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Resolving Individual Labour Disputes

A comparative overview

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10. United States

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10.1. Introduction

Over the last half-century, the United States has developed an increasingly complex web of mechanisms for resolving individual labour and employment disputes. During this period, the percentage of the private sector workforce represented by unions, protected by the "just cause" provisions established by a collective bargaining agreement, and using private labour arbitration to enforce these protections, has dipped significantly. The vast majority of workers are now "at-will" employees. But, as unionization declined, an increasing number of statutory rights were granted to workers, such as guarantees of minimum labour standards or prohibitions on discrimination, and these have been the source of a large number of legal disputes. These statutes often exist at multiple levels – federal, state and local – and many establish a new administrative mechanism to enforce the rights they create. Aggrieved workers can often also enforce these rights directly in the federal or state courts. In part owing to the high volume and costs of litigation, employers are increasingly establishing private mechanisms within the workplace to resolve disputes, such as mediation programmes, and requiring workers to pursue any still unresolved claims through private employment arbitration.

This chapter seeks to unpack this complicated institutional structure by describing how its components function and interrelate, with a particular focus on some of the more uniquely American aspects of the system. An initial attempt will also be made at evaluating the performance of these various mechanisms in resolving disputes. To this end, the chapter will be guided by the "efficiency", "equity" and "voice" framework developed by Budd and Colvin (2008, pp. 460–466), while also adding an "access" dimension.

The chapter proceeds in three sections. Section 10.2 sets out the background, discussing the general labour and employment law landscape of the United States, the

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changing nature of employment relations, and the specific laws and institutions that will be covered here. Section 10.3 analyses and evaluates the performance of the various dispute resolution mechanisms – administrative agencies, the courts and private dispute resolution mechanisms – and how alternative dispute resolution (ADR) is being used in conjunction with each of these. Section 10.4 summarizes and offers some concluding reflections on the analysis that precedes it.

10.2. Background

Context and recent trends

Employment at will

The default rule governing employer–employee relations in the United States, which now covers the vast majority of private sector workers, is "employment at will". Under this principle, employers are free to terminate employment for a good reason, a bad reason or no reason at all; similarly, employees are free to end an employment relationship without providing a reason. This backdrop is essential to understanding the limited types of legally actionable employment claims that may arise and the mechanisms for dealing with them. While there was a period when it seemed that some state courts were willing to chip away at employment at will, there is little evidence of the continuation of any such efforts. Today employment at will remains firmly in place in the United States.

There are, however, a few important exceptions to the employment-at-will rule. The first arises where a contractual agreement modifies the obligations of employers and employees. The most common example is where a union has negotiated a "collective bargaining agreement" (CBA), essentially a collective contract, that includes a "just cause" provision – meaning the employer may discipline or dismiss an employee only where good cause exists. Individual employees who are not union members may also have contractual restrictions on or attached to the termination of their employment, such as guaranteed severance. But such terms are generally limited to higher-level executives who have the leverage to negotiate the terms of their employment.

The second large exception to employers' freedom in their treatment and dismissal of employees originates in federal, state and local statutes. The primary such limit is found in prohibitions on employers engaging in discrimination based on protected characteristics, such as race, gender, age, disability or union membership, or discriminating against workers who engage in "concerted activity" to improve their terms or conditions of work. Generally, the statutes that prohibit discrimination on these bases also make it illegal for employers to retaliate against individuals who complain about illegal discrimination. In addition, there are statutes and regulations at all levels that establish certain minimum labour standards, such as rules on minimum wages, working hours and overtime, and health and safety standards. These laws too generally prohibit employers from retaliating against employees who complain about violations of the rights guaranteed in these statutes. Finally, although this falls outside the scope of the present chapter, it should be noted that civil servants and other public sector employees enjoy certain employment protections that private sector employees do not.

The changing employment landscape

In recent decades, several significant changes to the nature of the economy and workforce have had direct impacts on the landscape of labour dispute resolution. One major trend is the steady decline since the 1950s in the percentage of workers, particularly in the private sector, who are represented by a labour union. Whereas nearly one-third of the workforce was once unionized, by 2012 only 11.3 per cent of the total workforce and 6.6 per cent of the private sector workforce was unionized and enjoyed the corresponding "just cause" protections (Weil, 2014, p. 254). Moreover, employers generally fight very hard to oppose any attempt by unrepresented workers to form a union.

While employers seek to evade the costs and obligations that unionization would bring, they are also fighting to avoid the costs imposed by the increasing statutory protections that apply even to non-unionized workers. Specifically, employers are engaging in a wide variety of practices to escape establishing formal employment relationships with workers and thus also the corresponding legal obligations and risks. For instance, where an employment relationship exists, an employer must pay certain payroll, social security and unemployment taxes; must purchase workers' compensation insurance; may be required to provide health care; can be sued for discrimination; must pay overtime in certain situations; and may need to offer certain medical or sick leave. Thus, the incentives to avoid establishing these relationships are substantial. One method of achieving this has been for companies to treat workers as "independent contractors" instead of company "employees". By "misclassifying" these individuals as essentially self-employed, the company avoids the aforementioned obligations and risks, generally to the detriment of the worker. The public and Government also lose out on significant tax revenue as a result of such misclassification.

While "misclassification" seeks to make workers into nobody's employees, large companies have also been finding ways to make more and more individuals somebody else's employees. David Weil has used the term "fissuring" to describe this trend of employers engaging in subcontracting, franchising and outsourcing arrangements to avoid establishing direct employment relationships (Weil, 2014). As an illustration, a 500-person financial company (Company A), instead of hiring additional employees to clean its offices, may choose to pay a cleaning company (Company B) to provide this service. In turn, the cleaning company might then subcontract the work to Company C, which is essentially one man with a car, some cleaning supplies and the two or three people he hires to perform the work alongside him. If these cleaners were employed by Company A they would be eligible for certain benefits and protections that Company C, owing to its small size, is not obliged to provide. These smaller, less-capitalized employers are also less likely to comply even with those regulations that do apply to them; and, if they get caught, they are better able to evade the enforcement of any judgment against them. The same logic applies in the franchising model: the workers flipping hamburgers are not employees of the international corporation whose name appears on the restaurant, but employees of a small company that may own and operate just one or two outlets.[1]

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[1] David Weil (2014) provides numerous, detailed examples of how employers are using these various arrangements to evade their legal responsibilities. Cynthia Estlund (2008) also discusses this "contracting-out" phenomenon and employers' economic motivations for it.

Another common technique is for companies to contract with a staffing agency, which provides the company with "contract workers" or "temporary workers" while remaining the sole legal employer of these workers. In August 2014, over 2.87 million workers were employed through temporary agencies (NLRB, 2015). In response to these trends, worker advocates are seeking to use the "joint employment" doctrine to hold the larger companies and franchisors liable for any illegal behaviour. They have had some initial successes and there is likely to be more litigation of such issues in the future.[2]

Terminology and scope

It is important to note at the outset that the terms "labour law" and "employment law" have distinct meanings in the United States. The former refers to the field of collective labour relations or what is termed "industrial relations" in some jurisdictions – essentially issues concerning unions and their relationships with employers. This includes union elections and recognition issues as well as the rules governing strikes, lockouts and collective bargaining. Accordingly, the term "labour disputes" generally refers to disputes concerning these issues. Once there is a CBA in place between a union and employer, disputes concerning the interpretation or violation of that collective contract are usually called "grievances". Disputes concerning the discipline or termination of a union member allegedly in violation of the CBA are often termed "individual grievances". Basically, all other laws governing work and the workplace comprise the field of "employment law", and all corresponding disputes are termed "employment disputes".

To keep this chapter with a manageable compass, not all dispute resolution institutions available to all workers are covered. First, this study is limited to private sector employees, who comprise about 84 per cent of the total workforce in the United States. Second, like other chapters in this book, this one does not address collective labour disputes, such as those relating to union recognition or collective bargaining. Third, given the large number of laws governing various aspects of the employment relationship and with the potential to give rise to disputes, this chapter focuses on some of the more common types of claims and the corresponding mechanisms for processing them. Specifically, this chapter examines: discrimination against individuals for engaging in "concerted activity" protected by federal labour law; individual grievances by unionized employees alleging unfair treatment; claims of illegal discrimination; claims of

[2] The joint employment doctrine acknowledges that more than one entity can be the legal employer of a worker and thus liable for violations of labour or employment rights. The precise test of whether an entity is an employer varies under different statutes, but generally turns on the extent to which the entity in question exercises control over the worker. In a recent, controversial decision (*Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (27 Aug. 2015)), the NLRB restated its standard for what constitutes "control": it is not limited to actual control exercised over workers, but also includes control exercised "indirectly" through an intermediary, or the fact that a company has reserved the authority to exercise control. Courts have also showed some openness towards considering franchisors as joint employers under the wage-and-hour laws (Blum and Pfitsch, 2014; *Cano* v. *DPNY, Inc.*, 287 FRD 251 (SDNY 2012)).

illegal wage-and-hour practices; and claims of retaliation for complaining about discrimination or wage-and-hour violations. Finally, given the plethora of employment laws and administrative mechanisms in the various states and even cities, this study confines itself to examining the federal and New York State systems.

Legislation and dispute resolution mechanisms

Labour law and related mechanisms

The primary labour law statute in the United States is the federal National Labor Relations Act 1935 (NLRA). There are also similar statutes that govern specific industries, such as the railroads. A good portion of the NLRA addresses collective disputes concerning traditional industrial relations subjects that fall outside the scope of this chapter. However, there are parts of the Act that do give rise to individual disputes. In particular, section 7 of the NLRA gives employees the right to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection", and section 8(a)(1) makes it an "unfair labor practice" (or "ULP") for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7". These provisions protect workers from retaliation not only for activities that are overtly union-related, but also for other forms of concerted activity, such as complaints to employers about working terms and conditions (including wages or discrimination), or the act of filing a complaint with an agency or court concerning these issues.[3] No private right of action exists for violations of the NLRA. All alleged violations must be filed as a "charge" with the National Labor Relations Board (NLRB), a federal agency. Many states, including New York, have comparable legislation for entities that might not be covered under the federal law.

Where a union and employer have concluded a CBA, there is generally a "labour arbitration" mechanism in place – which involves private arbitration by a neutral individual agreed to by both union and employer – to process alleged violations of the CBA. This mechanism may be used for both general disputes between the union and employer and individual grievances concerning the alleged discipline or dismissal of a specific worker without "just cause". It is important to note that the right to challenge such an employer action belongs to the union; the worker is generally not a party to the CBA and thus lacks the authority to initiate a grievance.[4] Arbitrators' decisions can only be appealed on a very limited set of grounds, such as a violation of due process; challenging the decision on the merits is extremely difficult.

