

The Use of Initial Discovery Protocols for Employment Cases Alleging Adverse Actions

In November 2011, the U.S. Judicial Conference's Advisory Committee on Civil Rules (Advisory Committee) adopted the Initial Discovery Protocols for Employment Cases Alleging Adverse Actions.¹ A committee of plaintiffs' attorneys and management attorneys drafted the protocols, working under the supervision of the Hon. John G. Koeltl of the U.S. District Court for the Southern District of New York. Approximately 100 federal district court judges throughout the country are currently pilot testing the protocols in pending employment discrimination cases. Some federal district courts have adopted the protocols as part of their Local Rules,² and some individual judges have implemented them as part of their "local" Local Rules.³

Under Federal Rule of Civil Procedure 26(a)(1), the parties in all federal employment discrimination cases are required to exchange initial disclosures within 14 days of an initial discovery conference unless a stipulation or court order sets a different time. The timing of this process is fluid and varies from case to case. The initial discovery conference does not even occur until after the defendant has filed an answer or first responsive pleading.

In terms of substance, initial disclosures in employment discrimination cases are generally limited to cursory witness lists from both sides and sometimes the production of the employee's personnel file from the employer. This exchange routinely occurs 60 days after the defendant files an answer or first responsive pleading. The parties are then left to conduct more substantive discovery on their own in the form of interrogatories, requests to produce, requests to admit, and depositions, the initiation of which is often delayed pending the production of the cursory information covered by Rule 26(a)(1).

Almost inevitably, discovery disputes arise and motions are filed. The court becomes a reluctant but active player in the discovery process. Most employment lawyers, judges, law clerks, and litigants are too familiar with this costly and distracting aspect of federal employment discrimination practice.

For these reasons, it is not surprising that at least one commentator has noted that under Rule 26, "[t]he exchange of initial disclosures between parties in a lawsuit brought in federal court is not considered to be the most useful endeavor. The parties have to exchange a few pieces of information but, for the most part, expect to get into the substance of the case only after formal discovery has begun in earnest."⁴

In most employment cases, the most relevant information consists of documents related to the decision-making process, communications among the decision-makers, investigative reports, or notes and correspondence to, from, or about the plaintiff. Discovery in employment cases is generally broad "[b]ecause employers rarely leave a paper trail—or 'smoking gun'—attesting to a discriminatory intent, [therefore] disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence."⁵

The fact that the employee will often not be privy to the decision-making process resulting in the adverse employment action often compounds the difficulties of discovery in a circumstantial employment discrimination case. As the Tenth Circuit has noted, "in employment cases where the employers are large corporations, the employee might not know who actually fired her or for what reason."⁶ Under the strictures of Rule 26(a)(1), the most relevant information in an employment discrimination case is often not disclosed until several months into the litigation process.

Objections and discovery motions further delay the discovery process. Employers may file motions seeking protective orders regarding the scope or substance of discovery. Plaintiffs may file motions to compel when they perceive that employers have not been forthcoming with relevant evidence. Discovery motions in employment cases frequently involve the interplay between the discovery rules and the substantive law of employment discrimination, thus requiring significant intervention by the court. Commonly disputed issues include the admissibility of complaints by other employees or by the plaintiff, whether the plaintiff and other employees are "similarly situated" for purposes of the discrimination analysis, whether the employer and employee (depending on the facts) can introduce evidence of prior discipline, demotion, termination, or resignation, and whether the employer has engaged in a pattern of discrimination.⁷ In a typical case, if the parties' discovery dispute devolves into motion practice, then the discovery process may be delayed indefinitely until the issues are resolved by the court.

The delay in the production of the most relevant information that is inherent to the Rule 26(a)(1) process also means that, in many cases, there is a delay in the case assessment process on both sides of the battle. The employment plaintiff and his or her counsel might not even see the documents that support the employer's key defenses until months into the case. The employer and defense counsel might not have the



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opportunity to fully assess the relative merits of the adverse employment action and the surrounding facts until interrogatories and document requests have been served and answered and depositions have been noticed. A delay in the assessment of the case on either side can preclude settlement discussions as the costs of litigation steadily rise.

In this context, the designers of the Initial Discovery Protocols have attempted to craft a framework for early discovery in employment cases that will encourage the party to organize its discovery at the outset of the case and hopefully avoid the costs, hassles, and delays that typify the status quo.

