Discovery in Single-Plaintiff Employment Discrimination Cases (CA)

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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 California's Fair Employment and Housing Act (FEHA), Cal. Gov. Code § 12900 et seq. This note will focus on discovery procedures pursuant to California's Code of Civil Procedure.

Specifically, this note addresses the following topics:

- What Is the Permissible Scope of Discovery in FEHA Cases?
- Discovery Employers Should Seek from Plaintiff Employees
- Discovery Employers Should Seek from Nonparty Sources
- Responding to Written Discovery
- Resolving Discovery Disputes
- E-Discovery in California – Best Practices

For information on employment discrimination litigation generally, see the Employment Litigation – Discrimination, Harassment, and Retaliation practice notes page. For employment discrimination litigation forms, see the Employment Litigation – Discrimination, Harassment, and Retaliation forms page.

For more information on discovery in employment litigation, see Employment Litigation Discovery Resource Kit.

For more information about discovery generally under California law, see California Points & Authorities, Ch. 80–89.

For more information about the FEHA, see California Fair Employment and Housing Act (FEHA) and California Employment Law § 43.01.

What Is the Permissible Scope of Discovery in FEHA Cases?

Before requesting or responding to discovery, it is important to understand what the limits are for discovery in California. Cal. Code Civ. Proc. § 2017.010 sets forth the permissible scope of discovery. Any party may seek:

> [D]iscovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

Id.

Specifically, discovery can ask for non-privileged information relating to:

- Any claim
- Any defense
- Any party to the action
- The identity and location of persons having knowledge of any discoverable matter
- The existence, description, nature, custody, condition, and location of any document, electronically stored information (ESI), tangible thing, or land or other property

Id.

For cases brought under the FEHA, consider the elements of FEHA claims when formulating discovery requests or preparing a response. In summary, the FEHA prohibits discrimination and harassment in the workplace against employees or job applicants who are members of a protected class, as well as retaliation. Cal. Gov. Code § 12940.

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

- Race
- Religious creed
- Skin color
- National origin
- Ancestry
- Physical disability
- Mental disability
- Medical condition
- Genetic information
- Marital status
- Sex
- Gender, gender identity, or gender expression
- Age (40 and over)
- Sexual orientation
- Military or veteran status
- Pregnancy, childbirth, or related medical condition

Cal. Gov. Code § 12940(a); Cal. Gov. Code § 12926(o); Cal. Gov. Code § 12943; Cal. Gov. Code § 12945; 2 CCR § 11030.

Thus, in FEHA cases, the permissible scope of discovery encompasses any non-privileged matter relating to the alleged unlawful discrimination, harassment, or retaliation of the plaintiff. Discovery can also focus on an employer's defenses as well as the parties to the action themselves (subject to certain limitations discussed below).

You should review the FEHA (Cal. Gov. Code § 12900 et seq.) and the California Civil Jury Instructions relating to the FEHA (CACI Nos. 2500 et seq.) before drafting any discovery requests or responses to fully understand what is "relevant to the subject matter" of the lawsuit. Knowing specifically what a plaintiff must prove to win his or her case will help you limit the scope of discovery when defending your client against FEHA claims.

You should also be aware of your obligations to meet and confer with opposing counsel in person or by telephone to discuss a discovery schedule and resolve discovery disputes at least 30 days before the court's initial case management conference. See Cal. Rules of Court, Rule 3.724(1). The court usually sets a discovery schedule at the conference. See Cal. Rules of Court, Rule 3.722(a), 3.727(8), (9).

For more information about the FEHA, see California Fair Employment and Housing Act (FEHA) and California Employment Law § 43.01.

Discovery Employers Should Seek from Plaintiff Employees

When developing your discovery plan to defend your client in a FEHA claim, first gather all available information that your client has about the plaintiff employee, and then prepare your formal discovery requests. Identifying documents and information in the employer's control allows you to hone in on the gaps you need to fill via your discovery requests to the plaintiff.

For more information on requesting discovery from plaintiffs generally, see Discovery in Employment Discrimination Litigation: What Defendants Can Request and Obtain from Plaintiffs.

Preliminary Information to Seek from the Employer

The types of information that your client is likely to (or should) have include:

- The employee's personnel file, including any contract or agreement signed by the employee, performance reviews, performance improvement plans, attendance records, job descriptions, and disciplinary documents
- Wage and salary information including any bonus payments made to plaintiff

- Any commendations, honors, rewards, recognitions provided to the plaintiff
- Notes, emails, or other documents created by other employees, supervisors, colleagues, about the plaintiff
- Employee and/or company handbooks and any applicable policies
- Any work rules and/or collective bargaining agreement if the place of employment has a labor workforce –and–
- Information and documents regarding other employees who were similar to the plaintiff in terms of position, issues, and discipline

This initial information gathering should include whatever a third party might have that the client has control over, including information maintained by an outside human resources company with whom your client contracts or a payroll company that your client uses to issue wages. If your client has access to information held by a third party, then it is considered within your client's possession, custody, or control.

In addition to gathering information and documents within your client's files (or from third parties), conduct your own informal research through background checks, the internet, court listings and dockets, and other available sources of information. As the attorney, you should gather and direct this research so that it is covered and protected under the attorney work product doctrine. For more information on the attorney work product doctrine, see Attorney-Client Privilege and Work Product Protection in Workplace Investigations and Work Product Doctrine.

However, if you intend to introduce into evidence any publicly available information on the internet, such as a public profile on Facebook, make sure to have a paralegal—or someone other than the attorney—access and preserve/print this information since the person who conducted the research must authenticate it and may have to testify about it. Involving a paralegal prevents counsel from having to take the stand to authenticate that information.

Some records may also be obtained through a public records request under the California Public Records Act (Cal. Gov. Code § 6250 et seq.) or the Freedom of Information Act (FOIA) (5 U.S.C. § 552). For example, you may want to submit a public records request for any Department of Fair Employment and Housing (DFEH) records related to the claims or a FOIA request for military records related to the claims.

