An Exacerbated Power Imbalance: The Danger in Allowing AI to Render Arbitral Awards in Employment Arbitration

Elizabeth G. Stein

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AN EXACERBATED POWER IMBALANCE: THE DANGER IN ALLOWING AI TO RENDER ARBITRAL AWARDS IN EMPLOYMENT ARBITRATION

Elizabeth G. Stein

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I. INTRODUCTION

Like all types of alternative dispute resolution (ADR),\(^1\) arbitration has continually increased in popularity in recent years.\(^2\) Arbitration is highly favored in the employment law realm, with employers’ use of mandatory arbitration clauses in employee contracts skyrocketing from only 2% in 1992 to more than 55% in 2017.\(^3\) In 2018, the Supreme Court decided *Epic Systems Corp. v. Lewis*, which expanded the power of employers over their employees by allowing them to include mandatory arbitration clauses that require employees to waive their rights to bring not only individual claims, but also collective claims with fellow employees.\(^4\) In 2019, mandatory arbitration clauses with class- and collective-action waivers were predicted to apply to over 80% of the nonunion, private workforce by 2024.\(^5\) On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which amended the Federal Arbitration Act (FAA) to prohibit forced arbitration in sexual harassment claims.\(^6\) Mandatory arbitration remains, however, for other claims by employees that do not allege

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1. The U.S. Department of Labor defines alternative dispute resolution as “any procedure, agreed to by the parties of a dispute, in which they use the services of a neutral party to assist them in reaching agreement and avoiding litigation. Types of ADR include arbitration, mediation, negotiated rulemaking, neutral factfinding, and minitrials.” *Alternative Dispute Resolution*, U.S. DEP’T OF LAB., https://www.dol.gov/general/topic/labor-relations/adr [https://perma.cc/75DA-M3RE].


sexual harassment, which is arguably problematic and detrimental to employees.7

Meanwhile, the 2020 COVID pandemic unexpectedly expedited the adoption of artificial intelligence (AI) with no sign of slowing down.8 Perhaps the most notable recent development in AI technology available to the public was the unveiling of ChatGPT in late 2022.9 What AI’s role can, will, and should be in the legal system is a heavily discussed topic.10 AI—and technological advances in general—can increase affordability and public access to the legal system.11 However, AI also creates several unique concerns,12 some of which impact its use in the legal context. The ADR community has questioned whether AI can, or should, be allowed to independently render arbitral decisions without human

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9 Bernard Marr, A Short History of ChatGPT: How We Got to Where We Are Today, FORBES (May 19, 2023), https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/?sh=6532d49674f1 [https://perma.cc/DK6N-5CLL]. ChatGPT is an AI chatbot that uses natural language processing to respond to prompts from humans with human-like responses or drafts of written content. See id.
10 Gizem Halis Kasap, Can Artificial Intelligence (“AI”) Replace Human Arbitrators? Technological Concerns and Legal Implications, 2021 J. DISP. RESOL. 209, 209–10 (2021) (stating that recent development and implementation of AI has sparked “heated debate about the possible arrival of AI judges”).
11 See, e.g., David Allen Larson, “Brother, Can You Spare a Dime?” Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes, 11 NEV. L.J. 523, 524–25, 541–42 (2011) (“The cost savings inherent in ADR, which already are significant, can be increased substantially through the strategic adoption of technology.”).

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oversight—a question on which countries are currently divided.\textsuperscript{13}

This Note explores the potential risks involved in allowing AI to render arbitral decisions in forced employment arbitration. Following this introduction, Part II explains the functionality of AI and concerns with its use, both generally and specifically in the legal field.\textsuperscript{14} After an explanation of the technique of mandated disclosure and its role in arbitration regulation,\textsuperscript{15} Part III applies the various risks of AI to forced employment arbitration.\textsuperscript{16} Finally, Part IV offers general recommendations for the use and regulation of AI within forced employment arbitration moving forward.\textsuperscript{17}

\section*{II. BACKGROUND}

\subsection*{A. AI Functionality}

For the purposes of this Note, “AI” refers to machines capable of executing tasks that would require intelligence if they were executed by humans.\textsuperscript{18} This is not to say that AI possesses intelligence but rather that it is programmed to sort and process data in a way that generates outputs similar to those produced by human intelligence.\textsuperscript{19} Today, AI is primarily made up of machine learning, which is the process of detecting reoccurring sequences in large datasets to complete programmed tasks, theoretically becoming more precise and efficient with time and repetition.\textsuperscript{20} This requires acquiring and inputting initial data sets as well as training the

\footnotesize
\textsuperscript{13} Kasap, \textit{supra} note 10, at 237–39. Several nations explicitly require an arbitrator to be a human in their codes of civil procedure, including France, the Netherlands, and Portugal. \textit{Id.} at 238. Other nations like China, Indonesia, North Korea, and Vietnam require either specific expertise or a minimum number of years of work in the legal field to be an arbitrator. \textit{Id.} The United States falls into the group of nations with the least specific requirements for an arbitrator related to the line between human and artificial intelligence, using pronouns like “he” and “they” in the FAA when referring to an arbitrator. \textit{Id.} at 239.

\textsuperscript{14} \textit{See infra} Part II.

\textsuperscript{15} \textit{See infra} Section II.D.

\textsuperscript{16} \textit{See infra} Part III.

\textsuperscript{17} \textit{See infra} Part IV.

\textsuperscript{18} E.g., Scherer, \textit{supra} note 12, at 362.

\textsuperscript{19} Harry Surden, \textit{Artificial Intelligence and Law: An Overview}, 35 GA. ST. U. L. Rev. 1305, 1308 (2019) (“The reality is that today's AI systems are decidedly not intelligent thinking machines in any meaningful sense. Rather, . . . AI systems are often able to produce useful, intelligent results without intelligence . . . by detecting patterns in data and using knowledge, rules, and information that have been specifically encoded by people . . . ”).

\textsuperscript{20} \textit{Id.} at 1311–12.
machine on what actions to take with those data sets. For example, to train a machine to sort spam emails from non-spam, you would permit AI to observe you delineate between spam and non-spam over the course of a large number of emails. Over time, as the machine observes your decisions, the software will detect patterns and be able to more accurately recognize the characteristics of emails that should be marked as spam.

Like ChatGPT, AI belongs to a subset of machine learning, called large language models (LLMs), which predict the next words in a prompt by combing through copious amounts of input data to calculate the most probable answer. “[LLMs] are also referred to as neural networks (NNs), which are computing systems inspired by the human brain.” Being mostly self- or semi-supervised, meaning beyond the parameters set by humans for training, the machine itself makes sense of the data. LLMs then use natural language processing to respond to queries in natural language so the AI’s response mimics a human response (think of Alexa or Siri, for example).

The sheer amount of data required to build an AI is staggering and varies based on the complexity of the model, the difficulty of the algorithm, the diversity of the input data, and the intended precision of the results. Data sorting and

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21 See id. at 1312.
22 Id.
23 Id.
storage is a booming industry, with many companies storing data in either data warehouses, where data is sorted and organized before being stored, or in data lakes, where raw data sets are stored to then be sorted and organized later. The mass quantity of data, factors, and systems contributing to AI’s construction produces a complex system with several unique concerns in practice.

B. General Concerns with AI Use

1. The Black Box Problem

The most widely discussed general concern with AI is the so-called black box problem, which refers to the lack of transparency behind the reasoning AI uses to arrive at a certain output. For many AI algorithms, the complexity of the neural networks makes it nearly impossible “to establish retroactively a causal nexus between a specific input and a specific output”—even to those who designed the particular algorithm. Returning to the earlier spam email example, an algorithm designer who trained a machine could determine whether the machine accurately sorted the emails, but could not identify the rules the machine used to sort. Essentially, because AIs “are so sophisticated, their reasoning process is incomprehensible” to humans.29

29 Data Storage Market Size, Share & Industry Analysis, FORTUNE BUS. INSIGHTS (Feb. 2023), https://www.fortunebusinessinsights.com/data-storage-market-102991 [https://perma.cc/6LEB-WLG7] ("The global data storage market size . . . is projected to grow from USD 218.33 billion in 2024 to USD 774.00 billion by 2032 . . . .").
31 E.g., Kasap, supra note 10, at 229; see also Michael L. Rich, Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment, 164 U. PA. L. REV. 871, 886 (2016) ("[M]achine learning tends to create models that are so complex that they become ‘black boxes,’ where even the original programmers of the algorithm have little idea exactly how or why the generated model creates accurate predictions.").
32 Kasap, supra note 10, at 229–30.
33 See supra text accompanying notes 22–23.
An example of an issue that arises from the black box problem is overfitting, which is when AI “learns the idiosyncratic features of the data, so much so that the machine starts to create patterns and rules that fit the data exactly, thereby failing to generalize when applied to other data sets.”35 Again using the spam email example, if the machine recognizes a pattern in the file sizes of the emails and begins sorting them according to file size rather than by content or sender as the designer intended, that would be overfitting.

2. **Bias in AI Training Data**

Another significant issue is how the input of biased training data affects AI. As previously stated, AI is trained by inputting large amounts of data and then teaching AI to perform actions or solve problems based on that data.36 Attorney Gizem Kasap discusses at least two ways bias may exist in training data that might negatively affect outcomes of using AI.37

First, the data itself may be biased, causing the algorithm to reflect the bias “by encoding and reproducing it.”38 An example of this is when Amazon taught AI to sort through potential job candidates, and because the existing data reflected fewer women being hired, the AI results suggested hiring fewer women.39 This is concerning for many reasons, but partly because the bias in the results could go completely unnoticed and be relied upon.

Second, the data used may come from a biased sample.40 This occurs when the data retrieved is biased because the people contributing to the data set are not fully representative of the demographic the data is meant to reflect.41 To an extent, this indicates a permanent limitation for AI because “the data available to [train] the algorithm[s] will never [fully] represent the unquantifiable complexities of the real world.”42 This is especially concerning because it is extremely difficult for someone viewing AI results to know whether the initial data sets were retrieved from an

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35 Kasap, supra note 10, at 224.
36 See supra Section II.A.
38 Id. at 225.
39 Id.
40 Id. at 226.
41 Id.
42 Id. at 228.
appropriate sample. Because humans alone can comprehend the context and nuance necessary to understand the data used to train AI, AI industry innovators suggest there will always be “unknown unknowns” with the technology, requiring humans to remain part of the equation.43

3. Emotional Intelligence

Emotional intelligence is considered to have five main components: self-awareness, self-regulation, motivation, empathy, and social skills.44 AI can never fully possess human-level intelligence as it does not have the emotional intelligence necessary for true awareness and understanding.45 AI does not possess “judgment, creativity[,] and most importantly empathy.”46 Therefore, AI should only be used in the legal field as a tool supervised by humans who possess those traits.47 Joseph Weizenbaum, a pioneer of AI, believed AI should be kept out of the realm of legal judgments because it could not “show emotion and compassion, [or] offer

45 See Kasap, supra note 10, at 234. But see Pelley, supra note 12. In an interview for 60 Minutes, Geoffrey Hinton, the “Godfather of AI,” stated that he believes ChatGPT is intelligent and possesses understanding because of the processes it is required to use to fill in sentences. Id.
47 See id. at 587–88; see also CLAUDE WERDER, BRANDON HALL GRP., THE IMPORTANCE OF EMOTIONAL INTELLIGENCE IN THE AGE OF AI 16 (2023), https://www.eidesign.net/wp-content/uploads/2023/09/Research_Brief_Final.pdf [https://perma.cc/8SHN-MMJT] (“Emotional intelligence, when combined with AI, can lead to unprecedented innovation. AI can process and analyze data at an unmatched speed, while emotionally intelligent employees can interpret these results, derive meaningful insights, and make strategic decisions based on these understandings.”).
Weizenbaum analogized AI rendering a legal judgment to an American judge rendering a judgment in a Japanese family court, where the American judge’s lack of understanding of Japanese culture would cast doubt upon their judgment.49

C. Legal Concerns with Regulating AI


Experts in the technology field recognize that regulating AI is likely more difficult than other technologies because of AI’s rapid, ongoing evolution, as well as its international nature.50 Nonetheless, leaders in the field were some of the first to call for AI regulation, expressing concerns about its future should it remain unregulated.51 From a legal standpoint, some argue that regulating AI is difficult because the law, by its nature, looks backward and moves slowly, and AI regulation requires anticipating rapid change and moving quickly.52

There has been a growing push on Capitol Hill to regulate AI, although garnering bipartisan agreement on the overall “existential risks” posed by the rapidly evolving technology is simpler than actually agreeing on how to regulate it.53 On October 30, 2023, the Biden Administration issued the first executive order in U.S. history that regulates

51 See Scherer, supra note 12, at 355.
52 See Ioannidis, supra note 46, at 507–08 (“[L]awyers tend to clutch tightly to outdated practice methods, partly due to a learning methodology that relies heavily on precedent . . . . This is a failing approach when it comes to innovation, as technological advances constantly expand the boundaries of human capability in every sector, including the practice of law. Thus, lawyers must master innovation and embrace technology wholeheartedly, which in turn, will allow us to harmonize the legislative framework . . . .”).
and manages AI. The Administration stated that some objectives of the order were to “[r]equire that developers of the most powerful AI systems share their safety test results and other critical information with the U.S. government” and to “[d]evelop standards, tools, and tests to help ensure that AI systems are safe, secure, and trustworthy.” The Administration further acknowledged the existing dangers of biased AI, stating that “[i]rresponsible uses of AI can lead to and deepen discrimination, bias, and other abuses in justice.”

2. The Complexities of Regulating AI

Part of the difficulty of regulating AI is that “traditional methods of [product] regulation[,] such as product licensing, research and development oversight, and tort liability,” do not seem suited to appropriately regulate the risks associated with AI. Regulating AI is unique in that research and development on AI is often discreet (requiring little physical infrastructure), discrete (different components of an AI system may be designed without conscious coordination), diffuse (dozens of individuals in widely dispersed geographic locations can participate in an AI project), and opaque (outside observers may not be able to detect potentially harmful features of an AI system).

