FINRA Arbitration for Employment Lawyers

A Lexis Practice Advisor® Practice Note by
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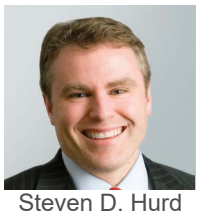
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This practice note serves as a guide to arbitrating employment disputes before the Financial Industry Regulatory Authority (FINRA) under the FINRA Code of Arbitration Procedure for Industry Disputes. The note discusses the FINRA arbitration process from start to finish, describing arbitration procedures and offering strategies for each phase of the employment arbitration, including initiating a claim, responding to a claim, selecting an arbitrator, preparing for and conducting a hearing, and challenging the arbitration award.

Specifically, this practice note discusses the following aspects of FINRA employment arbitrations:

- Overview of FINRA and Its Dispute Resolution Program
- Advantages and Disadvantages of FINRA Arbitrations for Employers
- Key Steps for the Claimant to Commence a FINRA Employment Arbitration
- Key Steps for Respondent to Respond to a Statement of Claim
- Best Practices for Selecting the Arbitration Panel in FINRA Employment Disputes
- Navigating the Prehearing Procedures in FINRA Employment Disputes
- Settlement and Withdrawal of the Claims
- FINRA Employment Arbitration Hearing Procedures and Strategies
- Understanding the Arbitration Award and Post-award Process

For additional guidance on employment arbitrations before FINRA and in other forums, see FINRA Arbitration for Employment Lawyers Flowchart; Labor And Employment Arbitration CHAPTER 1.syn; Alternative Dispute Resolution in the Work Place, Chapter 10: The ADR Process; AAA Arbitration for Employment Lawyers; AAA Arbitration for Employment Lawyers Flowchart; and Arbitration in International Jurisdictions.

For guidance on labor arbitrations, see Labor Arbitrations: Key Steps and Strategies.

OVERVIEW OF FINRA AND ITS DISPUTE RESOLUTION PROGRAM

What Is FINRA?

FINRA is a self-regulatory organization authorized by Congress to regulate the securities industry in the United States. FINRA was formed in 2007 through the consolidation of divisions of the New York Stock Exchange

(NYSE) and the National Association of Securities Dealers (NASD). FINRA is subject to the supervision of the U.S. Securities and Exchange Commission (SEC) but is a private, nonprofit organization.

FINRA performs a wide array of functions, including registering and educating industry participants, examining securities firms, writing rules, enforcing those rules and the federal securities laws, informing and educating the investing public, providing trade reporting and other industry utilities, and administering the largest dispute resolution forum for investors and registered firms.

Member Firms and Associated Persons

Every firm and broker-dealer that sells securities to the public in the United States must be licensed and registered by FINRA to conduct securities transactions and business with the investing public. These firms are called FINRA member firms. Certain employees of member firms who do business in the securities industry are required to register with FINRA and must pass qualification exams to register. These employees are called associated persons.

As part of an associated person's application for a FINRA license, he or she must execute a FINRA Form U4, which contains a pre-dispute arbitration agreement and the requirement that he or she must arbitrate claims in accordance with FINRA's Rules. Member firms are similarly required to arbitrate disputes in accordance with FINRA's Rules.

For more information on the FINRA application process, see FINRA Membership: Becoming a Member.

What Is FINRA Dispute Resolution?

FINRA operates the largest securities dispute resolution forum in the United States and offers arbitration and mediation services. Almost all employment disputes between member firms or between member firms and associated persons must be arbitrated in the FINRA forum, not in state or federal court, although there are certain exceptions, discussed below.

FINRA has issued procedural rules that govern its arbitrations. The Code of Arbitration Procedure for Industry Disputes (Industry Code) governs arbitrations between an associated person and member firm. See FINRA Industry Arbitration Guide. Conversely, the Code of Arbitration Procedure for Customer Disputes governs arbitrations between customers and associated persons or member firms. See FINRA Customer Arbitration Guide. FINRA employment arbitrations are governed by the Industry Code.

Parties seeking to arbitrate employment disputes can bring a wide variety of legal claims, including for breach of contract, quasi-contract violations, unpaid wages, wrongful termination, defamation relating to FINRA Form U5, and tortious interference. Statutory employment discrimination claims, such as claims under Title VII of the Civil Rights Act of 1964, can be arbitrated before FINRA only if the parties agree to arbitrate these claims either before or after the dispute arose. FINRA Rule 13201(a). The Industry Code also provides that claims arising under certain whistleblower statutes are not subject to arbitration before FINRA unless the parties have agreed to arbitrate the dispute after the dispute arose. FINRA Rule 13201(b).

Simplified, Expedited, and Complex Employment Arbitrations

Simplified Arbitrations

Simplified arbitration cases, also called "paper" or "small claims" cases, are cases in which the amount in dispute is $50,000 or less, exclusive of interest and expenses. FINRA Rule 13800(a). FINRA processes these claims using the Simplified Arbitration rule. FINRA Rule 13800. With some exceptions, all provisions of the Industry Code

apply to simplified arbitrations. FINRA Rule 13800(a). All arbitrations administered under the Simplified Arbitration rule will be decided by a single arbitrator unless the parties agree otherwise. FINRA Rule 13800(b).

No hearings are held in simplified arbitrations unless the claimant requests one. FINRA Rule 13800(c)(1). If no hearing is held, the arbitrator will render an award based on the pleadings and other materials submitted by the parties. FINRA Rule 13800(c)(2). If a hearing is held, the regular provisions of the Industry Code will apply. Id. During a simplified arbitration, the parties may request documents and other information from each other. FINRA Rule 13800(d).

If the amount in dispute is increased to more than $50,000, the arbitration will no longer be administered under the Simplified Arbitration rule and the regular provisions of the Industry Code will apply. FINRA Rule 13800(e).

