

Will Law Firms Bow to Pressure to End Mandatory Arbitration?

More and more voices are calling for big law firms to abandon mandatory arbitration and nondisclosure agreements for their own lawyers. Should the firms listen?

By **Meghan Tribe** | May 24, 2018 at 10:52 AM



It only took a single tweet—amplified by the #MeToo movement—to force a national debate about how large law firms force associates and other workers address alleged workplace misconduct.

A copy of **Munger, Tolles & Olson**'s contract for summer associates, including a mandatory arbitration agreement with a nondisclosure provision, **emerged on Twitter** in a series of posts in March by **Harvard Law School lecturer Ian Samuel**.

Caught up in a social media backlash, the firm quickly announced that it would no longer require its employees or associates to sign mandatory arbitration agreements. **Orrick, Herrington & Sutcliffe** and **Skadden, Arps, Slate, Meagher & Flom** rapidly **followed suit**.

Two months later, momentum against mandatory arbitration and nondisclosure agreements in Big Law is continuing to build. A growing chorus of critics—led by younger and aspiring lawyers who will one day shape the profession—expresses worry that the provisions can cause claims of sexual harassment and gender discrimination to be poorly addressed or swept under the carpet.

Others continue to defend the merits of arbitration, arguing that it is especially well-suited to law firm employment disputes.

“I personally think that arbitrations are getting a bad rap,” said Julie Totten, co-lead of the global employment law and litigation practice at Orrick.

After Munger Tolles' arbitration about-face, law students and some law professors across the nation's top law schools are calling for an end to such agreements at big firms.

“We have a lot of concerns about people not knowing what they're getting themselves into when they sign these contracts, because they feel like they don't have any option,” said Molly Coleman, a first-year law student at Harvard Law School who helped organize a campaign scrutinizing their use.

At Harvard, the Georgetown University Law Center and the University of California, Berkeley, School of Law, students penned letters to administrators calling for

the **abolition of mandatory arbitration and nondisclosure agreements** by law firms seeking to use campus facilities to recruit new summer associates. This month, Yale Law School and 13 of the nation's top law schools **announced they would** require law firms to **disclose whether they require summer associates** to sign such agreements.

Beyond Associates

While students and younger lawyers have been among the most vocal in demanding changes—and are clearly capturing big law firms' attention—they aren't the only ones governed by arbitration agreements at many firms.



Traci Ribeiro

Mandatory arbitration clauses are often included in partnership agreements, along with confidentiality provisions and class action waivers that have been the subject of many law firm pay equity and gender discrimination cases.

Traci Ribeiro, a former Sedgwick partner, saw her suit against the now-defunct firm **forced into arbitration** in late 2016. (Ribeiro subsequently **settled that dispute** with Sedgwick and joined **another firm in Chicago**.)

Constance Ramos, a former partner at Winston & Strawn, **filed a sex discrimination and retaliation suit** against the firm last summer. Shortly thereafter, Winston & Strawn, **represented by Orrick**, fought and won a challenge to **enforce a mandatory arbitration provision** in the firm's partnership agreement.

When Congress created the Federal Arbitration Act in 1925, arbitration was seen as a path to resolving disputes between commercial entities. That view remained dominant for decades, until a 1991 U.S. Supreme Court ruling **extended the reach** of arbitration to include the enforceability of mandatory employment arbitration agreements.

This week, **in a divided ruling**, the **Supreme Court determined** that workplace agreements banning class actions **do not violate federal labor laws**. The ruling caps a series of other cases decided by the Supreme Court that have steadily integrated arbitration agreements **into the fabric of the American workplace**.

The Employee Rights Advocacy Institute for Law & Policy **has found** that 80 Fortune 100 companies have arbitration clauses in their employment paperwork requiring employees to use a private forum to settle disputes, with more than half having mandatory provisions. Of those 80 companies, 39 have arbitration clauses that contain class, collective or joint action waivers.

Law firms are no different and have largely embraced arbitration for their employees, associates and partners over the past 20 years, said A. Michael Weber, a partner at global labor and employment giant Littler Mendelson.

"I'd be surprised if most [law firms] did not have some provision to resolve disputes in an [alternative dispute resolution] program," Weber said.

A Case for Arbitration?

Despite all the recent scrutiny they have attracted, mandatory workplace arbitration clauses still have many defenders in Big Law.