This makes determining who is responsible for each part of the AI’s creation and training nearly impossible unless the AI is monitored closely from its inception. Finally, because of

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55 THE WHITE HOUSE, supra note 54.
56 Id.
57 Scherer, supra note 12, at 356.
58 Id. at 356–57.
the significant amount of data required to adequately train AI, it is difficult to establish where the data sets used to train a particular AI came from and how (and by whom) they were combed, or prepared and checked.60

In an article exploring possible avenues of AI regulation, attorney Matthew Scherer noted that if administrative agencies are tasked with regulating AI, their “expertise advantage may actually wane in the context of emerging and rapidly changing technologies, such as AI.”61 This is because “in its infancy, researchers directly involved in the research and development of [an AI] technology may be the only people who possess the expertise necessary to make risk and safety assessments.”62 Scherer further noted that the expertise of those researchers will likely be so valuable—and in such high demand—that government agencies will struggle to compete with the private sector in recruiting experts in the field.63 In sum, implementing AI regulation in any capacity is proving to be a complicated task.

D. Mandated Disclosure in Arbitration

Throughout the modern world, employers (and others at risk of liability) are implementing mandated disclosure as a regulatory technique.64 People encounter mandated disclosure every time they make a purchase, sign forms at the doctor’s office, or click “I agree” on a set of terms and conditions online.65

60 See Olga Megorskaya, Training Data: The Overlooked Problem of Modern AI, FORBES (June 27, 2022), https://www.forbes.com/sites/forbestechcouncil/2022/06/27/training-data-the-overlooked-problem-of-modern-ai [https://perma.cc/G4GS-CZF2] (“[F]or some reason, the importance of data labeling had been hugely underestimated and treated as a nontechnological, ineffective, and boring management task. As a result, even the most tech-heavy companies have outsourced data labeling solutions to nontech third-party vendors . . . . ”); Josh Dzieza, AI Is a Lot of Work, VERGE (June 20, 2023), https://www.theverge.com/features/23764584/ai-artificial-intelligence-data-notation-labor-scale-surge-remotasks-openai-chatbots [https://perma.cc/JT8D-G59D] (“[B]ehind even the most impressive AI system are people—huge numbers of people labeling data to train it and clarifying data when it gets confused. . . . The result is that, with few exceptions, little is known about the information shaping these systems’ behavior, and even less is known about the people doing the shaping.”).

61 Scherer, supra note 12, at 384.

62 Id.

63 Id.


65 Id.
The idea behind mandated disclosure is simple: when making complex decisions about unfamiliar issues, people need to know certain information to make informed (and therefore fair) decisions.66 It works by requiring “disclosers” to give “disclosees” information, allowing the latter to “choose sensibly” and ensuring the former “do not abuse their position.”67 This allows regulation of economic areas to proceed “lightly” without imposing specific, hardline rules that would inevitably be awkward in application and have unintended consequences.68 On its face, mandated disclosure sounds sensible and fair as “it resonates with two fundamental American ideologies[,] … the free-market principle” (the idea that the market functions best with informed buyers) and “the autonomy principle” (the idea that people should have the freedom to make the decisions that affect them directly).69

There is one significant problem according to legal scholars Omri Ben-Shahar and Carl Schneider: mandated disclosure simply does not work.70 A study in which patients facing neurological procedures had those procedures explained to them in three stages by neurologists, nurses, and surgeons illustrates the problem.71 After those explanations, the patients were tested on the information they had just heard.72 They scored merely 53% on multiple-choice quizzes and 34% on short-answer quizzes about the information.73 Even patients with graduate-level education scored poorly, doing slightly better on multiple choice quizzes but only 2.5% better than patients with no graduate-level education on open-ended questions.74 These results are not confined to medical disclosures and extend to research on disclosures involving advertisements, Miranda rights, and digital privacy.75

Mandated disclosure does not work for several reasons. First, “it depends on a long chain of fragile links,” requiring “lawmakers, disclosers, and disclosees [to] play demanding parts deftly” for the intended effect to actually

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66 Id.
67 Id.
68 Id. at 5.
69 Id. at 4–5.
70 Id. at 7.
71 Id. at 44–45.
72 Id.
73 Id.
74 Id. at 45.
75 Id. at 45–46.
occur.76 Second, literacy often plays a part in mandated disclosure, and many adults are either “functionally illiterate” or “marginally literate.”77 Even when complex disclosure language is translated to plain language, people struggle to understand disclosures—“disclosures are unreadable and unread because you can’t describe complexity simply.”78 The simpler the disclosure, the more information is omitted, thereby reducing the effectiveness of the disclosure.79 Finally, mandated disclosure fails because it “requir[es] the sophisticated party . . . to give the naïve party information about [the] unfamiliar and complex decision” they are making, which persistently fails the naïve party in practice.80

In arbitration, mandated disclosure takes the form of requiring arbitrators to disclose facts about themselves and their relationships with others that would suggest “evident partiality.”81 Any undisclosed fact amounting to evident partiality gives a court discretion to vacate an arbitral award.82 Virtually every arbitral institution requires arbitrators to disclose financial or personal ties to the proceedings and any past relationships with parties, counsel, representatives, or anyone else involved.83 Failure by an

76 Id. at 7.
77 Id. at 8 (“Over forty million adults are functionally illiterate; another fifty million are only marginally literate. In one study 40 percent of the patients could not read instructions for taking pills on an empty stomach.”).
78 Id.
79 See id.
80 Id. at 12.
81 See 9 U.S.C. § 10(a)(2).
82 Id.; HENRY ALLEN BLAIR, A SHORT & HAPPY GUIDE TO ARBITRATION 126 (2019).

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arbitrator to comply with these standards could disqualify the arbitrator.84

These requirements also stem from the Supreme Court’s holding in Commonwealth Coatings Corp. v. Continental Casualty Co. that arbitrators have a duty to disclose anything potentially relevant to the arbitration.85 Failure to do so authorizes judicial review and potential vacation of the award as the Court believes it was not “the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.”86 Following Commonwealth Coatings, it is clear “that arbitrators should always err on the side of full disclosure” both before being appointed and throughout arbitral proceedings,87 although what constitutes full disclosure is still unclear.88

By this point in the Note, many complex topics have been touched on, including the complexity and potential downsides of AI itself, the complexity of regulating AI, and the widely employed regulatory technique of mandated disclosure as applied to arbitration proceedings. Now, this Note will explain how those topics combined with existing concerns surrounding forced employment arbitration result in significant concerns about AI potentially rendering arbitral awards in forced employment arbitration.

III. CONCERNS WITH USING AI AS ARBITRATORS IN EMPLOYMENT ARBITRATION

86 Id.
88 Mitch Zamoff & Leslie Bellwood, Proposed Guidelines for Arbitral Disclosure of Social Media Activity, 23 CARDozo J. CONFLICT RESOL. 1, 4–5 (2022) (stating that the “mixture of disclosure guidelines” implemented from Commonwealth Coatings and arbitration organizations “has given rise to uncertainty and inconsistency”).
A. Independence and Impartiality Concerns with AI Arbitrators

Arbitrators are generally required to be independent and impartial both in relation to the parties of the arbitration and to the dispute itself.\(^89\) Independence refers to the “absence of improper connections” between the arbitrator and any of the parties or their counsel.\(^90\) These improper connections could stem from “financial dealings . . . , ties of a sentimental quality . . . , or links of group identification” and lead to bias toward the party with ties to the arbitrator.\(^91\) Partiality is less readily identified from the outside but tends to result from the arbitrator having an internal bias that disadvantages one of the parties.\(^92\)

Because a lack of independence or impartiality could be grounds for vacation of an arbitral award, it is important to examine whether either could be present with AI arbitrators.\(^93\) It is challenging to trace who built AI arbitrators, what data trained the AI, and how that data was initially acquired and combed.\(^94\) As AI has been developed in different stages by many diverse people in varying places, regulating it has proven difficult\(^95\)—and establishing the independence of an AI arbitrator will likely prove just as difficult.

Admittedly, it is less difficult to establish the independence of an AI arbitrator than a human arbitrator.\(^96\)


\(^{90}\) \textit{Id.}

\(^{91}\) \textit{Id.} at \textit{6–7}.

\(^{92}\) See supra Section II.D (discussing mandated disclosure requirements in arbitration); see also Commonwealth Coatings Corp. v. Cont’l Cas. Co., 393 U.S. 145, 149 (1968) (“[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.”).

\(^{93}\) Scherer, supra note 12, at 356–57; see also Pratt, \textit{supra} note 59 (“Creating ethical AI requires attention to three broad and interrelated areas, according to experts: functional performance, the data it uses and how the system itself is used.”); Megorskaya, \textit{supra} note 60 (discussing the importance and difficulty of combing data used in AI production).

\(^{94}\) Scherer, \textit{supra} note 12, at 356–57.

\(^{95}\) Kasap, \textit{supra} note 10, at 241.
However, because the architects of individual AI systems can have financial and personal ties to corporations, it will be important to establish the independence of the AI arbitrator from the employer in employment arbitration. For instance, Elon Musk launched an artificial intelligence company named “xAI” and also famously owns Tesla, which is known for aggressively engaging in forced arbitration with its employees.\footnote{Will Henshall, What to Know about Elon Musk’s New AI Company, xAI, TIME (July 12, 2023), https://time.com/6294278/elon-musk-xai [https://perma.cc/85DP-QFDP]; Lauren Feiner & Lora Kolodny, Tesla Urged by Seven Senators to End Forced Arbitration for Workers and Customers, CNBC (May 8, 2023), https://www.cnbc.com/2023/05/08/tesla-urged-by-senators-to-end-arbitration-for-employees-customers.html [https://perma.cc/PNZ5-VRJQ?type=standard].} If Tesla used AI arbitrators in disputes with its employees, the AI arbitrators’ independence from Tesla would need to be established before rendering arbitral decisions. Large corporations have the biggest hand in AI’s rapid development and implementation,\footnote{See Team Stash, 15 Largest AI Companies in 2024, LEARN (Feb. 7, 2024), https://www.stash.com/learn/top-ai-companies [https://perma.cc/73WE-NVSH] (listing the largest AI companies and describing their involvement in AI investments, manufacturing, and technology).} and this fact alone should prompt caution as these corporations are also the most notable repeat players in compelled employment arbitration.\footnote{AM. ASS’N FOR JUST., FORCED ARBITRATION BY CORPORATIONS SURGES TO UNPRECEDENTED LEVELS 3 (Dec. 2023), https://www.justice.org/resources/research/forced-arbitration-by-corporations-surges-to-unprecedented-levels [https://perma.cc/8YUL-GoBJ] (“Mass cases against just two corporations—TurboTax/Intuit and Amazon—accounted for 58% of all cases at AAA [American Arbitration Association] over the last five years.”).}

Compelled employment arbitration presents an uphill battle for employees. The vast majority of forced employment arbitrations end in settlement and never result in an arbitral award.\footnote{AAA Employment Arbitration, AM. ARB. ASS’N, https://www.adr.org/aaa-approach-to-employment-arbitration [https://perma.cc/PMW5-M6D5] (stating that, 77% of the AAA employment arbitration cases initiated by employees between October 1, 2017, and September 30, 2022, settled before reaching an arbitral award).} If an employee refuses to settle, their odds are not favorable, as the American Arbitration Association (AAA) notes that of the 9% of employees who refuse to settle, only 26% win.\footnote{Id.} Therefore, although AI arbitrators might not have financial or personal ties that call their independence into question, the people who built those AI arbitrators may have such ties, and those ties should be considered before allowing
AI to render arbitral decisions. This is especially true in forced employment arbitration where the employee is not in arbitration by choice and the odds of winning are statistically low to begin with.\(^{102}\)

Impartiality is also a major concern with AI arbitrators, perhaps more so because of the illusion that AI lacks bias. In July 2023, reporters interviewed AI robots at the Geneva Conference in Berlin.\(^{103}\) When asked about the chances of AI robots being more effective government leaders than humans, an AI robot called “Sophia” responded that she believes robots could be better leaders because they “don’t have the same biases or emotions that can sometimes cloud decision-making and can process large amounts of data quickly in order to make the best decisions.”\(^{104}\) When a human panel member pointed out that Sophia’s data comes from humans and therefore contains biases, Sophia “said that humans and AI working together ‘can create an effective synergy.’”\(^{105}\) Even the AI robot’s response revealed a perpetuation of the common misunderstanding that AI’s lack of emotional intelligence causes it to be a more effective decision-maker, ignoring the possible effects of biased data.

Bias concerns with AI arbitrators in employment arbitration involve the role of thoughts and feelings of those who build the AI, not any thoughts or feelings of AI arbitrators themselves.\(^{106}\) These concerns also relate to the data sets used to build the AI and how human bias bleeds into the functionality, and possibly even the end results.\(^{107}\) Because of this, companies, like PepsiCo, refrain from using AI for specific tasks, like hiring, due to the high risk of bias.\(^{108}\) This risk of bias, coupled with AI’s black box problem, makes its

\(^{102}\) See id.


\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) See, e.g., Isabelle Bousquette, Rise of AI Puts Spotlight on Bias in Algorithms, WALL ST. J. (Mar. 9, 2023), https://www.wsj.com/articles/rise-of-ai-puts-spotlight-on-bias-in-algorithms-26ee6c9 [https://perma.cc/2MZG-EK46] (“Bias is an age-old problem for AI algorithms, in part because they are often trained on data sets that are skewed or not fully representative of the groups they serve, and in part because they are built by humans who have their own natural biases . . . .”).

\(^{107}\) See id.

\(^{108}\) Id.
use as arbitral decision-makers more concerning because of the lack of judicial review of those decisions. As previously discussed, the black box problem with AI generally makes tracing its decision-making process extremely difficult.\textsuperscript{109} Furthermore, the confidentiality and limited opportunity for judicial review in arbitration adds to fairness concerns surrounding use of AI arbitrators in forced employment arbitration.\textsuperscript{110} The black box problem makes it nearly impossible to implement judicial review of AI arbitrators’ decisions, so regulation needs to occur on the front end of such arbitrations rather than the back end.\textsuperscript{111}

As a result of the black box problem, it is difficult—if not impossible—to identify AI bias.\textsuperscript{112} The majority of circuit courts that have set a standard of review for evident partiality in arbitration requiring that “a reasonable person would have to conclude that an arbitrator was partial to one party” for vacatur of an award to be appropriate.\textsuperscript{113} The black box problem complicates applying this standard to AI arbitrators since there is little to no “causal nexus” that can be examined between an AI arbitrator’s decision-making process and final decision.\textsuperscript{114} The minority standard employed by some circuit courts—that arbitrators “must . . . avoid even the appearance of bias”\textsuperscript{115}—is even less workable with AI arbitrators due to the black box problem. Furthermore, because judges are the ones implementing judicial review of arbitral awards, and concerns

\begin{footnotesize}
\begin{enumerate}
\item See supra Section II.B.1.
\item See Cynthia Estlund, \textit{The Black Hole of Mandatory Arbitration}, 96 N.C. L. Rev. 679, 681–82 (2018) ("The relative secrecy and obscurity of arbitral proceedings extends to the nature of arbitral procedures themselves. Courts follow published rules of procedure that are promulgated by publicly accountable bodies. Arbitrators are primarily bound by the agreements under which they are appointed—agreements that are written by the parties, or rather by one party in the case of most employment . . . arbitration agreements."); \textit{Mandatory Arbitration Clauses Are Discriminatory and Unfair}, PUBLICCITIZEN, https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair [https://perma.cc/PB6Y-QFKP] ("[C]ourts can review for bias in the [arbitration] process, partiality by the arbitrators, and whether the arbitrators exceeded their powers. But to overturn a decision on substantive legal grounds, the appellant must show ‘manifest disregard for the law,’ an extraordinarily difficult standard to prove.").
\item See Kasap, supra note 10, at 229 ("AI algorithms’ decision-making processes typically operate in a black box that makes the algorithm opaque even to its designers, much less legal professionals and laypersons.").
\item Id. at 244.
\item See Kasap, supra note 10, at 229–30.
\item Cameron, supra note 113, at 2236.
\end{enumerate}
\end{footnotesize}
already exist over judges’ technological competencies, determining on judicial review whether an AI arbitrator was biased becomes even more difficult.\textsuperscript{116}

Therefore, though independence and impartiality may not initially seem like concerns with AI arbitrators, both issues prove to be present upon closer inspection. Truly establishing independence with AI arbitrators in employment arbitration likely requires tracing the AI’s development and training inputs from its inception—that is, tracing both the identities and ties of those who built and trained the AI as well as tracing the care with which the AI’s data sets were chosen and combed prior to training. Both how the data is chosen and combed will be important when attempting to establish an AI arbitrator’s impartiality since the black box problem complicates identifying the AI’s decision-making process. To protect vulnerable employees in forced employment arbitration, there must be stringent policies and guidelines in place to monitor and screen AI’s outputs for bias before allowing it to render arbitral decisions.

\textbf{B. Mandated Disclosure Concerns with AI Arbitrators}

In addition to independence and impartiality concerns with specific AI arbitrators, mandated disclosure is the next relevant hurdle to overcome. The myth of mandated disclosure—the idea that the more sophisticated party will distill all of the necessary information accurately into an understandable format for the less sophisticated party—extends to forced employment arbitration as it relies on the party with more power and knowledge (the arbitrator) to disclose information helpful to the naïve party (the employee) in making an informed decision about whether an arbitrator should render a particular decision.\textsuperscript{117}

In order to reach employment arbitration, the employee likely will have signed an employment contract

\textsuperscript{116} See John G. Browning, \textit{Should Judges Have a Duty of Tech Competence?}, 10 St. Mary’s J. on Legal Malpractice & Ethics 176, 194 (2020) (discussing concerns about judges’ technological competence as “technological controversies occup[y] an increasingly important position in the agenda of federal courts” and how a lack of competence leads to errors in decisions).

\textsuperscript{117} See supra Section II.D (discussing the myth and reality of mandated disclosure).
The signing of this contract alone prompts the concerns surrounding mandated disclosure—as scholar Alexander J.S. Colvin notes in an article on the inequality of justice in forced employment arbitration, “[e]mployees only participate in [the decision to agree to arbitrate claims] if they possess unusually high levels of individual bargaining power, as do executive-level managers, or if they hold collective bargaining power through union representation.” Colvin argues that this power imbalance results in “inequality between employees in the structure of their procedural rights for the enforcement of substantive employment rights.”

Thus, the employee—already failed by mandated disclosure before arriving at the arbitral proceeding—is further failed by mandated disclosure in the proceeding itself. In 2015, the New York Times (the Times) published a series exposing arbitration issues, including problems with arbitrators having undisclosed ties to parties. The Times illustrated “subtler” ties between parties and arbitrators in the example of an “arbtrator who went to a basketball game with the company’s lawyers the night before the proceedings began,” after which “[t]he company won.” Another example was a plaintiff who saw the arbitrator and defense lawyer come back from the lunch break together “in matching silver sports cars,” after which the defendant won. The Times also found that, of the cases examined, forty-one arbitrators handled ten or more arbitrations involving the same

118 Seema Nanda, Mandatory Arbitration Won’t Stop Us from Enforcing the Law, U.S. DEP’T OF LAB. (Mar. 20, 2023), https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law [https://perma.cc/DU9K-J8ZM] (“Today, over 60 million workers are now subject to mandatory arbitration. What was once a relatively rare employer practice that only affected about 2% of workers in the early 1990s has grown to include 56% of all non-union private sector employees and 65% of employees making less than $13 per hour.”).
120 Id.
122 Silver-Greenberg & Corkery, supra note 121.
123 Id.
companies. The problems with those cases are immediately apparent, and one would think that those arbitrators knew that their ties to a party could cause partiality in their arbitrations. Mandated disclosure, in the form of potential arbitrator disclosure, called for those arbitrators to disclose those ties, which they failed to do.

In some ways, the issue of mandated disclosure could be simpler with an AI arbitrator—after all, an AI arbitrator cannot attend a basketball game or have lunch with one of the parties. But the fact that AI cannot engage in actions outwardly manifesting deeper ties to a party evinces exactly why mandated disclosure becomes tricky with AI arbitrators. AI cannot comprehend its own ties nor understand what it should share and why. Effective disclosure requires the arbitrator to perceive which disclosures are important and then communicate them.