Expedited Arbitrations

FINRA expedites arbitration proceedings in matters involving senior citizens or seriously ill parties. Under these proceedings, FINRA's Dispute Resolution staff will begin the arbitrator selection process, schedule the initial pre-hearing conference (IPHC), and serve the final award on an expedited basis. The staff will also promptly assess whether the parties are interested in mediation. FINRA encourages its arbitrators to consider the needs of senior citizens and seriously ill parties when scheduling hearing dates, resolving discovery disputes, and determining whether postponements are reasonable. If you represent a senior citizen or seriously ill party, you should, at the IPHC, inform the arbitration panel of your client's need for expedited hearings. When you make such a request, you can expect the arbitration panel to expedite hearing dates and discovery deadlines, while still providing sufficient time for case preparation.

Complex Case Program

FINRA has recently implemented a voluntary program for large cases, defined as those involving damages claims of at least $10 million, which seeks to provide the parties with more control over the procedures used in arbitration. While the voluntary program for large cases is targeted at cases involving damages claims of at least $10 million, the program can apply to any case where all parties agree to the program and are represented by counsel. These cases are assigned to a specially trained and experienced case administrator who, along with senior regional staff, holds an early administrative conference with the parties to assist them in developing a plan for case administration. See FINRA Large Case Pilot – FAQ.

Under FINRA's general arbitration rules, parties may agree to modify certain arbitration procedures, including the location of hearings, the number of arbitrators, and the issuance of an explained award. FINRA Rules 13213, 13401, and 13904(g). The complex case program, however, enables parties in large cases to agree to alter additional FINRA arbitration procedures, including:

- The arbitrators' qualifications and arbitrator selection process
- Motion practice
- Discovery
- Official record of proceedings
- Hearing facilities
- Explanation of decisions

See FINRA Large Case Pilot – FAQ (see question #3).

Injunctive Relief

Temporary Injunctive Orders

If you must arbitrate your claim before FINRA, you may seek a temporary injunctive order from a court with proper jurisdiction even if you have not yet filed your claim with FINRA. FINRA Rule 13804(a)(1). In this case, you should simultaneously file a statement of claim requesting permanent injunctive relief and all other relief sought with the Director of the Office of Dispute Resolution (Director) at the same time you seek a temporary injunctive order with the court. FINRA Rule 13804(a)(2). Parties to a pending arbitration may also seek temporary injunctive relief from a court even if another party has filed a claim with FINRA arising from the same dispute, unless a hearing on a request for a permanent injunction has already begun. FINRA Rule 13804(a)(1).

Permanent Injunctive Relief

If a court awards a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief must begin within 15 days of the date the court issues the temporary injunction. FINRA Rule 13804(b)(1). If the fifteenth day falls on a weekend or FINRA holiday, the 15-day period will expire the next business day. Id. At least three days prior to the hearing, the Director will notify all parties regarding the date, time, and place of the hearing. Id.

For more information on injunctive relief in FINRA arbitrations, see Temporary and Permanent Injunctive Relief in FINRA Arbitrations.

ADVANTAGES AND DISADVANTAGES OF FINRA ARBITRATIONS FOR EMPLOYERS

Although there are advantages and disadvantages of FINRA arbitration that you should consider, the first question is whether any FINRA rule mandates or prohibits arbitration. As noted above, statutory employment discrimination claims, such as claims under Title VII of the Civil Rights Act of 1964, can be arbitrated before FINRA only if the parties agree to arbitrate these claims either before or after the dispute arose. FINRA Rule 13201(a). The Industry Code also provides that claims arising under certain whistleblower statutes are not subject to arbitration before FINRA unless the parties have agreed to arbitrate the dispute after the dispute arose. FINRA Rule 13201(b).

However, where it is possible to choose FINRA or another forum, you should consider the advantages and disadvantages of FINRA arbitration. The advantages of FINRA Arbitrations for employers include the following:

- FINRA arbitration offers confidentiality that typically is not available in federal or state court, as filings on FINRA's DR Portal are not public, whereas filings on PACER (the federal court equivalent) are publicly available unless they are made under seal. Further, unlike court hearings, FINRA hearings are closed door sessions not available to the public. Note, however, that FINRA arbitration awards are made public on FINRA's website after the hearing.
- FINRA arbitration features a streamlined discovery process, which is often much faster from inception to verdict than a case in federal or state court.
- FINRA arbitration includes a presumption that depositions are not available to the parties, which reduces the employer's expenses.

The disadvantages of FINRA Arbitrations for employers include the following:

- You cannot move to dismiss or for summary judgment in FINRA arbitrations, and the summary adjudication procedures are less favorable to employers than in federal and state court.

- Federal and state laws often provide for shorter statutes of limitation than FINRA's Eligibility Rule, discussed in more detail below, which provides that one may submit a claim to arbitration so long as fewer than six years have elapsed from the occurrence or event giving rise to the claim. FINRA Rule 13206(a).
- A hearing in a FINRA arbitration is typically conducted without the benefit of deposing the claimant, so, depending on the type of case, the lack of fulsome discovery can be a disadvantage.

KEY STEPS FOR THE CLAIMANT TO COMMENCE A FINRA EMPLOYMENT ARBITRATION

Filing the Statement of Claim

If you wish to initiate an arbitration proceeding, you must file a statement of claim and signed submission agreement with FINRA via the DR Portal and pay the required filing fees. See FINRA Rules 13302(a)(2) and 13300(b)(1). By filing a submission agreement, you agree to submit all relevant claims to arbitration and to be bound by the arbitration award. You must file your claim using the DR Portal (also called the Party Portal in the Industry Code), FINRA's recently introduced online filing system. FINRA only permits the prior method of filing, email, or overnight mail to FINRA Case Administration, in extraordinary circumstances. FINRA Rule 13300(a).

The statement of claim must provide the details of the dispute, including the relevant facts and remedies requested. You may request relief in many forms, including monetary damages, interest, expungement, and specific performance. You may also include any additional documentation supporting the statement of claim. FINRA Rule 13302(a).

