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Arbitration Outcomes and Employer Size in the Context of the American Arbitration  
Association 2010-2020

by

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# Arbitration Outcomes and Employer Size in the Context of the American Arbitration Association 2010-2020

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## Abstract

As mandatory employment arbitration has become a more prevalent practice in the United States over the past decade, numerous studies have examined arbitration outcomes and attempted to explain the factors that produce those outcomes. In particular, researchers have examined the “repeat player” effect in arbitration. Any defendant or plaintiff’s counsel who appears repeatedly in the same arbitration forum fares better than “first time” players. Researchers have also studied the internal human resources (“HR”) procedures of employer-defendants facing claims in arbitration and have come to the conclusion that larger employers likely implement more thorough and well-structured internal HR procedures which facilitate resolution of disputes before such disputes can reach the stage of arbitration. The focus of these latter studies have been on the differences in outcomes between employment litigation conducted in a public court of law and litigation conducted in a private arbitration forum, the impact of mandatory arbitration agreements (“MAAs”) on employment arbitration outcomes, and on the repeat player effect, controlling for employer size. Conversely, in this study I examine explicitly the impact of employer size on employment arbitration outcomes, controlling for the “repeat player” effect. My findings suggest that employer size matters for employment arbitration outcomes only insofar as the largest employers are concerned, and that furthermore, at least within the confines of the American Arbitration Association (“AAA”), the repeat player effect has a notable impact only on arbitrations involving the largest employers - and there principally insofar as plaintiff’s counsel are concerned.

## 2 Arbitration Outcomes and Employer Size

This study focuses exclusively on employment arbitration—cases in which an aggrieved employee files claims for wrongful termination, discrimination, or other such causes, in a private arbitration forum rather than a public court of law. This study does not consider consumer arbitration cases, although these are touched upon in the literature review below.<sup>1</sup>

### 1. Brief History of Arbitration

Prior to the enactment of the Federal Arbitration Act (“FAA”) in 1925, American courts were not obligated to uphold the outcomes of private arbitrations.<sup>2</sup> The FAA imparted to arbitration outcomes the sanctity of any contract, enforceable before court. At the time, this was an uncontroversial, and even laudable, change. Arbitration could in theory more speedily resolve disputes to the satisfaction of both parties in a given dispute than the court system could, with recourse to litigation always available for any reason “at law or in equity”. A year after the passage of the FAA, the American Arbitration Association was founded. The AAA is now nearly a century old and remains one of the nation’s most reputable arbitration forums for reasons that will be discussed below.

Arbitration remained a fairly non-controversial part of American legal life until the 1980s, when the Supreme Court, in a series of rulings, began to elevate arbitration to an equal footing with litigation. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court in essence ruled that the choice of forum – public litigation or private arbitration – was equivalent and ergo immaterial to the outcome of a given case. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984) the Court ruled that the FAA superceded conflicting state law, and as such a state could not pass legislation exempting wage disputes from arbitration. These rulings largely put arbitration on the same footing as litigation

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<sup>1</sup>For a decent overview of many of the reasons why a plaintiff might seek damages or some award in an employment suit, whether in a public court of law or private arbitration forum, see [https://www.fordharrison.com/files/33996\\_Chapter%2021%20-%20Employment%20Litigation%20Causes%20of%20Action%20-%202016-2017%20SourceBook.pdf](https://www.fordharrison.com/files/33996_Chapter%2021%20-%20Employment%20Litigation%20Causes%20of%20Action%20-%202016-2017%20SourceBook.pdf)

<sup>2</sup>Throughout this paper I will refer to litigation conducted in a court venue as “litigation”, and litigation conducted in an arbitration venue as “arbitration”. Both “litigation” and “arbitration” are, strictly speaking, litigation, but are conducted in entirely different venues, with substantially different rules, and substantially different outcomes. A practicing litigator may refer to a matter in arbitration as litigation, but he or she has in mind a largely different set of considerations than if he or she was litigating a case in a public court of law. My use of “litigation” and “arbitration” is, therefore, shorthand.

as far as the law of the land was concerned. Following these rulings, arbitration spread more widely throughout the economy as employers sought to escape state courts (LeRoy and Feuille (2002)). The AAA and Judicial Arbitration and Mediation Services (“JAMS”, founded 1979) were soon joined by a number of new arbitration forums, including ADR Services, Inc. and others.

In 1995, responding to criticism that arbitration, in contrast to litigation, favored the employer over the employee (notably on the grounds that arbitrators, the counterpart of judges in litigation, bill by the hour and therefore know what side their bread is buttered on), the AAA instituted the Due Process Protocol (“DPP”)<sup>3</sup> which caps fees, permits broad discovery, and permits employees to have a say in the selection of arbitrators. Because of the AAA’s implementation of the DPP, the AAA is to this day widely considered one of the nation’s most reputable arbitration forums.<sup>4</sup>

DPP notwithstanding, arbitration remained the preferred forum of corporate players, as it was generally held to be more defendant-friendly, especially after the *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 ruling in 2011. In *AT&T* the Supreme Court upheld class action waivers in arbitration agreements. The agreements considered in *AT&T* were consumer agreements, not employment agreements, but the precedent for employment agreements had nonetheless been set. Over the course of the 2010s, MAAs containing class-action waivers proliferated. It is estimated that today more than 50% of employers of any size bind their employees with MAAs, most of which contain class-action waivers (Colvin (2019)). In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 584 U.S., 200 L. Ed. 2d 889 (2018) the Supreme Court ruled that class-action waivers in employment MAAs do not violate the National Labor Relations Act (“NLRA”). Employees now face a world in which they can be forced to submit to arbitration as a condition of their employment and they cannot join with others similarly situated in a class to contest a claim collectively.

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<sup>3</sup><https://naarb.org/due-process-protocol/>

<sup>4</sup>It is worth noting that despite these reforms arbitration remains fundamentally different from litigation: AAA arbitrators still bill by the hour and AAA arbitrations remain closed to public attendance.

## 2. Literature Review

Studies of arbitration outcomes have focused predominantly on the differences between litigation and arbitration. This does not come as a surprise. After all, to the layperson, the decisions by the Supreme Court detailed above seem shocking. Determining whether, in fact, arbitration puts the employee-plaintiff at a disadvantage vis-à-vis litigation is a concern of paramount importance. This concern, however, is not the focus of this paper, which focuses exclusively on arbitration outcomes. Estreicher, Heise, and Sherwyn (2017) provides an excellent run-down of the academic studies of arbitration up to 2018. I will summarize the findings of these studies (where they agree) here, so as to provide background for the results to follow:

- Arbitration is generally quicker than litigation; averaging the studies considered by Estreicher, an individual arbitration generally took 281.25 days to conclude as opposed to 694 days for an individual litigation to conclude.
- Arbitrations are much easier to file than litigations; there are fewer hurdles to overcome. Proponents of arbitration point to this ease of access as one reason why arbitration should be considered a suitable substitute for litigation.
- Employee “win rate” is decided differently by a number of studies, and these studies do not agree whether arbitration or litigation is more favorable to the employee-plaintiff by this metric. That said, it is fairly uncontested within the universe of arbitration studies that the award amount for employment arbitrations is notably lower than that of employment litigations (in particular see Gough (2020) and Estreicher, Heise, and Sherwyn (2017)). The rationale for this finding is discussed below.
- Not all arbitration forums are equal. Chandrasekher and Horton (2019) provides a detailed look at AAA, JAMS, and ADR Services, Inc. and finds different outcomes for each forum. Studies suggest the the “repeat player” effect may be more prominent in arbitration forums that do not abide by the DPP.

