



Financial Services Employment Arbitration Q&A

Should You Transfer a FINRA Arbitration to New York City?

Often, you may have the luxury of choosing where you want to try a FINRA arbitration, in New York City (where many financial institutions are headquartered) or at another FINRA location. Consider the example we recently had where the claimant was a New York City employee who was transferred to Baltimore, but whose employment claims mostly (but not completely) concerned events taking place in New York City. The claim was initially filed in Baltimore, where the employee lives, and was assigned to FINRA's Baltimore office. In these or similar circumstances, what factors should you consider in deciding whether to try to move the case to New York City?

The Applicable FINRA Venue Rule

Rule 13213 of the Code of Arbitration Procedure for Industry Disputes gives the Director of FINRA Dispute Resolution the ability to choose where a FINRA dispute will be arbitrated. Under this rule, the Director will usually select the hearing location closest to where the employee was employed at the time of the events giving rise to the dispute. The parties, however, may also agree in writing to a different hearing location, or the employee's employment agreement may specify a different location. In either case, the Director should defer to the parties' preferences.

A party can also file a motion asking the Director or the Panel to change the hearing location. While there's no set deadline for filing such a motion, obviously the earlier you do it, the better. In deciding this motion, the Director or Panel will most likely give great weight to the availability of witnesses, the location of the documents, and the relative hardship on each party.

Factors to Consider

There are several factors you should consider when deciding whether to move a dispute to New York City. The most important factor is to choose the location that will allow you to put on the most vivid and compelling case possible. If most of your witnesses are in New York City, you should consider moving the arbitration to New York City. Not only is this a convenience to those witnesses, as well as a cost saving to the employer, but it also may allow you to put on a better case. While telephonic and video testimony are now common, the process tends to be unwieldy and will often result in less than memorable testimony. In short, if you have credible, key witnesses in New York City, you want the panel members to look

them directly in the eye. Push for a New York City arbitration. By contrast, if you want to de-emphasize the importance of a witness's testimony, perhaps where the witness is a bit problematic, you may want a non-New York location and make do with testimony by telephone.

A second factor to consider is the legal context of the dispute. If the employment agreement says, as is often the case, that it is to be construed under New York law, it might be better to try the case in New York where the arbitrators, especially if they are lawyers, will have some familiarity with New York law.

Similarly, for a number of issues, the law may be better in New York than in other jurisdictions. Familiarity with New York law may, for example, be particularly helpful when trying a bonus case. Typically, an employee will sue for a bonus he or she did not receive, even though the employment agreement gives the employer the discretion to pay whatever bonus it wants. Unlike some states, there is a wide body of New York case law where courts have enforced a firm's discretionary bonus policy, even when the employee has worked most of the year.

Finally, because a large number of employment disputes are arbitrated in New York, there may be a greater likelihood that you will get an arbitrator familiar with the discretionary nature of most Wall Street bonus policies and, even, a familiarity with New York's pro-employer application of those policies. While bonus policies are hardly a topic of cocktail chatter even in New York City, you may have a better chance of getting an arbitrator who has served on a panel where these disputes have been litigated before or who is otherwise familiar with the discretionary nature of Wall Street bonus policies and the law interpreting them.

In sum, in making a venue decision you should carefully consider (1) the effect on witnesses and your ability to try a compelling case and (2) whether the legal or policy issues favor a New York City panel which may be familiar with those issues.

By: *Cliff Fonstein*

Cliff Fonstein is located in Seyfarth Shaw's New York office. If you would like further information please contact the Seyfarth attorney with whom you work or Cliff Fonstein at cfonstein@seyfarth.com.

www.seyfarth.com



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