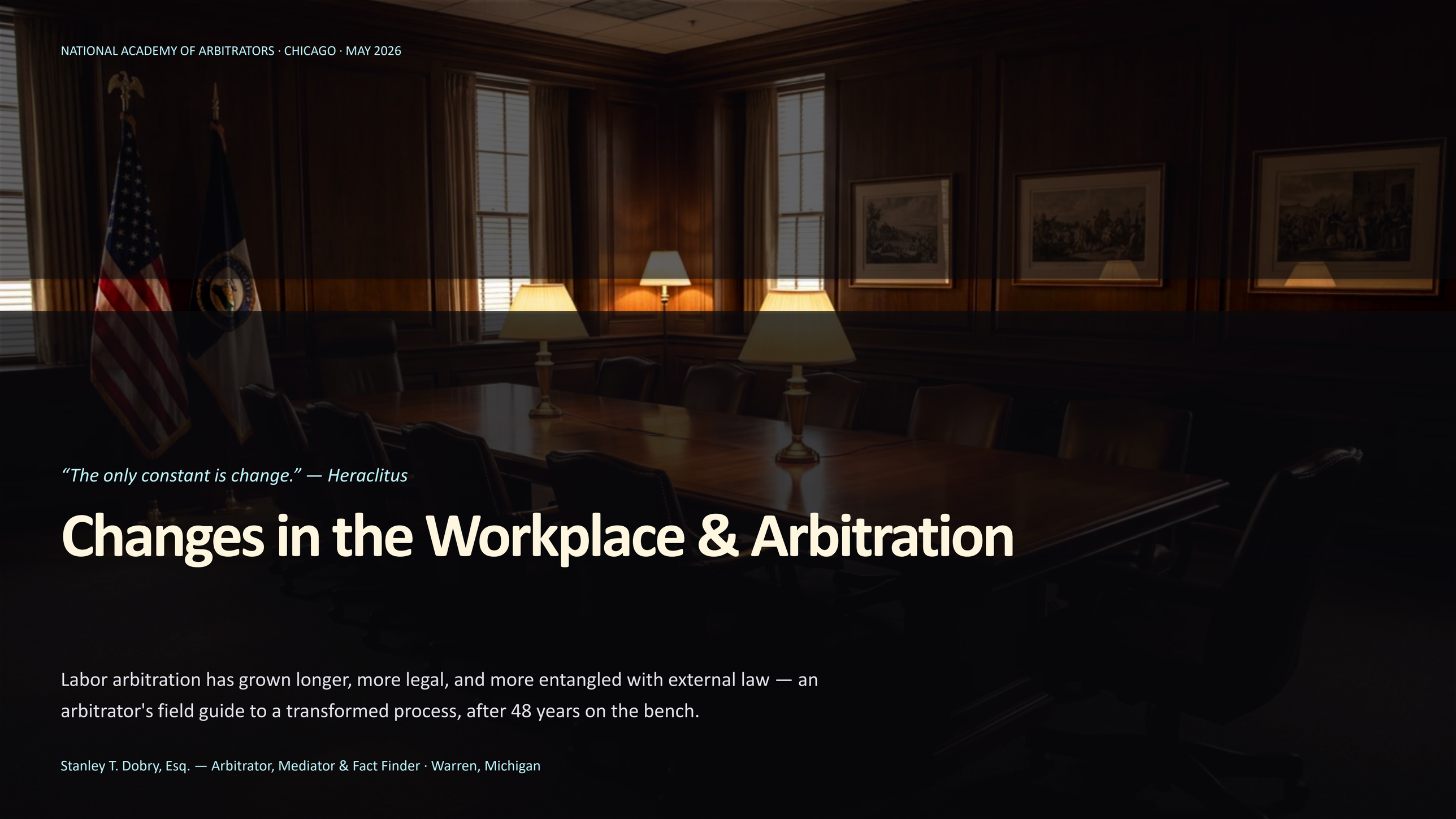
NATIONAL ACADEMY OF ARBITRATORS · CHICAGO · MAY 2026



“The only constant is change.” — Heraclitus

Changes in the Workplace & Arbitration

Labor arbitration has grown longer, more legal, and more entangled with external law — an arbitrator's field guide to a transformed process, after 48 years on the bench.