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[3] As Benjamin Sachs (2008) has analysed, such claims of retaliation for protesting illegal workplace conditions can often be brought under either the anti-retaliation provisions of employment law or the NLRA, sec. 7.

[4] Under the NLRA, the union member can file a "duty of fair representation" claim with the NLRB to challenge the union's handling of their case, but such claims are outside the scope of this chapter.

Anti-discrimination law and related mechanisms

Title VII of the Civil Rights Act 1964 was the first major federal statute to prohibit discrimination specifically in the employment setting.[5] Specifically, Title VII forbids employers from making discriminatory employment decisions on the basis of race, colour, religion, national origin or sex. Since then, numerous other statutes have been enacted to prohibit discrimination on other bases, such as pregnancy, age and disability.[6] In addition to prohibiting discrimination, all or almost all of these statutes also prohibit retaliation based on filing a complaint of discrimination pursuant to the given statute.

The Equal Employment Opportunity Commission (EEOC), a federal government agency, is responsible for enforcing Title VII and most of the other federal anti-discrimination statutes.[7] Individuals alleging illegal discrimination or retaliation are generally required first to file a complaint with the EEOC before they can go to court. The EEOC has also developed a wide body of regulations, guidance and memoranda of understanding that interpret these statutes and set forth its enforcement policies.

Federal law poses no bar to states issuing additional anti-discrimination protections, procedures and remedies, and many states have enacted such laws. New York State has passed its own law prohibiting discrimination in employment, the New York State Human Rights Law 1945 (NYSHRL),[8] and established a state agency to enforce it, the New York State Division of Human Rights (NYSDHR). New York City too has its own legislation, the New York City Human Rights Law, and body for enforcing it, the New York City Commission on Human Rights.

While there is certainly some overlap in the coverage of the federal, state and local statutory schemes, they also differ in some important ways. For instance, Title VII applies only to employers with at least 15 employees, whereas the NYSHRL applies to any employer with over four employees. The state and city laws explicitly prohibit discrimination based on sexual orientation, criminal background and other categories not specified in Title VII. Claims under Title VII must first be filed with the EEOC and this must be done within 180 days (or 300 days in New York). However, claims under the state or city law may be brought to the relevant agency within one year of the discrimination, or alternatively the complainant can entirely bypass the agency and file in court at any time within three years of the alleged discriminatory act. Moreover, the remedies available under the various statutes differ, including the funding of lawyers'

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[5] Employees may also bring claims for racial discrimination pursuant to 42 USC, sec. 1981, which was originally passed as part of the Civil Rights Act 1866 and prohibits discrimination based on race in the formation of contracts. Unlike claims under Title VII, such claims are not subject to a minimum threshold for employer size, are filed directly in court and may hold individuals liable.

[6] These statutes include the Pregnancy Discrimination Act 1978; the Age Discrimination in Employment Act 1967; the Americans with Disabilities Act 1990; and the Family Medical Leave Act 1993.

[7] In addition to Title VII, the EEOC website (www.eeoc.gov) lists seven other statutory provisions prohibiting discrimination that the agency is responsible for enforcing.

[8] NY Executive Law, art. 15.

fees for successful plaintiffs. Accordingly, while these various schemes make "forum shopping" possible for sophisticated claimants and lawyers, they may also create great confusion for less sophisticated individuals.

It is important to appreciate the particular significance of these anti-discrimination protections in an at-will employment system. A discrimination claim is usually the only legal claim available to a non-union employee who feels mistreated by their employer. The result is that employees, lacking any other option, may try to label many forms of unfair treatment as illegal discrimination. Although the precise extent of this phenomenon is contested, undoubtedly there are some legally frivolous claims brought against employers – such as where a supervisor may have grossly mistreated an employee but there is no evidence that it was motivated by race, sex or another impermissible reason. Staff at administrative agencies enforcing discrimination statutes often offer this explanation for the seemingly low number of complaints deemed to be meritorious.

Wage-and-hour law and related mechanisms

At the federal level, the Fair Labor Standards Act 1938 (FLSA) is the primary piece of wage-and-hour legislation, setting a minimum wage and overtime standards, establishing record-keeping requirements and prohibiting retaliation for complaining about violations of the statute.[9] At the state level, the New York State Labor Law 1921 (NYLL) regulates similar areas. In addition to claims for unpaid wages or underpayment of wages, "misclassification" disputes are also generally brought under these statutes. This is because these claims assert that the employer incorrectly classified the workers as independent contractors and thus failed to pay them the overtime premiums to which they are entitled as employees. In another variation of such claims, the employer incorrectly classifies an employee as performing a job that makes him "exempt" from the overtime requirements, such as being in an "executive" or "administrative" position. These various types of misclassification claims have been one of the largest sources of wage-and-hour cases in recent years.

The US Department of Labor (USDOL), and specifically its Wage and Hour Division (WHD), is charged with enforcing the FLSA. Similarly, the Division of Labor Standards in the New York State Department of Labor (NYSDOL) is responsible for enforcing the wage-and-hour provisions of the NYLL and related implementing regulations. Both USDOL and NYSDOL may investigate an employer's compliance either in response to a complaint or on their own initiative. Under either federal or state law, workers are also free to file claims directly in court. Both federal and state laws also authorize various forms of injunctive relief, including the reinstatement of retaliation victims.

As with discrimination, there are important differences between the various wage-and-hour statutes, including the actual minimum wage (the New York minimum

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[9] There are also federal wage-and-hour statutes specifically addressing migrant workers (the Migrant and Seasonal Agricultural Workers Protection Act 1983) and dealing with work on government-funded projects or work for the federal Government (such as the Davis–Bacon Act 1931 and the McNamara–O'Hara Service Contract Act 1965).

wage is higher than the federally mandated one), statute of limitations (six years under the NYLL and two or three years under the FLSA) and, until recent legislative amendments, the "liquidated damages" available upon proving a violation.[10]

Courts

Many of the rights granted under the abovementioned statutes may be enforced through the federal and/or state courts. Both the federal and New York court systems have a set of procedural rules which will have an impact on the manner in which these claims are processed – including the time needed to resolve the case, the requirements for a plaintiff to initiate a case, evidentiary rules, and rules governing class or collective actions. The most relevant such rules in the federal system are the Federal Rules of Civil Procedure and Federal Rules of Evidence. In the federal system, individual courts or even judges may also have their own individual rules governing certain deadlines or the discovery of evidence. In the New York State courts, these issues are governed by the New York Civil Practice Law and Rules.

As both federal and state law are common law systems, the case law established by appellate federal and state courts is a critical source of law. In addition to clarifying the substantive law, the case law also shapes important procedural matters, including but not limited to exceptions to statute of limitations requirements and evidentiary burden-shifting schemes. Often the best way to access and understand the case law on an issue is through the "restatement" for that particular area of law, which essentially synthesizes the case law and sets out the pertinent principles or rules of law.

10.3. Analysis and evaluation of mechanisms

This section analyses the following types of dispute resolution institutions: administrative agencies responsible for discrimination and retaliation claims; administrative agencies (or the inspectorate) responsible for wage-and-hour claims; the courts; and private dispute resolution mechanisms, including labour arbitration pursuant to CBAs, internal mechanisms in non-union workplaces and mandatory employment arbitration. The ways in which ADR is being used in conjunction with each of these mechanisms is also considered.

In evaluating and comparing this diverse set of institutions, it is useful to adopt a common set of questions. Budd and Colvin have developed a framework that they argue can be applied to a wide variety of labour dispute resolution processes, including

[10] Under the FLSA, when it is determined that an employer has underpaid an employee, the employee is entitled to an additional amount of liquidated damages in an amount equal to the underpayment, unless the employer can demonstrate the underpayment was made in "good faith" (19 USC, sec. 260). Previously, the NYLL entitled employees to an additional payment of liquidated damages in the amount of 25% of any underpayment where the employee could prove the violation was "willful"; but a 2010 legislative amendment then made the state law provision basically identical to the FLSA one (NYLL, sec. 198).

court litigation, labour arbitration and employers' internal mechanisms. Their model has three dimensions: efficiency; equity; and voice. Efficiency means the "effective use of scarce resources" and relates to the mechanism's cost, speed and promotion of productive employment. Equity is defined as "fairness and justice" and is characterized by unbiased decision-making, effective remedies, consistency, reliance on evidence, opportunities for appeal and protections against reprisal. Voice is the worker's "ability to participate and affect decision-making" in the process. Voice is characterized by established procedures for hearings, representation by advocates and the use of experts, opportunities for input into the design and operation of a dispute resolution system, and participation in determining the outcome (Budd and Colvin, 2008, pp. 460–466). These dimensions will be used as a rough guide for the analysis and evaluation of the various mechanisms that follow. This chapter also includes (or at least makes more explicit) an additional element of particular relevance: access. This dimension is concerned with how readily workers can take advantage of a particular mechanism.

Administrative agencies handling discrimination claims

NLRB: Agency with exclusive jurisdiction

As noted above, workers who are discriminated or retaliated against for engaging in concerted activity are not provided with a private right of action by the NLRA; only the NLRB may prosecute such claims. Nonetheless, the victim of discrimination or virtually any other individual or entity can file a charge alleging a ULP to prompt an investigation. The charge form need not even include the employee's name, and the content describing the alleged violation can be very simple. Charges can even be filed online. An NLRB agent will then perform an investigation into the alleged violation, which will probably include contacting the employer and taking affidavits from workers.

If the NLRB, through its General Counsel, finds sufficient evidence to support the charge, efforts are made to settle the claim. If there is no settlement, the General Counsel issues a "complaint" against the employer and takes on the role of the representative of the charging party. A hearing then occurs before an administrative law judge (ALJ), whose decision can be appealed to the Board itself in Washington, DC, and afterwards to the federal Court of Appeals and Supreme Court of the United States. If, however, the General Counsel does not issue a complaint, the case is over; there is no appeal from the decision not to proceed.

The NLRB performs relatively well in terms of access and efficiency, decently in terms of equity, but less well on voice. The lack of any filing fees, or the need for a lawyer, and most Board offices' commitment to providing translation services make the NLRB process quite accessible. The absolutely minimal requirements to file a charge, and the broad range of individuals or entities that may file it, also increases access. Allowing parties other than the discriminatee to file a charge may also help to prevent retaliation in some cases. To this end, the NLRB also has a useful practice of keeping confidential the identity of witnesses or employees who cooperate in its investigation or provide affidavits until it absolutely must be revealed. One shortcoming in terms of access is that undocumented workers who experience discrimination may not be awarded back

pay under the NLRA.[11] This severely restricts the usefulness of this mechanism for a significant group of vulnerable workers.

