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The huge diversity issue hiding in companies' forced arbitration agreements

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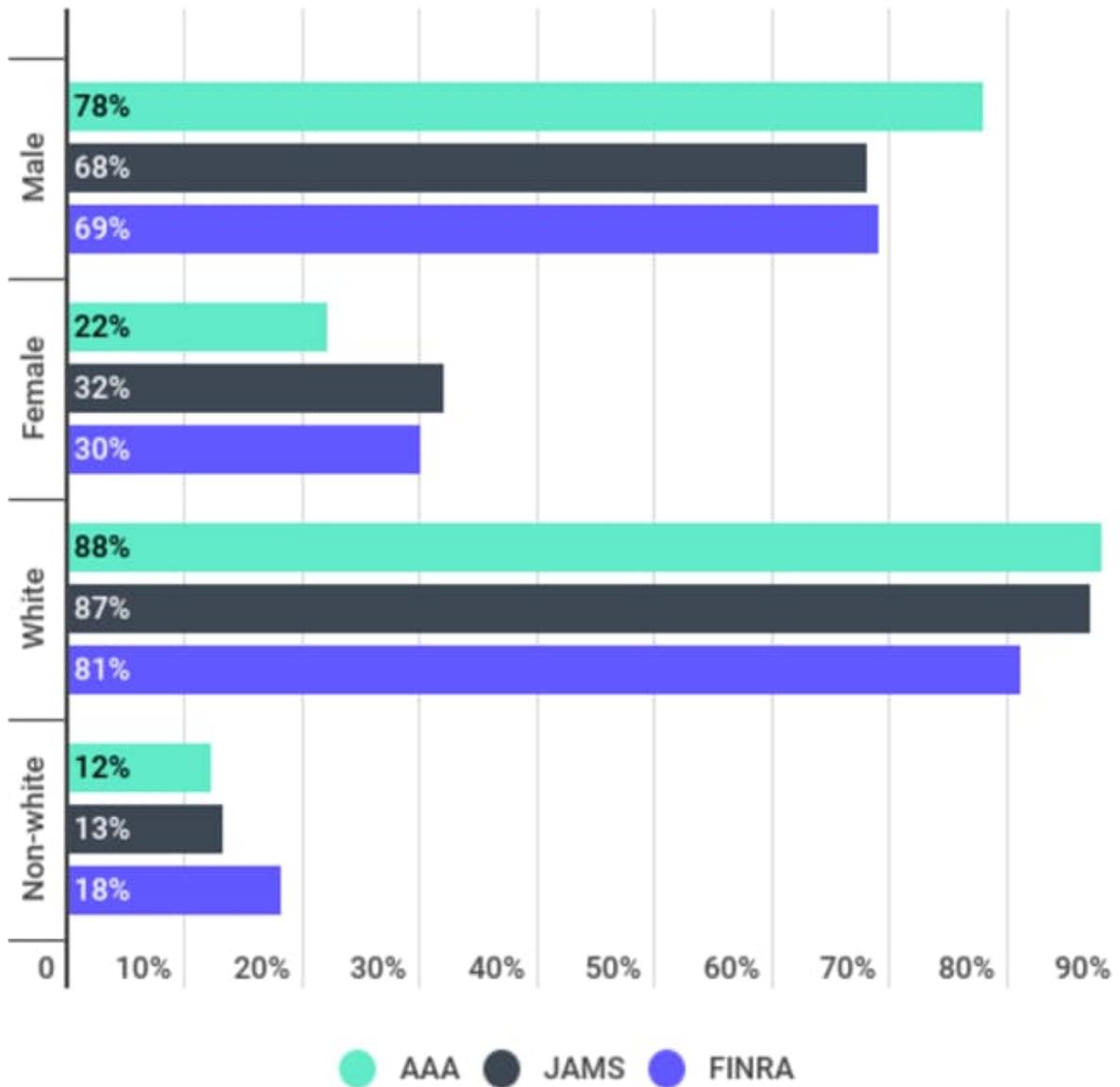
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When it comes to issues like racial discrimination and sexual harassment in the workplace, as well as service problems and contract disputes with corporations, millions of Americans are barred from suing companies in court. Instead, consumers and employees are forced to pursue a private dispute resolution method called

Breakdown of arbitrators' gender and race



Source: Gender and race demographics pulled from latest 2020 and 2021 self-reported data disclosed by JAMS, American Arbitration Association and the Financial Industry Regulatory Authority. Data collected by researchers for the American Association for Justice for the "Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and Minorities" report.

FINRA, which has been disclosing the demographics of its arbitrators since 2015, tells CNBC Make It that a diverse pool of knowledgeable and experienced arbitrators is a priority for the organization.