This study concerns actions brought by employee-plaintiffs under MAAs (which the AAA refers to as “Employer Promulgated Disputes”) exclusively, and considers only AAA arbitrations, just as Colvin and Gough (2015) does. Colvin and Gough (2015) defines the repeat player effect as the occurrence of the same employer-defendant more than once in the entire arbitration forum over the time period considered by the study, and finds a significant negative impact on both “wins” (the finding of any liability on the part of the employer-defendant, regardless of monetary awards) and the amount of monetary awards for successful employee-plaintiffs. The study finds a separate repeat arbitrator-employer effect to be even more punitive to the employee-plaintiff.<sup>5</sup> Chandrasekher and Horton (2019) finds these same repeat player effects, but in a twist finds that the repeat player effect for plaintiff’s counsel<sup>6</sup> is also a determining factor, to the benefit of the employee-plaintiff.

The focus of Estlund (2017) is not on “wins”, but rather, on the number of employment arbitration cases that one should expect to find given the corresponding number of employment litigation cases one finds in the same period. Estlund’s study throws some cold water on the premise advanced by Estreicher, Heise, and Sherwyn (2017) that repeat players may simply be “larger, more sophisticated employers with multi-step grievance procedures”, more likely to settle claims before they advance to arbitration, leaving only the weakest or most irreconcilable claims to advance. Estlund concedes that employers “that impose MAAs [may be] systematically different from those who are not, and less likely to generate claims” but notes that this premise cannot be quantified. Estlund’s central contention is that MAAs deter the bringing of claims in the first place. Employment arbitrations, even those conducted within the reputable AAA, are not public, and their secrecy may have a chilling effect on potential claimants. Further, as is noted in Colvin (2019), many employees are simply not aware that they’ve entered in a MAA when they are hired.

The survey of HR personnel in Colvin (2019) is hugely instructive regarding the impact

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<sup>5</sup>To clarify: in addition to the repeat player effect defined by simple appearance in the AAA multiple times, the repeat arbitrator-employer effect considers when an employer-defendant appears before the same specific arbitrator, not merely in the same forum.

<sup>6</sup>Note: not the identity of plaintiff itself, but specifically the attorney and/or firm bringing claims in arbitration.

of MAAs on employment arbitration. Colvin found that more than half of all employers utilized MAAs, and close to 70% of businesses employing 5,000 or more individuals utilized MAAs. Colvin found that roughly 50% of all employees in 2017 were covered by MAAs regardless of income level (and those earning less than \$13.00 hourly were 65% likely to be covered by an MAA). Colvin agrees with Estlund that MAAs have a chilling effect on claims, on the grounds that employment attorneys are less likely to take on representation of an employee-plaintiff in arbitrations (rather than litigations) due to the lower win rate and lower awards generally awarded (Colvin (2014)). Colvin's study may suffer from the defect of a fairly small number of observations – only 627 respondents provided usable answers to Colvin's survey – but there is no denying the detail and illuminating richness of those observations.

Gough (2020) also examines AAA data, agreeing with Estreicher et al. that larger employers may “filter out” meritorious claims via internal HR processes and thus the cases that reach arbitration will naturally face harsher outcomes. Like Colvin (2019), Gough conducts a survey, this time of attorney members of the National Employment Lawyers Association (“NELA”), to derive his data. Like Colvin, Gough's observation number is small (277 employment arbitration litigations are considered, along with 556 employment litigations<sup>7</sup>) but rich in detail. Gough exclusively focuses on employment discrimination cases, unlike the studies cited above. Gough's most striking finding is that the demographics of the plaintiff (gender, salary level and race) have a much smaller impact than the repeat player effect and the choice of forum—arbitration or litigation. A further study (and another survey), Gough and Colvin (2020), which specifically considers the background of the arbitrator, again finds strong repeat player effects: repeat employer-defendants and employer-defendant/arbitrator pairings produce lower win rates and damages awarded.

On the whole the literature depicts a world in which the MAA is increasingly omnipresent and inescapable for the employee, in which repeat player effects significantly alter the outcomes of arbitration (typically to the disadvantage of the employee-plaintiff, except where

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<sup>7</sup>As a reminder, “arbitration” and “arbitrations” in this paper refer to arbitration litigation and “litigation” and “litigations” refer to court litigations.

the repeat plaintiff's counsel is concerned), and in which the larger employer is less likely to face employment claims in arbitration, possibly due to well-developed internal HR procedures. This study sheds new light on the repeat-player effects.

### 3. Data

My data is derived from the same sources as Colvin (2019). It is comprised of two parts. The first part consists of publicly available AAA data (<https://adr.org/consumer>), current as of Q2 2020 and limited to “employer promulgated disputes”. My dataset therefore consists exclusively of disputes arising under MAAs. The second part consists of data from the Dun & Bradstreet (“D&B”) free data cloud (<https://www.dnb.com/perspectives/master-data/data-a-cloud-400million.html>). Insofar as the same employer may be sued under a multiplicity of names,<sup>8</sup> it is necessary to standardize defendant names, and following the example set by Chandrasekher and Horton (2019), I did so by examining every observation individually.

The publicly available AAA data contains most of the variables of interest in this study. Each observation pertains to a solitary claim. While the typical observation in the dataset represents one lawsuit, there are numerous instances where a solitary lawsuit is represented by many observations. The AAA data contains not only the names of the employer-defendant and the employee-plaintiff, but also the law firm representing the plaintiff, the arbitrator before whom both parties appeared, the filing and resolution dates for the lawsuits, the damages awarded (if any), the dispute subtype (an indicator of the industry of the defendant, such as retail, accounting, hospitality/travel, etc.), the state in which the arbitration was filed, and more. Of critical interest was the disposition variable, a categorical variable taking on five values: administrative, awarded, dismissed, settled and withdrawn. This variable is discussed in detail below.

Notably absent from this dataset are typical demographic considerations: the race, age, and gender of the employee-plaintiff and arbitrator. Also missing was the basis of the suit: dis-

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<sup>8</sup>For instance, “Turner Industries” is sued severally as “Turner Industries”, “Turner Industries Group, LLC” and “Turner Industries, Inc.”

crimination, wrongful termination, etc. The surveys conducted in Colvin (2019), Gough (2020) and Gough (2020) contain these hard-to-ignore details. However, while this study suffers qualitatively in comparison, it is much richer quantitatively, with 12,056 observations rather than only several hundred. While Chandrasekher and Horton (2019) and Estlund (2017) consider a similar size of observations, they are drawn from numerous arbitration forums—this study focuses exclusively on AAA MAA-governed disputes, and as such has a tighter focus.

