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COMPENSATION, WORK HOURS  
AND BENEFITS

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*Edited by:*  
Jeffrey M. Hirsch

*Series Editor:*  
Samuel Estreicher



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## CHAPTER 13

# Compensation Claims in Security Industry Arbitration

Ethan A. Brecher, Esq.\*

### 1. INTRODUCTION

The legal slugfest between securities industry employees and New York Stock Exchange (NYSE) and National Association of Securities Dealers (NASD) member securities firms over compensation claims is as vibrant as ever. For the better part of the past two decades securities industry management and employees have been engaged in a running battle over whether high-paid executives are entitled to bonuses – in many instances in the hundreds of thousands and even millions of dollars – which make up the primary component of pay for the investment bankers, analysts, traders, salesmen, and others who drive the securities markets. Securities firm management routinely label bonuses as “discretionary” payments, claiming that management controls if, under what circumstances, and in what amount bonuses are paid. By contrast, securities firm employees take a different view, to wit, that bonuses form an integral part of their annual pay (with salaries typically constituting just a fraction of total compensation) and that they have “earned” sizeable bonuses based on their performance.

The outcomes of “bonus” cases, which are generally resolved in arbitration proceedings, often depend on whether the arbitrators hearing the disputes are persuaded that static, boilerplate and unilateral

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\* Mr. Brecher is a member of Liddle & Robinson, L.L.P.

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“discretionary” bonus policies supersede the fact that Wall Street executives work for, earn, and expect to be paid sizeable bonuses based on their own performance.

The body of law that has developed leaves more than enough room for both management and employees to stake out mutually exclusive positions. The recurring legal issue around which most bonus cases revolve is whether an employee is entitled to a bonus in spite of an employer’s “discretionary” bonus policy, which ostensibly vests with management the right to pay – or not pay – bonuses. Secondary issues that arise include whether an employee was fired to deprive him or her of a bonus and whether the amount of bonus compensation paid was appropriate or commensurate in light of the employee’s actual performance.

Although state common law generally governs these issues, some employers have formulated severance policies, governed by the Employee Retirement Income Security Act (ERISA),<sup>1</sup> that specifically or by implication include bonus payments as a component of severance pay. In cases where ERISA is implicated, compensation disputes can focus on whether firms acted appropriately – or arbitrarily and capriciously – in granting or calculating bonus or “severance” payments.<sup>2</sup>

## 2. NEW YORK COMMON LAW AND BONUS CLAIMS

As a general rule, “[e]mployees in [New York] State may enforce an agreement to pay an annual bonus made at the onset of employment where such bonus constitutes ‘an integral part of plaintiff’s compensation package.’ ”<sup>3</sup> The question whether unpaid compensation constitutes a discretionary bonus or nonforfeitable earned wages is a question of fact.<sup>4</sup> Securities industry bonus arbitrations that do not involve

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<sup>1</sup> 29 U.S.C. §§ 1001 et seq.

<sup>2</sup> See *DeSantis v. Deutsche Bank Trust Co.*, 501 F. Supp. 2d 593 (S.D.N.Y. 2007) (denying summary judgment on ERISA claim where there were issues of fact whether severance plan administrator acted arbitrarily in computing bonus).

<sup>3</sup> *Mirchel v. RMJ Securities Corp.*, 205 A.D.2d 388, 613 N.Y.S.2d 876 (1st Dep’t 1994).

<sup>4</sup> *Id.*

express contractual agreements are typically based on implied-in-fact agreements or quantum meruit grounds.<sup>5</sup>

