DOES ALTERNATIVE DISPUTE RESOLUTION INFLUENCE LITIGATION FILINGS? AN EMPIRICAL ASSESSMENT OF THE LIITGATION PROFILES OF FORTUNE 1000 FIRMS

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by

Michael D. Maffie

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ABSTRACT

From the beginning of the "silent ADR revolution" in the 1970s, conflict management scholars have implied that ADR has the capacity to resolve workplace conflicts short of litigation. Yet the *Gilmer* decision gave firms two strategies for managing workplace disputes: (1) use arbitration to limit the costs associated with litigating workplace claims, or (2) use "conflict management systems" to control the escalation of these claims within the workplace. While many firms employ both strategies, they are rooted in different philosophies of workplace conflicts resolution. The first strategy focuses on "distributive" ADR and is indifferent to repairing the employment relationship. The second method focuses on so-called "win-win" ADR techniques that attempt to find solutions to workplace conflicts that benefit both employers and employees. This thesis provides cross-industry empirical data comparing if both of these strategies are able to influence the number of FLSA and employment discrimination claims filed against Fortune 1000 firms.

BIOGRAPHICAL SKETCH

Michael David Maffie was born February 14, 1985, in Dayton, Ohio to parents Maryjo and Kirk Maffie. He grew up in Centerville, Ohio and attended Centerville High School before completing his undergraduate degree in economics. He began graduate school at Cornell in the spring of 2011, and completed the Masters of Industrial and Labor Relations program before entering the Masters of Science program in Labor Relations.

To my parents and brother.

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CHAPTER 1

INTRODUCTION

Industrial relations research has long enjoyed a kinship with legal analysis. Indeed, even undergraduate students in introduction to collective bargaining courses learn that bargaining "occurs within the shadow of the law". Largely due to this, scholars' work in the American industrial relations field often reflected the legal arrangement prescribed in the National Labor Relations Act (29 U.S.C §151-169). While the traditional industrial relations frame largely confined itself to questions of union-management relations, the changing nature of the American economy and declining union density caused the field to expand its scope of inquiry. Beginning in the late 1970s, industrial relations scholars began investigating the unorganized sectors of the American economy and how these firms managed their employment relations.

Due to the employment-at-will doctrine in the United States, unorganized employees possess few legal protections. The two principal exceptions to the employment-at-will doctrine are discrimination and minimum wage laws. Discrimination laws in the workplace are most commonly associated with Title VII of the 1964 Civil Rights Act (Pub.L. 88–352, 78 Stat. 241), a law which makes it illegal for employers to take negative employment actions based on an employee's membership in a protected class. Federal regulation of the minimum wage and maximum working hours are defined in the Fair Labor Standards Act (FLSA) of 1938 (929 U.S.C. §201).

Since 1991, the number of employment claims in federal court has witnessed two distinct changes. First, a large increase in federal discrimination claims began after the passage of the 1991 amendments to the Civil Rights Act. The second major change was a large increase in FLSA cases after 2000. Legal and industrial relations scholars have extensively studied the first trend. The increase of FLSA claims, however, has largely gone unnoticed by the industrial relations community.

This thesis seeks to answer two questions: First, what explains trends in FLSA claims? Existing legal theories argue that changes in the law or economic calculation drive the number of

claims filed in court. Furthermore, as case law accumulates from these claims, firms are better able to predict possible outcomes, and therefore know when to settle a claim or when to proceed to court. Strangely, we have witnessed a fifteen-year increase in the number of FLSA claims without changes to the law that would make the law more desirable for plaintiffs to file a claim. Furthermore, the fifteen-year increase has continued without signs of abatement. With more than 150 million workers covered by the FLSA, and almost 10% of the workforce spending their first decade of post-school work earning the minimum wage (Carrington and Frank, 2009), it is important to understand why workers are suddenly seeking remedy from a statute passed nearly eighty years ago.

Yet, in employment relations, a story can never be understood from only a single perspective. The second half of this thesis examines the relationship between conflict management procedures and employment litigation. With the growing number of employment claims in federal court, some firms have turned to arbitration as a means of managing these claims (Colvin, 2003). Yet is arbitration the only method that firms can employ to manage their litigation profile? This thesis examines the association between several of the most common conflict management procedures and firms resulting litigation filings.

In order to approach these issues, I rely on both quantitative data collection and interviews with top plaintiff and defense lawyers. These interviews lasted between thirty minutes to two hours and took place between August 2014 and June 2015. These interviews were conducted with practitioners and scholars who represented both an industry and employee perspective. The second question is an empirical question. In order to examine the use of ADR policies, two datasets were used. The first dataset was a survey of the Fortune 1000 co-sponsored Cornell University, The Strauss Institute on Conflict Resolution at Pepperdine University, and CPR. This survey provided self-reported data on corporate ADR practices. The second dataset was an original dataset assembled for this thesis. This dataset recorded the FLSA and federal litigation histories of the respondents from the Fortune 1000 survey. Further research was conducted to determine if these claims were class actions, individual lawsuits, or collective

actions. Class and collective action cases were then coded for their outcomes, including individual settlement, dismissals, or class settlements. By matching firm's ADR policies to their litigation histories, we were able to make comparisons between ADR policies and firms' corresponding litigation filings. Structurally, this thesis is broken into this introduction and six other chapters.

The second chapter provides the context of the study. This chapter seeks to provide a landscape of the current literature and how the legal, organizational behavior and industrial relations fields have approached the question of employment litigation. Chapter 2 demonstrates how the three fields provide important insights for each other, and how this thesis will combine their findings into one argument.

The third chapter begins our investigation into the Fair Labor Standards Act. Although employees have been able to use private litigation to enforce the FLSA since 1938, only recently have they done so. Chapter 3 places the recent increase in FLSA litigation in its historical context. By tracing the historical evolution of the Act, this chapter provides the first contribution of this thesis: this chapter links together the rise in discrimination claims that occurred after 1991 and the current trends in FLSA litigation.

The fourth chapter turns to the future of employment litigation and conflict management in the American workplace. Specifically, this chapter gives an overview of the existing debate about arbitration and workplace ADR techniques. This chapter provides a literature review and evidence for why ADR techniques may be able to influence the amount of litigation a firm faces.

The fifth chapter is the research design. Based on the research question developed in Chapter 4, this chapter describes the data collection methods and the independent and dependent variables. It also provides distributions for each of these variables, and the appropriateness of fit between the data and the research question.

The sixth chapter is a discussion of the data analysis. This chapter explains how the author views the data and what the data indicates about the research question. This chapter draws

upon statistical theory and links the results to the existing research. Limitations of the data and data analysis are outlined in this chapter.

The seventh chapter is the conclusion. This chapter brings together the institutional explanation of FLSA litigation developed in Chapter 3 with the findings in later chapters. Finally, we return to the context of the study to determine what new questions have emerged.

CHAPTER 2

CONTEXTUALIZING THE STUDY

With the rise of anti-discrimination claims in the early 1990s, legal scholars began to study the effects of judicial attitudes on the success or failure of these claims (Clermont and Schwab, 2009; Clermont, Eisenberg, and Schwab, 2004). At the same time, industrial relations scholars have documented the rise of individual dispute resolution mechanisms, in part, to manage these workplace disputes that could result in discrimination litigation (Lipsky and Seeber, 1996; Lipsky et al. 2012; Lipsky et al, 2006). Yet firms are not free to choose any strategy to deal with workplace disputes; scholars have demonstrated that different institutional pressures, including litigation and human resource strategies (Colvin, 2004), can result in firms adopting different conflict resolution mechanisms. Finally, the field of organizational behavior has offered evidence that normative, regulative, and cognitive processes can influence how the firm approaches its nonunion conflict management strategies (Nielsen, 2010; Edelman, 1992; Edelman, 1990; Scott, 2005).

These three fields have suggested that environmental, firm, and judicial behaviors are interrelated in how firms manage workplace conflicts. Existing research also argues that institutional effects, such as judicial or societal attitudes about the validity of different types of discrimination claims or the limitations on discrimination protections, influence when individuals decide to litigate these workplace disputes (see, for example: Bisom-Rapp, 1999; Nielsen, 2010). Although existing findings have substantially improved our understanding of the interaction between legal environments and the workplace, the recent increase in Fair Labor Standards Act filings gives us an opportunity to re-examine our understanding of workplace conflict management. This thesis argues that a combination of all three perspectives – legal, industrial relations, and organizational behavior -- is necessary to fully understand the emerging pattern in workplace conflict.

The Legal Perspective

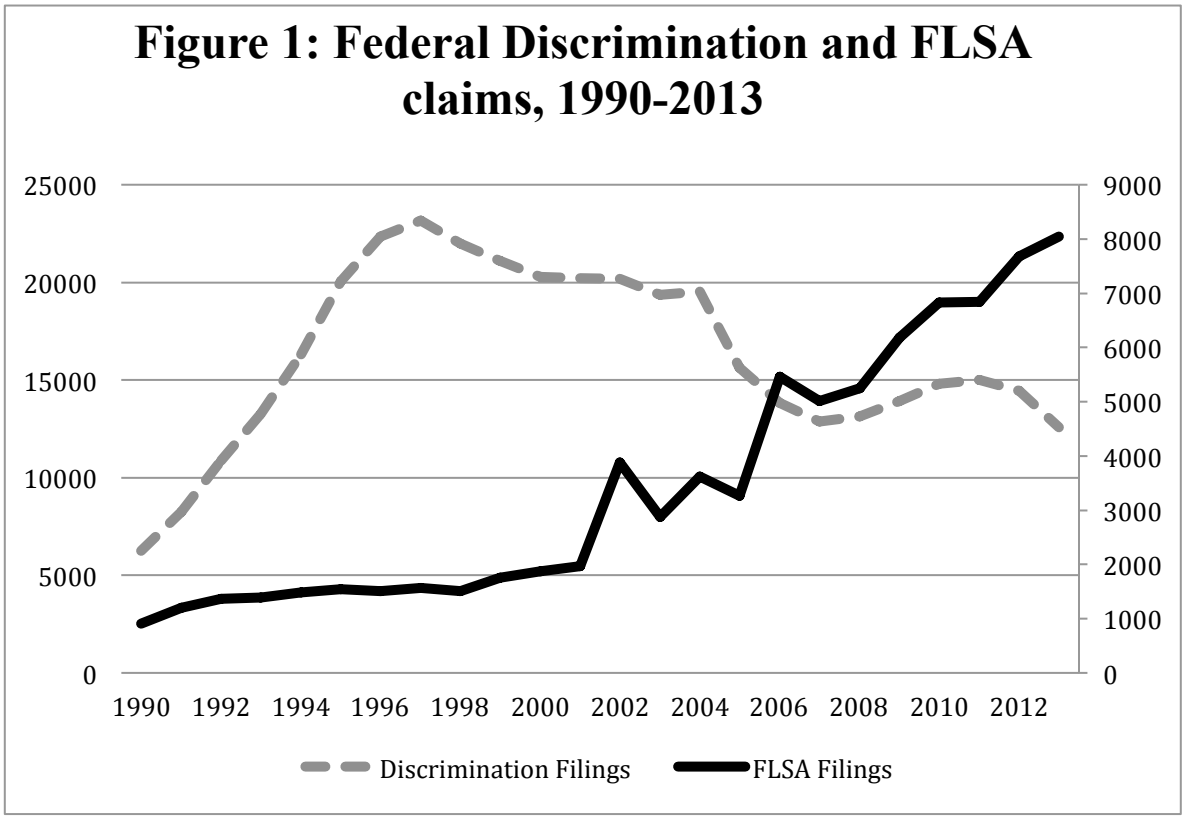
As outlined by Nielsen et al. (2010), there are four theories of why legal action is initiated. The first is a "formal theory" of law, which argues that legal action is determined by the formal letter of the law and supporting evidence. Under this theory, there is no place for power, institutions, or economic forces; exclusively the laws on the books determine trials. The second view is an economic view of law, which argues that lawyers consider the costs of taking a case against the probabilities and benefits of winning the case (see, for example: Priest and Klein, 1984). Under this theory, all agents are rational actors with (some variation on) perfect information. Using this information, lawyers from both sides assess the evidence and possible payoffs against the cost of a trial (and possible appeal). For cases where one side has a decisive advantage, the parties should enter into a settlement to avoid the cost of trial. This argument predicts that the cases that go to trial should have a roughly 50% chance of either side winning. Some scholars have built models that incorporate asymmetrical information to account for varying winning percentages across case and party type (Shavell, 1996).

Third, social mobilization theory argues that litigation, specifically class action claims, is a new form of a social movement that actors use to achieve social change (Bumiller 1988; Merry 1990; Sarat & Kearns 1995). This view argues that the rise in employment discrimination law was a social movement "within proper channels" (Burstein, 1991). Under this view, class actions act as a means of overcoming institutional resistance to change. Finally, the "critical realist" framework argues that law is a social construction where agents can contest the meaning of law by exerting power, economic influence, and lobbying to control the language of the law (for example, Katz, 1977). This theory argues that economically and socially influential players (usually firms) exploit the current legal environment at the expense of one-shot players (usually employees) (Galanter, 1974). While these arguments focus on the question of legislation, plaintiffs, and defendants, they do not focus on how advocates can act collectively to alter the legal environment.

The Industrial Relations Perspective

Early work on the intersection of legal analysis and industrial relations focused on the National Labor Relations Act (NLRA) and its influence on union-management relations (Slichter, Healy, and Livernash, 1960). For much of the 20th century, the NLRA comprised the main legal document governing the workplace. Yet the passage of Title VII of the 1964 Civil Rights Act expanded the scope of possible civil legal claims. As can be seen from Figure 1, after the 1991 amendments to the Civil Rights Act, employment discrimination claims exploded in federal court (Clermont and Schwab, 2009). Due in part to the increase in civil suits during the 1990s, firms began to seek out ways to manage conflict in the nonunionized workplace.

Firms have long attempted to extend mediation and arbitration to their nonunionized employees, but many of these early arrangements were inefficient or rarely used (Slichter, Healy, and Livernash, 1960). It was not until the 1970s that these arrangements began to gain traction in the nonunionized workplace (La Rue, 2000). In order to determine the scope of ADR in the nonunionized workplace, in 1994, the General Accounting Office conducted a national study of workplace ADR (La Rue, 2000). This study found that about 52% of private companies were using some form of ADR to manage their workplace disputes (La Rue, 2000). This survey also began documenting variation in ADR techniques: 39% of firms reported that they had used a peer review board, while 19 percent used some form of arbitration (La Rue, 2000; GAO 1994).



Data on federal discrimination (442) and FLSA filings (710) litigation filings was gathered from BloombergLaw litigation tracker. These cases were sorted by filing date and therefore are slightly different than previous work that tracked cases federal discrimination cases by closure date (Clermont and Schwab, 2009).

In order to create a clearer picture of corporate ADR practices, in 1997 Cornell University conducted a survey of the Fortune 1000 to see which ADR practices these firms had adopted. The results indicated that firms were using a variety of dispute resolution practices, including mediation, fact-finding, an ombuds, arbitration, mediation-arbitration, conflict resolution hotlines, peer-review boards, early neutral evaluation, and other conflict resolution techniques (Lipsky et al., 2003). While over half had used some form of arbitration, firms appeared to be skeptical of this practice and were less willing to indicate they would use it in the future than other procedures (Lipsky et al., 2003). While many firms were very positive about their experiences with non-binding, voluntary ADR practices, such as mediation or an open door policy, firms were more skeptical of arbitration. Mandatory arbitration policies, unlike other

ADR techniques, require employees to submit their employment disputes to a neutral third-party who will decide which claim is more meritorious. Due to its adversarial nature and lack of appeals, this method of dispute resolution has gathered a substantial amount of criticism from both practitioners and academics (see, for example: Stone, 1997; Colvin, 2008). A follow-up study of the Fortune 1000, the dataset used for the second half of this thesis, found that firms were increasing their use of ADR for unorganized workers while the use of arbitration seemed to be declining (Lipsky, et al. 2015).

The industrial relations field initially viewed the development of nonunion ADR with a degree of skepticism. These critics questioned if ADR could provide procedural justice on par with the court system or if a lack of union protection would lead to employer retaliation (Lewin, and Peterson 1988; Lewin 1987). Requiring unorganized employees to submit their workplace disputes to a neutral third party arbitrator instead of litigating their claims generated a substantial amount of controversy. Some questioned if arbitration had an unbalanced playing field in favor of employers because companies would become "repeat players" and gain valuable experience with both arbitrators and the arbitration system over time (Bingham, 1997; Colvin, 2003; Lipsky et al. 2013). Many of these questions have yet to be resolved in the industrial relations literature.

The Institutional Perspective

Finally, the field of organizational behavior has made considerable contributions to our understanding of the interaction between legal pressures and firm behavior. Specifically, Edelman (1992) argues that the ambiguity in anti-discrimination law has allowed certain practices to become institutionalized as a means of demonstrating compliance with anti-discrimination regulations. Drawing upon institutional dissemination theory (DiMaggio and Powell, 1977), Edelman demonstrates how, over time, regulatory authorities (the courts), experts (HR professional journals) or social pressure (a critical mass of firms adopting the same practices) can influence what dispute resolution practices firms adopt such as peer-review boards or non-union arbitration (Colvin, 2003).

Another important institutional development comes from Nielsen (2010). In this case study Nielsen argues that internal firm actors can both influence their legal environment and be influenced by the environment at the same time. Specifically, the fear of a large judgment against the company in this study caused the firm to adopt extensive internal HR procedures whenever the firm engaged in a disciplinary action or terminated an employee (Niselen, 2010). Nielsen explains that even though the firm faces a relatively small chance of losing a major judgment – in fact, it had never lost an employment case – the *possibility* of a major judgment caused it to adopt costly procedures to insulate itself from liability.

Finally, Clermont, Schwab, and Eisenberg document institutional effects *within* the court system. In their 2004 study of employment discrimination claims, the authors argue there is an anti-plaintiff bias developing in federal courts. Two of the authors build on this claim in a follow-up 2009 article (Clermont and Schwab, 2009). In this article, the authors delve deeper into the data, documenting a 15% plaintiff win percentage at the district court level. They also show that when employees do mange to win a judgment at the district court level, their cases are reversed at a disproportionally high rate compared to employee appeals. This pattern is irregular because appellate courts are not supposed to make decision about witness credibility, and it appeared to Clermont and Schwab that appellate courts were doing just that.

A Combination: The Story of the FLSA

Individually, these three perspectives have a difficult time explaining the increase in FLSA litigation. There have been no revisions to the Act that would make it easier for plaintiffs to win a suit; if anything, the George W. Bush Administration made it more difficult for employees to pursue claims. The lack of revisions or amendments also means that there is little outstanding legal ambiguity to resolve in trial. Half of all recent FLSA claims have been filed as collective actions (GAO, 2013), adding some evidence to the claim that legal mobilization may be a strategy for social change. Yet if this were true, we should expect to see an increase in cases in the 1990s when the relative minimum wage was falling, or in the 1980s during times of both

high unemployment and inflation. Employees have possessed the right to litigate their claims since 1938, yet in no previous recession have we seen such an increase in cases filed.

The industrial relations field also has problems with explaining the current litigation trend. The field has suggested that internal voice mechanisms decrease workplace conflict and reduce litigation filings against the firm (Lipsky et al. 2006). Due to ADR's claimed ability to resolve disputes at the lowest possible level, spread of ADR in the American workplace should make it harder, not easier, for claims to increase at a rapid rate. The 2011 survey of the Fortune 1000 provides evidence that firms were applying these ADR procedures to wage and hour complaints, yet the number of cases filed was increasing. Do these voice mechanisms, once thought to be the critical institutional linkage that allowed unions and management to resolve their disputes short of strikes, not adequately resolve workplace wage disputes? Considering the long history of institutional conflict resolution, this is hard to believe.

Instead, this thesis argues that the existing literature is missing a critical actor in the legal environment. While employees have had the right to litigate workplace discrimination and FLSA claims since 1964 and 1938, respectively, only recently have they done so. Existing analysis focuses on the development of firm-side practices and behaviors (including the role of the HR profession), but it has not yet considered that organizations, specifically, the plaintiff's bar, exist on the employee side. Scholars have long recognized that firms – through centralized litigation defense teams – have the ability to influence their environment, why would centralized employee-side actors not do the same?