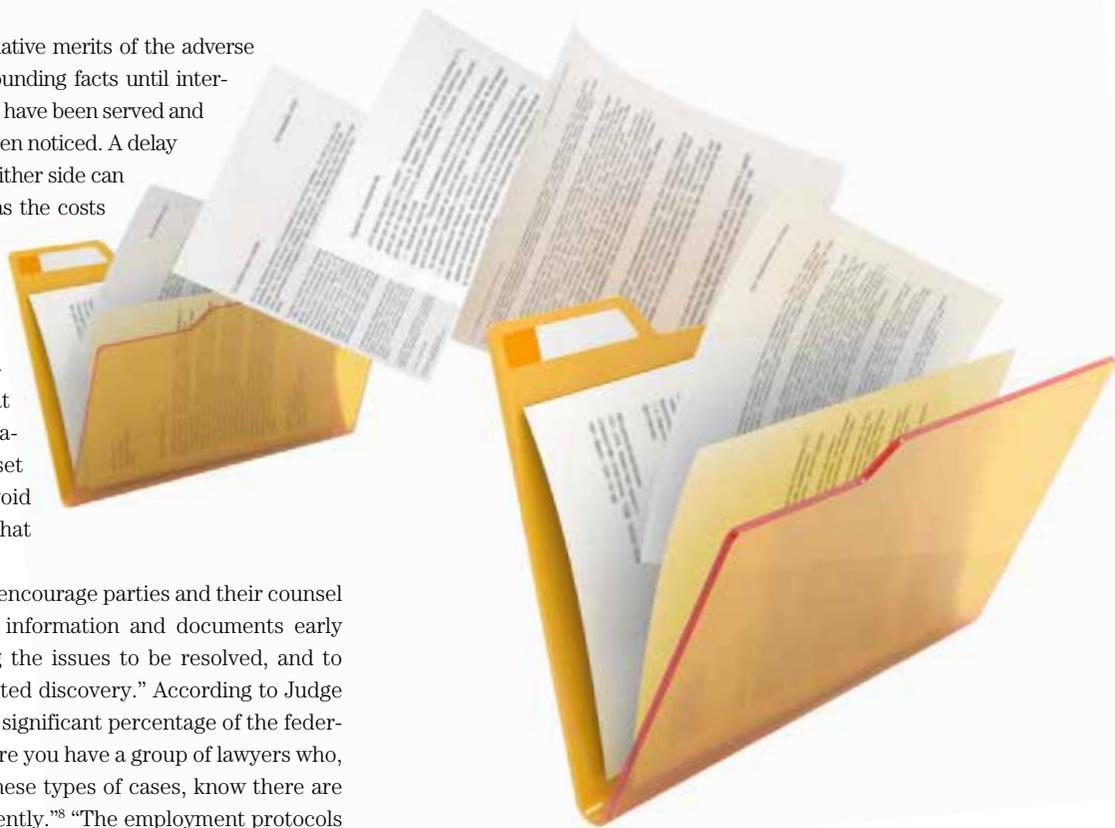
The protocols' purpose is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved, and to plan for more efficient and targeted discovery." According to Judge Koeltl, "Employment cases are a significant percentage of the federal docket." "It is also an area where you have a group of lawyers who, because they regularly handle these types of cases, know there are ways to handle them more efficiently."⁸ "The employment protocols cut through the cost and the time delay by getting the information produced at the outset."⁹

The protocols create a new category of information exchange, replacing the Rule 26(a)(1) initial disclosures with initial discovery that is specific to employment cases alleging adverse actions. Both sides automatically provide this discovery within 30 days of the defendant's responsive pleading, answer, or motion. The protocols are accompanied by a model standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and judge can use as a basis for discussion without waiting for a dispute to arise or for a party to file a motion. One federal judge who has adopted the protocols as part of his "local" Local Rules has also incorporated a standing protective order governing these early disclosures.¹⁰

As drafted, the protocols apply only to cases alleging adverse employment action. They do not apply to class actions or cases involving failure-to-hire, harassment, or hostile work environment. A party who believes that there is good cause for why a particular case should be exempt from the protocols can seek to do so, in whole or in part, by filing a motion.

Under the protocols, the plaintiff's early discovery obligations are extensive. Within 30 days of the defendant's first responsive pleading, the plaintiff must produce the following:

- All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant
- Claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit
- Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period
- Documents concerning the terms and conditions of the employ-



ment relationship at issue in this lawsuit

- Diary, journal, and calendar entries maintained by the plaintiff concerning the factual allegations or claims at issue in this lawsuit
- The plaintiff's current resume(s)
- Documents in the possession of the plaintiff concerning claims for unemployment benefits, unless production is prohibited by applicable law
- Documents concerning: (1) communications with potential employers; (2) job search efforts; and (3) offer(s) of employment, job description(s), and income and benefits of subsequent employment¹¹
- Documents concerning the termination of any subsequent employment
- Any other document(s) upon which the plaintiff relies to support his or her claims.