In terms of equity, the NLRB may only assess "make-whole" remedies, such as reinstatement and back pay, and "informational remedies", such as requiring the employer to post a notice promising not to violate the law. The NLRB may also seek injunctive relief from a federal court (a "10(j) injunction") to compel an employer to take (or stop) a certain action – for instance, to stop engaging in certain coercive behaviour or to reinstate an employee. The NLRB reports that the agency obtained 2,729 offers of reinstatement, of which 1,999 were accepted, and recovered US$109.7 million in back pay for workers in 2013.[12] Even in cases where reinstatement does not occur, the threat that an employer will need to reinstate an employee can translate into a greater willingness to pay damages. Nonetheless, many argue that the absence of liquidated or punitive damages, or compensatory damages beyond back pay and benefits, means that employers are not deterred from violating the NLRA. Further, the limited monetary damages available may also cause some employees to shy away from the NLRB. For instance, if a worker sued for retaliation in court pursuant to the FLSA, he would be entitled to back pay and an additional 100 per cent of that amount in liquidated damages, as well as costs and lawyers' fees. For this reason, when the alleged retaliation is illegal under both the NLRA and the FLSA, some advocates will choose to file the charge in federal court, or perhaps file at the NLRB and later bring a case in court to obtain the extra damages. Looking at the whole dispute resolution system together, this is obviously not the most efficient use of resources.

Turning to efficiency, the NLRB is generally quite successful at resolving a large number of the disputes filed there and doing so in a reasonable time. Although the promptness of proceedings depends somewhat on the leadership and investigators in the particular office, the NLRB often starts its investigation shortly after a charge is filed and therefore may issue a complaint fairly quickly. This allows the Board to show the employer that it is committed to pursuing the case and that there is likely to be a remedy at the end, which can help to induce settlement. Indeed, in fiscal year (FY) 2014, the highest percentages of ULP charges were withdrawn (36.4 per cent), resolved through settlement or adjustments (36.2 per cent) or dismissed (25.3 per cent); only a small remainder (2.1 per cent) were adjudicated and resulted in orders by the Board.[13] As shown in table 10.1, though, the percentage of cases resolved through settlement has fallen somewhat over the last decade. In the cases that are not settled, if the employer chooses to run the full length of the process, resolving a claim may take a very long time and not necessarily be faster than litigation in court. But this did not happen often:

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[11] *Hoffman Plastic Compounds Inc.* v. *NLRB*, 122 SCt 1275 (2002) (holding that individuals not legally authorized to work in the United States may not be awarded back pay under the NLRA).

[12] NLRB, *Reinstatement offers*, available at: www.nlrb.gov/news-outreach/graphs-data/remedies/reinstatement-offers [accessed 19 Apr. 2016].

[13] NLRB, *Disposition of unfair labor practice charges in FY14*, available at: www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/disposition-unfair-labor-practice-charges [accessed 19 Apr. 2016].

Table 10.1. Filing of ULP charges with NLRB and outcomes, 2004–14

Fiscal year	ULP charges brought (no.)	Settlements		Complaints issued	
		No.	%	No.	%
2004	26 890	10 632	39.5	1 840	6.8
2005	24 720	9 722	39.3	1 373	5.5
2006	23 091	8 848	38.3	1 272	5.5
2007	22 331	8 149	36.4	1 099	4.9
2008	22 497	8 379	37.2	1 108	4.9
2009	22 943	7 767	33.8	1 166	5.0
2010	23 523	7 696	32.7	1 243	5.2
2011	22 177	6 246	28.1	1 342	6.0
2012	21 629	6 742	31.1	1 314	6.0
2013	21 394	6 573	30.7	1 272	5.9
2014	20 415	6 504	31.8	1 216	5.9

Source: NLRB, Charges *and complaints*, available at: www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints [accessed 19 Apr. 2016].

between 2003 and 2013, the annual number of cases appealed to the federal courts ranged from 16 to 79. The NLRB website does not offer statistics about the extent to which back pay awarded by the Board is actually paid by the employer, but this has been a problem in many cases handled by the NLRB and other administrative agencies.

The NLRB, like many agencies, does not score particularly well on worker voice. The Board investigates all charges itself and complaints are brought in its own name. While some Board agents may seek input from workers or their advocates, and workers may need to testify at an evidentiary hearing, workers do not exercise any control over the process – including how the charge is investigated, what discovery is obtained, or what strategy will be employed at the hearing. Even decisions about settlement technically belong to the Board, not the workers. Similarly, if an employer fails to comply with an order to pay back pay or take some other action, only the Board may seek enforcement of that order.

NYSDHR: Agency process as alternative to court

In pursuing discrimination claims under the NYSHRL, complainants may file either with the NYSDHR or in court. However, once they file with the agency, they may no longer bring the claim in court. After the NYSDHR receives a complaint, the agency will investigate the allegation of discrimination through written inquiries, field visits, investigatory conferences and other methods. The agency will then determine whether or not there is probable cause to believe a discriminatory act has occurred. If probable

cause is found, a public hearing before an ALJ will be scheduled in which an agency lawyer or representative will present the case. A recommended order is prepared and sent to the parties for comment; then the NYSDHR commissioner either dismisses the complaint or issues a finding of discrimination, in which case injunctive relief (to cease and desist the discrimination or take other action), damages and/or back pay may be ordered. If there is no finding of probable cause, the complaint is dismissed. The employee may appeal that dismissal to a state court within 60 days. Similarly, an employer may appeal the commissioner's finding of discrimination and the related order to a state court within 60 days.

The NYSDHR provides a good illustration of how the same agency, under the same legal regime, can operate with radically different levels of efficiency. The NYSHRL directs (but does not legally mandate) that case investigations are to be completed within 180 days of the filing of the complaint and hearings are to be concluded within 465 days of the filing of the complaint. Yet an audit of the agency's performance on cases filed between 1999 and 2004 revealed that 73 per cent of the closed cases took more than 180 days to investigate and those that went to a hearing took over six years to resolve on average (Hevesi, 2006, p. 4). At the end of FY 2010/11, roughly 55 per cent of cases under investigation were still more than 181 days old, 31 per cent of cases that went to a hearing were over two years old, and the median time taken to process a case was 287 days.[14] However, the NYSDHR reported in November 2014 that the backlog of 2,188 "aged cases" that existed in spring 2012 had since been eliminated (NYSDHR, 2014). For FY 2014/15, over 86 per cent of investigations were completed within 180 days, over 69 per cent of hearings were completed within 465 days, and less than 8 per cent of hearing cases were over two years old.[15]

The agency's success in reducing its backlog and processing cases faster is attributed primarily to better organization and efficiency, more resources for increased staffing and overtime hours, and an emphasis on mediation and settlement. This increase in efficiency does not appear to be the result of simply dismissing more cases. Statistics on case dispositions from 2008 to 2015 are fairly consistent: during the investigation stage, the NYSDHR either dismissed a claim or issued a "no probable cause" finding in roughly three-quarters of cases, settled between 11 and 15 per cent of cases, and issued a probable cause finding in 8–13 per cent of cases.[16] There was, however, a substantial rise in the number of settlements at the hearing stage: 61 per cent of the cases concluded at this stage in FY 2009/10 were resolved through settlements, and this proportion increased to 70 per cent for FY 2010/11 and 72 per cent for FY 2014/15.[17]

The phenomenon of significant fluctuation in agency resources under different government administrations is also well illustrated by the New York City counterpart

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[14] NYSDHR, *Annual Report FY 2010–2011*.

[15] NYSDHR, *Annual Report FY 2014–2015*. While these statistics encompass the variety of discrimination claims handled by the NYSDHR, generally over 80 per cent of the NYSDHR's cases each year involve employment discrimination (NYSDHR, *Annual Reports*, various years).

[16] NYSDHR, *Annual Reports*, various years.

[17] NYSDHR, *Annual Reports*, various years.

of the NYSDHR – the New York City Commission on Human Rights. In the past two decades, this agency's payroll went from a high of 152 City-funded employees down to just 11, a drop of more than 90 per cent. Yet in February 2015 the City Council announced plans to increase the Commission's funding by US$5 million (Legal Services NYC, 2015). These huge variations in resource and staffing levels inevitably have a significant impact on the agency's ability to tackle discrimination.

EEOC: Agency process as a prerequisite to action in court

Most discrimination claims under federal statutes must first be filed with an administrative agency, the EEOC, before they may be filed in federal court. Upon the filing of a charge, an investigator is appointed and the employer notified. Some cases are deemed to lack merit and dismissed almost immediately. For the rest, many EEOC offices will invite the parties to take part in a voluntary mediation process. The idea is to mediate the claim early before the parties have invested significant time or resources. (The EEOC mediation programme is analysed in the next subsection.) If the case is not successfully mediated, an investigation will take place in which both parties will be asked to provide information relating to the claim. The EEOC reports that the investigation process takes on average nearly ten months.[18] Upon completion, the EEOC will determine whether or not there is "reasonable cause" to believe illegal discrimination occurred. If there is not, the charge is dismissed and the employee is notified that they have 90 days to file a claim in federal court. No "reasonable cause" is found in the vast majority of cases. For instance, the EEOC resolved nearly 64,000 charges filed under Title VII in 2015, with 67 per cent resulting in a "no reasonable cause" determination and an additional 16 per cent being withdrawn by the complainant (without receiving any relief) or closed by the agency for administrative reasons.[19]

Where the EEOC determines that "reasonable cause" exists, it may choose to litigate the alleged violation against the employer in federal court. However, before doing so, the EEOC is statutorily required to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion".[20] Therefore, both parties will be notified of the determination and the parties will be invited to "conciliation" – a voluntary process resembling mediation. The EEOC reported that its conciliation success rate in FY 2014 was 38 per cent (James, 2015). Where conciliation is unsuccessful, the EEOC's limited resources restrict the number of such cases that it can then litigate. In FY 2014, the agency received over

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[18] EEOC, *What you can expect after you file a charge*, available at: www.eeoc.gov/employees/process.cfm [accessed 19 Apr. 2016].

[19] EEOC, *Title VII of the Civil Rights Act of 1964 charges*, available at: www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm [accessed 19 Apr. 2016].

[20] 42 USC, sec. 2000e–5(b). The Supreme Court recently clarified that this requires the EEOC to inform the employer about the specific allegation, which it typically does in a letter announcing its "reasonable cause" determination, and to "try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice" (*Match Mining, LLC* v. *Equal Employment Opportunity Commission*, 135 SCt 1645 (2015)).