From the D&B data cloud the sole, critical, variable added to the AAA data is total employer size. Payroll size is not considered. The rationale behind this decision is simple: regardless of payroll size, it is the total number of employees which is likely to determine HR considerations. A tech firm employing 20 individuals all at high salaries is less likely to rely on an elaborate internal HR procedure than a law firm employing 200 individuals at lower salaries.

In gathering the D&B data, I made certain assumptions in matching the AAA employer-defendant firms to the firms located in the D&B data cloud. In suits brought against a subsidiary of a parent firm, I assumed that the HR resources of the parent firm would be brought to bear on behalf of their corporate child prior to arbitration, and therefore the employer size of the parent company was used in my dataset. However, I made this consideration only where there was a “brand” to defend, but not necessarily otherwise, because a holding company may care less about the legal fate of its subsidiaries when a brand name is not involved. For instance, Pecos Valley Pizza, Inc. does business as Domino’s Pizza. For cases brought against Pecos Valley Pizza, I assume that the HR resources of Domino’s Pizza have been brought to bear. When a corporate child of a parent does not share a brand with the parent, however, I assume this child is “on its own”.

Beyond this assumption, I dropped any observation for which I could not find the number of employees in the D&B free data cloud. I also did not include observations for employer-defendants based in the Virgin Islands or headquartered overseas (except for Canada, which I treated as “not overseas”). Lastly, I omitted 76 observations which included no information

as to salary range. As a result of these omissions, the total number of observations was reduced from 13,220 to 11,967.

## 4. Summary Statistics

Table 1 below sets forth the cross-tabulation for the salary range of the employee-plaintiffs in this dataset and the disposition of their arbitrations.

Table 1. Salary range of employee-plaintiff and disposition of cases

Disposition	Up to \$100,000	\$100,000 - \$250,000	\$250,000 and Greater	Not Provided by Parties	Total
Administrative	133	19	6	184	342
Awarded	358	84	43	308	793
Dismissed	1,733	55	24	296	2,108
Settled	5,063	480	164	2,561	8,268
Withdrawn	245	42	7	162	456
Total	7,532	680	244	3,511	11,967

In this study I consider disposition rather than “wins” as the prime dependent variable of interest. Most of the various disposition outcomes speak for themselves: “awarded” means that the employee-plaintiff won some sort of award;<sup>9</sup> “dismissed” means that the case was dismissed after arbitration was commenced; “settled” means that it was settled and “withdrawn” means that the claim was withdrawn. “Administrative” covers all other outcomes, including notably when the party that initiated the arbitration cannot be located or when the party that initiated the arbitration refused to accept the full relief offered by the administrator. In the context of this study, “administrative” can be considered “no result”.

As can be seen, the vast bulk of arbitration cases were settled, and roughly one-quarter that number were dismissed. Only 6.6% of cases resulted in awards. A small handful of arbitrations were brought by employee-plaintiffs earning \$250,000 or more. The majority were brought by employee-plaintiffs earning \$100,000 or less, which does not come as a surprise given that (1) arbitration is, on the whole, cheaper to commence and pursue than

<sup>9</sup>Not all awards are monetary; certain awards reflect simply that the employee-plaintiff “won”. Certain monetary awards were of a symbolic solitary dollar. Other awards were both substantive and monetary; these awards are discussed below.

litigation and (2) many high earners may be assumed to be more discriminating and have more options with regard to the construction of their own employment contracts. These individuals may well opt out of any MAA on principle, and as such few of them appear in this dataset. As can be seen, 29.7% of the observations in this dataset contain no salary information. This omission sets off more alarm bells than are warranted—looking at the marginal impact of the tiers of employer size on arbitration outcomes (as will be discussed below) yields highly similar results whether or not this impact is assessed strictly for those cases where the employee-plaintiff was earning \$100,000 or less or for the entire dataset. This assessment includes those observations for high earners and those for which salary is unobservable.

In considering the universe of this dataset, it is instructive to consider Table 2. In assessing the data collected from the D&B data cloud, I made the determination to break the employment number into five distinct tiers which echo those used in Colvin (2019). In part I made this determination because performing various regressions on the number of employees as a continuous variable yielded results that were too minuscule to be meaningful; by contrast, breaking this variable down into tiers makes the results statistically significant and easy to interpret. My main rationale for choosing the specific tiers that I did was to make an apples-to-apples comparison with Colvin (2019), which is a study of major significance for MAAs and employment arbitration and which my study consistently uses as a reference point.<sup>10</sup>

The largest number of observations consist of employee-plaintiffs earning \$100,000 or less and employed by<sup>11</sup> “Tier 5” (5,000 or more employees) companies. The second largest grouping consists of employee-plaintiffs earning \$100,000 or less and employed by “Tier 1” (99 employees or less) companies. 60% of observations pertain to Tier 5 companies, and 15.7% pertain to Tier 1 companies—the middle tiers of company size are, to a certain

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<sup>10</sup>LOESS (locally estimated scatterplot smoothing) analysis of the continuous number of employees variable yields some interesting insights which might suggest that there are really only two tiers that “matter” - employers who employ 59,999 or fewer employees, and employers who employ 60,000 or more. However, making a straight-ahead comparison with Colvin (2019) is likely to prove more valuable to the literature on this subject. I discuss the implications of the LOESS findings in Part 7 of this paper, below.

<sup>11</sup>Or formerly employed by, in the case of arbitrations involving termination.

extent, an afterthought in this world of 2010-2020 AAA employment arbitrations.<sup>12</sup>

Table 2. Salary range of employee-plaintiff and company tiers of employees

Number of employees	Up to \$100,000	\$100,000 - \$250,000	\$250,000 and Greater	Not Provided by Parties	Total
Fewer than 100 employees	909	134	39	793	1,875
100 to 499 employees	440	82	31	230	783
500 to 999 employees	551	30	13	229	823
1,000 to 4,999 employees	797	95	33	374	1,299
5,000 or more employees	4,835	339	128	1,885	7,187
Total	7,532	680	244	3,511	11,967

The independent variable “dispute subtype”, which describes the industry of the workplace for the case at hand, includes 27 discrete values, which at times makes the multinomial logisitic regressions undertaken in this study difficult, simply because there not enough observations for each industry type to obtain meaningful results. “Dispute subtype” might reasonably be simplified to include only three values: Retail, Restaurant/Food Service, and Other. Retail, Restaurant/Food Service make up 43% of the observations in the data set, while the remaining 25 discrete values for dispute subtype are quite diffuse.<sup>13</sup>

Table 3. Disposition of cases and dispute subtype by industry

Disposition	Restaurant / Food Service	Retail	Other	Total
Administrative	33	32	277	342
Awarded	72	111	610	793
Dismissed	60	1276	772	2,108
Settled	1,449	2,019	4,800	8,268
Withdrawn	50	52	354	456
Total	1,664	3,490	6,813	11,967

The last summary of the dataset that needs to be considered involves the region in which

<sup>12</sup>It would be interesting to study which arbitration forums the various tiers of employers are drawn to. Might the AAA be an especially appealing forum for the largest employers due to its reputation, and to the smallest as well, seeking the biggest name they could find? Might mid-sized employers be more inclined to try their chances in a separate forum? These questions are beyond the scope of this paper but are worth examining.