Key Categories of Information to Seek from Plaintiff

The discovery an employer requests in a single-plaintiff FEHA employment matter should include the following:

- **Background information.** Obtain background information about the plaintiff employee, including prior and subsequent employment records and history, tax returns, diaries, journals, logs, personal notes, and medical records (if the plaintiff claims emotional distress, physical disability, or other medical damages).
- **Identification of all claims.** Ask the plaintiff to identify all the claims and allegations asserted by the plaintiff, whether or not they are laid out in the complaint.
    - You want to try and flesh out every possible claim the plaintiff is making so you can prepare your defense and have a response.
- **Facts supporting each claim.** Request all facts that support each of the claims and allegations contained in the plaintiff's complaint.
- **Facts supporting damages.** Request all facts that support the damages that the plaintiff is seeking.
- **Identification of documents supporting claims.** Ask the plaintiff to identify any documents that might support his or her claims.
    - This includes written or electronic communications in the form of emails, texts, or letters/correspondence.
- **Identification of witnesses.** Ask the plaintiff to identify all witnesses to the supposed unlawful actions by your client as well as any individuals who have information to support the plaintiff's claims and damages.
    - Be sure to get contact information for these individuals so you can reach them if you need to gather additional information from them (see Discovery Employers Should Seek from Nonparty Sources).
- **Records from social media accounts.** Request records from social media accounts such as Facebook, Instagram, Snapchat, Twitter, Google+, YouTube, and LinkedIn.
    - Keep in mind, however, that due to the Stored Communications Act, 18 U.S.C. § 2701 et seq., you may not be able to subpoena these records directly from the social media company.
- **Information about other litigation or disputes involving plaintiff.** Seek information about any other litigation or disputes in which the plaintiff has been involved.

- Run a search on this type of information first; if you find information that is different from what plaintiff provides in written discovery, use the contradiction to impugn his or her credibility in deposition or at trial.

Information That Is Not Permissible to Request

Counsel should remember that it is impermissible to request the following information:

- Irrelevant or privileged information
- Information protected by the plaintiff's privacy rights
  - California courts have repeatedly held that merely because an individual files a lawsuit in which emotional distress is claimed, the plaintiff is not opened up to wholesale discovery of every aspect of their life, even if it might have some bearing on emotional distress (see, e.g., Britt v. Superior Court, 20 Cal. 3d 844 (1978)).
- Character evidence if it is used to prove the individual's conduct on a specific occasion (Cal. Evid. Code § 1101)
- Amount of unemployment insurance benefits (Crest Catering Co. v. Superior Court, 62 Cal. 2d 274 (1965))
  - You should still try and seek this information because not all plaintiffs' counsel will object to this.
- Communications with the Employment Development Department (Cal. Evid. Code § 1040) –and–
- In cases involving sexual harassment, battery, or other sexual misconduct, discovery related to sexual activity to prove that she (or he) consented to the sexual act (Cal. Evid. Code § 1106)

Definitions for Use in Written Discovery

To simplify the document demands, interrogatories, and requests for admissions, it is helpful to include defined terms or phrases. You can use the following key defined terms and phrases:

- "DOCUMENT" and "DOCUMENTS" shall mean and include (1) any "Writing," "Original," and "Duplicate" as those terms are defined by California Evidence Code Sections 250, 255, and 260, which have been produced in discovery in this proceeding by any person; and (2) any copies, reproductions, or summaries of all or any part of the foregoing and includes information stored in, or accessible through, computer or other information retrieval systems, whether or not in hard copy form, together with instructions and all other materials necessary to use or interpret such data compilations. If more than one copy of any DOCUMENT exists, and if as a result of handwritten additions and notations, or for any other reason, the copies are not identical, each nonidentical copy is a separate DOCUMENT and should be separately identified. Without limiting the foregoing, the terms DOCUMENT and DOCUMENTS include all originals (or copies if the original is unavailable), nonidentical copies, drafts, and revisions. DOCUMENTS mean both electronic and native versions of documents—including load files and metadata. This request is intended to include DOCUMENTS and things that YOU (1) own or possess in whole or in part; (2) have a right by contract, statute, or otherwise to use, inspect, examine, or copy on any terms; (3) have an understanding, express or implied, that YOU may use, inspect, examine, or copy on any terms; or (4) have, as a practical matter, been able to use, inspect, examine, or copy when YOU have sought to do so. Such DOCUMENTS shall include, without limitation, DOCUMENTS that are in the custody of YOUR attorney(s) or other agents.
- "EMPLOYER" shall mean and refer to [name of employer] and its agent, principals, and anyone else acting on its behalf.
- "COMMUNICATION" or "COMMUNICATIONS" as used herein shall mean and refer to any written, oral, or telephonic communication including the transmission or exchange of any kind of DOCUMENT or DOCUMENTS as those terms are previously defined, including, without limitation, face-to-face conversations, meetings, telephone conversations, voice mail messages, electronic mail, messages stored on the internet, inquiries, representations, discussions, negotiations, agreements, understandings, letters, notes, telegrams, interviews, or any other method of communication.
- "SOCIAL MEDIA ACCOUNTS" shall mean and refer to any and all social media accounts such as Facebook, Instagram, Snapchat, Twitter, Google+, YouTube, LinkedIn, or other online websites, applications and services used to participate in social networking, post information, updates, photographs, and status reports, and share ideas and personal messages.

As discussed below, the placement of these defined terms varies depending on whether the written discovery is a document demand, special interrogatory, or request for admission.

Document Demands in FEHA Cases

This section discusses technical requirements for making document demands in FEHA cases and provides sample document demands.

Document Demand Requirements

Cal. Code Civ. Proc. § 2031.010 et seq. provides the specific requirements for document demands. Some important requirements include the following:

- **Numbering.** The demands must be numbered consecutively. Cal. Code Civ. Proc. § 2031.030(a)(1).
- **Timing of document demands.** A defendant can send out document demands at any time, whereas a plaintiff must wait until 10 days after service of the summons. Cal. Code Civ. Proc. § 2031.020(a)–(b).
    - As the employer defendant, a good practice is to send out discovery immediately upon being served with the summons, as the plaintiff must then respond to your client's document demands before your client has to respond. This strategy provides the employer the advantage of better understanding the plaintiff's claims and factual basis for those claims before providing its own documents.
- **Response time.** The demand should specify the date due or use language that the responses are due "pursuant to the applicable statutory authority." The responses are due 30 days after the demands are personally served (if they are mail served, the response deadline is extended by five calendar days; if they are served by express mail, the response deadline is extended by two court days). Cal. Code Civ. Proc. §§ 1013, 2031.030(c)(2).
- **Location.** The demand has to identify where the documents need to be produced. Cal. Code Civ. Proc. § 2031.030(c)(3).
- **No limit.** Unlike special interrogatories and requests for admissions, there is no limit to the number of document demands that can be served.