88,000 charges (under all statutes) but filed only 133 lawsuits in federal court (EEOC, 2014, pp. 26–27). If the EEOC will not litigate the case, the employee is issued a "notice of right to sue" – commonly called a "right to sue letter" – and may bring a lawsuit in federal court within 90 days.

In evaluating the EEOC on the dimension of access, one shortcoming is that Title VII simply does not cover certain employers (those with under 15 employees) or types of discrimination claims. Another issue is that while the mediation programme is quite successful in resolving charges (see below), very few of those that are not resolved and get investigated actually result in a "reasonable cause" finding by the EEOC, let alone prosecution by the agency. The agency reports that only 16.5 per cent of Title VII charges filed in 2015 resulted in a "merit resolution", meaning the charging party obtained a favourable outcome.[21] Therefore, given the long time it takes for a claim to be investigated by the EEOC and the low likelihood of it being pursued by the agency, unless the employer is likely to accept voluntary mediation and resolve the case, some see filing at the EEOC as a time-consuming obstacle in their path to federal court. One good EEOC practice is that the agency will generally provide a "right to sue" letter to an employee who requests it, even if the charge was filed less than 180 days earlier. This helps reduce the time claimants must wait before they can start litigation. In practice, however, most claimants who file at the EEOC will not continue on to court. Sherwyn, Estreicher and Heise reported that "even though there are anywhere from 75,000 to 150,000 discrimination cases filed under federal statutes with the EEOC each year, of the EEOC cases terminated in 2003, only 14,877 resulted in any court action" (2005, pp. 1585–1586). That is probably because, while filing an EEOC claim is fairly easy, proceeding in court without counsel is hard (as described below) and finding a lawyer, especially for low-wage claimants, is often difficult. Thus, for many claimants, the EEOC or the comparable state agency may be their only recourse.

EEOC mediation programme

The EEOC programme for mediating disputes prior to conducting an investigation (as opposed to conciliation after a finding of "reasonable cause") has been quite successful. The EEOC reported that in FY 2014, 10,221 (11.5 per cent) of the 88,778 charges filed with the agency went to mediation; of the mediated cases, 7,846 cases (76.8 per cent) were successfully resolved; and US$144.6 million in monetary benefits was obtained for complainants (EEOC, 2014, p. 26). Moreover, 96.4 per cent of participants in the programme reported their confidence in it (EEOC, 2014, p. 26). A much earlier study revealed that over 90 per cent of both complainants and employers who used the mediation system said they would use it again (McDermott et al., 2000).

Several factors seem to contribute to this high rate of success. First, only complaints that the EEOC determines may have some merit will be sent to mediation; the others are weeded out. Second, the process is voluntary, and thus mediation occurs only

[21] EEOC, *Title VII of the Civil Rights Act of 1964 charges*, available at: www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm [accessed 19 Apr. 2016].

when the employer agrees to participate. According to staff in the EEOC's New York City office, while charging parties accept mediation around 90 per cent of the time, employers agree to mediation in only 25 per cent of cases.[22] Third, some defence lawyers report that the EEOC investigation itself can be quite unpredictable and costly to a company, thus making settlement more attractive (Maleske, 2015). Moreover, even if the investigation does not result in a reasonable cause finding, the fact that the plaintiff can still take the case to court also provides incentives for employers to resolve cases through settlement.

An academic study of the EEOC's mediation programme by McDermott and Ervin found that the perceived fairness of the process – which, as noted above, remains high – correlates positively with settlement (McDermott and Ervin, 2005, p. 59). Interestingly, they also found that the presence of a representative (for example, a lawyer) for the charging party reduces the chance of the dispute actually being settled in mediation (McDermott and Ervin, 2005, p. 59). Of course, this does not necessarily mean that including lawyers is a bad thing. For instance, it may be that some complainants without lawyers are being pressured into accepting settlements below the actual value of their case.

In sum, the EEOC's voluntary mediation of meritorious cases has been an efficient means of resolving disputes. Mediation also generally ranks high on the voice dimension, as the worker can participate as actively in the process as he/she chooses and makes all settlement decisions. The high proportion of actual users that expressed a willingness to use the process again also suggests the process is quite equitable. On the other hand, it is worth at least noting that many criticize mediation (in any context) because the process, even if it results in a settlement, never addresses the power imbalances that exist in negotiations between employers and employees.

Administrative agencies (inspectorate) handling wage-and-hour claims

Both the federal and state wage-and-hour schemes involve an administrative agency, or inspectorate, responsible for enforcing the relevant statute – namely, USDOL and NYSDOL. In neither case is there any requirement that complaints first be filed here; workers can go straight to court. However, these agencies are generally more accessible to workers than the courts. Filing with these agencies is free, and the worker need not have a lawyer and need not be very involved in the investigation or handling of the claim.

The federal and state agencies function similarly. Either in response to a complaint or on its own initiative, the agency may investigate the wage-and-hour practices of the employer. In New York, investigators are authorized to enter a place of business and inspect its wage-and-hour records, can require employers to submit written statements and reports about the wages paid and hours worked by employees, and can ques-

[22] Emails on file with the author.

tion employees on these topics (Meyer and Greenleaf, 2011, p. 95). Federal investigators have similar powers. If a violation is discovered, the employer is generally informed of this fact and the amount to be paid. In the state system, if the employer contests the finding or the amount, the employer may appeal NYSDOL's determination to an ALJ. If a hearing takes place, the agency provides its own staff or lawyer to defend the agency's determination. If unsatisfied with that decision, the employer may appeal to the civil court for review on a limited set of grounds. In the federal system, if the employer will not voluntarily comply with the orders resulting from the investigation, the case is passed to USDOL's lawyers, who then bring an action in the federal district court against the employer. The plaintiff in these actions is the agency, not the worker. USDOL may also seek certain forms of injunctive relief, including the seizure of "hot goods" produced in violation of the FLSA and the reinstatement of retaliation victims.

Although these processes are easy to initiate, there are still challenges in getting workers to do so. As David Weil notes, writing in 2014 about USDOL, "[n]ot only are complaint rates low, but they have declined substantially over the past decade … even in the face of worsening conditions" (Weil, 2014, p. 248). Aside from the fact that many low-wage workers are unaware of their rights, even those who are aware remain largely unwilling to file a complaint from fear of retaliation by their employers. This is particularly true of undocumented workers, who fear not only the economic harm of a retaliatory act, but also potential immigration consequences as a result of coming forward (Halegua, 2016).

The inspectorates have sought to combat this problem. For instance, like the NLRB, these agencies permit a third party to file a complaint so that it need not be the aggrieved workers themselves. Both agencies also seek to work in tandem with community groups or worker centres that are more easily accessible to and are more trusted by low-wage workers, particularly immigrants, to encourage wage theft victims to come forward. The agencies also make their own outreach efforts, including in foreign languages. However, there are never sufficient resources to do this adequately. More recently, NYSDOL has made combating retaliation a top priority, promising to prioritize investigation and seek quick resolution of claims in these cases. Another important aspect of the inspectorates' practice is that even in response to a complaint by a single worker, the investigation will generally cover the entire workplace. This is both an efficient use of resources and helpful in keeping the complainant's identity confidential.

The inspectorates' ability to initiate their own investigations allows them to engage in strategic enforcement, such as targeting industries where violations are rampant or performing those investigations that will have the largest impact in an industry or community. Several years back, NYSDOL reported that about 20 per cent of its investigations were of this nature (Meyer and Greenleaf, 2011, p. 95). The author lacks more recent statistics, but NYSDOL has been more proactive when conducting certain targeted campaigns. For instance, in 2015, after a *New York Times* exposé revealed widespread exploitation in the nail salon industry, NYSDOL performed a "sweep" of 395 New York City salons, citing 85 per cent of stores for failing to maintain adequate payroll records and 40 per cent for underpaying employees (Barker and Buettner, 2016). USDOL reports that from 2009 to 2014, the number of investiga-

Table 10.2. USDOL statistics on WHD enforcement work, FY 2010–15

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Complaints registered	31 824	27 112	25 420	25 628	22 557	21 902
Cases concluded	26 486	33 295	34 139	33 146	29 483	27 914
Average days to resolve complaint	142	177	145	110	116	125
No. of employees receiving back wages	209 814	275 472	308 846	269 250	270 570	240 340
Back wages paid (US$ 100 million)	1.76	2.25	2.81	2.50	2.41	2.47

Source: USDOL, *Fiscal year statistics for WHD*, available at: www.dol.gov/whd/statistics/statstables.htm#lowwage [accessed 19 Apr. 2016].

tions it proactively initiated rose from 35 per cent to 43 per cent, and the violation rate discovered in these cases climbed from 65 per cent to 78 per cent (Weil, 2015).

The effectiveness of these agencies in investigating wage claims and obtaining money for workers, though criticized by some worker advocates, is substantial. For low-wage industries, USDOL statistics show some improvement on this front in recent years: whereas the WHD recovered US$57.5 million in back wages for 76,900 workers in FY 2008, it recovered US$79.3 million for 102,000 workers in FY 2015. That represents an increase of more than 32 per cent in back wages paid and an increase of more than 29 per cent in the number of workers benefiting.[23] At least part of the explanation for these increases is the fact that the WHD hired over 300 new investigators in the last five years (Weber, 2014). Statistics from USDOL's website concerning enforcement work by WHD for all statutes under its purview from FY 2010 to FY 2015 are presented in table 10.2.

The most consistent criticism of these agencies, and indeed of most agencies, is the slowness of the process. In schemes where filing with the agency does not foreclose going to court, a critical issue is how filing with the agency affects the statute of limitations for filing a lawsuit.[24] Filing with USDOL, for instance, does not "stop the clock" on the FLSA's already short statute of limitations of two or three years.[25] Accordingly, even if USDOL ultimately brought a lawsuit on behalf of a complainant,

[23] USDOL, *Working for a fair day's pay*, available at: www.dol.gov/whd/statistics/ [accessed 19 Apr. 2016].

[24] For wage-and-hour claims, one can sue only for the wages not paid within the statute of limitations period, not over the whole period of employment.

[25] The statute of limitations is three years in cases where the employer's violations are deemed to be willful.

any time spent during the investigation would be essentially lost. This fact discourages workers from making use of this free administrative process and encourages employers to delay the process once it begins. While USDOL reduced the time it takes to resolve complaints from 177 days in 2011 to 125 days in 2015 (it was as low as 110 days in 2013), as seen in table 10.2, losing over three months' worth of wages is still significant.

