Discovery in Single-Plaintiff Employment Discrimination Cases (NY)

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This practice note provides guidance to employers' attorneys who need to request and respond to discovery in single-plaintiff employment discrimination cases brought under the New York State Human Rights Law (NYSHRL), New York State Exec. Law § 290 et seq., and the New York City Human Rights Law (NYCHRL), New York City Admin. Code § 8-107 et seq. The note will focus on discovery procedures pursuant to New York's Civil Practice Law and Rules (CPLR).

More specifically, this note addresses the following topics:

- The Permissible Scope of Discovery in NYSRHL and NYCHRL Cases
- Documents Defense Counsel Should Seek from the Employer in Preparation for Discovery
- Categories of Information and Documents to Seek from Plaintiff
- Document Requests in NYSHRL and NYCHRL Cases
- Interrogatories and Notices to Admit in NYSHRL and NYCHRL Cases
- Deposing the Plaintiff in NYSHRL and NYCHRL Cases
- Discovery from Non-party Sources
- Responding to Written Discovery from Plaintiff Employees
- Expert Discovery
- E-discovery for New York Employers
- Resolving Discovery Disputes

For non-jurisdictional practical guidance on single plaintiff employment discrimination cases, see Employment Discrimination Litigation: Defending Single-Plaintiff Cases. For non-jurisdictional practice notes and forms on employment discrimination litigation, see the Employment Litigation—Discrimination, Harassment, and Retaliation practice notes page and the Employment Litigation—Discrimination, Harassment, and Retaliation forms page.

For information on New York State and City anti-discrimination laws, see Discrimination, Harassment, and Retaliation (NY). For New York State and City checklists and annotated anti-discrimination forms, see the New York row of Discrimination, Harassment, and Retaliation State Expert Forms and Checklists Chart. Also see New York Employment Law (Section III, Chapters 24–28).

[>] Video: For a three-minute video on how to access employment litigation practical guidance in Lexis Practice Advisor (LPA) – Labor & Employment (L&E), see Employment Litigation Resources on LPA L&E. For a transcript of the training video, see Employment Litigation Resources on Lexis Practice Advisor Labor & Employment: How-to Video.

The Permissible Scope of Discovery in NYSRHL and NYCHRL Cases

Before an attorney requests or responds to discovery, it is first important to understand what, if any, limits for discovery exist in New York. See CPLR § 3101(a) sets forth the permissible scope of discovery.

The provision broadly provides:

> There shall be full disclosure from a party of all matter material and necessary in the prosecution or defense of an action—regardless of the burden of proof.

CPLR § 3101(a).

The words "material and necessary" refer to requiring disclosure of any facts that bear on the controversy and will assist either party in preparing for trial. Allen v. Crowell-Collier Publishing Co., 21 N.Y. 2d 403, 406 (1968).

Essentially, this broad provision entitles parties to any discovery with the only exceptions being privileged materials and attorney work product. CPLR §§ 3101(c)–(d). Even materials prepared in anticipation of litigation or for trial are discoverable upon a showing of a "substantial need" for the requested information and that a party is otherwise unable, without undue hardship, to obtain the equivalent information by other means. CPLR § 3101(d)(2).

For cases brought under the NYSHRL and NYCHRL, attorneys should consider the elements of those claims when formulating discovery requests or preparing responses. Both laws prohibit discrimination and harassment in the workplace against employees or job applicants who are members of a protected class, as well as retaliation. N.Y. Exec. L. § 296(1); N.Y.C. Admin. Code § 8-107(1).

Discrimination under NYSHRL

Specifically, the NYSHRL prohibits discrimination and harassment on the basis of one's actual or perceived:

- Age (over 18)
- Race
- Creed
- Color
- National origin
- Sexual orientation
- Gender identity or expression
- Military status
- Sex
- Disability
- Predisposing genetic characteristics
- Familial status
- Marital status –or–
- Domestic violence victim status

N.Y. Exec. L. § 296(1)(a). Also see New York State Human Rights Law (NYSHRL).

Discrimination under NYCHRL

The NYCHRL prohibits discrimination and harassment on the basis of one's actual or perceived:

- Age
- Race
- Creed
- Color
- National origin
- Gender
- Disability
- Marital status
- Partnership status
- Caregiver status
- Sexual and reproductive health decisions
- Sexual orientation
- Uniformed service –or–
- Alienage or citizenship status of any person

N.Y.C. Admin. Code § 8-107(1)(a). Also see New York City Human Rights Law (NYCHRL).

Best Practices

In NYSHRL and NYCHRL cases, the permissible scope of discovery encompasses any non-privileged, non-attorney work product matter pertaining to alleged unlawful discrimination, harassment, or retaliation towards the plaintiff and potentially similar conduct directed to co-workers and potentially non-employees. Discovery may also focus on an employer's defenses as well as the parties to the action themselves.

You should review the NYSHRL and NYCHRL as well as the New York Pattern Jury Instructions relating to the NYSHRL and NYCHRL before drafting discovery requests or responses to fully understand what is material and

necessary to the prosecution or defense of the claims. Knowing specifically what a plaintiff must prove to win his or her case will enable you to limit the scope of discovery when defending the employer against NYSHRL and NYCHRL claims. Similarly, understanding the applicable legal defenses will enable you to obtain the requisite discovery needed to prove the aforementioned defenses. While the standard for pretrial discovery is far broader than admissibility at trial, knowing what evidence is important to prevailing at trial or summary judgment will greatly inform how litigants should approach responding to and propounding discovery.

Informal Research on the Plaintiff: Internet Resources and Requests for Records

You should perform informal research on the plaintiff employee using internet resources such as Public Access to Court Electronic Records (PACER) and New York State Courts Electronic Filing (NYSCEF). Generally, you should gather and/or direct this research such that it is covered under the attorney work product doctrine and thus not discoverable under the CPLR. One exception to this general rule is if you later intend to introduce into evidence any information publicly available on the internet, such as a Facebook profile, make sure to have a non-attorney access and preserve this information since the person who conducted the research will later be required to authenticate it, which may involve testifying.

Consider whether to also request certain records under the New York State Freedom of Information Law (FOIL), New York Public Officers Law § 87 et seq., or the United States Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. In particular, you should send out a FOIL or FOIA request if the plaintiff has filed a discrimination claim with the United States Equal Employment Opportunity Commission (EEOC), the New York State Division of Human Rights (NYSDHR) or the New York City Commission on Human Rights (NYCCHR). Note that these agencies might withhold some of the records related to the plaintiff employee's administrative action as being exempt from such disclosure. For more information on FOIL requests, see the section below entitled "New York's Freedom of Information Law."