Stanley T. Dobry, Esq. — Arbitrator, Mediator & Fact Finder · Warren, Michigan

The workplace changed underneath arbitration — and arbitration had to follow

01

Nature of work

Manufacturing gave way to services; full-time roles waned to gig, casual, and "independent contractor" labor outside FLSA protection.

02

Surveillance

Cameras, keystroke monitors, and webcams watching remote workers are now an industrial fact of life.

03

Guns & violence

Right-to-carry is the norm; workplace violence is "an ever-increasing crisis" that "zero tolerance" cannot simply resolve.

04

Health care cost

Availability and cost of medical and pharmaceutical insurance now shapes both the workplace and the process.

05

More law

The workplace is subject to more statutes protecting individuals; mandatory arbitration is now everywhere.

06

Legalism & Zoom

The process is more legalistic — motions, transcripts, briefs, lawyers — and Zoom hearings are a new way to arbitrate.

The transformation of work in the U.S. and Canada "has been momentous." Inevitably, problem resolution has changed with it.

CHAPTER 1 · SOCIAL CONTRACT

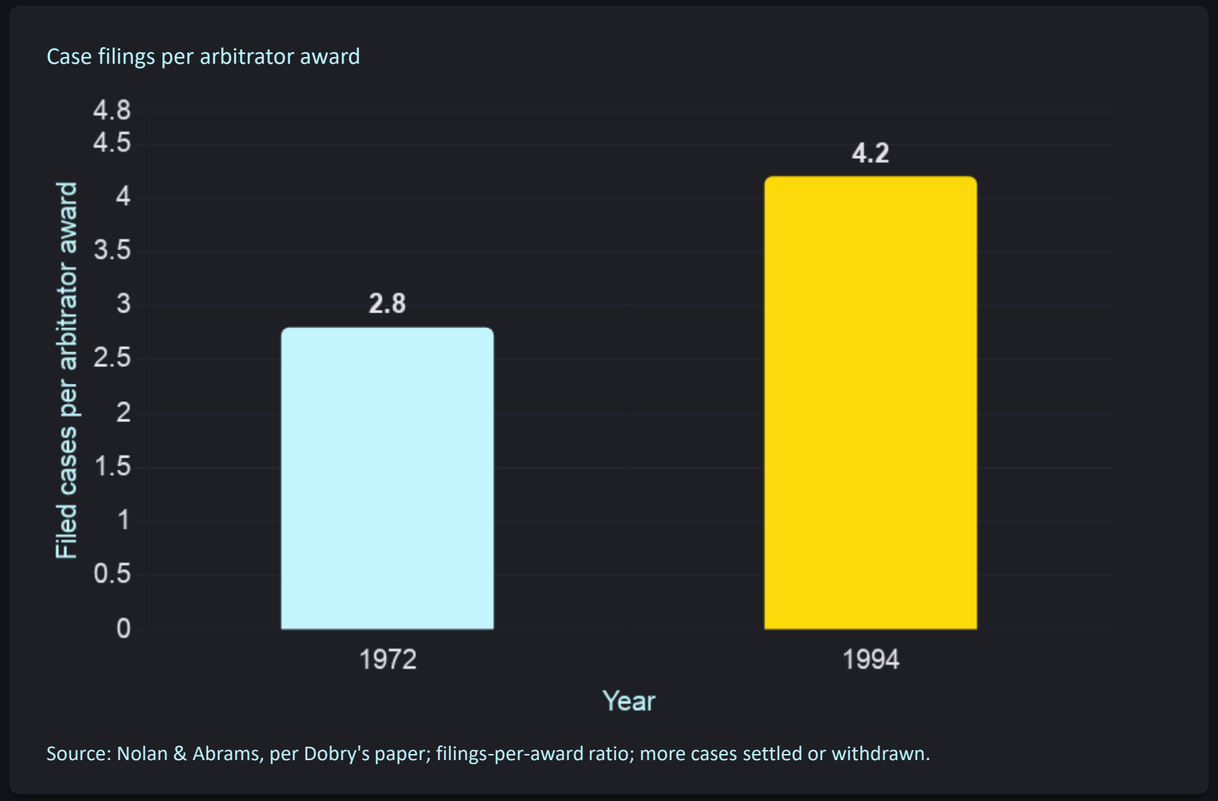
37%

rise in union-election petitions filed with the NLRB in 2021 — yet union membership kept declining.

