

## Employment Discrimination Protocols for Discovery: They're Coming

By Daniel Schwartz on March 5th, 2012

### UPDATED

A few weeks ago, the U.S. Courts' publication "The Third Branch" updated the public on a pilot program that has been going on for a while that established initial discovery protocols that employers and employees need to follow in discrimination cases, without the need for case-specific discovery requests.

Sharpen your pens



(I was tipped off to this by Alli Gerkman, who is the Online Content Manager of IAALS, the Institute for the Advancement of the American Legal System. The IAALS worked with a group of employment lawyers to develop these protocols. My thanks to Alli for the detailed information and I recommend their website for further details.)

Nice article, you may be thinking, but so what? It's just a pilot? Well, as the article indicates, "any district judge may choose to adopt the protocols, which do not require changes to local rules."

The pilot is getting strong support; the Judicial Conference Advisory Committee on Civil Rules has encouraged judges to join the pilot. As the article goes on to note, "Judge Jeremy Fogel, Director of the Federal Judicial Center, sent a memo to all chief district judges, advising them of the availability of the employment protocols."

The District Court of Connecticut website has not indicated that it is being adopted yet in Connecticut, but I understand that it is under consideration. (If anyone is aware of it being used in a Connecticut case, let me know.) **UPDATE:** I understand Judge Kravitz has indicated a willingness to participate.

The Delaware Employment Law Blog did a full recap of the employment discrimination protocols here, but there are several items worth emphasizing.

Understanding what information is going to need to be exchanged early on, can help prepare employers for the inevitable. Even if the protocols aren't adopted in your particular case, these protocols serve as a road map for what should be asked by the respective parties.

(You can download the protocols themselves here.)

## What Documents Must the Employee Produce to the Employer Under the Protocols?

- 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 employment 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: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income and benefits of subsequent employment.
- Documents concerning the termination of any subsequent employment.
- Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

## What Information Must the Employee Provide?

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

## What Documents Must the Employer Produce to the Employee?

- 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. Depending upon the case, those may include policies or guidelines that 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. Those normally include 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.

## What Information Must the Employer Also Provide?

- 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). Identify any documents concerning any such application or any such information provided to a third party.

This information would be exchanged very early on in the case — likely 30 days after the employer has submitted a responsive pleading.

The protocols also have a sample protective order to be used in employment discrimination cases as well. It's not perfect and employers should consider using something a little more tailored to their particular business, but its helpful on both sides to understand what a reasonable compromise in this area would look like.

**UPDATE:** A joint meeting of the CBA Labor & Employment Section and the CT Employment Lawyers Association is tentatively set for April 10th at Bentara. On the agenda is a discussion about these

protocols. Joe Garrison — who was on the committee looking into these protocols — is expected to be part of the discussion.

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