Documents Defense Counsel Should Seek from the Employer in Preparation for Discovery

When beginning to develop your discovery plan to defend the employer against NYSHRL and NYCHRL claims, you should first gather all available information the employer has about the plaintiff employee. Then, begin preparing your initial discovery requests. Identifying documents and information in the employer's control allows you to focus your requests on the gaps you need to fill with information from the plaintiff.

Information to Gather from the Employer

The information the employer should or may have includes:

- **The plaintiff employee's personnel file**
  - o This personnel file should include performance reviews, disciplinary documents, job descriptions, job application materials, and any contractual agreements the plaintiff signed.
    - — Employers without internal human resources (HR)—often small employers—may not maintain personnel files or written performance reviews. It is important to ask for all this information in detail to learn what the employer has and does not have. This will also give defense counsel insight into how sophisticated the employer is regarding employment and HR issues.
  - o Job applications, offer letters, and employment agreements can contain arbitration provisions or other contractual terms that either bar or limit an employee's case. For example, contractual limits on the statute of limitations under the NYCHRL and NYSHRL are enforceable. See, e.g., Ortegas v. G4S Secure Sols. (USA) Inc., 156 A.D.3d 580, 580 (1st Dep't 2017). Often times, employers are unaware they have these types of provisions that bar or restrict an employee's case.
- **Employee manuals and/or handbooks**
  - o These documents should contain relevant policies (e.g., policies for dealing with complaints of discrimination).
- **Wage and salary information**
  - o Even if not at issue in the case, review the employer's wage statements and wage notices for accuracy and compliance with the New York Labor Law. Savvy plaintiffs' counsels will be looking for issues to add claims to the case, or to save for a future litigation.
- **Notes, emails, and memoranda that supervisors or colleagues created regarding the plaintiff**
- **Documents and information concerning other employees who were in similar positions to the plaintiff in terms of position, issues (e.g., attendance or performance), and discipline**
- **Any collective bargaining agreements, if applicable**

- If there is a collective bargaining agreement, review it closely for an anti-discrimination provision and grievance procedure that may bar the employee's claim in court.

The initial information gathering should include anything that any non-party may have that the employer has control over, including information maintained by outside HR companies with whom the employer contracts or any payroll companies the employer uses to issue wages. This information is considered to be within the employer's possession, custody, or control if the employer has access to the information.

Categories of Information and Documents to Seek from Plaintiff

Discovery you should seek from the plaintiff employee in NYSHRL and NYCHRL matters should include the following:

- **Identification of every claim being raised**
  - Ask the plaintiff to identify all of his or her claims and allegations, whether or not plaintiff pleads them in the complaint. Fleshing out all the plaintiff's claims and allegations will better enable you to prepare the employer's defense.
- **Background information**
  - Obtain any background information about the plaintiff, including past or present employment history, tax returns, diaries, journals, logs, and notes.
    - Note that judges typically will not compel disclosure of tax returns. Instead, seek the plaintiff's W-2s or 1099s.
  - You should request medical records if the plaintiff claims emotional distress, physical disability, or other medical damages. This is best done by requesting signed unrestricted authorizations in accordance with the Privacy Rule of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The New York State Unified Court System's website provides blank forms approved by the New York State Department of Health to avoid any compliance issues. See New York State Department of Health Fillable HIPAA Form.
- **Facts supporting each claim as well as damages**
  - Request any and all facts that support the claims and allegations in the complaint and also that support the damages the plaintiff is seeking.
    - For example, if the plaintiff is alleging his or her termination resulted in depression and/or anxiety, request any and all medical records evincing such conditions.
- **Identification of documents supporting claims**
  - Demand the plaintiff identify any documents supporting his or her claims, including emails, text messages, and other correspondence.
- **Identification of witnesses**
  - Ask the plaintiff to identify any witnesses to the alleged unlawful conduct as well as anyone who has information supporting the claims and damages.
  - Specifically request the individuals' contact information so that you can contact them as necessary, such as for a non-party deposition.
- **Social media records**
  - Request records from plaintiff's social media accounts such as Facebook, Twitter, LinkedIn, or Snapchat, among others.
    - See Forman v. Henkin, 30 N.Y.3d 656, 667 (2018) (holding that a user's "private" Facebook messages and photos are subject to disclosure where "reasonably calculated to contain evidence material and necessary to the litigation."); see also Vasquez-Santos v. Mathew, 168 A.D.3d 587, 587–88 (1st Dep't 2019) (holding that the defendant could utilize the services of a "data mining" company for a widespread search of the plaintiff's devices, email, and social media accounts for certain discoverable information regarding the credibility of his claim).
  - Subpoenaing the records from the social media companies directly may be unavailable pursuant to the Stored Communications Act, 18 U.S.C. 2701 et seq. See Stored Communications Act (SCA): Practical Considerations.
- **Information about prior lawsuits or claims involving the plaintiff**
  - Run a search for this type of information on your own first and obtain the records, if any, using the FOIL and FOIA searches discussed above or using public websites. If the plaintiff provides contradictory information in discovery, use the contrary evidence to impeach his or her credibility at deposition or at trial.

Document Requests in NYSHRL and NYCHRL Cases

This section discusses technical and strategic aspects to remember when preparing document demands in NYSHRL and NYCHRL cases. This section also provides sample document demands.

Document Demand Requirements

CPLR § 3120 et seq. sets forth the specific requirements for document demands. Two types of devices are available under the provision. First, you may serve a Notice for Discovery and Inspection, which practitioners commonly refer to as a "D&I Notice." Second, you may serve a Subpoena Duces Tecum. While you may serve a Notice for Discovery and Inspection upon a party to the action, you may only seek discovery from non-parties with a Subpoena Duces Tecum. See CPLR § 3120(1). For more information on non-party subpoenas, see Discovery from Non-party Sources, below.

Important requirements include the following:

- **Timing**
  - Document demands may be sent any time after commencement of an action. See CPLR § 304 ("An action is commenced by filing a summons and complaint or summons with notice."). Thus, parties may not serve document demands under the CPLR during pre-litigation or at the employment discrimination charge stage.
  - Technically, the employer defendant can send out discovery immediately upon commencement of the action and therefore be entitled to responses before responding to the complaint. But the plaintiff can also serve discovery demands along with the summons and complaint as well.
- **Response time**
  - The discovery demand must specify the date due or use language that the responses are due within the time proscribed by the CPLR.
  - CPLR § 3120(2) provides that the time "shall be no less than twenty (20) days after the service of the notice or subpoena."
- **Location**
  - The demand must identify where the demands need to be produced. CPLR § 3120(2).
- **Service considerations**
  - The party issuing a Subpoena Duces Tecum must also serve a copy on all other parties. CPLR § 3120(3). Within five days of receipt of the subpoenaed items, the receiving party must notify all other parties that the items are available for inspection and copying.
- **No limit**
  - There is no limit on the number of document demands a party may serve.

Sample Document Demand Questions

The following items are a sampling of key document demands to use in NYSHRL or NYCHRL actions:

(1) All documents referring or relating to any allegation made in the Complaint.

(2) All documents received from the employer during your employment with the employer.

(3) All documents referring or relating to communications you had with any former or current officer, employee, or agent of the employer regarding any of the matters referenced in the Complaint.

(4) All documents referring or relating to any and all meetings or other contacts you had with any employees at the employer regarding anything referenced in the Complaint.

(5) All documents referring or relating to any meetings or contacts you had with HR personnel at the employer regarding any matter referenced in the Complaint.

(6) All documents that refer, relate to, or exemplify any statement by any supervisor or manager at the employer regarding any matter referenced in the Complaint.

(7) All documents referring or relating to, or exemplifying all journals, calendars, or diaries you maintained while employed by the employer.

(8) All documents supporting, referring, or relating to the emotional injuries you allegedly suffered as a result of the employer's alleged actions.

(9) All documents supporting, referring, or relating to the monetary damages you allegedly suffered as a result of the employer's alleged actions.

(10) All job applications you have submitted since the termination of your employment with the employer.

(11) All documents referring, relating, or exemplifying any statement made by any person with knowledge of any of the facts upon which the Complaint is based.

(12) All documents that referring, relating, supporting of evidencing any and all jobs and employment you have had, including but not limited to all job descriptions, job applications, interviews, offers and rejections, employment documents, and wage statements, and earnings since the termination of your employment with the employer.

(13) All documents relating or referring to the amounts and sources of all income received by you from any source.

(14) All notes, written statements, and/or recordings of interviews you have obtained of the employer's employees, current or former, or any other potential witnesses concerning any matter referenced in the Complaint.

(15) Authorizations to obtain your tax returns from the Internal Revenue Service (IRS), New York state and any applicable local authority for three years prior to and up to your last date of employment with the employer.

(16) All documents reflecting any postings by you on social media accounts from the date you started employment with the employer to the present that relate or refer to matters referenced in the Complaint.

(17) All complaints or other documents filed with or received from the EEOC, the NYSDHR, or the NYCCHR, the federal or state Department of Labor, or any other government agency concerning matters referenced in the Complaint.

(18) Produce all documents concerning any evaluation or treatment of Plaintiff by any medical facility, physician or health care professional, including mental health professionals or substance abuse counselors from whom Plaintiff has sought or received treatment or evaluation since January 1, 2014. This should include, but not limited to, any treatment or evaluation sought or received in connection with any injuries, including, but not limited to extreme emotional distress as alleged in the Complaint. For each such medical facility, physician, and health care professional, execute a HIPAA-compliant medical release and include the release together with the responses to the instant request. A HIPAA-compliant medical release for Plaintiff to execute and return is attached as Exhibit A. Plaintiff is to complete, initial, and execute the releases, in the format attached for each such provider and to indicate the inclusion of Alcohol/Drug Treatment, Mental Health Information, and HIV information in the released materials.

– **NOTE:** The date in the document request for how far back the plaintiff must provide documents will be dependent upon the facts of a particular case. As a general rule, you should seek up to five years of records in the initial demand.

For more information on making document demands in New York state cases, see Document Requests: Drafting and Serving the Requests (NY).

Interrogatories and Notices to Admit in NYSHRL and NYCHRL Cases

This section discusses technical and strategic aspects for interrogatories in NYSHRL and NYCHRL cases. This section also provides sample interrogatories.

Interrogatory Requirements

CPLR § 3130 et seq. sets forth applicable requirements for the use, service, and scope of interrogatories in New York State. Keep in mind the following important considerations:

- **Timing**
  - o Any party may serve interrogatories after an action begins, with one important exception.
    - – The plaintiff may not serve the employer with interrogatories until the employer's time to serve a responsive pleading has expired, absent a contrary court order. CPLR § 3132. Thus, the employer may technically serve interrogatories on the plaintiff upon receipt of the Complaint and prior to responding to the Complaint.
- **Scope**
  - o Interrogatories may relate to any matter material and necessary to the prosecution or defense of the action. CPLR § 3131; CPLR § 3101(a).
  - o Parties may use answers to interrogatories to the same extent as they use answers to deposition questions of a party. CPLR § 3131.
- **Response time**
  - o A party must respond to interrogatories within 20 days after the opposing party serves them. CPLR § 3133(a).
- **Form of responses and objections**
  - o A party must adequately and fully answer each interrogatory. CPLR § 3133(b). Each interrogatory answer must be preceded by the question to which it responds. Id.
  - o Responses and objections must be in writing and under oath by the party served. Id.
- **Amending or supplementing response**
  - o A party may only amend or supplement a response by order of the court unless the party promptly makes an amendment or supplemental response after obtaining information that (1) the response was incorrect or incomplete or (2) the response, though correct

and complete when made, is no longer correct and complete. CPLR § 3133(c).

- **No limit on the number of interrogatories**
  - o Unlike in federal court, there is no limit on the number of interrogatories a party may serve in an employment discrimination case in New York state court unless the case is in the New York Supreme Court's Commercial Division, which sets its own limits. Most employment discrimination cases are not in the Commercial Division.

Strategies for Use of Interrogatories

The value of interrogatories to defense counsel in employment cases is often hotly debated. When preparing the interrogatories, consider holding back certain questions until the plaintiff's deposition so that you can seek to use the element of surprise to your advantage. This often leads to the plaintiff making an admission on the record or possibly lying on the record. This is a particularly useful strategy because plaintiff's counsel prepares responses to interrogatories and therefore likely carefully words them. As a result, interrogatories asking the plaintiff to describe the basis for his or her claims, damages, or the circumstances of the adverse employment action at issue can give plaintiff's counsel an opportunity to create clear testimony—as the answers are sworn—for the summary judgment record.

Lastly, propounding too many interrogatories may result in you tipping your hand as far as the employer's defense strategy goes. For this reason, sometimes it may make sense to not propound any interrogatories at first (or perhaps very few), and then consider revisiting the issue after the first round of discovery and depositions.

Sample Interrogatories

The following are a sampling of interrogatories to use in NYSHRL and NYCHRL actions:

(1) Identify the name and contact information, including the telephone number and relationship to the plaintiff, for each person who prepared or assisted in the preparation of the responses to these interrogatories.