You do not need to formally effect service using a process server. Once you file a statement of claim, the Director will serve the respondent unless your statement of claim is deficient. FINRA Rule 13307(a). A statement of claim is deficient if any of the following are true:

- It does not specify your or your representative's current address.
- You do not pay all required filing fees, unless the Director defers the fees.
- The claim does not comply with the restrictions on filings with personal confidential information pursuant to FINRA Rule 13300(d)(1).

FINRA Rule 13307(a).

Time Limits and Fees

You may submit a claim to arbitration so long as fewer than six years have elapsed from the occurrence or event giving rise to the claim. FINRA Rule 13206(a). This six-year limitations period is called the Eligibility Rule, and practitioners should consider how this rule affects the claims asserted in arbitration.

If your claim is dismissed due to the six-year time limitation, you may pursue the claim in court if that claim is timely. FINRA Rule 13206(b). When you file a statement of claim with the Director, any time limits for filing the claim in court are tolled while FINRA retains jurisdiction of the claim. FINRA Rule 13206(c). Similarly, when you submit a claim in court, the six-year FINRA limitations period does not run while the court retains jurisdiction of the claim. FINRA Rule 13206(d).

You must pay all required filing fees at the time you file the statement of claim and submission agreement. FINRA Rule 13302(b). Generally, filing fees are calculated based on the amount of the claim and vary depending upon whether the claimant is an associated person or a member firm. See FINRA Rules 13900(a) and (b). If the claim

does not specify monetary damages, the Director may determine the filing fee, subject to certain limitations. See FINRA Rules 13900(a)(2) and (b)(2). Different filing fees apply to claims alleging statutory discrimination, which are capped at $200, and claims seeking injunctive relief, which require a nonrefundable surcharge of $2,500, in addition to the initial filing fee. See FINRA Rules 13802(d)(1)(A) and 13804(b)(6)(B).

Practical Tips for Drafting Statements of Claim

Because there is no required format for a FINRA statement of claim, practitioners often mirror the format of a complaint in federal court but attach documentation supporting the claims.

As discussed below, the grounds for filing a motion to dismiss are very limited and there is no summary judgment process in FINRA arbitrations. See "Motion Practice—Motions to Dismiss" in Navigating the Prehearing Procedures in FINRA Employment Disputes. The statement of claim, therefore, is often the only written document that the claimant provides to the panel prior to the hearing. (Although in some cases the parties will submit prehearing briefs.) For this reason, consider drafting your statement of claim in a persuasive manner and include background facts that allow the panel to understand the issues, even though such facts may not be technically necessary to state a claim.

The FINRA Form U5 and Claimant's Requests for Expungement

The FINRA Form U5 "FINRA Form U5" is a disclosure form that member firms must file with FINRA within 30 days after terminating an associated person's registration. Where an associated person is "discharged" or "permitted to resign," a member firm must answer specific questions on the Form U5 concerning the circumstances of the termination of employment, including the type of termination (e.g., discharged or permitted to resign), and provide a narrative description of the reason for the associated person's separation. See FINRA Regulatory Notice 10-39 (explaining that member firms have an "obligation to provide timely, complete and accurate information on Form U5"). Associated persons often file arbitration claims relating to their Form U5s, including claims for defamation under state law alleging that the language the member firm used on the U5 was false. Associated persons can request that the panel expunge information from the U5 as a form of relief.

Be aware that the standards for expungement of customer dispute information under FINRA Rules 13805 and 2080 differ from the standards for expunging employment information from the Form U5. FINRA has said that the information disclosures on the Form U5, some of which FINRA makes publicly available via its BrokerCheck website, are of critical importance to the investing public, and expungement is an extraordinary remedy that should be recommended only under appropriate circumstances.

For more information on the Form U5, see FINRA Form U-5's Termination Explanation Provision.

KEY STEPS FOR RESPONDENT TO RESPOND TO A STATEMENT OF CLAIM

The Statement of Answer

If you are the respondent in an arbitration proceeding, then, once served with a statement of claim, you must file a statement of answer and submission agreement with the Director and serve a copy on every other party. FINRA Rules 13303(a)(2) and 13303(c). The statement of answer should specify the relevant facts and available defenses to the claims asserted. FINRA Rule 13303(b). You may include any additional documentation supporting the statement of answer. FINRA Rule 13303(a). In the statement of answer, you should also assert any counterclaims, cross-claims, or third-party claims; assert all relevant facts and requested remedies with respect to any counterclaims, cross-claims, or third-party claims; and provide all additional documents supporting the claims. FINRA Rule 13303(b).

Like the statement of claim, the statement of answer is frequently the only written document you will provide to the panel prior to the hearing, so it should typically be a persuasive document—akin to a position statement—and more than just an admission and denial of claimant's allegations.

Time Limits and Fees

You must file the statement of answer within 45 days of receiving the statement of claim. FINRA Rule 13303(a). Respondents who fail to file their statement of answer in a timely fashion may be subject to default proceedings. See FINRA Rule 13801 for more information on default proceedings. Similarly, you may be barred from raising defenses or presenting relevant facts if you file an untimely statement of answer or fail to present those defenses or facts in your original answer. FINRA Rule 13308(a)–(b). The parties can agree between them to extend the time to answer.

If the statement of answer asserts any counterclaims, cross-claims, or third-party claims, you must pay all required filing fees. FINRA Rule 13303(d). The filing fees for a statement of answer asserting any of these claims are calculated in the same fashion as those for a statement of claim (see "Time Limits and Fees" under Key Steps for the Claimant to Commence a FINRA Employment Arbitration, above). FINRA Rule 13900. If you file a counterclaim, the claimant must file a statement of answer to the counterclaim within 20 days from the date the statement of answer is due or from the receipt of the counterclaim, whichever is later. FINRA Rule 13304(a). Similarly, a third-party respondent must file an answer to a counterclaim within 20 days from the date the statement of answer is due, or from the receipt of the claim, whichever is later. FINRA Rule 13305(a).