NYSDOL also struggles to resolve cases in a timely manner. An audit revealed that as of August 2013, 75 per cent of wage theft cases had been open for more than one year since the initial claim was received by NYSDOL (NYSOSC, 2014, p. 1). NYSDOL has since made some progress in shortening investigations: in FY 2013/14, 67 per cent of new investigations were closed within six months (NYSOSC, 2014, pp. 14–15). But this apparent improvement is at least partially attributable to the agency's decision to investigate only the most recent three years of any claim, not the full six, a decision which many worker advocates have criticized. Unlike the federal law, though, the filing of a complaint with NYSDOL "stops the clock" in respect of the statute of limitations on a worker's claims under state law, and so the investigation time is not "lost" by the worker.

Another difficult area for NYSDOL, and other such agencies, is actually collecting the back wages and fines that it assesses against employers. Many employers find ways to frustrate the enforcement of any order or judgment against them. For instance, employers may keep assets in someone else's name, transfer assets when an investigation or litigation against them commences, or declare bankruptcy to stall collection efforts. Generally, the longer the dispute resolution process takes, the more opportunities an employer has to engage in such practices. Some employers will thus object to and appeal any determination against them while hiding their assets; others virtually ignore the case against them and focus on making themselves judgment-proof. Further, NYSDOL has limited resources to expend on seeking out employers' assets or collecting the monies found to be due to workers. Table 10.3 shows the proportions of assessed damages that NYSDOL could not recover from 2005 to 2009. Several New York legal aid organizations discovered that over US$101 million in wages determined by NYSDOL

Table 10.3. Monies assessed and unrecovered by NYSDOL, 2005–09

	Total assessed (US$)	Unrecovered	
		US$	%
2005	13 637 494	3 243 105	23
2006	16 964 600	9 991 027	58
2007	23 939 717	10 801 874	45
2008	26 589 033	7 204 915	27
2009	45 608 966	25 338 643	55

Source: Meyer and Greenleaf, 2011, p. 144.

to be owed by employers during the decade from 2003 to 2013 went unpaid (UJC, LAS and NCLEJ, 2015, p. 5).

The potential for these administrative processes to drag on for years and the difficulty of actually collecting money demonstrate the importance of resolving such cases early. Both agencies make an effort to do so. USDOL reports engaging in "conciliation" in smaller cases where a formal investigation has not been conducted as well as attempting "settlement" after a formal investigation is complete. NYSDOL also seeks to resolve cases through conciliation, and states that it is increasingly using this method to help resolve cases quickly. Generally, after notice of the violation is sent to the employer, NYSDOL may schedule an informal case resolution conference if the employer requests this. A "compliance officer" from NYSDOL serves as a neutral in the session with the employer and the case investigator. Additional attempts to resolve the case may be made as it proceeds. NYSDOL has also recently announced the creation of a mediation unit to review complaints after they are filed and identify those cases that appear ripe for settlement. Neither USDOL nor NYSDOL has reported using third-party neutrals from outside the agency to aid in this process. There do not appear to be public statistics on the number of cases resolved through these methods.

In sum, like all mechanisms, these agencies enforcing wage-and-hour laws have both strengths and weaknesses. The fact that neither a lawyer nor any money is required to initiate the process makes it more accessible, although outreach can always be more effective. Fear of retaliation remains an obstacle, but complainants have a better chance of remaining anonymous through this process than when filing a lawsuit. The complainant also need not invest much time or effort in the proceedings, and the complainant's co-workers may see violations remedied without taking any action themselves. On the other hand, while the agency may provide the employee with opportunities to express an opinion on how the case is resolved, control over the process and decisions about settlement ultimately belong to the agency – thus limiting voice. The particular determinations, calculations or deals made by the agency may be more or less helpful to different workers. These agencies do identify violations and order payments relatively quickly. But if an employer contests this determination and exhausts its appeal rights, the process is not necessarily any faster than litigation in court.

Courts

While far fewer employment disputes are filed in the federal courts than with administrative agencies, the number of such court cases (over 22,000 in 2013) has grown significantly since the recording of these data began in 1977 (under 7,000).[26] However, official court data show that employment discrimination claims and wage-and-hour claims have had very different trajectories over this period; while the number of wage-and-hour claims has exploded over the past decade, the number of discrimination

[26] The growth in the number of employment cases in federal court between 1990 (8,422) and 2010 (22,478) also outpaced the growth in the size of the civilian labour force in this period from 125 million in 1990 to 153 million in 2010 (Lee and Mather, 2008, p. 4; Bureau of Labor Statistics, available at: www.bls.gov/data/ [accessed 30 Mar. 2016]).

claims has dropped considerably since 1997 (Eigen, Rich and Alexander, 2016).[27] Nonetheless, court litigation still plays a significant role in shaping the dispute resolution landscape for each of these types of claim.

Jurisdiction and process

As a preliminary matter, federal courts are courts of "limited jurisdiction". They may hear only two types of claims: (1) those pursuant to a federal statute, and (2) those where the plaintiff and defendant are from different states (which is slightly less common in employment disputes) and the amount in controversy exceeds a certain sum. However, once the court accepts a claim, courts have a large degree of discretion to also hear any other claims that share a common set of facts. Thus, for instance, if someone brings a discrimination claim in federal court under Title VII, the court will probably also accept the claims of discrimination under state or city law. Similarly, if one's wage and discrimination claims stem from the same period of employment and involve common facts, a court may decide to allow those claims to be pursued in a single case.

Cases are initially filed in a district court – the trial-level court in the federal system. If the case is not settled and a decision is issued, the losing party may appeal to the appropriate Court of Appeals, which must consider the appeal. Thereafter, the losing party may appeal to the Supreme Court, which has discretion as to which cases it will consider and, in practice, hears only a small fraction of the matters appealed to it.

State courts, by contrast, are courts of "general jurisdiction", meaning they will hear claims under local, state or federal statutes. In New York City, claims are directed to different state courts depending on the amount in dispute: the small claims court for those of US$5,000 and under, the civil court (US$25,000 and under) and the supreme court for higher amounts. (In New York State, the "supreme court" is the trial court and the Court of Appeals is the highest court.) As a general rule, as one goes higher in the chain, the complexity of the procedures involved and the time taken to resolve a case both increase.

Neither the federal nor the New York State court system has any specialized labour courts. A federal judge's caseload is likely to include a full range of criminal and civil cases. State courts are sometimes more specialized, but a judge handling civil cases is still likely to deal with a wide range of matters. This system naturally lacks some of the efficiencies of specialized labour courts in which the judges are intimately familiar with labour and employment issues.

Performance and evaluation

Litigation in the United States is often characterized as a "high risk, high reward" system: that is, it is not easy to sue or prevail in court, but the awards to successful plain-

[27] The number of discrimination claims began to climb after passage of the Civil Rights Act 1991 and peaked in 1997, with 23,392 cases filed in that year. By 2013, though, this number had dropped by over 30% to just 15,108 cases. By contrast, the number of FLSA cases (wage-and-hour suits) climbed at a slow rate from 634 in 1977 to 1,786 in 2000, but then increased dramatically, reaching 7,226 cases in 2013 – nearly five times the number in 1997 (1,490) (Eigen, Rich and Alexander, 2016).

tiffs are often far larger than those in other forums. Court litigation performs relatively well on measures like fairness and justice owing to the thorough nature of the process – including extensive fact discovery and trials according to strict rules of evidence. The fact that virtually everything that happens in court, and all of the court's decisions, are entirely transparent also helps disputants to see the process as fair. Court litigation scores highly in terms of voice because the employee maintains control over the process. Decisions about how to conduct discovery, trial and settlement ultimately belong to the plaintiff.

In terms of outcomes, some studies have compared employment discrimination cases litigated in court with those handled through private employment arbitration (described in more detail below). In an experiment in which actual labour arbitrators, employment arbitrators (selected from the roster of the American Arbitration Association) and jurors evaluated various hypothetical employment discrimination scenarios, labour arbitrators and jurors were more likely to rule in favour of the employee than were employment arbitrators (Klaas, Mahony and Wheeler, 2006, pp. 88–90).[28] Looking at actual cases, Colvin found that the employee win rate was higher in trials in federal courts (36.4 per cent) and in state courts (59 per cent) than in private employment arbitration (21.4 per cent) (Colvin, 2012, p. 470). Moreover, in the cases that plaintiffs win, the median award is higher in court than in arbitration: US$150,500 in federal court, US$296,991 in California state courts and US$36,500 in employment arbitration (Colvin, 2012, p. 470). This is not to suggest that prevailing in court in discrimination cases is easy. Federal judges report that their colleagues have grown less supportive of employment discrimination claims and more focused on finding ways to dismiss them (Bennett, 2012–13, p. 686; Gertner, 2012). Many such claims will be dismissed "as a matter of law" at the motion to dismiss or summary judgment stage – essentially a determination by the judge that no reasonable juror could find in favour of the plaintiff – and thus will never be heard by a jury. Indeed, the difficulty of prevailing on discrimination claims in court, which usually requires proving the intent and thus mental state of the employer, is one key reason why plaintiffs' lawyers now prefer bringing "comparatively more winnable" wage-and-hour actions that "are based on simpler legal inquiries" (Eigen, Rich and Alexander, 2016). However, as the number of wage-and-hour cases rises, there is some initial evidence that these cases, like discrimination cases, will come to be seen as "nuisance type claims" (Eigen, Rich and Alexander, 2016). Unfortunately, at present, less empirical research has been done on how wage-and-hour claims fare in the courts and other forums.

The weaknesses of the courts as a dispute resolution mechanism include the barriers to entry, the complexity of the processes and the length of the process. Unlike administrative agencies, most courts have filing fees – the current filing fee in

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[28] Generally, in court trials, it is the jury that makes factual findings relating to liability, such as whether discrimination occurred, and relating to damages, such as the appropriate compensation for a plaintiff's emotional distress. The judge oversees the trial process and decides any questions of law. The plaintiff can waive his right to a jury trial, in which case the judge both decides questions of law and serves as the finder of fact.

federal court is US$350. While the amounts are not high, and the fee may sometimes be waived (if one is familiar enough with the procedures to find out how to achieve this), they may still be significant enough to deter a low-wage worker who has not been paid or has lost his or her job. Court procedures, particularly in federal court and higher-level state courts, are also complicated and therefore lengthy. One study found that state and federal employment discrimination cases generally took around two years to reach adjudication (Budd and Colvin, 2008, p. 473). Another study determined that the average time from the filing of a court complaint until trial was 709 days in federal court and 818 days in state court (Colvin, 2012, p. 470). One very important caveat to the above statistics, however, is that very few cases actually go to trial; virtually all of them will be dismissed or settled before that point. For instance, federal district court statistics show that for no category of employment cases did more than 3.1 per cent of the cases terminated between March 2014 and March 2015 go to trial.[29] A study focusing on federal court wage-and-hour claims filed between 2000 and 2011 shows that over 80 per cent of cases were resolved through settlement and under 2 per cent went to trial (Alexander, n.d.).[30] Moreover, many cases never make it to court because the threat of litigation alone is enough to compel the employer to reach a settlement.