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<sup>5</sup> Quantum meruit recovery is based on an “exception to the rule that a party may not expect compensation for a benefit conferred gratuitously upon another. In order to make out a claim in quantum meruit, a plaintiff must establish: (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefore, (4) and the reasonable value of the services.” *Guggenheimer v. Bernstein Litowitz Berger & Grossman LLP*, 810 N.Y.S.2d 880, 888 (N.Y. Sup. Ct. 2006). Generally, the “performance and acceptance of services gives rise to the inference of an implied contract to pay for the reasonable value of such services. . . . The question of whether a party had a reasonable expectation of compensation for services rendered is a matter for the trier of fact to determine based on the evidence before it.” *Id.* (citations omitted). To state a claim for “unjust enrichment,” a plaintiff must establish that he “conferred a benefit upon [an employer] and that [the employer] will obtain such benefit without *adequately* compensating [him] therefor.” *Guggenheimer*, 810 N.Y.S.2d at 888 (emphasis added). On a quantum meruit claim, the reasonable value of an employee’s services can be established by what the employer paid other similarly situated employees See *National Refund & Utility Servs., Inc. v. Plummer Realty*, 803 N.Y.S.2d 63, 64 (1st Dep’t 2005) (“[T]he damage award reflects the reasonable value of plaintiff’s services as indicated by . . . a prior contract between plaintiff’s predecessor and [the defendant].”); *Gottesman v. Keystone Enters.*, 841 N.Y.S.2d 540 (1st Dep’t 2007) (“[T]he jury was entitled to consider the fee schedule in plaintiff’s agreement with Enterprises as evidence of the reasonable value of the similar finder’s services plaintiff provided to Holdings, a related company.”).

In *Thayer v. Dial Industrial Sales, Inc.*, 85 F. Supp. 2d 263, 273–274 (S.D.N.Y. 2000), the court permitted compensation claims based on quantum meruit and unjust enrichment for the period of time before the employee signed an integrated employment agreement, because during the pre-agreement time frame there was no express contract covering employee’s compensation: “Whether plaintiff had a reasonable expectation of receiving compensation is an issue of fact for the jury.” By contrast, in *Namad v. Salomon, Inc.*, 74 N.Y.2d 71, 545 N.Y.S.2d 79 (1989), the New York Court of Appeals rejected an effort by an employee to use parol evidence to interpret a written employment contract that both parties signed, which provided that bonuses would be payable “at the discretion of management. . . . Such bonuses as are awarded will be consistent with the customary policy of the company.” The employee wanted to offer evidence that the term “customary policy” equated to a bonus equal to annual salary. The Court rejected this offer of parol evidence because the employment agreement specifically vested discretion for determining the bonus with the company’s management.

In *Mirchel v. RMJ Securities Corp.*, the plaintiff, at the outset of his employment, was offered a compensation package that included a base salary and an annual bonus, and he received a substantial annual bonus throughout his employment.<sup>6</sup> When he resigned in early 1987, however, his employer refused to pay him a bonus for 1986, asserting that bonus compensation was discretionary. The court denied the defendant's motion for summary judgment on the plaintiff's breach of implied-in-fact contract claim, holding that "[t]he course of dealing between the parties evinces an implied promise that . . . bonus payments constitute a part of plaintiff's compensation."<sup>7</sup>

Numerous arbitration panels have recognized this principle in making bonus awards.<sup>8</sup> Arbitration panels recognize that, in spite of

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<sup>6</sup> Id.

<sup>7</sup> 613 N.Y.S.2d at 879.

<sup>8</sup> *Chiosson v. ING Barings*, NYSE Docket No. 2000-008755 (Apr. 26, 2002) (awarding an investment banker \$206,750, plus 9% interest from Mar. 1, 2000, on his bonus claim, plus all forum fees of \$11,000 to be paid by the firm); *James Alban-Davies v. Credit Lyonnais Securities (USA) Inc.*, NYSE Docket No. 2000-008631 (awarding \$650,000 for unpaid bonus claim plus interest at 9%); *Michael Kukanza & Carmine Ricciardi v. Merrill Lynch Pierce, Fenner & Smith*, NASD Case No. 95-01175 (awarding claimants a total of \$415,000.00 in earned but unpaid bonus compensation for their performance; also assessing Merrill Lynch with the full compliment of forum fees totaling \$54,000); *Halpern, Lyons & McCall v. ING Baring USA*, NYSE Docket No. 1998-007179 (awarding claimants \$298,154.76 in bonus compensation, \$150,000 in attorneys' fees, and forum fees of \$17,2000; claimants had been fired in downsizing along with a number of other employees, the day before bonuses were to be paid, and the arbitration panel rejected ING's defense that bonuses were discretionary, concluding instead that each of the claimants were entitled to bonus and interest from the date bonuses should have been paid up through the date of the award); *Mary Cassella v. Smith Barney, Inc.*, NASD Case No. 95-03783 (awarding Ms. Cassella \$135,115 on her bonus claim, and assessing Smith Barney with all forum fees of \$15,000); *Elise Balboni, et al. v. C.S. First Boston*, NYSE Docket No. 1995-005313 (awarding damages of \$500,000, attorneys' fees of \$75,000, and assessing forum fees of \$18,450 against First Boston for one of forty bankers (the other thirty-nine settled their claims) from First Boston who were fired in connection with the closing of their division in 1995; First Boston failed to pay any of the bankers a bonus for their work, even though their department had generated profits in excess of \$7 million); *Helie v. Merrill Lynch, Pierce, Fenner & Smith*, NASD Case No. 95-01297 (awarding Helie a \$600,000 bonus and also directing Merrill Lynch to deliver to him 7,056 shares of its common stock, then valued at \$230,202, together with all dividends declared from Jul. 31, 1994; also assessing Merrill Lynch \$12,250 in forum