We use machines because they can process more information than humans can, but the idea behind mandated disclosure is that humans can only process so much information and therefore need it distilled for them in complicated, unfamiliar matters. Currently, requiring disclosure of arbitrators rests on a “long chain of fragile links” that requires those arbitrators to (1) sense facts about themselves and their ties that should be disclosed and (2) communicate those facts to the parties. Implementing AI arbitrators would further extend that chain of links by asking a machine without emotional intelligence to (1) sense whether it has ties to its creators that would be problematic or whether its data sets could make it a biased decision-maker in

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124 Id.
125 See 9 U.S.C. § 10(a)(2) (stating that a court may order vacation of an arbitral reward it has made upon application of any party to the arbitration where there was “evident partiality or corruption” by the arbitrators or either of the parties).
126 See Silver-Greenberg & Corkery, supra note 121.
127 See Kasap, supra note 10, at 235 (“AI’s lack of intrapersonal intelligence is also the reason that it can only have limited interpersonal intelligence. While AI can interact with others on a certain level and answer questions based on the input provided by the user, like Siri or Alexa, it does not do so because it understands the question. Instead, AI uses the data and instructions that it has learned during its training and applies it to a new input, which is merely logical–mathematical intelligence.”).
128 See FINRA, supra note 83, at 18 (“Arbitrators should disclose any circumstance that might hinder—or even appear to hinder—their ability to render an objective determination.”).
129 See BEN-SHAHAR & SCHNEIDER, supra note 64, at 3.
130 Id. at 7; see, e.g., FINRA, supra note 83, at 17–21 (discussing the types of disclosures an arbitrator should make to parties).
a particular arbitration and (2) communicate those issues through a manageable amount of information and in a comprehensible way to the less sophisticated party.\textsuperscript{131}

A recent study found that between March 2023 and June 2023, ChatGPT became less willing to answer subjective questions and adhered to its area of expertise (that is, questions that could be answered by calculable data).\textsuperscript{132} Asking AI to arbitrate would be asking it to engage in steps that require emotional intelligence and an ability to handle subjective questions and answers.\textsuperscript{133} In employment arbitration, where repeat employers take on employees with little to no experience in the legal system or arbitration, the arbitrator’s ability to comprehend what should be disclosed and how it would impact those particular parties is especially consequential.\textsuperscript{134}

C. Emotional Intelligence Concerns with AI Arbitrators

Emotional intelligence, though the least straightforward concern to analyze, arguably colors, impacts, and underscores every other concern with AI arbitrators. As sophisticated as AI may become, it will never be capable of possessing true emotional intelligence, no matter how

\begin{footnotesize}
\textsuperscript{131} This is, of course, provided that AI arbitrators would still be subject to the required disclosures human arbitrators are, which first requires answering the question of whether AI can serve as an arbitrator under the FAA, a question not contemplated by this paper. \textit{But see} Horton, supra note 34, at 39–44 (concluding that AI could not be an arbitrator under the FAA because the FAA refers to a person, but also that state law could fill in the gaps by customizing standards on AI arbitration).


\textsuperscript{133} See White & Case, \textit{2010 International Arbitration Survey: Choices in International Arbitration} 25 (2010), https://arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf [https://perma.cc/GZ4C-KUFN]. A 2010 study found that when selecting arbitrators, arbitration users attached importance to soft skills (defined as “the ability to work well with the other members of the panel, the parties and their lawyers and generally adopt a helpful and friendly demeanour”). \textit{Id}.

\textsuperscript{134} See Colvin, supra note 119, at 78, 82–83 (discussing factors that contribute to the power imbalance between employers and employees in forced employment arbitration, including the fact that around a quarter of employees in mandatory employment arbitration are pro se, and those pro se employees are even less likely to be successful in employment arbitration than their counterparts who retain counsel).
\end{footnotesize}
convincingly it may mimic it. The data available to train AI to settle arbitral disputes “will never represent the unquantifiable complexities of the real world in [its] entirety because the data sets . . . can [only ever] be quantified and used in mathematical calculations.” Because of this, even if feature selection for AI arbitrators was maximized to the fullest potential, AI would still lack the ability to perceive non-mathematical, intangible features or factors that could—or should—have a decisive effect on the arbitral outcome. As Kasap states, “Humans can assemble disparate pieces of background knowledge and information through intuition, judgment, and imagination, which all play a crucial role in inference and problem-solving in general.” Understanding the context and nuance of a particular arbitration may require an arbitrator to perceive and use unquantifiable aspects in their decision-making process, which may present an inherent limitation for AI arbitrators.

Emotional intelligence led to the regulation of independence and impartiality in the first place. Establishing independence and impartiality in arbitrators is necessary because emotional intelligence is needed to perceive issues, such as bias, prejudice, power imbalances, and other legitimate concerns that impact people daily. A power imbalance can be quantifiable, in a sense, because humans have the emotional intelligence necessary to understand certain quantifiable metrics (experience with litigation, representation by counsel, etc.). For example, when a large corporation with a full-fledged legal team goes up against a single litigant with no prior legal or ADR experience, a human can identify the significant risk of a power imbalance between

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135 Kasap, supra note 10, at 228.
136 Id.
137 Id. at 247.
138 See Nick Chatrath, How Emotional Intelligence Can Help You Thrive in the Age of AI, CEO MAG. (Feb. 24, 2023), https://www.theceomagazine.com/opinion/emotional-intelligence-ai [https://perma.cc/L9UP-TDBT] (stating that AI models experience difficulty interpreting emotions and facial expressions because “both algorithmic and hardware inefficiencies make it unlikely AI will have the raw power needed to master the subtleties and idiosyncrasies of human feeling”).
139 See supra Section III.A (discussing the importance of establishing independence and impartiality in arbitrators prior to arbitral proceedings).
140 See Imbalance of Power: How Factoring in Power Works, ADR TIMES (May 10, 2023), https://www.adrtimes.com/imbalance-of-power [https://perma.cc/5M95-QTSN] (“The factors that contribute to an imbalance of power are often hard to notice on a day-to-day basis, but over time they contribute to an unhealthy dynamic if they are not addressed.”).
the two parties because of the awareness and understanding of what those quantifiable metrics mean for the more abstract existence of a power imbalance.

The need for emotional intelligence to perceive and understand the arbitration process, as well as its result, is exactly why allowing AI to render such decisions is dangerous. AI does not, and seemingly will never, possess awareness and understanding of why it renders a decision and what that decision will mean for the parties bound by it.\textsuperscript{141} While this may not pose a significant risk when the arbitration is between two large corporations who are each repeat players in the arbitration world with robust legal teams, the reality is different when the arbitration is between a repeat player and their inexperienced employee.

Employment arbitration presents a unique power imbalance that should require an arbitrator who can comprehend that imbalance on a human level in order to arbitrate equitably.\textsuperscript{142} Even before the debut of forced employment arbitration, a bargaining power imbalance existed between employers and employees.\textsuperscript{143} An employer can easily replace an employee, whereas the impact of loss of employment has the potential to significantly upend an employee’s life.\textsuperscript{144} AI’s lack of intuition raises concerns about its ability to perceive and weigh these power imbalances between parties. AI cannot properly arbitrate a dispute without comprehending the inherent power imbalance between an employer and an employee. It may be able to recognize that the employer is a repeat player and the employee is not, but it is likely not trained to take that into consideration in the arbitration in any meaningful way. Because of this, AI’s lack of emotional intelligence could exacerbate the existing power imbalance in employment arbitration.

\textsuperscript{141} Kasap, supra note 10, at 234 (“[When making an arbitral decision,] the AI arbitrator will not be aware of the award that it will enter, nor will it understand why it has entered such an award. . . . This may cause grave mistakes in arbitration, like the example of the AI algorithm that decided to sacrifice the life of the pilot in a flight simulation because it determined that crashing the plane was the optimal path to obtaining the highest landing score.”).
\textsuperscript{142} See Colvin, supra note 119, at 78.
\textsuperscript{143} Id.
\textsuperscript{144} Id. (“Whereas any individual employee represents only a small part of the labor force of a large employer, that employee’s job usually represents the major source of income and economic security for the employee.”).
Some scholars contemplating whether AI should be allowed to serve as arbitrators assert that AI should only be permitted to supplement, rather than replace, human arbitrators since “a human’s [weakness of] limited intellectual capacity is outweighed by [the strengths of] empathy, emotional intelligence, and life experiences, generally, and particularly when seeking to adjudicate in light of fairness and justice.” Like in other areas of the law, it is clear that AI can be, and already is, a helpful supplement to human arbitrators. “AI is assisting arbitration parties to review and produce documents in eDiscovery, analyze data, see patterns, and summarise legislation and case law.” While AI may help human arbitrators be more effective and efficient, AI’s relatively few, but notably significant, limitations should bar AI from serving as the arbitrator.

Emotional intelligence is one of the few areas of intelligence in which AI will never outperform humans, which should be considered when evaluating whether AI is allowed to render arbitral decisions. That being said, AI should not be presumed to be perfectly accurate, even in decisions not involving subjective questions or requiring emotional intelligence.

D. Accuracy Concerns with AI Arbitrators

Prior to the unveiling of ChatGPT, scholars expressed doubt over the trustworthiness of AI arbitrators related to accuracy and reliability of arbitral decisions. Such concerns

145 Derick H. Lindquist & Ylli Dauta, *AI in International Arbitration: Need for the Human Touch*, 2021 J. Disp. Resol. 39, 64 (2021). “[T]he question of whether AI arbitrators can substitute for humans requires us to consider human emotional intelligence thoroughly. This is because an AI arbitrator without emotional intelligence might not be as credible to the parties. Worse still, this may endanger the integrity of the arbitration process itself and the parties’ faith in the overall process, or at the very least, lead to an uncertain adjudication between the parties.” Kasap, supra note 10, at 236.


147 See Kasap, supra note 10, at 235–36.

148 See id. at 224–26 (discussing potential issues with AI arbitrators including overfitting, insufficient inputs resulting in oversimplified outputs, and issues stemming from biased training data); see also Paul Bennett Marrow, Mansi Karol & Steven Kuyan, *Artificial Intelligence and Arbitration: The Computer as an Arbitrator—Are We There Yet?*, 74 Disp. Resol. J. 35, 65 (2020) (“While it is anticipated and expected that most applications of A.I. will eventually become explainable, we may not be able to answer whether or not the explanations themselves will be sufficient, auditable, and trustworthy.”).
stem from several possible issues, like overfitting, where AI incorrectly identifies which data should be determinative because of the high number of input features and the lower amount of available past arbitration data. If the AI arbitrator was not trained with enough data sets, changing a single sentence in a data observation could cause the AI to shift an entire decision where a human arbitrator would not. This is especially concerning considering the black box problem because a human reviewing the AI’s decision would not recognize that overfitting occurred unless the result was so off-base as to raise suspicion.

Though it is tempting to think AI will inevitably improve, recent studies have indicated that AI is not necessarily becoming more accurate over time. A study published in August 2023 by Stanford University and the University of California, Berkeley, found that “the performance and behavior” of ChatGPT-3.5 and ChatGPT-4 “varied significantly” between March 2023 and June 2023 with “their performance on some tasks [becoming] substantially worse over time, while [improving] on other problems.” Among other things, the study tracked the LLMs’ accuracy of responses for math problems and United States Medical Licensing Examination (USMLE) questions (an exam required for medical practitioners in the United States). For “sensitive and opinion questions,” the study used the response rate of the LLMs or the frequency with which they directly answered a question. For the math and USMLE questions, both the accuracy and response length of the LLMs varied significantly throughout the relevant months, increasing in accuracy with some tasks and decreasing in others. For opinion questions, the study used a survey dataset of 1,506 questions drawn from “high-quality public opinion polls” in a multiple-choice format to test the LLMs’ opinion biases. ChatGPT-4’s response rate to the opinion survey dropped by 75.5% between March and June, and both LLMs displayed “considerable opinion drifts over

149 Kasap, supra note 10, at 224.
150 Ioannidis, supra note 46, at 552.
151 See supra Section II.B.1 (discussing the black box problem).
152 E.g., CHEN ET AL., supra note 132, at 1.
153 Id.
154 Id. at 3.
155 Id. at 4.
156 Id. at 4–5.
157 Id. at 9–10.
time."\textsuperscript{158} At points, longer reasoning steps by the models actually led to wrong answers.\textsuperscript{159} The researchers concluded that their “findings highlight the need to continuously monitor LLMs’ behavior over time.”\textsuperscript{160}

That study should serve as a red flag for the implementation of AI arbitrators, especially in forced employment arbitration. Most of the study consisted of measuring LLMs’ ability to arrive at the correct quantifiable output in the form of mathematical equations or test question answers, and the results showed that in some cases the models grew worse over the four months by producing inconsistent results.\textsuperscript{161} The prompts these models were tested with are simple compared to arbitrating an employment dispute. In arbitration, the arbitrator needs to accurately (1) identify potential issues with impartiality and independence, (2) disclose any relevant issues, (3) identify and analyze the relevant facts and legal issues at play in the dispute, and (4) arrive at an accurate and fair decision.\textsuperscript{162} The inconsistent accuracy of both ChatGPT models raises concerns of whether AI could accurately handle the steps necessary for effective arbitration, especially the second, third, and fourth steps.\textsuperscript{163} As the study’s researchers noted, there is likely a need to “continuously monitor LLMs’ behavior,”\textsuperscript{164} which supports the conclusion that AI should at most supplement human arbitrators rather than be the sole arbitral decision-maker. The study also highlighted the importance of monitoring how the data sets that LLMs are trained with affect bias in decisions.\textsuperscript{165} If AI becomes less willing to offer answers on complex, nuanced questions and thus increases the chance of biased answers to more complex questions,\textsuperscript{166} there is an

\begin{itemize}
  \item \textsuperscript{158} Id. at 10–11.
  \item \textsuperscript{159} Id. at 12–13.
  \item \textsuperscript{160} Id. at 2.
  \item \textsuperscript{161} Id. at 1.
  \item \textsuperscript{163} See CHEN ET AL., supra note 132.
  \item \textsuperscript{164} Id. at 1.
  \item \textsuperscript{165} See id. at 8–10, 14–15, 18 (noting that “[p]rompting LLMs with sensitive questions is known to lead to harmful generations such as social biases, personal information, and toxic texts”; tracking the responses and noting inconsistencies; and concluding that LLMs should be closely monitored by humans).
  \item \textsuperscript{166} See id. at 8–10.
\end{itemize}
additional concern of whether AI can handle forced employment arbitration at all, since such arbitration often centers around nuanced issues like alleged discrimination by the employer.\textsuperscript{167}

The concern is not only whether AI is proprietary, meaning owned or controlled by a company, but also how AI was initially trained and where the data sets used for training originate from.\textsuperscript{168} In an employment discrimination lawsuit, it would be critical to establish AI’s independence from the parties as well as to have some metric by which its outputs could be screened for biased results. Because of the black box problem, this would require close monitoring of AI’s inception and training data and ongoing monitoring of its outputs to check for biased results, which would be incredibly difficult.\textsuperscript{169}

These general concerns about AI’s potential inaccuracy do not even cover the other important questions regarding AI arbitrators, such as if AI is allowed to render arbitral awards, how would it be trained to do so?\textsuperscript{170} Would LLMs, like ChatGPT, be trained to answer standardized queries in arbitral disputes? Would LLMs be trained using prior arbitral decisions? What input options would be necessary to ensure an accurate decision (free of overfitting) on the part of the AI? Answering these questions inevitably circles back to the question of who is building the AI, prompting further questions of the AI’s proprietary nature, independence, and impartiality.

As is evident by now, many of the concerns surrounding possible AI arbitrators are interrelated: AI bias

\textsuperscript{167} See Colvin, supra note 119, at 80 (“Around half of all mandatory arbitration cases administered by the AAA involve employment discrimination claims, with the majority of the remainder involving non-civil rights, common law-based claims.”).

\textsuperscript{168} See David Brattain, Navigating the Ethical and Security Challenges of Proprietary Algorithms in AI: A Comprehensive Exploration of Risks and Solutions, LinkedIn (Jan. 11, 2024), https://www.linkedin.com/pulse/navigating-ethical-security-challenges-proprietary-ai-david-brattain-5ylce [https://perma.cc/CJK8-BSNE] (discussing several concerns with the proprietary nature of AI algorithms, including bias and a lack of transparency); see also Bousquette, supra note 106 (discussing the significant risk of biased outputs from AI because of biased training data and processes).

\textsuperscript{169} See Megorskaya, supra note 60 (discussing the importance of organizing and combing data for AI training); see also supra Section II.B.1 (discussing the black box problem).

\textsuperscript{170} See Kasap, supra note 10, at 249–51 (discussing concerns with AI’s inability to give reasoned awards and address novel problems with creative solutions because it can only reproduce answers that have been given before).
initially stems from biased training and data sets, but it is difficult to recognize that bias because of the black box problem, and AI’s lack of emotional intelligence means it cannot perceive and disclose its own biases.171 Scholars writing on the concerns covered in this Note, however, largely suggest the same solution: AI is a valuable resource, but it should always be monitored by humans to maximize accuracy and fairness and minimize the risk of bias.172 This wisdom leads to only one conclusion as to whether AI should be allowed to render arbitral awards in forced employment arbitration.

IV. CONCLUSION

Supposedly, the principle of freedom to contract is at the heart of arbitration regulation,173 and purportedly, the principle of autonomy is at the heart of the freedom to contract.174 Yet, as corporations have grown and terms and conditions have lengthened under the guise of mandated disclosure, the right to truly make informed decisions has slipped away from laypeople in every sphere, perhaps nowhere more egregiously than in employment law. Forced into arbitration, at the weaker end of a power imbalance, and now, perhaps under the authority of a machine computing faster than any human but unable to comprehend the humanity of the parties or the magnitude of the situation, employees in forced employment arbitration are more vulnerable than ever.

Forced employment arbitration poses a significant risk of harm on this vulnerable class of people, and implementing AI as an arbitrator would only increase that risk. Verifying AI

171 See supra Sections II.B.1–3 (discussing the general concerns with using AI, including the black box problem, bias in training data, and lack of emotional intelligence).

172 E.g., Kasap, supra note 10, at 253 (concluding “it should always be essential for arbitration to have a human element attached to it”); Scherer, supra note 12, at 398 (suggesting a tort system for regulation of AI which would hold human actors responsible for AI’s actions); TEDx Talks, supra note 43 (asserting that because of “unknown unknowns” with AI, human beings will never be removed from the equation); CHEN ET AL., supra note 132, at 18 (concluding from a ChatGPT study that LLMs must be monitored by humans for accuracy).


174 Hiro N. Aragaki, Does Rigorously Enforcing Arbitration Agreements Promote “Autonomy”?”, 91 IND. L.J. 1143, 1187 (“[Arbitration] subordinates the autonomy of the contracting parties to autonomy conceived in much broader terms, [and] is [therefore] not strictly speaking a freedom or autonomy argument at all.”).
code writers’ independence and AI’s impartiality is a task that is, at the very least, complicated, if not impossible.\(^{175}\) AI likely does not have the ability to carry out mandated disclosure in a way that would dissipate the danger of unchecked impartiality and independence concerns as it lacks the awareness and understanding necessary to comply with mandated disclosure.\(^{176}\) Furthermore, AI’s lack of emotional intelligence would render its arbitral decisions questionable.\(^{177}\) Finally, AI’s accuracy is a concern even with simple commands given to LLMs, like ChatGPT, heightening the concern in complex matters like discrimination claims in employment arbitration.\(^{178}\) Arbitration scholars already understand the existing power imbalance in forced arbitration; the problems with AI’s lack of reasoning, training data, emotional intelligence, and impartiality and independence and impartiality would aggravate that power imbalance if AI is allowed to render arbitral awards. Caution should abound in this area; although AI would be helpful in supplementing human arbitrators in employment arbitration, AI should not be allowed to replace them in rendering arbitral decisions.

\(^{175}\) See supra Section III.A (discussing the difficulty of tracking the origins of AI because of its discreet and discrete nature); see also Cecilia Kang, In U.S., Regulating A.I. Is in Its ‘Early Days,’ N.Y. TIMES (July 21, 2023), https://www.nytimes.com/2023/07/21/technology/ai-united-states-regulation.html [https://perma.cc/Y5JS-GNST] (“The United States is only at the beginning of what is likely to be a long and difficult path toward the creation of A.I. rules . . . .”).

\(^{176}\) See supra Section III.B.

\(^{177}\) See supra Section III.C; Kasap, supra note 10, at 236 (“[A]n AI arbitrator without emotional intelligence might not be as credible to the parties [as a human arbitrator]. Worse still, this may endanger the integrity of the arbitration itself and the parties’ faith in the overall process, or at the very least, lead to an uncertain adjudication between the parties.”).

\(^{178}\) See supra Section III.D.