Comparative Analysis of Damages in Employment Arbitration and Employment Litigation – A Report to the NAA, June 4, 2026

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Damages in Employment Cases -- Litigation and Arbitration Compared

In 2023 our group published a comparative analysis of outcomes in employment litigation and employment arbitration.[1] We found that:

1. Employees win more often in arbitration than in court litigation
2. Employees receive higher awards in litigation than arbitration
3. Employees receive justice faster in arbitration than litigation
4. Many employees whose cases are too small to litigate are able to receive justice through arbitration

Our study did not resolve how much higher awards are in litigation. Nor did it explain the type of cases in which employees receive higher awards in litigation or the reasons for the higher awards.

We therefore conducted a second study focused exclusively on damages to answer these questions.

Methodology

We identified all employment cases in 2023 and 2024 in which employees were successful in claims filed with the American Arbitration Association (using a Lexis search). We then read each award to determine the nature of the claim, the amount of damages received, and the type of damages.

We then identified the employment cases in which employees prevailed in federal court in fiscal 2023-2024[2] and read the court docket for each case to find the same information.

One of the methodological shortcomings of prior studies in this field is that they compare all results of AAA employment arbitration with the results of all federal employment litigation. For this to be accurate, both systems would have to consist of the same types of cases, distributed in the same manner.

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[1] *Comparative Analysis of Employment Arbitration and Employment Litigation* National Workrights Institute, www.workrights.org

[2] https://www.fjc.gov/research/federal-court-cases-fjc-integrated-database-1979-present

This, however, is not the case. All of the court cases involve federal statutes. While AAA's caseload includes cases under these statutes, it also includes a significant number of contract and tort cases. In addition, the distribution of cases under federal statutes differs between AAA and the courts. This creates addition problems because there are significant differences between the statutes involved, including differences in authorized damages.

To produce a more meaningful comparison, we limited our analysis to cases in both systems involving the causes of action included in section 441 (employment) of the federal civil litigation database.[3]

Even within this limited range of cases, statutorily authorized remedies vary greatly. For example, Title VII authorizes the award of damages for both emotional distress and punitive damages that are capped based on the number of employees in the firm. Under ADEA, neither emotional distress nor punitive damages are authorized, but liquidated damages in the form of double backpay are authorized if the conduct is intentional and willful. Comparing total awards in cases with such disparate limitations on authorized awards would be misleading.

We used this data to compare awards of individual types of damages by arbitrators and courts in cases in which such damages are authorized.

Economic Damages

The critical question regarding economic damages (almost exclusively lost wages) is not, "how much money did the employee receive?" but "did the employee receive an amount that fully compensated her for her lost pay?"

Neither arbitrators' awards nor court dockets consistently contain the level of detail one would like to address this question. However, we read every arbitration award and every judicial case docket looking for disparities between the employee's lost wages and the damages they were awarded and found no examples of such cases. Both the courts and arbitrators consistently awarded full backpay.

[3] Discrimination on the basis of race, gender, disability, national origin, religion, pregnancy, and age. This database also includes cases under FMLA, retaliation, section 1981, section 1983, and wage and hour laws.

This strongly suggests that courts and arbitrators do not differ in their awards of economic loss to successful employee plaintiffs. Of all cases won by plaintiffs in litigation, 35% are under statutes that provide only economic damages.

We did, however, find a difference in the value of the claims being brought in arbitration and litigation. The median award for economic loss in arbitration is $54,000. In litigation, the median award is $150,000. This suggests that the cases employees bring to court involve larger economic loss than the cases brought to arbitration.

Non-Economic Damages

Our data set did not include enough AAA cases involving non-economic damages to support statistically significant conclusions comparing awards of such damages in arbitration and litigation.

However, our data suggest that arbitrators award non-economic damages less frequently than courts.

Liquidated Damages

The Fair Labor Standards Act calls for successful employees in wage and hour cases to receive liquidated damages equal to their lost wages to incentivize employers to comply with the law in an area where it would otherwise be cost-effective not to comply. Employers are required to pay double damages unless they can prove the violation was made in good faith and with reasonable grounds for believing it was lawful.

Courts generally comply with this provision. Of all employees who were successful in wage and hour claims, 85% received liquidated damages.

Arbitrators in our data set were less likely to award liquidated damages, despite the limited discretion in the statute. Only 59% of employees who successfully brought wage and hour claims to arbitration received liquidated damages.

