

Confidentiality in Consumer and Employment Arbitration

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Citation:

Drahozal, Christopher R., Confidentiality in Consumer and Employment Arbitration, 7 Yearbook on Arbitration & Mediation (2015).

Available at SSRN: <http://ssrn.com/abstract=2716412>

Abstract:

This article examines an apparent misperception among some commentators about the confidentiality of consumer and employment arbitration in the U.S. Arbitration is a private process — i.e., the public cannot attend an arbitration hearing — and arbitrators and arbitration administrators are (with some exceptions) required to keep information about arbitrations confidential. But the parties to the arbitration agreement are not subject to an obligation of confidentiality. Either party can disclose the existence of the dispute and any underlying facts, the existence of any arbitration proceeding, and any information about or provided in the arbitration proceeding, including the arbitral award. Only if the arbitration clause also includes a confidentiality provision are the parties subject to a confidentiality obligation, as set out in their agreement.

Accordingly, criticisms of the confidentiality of arbitration, and in particular that arbitration clauses enable businesses to hide wrongdoing, are at best overstated and at worst misguided. They are overstated because information about disputes remains available, not from the court system but from the parties themselves. When a dispute is subject to arbitration, interested persons are not able to obtain filings and other information from the court clerk like they could if the case was in court. In the rare case that would have gone to trial, the public is not able to watch. But the parties continue to be able to disclose the same information they can disclose without an arbitration clause. The criticisms are misguided because they direct attention toward arbitration clauses and away from confidentiality provisions, which seem to be the real source of many commentators' complaints.