Practical Tips for Drafting Statements of Answer

When drafting the statement of answer, draft it as a narrative in a persuasive manner as it is not necessary to proceed through each paragraph stating whether you "admit" or "deny" each allegation. This is true regardless of the format of the statement of claim. The statement of answer should include a statement of facts and legal argument section, in which you should explain the controlling law and apply it to the facts of the case. It also should include any affirmative defenses.

Regarding the legal claims, ensure that you specifically address and thoughtfully present each claim. You should explain the controlling law and how it applies to the facts to foreclose attempts to circumvent the law. For example, you should argue that the at-will employment doctrine forecloses claims of wrongful termination and the claimant cannot establish any of the very narrow exceptions based on public policy. See, e.g., Murphy v. Am. Home Prod. Corp., 58 N.Y.2d 293, 300–02 (1983). Additionally, when facing defamation claims based on required FINRA Form U5 filings, you should investigate whether your jurisdiction limits recoveries in such cases. See, e.g., Rosenberg v. Metlife, Inc., 8 N.Y.3d 359, 361–68 (2007) (holding that New York provides an absolute privilege from money damages arising from U5s).

In FINRA arbitrations, each party typically bears its own attorney's fees unless a statute or contract provides otherwise or the parties both request an award of fees.

The FINRA Form U5 and Respondent's Defenses

As noted above, respondents often face defamation claims based on the FINRA Form U5 that member firms are required to file. New York and California, however, provide for an absolute privilege from money damages arising from U5s. See Rosenberg v. Metlife, Inc., 8 N.Y.3d 359, 361–68 (2007); Adjian v. JPMorgan Chase Bank, N.A., 697 F. App'x 528, 530 (9th Cir. 2017) (California law). Other states provide for a qualified privilege, which protects member firms from defamation suits for any U5 statement made in good faith, without malice. See, e.g., Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 705 (7th Cir. 1994) (Illinois law); Dickinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 2d 247, 261–62 (D. Conn. 2006) (Connecticut law); Eaton Vance Distributors,

Inc. v. Ulrich, 692 So. 2d 915 (Fla. Dist. Ct. App. 1997); UNIF. SEC. ACT § 507 (2002) (Uniform Securities Act providing for qualified immunity). Ensure that you explain the relevant state law to the panel in the statement of answer and why monetary damages for the required Form U5 filing are not justified.

BEST PRACTICES FOR SELECTING THE ARBITRATION PANEL IN FINRA EMPLOYMENT DISPUTES

Arbitrator Selection Process

The arbitrator selection process begins shortly after the respondent files its statement of answer. FINRA Case Administration sends the parties a letter that describes the process and encloses a list of arbitrator candidates and background information on each candidate. Under FINRA's Industry Code, the employment arbitration panel for claims of greater than $100,000 consist of three arbitrators: a public chairperson, a public arbitrator, and a nonpublic arbitrator. FINRA Rules 13401(c), 13402(b). The panel composition for claims under $100,000 and statutory discrimination claims are different, and FINRA has established specific requirements for such panels. See FINRA Rule 13802.

FINRA uses its Neutral List Selection System to randomly generate lists of arbitrator candidates for the parties. FINRA Rule 13403. The parties receive a list of 10 public chairperson candidates, 10 public arbitrator candidates, and 10 nonpublic arbitrator candidates. The parties then have approximately three weeks to conduct background research and submit their rankings to FINRA. The parties must strike four candidates from each list of 10 and then rank the remaining six arbitrators indicating their order of preference. FINRA Rule 13404(a). FINRA then consolidates the parties' lists and empanels arbitrators consistent with the rankings provided. FINRA Rule 13405.

You may challenge an arbitrator candidate due to conflict of interest or bias by filing a motion setting forth the grounds for removal. FINRA Rule 13410(a). In practice, sometimes parties also consent to remove an arbitrator candidate from the list and request that FINRA provide a replacement candidate.

Arbitrator Qualifications

Chairpersons

FINRA Rules govern the specific qualifications of each category of arbitration candidates. Arbitrators are eligible to serve as chairpersons of panels submitted for arbitration under the Industry Code if they have completed FINRA chairperson training, and:

- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least one arbitration administered by a self-regulatory organization in which hearings were held –or–
- Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory agency in which hearings were held

FINRA Rule 13400(c).

Public Arbitrators

FINRA considers an otherwise qualified arbitrator to be a public arbitrator if he or she is not excluded from public designation because of a background in the securities industry. The specific exclusions are complex and detailed in FINRA Rule 13100(x)(1). In general, be aware of the exclusionary criteria and that an arbitrator can be permanently or temporarily disqualified to serve as a public arbitrator, which can be based on the person's own activities or those of an immediate family member. Id.

Nonpublic Arbitrators

FINRA considers an otherwise qualified arbitrator to be a nonpublic arbitrator if he or she meets the criteria set forth in FINRA Rule 13100(r). In general, a nonpublic arbitrator (also known as an industry arbitrator) is an arbitrator who is, or was, associated with (including registered through, under, or with) any of the following:

- A broker or dealer
- The Commodity Exchange Act or the Commodities Future Trading Commission or a member of the National Futures Association or the Municipal Securities Rulemaking Board
- An entity organized or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940
- A mutual fund or hedge fund
- An investment adviser

FINRA Rule 13100(r)(1)(A)–(E)

Statutory Employment Discrimination Claims

As noted above, the composition of the arbitration panel differs for statutory employment discrimination claims that the parties agree to arbitrate before FINRA. Unless the parties agree otherwise, the following rules apply:

- A single public arbitrator will adjudicate claims seeking $100,000 or less. FINRA Rule 13802(b)(1), (c)(1).
- A panel of three public arbitrators will adjudicate claims seeking greater than $100,000 in damages. FINRA Rule 13802(b)(2), (c)(2).
- A single arbitrator or the chairperson of a three-arbitrator panel must have a law degree, at least 10 years of legal experience, and meet other qualifications listed in FINRA Rule 13802(c)(3).