Additionally, within 30 days of the defendant's answer, the plaintiff must also:

- Identify persons he or she believes to have knowledge of the facts concerning the claims or defenses at issue in the lawsuit and provide a brief description of that knowledge;
- Describe the categories of damages claimed; and
- State whether he or she has applied for disability benefits and/or social security benefits after the adverse action, whether any application has been granted, and the nature of the award, if any, and identify any document concerning any such application.

The defendant, within 30 days of its first responsive pleading, must produce the following:

- All communications concerning the factual allegations or claims

at issue in this lawsuit among or between the plaintiff and the defendant; and the plaintiff's manager(s), and/or supervisor(s), and/or the defendant's human resources representative(s)

- Responses to claims, lawsuits, administrative charges, and complaints by the plaintiff that rely upon any of the same factual allegations or claims as those at issue in this lawsuit
- Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period
- The plaintiff's personnel file, in any form, maintained by the defendant, including files concerning the plaintiff maintained by the plaintiff's supervisor(s), manager(s), or the defendant's human resources representative(s), irrespective of the relevant time period
- The plaintiff's performance evaluations and formal discipline
- Documents relied upon to make the employment decision(s) at issue in this lawsuit
- Workplace policies or guidelines relevant to the adverse action in effect at the time of the adverse action, which may address discipline; termination of employment; promotion; discrimination; performance reviews or evaluations; misconduct; retaliation; and nature of the employment relationship
- The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action
- Job description(s) for the position(s) that the plaintiff held
- Documents showing the plaintiff's compensation and benefits, such as retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation
- Agreements between the plaintiff and the defendant to waive jury trial rights or to arbitrate disputes
- Documents concerning investigation(s) of any complaint(s) about the plaintiff or made by the plaintiff, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged
- Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law
- Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims, including any other document(s) describing the reasons for the adverse action

In addition, within 30 days of its first responsive pleading, the defendant must also:

- Identify the plaintiff's supervisor(s) and/or manager(s);
- Identify person(s) presently known to the defendant who were involved in making the decision to take the adverse action;
- Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge;
- State whether the plaintiff has applied for disability benefits and/or social security disability benefits after the adverse action;
- State whether the defendant has provided information to any third party concerning the application(s); and
- Identify any documents concerning any such application or any such information provided to a third party.

Conclusion

The purpose of the Initial Discovery Protocols is to "encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery." A review of the protocols reveals that they encourage an up-front investment of significant time, energy, and attention, however, such efforts will avoid future disputes, delays, and costs by focusing the parties on the critical issues of the case at the outset of litigation.

The fact that more than 100 federal judges have already implemented the protocols in one form or another demonstrates a trend toward utilizing the protocols instead of the antiquated requirements of Rule 26(a)(1), which are properly viewed as an impediment to early assessment and development of the factual record that will drive the outcome of employment cases in federal courts. ☉

Endnotes

¹The Protocols can be found at: [www.fjc.gov/public/pdf.nsf/lookup/discempl.pdf/\\$file/discempl.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/discempl.pdf/$file/discempl.pdf).

²For example, the U.S. District Court for the District of Oregon has adopted LR 26-7, which can be found at www.ord.uscourts.gov/index.php/civil-procedure-2013-all-without-amendments/249-lr-26/797-lr-26-discovery.

³See www.ctd.uscourts.gov/sites/default/files/forms/Discovery_Protocols.pdf

⁴See www.delawareemploymentlawblog.com/2011/12/initial-discovery-protocols-for-employment-discrimination-cases.html.

⁵*Vazquez-Fernandez v. Cambridge Coll., Inc.*, 269 F.R.D. 150, 155 (D. P.R. 2000) (quoting *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990).

⁶*Khalik v. United Air Lines*, 671 F.3d 1188, 1193 (10th Cir. 2012).

⁷See Charles Alan Wright, et al., *Federal Practice and Procedure* §2009.2.

⁸See www.uscourts.gov/news/TheThirdBranch/12-02_01/Pilot_Program_Introduces_Protocols_for_Employment_Cases.aspx.

⁹*Id.*

¹⁰See www.ctd.uscourts.gov/sites/default/files/forms/Discovery_Protocols.pdf.

¹¹The Protocols pre-emptively address a frequently disputed issue in employment cases, namely, the extent to which the defendant can contact former, current, or prospective employers regarding the plaintiff's employment and job search history. The protocols provide that "[t]he defendant shall not contact or subpoena a prospective or current employer to discover information about the plaintiff's claims without first providing the plaintiff 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon."