggest the possibility that minority attorneys are less likely to practice in the labor and employment area than in other areas. To the extent that this is the case, and if labor and employment arbitrators are more likely than otherwise to be attorneys who practice in the labor and employment area, the pool of potential minority labor arbitrators is smaller than it might otherwise be.

Clearly, additional work must be done among attorneys to confirm that minority attorneys are less likely to practice in the labor and employment than in other areas of the law. Nevertheless, these data do suggest that, given the importance of the question of DEI in the Academy, perhaps efforts should be made to reach out to the ABA and its Labor and Employment Section to encourage attorneys who are members of underrepresented groups are to consider practicing labor and employment law and then to consider moving to the role of a neutral.

Conclusion

After some eight decades as an identifiable profession in the United States, labor arbitrators are still predominantly male and White. While individuals and organizations in the labor-arbitration profession have striven to increase the demographic diversity of arbitrators to better reflect the diversity of the union-represented employees who utilize labor arbitration services, the data show that progress has been modest. If the progress is to gain momentum, other strategies will be needed.

There is perhaps a note of caution, however, that should be struck when we assess the implications of survey data or membership data in different years. Comparing snapshots of diversity within groups whose members turn over slowly can mask the magnitude of recent trends. A useful exercise would be to compare, say, the demographic profile of NAA members who entered the Academy during the past ten or fifteen years with those who entered earlier. Another would be

to limit the analysis to active arbitrators. It would be useful to know, in short, whether the modest changes observed in the global data are the result of a legacy effect or present-day obstacles faced by minority and female professionals who aspire to become arbitrators. The NAA's Research and Education Foundation may wish to commission such an analysis.

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III. The Work – How Much?

The question of how much work exists for labor arbitrators and how it is distributed is of central concern to the profession. Unfortunately, quantifying the amount of work available to arbitrators is not easy. The sources for appointment vary; the record-keeping methods for the major referral agencies differ; most public-sector referral agencies either do not keep or do not provide such information; and, anecdotally, we know that there are many entities that maintain private panels by contract. Information on those panels is not widely available.

Nonetheless, two key facts feature prominently in this inquiry:

1. The number of arbitrator appointments has decreased over the 10-year period examined.
2, Union Membership has consistently decreased over a 50-year period.

A. Summary of Data on Appointments from Referral Agencies

In preparing this report, the committee had access to labor-case data from the FMCS, the AAA, and the NMB.[2] All three referral agencies keep some data on neutral appointments that permit a comparison of the total number of cases annually and by state. However, the overall quantity and quality of the data published by the three agencies varies widely, and there is little consistency in the types of information being tracked or reported across the agencies. Some of these differences may inhibit an accurate aggregation or comparison between agencies. For example, the AAA reports annually the number of *cases filed* while FMCS and NMB appear to report the annual number of *cases assigned*. AAA's data are also based on the calendar year and not the federal fiscal year like the other two agencies. Further, AAA and FMCS track their cases by state, but FMCS does not publish the raw data on all the states [only the top 10]. NMB, on the other hand, breaks down the cases by boards: public law boards, special boards, interest arbitration boards, and pay boards. AAA disaggregates its total filings by issue: *e.g.,* discharge, suspension, other discipline, contract interpretation, and work assignment,. Other types of data reported include the number of arbitrators appointed, the number of cases closed, how cases are closed, how the hearings are conducted, the total number of panel members, the number of awards issued, city vs. regional, and diversity commitment. As noted earlier, however, none of these variables is reported by all three referral agencies. Interestingly, a 2022 report from the NMB also detailed how the railroad cases assigned were concentrated among only a few of the arbitrators on the panel: the top 10 arbitrators receive 60 percent of the work, and the top 2 arbitrators receive 25 percent of all cases. This information is arguably more helpful to Academy members or potential arbitrators than a simple average of cases per panel arbitrator, which could be a very unreliable indicator of available work when a small number of panel arbitrators receive the vast majority of the cases administered.

Most of the data available to the committee came from AAA and FMCS. Their reports show that both agencies have had significant decreases in arbitration cases filed or assigned. FMCS's cases have declined by nearly 50 percent since 2004 [from 18,033 in 2004 to 9,678 in 2022]. The AAA's data from 2017 to 2022 show a 28 percent decline in

[2] Limited data was also accessible from FINRA, ICDR and other AAA administered panels such as employment, commercial and construction but not analyzed.

cases administered in only a five-year period. NMB data were available for only one year. Given the differences in data published and available to the committee, there are few conclusions that can be drawn from them other than the total number of cases administered by each agency. For 2022 and FY 2022, these are: 4,682 for AAA; 9,678 for FMCS; and 1,088 for NMB (2,300 funded). One other factor that should be noted is that the ten states with the highest number of cases filed in 2022 and FY 2022 differ at FMCS and AAA. They are listed in descending order below:

Labor Case Filings by State [highest to lowest]	
FMCS FY2022	**AAA 2022**
Illinois	New York
Ohio	Pennsylvania
California	Massachusetts
Florida	New Jersey
Texas	Michigan
Pennsylvania	Ohio
Washington	Connecticut
Nevada	Rhode Island
District of Columbia	Washington
New York	Texas

Pennsylvania, Ohio, New York, and Washington were among the top ten sources of cases for both AAA and FMCS. Indeed, over one third of the cases filed at FMCS and over 60 percent of the cases filed at AAA were generated from those four states. Thus for the purposes of building and maintaining a practice, it may be useful to Academy members to further analyze whether the volume of cases from geographic areas has changed over time. They may also want to consider that more than half of all U.S. union members reside in seven states.

Should the Academy want to analyze data on appointments and trends across agencies and/or over time, it will be necessary to make efforts to obtain better data. Such an effort should begin with identifying a time frame and the specific

case data desired. It will be helpful to first consider the desired goals of the analysis. Are they to identify national trends, state trends, industry trends, or public/private sector trends? Or to identify areas that generate the most work – by state or sector? It has previously been reported that large numbers of public sector and other cases are handled at referral agencies on the state and local level. Should the Academy limit its analysis to the national labor-referral agencies or look more broadly to state-level referral agencies as well? Should case data from other non-traditional labor referral agencies [*e.g*. FINRA, ICDR, AAA consumer, employment, construction panels] or data from other large private panels such as postal be considered? Once the Academy defines clear goals and the data needed, it should consider developing a survey form to seek annual data from referral agencies.[3] Obtaining the same data set annually will allow for easier comparisons, and the Academy could better analyze, aggregate, and maintain this information for future study. Alternatively, it may be helpful for the Academy to publish a summary of which states have state and local referral agencies and the types of cases they administer and requirements to receive cases from those agencies. This information does not appear to be available in summary format.

B. NAA New Applicants

We examined new applicant data to try to determine if the number of applicants and the number of cases they reported on their applications provided any insight into the amount of work available. We obtained applicant data from the operations committee and examined the applicants for 2012, 2017, and 2022. It should be noted that the standard threshold for consideration for NAA membership changed between 2017 and 2022. Prior to 2022, the standard threshold for consideration was:

1. minimum of five years as an arbitrator;
2. at least sixty written decisions in a time period not to exceed six years;
3. at least 40 of the decisions must be countable labor-management arbitration awards;
4. up to 20 decisions in the field of workplace-disputes-resolution were countable;
5. no more than 10 countable workplace dispute decisions could involve employment arbitration pursuant to individual contract, handbook or other agreement in which the employee is not represented by a labor organization.

[3] Concerning the narrow issue of appointments, the most relevant information relates to the number of arbitrators, number of cases, types of cases, average number of cases per panel arbitrator, distribution of cases among panel arbitrators, and the geographic source of the cases. Much, if not all, of this information is currently being maintained by the national referral agencies.

By 2022 the NAA had instituted some changes that enabled applicants to meet the threshold for admission in other ways. While stressing that the basic standard for membership to the NAA remains "general acceptability by the parties" as reflected by the applicant's "substantial and current experience," the NAA still has a threshold requirement of 60 decisions in a six-year period. However, the 60 decisions may now be made up of:

1. Forty written decisions, but only 25 of them must be in labor-management cases. The other 15 may be additional labor-management awards or written decisions in similar types of workplace disputes, such as civil-service and teacher-tenure cases.

2. The remaining 20 cases may be in the form of additional written labor-management awards, workplace dispute decisions, or alternatively:

    a. Consistent record of mutual selection. Five mutual selections that produce no decision count as 1 award.
    b. If the applicant was an active participant in the settlement of the dispute, 2 selections count as 1 award.

The new standard acknowledged the changes in arbitration workload over time and the difficulty of meeting the standards with a large number of appointments never getting to a hearing.

The data on applicants did not show any meaningful trends. The numbers of applicants were as follows:

	2012:	2017:	2022:
Applicants	15	8	18 (four by Alternate Standard based on related experience)
Accepted	13	6	14
Rejected/ Deferred	2	2	4

It is notable that of the 18 applicants in 2022, four applications were based upon the alternate standard of service in the field, rather than on arbitration decisions. In addition, all but four of the applicants relied upon the mutual selection criteria for a significant portion of their countable awards. However, the limited amount of data does not enable us to determine if there is significantly less work.

C. Union Membership – 2023 – The decline continues

Although information about union membership and organizing does not provide direct information about the amount of arbitration work, it seems intuitive that trends in union membership are likely related to arbitration caseloads. On January 23, 2024, the Bureau of Labor Statistics reported the following:

- 10.0 percent of wage-and-hour workers (14.4 million) were members of unions in 2023, down from 10.1 percent in 2022. The 10-percent overall union-membership rate represents a new low for recent decades.
- In the private sector, notwithstanding an increase of 191,000 in the total number of union members (to 7.4 million), the 2023 union-membership rate of 6.0 percent remained unchanged from 2022.
- In the public sector, the union-membership rate of 32.5 percent (7 million workers) was down from 33.1 percent in 2022.
- For context, in 1983, the first year that comparable data were available, the private sector union-membership rate was 16.8 percent, and the public sector union membership rate was 36.7 percent.

D. NLRB Union Representation Election Petitions

On October 13, 2023, the National Labor Relations Board released case filing data for FY 2023 (Oct. 1, 2022 – September 30, 2023). In FY 2023, 2,594 union representation petitions for elections were filed, an increase of 3 percent over FY 2022. In contrast, FY 2022 saw a 53 percent increase in union representation petitions for elections over FY 2021, likely a result of the easing of the pandemic.

On August 24, 2023, the NLRB adopted a Final Rule (effective December 26, 2023) amending representation election procedures by reversing the 2019 Trump Administration Election Rule and returning to the 2014 Election Rule designed to speed up the union election process. As a result, an uptick in union election petitions and unfair labor practice charges is anticipated.

For FY 2023, the NLRB reported that Unions won 76 percent of the 1,320 union/employee (RC) and employer (RM) initiated representation elections conducted. However, unions won only 43 percent of the 162 decertification petitions (RD) filed.

E. Conclusion

Although there are no data series that can definitively measure the volume of arbitration work that is being performed in North America, or the trends in that work over time, the available information, both direct and indirect, seems mostly to point in the same direction. Arbitration work has been declining in recent decades, and there is scant evidence to suggest a

likely reversal in the near future. Although there will still be opportunities for new arbitrators to pursue full-time careers in the future, those careers may well have to go beyond the traditional labor-management arbitration. By all indications, the state of the profession is not one of growth.

IV. The Work – What Kind?

In this section, we examine trends in the nature of the work that arbitrators are called upon to perform in the United States and Canada. The specific areas of interest we set out to address here include:

A) Labor vs. employment arbitration
B) Evolving and emerging issues presented to arbitrators (*e.g.*, COVID-related)
C) Distribution across industrial sectors
D) Relations with "external law"
E) Interest arbitration, fact-finding, med-arb
F) The work processes the parties want from their neutrals

A) US, Canada and cross-border practice

In order to assess the various types of arbitration being practiced in North America and how they may have changed in recent years, the Committee sought data for 2012, 2017, and 2022. When those years were not available, we report years for which data were available. Occasionally, the reporting Agency revised its data description, *e.g.*, public sector became state and local sector.

We note as an aside that cross-border work may present an opportunity to expand an arbitrator's practice. At least three current NAA members have established practices in Canada and the United States: Randi Abramsky (NAA Toronto), Margo R. Newman (NAA Toronto and Chicago), and Sylvia Skratek (NAA Vancouver and Seattle). [Source: *A Quarter Century of New Directions in Leadership and Mission*, at 152 (NAA, Theodore J. St. Antoine Ed. 2022).]

According to the Bureau of Labor Statistics, the employment of arbitrators, mediators, and conciliators in the United States is projected to grow 5 percent from 2022 to 2032, faster than the average for all occupations. About 400 openings for arbitrators, mediators, and conciliators are projected each year, on average, over the decade. Many of those openings are expected to result from the need to replace

workers who transfer to different occupations or exit the labor force, such as to retire. [Source: https://www.bls.gov/ooh/legal/arbitrators-mediators-and-conciliators.htm#tab-6]

Canada

In Canada, union members in their main job fell from 38 percent of workers in 1981 to 29 percent in 2022. From 1981 to 2022, unionization rates fell by almost 11 percentage points in full-time jobs and 3 percentage points in part-time jobs. Unionization rates fell by 16 percent among men but remained stable among women. As a result, 31 percent of women workers were unionized in 2022, compared with 26 percent of men workers. [Source: René Morissette, Economic and Social Reports Unionization in Canada, 1981 to 2022 (Nov. 23, 2022) (https://doi.org/10.25318/36280001202201100001-eng).[

Canada: Federal Appointments

Under Collective Bargaining Agreements: If parties are unable to agree on the arbitrator or the chair, the Minister of Labour may make the appointment. [Source: Arbitration Appointments (last visited January 16, 2024) (https://www.canada.ca/en/employment-social-development/services/labour-relations/arbitration.html).]

For non-union workers: Unjust Dismissal (UD) Adjudicators hear complaints of unjust dismissal. Wage Recovery (WR) Referees hear wage recovery appeals. Wage Earner Protection Program Adjudicators hear appeals of section 12 of the Wage Earner Protection Program Act decisions only on a question of law or jurisdiction. [Source: Arbitration Appointments (last visited January 16, 2024) (https://www.canada.ca/en/employment-social-development/services/labour-relations/arbitration.html]

From 2007 through 2017, total federal grievance-arbitration appointments ranged from a high of 112 in 2008-09 a low of 58 in 2013-14, with 84 in 2016-17. During the same period, total federal unjust dismissal and wage recovery and wage earner appointments ranged from to a low of 348 in 2007-08 to a high of 508 in 2010-11, with 484 in 2016-17. [Source: Federal mediation and conciliation service, Review of the fiscal year 2016 to 2017 Appendix G. Appointments under Part I and III (UD and WR) of the Canada Labour Code and Wage Earners Protection Program Act appointments since 2007 to 2008

(https://www.canada.ca/en/employment-social-development/services/labour-relations/reports/2017-federal-mediation-conciliation.html#h2.10-g)]

In the fiscal year 2017-18, Arbitrators were appointed by the federal government in 72 grievance arbitrations, 92 wage recovery claims, 380 unjust dismissal claims and 3 Wage Earner Protection Program Act claims. [Source: Federal Mediation and Conciliation Service Review of Fiscal Year 2017-2018 (https://www.canada.ca/content/dam/esdc-edsc/documents/services/labour-relations/fmcs-review-report-2017-18-en-ext.pdf)]

Canada: Provincial Arbitrations

For the four provinces that contain over 85 percent of Canada's population -- Alberta, British Columbia, Ontario, and Quebec -- the Committee gathered data on Awards issued from LexisNexis Advance Quick Law. A majority of the cases occurred in Alberta, British Columbia, and Ontario.

Province	2023	2022	2021	2020	2010
Alberta	38	59	87	52	76
British Columbia	141	148	180	162	202
Ontario	305	377	569	382	702
Quebec		Insufficient information available			

Trends in Arbitration Awards Issued at the Federal Level

2010: 350 2020: 111 2021: 71 2022: 65 2023: 66

United States

As summarized in an earlier section, union membership in the United States has been in decline for some time. In 1983, the first year in which comparable union data were available, the union-membership rate was 20.1 percent and there were 17.7 million union workers. In 2020, the union-membership rate had fallen to 10.8 percent, although it was up by 0.5 percent from 2019. [Source: U.S. Bureau of Labor Statistics, Union Members — 2020 (Jan. 22, 2021).] In 2022, the union membership rate fell further to 10.1 percent.. Although the number of workers belonging to unions, 14.3 million in 2022,

represented an increase of 273,000, or 1.9 percent, from 2021, the total number of workers grew much faster, by 5.3 million or 3.9 percent. [Source: U.S. Bureau of Labor Statistics Union Members — 2022 (Jan. 19, 2023).] In 2023, the union-membership rate fell yet again, to 10.0 percent.

The union-membership rate in the public sector was stable from 1983 (36.7 percent) to 2011 (37.0 percent), but it has since declined to 32.5 percent. In the private sector in 2023, union membership increased by 191,000 to 7.4 million, but the unionization-rate was unchanged at 6.0 percent. About one-half of all union members were in the public sector, although the pubic sector represented a much smaller proportion of total employment. Other industries with high unionization rates included utilities (19.9 percent), transportation and warehousing (15.9 percent), educational services (12.9 percent), and motion picture and sound recording industries (12.1 percent). [Source: U.S. Bureau of Labor Statistics Union Members — 2023 (Jan. 23, 2024)]

Labor Arbitration

Generally, requests for labor panels and labor awards fell from 2012 through 2022. On the other hand, employment-arbitration filings and awards generally remained stable. The tables below report data from the FMCS and the AAA. FMCS statistics are for fiscal years and AAA statistics are for calendar years. We report years for which data were readily available. The numbers for arbitrators generally reflect active arbitrators. Both the FMCS and AAA provide "list only" services for which they do not obtain follow-up data for the number of awards issued. Also, the Committee did not obtain data from state appointing agencies, permanent panels, or similar sources. Still, we conclude that the amount of available labor arbitration work fell from 2012 through 2022. This decline is evident in both national data from FMCS and AAA and data for individual states.

FMCS

2017	12,100 Panels requested	966 Awards	953 Arbitrators
2022	9,695 Panels requested	1,079 Awards	832 Arbitrators
2023	9,705 Panels requested	717 Awards	732 Arbitrators (including 308 Academy members, 42%)

AAA

Total Filings

2012	9,332 Filings		
2017	6,424 Filings	519 Awards	
2019	5,738 Filings	404 Awards	
2020	4,782 Filings		659 Arbitrators and Mediators (270 NAA members, 41%)
2021	4,939 Filings		612 Arbitrators and Mediators (250 NAA members, 41%)
2022	4,682 Filings	1,023 Awards	576 Arbitrators and Mediators (224 NAA members, 39%)

Labor Filings for Selected States

State	2017	2022
California	114	95
Connecticut	285	172
Florida	227	121
Massachusetts	716	640
Michigan	334	226
New Jersey	394	232
New York	1,895	1,328
Ohio	275	225
Pennsylvania	1,058	736
Rhode Island	209	148
Texas	217	139
Washington	110	143

Employment Arbitration

[Note: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 amended the Federal Arbitration Act. This may limit the number of employment arbitrations in the future. See D) Relations with External Law, below.]

Data from AAA

From October 1, 2017 to September 30, 2022, about 9,200 employment cases were filed, but only about 800 of these went to an award. About 7,000 settled, and 1,200 had some other outcome, such as withdrawals or dismissals. In 2017, individual filings increased by 8.6 percent (the number of filings is not available). In 2017, about 60 million private sector nonunion employees in the United States were subject to employment arbitration agreements.

2020	3,343 Filings	256 Awards
2021	3,333 Filings	375 Awards
2022	3,337 Filings	316 Awards

It may be seen that the number of awards for 2020, 2021, and 2022 exceeds the awards reported for 2017-2022, The discrepancy may be explained by variations in the definition of a settlement, an award, or a dismissal, which may have varied over the years. For example, an order of dismissal with prejudice may have been recorded as a settlement, as an award, or as dismissal.

Other Arbitration

Labor arbitrators wanting more work may find it in business, construction, FINRA, and international arbitrations. Below we report numbers in years for which data were readily available. We did not find readily available data for the number of filings or awards for patient medical billing disputes, tax appraisal arbitrations, teacher arbitrations, JAMS, the American Health Law Association, the National Academy of Distinguished Neutrals, the College of Commercial Arbitrators, or similar organizations.

Data from AAA

Business

2015	8,360 Filings
2018	8,983 Filings
2020	9,538 Filings
2021	9,196 Filings
2022	10,273 Filings

Consumer

On January 15, 2024, the AAA revised the arbitrator compensation on consumer arbitrations to **$300 per hour** (there are no longer different, **flat** arbitrator compensation rates for documents-only cases, which provide a maximum of $1,500, and in-person/telephonic/virtual evidentiary hearing cases, which provide a maximum of $2,500). The Committee judges that this increase in compensation reflects a shortage of qualified arbitrators for AAA consumer cases.

Like its employment due-process protocol, the AAA has a due-process protocol for consumer cases. Academy members may find helpful the NAA's Policy Statement on Employment Arbitration as a guide for consumer cases. (https://naarb.org/employment-arbitration-policy-and-guidelines/)

2021	8,210 Filings	624 Awards
2022	10,782 Filings	738 Awards

Construction

2022 3,713 Filings; 1,385 Arbitrators and Mediators

International

AAA international cases include those filed against cruise lines by their crews, and the crews of cruise lines are often protected by a CBA.

2017	1,026 Filings
2022	755 Filings

NATIONAL MEDIATION BOARD

Rail arbitration is funded by the federal government. In Fiscal Year 2022, the NMB funded 2300 cases. Of the 252 rail arbitrators on the panel, about 20 percent (50) were selected for cases. In 2022, two arbitrators accounted for 25 percent of all cases. For the current fiscal year that began on October 1, 2023, due to Congress' use of continuing budget resolutions, the NMB has not funded any rail arbitration cases.

FINRA

2012	4,759 Filings		
2017	3,456 Filings		
2022	2,671 Filings	635 Awards	8,180 Arbitrators (usually panels of 3)
2023	1,914 Filings	322 Awards	8,273 Arbitrators (usually panels of 3)

Arbitrators are paid $300 per hearing session of four hours, with a maximum of two sessions per day. A hearing of four or fewer hours, however split across the day, counts as one session. For cases filed on or after April 19, 2021, Chairpersons are paid an additional $250 for each hearing day or a total of $850. For cases filed or after April 19, 2021, Chairpersons are paid an additional $125 for each prehearing conference in which the Chairperson participates. Arbitrators are paid $200 per motion to decide discovery-related motions on the papers and $200 per subpoena to decide subpoena disputes on the papers. Arbitrators are not paid for other motions, *e.g.*, to amend, to strike, etc. Study or preparation time is not compensated. An arbitrator is paid $600 if a hearing is postponed, adjourned, or cancelled within 10 days before a scheduled hearing session. Only the Chair is paid for an explained decision. Currently, the amount is $400. Arbitrators are reimbursed for reasonable local expenses, e.g., meals and parking.

Mediators currently set their rates for FINRA mediations.

B) Evolving and emerging issues presented to arbitrators (*e.g.*, COVID-related)

In recent years, the most prominent class of new issues faced by labor arbitrators are those growing out of the COVID pandemic. The only data we were able to find on the incidence of these issues are from AAA. We report those years for which data are available.

AAA

2020 2 percent of labor cases filed involved Covid (4,782 Filings = 96 Filings)

2021 5 percent of labor cases filed involved Covid (4,939 Filings = 245 Filings)

2022 4 percent of labor cases filed involved Covid (4,682 Filings = Filings)

Another subject area that has gained increasing saliency in recent years is the arbitration of disputes involving the use of social media. Our inquiries did not focus on this topic, but it is one that should be explored in the future, either by this Committee or the REF.

C) Redistribution across industries (*e.g.*, public vs. private sector)

As the public sector has come to represent an ever-higher proportion of unionized labor, the distribution of arbitration work has likewise shifted. The data below from FMCS show the distribution of awards between private and

public employers. The percentage of awards in the private sector fell from 66.3 percent of the total in 2012 to 61.4 percent of the total in 2023.

FMCS

2012

1,310 Private Awards

244 Federal Awards

422 Public Awards

1,976 Total Awards

2022

641 Private Awards

214 Federal Awards

224 Public Awards

1,079 Total Awards

2023

586 Private Awards

161 Federal Awards

207 State or Local Awards

954 Total Awards

Airline Industry Hearings

From 2013 to 2017 there were 433 reported hearings.

From 2018 to 2022, there were 411 reported hearings.

In 2023, there were 80 reported hearings.

Source: Airlines for America (Members: Alaska Airlines, American Airlines, Atlas Air Worldwide, Delta, FedEx, Hawaiian Airlines, JetBlue, Southwest, United, and UPS).

Due to inconsistent record-keeping and with only about one-half of the airlines responding, it is likely that more hearings actually occurred.

Generally, airline CBAs did not require arbitrators to be NAA members. One carrier had an informal agreement with one workgroup to use only NAA members. Two CBAs required AAA arbitrators.

D) Relations with "external law"

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 may limit employment arbitrations. For example in, Turner v. Tesla, Inc., No. 3-23-cv-02451, (N.D. Cal. May 19, 2023) the plaintiff sued the defendant alleging seven claims based on her employment. Five of the claims related to sexual harassment. The other two were not sexual harassment claims, but were intertwined with them. The court held the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 rendered the parties' arbitration agreement unenforceable for all claims.

The following new laws or regulatory guidance may generate more labor and employment arbitrations:

Pregnancy: The Pregnant Workers Fairness Act, (eff. June 27, 2023) requires covered employers to make "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical condition of a qualified employee" unless the employer can demonstrate undue hardship. It applies to private and public sector (Congress, federal agencies, state, local, and municipal agencies) employers with at least 15 employees, employment agencies, and labor organizations. It is enforced in the same manner as other federal employment discrimination laws.

PUMP Act: The Providing Urgent Maternal Protections for Nursing Mothers Act or "PUMP" passed in December of 2022, expanded protections to nursing mothers in the workplace. The PUMP Act amended the Fair Labor Standards Act to provide nursing employees with reasonable break times and private spaces in which to express breast milk.

EEOC Artificial Intelligence, Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964, 05-18-2023. This technical assistance document discusses how existing Title VII requirements may apply to the assessment of adverse impact in employment selection tools that use artificial intelligence.

Illinois 820 ILCS 42/1, Artificial Intelligence Video Interview Act, (employers who use artificial intelligence to analyze an applicant's videoed interview must: (1) notify the applicant before an interview that artificial intelligence may be used. (2) explain characteristics artificial intelligence uses to evaluate applicants. (3) Obtain, before an interview, the applicant's consent; an employer may not share videos, except with persons whose expertise or technology is necessary to evaluate the applicant's fitness for a position; upon an applicant's request to delete interviews).

Maryland Md. Lab. & Empl. Code Ann. § 3-717 (employer may not use a facial recognition service to create a facial template during an applicant's interview for employment unless an applicant consents per this section).

New York New York City Admin. Code § 20-871 (unlawful for employer to use automated employment decision tool to screen a candidate or employee for employment decision unless: 1. Such tool has been subject of a bias audit conducted no more than one year before; and 2. summary of results of most recent bias audit and distribution date of tool made publicly available on employer's website; employer that uses automated employment decision tool to screen employee or candidate must provide specific notice to those employee or candidate who reside in NYC).

Source: 2023 Employment/Commercial Arbitration Developments Annual Report National Academy of Arbitrators Employment Arbitration Committee February 2024

E) Interest arbitration, fact-finding, med-arb

The agencies we consulted do not keep these data for private parties, and the Committee did not find readily available and reliable data elsewhere except for FINRA and third-party payers.

AAA

Between 2020-2022, parties in nearly 1,100 individual employment arbitration matters used mediation.

FINRA

2022 746 Mediations

2023 407 Mediations

Airline Industry

Several carriers reported using alternate dispute resolution approaches in 25 percent of their cases, while most reported no concerted effort to use ADR, although they were generally encouraged to "work it out."

General Observations:

In Canada, labor and management moved toward med-arb in the 1990s [Source: Michelle Flaherty's terrific paper, "Mediation-Arbitration in Ontario: Labor Relations, Human Rights and Beyond?" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080367).]

In the United States, mediators who are FMCS employees increased their mediations from 1750 in 2007 to more than 2000 in 2020. FMCS mediators mediated an additional 2,750 collective-bargaining disputes for a total of 4,750. [Source: NAA Mediation Webinar Panel on Mediation December 2, 2021

F) What work processes do the parties want from their neutrals?

There is limited information available to provide a hard answer to this question. Neither FMCS nor AAA has ever solicited such information from advocates. The NAA has elicited anecdotal information through presentations at our Annual Meetings, as well as through programs conducted at the Regional Level. It would be desirable, however, for the NAA to consider conducting some rigorous research that might answer this question. For now, however, the commentary below may provide some guidance. The suggestions have been gathered from the NAA Proceedings, the efforts of the Pacific Northwest Region in surveying advocates with specific questions, ongoing anecdotal information provided by advocates, and

specific requirements set forth by parties jointly as to their expectations of an arbitrator. These suggestions do not represent Committee recommendations, but rather represent the views of some advocates.

- Follow some rules of evidence with a focus on "best evidence."
    - If taking evidence "for what's it worth," then tell us what it's worth; otherwise we have to address evidentiary issues that should not be necessary.
    - Rules should be a guide, but practicality should allow some hearsay.

- Listen carefully to everything being said at the arbitration proceeding. The Arbitrator's listening skills are critical to a successful presentation by the advocates.

- Be thoughtful and considerate when making decisions on objections and legal arguments.

- Neither a transcript nor a recording should be required. Appeal rights in arbitration are extremely limited and a "record" sends the wrong message.

- If one party requires a transcript then the arbitrator should not receive a copy of the transcript.
    - The party that does not get a copy of the transcript, usually the Union, is at a disadvantage if the arbitrator gets a copy. Practically not fair and optically makes the Union look bad in front of its witnesses.

- Parties should be permitted to decide upon the form of closing arguments.
    - If one party requests briefing it may be allowed but consideration should be given to allowing an oral argument by the party that opposes briefing. Oral argument can be given without the presence of the party that requested briefing.

- Do not force the formulation of the issue at the hearing.
    - Advocates recognize that an agreed upon issue could streamline the hearing but if the parties cannot agree on the statement of the issue, then do not force it.
    - Do, however, remind us that if we cannot agree then we are at the mercy of the arbitrator to formulate the issue. That may cause some movement.

- Do not be an activist in cross-examination.
    - Let the parties try their own case but the arbitrator should ask questions to clarify understanding.

- Do not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.

- Do not suggest certain lines of examination or specific matters of evidence to be presented by the parties.
    - Takes the case away from the parties.

- Do not automatically sequester witnesses if only one party requests it.
    - Determine the reasonableness of the request.

- Bifurcate arbitrability and the merits only if truly necessary.
    - There is usually an overlap of facts, testimony, and documentation that makes it economical to proceed without bifurcation.

- Encourage pre-hearing conferences only on complex cases.
    - Most cases do not require a pre-hearing conference and it adds to the time and cost of the arbitration proceeding to require it in every case.

- Do not require pre-hearing briefs.
    - Adds to the time and cost of the arbitration proceeding.

- Do not suggest mediation before the hearing.
    - If the parties wanted mediation, they would have sought it before going to arbitration.

- Require the parties to follow an orderly procedure during the hearing. Insure decorum at all times and remove individuals from a hearing that are disorderly.

- Arbitrator's decision should be a clear, concise, and compelling statement of the determined outcome of the case.
    - Does not need to respond to every argument presented by the parties; Can overcomplicate the ruling and the explanation of the ruling.
    - Respond only to the key arguments.

- Do not repeat the parties' arguments in the decision. We know what they are and do not need to have them repeated in the decision. Simply provide a paragraph or two with key points.

- Retain jurisdiction in disciplinary matters for the sole purpose of resolving any dispute over the implementation of the award.
- Issue your decision on time. Adhere to the established time limits for the award, i.e., either 30 or 60 days after the receipt of the closing arguments.

SUMMARY

Generally, there was an overall decline in work for labor arbitrators from 2012 through 2022 in both Canada and the United States.

For employment arbitrators, the workload varied over the period, with an increase in 2021 followed by a decrease in 2022. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 may limit future employment arbitration opportunities, and new discrimination laws may generate more employment arbitration filings.

Opportunities for expanding an arbitration practice exist with a cross-border practice, business arbitration, consumer arbitration, and construction arbitration as well as mediation in those areas.

V. LEGAL UPDATE

INTRODUCTION

This update covers significant legal decisions and changes affecting arbitration that occurred from late 2021 through 2023. Canada saw a big change in the standard of review of arbitration awards and an evolution in the state of the law on arbitrators' exclusive jurisdiction over statutory disputes in unionized workplaces. In the United States, the court decisions and legislation generating most of the major legal news arose under the Federal Arbitration Act (FAA), directly affecting employment arbitration and other non-labor types of arbitration. For labor arbitration, the judicial review standards and other related doctrines arising from the Steelworker Trilogy remained unchanged. In addition, the NLRB's policy on deferral to arbitration has remained unchanged since it reverted back to the *Spielberg/Olin* deferral standards in December 2019 in *United Parcel Services*, 369 NLRB No. 1 (2019). However, the NLRB reversed or changed many other doctrines that the Trump Administration Board had adopted.

CANADA UPDATE

There were no legislative changes in 2023 significantly impacting the state of the labour arbitration profession. This update will focus on 2023 Court of Appeal decisions applying the relatively recently enunciated reasonableness standard of review set out in the Supreme Court of Canada's 2019 decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*[4], and on jurisprudence delineating the exclusive jurisdiction of arbitrators to interpret and apply statutory protections in unionized contexts.

The Standard of Judicial Review of Arbitral Awards

In *Vavilov*, the Supreme Court of Canada redefined Canada's approach to judicial review of administrative decisions. The Court stated a presumption that the applicable standard of review of tribunal decisions, including those

[4] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

of labour arbitrators, is reasonableness. This presumption can be rebutted when the legislature expresses an intention to apply a different standard or when the rule of law requires a correctness standard. The latter occurs in cases involving constitutional questions, those that have central importance to the legal system as a whole, and those involving jurisdictional boundaries between two or more administrative bodies.

Under the reasonableness standard post-*Vavilov*, labour relations decision makers are required to justify their decisions in written reasons, respond to the arguments presented, and thereby demonstrate expertise.[5] It is not sufficient that the outcome of a decision fall within a reasonable range. The justification requirement can be used to attack failures of rationality internal to the reasoning process. It also requires that a decision maker comply with or justify departures from relevant factual or legal constraints, including those imposed by statutes, principles of interpretation, the evidence before the decision-maker, and past decisions. Some commentary has predicted that the requirements of justification may lead to more searching review of arbitrators' reasons.[6]

The two recent Court of Appeal decisions applying *Vavilov* in judicial review of labour arbitration decisions seem to bear out these predictions. In *P&H Milling Group v Commercial Workers Local 1400*[7] the grievors were absent from work due to a requirement to self-isolate because they were possibly exposed to Covid-19. Since none of them were symptomatic or even tested, the employer said they did not qualify for sick pay. The arbitrator concluded that the grievors were not entitled to sick pay because they were not sick, relying on a provision of the collective agreement requiring a doctor's note to certify the legitimacy of an absence as indicative of the parties' intention to limit sick pay.

The Saskatchewan Court of Appeal found this decision to be unreasonable because it failed to employ the proper approach to interpreting a collective agreement. The Court noted that the language of the agreement was very broad or very ambiguous, requiring, in the view of most arbitrators and the Supreme Court of Canada, a purposive approach to interpretation. The arbitrator did not, in the view of the Court of Appeal, apply such an approach, or explain her departure from it. Further, the Court ruled, the arbitrator's decision was not internally rational because it framed the question to be answered in a way that did not take account of the various circumstances under which the collective

[5] Paul Daly, "Canadian Labour Law after *Vavilov*" (2021) 23:1 CLELJ 103.
[6] *Ibid*.
[7] *P&H Milling Group v Commercial Workers Local 1400*, 2023 SKCA 14.

agreement created an entitlement to sick pay, ultimately leading to a circular analysis. The court concluded that in this case there was in fact only one reasonable interpretation of the sick leave provisions: that the parties intended employees to receive sick pay when absent for legitimate health-related reasons, which included employer or public health directions to self-isolate when they were possibly infectious. The Court's analysis suggests that it was willing, under the *Vavilov* standard of reasonableness, to examine quite closely an arbitrator's reasoning where in the view of the Court it was clearly inconsistent with the scheme of rights in the collective agreement.

In *Unifor, Local 907 v Irving Paper Ltd*[8], an employee was dismissed for time theft and breach of trust. The union filed a grievance alleging that the discharge was not for cause. The arbitrator found that there was serious and repetitive misconduct which justified discipline. He went on to conclude however, on the basis of a brief discussion of mitigating factors (length of service, prior clean disciplinary record, and an "imperfectly worded" apology), that the employment relationship was not irretrievably broken and that the employee should be reinstated without compensation or benefits. The employer applied for judicial review on the ground that the decision was unreasonable, and the application judge agreed. The union appealed the decision.

The Court of Appeal dismissed the appeal. The Court determined that the arbitrator's decision was unreasonable because in its view factual findings that the grievor had repeatedly engaged in dishonesty without expressing remorse could not be squared with a subsequent determination that the grievor had rehabilitative potential. The Court reasoned that the grievor's long service with a previously clean disciplinary record and (in the Court's view) dubious later apologies provided no basis in evidence for finding rehabilitative potential. The Court found that without this, or a rational explanation, the arbitrator's finding of rehabilitative potential appeared to be an unjustified departure from previous arbitral caselaw on time theft. It therefore could not survive the "robust analysis" required by *Vavilov*. This decision is notable because it extends the Court's review well into questions of mixed law and fact involved in assessing the many factors at play in determining whether there is just cause for dismissal. At a minimum, the decision suggests that in cases where an employee does not admit proven serious and dishonest misconduct, a decision to

[8] *Unifor, Local 907 v Irving Paper Ltd*, 2023 NBCA 52.

reinstate may require greater support in reasons and evidence than the somewhat brief and perhaps conclusory analysis that was overturned in this case.

Scope of Exclusive Jurisdiction of Labour Arbitrators

In 2021 the Supreme Court of Canada decided *Northern Regional Health Authority v Horrocks*[9]. The decision dealt with the scope of exclusive jurisdiction of labour arbitrators under a collective agreement. The Court clarified that in the absence of express legislative intent to give concurrent jurisdiction to a statutory tribunal, labour arbitrators generally have exclusive jurisdiction over claims by unionized employees grounded in statutory employment rights. In this case, the grievor was suspended for attending work under the influence of alcohol. After she disclosed her addiction to alcohol, her employer, the Northern Regional Health Authority (NRHA), requested that she enter a "last chance agreement" which required her to abstain from alcohol and undergo treatment, failing which her employment would be terminated. She refused, and her employment was terminated. Her union filed a grievance on her behalf alleging that the NRHA discriminated against her on the basis of her disability, thereby breaching both Manitoba's *Human Rights Code* and the collective agreement. The grievance was settled by an agreement that reinstated her employment on terms similar to the proposed last chance agreement. Her employment was subsequently terminated again for not complying with the terms of the agreement. She then filed a complaint with the Manitoba Human Rights Commission ("the Commission"), again alleging that the NRHA discriminated against her on the basis of her disability contrary to the *Human Rights Code*.

At the Commission, Chief Adjudicator Welsh found that she had jurisdiction to hear the complaint because the dispute was essentially a human rights violation, not a dispute arising from the interpretation, application, administration or violation of a collective agreement. She went on to find in favour of Ms. Horrocks. The NHRA sought judicial review. The court of Queen's Bench overturned the Commission's decision. The Court of Appeal reinstated it, agreeing with the Commission that it had concurrent jurisdiction. The Supreme Court reversed and reinstated the trial judge's finding that the Commission did not have concurrent jurisdiction over the dispute. Relying on its previous decision in *Weber v*

[9] *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 [*Horrocks*].

Ontario Hydro[10] the Court stated that under labour relations legislation conferring exclusive jurisdiction on arbitrators to deal with disputes over the interpretation or application of a collective agreement, all disputes that are factually related to the rights and obligations of the collective agreement fall within an arbitrator's exclusive jurisdiction, regardless of whether they give rise to other legal claims under a statute or at common law, unless there is a clear expression of legislative intent to the contrary. The Court expressed the concern that allowing concurrent jurisdiction would undermine the goal of resolving disputes efficiently with minimal disruption to the parties and the economy.[11] That said, the court noted that pre-employment contract disputes would not fall within arbitral jurisdiction, and that courts retained a residual jurisdiction to grant remedies such as interlocutory injunctions where arbitrators could not.[12]

Applying its reasoning, the Court found that the Labour Relations Act conferred exclusive jurisdiction on arbitrators, that the *Human Rights Act* did not expressly displace that jurisdiction, that the essential character of the grievor's claim was that the employer had exercised management rights given by the collective agreement in a manner inconsistent with statutory obligations under the Human Rights Act, and that this claim could not be meaningfully separated from the scope of issues over which arbitrators had exclusive jurisdiction. The Court therefore set aside the Commission's finding.

One area in which legislatures often do expressly limit the jurisdiction of arbitrators is in determining compensation for injuries and illness arising out of employment. Deciding such matters tends to be within the exclusive jurisdiction of workers' compensation tribunals. As a policy matter, this is to ensure that the immunity provided to employers under workers compensation legislation in conjunction with their participation in workers compensation insurance schemes is consistently applied and enforceable by workers compensation boards. To ensure that they can

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[10] *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 [*Weber*].

[11] *Ibid* at para 21. The Court later pointed to unions' duty of fair representation and potential liability as co-discriminators if they enter into discriminatory agreements as safeguards against misuse of their powers of exclusive representation under collective agreement dispute resolution processes. *Ibid* at paras 37 and 38

[12] *Ibid*, at paras 22 and 23. The Court later added that where the parties to a collective agreement had no dispute over what negotiated terms meant or how they should be applied, so that the claim of an individual employee concerned what the parties had agreed to rather than how it operated, such a claim would fall outside of an arbitrator's exclusive jurisdiction. *Ibid* at paras 27 and 28.

meet this aim, workers compensation tribunals are granted exclusive authority to decide upon whether a claim for compensation for a workplace injury or illness is barred by the workers' compensation statute.

In *Regina Civic Members' Union, Local 21 v Regina (City)*,[13] the central issue was whether the arbitration hearing should be adjourned pending the employer's application to the Saskatchewan Workers' Compensation Board for a determination of whether the arbitration was barred by *The Workers' Compensation Act, 2013*[14] (WCA). The grievor was receiving workers' compensation benefits in connection with harassment by a co-worker. The Union maintained that the grievance raised human rights, collective agreement rights, and occupational safety and health law issues extending beyond matters of workers' compensation. The panel concluded that ss. 169 and 20 of the WCA expressed clear legislative intent to confer exclusive jurisdiction on the Saskatchewan Workers' Compensation Board to determine whether claims in other fora were barred by the Act. The employer's request for adjournment of the arbitration hearing pending the Board's determination was therefore granted.

UNITED STATES UPDATE

Supreme Court Decisions on Arbitration

In 2022 and 2023, the United States Supreme Court issued five decisions concerning the Federal Arbitration Act (FAA). The NAA had filed amicus briefs in three of those cases, *Southwest Airlines v. Saxon*, *Viking River Cruises v. Moriana* and *Morgan v. Sundance*, because of their substantive impact on the implementation and interpretation of the FAA and the enforceability of mandatory arbitration clauses. The other two cases, *Badgerow v. Walters*,[15] and *Coinbase v. Bielski*,[16] concerned procedural and jurisdictional issues of less importance to NAA members and are not discussed in this update.

1. FAA exemption

[13] *Regina Civic Members' Union, Local 21 v Regina (City)*, 2022 CanLII 73192 (SK LA).
[14] *The Workers' Compensation Act, 2013*, SS 2013, c W-17.11.
[15] 596 U.S. 1 (2022).
[16] 599 U.S. 736 (2023).

a) ***Southwest Airlines v. Saxon***. In *Southwest Airlines v. Saxon*,[17] the Court took a small step in clarifying the FAA's exemption for "transportation workers." Section 1 of the FAA states that it applies to all contracts "involving commerce," except for "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*"[18] In *Circuit City Stores v. Adams*,[19] the Court had held that "any other class of workers" included only "transportation workers," but did not provide a definition of what that term meant.[20]

Southwest raised the question of whether an airline ramp supervisor, Latrice Saxon, was exempt from the FAA. She had signed an arbitration agreement that required all disputes with her employer to be heard by an arbitrator rather than a judge and also forbade bringing class and representative actions. Nonetheless, Ms. Saxon brought a class action in court against Southwest alleging it had violated the Fair Labor Standards Act by failing to pay overtime properly to Southwest's ramp supervisors. When Southwest moved to compel arbitration of her claim and also to dismiss the class action pursuant to the FAA, Ms. Saxon argued that Southwest could not enforce the agreement against her because she was an FAA-exempt transportation worker.

The Supreme Court agreed with the Seventh Circuit's conclusion that Ms. Saxon was exempt from the FAA. The Court held it was "plain that airline employees who physically load and unload cargo on and off planes traveling in interstate commerce are, as a practical matter, part of the interstate transportation of goods."[21] As part of her duties, Ms. Saxon often loaded and unloaded cargo and therefore her work was part of the continuous interstate transportation of goods, making her a transportation worker who is exempt from the FAA.[22]

b) *Southwest's* aftermath – state arbitration law applicability. Although Southwest could not use the FAA to enforce Ms. Saxon's arbitration agreement, it went back to federal district court after the Supreme Court decision and argued that it could enforce the agreement under the Illinois Uniform Arbitration Act, which does not have a

[17] 596 U.S. 450 (2022).
[18] 9 U.S.C. § 1 (emphasis added).
[19] 532 U.S. 105 (2001).
[20] *Id*. at 115.
[21] *Southwest*, 596 U.S. at 457.
[22] *Id*. at 457-459.

transportation worker exemption. The United States District Court for the Northern District of Illinois agreed with Southwest and granted Southwest's motion to compel arbitration of Ms. Saxon's FLSA claim.[23]

Although the court found that Ms. Saxon's arbitration was enforceable under Illinois' arbitration law, similar arbitration agreements may not be enforceable in other states. For example, the Washington State Court of Appeals held that although Washington arbitration law applied to an FAA-exempt trucker's arbitration agreement, the agreement was unconscionable and unenforceable under state law because its class action waiver violated the state's public policy to allow workers to be "free from interference . . . in . . . concerted activities."[24] Other states' doctrines concerning unenforceability would also apply to other FAA-exempt arbitration agreements.[25]

c) Certiorari granted in FAA exemption case. In October, 2023, the Supreme Court granted certiorari to hear an appeal of *Bissonnette v. LePage Bakeries*,[26] a case in which the United States Second Circuit Court of Appeals decided that truck drivers for Flower Foods were not exempt from the FAA. The Second Circuit had held that the truckers, who delivered and also sold Wonder Bread and other bakery products to food stores, are "not 'transportation workers,' even though they drive trucks, because they are in the bakery industry, not a transportation industry."[27] This conflicted with other courts' findings that interstate truck drivers are exempt transportation workers no matter what type of business uses their services.[28] It is also inconsistent with the Supreme Court's *Saxon* decision in which that Court held that "Saxon is therefore a member of a "class of workers" based on what she does at Southwest, not what Southwest does generally,"[29] and that "any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption."[30] The NAA is submitting an amicus brief in support of the truck drivers' position to urge

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[23] *Saxon v. Southwest Airlines*, 2023 WL 2456382 (N.D. Ill. 2023).
[24] *Oakley v. Domino's Pizza*, 516 P.3d 1237, 1245 (Ct. App. Wash. 2022), *rev. denied* 523 P.3d 1188 (2023).
[25] See, e.g., *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160 (2005) (some class action waivers in arbitration agreements are unconscionable per se – also known as "the Discover Bank rule"). In *AT&T Mobility v. Concepción*, the Supreme Court held that the FAA preempted the Discover Bank rule for FAA-enforceable contracts. 563 U.S. 333, 352 (2011). However, *Concepción* would not apply to an FAA-exempt agreement.
[26] *Bissonnette v. LePage Bakeries*, 49 F.4th 655 (2d Cir. 2022), *reh'g en banc denied*, 59 F.4th 594 (2d Cir. 2023).
[27] *Id*. at 657.
[28] *Canales v. CK Sales Co.*, 67 F.4th 38, 45-46 (1st Cir. 2023); *Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228, 234-237 (1st Cir. 2023); *Brock v. Flowers Foods, Inc*., 2023 WL 3481395 at *3-*4 (D. Col. 2023). Both *Canales* and *Brock* also involved drivers for Flowers Foods.
[29] *Saxon*, 596 U.S. at 455.
[30] *Id*. at 457.

the Supreme Court to correct the Second Circuit and to establish a clear test or set of principles for determining which workers are exempt from the FAA.

2. Waiver of right to bring collective actions.

a) Viking River Cruises v. Moriana. The Supreme Court took on the issue of the interplay between the FAA and state laws granting rights to bring collective actions in *Viking River Cruises v. Moriana.*[31] Angie Moriana brought a court action under California's Private Attorneys General Act (PAGA)[32] against Viking River Cruises, her former employer, alleging that Viking had violated California's Labor Code with respect to her and to a group of other Viking employees. PAGA allows an "aggrieved employee" to sue an employer "on behalf of himself or herself and other current or former employees" for California Labor Code violations and to seek penalties for the violations on behalf of the state.[33] California's state legislature decided to empower individuals to enforce the Labor Code on behalf of the state because the state did not have the resources to pursue all employers who were violating the Labor Code.[34]

The problem was Ms. Moriana had signed an arbitration agreement that required her to pursue any claims against her employer through the arbitration process and that prohibited her from bringing any class or collective actions. When Viking sought to compel arbitration and invalidate the PAGA action, Ms. Moriana's attorneys argued that California state law did not permit a waiver of PAGA actions. In *Iskanian v. CLS Transp. Los Angeles, LLC*,[35] the California Supreme Court had held that it violated state public policy to permit the enforcement of waivers of PAGA claims. The court recognized that the United States Supreme Court had held in 2011 in *AT&T Mobility v. Concepción*[36] that the FAA preempted a California rule that all class action waivers in consumer contracts of adhesion were unenforceable.[37] However, the *Iskanian* court ruled, PAGA claims were different; "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute

[31] 142 S.Ct. 1906 (2022).
[32] Cal. Lab. Code Ann. § 2698 *et seq.*
[33] Cal. Lab. Code Ann. § 2699(a).
[34] *Viking*, 142 S. Ct. at 1913-1914.
[35] 327 P.3d 129 (2014).
[36] 563 U.S. 333 (2011).
[37] 327 P.3d at 134-136.

between an employer and the *state."*[38] *The court held that waivers of PAGA representative claims violated the state's public policy and were not enforceable.*[39]

The U.S. Supreme Court held that part of the *Iskanian* holding was correct – the FAA did not preempt PAGA insofar as it prohibited the waiver of the right to bring PAGA representative claim for an "absent principal" – the State of California – in order to vindicate the Labor Code rights of a group of employees. The Court saw PAGA representative claims as involving very different procedures and purposes than class actions. Outlawing the waiver of PAGA representative claims did not interfere with the FAA's pro-arbitration policy in the same way that outlawing the waiver of class actions did, the Supreme Court held.[40]

However, the Court held that the FAA preempted the part of *Iskanian* that outlawed the division of individual and collective claims and therefore interfered with Moriana's agreement to arbitrate her individual claims against the employer. Essentially forbidding Moriana's waiver of her own individual claim contravened the FAA's purpose of allowing the enforcement of individual agreements to arbitrate disputes with whatever type of procedural rules to which the parties agreed. Therefore, the Court held that the lower court should grant Viking's motion to compel arbitration of Moriana's individual PAGA claim.[41]

As to what should happen to the representative part of the PAGA claim, Justice Samuel Alito, writing for the majority, gave this interpretation of California's law:

> As we see it, PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA's standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action.[42] However, in a concurring opinion, Justice Sonia Sotomayor pointed out that the standing issue was a matter for the California courts to decide: "Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."[43]

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[38] 327 P.3d. at 150 (emphasis in the original).
[39] 327 P.3d. at 152.
[40] *Viking*, 142 S. Ct at 1920-1923.
[41] *Id*. at 1924-1925.
[42] *Id*. at 1925.
[43] *Id*.

***a) Viking's* aftermath – California courts have "the last word."** The California Supreme Court had "the last word" a year later in *Adolph v. Uber Technologies*.[44] That case involved an Uber driver who signed an arbitration agreement similar to Moriana's in which he agreed to waive his right to bring class and collective actions. He brought PAGA claims on behalf of himself and a group of other drivers. The California Supreme Court had to decide: "whether an aggrieved employee who has been compelled to arbitrate claims under PAGA that are "premised on Labor Code violations actually sustained by" the plaintiff . . . maintains statutory standing to pursue "PAGA claims arising out of events involving other employees" in court.[45] The court answered that question by stating: "We hold that the answer is yes."[46] The court reasoned that under PAGA, "aggrieved employees" have standing to bring any type of PAGA suit. An employee is "aggrieved" even if her or his individual PAGA claim is resolved through arbitration, the court held, and therefore has PAGA standing to pursue the representative claims.[47]

The California Supreme Court dealt with Justice Alito's standing *dicta* in *Viking* by reasoning:

> Because "[t]he highest court of each State ... remains 'the final arbiter of what is state law' . . . we are not bound by the high court's interpretation of California law. . . . And although the high court's interpretations may serve as persuasive authority in cases involving a parallel federal constitutional provision or statutory scheme . . . *Viking River* does not interpret any federal provision or statute similar to PAGA. Where, as here, a cause of action is based on a state statute, standing is a matter of statutory interpretation. "We review questions of statutory construction de novo."[48]

3. Waiver of the right to compel arbitration. In the *Morgan v. Sundance* case,[49] Robyn Morgan worked for Taco Bell and had signed an arbitration agreement when she was first hired. When she brought a collective action in court against her Taco Bell franchise (owned by Sundance) alleging Taco Bell violated laws concerning the payment of overtime, Sundance filed a motion to dismiss and engaged in mediation without once mentioning the arbitration agreement. Eight months later, Sundance moved to compel arbitration. Because Morgan could not show she had suffered any prejudice due to Sundance's delay, the lower court had held that Sundance had not waived its right to

[44] 532 P.3d 683 (2023).
[45] *Id*. at 686, *quoting Viking River*.
[46] *Id*.
[47] *Id*. at 690-691.
[48] *Id*. at 689-690 (citations omitted).
[49] 596 U.S. 441 (2022).

compel arbitration.

The U.S. Supreme Court reversed the lower court, holding that federal law did not require a showing of prejudice to the party seeking to dismiss a motion to compel arbitration based on a waiver doctrine. The FAA precludes courts from creating "arbitration-specific variants of federal procedural rules like those concerning waiver,"[50] the Court held. It remanded the case to the Court of Appeals to make a determination as to whether Sundance waived or forfeited its arbitration rights.[51]

B) **Legislative Developments -- Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act**

1. The Law. Enacted in March 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFASASHA") amends the FAA as follows:

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.[52]

EFASASHA defines sexual assault as "a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent."[53] EFASASHA defines sexual harassment dispute as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[54] EFASASHA allows the parties to continue to pursue arbitration if they mutually agree to do so after a dispute has arisen.[55] This legislation, however, limits the options businesses may pursue in resolving these covered disputes with employees by prohibiting them from requiring arbitration as a condition of employment.

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[50] *Id*. at 416.
[51] *Id*. at 419.
[52] 9 U.S.C. § 402.
[53] 9 U.S.C. § 401(3).
[54] 9 U.S.C. § 401(4).
[55] 9 U.S.C. § 402 (a) (discussing prevention of arbitration "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute").

The scope of EFASASHA's ban on arbitration of employment claims will have to be resolved through court interpretations for claims arising or accruing after the effective date of EFASASHA of March 3, 2022.[56] At a minimum, employers may no longer force sexual harassment and assault claims to be resolved through pre-dispute arbitration agreements. Also, claims in a "case" that are "related" to any "sexual harassment dispute" will not be subjected to arbitration through enforcement under the FAA.[57] Other bills are pending in Congress that could further amend the FAA to prohibit race discrimination claims and age discrimination claims from being subjected to forced arbitration.[58]

2. Sampling of Lower Court Cases Since Passage of EFASASHA.

a) ***Johnson v Everyrealm, Inc.***[59] Johnson filed his initial complaint alleging a number of causes of action, including race discrimination and sexual harasssment, all arising out of his employment with the defendant, Everyrealm, Inc.[60] The court acknowledged that under the FAA, "if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation."[61] However, the court observed that EFASASHA made pre-dispute arbitration agreements unenforceable "with respect to a *case* which is filed under Federal, Tribal or State law and relates to the … sexual harassment dispute."[62] The court held the traditional definition of "case" referred to the overall legal proceeding, not merely the discrete claims alleging sexual harassment.[63] Thus, the court denied the motion to compel arbitration as to the entire case. [64]

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[56] *See* Bopda v. Comcast of the District, LLC, 2023 WL 6292767, at *3 (D. Md. Sep. 27, 2023) (finding EFASASHA "applies only to claims that accrued on or after March 3, 2022").
[57] 9 U.S.C. § 402 (a).
[58] *See* Laurel Kalser, *BJ's Restaurant arbitration agreement was valid without employer's signature*, *5th Cir. holds*, LEGAL DIVE, Oct. 16, 2023, https://www.legaldive.com/news/arbitration-agreement-valid-without-employer-signature/696870/ (describing Democrat-sponsored Senate bill, S. 140, to ban forced arbitration of race discrimination claims, the Ending Forced Arbitration of Race Discrimination Act of 2023, and the bipartisan-sponsored, H.R. 4120, the Protecting Older Americans Act of 2023, to ban forced arbitration of age discrimination claims).
[59] 2023 WL 2216173 (S.D.N.Y. Feb. 24, 2023).
[60] *Id*. at *2 n.2.
[61] *Id.* at *17 (citing KPMG LLP v. Cocchi, 565 U.S. 18, 19 (2011)).
[62] *Id.* (citing 9 U.S.C. 402(a))(emphasis added in case).
[63] *Id*. at *17-*18.
[64] *Id*. at *20.

b) ***Yost v. Everyrealm, Inc.***[65] This case was decided by the same judge and on the same day as the *Johnson* companion case above.[66] The court found that it had to decide the case "independently" from *Johnson* as Yost's complaint "involves distinct (and fewer) factual allegations relevant to the sexual harassment claim than did Johnson's operative pleading."[67] The conduct involved must have been "alleged to constitute sexual harassment under applicable Federal, Tribal, or State law" before EFASSHA can apply.[68] To find otherwise, the court stated, "would enable a plaintiff to evade a binding arbitration agreement – as to wholly distinct claims, and for the life of a litigation – by the expedient of adding facially unsustainable and quickly dismissed claims of sexual harassment."[69] Because the court found that Yost's allegations did not rise to the level of actionable sexual harassment, [70] EFASASHA did not apply to the other claims brought.[71]

c) ***Mera v. SA Hospitality Group*.**[72] Mera filed a complaint for sexual harassment pursuant to New York State Human Rights Law and the New York City Human Rights Law based on his sexual orientation.[73] Mera also alleged violations of the Fair Labor Standards Act and New York Labor Law based upon unpaid wages.[74] The restaurant employer filed a motion to compel arbitration.[75] Because the claim for sexual harassment clearly fell within the coverage of EFASASHA, the arbitration agreement was unenforceable as to that claim.[76] Relying upon the *Johnson* case, Mera alleged that the entire "case" including his wage claims should be covered by EFASAHA.[77] The court disagreed and found the

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[65] 2023 WL 2224550 (S.D.N.Y. Feb. 24, 2023).
[66] *Id*. at *9 & n.7 (noting how *Johnson* and this case both involved Everyrealm employees represented by the same counsel where each case was "coincidentally, both assigned to this Court").
[67] *Id*. at 11.
[68] *Id*. at 16.
[69] *Id.* at *17.
[70] *Id*. at *14 ("The Court grants the Everyrealm defendants' motion to dismiss all sexual harassment claims. . . under Rule 12(b)(6)).
[71] *Id.* at *16 (finding that "plain language makes [EFASASHA]inapplicable where there has not been an allegation that such conduct violated a law prohibiting sexual harassment").
[72] 2023 WL 3791712 (S.D.N.Y. June 3, 2023).
[73] *Id.* at *1, *3.
[74] *Id.*
[75] *Id.*
[76] *Id.* at *3.
[77] *Id*. at *3-*4.

wage claims were distinct and did not relate to the sexual harassment claims. [78] As a result of this finding, the court compelled arbitration of those wage claims.[79]

d) ***Delo v. Paul Taylor Dance Found., Inc.***[80] Delo signed an arbitration agreement at the commencement of her employment with Paul Taylor Dance Foundation. After her termination, she filed suit alleging gender, caregiving and familial discrimination which related to the nursing and caring for her newborn while at work.[81] In response to the defendant's motion to compel arbitration, Delo asserted the arbitration agreement was unenforceable under EFASASHA.[82] The defendant argued that Delo did "not style" any of her claims "as 'sexual harassment'" and further that the conduct alleged did not otherwise amount to sexual harassment.[83] The court disagreed. Although not labeled as such, the court noted Delo's allegations otherwise alleged a "hostile environment," which is a recognized form of sexual harassment.[84] As to the merits of the allegations, the court noted that under New York Law, allegations of sexual harassment only need to show that the plaintiff has been treated less well than other employees because of her gender, based on unwanted "gender-based conduct."[85] Delo met that test and the court held that EFASASHA blocked the arbitration of all her claims.[86]

e) ***Turner v. Tesla, Inc.***[87] Tesla hired Turner at the age of 18 as a production associate in its Fremont, California manufacturing facility on November 30, 2020.[88] She signed an arbitration agreement on the commencement of her employment.[89] Her complaint, which she filed in state court, alleged she had been subjected to and complained of sexual harassment prior to her termination from employment on September 14, 2022.[90] She also alleged her termination

[78] *Id.*
[79] *Id.*
[80] 2023 WL 4883337 (S.D.N.Y. Aug. 1, 2023).
[81] *Id*. at *4.
[82] *Id.*
[83] *Id.* at *5.
[84] *Id.* at *5-*6.
[85] *Id.* at *6.
[86] *Id*.
[87] 2023 WL 6150805 (N.D. Cal. Aug. 11, 2023).
[88] *Id*. at *1.
[89] *Id*.
[90] *Id.*

was in retaliation for reporting her sexual harassment complaints to her supervisor as well as in retaliation for reporting workplace injuries.[91] The complaint also alleged a failure to pay owed wages after her termination.[92]

After the case was removed to federal court, Tesla moved to compel arbitration, or in the alternative, to sever the non-sexual harassment claims and send them to arbitration. With respect to the severance request, the court addressed each of Turner's claims and found the arbitration agreement unenforceable as to all of her claims because the core of her case alleged "conduct constituting a sexual harassment dispute" under EFASASHA.[93] The court also found that the retaliation claim was otherwise "inherently intertwined with the other causes of action such that it makes sense to have this claim proceed alongside the other causes of action."[94] Even with respect to her claim based on failure to pay owed wages after her termination, the court found this claim "arose out of the same facts and circumstances underlying Turner's sexual harassment causes of action and is substantially related to her sexual harassment claim."[95]

C) Developments Under the National Labor Relations Act

Although the recent legal developments under the National Labor Relations Act (NLRA) do not affect arbitration directly, they inform the collective bargaining process, and arbitration is a key component of that process. The highlights follow.