Legal representation

The court process is difficult for most employees to navigate without legal representation. While some parts of the United States, New York among them, have a sizeable pool of lawyers who will represent employees, representation is not always easy to find for workers. Many underpaid or dismissed workers cannot afford to pay a private lawyer on a per-hour basis for the work needed to litigate their case. Lawyers will take some discrimination and wage cases on a contingency basis, but only if the evidence is strong. Moreover, some argue that for employees earning under US$60,000 per year, it often does not make economic sense for a lawyer to handle their discrimination cases (St Antoine, 2008, p. 791). One estimate is that only 5 per cent of employees alleging discrimination and seeking a private lawyer are able to obtain counsel (St Antoine, 2008, p. 790). Not surprisingly, it is managers or professionals, rather than lower-level workers, who file most discrimination claims in court (Dunlop Commission, 1994, p. 50).

Workers with wage claims, even small ones, may fare slightly better. These claims are generally more straightforward to prove, particularly as the employer bears the burden of maintaining and producing accurate time and pay records. Moreover, liquidated damages equal to 100 per cent of the underpayment are available to successful plaintiffs in most cases. Indeed, some lawyers in New York City – mostly in small firms or sole practice – are willing to litigate a case in which the underpayment is only US$5,000 or

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[29] United States Courts, *Table C-4—U.S. District Courts–Civil federal judicial caseload statistics (Mar. 31, 2015)*, available at: www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2015/03/31 [accessed 19 Apr. 2016].

[30] Charlotte Alexander has collected 55,014 federal court cases that involve FLSA claims and randomly selected a sample of 1,010 to study. This work has not yet been published, but Alexander shared her initial results with the author.

so, and perhaps willing to attempt to negotiate a resolution of claims worth even less (Halegua, 2016). One factor that could prevent a lawyer from taking such a case is a perception that collection will be difficult. And it is low-wage workers – who are often employed by smaller, more informal enterprises – who face the greatest risk of being unable to enforce any judgment they receive. A 2015 report identified court judgments in 62 New York cases, involving 284 low-wage workers and over US$25 million, where employers had not made the payments due (UJC, LAS and NCLEJ, 2015, p. 4).

The potential for "fee shifting" in most discrimination and wage-and-hour cases also provides some encouragement for lawyers to take cases with small damages. The default rule in the United States is that each party bears its own legal fees and costs. But for most federal workplace discrimination claims, and both federal and state wage-and-hour claims, a successful plaintiff is to be awarded a reasonable amount in legal fees, based on prevailing hourly rates and the time reasonably expended by the lawyer.[31] Therefore, even if the plaintiff is entitled to only a small damages award, lawyers can still be fairly compensated for their litigation work. Indeed, there are several examples of cases in which the lawyers' fees award has exceeded the damages.

There are also some alternatives to private legal representation. Legal aid offices, which are generally funded by a combination of government and private funds, provide legal advice and sometimes representation. Unions may sometimes pay for or provide their own lawyers to represent workers in certain cases, particularly when the litigation is somehow connected to an organizing campaign. In addition, worker centres are becomingly increasingly common – one study counts 214 such centres nationwide (Milkman, 2014, p. 2). Janice Fine describes worker centres as "the inverse of prototypical American unions" as "[t]hey are non-bureaucratic, grass-roots organizations with small budgets, loose membership structures, [and] improvisational cultures and strategies" (Fine, 2007, p. 341). These centres generally seek to organize and empower workers through a variety of means, one of which may be litigation (Halegua, 2016). But even in the few cities where legal aid offices and worker centres are relatively numerous, a large number of workers still are never able to obtain legal representation.

Aggregate litigation

Another solution to the representation problem is the use of collective mechanisms that allow multiple workers to litigate their claims together in a single case. There are at least three procedures for bringing "collective claims" or "aggregate litigation" in the courts. The first and most basic is "joinder", in which the claims of multiple plaintiffs that raise similar factual and legal questions are simply joined together in a single case. Each claim is still technically separate and must be individually proven with its own

[31] While fee-shifting provisions in civil rights and employment statutes are generally "one way", a prevailing employer in a Title VII case can also be awarded legal fees where the plaintiff's claim is "frivolous, unreasonable, or without foundation" (*Christiansburg Garment Co.* v. *EEOC*, 98 SCt 694, 700 (1978)). But these claims by employers, which if routinely granted could discourage plaintiffs from bringing discrimination claims, are generally disfavoured by the courts and rarely granted.

evidence. Nonetheless, consolidating these claims into one case does achieve certain efficiencies.

The next two mechanisms – "opt-out" class actions and "opt-in" collective actions – involve formal representation structures. In the former, a court may certify the existence of a "class" of plaintiffs if it determines that the questions common to the class predominate over the individualized inquiries, thus making the class action format superior.[32] All individuals who meet the class criteria are automatically included in the class and their claims adjudicated through the litigation, unless they choose to "opt out". The class is represented by one or more plaintiffs serving as "class representatives" and the lawyers for the class. This procedure can be used for NYLL claims as well as federal, state or local discrimination claims. Instead of class actions, the FLSA permits only "collective actions", in which employees must affirmatively "opt in" to the case. The legal standard and procedure for the establishment of the collective group is similar to that in a class action – namely, the plaintiffs must all be "similarly situated" but need not be "identical". The outcome of the case is binding only on those individuals who chose to opt in.

These procedures essentially allow for economies of scale in litigation. There are many instances in which it does not make economic sense for a worker or a lawyer to litigate the claim of a single employee, but it *is* worthwhile to litigate that claim on behalf of several dozen or several hundred employees. For example, this may be true in cases where women throughout a company are paid less than their male counterparts but only by a small amount, or where factory workers are not paid for the few minutes they spend each day taking their protective uniforms on and off. This ability to pool resources also makes litigation possible in complex cases that might entail significant costs, such as retaining expert witnesses. Another advantage to the workers is that they are unlikely to be required to participate actively in the case, for example by appearing for depositions, negotiating settlements or appearing at trial; the lawyers and class representatives generally handle these matters. The lower level of involvement by workers in these cases may also limit the likelihood of retaliation by an employer, particularly in an "opt-out" class action, where the worker is included in the case without taking any affirmative step. For these reasons, class and collective actions are very important tools for vindicating employees' rights, particularly among low-wage workers.

Settlement conferences and ADR

As noted above, only a fraction of cases filed in federal and state courts will actually proceed to a trial. While judges dismiss some claims prior to trial, in the remainder the parties generally reach a settlement. The courts may facilitate settlement through a variety of methods with differing degrees of formality. At the informal level, the judge may hold a settlement conference to try to resolve the case. Practice differs as to whether this process is mandatory, whether the parties or only attorneys must appear

[32] *Comcast Corp.* v. *Behrend*, 133 SCt 1426 (2013).

at the conference, at what stage in the litigation the conference occurs, and whether the judge administering the case will also conduct the settlement conference.

The federal district court for the Southern District of New York has instituted a mandatory mediation programme for all employment discrimination claims. Even if the parties have previously tried mediation, for example at the EEOC, they are required to participate in at least one mediation session. The reaching of an agreement, of course, is voluntary. Mediators are generally lawyers or professional mediators who volunteer their time. Judges refer cases to the programme shortly after they are filed, and a session is scheduled within 30 days, or 60 days if the party is unrepresented so that counsel for the purpose of mediation can be appointed. The mediators have all received training on both mediation techniques and employment discrimination law. For each year from 2011 to 2014, the percentage of successful outcomes (full or partial settlement) in represented cases was less than that in cases in which counsel was appointed; specifically, these percentages were 42 per cent and 66 per cent in 2011, 38 per cent and 54 per cent in 2012, 45 per cent and 52 per cent in 2013 and 50 per cent and 65 per cent in 2014 (Price, 2014).

In the state court system, a variety of mediation and neutral evaluation programmes are available at courthouses at different levels and locations. There also exist "small claims courts", whose procedures are more akin to employment arbitration than court litigation in some ways: cases are heard not long after they are filed; the hearing may last only a few minutes; there is little to no discovery; and it is less necessary to have a lawyer. In fact, in New York City the small claims courts actually use private lawyers to serve as "arbitrators" to decide many of these cases. However, the judges or volunteer lawyers who handle claims in these courts do not necessarily have much experience in employment law. This may result in these cases being decided according to contract law principles instead of under the employment laws, which contain certain burden-shifting rules and other provisions that favour workers. Further, decisions by these arbitrators may not be appealed. Therefore, while providing a quick means of dispute resolution, small claims arbitration may not be a wise choice for many employment claims. However, it may make sense in some instances, such as those involving genuine independent contractors whose claims do not rely on employment laws and who do not have recourse to the federal or state inspectorates.

The significance of courts in shaping the dispute resolution landscape

It must be noted that even though only a relatively small number of the employment claims made each year are resolved in the courts, the role of litigation in the larger dispute resolution system is still enormously important. In many ways, litigation provides the background that shapes how all other mechanisms are designed, operated and assessed. Employers' fear of litigation – with its high costs and potentially high jury awards – is what causes them to invest in internal mechanisms, use mediation and promote private employment arbitration (Eigen, Rich and Alexander, 2016). Employers will also evaluate administrative agency outcomes or settlement offers in comparison to the likely outcome in litigation. This is why settlement negotiations are said to occur "in the shadow of the law". Accordingly, any significant change in the court process or its outcomes is also likely to cause shifts in other mechanisms. For example, if workers

claiming discrimination find it increasingly difficult to prevail in court, employers may become less willing to settle claims while they are still at the EEOC.

Internal and private mechanisms

Having examined the public dispute resolution mechanisms of administrative agencies and courts, we turn now to examine private dispute resolution mechanisms, specifically: labour arbitration pursuant to a CBA; internal mechanisms being used by non-unionized employers; and mandatory employment arbitration.

Labour grievance arbitration and dispute resolution in unionized workplaces

Collective agreements between unions and employers generally establish a system of private arbitration in which grievances are referred to a neutral decision-maker agreed to by both parties. For a long time, labour grievance arbitration has been celebrated as the "gold standard" of dispute resolution (Budd and Colvin, 2008, p. 466). The most commonly arbitrated issues are discipline, pay and conditions, and work assignments (Lewin, 2014, p. 118). However, the relevance of this institution has declined as the number of unionized workplaces has shrunk. Furthermore, employers and unions have sought to reduce the temporal and financial costs of labour arbitration by simplifying the process and introducing other processes to resolve disputes prior to arbitration.