Sample Document Demand Questions

The following are a sampling of key document demands to use in a FEHA action:

1. All DOCUMENTS that refer or relate to any allegation made in the Complaint.

2. All DOCUMENTS you received from EMPLOYER during your employment with EMPLOYER.

3. All DOCUMENTS that refer or relate to COMMUNICATIONS that you had with any former or current officer, employee, or agent of EMPLOYER regarding any of the matters referenced in the Complaint.

4. All DOCUMENTS that refer or relate to any and all meetings or other contacts you had with any management employees at EMPLOYER regarding any of the matters referenced in the Complaint.

5. All DOCUMENTS that refer or relate to any and all meetings or other contacts you had with Human Resources personnel at EMPLOYER regarding any of the matters referenced in the Complaint.

6. All DOCUMENTS that refer, relate to, or embody any statement by any person with knowledge of any of the facts upon which the Complaint is based.

7. All DOCUMENTS that refer, relate to, or embody any statement by any EMPLOYER supervisor or manager regarding any of the matters referenced in the Complaint.

8. All DOCUMENTS that refer or relate to, or embody all journals, diaries, day books, or calendars you maintained during the time that you were employed by EMPLOYER.

9. All DOCUMENTS that evidence, support, refer, or relate to any emotional injury you alleged you suffered as a result of EMPLOYER's alleged actions.

10. All DOCUMENTS that evidence, support, refer, or relate to any physical injury you allege you suffered as a result of EMPLOYER's alleged actions.

11. All DOCUMENTS that evidence, support, refer, or relate to any monetary damages you allege you sustained as a result of EMPLOYER's alleged actions.

12. All versions of your resume from the date you started employment with EMPLOYER to the present.

13. All job applications you have submitted since the termination of your employment with EMPLOYER.

14. All DOCUMENTS that evidence, support, refer, or relate to 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 EMPLOYER.

15. All DOCUMENTS that relate to the amount(s) and source(s) of all income received by you from any source.

16. All written statements, notes, and/or tape recordings of interviews you have obtained of EMPLOYER employees (current or former) or any other potential witnesses concerning any of the matters referenced in the Complaint.

17. Your tax returns since the date you started employment with EMPLOYER to the present.

18. All DOCUMENTS reflecting any postings by you to SOCIAL MEDIA ACCOUNTS from the date you started employment with EMPLOYER to the present related to the allegations made in the Complaint.

19. All complaints or other DOCUMENTS that you filed with or received from the Equal Employment Opportunity Commission or equivalent state agency, the federal or state Department of Labor, or any other government agency concerning the allegations made in the Complaint.

For a comprehensive list of non-jurisdictional document requests to a plaintiff in a federal single-plaintiff employment discrimination action, many of which can be adapted to a California action, see Document Requests (Defendant to Plaintiff) (Single-Plaintiff Discrimination Action).

Interrogatories in FEHA Cases

This section discusses technical requirements for interrogatories in FEHA cases and provides sample special and form interrogatories.

Interrogatory Requirements

Cal. Code Civ. Proc. § 2030.010 et seq. sets forth the various rules that govern interrogatories that can be served on the plaintiff. Some of the key points are as follows:

- **Subject matter of interrogatories.** Interrogatories can relate to:
  - Whether the other party is making a certain contention –or–
  - The facts, witnesses, and documents that support the contention (Cal. Code Civ. Proc. § 2030.010(b))
- **Opinions and legal theories.** Interrogatories are not objectionable because they seek:
  - An opinion or contention that relates to a fact or the application of the law to a fact –or–
  - Information or legal theories developed in anticipation of litigation or trial (Cal. Code Civ. Proc. § 2030.010(b))
- **Numbering.** The interrogatories must be numbered consecutively. Cal. Code Civ. Proc. § 2030.060(a).
- **Timing of interrogatories.** A defendant can send out interrogatories at any time, whereas a plaintiff must wait until 10 days after service of the summons. Cal. Code Civ. Proc. § 2030.020(a), (b).
  - As with document demands, consider sending out interrogatories immediately upon being served with the summons, as the plaintiff must then respond to your client's interrogatories before your client has to respond.
- **Response time.** The responses are due 30 days after the demands are personally served (if they are mail served, the response deadline is extended by five calendar days; if they are served by express mail, the response deadline is extended by two court days). Cal. Code Civ. Proc. §§ 1013, 2030.260(a).
- **Interrogatory limit.** There is a 35-interrogatory limit on special interrogatories (see the section "Sample Special Interrogatories," below). Cal. Code Civ. Proc. § 2030.030(a)(1).
- **Exception to interrogatory limit.** You can serve more than 35 special interrogatories if you serve a declaration at the same time that states that the additional interrogatories are warranted due to (1) the complexity or the quantity of the existing and potential issues in the case, (2) the financial burden on a party to conduct discovery by oral depositions, or (3) the expedience of using interrogatories for the responding party to provide responses. Cal. Code Civ. Proc. § 2030.040. See Cal. Code Civ. Proc. § 2030.050 for sample language to use in a declaration.
- **Each interrogatory needs to be complete.** Each interrogatory has to be complete in and of itself and cannot refer to other discovery requests or have an introduction or preface. Cal. Code Civ. Proc. § 2030.060(d).
  - Note that for purposes of definitions, you should define a term (e.g., "EMPLOYER") in the first interrogatory it is mentioned and indicate that the term will be used for subsequent interrogatories. See the example in the following section: "Sample Special Interrogatories." Defined terms must be in all capital letters. Cal. Code Civ. Proc. § 2030.060(e).
- **No subpart, compound, conjunctive, or disjunctive interrogatories.** The interrogatories cannot contain any subparts or be compound, conjunctive (i.e., contain a list using the word "and"), or disjunctive (i.e., contain a list using the word "or"). Cal. Code Civ. Proc. § 2030.060(f).
- **Interrogatories cannot be continuing.** An interrogatory cannot be continuing (e.g., stating, "If your answer to the previous interrogatory was yes, then state . . ."). Cal. Code Civ. Proc. § 2030.060(g).
- **Supplemental interrogatories are permitted.** Despite the number limitations on interrogatories, you can serve "supplemental interrogatories" two times before trial

is initially set and one time after the trial is initially set to ask the responding party to supplement any prior responses to previously served interrogatories. Cal. Code Civ. Proc. § 2030.070.

