



## **FACT SHEET ON THE INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTIONS**

### **Summary Of The Project**

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 (Protocols)*, which individual judges across the country will pilot test. NELA's Federal Rules Task Force and a subcommittee of management attorneys worked for eighteen months with Judge John G. Koeltl (S.D.N.Y.) and the Institute for the Advancement of the American Legal System to negotiate and draft these protocols.

The Protocols are accompanied by a standing order for use by individual judges as they implement the pilot project, as well as an optional protective order that the attorneys and the judge can use as a basis for discussion.

The Federal Judicial Center (FJC) will establish a framework for effectively measuring the results of this pilot project. The Protocols can be downloaded from the Federal Judicial Center's web site: [http://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)

### **The Benefits of Adopting the Protocols**

Once judges adopt the Protocols, plaintiffs will be able to obtain a substantial amount of valuable information much earlier in the case than under the current Federal Rules of Civil Procedure (Rules).

Under the Protocols, the defendant must produce all communications concerning the factual allegations or claims among or between plaintiff and defendant, as well as plaintiff's managers, supervisors and/or human resources. Plaintiffs will receive the personnel file including supervisory files and/or human resources files, as well as performance evaluations and records of formal discipline. They will also obtain documents relied upon to make the employment decision, in addition to workplace policies or guidelines relevant to the adverse action. Plaintiffs will acquire the history of compensation and benefits for the last 3 years. They will be provided documents concerning investigations of any complaints about or made by the plaintiff. Plaintiffs also will be given other mandatory information, such as job descriptions for positions the plaintiff held, any arbitration agreements defendant believes are binding on the plaintiff, and documentation of unemployment benefits. The Protocols also contain a "catch-all" provision, under which plaintiffs obtain any other documents upon which defendant relies to support defenses, affirmative defenses and counterclaims, including any other documents describing the reasons for the adverse action.

With respect to non-document related information, defendants will need to identify the plaintiffs' supervisor(s) and/or manager(s), persons involved in the decision to take the adverse action, persons with knowledge of the facts concerning the claims or defenses, and any information the defendant has provided to third parties with respect to disability or social security disability benefits.

Defendants' current power to subpoena prospective or current employers without providing prior notice to the plaintiff is curtailed under the Protocols. With these in place, the defendant must first provide 30 days notice and an opportunity for plaintiff to file for a protective order or motion to quash a subpoena. The subpoena then cannot be served until the court rules on the motion.

## Interplay With Existing Federal Rules

The Protocols create a new category of information to be exchanged by the parties. This information exchange is designed to replace initial disclosures under Rule 26. The Protocols provide for early, initial discovery specific to employment cases alleging adverse action. The Protocols are not designed for use in certain categories of employment cases, including class action, reasonable accommodation cases, sexual harassment cases, and others.

This early discovery is to be provided reciprocally and automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to further discovery under the Rules is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship.

While the Protocols are designed to replace the current system of initial disclosures under the Rules, and should not generally be subject to objection, the Protocols were also designed to avoid conflicting with other provisions of the Rules. Therefore, the Protocols should not be read to alter the existing interpretation and application of other Rules, such as those protecting against the disclosure of privileged information or attorney work product.

This is particularly important in regards to the sample menu of provisions that comprise the optional protective order attached to the Protocols. While the Protocols are designed to replace the current initial disclosure requirements, the options in the sample protective order are not meant to supersede existing local or federal rules governing the adoption or implementation of protective orders. The sample protective order has been included to be used as a basis of discussion in those cases where, based on the applicable local practice or rule, the parties and the judge have decided that such an order is appropriate.

## Implementing The Protocols

A panel of judges from the Advisory Committee has been tasked with guiding the implementation of the Protocols. An important aspect the implementation process involves publicizing the existence of the project, and beginning a dialogue among the members of the bench and bar who will be using the Protocols in their cases. Some of the steps the panel, in cooperation with the FRTF and the defense subcommittee, will be taking include:

1. Coordinate with the Administrative Office of the Courts and FJC to include presentations on the Protocols in upcoming judicial education programs.
2. Include articles on the adoption of the Protocols in publications that are circulated to members of the judiciary and their clerks.

The FRTF has also suggested various ways in which the NELA state and local affiliates can contribute to the successful implementation of the Protocols, including:

1. Draft letters on behalf of your local affiliate, urging both your Chief District Judge and other district judges to adopt the Protocols in their cases.
2. Develop articles for publication in local legal newspapers and magazines alerting the local legal community about the Protocols, describing the substance of the Protocols, and highlighting the potential benefits of using them.

3. Coordinate, either as representatives of your local affiliate or as members of NELA, with the local chapter of the Federal Bar Association, and arrange to make a presentation on the Protocols at their next meeting or event.
4. Contact the labor and employment sections of both state and local bar associations, and offer to help educate the other members of the section about the Protocols, either through written materials or live presentations.
5. Suggest that each organization to which the affiliate has introduced the Protocols urge their adoption by federal judges in writing. Develop form letters that other organizations can use to do so.

Finally, individual NELA attorneys have a vital role to play in the process of publicizing the Protocols. To help guide NELA members who are interested in helping with the implementation of the Protocols in the districts where they practice, the FRTF suggests the following steps:

1. The next time you bring a case in federal court, contact the clerk(s) of the judge who will be hearing the matter and urge the court to adopt the Protocols in your case.
2. Talk to defense counsel in pending cases and discuss using the Protocols in your matter, assuming it is early enough in the case. Then, contact your judge about adopting the Protocols.
3. Contact individual district judges with whom you have existing personal or professional relationships to discuss implementing the Protocols in employment cases in his/her court.
4. Suggest making the Protocols a topic for discussion at the next meeting of your local bench/bar committee(s).
5. Engage local defense attorneys with whom you have a productive working relationship, and approach your local district judges as a pair to discuss the Protocols.

For more information about the Protocols or if you have specific questions about how to engage defense counsel and the judiciary, please contact NELA Program Director Rebecca M. Hamburg ([rhamburg@nelahq.org](mailto:rhamburg@nelahq.org)) or Paul H. Tobias Attorney Fellow Matt Koski ([pht.fellow@employeeightsadvocacy.org](mailto:pht.fellow@employeeightsadvocacy.org)). Both can be reached by phone at (415) 296-7629.