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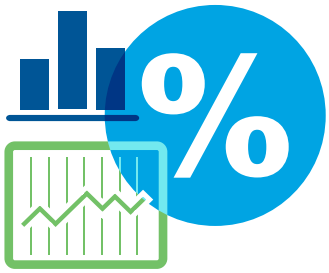

Financial Services Employment Arbitration Q&A

What Do We Do If an Employee Sues Us in FINRA and in Court at the Same Time?

Absent an agreement to the contrary, FINRA won't hear statutory discrimination or harassment claims, among others. Instead, those claims must be litigated in court. Occasionally, a shrewd employee will file parallel proceedings in FINRA and in court. For example, an employee may file a FINRA arbitration claiming that the employer breached her employment contract when it failed to pay her a year-end bonus, and simultaneously file a federal lawsuit claiming that the failure to pay the bonus was also based on gender discrimination or retaliation for asserting her rights.

Can't We Consolidate the Cases?

FINRA Rule 13803 permits the cases to be consolidated in court - if the court will agree in its discretion to take jurisdiction. If the court declines jurisdiction, an employer's options are few.

If the employer is relying on the agreement to arbitrate contained in the employee's U-4, efforts to consolidate the cases in either forum are sure to fail unless the employee agrees, which is highly unlikely. As a result, the employer should be prepared to litigate parallel cases running on parallel tracks, which presents one thorny problem, and one possible opportunity.

The Problem: Discovery Migrating from One Case to Another

The main, and thorniest, problem will be keeping discovery in the two cases separate. Discovery is more likely to migrate from the court case into the FINRA case, as arbitrators are generally more lenient regarding the evidence they are willing to consider. Crafty plaintiff's lawyers will exploit this fact by (for example), attempting to use deposition transcripts from the court case in the FINRA action, asking questions at depositions in the court case that are intended to obtain admissions for use in the FINRA case, using correspondence or pleadings from one case in another, and using motions to compel in one case to obtain discovery you have successfully blocked in the other.

The best approach to this problem is to keep the two worlds of discovery as separate as possible. Although it represents an additional cost, separate document productions (even if they are substantially overlapping) are advisable, with each

page stamped "For use in [FINRA/court] case only." In addition, be willing to instruct the witness not to answer improper questions at depositions or otherwise to bring plaintiff's improprieties to the attention of your judge or arbitration panel as soon as they occur.

The Opportunity: Preclusive Effect

With luck, obtaining a favorable result in one case will enable you to use the preclusive effect of that result to severely damage or dismiss the remaining case. A court is likelier to acknowledge the preclusive effect of a favorable result in the arbitration, of course, while an arbitration panel may be harder to persuade. Even an arbitration panel, however, may be swayed by a court's decision to dismiss, or to grant partial summary judgment on a key issue in the case. At an early phase of your cases, then, you need to decide which case is likelier to yield a positive outcome, and make every effort to "fast track" that case so that you achieve your good result - and its preclusive effect - before the other case can come to a bad end.

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