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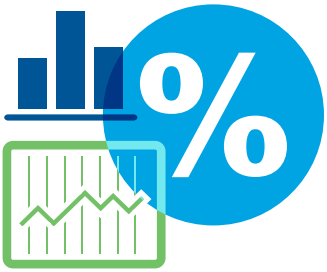

Financial Services Employment Blog

FINRA Brushes Back Courts and Others Crowding Its Home Plate for Exclusive Dispute Resolution

By Loren Gesinsky and Meredith-Anne Berger

Recently, FINRA published Regulatory Notice 16-25, avowing its staying power as the exclusive forum for the resolution of employment and other business-related disputes between members and associated persons. Despite efforts by a growing number of parties to contract away from the FINRA forum (for reasons such as those summarized here), with the support of certain courts, FINRA has doubled down on its position that any agreement signed by an employee waiving his or her right to arbitration through FINRA is unenforceable.

FINRA Rule 2268(d) prohibits any pre-dispute arbitration agreement that limits or contradicts the rules of self-regulatory organizations such as itself, or limits the right to bring a claim through arbitration. This right may be invoked at any time, pre- or post-dispute. The Notice goes further, requiring that any pre-dispute arbitration agreement include specific language such as an explicit waiver of the right to sue and the right to a trial by jury, that arbitration awards are typically binding, and that discovery is generally more limited in arbitration. The Notice even suggests a bootstrap addition to any pre-dispute arbitration agreement that "This agreement does not prohibit or restrict you from requesting arbitration of a dispute in the FINRA arbitration forum as specified in FINRA rules."

The Notice acknowledges federal appellate cases that would ostensibly strip FINRA of the right to supersede all forum selection clauses. *See, e.g., Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.,* 764 F.3d 210 (2d Cir. 2014). Nevertheless, the Notice reiterates FINRA's position that its rules are as binding as federal law because they are approved by the Securities and Exchange Commission and are binding on broker-dealers and associated persons.

Indeed, FINRA Rule 13200 provides that FINRA arbitration is required for associated persons on all matters arising out of the business activities between a member and associated persons or some combination thereof. This Rule was included in the Notice in an effort to prevent firms from effectively carving out employment, competition, and similar disputes from FINRA's ambit. While again acknowledging Second Circuit precedent (*Credit Suisse Sec. (USA) LLC v. Tracy*, 812 F.3d 249 (2d Cir. 2016)), which explicitly held that employees may waive the right to arbitration in a FINRA forum in a pre-dispute arbitration agreement, FINRA seized on the Court's reliance that FINRA had not explicitly prohibited Rule 13200 from being waived in the employment context and used the Notice to explicitly prohibit such a waiver.

What is at stake for member firms according to the Notice? The Notice asserts that a member firm would be in violation

of FINRA Rule 2010, governing the Standards of Commercial Honor and Principles of Trade, should it attempt to require an associated person to agree to waive the right to proceed in the FINRA forum. And the Notice reminds member firms that violation of any FINRA Rule may lead to sanctions, including fines, suspension, and expulsion. Accordingly, member firms should take heed of the Notice in drafting or implementing any arbitration agreement seeking to contract around the FINRA forum.

If you would like further information, please contact your Seyfarth attorney, Loren Gesinsky at lgesinsky@seyfarth.com or Meredith-Anne Berger at mberger@seyfarth.com.

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