Mutual trust and lifelong loyalty — the assumptions underneath the bargain — have eroded

- **COVID-19 was a catalyst.** Remote and hybrid work decoupled labor from geography; employers were left with empty offices and a cultural clash over face-to-face attendance.
- **Pensions shifted** from defined benefit to defined contribution — a sea change. Employees now take a 401(k) out the door instead of being wedded to a plan.
- **Two-tiered wage and benefit systems** appeared, and the parties must live with the aftermath.
- **Long-term employment is a bygone expectation.** Employers downsize, employees quit, companies merge — and irreplaceable institutional knowledge is lost.
- **"Joint labor-management cooperation" should be more than a slogan** — both sides share a profound interest in the enterprise's success.

The remaining cases are fewer, harder, and more legal — the winnowing is the story



Source: Nolan & Abrams, per Dobry's paper; filings-per-award ratio; more cases settled or withdrawn.

By 1994 it took **4.2 filed cases** to produce one award — up from 2.8 in 1972. Fewer cases reach decision, and those that do are "closer to the margins of victory or vanquish."

- **Settlements are proof the system works** — scarcity "sharpens the deletion knife," and parties prioritize which fights are worth the cost.
- **Longer, costlier process:** transcripts, briefs, motions, discovery, and lawyers each add time and expense.
- **Legalism is qualitative, not quantitative** — it's the *manner* legal techniques are used, not the mere fact of their use (Alleyne, Bartlett).

"Almost from the inception of modern labor arbitration, commentators warned that legalism was the opposite of arbitration." — Anthony Bartlett

"Zero tolerance is a substitute for thought" — just cause is the filter it must survive

Zero Tolerance

CERTAINTY · DETERRENCE · SPEED

A single infraction triggers a predetermined penalty — often termination — with no consideration of intent, circumstance, or long service.

- Ignores context, intent, mitigating factors
- One-size penalty punishes minor as harshly as serious
- Failure to enforce undercuts notice — invites the "entrapment" defense
- Can conflict with anti-discrimination law and the CBA

Just Cause (CBA)

FAIRNESS · PROPORTIONALITY · DUE PROCESS

Daugherty's seven tests crystallize the standard — notice, reasonable rule, investigation, fairness, proof, equal treatment, and proportional penalty.

1. Notice / forewarning
2. Reasonable rule or order
3. Investigation before discipline
4. Fair, objective investigation
5. Substantial proof
6. Equal, even-handed treatment
7. Penalty fits the offense & record

Even in unionized shops, rigid zero-tolerance rules must still be read "through a just-cause filter to withstand arbitration or legal scrutiny." The tests guide — they are not a formula.



A gummy in Illinois, a positive test in Indiana — presence is not impairment

Urine tests are a blunt, temporally imprecise tool. THC metabolites persist for days or weeks after use — long after any intoxication has ended. Increasingly, arbitrators distinguish **metabolite presence** from **active impairment**.