Tips for Selecting FINRA Arbitrators

The selection of arbitrators in FINRA is often considered the most important step in the entire arbitration process. Therefore, you must review all available information, including the candidates' background, experience, writings, and prior awards to ascertain whether you believe that the candidate is a good fit for your case.

The following are practical tips for selecting FINRA arbitrators:

- Conduct as much research as you can to ensure informed decision-making. Information that may be instructive is educational history, prior positions, previous awards issued, and any writing and/or decisions.
- Contact members of your firm and others with experience litigating employment cases before FINRA for first-hand opinions of arbitrator candidates. You may find out that an award that appears unfavorable was actually a positive result for that party because of the facts of the case. First-hand experience with the arbitrator candidate is the best source of information for your case.
- You should consider whether your case is factually or legally driven and adjust your preferences accordingly. An industry arbitrator with experience as in-house counsel or in compliance or risk functions may bring a particular mindset to an arbitration panel.
- Be sure to file your arbitrator ranking list on time. Missing the filing deadline will cause FINRA to accept the other party's preferences.

For more information on FINRA arbitrator selection, see FINRA Dispute Resolution: Arbitrator Selection Recommendations, which covers both customer and industry arbitrations.

NAVIGATING THE PREHEARING PROCEDURES IN FINRA EMPLOYMENT DISPUTES

The Initial Pre-hearing Conference (IPHC)

After the panel is appointed, the next step is an IPHC. The IPHC is generally held by telephone, and FINRA will notify each party of the time and date of conference at least 20 days before it takes place. FINRA Rule 13500(b). During the IPHC, the panel will follow a set script to confirm the composition of the panel; set discovery, briefing, and motions deadlines; schedule hearing sessions; and address other preliminary matters. FINRA Rule 13500(c).

It is a best practice to confer with the other party(s) prior to the IPHC concerning the case schedule and, if possible, agree on the number of hearing sessions and the dates of the hearing. While agreement is not always possible, the panel will appreciate that the parties conferred, and it generally streamlines the IPHC.

It is also best practice for employers to ensure that the deadlines for prehearing briefs is set in the calendar. It is advisable to submit prehearing briefs in FINRA arbitrations because it enables you to educate the arbitration panel as to what the law requires. You must always ensure that the arbitrators are fully educated on the specific law that applies to your case, as the legal aspects of the case typically favor employers but can be deemphasized in FINRA hearings.

During the IPHC, the panel will decide whether they want to have the parties communicate with the panelists directly via email, pursuant to the Direct Communication rule, or have the parties send emails through FINRA Case Administration, which will forward them to the panelists. See FINRA Rule 13211.

The IPHC will not be recorded unless the panel determines otherwise. FINRA Rule 13502(a). In practice, it is not necessary to record the IPHC unless extraordinary circumstances exist.

Discovery

Making Discovery Requests

Discovery in FINRA employment arbitrations is more limited than in state or federal court proceedings. The primary method of discovery is through the service of document and information requests and production of documents.

You may request documents or information by serving a written request on a party. FINRA Rule 13506(a). You may serve discovery requests on the claimant or any respondent named in the statement of claim 45 days or more after the Director serves the statement of claim. FINRA Rule 13506(b)(1). You may also serve discovery requests on any party subsequently added to the complaint so long as 45 days or more have passed since the statement of claim was served on that party. FINRA Rule 13506(b)(2). You must also serve copies of the discovery request on all other parties but not on FINRA or the panel. FINRA Rule 13506(b).

Information requests are generally limited to identification of individuals, entities, and time periods related to the dispute. FINRA Rule 13506(a). Such requests should be specific, reasonable in number, not require narrative answers or fact-finding, and relate to the matter in controversy. FINRA Rules 13506(a)–(b). This means that standard interrogatories, including contention interrogatories, are not permitted in FINRA arbitrations. FINRA Rule 13506(a).

Responding and Objecting to Discovery Requests

Within 60 days of receiving a discovery request, you must do one of the following:

- Serve the requested documents or information to all other parties.
- Identify and explain the reason that you cannot produce specific requested documents or information within the required time, state when you will produce the documents, serve the response on all parties, and file it with the Director.
- Object pursuant to FINRA Rule 13508, serve the response on all parties, and file the response with the Director.

FINRA Rule 13507(a).

If you cannot produce the documents in the required time, you must establish a reasonable time frame to produce the documents. FINRA Rule 13507(b). In practice, the parties often come to an agreement concerning rolling production of documents subject to a discovery cut-off date. Counsel for member firms require sufficient time to conduct a reasonable search and review of electronically stored information to identify and produce responsive documents.

If you object to producing any document or information requested pursuant to FINRA Rule 13506, you must serve a written objection on all other parties, specifying which document or information request you are objecting to and the reason for the objection. FINRA Rule 13508(a). You must produce and serve any requested documents or information not specified in the objection pursuant to FINRA Rule 13300. Id.

Any objection not made within the required time is waived, absent a showing of substantial justification. FINRA Rule 13508(b). When ruling on objections, arbitrators may consider the relevance of documents or discovery requests as well as any costs and burdens to parties in producing the information. FINRA Rule 13508(c).

Relatedly, you should ensure that you enter into a strong confidentiality stipulation with opposing counsel to ensure the confidentiality of your client's documents and information.

Electronic Discovery

If your case involves electronic data like emails, instant messages, or computer files, you should enter into an agreement with opposing counsel concerning a reasonable e-discovery protocol, including the custodians, date ranges, and search terms to be used as part of the discovery process. Ensure that the search terms are reasonable and well-tailored to locate responsive documents in your case. The agreement should also describe how the parties will modify the search terms if they come back with an unreasonably large number of hits.

For more information on electronic discovery (e-discovery) in employment litigation, see Electronic Discovery in Employment Litigation.