1. United States Supreme Court decision. In *Glacier Northwest, Inc. v. Teamsters Local No. 174*,[96] the Supreme Court held that an employer could sue a union for tort damages arising from the union's strike activity. Glacier sells "ready mix" concrete. Because concrete hardens quickly, it must be mixed on the day it is delivered and it cannot sit in a truck for long. Teamsters Local 174 called a strike during prime concrete delivery time. Glacier's district court complaint alleged that Local 174 deliberately timed the strike to waste concrete and to "freeze" the concrete trucks. Local 174 moved to dismiss based on *Garmon* preemption, and also filed unfair labor practice charges with the NLRB stating that Glacier's lawsuit was retaliation for a protected strike. The Court held that the intentional destruction of

[91] *Id.* at *2.
[92] *Id*. at *5.
[93] *Id*.
[94] *Id.* at *7 (citing *Johnson*, 2023 WL 2216173, at *18; *Mera,* 2023 WL 3791712, at *3).
[95] *Id.* at *8.
[96] 598 U.S. 771 (2023).

employer property caused by leaving concrete in trucks is not protected activity. Therefore, *Garmon* preemption did not apply and the employer's tort claims could proceed. Though a win for employers, the ruling was narrow and did not, as unions feared, destroy *Garmon* preemption.

2. NLRB Decisions – Reversing a Slew of Trump-Board Decisions.

a) ***American Federation for Children*.**[97] In this case, the NLRB reversed *Amnesty International* (2019), and held that concerted advocacy by covered employees on behalf of non-covered employees is protected activity when it benefits covered employees by improving their own working conditions.

b) ***Miller Plastic Products*.**[98] The NLRB reversed *Alstate Maintenance* (2019), and returned to a "totality of the circumstances" test for determining whether an employee who intends to induce group action by co-workers engages in protected concerted activity.

c) ***Wendt Corp*.**[99] The NLRB reversed *Raytheon Network Centric* (2017), and expanded employers' duty to bargain before changing the terms and conditions of work.

d) ***Stericycle Inc.***[100] The Board reversed *Boeing Co.* (2017), and adopted a new legal standard for evaluating employer work rules challenged as facially unlawful for chilling employees' exercise of Section 7 rights. The General Counsel has the initial burden to prove that a challenged rule has a reasonable tendency to chill employees from exercising their NLRA rights. The focus is on whether an employee could reasonably interpret the rule in question to have a "coercive meaning," even if a contrary, non-coercive interpretation of the rule is also reasonable. The Board clarified that it would interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activities. If the General Counsel is able to prove this, then the rule is presumptively unlawful. The employer can rebut this presumption by

[97] 372 NLRB No. 137, No. 28-CA-246878 (Aug. 26, 2023).
[98] 372 NLRB No. 134, No. 06–CA–266234 (Aug. 25, 2023).
[99] 372 NLRB No. 135, Nos. 03–CA–212225, 03–CA–220998, and 03–CA–223594 (Aug. 26, 2023); *Tecnocap*, No. 06-CA-269480 (Aug. 26, 2023).
[100] 372 NLRB No. 113, Nos. 04–CA–137660, 04–CA–145466, 04–CA–158277, and 04–CA–160621 (Aug. 2, 2023).

demonstrating that the rule serves a valid and substantial business interest and that there is no narrower rule available to achieve interest. Ambiguous rules will be interpreted against the employer.

e) M***cLaren Macomb*.**[101] Both the non-disparagement and confidentiality clauses in severance agreements are unlawful. These provisions have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the National Labor Relations Act.

3. NLRB Rulemaking.

a) Union Elections.[102] The NLRB rescinded the amendments made by a rule the Board promulgated in 2019 and thereby substantially returns representation case procedures to those that existed following the Board's promulgation of a rule concerning representation case procedures in 2014. The new Rule is designed to speed up the election process by allowing pre-election hearings to occur sooner and ensuring election information is disseminated to employees more quickly.

b) Fair Choice, Employee Voice rule currently under consideration.[103] The proposed rule would rescind amendments promulgated in 2020 and, among other things, would allow the Board to delay representation elections while ULP investigations are ongoing.

4. General Counsel's Office.

Office of General Counsel, Memorandum GC 23-08 (May 30, 2023). This memorandum states that it is the GC's position that noncompete agreements violate Section 7 except in limited circumstances. The memo argues that noncompetes interfere with employees' ability to, among other things, concertedly seek or threaten to seek employment with a local competitor to obtain better working conditions.

[101] 372 NLRB No. 58, No. 07–CA–263041 (Feb. 21, 2023).
[102] 88 Federal Register 58076; 29 CFR 102 (Aug. 25, 2023, effective Dec. 26, 2023).
[103] 87 Federal Register 66890, 29 CFR 103 (Nov. 4, 2022).

VI. THE PRACTICE OF ARBITRATION: RECENT DEVELOPMENTS

Virtual Hearings

The most notable recent development in the practice of arbitration has clearly been the expanding use of videoconferencing in the conduct of hearings. While it was not unusual historically for the testimony of individual witnesses to be taken remotely, either by telephone or video conference, and much less commonly for hearings to be run with most or all of the participants in different places, this landscape changed dramatically with the arrival of the COVID-19 pandemic in 2020. With health authorities aggressively counseling against the assembling of people in confined spaces, and with many arbitrators themselves at high risk of serious illness if they contracted the disease, the need for an alternative way to do business became apparent. This was so even as the amount of business was inevitably impacted by shutdowns and other contractions – at least in the short term.

As the need for ways to arbitrate controversies without physical interactions became increasingly clear, various actors in the arbitration profession, and the NAA in particular, initiated steps to encourage and facilitate the use of teleconferencing technology for arbitration hearings. This required bringing many members of the profession – both arbitrators and advocates -- up to speed on the technology available and the special challenges of conducting hearings remotely. To that end, the Academy, sometimes in cooperation with appointing agencies like the FMCS, developed an array of educational tools and processes aimed at equipping arbitrators with the skills (and artistry) necessary for virtual hearings. With FMCS, for example, the Academy early on sponsored a well-attended Webinar on Videoconferencing, concentrating on the fundamentals of remote hearings.

The primary vehicle through which the Academy pursued this objective, however, was the Videoconferencing Task Force (VTF), a group of tech-savvy members who volunteered their time to help bring the membership at large up to speed. The VTF was established in March 2020 and operated until May 2021, when it was incorporated into the Academy's Continuing Education Committee. During this period, it embarked on a variety of educational initiatives to help members adapt to the new normal. Some examples:

- A Videoconference Procedures "Primer", based on a paper that the VTF's Chair, Jeanne Charles, had presented – indeed presciently -- at the Academy's 2019 Fall Education Conference. The Primer dealt with such pragmatic topics as identifying a video platform; determining when videoconferencing is best used; tips on conducting the hearing, including handling documents and witnesses; and recording the sessions.

- A document titled "Frequently Asked Questions About Videoconferencing for Arbitrators," which was issued at the onset of the pandemic in March 2020. This expanded somewhat on the "Primer," addressing such topics as: the preliminary essentials regarding equipment and space; gaining agreement from the parties; managing exhibits; starting, running, and ending the hearing; using breakout rooms; dealing with privacy and security issues; and technical requirements.

- The VTF also produced a "Best Practices Guide for Conducting Video Hearings," last updated in February 2021 by Pilar Vaile and Brian Clauss. This comprehensive document dealt extensively with the myriad procedural and practical issues that arise with virtual hearings, including: the necessary equipment; determinants of the hearing's effectiveness; pre-hearing instructions and conferences; in-hearing procedures; credibility determinations; and the "optics" of the process. The document also provided links to other valuable sources of information about video hearings.

- From April 2020 to April 2021, The VTF held 16 training sessions which they called "Office Hours." Participation in eight of the sessions was limited to Academy members, and eight were open to the public. Each session was devoted to a specific topic and led by one or more VTF members. With the help of a grant from the NAA Research and Education Foundation, four of the sessions were converted to a professional video presentation and posted on the NAA website. The last of the sessions comprised a focus group aimed at collecting information on arbitrator and advocate experiences with videoconference hearings. The VTF produced a report on this exercise.

Although it is safe to say generally that some use of videoconferencing for arbitration hearings pre-dated the pandemic but then grew substantially after its onset, there are few sources that provide hard data on the extent of that growth over time, much less on whether the expanded use of videoconferencing has been sustained as the worst effects of the pandemic have ameliorated. The appointing agencies have generated some data on the number or percentage of their hearings that were conducted remotely, but for the most part these data provide snapshots rather than a longitudinal series. Here is a summary of the information that the Committee has been able to gather.

1. In 2022, researchers at Cornell University conducted a survey of NAA members soliciting information on themselves and their practices. The researchers received 289 usable responses, for a response rate of 43 percent. One section of the survey dealt with arbitrators' experience with virtual hearings. Here are the major findings:

    - By 2022, almost all members had conducted at least one virtual hearing since the start of the pandemic.
    - Prior to the pandemic, only four percent of hearings were conducted virtually, with at least half of the respondents conducting none. From 2020 to 2022, however, members reported an average of 76 percent of their hearings conducted virtually, with half of all members conducting at least 90 percent of their hearings virtually.

- Participation in VTF training sessions was high, with 79 percent of respondents taking part. However, by 2022 only 29 percent of the respondents perceived a need for additional training.
- Although members' perceptions of the adequacy of virtual hearings varied, nearly two-thirds believed that they were at least as good as in-person hearings, and more than half reported that they were "very likely" to continue using virtual hearings "after the pandemic is contained." Again, however, there are no data to tell us whether those assessments have been borne out as the pandemic has receded.