~10×

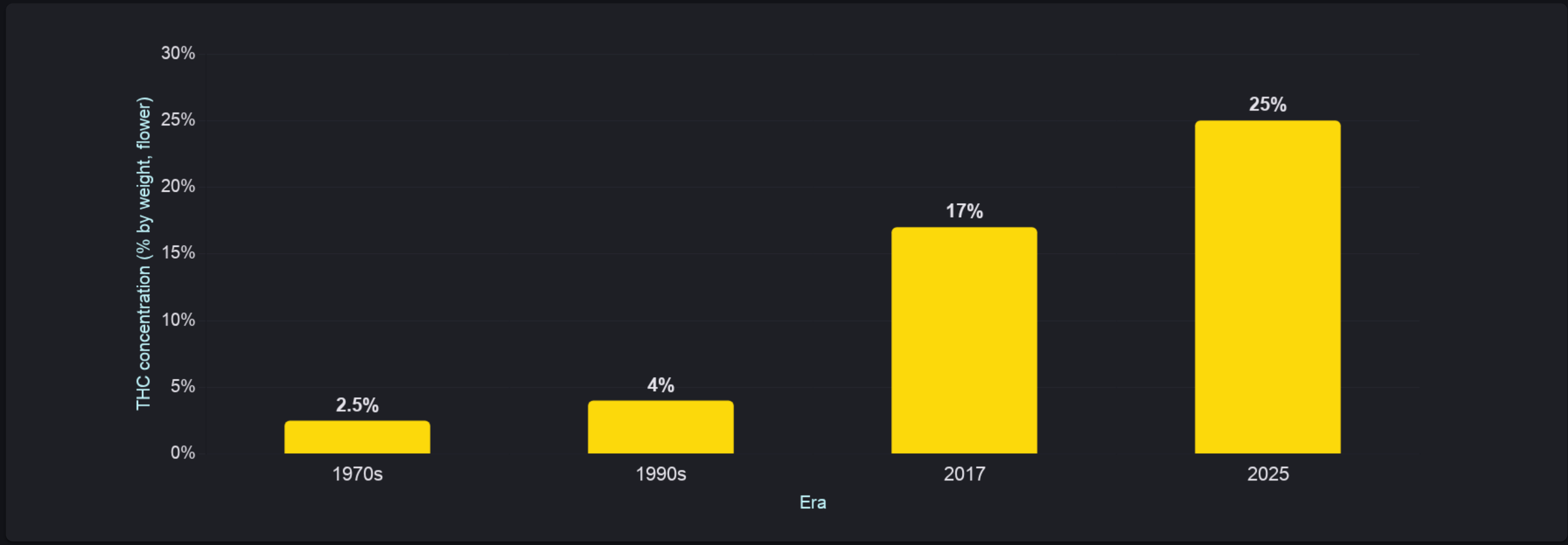
rise in THC potency over 50 years — 2–3% flower in the 1970s to 20–30% today

10 days

metabolite detection for a casual user; 2–4 weeks for frequent, more potent use

The **Nexus Test** governs off-duty conduct: discipline holds only if it harms the business, impairs performance, or disrupts the workforce. Federal preemption (DOT, federal contracts) can override state "lawful activity" protections.

Potency has climbed as fast as legalization — and the law can't keep up with the plant



Source: Dobry's paper, citing THC concentration in flower strains; 2020 European study found ~0.29% annual rise, 1970–2017. Concentrates and edibles now rate 80–90% THC — a problem statutes chase in arrears.

Follow the contract first, harmonize with the law — but the more law you invite, the more review you invite

1957 — **Lincoln Mills**

Courts will enforce arbitration agreements — sparking the debate over who decides arbitrability, courts or arbitrators.

1974 — **Alexander v. Gardner-Denver**

Court refused to let arbitration bar statutory anti-discrimination claims — unions and employees may have conflicting interests.

1991 — **Gilmer v. Interstate/Johnson Lane**

Shrugged off most public-policy arguments for vacating arbitration awards.

2009 — **14 Penn Plaza v. Pyett**

Expressly overruled Gardner-Denver: a CBA can require arbitration of ADEA claims — and the Court leaned on the *Federal* Arbitration Act's narrow review.

2022 — **EFAA (9 U.S.C. §§ 401–402)**

Carves an "expressway to court" — victims can opt out of pre-dispute arbitration of sexual assault and harassment claims.

Better practice: don't interject legal issues on your own motion. A failure to enforce law can create a forfeiture of statutory rights — "two bites at two apples," not one.