- The best practice is to send out supplemental interrogatories immediately prior to the close of discovery to make sure you have the most updated information.

When drafting interrogatories, consider holding back certain questions until the plaintiff's deposition. The element of surprise in this maneuver may work to your advantage: you may catch the plaintiff off guard and cause him or her either to offer up an admission or lie on the record. Also, because the interrogatory responses are drafted by the plaintiff's lawyer, the answers you receive will be filtered through the lawyer and less spontaneous than if the actual plaintiff were answering in a deposition. Finally, if you give away too much during written discovery, you risk showing your hand on your defense strategy.

Sample Special Interrogatories

In California, parties can serve either special interrogatories, form interrogatories, or a combination of the two. This section discusses special interrogatories, which are custom interrogatories drafted by a party. Form interrogatories are discussed in the following section. Because of the number and formatting limitations that exist with special interrogatories, it is important to be thoughtful about what questions you ask. Some suggested special interrogatories for a FEHA case include the following:

1. Describe with particularity each instance of EMPLOYER's alleged [discrimination/harassment/retaliation]. (For purposes of these special interrogatories, the term EMPLOYER shall mean and refer to [name of employer] and its agent, principals, and anyone else acting on its behalf.)

2. Identify any individual by full name who allegedly [discriminated against / retaliated against / harassed] you.

3. State the name of any person who witnessed each instance of EMPLOYER's alleged [discrimination/harassment/retaliation] (but see the discussion in the following section regarding requests for admissions and form interrogatory number 17.1).

4. If you are aware of any other individuals who EMPLOYER allegedly [discriminated against / retaliated against / harassed], identify them by name.

5. Identify all employment you have had since your employment with EMPLOYER ended.

6. If you are currently unemployed, describe with particularity all efforts you have made to find new employment.

7. If you are currently employed, state with particularity the amount of annual gross compensation you receive from your current employer.

8. If you are currently employed, state with particularity the total amount of gross compensation you have received in total from your current employer to the present.

9. If you are currently employed, state with particularity the amount of annual benefits you receive from your current employer.

10. Identify any lawsuits that you have been involved in either as a plaintiff or a defendant.

For a comprehensive list of non-jurisdictional interrogatories to a plaintiff in a single-plaintiff employment discrimination action, many of which can be adapted to a California action, see Interrogatories (Defendant to Plaintiff) (Single-Plaintiff Employment Discrimination Action).

Suggested Form Interrogatories

As mentioned above, in addition to special interrogatories, a party in California can also serve form interrogatories, which do not count against the 35 interrogatory limit. Cal. Code Civ. Proc. § 2030.030(a)(2). Form interrogatories are worth serving because they can help you obtain helpful background information for your case and, since the form is approved by the Judicial Council of California, plaintiff's counsel will have a difficult time avoiding responding to a question on the grounds that it is vague or ambiguous.

Form Interrogatories – General

Use this form, which applies generally to civil cases, in single-plaintiff FEHA matters. The form contains requests for general background information (e.g., a plaintiff's name, date of birth, addresses, employment, and education), insurance, injuries (physical, emotional, and mental), loss of income or earning capacity, other damages, medical history, other claims or previous claims, investigation and surveillance efforts, and any contract claims. All you need to do is go through the form and check off the interrogatories that are relevant. For defendants in a single-plaintiff FEHA case, we recommend selecting all of the form interrogatories in each of the following sections: 1.0, 2.0, 4.0, 6.0, 8.0, 9.0, 10.0, 11.0, 12.0, 13.0, 14.0, 17.0 (see below for further specifics on interrogatory 17.1), and 50.0 (if the plaintiff is claiming that your client also breached an employment agreement in some way).

Make sure to define INCIDENT under Sec. 4 "Definitions" by either checking the pretyped definition or inserting your own definition based on the claims in the action. For a single-plaintiff FEHA lawsuit, checking off the provided definition for "INCIDENT" will normally suffice.

Form Interrogatory 17.1. Form interrogatory 17.1, which relates to any concurrently served requests for admissions, is an essential tool when used correctly. Form interrogatory 17.1 requires opposing parties to either concede that each of their responses to a request for admission is an unqualified admission or provide detailed information and documents about each response. Specifically, for all qualified admissions, the plaintiff must identify (1) all facts that support any response to a request for admission, (2) all people with knowledge of those facts, and (3) all documents that support any response to a request for admission. So, instead of using up three special interrogatories to ask for these three categories of information, you can use the requests for admissions and form interrogatories to avoid having to issue impermissible compound special interrogatories or coming up against the limit on the number of special interrogatories.

An example of how this can work in a FEHA case is as follows:

- Serve a request for admission (see below for other sample requests for admissions) that states: "Admit that EMPLOYER did not [discriminate against / harass / retaliate against] you."
- Serve form interrogatory with number 17.1 checked off at the same time.

Form Interrogatories – Employment Law

In addition to the general form interrogatories, you should also consider serving form employment law interrogatories.

Depending on the claims at issue, recommended form interrogatories to check off include 200.1, 200.2, 200.3, 200.6, 202.1, 202.2, 203.1, 204.1–204.6, 205.1, 207.2, 208.1, 209.1, 209.2, 210.1 through 210.6, 212.1–212.7 (though check to see if these are the same as the general form interrogatories), 213.1, 213.2, 215.1 215.2, and 217.1 (which is the same a general form interrogatory 17.1, so pick one that you are going to ask and do not do both).

Requests for Admission in FEHA Cases

This section discusses technical requirements for requests for admission in FEHA cases and provides sample requests for admission.

Requests for Admission Requirements

Cal. Code Civ. Proc. § 2033.010 et seq. addresses the requirements for requests for admission. Use requests for admission to obtain an opposing party's admission to the truth of some fact, opinion relating to a fact, or the application of law to fact. You can also obtain admissions to the genuineness to a specific document. Cal. Code Civ. Proc. § 2033.010. Requests for admission are a powerful tool, not least because if a plaintiff fails to respond to them, the request is deemed admitted.

Keep in mind these rules when preparing requests for admission:

- **Timing of requests for admission.** Similar to interrogatories, a defendant can serve requests for admission at any time, whereas a plaintiff has to wait until 10 days after service of the summons. Cal. Code Civ. Proc. § 2033.020(a), (b).
- **Limit on requests for admission.** A party is limited to serving 35 requests for admission relating to the truth of fact, opinion relating to a fact, or application of law to fact. Cal. Code Civ. Proc. § 2033.030(a).
- **Exception to the limit on requests for admission.** Similar to special interrogatories, you can serve more than 35 requests for admission if you provide a supporting declaration. Cal. Code Civ. Proc. §§ 2033.040 and 2033.050.
- **No limit on requests for admission for genuineness of documents.** There is no limit to requests for admission relating to the genuineness of documents unless they are causing unwarranted annoyance, embarrassment, oppression, undue burden, or expense. Cal. Code Civ. Proc. § 2033.030(c). The documents referenced must be attached to the requests for admission. Cal. Code Civ. Proc. § 2033.060(g). See the sample requests below.
- **Numbering.** The requests for admission must be numbered consecutively. Cal. Code Civ. Proc. § 2033.060(a).
- **Each request for admission needs to be complete.** Each request for admission has to be complete in and of itself and cannot refer to other discovery requests or have an introduction or preface. Cal. Code Civ. Proc. § 2033.060(d).
    - Note that for purposes of definitions, similar to special interrogatories, you should define a term (e.g., "EMPLOYER") in the first request it is mentioned and indicate that the term will be used for subsequent request. See the example in the following section: Sample Requests for Admissions. Defined terms

must be in all capital letters. Cal. Code Civ. Proc. § 2033.060(e).

- **No subparts, compounds, conjunctives, or disjunctives in requests for admission.** Requests for admission cannot have any subparts or be compound, conjunctive (i.e., contain a list using the word "and"), or disjunctive (i.e., contain a list using the word "or"). Cal. Code Civ. Proc. § 2033.060(f).

A responding party is required to either admit as much of the request that is true, deny as much is untrue, or specify what the responding party lacks sufficient information or knowledge about to respond to. Cal. Code Civ. Proc. § 2033.220(b).

Sample Requests for Admissions

Sample requests for admissions that can be served with a set of form interrogatories (at the same time) include:

1. Admit that you have no facts to support your allegations in the Complaint.

2. Admit that EMPLOYER did not discriminate against / retaliate against / harass you. (For purposes of these requests for admissions, the term "EMPLOYER" shall mean and refer to [name of employer] and its agent, principals, and anyone else acting on its behalf.)

3. Admit that you have no DOCUMENTS to support your allegations in the Complaint. (For purposes of these requests for admissions, the term "DOCUMENTS" shall mean and refer to [definition].)

4. Admit the document, a copy of which attached hereto as Exhibit [number] and incorporated herein, is genuine.

    a) Use this request if you have documents that you want to authenticate (e.g., some correspondence from the employee or other document).

For sample, non-jurisdictional requests for admission to a plaintiff in a federal action, see Requests for Admission (Defendant to Plaintiff) (Federal).

Depositions of Plaintiff Employees in FEHA Cases

Cal. Code Civ. Proc. § 2025.010 et seq. lays out the requirements governing depositions in California. Taking a plaintiff employee's deposition is a critical part of the discovery process in a FEHA action. The plaintiff's deposition is your one chance to question the individual before trial, so make the most of this opportunity.

For more information on how to effectively take an employee deposition, see Deposing Plaintiffs in Employment Litigation and Deposing Plaintiffs in Employment Litigation Checklist.

When to Send the Deposition Notice

As the defendant, you may serve a deposition notice at any time. Cal. Code Civ. Proc. § 2025.290(a). The plaintiff must wait until 20 days after service of the summons to notice depositions, unless the court approves an earlier date. Cal. Code Civ. Proc. § 2025.290(b). Normally, it is best to notice the deposition for a date after you've received and reviewed all documents and information from the employer, any nonparties, and the plaintiff employee. This will allow you to ask the plaintiff about critical evidence you've received during the discovery process.

Elements of the Deposition Notice

Key elements of the deposition notice include the following:

- **Send written notice to other side.** You must send a written notice to the opposing party (and any other parties in the lawsuit) stating the deposition location and the deposition date. Cal. Code Civ. Proc. § 2025.220(a)(1), (2).
- **Location of deposition.** Unless the court orders otherwise, the location of the deposition must be either (1) within 75 miles of the deponent's residence or (2) within 150 miles of the deponent's residence and in the county where the action is pending. Cal. Code Civ. Proc. § 2025.250.
- **Date of deposition.** The deposition date must be at least 10 days after service of the notice. Cal. Code Civ. Proc. § 2025.270(a).
- **Recording of deposition.** If you plan on recording the deposition by video or audio, you must specify that in the notice. See Sample Language for a Deposition Notice below. Cal. Code Civ. Proc. § 2025.220(a)(5).
- **Requesting documents.** If you want the deponent to produce documents at the deposition, you must describe them "with reasonable particularity." Cal. Code Civ. Proc. § 2025.220(a)(4). Broad and vague requests for documents do not suffice. Include these document requests as an attachment to the deposition notice.
- **Timing to request documents.** If you request documents with the deposition notice, you must give 10 days' notice. Cal. Code Civ. Proc. § 2025.270.

For additional procedures to follow regarding noticing depositions, refer to Cal. Code Civ. Proc. §§ 2025.210–2025.290.

Sample Language for a Deposition Notice

Consider using this sample language for a notice of deposition:

> PLEASE TAKE NOTICE that pursuant to Cal. Code Civ. Proc. § 2025.010 et seq., defendant [employer name] through its attorneys of record, will take the deposition of plaintiff [employee name]. The deposition will now be taken at [location], commencing at [time] on [date]. The deposition will be taken upon oral examination before a certified shorthand reporter or a notary public, or other officer authorized by law to administer oaths, and shall continue from day to day (excluding Saturdays, Sundays, and holidays), or by agreement of counsel, until completed.
>
> PLEASE TAKE FURTHER NOTICE that defendant may record the deposition testimony by videotape and may use instant visual display of testimony (e.g., RealTime and/or LiveNote, in addition to recording the testimony stenographically). Defendant reserves the right to introduce the deposition testimony, including any video recording of the deposition testimony, as evidence at trial pursuant to Cal. Code Civ. Proc. § 2025.620.

For a sample California deposition notice, see LexisNexis(R) Forms FORM 1290-6.62.

Taking the Deposition

While depositions taken in general civil lawsuits in California have a seven-hour time limit, depositions in cases brought by an employee or job applicant against an employer for "acts or omissions arising out of or relating to the employment relationship" are not subject to the seven-hour limit. Cal. Code Civ. Proc. § 2025.290(b)(4).

When questioning a plaintiff employee, you should try to obtain the following:

- A list of all the alleged unlawful acts by your client
    - Walk through the allegations in the complaint and ask whether the plaintiff saw the document before it was filed and whether it is true, and confirm that it lists everything he or she is claiming.
- Whether the plaintiff ever complained about the alleged unlawful acts, and if so, when, and to whom
- Every fact the plaintiff is aware of about each of the alleged unlawful acts
- A list of all the individuals who allegedly committed these acts
- The time frame when each act occurred
- A list of other witnesses to these acts
- Whether there are other employees who experienced these acts and who they are
- Whether there are other employees who were treated better than the plaintiff
- Whether there are documents to support the allegations
- Who at the company made unlawful decisions or allegedly acted improperly
- Admissions that the employer investigated and remedied any issues the plaintiff raised
- Admissions that the plaintiff had performance problems at work, was spoken to about them, and received discipline or poor performance evaluations
- The basis of plaintiff employee's belief that the employer's legitimate reasons for its adverse action were pretextual
- What specific damages the plaintiff is claiming (often he or she will have no idea what amount they are seeking)
- What supposed economic or emotional injuries the plaintiff suffered
- What treatment the plaintiff received for his or her injuries
- Other sources for any alleged medical, emotional, or mental distress or injury (e.g., relationship, family, or health issues)
- What plaintiff did to mitigate his or her injuries (e.g., seeking other jobs)
- Confirmation that documents are genuine and authenticated
- Clarification on any questions or uncertainties in the documents you have
- Answers to any follow up questions to written discovery
- Whether the plaintiff gave all the documents he or she has to counsel and whether there are any other documents to be produced or obtained from nonparties
- The location of any outstanding documents

For sample, non-jurisdictional deposition questions in a discrimination, harassment, or retaliation lawsuit, see Deposition Questions (Defendant to Plaintiff) (Discrimination, Harassment, or Retaliation).

Physical Examination of Plaintiff

Under Cal. Code Civ. Proc. § 2032.220(a), if the plaintiff's physical, mental, or emotional condition is at issue in the lawsuit and plaintiff is seeking damages from some alleged injury, you can demand a physical examination of the

plaintiff provided that it will not be painful, protracted, or intrusive, and is conducted within 75 miles of the plaintiff's residence.

If granted, provide the examining doctor with all of the necessary information and documents to help the doctor prepare for the examination. You must give at least 30 days' notice before the physical examination. Cal. Code Civ. Proc. § 2032.220(d). Remember that anything you give to this doctor will be discoverable, so stick to providing the documents that you wouldn't mind sharing with the other side; avoid providing the doctor with any legal memos or analysis.

For a sample California notice of physical examination, see LexisNexis(R) Forms FORM 1290-11.56.

Key Differences from Federal Practice regarding Depositions

As discussed above, in California, a party may serve a notice of deposition that includes requests for the production of documents at the deposition on 10 days' notice. See Cal. Code Civ. Proc. §§ 2025.220(a)(4), 2025.270(a), 2025.280. Thus, even though the responding party normally has 30 days to respond to a document demand, a party served with a notice of deposition containing a request for documents would be required to produce the documents at a deposition that was noticed just 10 days prior.

The Federal Rules of Civil Procedure (FRCP), however, treat a request for the production of documents that accompanies a notice of deposition as a separate discovery request under Rule 34 as opposed to Rule 30, which governs depositions in federal cases. Because a party responding to a document request served under Rule 34 has a minimum of 30 days to respond and produce documents, a party in a federal court case must notice the deposition for a date at least 30 days after service of the document requests to ensure receipt of the documents before the deposition occurs—a full 20 days later than in California state court. See Fed. R. Civ. P. 34(b)(2).

Another difference between the federal and California state court rules is that requests for production of documents at depositions served under FRCP Rule 34 are limited to a single party (e.g., an employer) and not its affiliates (e.g., the employer's employees). Thus, a plaintiff seeking documents from an employer's employee at a deposition in a federal case would either need to serve a Rule 45 subpoena on the employee or affiliate or get an agreement with opposing counsel to obtain discovery from the affiliated party. In state court, however, a notice of deposition served with a request for production of documents on a party's employee or party-affiliate suffices to compel production of the documents at the deposition. See Cal. Civ. Proc. Code §§ 2025.220(a)(4), 2025.280(a).

Discovery Employers Should Seek from Nonparty Sources

In addition to discovery that you can serve on the plaintiff employee, you may also seek discovery from nonparty sources.

Nonparties who might have relevant information include:

- Witnesses to the alleged discrimination, harassment, or retaliation
- Other employers of the plaintiff (former and/or subsequent)
- Medical professional or counselors
- Governmental agencies

While you may reach out to a nonparty informally to request information about the plaintiff, most nonparties are not willing to volunteer documents or information. To obtain information from uncooperative nonparties, you must serve them with a subpoena to request records from them, depose them, or both.

For governmental records, you should send a letter pursuant to the California Public Records Act or Freedom of Information Act to request specific documents.

Subpoena Requirements

A deposition subpoena is generally the only procedure authorized by the Civil Discovery Act to obtain discovery from a nonparty. Cal. Code Civ. Proc. § 2020.010(b). An exception applies if the nonparty is an officer, director, managing agent, or employee of the deponent, in which case a regular deposition notice suffices. Id.; Cal. Code Civ. Proc. § 2025.280(a). A subpoena can be used to secure attendance of a witness and/or production of documents. Cal. Code Civ. Proc. § 1985(a).