employers' arguments to the contrary, bonuses in fact constitute a significant and integral portion of an employee's compensation and represents earned pay.

For example, in *Halikias v. Warburg Dillon Read LLC*,<sup>9</sup> an employee, Halikias, sought to confirm a NYSE arbitration award that awarded him \$1.422 million in bonus compensation. He had held "various high level positions" with the respondent, Warburg Dillon Read LLC. In 1995 and 1996, Halikias was paid \$110,000 and \$112,5000 in salary and \$1.275 million and \$1.65 million in bonuses, respectively. In 1997 and the first five months of 1998, Halikias was paid \$112,500 and \$150,000 in salary, and \$600,000 and nothing (\$0) in bonuses, respectively. The parties disputed Halikias's performance in 1997 and 1998. In seeking to vacate the arbitration award on grounds that it was in "manifest disregard of the law," Warburg relied on Halikias's original employment agreement and its employment handbooks, which stated that "bonuses are wholly discretionary." UBS also relied on the New York Court of Appeals' decision in *Hall v. United Parcel Service of America, Inc.*,<sup>10</sup> for the proposition that "an employee's entitlement to a bonus is governed by the terms of the employer's bonus plan."

On the other hand, as the court in *Halikias* noted, "[p]etitioner alleged that respondent's prior course of conduct and prior representations committed it to pay appropriate bonuses. He cites cases that indicate that, in the context of employment of securities professionals, bonuses may not be entirely discretionary." The court concluded that

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fees); *Ventura v. PaineWebber, Inc.*, NASD Case No. 96-0131 (awarding bonus of \$300,000, and assessing \$14,400 in forum fees against PaineWebber, for investment banker at PaineWebber); *William Kelly v. Prudential Bache Securities*, NYSE 1998 (awarding damages of \$75,750 on compensation claim); *William Kelly & Michael Newcomb v. Dean Witter Reynolds Inc.*, NYSE 1989 (ordering Dean Witter to pay Kelly \$404,294 and Newcomb \$196,785 (who were high yield salesman who sued for unpaid bonus compensation), for a total of \$601,079 in addition to \$69,105.16 in attorneys' fees and costs; also assessing all forum fees of \$16,000 against Dean Witter, and dismissing Dean Witter's counterclaim against Kelly for return of compensation from 1987); *Paul Patrello & David Weiss v. Jefferies*, NASD Case No. 91-01875 (awarding Patrello and Weiss each \$416,667, for a total award of \$833,334 for unpaid bonus and equity compensation); *Frank C. Forelle v. Citicorp Securities, Inc.*, NASD Docket No. 99-00570 (awarding \$130,000.00 for unpaid bonus compensation plus interest at the rate of 9%).

<sup>9</sup> 195 Misc. 2d 447, 759 N.Y.S.2d 288, 2000 N.Y. Slip Op. 20800 (N.Y. Sup. Jul 6, 2000).

<sup>10</sup> 76 N.Y.2d 27, 36, 556 N.Y.S.2d 21 (1990).

there was no “manifest disregard of the law” in the arbitrator’s award.<sup>11</sup> Similarly, the court in *Credit Suisse First Boston v. Crisanti*,<sup>12</sup> affirmed the confirmation of an arbitration award granting a bonus, finding “no basis for judicial disturbance of the arbitrators’ primarily factual conclusion that the bonus sought by respondent was an essential component of his compensation and that the parties’ course of dealing and the industry practice gave rise to an implied right to a bonus.”