In order to answer this question I interviewed seven leading employment litigation lawyers in the United States. These are some of the leading attorneys in employment law and have been involved in hundreds of employment discrimination and FLSA lawsuits. These interviewees were selected due to their extensive experience in the area of employment litigation. During these interviews the participants were asked about their experiences with litigating the recent trend in FLSA litigation, such as if the current filings are associated with any particular

industry or production style. Some of the interview questions asked about the way these lawyers' firms handled FLSA and anti-discrimination claims, so interviewees were offered confidentiality.

My interviewees argue that the 1991 amendments to the Civil Rights Act made anti-discrimination law more economically viable for plaintiff-side attorneys. These attorneys, however, did not merely pursue these claims individually, but they also combined efforts and created a well-organized plaintiff's bar. This change precipitated an increase in the number of cases filed in federal and state courts. The plaintiff's bar also created institutional knowledge and standardized practices that decreased the cost of bringing a dsicrimination claim. The effect was dramatic: In only seven short years, the number of discrimination cases in federal court went from one in one hundred to one in ten of the all cases filed in federal court (Clermont and Schwab, 2009). Yet, theory instructs us that environments are dynamic, and both firms and the court system reacted to this increase in cases. Firms introduced HR processes, such as extensive pre-termination documentation, to help prepare for possible discrimination claims from their nonunionized workforce (Colvin, 2003). For various reasons, the court system developed an anti-plaintiff bias (Clermont and Schwab, 2009).

This thesis argues that, ironically, the institutional effects of the anti-plaintiff bias and development of firm-side ADR influenced the legal environment in such a way that the legal market shifted in the direction of FLSA claims. In preparation for this thesis, I interviewed leaders in the field of employee litigation, reviewed the relevant literature, and reconstructed some of Clermont and Schwab's analyses. This thesis will use these as evidence for the claim that institutional effects explain the current increase in FLSA litigation.

The first half of the thesis is dedicated to explaining the rise in FLSA litigation and expanding on some of the components of this claim, such as where did these FLSA claims come from? Also, if firms are not complying with the FLSA, when did this trend away from compliance begin? To answer these questions, I conduct a historical analysis of the passage of the FLSA and subsequent enforcement.

While the first half of this thesis looks to the past, the second half focuses on the future. Specifically, it asks about emerging conflict management techniques. Recent work indicates that firms are experimenting with their ADR policies as a means resolving workplace conflict short of litigation. Using federal litigation data, I attempt to examine the relationship between federal employment litigation and some of the most common ADR techniques.

CHAPTER 3

A MARKET FOR CLAIMS: THE ORIGIN AND RISE OF FLSA CLAIMS

Introduction

Wage, hour, and workplace safety regulations long preceded the passage of the Fair Labor Standards Act in 1938. Indeed, for almost half a century the politics and economic structure of America was shifting due to industrialization and coping with the new problems of a mechanized workplace. These changes played an important role in the passage of the FLSA. At the same time, the federal and state governments fought an almost fifty-year regulatory tug-of-war against a conservative leaning Supreme Court as these governing bodies attempted to pass legislation regulating workplace conditions. Yet it was not a political act but an economic one that finally broke the legal logjam: the Great Depression caused a large number of Americans to rethink their views on the relationship between government and the economy. With the support of business, labor, and the overwhelming endorsement of the public, President Roosevelt was finally able to establish federal regulations governing wages and hours for private industry.

Firms' compliance with the new workplace regulations was unusual: at first, virtually all firms acted in accord with the new regulations (Samuel, 2000). The Wage and Hour division at the Department of Labor, the agency established to enforce the FLSA, estimated compliance upwards of 95% for the first few decades following enactment of the statute (Nordlund, 1997). Economic theory argues that firms calculate the costs of legal infractions against the benefits of compliance. If so, then why did so many firms comply with the law for almost three decades (Nordlund, 1997)? This chapter advances an institutional explanation for the high levels of private sector compliance. Specifically, this chapter argues that a historically powerful President, strong public support, endorsement from the AFL, and the Second World War combined to create a normative acceptance of compliance with the FLSA. This institutional practice broke down in the face of rising political and economic pressures of the 1970s partially because it was

unable to reach the level of cognitive institutionalization. Today, compliance in some industries is estimated to be below 50% (GAO, 2013)

The decline in legal compliance with the FLSA has important implications for understanding the current legal environment. The steady increase in FLSA claims is not a temporal anomaly but instead a constant rise over time. Over half of FLSA cases are filed as class action claims, and, due to de-certified collective action cases, they are primarily located in three states: Florida, New York, and Alabama (GAO, 2008). Compared to previous decades, this increase in cases is unprecedented: from 1991 to 1999, the number of cases increased gradually, increasing from 1,200 to 1,748. The 1980s experienced a similar trend. Where did these cases come from? Furthermore, why did the increase in FLSA filings come nearly ten years after the increase in discrimination claims? To understand these questions it is necessary to look back at the historical context of the FLSA and its enforcement over time.

The Institutionalization of "fair wages": 1820-1930

Institutional theory argues that firms are not completely free to act in their own best interests but firms' choices are influenced based on their institutional environments (Tolbert and Zucker, 1983; Meyer and Rowan, 1977). In the face of institutional pressures, firms attempt to cultivate legitimacy with a specific audience by adopting a particular set of practices. In doing so, the firm "demonstrates that it is acting on collectively valued purposes in a proper and adequate manner" (Meyer and Rowan, 1977: 319). The firm seek legitimacy for a several instrumental reasons, such as maintaining stock prices, generating a positive public image, or appeasing government agencies. Yet compliance with institutionalized practices does not need to materially interfere with the operation of the organization and can be purely symbolic (Tolbert and Zucker, 1983).

Theory argues there are three dimensions of an institutional environment: normative, regulative, and cognitive (Scott, 2001). Normative institutional markers are statements or endorsements by experts or other credible individuals or groups (Meyer and Rowan, 1977; Sine,

David and Mitsuhashi, 2007). Credibility can be gained from a variety of sources. While most organizational studies focus on the role of industrial groups that create "best practices" or other organizational benchmarks, social movements can play an important role shaping the normative environment as well.

In addition to normative practices, regulatory actions, in the form of "rule setting, monitoring, and sanctioning of activities" by other powerful actors in the environment, can constrain organizational decision-making (Scott, 1995:25). As will be important to the story of wage regulation, the organization establishing these rules must be able to enforce, or at least create the impression that it is able to enforce, its rules. Regulatory changes are also important because they can lead to a change in other dimensions of the institutional environment (Edelman, 1990; Haveman, Rao, and Paruchuri, 2007).

Finally, the cognitive dimension, the largest power element of institutional control, is when actors take a certain behavior for granted (Meyer and Rowan, 1977). This dimension indicates that a practice has escaped the question of calculation and has instead permeated the consciousness of most organizational actors. These deeply held, perhaps even unconscious, beliefs about proper behavior have the capacity to create powerful, long-lasting institutional arrangements (Meyer and Rowan, 1977).

The following sections will trace the political, historical, and economic changes that occurred from the 1820s to the enactment of the Fair Labor Standards Act. In doing so, this section argues that the concept of fair workplace conditions and compensation moved from economic calculations to normative concepts enforced by both regulative agencies and social expectations. Despite this change in the institutional environment, however, there is no compelling evidence that the concept of fair workplace conditions reached the level of cognitive acceptance, and therefore, created space for alternative practices to emerge.

1. Regulatory Changes: Creating a Justification for Regulation of the Workplace

Prior to the twentieth century, law governing wages, hours, or working conditions was largely nonexistent in the United States (Wecht, 1951:9). Early on, this absence was due to the prevailing view that workers and firms should be free to enter into contracts without government interference (Wecht, 1951:1; Paulsen, 1959; 1). Even in the early twentieth century, when federal legislators desired to regulate what they viewed as substandard working conditions, the Supreme Court was reluctant to allow the federal government regulatory authority in the area of employment contracts (Paulsen, 1959:2). The Supreme Court held a restrictive view of Congress's power to regulate interstate commerce, including wages and labor conditions (Paulsen, 1959:1; Wecht, 1959:13). Due to the Court's limited interpretation of the commerce clause (Article 1, §8, Clause 3), state legislatures were the first governing bodies to enact limitations on working hours or set a floor for labor conditions (Paulsen, 1959:1; Wecht, 1959:15).

States' regulation of child labor began in the early 1820s when several states passed compulsory education laws (Paulsen, 1959:3). These laws limited the number of possible workers in the labor market and, for the first time, systematically regulated the number of hours citizens could work due to age (Paulsen, p.3). By 1879, nineteen states had passed laws limiting the number of hours children could work or barring the practice altogether (Paulsen, 1959:3). Some of these states included limitations on the number of hours women could work (Paulsen, 1959:8). These states argued it was dangerous for women to work long hours and claimed it was immoral to subject women to extended time in the workplace (Paulsen, 1959:9). In 1896, thirteen states had enacted limitations on working hours for women and by 1900 that number had risen to 28 (Paulsen, 1959:14).

Other attempts at limiting working hours did not focus on gender or age but instead focused on workplace safety. Utah passed the first maximum hour law in 1896 for the mining industry and fifteen states would soon follow suit (Paulsen, 1959:15). Textiles, led by Montana, created a standard eight hour workday for stationary engineers (Paulsen,1959:16). Finally,

several bakeries in New York exploded due to poor working conditions. This resulted in New York enacting the Bakeshop Act that limited the number of both daily and weekly hours a bakery could require of its employees.

During this period, the Supreme Court held a suspicious view of government interference with the freedom to contract. In 1905 the Court struck down the Bakeshop Act in *Lochner v. New York* (198 U.S. 45, 1905). Three years later, however, the Court indicated there might be a role for state governments to regulate hours and wages. In the case *Oregon v. Mueller* (208 U.S. 412, 1908), the Court upheld Oregon's attempt to protect women's health based on limiting the number of hours they could be required to work. This legal opening led Massachusetts to pass the first minimum wage law, but this law only applied to women and minors (Waltman, 2000:28). Eight states (Oregon, Utah, Washington, Nebraska, Minnesota, Colorado, California, and Wisconsin) would pass similar laws the following year (Waltman,2000:29). Three other states and the District of Columbia would follow suit by 1923 (Waltman, 2000:29).

Yet the Court would soon backtrack and strike down Washington D.C.'s general limitation on wages and hours in *Adkins v Children's Hospital* (261 U.S. 525, 1923). From 1905 to 1923, the Court failed to take a clear stance on regulation of workplace safety and hours, and due to this, states were left without guidance on whether their laws would be upheld in the courts. Despite this uncertainty, states continued to pass legislation in the area of workplace safety and wage and hour regulation. During the Great Depression, 25 of 48 states would enact broad minimum wage laws, some of which said that violations could result in prison time (Waltman, 2000:30). The Roosevelt Administration was also undeterred by the Court's conservative leanings, even going so far as to attempt reshaping the judiciary so the Court would be more accepting of government regulation of the workplace (Paulsen, 1959). While there was a strong push from the regulatory environment, the strongest change was occurring at the social-normative level.

2. Normative Changes: Social Movement and the National Industrial Recovery Act

Public support for government regulation of the workplace began building in the late 1800s. Prior to the enactment of legislation regulating wages, hours, and workplace conditions, social movements coalesced around the mantra that labor needed time to "work less and live more" (Miller, 2001). These social conflicts over wages and working conditions were fierce and sometimes violent, as documented by Miller (2001):

> Examples of the United States' close brush with class warfare during this period include the railway strike of 1877, the Haymarket Square riot of 1886, the Homestead strike of 1892, the Pullman strike and boycott of 1892, the anthracite strike of 1902, the garment workers' uprisings of 1909-1911, and the steel strike of 1919. With the labor question as an ongoing concern, the Progressive Era (1890-1914) and the New Deal Era (1933-1938) were periods of tumultuous technological, social, and economic change.

While the Court held a suspicious view of government regulation of the economy, the Great Depression had sufficiently shaken the public's belief in unregulated markets (Paulsen, 1959). Economic experts reinforced this view by arguing that competition over labor costs and workplace safety created negative externalities and were a sub-optimal economic arrangement (Reich, 2013). The public was also receptive to the message that workers needed to "spread the work": polling indicated workers were willing to accept a cutback in hours in order to decrease unemployment (Paulsen, 1959).

One important factor in aligning the public on the side of government regulation was the passage of the National Industrial Recovery Act in 1933. In response to the Great Depression, the Roosevelt Administration passed the NIRA to jumpstart an economic recovery (Walman, 2000:29). This NIRA attempted to restore consumer purchasing power and higher levels of employment after the beginning of the Great Depression. The NIRA relied on several components, including "fair competition" standards for industry and granting the President power to create industrial health and safety regulations (Waltman, 2000:30). The most popular aspect of the NIRA, however, was the minimum wage component. In 1936, over 70% of the American public favored a constitutional amendment guaranteeing a minimum wage (Waltman, 2000:49). Following the enactment of the NIRA, the Administration received letters from

working people indicating the passage of the Act had materially improved their lives. Waltman provides excerpts from four letters:

> "The fair employer is certainly for the NRA. The NRA places a minimum wage so the man paying $13 a week don't have to compete with the one paying $3 a week. Those who don't like the NRA never have worked in a sweatshop.
> If the poor people could only express themselves like the rich there would be no question as to whether NRA had been a benefit to the working classes or not.
> Our life is no bed of roses because that ain't the way it is for workers yet but its better for us than ever I seen it and I been in a factory 9 years since I was 15.
> [The minimum wage makes] a big difference and our life is different and there is a chance for a happy home." (Waltman, 2000:30-31)

Two years after the NIRA was enacted, however, the Supreme Court struck down the law in the case *A.L.A. Schechter Poultry Corp. v. United States* (295 U.S. 495, 1935). In this decision, the Court found the NIRA was an unconstitutional delegation of power to the executive (Waltman, 2000:31). Contrary to the intention of the Court, the *Schechter* decision indirectly increased momentum for the passage of the FLSA. Striking down the NIRA two years after its implementation provided a natural experiment where the nation could witness the effects of federal regulation of wages and working hours. The Roosevelt Administration launched the Committee on Industrial Analysis to study if the NIRA had decreased unemployment or created safer working conditions (Paulsen, 1959). The Committee found overwhelming evidence that, following the Court's invalidation of the NIRA, the number of hours worked and the incidents of child labor increased while wages fell (Paulsen, 1959:24). This helped solidify the public perception that government regulation could decrease unemployment and increase wages (Pauslsen, 1959:25). High public approval of federal wage and hour regulations would continue through the passage of the FLSA, cresting at 71% approval when the Administration presented the bill to Congress (Waltman, 2000:49).

Furthermore, a more nuanced legal argument emerged from the Committee on Industrial Analysis. From their report, the authors found that businesses had increased hours and child labor following the Court's invalidation of the NIRA (Paulsen, 1959:27). By decreasing wages

and increasing working hours, businesses increased market pressure on all other firms, including those across state borders. The report found the effect of decreasing wages and working hours in one state spills over into other states putting the FLSA in line with previous Court rulings:

> "…long working hours, inadequate wages and employment of children in industry create unfair competition in the flow of commerce…and is detrimental to the general welfare of industry and the Nation; and that Congress should create a commission empowered to regulate such unfair and detrimental practices." (Paulsen, 1959:27)

With this report, the President and supporters of wage and hour regulation gained an important piece of evidence that government regulation of the economy was effective and had "spread the work" while limiting the incidents of child labor. Tactically, it provided the Administration with a way of writing the FLSA in a way that could align with the Court's view of interstate commerce.

The following year, 1936, the Democratic Party placed wage and hour regulation in its national platform and President Roosevelt made this issue an important aspect of his presidential campaign (Paulsen, 1959:29). At the same time, organized labor, long concerned that government regulation of the workplace would undermine workers' desire to join unions, endorsed a national wage and hour fixing program (Paulsen, 1959:28). Due partially to this economic platform, the American people rewarded Roosevelt's stance by re-electing the President and ushering in large Democratic majorities in both houses. This was seen as "…not only as an endorsement of his New Deal policies, but also as a mandate on the party's pledges, including the promise to enact a new wage measure." (Paulsen, 1959:29). By 1937, the fight for fair wages had been cast along the following lines:

> "…the fight against the sweatshop was enhanced because reformers, labor leaders, and many businessmen considered it a continuation of the humanitarian struggle for social justice and a further step in the regulation of labor conditions by the government for the benefit of oppressed workers who were unable to protect themselves. The great majority of Americans, therefore, agreed with the President that sub-standard labor conditions were beyond the power of individuals, unions, or the states to handle and that it was time for the federal government to act." (Paulsen, 1959:30)

The evidence suggests that in the 19th century, few laws governed wages, hours, and working conditions. At the turn of the century, progressives who wished to use government to remedy the social ills of economic competition focused on the least controversial areas of social regulation: child labor and protecting women in the workplace. During this era society witnessed several industrial disasters, including the Triangle Shirtwaist Factory fire and exploding bakeries in New York State that were associated with long hours or poor working conditions (Nordlund, 1997). Powerful political actors, including, in the 1930s, a historically powerful president, endorsed government regulation of wages and working hours. Finally, both business and labor supported federal intervention into the economy in order to regulate dangerous workplace conditions.

These actors provided several important audiences from which firms could gain legitimacy. Yet, there is a difference between caring about a particular constituency and seeking legitimacy from that constituency. Or, one could ask, did firms actually modify their behavior in the face of social pressure to improve workplace conditions?

In one early example of the importance of political and social legitimacy, the Roosevelt Administration offered a poster of the Blue Eagle, the symbol of the National Industrial Recovery Act, to firms that pledged to comply with the law. The Administration encouraged Americans to purchase from businesses that were "doing their part" to help the country past the Great Depression (Taylor, 2007). By November 1933, 96% of commercial or industrial firms had filed paperwork with the government requesting a Blue Eagle poster (Taylor, 2007). At the height of its popularity, the Blue Eagle appeared in over half of all advertisements in three major newspapers, the *State Journal* (Lansing), the *Chicago Tribune*, and the *New York Times* (Taylor, 2007). This anecdotal evidence suggests that during the Great Depression, compliance with fair wage laws were not only an economic calculation but also a combination of legal compliance and patriotism.

Conclusion: Institutionalization from 1820 to 1938

In the enactment of the Fair Labor Standards Act, we find evidence of normative and regulative dimensions of institutionalization. As stated by Paulsen: "Perhaps the most significant development, however, was the overwhelming endorsement of the New Deal by the American people and the election of huge Democratic majorities to the new Congress" (Paulsen, 1959:29). Although the legislation required multiple rounds of bargaining over the language and scope of the Act, it was enacted with large majorities in both houses of Congress: In the House, the Fair Labor Standards Act passed by a 319-97 margin while the Senate passed the legislation without even a recorded vote (Nordlund, 1997:51). President Roosevelt signed the Fair Labor Standards Act into law on June 25th, 1938.

The evidence, however, falls short of demonstrating fair wage practices were supported by the cognitive dimension of institutionalization. For example, following Supreme Court's decision striking down the NIRA, many firms increased the number of child workers they employed and workers' wages fell below the thirty-cent minimum set by the NIRA (Paulsen, 1959). At the same time, we find growing social support for fair wage laws across all states and many important constituencies (labor and management; economic experts; Republicans and Democrats). Due to this, we should expect initial compliance to be high, but perhaps not a durable realignment of the institutional environment.

Early Compliance with the Act, 1939-1960

The evidence suggests that most firms complied with the Act during its first few decades of existence. The first year is particularly instructive because the threat of regulatory enforcement was almost nonexistent: the Wage and Hour Division had not yet set up regional offices, developed targeted inspection practices, or fully staffed their federal offices. At the time of the very first report to Congress, the Wage and Hour Division only had 374 employees (Nordlund, 1997). Despite this, evidence suggests that voluntary firm compliance was relatively high, both in the first year and the following few decades.