The California Judicial Branch provides the following form subpoenas for practitioners to use depending on the type of discovery sought:

- SUBP-010– Deposition subpoena for business records from custodian
- SUBP-015– Deposition subpoena for personal appearance

- SUBP-020– Deposition subpoena for personal appearance and production
- SUBP-025– Notice to Consumer or Employee

Keep in mind these rules regarding timing of service when preparing subpoenas:

- **Deposition subpoena to attend.** You must serve a deposition subpoena for personal appearance with a reasonable amount of time built in to arrange for travel; at least 10 days should be reasonable. See Cal. Code Civ. Proc. § 2020.220(a).
- **Business records.** When issuing a deposition subpoena for business records, set a date for production for business records that is at least 15 days after personal service or 20 days after issuing the subpoena (whichever is later). Cal. Code Civ. Proc. § 2020.410(c).
- **Personal records.** When seeking personal records, you must provide the witness with reasonable time to locate and produce records. Cal. Code Civ. Proc. §§ 1985.3(d), 1985.6(d).
    - You should serve a deposition subpoena to attend and produce records at least 20 days before the production date.
    - You should serve a deposition subpoena to produce records only at least 15 days prior to the date of production.
- **Notice to consumer or employee.** You must serve the consumer or employee with a Notice to Consumer or Employee at least five days before serving a witness with a subpoena that seeks the consumer or employee's records and at least 10 days before the date for the witness to produce the records. Cal. Code Civ. Proc. §§ 1985.3(b), 1985.6(b).

For more information on using deposition subpoenas, see California Forms of Pleading and Practice—Annotated §§ 193.226–193.228, 535.69.

Subpoena to Witness for Records

Form subpoenas provide an opportunity to attach specific requests for records. Sample subpoena requests for records to a nonparty witness include the following:

1. All documents, including emails, relating to communications between you and the EMPLOYEE regarding EMPLOYER

2. All documents that reflect, refer, or relate to EMPLOYEE regarding EMPLOYER

Subpoena to Other Employer for Records

Sample subpoena requests to the plaintiff's former or new employer include the following:

1. Any and all documents, records or writings that refer, reflect, or relate to the employment of [employee name], DOB [date of birth] (EMPLOYEE), including but not limited to:

    a. All offer letters, employment agreements or contracts

    b. Job titles

    c. Job descriptions

    d. Dates of work

    e. All agreements related to compensation of any kind including base salary, bonuses, or equity

    f. Performance reviews, evaluations, or reprimands (including performance improvement plans) –and–

    g. Reasons for separation

2. Any and all documents, including emails, relating to communications between EMPLOYEE and any individual at COMPANY (COMPANY shall mean and refer to [name of company] and its agent, principals, and anyone else acting on its behalf.)

3. All payroll records for EMPLOYEE from [his or her start date] to [present / his or her separation from COMPANY], including but not limited to W-2 forms, 1099 forms, payroll records, wage statements, and payment history

4. All records that reflect, refer, or relate to benefits offered by COMPANY to EMPLOYEE, including but not limited to medical insurance, life insurance, and long- and short-term disability

5. All documents that reflect, refer, or relate to retirement benefit programs offered to EMPLOYEE by COMPANY including but not limited to 401k plans

Note that Requests Nos. 3–5 are likely only relevant to new employers after the plaintiff's termination since they are relevant to the plaintiff's mitigation of his or her economic damages from loss of employment.

Deposing Nonparties

Depositions of nonparties in FEHA cases are useful where the nonparty has non-document-based information about

either the plaintiff or the conditions at the workplace. This is your chance to understand what these individuals know and may testify to at trial, so be sure that you fully explore every issue they know about and any events they witnessed. Possible nonparty witnesses to depose in FEHA cases include:

- **Former employees.** Consider deposing a former employee who witnessed the alleged discrimination, harassment, or retaliation about what knowledge he or she has and what events they witnessed. Confirm what the relationship is between the nonparty and the employee; if there is a close relationship between the two, consider that a nonparty witness may be biased in the plaintiff's favor.
- **Other employers.** Depositions of the plaintiff's other employers can also be helpful, though most are likely to be tight-lipped about any performance issues the employee has/had to avoid precipitating defamation claims and damaging the relationship with the employee.
- **Medical professionals or counselors.** These individuals may have insight about emotional distress claims asserted by the plaintiff.
- **Current or former managers.** You may also want to take the deposition of current or former managers to elicit testimony (only if it is helpful) to dispute the plaintiffs' claims. They may have information about the plaintiff's poor performance or mistreatment of others.

For more information on deposing nonparty witnesses generally, see Federal Litigation Guide § 16.06.

California Public Records Act

While you are not required to submit a request in writing to obtain records under the California Public Records Act, setting your request out in a letter may help you to get the public records you desire. The letter should be addressed to the public records officer of the agency and should include the following information, as appropriate:

- Your identifying information and where to send the documents
- A clear description of the records that you are seeking (including dates)
- A statement that if portions of the records are exempted, the nonexempt portions of relevant records should still be provided
- Limitations on pre-authorized costs or a request for a cost waiver, together with your reasons for requesting a waiver

Consider using the sample language below when making a California Public Records Act request.

> By this letter and pursuant to the California Public Records Act (PRA) (Cal. Gov. Code § 6250 et seq.), I am formally requesting that the Department of Fair Employment and Housing (DFEH) provide me with copies of the following public records:
>
> 1. The DFEH file for DFEH Case No.: [case number], including, but not limited to, pre-complaint inquiries, complaints, case notes, correspondence and decisions.
>
> 2. All documents given to or received from the DFEH and/or constituting, discussing or otherwise pertaining in any way to correspondence, or other written or oral communication between plaintiff and the DFEH, that in either case relate or pertain in any manner to DFEH Case No.: [case number].
>
> 3. Any and all investigative notes, interview notes, or findings by the DFEH relating to plaintiff, DFEH Case No: [case number].
>
> 4. Any and all documents utilized and/or relied upon by DFEH relating to plaintiff, DFEH Case No: [case number].
>
> 5. Any Notice of Case Closure and Right to Sue for DFEH Case No: [case number].