Employers’ contention that “discretionary” bonus policies preclude implied-in-fact contract claims is of dubious legal rationale, as most of those policies, by their own terms, disclaim that they are binding contractual agreements. The New York Court of Appeals, in *Lobosco v. New York Telephone Co.*,<sup>13</sup> declined to enforce an employer’s promises to its employees contained in an employee handbook where the handbook contained “disclaimer” language stating that it was not contractual:

[r]outinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements. That would be an unwise expansion of *Weiner [v. McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193, 43 N.E.2d 441 (1987)]*. It would subject employers who have developed written policies to liability for breach of employment contracts upon the mere allegation of reliance on a particular provision. Clearly that cannot be, especially in light of conspicuous disclaiming language. An employee seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer. Here we conclude that such disclaimer prevents the creation of a contract and negates any protection from termination plaintiff may have inferred from the manual’s no-reprisal provision.<sup>14</sup>

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<sup>11</sup> See *Berardi v. Fundamental Brokers, Inc.*, Nos. 89 Civ. 5143 (JSM), 90 Civ. 0646 (JSM), 1990 WL 129174 (S.D.N.Y. Aug. 30, 1990) (holding that implied contractual cause of action stated by virtue of allegations that (a) the firm had a policy and/or practice of regularly paying bonuses in addition to salary; (b) plaintiffs had received bonuses based on such policy/practice; (c) bonuses constituted a large percentage of plaintiffs’ compensation; and (d) plaintiffs knew about, expected to receive, and relied on receiving, a bonus in addition to their salary).

<sup>12</sup> 734 N.Y.S.2d 150, 151 (1st Dep’t 2001).

<sup>13</sup> 96 N.Y.2d 312, 751 N.E.2d 462, 727 N.Y.S.2d 383 (2001).

<sup>14</sup> *Id.*; cf. *Finsterwald-Maiden v. AAA S. Central Ohio*, 115 Ohio App.3d 442, 447, 685 N.E.2d 786, 789 (Ct. App. 1996) (“In situations where an employee handbook disclaims any intent to create a contractual relationship, courts have found no mutual assent by the parties to be bound by the handbook’s provisions.”).

This language suggesting that an employee should not be precluded from pursuing a bonus claim under an implied-in-fact contract theory, or in quantum meruit where a handbook stating that bonuses are “discretionary” also contains language disclaiming that it is a contract. However, the New York Court of Appeals in *Kaplan v. Capital Co. of America LLC*,<sup>15</sup> nonetheless concluded that the noncontractual nature of a handbook does not render its language “nugatory” and that policy handbooks containing discretionary bonus language can be enforced as written. The court in *Kaplan* held that:

here the bonus compensation sought was clearly stated in the company handbook to be purely discretionary. The handbook also clearly stated that its terms alone would govern the employment relationship and that no other promises regarding the terms of employment could be made, except by specific individuals and in writing. Defendant signed documents providing that he understood these terms. . . . Although the handbook asserted that the policies and benefits contained therein were not intended to be contractual and were subject to change at any time, this provision was plainly not intended to render the handbook wholly nugatory. . . . Given the clearly expressed policy of the company that bonuses were to be paid solely at the company’s discretion, and the provision requiring a writing executed by specified persons on the company’s behalf to alter the terms of the employment relationship, plaintiff has no sustainable claim that defendant company entered into an enforceable agreement entitling him to bonus compensation.<sup>16</sup>

In contrast to the *Kaplan* case, the United States District Court for the Southern District of New York, in *Xu v. J.P. Morgan Chase & Co.*,<sup>17</sup> held that an employee could proceed with a bonus claim under implied-in-fact and quantum meruit theories on grounds that the employer’s discretionary bonus plan was not an enforceable contract.

In *Xu*, the employee was eligible to participate in Chase’s incentive bonus plan, which contained no formula for determining bonuses, prohibited its participants from participating in any other bonus plans, and required the employee to be employed on the date bonuses were paid. The incentive plan also vested absolute discretion with Chase regarding whether to pay a bonus at all. The employee, *Xu*, claimed that

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<sup>15</sup> 747 N.Y.S.2d 504 (1st Dep’t 2002), leave to appeal denied, 99 N.Y.2d 510 (2003).

<sup>16</sup> *Id.*, at 505–506.