CHAPTER 26 · ZOOM HEARINGS

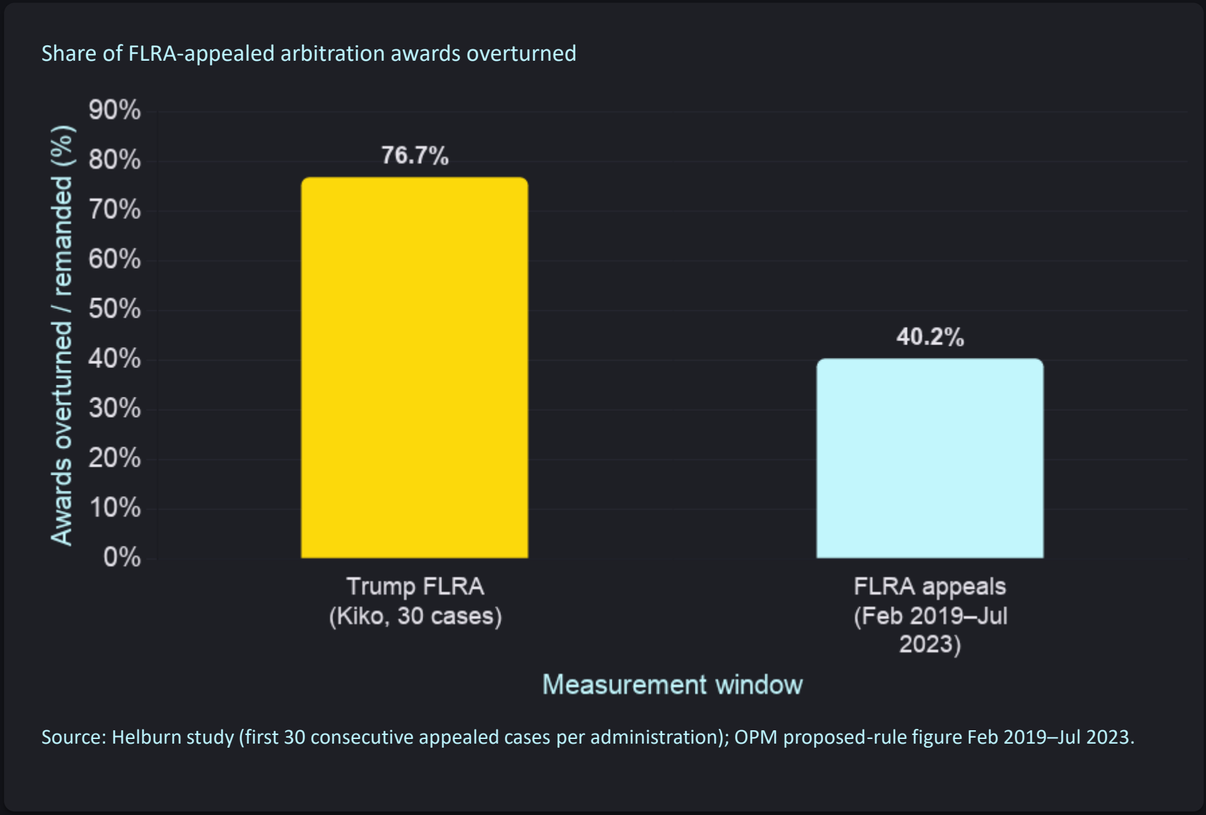
A pandemic workaround became a permanent way to arbitrate

Remote hearings are cheaper — no travel, airfare, or hotels — and open the parties to a new set of dispute resolvers from outside their neighborhood. But **preparation is everything.**

- Hold a **prehearing**; exchange pre-numbered exhibits in advance — one shared numbering set (Joint 1, Union 2, Employer 3).
- Use **at least four rooms**; separate cameras per witness — never one panoramic view. Address sequestration; have a connectivity backup plan.
- **Zoom fatigue is real** — break for lunch. "Somebody in the room needs to get fed." We all function better fed and watered.



Federal-sector awards get overturned at rates that make advocacy a guessing game



Source: Helburn study (first 30 consecutive appealed cases per administration); OPM proposed-rule figure Feb 2019–Jul 2023.

Under Chairwoman Kiko, the FLRA overturned **23 of 30** appealed awards — "roughly three times as often" as her Obama and Bush predecessors — and a disproportionate share were pro-union rulings.

- **Kiko:** arbitrators were "exceeding their authority." **Rep. Raskin** pressed her on the "tremendous disparity."
- "Not drawing its essence from the contract" was the most frequent OPM justification for reversal.
- **Practice tip:** make the parties fully brief every point — draft proposed findings and conclusions. "Plagiarism is the sincerest form of flattery."

The FLRA process "seems all too frequently to have become the Russian roulette of federal-sector arbitration" — with either party's finger on the trigger.

Courts stirred labor, commercial, and consumer arbitration into one indiscriminate pot of stew

Labor arbitration

§ 301 LMRA

A substitute for the strike — a road to labor peace and an **extension of collective bargaining.** Built-in protections: grievance-process discovery and the union's duty of fair representation.

Consumer / employment

FEDERAL ARBITRATION ACT

Fine-print, take-it-or-leave-it clauses in "acres of boilerplate," now fused with class-action waivers — a "get out of jail free card" for corporate wrongdoing.

55%

of the U.S. workforce is subject to mandatory binding arbitration with employers

75%

of major consumer transactions carry a mandatory binding arbitration clause

2%

of the time consumers win in arbitration — and for smaller rewards than in court

Concepcion, Stolt-Nielsen, Lamps Plus, Pyett — a fine-print seed germinated into corporate power to write the rules, run the tribunal, and block class actions.