Elmer Andrews, Administrator of the Wage and Hour Division, submitted the first report to Congress regarding the enforcement of the new wage and hour law on January 14, 1939 (Nordlund, 1997:62). In this report, Andrews observed, "Without compliance, the purposes of the statute are merely pious wishes" (Nordlund, 1997: 62). Enforcing wage and hour limits across the entire nation was a complex task and in order to supplement its initial enforcement efforts, the Wage and Hour Division received support from the Women's Bureau, the Social Security Administration, the Works Progress Administration, the Bureau of Labor Statistics, and the Treasury Department (Nordlund, 1997:63). The Wage and Hour Division would also receive a substantial increase in personnel after the first year of the Act.

Despite concerns over noncompliance, the Act did not appear to merely be pious wishes. At the 1939 American Federation of Labor Convention, then president William Green lauded industry for its compliance with the Act by stating, "The initial year of operation was notable for the extent of voluntary compliance with these standards by employers" (Samuel, 2000). The Wage and Hour Division, reinforced with a greater number of personnel and aided by other government agencies, developed a program to target their enforcement of the Act in industries where noncompliance was the highest (Nordlund, 1997:63). In the first twenty months, the Wage and Hour Division received over 50,000 complaints from roughly 36,000 different establishments (Nordlund, 1997:64). Overtime complaints were a part of, or the main complaint, in almost 90% of all complaints made to the Wage and Hour Division (Nordlund, 1997:64). The second report to Congress argued that the enforcement efforts demonstrated that there was a high level of compliance despite the number of enforcement requests (Nordlund, 1997:63).

Geopolitical events intervened and changed the enforcement practices of the Wage and Hour Division. On December 7, 1941 the United States entered World War II with the attack on Pearl Harbor. Due to its established network of workplace monitors and field agencies, the Wage and Hour Division was assigned to help enforce wartime production standards (Nordlund, 1997:65). These wartime inspections increased the number of workplace inspections by about 50%, and with increased staffing and governmental support, the number of cases prosecuted in

1941 and 1942 increased by 54% (Nordlund, 1997:65). Wartime inspections took a different path as Roosevelt froze national wages with Executive Order 9250. Under the Executive Order, the Wage and Hour Division was asked to enforce the wage stabilization program and the FLSA. This effort, in only eight months, had generated over 900,000 informal requests for information regarding the wage stabilization program (Nordlund, 1997:65).

In 1948, the ten-year anniversary of the FLSA, the department issued a report regarding inspections, compliance activities, and the overall effectiveness of the program. During the decade, the Wage and Hour division had found that 3.2 million employees were uncompensated (Elder and Miller, 1979). Does this mean that the Act's ambitions were merely pious wishes? The agency argued, "The Fair Labor Standards Act has proved basically efficient both in peacetime and war" (Nordlund, 1997: 70). After ten years of data, the estimated noncompliance with the act was around 5% (Nordlund, 1997: 71). Many of the violations were "minor" violations, such as record keeping errors, failure to post notices, discrimination, or illegal discharge (Nordlund, 1997:67) Furthermore, compliance was made easier due to wartime inflation driving down the real value of the minimum wage.

Case studies provide further evidence of compliance with the Act. In the 1930s, the retail and wholesale industries were known for long hours and low wages. In one study of the retail and wholesale industries, Costa found evidence of compliance with the Act in both Northern and Southern establishments (Costa, 1998). Hours in these industries regularly eclipsed 40 hours prior to the passage of the FLSA. Using data gathered from the Bureau of Labor Statistics, the author estimated the changes in hours and income by taking the aggregate number of hours reported in these industries and the average wages. Fixed effects were used for southern and northern establishments and to separate wholesale and retail establishments.

The results of this study indicate that, following the passage of the FLSA, firms in both industries and in both regions began reducing the number of hours worked. What is interesting is that the number of part-time workers *decreased* during this period. The authors argue this is evidence that as firms reduced workers' hours to 42 (and then 40) hours a week, they were not

filling this time with new workers, but were instead reducing the number of part-time workers. Wages during this time also increased following the passage of the Act. This study provides some evidence that even in industries where labor costs had been a competitive advantage, firms were attempting to comply with the law. The study is consistent with independent compliance estimates that placed the compliance rate around 90% until the late 1970s (Nordlund, 1997).

The Deinstitutionalization of Fair Wage Practices: Theory

Institutional theory has long struggled with questions change and agency (Oliver, 1992). While institutional theory provides a powerful balance of both economic and social influences, the explanation can become circular if argued too forcefully. Indeed, if actors cognitively accept a particular practice as "just the way things are", it becomes difficult to explain how alternative practices arise in the face of social inertia (Oliver, 1992). Therefore, any explanation of institutional change must be able both to demonstrate the power to create strong social orientations toward specific practices while still leaving space for new pressures to alter existing arrangements. In the context of the FLSA, despite the evidence of normative and regulative pressures, firms still appeared to make economic calculations when allowed to alter wages. In other words, compliance with the FLSA only ever experienced regulatory and normative institutional support but never reached the cognitive level. Due to this, when faced with new pressures, there was space for actors to shift away from the existing arrangement.

There are many theories of institutional change that focus on different levels of analysis. Some focus on global changes, such as changing patterns of capitalism (Djelic and Quack 2003) while others are focused on the organizational level (Bartunek, 1984) or the role of technology and individuals' roles within firms (Barley, 1986). The analysis of the deterioration of fair wage practices at a national level, however, is concerned with the changing macro-political forces during the late 1970s to the present. Due to this, Oliver's "antecedents to deinstitutionalization" framework is best suited to analyze the data on wage practices (Oliver, 1992). This work uses political, functional, and social pressures as a means of examining institutional change over time

(Oliver, 1992: 567). Specifically, the best evidence for the FLSA is associated with new political pressures and functional changes in enforcement activities.

1. Political Pressure

Political pressure can emerge from several sources at both the organizational and environmental level (Oliver, 1992:570). At the organizational level, political dissent can come from performance shortcomings, the rise of institutional entrepreneurs, or a crisis within the firm (Oliver, 1992: 569-571). At the environmental level, firms may experience political pressure in their effort to obtain resources from the state, the need to appease an important external actor, changes in regulations, or other macro-level changes in the existing political power arrangement (Oliver, 1992: 571).

In the early 1970s, political fissures in the debate over raising the minimum wage began to emerge. During the 1960s, the Republican Party, under the Eisenhower Administration, was fully supportive of expanding the scope of the FLSA (Nordlund, 1997:130). Yet only ten years later, however, Richard Nixon became the first president to veto an increase of the minimum wage, arguably the FLSA's most important and publicly visible provision (Lodi-New Sentinel, September 15, 1973). The standoff between the president and Democrats in Congress would last well into 1974. It was not until the President, weakened by Watergate and facing veto-proof majorities in both the House and Senate, would finally concede and sign a bill that expanded the scope of the FLSA to include 6 million more workers and increase the minimum wage to $2.30 an hour (Nordlund, 1997:137).

The Nixon Administration highlighted the changing debate around the minimum wage. In short, the terms of the debate had changed. In the 1940s, congressional conservatives in the House objected to the bill under the guise that it would harm small businesses (Paulsen, 1959). In order to accommodate these concerns, the FLSA was phased in over time (Paulsen, 1959). In the 1970s, the debate over wage and hour regulations had shifted from objecting to the existence of federal regulation to the *effect* of federal regulation. In this era, conservatives objected to raising

the minimum wage on the grounds that it would drive up inflation (Waltman, 2000:44). By the late 1970s, the minimum wage had become a fierce political battle with one side arguing that the real value of the minimum wage was insufficient and the other countering that the nation needed to focus on controlling inflation (Waltman, 2000:44). In fact, pressure had built up to *lower* the minimum wage, a provision that was only kept out of the 1974 bill by a single vote (Waltman, 2000:44). The Carter Administration was required to trade an expanded retail exemption and tip credit provision in order to gain an increase in the overall minimum wage (Waltman, 2000:44). Ronald Regan, in 1980, became the first President to openly oppose the minimum wage when he stated, "The minimum wage has caused more misery and unemployment than anything since the Great Depression" (Waltman, 2000:44).

2. Functional Pressure

Functional pressures emerge as firms re-evaluate the technical necessity or desirability of existing practices (Oliver, 1992:571). When the outside environment shifts in a way that either no longer incentivizes certain practices or encourages the adoption of different practices, functional pressure emerges (Oliver, 1992:571). As firms develop new modes of economic production or face an increasing demand for efficient use of resources, existing institutional practices can be questioned (Oliver, 1992:572). As written by Oliver:

> Organizations may begin to question the functional utility of anything from traditional extended lunch hours to the burdens of compliance with elaborate occupational safety guidelines when the potential for these institutionalized practices to compromise effective task performance and efficiency becomes salient and significant. (Oliver, 1992: 572)

Since the federal government funds the Wage and Hour Division, politicization of the minimum wage law has material enforcement consequences. Since its establishment through the late 1970s, the Wage and Hour Division grew in size. At first, the Agency only employed 21 agents but grew to over 400 employees by the completion of the first calendar year (Nordlund, 1997:195). Tasked with enforcing production standards in World War II, the division almost doubled in size, but soon after the war, the department substantially cut back the number of its

enforcement officers. Despite this cutback, there was little evidence of growing noncompliance (Nordlund, 1997). The hiring trajectory would flatten out in 1969 when the division employed 1,198 employees, and then peaked in 1978 when the agency employed 1,343 people. The end of the 1970s and 1980s witnessed a 30% decline in the number of employees at the Wage and Hour Division compared to the 1978 high-water mark.

The optimist may claim that automation, technology, and targeted enforcement activities were able to offset the reduction in force. Yet the decline in enforcement officers coincided with increasing demands on the division. As stated by Nordlund:

> Reductions occurred from 1979 to 1982, involving a change of about 414 investigative staff…A final point is needed to provide perspective about these changes. Wage and Hour COs [Compliance Officers] do not have the luxury of simply enforcing the traditional programs, for example, FLSA, Davis-Bacon Act, Service Contract Act, and so forth. Their enforcement responsibilities expand and contract as public policy, legislation, and court decisions mandate. Returning over 7 million state and local employees to FLSA coverage in response to the *Garcia* [1985] decision expanded the division's workload. Requiring Cos to examine payroll records and employment activities under the Immigration Reform and Control Act (IRCA), the Polygraph Act, and several others also spread the time and resources available even thinner. (Nordlund, 1997:186)

Staffing shortages do not tell the entire story. Starting in the mid 1970s and continuing for nearly the next 40 years, the Wage and Hour division witnessed both budget cuts and decreasing personnel. By 2004, the division employed only 788 individuals nationwide and had decreased its enforcement actions by 36% compared to 1975 (Ruckelshaus, 2008). At the same time, a growing private sector placed greater demands on the agency; one study found the Wage and Hour Division covered half a million more businesses in 2004 than it did in 1974 (Ruckelshaus, 2008).

3. Social Pressure

Finally, social pressures can originate either within the firm or outside the firm (Oliver, 1997: 573). Some of these social changes can be caused by changes within the organization, such as high turnover, weakening of socialization mechanisms, or changes in the firm's leadership (Oliver, 1992:573). An organization can also be subject to the changing conditions around it.

Firms exist in a weakening regulatory environment and consolidating technical base, or can be the subject to a high level of media scrutiny. Firms that need the public for access to resources, to maintain high stock prices, or fear backlash due to poor employment, environmental, or government conditions may find themselves beholden to changing social circumstances (Oliver, 1992:573). While there are probably social factors underlying both the changing political and functional pressures, it is difficult to distinguish if social forces are the result or product of these changes. Due to this, I will confine the analysis to the above manifest behaviors: the functional breakdown in compliance and political challenges to the law.

Evidence of Deinstitutionalization

Several methodological problems obscure the exact moment when compliance with the FLSA began to deteriorate. Economic growth from 1938 to 1970 means that even though we witness a rising number of wage and hour complaints and a high violation rate for these complaints, this is not necessarily evidence of increasing noncompliance. Early on, the Wage and Hour Division began targeted inspections and audits for "high risk" industries. By collecting data on past violations and creating a database on suspected high-risk industries, higher violation rates could be the result of the Wage and Hour division creating increasingly effective monitoring programs. Indeed, after World War II, we find fewer inspections but a higher violation rate for these inspections (Nordlund, 1997). Furthermore, not all violations are evidence of noncompliance. There is a clear pattern in the data that shows that complaints to the Wage and Hour Division increased following Congress raising the minimum wage, expanding the FLSA into additional industries, or reducing the maximum hours allowed under the statute.

Yet perhaps one of the most interesting reasons why it is difficult to identify the exact moment compliance began to wane is because much of the early compliance data is simply gone. When contacted about the compliance numbers provided by the Department of Labor, Willis Nordlund recalled the following event:

> What most people don't know is that the Labor Department compiled a massive amount of data and information on the FLSA in manual files from the earliest years of the program. A statistician named Charles Stanford was the primary custodian of these files and data and protected them like a mother hen. Many (most) of these data were one-of-a-kind data that existed nowhere else. They were used for coverage estimates, compliance estimates, economic impact estimates, and much more. I was the Division Director at that point and Charles worked for me. One Monday morning we arrived to find that all of those data and information sources were gone. They had been removed and destroyed. Why this happened or who ordered it to happen could not be determined. The word in the system was that the Administration did not want anybody to focus on the minimum wage or any other labor issues and therefore by destroying the data and information it would make further analysis difficult or impossible. I tell this story to indicate that much of the early data relating to the FLSA that was not captured in earlier 4(d)(1) reports was simply lost.

Projections based on the number of employees in different industries and the reported violation rate suggest that noncompliance in the first few decades after the passage of the FLSA was around 5% (Nordlund, 1997). Green's statement at the AFL convention in 1939 also provides anecdotal evidence that voluntary compliance with the Act was, at least initially, high. Further evidence of institutional support for wage and hour compliance can be found in William R. McComb's (Administrator of the Wage and Hour Division) 1953 annual report to Congress that "…employers as a usual rule want to comply with the Act" (Nordlund, 1997:83). This belief manifested in the Wage and Hour division altering their enforcement patterns to raise awareness about the Act to cut down on accidental violations of the Act (Nordlund, 1997:84).

In the late 1970s, multiple studies were initiated to determine the compliance level of the FLSA (Wash, 1997). The Minimum Wage Study Commission randomly investigated 15,000 businesses to determine if these establishments were complying with the Act. The results indicated that noncompliance was becoming a problem for the Act. These audits revealed that 21% of establishments were violating the overtime provisions of the Act and 43% of establishments had at least one overtime violation in the past two years (Wash, 1997). As discussed above, violations may not indicate that firms are willfully violating the Act. The Commission, however, found that "the evidence strongly indicates that many FLSA violators are

recidivists" (Wash, 1997). The study estimated that 28.1% of all violations were repeat offenders. After conducting regression analyses on their data, the authors conclude that:

> …taken together, these results provide strong support for the view that at least some employers do make conscious decisions about whether to comply with the overtime provisions of the FLSA decisions that involve a weighting of the benefits and costs of such an action. (Minimum Wage Study Commission, 1981)

In 1981, a study by the General Accounting Office (GAO) would come to a similar conclusion. After reviewing over 4,000 cases where the Wage and Hour division had made a finding, the GAO called noncompliance with the Act, "a serious and continuing problem" and "that many employers willfully violated the act and that current enforcement actions have not resulted in penalties that would deter these violations" (Wash, 1997). The GAO's conclusions were based on both the reported recidivism rate and interviews with field officers. These interviews indicated compliance officers believed repeat offenses were willful. These interviews also provide evidence that firms were balancing the cost of compliance against the possible risk they would be audited and found in violation of the Act (Wash, 1997).

More recent surveys underscore the trend. In 1998, the GAO revealed that compliance with Act in the Los Angeles garment industry was as low as 39% (Wash, 1997). Of special concern was the finding that the garment industry was an industry that the division targets; despite concentrating its resources to improve compliance with the Act, the Wage and Hour division was unable to make any meaningful improvements in compliance. A 1997 GAO report found that 30% of all nursing homes violated the act, and 83% of employee complaints to the Wage and Hour Division had uncovered at least one violation of the Act (GAO, 1997). Similar compliance rates were found in the meatpacking industry (Wash, 1997).

The trend toward noncompliance continued in the 2000s. The largest study of FLSA noncompliance in low wage industries was conducted by a group of research universities in 2009 (Berhardt, et al. 2009). In this study, researchers interviewed 4,387 workers in three large U.S. cities (Chicago, Los Angeles, New York) to determine the scope and magnitude of noncompliance with the FLSA. The researchers found that over half of the workers were

underpaid by more than a dollar an hour and 76% of workers were forced to work unpaid or underpaid for overtime hours. By projecting these figures, the researchers estimate that the 1.12 million hourly wage earners in these three cities were being underpaid by $56 million a week. One of the lawyers interviewed for this thesis stated that not only is noncompliance widespread,

> "…there are lots of violations, particularly by small businesses…they are relatively unsophisticated they don't have a dedicated HR person. A lot of them are hiring, particularly in the restaurant industry, are hiring undocumented workers. They are not paying them properly, its commonplace, frankly, its omnipresent in major cities…if you go to so-called back of the staff you have undocumented workers who are not being paid properly. It's endemic."

In the mid-1950s, noncompliance was estimated to be around 5%, but by the 1970s it had grown to around 20 percent, and by the mid-1990s, in some industries it was high as 68.1%. Today, in some industries, it has become common practice to violate the FLSA (Berhhardt, et al 2009). In the span of fifty years, firms went from making a genuine attempt to comply with the Act to willfully calculating the costs and benefits of violating it. When the FLSA was passed, it not only allowed for public enforcement via the Wage and Hour division, but also for private enforcement through civil lawsuits. Litigation, however, was rarely used until the mid-1980s. Even during this time, however, private enforcement of the act was sporadic, at best. In 2000, this old method of enforcement found new momentum.

Consequences of Deinstitutionalization: FLSA litigation 1999-2014

The number of FLSA claims in federal court remained remarkably stable from 1978 to 2001, only gradually rising over this time. Beginning in 2001, however, a "wave" of FLSA claims hit the federal courts: between 2001 and 2013, the number of claims increased over 600 percent. These can be seen in two distinct spikes in activity: the first major increase came between 2001 (1,962 FLSA claims) and 2002 (3,882 claims), while the second occurred from 2005 (3,269 claims) to 2006 (5,461 claims). Despite the increase in the number of claims, there has been very little research examining why employees are suddenly turning to the FLSA as a

remedy for wage violations. Law scholars, however, have pointed to several factors that may be driving this increase. I will review these theories before offering an institutional explanation of the changes in FLSA filings.

The first explanation relies on an increase in enforcement by the Department of Labor (Alaimo, et al., 2005). In 2001, the DOL made a commitment to enforce the FLSA and followed up this commitment with a record breaking $110 million in collections for FY2001. During that financial year, the DOL initiated actions that covered nearly 200,000 workers (Alaimo, et al., 2005). The following two years, the DOL continued this trend, collecting $143 million and $182 million, respectively. In FY2003, some 315,000 employees received back wages due to DOL actions. These efforts, combined with greater public information regarding FLSA compliance, have been linked to the increase in FLSA activity in federal courts.

This argument benefits from linking the rise in FLSA claims to federal enforcement, a factor that, depending on the political alignment, could persist over multiple years. Furthermore, this explanation benefits from fitting the timeline created by our data. In 2005, this was a viable theory. A 2008 study by the Government Accountability Office, however, argues that the George W Bush Administration did not encourage the Department of Labor to vigilantly track down wage and hour violations (Lurie, 2011). Researchers found that staffing levels had been steadily eroding at the DOL, reaching their lowest levels in nearly thirty years. My interviews reaffirmed the DOL's lack of resources, with one advocate stating, "The department of labor has limited resources and they are not in a position to do very much about the proliferation of compliance problems at the local level."