<sup>17</sup> 01 Civ. 8686 (WHP) (S.D.N.Y., Sep. 23, 2003).

several years after he joined, his supervisor promised him orally that he would be paid a bonus based on a formula. Prior to bonuses being paid for the year in question, Chase fired Xu and did not pay him a bonus consistent with the formula/oral guarantee, which would pay him a percentage of his personal production.

Chase made a motion for summary judgment, claiming that its incentive bonus plan precluded Xu's claim for breach of an oral agreement. The court recognized that the central issue was whether the oral promise had been made, which Chase disputed. The court rejected Chase's claim that its discretionary incentive plan precluded Xu from suing on the terms of his oral agreement. The court reasoned that because the incentive plan provided Chase with absolute discretion whether to pay a bonus, the incentive plan itself was not a contract and accordingly did not preclude a separate oral contract, such as the one Xu claimed existed.<sup>18</sup> Accordingly, the court held that summary judgment should be denied because there was a genuine dispute as to whether the oral agreement existed and if so, its terms. Likewise, the Court held that Xu could proceed on claims for implied-in-fact contract and quantum meruit because the incentive plan was not a contract and thus material questions existed regarding the parties' course of dealing, the reasonableness of Xu's expectations, and the value of his services –

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<sup>18</sup> See *Canet v. Gooch Ware Travelstead*, 917 F. Supp. 969, 985–986 (E.D.N.Y. 1996) (“[W]here contractual provisions assign the employer *absolute* discretion to grant and pay bonuses, those provisions may be enforced[, but] . . . such discretion will not be implied when such language is absent.”) (emphasis added); *Polycast Tech. Corp. v. Uniroyal, Inc.*, No. 87 Civ. 3297 (CSH), 1992 WL 123185, at \*9 (S.D.N.Y. May 28, 1992) (denying defendant's motion for summary judgment even though plaintiff's employment agreement provided that bonus compensation was to be determined in the “sole discretion” of the defendant, because the agreement further provided that the defendant should consider the performance of the company in determining the bonus). The Court held in *Canet* that “although [defendant] had the discretion to determine the *amount* of the bonus, a bonus was part of [defendant's] employment contract with [plaintiff]. [Plaintiff] was entitled to receive payment of his bonus once [defendant] had determined the amount” by telling plaintiff that he would be paid a bonus of \$300,000, which defendant thereafter failed to pay. 917 F. Supp. at 986. Similarly, in *Thomson v. Saatchi & Saatchi Holdings (USA), Inc.*, 958 F. Supp. 808, 824–826 (W.D.N.Y. 1997), summary judgment was denied because an issue of fact existed as to whether plaintiff had earned a bonus where a bonus amount for the plaintiff had been recommended and evidence showed that such recommendations were usually followed.

of which were elements of Xu's implied-in-fact or quantum meruit claims.<sup>19</sup>

### 3. PRACTICAL ASPECTS OF PROVING BONUS CLAIMS

One of the main proof issues in bonus cases involves determining the amount of what the proper bonus should have been, had one been paid. Bonus history may be used to determine an appropriate bonus amount.<sup>20</sup> Thus, during discovery employees seek from their former employers documents relating to their own bonus history, but importantly, to bonuses awarded to similarly situated employees for the same year in question. Employees also seek documents used in formulating bonus awards, including "bonus runs" and other schedules used by management in determining bonus awards. Employers also create documents comparing bonus increases or decreases from year to year, which can be of use in establishing (or defending) bonus claims. This also opens the door to the production of revenue and other data for comparable employees, so that arbitration panels can make reasoned and rational judgments on what a fair and appropriate bonus should have been. A good deal of effort is spent during the discovery process by employees trying to gain access to this information, and by employers seeking to shield it from production.

### 4. THE NEW YORK LABOR LAW

In New York, employees frequently invoke the New York Labor Law in connection with their compensation claims, which under certain circumstances permits an employee to recover unpaid wages (i.e., bonuses) and collect attorneys' fees and liquidated damages of 25% of the amounts wrongfully withheld.

Section 190(1) of the New York Labor Law defines "wages" broadly as "the earnings of an employee for labor or services rendered, regardless of

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<sup>19</sup> "A contract is implied where the agreement is a matter of inference and deduction as evidenced by the conduct of or a course of dealing or practice between the parties, and a promise will be implied where the agreement is instinct with obligation and supported by circumstances." *Wineburgh v. Seeman Bros.*, 21 N.Y.S.2d 180, 186 (Sup. Ct. N.Y. Co. 1940).