Depositions

Depositions are strongly discouraged in arbitration. FINRA Rule 13510. The panel, however, may permit depositions upon motion of a party under very limited circumstances, including:

- To preserve the testimony of ill or dying witnesses
- To accommodate essential witnesses who are unwilling or unable to travel for a hearing and may not otherwise be required to participate

- To expedite large or complex cases
- In statutory employment discrimination cases, if necessary and consistent with the expedited arbitration
- If the panel determines that extraordinary circumstances exist

Id.

Subpoena Practice

You may not serve a subpoena unless an arbitrator authorizes it. FINRA Rule 13512(a)(1). You may make a written motion requesting that an arbitrator issue a subpoena to a nonparty to produce documents or appearance of witnesses. FINRA Rule 13512(b). FINRA has a separate rule that governs requests to nonparty member firms or associated persons for the production of documents or appearances of witnesses. See FINRA Rule 13513.

Prehearing Exchange of Exhibit and Witness List

At least 20 days before the first scheduled hearing date, all parties must provide all other parties with:

- All copies of documents and other materials that they intend to use at the hearing, if not already produced –and–
- A list of the names and business affiliations of witnesses whom they intend to call at the hearing

FINRA Rule 13514.

This is referred to colloquially as the 20-day letter and in practice is exchanged on the deadline and not before. FINRA Rule 13514 also requires the parties to file witness lists, but not documents, with the Director. Moreover, at least 20 days before the first scheduled hearing date, all parties must file any joint request for an explained decision, pursuant to FINRA Rule 13904(g), with the Director. FINRA Rule 13514(d).

Motion Practice

Motions

The parties may make motions in writing during the prehearing phase of the arbitration (e.g., discovery motions) or orally during any hearing session (e.g., motions to dismiss). FINRA Rule 13503(a)(1). Before making a motion, the moving party must make efforts to resolve the matter with the other parties. Id. All motions must include a description of the efforts made to resolve the matter. Id. Unless the panel decides otherwise, the moving party must serve written motions on each other party at least 20 days before a scheduled hearing. FINRA Rule 13503(a)(3).

Unless the parties agree to an extension or the Director or panel decides otherwise, parties have 10 days from the receipt of a written motion to respond. FINRA Rule 13503(b). Respondents must serve their responses on each party and file them with the Director. Id. The moving party has five days from the receipt of a response to a motion to reply, unless the responding party agrees to an extension or the Director or panel decides otherwise. FINRA Rule 13503(c). The moving party must serve its reply on each other party and file it with the Director. Id.

Moving to Compel Discovery

You may move to order another party to produce documents or information if the other party has either failed to comply with FINRA Rule 13506 or 13507 or has objected to the production of documents or information under FINRA Rule 13508. FINRA Rule 13509(a). Motions to compel discovery must be made and decided in

accordance with FINRA Rule 13503 and include the disputed document request, a copy of any objection, and a description of efforts taken by the moving party prior to making the motion. FINRA Rule 13509(b).

Discovery Sanctions

In accordance with FINRA Rule 13212(a), the panel may sanction any party who fails to cooperate in the exchange of documents and information, FINRA Rule 13511(a). The panel may sanction a party if it fails to comply with discovery provisions absent a showing of substantial justification, or if a party frivolously objects to producing required documents or information. Id. If prior warnings or sanctions have been ineffective, the panel may dismiss a claim, defense, or proceeding with prejudice for intentional and material failure to comply with a discovery order in accordance with FINRA Rule 13212(c). FINRA Rule 13511(b).

Motions to Dismiss

Motions to Dismiss Prior to the Conclusion of the Case-in-Chief

FINRA discourages motions to dismiss a claim prior to the conclusion of the case-in-chief and permits them only where authorized by FINRA rule. FINRA Rule 13504(a)(1). If you receive authorization to file a motion to dismiss, you must make the motion in writing, file it separately from the statement of answer, and file it only after the respondent files the answer. FINRA Rule 13504(a)(2). Unless the parties agree or the panel determines otherwise, you must serve a motion to dismiss at least 60 days before a scheduled hearing. FINRA Rule 13504(a)(3). Parties have 45 days to respond to a motion. Id. If you reply to a response, you must reply within five days of receipt of the response. Id.

The full panel will decide motions to dismiss a claim prior to the conclusion of the case-in-chief. FINRA Rule 13504(a)(4). The panel may not grant a motion absent an in-person or telephonic prehearing conference on the motion unless the parties waive it. FINRA Rule 13504(a)(5). Prehearing conferences will be recorded pursuant to FINRA Rule 13606. Id.

As noted above, the grounds are narrow and the panel cannot act upon a motion to dismiss unless they determine that any of the following are true:

- The nonmoving party previously released the claims by a signed settlement agreement or written release.
- The moving party was not associated with the accounts, securities, or conduct at issue.
- The nonmoving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.

FINRA Rule 13504(a)(6).

If the panel grants the motion, the decision must be unanimous and accompanied by a written explanation. FINRA Rule 13504(a)(7). If the panel denies the motion, the moving party may not refile the denied motion absent specific permission by the panel, and the panel must assess forum fees against the moving party. FINRA Rule 13504(a)(8)–(9). If the panel deems a motion filed to be frivolous, the panel must award reasonable costs and attorney's fees to parties that opposed the motion. FINRA Rule 13504(a)(10). Additionally, if the panel determines that a party filed a motion in bad faith, it may issue sanctions pursuant to FINRA Rule 13212. FINRA Rule 13504(a)(11).

Other Motions to Dismiss

Motions to dismiss made after the conclusion of the case-in-chief are not subject to the procedures set forth above. FINRA Rule 13504(b). Motions to dismiss based on eligibility are governed by FINRA Rule 13206.

FINRA Rule 13504(c). Motions to dismiss based on failure to comply with the Industry Code or a panel order are governed by FINRA Rule 13212. FINRA Rule 13504(d). Motions to dismiss based on discovery abuse are governed by FINRA Rule 13511. FINRA Rule 13504(e).