“There are some very significant advantages,” said Orrick’s Totten. “And I think that is particularly true in a profession such as law.”

A common argument in favor of arbitration is that it provides a forum for resolving employment disputes that’s faster, cheaper and more private than a traditional court proceeding.

While each matter is different, estimates are that most employment disputes are resolved in 120 to 180 days, [according to the American Arbitration Association](#), with the average length of all arbitrations through the AAA taking about 4½ months. Similar disputes can sometimes take years to resolve in court.

Arbitrations also are far more cost-effective for employee claimants, Totten said. A [study by Alexander Colvin of Cornell University](#) found that the mean arbitration fees were \$6,340 per case and \$11,070 for cases that were settled via an award following a hearing. Colvin also found that, in 97 percent of arbitration cases, employers paid 100 percent of the arbitration fees, beyond a small filing fee.

But the expectation that employers will cover a greater share of arbitration fees may have a downside for employees, said Noah Lebowitz, a Berkeley, California-based employee rights litigator who is currently representing Ramos in her suit against Winston & Strawn. (Lebowitz declined to comment about that case.)

“That’s a double-edged sword, of course, because it creates an imbalance and inequity in the economics of the arbitration,” Lebowitz said. “But to have it any other way would erect an enormous barrier.”

Beyond timing and cost, others argue that arbitration can unfairly restrict employees' access to courts and preclude them from getting adequate redress for their claims.

“Arbitration is a disincentive for many people to bring their cases,” said Jonathan Ben-Asher, a name partner at New York-based employee rights boutique Ritz Clark & Ben-Asher. While acknowledging that arbitration is generally quicker than litigating in court, he said the secretive nature of proceedings can be problematic.

“If I have a case in federal court, obviously every single pleading and motion that isn't filed under seal is going to be there for anyone on the [electronic court filing] system to see,” Ben-Asher said. “Whereas [in] an arbitration, those are not public filings. They're filed with the ADR provider.”

Seeking Discretion

In Ramos' suit against Winston & Strawn, a mandatory arbitration provision in her partnership agreement contained a confidentiality clause requiring Ramos to maintain “strict confidence” in “all aspects of the arbitration.” Ramos, who now has **her own firm**, is awaiting a decision by the First District Court of Appeals in San Francisco regarding her case.

Orrick's Totten declined to discuss the Ramos dispute but said that confidentiality clauses can be beneficial to employees when they want to enforce their rights while keeping a dispute private.

“They don't want their name associated with a lawsuit because generally, as a society, there are some negative connotations to that,” said Totten, noting that in many professional situations women often opt to bring claims as “Jane Does.”

A \$50 million gender bias suit **filed against Proskauer Rose last year** was initially made by a Jane Doe plaintiff until **she revealed herself in late April as Connie**

Bertram, a Washington, D.C.-based partner who serves as co-head of Proskauer's whistleblowing and retaliation group.

Though Orrick is among a few firms that have since made arbitration optional for nonpartners, Totten added that her firm's arbitration provision does not contain a confidentiality provision.

"There would be nothing that would have prevented somebody if they wanted to make a result public," Totten said. "There's nothing that would've prevented them from doing that."

Littler's Weber argued that arbitration can be an ideal forum for all parties in law firm employment disputes.



A. Michael Weber

"Publicity is bad for both a law firm and the lawyer who's involved," he said, noting that, when a onetime plaintiff hunts for future jobs, information about the lawyer and his or her case is readily available to employers.

The American Lawyer reported in 2016 on the career trajectories of three women who sued their former firms for gender discrimination. All three left Big Law. Weber claims there's an advantage to having such claims resolved quietly by an expert arbitrator who understands employment issues.

Ben-Asher, who frequently represents whistleblowers and employees, vigorously disagrees.

“It basically means you have a dispute that nobody hears about, and that's a problem for society,” he said.

The decision to have confidentiality in a dispute should stay with the employee, added Ben-Asher, not be forced on the employee by a mandatory arbitration and confidentiality provision.

“It's really not up to the employer as a simple matter of ethics or morals to say, ‘We're watching out for you and to make sure that nobody ever finds out about your case because it might be embarrassing to you, [so] we're going to make you proceed in an arbitration,’” Ben-Asher said. “I think that's nonsense.”

