



Financial Services Employment Blog

FINRA Award Numbers Show Declining Employee Win and Recovery Rates

By Cameron Smith and Cliff Fonstein

Seyfarth Synopsis: *The Securities Arbitration Commentator (“SAC”) recently published its 2015 award analysis survey. Since the last survey in 2013, there has been a slight increase in the number of employment arbitrations resulting in awards, but a notable decrease in win and recovery rates by employees against member firms.*

The SAC’s 2015 survey examines securities industry arbitration awards (mostly FINRA awards) issued in 2015 and analyzes them in the context of awards from a 7-year period (2009 through 2015). While the majority of awards issued each year are for customer cases, and a good deal of the SAC analysis concerns customer cases, SAC has broken out numbers for employment cases. Unlike the caseload for customer cases, which roughly follows the ups and downs of the economic cycle, the number of employee claims proceeding to award has increased slightly. In 2015, for example, employees arbitrated 173 employment claims to award against their employers. While this was a decrease from 202 cases the previous year, both 2014 and 2015 exceed the average of 162 cases a year from 2009 to 2015, and the average of 156 cases per year from 2007 through 2013. The SAC speculates that the peak of 202 cases in 2014 may be explained, at least in part, by the steady increase of “independent” expungement claims by brokers to remove customer complaints from their records, which comprised 54 employee-initiated cases against member firms in 2014.

The employee win rate, however, has declined markedly, from a high of 49% and 44% in 2010 and 2011 to a low of 28% in 2014 and 2015. The last two years’ employee win rate of 28% was below the 37% average win rate for the seven-year period. Moreover, an employee “win” is defined broadly as any award, no matter how small, that a claimant receives. Declining win rates may be depressed by the increased popularity of independent expungement claims by brokers, which do not generate damage awards. However, even when these expungement awards are removed, win rates have declined consistently from 54% in 2010 to 38% in 2014 and held constant at 39% in 2015.

The SAC also looked at recovery rates over time. The recovery rate is the amount that the employee is awarded compared with the amount of damages the employee requested. As the SAC notes, this statistic is particularly volatile in employment cases, where the claimed amount is often premised on a very subjective (and exaggerated) tort damage calculation. For the entire 7-year period, the median recovery rate was 22%, i.e., those employees who received an award only got 22% of what they claimed. That number would have been lower but for a spike in 2012 when the median recovery rate was 43%. Nonetheless, the median recovery rate for the 7-year period has declined to 22%, down from 25% for the last review period that covered 2007-2013. In 2014 it was 8%, ticking up to 15% in 2015, but in both years the recovery rate was below the average for the 7-year period, less than the 17% seen 2013 and far below 2014’s peak of 43%.

Similarly, the average recovery in 2015 was \$429,166, and in 2014 it was \$580,357, which are roughly comparable to the average recovery of \$469,000 in 2013, but far less than the \$953,846 seen in 2012. However, one or two large awards can skew these results and accounts for their volatility. The compensatory damages portion of awards continues to dominate. In awards to employees with claims against member firms, punitive damages and attorneys’ fees averaged \$70,000 per award to an employee.

With numbers this volatile, it is difficult to make a conclusion about any trends based on 2014 and 2015's low recovery rates, as compared to the recovery rate of 43% in 2012. Optimistically, declining win and recovery rates may reflect greater skepticism by arbitrators of claimants' exaggerated damages claims. Alternatively, they may indicate increased expectations by claimants of outsized recoveries and aggressive damages claims based on multi-year or lifetime "lost damages" calculations.

Finally, the SAC looked at cases that employers brought against employees. These were mostly, although not exclusively, promissory note cases. While there was a rise in the number of cases brought against employees over the 7-year period, the employer win rates over time are relatively high and static. For the entire period, the win rate on employer brought cases was 91%. In 2014 and 2015, the win rates were 93% and 91% respectively. Overall, the numbers suggest that promissory note cases often succeed.

In sum, the SAC numbers show what we've been sensing on our own: that FINRA panels have become more responsive to employer defenses, and in particular, more attentive to the legal context of the employment claims. In addition, when they do find in favor of the employee, panels are awarding a smaller amount of the total compensatory damages requested.

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