Unlike discrimination claims, employees are not required to exhaust their administrative remedies before filing a claim in court, so employees may choose to bypass filing with the Department of Labor and proceed directly to federal court. The 2008 GAO report found that every year since 2002 the number of claims filed with the Department of Labor had decreased. This has led some advocates to argue that the Department of Labor's "lack of resources and political will to investigate low-wage workers' claims" was driving the decline in employee

complaints filed with the Wage and Hour Division (Verga, 2005). Due to this, Bershad (2012) attributes the rise in FLSA cases in federal court to a "deliberate choice of employees to vindicate wage rights through litigation and not government enforcement…"

Second, the economic theory of law argues that, in common law countries, litigation occurs when there is uncertainty in the meaning or intent of legislation (Nielsen, 2010). According to this theory, in a legal system with both a high level of information and a stable legal environment, rational actors should be able to settle their cases prior to trial because both parties can accurately estimate the damages of the case. The American legal system, with extensive discovery and an increasingly expensive appeals process (McEwen, 1998), lends itself well to this theory of litigation. Furthermore, the rise and fall of employment litigation provides a compelling case study in the economic theory of law. According to this line of reasoning, Congress created legal uncertainty by enacting the 1991 amendments to the Civil Rights Act and the legal system responded with increased filings alleging discrimination until equilibrium was reached in the late 1990s.

There is some merit to the argument that FLSA claims increase after there are changes in the regulations. Some firms do not have the resources to keep an eye on their changing regulatory environment and unintentionally violate the Act. This is why the Wage and Hour division has conducted education and outreach missions since the 1960s. Yet the magnitude and sustained nature of the filing changes after 1999 does not fit with past changes in the FLSA. For example, in 2004, the Department of Labor revised the "white collar exemption" to the FLSA, a substantial change in the method of determining who qualifies as an exempt employee. The "white collar" exemption to the FLSA was originally intended to exempt partial owners from overtime requirements. Since the passage of the FLSA, however, "organizational bloat" and managerial misclassification has caused many employees to become listed as "managers" and therefore exempt from FLSA requirements (Ruan, 2013). In response, the DOL issued new guidelines in 2004 to clarify the white-collar exemption. These new clarifications removed the "long test" standard and replaced it with the "duties test", a standard that had been used by

several circuit courts when determining if an employee fell into the exempt or non-exempt category. These new rules were announced in April and were put into effect four months. The lack of lead-time or phase in under the new regulations should compound the uncertainty within the law. If ambiguity drives litigation, we should have seen an increase in filings after 2004 when the Department of Labor changed the definition of "white collar" employees (Lemond and Carty, 2006). Under an economic theory of law, these new regulations should set off a series of new lawsuits in order to clarify the meaning and intent of the regulations.

This theory, however, falls short of explaining the variation in our data. In 2004, there were 3,620 FLSA claims filed, yet in 2005, after the changes in the "white collar" classification, that number declined to 3,264. Furthermore, the 2004 rules do not capture the beginning of the increase in FLSA filings. From 1998 to 2001, the claims that arose under the FLSA normally increased by roughly 100 cases per year, but 2002 shows the first inflection point where cases almost doubled, rising from 1,962 filings to 3,882. Although this does not rule out that the new regulations played a role in the long-term upward trajectory of FLSA filings, these regulations are unlikely to be the underlying driving force. Instead, a new actor is necessary to fully understand the emerging FLSA litigation trend.

A New Actor: The Plaintiff's Bar

My interviewees argue these models omit an actor in the modern legal environment: a well-organized plaintiff's bar. Prior to the organization of a plaintiff bar, there were very few professional plaintiff side attorneys. In one interview, an attorney stated:

> …there are more and more law firms that are focused on wage and hour enforcement, so that's a new development since about [19]98 to 2000. And…the area itself has become more professionalized in terms of private firms that are knowledgeable about wage and hour enforcement and are capable of bringing cases.

The 1991 amendments to the Civil Rights Act made it economically viable for lawyers to specialize in employment law. Furthermore, my interviewees stated that the environment around plaintiff side representation changed with the passage of the Family Medical Leave Act,

Americans with Disability Act, the Anita Hill hearings, and the *Harris v Forklift Systems* (1993) ruling. These changes made discrimination cases more economically lucrative and, as a result, law firms began to pursue employee-side discrimination cases. The existence of mass torts, such as the asbestos settlement, reinforced the economic incentive for plaintiff law firms to begin prosecuting employment side claims.

With more sophisticated firms growing around plaintiff side representation, plaintiff's attorneys developed a series of normative procedures to prosecute both discrimination and wage and hour claims simultaneously. In 1999, the American Bar Association published what has been described as a "how to" guide for prosecuting FLSA claims. This work helped litigators develop a series of intake question designed to identify possible actionable offenses. One lawyer with extensive experience litigating both FLSA and workplace discrimination claims described some of the strategic differences between the two statutes:

> Your client or prospective client that walks through the front door basically knows all the facts that would support the claim: you can look at their pay records, you can ask them what their duties are and you can look at the job description, or investigate and talk to other workers that similarly situated. It's much less complex [than other employment statutes]. The statute itself [the FLSA] is almost a strict liability statute against the employer; it's the employer's duty and burden to demonstrate that the worker is not entitled to overtime or minimum wages.... So, it's a lot easier and because of that it's a simple case to assess…if you look at the Title VII or statutory discrimination cases, they are wildly challenging for lots of reasons starting with the plaintiffs almost never win jury trials; it's something like 5%. Miserably low. They are complex cases: the prospective client may or may not have sufficient facts to state a claim, they might not know what their comparator is being paid, they may not give a fair description of what happened in the workplace, there is always some bias there. It is hard to prosecute individual statutory discrimination cases because of that.

Due to the procedural advantages of FLSA claims compared to discrimination ones, my interviewees indicated that it is now common practice for potential employment discrimination plaintiffs to be asked if they "have ever been asked to work through lunch?" or "have you ever not been paid for time at work?"

While traditional economic theories of law focus on the possible damages in the case, the rise of the plaintiff's bar adds to our current perspective by showing how lawyers can collectively mobilize to decrease the cost of litigation. Despite the FLSA being on the books for almost eighty years, the lack of a group specializing in employment litigation meant that these claims went unheard. The value and determinacy of these claims did not change, but instead plaintiff attorneys formed law firms and associations that reduced transaction costs within the legal environment (Williamson, 1981). By creating firms and associations, specialists were able to share their expertise and experience in prosecuting cases. One interviewee indicated that technological breakthroughs, such as the fax machines, helped level the playing field between plaintiff and firm-side law firms because because it meant plaintiff lawyers could quickly send documents across the country. This dissemination of information resulted in the creation of normative prosecution steps, standardized interview questions to identify potential wage and hour violations, and a more level the playing field between large and small law firms. These factors changed the economic calculation behind FLSA cases without making any structural changes to the law itself.

Institutional Resuscitation: A Return to the FLSA

With the consolidation of the plaintiff's bar and a large number of possible claims, discrimination claims quickly became the workplace conflict of the 1990s. Both the courts and firms reacted to this change in their legal environment. Prior to the 1990s, courts would hear a civil discrimination claim, on average, one out of every one hundred cases (Clermont and Schwab, 2009). In only seven short years, one out of ever ten cases on the federal docket was a civil discrimination claim (Clermont and Schwab, 2009). Clermont and Schwab's study documents a 15% win rate for employees at the district court level but a 5:1 reversal rate upon appeal in favor of employers. Due to this, the authors claim that federal judges possess an anti-plaintiff bias in employment discrimination cases. Clermont and Schwab leave open the reasons behind this anti-plaintiff effect but speculate it may be due to several factors, including litigation

reform propaganda or many underdog plaintiffs. One interviewee said that he believed that judges were tired of hearing weak discrimination cases. Due to this lawyer's belief that judges hold a jaundiced eye toward discrimination claims, he "won't even pick up the phone anymore" if the plaintiff is claiming discrimination.

The legal environment is dynamic and shaped by both litigation and firm behavior. In response to the rise in discrimination cases, some firms have adopted more sophisticated HR practices to control situations that may expose them to liability (see, for example, Nielsen, 1999; Bisom-Rapp, 1999). Extensive screening processes, termination procedures, and legal consultations allow firms to minimize their legal exposure by controlling evidence produced in disciplinary hearings. Moreover, partially in reaction to litigation, firms have adopted conflict management procedures (Lipsky et al., 2003). The near ubiquity of conflict management in the Fortune 1000 is a strong statement that managing workplace conflict is an essential function of the modern workplace (Lipsky, et al. 2014).

Finally, weak public enforcement of wage and hour violations since 1978 created an environment in which firms freely violated the FLSA. Firms in the service and retail industries are the most frequent violators, and lacking punitive damages, violating the FLSA has become just another cost of doing business. The pair of GAO reports cited earlier in this chapter argue that even with targeted enforcement activities, the Wage and Hour division was unable to modify firm behavior. Without public enforcement or a plaintiff's bar to take these claims, enforcement was not a credible threat. For decades, this left wage and hour violations generally unprosecuted. The anti-plaintiff bias, combined with better firm defense tactics, changed the market for legal claims. As noted by Clermont and Schwab, "The most startling change in the last few years' data is the substantial drop of almost forty percent in the number of employment discrimination cases in the federal district courts." (Clermont and Schwab, 2009:131-312). Ironically, these efforts gave rise to today's FLSA claims. As the cost of pursing discrimination claims increased, plaintiff side law firms began pursuing FLSA claims in addition to discrimination claims. This transition happened quickly because it was easy for law firms to re-tool their employee-side

representation strategies. The interviewees were in agreement that, from a procedural perspective, FLSA litigation is relatively simple. For several reasons, pursuing FLSA claims is easier than discrimination claims. Most significantly, unlike discrimination claims, where the burden is always on the employee, the burden of production is on the *employer* in a wage and hour suit. This means that if the employer is unable to produce time records or other evidence of employment times, the employer is assumed to be not only at fault, but to be liable for double damages (Ruan, 2012). The ineffective nature of public enforcement had generated a substantial number of violations of the Act, and the plaintiff's bar was able quickly to mobilize these complaints to into collective action suits.

The creation of a plaintiff's bar explains how there could be a durable increase in the number of FLSA claims in such a short period of time. The anti-plaintiff bias, however, was not immediate but took a legal generation to learn. This delay helps explain why the increase in discrimination claims occurred in the early 1990s while the increase in FLSA claims occurred nearly ten years later.

Finally, these findings have implications for our understanding of institutional shocks. While there is an ongoing discussion regarding when institutional change presents itself as a gradual evolution (for example, see Djelic and Quack, 2003) or radical shift, this study helps move forward our understanding of when shocks occur. The evidence presented here suggests that an institutional environment consists of functional institutions and dormant pieces of old practices and arrangements. Some of these practices have lost their regulatory credibility, or in the context of litigation, exist beyond the scope of economically viable claims. Due to these pre-existing arrangements, small changes in the environment can produce large shocks. From this perspective, institutional archeology can help link past practices with radical current changes. This behavior is present in both discrimination and FLSA claims.

For much of the 1970s and 1980s private attorneys did not pursue discrimination claims because there was a financial gap in the law where, in many cases, the cost of litigation was higher than the recoverable damages. Some firms did attempt to comply with these laws by

creating nonunion grievance mechanisms, but many firms did not. This led to an accumulation of practices over these decades that could violate the law. With a large accumulation of practices that violated these laws, it took only a small legal reform, in the form of the 1991 amendments to the Civil Rights Act, to create a large shock to the legal environment.

The same pattern is present for FLSA claims. While initially firms complied with the Act, the lack of enforcement by the Wage and Hour Division in the 1980s and 1990s created a series of institutional practices that violated wage and hour laws. My interviewees stated that plaintiffs would rarely believe that they even had an FLSA claim because it was so common for their manager to ask them to work uncompensated time. Both ignorance of the law and weak enforcement created a strong institutional acceptance of violating minimum wage and overtime laws. When the payoff for discrimination claims dropped, the plaintiff's bar was able to quickly fill the void and create a disruption in the legal environment.

Under this view, an institutional shock can occur when a practice gradually atrophies yet there is still a mechanism for its enforcement. The FLSA, like many other forms of employment regulation, could be enforced via public agencies or private litigation. Yet when neither exists, practices that violate these regulations begin to emerge and become commonplace. For discrimination claims, these were social biases that went unpunished in the workplace. Unlike discrimination claims, competitive market forces led firms to adopt practices that violated the FLSA. As noted by one lawyer I interviewed indicated that large organizations put pressure on managers, and the managers subsequently put pressure on their employees to work longer hours. Yet the regulations were available, and decades worth of noncompliance allows new actors to create shocks with relative ease.

The return of a long dormant institution, institutional resuscitation, created a shock because of the other institutional practices that had built up in its absence. Under this view, a shock can occur when a previous practice fades from the institutional environment but its enforcement is still available for future actors. These future actors have the ability to resuscitate the practice and use it to disrupt the existing environment.

CHAPTER 4

ALTERNATIVE DISPUTE RESOLUTION AND LITIGATION PROFILES: DOES ADR INFLUENCE EMPLOYMENT LITIGATION FILINGS?

Introduction

Over the last fifty years, one of the most significant changes in the American industrial economy has been the rise of internal due process procedures in the non-unionized workplace (Colvin, 2003). Initially, scholars believed firms adopted these procedures as a union-substitution tactic, but the continued spread of internal due process procedures during a time of decreasing unionization suggests that these procedures are now primarily used to manage the cost of workplace conflict and litigation (Colvin, 2008). In the past twenty-five years, roughly two "strategies" for managing workplace conflict have emerged in the non-unionized sector: (1) limiting legal cost of conflict via instituting arbitration agreements or (2) attempting to limit the escalation of conflict via "conflict management systems".

While this is not a forced choice – some firms utilize both a conflict management system and use arbitration– these two methods of managing conflict represent different philosophies regarding workplace disputes. Scholars who advocate "conflict management systems" view collaborative, "win-win" dispute resolution techniques, such as mediation, as a way to clarify conflicts, provide feedback to management regarding issues beyond their line of sight, and craft specific solutions to workplace disagreements (see, for example, Lipsky and Seeber, 1998; Lipsky and Avgar, 2004). Scholars who defend arbitration are skeptical of conflict management techniques but view arbitration as a method of limiting firms' exposure to litigation and "de facto severance" settlements (Sherwyn, Estreicher, Heise, 2005). These scholars argue that the cost of litigating a conflict can escalate quickly for firms because plaintiff-side attorneys often work on

contingency arrangements and frequently file claims in search of a quick, but potentially costly settlements (Sherwyn, Estreicher, and Heise, 2005). While one philosophy expressively focuses on managing the process of conflict and preventing workplace disputes from reaching the point of litigation, the other side believes that the financial incentive to engage in litigation is too strong to prevent conflict escalation, and instead seeks to limit the possible financial risk associated with litigating these claims.

Despite the extensive research into conflict management and near ubiquity of mediation in Fortune 1000 firms (Lipsky et al. 2015), the field is still missing quantitative evidence comparing these two perspectives in terms of litigation filings. Case studies (see, Lipsky et al., 2003; Bendersky, 2003) and practitioner studies (for example, Maryland Mediation and Conflict Resolution Office, 2004) have provided initial evidence that "win-win" dispute resolution, such as mediation, can control the escalation of workplace disputes. Yet these studies that explicitly link alternative dispute resolution (ADR) to litigation are either limited by methodological problems (for example, see: Maryland Mediation and Conflict Resolution, 2003) or are based on practitioner testimony (Lipsky et al., 2003). Furthermore, the empirical cross firm-studies of ADR and dispute resolution focus on internal grievance resolution rate (Colvin, 2003), not the number of lawsuits filed against a firm. This study seeks to build upon these works by comparing these two firm strategies – conflict escalation control vs. litigation cost control – to determine if both strategies are able to influence the number of filings against a firm.

Using the internal conflict resolution data from 368 Fortune 1000 firms, we compare these firms' self-reported alternative dispute resolution (ADR) practices to the number of lawsuits each firms faces in three areas: FLSA claims, discrimination claims, and these two categories of lawsuits "complex case" counter parts (collective actions for FLSA and class

actions for discrimination claims). While previous research has limited its scope of inquiry to discrimination claims, the research conducted in Chapters 2 and 4 of this thesis suggest this is an incomplete view of way modern conflicts occur in the workplace. Due to this, we will see if "win-win" ADR procedures are associated with a different number of filings for both FLSA and discrimination claims.

Ultimately this is a question of control: can firms use ADR to control the escalation of conflict in the workplace? In search of this control, over the last twenty-five years, some firms have started ceding oversight of disciplinary issues to many different actors, including, employees, in the form of employee review boards, arbitrators, Ombuds, or outside neutrals. Other firms, however, have moved to insulate themselves from the costs of litigating workplace claims by primarily using arbitration to resolve workplace disputes. This begs the following question: can firms influence their litigation profile by only using so-called "win-win" conflict management procedures? Or do claims that rise the to level of litigation remain outside of the reach of these "win-win" conflict management techniques?

History and Theoretical Relationship Between Conflict Management and Litigation

Beginning with the foundational works in the field such as Edwards (1979), Burawoy (1979), and Kerr (1960), workplace conflict has been an integral part of industrial relations research. These works documented the widespread nature of disputes between workers and management, and the field soon turned to the question of how unions and management can work together to form a more peaceful industrial arrangement. Freeman and Medoff (1984) argued that unions provided an opportunity for workers to voice their disputes to management with less fear of reprisal. Given the prevailing employment at will doctrine in the United States, these early theorists argued that a "just cause" clause, combined with the economic bargaining power of a union, was important for workers to feel more comfortable in voicing their workplace disputes.

Due to this, these authors argued that, in the non-unionized workplace, employees would be less likely to come forward and present their concerns to management (Freeman and Medoff, 1984).

Employees' unwillingness to voice their workplace disputes affects both employees' experiences in the workplace and management's ability to run their operation. As Hirschman (1970) argues, employees face several options when they experience a conflict at work: (1) employees can seek resolution by voicing their dispute to management or other employees, (2) employees can exit the firm, (3) employees can passively wait for the conditions to improve (loyalty), or (4) employees can neglect their work. From a management perspective, the cost of conflict comes in neglected work or underperforming employees, a poor workplace climate, unexpected turnover, or employees resorting to litigation as a means of resolving their workplace disputes.

For multiple reasons some firms in the 1940s began extending grievance mechanisms to their non-unionized employees (Colvin, 2003). These early attempts at extending grievance procedures to non-unionized employees suffered from inefficient implementation or employees' fear of retaliation (Slichter, Healy, and Livernash, 1960). Later work in the area of non-unionized grievance procedures provided evidence that employees' concerns about reprisal and retaliation for using these procedures were not unfounded: Lewin (1987) and Lewin and Peterson (1988) found that non-unionized employees who used grievance systems were less likely to be promoted and had lower performance evaluations compared to employees who did not use these procedures. Perhaps the finding of most concern that emerged out of these studies was that employees who won their arbitration case fared worse in future performance evaluation than employees who had lost their arbitration hearing. These findings help provide context for why so few unorganized employees utilized early firm-led grievance procedures.

Outside of the firm, the American legal system provides some recourse for a limited set of employment disputes: For example, concerted activities for the purpose of forming or joining a union is protected under section 7 of the National Labor Relations Act; the Fair Labor Standards Act places legal limits on the lower bound for wages and the maximum hours an

employee can work without being entitled to overtime; Title VII of the Civil Rights Act makes it unlawful for employers to discriminate based on race, color, religion, sex or national origin. The legal system, however, is an imperfect vehicle for conflict resolution. First, under most circumstances, using the legal system is associated with employees exiting the firm, and therefore it does not provide an opportunity to repair the employment relationship. Second, the legal system poses significant expenses for both employees, in terms of time to trial and resolution (Clermont and Schwab, 2009), and firms, in terms of the cost of litigation (Nielsen, 2010). One study indicated that the firm-side costs of defending against employment claims went up ten-fold during the 1990s (McEwen, 1998). Furthermore, the legal system only covers a limited set of workplace disputes. In contrast, studies of union grievance systems found that employees covered under these procedures filed many different types of workplace disputes outside of discrimination claims (Kuhn, 1961). Due to the legal system's expensive nature and narrow coverage, it is an imperfect method of dealing with workplace conflict.