For more information, see Motions to Dismiss in FINRA Arbitrations.

SETTLEMENT AND WITHDRAWAL OF THE CLAIMS

Parties to an arbitration may agree to settle at any time. FINRA Rule 13701(a). Parties who settle must file a written notice of settlement with the Director. Id. Although you do not need to disclose the terms of the settlement to the Director or the Office of Dispute Resolution, members and associated persons may have reporting obligations. Id.

Before a respondent answers a claim, the claimant may withdraw the claim with or without prejudice. FINRA Rule 13702(a). After a respondent answers a claim, the claimant may only withdraw it with prejudice unless the panel decides or the parties agree otherwise. FINRA Rule 13702(b).

FINRA EMPLOYMENT ARBITRATION HEARING PROCEDURES AND STRATEGIES

Prehearing Briefs, Preliminary Matters, and Opening Statements

In some FINRA employment arbitrations, by request of the parties or panel, the parties submit prehearing briefs that set forth the key factual and legal issues in the case. Prehearing briefs are exchanged simultaneously by the parties and submitted to the Director. Typically, no replies are permitted.

On the first day of the hearing, the panel and parties discuss some preliminary matters. One of the more important matters is the official record of the proceeding. The Industry Code sets forth the default rule that an audio recording of the arbitration hearing is the official record of the proceeding unless a stenographic record is made and the panel determines it is to be the official record. FINRA Rule 13606. Most practitioners elect to have a court reporter transcribe the hearing and request it to be the official record, and the parties often share the costs of the court reporter. FINRA Rule 13606(b).

Once the preliminaries are out of the way, the hearing begins with opening statements by the parties. You can elect to use an audiovisual presentation during opening statements if you would like, but be prepared with your own equipment and ensure it is tested thoroughly. Most panels prefer opening statements that are brief and to the point. As in court, the purpose of an opening statement in arbitration is to inform the panel what the case is about and what the party will prove during the hearing.

Direct and Cross-Examination of Witnesses

The hearing then proceeds with the testimony of witnesses. All witness testimony is under oath. FINRA Rule 13605. In a typical case, the claimant begins his or her presentation of evidence by calling witnesses first, followed by the respondent's defense. FINRA Rule 13607. The panel has the discretion to vary the order in which the hearing is conducted and may permit the respondent to call a witness out of order if good cause exists. Id. The panel also has discretion to permit a party to present testimony by videoconference or teleconference.

In employment arbitrations, many of the claimant's witnesses are current employees of the respondent-employer, and the parties should confer in advance about the date and specific time the witnesses will testify.

Following the conclusion of an examination, the panel will on occasion ask their own questions of the witness. The frequency and amount of questions from the panel depends on the arbitrators.

You should be prepared for the opposing party, especially the claimant, to call some or all of your witnesses as part of his or her case-in-chief. This is a typical strategy for employee counsel, as doing so causes the arbitrators' first impression of your witnesses to be on cross-examination and it detracts from the employer's ability to put on a logical, chronological defense. Instead, the employer's defense comes in piecemeal and out of order depending on how the witnesses are called.

Keep in mind that even though your witness has testified, you may need to recall them on your rebuttal case. Note, however, that many arbitrators do not permit recalling witnesses.

Objections and Rules of Evidence

Although the Industry Code states that the "panel is not required to follow state or federal rules of evidence," panels often set reasonable boundaries concerning what is admissible and inadmissible. FINRA Rule 13604. As in a typical court hearing, you can and should object to improper questions and the introduction of documents on bases similar to those in the state or federal rules of evidence. The chairperson rules on objections to evidence, but the panel has the power to enter an "executive session" to privately discuss an evidentiary ruling outside the presence of counsel. The Industry Code states that the production of documents in discovery does not create a presumption that the documents are admissible at the hearing. FINRA Rule 13604(b).

Motions to Dismiss after Close of Claimant's Case-in-Chief

Following the conclusion of claimant's case-in-chief, the respondent may move to dismiss on the basis that claimant has not proven he or she is entitled to the relief requested. See FINRA Rule 13504(b) (explaining that motions after the conclusion of claimant's case-in-chief are not subject to Rule 13504(a)). At this time, the panel can deliberate and rule on the motion or defer a ruling until after the hearing has concluded.

Closing Statements or Post-hearing Briefs

Once the respondent presents its case and rests, the parties will present closing statements. In long or complex cases, the parties often request that the hearing adjourn for a day to prepare for closing statements. As with opening statements, you can elect to use an audiovisual presentation during closing if you would like. The panel can also decide whether it would like to receive post-hearing briefs in lieu of, or in addition to, closing arguments. Typically, a post-hearing brief is more effective for an employer than a closing argument because it enables you to focus on the applicable law and put forth a more logical presentation of defenses.

Hearing Fees

In addition to filing fees, FINRA also charges fees for each hearing session conducted by FINRA arbitrators. FINRA Rule 13902. There are two hearing sessions per day, one in the morning and one in the afternoon. The amount of the award the claimant seeks dictates how much each hearing session will cost. FINRA Rule 13902(a)(1). For example, for claims seeking up to a $2,500 award, a hearing session with one arbitrator will cost $50. Id. For claims seeking an award greater than $5,000,000, a hearing session with one arbitrator will cost $450, and a hearing session with three arbitrators will cost $1,500. Id.

If the claimant has not specified the amount of damages it is seeking, the Director will set the hearing fee between $50 and $1,500 for each session. FINRA Rule 13902(a)(2). If a claimant asserts more than one claim in a proceeding, the hearing session fees will be calculated based on the largest claim asserted. FINRA Rule 13902(a)(3).

In its award, the panel will determine the amount of each hearing session fee that each party must bear. FINRA Rule 13902(a)(1). The panel may, however, require the parties to pay hearing session fees throughout the course

of the arbitration. FINRA Rule 13902(b)(1). Any interim hearing session fee payments you make are deducted later from the total amount of hearing session fees against you in the award. FINRA Rule 13902(b)(2). Likewise, the cost of one hearing session fee will be deducted from the total amount of hearing session fees assessed against the party who paid the filing fee. FINRA Rule 13902(b)(3).