A patrol officer who "can't be trusted on the stand" becomes a liability — and the label may end the career

Brady (1963)

Prosecutors must disclose **exculpatory** evidence — anything pointing to innocence.

Giglio (1972)

Extends the duty to **impeachment** evidence — an officer's documented history of dishonesty.

Loudermill (1985)

"For-cause" public employees have a property interest — entitled to a pre-termination hearing: notice, the evidence, and a chance to respond.

Garrity (1967)

The state can compel an officer's statement about official duties — but must grant **use immunity** so it can't be used in criminal court.

Kalkines (1973)

The federal equivalent — explicitly removes the right to remain silent; answer truthfully or face termination, in exchange for use immunity.

The tension

A "Brady cop" or "Giglio list" entry can follow an officer forever. Unions fight the lists as due-process shortcuts; transparency advocates want them public.

The arbitrator must weigh a sustained truthfulness finding against a livelihood — and whether the officer will be "banished from the profession."

CHAPTER 23 · THE ELEPHANT IN THE ROOM

"You can afford a raise or health care — but not both." An unclimbable mountain.

66.5%

of all personal bankruptcies are attributed to medical expenses or illness-driven income loss

78–80%

of those who file medical bankruptcy *had health insurance* when the illness began

66%

of U.S. adults, as of 2026, worry about their ability to afford medical care

High deductibles, coverage gaps, and job-loss income shocks mean even "insured" workers face crushing debt. For a discharged employee, losing coverage radiates outward — "the consequences cannot be overstated." Congress recently let ACA subsidies lapse.

For arbitrators in fact-finding and interest arbitration, health care is the fixed cost that shapes every wage negotiation and every discharge remedy.

Cafeteria plans look benign — but they split the unit into warring factions and can spiral

The "death spiral"

1. Healthy employees pick low-cost, high-deductible plans or waive coverage.
2. Sicker employees cluster in "richer," comprehensive plans.
3. Average cost per remaining participant climbs — premiums rise the next year.
4. Comprehensive options become unaffordable or are discontinued.

Union strategic responses

- **Insist on risk-equalization** — structure employer contributions to keep comprehensive plans affordable; flat-dollar contributions accelerate the spiral.
- **Negotiate a "core" benefit floor** so even basic options stay robust and healthy members don't abandon the pool.
- **Seek joint governance** via Taft-Hartley trusts — direct control over design and cost-saving levers.
- **Audit non-discrimination testing** annually; counter with narrow networks and on-site primary care.

"Insurance is more affordable when costs are shared in a broader demographic." Adverse selection can place a coverage out of reach for everyone.

AI can make the book — but it can't make the judgment; the algorithm is not an unassailable black box

Unconscious bias

Cardozo's "stream of tendency" tugs at every finder of fact. Cultural bias affects credibility findings — judges favor those they identify with, and disparity can bring harsher penalties.

AI in the award

In *LaPaglia v. Valve*, an award was attacked for allegedly being drafted by ChatGPT. AI lacks emotional intelligence and "practiced, nuanced judgment." All responsibility falls on the arbitrator — who must decide for themselves.

Predicting outcomes

Confidentiality and the vast pool of **unreported** decisions make machine learning a black box, prone to the fallacy of composition. Trust — interdependence and truth-telling — can't be automated.

AI monitoring & just cause

Keystroke and dashboard monitoring can flag "time off task." But arbitrators still examine notice, consistency, proportionality, and disparate treatment. In arbitration, *"ipse dixit doesn't apply — just cause does."*

Michigan's Bullard-Plawecki Act gives employees a right to review the records — including algorithmic data — that affect their discipline.

CHAPTER 27 · FINAL THOUGHTS

Arbitration does not exist for the care and maintenance of arbitrators.

It exists because it filled a felt need for labor and management — and it will prosper only if unions, companies, and arbitrators stay open-minded about change, frank about deficiencies, and imaginative in building a better process.

"The climate in which arbitration takes place will continually vary because we live in a dynamic society." The only constant is change — and grievance arbitration requires continuous revision to keep pace.

Respectfully submitted — Stanley T. Dobry · National Academy of Arbitrators · May 2026 · 48 years on the bench