2. As noted earlier, in April 2021 the VTF conducted focus groups to determine the extent of use of virtual hearings by arbitrators, among other subjects. A total of 104 arbitrators participated. About 90 percent of the participants reported conducting at least one virtual hearing over the past year, with 56 percent reporting 1-10, 30 percent reporting 11-39, and 4 percent reporting 40 or more. How these numbers compare to a pre-pandemic year is unknown, of course, but they are certainly higher. Interestingly, moreover, the shift to virtual hearings started very soon after the onset of the pandemic, with almost two-thirds of respondents reporting that they conducted their first virtual hearing between April and July 2020. Another interesting finding was that there were significant variations in the formats of virtual hearings. While many hearings saw all the participants joining from different locations, there were also varying combinations of some people being together in a hearing room and others remote. Here again, however, these findings are now three years old, and the subsequent patterns of hearings by videoconference are not known.
3. Although the FMCS does not collect or maintain data on the number of hearings that its appointed arbitrators have conducted remotely, it does maintain data on arbitrators' willingness to conduct virtual hearings only, in-person hearings only, or either. Arbitrators on the FMCS panel have been asked to self-certify that they are able to conduct virtual hearings. On April 6, 2020, the number of such arbitrators was 156. By November 7, 2020, that number had grown to 516, and by June 2, 2022, it had further grown to 593, about the same as the number 18 months later. From the numbers provided by FMCS, it does not appear that many panel members have been entirely unwilling to conduct in-person hearings since at least

November 2020. From anecdotal evidence, however, it is apparent that, especially in the early months of the pandemic, arbitrators developed often elaborate safety protocols for the conduct the in-person hearings.

Although much of the information on arbitration practices comes from surveys of NAA members, it is important to remember that the arbitration profession extends beyond the NAA. It may therefore be relevant to know whether the experiences of NAA members are representative of the profession as a whole. According to the FMCS data provided to the Committee, as of December 2023 about 82 percent of the 723 active and available arbitrators on their panel had self-certified that they are able to conduct virtual hearings. That compares to 87 percent for the 308 active and available arbitrators who are also NAA members. Thus although the Academy took many important steps to help its members equip themselves for virtual hearings, it appears that non-NAA arbitrators were also developing new skills in this area.

4. At the Committee's request, contacts at the American Arbitration Association (AAA), the National Mediation Board (NMB), and the trade association Airlines for America compiled and provided various data to assist the Committee's work. The AAA has provided the Committee with numbers for in-person and virtual hearings from 2019 to 2022, and a pattern emerges. In 2019, as might be expected, almost all hearings were in-person. In 2020, 600 of 1,440 hearings (41.7 percent) were virtual, and in 2021 the number surged to 1,274 of 1,838 hearings (69.3 percent). In 2022, however, the incidence of virtual hearings began to decline, to 1,108 of 1,857 hearings (59.6 percent), and in 2023 it declined further to 840 of 1,675 hearings (50.1 percent). It thus appears that the pandemic-induced migration to virtual hearings may settle at a steady state well below the peaks reached at the height of the pandemic, but at some level well above that which prevailed prior to the pandemic.

5. The NMB reports that "virtual only hearings have been taking place since April 2020," and that in fiscal year 2022 (October 1, 2021, to September 30, 2022) 75 percent of their cases were heard virtually. The NMB's report also contains some interesting observations on the efficacy of virtual hearings:

> Virtual hearings since the COVID era improved the quality and efficiency of hearings. The parties have reported that these hearings are more transparent because more claimants can attend. They also indicated that the hearings are more productive and efficient because much more preparation is done in advance of the hearing. Technology makes it easier to schedule pre-hearing conferences with arbitrators. And because of those meetings, there is less posturing at the actual hearing. Another pandemic benefit is that the parties can choose from a wider range of arbitrators without the need to consider the meeting location, and more hearings can be held since in-person hearings are no longer required in every case.

6. Airlines for America provided the Committee with data on the total number of arbitrations they handled and the number that involved virtual hearings. Predictably, none of the 433 arbitrations processed from 2013 to 2017 was heard virtually. From 2018 to 2022, however, 94 of the 411 arbitrations used virtual hearings, and it seems safe to say that most if not all the virtual hearings happened after March 2020. It is also a fair assumption that total arbitrations declined during the early years of the pandemic, with the numbers suggesting that the incidence of virtual hearings from mid-2020 to the end of 2022 was comparable to those administered by AAA and NMB. In 2023, 25 of 80 airlines arbitrations (31 percent) were virtual, again suggesting that video hearings are declining from their pandemic peak but will remain a significant presence in arbitral practice.

We have noted that most of the evidence we have on the growth of hearings by teleconference does not extend beyond 2022, while the ravages of the pandemic were still fresh. As we come to think of COVID-19 as less pandemic and more endemic, there are conflicting considerations as to what we might expect to happen with virtual hearings. On the one hand, as the health risks of people's assembling in a room have receded, the impetus for virtual hearings might be expected to recede as well. Indeed, in the Cornell survey more arbitrators (34 percent) believed that virtual hearings were "not as good but acceptable" than were "in some ways better than an in-person session" (20 percent). At the same time, as the earliest writings of the VTF pointed out, and as the report from the NMB suggests, virtual hearings may have advantages of cost and convenience that are unrelated to health risks. If arbitrators and parties, initially responding to the health risks, came to appreciate those advantages of cost and convenience, one might expect them to stick with virtual hearings even as the health risks have receded.

As the foregoing discussion suggests, there are many interesting and unanswered questions surrounding the extent, use, and efficacy of virtual hearings, and indeed more broadly on the impact of the COVID-19 pandemic on the

practice of arbitration. Accordingly, the Committee urges the NAA Research and Education Foundation to consider issuing a Request for Proposals for a comprehensive study of how the pandemic has engendered changes in the arbitration profession. Regarding virtual hearings, questions that such a study might ask include:

- Have we reached a plateau for virtual hearings, assuming that COVID remains under control and no new disease emerges?
- Does the incidence of virtual hearings vary by region?
- Is the use of virtual hearings related to the characteristics of the arbitrator?
- What role does distance play in the preference for virtual hearings?
- To what extent do virtual hearings take a "hybrid" form, with some participants together in a room and others remote?
- To what extent do virtual hearings reduce the cost of arbitration to the parties?
- To what extent have virtual hearings expanded the market for arbitrators, with parties more willing to turn to arbitrators based a long distance away?

Settlements During Arbitration

Arbitrators have long played a role in facilitating the settlement of disputes, involving both interests and rights, in order to avoid the possibly negative consequences of an imposed outcome. Although such interventions are by no means a "recent development," the question of whether arbitration practice has over time become more oriented toward promoting voluntary settlement seems worth asking. Unfortunately, we were unable to locate any hard data to document the incidence of successful settlement efforts by arbitrators, either in the present day or over time. At a gross level, it is clear from summary data maintained by referring agencies that a large percentage of arbitrator appointments do not result in an ultimate decision. According to the FMCS, for example, in 2022 the issuance of 9,695 panels resulted in 1,079 arbitration awards, or 11.1 percent. Similarly, the AAA reports that in 2022 there were 3,821 arbitrator appointments to labor cases and 1,023 awards, or 26.8 percent. (Presumably not all the panels issued by the FMCS resulted in the appointment of an arbitrator.) But although it is clear that a great many disputes that are referred to arbitration are ultimately resolved without an award, there is no way to determine whether the outcomes of these cases

came about from active mediation efforts by the arbitrator or simply the parties' continuing negotiations following the filing for arbitration.

There is anecdotal evidence that the propensity for arbitrators to engage in mediation efforts is greater in Canada than in the United States, although even in Canada there is apparently no data source for the actual number of arbitration appointments that result in mediated settlements. The Committee solicited information on this point from three prominent Canadian arbitrators: Chris Albertyn, Jules Bloch, and Susan Stewart. None was aware of a source for data on settlements, although Arbitrator Albertyn offered some interesting insights:

> There is no official report of the extent of settlements.
>
> Anecdotally, arbitrators are writing fewer decisions, and settlement rates are between 70% and 80% of grievance cases in Ontario. Mediation-arbitration is the dominant mode of practice. It is expressly permitted with the parties' consent under s.50 of the Labour Relations Act, 1995.
>
> This is less true of other provinces. British Columbia is perhaps closest to Ontario, though with more straight arbitration. Alberta and the prairies are varied. Eastern Canada is also mixed. Federally, there is also a mixed practice, perhaps more straight arbitration than med-arb.
>
> Quebec is still much more similar to the U.S. - perhaps the most of all the Canadian provinces - doing relatively little med-arb, and mostly hearing cases in the way it is done in the U.S. Some informal chats in the hallway, but no extensive mediation-arbitration, as in Ontario.

VII. Recommendations for Further Study

In this final section, we offer suggestions for further study, which may take the form of REF proposals or future activities of the State of the Profession Committee

The Arbitrators

- There is a need for common data among data sources:
- The State of Profession committee should determine the kind of data that would be useful to arbitrators; look at the need for consistency in the types of information being tracked and reported across agencies; and work with FMCS/AAA/NMB, State agencies; employment law cases to generate useful data series.
- Consider establishing sectoral industry data including transportation, entertainment, manufacturing, service sector

- Examine the kind of geographic disaggregations that could be useful, including local areas, regions, and states

- Cross-reference industry and geographic information, e.g., federal sector in DC, manufacturing in Ohio, entertainment industry in LA, State and municipal public sector in NY

- Billing: amounts charged, numbers of arbitrations, different services provided, taking care to avoid anti-trust issues

- Diversity issues: examine why number of NAA nonwhite members is not increasing as fast as women.

- A traditional pool for future labor arbitrators is the lawyers in the area of labor and employment. ABA statistics suggest that white attorneys tend to specialize in labor and employment law to a greater extent than nonwhite attorneys. Maybe look at reaching out to this pool of potential neutrals. Look to recent trends also.

The Work -- How much:

- Need for data by state /national
- Public/ private sector information and by industry
- Need to look at state agencies not just national referral agencies.
- Look at non labor areas like FINRA, construction, consumer, business
- Include large private panels
- Conduct survey?

<u>The Work – What Kind:</u>

- Conduct a study on what the parties expect and want from arbitrators. Several NAA annual meeting presentations have discussed this subject but it may be appropriate to conduct more rigorous research through an REF study.

<u>The Practice of Arbitration: Recent Developments</u>

- Look at the comparative advantages and disadvantages of virtual, in-person and hybrid hearings in this post-pandemic period.
- Learn the current viewpoints of arbitrators and parties on the continued use of virtual hearings.
- Examine settlement efforts and rates as part of the arbitration process.
- Examine the impact of med-arb requirements in Canada on settlements, practice issues and parties' expectations.