Of the various forms of private mechanisms, labour arbitration is the most similar to court litigation. And, as with litigation, the fairness and equity of the process have to be set against its relatively high cost and low speed. In labour arbitration, formal rules of evidence generally apply and lawyers are often involved on both sides (Budd and Colvin, 2008, p. 466). One study reports that getting a decision might take up to a year, and the cost can be roughly US$10,000 per hearing (Budd and Colvin, 2008, p. 466). There is also evidence of significant retaliation against workers who file grievances in the one to three years after participating in the labour arbitration process (Lewin, 2014, p. 126).

In their search to reduce the time and money taken up by resolving grievances, unionized employers have generally adopted one of two approaches. The first is trying to resolve cases before they get to arbitration. In fact, according to one study, 12 cases are now settled before even engaging the formal grievance process for every one that enters it (Lewin, 2014, p. 117). Grievance processes themselves now also generally consist of multiple steps prior to arbitration. For instance, some firms have introduced grievance mediation by third parties as a precursor to arbitration (Lewin, 2014, p. 121; Budd and Colvin, 2008, p. 468). Though somewhat dated, a 1988 study of one employer's four-step process showed that almost all disputes were settled prior to arbitration: 60 per cent at the first step (usually a meeting with a manager), 30 per cent at the second step (meeting between a higher manager and a union representative), 7 per cent at the third step (decision by a more senior manager) and only 3 per cent through arbitration (Lewin, 2014, pp. 118–119).

The second approach is to simplify the arbitration process itself. Adoption of a process known as "expedited arbitration", not surprisingly, was found to reduce the

duration of the process by 40–50 per cent (Lewin, 2014, p. 121). "Expedited arbitration reduces costs and fosters faster resolution of grievances by avoiding written briefs; transcripts; perhaps lawyers; and detailed, written decisions" (Budd and Colvin, 2008, p. 468). Data seem to be lacking on how expedited arbitration compares with normal labour arbitration on other measures, such as win rates or participant satisfaction.

In short, labour arbitration, although a private mechanism, shares many similarities with court litigation: it performs well on voice and equity but involves considerable costs, time and complexity. But, as with litigation, the threat of these high costs encourages the parties to settle. Accordingly, if labour arbitration is to be part of a grievance process, it would seem preferable to also provide disputants with faster, more informal methods for resolving individual grievances prior to initiating labour arbitration.

Internal mechanisms for private employers

Private, non-unionized employers have increasingly instituted their own internal dispute resolution procedures. Colvin reports that a majority of non-union workplaces have "some type of standard, systematic procedure ... through which an employee's grievance can be raised and resolved" (Colvin, 2014, pp. 169–170). Estlund argues that the primary motivations for such systems are employers' desires to avoid unionization and the costs of litigation (Estlund, 2014, p. 55). The basic strategy is that proactively offering some form of due process to workers will remove their incentive to form a union. Employers also hope that actually resolving complaints internally will mean less litigation. In addition, while such systems are not legally required, employers who create them may benefit from limits on certain forms of liability in harassment and discrimination cases.[33] Aside from such considerations, employers may also establish such systems in order to increase productivity and prevent conflicts from disrupting the workplace (Colvin, 2012, p. 260).

These dispute resolution mechanisms come in diverse forms and varying degrees of complexity. As Colvin notes, in its most basic version, a company may simply designate a manager to whom grievances should be brought. Others may create a panel of managers to hear grievances, establish management appeal procedures or introduce an ombudsman. In recent years, the complexity of such systems has grown, with some involving third parties, such as mediators and arbitrators. Some have also developed peer review panels in which co-workers of the employee hear and decide cases (Colvin, 2013, p. 264; Colvin, 2014, pp. 170–173).

There are an increasing number of mediation providers, who can be engaged at various stages throughout the dispute resolution process. Two of the better-known providers of these services are JAMS[34] and the American Arbitration Association (AAA),[35] both of which also provide arbitration services. These organizations do not deal exclusively with employment disputes, but have individual arbitrators, mediators and other

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[33] *Burlington Industries, Inc.* v. *Ellerth*, 118 SCt 2257 (1998); *Faragher* v. *City of Boca Raton*, 118 SCt 2275 (1998).

[34] www.jamsadr.com [accessed 30 Mar. 2016].

[35] www.adr.org [accessed 30 Mar. 2016].

neutrals who specialize in this area. In addition to mediation and arbitration, they also offer other similar processes, such as early neutral evaluation. With the decline of unionization and the growth of employer-designed mechanisms, these private, third-party providers are becoming increasingly important players in the employment dispute resolution landscape.

In terms of efficiency, the general perception is that these internal or private processes are faster and less costly than alternatives such as litigation. As for equity, in those mechanisms that involve a decision being made about the dispute, Colvin reports that workers' win rates are actually quite similar whether the decision-maker is a high-level executive within the company (such as the vice-president of human resources or the chief executive officer) or someone outside the company (such as an employment arbitrator) (Colvin, 2014, p. 179). However, workers filed more grievances – in other words, used these processes more – when the decision-maker was a non-managerial employee, such as a panel of peers or outside arbitrator (Colvin, 2014, p. 180).

The degree of voice achieved depends on the specific procedures used. Some interesting research has been done on how the general work environment in an enterprise can influence the number of disputes that arise in the first place. For instance, Colvin has found that companies with "high involvement work systems" – including high levels of training, and employee participation in workplace operations and decision-making (for example, through working in teams) – experienced less workplace conflict and lower grievance rates (Colvin, 2014, p. 180).

There is much support for the use of mediation as part of a dispute resolution system. There is far less agreement about how a mediation programme should be designed. For instance, in their review of the research on workplace mediation, Latreille and Saundry note that some studies find, despite the frequent emphasis on the voluntary character of mediation as one of its virtues, that voluntary and mandatory mediation actually achieve the same level of success in resolving cases (Latreille and Saundry, 2014, p. 193). Opinions are also divided on the value of representation in the process: some findings show it makes parties feel the process is more fair, but others argue that participation by representatives increases formality, which is antithetical to the whole process (Latreille and Saundry, 2014, p. 193). When mediation should occur is also an unresolved matter – too early, and the parties may not be ready to settle; too late, and the parties' positions may have hardened, making settlement more difficult (Latreille and Saundry, 2014, pp. 197–198).

Mandatory employment arbitration

The use of private employment arbitration by non-unionized employers has been growing for several decades now and the practice remains highly controversial (Silver-Greenberg and Gebeloff, 2015a). It must be noted at the outset that private employment arbitration is not monolithic; a variety of forms exist. The form that is most prevalent and most contentious, and on which this section primarily focuses, is "mandatory arbitration". This is where employees are forced to consent to an arbitration policy when they accept an offer of employment, usually either by signing a contract to this effect or by agreeing to the policies set out in an employee handbook. The agreement gener-

ally requires that the employee resolve any and all future claims against the employer, including any statutory claims for discrimination or otherwise, through private arbitration that is final and binding. This means the claimant may not concurrently or subsequently bring an action in another forum, and the decision may only be appealed to a court on very limited grounds. Thus, "mandatory arbitration" is to be distinguished from cases in which executives engage in negotiations with an employer over an individually tailored employment contract that may ultimately contain an arbitration provision, and from a situation in which a union voluntarily agrees to process disputes through a system of labour arbitration that it has a say in designing. It is also significantly different from instances in which a dispute has already arisen and the employee voluntarily agrees to resolve it through arbitration.

Some 15 years after the introduction of employment arbitration agreements, Colvin and others estimate that roughly a quarter of non-unionized workers are covered by these agreements (Colvin, 2012, p. 469; Fair Arbitration Now, 2015). These agreements may be most prevalent in states such as California, New York and Texas, presumably owing, at least in part, to the perceived threat of litigation in those states (Colvin, 2015). But employers nationwide, from national chains to storefront shops to families hiring domestic workers, are requiring employees to sign these agreements (Silver-Greenberg and Gebeloff, 2015a, b). Proponents of employment arbitration often stress its efficiency and accessibility: the procedure is simple; there are no procedural barriers to entry; legal representation is not required; the process is fast; cases get decided on their merits instead of being dismissed on summary judgment; and the process can be less adversarial than protracted litigation. Sherwyn, Estreicher and Heise also stress that employment arbitration is frequently only the final stage in a multi-step process designed to settle disputes amicably through mechanisms such as mediation, and that these systems should be evaluated as a whole (2005, pp. 1565–1566).

The critics of mandatory arbitration, some of whom call it "justice lite", object to the institution on many grounds, primarily focusing on the involuntariness of the agreement and due process concerns about the procedure. More specifically, Sherwyn, Estreicher and Heise identified four common arguments against employment arbitration: it "(1) does not allow for the development of the law; (2) is private and does not provide for public accountability; (3) is unfair to employees because it can be expensive, limit damages, reduce the statute of limitations, alter the burden of proof, allow for untrained arbitrators to decide cases, limit discovery, and is biased in favor of employers; and (4) is the product of contracts of adhesion and unequal bargaining power" (2005, p. 1563). Another major criticism, discussed further below, is that many arbitration agreements also prohibit employees from bringing a class or collective action. A recent, multi-part investigative report by the *New York Times*, which examined 25,000 arbitration decisions from 2010 to 2014 in 35 states, found support for many of these criticisms and provides compelling anecdotes illustrating them (Silver-Greenberg and Gebeloff, 2015a, b).[36]

[36] The cases studied did not solely concern employment disputes. Mandatory arbitration clauses are being used in many contexts and are particularly prevalent in consumer contracts.

In terms of the legal challenges to employment arbitration, the Supreme Court has upheld the validity of these mandatory contracts so long as certain due process requirements are met.[37] Specifically, these agreements may not "prevent the 'effective vindication' of a federal statutory right".[38] The Supreme Court explained that this standard "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would *perhaps* cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[39] Thus, simply eliminating a statutory claim is forbidden, and several federal appellate courts have invalidated agreement provisions that eliminate a specific remedy, such as punitive damages.[40] Beyond that, the precise bounds of the due process requirements for arbitration are less than clear. In practice, except in extreme cases, the federal courts have been reluctant to invalidate arbitration agreements on due process grounds, generally pointing to the "'liberal federal policy favoring arbitration agreements'".[41]

As for the functioning of employment arbitration, there are now a few empirical studies evaluating its performance (Klaas, Mahony and Wheeler, 2006; Colvin, 2008, 2011; Silver-Greenberg and Gebeloff, 2015a, b). In terms of the efficiency of employment arbitration, proponents and critics seem to agree that it is on average faster than litigation (Budd and Colvin, 2008, p. 473; Colvin, 2012, p. 470). Arbitration has also been found to cost less than litigation, at least for employers. Estreicher notes that defending an employment case in court through trial often costs the employer US$200,000 or more, whereas the average cost of an employment arbitration is US$20,000 (Estreicher, 2002, p. 16). Colvin's study of 3,945 employment discrimination cases handled by the AAA found that the mean arbitration fee was US$6,340 per case, and US$11,070 for cases that resulted in a decision; and pursuant to AAA rules for employment cases, the employer paid all of these fees (except a small filing fee) in 97 per cent of cases (Colvin, 2011, p. 9).