<sup>13</sup>Of course, in a larger dataset, we would not want to cut such corners. A case can be made here that the third and fourth largest number of observations for dispute subtype – Healthcare, with 806 observations, and Financial Services, with 798 – should not be lumped into “Other” along with Hospitality, Sports, Education, etc. However, even considering the un-simplified “dispute subtype” does not radically change the conclusions of any of the regressions reported in this study. All regressions were run with both, and the simplified and un-simplified conclusions were so similar as to make reporting the un-simplified, marginally less comprehensible un-simplified results beside the point.

the arbitration took place. The AAA data provides the individual states<sup>14</sup> in which the arbitration was initiated. Running regressions with such a granular variable yielded difficult-to-interpret results, so I consolidated these observations into four distinct regions which mirror the U.S. Census Bureau’s regional divisions—Northeast, Midwest, West and South<sup>15</sup>. Note in Table 4 the disproportionately large number of dismissed cases in the West. This is likely due to the influence of California, well known to be a employee-friendly state in terms of litigation, if not necessarily arbitration (Colvin and Gough (2015)). It is beyond the scope of this study to posit why so many dismissals occur in the West—perhaps the “employee-friendly” culture of California leads to a pre-arbitration settlement of claims in the same way that Tier 5 employers with strong HR procedures might, or perhaps some other explanation is at hand. In any event it is important to take note of this quirk.

Table 4. Disposition of cases and regions where the arbitrations were initiated

Disposition	Northeast	Midwest	West	South	Total
Administrative	42	17	205	78	342
Awarded	152	148	208	285	793
Dismissed	80	119	1625	284	2,108
Settled	1,990	1,935	2,016	2,327	8,268
Withdrawn	73	75	133	175	456
Total	2,337	2,294	4,187	3,149	11,967

## 5. Methods

The primary outcome variable of interest for this study is disposition—whether a case resulted in an “administrative” end, an award, dismissal, settlement, or withdrawal. A secondary outcome variable of interest is award amount, although, as discussed below, it is difficult to determine what effect if any our independent variables exert on award amount given the limitations of the dataset.

I model the outcome disposition as a multinomial logistic function of employer tier, salary range, dispute subtype, region, and the two repeat player effects (whether or not the employer-defendant has been seen before the same arbitrator, and whether or not the employee-plaintiff’s

<sup>14</sup>Including, in 13 dropped instances, the Virgin Islands, and, surprisingly, not a single observation for Alaska.

<sup>15</sup>[https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us\\_regdiv.pdf](https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf)

counsel has argued before the same arbitrator), which, with variations, takes the basic form:

$$\Pr[Disposition = c] = \frac{e^{\beta_c X_i}}{\sum_{i=1}^K e^{\beta_c X_i}}$$

The vector  $X$  is composed of the variables mentioned immediately above (employer tier, salary range, dispute subtype, region, and the two repeat player effects). The outcome variable, case disposition, takes the five discrete values detailed above: administrative, award, dismissal, settlement or withdrawal.

Employer tier is a discrete variable with five values<sup>16</sup>. Salary range is also a discrete variable with four values, which refers to the annual income of the employee-plaintiffs at question, as given by the AAA data: \$0-\$100,000 annually, \$100,000-\$250,000, \$250,000 or greater, or salary data not provided by the parties to the arbitration. Dispute subtype is a discrete variable with three values: Retail, Restaurant/Food Service, and Other. Region is a discrete variable which refers to the U.S. Census Bureau's regional divisions discussed above, having four values: Northeast, Midwest, West and South.

Concerning the repeat player effects, it is important to clarify their treatment in this study, as opposed to in prior studies. All the studies cited above define a repeat player as either an employer-defendant or a plaintiff's counsel/firm that appears in an arbitration forum more than once. Estreicher, Heise, and Sherwyn (2017) raises a well-considered objection to this methodology:

First, repeat players are labeled repeat players simply because their second case is in the data set, but researchers include the first case in measuring the repeat players' win/loss record. This placement begs a critical question: how did the arbitrator in the first case know the employer would be a repeat player and thus arguably have been influenced by the prospect of repeat business with that company.

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<sup>16</sup>Fewer than 100 employees, 100 to 499 employees, 500 to 599 employees, 1,000 to 4,999 employees, and 5,000 or more employees. Throughout, this first value – Fewer than 100 employees – is the reference category for this variable, and is such is excluded from the tables included in this study. The marginal effects reported are always in reference to this “Tier 1” fewer than 100 employees reference category.

In keeping with this consideration, I have defined my repeat player effects fairly narrowly. First of all, I do not assume, especially given the AAA's adherence to the DPP, that simply appearing in the same forum will confer benefits upon either employer-defendants or plaintiff's counsel.<sup>17</sup> Rather, I assume that only appearing before the same specific individual arbitrator repeatedly will confer such benefits, if any. Secondly, I account for Estreicher's objection above by subtracting 1 from the repeat player "score". So in other words, if counsel X appears before arbitrator Y seven total times, counsel's X repeat player score will be six, not seven. It turns out that defining repeat players in this way significantly changes the findings of Colvin and Gough (2015) and Chandrasekher and Horton (2019) in particular, as will be discussed below.

## 6. Results

### *Award Amount*

With regard to award amount: in the entire dataset, there are only 797 observations (out of 12,043 observations total) that contain an employee award of any sort. Of those 797 observations, the vast bulk are non-monetary. Considering awards to employee-plaintiffs of at least \$1 or more, there are only 190 observations. It is then not surprising that a regression run on award amount controlling for employer size, region of the arbitration, employer-defendant's industry, and the repeat player effects for both employer-defendant and plaintiff's counsel yields wholly insignificant results for employer size. The regression revealed that cases against a Tier 5 employer result in an additional \$121,794 per employee-plaintiff award. With a p-value of .621 we can read nothing into such a result of course, but one wonders if we would see a similar result with a dataset consisting of many more monetary award observations.<sup>18</sup>

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<sup>17</sup>As a reminder, the repeat-player effect concerns the employer-defendant entity, not employer-defendant's counsel. The counsel of each employer-defendant is not even noted in the dataset. By contrast, it is the specific repeat-playing attorney or law firm – plaintiff's counsel – that imparts a repeat-player effect on the employee-plaintiff.

<sup>18</sup>The results of the studies cited thus far suggest that the "win" rate in arbitration is sufficiently low in general that such a hypothetical dataset might need to be several orders larger than the one I have assembled for this study.

### *Disposition*

Now let us turn to disposition. Here the impact of employer size is concrete. As mentioned, treating employer size as a continuous variable yields statistically significant results that are nonetheless too minuscule to be considered. However, using the tiers discussed above produces illuminating results.

Table 5 below reports the marginal effect of the five employment tiers on disposition. The reference category, not displayed on the table, is fewer than 100 employees (“Tier 1”). A quick glance reveals that throughout, the impact of employment tier size is mostly not significant, except for Tier 5. Tier 5 observations do make up nearly 60% of the dataset but it is still striking to see that the impact of employer size is generally of little import until, above a certain threshold, it is suddenly quite decisive.

