

# Are AIR21 Whistleblowers Subject to Mandatory Arbitration Agreements?

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A [study](#) released in December 2015 by the Economic Policy Institute (EPI) confirmed what employment law practitioners have always known to be true: Employees who are forced to submit to binding arbitration to resolve their employment claims win less often and receive much lower damages than employees who are able to pursue their claims in court. The study also found that employers tend to win cases more frequently when they appear multiple times before the same arbitrator—an advantage to which the employee is not able to avail herself—creating a “repeat-player advantage” over employees.

These employer advantages in arbitration render great import onto rulings like the one made by the Administrative Review Board (ARB) of the Department of Labor (DOL) last year in [Willbanks v. Atlas Air Worldwide Holdings Inc.](#), ARB No. 14-050, ALJ No. 2014-AIR-10 (ARB Mar. 18, 2015), in which the ARB held that that pilots, like other classes of workers engaged in interstate commerce, cannot be bound to mandatory arbitration clauses.

In this post, we will review the EPI statistics and unpack the *Willbanks* case to better understand its effect on arbitration agreements and transportation workers, specifically those involved in the aviation industry.

## Impact of Mandatory Arbitration Clauses on Employees

The statistics compiled by the EPI study demonstrate the significance of the impact mandatory arbitration agreements have on employees’ ability to vindicate their rights in an employment dispute. The study showed that the win rate of employees in arbitrations was just 21.4%, as compared to 36.4% in federal court trials or 57% in state court trials. The gut reaction to this statistic from many practitioners may be that the figures fail to take into account the amount of litigated disputes resolved prior to trial via summary decision. However, that reaction likely fails to appreciate the number of arbitration cases in which a summary judgment motion is filed – approximately 48% according to a 2014 survey, as compared to 77% of litigated employment cases that involved a summary judgment motion.

Finally, this disparity is bolstered by the disparity in awards. The EPI study found that “plaintiffs’ overall economic outcomes are on average 6.1 times better in federal court than in mandatory arbitration (\$143,497 versus \$23,548) and 13.9 times better in state court than in mandatory arbitration (\$328,008 versus \$23,548).”

## The “Repeat Player” Advantage

The repeat player advantage was similarly dramatic. The EPI study found that employees had approximately a 17.9% success rate the first time their employer appeared before a particular arbitrator. The fourth time that employer appeared before a repeat arbitrator, however, the employee’s chances of winning dropped to 15.3%, and employees facing an arbitrator that whom the

employer had appeared before 25 or more times had a success rate of just 4.5%.

These statistics demonstrate the inherent employer advantage arising from mandatory arbitration agreements. This advantage makes the decisions like that of the DOL ARB in *Willbanks v. Atlas Air Worldwide Holdings Inc.* all the more important.

### **The Willbanks Case**

*Willbanks* involved a flight attendant who complained about the safety of service carts used on her airline. She feared that the faulty brakes on the heavy carts could result in injury to passengers or flight attendants. Willbanks was terminated following her complaints, and she filed a complaint with the U.S. Occupational Safety and Health Administration (OSHA), alleging that her termination constituted a violation of the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). The company moved to dismiss the claim on the basis of a predispute arbitration agreement Willbanks had entered into with the company. Willbanks maintained that her claims were subject to the Federal Arbitration Act's (FAA's) interstate commerce exception.

The ARB sided with Willbanks. The ARB first noted that the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable" unless grounds "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. However, the ARB noted that under 9 U.S.C. § 1, the FAA "exempts from coverage all 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.'"

The ARB found that this "interstate commerce exception" exempted transportation workers, including airline employees, seamen and railroad employees, from mandatory arbitration agreements. The ARB held that, although airline workers were not explicitly included in the FAA's non-exhaustive list of "workers engaged in . . . interstate commerce," Supreme Court precedent finding that the exception applied to "transportation workers" had "clearly left open the prospect that airline carriers and their employees were to be excluded from the FAA's arbitration mandate in the same manner and to the same extent as seamen and railroad workers."

The ARB also rejected the findings of some federal circuit courts that had limited the FAA exception to "transportation workers engaged in the movement of *goods* in interstate commerce." The ARB found that "there is ultimately no basis for limiting the exclusion from FAA mandatory arbitration to only employees engaged in the interstate air transportation of cargo or goods." The ARB ultimately concluded that "[e]mployees engaged in the interstate air transportation of passengers, such as Willbanks, are to be afforded the same rights as are afforded railroad employees under the FAA, and thus entitled to the same exclusion from arbitration[.]"

### **Whistleblower Interstate Commerce Protections**

Importantly, as explained above, the FAA's interstate commerce exception is not limited to [aviation whistleblowers](#). Railroad whistleblowers with complaints under the Federal Railroad Safety Act (FRSA), seaman with whistleblower complaints under the Seaman's Protection Act (SPA) and other transportation workers engaged in interstate commerce may not be forced into arbitration agreements that will hinder their ability to hold their employer accountable for their illegal actions. In turn, this freedom to litigate should cause employers to react in a more responsible manner to safety complaints, which will in turn protect all of us who rely on transportation workers to keep us safe.