



Financial Services Employment Arbitration Q&A

FINRA Award Numbers: Good News For Employers

By *Cliff Fonstein*

The Securities Arbitration Commentator (“SAC”) recently published its 2013 award survey. The numbers in employment cases present good news for employers.

The survey examines securities industry arbitration awards (mostly FINRA awards) that were issued in 2013 and analyzes them in the context of awards issued over a 7-year period (from 2007 through 2013). While the majority of the 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 case load for customer cases, which roughly follows the ups and downs of the economic cycle, the number of employee claims going to award has been roughly constant over the 7-year period. In 2013, for example, 160 employment claims were arbitrated to award by employees against their employers. While this was an increase from 136 the previous year, it is consistent with the average of 156 cases a year from 2007 through 2013.

The employee win rate, however, has declined markedly, from highs of 45% and 49% in 2007 and 2010 to lows of 38% and 34% in 2012 and 2013. In fact, the employee win rate has declined in each of the last three full calendar years. Moreover, an employee “win” is defined broadly as any award, no matter how small, that is received by the claimant.

SAC also looked at the recovery rates over time. A recovery rate is the amount that the employee is awarded compared with the amount that the employee had claimed. As 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 25%, i.e., those employees who received an award only got 25% of what they claimed. In 2013, the recovery rate was even less at a 17% recovery rate. However, because the numbers are so volatile, it’s difficult to make a conclusion based on 2013’s low recovery rate. By contrast, the year before, i.e., in 2012, the recovery rate was 43%, the highest rate in the 7-year period. Similarly, the average of recovery in 2013 was \$469,000, but in 2012 it was \$953,846.00. One or two large awards can skew these results.

Finally, 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 was relatively high and static. For the entire period, the win rate on the employer brought cases was 89% and in 2013, the win rate was 90%. Overall, the numbers suggest that promissory note cases rarely fail.

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.

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