Emotional Distress

Our research finds that when statutorily authorized[4], both arbitrators and courts generally award successful plaintiffs emotional distress damages. The courts in our database, however, were more likely to award emotional distress damages (90%) than arbitrators (67%). Courts also gave higher awards. The median emotional distress award in court was $100,000. In arbitration, it was only $60,000. This could be due to statutory damage caps if the defendant employers in arbitration were smaller than the employers in litigation

Punitive Damages

While punitive damages are the issue on which courts and arbitrators appear to differ most dramatically, we caution any reader to draw any strong conclusions as our sample sizes are too small for us to conclude that our results are anything more than just chance.[5] In litigation, there were 14 Title VII cases, 8 ADA cases and 14 Section 1981 and 1983 cases. In contrast in arbitration, there were 9 cases. We simply cannot test for statistical significance because the sample size is too low. That said, successful plaintiffs, in court, under the statutes which authorize punitive damages, were awarded such damages in 70% of their cases. Arbitrators in our study awarded punitive damages in only 12% of the cases.

The ADA and Title VII authorize punitive damages when the conduct is both intentional (thus, unavailable for disparate impact cases and good faith reasonable accommodation cases) and either reckless or malicious. The Supreme Court has opined as to how something can be intentional but not reckless or malicious and gave three limited situations: (1) a failed BFOQ; (2) a novel area of the law; or (3) the employer was unaware of that the intentional conduct was unlawful. While this list may not be exhaustive, the conclusion is that most Title VII and ADA cases should qualify for punitive damages. Again, while our sample is too small to make a statistical conclusion, it seems that courts are more in line with the punitive damages law and that training for arbitrators or changes in arbitration service provider polices may be warranted.

Conclusion

Our investigation indicates that arbitrators and courts both award successful employees full (lost wage) economic damages.

[4] Emotional distress damages are authorized by Title VII, ADA, Section 1981, and Section 1983.

[5] Punitive damages are authorized by the same statutes as emotional distress damages.

Employees in arbitration receive lower dollar awards. This appears to be the result of forum selection. Arbitration is faster and less expensive than litigation. Many employees have legitimate claims that are too small to support the expense of litigation. One would expect that this would result in the average case in arbitration having lower damages than the average case in court. Our investigation suggests that this is the case.

Arbitration damages may also be lower because arbitrators award non-economic damages less frequently than courts.

Number of Employees Affected

Some, but not all, employees who succeed in court receive greater damages than they would have in arbitration.

Out of all employees who prevailed in AAA arbitration in 2023-2024, the majority (55%) brought their cases under causes of action where only economic damages are available. These employees would have fared no better had they brought their cases in federal court.

Twenty-five percent (25%) of successful employees in arbitration brought their cases under statues that permit the award of emotional distress or punitive damages. These data suggest that many of these employees may have received larger awards in federal court.

The remaining successful plaintiffs (20%) brought their claims under statutes authorizing liquidated damages in addition to economic loss, primarily FLSA cases. These plaintiffs received the same damages for lost wages in arbitration that they would have in court.[6] But 85% of this group received liquidated damages in court and only 59% received them in arbitration.

Overall, this indicates that approximately 70% of successful employee plaintiffs in arbitration would have received the same award in federal court. Even if our data on differences in awards for non-economic damages is supported by our ongoing research involving a larger number of cases, only 30% would have received a higher award in court.

Policy Implications

[6] FLSA calls for liquidated damages to be equal to lost wages. We found no case in which an arbitrator who awarded liquidated damages awarded a lesser amount.

Our findings regarding damages reinforce the conclusion of our first report that employment arbitration should be reformed, not eliminated. Employees win more often in employment arbitration and many employees get access to justice through arbitration they would have been denied through litigation because of the higher costs. The only negative we found in arbitration was that employees were less likely to receive "extra damages" although the strength of our finding on this matter is weakened by the limited number of cases in the data we were able to analyze at this point in time .

Our new study reveals that not all successful employees receive more in litigation than arbitration. Of all successful arbitration plaintiffs in our study, only about 30% appear to have received a higher award in court –The other 70% received the same in arbitration as they would have in court. With regard to the disparity, because of limits in our data (the reported cases lack detail and we have too small of number of cases), we are unsure if the disparity is because of strength of the case, number of employees, or if arbitrators are not awarding extra damages in instances where juries / judges would. If arbitrators are awarding extra damages at a lower rate/amount than courts, then we need to address this disparity.

A necessary next step is research analyzing a larger sample of cases in arbitration and court in which employees prevailed in types of cases in which non-economic damages are authorized to see if courts actually award such damages more often. Our group has already begun such a study.

Even if successful employees in arbitration receive lower non-economic damages than in court, this in no way supports an argument that arbitration should be eliminated. A system which provides greater access to employees, a much better employee win rate than litigation, and where 70% of employees receive the same award as those in litigation, should not be eliminated because it delivers lower overall damages to 30% of certain types of successful claimants. Instead, if a new study confirms that arbitrators award non-economic damages less often, this would be a problem that must be addressed. This could be accomplished by training arbitrators, clarifying the polices that of those companies that provide arbitration services, having the relevant agencies provide guidance on the appropriate federal statutes to make it clear that such damages are not extraordinary and should be awarded as a matter of course in many situations, or even amending the statutes.