<sup>20</sup> *Giuntoli v. Garvin Guybutler Corp.*, 726 F. Supp. 494, 508 (S.D.N.Y. 1989); *Willoughby Camera Stores, Inc. v. Commissioner*, 125 F.2d 607 (2d Cir. 1942).

whether the amount of earnings is determined on a time, piece, commission, or other basis.”<sup>21</sup> Generally, incentive compensation based on factors other than the employee’s own performance preclude an employee from recovering under the Labor Law. For example, in *Truelove v. Capital & Advisory, Inc.*,<sup>22</sup> the plaintiff was hired in a nonrevenue generating position and elected a compensation plan under which he received a base salary and was eligible to participate in a “bonus/profit sharing pool.”<sup>23</sup> In concluding that the plaintiff’s bonus did not constitute wages under the Labor Law, the New York Court of Appeals noted that the terms of the defendant’s bonus plan “did not predicate bonus payments upon plaintiff’s own personal productivity.”<sup>24</sup> Instead, the plaintiff’s bonus was dependant “solely upon his employer’s overall financial success.”<sup>25</sup>

By contrast, in *Xu*, the Court of Appeals held that the employee’s claim was potentially covered by the Labor Law because his claim was based on a formula and thus akin to a “commission,” which is covered by the Labor Law.<sup>26</sup> Moreover, in June 2008, the Court of Appeals resolved an issue that had divided the lower courts and held that executives are employees covered by the Labor Law.<sup>27</sup>

## 5. AT-WILL EMPLOYMENT AND COMPENSATION ISSUES

Because member firms often fire employees shortly before bonuses are paid, typically in transparent efforts to avoid paying bonuses, arbitration cases sometimes become focused on the reasons for the termination and whether an employee was fired in order to avoid paying him or her otherwise “earned” compensation. Arbitration panels, and even courts, are far more inclined to find in an employee’s favor if he or

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<sup>21</sup> N.Y. Labor Law § 190(1).

<sup>22</sup> 95 N.Y.2d 220, 715 N.Y.S.2d 366 (2000).

<sup>23</sup> *Id.*, 715 N.Y.S.2d at 367.

<sup>24</sup> *Id.*, 715 N.Y.S.2d at 368.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> See also *Reilly v. Natwest Mkt. Grp. Inc.*, 181 F.3d 253, 265 (2d Cir. 1999) (holding that an employee’s “pay was guaranteed under the Percentage Bonus formula to be a percentage of the revenues he generated, and was not left to the defendant’s discretion. . . . [Therefore the] Percentage Bonus falls comfortably within the definition of a ‘commission’ that is expressly included within the Labor Law’s definition of ‘wages’.”).

<sup>27</sup> *Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609 (2008).

she is terminated in close proximity to the date bonuses are paid to other employees.<sup>28</sup>

In addition, securities industry employees have had success in relying on the fact that because of the mandatory nature of arbitration in the industry, the employee's status is not at-will, and an implied requirement exists that discharges must be only for "just cause."<sup>29</sup>

Several courts have concluded that this implied "just cause" requirement exists. For example, in *Agron*, the Eighth Circuit held:

Even accepting that Kansas<sup>[30]</sup> is an employment-at-will state, and further assuming that we would be willing to apply a manifest disregard analysis, PaineWebber's relationship with Agron under the oversight of the NASD contemplated the use of the arbitration procedure as a means of settling employment-related disputes. This process necessarily alters the employment relationship from at-will to something else – some standard of discernable cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship.<sup>31</sup>

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<sup>28</sup> See e.g., *Knudsen v. Quebecor Printing (U.S.A.) Inc.*, 792 F. Supp. 234, 238 (S.D.N.Y. 1992) (citing *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 111–112 (2d Cir. 1985) (holding that an employer may not fire an at-will employee in order to avoid paying him compensation, and if an employer does so, an employee may recover upon grounds that the employer violated the covenant of good faith and fair dealing between them)).

<sup>29</sup> See *PaineWebber v. Agron*, 49 F.3d 347, 352 (8th Cir. 1995) (Use of the arbitration "process necessarily alters the employment relationship from at-will to something else [necessitating] some standard of discernable cause."); *Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312–313 (7th Cir. 1981).

