



Financial Services Employment Arbitration Q&A

Understanding FINRA Panel Composition

Not all FINRA panels are alike. Some cases will be heard before a single arbitrator, others before a panel of three. The nature of the panel's composition may differ as well: some panels may have solely public arbitrators, while others may have a mix of public and industry arbitrators, as well as other special qualifications.

Understanding the basic rules around panel composition is critical to successfully litigating FINRA employment arbitrations. Here are some of the factors determining FINRA panel composition.

Amount of Claim Determines the Number of Arbitrators

FINRA Rule 13401 sets forth the basic principles regarding FINRA panel composition.

- For claims of \$50,000 or less, the panel will consist of one arbitrator. This is typically known as "simplified arbitration" or "arbitration on the papers." See FINRA Rule 13401(a) and 13800.
- For claims over \$50,000 but not more than \$100,000, the panel will consist of one arbitrator by default, but the parties may agree in writing to a panel of three arbitrators. See FINRA Rule 13401(b).
- For claims of more than \$100,000, or where the claim amount is not specified, the panel will consist of three arbitrators, unless the parties agree in writing to one. See FINRA Rule 13401(c).
- Claims for permanent injunctive relief are heard by a panel of three, the composition of which is determined based on the relationships between the parties (see below). See FINRA Rule 13804.

Relationships of Parties to Dispute Determine the Nature of the Panel's Composition

- For disputes between members (industry disputes), a single-arbitrator panel will consist of a non-public (industry) arbitrator chosen from the chairperson roster. A panel of three arbitrators will consist of three non-public (industry) arbitrators, one of whom is selected from the chairperson roster. For both single and three arbitrator panels between members, the parties can agree in writing to alter these compositions.
- For disputes that involve associated persons as parties (employment or customer cases), the single arbitrator will be a public arbitrator selected from the chairperson roster. A panel of three arbitrators will consist of one non-public (industry) arbitrator and two public arbitrators. One of the public arbitrators must be selected from the chairperson roster. Again, the parties may agree in writing to alter these compositions.

Statutory Employment Discrimination Claims Have Distinct Panel Composition Rules

FINRA Rule 13802 establishes the framework for panels in cases with statutory employment discrimination claims.

- For this class of claims, panels assigned to claims of \$100,000 or less will consist of one arbitrator, while claims of more than \$100,000 will consist of three. See FINRA Rule 13802 (a)(1).
- All arbitrators in these cases are public. See FINRA Rule 13802(c)(1)&(2).
- The chairperson on a three-member panel, or a single arbitrator, must fulfill several additional, specific requirements:
 - she must be a public arbitrator;
 - she must have a law degree;
 - she must have membership in at least one bar;
 - she must have substantial familiarity with employment law;
 - she must have ten or more years of legal experience, five of which must be in either law practice; law school teaching; government enforcement of equal opportunity statutes; work as a judge, arbitrator or mediator; or experience as an equal employment opportunity officer or in-house counsel of a corporation; and
 - she must not have represented primarily employers or employees within the last five years. See FINRA Rule 13802(c)(3).

In Promissory Note Proceedings, the Number of Arbitrators Depends on Several Factors

- A special rule exists for claims solely involving a member's claim that an associated person failed to pay money owed on a promissory note. See FINRA Rule 13806.
- If the associated person (typically a former employee) does not file an answer or alleges no counter/third party claims, or alleges counter/third party claims seeking money damages which are less than \$100,000, a single arbitrator will be appointed by the Director. This arbitrator will be a public arbitrator chosen from the chairperson roster.
- Where the associated person files any counter/third party claim and the amount sought is more than \$100,000, or if the amount is unspecified or does not involve monetary damages, the Director will appoint three arbitrators. One of these arbitrators will be a public arbitrator selected from the chairperson roster and one will be selected from the roster of public arbitrators and the final will be selected from the roster of non-public (industry) arbitrators.

Accordingly, most employment arbitrations will have a panel of three, with one industry arbitrator or all public arbitrators – if there is a statutory discrimination claim. However, this can be an important distinction, as not all statutory employment claims (e.g. retaliation or whistleblower claims) fit neatly within the definition of statutory employment discrimination claims in FINRA Rule 13201. Therefore, financial services employers can (and indeed should) challenge determinations denying industry arbitrators in cases lacking a statutory employment claim falling clearly within Rule 13201.

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