



# Financial Services Employment Arbitration Q&A

## Choosing A Forum: FINRA vs. JAMS vs. AAA

Sometimes an employer has the opportunity to choose which forum to use when arbitrating an employment claim: the American Arbitration Association (“AAA”), JAMS, or the Financial Industry Regulatory Authority (“FINRA”). Remember, for example, in *Credit Suisse v. Pitofsky*, 4 N.Y.3d 149 (2005), the New York Court of Appeals held that an employer can draft an arbitration agreement that supersedes any obligation to litigate employment claims before a FINRA panel. If you have the luxury of choosing a forum, or are creating an arbitration protocol for your company, there are several considerations you should examine before deciding which forum is the best for you. We look at some of those considerations in this post.

### Discovery

The available discovery methods vary by forum, and you should carefully consider these differences because they will drive the cost of any arbitration and your ability to get information from the claimant or to resist the claimant’s access to information from you.

Under FINRA’s rules, the parties are generally limited to **only one** method of discovery: a request for documents or information. While you can ask interrogatory type questions in these requests, they must not require narrative answers or fact finding. Significantly, FINRA “strongly” discourages depositions, and they are permitted only in the most limited and extraordinary circumstances, e.g., a dying witness. See FINRA, Code of Arb. Proc., Ind. Disp. Rule 13510.

The AAA, by contrast, gives the arbitrator almost total discretion in deciding what discovery to permit. The AAA employment rules simply state: “The arbitrator shall have the authority to order such discovery, by way of depositions, interrogatories, document production or otherwise as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.” AAA Empl. Arb. R. 9. Under the AAA rules, the amount and extent of discovery will be dependent upon the arbitrator.

JAMS requires most discovery to be shared through a “voluntary and informal exchange” of all relevant, non-privileged documents at the beginning of the case. See JAMS Empl. Arb. R. & Proc. 17. Although interrogatories are not permitted, the parties must disclose the names of all individuals they may call as witnesses at the hearing. What makes JAMS unique is its treatment of deposition discovery. In contrast to FINRA’s general prohibition and the AAA’s imprecise deference to the arbitrator, in JAMS each party is allowed to take at least one deposition.

## Dispositive Motions

One of the main drawbacks with FINRA is that pre-hearing motions to dismiss are discouraged and can be made only in limited circumstances. See Code of Arb. Proc., Ind. Disp., R 13504. Motions under this rule will be decided by the full panel and, if granted, the decision must be unanimous and in writing. If the motion is decided against the moving party, that party must pay the hearing fees associated with the motion.

As with its discovery rules, the AAA rule regarding dispositive motions is somewhat murky: the arbitrator **may** allow parties to file motions only if the arbitrator determines that the moving party has shown “substantial cause” that the motion is likely to succeed. See AAA Empl. Arb. R. 27. The JAMS rule is not much more precise. Under JAMS, the arbitrator **may** permit any party to file a dispositive motion, with no guidance as to when such a motion would be appropriate.

Thus, while FINRA discourages dispositive motions, JAMS and the AAA essentially leave the issue up to the arbitrator. Generally, in both the AAA and JAMS, broad motions with lengthy submissions that raise issues of fact will be disfavored. Simple motions that turn on a clear statement of the law or an undisputed fact will likely be thought of as a time saver and receive the arbitrator’s blessing. Typically, arbitrators will pre-screen a proposed dispositive motion, and you should, therefore, raise a potential motion as early as possible.

## The Quality of the Arbitrators/Flexibility of the Forum

The quality of the arbitrators in each forum will often depend upon your location. As a general rule, however, AAA and JAMS arbitrators are more likely to be lawyers (and sometimes judges), though they will be less likely to have experience with the financial services industry. Thus, in choosing a forum, you may have to balance the likelihood of an arbitrator’s having substantive industry knowledge against his or her knowledge of the litigation process and legal context. Relatedly, a FINRA arbitration, with its set fees, tends to cost less than a JAMS or AAA arbitration, especially if the AAA or JAMS arbitrator is a retired judge or well-known arbitrator.

One important distinction between FINRA and JAMS and AAA is that the latter two processes allow greater flexibility than does FINRA. For example, as noted above, in JAMS and the AAA, the arbitrators have much discretion. FINRA, by contrast, is more rule bound. The flexibility of JAMS and the AAA also allows the parties themselves to establish their own rules and procedures. For example, one advantage that flows from this flexibility is that under the AAA and JAMS, the parties can agree on a particular arbitrator or selection process, and not leave that up to some randomly generated list of arbitrators.

Ultimately, your choice of forum should depend upon which forum you believe will allow you to win in the most cost efficient way possible. In making this decision, you should not only consider the above factors, but also seek advice of colleagues who have experience with these forums

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