UNDERSTANDING THE ARBITRATION AWARD AND POST-AWARD PROCESS

Timing

Generally, the panel will aim to render an award within 30 business days from the date the record is closed. FINRA Rule 13904(d). This is not a hard-and-fast rule, however, and panels can take more than 30 business days. The award will be entered in writing and signed by a majority of the arbitrators, and the Director will serve it on each party. FINRA Rule 13904(a) and (c). FINRA makes all awards it issues publicly available. FINRA Rule 13904(h). See FINRA's Arbitration Awards database.

Content of the Award

A FINRA award will include, among other things, the following:

- The names of the parties
- A summary of the issues
- The damages and other relief requested and awarded
- The allocation of applicable fees by the panel (e.g., hearing session fees)
- The signatures of the arbitrators

FINRA Rule 13904(e).

The panel may issue an explained decision only when all parties jointly request one. FINRA Rule 13904(g)(1). An explained decision highlights the general fact-based reasons for the panel's decision and need not include legal authorities or damage calculations. FINRA Rule 13904(g)(2). The parties should request an explained decision no later than the time for the prehearing document and witness list exchange. FINRA Rule 13904(g)(3). The chairperson of the panel will author the explained decision. FINRA Rule 13904(g)(4). Explained decisions are not available for simplified or default cases. FINRA Rule 13904(g)(6).

FINRA awards cannot be appealed within the FINRA Dispute Resolution system; all awards rendered are final and not subject to review within the FINRA process. FINRA Rule 13904(b). Motions to vacate arbitration awards are discussed below.

Failure to Comply with the Award

Generally, you should pay damages awards within 30 days of receiving the award unless you have filed a motion to vacate with a court of competent jurisdiction. FINRA Rule 13904(j). Failure to pay the award within 30 days will cause it to accrue interest as of the date it was issued, the date on which the motion to vacate was denied, or as specified by the panel in the award. FINRA Rule 13904(j)(1)–(3).

Failure to comply with an award may also lead to FINRA suspension. FINRA Rule 9554(a). FINRA staff may provide a written notice informing a delinquent member or associated person that their failure to comply with the award within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension from associating with any member. FINRA Rule 9554(a). Unless the suspension or cancellation is

stayed by a request for hearing filed during the 21-day period, it will take effect immediately after the period ends. FINRA Rule 9554(d).

A member or associated person subject to suspension may request its termination on the ground of full compliance with the notice or decision. FINRA Rule 9554(g). You should file the request with the head of the FINRA office or department that issued the notice. FINRA Rule 9554(g). If you demonstrate compliance, the head of the department or office may grant relief. FINRA Rule 9554(g).

A member or associated person may also attempt to resist suspension by asserting any of the following defenses:

- The member or person paid the award in full.
- The parties have agreed to installment payments or have otherwise settled the matter.
- The member or person has filed a timely motion to vacate or modify the award, and the motion has not yet been denied.
- The member or person has a pending bankruptcy petition, or a bankruptcy court has discharged the award.

Sanctions

An arbitration panel may levy sanctions against any party that fails to comply with any provisions in the Code of Arbitration Procedure for Industry Disputes. FINRA Rule 13212(a). Subject to applicable law, sanctions may include any of the following:

- Assessing monetary penalties payable to one or more parties
- Precluding a party from presenting evidence
- Making an adverse inference against a party
- Assessing postponement and/or forum fees
- Assessing attorney's fees, costs, and expenses

FINRA Rule 13212(a).

Notably, a panel is not limited to these sanctions and may craft and impose others that it deems appropriate. FINRA Rule 13212(a). For example, where prior sanctions have proven ineffective, a panel may dismiss a claim, defense, or arbitration with prejudice in response to an intentional failure to comply with an order. FINRA Rule 13212(c).

Confirming or Vacating the Award in the Courts

A prevailing party may bring suit in a court of competent jurisdiction to enforce an arbitration award within one year from the date it was rendered. 9 U.S.C. § 9. Unless it finds that grounds for vacating the award exist as listed in 9 U.S.C. § 10, a court will enforce the arbitration award.

Conversely, an adverse party may ask a court to vacate an arbitration award entered against it. 9 U.S.C. § 10. A court should grant an order vacating an award only in the following instances:

- The party procured the award by corruption, fraud, or undue means.
- One or all of the arbitrators were evidently partial or corrupt.
- The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown,

or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior that prejudiced the rights of any party.

- The arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10.

The narrow nature of these grounds means that courts seldom vacate challenged arbitration awards. Additionally, an adverse party may petition a court seeking to modify or correct an arbitration award. 9 U.S.C. § 11. A court may grant an order modifying or correcting an award where:

- There was a material miscalculation of figures or a material mistake in the description of a person, thing, or property referred to in the award.
- The arbitrators granted an award concerning a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- The award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

You should file a motion to vacate, modify, or correct an award within three months after the award is filed or delivered. 9 U.S.C. § 12.

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Steve Hurd has extensive trial and appellate experience, in both federal and state courts focusing on claims of alleged individual and class discrimination, sexual harassment, wage and hour violations, FINRA, whistleblowing and retaliation, defamation, fraud, breach of contract, wrongful discharge and other statutory and common law claims. Steve also advises clients on employment litigation avoidance, litigation strategy and alternative forms of dispute resolution.

Steve is a partner in the Labor & Employment Law Department and co-head of the Employment Litigation & Arbitration Practice Group and Media & Entertainment Industry Group.

Steve helps his clients stay in compliance with the ever-changing employment regulations with respect to FLSA and state law wage and hour requirements by providing advice and conducting comprehensive audits. Steve conducts investigations pertaining to reductions-in-force and individual employee terminations, and claims of gender, race, national origin, and disability discrimination.