In the late 1970s, ADR began to emerge in the American workplace (La Rue, 2000). ADR refers to a series of practices that offer individuals a method of resolving their disputes short of litigation (La Rue, 2000). This is a large category of practices that include techniques such as: mediation (including a third party without decision-making power); early neutral evaluation (where an expert evaluates the conflict prior to litigation); an Ombudsman (a conflict resolution expert that can grant employee confidentiality); peer-review boards (where firms allow employees to sit on disciplinary boards); hotlines (where employees can anonymously report employment concerns); appeal to high level executives in the firm; or arbitration (where a third-party has the power to make a binding decision about the dispute). These practices are only loosely tied together and the field lacks consensus regarding how to conceptually group these practices (Stipanowich, 2008).

One conceptual grouping offered by Lipsky et al. (2015) splits dispute resolution practices into "distributive" or "integrative" ADR practices. Distributive ADR is used to make a decision between two competing arguments without looking to create new options (or

accommodations) for the parties. This type of dispute resolution is described as distributive or "zero-sum" because one party will be deemed the winner while the other's perspective will be rejected. Arbitration, where the two parties submit a dispute to a third party decision-maker, is the most faithful embodiment of this practice. The other style of dispute resolution, "integrative" style ADR, looks to create options by analyzing the underlying causes of the conflict and attempting to generate better solutions than the parties are able to achieve by themselves. Mediation is one of the best examples of this practice because it can help steer parties in the direction of mutually satisfactory solutions, diffuse tension, and can offer new ideas to parties.

When ADR emerged in the non-unionized sector in the late 1970s it built upon previous attempts of extending these practices to non-unionized employees by offering dispute resolution options that were outside of the traditional chain of management (La Rue, 2000). Research in the area of internal ADR procedures suggests that multiple techniques have the capacity to come together in ways that are greater than the sum of their parts (Lispky et al., 2003). When ADR techniques combine in a logical fashion these are called ADR "systems" (Lipsky et al., 2003). These systems typically require multiple intake procedures (such as an Ombuds, appeal to supervisors, Office of Dispute Resolution, etc.), additional procedures to process complex disputes (such as having a professional mediator in-house or early neutral evaluation to inform the parties of their legal prospects), and finally a resolution mechanism, such as resorting to the legal system or binding arbitration (Lipsky et al. 2006).

The theoretical link between conflict management and litigation is drawn from Hirschman's work on exist, voice, loyalty and Freeman and Medoff work in the area of union grievance systems. This link argues that internal due process procedures allow employees to voice their conflicts to management without needing to resort to exiting the firm and litigating their claims. From this perspective, conflict management techniques, such as mediation or hotlines, provide a variety of methods to deal with different types of conflicts that may arise during the course of work. Some of these techniques allow parties to clarity their positions or statements (usually "process based" ADR, such as mediation) while drawing upon the expertise

of a neutral third party. Furthermore, techniques that provide internal voice options outside of the chain of management, such as an Ombuds office or an office of dispute resolution, allow managers to understand what possible areas of conflict are emerging in the workplace. From this information, management has the ability to instate policies that could prevent existing conflicts from resulting in litigation.

Studies of Employment Arbitration

There are very few aspects of employment arbitration about which researchers generally agree. In fact, some of the most basic questions about arbitration are still unresolved: What is the proportion of private-sector employees covered under employment arbitration policies? Are these agreements "almost ubiquitous" (Stone, 1997)? Twenty-five percent (Colvin, 2011)? A third (Lewin, 2008)? Or perhaps less (Lamare and Lipsky, 2014)? A second important question: Does arbitration have a "repeat player" effect? Some scholars say yes (Colvin 2011; Bingham, 1997), some scholars say no (Estreicher, 2001; Sherwyn, Estreicher, and Heise, 2005), some scholars believe that these results could be a function of the industry and qualifications of the arbitrator (Lamare and Lipsky, 2014). These are not hollow, one-sided debates but disagreements by scholars with well-researched studies to support their claims.

For the purposes of this study, we are able to sidestep many of these debates about the outcomes of arbitration and focus only on the presence or absence of arbitration agreements in firms. Firms can write their arbitration policies in a variety of ways, including covering only a specific type of conflict (for example, only covering FLSA claims), how the arbitrator will be selected, and if employees are allowed to file multiple claims in a single arbitration (so-called class-action arbitration). The conflicts covered by these policies will be directed into arbitration and therefore, for these conflicts, firms should experience fewer filings in court.

Studies of Conflict Management

In a study of the telecommunication industry, Colvin (2004) examined grievance rates in

180 telecommunication firms in an attempt to discover the absolute difference between unionized and nonunionized firms' grievance rates. This study provided initial evidence that employees in unionized firms utilize their grievance system more frequently and appeal their grievance decisions more often than their non-unionized counterparts. Despite this finding, the author found evidence that including non-managerial decision makers in the disciplinary process (peer-review or arbitration) increased the likelihood that employees would use these procedures. Finally, the author reports that the presence of self-managed teams decreases the likelihood of grievances in firms. From this work we can infer that modern conflict management systems that include non-managerial decision makers are able to partially overcome employees' fear of reprisal.

Lipsky et al. (2003) offer perhaps the most comprehensive study in workplace dispute resolution system design (Lipsly et al., 2003). This work draws from case studies of multiple industries and cover a variety of firms' experience with litigation threats, unionization drives, everyday workplace disputes. The authors discuss how these firms have attempted to manage these conflicts. By interviewing key actors in leading firms, other experts in the field, and using survey data from a 1997 survey of the Fortune 1000, the authors argue that workplace conflict has shifted from question "managing conflict" to a possible strategic advantage for firms. The authors develop the concept of an "integrated conflict management system" that offer employees: multiple access points, provide a confidential reporting process, include training for managers and employees regarding how to appropriately use the system, employing qualified neutrals, maintaining a voluntary process, and respecting collectively bargained rights (Lipsky et al., 2003). By building in each of these features, the authors argue, firms are able to achieve outcomes that are superior to any individual feature of the conflict management system.

Bendersky (2003) offers some empirical evidence supporting the "complementarities" view of conflict management systems. The author observed a natural experiment when the Canadian national government decided to test pilot a dispute resolution system in one of its agencies. The author collected survey data from two branches that were included in the pilot program and two that were not. All four of these branches had a rights-based grievance system but the two treatment conditions varied in the follow ways: "treatment one" had a three-day workshop in interest-based negotiation training for all its employees and three-days of training for managers, supervisors, and union representatives. "Treatment two" included the training in "treatment one" but also had an onsite interest-based neutral who coached disputants in their options and provided ongoing assistance for employees. The author found that the inclusion of a neutral greatly improved disputants' attitude toward conflict and behaviors in the workplace. By finding that the marginal impact of each component in a three-part system exceeded their relative impact in a two-component system, the author argues for a "complementary" view of dispute resolution.

Further evidence supporting an integrative perspective on conflict management comes from practitioner studies. These studies, despite showing promising results, suffer from a variety of methodological problems that may bias their outcomes. These studies are offered in the spirit of completeness, but their results offer questionable credibility.

In 2004, the Maryland Mediation and Conflict Resolution Office released a report on the corporate use and ADR in the greater Maryland area (Maryland Mediation and Conflict Resolution Office, 2004). The report targeted organizations with over 1000 employees and included firms from multiple industries. This report surveyed and interviewed over 100 companies on their ADR practices to see how these practices have influenced their legal costs.

The results indicate that some corporations were able to decrease their litigation expenses following the implementation of a comprehensive conflict management system. Most notably, Brown and Root saw an 80% decrease in their outside litigation costs after implementing an integrated conflict management system. Other firms reported similar results. Motorola saw a 70% reduction in their overall litigation costs over six years while National Cash Register saw a 50% reduction in legal costs and a reduction of their pending lawsuits from 263 to 28 in nine years. Yet despite these gains, ADR systems had not taken root in the majority of corporations within the study. Only one in three companies reported they use ADR to deal with internal workplace disputes, while less than one in five reported having an integrated conflict management system.

Court referred ADR also provides evidence that ADR is able to resolve disputes prior to litigation. In 2009, the Superior Court of California released an evaluation of their court-referred ADR program (ADR Staff, Superior Court of California County of San Mateo, 2009). This report surveyed over 100 plaintiffs and advocates involved in cases between October 1, 2007 and December 31, 2007. Over 95% of attorneys surveyed believed the ADR program resulted in fewer days in court, while 85% believed that ADR reduced the overall cost of the case. Importantly, the majority of attorneys believed that participation in the ADR program was very important to gaining a settlement. This belief provides evidence that the difference in settlement rate (71% for non-arbitration ADR, while only 26% for those that did not participate in the ADR program) is not solely driven by case selection. Even for cases that did not settle in ADR, the majority of attorneys surveyed believed the process was beneficial because ADR (almost always mediation) was able to clarify issues, improves communication and provided parties with a better understanding of their case.

A study of California's early mediation pilot program also argues that ADR is able to reduce the number of cases that go to trial (Judicial Council of California Administrative Office of the Courts Office of the General Counsel, 2004). This study focused on five early ADR programs created in San Diego and Los Angeles. These two sites were used because they have similar case demographics and time prior to trial. Researchers surveyed the attorneys and litigants in over 6,300 unlimited civil cases and 1,600 limited civil cases and asked them to assess ADR's ability to reduce time before trial and disposition time, settlement rate from participation in the program, and a reduction in the overall cost of litigation. The results were in line with previous studies. In the ADR program, unlimited civil cases settled 58% of the time while limited cases settled 71% of the time. Overall, this reduced the number of cases going to trial between 24-30%, saving San Diego almost 1.6 million dollars and Los Angeles 2 million dollars. Within all five pilot programs, litigants reported strong support for the program and, compared to non-ADR litigants, had a 10-15% greater satisfaction with the overall process.

The Research Question

Existing work provides suggests that conflict management procedures have some effect on the intensity of workplace conflict, employees' general workplace behaviors and orientation toward conflict, and their willingness to provide management with information about their disputes in the workplace. While these studies suggest a negative relationship between conflict management and litigation, they do not provide us with a definite answer. This study seeks to fill that gap by testing the association between conflict management techniques and firms' litigation profiles. While it is easy to demonstrate that firms that use arbitration policies experience fewer case filings than firms that do not, can "win-win" conflict management techniques do the same?

CHAPTER 5

RESEARCH METHODOLOGY

Introduction

In order to test the relationship between conflict management procedures and federal litigation, we will need to use a large sample of firms from multiple industries. These firms should be sufficiently sophisticated to understand it may be possible to use conflict management practices to resolve employment claims prior to litigation. Finally, these firms must experience litigation at a sufficiently frequent rate so that differences in policy could impact the amount of litigation filed against these firm. Therefore, my research strategy focused on Fortune 1000 firms because these firms have a sufficient numbers of employees that they could frequently experience employment litigation while also possessing the economic resources to invest in sophisticated legal defense strategies.

The data on firm dispute resolution practices was collected in 2011 by Cornell University, the Strauss Institute on Conflict Resolution at Pepperdine University, and CPR. The Survey Research Institute at Cornell University attempted to contact the general counsel at each firm on the 2010 Fortune 1000 list. If the general counsel was unavailable to respond to the survey, the Survey Research Institute attempted to have a senior deputy counsel complete the survey.

The survey asked firms what dispute resolution practices they used for workplace, consumer, or businesses-to-business conflicts. Of the 1000 firms contacted, 368 respondents completed or partially completed the survey. Analysis of the respondents indicated that non-respondents were not biased by industry or revenue (Stipanowich and Lamare, 2012). The survey began in summer 2010 and was completed in 2011. Additional control variables were also gathered from this survey: for example, firms were asked their percentage of unionized employees, if they use mandatory or voluntary ADR practices, and if they use ADR to resolve

wage disputes.

Dependent Variable: Litigation Filings, 2010-2013

In order to identify all federal filings against these 368 responding companies and their subsidiaries, we used Bloomberg Law's litigation database. The Bloomberg Law litigation database covers all federal claims filed since 2005. Previous studies have documented that the Bloomberg Law's litigation case list is over 99% accurate compared to the Public Access Court Electronic Records (PACER) system (Cotropia et al. 2013). Bloomberg Law compiles and sorts lawsuits by the claim type and year of filing, according to the PACER system. While the PACER database has come under scrutiny due to inconsistent coding of monetary demands (Eisenberg and Schlanger 2003), the procedure for coding filings is less complicated: Every time a case is filed in federal court, it is entered into the PACER database according to the information provided by the filing attorney. This information is then re-checked once the case is closed.

From the PACER database, we collected data on the two most common types of employment disputes: FLSA and federal discrimination claims. These data were recorded in the summer of 2011 and then updated in the summer of 2014. Since the survey mechanism did not ask firms when they adopted their conflict management policies, we limited the range of cases to only those cases following the survey, 2010-2013[1].

[1] An ANOVA analysis of these years found none of these years were statistically different from others so they were combined to increase the sample size.
[2] Regressions were similar with and without the arbitration control variable, but models with the arbitration control reported a better model fit.
[3] For the Conflict Management System, Mandatory/Voluntary ADR, and Office of Dispute Resolution regressions, both "Uses ADR for Wage and Hour Claims" and "Use of Arbitration"

Table 1: The Dependent Variable				
	Mean Number of Cases Per Company	**Stand. Dev.**	**Upper 95%**	**Lower 95%**
FLSA 2010-2013	1.43	3.12	1.77	1.10
Federal Discrimination, 2010-2013	8.38	13.57	9.83	6.93

From these data it is possible to see that the average company in our survey faced fewer than two FLSA cases and nine federal discrimination cases from 2010 to 2013. The vast majority (90%) of companies that responded to our survey faced between seven and ten discrimination cases and between one and two FLSA cases during this time. Despite the highly different production techniques and industries represented in our survey data, these data show that firms in our survey faced a similar number of employment filings in federal court during this three-year window. Due to the presence of a few firms that faced a large amount of litigation during this time, the data is strongly right-skewed. When modeling these data, we utilized a negative binomial model to account for the strong skew (the mean did not equal the variance, as assumed by a normal Poisson model) within the data (often referred to ask "overdispersion").

Aside from the volume of filings, it is also unknown what effect conflict management policies have on class or collective action claims. Within the 2010 to 2013 filings, each case was inspected to determine if it was a class action, collective action, had more than 10 plaintiffs, or was filed for more than a million dollars. These cases created a subsample of "Class Action" claims that we used to test if there is an association between conflict management policies and these larger (in terms of claimants) and more expensive claim types.

Table 2: Collective Action Data (Dependent Variable)				
	Mean Number of Cases Per Company	**Stand. Dev.**	**Upper 95%**	**Lower 95%**
FLSA Collective Action Cases, 2010-2013	0.624	1.449	0.778	0.470
Federal Discrimination Class Action, 2010-2013	0.526	1.065	0.640	0.412

From these data, we can see the vast majority (90%) of firms in our sample faced less than one FLSA collective action and federal discrimination class action filing from 2010 to 2013. These data were also right-skewed and therefore we relied on a negative binomial model for regression analysis.

Key Independent Variables: Dispute Resolution Practices

a. ADR Procedures

Due to the large variety in conflict management practices uncovered in the 2011 survey, it will be necessary to test several different forms of "conflict management" practices. Fortunately, the 2011 survey provides a large amount data regarding how firms handle employment conflicts. These tests will be conducted from the most general indicators of ADR to specific ADR practices. Specifically, the first variables of interest merely indicate if firms use ADR – in any capacity – to resolve wage and hour or statutory conflicts (one variable for each type of claim). This test has the benefit of allowing the techniques to be variable and only make a comparison between firms that choose to use ADR for these conflicts against those that do not. In doing so, it allows firms to tailor the specific type of ADR they believe would be most beneficial to resolve these types of conflicts and not rely on our own pre-existing assumptions of what type(s) of ADR should be able to resolve each type of claim. This will give a general indicator if the use of ADR – regardless of technique -- is associated with a different number of filings than firms that choose to litigate these claims. These variables will be retained as control variables for the other regressions to ensure that the firms ADR policies are aimed at reducing employment conflicts.

After testing for the broad use of ADR, I will proceed to test a procedural question: Do firms that mandate their employees use their ADR procedures prior to filing a claim in court

experience fewer claims than firms that offer voluntary procedures? While there is substantial overlap between this variable and the use of binding arbitration, some firms reported they mandate their employees use their firm's ADR procedures but did not use binding arbitration to resolve employment disputes. Firms that require employees to submit their claims to an internal conflict management procedure may have more robust policies than those who merely offer these procedures as a voluntary technique.

After this I will begin testing specific firm practices. The first practice I will test will be if firms that use employment arbitration experience fewer employment claims than those that do not use this practice. If firms use arbitration, they should experience zero (or close to zero) filings in federal court. Many firms in our sample use both arbitration and other conflict management procedures as part of their dispute resolution system. This poses the following question: if these firms report fewer legal filings, does is this due to the conflict management procedure or the presence of an arbitration policy? Due to this, I will retain the arbitration variable (if the firm uses ADR to resolve wage and hour claims) as a control variable when testing the effect of other "ADR practice" on litigation filings[2]. The next practice I will test is if firms that indicated they use a "conflict management system" experience a different level of FLSA or federal discrimination litigation that those that do not use these systems. As noted earlier, existing studies (Bendersky, 2003; Lipsky et al. 2003) have argued that conflict management systems are thought to be able to increase positive workplace behaviors and remove, or at least control, the antecedents to litigation.

It is important to distinguish firms that offer a few ad-hoc ADR procedures from those that have systematic approaches to resolving conflict. (Lipsky, 2014). There is, however,

[2] Regressions were similar with and without the arbitration control variable, but models with the arbitration control reported a better model fit.

substantial ambiguity regarding what constitutes a systematic approach to resolving conflict from merely offering several dispute resolution mechanisms. This ambiguity is reflected in the 2011 survey in that 67% of respondents indicated they had a conflict management system. As argued by Lipsky (2014), this finding is not in line with previous research that estimates only about a third of firms have a systematic approach to resolving workplace conflict. Instead, Lipsky (2014) suggests that most conflict management systems are separated from the counsel's office or HR:

> Although some systems are managed directly by the corporate counsel's office or by the human resources function, past research suggests that the most fully developed systems are managed by independent or semi-autonomous offices within the organization (Lipsky et. al., 2003). [Lipsky, 2014, p.141]

Due to this, the final independent variable I chose was if firms had an "Office of Dispute Resolution" to manage workplace conflicts.

Table 3: Distribution of ADR Procedures in the Sample

	Number of Firms that Use the Procedure	Number of Firms that Do Not Use the Procedure
Use ADR to Resolve Wage Disputes	122	92
Use ADR to Resolve Statutory Claims	120	93
Mandatory ADR Procedures	71 [Mandatory]	167 [Voluntary]
Has a "Conflict Management System"	213 [Has a System]	111 [No System]
Office of Dispute Resolution	116	225

B. Quantification and Distribution of the Use of Arbitration in the Sample

Two hundred fifty-seven firms provided responses to the 2011 survey indicating the frequency with which they used binding arbitration to resolve employment disputes. Firms were given five possible responses in the survey, ranging from "never" to "always". Firms that responded they never used arbitration (45.9%) were the largest single category with fewer and

fewer firms at each step up the survey question: rarely (24.1%), occasionally (14.3%), frequently (11.2%), and always (4.2%). We pooled together any response that indicated a firm used binding arbitration (always, frequently, occasionally, and rarely) and compared these to firms that never used binding arbitration.

Table 4: Independent Variable -- Use of Arbitration for Employment Disputes	
Used Binding Arbitration	139
Never Used Binding Arbitration	118

Control Variables

Aside from dispute resolution procedures, other features of the firm could influence the frequency with which firms experience employment litigation. The following variables were used to control for this possible variation:

Number of Employees — Since we are using the number of lawsuits filed as the dependent variable (count data), it is necessary to control for the number of employees who could theoretically file a claim against their employer. The yearly data for all employees, revenue, and earnings per share were downloaded from Capital IQ. This database draws its information from a wide number of public documents, including annual reports, earning statements, and 10-K forms. Capital IQ is considered one of the most reliable databases for corporate information and has been used by previous studies of firm behavior (it draws all these documents from CompuSTAT, the same database used by Collins and Clark, 2003). Both the average number of employees from 2010 to 2013 and a squared measure of this value were used in the model.