Linda Friedman, a founding partner of Chicago-based litigation boutique Stowell & Friedman, noted that, in all of the cases she has handled over the last 15 years involving law firms, she could not recall any partnership agreements that did not contain a mandatory arbitration provision.

“It's typically built into the partnership agreement [that] if any partner has a dispute against another partner, including for gender discrimination, that it will be resolved by AAA or JAMS in a private, confidential quiet setting,” said Friedman, adding that many of those arbitration agreements also contain nondisparagement clauses and class action waivers.

In Ribeiro's suit, Sedgewick's partnership agreement **contained an alternative dispute resolution provision** that applied to "any disagreements in connection with any matters set forth in" the partnership agreement. Winston & Strawn's partnership agreement also contained an arbitration clause that covered "[a]ny dispute or controversy of a Partner or Partners arising under or related to this Agreement or the Partnership."

Friedman said that "law firms are quite astute at understanding that these issues will come up and they prevent a woman from going to court."

But it's not just that firms have an incentive to keep disputes involving sexual harassment or gender discrimination and their partnerships away from courts and juries, it's also that those same firms don't want their private financial information accessible in a public litigation docket, Ben-Asher said.

While firms can file their information under seal, Ben-Asher said it's still difficult to keep those details out of the public eye. And in any employment discrimination case, the issue of economic damages becomes critical and often requires deep discovery into a firm's financials and how partners are compensated, he added.

"What they like to do is report to the major publications how great they are doing in terms of their revenue, but the last thing they want to report are detailed accountings of what each partner made," Ben-Asher said.

Seeing Results

The ability to sue her law firm in open court was important to Kerrie Campbell, a former litigator at Chadbourne & Parke who filed a **\$100 million gender bias suit against the firm** in 2016.



Kerrie Campbell

The hard-fought litigation between Campbell and Chadbourne, which ousted her from its partnership prior to its combination last summer with Norton Rose Fulbright, finally **settled in March**. As an apparent condition of the settlement, Chadbourne issued a **conciliatory statement praising Campbell's efforts in the case** for contributing to a national discourse on gender issues in the workplace.

“How could we have facilitated positive change if we had been relegated to a secret proceeding?” Campbell said. “Requiring mandatory arbitration as a condition of employment is about the firm saving face and money—that’s it.”

Campbell said mandatory arbitration clauses threaten to undermine federal civil rights laws enacted to prohibit discrimination and harassment, including Title VII and the Equal Pay Act.

“Secret proceedings facilitate and perpetuate discriminatory and retaliatory conduct because there is an inherent lack of transparency and accountability,” she said.

Unlike Ramos or Ribeiro, Campbell did not sign an arbitration agreement with Chadbourne. That “had a tremendous impact on our case, one that cannot be overstated,” she said.

“This meant that important claims and issues relating to federal civil rights statutes and local laws prohibiting discrimination and retaliation in the workplace could be adjudicated in open court by an Article III judge, rather than in a secret and inscrutable proceeding without basic procedural safeguards, like full and fair discovery and judicial review,” Campbell said.

Nevertheless, Orrick’s Totten and others strongly defend the value of forcing partners to arbitrate disputes with their firms.

“We [at Orrick] have a provision in our partnership agreement, and I definitely absolutely support that provision being in there,” said Totten, who has spent two decades at the firm. “The negatives of an arbitration I just don’t think are applicable in a partnership situation, where everybody is an owner and everybody is expected to act like owners and treat this as if it’s our own business.”

Totten noted that, at Orrick, all partners have at least some equity and thus a financial stake in the firm’s performance.

“To me, that is a situation where arbitration is much more appropriate,” she said. (The question of whether law firm partners can be defined as an “employee” under workplace antidiscrimination laws is **currently at issue** in Bertram’s case against Proskauer, as well as other suits.)

At least when it comes to associates, meanwhile, full-throated defenses of mandatory arbitration and confidentiality agreements may soon be harder to come by.

Following Munger Tolles’ retraction of its mandatory arbitration clause for summer associates and amid calls by students at many top law schools for firms to abandon

such provisions, Yale Law School professor Judith Resnik has issued a challenge to law firms across the country.

“To be a lawyer, we participate and pledge to uphold the administration of justice,” she said. “To use as a condition of employment that people won’t use the court system is a sad comment on firms who spend a significant amount of their time helping clients who are using the court system.”