



# Arbitration Agreements in the #MeToo Era

## EXECUTIVE SUMMARY

- Arbitration is an alternative to civil litigation where both parties agree to forgo the option of suing in court.
- Many employment agreements contain provisions under which the employer and employee agree to resolve any future disputes in arbitration.
- Arbitration has advantages for both employers and employees over full-blown civil litigation, including speed, privacy, cost, and flexibility.
- In recent years, #MeToo activists have objected to the resolution of workplace sexual harassment claims in arbitration, claiming that arbitration disadvantages employees and “silences” victims.
- In truth, arbitration affords claimants the same opportunity to pursue monetary damages as trying their cases in court.
- Employees who have agreed to arbitrate claims against their employer may still report wrongful conduct to the police and to government agencies, and they can cooperate fully in government investigations of such conduct.
- Although arbitration proceedings are conducted in a private setting, arbitration in no way prevents claimants from going public with their stories, if they so choose.
- There is no principled basis for legislative bodies to carve out a narrow exception for sexual harassment claims to the federal policy in favor of arbitration.

### ***Background***

Sexual harassment is not a new problem, but in recent years the #MeToo movement has increased public awareness about the issue. One of the fundamental premises of the #MeToo movement is that those who have experienced harassment or assault gain strength from sharing their stories publicly, hearing the stories of others, and knowing that they are not alone.

Many #MeToo activists object to the resolution of sexual harassment claims through private arbitration, arguing that this forum creates a “**veil of secrecy**” that silences women. In response, state and federal lawmakers have introduced a variety of proposals to limit or prohibit mandatory arbitration of sexual harassment claims.

Contrary to the claims of arbitration opponents, however, there is scant evidence that arbitration disadvantages employees or that it in any way “silences” women. In fact, arbitration may, in some cases, provide a more advantageous setting for the efficient resolution of employment-related claims.

### ***What Is Arbitration?***

**Arbitration** is a form of alternative dispute resolution (ADR) in which the parties to a dispute agree to have it resolved without going to court. Like litigation in court, arbitration is a neutral forum that favors neither one side nor the other.

Most arbitrations are handled by the American Arbitration Association (AAA), by JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.), or by some other professional arbitration provider. These associations require adherence to well-established rules to ensure fairness and due process.

In an arbitration, as in civil litigation in court, the parties present evidence and arguments to a neutral fact-finder at a hearing. Arbitrations are typically presented to a single arbitrator or panel of arbitrators selected by agreement of the parties. (Many arbitrators are retired judges or attorneys with expertise in a particular subject matter).



***Arbitration is a form of alternative dispute resolution in which the parties agree to resolve their disagreements outside of court in a private, more informal, proceeding.***



Unlike civil litigation in court, arbitration does not require compliance with formal rules of evidence, is conducted in a private setting and is, generally, less-costly and more efficient than full-blown litigation in court.

After hearing from both sides, an arbitrator issues a decision. (Arbitrators are different than mediators in that they possess the authority to issue a ruling, rather than simply encourage settlement.) The arbitrator’s decision is final and almost always binding. Arbitration decisions can be enforced in court and are overturned only occasionally.

Parties can agree at the beginning of their relationship to resolve any future disputes between them in arbitration. Although arbitration agreements do not preclude claimants from filing criminal charges or from filing complaints with government enforcement agencies, once signed an arbitration agreement requires parties to file any civil claims for monetary damages in arbitration, rather than court.

In recent years, arbitration has gained popularity as a means of resolving employment-related disputes. Some companies have employment policies that apply to any dispute arising in the course of employment. Other companies make mandatory arbitration a part of their standard employment agreements.



***In arbitration, rights and remedies remain the same. Only the forum changes.***



### ***The Law of Arbitration***

The **Federal Arbitration Act** (the “FAA”) requires federal and state courts to enforce and uphold arbitration agreements to the same extent as they uphold other types of contracts.<sup>1</sup> The U.S. Supreme Court has held that the FAA establishes a federal policy favoring arbitration for contractual *and* statutory claims.

In a host of cases involving commercial disputes, the United States Supreme Court has held that claims brought to enforce statutory rights are presumed to be included in agreements to arbitrate unless the statute at issue explicitly excludes arbitration.<sup>2</sup> In 1991, the Supreme Court held in ***Gilmer v. Interstate/Johnson Lane Corp.***<sup>3</sup> that claims under the Age

<sup>1</sup> The Federal Arbitration Act provides that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2012).

<sup>2</sup> *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (claims arising from the Securities and Exchange Act of 1933 may be subject to arbitration); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (civil claims arising from the Racketeer Influence and Corrupt Organizations Act may be subject to arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (claims arising from the Sherman Antitrust Act may be subject to arbitration).

<sup>3</sup> 500 U.S. 20 (1991).

Discrimination in Employment Act could be subject to compulsory arbitration. Ten years later, in *Circuit City Stores, Inc. v. Adams*, the Court rejected an employee’s argument that the FAA exempts employment contracts, holding that the exception contained in section 1 of the statute applies only to transportation workers, not all employees.<sup>4</sup>

The use of arbitration clauses in employment agreements has risen dramatically since the Court decided *Circuit City* in 2001. Some experts estimate that more than half of non-unionized, private-sector employers now use mandatory arbitration agreements.<sup>5</sup>

### ***Arbitration and the #MeToo Movement***

Some #MeToo activists argue that arbitration agreements should not be enforceable in sexual harassment cases. In a 2017 *New York Times* op-ed, former Fox News anchor Gretchen Carlson claimed that women are hesitant to report harassment because those that have entered into an employment arbitration agreements have “signed away [their] right to a jury trial.”<sup>6</sup> Carlson also claimed that arbitration clauses “benefit employers” by creating a “veil of secrecy” that keeps other women in the dark and “minimiz[es] pressure on companies to fire predators.” Carlson concluded that “reforming arbitration laws is key to stopping sexual harassment.”

Over the past few years, in response to employee protests, Microsoft, Google, and Facebook have all agreed not to use arbitration to resolve sexual harassment claims.<sup>7</sup> In early 2019, Google announced it would discontinue using arbitration in all employee disputes.<sup>8</sup>



***Arbitration has advantages for both employers and employees: it is faster, cheaper, and more efficient than full-blown civil litigation in court. It also provides employees a chance to voice their complaints in their own words without the limitations of strict evidentiary rules.***



<sup>4</sup> 532 U.S. 105, 109 (2001) (involving claim by an employee that he was being harassed at work on the basis of his sexual orientation).

<sup>5</sup> S&C Critical Insights: Tracy Richelle High and Annie Ostrager discuss Mandatory Arbitration Agreements and Sexual Harassment Claims in the #MeToo Era, SULLIVAN & CROMWELL LLP (June 13, 2019), <https://www.sullcrom.com/sandc-critical-insights--mandatory-arbitration-agreements-2019>.

<sup>6</sup> Gretchen Carlson, *How to Encourage More Women to Report Sexual Harassment*, New York Times (October 10, 2017), <https://www.nytimes.com/2017/10/10/opinion/women-reporting-sexual-harassment.html>.

<sup>7</sup> Samantha Cooney, *Microsoft Won't Make Women Settle Sexual Harassment Cases Privately Anymore. Here's Why That Matters*, TIME (December 19, 2017), <https://time.com/5071726/microsoft-sexual-harassment-forced-arbitration/>; Jena McGregor, *Google and Facebook ended forced arbitration for sexual harassment claims. Why more companies could follow*, Washington Post, (November 12, 2018), <https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/>.

<sup>8</sup> Sarah Ashley O'Brien, *Google Eliminating Controversial Forced Arbitration Practice*, CNN (February 21, 2019), <https://www.cnn.com/2019/02/21/tech/google-mandatory-arbitration/index.html>.

And legislators at both the state and federal level have introduced proposals to limit or prohibit arbitration.<sup>9</sup> Proposals to ban arbitration of sexual harassment claims are based on the twin presumptions that suing in court: (1) allows victims to tell their stories publicly; and (2) subjects harassers (and the companies that employ them) to a dramatic public reckoning.

But is suing in court actually better for victims? And do victims of sexual harassment receive better outcomes in court than in arbitration?

### ***Myths About Arbitration Agreements***

#### **MYTH #1—Arbitration silences victims.**

Unlike court, arbitration proceedings are closed to the public. But while arbitration proceedings are private, they do not necessarily prevent parties from discussing the underlying facts of the case.

Federal law imposes no confidentiality requirements in arbitration.<sup>10</sup> Rule 23 of the **Employment Arbitration Rules** of the American Arbitration Association provides that an *arbitrator* shall maintain the confidentiality of the arbitration unless the parties agree otherwise. Other arbitration associations have similar rules. These confidentiality rules do not bind the parties and do not prevent claimants from sharing their experiences publicly.<sup>11</sup>

Absent separate confidentiality agreements between the parties, claimants may still hold press conferences, give interviews, write articles, author books, and otherwise

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***Arbitration proceedings are private. But, absent a separate confidentiality agreement, parties are free to hold press conferences, give interviews, write articles, and otherwise exercise their First Amendment right to discuss the underlying facts of the case.***  
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<sup>9</sup> In September 2019, the U.S. House of Representatives passed, the Forced Arbitration Injustice Repeal (“FAIR”) Act, H.R.1423, 116th Cong. (2019), which prohibits and invalidates arbitration contracts in employment, consumer, antitrust, and civil rights disputes. On the Senate side, Sen. Lindsay Graham (R-SC) and Sen. Kirsten Gillibrand (D-NY) have introduced the Ending Forced Arbitration of Sexual Harassment Act, S. 2203, 115th Cong. (2017), which carves out an exception from employment arbitration for disputes claiming sex discrimination.

<sup>10</sup> Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28, 32 (2015).

<sup>11</sup> *Id.* at 30-31 (“[a]greeing to arbitrate does not preclude a consumer or employee from disclosing the facts underlying a dispute they have with a business. Nor does it typically preclude a party from disclosing information obtained in the arbitration process or any resulting award.”). See also Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260 (2006) (“A crucial distinction ... must be drawn between the ‘privacy’ of the arbitral proceeding and the ‘confidentiality’ of the proceeding.”); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (“Arbitration is private but not confidential . . . Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the process may become public.”).

exercise their First Amendment right to tell their stories. Arbitration agreements that prohibit the exercise of such rights are generally held to be unenforceable.<sup>12</sup>

By contrast, settlement agreements in court cases usually contain strict confidentiality provisions that are more onerous than the terms of arbitration, which may prohibit discussion of the proceedings, as opposed to the underlying facts.

It is, thus, simply untrue that arbitration silences victims in a way that full-blown litigation does not.

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***Employees who agree to arbitrate their claims may still report misconduct to the police or to government enforcement agencies.***  
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**MYTH #2—Arbitration denies victims “their day in court” and prevents justice from being served.** Arbitration provides an alternate forum for resolving any and all claims that can be pursued in court, including claims for monetary damages. A claim brought in arbitration can reap the same amount of civil damages as a claim filed in court. In arbitration, rights and remedies remain the same. Only the forum changes.

Arbitration agreements do not prevent victims from reporting misconduct to government enforcement agencies or from cooperating with government investigations. An employee who agrees to resolve disputes in arbitration agreement, thus, remains free to file charges of sex discrimination, including harassment, with the Equal Employment Opportunity Commission (EEOC), and the employee can still assist the EEOC with the investigation.<sup>13</sup> And, of course, a victim can always file charges of criminal harassment or sexual assault with the police. The only thing that parties to arbitration agreements cannot do is bring civil claims for monetary damages in court (as opposed to in arbitration).

**MYTH #3—Arbitration agreements are forced on employees against their will.**

Arbitration agreements are like any other aspect of an employment contract.

<sup>12</sup> See e.g., *Larsen v. Citibank FSB*, 871 F.3d 1295 (11th Cir. 2017) (confidentiality provision in an arbitration clause in a bank account holder agreement requiring both parties to keep confidential any decision of an arbitrator was substantively unconscionable); *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), overruled on other grounds by *Kilgore v. KeyBank, Nat’l Ass’n*, 673 F.3d 947 (9th Cir. 2012) (overbroad confidentiality clause is unconscionable under California law).

<sup>13</sup> See *Gilmer*, 500 U.S. at 32 (EEOC is not precluded from seeking classwide and equitable relief in court on behalf of an employee who signed an arbitration agreement); *EEOC v. Waffle House*, 534 U.S. 279 (2002) (an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages in an ADA enforcement action).

Employees who do not like certain aspects of an offered contract are free to take their labor elsewhere. If enough current employees demand changes to the employment agreement, employers will comply. This is the essence of the free market, and it is exactly what happened when employees at **Google** staged a walkout over the issue of arbitration clauses.

**MYTH #4—If there are benefits to arbitration, then we should let claimants select it after a dispute arises, rather than mandate it upfront.** This sounds reasonable, but the reality is that arbitration only works if the parties agree to it while on good terms and before any disputes arise. Once a dispute arises, lawyers have financial incentives to encourage full-blown litigation in court—which takes longer, and, therefore, produces higher fees than arbitration.<sup>14</sup>

Moreover, arbitration only makes economic sense for an employer if it can rely on having *all* disputes resolved in arbitration and can plan for it. Companies that can count on resolving all disputes in arbitration are often willing to shoulder the cost of the arbitration system. It makes economic sense for employers to pay these costs if they can avoid the high costs of litigation in court and the potential for class action lawsuits and runaway juries. If, however, a company has to resolve disputes both in court *and* in arbitration, employers will not agree to fund the arbitration system, as it will provide no overall savings.

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### ***Benefits of Arbitration***

**1. Arbitration is simpler, less formal, less adversarial, and more flexible than full-blown litigation—**The rules of arbitration are less formal than the rules of civil procedure, and the setting is more private and can provide confidentiality to employees who do not want to testify in open court. Arbitration can also provide a neutral arbiter with subject-matter expertise.

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<sup>14</sup> *Justice Denied: Forced Arbitration and the Erosion of Our Legal System, Hearing before the Subcomm. on Antitrust, Commercial and Administrative Law of the H. Comm. on the Judiciary 116th Cong.* (May 16, 2019) (statement of Andrew J. Pincus, Mayer Brown LLP, on behalf of U.S. Chamber Institute for Legal Reform), <https://docs.house.gov/meetings/JU/JU05/20190516/109484/HHRG-116-JU05-Wstate-PincusA-20190516.pdf>

Although #MeToo activists prefer to force all cases to be tried in court, as part of some sort of public reckoning, many victims prefer the private, less intimidating setting of arbitration, which allows them to tell their stories in their own words, rather than face a public and formal interrogation in court.

**2. Arbitration is less costly than full-blown litigation**—Pursuing a lawsuit can be costly. Because employers pay the costs of arbitration when all employees agree to it upfront, it is cheaper for claimants than filing a civil lawsuit in court.

Since trial lawyers usually get paid only if they win, they sometimes turn down cases that are worth little or that are unlikely to succeed at trial. Arbitration makes it easier for claimants in such cases to hire attorneys, since arbitration ensures that attorneys for both sides are paid, irrespective of outcome.

In addition, because arbitration is simpler and less formal, it allows claimants to save even more money by pursuing their claims without an attorney, if they so choose.

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*Prohibiting arbitration agreements may help trial lawyers and advance the social justice objectives of #MeToo activists, but it will not help victims of sexual harassment obtain justice.*

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**3. Claimants are often better compensated in arbitration than in litigation.**

Employees actually win more often and collect more money in arbitration than they do in court. In fact, in a study of more than 100,000 employment cases by **NDP Analytics**, employees whose cases were arbitrated to completion won three times as often as employees who tried their cases to completion in court—32% compared to 11%. The average award in arbitration was \$520,630, compared to \$269,885 in court.<sup>15</sup> Trial lawyers, however, would rather take their chances in court, where one runaway jury can deliver a sky-high windfall.

**4. Arbitration resolves claims more quickly than full-blown litigation**—Civil litigation in court is a complex process. As a result, it often takes longer to resolve cases in litigation than in arbitration. NDP compared cases where employees initiated and prevailed in arbitration during 2014-18 with cases from the same time period where

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<sup>15</sup> Nam D. Pham, Ph.D. and Mary Donovan, NDP Analytics, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 9-10 (May 2019).



employees initiated and prevailed in litigation in federal court. They found that the average employment arbitration case terminated with monetary awards in 569 days from the date of filing, while the average time for litigation to terminate with monetary awards was 665 days—a difference of almost 100 days.<sup>16</sup>

### ***Conclusion***

Many employers prefer arbitration because it avoids the possibility of costly class-action lawsuits. Many employees also prefer arbitration because it can be a more sympathetic forum that allows a claimant the chance to tell his or her story without strict evidentiary rules. Prohibiting arbitration agreements may help trial lawyers and advance the social justice objectives of the #MeToo movement, but it will not help victims of sexual harassment—many of whom would prefer to have their claims resolved quickly, less formally, and without public attention.

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<sup>16</sup> *Id.* at 11-12.