Table 5: Distribution of the "Employees" Variable					
Variable	**Obs**	**Mean**	**Stand. Dev.**	**Upper 95%**	**Lower 95%**
Number of Employees Per Firm	326	33702.15	53289.12	39508.43	27895.86

HR Manager on the Top Management Team. Each company was coded to denote if a labor relations or human resource officer was on the top management team. Existing research in the human capital field indicates that firms that appoint HR managers to the top management team do so because they view the HR function as an essential aspect of the firm's mission.

Table 6: Distribution of Management Team Control Variable	
Top Management Team	**Number of Firms**
HR Manager Member of Team	112
HR Manager Not Member of Team	236

Industry — Existing literature demonstrates that different industries adopt different conflict management practices (Lipsky and Seeber, 1996; Lipsky et al. 2003; Lipsky et al. 2013). This is logical because firms in different industries face different conflict profiles. For example, in industries that employ a significant number of low wage employees, workplace disputes will most likely revolve around wage and hour practices, whereas conflicts in the securities industry generally revolve around customer relations (churning) and discrimination (Lamare and Lipsky, 2014). In keeping with past research, we use the same categories, coded as dummy variables, as the 1996 survey of the Fortune 1000 (durable manufacturing, finance, insurance, mining/construction, nondurable manufacturing, service, trade, telecom/utilities).

Table 7: Distribution of Industries in the Sample	
Industry	**Number of Firms**
Durable Manufacturing	57
Finance	23
Insurance	24
Mining/Construction	25
Nondurable Manufacturing	62
Service	49
Trade	71
Telecom/Utilities	37

Percentage of Unionized Employees — Employees who are covered by a collective bargaining agreement may have a union grievance system that ends in grievance arbitration. If so, this would systematically decrease the number of lawsuits filed against a firm because the employee would have to pursue his or her claim via the grievance system in lieu of litigation. Due to this, unionization level is an instrumental, but imperfect, measure of the number of employees that would be ineligible to file claims against a firm. Firms in the 2011 survey self-reported their percentage of unionized employees. In our data analysis, these categories were collapsed to (0%, 1-20%, 21-30%, 30% or more).

Table 8: Distribution of Unionization Variables	
Unionization Controls	**Number of Firms**
More than 30%	31
21-30%	14
1-20%	103
0%	123

Revenue Per employee (averaged, 2010-2013) — The effect of revenue on employment litigation is unclear. Revenue per employee may act as a measure of a high quality workface, and therefore the firm might act to try to keep this talent via progressive HR and conflict

management policies. Alternatively, high revenue per employee might increase the size of a potential claim and incentivize employees to file claims against their employer. It is unclear which effect will dominate.

Earnings Per Share (averaged, 2010-2013) – This variable is used to control for performance of the firm. It could be that well performing firms are more lucrative targets for lawsuits and therefore lawyers are more likely to pursue claims against these firms. Alternatively, firms that are performing well may have fewer employment conflicts because they are less likely to be reducing their workforce or freezing salaries. These effects could influence the number of lawsuits filed against a firm based on performance.

Table 9: Negative Binomial Regressions of ADR Practices on Federal Litigation Filings (Including Full Controls[3])

	FLSA Filings	*FLSA Collective Actions*	*Discrimination Claims*	*Discrimination Class Actions*
Uses ADR for Statutory Claims	---	---	-0.696 (1.026)	-1.005 (1.805)
Uses ADR for Wage and Hour Claims	1.387 (1.537)	-0.292 (2.206)	---	---
Conflict Management System	-0.908 (1.582)	0.963 (2.095)	-0.266 (1.089)	-0.471 (1.739)
Mandatory ADR Procedures	-1.415 (1.579)	-1.471 (2.188)	-1.024 (1.067)	-1.021 (1.780)
Office of Dispute Resolution	1.042 (1.506)	1.883 (2.082)	0.666 (1.117)	0.208 (1.724)
Uses Arbitration	**-3.481*** (1.566)	**-4.759*** (2.192)	**-2.616*** (1.078)	**-4.190*** (1.885)

** = p<.05. Each of these columns represent an independent regression analysis. Due to concerns about multi-colinearity, these were performed independently.*

[3] For the Conflict Management System, Mandatory/Voluntary ADR, and Office of Dispute Resolution regressions, both "Uses ADR for Wage and Hour Claims" and "Use of Arbitration" were included as control variables because it improved model fit. Arbitration as not included in the Mandatory/Voluntary regression due to concerns of multicollinearity ($\rho = .55$). Full tables can be seen at the end of this chapter.

Since we do not have implementation dates for these policies it is crucial to underscore that we are not making causal claims between these practices and the resulting litigation filings. Instead, this study is merely to uncover that there is an association between the presence of certain ADR policies and federal employment litigation. The results, however, provide a mixed picture for ADR scholars.

Our results do not provide evidence that so-called "win-win" conflict management procedures are associated with a significantly different number of employment claims in federal court compared to firms that do not use these procedures. Instead, our evidence reports a consistent story that binding arbitration, but not so-called "win-win" conflict management procedures, is associated with fewer claims filed in federal court ($p<.05$, both FLSA and discrimination claims). For both federal discrimination class action claims ($p<.03$) and FLSA ($p<.03$) collective action claims we find a negative association between the presence of a binding arbitration policy and these types of filings. While we do not have data stating if these policies cover collective action claims, this result suggests that firms that do use binding arbitration are also likely to use it in a method that limits employees' access to collective legal remedies.

The presence of an HR representative on the top management team was not associated with firms' litigation profiles. This result could be due to the many possible HR practices and policies that each of these firms could implement to manage their operation. Bluntly, the lack of precision in this variable may be driving its insignificance

The workforce unionization variable was generally not able to report a significant association between unionization levels and litigation. In the model testing arbitration as the only key independent variable, we found an association ($p<.10$) between the mid-level unionization category (21-30%) and litigation filings. Due to the problem of multiple simultaneous inferences,

accepting evidence at the $p<.10$ level is questionable. Given the multiple models reported in this thesis, it is appropriate to view this finding with a high level of skepticism.

The lack of consistent evidence for unionization and federal litigation filings is not unusual as not all collective bargaining agreements cover statutory claims such as overtime, wage and hour violations, or federal discrimination claims. It should be further noted that these firms are large and operate under many different collective bargaining agreements with many different unions. The variance from this alone poses significant challenges for finding the relationship between litigation and unionization. Even an ANOVA test was unable to reject the null hypothesis that these categories were significantly different based on their litigation filings. Alternatively, we fit a model using the number of unionized employees (averaged) from 2010 to 2013 instead of the reported categories. These numbers were gathered from CompuSTAT. Both in the simple two-way analysis and in the full model, we were unable to gain significance for other unionization levels.

These models consistently reported fixed industry effects that influenced the number of federal employment claims filed against these firms. While exact causal mechanisms cannot be determined, it is reasonable to conjecture that different production methods influence the types of employment conflicts that arise in firms. Across virtually every model, durable and nondurable manufacturing experienced significantly ($p<.05$) fewer employment claims than other industries. There are several possible explanations: these firms may operate in federal districts that are more conservative on workplace claims; these variables could be detecting differences in unionization; these industries may have more developed industrial relations than firms in emerging fields. The evidence in this study is not sufficiently granular to confidently select an answer between these competing arguments.

The financial measures appear to be independent of firms' litigation profiles. Both earning per share and total revenue per employee reported almost no relationship with litigation filings. Other variables, such as revenue and ranking on the Fortune 1000 list, were also tested in the model. None of these were able to report a significant result. Given that all the firms in our sample appear on the Fortune 1000 list, the marginal difference in revenue or earnings between these firms may not be representative of how financial performance generally affects firms' litigation profiles. Future research that targets a wider variance in revenue or financial performance will be able to clarity this question further.

An increase in the number of employees is associated with a higher rate of both FLSA ($p<.001$) and discrimination ($p<.001$) federal employment claims. The squared number of employees ($p<.001$) is also highly significant and indicates the marginal effect of adding an additional employee on litigation filings levels-off at a certain point. This was the most influential predictor in each model. In a count model, this result is expected.

Table 10: Federal Filings, 2010-2013

	(1) Discrimination	(5) Discrimination Class Action
Constant	1.758***	-1.007***
	(0.071)	(0.148)
Use ADR for Stautory Claims	-0.696	-1.005
	(1.026)	(1.805)
Durable Manufacturing	-4.104	-4.878
	(1.703)	(3.192)
Finance	-2.415°	0.963
	(1.321)	(2.137)
Insurance	1.406	3.168
	(1.256)	(2.200)
Mining/Construction	0.739	2.385
	(1.448)	(2.331)
Nondurable Manufacturing	-4.635**	-4.153
	(1.577)	(2.966)
Service	0.098	-2.166
	(1.593)	(2.972)
Trade	-1.517	-1.834
	(1.696)	(3.098)
Number of Employees	18.393***	12.450**
	(2.499)	(3.855)
Number of Employees (Squared)	-9.084***	-6.135°
	(1.993)	(3.855)
Earnings Per Share 2010-2013	-4.779	-3.263
	(3.987)	(7.367)
Total Revenue Per Employee, 2010-2013	-2.481°	-6.914*
	(1.405)	(3.041)
HR on Top Management Team [No]	0.465	-3.194°
	(1.137)	(1.875)
Workforce Unionization >30%	0.918	0.310
	(1.157)	(2.056)
Unionization, 21-30%	1.345	-0.147
	(1.016)	(2.322)
Unionization, 1-20%	0.161	-1.484
	(1.245)	(2.322)
AICc	1133.82	365.31
BICc	1192.55	424.04
Number of Observations	193	193

° = <.10
* = <.05
** =< .01

Table 11: Federal Filings, 2010-2013

	(3)FLSA	(6) FLSA Collective Action
Constant	0.005	-0.932
	(0.108)	(0.159)
Use ADR to Resolve Wage and Hour Claims	1.387	-0.292
	(1.537)	(2.206)
Durable Manufacturing	-2.900	-7.286
	(2.688)	(3.851)
Finance	-0.511	-0.658
	(2.150)	(2.924)
Insurance	2.026	1.662
	(1.844)	(2.655)
Mining/Construction	1.980	0.986
	(2.192)	(3.043)
Nondurable Manufacturing	0.243	-0.112
	(2.434)	(3.231)
Service	2.434	1.044
	(2.399)	(3.246)
Trade	3.467	1.259
	(2.575)	(3.479)
Number of Employees	15.040***	12.137
	(3.234)	(4.690)
Number of Employees (Squared)	-8.506**	-6.635
	(2.639)	(3.663)
Earnings Per Share 2010-2013	-3.305	-3.148
	(5.594)	(7.438)
Total Revenue Per Employee, 2010-2013	-2.804	-6.338
	(1.927)	(4.075)
HR on Top Management Team [No]	-0.626	-0.218
	(1.529)	(2.109)
Workforce Unionization >30%	-1.892	-1.126
	(1.767)	(2.446)
Unionization, 21-30%	2.220	2.287
	(1.448)	(1.953)
Unionization, 1-20%	0.848	3.047
	(1.736)	(2.400)
AICc	595.82	385.87
BICc	654.65	444.69
Number of Observations	194	194

° = <.10
* = <.05
** =< .01

Table 12: Federal Filings, 2010-2013

	(1) Discrimination	(3)FLSA	(5) Discrimination Class Action	(6) FLSA Collective Action
Constant	1.736***	-0.010	-0.963***	-0.934***
	(0.067)	(0.110)	(0.129)	(0.158)
Conflict Management System [Yes]	-0.266	-0.908	-0.471	0.963
	(1.089)	(1.582)	(1.739)	(2.095)
Durable Manufacturing	-5.118**	-3.016	-3.295	-6.393°
	(1.652)	(2.675)	(2.778)	(3.656)
Finance	-2.157	-0.154	2.195	-0.218
	(1.369)	(2.165)	(2.078)	(2.881)
Insurance	0.623	1.482	1.349	1.108
	(1.230)	(1.857)	(1.914)	(2.571)
Mining/Construction	0.069	2.000	1.064	1.167
	(1.409)	(2.172)	(2.138)	(2.876)
Nondurable Manufacturing	-5.321**	0.762	-2.959	0.819
	(1.531)	(2.361)	(2.667)	(2.987)
Service	-0.247	3.730	-1.266	1.667
	(1.496)	(2.601)	(2.681)	(3.175)
Trade	-1.845	3.730	-0.786	2.102
	(1.595)	(2.601)	(2.794)	(3.385)
Number of Employees	26.427***	15.450***	23.779***	12.243**
	(2.923)	(3.397)	(4.061)	(4.549)
Number of Employees (Squared)	-15.255***	-9.188**	-15.693***	-7.093°
	(2.614)	(2.803)	(3.747)	(3.642)
Earnings Per Share 2010-2013	-3.346	-2.558	-1.435	-2.323
	(2.653)	(4.914)	(4.301)	(6.384)
Total Revenue Per Employee, 2010-2013	-1.690	-2.517	-2.032	-6.024
	(1.172)	(1.920)	(2.502)	(3.907)
HR on Top Management Team [No]	1.410	-1.044	-1.977	-0.723
	(1.172)	(1.551)	(1.763)	(2.023)
Workforce Unionization >30%	1.011	-1.833	-0.247	-1.104
	(1.211)	(1.796)	(1.962)	(2.392)
Unionization, 21-30%	2.002°	2.544°	-0.238	2.761
	(1.075)	(1.459)	(1.717)	(1.874)
Unionization, 1-20%	0.377	0.829	-2.717	2.536
	(1.256)	(1.754)	(2.136)	(2.345)
Use of Arbitration [Yes]	-2.353*	-3.428*	-4.184*	-4.635*
	(1.055)	(1.576)	(1.901)	(2.155)
Use Wages for ADR	---	2.190	---	0.518
		(1.607)		(2.419)
AICc	1371.78	575.41	494.05	446.49
BICc	1306.96	639.92	429.23	381.65
Number of Observations	224	189	224	189

° = <.10
* = <.05
** =< .01

Table 13: Federal Filings, 2010-2013

	(1) Discrimination	(3)FLSA	(5) Discrimination Class Action	(6) FLSA Collective Action
Constant	1.740***	-0.001	-0.966***	-0.954***
	(0.066)	(0.109)	(0.128)	(0.159)
Office of Dispute Resolution	0.666	1.042	0.208	1.883
	(1.117)	(1.506)	(1.724)	(2.082)
Durable Manufacturing	-5.119**	-2.973	-3.368	-6.716
	(1.651)	(2.649)	(2.807)	(3.726)
Finance	-2.181	-0.258	2.232	-0.197
	(1.358)	(2.146)	(2.067)	(2.902)
Insurance	0.550	1.573	1.344	1.066
	(1.214)	(1.837)	(1.891)	(2.614)
Mining/Construction	0.232	2.038	1.129	1.292
	(1.411)	(2.134)	(2.132)	(2.906)
Nondurable Manufacturing	-5.300**	0.528	-2.984	0.658
	(1.545)	(2.349)	(2.678)	(3.046)
Service	-0.152	2.913	-0.871	1.706
	(1.492)	(2.388)	(2.842)	(3.183)
Trade	-1.561	3.898	-0.871	2.290
	(1.621)	(2.571)	(2.842)	(3.438)
Number of Employees	26.139***	15.008***	23.726***	11.907**
	(2.894)	(3.235)	(3.976)	(4.493)
Number of Employees (Squared)	-14.953***	-8.780*	-15.609***	-6.782°
	(2.556)	(2.664)	(3.677)	(3.562)
Earnings Per Share 2010-2013	-3.399	-2.844	-1.383	-2.665
	(2.651)	(5.296)	(4.197)	(7.106)
Total Revenue Per Employee, 2010-2013	-1.840	-2.698	-2.039	-6.036
	(1.169)	(1.922)	(2.465)	(3.948)
HR on Top Management Team [No]	1.337	-0.765	-2.122	-0.593
	(1.150)	(1.521)	(1.753)	(2.398)
Workforce Unionization >30%	0.778	-1.758	-0.276	-0.981
	(1.189)	(1.762)	(1.925)	(2.390)
Unionization, 21-30%	2.060°	2.722	-0.272	3.210
	(1.071)	(1.432)	(1.703)	(1.897)
Unionization, 1-20%	0.246	1.088	-2.780	2.980
	(1.227)	(1.703)	(2.115)	(2.320)
Use of Arbitration [Yes]	-2.616*	-3.481*	-4.920*	-4.759*
	(1.078)	(1.566)	(1.885)	(2.192)
Use ADR for Wage Disputes	---	2.097	---	0.701
		(1.585)		(2.208)
AICc	1324.99	585.59	433.80	381.65
BICc	1390.06	650.43	498.88	446.49
Number of Observations	227	189	227	189

° = <.10
* = <.05
** = <.01

Table 14: Federal Filings, 2010-2013

	(1) Discrimination	(3)FLSA	(5) Discrimination Class Action	(6) FLSA Collective Action
Constant	1.740***	-0.001	-0.966	-0.951
	(0.066)	(0.109)	(0.128)	(0.159)
Use of Arbitration [Yes]	**-2.616***	**-3.481***	**-4.190***	**-4.759***
	(1.078)	(1.566)	(1.885)	(2.192)
Durable Manufacturing	-5.119**	-2.973	-3.368	-6.716°
	(1.651)	(2.649)	(2.807)	(3.726)
Finance	-2.181	-0.258	2.232	-0.197
	(1.358)	(2.416)	(2.807)	(2.902)
Insurance	0.550	1.573	1.344	1.066
	(1.214)	(1.837)	(1.891)	(2.614)
Mining/Construction	0.232	2.038	1.129	1.292
	(1.411)	(2.134)	(2.132)	(2.906)
Nondurable Manufacturing	-5.300**	0.528	-2.984	0.658
	(1.545)	(2.349)	(2.678)	(3.046)
Service	-0.152	2.913	-1.207	1.706
	(1.492)	(2.388)	(2.686)	(3.183)
Trade	1.561	3.898	-0.871	2.290
	(1.621)	(2.571)	(2.842)	(3.428)
Number of Employees	26.139***	15.008***	23.762***	11.907**
	(2.894)	(3.235)	(3.976)	(4.493)
Number of Employees (Squared)	-14.953***	-8.780***	-15.609***	-6.782°
	(2.556)	(2.664)	(3.677)	(3.562)
Earnings Per Share 2010-2013	-3.399	-2.844	-1.383	-2.665
	(2.651)	(5.296)	(4.197)	(7.106)
Total Revenue Per Employee, 2010-2013	1.840	-2.698	-2.039	-6.036
	(1.169)	(1.922)	(2.465)	(3.948)
HR on Top Management Team [No]	1.337	-0.765	-2.122	-0.593
	(1.150)	(1.521)	(1.753)	(2.061)
Workforce Unionization >30%	0.788	-1.758	-0.276	-0.981
	(1.189)	(1.762)	(1.925)	(2.390)
Unionization, 21-30%	2.060°	2.722°	-0.272	3.210°
	(1.071)	(1.432)	(1.703)	(1.897)
Unionization, 1-20%	0.246	1.088	-2.780	2.980
	(1.227)	(1.703)	(2.115)	(2.320)
Office of Dispute Resolution [No]	-0.666	-1.042	-0.208	-1.883
	(1.117)	(1.506)	(1.724)	(2.082)
Use ADR for Wage Disputes	---	2.097	---	0.701
		(1.585)		(2.208)
AICc	1324.99	585.59	433.80	381.65
BICc	1390.06	650.43	498.88	446.49
Number of Observations	227	189	227	189