<sup>30</sup> The nature of Kansas' and New York's "at-will" doctrine are essentially the same. Kansas' "at-will" doctrine states: "Under Kansas law, employment is at the will of the employer and employee; the general rule is that employment is terminable at the will of either party in the absence of an express or implied contract." *Maus v. City of Towanda, Kansas*, 165 F. Supp. 2d 1233 (D. Kan. 2001).

<sup>31</sup> *Agron*, 49 F.3d at 352 (citations omitted). Similarly, the Seventh Circuit held in *Liang* that:

[Respondent's] further reply that Liang's employment was terminable at will is without merit. It has been held repeatedly that an agreement to arbitrate disputes about employee discharges implies a requirement that discharges be only for "just cause". Since the arbitrators had power under the contract to make that determination, their award must be upheld.

*Liang*, 653 F.2d at 312–313.

Several arbitration panels have also considered this issue and reached the same conclusion.<sup>32</sup> Thus, based on the theory set forth in *Agron*, employees terminated without bonuses are provided an additional ground upon which to claim, as an element of damages, that they were wrongfully denied a bonus.

## 6. OTHER TYPES OF COMPENSATION DISPUTES

Besides bonus claims, other types of compensation disputes are routinely litigated in securities industry arbitration. Particularly with respect to retail stock brokers, typical claims include arbitration proceedings brought by member firms against former brokers for the recovery of "upfront money" (i.e., signing bonuses paid in the form of forgivable loans). Brokerage firms pay these types of bonuses to induce brokers to leave another firm and bring with them their "book of business," that is, their clients' assets. These loans are typically forgiven over a period of years and provide that the employee must repay unforgiven amounts if his employment terminates for any reason. Some loan agreements provide that forgiveness is accelerated in the event of a termination without cause. These compensation disputes thus typically revolve around whether the employee was terminated "for cause" as well as around any counterclaims that the employee might have. More often than not these collection claims are settled in a manner requiring the employee to repay a portion of the outstanding loan amount over a period of time.

In *Agron*, the employee, Agron (a stockbroker), was successful in defeating PaineWebber's arbitration before the NASD to recover the remaining amount due on a promissory note from him. Agron argued that PaineWebber's termination of his employment was improper.

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<sup>32</sup> See *Kates v. Deutsche Bank*, NYSE Docket No. 1998-007498 (NYSE panel on Jul. 13, 2001 awarded \$150,000 as damages for claims of defamation and wrongful termination under *Agron*); *Soigos v. Merrill Lynch, Pierce, Fenner & Smith*, NASD Case No. 93-04516 (NASD panel on Oct. 6, 2000 awarded \$515,000 of \$2,300,000 in compensatory damages on wrongful termination claim under *Agron*); *Fernandez & Link v. Merrill Lynch, Pierce, Fenner & Smith*, NYSE Case No. 99-7590 (NYSE Panel on Mar. 15, 2001 awarded \$500,000 on breach of contract and wrongful termination claims under *Agron*).

The Court in *Agron* affirmed the arbitration panel's decision that "PaineWebber's termination of Agron . . . was improper" because it lacked "just cause" and upheld the panel's decision to award him approximately \$300,000 in damages (in addition to forgiving the promissory note) for PaineWebber's wrongful termination of his employment.<sup>33</sup>

## 7. CONCLUSION

Although arbitration panels ultimately resolve some compensation disputes in the securities industry, the vast majority of these disputes are resolved through private settlements by the parties. One suspects that this is so because, notwithstanding the gloss of legal terms of art such as "discretionary," management in the securities industry recognizes, accepts, and lives by the truth that on Wall Street bonuses are based and paid on an employee's individual performance.

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<sup>33</sup> *Agron*, 49 F.3d at 349. In *Liang*, Shearson Hayden Stone, a registered broker dealer, terminated the employment of Mr. Liang, a registered representative, when it learned he owned an X-rated movie theater. Shearson Hayden Stone then undermined Mr. Liang's future employment opportunities. In affirming an arbitration award in favor of Mr. Liang for wrongful discharge, the Seventh Circuit stated that "an agreement to arbitrate disputes about employee discharges implies a requirement that discharges be only for 'just cause.'" *Liang*, 653 F.2d at 312.

