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ILR Impact Brief - Employment Arbitration: Emergence of a New Profession

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ILR Impact Brief - Employment Arbitration: Emergence of a New Profession

Abstract

The ILR Impact Brief series highlights the research and project based work conducted by ILR faculty that is relevant to workplace issues and public policy. Brief #1 highlights the authors' research on employment arbitration, including a survey of the National Academy of Arbitrators.

Keywords

arbitrator, ilr, workplace, conflict, system, employment, profession, disputes, arbitration, law

Comments

Suggested Citation

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For a more in-depth analysis, please see: Picher, M., Seeber, R.L., & Lipsky, D.B. (2000.) [The Arbitration Profession in Transition: A Survey of the National Academy of Arbitrators](#) (Cornell Studies in Conflict and Dispute Resolution No. 3). Ithaca, NY: Cornell/PERC Institute on Conflict Resolution.

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IMPACT BRIEF

BRIEF #1 / FEBRUARY 2006 / ILR SCHOOL / WWW.ILR.CORNELL.EDU

Employment Arbitration: Emergence of a New Profession

Research question: Is employment arbitration a new profession in the U.S. employment relations system?

Conclusion: The need for neutrals to resolve workplace disputes in the absence of alternative institutions (i.e., collective bargaining) is facilitating the evolution of employment arbitration as a new profession, distinct from that of labor arbitration.

Workplace impact: Employment arbitrators are filling a critical void left by the decline of unionism in the American workplace, the proliferation of statutes aimed at protecting workers' rights, and court acceptance of arbitration as a private forum for interpreting the laws. The federal government has subcontracted its role as referee in balancing the power between employers and employees to independent arbitrators who are increasingly responsible for dispensing workplace justice in non-union environments. Whether these arbitrators will protect statutory rights or show bias in favor of employers remains to be seen.

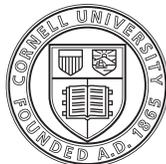
Research abstract: The employment relations system in the United States has been profoundly transformed over the past three decades. Labor unions represent an ever-shrinking share of the workforce and their once dominant role in protecting workers' rights and shaping workplace culture has atrophied. Meanwhile, the number of laws aimed at regulating the workplace has mul-

tiplied, prompting a surge in the number of suits filed (usually by employees) seeking legal interpretation and enforcement of these laws. The courts, under pressure from heavy caseloads and long comfortable with arbitration as a means of settling commercial disputes, have issued rulings that promote the use of private forums to resolve employment-related disputes, including those arising from statutory law. The cumulative effect of all these factors: demand for arbitrators' services in non-union workplaces is growing.

Arbitration has been the method of choice for resolving contract disputes in unionized environments for years. In this system, neutral deciders are jointly chosen by labor and management to serve as agents of the parties and of the government in its statutory role of safeguarding commerce and equalizing bargaining power in the workplace. These neutrals, or labor arbitrators, constitute a clearly identified profession that is delineated by characteristics such as the number of individuals working fulltime as arbitrators, a widely recognized job title, a professional association that sets and advances standards, training programs, a code of ethics, and some amount of political power.

By contrast, arbitration in non-union settings, a.k.a. employment arbitration, has yet to attain the status of a profession. Most employment arbitrators are lawyers, but many do not work full time as neutral deciders. The job title is not widely understood or accepted and no professional association has emerged to set and promote standards. There is minimal consensus on professional qualifications, the content of training programs,

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or what constitutes ethical behavior. Finally, employment arbitration commands little popular or interest group support. The authors of this paper assert, however, that as private dispute resolution becomes more institutionalized in the workplace, these and related issues will be addressed and employment arbitration will eventually become its own profession.

Even as the professionalization of employment arbitration gathers momentum, debate over its role in the workplace will likely continue. Critics of private dispute resolution in the absence of a union note that employment arbitration lacks universally-agreed-upon procedural and ethical standards that would level the playing field between employers and employees. Although arbitration awards should be consistent with public law and can be scrutinized by the courts, debate persists over the principles, values, and codes of conduct that would guide employment arbitrators. Employment arbitration is typically created and controlled by employers, and this unilateralism raises concerns, particularly among labor arbitrators and plaintiffs' lawyers, about due process, the scope of awards, and the possibility of arbitrator bias.

Many labor arbitrators are choosing not to play in this new forum. The decision by these veteran neutrals to opt out has opened the field to new entrants, particularly women, minorities, and younger arbitrators. Two distinct pools of workplace arbitrators are thus evolving: a relatively homogeneous cohort of older males who have long served the union contract arbitration sector and a more heterogeneous group, including many with legal training, that may be well suited to dealing with the types of discrimination claims that underlie the majority of workplace disputes. It is too soon to assess whether these new actors in the non-union employment relations system are proving to be effective protectors of workers' rights.

Methodology: The authors surveyed 599 members of the National Academy of Arbitrators, with a 77% response rate.

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