° = <.10
* = <.05
** =< .01

Table 15: Federal Filings, 2010-2013

	(1) Discrimination	(3)FLSA	(5) Discrimination Class Action	(6) FLSA Collective Ac
Constant	1.738	0.018	-0.980	0.881
	(0.066)	(0.110)	(0.133)	(0.159)
Mandatory ADR Procedure [Yes]	-1.024	-1.415	-1.021	-1.471
	(1.067)	(1.597)	(1.780)	(2.188)
Durable Manufacturing	-5.244**	-3.455	-2.366	-6.256
	(1.636)	(2.745)	(2.969)	(3.804)
Finance	-2.409°	-0.579	2.665	-0.569
	(1.346)	(2.210)	(2.204)	(2.984)
Insurance	0.821	1.654	2.347	1.660
	(1.190)	(1.906)	(2.024)	(2.717)
Mining/Construction	0.298	1.928	2.502	1.331
	(1.403)	(2.244)	(2.316)	(3.071)
Nondurable Manufacturing	-6.485***	-0.394	-3.472	0.465
	(1.603)	(2.516)	(2.971)	(3.280)
Service	-0.301	2.463	-0.416	1.616
	(1.479)	(2.453)	(2.827)	(3.268)
Trade	-1.812	3.401	0.144	1.782
	(1.664)	(2.717)	(3.124)	(3.670)
Number of Employees	25.110***	15.558***	23.030***	11.656*
	(2.870)	(3.386)	(4.249)	(4.753)
Number of Employees (Squared)	-14.015***	-8.622**	-14.849***	-6.212°
	(2.547)	(2.761)	(3.907)	(3.713)
Earnings Per Share 2010-2013	1.438	0.278	1.116	0.233
	(1.541)	(1.523)	(2.468)	(2.339)
Total Revenue Per Employee, 2010-2013	-2.209°	-2.928	-2.688	-6.808
	(1.559)	(1.982)	(2.445)	(4.154)
HR on Top Management Team [No]	0.978	-0.873	-1.140	-0.273
	(1.130)	(1.574)	(1.867)	(2.131)
Workforce Unionization >30%	0.477	-1.902	-1.668	-0.520
	(1.175)	(1.774)	(2.045)	(2.362)
Unionization, 21-30%	2.242*	2.047	0.597	2.279
	(1.043)	(1.475)	(1.667)	(1.965)
Unionization, 1-20%	2.242	0.632	-1.846	2.870
	(1.043)	(1.775)	(2.189)	(2.418)
Office of Dispute Resolution [No]	0.168	-0.554	0.797	-1.168
	(1.119)	(1.615)	(1.795)	(2.265)
Use ADR for Wage Disputes	---	1.521	---	-0.382
		(1.631)		(2.258)
AICc	1254.16	565.51	409.60	374.48
BICc	1318.21	629.48	473.64	439.45
Number of Observations	215	181	215	181

° = <.10
* = <.05
** = <.01

Table 16: Federal Filings, 2010-2013

	(1) Discrimination	(2) Discrimination	(3)FLSA	(4) FLSA	(5) Discrimination Class Action	(6) FLSA Collective Action
Constant	1.740***	1.727	-0.001	0.009	-1.026	-0.923***
	(0.066)	(0.066)	(0.109)	(0.110)	(0.137)	(0.160)
Use of Arbitration [Yes]	**-2.616***	**-3.122***	**-3.481***	**-3.787***	**-5.973***	**-6.050***
	(1.078)	(1.233)	(1.566)	(1.895)	(2.348)	(2.596)
Mandatory ADR Procedure [Yes]	---	0.490	---	0.605	2.036	1.831
		(1.256)		(1.867)	(2.089)	(2.487)
Durable Manufacturing	-5.119**	-5.780**	-2.973	-3.532	-3.419	-6.216°
	(1.651)	(1.649)	(2.649)	(2.726)	(2.936)	(3.699)
Finance	-2.181	-2.682*	-0.258	-0.595	2.294	-0.489
	(1.358)	(1.353)	(2.416)	(2.202)	(2.134)	(2.940)
Insurance	0.550	0.225	1.573	1.299	1.463	1.018
	(1.214)	(1.206)	(1.837)	(1.885)	(1.980)	(2.620)
Mining/Construction	0.232	0.015	2.038	1.764	1.155	1.014
	(1.411)	(1.391)	(2.134)	(2.174)	(2.262)	(2.876)
Nondurable Manufacturing	-5.300**	-7.059***	0.528	-0.480	-3.783	0.254
	(1.545)	(1.620)	(2.349)	(2.451)	(2.837)	(3.115)
Service	-0.152	-0.629	2.913	2.654	-0.542	1.939
	(1.492)	(1.483)	(2.388)	(2.427)	(2.784)	(3.165)
Trade	1.561	-2.236	3.898	3.153	-0.469	1.586
	(1.621)	(1.657)	(2.571)	(2.695)	(3.083)	(3.588)
Number of Employees	26.139***	25.443***	15.008***	15.258***	23.485***	11.524**
	(2.894)	(2.858)	(3.235)	(3.330)	(4.047)	(4.450)
Number of Employees (Squared)	-14.953***	-14.544***	-8.780***	-9.060***	-15.634***	-6.971*
	(2.556)	(2.552)	(2.664)	(2.741)	(3.724)	(3.546)
Earnings Per Share 2010-2013	-3.399	1.549	-2.844	0.442	1.668	0.559
	(2.651)	(1.522)	(5.296)	(1.484)	(2.409)	(2.141)
Total Revenue Per Employee, 2010-2013	1.840	-2.121°	-2.698	-2.885	-2.538	-6.303
	(1.169)	(1.152)	(1.922)	(1.956)	(2.537)	(3.959)
HR on Top Management Team [No]	1.337	1.047	-0.765	-1.308	-1.732	-1.065
	(1.150)	(1.131)	(1.521)	(1.578)	(1.827)	(2.087)
Workforce Unionization >30%	0.788	0.307	-1.758	-1.625	-1.533	-0.212
	(1.189)	(1.180)	(1.762)	(1.767)	(1.994)	(2.279)
Unionization, 21-30%	2.060°	2.483*	2.722°	2.437	0.826	3.010
	(1.071)	(1.037)	(1.432)	(1.445)	(1.647)	(1.861)
Unionization, 1-20%	0.246	0.451	1.088	0.695	-2.290	2.568
	(1.227)	(1.210)	(1.703)	(1.734)	(2.144)	(2.309)
Office of Dispute Resolution [No]	-0.666	-0.233	-1.042	-0.731	0.222	-1.451
	(1.117)	(1.114)	(1.506)	(1.586)	(1.758)	(2.185)
Use ADR for Wage Disputes	---	---	2.097	1.858	---	0.190
			(1.585)	(1.610)		(2.162)
AICc	1324.99	1229.07	585.59	558.55	339.09	421.79
BICc	1390.06	1296.10	650.43	625.36	466.13	488.92
Number of Observations	227	211	189	178	211	178

° = <.10
* = <.05

CHAPTER 6

DISCUSSION

Despite the growing use of conflict management techniques in Fortune 1000 firms, we were unable to find an association between any of the most comprehensive conflict management techniques and federal litigation filings. Our models were not only tested for the reported years, but alternative models (such as pooling 2005-2013 filings or 2009-2013) were also unable to uncover significant differences in filings due to the presence of these procedures or systems. While our results are indicative that "win-win" conflict management systems do not influence the number of filings a firm faces, this is just one measure of the costs of litigation. For example, conflict management systems may be able to alert a firm to the most threatening types of conflicts prior to an employee filing a claim and allow firms to settle the conflict before a claim is filed. Weaker claims can be susceptible to dismissal on summary judgment, thus decreasing the cost of these claims to a firm. We cannot speak to the association between these qualitative aspects of litigation and the presence or absence of conflict management systems.

Furthermore, even if there is no association between these "win-win" procedures and the cost of litigation, this study does not contradict the existing literature on the internal firm benefits of ADR. As stated earlier, existing studies have shown that ADR has the ability to reduce negative workplace behaviors (Bendersky, 2003), non-managerial decision makers can resolve grievances within the workplace (Colvin, 2003), and can help reduce other costs of conflict – such as absenteeism or low productivity (Lipsky et al. 2006). In short, it is important to keep in mind that filings are just one of the many costs of conflict.

Yet litigation filings are not costless: claims take time to investigate, cost legal resources, require managers to take time out of their day to meet with the legal team, and could pose negative publicity. With that in mind, our study provides three findings of interest relating

employment filings to ADR. First, the results of this study suggest that the presence of structures, such as an office of dispute resolution, may not be able to independently influence the amount of employment litigation filed against a firm. This is in line with previous research (McEwen, 1998) that finds firms' commitment to ADR procedures is an important aspect of crafting a conflict management system. Indeed, Lipsky et al. (2003) argues that firms need to complement their procedural conflict management policies with training for managers, employees, and union representatives. Given the wide variety of ways firms could implement each of these procedures and varying levels of commitment, it is not surprising that we were unable to uncover a consistent relationship between ADR procedures and federal litigation filings.

Second, this study finds a strong and consistent relationship between employment litigation and the use of binding arbitration. This negative association appears in other parameterizations of the model and was one of the strongest relationships of any variable we modeled. This result, while intuitive, is a fairly important piece of evidence in the emerging debate regarding the scope of arbitration policies. By finding a significant negative association between binding arbitration policies and collective action claims, we present the first cross industry study that suggests firms are incorporating collective action waiver provisions into their standard arbitration policies. This procedural limitation changes the number of cases for which plaintiffs can find representation because some employment claims, such as many individual overtime cases, are "negative value" claims if litigated individually. While there is a coming legal battle regarding if section 216(b) of the FLSA can be waived with an arbitration agreement, these results provide evidence of the effect of arbitration on the number collective and class cases filed.

Finally, this study also finds that as firms hire additional employees, firms increase the probability of litigation at a decreasing rate. This is an intriguing result because we initially believed that firms would increase the risk of litigation at an increasing rate since additional employees drive up the possible damages associated with a class claim. This is not a small effect; in fact, both the average and the squared term are the strongest predictors of employment litigation in our model. Despite this, for both individual and class based claims we find that litigation risk increases at a *decreasing* rate. This result holds for both FLSA and discrimination claims. What may be driving this effect? Our results can only provide so much insight into these findings, but we may speculate at an answer. It could be that as firms increase in size they are able to better standardize employment practices and therefore are able to reduce their risk of litigation. Further research will be needed to investigate this question.

Limitation

There are several limitations of this study. The first and most obvious is the question of causality. The main concern here is that our data on firm practices is cross-sectional while our data on litigation filings is longitudinal. This creates the question: could it be that firms that have fewer filings against them are able to offer arbitration policies *because* these firms are not as concerned about litigation? This might be the case. We know that firms consider a wide variety of factors before choosing their employment conflict management strategy, so the best we can claim is association.

Second, there is a possible response bias due to a lack of understanding or precision in the survey question. For example, what does having an "Office of Dispute Resolution" indicate for a company with many branches in multiple states? Does this mean that the firm has an Office of Dispute Resolution in each of its branches? For a firm with many large branches this may be

the case, but for a corporation like Dollar General, that interpretation seems less plausible. The lack of precision in our variable formation may be increasing the standard errors for our independent variables. We attempted to control for this by including variables that would both be indicative of important conflict management structures ("Office of Dispute Resolution") and also act to identify firms that have a more complete and progressive view of conflict management ("Conflict Management System"). Despite our efforts, we were unable to uncover a significant relationship.

As noted earlier, we are unable to speak of the quality of these claims filed against firms. While we attempted to use collective and class actions to proxy for highly threatening cases, it is still unclear if these are high quality cases. Furthermore, we cannot speak to employees' motivations for filings these claims. While we assume that most of these claims are sincere, this may not be the case. The existing literature alleges that many employees who file a lawsuit do so in order to try to achieve a "de facto settlement" (Sherwyn, Estreicher, and Heise, 2005). These claims would be undeterred by a firm's ADR procedures.

Furthermore, as has been documented by the HR literature, using data from the corporate level to explain workplace practices at the establishment level introduces a large amount of random variation in the data (see, for example, Wright, et al. 2000). High-level corporate actors are likely to know the policy, but are unlikely to be able to verify if these policies are being followed at the establishment level. This is less a concern for arbitration agreements because they are contracts and therefore, unlike training or HR policies, have less implementation variation. This concern is valid for our ADR measure because it is unclear what training and procedures are actually implemented at the establishment level. The local polices that could influence the number of lawsuits filed is a valid concern and one we will need to address in future research.

Additionally, due to data collection problems, our study was unable to uncover state-based litigation filings against these firms. There are complex procedural reasons why a firm may face a federal or state based suit, and due to this, some firms may see more state based litigation than federal litigation. It is known in the literature that many attorneys in California prefer to file under the state statutes because they provide wider protection (and sometimes greater damage awards) than Federal ones. We will need to include these cases in future studies.

CHAPTER 7

CONCLUSION

In closing, it is appropriate to return to the two questions raised in the introduction of this thesis: what caused the rise in Fair Labor Standards Act (FLSA) claims from 2000 to the present and how can firms manage these claims?

Background

As statutory workplace rights expanded in the United States, managing employment litigation became an important aspect of the modern firm. With this change in the industrial economy, firms have begun seeking more cost efficient methods of resolving workplace conflict. Early attempts to extend grievance procedures to non-unionized employees failed due to many factors, including fear of retaliation (Slicter, Healey, Livernash, 1960). Yet the ADR "revolution" in the 1970s has witnessed firms establishing due process procedures in an attempt gain a strategic advantage (Lipsky and Avgar, 2004).

Studies of workplace conflict resolution in the 1990s primarily examined workplace discrimination claims, yet in the past fifteen years an old type of employment claim has regained prominence in the federal court system: wage and hour litigation. In the last fifteen years, employees have begun turning to the wage and hour law en mass, resulting in the number of cases increasing over 600% since 2000. What explains the increase in the number of wage claims in federal court?

Previous literature examining workplace litigation maintained that different areas of employment law operated independently of each other. Given that there are different burdens and legal rules for say, securities law and environmental law, this is logical. While scholars had identified a large increase in the number of employment discrimination filings in the 1990s, very little work had been dedicated to explaining what were the driving factors behind this increase.

Due to this omission, the relationship between the increase in FLSA claims and discrimination claims was largely overlooked. The passage of the 1991 Amendments to the Civil Rights Act made employment law an economically viable career choice for attorneys, and with the increase in the number of attorneys practicing plaintiff-side employment law, these lawyers created professional organizations. The formation of the plaintiff's bar allowed these attorneys to create a body of institutional knowledge regarding the "best practices" for litigating plaintiff-side employment claims.

With more attorneys filing employment claims, the number of employment discrimination claims increased from one in one hundred to one in ten of the total cases filed in federal court in only eight years (Clermont and Schwab, 2009). Despite the large number of claims, these plaintiffs' win rate for these claims was surprisingly low, around 15% (Clermont and Schwab, 2009). Partially due to this "anti-plaintiff bias", the plaintiff's bar made a choice to begin filing FLSA claims. Unlike discrimination claims, wage and hour claims are easier for plaintiffs to win because the burden of production is on the firm rather than the employee. This means that, should the firm be unable to produce evidence the employee was not working during the time in question, the firm will most likely fail to defend its claim. The collective action procedure under section 216(b) of the FLSA also makes it easier to certify a collective action than rule 23 of the *Federal Rules of Civil Procedure*. The plaintiff's bar was able to mobilize these claims quickly, resulting in a 600% increase in the number of FLSA claims in only 15 years.

How would firms manage these new filings in federal court? The existing literature had found some association between employment litigation and the establishment of internal due process mechanisms, but this literature is just beginning to make these connections. Largely, this

debate about ADR was grounded in the difference between integrative (win-win) solutions to workplace conflict and distributive (zero-sum) conflict management procedures.

Theory and Structure

The theory of exist-voice-loyalty provides a link between alternative dispute resolution and litigation (Hirschman, 1970). Under this theory, when an employee is confronted with a workplace dispute he/she can choose either to stay with the firm (loyalty) or leave the firm (exit). Internal voice mechanisms provide a method for employees to articulate their workplace disputes short of leaving the firm (and, sometimes, initiating litigation). Constructing mechanisms that allow employees to voice discontent or concerns short of litigation allows firms to detect possible conflicts or workplace practices that could result in turnover, low productivity, or litigation. Managerial knowledge of the shop floor via voice mechanisms (such as a grievance system) was one of the ways some unionized firms, despite paying higher wages, were able to exhibit higher productivity than comparable nonunion firms (Freeman and Medoff, 1985).

Yet the applicability of the traditional elements of a union grievance procedure (a written complaint, appeal to management, and then perhaps mediation or arbitration) may not apply to the nonunionized workplace. Even foundational works in the industrial relations literature argued that employees would be hesitant to come forward without the protection of contractual provisions such as a "just cause" employment agreement (Freeman and Medoff, 1985). In the late 1970s, however, many companies began investing in internal due process procedures to manage their workplace disputes (La Rue, 2000). Now, after twenty-five years of research, it appears that alternative dispute resolution is a durable aspect of the modern industrial economy (Stipanowich and Lamare, 2012).

Modern conflict management systems have attempted to overcome employee concern about retaliation by ceding some power over disciplinary decisions away from the managerial

hierarchy (Colvin, 2003). Some of these procedures, such as an Ombuds, extend confidentiality to employees while others, such as a peer-review board or arbitration, grant other actors input over disciplinary issues. Scholar argue that having a variety of ways to enter the conflict management system allows employees choice over how they wish to handle their workplace dispute (Lipsky et al., 2003). Using multiple procedures, firms have tried to bundle together conflict management practices into "conflict management systems" (Lipsky et al., 2003).

The most studied aspect of conflict management, however, is the use of employment arbitration. Since pre-dispute arbitration agreements require employees to submit their workplace disputes to a private forum that results in decisions that cannot be appealed, extending this practice for non-unionized employees has attracted a significant amount of attention both from the academic community and popular press. This practice set off a series of research questions: for example, does arbitration have a gender or race bias? Do employers benefit from repeat player effects? How many employees are covered under these agreements? Following *AT&T v Concepcion,* there is a new dispute over employment arbitration: should employment arbitration agreements allow employers to limit collective or class filings in their standard arbitration policy?

This thesis attempts to find the effect of certain ADR structures, including arbitration, on firms' litigation profiles. While previous work had shown promising relationships between ADR and the ability for firms to resolve conflict internally (Colvin, 2003; Lipsky et al., 2003; Bendersky, 2003), this work had not yet extended its analysis to litigation filings. This thesis fills in this gap.

Results

In 2011, Cornell University, the Strauss Institute on Dispute Resolution at Pepperdine University, and CPR surveyed the Forbes Fortune 1000 regarding what conflict management

practices these firms used to resolve consumer, employment, and business-to-business disputes. This survey allows us to identify 226 firms that had sufficient data for our study. Following the survey, a team of graduate students researched the litigation histories for each of the 368 companies that had responded to the 2011 survey. Using the BloombergLaw database (which draws data from PACER) we were able to identify the number of discrimination and FLSA claims filed against these firms. Each lawsuit was then inspected to determine if it was a collective or class action lawsuit. Using a regression analysis we were able to model the relationship between conflict management policies and firms' federal employment litigation filings.

Our results offer three findings of interest. First, we were unable to discover a statistically significant relationship between any of the so-called win-win conflict management procedures and federal litigation. These results found that even firms that self-identify as having a "conflict management system" do not experience litigation at a different rate from firms that do not identify as having such a system. Previous work in the area of conflict management suggests that firms that have a specific office to handle workplace conflicts often have more robust conflict management procedures than those that do not. Our results, however, do not support this claim. Furthermore, firms that require their employees to submit their claims to a mandatory ADR procedure do not experience litigation at a different rate from firms that have voluntary procedures.

Second, we were able to find a strong negative relationship between binding arbitration and firms' litigation profiles. This result strongly suggests that firms that use arbitration do so in such a way that limits the ability of their employees to engage in collective legal action. The legal-economic implications of this are not in question: even firm-side attorneys that were

interviewed for this study agree that litigating individual FLSA claims takes so-called "positive-value" collective action claims and renders them "negative-value" individual claims. While the legality of applying *AT&T v. Concepcion* to FLSA claims is an issue left to the judicial system, there is considerably less ambiguity regarding the effect of collective action waivers on the FLSA.

Finally, this work offers some insight regarding the relationship between the size of a firm, in terms of employees, and the amount of employment litigation an average firm will experience. Our model finds that adding an additional employee to a firm increases the risk of litigation at a decreasing rate. The relationship between firm characteristics and litigation filings has yet to be examined by the industrial relations literature so interpretation of this finding is speculative. At some point, however, it appears that firms create structures or policies that are able to limit the risk of adding additional employees to the firm. Further research into the relationship between firm size and litigation will be necessary to explore this question.