"It's vitally important that our pool of arbitrators reflects the varied backgrounds of the parties who use the FINRA arbitration forum. We have bolstered our recruitment efforts, both in terms of increasing the numbers and diversity - in age, gender, race, and occupation - and continue working toward this goal," Richard Berry, executive vice president and director of dispute resolution services said in a statement.

AAA said in a statement to CNBC Make It that the diversity of its arbitrators does vary by sector. Last year, [arbitrators on its employment panel](#) were 42% diverse in terms of gender or ethnicity and its consumer panel was 31% diverse. AAA also attempts to provide parties with a list of arbitrators that is at least 20% diverse, although this may not be possible in some cases.

"The AAA has acknowledged the need to improve the diversity of the pool of arbitrators and mediators, which is not just an issue for the AAA but for the field of arbitration in general," the organization said in a statement. "We are encouraged that the AAA's appointments of diverse arbitrators and mediators have increased in each of the last four years."

"JAMS fully recognizes the value that diverse panelists bring to our organization and the arbitration process, and we have made it a top priority to increase the number of diverse neutrals on our panel. We agree that more needs to be done to increase diversity among alternative dispute resolution (ADR) practitioners and providers, and have made significant progress achieving an increasingly diverse pool of talent," the company said in a statement, adding that nine of 33, or about 27%, of those added to the JAMS panel last year were ethnically diverse.

AAJ reported that AAA and JAMS started disclosing the demographics of their arbitrators as part of a [California statute put in place in 2019](#).

It's worth noting that many of the arbitrators used by these organizations are attorneys and judges — and in the case of FINRA, members of the financial industry. These industries overall have [struggled with diversity issues themselves over the years](#), so it's perhaps unsurprising that there would be fewer women and minorities serving as arbitrators as well.

Even within the federal court system, active judges in the U.S. Supreme Court, circuit courts, district courts and the Court of International Trade are about 64% white and 67% male, [according to the American Constitution Society](#).

Why arbitrator diversity matters

Millions of Americans are bound by arbitration agreements. An [academic study](#) found that 81 of the [biggest 100 companies in America](#) have put legal clauses in the fine print of their customer agreements that bar consumers from suing them in federal court.

Meanwhile, the Economic Policy Institute found that more than half, or about [60 million American workers](#) are required to use arbitration to settle disputes with their employers as of 2017, including cases claiming discrimination, civil rights violations and sexual harassment. By 2024, EPI predicts about 80% of workers will be covered by arbitration agreements if nothing changes.

"I would venture that every person living in the U.S. today has unknowingly signed up for forced arbitration in some aspect of their lives, whether it's through credit cards, cell phones, long-term care or employment contracts," says Julia Duncan, senior director of government affairs for the American Association for Justice.

But arbitration is far less transparent than the federal court system, Duncan says. Instead of going to federal court where there can be a trial by a jury of your peers, arbitration agreements require consumers and employees to go before an arbitrator or a panel of arbitrators to decide the final outcome of the dispute. The outcome is rarely public and there are typically fewer options to appeal.

"Forced arbitration is essentially an entire system that's operating without any public accountability and almost entirely off the books," Duncan says. So the lack of diversity among arbitrators can have real-world consequences.

In some cases, having a pool of arbitrators that is made up of mostly white men may stop some consumers and employees from coming forward. "The lack of diversity in the arbitrator pool may cause black employees to not pursue their discrimination claims out of a feeling that it would be futile in such a questionable system," [wrote Michael Green, a Texas A&M University School of Law professor](#).

Additionally, the gender and race of an arbitrator can have an impact on the outcome of a case. Female arbitrators, for example, rule in favor of employees more often than male arbitrators, and typically award higher settlement amounts, according to AAJ's report.

But companies usually pay the arbitration costs and typically get a say in the arbitrator selected for the case. So even when women are available, companies don't agree to female arbitrators as often — male arbitrators are presiding over more cases per person than female arbitrators, [according to AAJ's research](#).

"It's like having two teams, and one team gets to choose the umpire. And if they don't like that umpire, they can choose a different umpire. There are no limits to what they can do in that regard," Duncan says.

Tanuja Gupta, an advocate and a leader of [Googlers for Ending Forced Arbitration](#) — which helped [end Google's use of mandatory arbitration](#) for employees and independent contractors at the company — says she's not surprised by the lack of diversity.

"We live in a society where there is white male dominance, and so that's going to permeate every system. The difference between the forced arbitration system and the judicial court system is that the judicial court system has mechanisms for holding the system accountable, there are ways to flag imbalances," Gupta says.

"When you think about the lack of diversity compounded with the lack of transparency, you can see the likelihood of inequity is exponentially higher," Gupta says.

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