(2) Describe with particularity each and every instance of the employer's alleged harassment or discrimination/retaliation.

(3) Identify any individual by name who allegedly harassed or discriminated/retaliated against you.

(4) Identify any person by name who witnessed each instances of the employer's alleged harassment or discrimination/retaliation.

(5) Identify all employment you have had since your employment with the employer ended.

(6) If you are unemployed, describe with particularity all efforts made to fine new employment, including jobs applied for, interviews, job offers, rejections, and job searches, identifying all relevant dates as well.

(7) If employed, identify the name of your current employer, work address, and the start date for your employment at your current employer.

(8) If employed, identify your current gross annual compensation from your current employer.

(9) If employed, identify the amount of compensation received to date from your current employer.

(10) Identify any lawsuits you have been involved in as either a plaintiff, defendant, or witness.

For more information on propounding interrogatories in New York state cases, see Interrogatories: Drafting and Serving Interrogatories (NY).

Notices to Admit in NYSHRL and NYCHRL Cases

An infrequently used discovery tool available to you in New York state courts is the Notice to Admit. A Notice to Admit is a written request to another party asking the other party to admit certain matters of fact to expedite the trial by eliminating the necessity of proving matters not in dispute. CPLR § 3123.

More succinctly, you can use this device to establish certain facts or the authenticity of documents (including photographs) to be used at trial. For example, if the employee has signed a document that limits or bars a particular employment law claim or shortens the statute of limitations, consider a notice to admit the employee's signature. A notice to admit can also be useful to lock down post-termination employment history or an employee's employment disciplinary history. That being said, use notices to admit with caution as you may want to avoid creating an opportunity for plaintiff's counsel to create a record of disputed facts.

There are several important requirements to keep in mind when serving Notices to Admit, including:

- **Timing**
  - o You can serve a Notice to Admit on the sooner of the following (1) contemporaneously with the employer's answer or (2) 20 days after plaintiff served the summons. CPLR § 3123(a).
  - o You may **not** serve a Notice to Admit less than 20 days before trial. Id.

- **Scope**
    - o The Notice to Admit may only seek admission of certain items:
        - – Genuineness of documents, correctness of representation of photographs, or, most importantly, the truth of any matters of fact. CPLR § 3123(a).
    - o The items for which admissions are sought must be reasonably believed there can be no substantial dispute at the trial and which is within the knowledge of the adverse party or can be ascertained by them upon reasonable inquiry. Id.
- **Response time**
    - o Within 20 days of service, a response to the Notice to Admit must be served.
        - – Responses must either (1) deny the matter to which you have sought an admission or (2) set forth reasons why they cannot truthfully deny or admit those matters. CPLR § 3123(a).
- **Effect of failure to respond on time or to not respond at all**
    - o Failure to timely respond (or to not respond at all) results in the matters being deemed admitted, subject to a few excuses:
        - – One excuse for not responding to a notice to admit is if it contains a question regarding ultimate liability (e.g., Did you discriminate against the plaintiff?).
        - – Another excuse is that the notice to admit is not attuned to any reasonable belief that the request for admission is free from substantial dispute.
        - – Furthermore, "[i]f the matters of which an admission is requested cannot be fairly admitted without some material qualification or explanation, or if the matters constitute a trade secret or such party would be privileged or disqualified from testifying as a witness concerning them, such party may, in lieu of a denial or statement, serve a sworn statement setting forth in detail his claim and, if the claim is that the matters cannot be fairly admitted without some material qualification or explanation, admitting the matters with such qualification or explanation." CPLR § 3123(a).

For more information on propounding notices to admit, see Notice to Admit: Preparing and Using Requests for Admission (NY).

Deposing the Plaintiff in NYSHRL and NYCHRL Cases

CPLR § 3106 et seq. and N.Y. Comp. Codes R. & Regs. tit. 22, § 221.1 et seq. lay out the rules and procedures governing depositions in New York. Taking the plaintiff's deposition is often the most critical part of the discovery process in an NYSHRL and NYCHRL case. It is your singular chance to question the plaintiff before trial, so make the most of the opportunity as it may make or break your case.

Noticing and Conducting the Plaintiff's Deposition

As the defendant, the employer has priority in deposing the plaintiff. Specifically, CPLR § 3106 provides that the plaintiff may not serve a deposition notice on defendant until defendant's time to serve a responsive pleading has expired. Thus, to maintain priority, it is best practice to serve a Notice of Deposition with the employer's answer.

Notices of Deposition and Deposition Subpoenas in New York State Court

Two types of depositions are available in New York state court: (1) oral depositions and (2) depositions on written questions, which employment law attorneys rarely use in modern practice. Some important requirements to keep in mind when noticing or subpoenaing depositions in New York are as follows:

- **Timing**
    - o Depositions require a minimum of 20 days' written notice to the opposing party absent a contrary court order. CPLR § 3107.
- **Place**
    - o The notice or subpoena must also state the time and place of the deposition as well as the name and address of each person to be deposed.
        - – You must depose a party in the county (1) where he or she resides, (2) where he or she has an office for the regular transaction of business, or (3) where the action is pending. CPLR § 3110(1).
        - – You must depose resident non-parties in the county where they reside or work. CPLR § 3110(2).
- **Written Depositions**
    - o Although used infrequently, you may also take a deposition on written questions. CPLR § 3108. You

may only use the written deposition when questioning a non-resident witness or when he or she is "without the state."

  - Should you desire to take a written deposition, you must serve a notice identifying the name and address of the deponent as well as the name and address of the officer before whom the written questions will be answered under oath.

- **Non-party Depositions/Subpoenas**
  - For a non-party deposition, you must also serve the notice on all other parties.
    - The witness fee is governed by CPLR § 8001 and is generally $15.00 per day, along with $0.23 per mile for travel, unless the deponent is traveling within the same city.
  - You must further serve a subpoena on and provide requisite fees to the non-party witness. CPLR § 3016(b).
  - Finally, the subpoena must include a statement of the reasons or circumstances for which the non-party deposition is sought. CPLR § 3101(a)(4). You must likewise give 20 days' written notice to non-party witnesses as well.

You should always include both your email address and phone number on subpoenas and notices of deposition to invite the witness or his or her counsel to contact you about scheduling if any such issues arise.

Sample Language for a Deposition Notice

> PLEASE TAKE NOTICE that, pursuant to CPLR § 3107, defendant [Employer name] through its attorneys of records, will take the testimony by deposition upon oral examination of plaintiff, with respect to all matters relevant to the subject matter involved in this action. The deposition will be taken before a person authorized by the laws of the State of New York to administer oaths. The deposition will be taken at [LOCATION], commencing at [TIME] on [DATE], and shall continue from day to day, excluding Saturday, Sunday and holidays, or by agreement of counsel, until completed.

Key Differences Between Federal and New York State Court Depositions

There are several differences between depositions taken in matters venued in federal court as opposed to New York state court. Important differences to keep in mind are as follows:

- **Priority**
  - CPLR § 3106(a)'s priority rules do not apply in a federal court action.
    - Under the federal rules of civil procedure, absent a stipulation or court order, depositions may be conducted in any sequence. Compare CPLR § 3106(a) with Fed. R. Civ. P. 26(d)(3)(A).
- **Timing**
  - Under the federal rules, there is no firm timeframe for giving notice to a deponent. Instead, the federal rules merely require "reasonable written notice." Fed. R. Civ. P. 30(b)(1).
- **Expert witnesses**
  - In New York state court, it is generally impermissible to depose expert witnesses absent special circumstances or where the expert has exclusive knowledge of certain factual information. CPLR § 3101(d). Even then, you may only depose the expert as a fact witness and they may not offer expert conclusions or opinions.
  - In federal court, you may depose expert witnesses. Fed. R. Civ. P. 26(a)(2)(A). However, you cannot conduct the deposition until the expert to be deposed has provided a written report.
- **Limits**
  - In New York state court, there are no limits on the length and number of depositions a party can take.
  - In federal court, a party may only take up to 10 depositions, absent permission from the court. Further, a deposition in federal court is limited to "1 day of 7 hours," absent special circumstances and approval from the court to exceed the limit. Fed. R. Civ. P. 30(d)(1).

Taking the Deposition

When questioning the plaintiff employee in a NYSHRL or NYCHRL case, you should attempt to solicit the following information:

- **A detailed list of all the alleged unlawful, discriminatory acts by the employer**
  - You may do this by walking through the allegations in the complaint and asking whether the plaintiff reviewed the document before he or she filed it. In doing so, you should also confirm whether the plaintiff believes the allegations are true and confirm that the complaint lists everything he or she is claiming in the case.

- **Any complaints the plaintiff ever made about the alleged unlawful, discriminatory acts**
  - If so, you should determine when the plaintiff employee made the complaint and to whom he or she made it.
- **A list of the individuals who allegedly committed the unlawful, discriminatory acts**
- **The date or time frame when each alleged act occurred**
- **A list of any witnesses to the alleged acts**
  - This should also include any other employees who allegedly shared similar experiences.
- **A list of any other employees who the employer allegedly treated more favorably than the plaintiff and information regarding those individuals**
- **Whether there are documents to support the plaintiff's allegations**
- **Admissions that the employer investigated and remedied any issues the plaintiff raised in complaints**
- **If the employer's defense concerns any performance deficiencies, solicit admissions that the plaintiff had performance problems and the employer had spoken to him or her about them**
  - This could involve critical performance evaluations, performance improvement plans, or verbal reprimands and/or warnings.
- **Any alleged support for the plaintiff's belief that the employer's reasons for the adverse action was pretextual and that the real reason was discriminatory or retaliatory animus**
  - Is it based on speculation or admissible evidence?
- **The specific damages claimed by the plaintiff**
  - Is the plaintiff claiming monetary damages alone or emotional damages as well?
  - You should have the plaintiff specify the damages claimed in the complaint.
- **Any medical/psychiatric treatment the plaintiff received as a result of the alleged unlawful, discriminatory acts**
- **Any efforts the plaintiff undertook to mitigate his or her injuries**
  - Job searches, applications, interviews, and unemployment benefits are topics to address.
- **Authentication of key documents**
  - Does the plaintiff contend he or she never received a particular document concerning disciplinary action such as a written warning?
- **Clarification regarding any documents you have and identify any outstanding documents**
  - Make the plaintiff confirm whether or not he or she gave all the documents in his or her possession to counsel and also whether or not he or she is aware of documents in the possession of any non-parties.
- **Any follow-up questions concerning written discovery**
  - For example, have the plaintiff verify that he or she reviewed the interrogatory responses served on his or her behalf.

For more information on taking depositions in New York, see Depositions: Preparing for and Taking a Deposition (NY). For information on defending depositions in New York, see Depositions: Defending a Deposition (NY).

For additional information on taking and defending depositions in employment cases, including employment discrimination actions, see Deposing Plaintiffs in Employment Litigation and Defending Depositions of Employer Witnesses in an Employment Litigation.

Discovery from Non-party Sources

In addition to discovery you can demand from the plaintiff, you may also seek discovery from non-party sources. In particular, non-parties who might have relevant information worth requesting include the following:

- **Governmental agencies**
  - For example, you may want to seek discovery from the EEOC, the NYSDHR, and the NYCCHR.
- **Medical professionals or counselors**
  - You should always seek discovery from medical professionals and/or counselors where the plaintiff is claiming emotional damages, but especially when you have reason to suspect that the plaintiff had previously been diagnosed with an emotional disorder.
- **The plaintiff's other employers**
  - This includes prior and subsequent employers. Information obtained may be particularly useful if the plaintiff left the other position(s) on bad terms.
- **Witnesses to the alleged unlawful, discriminatory, or retaliatory acts**
  - You should ask the plaintiff to identify any such individuals during the exchange of document discovery or at the plaintiff's deposition.

While you may be able to obtain this information informally, you ordinarily will have to subpoena the information or, if the non-party is a governmental agency, serve a FOIL or FOIA request. We discuss FOIL requests in greater detail below in the section entitled "New York's Freedom of Information Law."

Non-party Subpoenas

Subpoenas in New York state court actions are governed by CPLR § 2301 et seq. You may subpoena non-parties to give testimony at a deposition. You may also serve a *subpoena duces tecum* on a non-party, which requires the non-party to produce of documents. The CPLR permits attorneys of record for a party to an action to issue either type of subpoena without a court order. CPLR § 2302. You must serve the subpoena or *subpoena duces tecum* in the same manner as a summons. CPLR § 308.

Example Subpoenas for Records

The two most frequently used subpoenas in cases under the NYSHRL and NYCHRL are subpoenas to witnesses and/or the plaintiff's other employers for records.

Subpoena requests for records to a non-party witness should include the following:

- All documents, including emails and text messages, relating or referring to communications between you and [Plaintiff's name] regarding [Employer].
- All documents that reflect, relate, or make reference to [Plaintiff's name] regarding [Employer].

Subpoena requests for records to the plaintiff's other employers should include the following:

- All documents, records or writings, including those stored electronically, that relate, reflect or make reference to the employment of [Plaintiff's name], including but not limited to:
  - o Applications, offer letters, or employment agreements/contracts
  - o Job descriptions and titles
  - o Dates of employment
  - o All agreements, including wage notices, relating to compensation of any kind, including bonuses, salary, hourly wage, or equity packages
  - o The entire personnel file of [Plaintiff's name], including performance reviews, evaluations, and performance improvement plans –and–
  - o Reasons for separation (if no longer employed there)
    - — You should pay particular attention to the plaintiff's former employers' responses to this question. Often times, when an employee separates from employment on less than favorable terms, the employer's response may only be the plaintiff's title and dates of employment. This may a topic worth exploring at the plaintiff's deposition if you receive any such responses.
- All payroll records for [Plaintiff's name] for the duration of his or her employment with [Employer], including W-2 forms, 1099 forms, wage statements, wage notices and payment history
- All records relating, reflecting or making reference to benefits offered by [Employer] to [Plaintiff's name] including health insurance, life insurance, long and short-term disability
- All documents relating, reflecting or making reference to retirement benefit programs offered to [Plaintiff's name] by [Employer], including but not limited to 401k plans

For more information on subpoenas in New York state cases, see Subpoenas: Drafting, Issuing, and Serving a Subpoena (NY). See also Subpoenas: Responding to a Subpoena (NY).

New York's Freedom of Information Law

The Freedom of Information Law (FOIL) is an important tool to gain access to public records in the State of New York, including records of plaintiff's employment discrimination administrative actions filed with the NYSDHR. N.Y. Pub. Off. Law. § 84 et seq. Generally speaking, you should set out FOIL requests in a letter addressed to the public records officer of the agency from which you are seeking records (generally the NYSDHR in New York state employment discrimination cases). Importantly, the agency cannot require you to provide a reason for the intended use of the records sought. Within five business days of receiving the FOIL request, the agency must grant or deny access in whole or in part, or if more time is needed, the agency must acknowledge the receipt of your request in writing and provide an approximate date by which it will respond. N.Y. Pub. Off. Law. § 89(3)(a).

Sample FOIL Request

A sample letter requesting records from a New York state agency follows:

[Name of Public Records Officer]

[Title]

[Agency Name]

[Street Address]

[City, State ZIP Code]

Re: Freedom of Information Law Request for Records

Dear [Name of Public Records Officer]:

Under the New York Freedom of Information Law, N.Y. Pub. Off. Law § 84 et seq., I am requesting an opportunity to inspect or obtain copies of public records that [Describe the records or information sought with enough detail for the public agency to respond. Be as specific as your knowledge of the available records will allow. But it is more important to describe the information you are seeking.]

I understand there may be a fee of up to $.25 per page for duplication of the records request. If the fee exceeds $[dollar amount], please contact me before duplicating the records.

The New York Freedom of Information Law requires a response time of five business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Sincerely,

[Name]

[Phone number]

New York's Open FOIL Website

New York's "Open FOIL" website also enables you to submit a FOIL request to approximately 50 state agencies online, including the New York State Department of Labor. If your request is aimed at one of the agencies on the website, it may be more efficient to submit your request there rather than by letter.

Responding to Written Discovery from Plaintiff Employees

For the most part, plaintiff employees serve written discovery on employers in the form of document demands, interrogatories, and deposition notices. The employer will usually need to produce the plaintiff's personnel file, employment agreements, policies or practices reflected in employee handbooks/manuals, and payroll/timekeeping records. Failure to produce these documents when requested by the plaintiff employee may lead to discovery motions and sanctions.

The employer may also have to supply documents and information regarding the employee's supervisors, managers, or agents who allegedly committed the unlawful discrimination, retaliation, or harassment. For example, under the NYCHRL, employers can be held strictly liable for harassment by these individuals. See N.Y.C. Admin. Code § 8-107(13). Under the NYSHRL, however, an employer is only liable for harassment by these individuals that the employer encouraged, condoned, or expressly or impliedly approved. See Marchuk v. Faruqi & Faruqi, 100 F. Supp. 3d 302, 307 (S.D.N.Y. 2015). Also see New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL).

In responding to written discovery, consider the following:

- Whether the employer possesses the information requested
- Whether any privilege or confidentiality issues are implicated in producing the information
- Whether the information sought is material and necessary to the claims or defenses in the lawsuit –and–
- Whether the responsive documents reveal private information about another individual

Options in responding to discovery are as follows:

- Respond and produce the information with or without asserting objections
- Serve objections only
- File a motion for a protective order

See CPLR § 3103(a).

Because discovery disputes and motions can be quite costly, you should consider all attempts to resolve discovery disputes informally before resorting to motion practice.

Discovery Response Requirements

When responding to discovery requests, keep in mind the following requirements:

- **Deadline for producing documents.** Plaintiff must provide a deadline for producing documents sought by way of a subpoena duces tecum, which may not be less than 20 days after service of the document request. See CPLR § 3120. You must serve responses to notices to admit and interrogatories within 20 days after service of the interrogatories. See CPLR §§ 3123(a), 3133.
    - o If you fail to timely respond to a notice to admit, the item will be deemed admitted, so it is extremely important to calendar deadlines for responding to this and all other discovery requests to ensure compliance.

- **Responses to a notice to admit.** Upon receipt of a notice to admit, you have the following options: (1) serve a sworn denial, (2) serve an explanation for why you cannot admit or deny, (3) serve an admission, or (4) not respond, which is effectively an admission. See Notice to Admit: Responding to Requests for Admission (NY).
    - o You should be wary of simply denying every notice to admit because unreasonable denials may allow the plaintiff employee to recover costs incurred in proving the fact denied, including attorney's fees. See CPLR § 3123(c).
- **Objections to discovery demands.** You must state objections to discovery demands with "reasonable particularity." See CPLR § 3122. This includes specifying whether an objection pertains to all or only part of the request.
- **Assert relevant objections in written responses.** Always assert relevant objections in written responses to the plaintiff employee's discovery requests because failure to do so may waive important, unasserted objections. For example, failure to timely object to discovery demands results in a waiver of objections pertaining to irrelevance under CPLR § 3101(a) or material prepared in anticipation of litigation under CPLR § 3101(d)(2).

Sample Objections Applicable in NYSHRL and NYCHRL Cases

The following is a list of objections you should consider using in response to any discovery requests in NYSHRL and NYCHRL actions:

- **Attorney-client privilege and/or work product doctrine**
    - o Defendant employer objects to this request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, and/or other documents or information prepared in anticipation of trial in this matter.
        - – When reviewing documents for production, if the employer is withholding any documents as privileged, you should prepare a privilege log and make it available to the plaintiff employee's counsel upon request. The log should identify the nature of the document withheld and provide sufficient factual information to allow the plaintiff employee's counsel to evaluate the merits of the privilege claim.
    - o Below are examples of documents that plaintiffs often request that may fall under the attorney-client or work product privilege.
        - – Drafts or final versions of internal investigation reports
        - – Correspondence related to internal investigations where in-house or outside counsel may have been involved
        - – Certain drafts or final versions of pay equity studies
        - – Drafts of employee workplace policies
        - – Correspondence concerning contemplated discipline or the enactment of workplace policies where in-house or outside counsel may have been involved

Be careful when reviewing documents the employer provides to respond to plaintiffs' requests to see whether they may be privileged or if in-house counsel is copied on any correspondence.

- **Irrelevance**
    - o Defendant employer objects to this request to the extent it seeks information or documents that are not material and necessary to the prosecution or defense of this case and is not reasonably calculated to lead to the discovery of admissible evidence.
    - o Below are examples of documents that plaintiffs often request that frequently elicit irrelevancy objections.
        - – Company financial records
        - – Documents related to other employment lawsuits or claims
        - – Discipline and other personnel records concerning other non-similarly situated employees. Even for similarly situated employees, employers should be hesitant to produce any such information absent a clear showing by the employee as to how it is relevant to his or her claim.
        - – Demographic (age, race, etc.) information. Again, such information can be discoverable but force the plaintiff to articulate why.
- **Lack possession or in plaintiff's possession**
    - o Defendant employer objects to this request to the extent that it seeks information that is not within its possession, custody, or control, or inappropriately seeks documents that are already in the possession, custody, or control of plaintiff.
    - o Documents that are often not in the employer's possession include:
        - – Text messages between plaintiff and other employees. Most employers do not provide employees with cell phones or other such devices. If they do, employers often wipe those devices and issue them to a different employee immediately after an employee's termination.

- W2s and 1099s
- E-mail correspondence if the employer did not provide the employee with an employer e-mail account

- **Overbroad in time and scope**
  - Defendant employer objects to this request to the extent it fails to define a reasonable time period and is therefore overly broad, unduly burdensome, or vague.
- **Duplicative**
  - Defendant employer objects to this request on the grounds that it has been previously propounded (see Request No. [number]) and is therefore duplicative, burdensome, and harassing.

Expert Discovery

When defending employers in discrimination claims where the plaintiff asserts emotional distress, be cognizant of the potential need for an expert. Typically, most plaintiffs allege only what are called "garden variety" emotional distress damages, which are those for which the plaintiff has not sought medical treatment. However, where a plaintiff has disclosed treatment by a either a physician or a mental health professional for emotional distress, consider (1) whether retention of an expert to review medical and treatment records is necessary and (2) whether an expert should potentially conduct an independent evaluation of the plaintiff. Be cautious in this area. Unless the plaintiff has introduced his or her own expert, a review by an independent physician may end up actually supporting plaintiff's emotional distress claims by confirming plaintiff suffers from depression or anxiety.

There are a few procedural differences between New York state court and federal practice as it relates to expert discovery and disclosure. Keep in mind the following points:

- **Expert depositions**
  - **New York.** In New York state practice, attorneys rarely depose experts. Under the CPLR, attorneys may only depose experts where the requesting party establishes the existence "special circumstances" necessitating a deposition. See CPLR § 3101(d)(1)(iii). This exception is rarely met.
  - **Federal.** By contrast, attorneys routinely conduct expert depositions in federal practice.
- **Expert reports**
  - **New York.** The CPLR does not require expert witnesses to produce written reports. Instead, the lone expert disclosure the CPLR contemplates is a document written by counsel identifying the expert, his or her qualifications, and summarizing "in reasonable detail … the substance of the facts and opinions on which [the] expert is expected to testify." See CPLR § 3101(d).
  - **Federal.** In federal court, an expert generally must produce a written report providing a thorough statement of his or her opinion and grounds for the opinion, including attaching any exhibits to summarize or support the opinion. Also, the expert must provide a list of all other cases in which they previously testified as an expert during the previous four years.
  - **Practical effect of the distinction.** The practical effect of this distinction is that it is generally much more difficult to impeach an expert witness in New York state court, as expert depositions are normally invaluable for purposes of impeachment.
    - One way to overcome the limiting effect that the CPLR has on your ability to impeach plaintiff's expert witness is to thoroughly research the opposing party's expert, including the subjects on which they are expected to testify. Your own expert should be able to provide guidance in this regard.
- ***Daubert* versus *Frye* Standards**
  - **New York and federal follow different standards.** The two courts systems also address novel scientific evidence using different standards. Federal courts follow the so-called *Daubert* test (see Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993)), while New York state courts follow the *Frye* standard (see Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).
  - ***Frye* standard.** The *Frye* standard is much more lenient, permitting testimony so long as the theory or principles employed have gained "general acceptance" in a particular field. For more information on the *Frye* standard, see 1 Scientific Evidence § 1.06—*Frye* Test.
  - ***Daubert* standard.** Meanwhile, the *Daubert* standard requires general acceptance and also requires the court to examine the theory more closely. For more information on the *Daubert* standard, see the section entitled "Daubert Motions" in Employment Discrimination Class and Collective Actions: Special Issues and Considerations.
  - **Consequence of New York state courts using the *Frye* standard.** There is generally less motion practice addressed to disqualifying expert witnesses in New York state practice because New York state courts follow the more lenient *Frye* standard.

For more information on responding to written discovery in New York state cases, see Document Requests: Responding to the Requests (NY) and Interrogatories: Responding to Interrogatories (NY).

E-discovery for New York Employers

E-discovery—or electronic discovery or ESI (electronically stored information)—is a large part of employment litigation. In practice, employers are most often on the receiving end of requests for ESI since they control the servers on which most ESI resides. Thus, at the outset of a litigation, you must identify the employees who may have relevant communications and ensure the employer preserves those email accounts in anticipation of discovery. Employers should instruct employees to preserve and not delete text messages and e-mails with or concerning the plaintiff (even those on their personal devices), recordings, photographs, and instant messages (Slack, etc.). Or, better yet, the employer should take affirmative steps to retrieve and save such information in the possession of its employees.

Discussing Discovery with the Employer

Employees often communicate exclusively via email or online messaging programs. When discussing discovery with an employer, defense counsel should inquire as to which employees have email, whether the employer monitors the emails, and whether the employer uses an internal instant messaging client such as Slack. Many employees still send emails assuming no one will ever read them. As such, the employer should preserve the plaintiff's work email account and search it immediately. For example, often times a plaintiff will have emailed a work colleague immediately following an altercation or negative interaction with another employee or superior. This information may be vital in showing that the employee's conduct, as opposed to his or her protected class under the NYSHRL or NYSHRL, was the motivation for the employer's adverse action against him or her. Additionally, defense counsel must ascertain what devices, if any, the employee used in the course of his or her employment as those devices may contain files or documents that are not found in the employer's email server.

Searching Plaintiff's Electronic Devices

Defense counsel should also press plaintiff's counsel to properly search plaintiff's electronic devices for relevant material. Plaintiffs often get away with producing screen shots of texts or images from their cell phones instead of making the device available for collection. Defense should weigh the cost and benefits of conducting proper electronic discovery of the plaintiff. If plaintiff produces emails from his or her personal email account, you should compel him or her to identify the search terms used so that you can potentially object to the production as inadequate.

New York Exceptions to Federal Court Procedures Concerning ESI

While New York state courts have trended towards following procedures used in federal court concerning ESI, there are a few notable differences worth highlighting.

- **"Meet and Confer"**
  - With the exception of cases litigated in the Supreme Court's Commercial Division, parties in New York state court are generally not obligated to "meet and confer" about ESI prior to the preliminary conference. However, a discussion is generally required at the preliminary conference where deemed appropriate by the court. Items that may be discussed include:
    - Preservation of ESI
    - "Identification" of relevant ESI
    - The scope of ESI in the action
    - The form of production (i.e., paper vs. electronic)
    - Anticipated costs and proposed allocation of same
    - Disclosure of the "programs and manner" in which the ESI is stored
    - Identification of systems holding relevant ESI –and–
    - Identification of the individuals responsible for ESI preservation
  - Counsel should review the rules of the particular state court justice assigned to the matter to determine the existence of any additional rules concerning e-discovery. For example, see the rules for each justice of the New York County Supreme Court here. This information is updated frequently.
- **Spoliation**
  - **Federal.** In federal practice, severe sanctions for spoliation of ESI, such as an adverse inference instruction to the jury, may only be levied where it is found that a party acted with "intent to deprive" its adversary of the lost ESI.
  - **New York.** However, in New York state practice, courts may impose severe sanctions, such as an adverse inference instruction or striking of a pleading, even where the evidence was lost or destroyed only as a matter of negligence.
    - As a result of the greater potential for severe sanctions for spoliation in state court practice, you should immediately ensure that the employer has

sound preservation procedures in place for ESI. This should include consideration of the employer's existing document retention policy and ensuring that no relevant documents at issue run beyond the retention period.

For detailed information on e-discovery in federal court in employment actions, see Electronic Discovery in Employment Litigation.

Resolving Discovery Disputes

In New York state practice, discovery disputes can be difficult to resolve. As many employment discrimination cases are litigated outside of the Supreme Court's Commercial Division, getting the attention of the court can be difficult. It is critical that you serve plaintiff's counsel with a deficiency, or "good faith," letter outlining defendant's objections to plaintiff's discovery.

Motion to Preclude or Strike

If the deficiencies relate to plaintiff altogether failing to respond to discovery, you should contemplate making a motion to preclude evidence. See CPLR § 3126(3). A motion under CPLR § 3126 may result in an order against the plaintiff, including preclusion of evidence in support of, or in opposition to, a claim or defense, or striking all or part of a pleading. While striking a pleading is a drastic remedy, state courts in New York will do so when the non-compliant party demonstrates a willful or disobedient pattern of behavior.

When filing a motion pursuant to CPLR § 3126, you must also provide an "affirmation of good faith." See N.Y. Comp. Codes R. & Regs. tit. 22, § 202.7. The affirmation of good faith should detail all efforts you made to obtain a response from the plaintiff employee. As such, it is important to contemporaneously document all efforts to obtain a response from the plaintiff. This includes any phone calls, emails, or good faith letters mailed to plaintiff's counsel. Failure to attach the affirmation of good faith to your motion to preclude or strike should result in denial of the motion as a procedural matter.

Motion to Compel

If the plaintiff has responded to your discovery demands but withheld certain information for improper reasons (e.g., improper objections), consider filing a motion to compel production of the information. See CPLR § 3124. Depending on what county the case is pending in, a motion to compel may simply be adjourned to the same date as the next compliance or status conference for the issue to be worked out with the court attorney.

It is relatively rare that judges actually rule on routine discovery motions. In some instances, at a discovery conference where the parties present a difficult issue, the court will direct the attorney to file a motion to compel by order to show cause. In other instances, the court will merely direct the disobedient party to serve responsive information by a date certain.

If this occurs, you should argue at the discovery conference for the court to include sanctions in the discovery conference order. For example, the plaintiff employee will commonly push for language to the effect that sanctions "may" be levied for failure to comply with the discovery order. Make all efforts to include mandatory language, using the word "shall," instead. The opposite, of course, is true where the employer is the party opposing the discovery motion.

Plaintiffs in employment discrimination cases often refuse to produce sufficient mitigation evidence (e.g., all applications for employment), authorizations for records from their current employers, and medical and psychological records. Plaintiff employees usually do not provide these types of information at all or plaintiffs fail to provide all the information in their possession. Employers often must file motions to compel to obtain this information.

For a sample motion to compel in New York, see Notice of Motion (Motion to Compel Discovery) (NY), Affirmation (Motion to Compel Discovery) (NY), and Memorandum of Law (Motion to Compel Discovery) (NY). See also Motion to Compel Discovery: Making and Opposing the Motion (NY).

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Prior to joining Lewis Brisbois, Andrew served as an Assistant Corporation Counsel in the Labor and Employment law division of the New York City Law Department. As an Assistant Corporation Counsel, Andrew defended the City of New York, its agencies, and employees in single-plaintiff and class action labor and employment matters in both federal and state court. He also represented municipal agencies in administrative proceedings, including the prosecution of employee disciplinary matters. Andrew received a Legal Rookie of the Year Award from the New York City Law Department at the end of his first year. The award is given annually to the office's top first-year attorneys.

Andrew graduated from the Mississippi College School of Law, magna cum laude, where he served as an Executive Editor of the Mississippi College Law Review. He was also a member of the school's Moot Court Board and participated in multiple moot court competitions, placing at each of them. Additionally, Andrew received the highest grade in seven courses while in law school, including Employment Law and Constitutional Law, and served as a Teaching Assistant for Professor Cecile Edwards' Business Associations course.

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