Aside from these three principle findings, our control variables offer some insight into the behavior of litigation in Fortune 1000 firms. Much like the work of Lipsky et al. (2003), we were able to uncover industry effects within the data. Due to this, it appears that industry characteristics, such as seasonal production patterns, hiring practices, unionization, or different production processes, are strongly related to firms' litigation profile. Much like our finding about the relationship between employees and litigation, this suggests there is a relationship between the structure of firms, the markets in which they compete, and the types of employment conflicts that reach the point of litigation.

By using the presence of a human resource or labor relations executive on the top management team, we attempted to identify firms that valued the HR function, and with this,

were more likely to have a well-developed HR system. Much like conflict management systems, HR systems have a variety of characteristics, including different compensation, retention, selection, and other policies. While our results were unable to uncover a relationship between a member of the HR function on the top management team and employment litigation, this is not to imply that these policies and procedures do not affect the amount of litigation a firm faces. Our null findings could merely be the result of a lack of variation in Fortune 1000 HR systems or perhaps that most of these firms have sufficiently well-developed HR strategies that our model is not picking up any meaningful variation between firms. Future research will have to investigate these questions.

Future Research

While most of the existing research on conflict management has explored the landscape of practices and policies in corporate America, the relationships between these practices and firms' goals is still a developing field. Our evidence shows that firm-to-firm variation may be too coarse to pick up meaningful evidence that "win-win" conflict management practices influence "bottom line" outcomes, but looking deeper inside a firm may clarify these murky relationships. After reviewing the findings of this study, the logical next question is: where is the variation in conflict management policies? Is the relevant variation federal district to federal district? Or perhaps state to state? It could be that regional mangers or branch managers are the key members to drive effective ADR programs. Or, perhaps differences in ADR procedures are best explained in store-to-store variation.

There is, at this point, too much evidence supporting the claim that conflict management policies have the effect of resolving workplace conflict short of litigation to dismiss this claim. Yet given the complexity of conflict management policies and variance associated with different litigation claims it is difficult to isolate the effect of individual ADR policies on "bottom-line" outcomes in Fortune 1000 firms, like litigation. I have started working on a matched-pairs

comparison of two firms in the Fortune 1000 survey to begin isolating the possible sources of variation in conflict management procedures to help guide research efforts in the future. This project will take two firms in the same industry, targeting the same clients, and with similar job functions but very different ADR procedures and litigation filings. Dollar General has extensive ADR procedures but experiences employment litigation at an alarming rate: on average, from 2005 to 2013, Dollar General was taken to court by one of its employees every other day. The other firm, Dollar Tree, has very few ADR procedures but rarely experiences employment litigation. The variation in these two firms, their training procedures and approaches to conflict, will be instructive in discovering the relationship between conflict management and employment litigation.

REFERENCES

Alaimo, Michael A., James B. Thelen, and Jennifer L. Sabourin. 2005. "Labor Law: Emerging FLSA Trends: Class Actions, Enforcement, and New Regulations." *Michigan Bar Journal,* Vol. 84, pp. 15-18.

ADR Staff, Superior Court of California county of San Mateo, 2009, 2009. "Multi-Option ADR Project Evaluation Report". Available at: https://www.sanmateocourt.org/documents/adr/2007_2008_evaluation_report.pdf

Barley, Stephen R., 1986. "Technology As an Occasion for Structuring: Evidence From Observations of CT Scanners and the Social Order of Radiology Departments." *Administrative Science Quarterly,* Vol. 31. Pp. 78-108.

Bartunek, Jean M, 1984. "Changing Interpretive Schemes and Organizational Restructuring The Example of a Religious Order" *Administrative Science Quarterly*. Vol. 29 pp. 355-372.

Bendersky, Corinne. 2003. "Organizational Dispute Resolution Systems: A Complementarities Model." *Academy of Management Review*, Vol. 28, no. 4 (October), pp. 643–56.

Bernhardt, Annette, et al. 2009. "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities." Report for the National Employment Law Project.

Bershard, Iliza. 2012. "Note: Employing Arbitration: FLSA Collective Actions Post-Conception." *Cardozo Law Rev.* Vol. 34 pp.359-388.

Bingham, Lisa B. 1997. "Employment Arbitration: The Repeat Player Effect." *Employee Rights and Employment Policy Journal*, Vol. 1, pp. 189–220.

Bisom-Rapp, Susan. 1999 "Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice" *Florida State University Law Review*, Vol. 26 pp.958-1049.

Bumiller, Kristen, 1987. "Victims in the Shadow of the Law: A Critique of the Model of Legal Protection," 12 *Signs: J. of Women & Culture in Society* 421.

Burstein, Paul, 1991. "Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity," 96 *American J. of Sociology* 1201.

Burawoy, Michael, 1979. *Manufacturing Consent: Changes in the Labor Process Under Monopoly Capitalism*. Chicago: University of Chicago Press.

Carrington, Wiliam J. and Bruce C. Frank. 2001. "Do Some Workers Have Minimum Wage Careers?" *Monthly Labor Review.* May, pp. 17-27.

Clermont, Kevin M., and Stewart J. Schwab. 2004. "How Employment Discrimination Plaintiffs Fare in Federal Court," *Journal of Empirical Legal Studies*, Vol. 1, no. 2 (July), pp. 429–58.

Clermont, Kevin M. and Stewart J. Schwab. 2009. "Employment Discrimination Plaintifs in Federal Court: From Bad to Worse?" *Harvard Law & Policy Review*, Vol. 3(1), 3-35.

Collins, Chris and Kevin D Clark. 2003. "Strategic Human Resource Practices, Top Management Team Social Networks, and Firm Performance: The Role of Human Resource Practices in Creating Organizational Competitive Advantage." *Academy of Management Journal.* Vol. 46 No. 6 pp. 740-751.

Colvin, Alexander. J. S. 2011. "An empirical study of employment arbitration: Case outcomes and processes." *Journal of Empirical Legal Studies*, Vol. 8 No. 1 (March), pp. 1-23.

Colvin, Alexander J.S. 2003. "Institutional Pressures, Human Resource Strategies and the Rise of Nonunion Dispute Resolution Procedures." *Industrial and Labor Relations Review*, Vol. 56, No. 3 (April), pp. 375-92.

Colvin, Alexander J.S. 2011. "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies*, Vol. 8(1): 1-23.

Colvin, Alexander J.S. 2008. "Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?" *Employee Rights and Employment Policy Journal*, Vol. 11, pp. 405-47.

Colvin, Alexander J.S., 2004. "Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace," *Advances in Industrial & Labor Relations*. Vol. 13:71-97.

Colvin, Alexander J.S. and Kelly Pike. 2014. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" Ohio State Journal on Dispute Resolution, Vol. 29, No. 1, pp. 59-83.

Costa, Dora L., 2000. "Hours of Work and the Fair Labor Standards Act: A Study of Retail and Wholesale Trade, 1938-1950" *ILR Review,* Vol 53 No 4. Pp.648-664.

Cotropia, Christopher Anthony, Jay P. Kesan, and David L. Schwartz. "Patent Assertion Entities (PAEs) Under the Microscope: An Empirical Investigation of Patent Holders as Litigants" *Minnesota Law Review, Forthcoming.*

Desai, Aashish Y. 2003. "Features: FLSA Overtime Class Actions and Liquidated Damages." *Orange County Lawyer,* Vol 45 pp. 20-24.

DiMaggio, Paul D. and Walter W. Powell. 1983. "The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields." American Sociological Review 48: 147-160.

Djelic, M.L., and S. Quack, 2003. *Globalization as a Double Process of Institutional Change and Institution Building.* In: *Globalization and Institutions. Redefining the Rules of the Economic Game*. Cheltenham (Grande-Bretagne): Edward Elgar Publishing.

Eisenberg, Theodore and Margo Schlanger. 2003."The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis." *Notre Dame Law Review,* Vol. 78, No. 5 (October).

Edelman, Lauren B., Steven E. Abraham, and Howard S. Erlanger. 1992. "Professional Construction of Law: The Inflated Threat of Wrongful Discharge." *Law and Society Review*, Vol. 26, no. 1, pp. 47–83.

Edelman, Lauren B. 1992. "Legal ambiguity and symbolic structures: Organizational mediation of civil rights law." American Journal of Sociology 97: 1531-1576.

Edelman, Lauren B., Howard S. Erlanger, and John Lande. 1993. "Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace." *Law and Society Review,* Vol. 27(3), pp. 497-534.

Edelman, L.B. 1990. "Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace." *American Journal of Sociology*, Vol. 95, no. 6 (May), pp. 1401–40.

Edelman, Lauren B., Christopher Uggen, and Howard S. Erlanger. 1999. "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth." *American Journal of Sociology*, Vol. 105, no. 2 (September), pp. 406–54.

Edwards, Richard, 1979. *Contested Terrain: The Transformation of the Workplace in the Twentieth Century.*" Basic Books.

Estreicher, Samuel. 2001. "Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements." *Ohio State Journal on Dispute Resolution*, Vol. 16, no. 3, pp. 559–70.

Freeman, Richard B., and James L. Medoff. 1984. *What do Unions do?* Basic Books.

GAO, "H-2A Agricultural Guestworker Program: Changes Could Iprove Serice To Employers and Better Protect Workers".

GAO, 2013. "The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance". GAO Report GAO-14-69.

GAO, 2008. "Better Use of Available Resources and Consistent Reporting Could Improve Compliance". GAO Report GAO-08-962T.

Galanter, Marc, 1974. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Rev.* 95.

Getman, Julius and Dan Getman. 2012. "Symposium: World of Work Employment Dispute Resolution Systems Across the Globe: Wining the FLSA Battle: How Corporation use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws." *St. John's Law Review,* Vol. 86, pp.447-463.

Hall, P. and Soskice, D. 2001 'An Introduction to Varieties of Capitalism' in Hall, P. and Soskice, D. *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: OUP, pp. 1-70.

Haveman, Heather A., Hayareeva Rao and Srikanth Paruchuri. 2007. "The winds of change: The Progressive movement and the bureaucratization of thrift." American Sociological Review 72: 177-142.

Hinkin, Timothy R. and J. Bruce Tracey. "What Makes It So Great? An Analysis of Human Resources Practices among *Fortune*'s Best Companies to Work for" *Cornell Hospitality Quarterly, 51*(2), 158-170.

Hirschman, Albert, O., 1970. *Exit, Voice, Loyalty: Responses to Decline in Firms, Organizations, and States.* Harvard University Press: Boston.

Judicial Council of California Administrative Office of the Courts Office of the General Counsel, 2004. "Evaluation of the Early Mediation Pilot Program". Available at: http://www.courts.ca.gov/documents/empprept.pdf

Lamare, J. Ryan and David Lipsky. 2014. Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research, Berkeley Journal of Employment and Labor Law. 35:113-133.

Katz, Jack, 1977. "Lawyers for the Poor: Involvement, Reform, and the Turnover Problem in the Legal Services Program," 12 *Law & Society Rev.* 275.

Katz, Lawrence F. 1994. "Active Labor Market Policies to Expand Employment and Opportunity." In Reducing Unemployment: Current Issues and Policy Options. Kansas City, MO: Federal Reserve Bank of Kansas City.

Kuhn, James W. 1961. *Bargaining in Grievance Settlement: The Power of Industrial Work Groups*. New York, NY: Columbia University Press. Ch. IV, pp. 58-83.

Kerr, Clark K., 1960. *Industrialism and Industrial Man.* Harvard University Press: Boston.

La Rue, Homer C, 2000. "The Changing Workplace Environment in the New Millennium: ADR is a Dominant Trend in the Workplace." *Columbia Business Law Review*, pp.435.

Lamare, J. Ryan, and David B. Lipsky, 2014. "Employment Arbitration in the Securities Industry: Lessons from Recent Empirical Research." *Berkeley Journal of Employment and Labor Law* 35(1-2): 113-133.

Lemond, Scott and Rob Carty. "Feature: The Suddenly En Vogue FLSA: After 50 Years as a Wallflower, She's Finally Ready to Dance." *The Houston Lawyer*, September/October. Vol. 44 pp.10-14.

Lewin, David. 2008. "Employee Voice and Mutual Gains," presented at the Labor and Employment Relations Association (LERA) Proceedings. New Orleans, LA.

Lewin, D., and R.B. Peterson. 1988. *The Modern Grievance Procedure in the United States: A Theoretical and Empirical Analysis.* Westport, CT: Quorum, Ch. 6, pp. 167-96.

Lewin, David. 1987. "Dispute Resolution in the Nonunion Firm: A Theoretical and Empirical Analysis." *Journal of Conflict Resolution,* Vol. 31, no. 3 (September), pp. 465–502.

Lurie, Irene. 2011. "Enforcement of State Minimum Wage and Overtime Laws: Resources, Procedures and Outcomes." *Employment Rights and Employment Policy Journal,* Vol. 15 pp.411-440.

Lipsky, David B., and Ronald L. Seeber. 1996. *The Appropriate Resolution of Corporate Disputes: A Report on the Growing use of ADR by U.S. Corporations*. Ithaca, NY: Institute on Conflict Resolution.

Lipsky, David B., Ronald L. Seeber, and Richard D. Fincher. 2003. *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals.* Jossey-Bass: San Francisco, CA.

Lipsky, David B., J. Ryan Lamare, and Michael D. Maffie. 2014. "Dispelling the Myths about Mandatory Arbitration." *Alternatives to the High Cost of Litigation* (forthcoming).

Lipsky, David, and Ariel C Avgar. 2004. Research on Employment Dispute Resolution: Toward a New Paradigm, Conflict Resolution Quarterly. 22(1-2):175-189.

Locke, Richard, and Kathleen Thelan. 1995. "Apples and Oranges Revisited." *Politics and Society.* 233:337-67.

Martucci, William C., and Jennifer K. Oldvarder. 2010. "Article: Addressing the Wave of Dual-Filed Federal and State Law "Off-The-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform." *Kansas City Journal of Law & Public Policy.* Vol. 19, pp. 433-453.

Maryland Mediation and Conflict Resolution Office, 2004. "The Use of Alternative Dispute Resolution (ADR) in Maryland Business: A Benchmarking Study". Available at: http://www.courts.state.md.us/macro/pdfs/macro-busstudy.pdf

McEwen, Craig A. 1998. "Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation." *Ohio State Journal on Dispute Resolution,* Vol. 14 No. 1 pp. 1-28.

Merry, Sally Engle, 1990. *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*. Chicago, IL: Univ. of Chicago Press.

Meyer, John W. Brian Rowan. 1977. "Institutionalized organizations: Formal organizations as myth and ceremony." *American Journal of Sociology* 83: 340-363.

Miller, Scott D. 2001. "Revitalizing the FLSA." *Hofstra Labor and Employment Law Journal.* Vol 19, Issue 1. Pp.1-124

Nielsen, Laura Beth. 1999. "Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada." *Law & Policy* Vol. 21 No. 3 July. Pp. 247-282.

Nielsen, Laura Beth, Robert L. Nelson, and Ryon Lancaster. 2010. "Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States." *Journal of Empirical Legal Studies*, vol. 7(2), 175-201.

Nordlund, Willis J., *The Quest for a Living Wage: The History of the Federal Minimum Wage Program.* In the Contributions in Labor Studies Program (Book 48). Praeger.

Oliver, Christine, 1992. "The antecedents of deinstitutionalization." *Organization Studies* 13: 563-588.

Paulsen, George Edward. 1959. "The Legislative History of the Fair Labor Standards Act". Unpublished Thesis.

Priest, George L., and Benjamin Klein. 1984. "The Selection of Disputes for Litigation." *The Journal of Legal Studies* Vol 13. No. 1 pp. 1-55

Reich, Michael, 2013. "Minimum Wage Policy after Seventy-Five Years Historical and Contemporary Effect of the FLSA." Prepared for presentation to the Committee on Health, Education, Labor and Pensions, U.S. Senate, June 25, 2013, "Building a Foundation of Fairness: 75 Years of the Federal Minimum Wage," on the 75th anniversary of the signing of the Federal Labor Standards Act of 1938.

Ruan, Natiya. 2012. "Article: What's Left to Remedy Wage Theft: How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers" *Michigan State Law Review* Pp.1103-11147

Ruckelshaus, Catherine K., 2008. "Article: Labor's Wage War" *Fordham Urban Law Journal*. Vol 35.

Samuel, Howard D., 2000. "Troubled Passage: The Labor Movement and the Fair Labor Standards Act." *Monthly Labor Review,* December. Pp. 32-37.

Schickler, Eric. 2001. *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress.* Princeton University Press.

Scott, W.R, 2005. "Institutional Theory: Contributing to a Theoretical Research Program" Chapter prepared for *Great Minds in Management: The Process of Theory Development,* Ken G. Smith and Michael A. Hitt, eds. Oxford UK: Oxford University Press.

Shavell, Steven, 1996. "Any Frequency of Plaintiff Victory at Trial Is Possible." *The Journal of Legal Studies,* vol. 25 No. 2 Pp. 493-501.

Sherwyn, David, Samuel Estreicher & Michael Heise. 2005. "Assessing the Case for Employment Arbitration: A New Path for Empirical Research." *Stanford Law Review,* Vol 57, No 5. pp. 1557-1591

Shierholz, Heidi. 2009. "Fix It and Forget It: Index the Minimum Wage to Growth in Average Wages." EPI Briefing Paper. Washington, DC: Economic Policy Institute.

Sine, Wesley D., Robert J. David, Hitoshi Mitsuhashi, 2007. "From Plan to Plant: Effect of Certification on Operational Start-Up in the Emergent Independent Power Sector." *Organizational Science* Vol. 18 No 4. Pp. 578-594.

Slichter, Sumner H., James J. Healy, and E. Robert Livernash, 1960. *The Impact of Collective Bargaining on Management*. Washington, D.C.: Brookings Institution.

Stipanowich, Thomas, 2004. "ADR and "The Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, Journal of Empirical Legal Studies*, Vol. 843. (Symposium on "The Vanishing Trial")

Stipanowich, Thomas and J. Ryan Lamare, forthcoming. "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations" *Harvard Negotiation Law Review.* Available at SSRN: http://ssrn.com/abstract=2221471.

Stone, Katherine. 1995. "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s." *Denver Law Review* Vol. 73, pp. 1017-50.

Sarat, Austin, & Thomas R. Kearns (1995) *Law in Everyday Life*. Ann Arbor, MI: Univ. of Michigan Press.

Taft, Phillip. 1964 *Organized Labor in American History.* New York: Harper & Row.

Taylor, Jason E., 2007. "Buy now! Buy Here!: The Rise and Fall of the Patriot Blue Eagle Emblem, 1933-1935" *Essays in Econmic and Business History* Vol 25. Pp. 117-130.

Tolbert, Pamela S. and Lynne G. Zucker, 1983. "Institutional sources of change in the formal structure of organizations: The diffusion of civil service reform, 1880-1935." *Administrative Science Quarterly* 28: 22-39.

Verga, Rita J. 2005. “An Advocate's Toolkit: Using Criminal “Theft of Service” Laws to Enforce Workers’ Right to be Paid” *New York City Law Review, Vol 8* pp.283-310.

Waltman, Jerold, 2000. *The Politics of the Minimum Wage.* University of Illinois Press.

Walton, Richard E. , and Robert B. McKersie. 1965. *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System*. New York: McGraw Hill.

Wash, David J., 1999. “The FLSA Comp Time Controversy: Fostering Flexible or Diminishing Worker Rights?” *Berkeley Journal of Employment and Labor Law* Vol. 20.

Wecht, Herman A. 1951. *Wage-Hour Law: Coverage*. J.M. Mitchell: Philadelphia.

Wright, Patrick M. Timothy M. Gardner, Lisa M. Moynihan, Hyeon Jeong Park, Barry Gerhart, and John E. Delery. 2000. “Measurement Error in Research on Human Resources and Firm Performance: Additional Data and Suggestions for Future Research” *Personal Psychology*. Vol 54. pp. 875-900.

Williamson, Oliver. 1981. “The Economics of Organization: The Transaction Cost Approach.” *American Journal of Sociology* Vol. 83, pp.539-57

Yamamoto, Eric K. 1996. “ADR: Where Have All The Critics Gone?” *Santa Clara Lew Review* Vol 46, No 4.