Studies have compared win rates and the size of damage awards in employment arbitration with those achieved through litigation, although some question the usefulness of this comparison given that so few court cases actually go to trial. As discussed above, Colvin found that employees obtain higher win rates and larger damages awards in court (Colvin, 2011, p. 7; 2012, p. 470), and the experiment by Klaas, Mahony and Wheeler revealed that employment arbitrators were less likely than jurors to find in favour of plaintiffs in discrimination cases (2006, pp. 88–90).[42] That inquiry

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[37] *Gilmer* v. *Interstate/Johnson Lane*, 111 SCt 1647 (1991); *Circuit City* v. *Adams*, 121 SCt 1302 (2001).

[38] *Am. Exp. Co.* v. *Italian Colors Rest.*, 133 SCt 2304, 2310 (2013) (citations omitted).

[39] *Am. Exp. Co.* v. *Italian Colors Rest.*, 133 SCt at 2310–11 (emphasis added).

[40] *Booker* v. *Robert Half Int'l, Inc.*, 413 F3d 77, 83, 85 (DC Cir. 2005); *Ingle* v. *Circuit City Stores, Inc.*, 328 F3d 1165 (9th Cir. 2003).

[41] *Gilmer*, 111 SCt at 1651 (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 SCt 927, 941 (1983)).

[42] This disparity in damages awards may be partly attributable to the fact that court litigation takes longer, since back pay – a key component of most discrimination awards – is a function of the time between the illegal termination and the issuance of the award.

also found labour arbitrators to be more heavily influenced than employment arbitrators by the presence of mitigating factors favouring the employee (Klaas, Mahony and Wheeler, 2006, p. 89). But other studies disagree. For instance, St Antoine found that the success rate of workers in mandatory employment arbitration was comparable to, and sometimes even higher than, that of union-represented employees in labour arbitration (2008, pp. 795, 811).

Critics attack the equity of employment arbitration on many grounds. One commonly made point is that since employers generally pay for the arbitration, and are repeat players in the system, arbitrators will be biased in their favour in order to be chosen in future cases. The *New York Times* investigation referenced above offers some evidence of this phenomenon, including: interviews with over three dozen arbitrators who described feeling beholden to the company that had appointed them; the arbitrator who awarded US$1.7 million to a plaintiff and was never chosen to hear an employment case thereafter; and an arbitrator who handled 40 cases involving the same management law firm (Silver-Greenberg and Gebeloff, 2015b). Several academic studies also report finding evidence of this "repeat player bias" (Klaas, Mahony and Wheeler, 2006, p. 88; Colvin, 2011, pp. 11–16, 2012, pp. 470–471). Specifically, Colvin's analysis of AAA awards found that where the same employer and arbitrator had appeared together more than once in the data set, the employee win rate and award amount were both lower than in other cases to a statistically significant degree (Colvin, 2011, p. 14). Moreover, the *New York Times* reports finding cases in which arbitrators "twisted or outright disregarded the law" in order to find for the employer (Silver-Greenberg and Gebeloff, 2015a). These equity concerns make the extremely limited scope of court review of arbitration decisions even more troubling. Proponents of arbitration generally doubt that any such bias exists and have questioned the methodologies claiming to have detected bias.

There are also concerns that employee arbitration may not be as accessible as its proponents suggest. One problem is that mandatory arbitration agreements often force employees to waive their right to bring a class or collective action, and the Supreme Court recently upheld the legal validity of such waivers. In *Italian Colors*, the plaintiffs sought to invalidate the class action waiver in an arbitration agreement on the grounds that it stymied the "effective vindication" of their statutory rights. They argued that it was not economically feasible for a single plaintiff to litigate an anti-trust claim on his own because the costs of litigation (particularly, hiring an expert witness) exceeded the potential recovery for any single plaintiff. But the Supreme Court, in a controversial 5–3 decision, disagreed: "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy".[43] Despite widespread criticism of this holding, lower courts have – albeit some of them begrudgingly – interpreted the *Italian Colors* decision to mean that class or collective action waivers in employment arbitration agreements are also legally permissible (Silver-Greenberg and Gebeloff, 2015a). The result of banning class actions has generally not been that plaintiffs file individual arbitration claims instead; rather,

[43] *Am. Exp. Co.* v. *Italian Colors Rest.*, 133 SCt at 2311 (emphasis in original).

"[o]nce blocked from going to court as a group, most people dropped their claims entirely" (Silver-Greenberg and Gebeloff, 2015a). One reason for this may be the difficulty plaintiffs have finding lawyers. While arbitration's proponents stress its informality and accessibility, Colvin's analysis of AAA cases shows that only 24.9 per cent of plaintiffs actually proceeded to arbitration without a lawyer (Colvin, 2011, p. 16). Thus, as plaintiffs' lawyers grow increasingly sceptical about the chances of achieving a positive result in arbitration (Silver-Greenberg and Gebeloff, 2015a), finding a lawyer will become harder and plaintiffs may thus be even more likely to simply forgo pursuing their claims.

In sum, a cheaper, faster, less formal alternative to litigation could theoretically be beneficial to some employees. That said, although some individual plaintiffs may have achieved positive results in employment arbitration (Silver-Greenberg and Gebeloff, 2015b), the system of mandatory arbitration, as it exists today, raises very serious concerns in respect of fairness, equity and access. Further, the movement against mandatory arbitration may be gaining some steam (Silver-Greenberg and Corkery, 2015). The prominent *New York Times* series and subsequent editorial by that paper opposing forced arbitration focused significant attention on the issue. In response to concerns about the expansion and conduct of mandatory arbitration, as well as the Supreme Court's seeming unwillingness to police this field in any meaningful way, some members of Congress have introduced legislation – the Arbitration Fairness Act 2015 – to ban mandatory arbitration in the consumer, employment, anti-trust and civil rights contexts. The legislation would still permit workers to select arbitration *after* a dispute has arisen. The sponsors of the Bill argue that if employment arbitration provides all the benefits that its proponents suggest, then at least some workers should voluntarily choose this route after having had a chance to analyse and weigh the various dispute resolution options. Reforming mandatory arbitration through legislation is not expected to be easy, however, as business interests are likely to oppose such efforts (Silver-Greenberg and Corkery, 2015). The Arbitration Fairness Act 2015 was introduced in both chambers of Congress in April 2015, but as yet has not been passed by either.

10.4. Conclusion

The above discussion reveals the complex, fractured and evolving nature of the individual labour dispute resolution system in the United States. This level of complexity has itself become a significant feature of the system, with important implications. For one thing, it creates a level of inefficiency, as multiple dispute resolution mechanisms may be dealing with the same dispute or aspects of the same dispute. For instance, if a female worker is fired for complaining about improper overtime payments to her work team, it is possible that the NLRB, federal or state inspectorate, EEOC and court could all be simultaneously handling aspects of the dispute. While the existence of multiple access points may benefit workers in some ways, the existence of this wide web of mechanisms with varying jurisdictions can also cause confusion. Further, it increases the importance of having a lawyer, who will be better able to "forum shop" – or at least navigate – among these institutions.

Most of the statutory rights held by employees can be enforced through complaints to an administrative agency. These agencies often control the investigation and dispute resolution process with limited input from the worker, but this may benefit workers who cannot find a lawyer or lack the time to be more actively involved. On closer inspection, there are some important distinctions between these agencies in respect of their rules and procedures, their role in the larger dispute resolution scheme, and their performance. At least part of this variability is attributable to political decisions, including the level of resources and funding allocated to any given agency.

The courts are a crucial piece of the dispute resolution landscape in the United States. Workers face some significant barriers in accessing courts, such as finding a lawyer, but fee-shifting provisions and class litigation mechanisms play some role in mitigating access difficulties. Jury trials are known for being lengthy and costly, but for producing large awards for those employees who win their cases. Accordingly, this process ranks low in terms of efficiency, but performs well on equity and voice. The impact of court litigation, however, spreads far beyond the disputes actually resolved through this means. For employers, the threat of litigation is a key factor in their decision to institute private, less costly and less risky dispute resolution mechanisms. Employees and their advocates also evaluate the performance of administrative agencies, employment arbitration and other mechanisms by how they compare to litigation.

The prevalence of various forms of ADR in the United States has been increasing for some time, and the field of employment disputes is no exception. Public dispute resolution institutions are increasingly making use of ADR processes: the public agencies and courts examined here all use at least some form of conciliation or settlement process to resolve cases. Some institutions have taken this trend further. In the discrimination context, both the EEOC and at least one federal district court have instituted more formal mediation programmes, one voluntary and one mandatory, and by this means have been able to resolve a significant number of disputes without going through the entire investigatory or litigation process.

The use of internal and private dispute resolution mechanisms is growing, but changing in form. The private schemes negotiated between unions and employers that culminate in labour arbitration by a mutually selected neutral are unlikely to play a large role as unionization rates remain low. Meanwhile, in an effort to avoid the costs of unionization, lost productivity or litigation, and particularly class action suits, non-unionized employers are increasingly setting up internal dispute resolution mechanisms. These schemes come in a variety of forms and degrees of complexity, and thus with differing levels of efficiency, equity and voice. But they increasingly culminate in, or sometimes solely consist of, mandatory employment arbitration. The means by which these mandatory arbitration clauses are imposed and how the arbitrations are conducted raise very serious fairness concerns. There is already some evidence that lawyers and plaintiffs, unable to proceed in court, will forgo pursuing a claim rather than attempt arbitration. The Supreme Court's approval of mandatory class and collective action waivers will also deny aggrieved employees a very useful means of redress. If employees' ability to access courts and juries is increasingly curtailed, this could have significant implications for the entire dispute resolution landscape. Accordingly,

it is important to pay attention to the future of mandatory employment arbitration, as whether it is permitted to expand unabated or is restricted through legislation or otherwise will have important system-wide implications.

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Equal Employment Opportunity Commission: www.eeoc.gov.

National Labor Relations Board: www.nlrb.gov.

New York State Courts ADR programmes: www.nycourts.gov/ip/adr/index.shtml.

New York State Department of Labor: www.labor.ny.gov.

New York State Division of Human Rights: www.dhr.ny.gov.

United States Department of Labor: www.dol.gov.

United States Courts: www.uscourts.gov.