Cases involving Tier 5 employers are 1.85% more likely than the Tier 1 reference category (1 to 99 employees) to result in awards for the employee-plaintiff, 11.8% more likely to be dismissed, 13.1% less likely to settle, and 1.22% more likely to be withdrawn.<sup>19</sup> Leaving speculation aside as to why this might be, it seems indisputable that, controlling for the repeat player effect, the size of the employer-defendant alone is fairly determinative for the disposition of an employment arbitration in the AAA. To control for whether the industry classification of the employer-defendant concretely impacts these outcomes, two regressions are reported in Table 5: one including dispute subtype as an independent variable, and one that does not. The differences between the two are trivial.

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<sup>19</sup>A note about the use of percentages in my analysis: my results are derived from first running a multinomial logistic regression, as discussed above, and subsequently using Stata’s `margins` command to find the average marginal partial effect of employer tier on the outcome variable, case disposition. In other words, I report not the log-odds of the multinomial logistic regression but rather the predicted probability of a given disposition occurring as one moves from the reference category of employer tier – Tier 1, or employers employing fewer than 100 employees – to the other employer tiers. It is reasonable to discuss these probabilities in terms of percentage likelihoods relative to the reference category, and I use that convention throughout. Log-odds are much more difficult to interpret at first glance. For further reading, and for the rationale for my shorthand use of percentages in discussing marginal effects, I point to <https://www.stata.com/features/overview/marginal-analysis/> as well as <https://www3.nd.edu/~rwilliam/stats/Margins01.pdf>. The latter analysis of `margins` is especially clear and rich.

Table 5. Disposition Outcomes

	(1) Dispute Subtype		(2) No Dispute Subtype	
100 to 499 employees				
Administrative	-0.0163**	(-3.00)	-0.0165**	(-3.00)
Awarded	-0.0108	(-1.47)	-0.0110	(-1.48)
Dismissed	-0.0003	(-0.02)	0.0024	(0.21)
Settled	0.0257	(1.72)	0.0237	(1.59)
Withdrawn	0.0017	(0.28)	0.0014	(0.22)
500 to 999 employees				
Administrative	0.1280***	(8.40)	0.1330***	(8.65)
Awarded	0.0087	(0.78)	0.0089	(0.79)
Dismissed	-0.0267*	(-2.03)	-0.0338**	(-2.91)
Settled	-0.1090***	(-5.37)	-0.1060***	(-5.33)
Withdrawn	-0.0018	(-0.23)	-0.0017	(-0.21)
1,000 to 4,999 employees				
Administrative	-0.0169***	(-3.30)	-0.0169**	(-3.25)
Awarded	0.0196*	(2.48)	0.0208**	(2.58)
Dismissed	-0.0014	(-0.13)	0.0025	(0.24)
Settled	-0.0004	(-0.03)	-0.0056	(-0.39)
Withdrawn	-0.0009	(-0.16)	-0.0008	(-0.14)
5,000 or more employees				
Administrative	-0.0174***	(-4.10)	-0.0183***	(-4.39)
Awarded	0.0185***	(3.32)	0.0162**	(2.97)
Dismissed	0.1180***	(13.95)	0.1360***	(16.93)
Settled	-0.1310***	(-12.36)	-0.1430***	(-13.90)
Withdrawn	0.0122**	(2.80)	0.0087*	(2.01)
Observations	11,967.0000		11,967.0000	

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

To make more sense of the repeat player effect in isolation, consider Table 6. Here the same multinomial logistical regression described above has been conducted under three separate conditions: (1) with a repeat employer-defendant only present; (2) with a repeat plaintiff's counsel only present; and (3) with both present.<sup>20</sup>

Table 6. Repeat Player Effect on Disposition Outcomes, Separately and Jointly

	(1) Repeat Defendant Only		(2) Repeat Plaintiff Attorney Only		(3) Both	
100 to 499 employees						
Administrative	-0.0859*	(-2.36)	0.0114	(0.61)	-0.0006	(-0.09)
Awarded	-0.1180**	(-2.59)	-0.0045	(-0.16)	-0.0155**	(-3.29)
Dismissed	-0.0594	(-1.80)	0.0240	(0.61)	-0.1190**	(-3.18)
Settled	0.3430***	(5.26)	-0.0199	(-0.37)	0.1260***	(3.32)
Withdrawn	-0.0798*	(-2.30)	-0.0110	(-0.38)	0.0096	(1.41)
500 to 999 employees						
Administrative	-0.0429	(-0.79)	-0.0228**	(-2.60)	0.2450***	(8.19)
Awarded	-0.0831	(-1.46)	0.0007	(0.02)	-0.0151**	(-2.71)
Dismissed	-0.0326	(-0.77)	-0.0435	(-1.26)	-0.0487	(-1.35)
Settled	0.1630	(1.66)	0.0767	(1.28)	-0.1810***	(-5.82)
Withdrawn	-0.0043	(-0.07)	-0.0110	(-0.31)	-0.0001	(-0.02)
1,000 to 4,999 employees						
Administrative	-0.0495	(-1.21)	0.0037	(0.24)	0.0090	(0.84)
Awarded	0.0087	(0.15)	0.0634	(1.91)	0.0049	(0.60)
Dismissed	0.0160	(0.37)	-0.0224	(-0.74)	-0.0807	(-1.84)
Settled	0.0823	(1.02)	-0.0440	(-0.90)	0.0669	(1.54)
Withdrawn	-0.0575	(-1.52)	-0.0007	(-0.03)	0.0000	(-0.01)
5,000 or more employees						
Administrative	-0.0538	(-1.44)	-0.0082	(-0.80)	-0.0023	(-0.47)
Awarded	-0.0328	(-0.69)	0.0757***	(3.46)	0.0068	(1.39)
Dismissed	0.0341	(0.97)	0.0500*	(2.01)	0.1060***	(5.45)
Settled	0.0402	(0.59)	-0.1310***	(-3.70)	-0.1300***	(-6.61)
Withdrawn	0.0124	(0.34)	0.0140	(0.69)	0.0190***	(4.43)
Observations	797.0000		1249.0000		5816.0000	

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

<sup>20</sup>As a reminder, the two repeat player effects considered in this study are (1) the effect of an employer-defendant appearing before the same arbitrator repeatedly, referred to as the employer-defendant repeat player effect, and (2) the effect of plaintiff's counsel appearing before the same arbitrator repeatedly, referred to as the employee-plaintiff repeat player effect. Appearing in the same arbitration forum repeatedly is not considered a repeat player effect in this study.

There are several surprises in this table. For one, for observations in which the employer-defendant repeat player effect is exclusive, the significance of employer size melts away—at least for Tier 5. However, for Tier 2, the results are more significant than they are when one does not impose the condition of employer-defendant repeat player effect exclusivity. When Tier 2 (100 to 499 employees) employer-defendants appear repeatedly before an arbitrator and plaintiff’s counsel does not, the settlement rate jumps a whopping 34.3% compared to Tier 1 employer-defendants who do the same. Likelihood of an award drops 11.8%. However, dismissals and withdrawals also drop (each less than 10%). While the sample size is small – 797 observations – the implications are intriguing.

When only a repeat plaintiff’s counsel appears in an observation, we see a significant increase in the number of cases resulting in awards for cases involving Tier 5 employees (7.57% as opposed to 1.85% in Table 5). There is a decrease in the number of dismissals (5% as opposed to 11.8%), and roughly 11.3% fewer cases are settled. Considering the rationale experienced counsel might bring to bear in such employment cases, this result is not surprising, about which more will be said below.

When both repeat player effects are at play, we see a striking increase – 10.6% – in the likelihood of dismissal, as well as a 13% decline in the likelihood of settlement.<sup>21</sup>

Given the centrality of repeat player effects in the literature concerning employment arbitration, and how differently (following the lead of the critique in Estreicher, Heise, and Sherwyn (2017)) I have defined them in this study, it is worth turning away from the marginal impact of employer size for a moment to consider the marginal impact of the repeat player effects themselves. The below two tables show the marginal effect of one repeat player flag or the other (not both at once) on Tier 1 and Tier 5 employers.<sup>22</sup>

What immediately sticks out about these results is that they appear to directly contradict Chandrasekher and Horton (2019) with regard to repeat player plaintiff’s counsel. When the repeat player effect for plaintiff’s counsel is present for both the smallest and largest em-

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<sup>21</sup>The comparison made here are to the results in Table 5, where repeat player flags are not specified.

<sup>22</sup>I here deliberately avoid Tiers 2 through 4 because of their smaller sample size—see Table 2.

Table 7. Repeat Player Effect on Disposition Outcomes, Smallest Employers (Tier 1), Flag

	(1)		(2)	
	Repeat Defendant		Repeat Plaintiff Attorney	
Administrative	0.0335***	(4.60)	-0.0018	(-0.30)
Awarded	-0.0518***	(-8.09)	-0.0174***	(-3.44)
Dismissed	0.0021	(0.35)	0.0737***	(10.75)
Settled	0.0190	(1.78)	-0.0542***	(-5.43)
Withdrawn	-0.0027	(-0.65)	-0.0004	(-0.09)
Observations	11,967.0000		11,967.0000	

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

ployers, the marginal impact on awards is negative and the number of dismissals is larger. Both effects are statistically significant at the 1% level. These results directly contradict the premise that a plaintiff's counsel who repeatedly appears before the same arbitrator provides benefits to the employee-plaintiff. It may be that familiarity with the "system" of a given arbitration forum (here, the AAA) provides a benefit—this study does not control for such. However, appearing repeatedly before a given arbitrator does not appear to give the employee-plaintiff an edge. The findings for the repeat player effect for employer-defendants are much less surprising. Awards are down, between 5-7%, at both employer size levels, significant at the 1% level. Dismissals are up, and settlements are also slightly up—all of which comports with what we've come to expect so far.

Table 8. Repeat Player Effect on Disposition Outcomes, Largest Employers (Tier 5), Flag

	(1)		(2)	
	Repeat Defendant		Repeat Plaintiff Attorney	
Administrative	0.0137***	(5.18)	-0.0024	(-1.04)
Awarded	-0.0660***	(-8.79)	-0.0280***	(-4.33)
Dismissed	0.0122	(1.32)	0.1220***	(13.20)
Settled	0.0414***	(3.60)	-0.0875***	(-7.94)
Withdrawn	-0.0013	(-0.26)	-0.0038	(-0.76)
Observations	11,967.0000		11,967.0000	

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

Considering the repeat player effects as continuous variables, not dummy variables, we see

Table 9. Repeat Player Effect on Disposition Outcomes, Smallest Employers (Tier 1), Continuous

	(1) Repeat Defendant		(2) Repeat Plaintiff Attorney	
Administrative	0.0003***	(5.52)	-0.0001***	(-4.22)
Awarded	-0.0054***	(-6.40)	-0.0002***	(-3.76)
Dismissed	0.0004***	(7.24)	-0.0001***	(-3.86)
Settled	0.0044***	(6.20)	0.0006***	(9.89)
Withdrawn	0.0002***	(4.39)	-0.0002***	(-5.07)
Observations	11,967.0000		11,967.0000	

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

that the marginal impact of each successive appearance by either the defendant-employer or the plaintiff-employee's counsel is highly significant and yet extremely small for all outcomes, for both the smallest tier of employers and the largest.<sup>23</sup>

Table 10. Repeat Player Effect on Disposition Outcomes, Largest Employers (Tier 5), Continuous

	(1) Repeat Defendant		(2) Repeat Plaintiff Attorney	
Administrative	0.0002***	(5.73)	-0.0001***	(-3.93)
Awarded	-0.0070***	(-6.85)	-0.0002***	(-3.52)
Dismissed	0.0014***	(7.83)	-0.0001*	(-2.56)
Settled	0.0050***	(6.59)	0.0007***	(10.10)
Withdrawn	0.0005***	(5.36)	-0.0003***	(-5.27)
Observations	11,967.0000		11,967.0000	

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

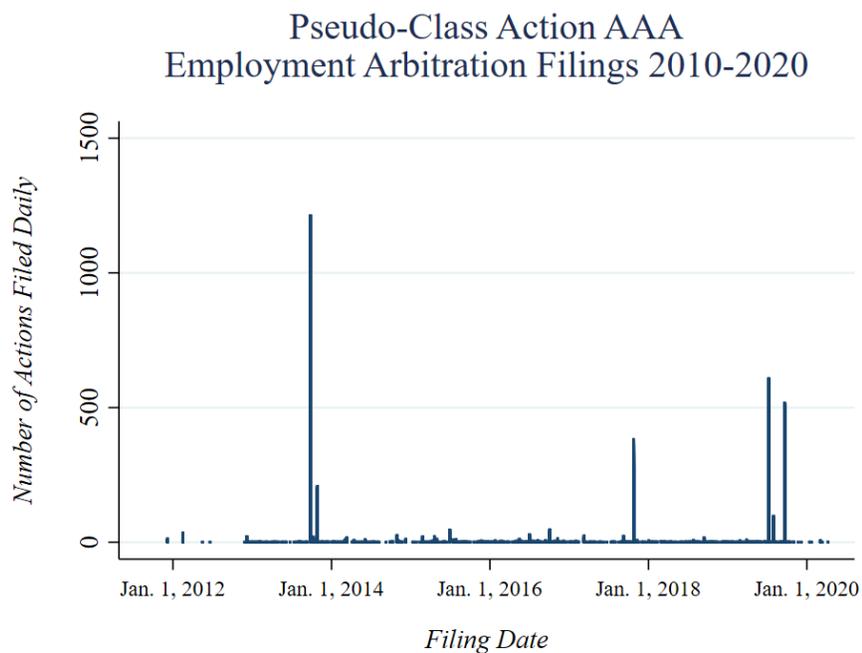
Given that this dataset focuses exclusively on MAA-governed employment arbitrations, it is worth contemplating the impact that the *Epic Systems* ruling might or might not have had on disposition outcomes. Sadly, the number of post-*Epic Systems* observations in this dataset is too limited to draw any strong conclusions. Extrapolating from what we can observe (see

<sup>23</sup>All the regressions reported in this study were run twice, first utilizing the repeat player effect flags as independent variables, and then utilizing the continuous repeat player variables as independent variables. The differences between each were miniscule at best, and therefore throughout this paper I report results of the regressions utilizing the continuous repeat player effects. Anyone interested in seeing the differences between these regressions may contact the author.

Table 11), it seems possible that the post-*Epic Systems* world might feature more settlements for the largest employers. For now we can only wait for future years to see if this speculation bears fruit.

### *Class-Action Style Cases*

It is worth commenting on the effect of “class-action style” cases, in which a plaintiff’s attorney commences a multitude of individual arbitrations against the same defendant on the same date, thereby attempting to emulate proper class action litigation. There are very few of these attempts found in my dataset, as the below graph makes clear.



Taking an extremely sweeping definition of these attempts – that more than 50 cases brought by the same attorney against the same employer-defendant constitutes a “class-action style” attempt – and dropping these observations from the dataset only somewhat alters the conclusions stated above. The total number of observations drops from 12,043 to 9,205. Most of these observations come from employee-plaintiffs in the \$0-\$100,000 salary range employed/formerly employed by Tier 5 employer-defendants. Only the impact on Tier 5 employers is substantial and significant. Omitting “class-action” arbitrations makes dismissal roughly 6.5% less likely and makes settlement 6% more likely. These findings do not ma-

terially change no matter how we control for different combinations of the repeat player effects.

## 7. Analysis and Avenues for Future Study

The clear takeaway of this study is that employer size has very little impact on employment arbitration outcomes until employer size hits the threshold of 5,000 employees or more, roughly speaking. It is striking how little statistical significance we can derive in outcomes as employer size creeps steadily upwards from 1 to 4,999 total employees per company. Employee size as a continuous variable was not reported in this study but the marginal impact of a given additional employee proves too minuscule to comment on. Nonetheless once we hit the 5,000 plus threshold established in Colvin (2019) we do begin to see significant impacts on employment arbitrations. We see many more dismissals, fewer settlements, and a slightly higher amount of awards.

This study does not establish the “why” of these findings. The survey approach employed in Colvin (2019) and Gough (2020) begins to get at the rationale for these findings, but yields a limited number of observations with all the obvious flaws of self-reporting. This study, while cruder, is of value because insofar as it establishes a pattern of outcomes based on employer size.

One would hope to obtain documentation of HR procedures for a wide array of companies defending themselves in employment arbitration to reach conclusions about the quality of the claims that reach arbitration in the first place. As strongly suggested by Estreicher, Heise, and Sherwyn (2017), it may well be that only the most intractable claims reach the arbitration stage—or, as Estlund (2017) suggests, that there is a chilling effect imposed by MAAs that deters valid claims from advancing to the stage of arbitration to begin with. Without being able to peer within the internal HR procedures of any given company it is virtually impossible to determine why, exactly, the character of arbitration outcomes is so notably different for the nation’s largest companies as opposed to their smaller cousins. In particular, we would like to compare the internal HR processes of smaller employers with

larger employers, to see how similar or dissimilar they may be. Absent such documentation – which may be notably difficult to obtain without what is in legal terms known as “discovery”, i.e., a mandatory turning-over of documentation – it will remain a mystery why employer size functions as it does in the context of arbitration.

It is also worth pausing to note that this study examines exclusively lawsuits held in the “reputable” AAA, governed by it is as by the DPP and arguably the closest alternative to litigation that we can examine. Estlund (2017) strongly suggests that the employee-plaintiff faces a harder slog in less reputable arbitration forums than the AAA and that their disposition outcomes suffer accordingly.

Nonetheless within the allegedly reputable world of the AAA we can see that after crossing a certain line employer size-wise, the employee-plaintiff faces a steeper uphill battle to achieve a positive disposition. That the individual employee-plaintiff, unlikely or unable to join in a class with his or her peers, would face a steep challenge against a sizable employer-defendant is not surprising, even leaving repeat player effects out of the equation. What is surprising, however, is that the employee-plaintiff going up against a employer-defendant in AAA arbitration seems to face equal odds if that defendant employs, for instance, 3,000 individuals as opposed to 300. This study suggests that the potential employee-plaintiff should not be any more deterred by facing a company with 2,000 employees than one with 20, at least as far as cases heard in the AAA are concerned.

An obvious shortcoming of this study is that it looks narrowly at AAA arbitrations over the course of one pivotal decade.<sup>24</sup> Were this study to incorporate JAMS arbitrations over the same time period we might well come to separate conclusions. Another shortcoming of this data is the lack of information on payroll numbers. While I have assumed that it is employee size rather than payroll size that dictates the HR processes of a given company, this assumption may not hold, and future studies should incorporate this data.

The alternate approach taken in this study with regard to defining the repeat player effect,

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<sup>24</sup>Pivotal in the sense that, in this decade, employment arbitration became a more widely accepted substitute to employment litigation.

Table 11. Disposition Outcomes, pre- and post-Epic, Repeat Player Flags

	(1) Pre-Epic		(2) Post-Epic	
100 to 499 employees				
Administrative	-0.0164**	(-2.92)	-0.0208	(-1.56)
Awarded	-0.0132	(-1.43)	-0.0027	(-0.37)
Dismissed	0.0137	(1.02)	-0.0089	(-1.12)
Settled	0.0116	(0.67)	0.0418*	(2.15)
Withdrawn	0.0044	(0.58)	-0.0094	(-0.85)
500 to 999 employees				
Administrative	-0.0087	(-1.05)	0.2350***	(6.54)
Awarded	0.0051	(0.38)	0.0149	(0.84)
Dismissed	-0.0625***	(-4.77)	-0.0074	(-0.61)
Settled	0.0677**	(3.27)	-0.2460***	(-6.66)
Withdrawn	-0.0016	(-0.17)	0.0042	(0.21)
1,000 to 4,999 employees				
Administrative	-0.0143**	(-2.60)	-0.0279*	(-2.23)
Awarded	0.0206*	(2.14)	0.0066	(0.74)
Dismissed	-0.0428***	(-4.16)	0.0093	(0.81)
Settled	0.0458**	(3.05)	-0.0141	(-0.62)
Withdrawn	-0.0093	(-1.57)	0.0261	(1.69)
5,000 or more employees				
Administrative	-0.0171***	(-3.87)	-0.0127	(-1.19)
Awarded	0.0213**	(3.07)	0.0043	(0.74)
Dismissed	0.0697***	(7.64)	0.0153	(1.96)
Settled	-0.0820***	(-6.85)	-0.0338*	(-2.10)
Withdrawn	0.0080	(1.61)	0.0269**	(2.76)
Observations	9461.0000		2506.0000	

*t* statistics in parentheses

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

as suggested by Estreicher, Heise, and Sherwyn (2017), yields surprising results that should be taken seriously even if the rest of the study is found to be flawed or too narrowly focused on the AAA. The eminently reasonable objection that a first appearance before an arbitrator by either party cannot be considered part of a “repeat” effect has not been incorporated by other studies to date. The results of this study differ in notable ways from the rich results of Chandrasekher and Horton (2019). Chandrasekher and Horton (2019) finds statistically significant results for the repeat player effect of employer-defendants in the same forum; by contrast, this study finds significant impacts only for Tier 2 (100 to 499 employees) employers who are repeat players, and no other significant effects (see Table 6). Meanwhile, while the repeat player effect for plaintiff’s counsel is highly significant insofar as the largest employers are concerned, the practical effects cut two ways for employee-plaintiff claimants: repeat playing plaintiff’s counsel yields 7.57% uptick in awards yet also a 5% uptick in dismissals. The settlement rate is down 13.1% in such scenarios. Perhaps repeat playing plaintiff’s counsel are simply determined high stakes gamblers? This would make a certain degree of sense if we accept the rationale advanced by Estreicher, Heise, and Sherwyn (2017) that the most meritorious cases don’t make it to arbitration in the first place, having long prior been settled by internal HR procedures.

An important consideration absent from this study (and from most of the studies contemplated thus far) is the mentality of the attorney who either takes or declines an employment case before arbitration. Estreicher, Heise, and Sherwyn (2017) comments on the thought process of lawyers with regard to case selection thus:

[P]laintiffs’ lawyers are rational actors and typically do not take cases unless they see a significant potential return to warrant their time and effort. They will take cases for settlement purposes that may be relatively weak on the merits but exhibit other characteristics that suggest a prompt resolution. But unless lawyers are directly compensated by the client or third party for their time, the cases they are willing to expend significant time and effort on are likely to be relatively strong on the merits and suggest recovery of substantial damages.

It is possible that the deterrent effect of facing a large employer-defendant in arbitration, along with the minimal legal fees that most employee-plaintiffs are able to pay,<sup>25</sup> put the most capable counsel off of representing employee-plaintiffs in arbitration at all (potentially exacerbating the cycle of outcomes). Clearly, certain repeat-playing plaintiff's counsel have other considerations in mind. A systematic examination of the decision-making of plaintiff's counsel in the arbitration context, beyond Gough (2020), would be of tremendous value.

This study is focused exclusively on the impact of employer size in a sample from one decade within one arbitration forum. The arbitration forum in question may be fairly reputable and committed to public reporting, but it is nonetheless worth bearing in mind that arbitrations are wholly private, unlike litigations, which can be observed by the public. While the AAA has made much information public, much more remains missing—notably case-by-case demographic information. Gender, age, race and all other demographic considerations do not appear in this study. That is because this information is not given in the AAA publicly-available database that was used, and this is an obvious major flaw of the data which undermines this study. We are left to imagine a world in which demographics do not impact of these arbitrations, which seems ludicrous.<sup>26</sup> For instance, do the Tier 5 employers considered here happen to employ a disproportionate number of non-native English speakers? Do women disproportionately appear as plaintiffs in employment arbitration cases against Tier 5 employers?

Despite this flaw, we can be very grateful for the information on the previous salaries of the employee-plaintiff claimants that the AAA provides. Given the tiers we are provided for this variable (\$100,000 or less annually; \$100,000-\$250,000 annually; or \$250,000 or greater annually) we can speculate with some degree of confidence as to the demographics of the groups involved.<sup>27</sup> One of the most significant takeaways from this study is that the disposition outcomes for individuals within a wide range of salaries are not radically

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<sup>25</sup>See also Estreicher, Heise, and Sherwyn (2017)

<sup>26</sup>Even if Gough and Colvin (2020) suggests this may in fact be the case.

<sup>27</sup>It would be best, of course, in the absence of demographic information, if the AAA could make publicly available an even more granular breakdown of salary range. There is surely a substantive difference in the ability of the individual earning \$90,000 per year to retain counsel as opposed to their peer earning less than \$40,000.

different. The entirety of the observations contained in this dataset involve MAAs. It is unlikely that top-flight attorneys would submit themselves to an MAA. But that a notable number of individuals earning at least \$250,000 appear to do so suggests that the practice is widespread, and all the literature on this subject suggests it is more likely to spread than abate.

Another potential shortcoming of this study is that the “dispute subtype” variable, which concerns the specific industry of the employer-defendant, is too granular to be of much use. Perhaps over a much larger dataset we would see significant results. Combining the various subtypes into larger categories yields more concrete and significant results, but this approach begs the question of whether we are potentially overlooking industry-specific effects. In this study, dispute subtype was somewhat surprisingly almost a complete non-factor in determining outcomes, either in its simplified or un-simplified form.

The employment tiers chosen here, while based on Colvin (2019), are arbitrary. LOESS analysis of the number of employees – a continuous variable, not broken into tiers – suggests that above the mean value of this variable (58,118 employees) there is a notable uptick in the probability of dismissals and a notable decrease in the probability of settlements. Above 80,000 employees, more or less, the probability of an award increases. Perhaps a company employing 5,000 employees doesn’t deserve a “top tier” classification—perhaps 60,000 or more employees is the true “heavyweight” category. And perhaps 5 tiers is too many; maybe there are simply “behemoths” and “everyone else”. Experimentation regarding employer tier size is a valid avenue for future research.

What we can say concretely for now is that in the past decade, concerning employment arbitrations arising from disputes governed by a mandatory arbitration agreement conducted in the forum of the American Arbitration Association, employer size was a significant factor only for the largest employers. Repeat player effects were of little impact for smaller employers or the plaintiff’s counsel opposing them. If one defines the repeat player effect as an interaction among individuals (the defendant, the arbitrator, and plaintiff’s counsel) its impact is fairly debatable. It seems, however, that the sheer heft of the largest employers

does come to bear notably on the outcome of employment arbitrations. The reason why that may be is left to future studies.

## References

- Chandrasekher, Andrea Cann and David Horton. 2019. "Arbitration Nation: Data from Four Providers." *Calif. L. Rev.* 107:1.
- Colvin, Alexander JS. 2014. "Mandatory Arbitration and Inequality of Justice in Employment." *Berkeley Journal of Employment and Labor Law* 35 (1/2):71–90.
- . 2019. "The Metastisization of Mandatory Arbitration." *Chi.-Kent L. Rev.* 94:3.
- Colvin, Alexander JS and Mark D Gough. 2015. "Individual employment rights arbitration in the United States: Actors and outcomes." *ILR Review* 68 (5):1019–1042. URL <http://www.jstor.org/stable/24810326>.
- Estlund, Cynthia. 2017. "The black hole of mandatory arbitration." *NCL Rev.* 96:679.
- Estreicher, Samuel, Michael Heise, and David S Sherwyn. 2017. "Evaluating employment arbitration: a call for better empirical research." *Rutgers UL Rev.* 70:375.
- Gough, Mark. 2020. "A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation." *ILR Review* :0019793920915876.
- Gough, Mark D and Alexander JS Colvin. 2020. "Decision-Maker and Context Effects in Employment Arbitration." *ILR Review* 73 (2):479–497.
- LeRoy, Michael H and Peter Feuille. 2002. "Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future." *Ohio St. J. Disp. Resol.* 18:249.