



# Financial Services Employment Arbitration Q&A

## What Procedures and Standards Apply to an Expungement Claim in an Employment Dispute that Does Not Involve a Customer Complaint?

FINRA Rule 2080 provides clear procedural rules and guidelines when associated persons seek to expunge customer complaints from their Form U4 and Central Registration Depository (“CRD”) profile. Rule 2080, however, does not apply to information concerning employment termination decisions not involving a customer complaint that are typically reported on the Form U5.

While no formal FINRA process exists in this area, a series of public notices and commentaries issued over the years shed some light on what standard and rules apply. In essence, the process looks very similar to that laid out in Rule 2080.

### Procedural Rules to Remember When Defending Intra-Industry Expungement Claims

- Arbitration is the only procedure available to associated persons to modify a U5.
- To obtain such a remedy, associated persons must file an arbitration demand with FINRA within six years of the date a Form U5 was issued.
- FINRA can expunge information from the CRD system in intra-industry disputes only to the extent that it is directed to do so in an arbitration award.
- FINRA cannot expunge a Termination Explanation without providing language to replace it, nor can an arbitration panel delete the entire Form U5 or order a firm to withdraw a U5 and file a new one.
- Consequently, if an award is too broad, too narrow, or does not provide the necessary information, FINRA may not be able to expunge certain information as intended by the panel. In such situations, the information will remain on a broker’s CRD record unless the broker can obtain an amended award.

## Grounds for Expungement Explained

- FINRA may expunge information only if the arbitrators find it to be defamatory, misleading, inaccurate, or erroneous.
- While the elements of a defamation claim will vary by state, the standard applied in FINRA arbitrations often is more lenient than would be applied in a state or federal court action. Generally, arbitrators focus on whether the statements are inaccurate or false, not whether the technical legal elements of a defamation claim have been proven.
- Some states, like California and New York, have held that statements on a U5 are protected by an “absolute privilege,” but most states have applied a “qualified privilege.” FINRA panels may not always understand or apply these privileges consistent with state law, and are not required to state explicitly in the award that they have found that all of the elements required to satisfy a defamation claim under governing law have been met.
- FINRA will expunge information in a Form U5 and the CRD system, without a court order, if an arbitration panel determines that the information is defamatory and explicitly recommends expungement relief on that basis. Otherwise FINRA will not expunge the information unless the arbitration award is confirmed by a court of competent jurisdiction.

## Final Thoughts

Keep in mind that an associated member can seek monetary damages in addition to expungement of information from a U5. This often occurs in the context of a wrongful termination claim or a defamation claim. Potential damages can be large especially if false statements were intentionally or recklessly published.

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