For a sample FOIA request to the EEOC, see FOIA Request Letter (EEOC).

Responding to Written Discovery

Plaintiff employees serve written discovery on employers most often in the form or document demands, interrogatories, and deposition notices. In general, the universe of documents and information that an employer defendant should have to produce in a FEHA case is fairly limited. The employer should aim to produce the plaintiff employee's personnel file and payroll records, any employment agreements or contracts applicable to the plaintiff's employment, and policies/manuals/handbooks that would have applied to the employee. Failure to produce these items in response to discovery requests may lead to discovery motions and sanctions.

You may also have to produce information regarding the employee's supervisors, managers, or agents who

allegedly committed the unlawful acts. Under the FEHA, an employer can be held strictly liable for harassment by these individuals. See Cal. Gov. Code § 12940(j)(1).

In responding to written discovery, consider:

- Whether you have the information requested
- Whether there are any privilege or confidentiality issues in producing the information
- Whether the information requested is relevant to the claims in the lawsuit –and–
- Whether there are privacy issues to consider (e.g., do the responsive documents reveal private information about another individual)

Your options in responding to discovery are:

- Respond and produce the information with or without asserting objections
- Serve only objections –or–
- File a motion for a protective order (see Resolving Discovery Disputes)

Discovery disputes and motions can be very costly, so think hard about whether a fight is worth it.

Discovery Response Requirements

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

- Parties must answer or object to written discovery within 30 days of service. Cal. Code Civ. Proc. §§ 2030.260 (interrogatories), 2033.250 (requests for admission), 2031.260 (document demands).
- The responses must be in writing, identifying the parties, the nature of the document and set number, and separately stating each answer or objection. Cal. Code Civ. Proc. §§ 2030.210 (interrogatories), 2033.210 (requests for admission), 2031.210 (document demands).
- Interrogatories, requests for admission and demands to produce require verifications. Cal. Code Civ. Proc. §§ 2030.250 (interrogatories), 2033.240 (requests for admission), 2031.250 (demands to produce). However, if the response contains objections only, no verification is required. Cal. Code Civ. Proc. §§ 2030.250 (interrogatories), 2033.240 (requests for admission), 2031.250 (document demands).

Discovery Objections

A defendant employer should always assert relevant objections in its written responses to the plaintiff's discovery requests, as failure to do so may waive unasserted objections.

Nevertheless, only include objections that actually apply to the request at issue. Otherwise, you risk a complaint from the plaintiff that the objection is boilerplate and improper and should be struck. If a plaintiff's attorney is aggressive enough, he or she may even move to compel a written response that removes a boilerplate objection. If you lose such a motion, or otherwise abuse the discovery process, not only will you owe attorneys' fees and costs to the plaintiff, you also injure your reputation with the court. See Cal. Code Civ. Proc. §§ 2023.010–2023.040.

Finally, always serve your discovery responses within the deadline to avoid waiving your objections. Even if you do not have all the documents or information required to provide substantive responses, still serve the objections to avoid any waiver.

Sample Objections Applicable to All Types of Discovery

The following is a list of objections to consider using in response to any type of discovery request (the bold lead-ins should not be included with the actual objections):

- **Attorney-client privilege and/or work product doctrine.** Responding party objects to the [demand/interrogatory/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.
    - **Privilege log.** A privilege log identifies documents and other materials withheld from discovery because they contain information that is protected under the attorney-client privilege, the work product doctrine, or another recognized privilege. Under Cal. Code Civ. Proc. § 2031.240(c)(1), a party withholding or redacting documents based on privilege must:

        — Timely and expressly make the privilege claim (Cal. Code Civ. Proc. § 2031.300(a)) –and–

        — Provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log (Cal. Code Civ. Proc. § 2031.240(c)(1)).
- **Duplicative.** Responding party objects to the [demand/interrogatory/request] on the grounds that it has, in substance, been previously propounded (see [Demand/Interrogatory/Request] No. [number]) and is therefore burdensome and harassing.
- **Lack possession.** Responding party objects to this [demand/interrogatory/request] to the extent it seeks information or documents not within responding party's possession, custody, or control.

- **In plaintiff's possession.** Responding party objects to this [demand/interrogatory/request] on the grounds that it is burdensome and harassing as it seeks information or documents that are equally available to or already in the possession, custody, or control of the propounding party.
- **Irrelevant.** Responding party objects to this [demand/interrogatory/request] to the extent it seeks information or documents that are irrelevant to the subject matter of this litigation and are not reasonably calculated to lead to the discovery of admissible evidence.
- **Vague and ambiguous.** Responding party objects to this [demand/interrogatory/request] on grounds that it is vague and ambiguous including, but not limited to, the terms or phrases, "[ambiguous term or phrase]," thereby preventing this responding party from providing an intelligible response.
- **Overbroad in time and scope.** Responding party objects to the [demand/interrogatory/request] on the grounds that it is overbroad as to time and without reasonable limitations in its scope, and therefore seeks information irrelevant to the subject matter of this litigation and is burdensome and oppressive.
- **Confidential business information.** Responding party objects to this [demand/interrogatory/request] to the extent that it seeks information or documents concerning or containing trade secret, propriety, or other confidential business information.
- **Private personal information.** Responding party objects to the [demand/interrogatory/request] to the extent that it seeks information regarding the addresses and/or telephone numbers of individuals, which constitutes personal and private information not subject to discovery in this matter.
- **Tax information.** Responding party objects to the [demand/interrogatory/request] on the grounds that it seeks privileged tax information that is protected from disclosure. Brown v. Superior Court, 71 Cal. App. 3d 141 (1977).
- **Financial information.** Responding party objects to the [demand/interrogatory/request] on the grounds that it improperly and prematurely seeks to discover the financial condition of the defendant or the profits that the defendant has gained by conduct without having first obtained a court order permitting such discovery and/or without establishing liability for punitive damages.
- **Calls for expert opinion.** Responding party objects to the [demand/interrogatory/request] on the grounds that it violates Cal. Code Civ. Proc. § 2034.210 et seq. as it calls for an expert opinion and analysis that is not required to be disclosed at this point in the litigation.

Sample Objections Applicable to Documents Demands

The following is a list of objections to consider using specifically in response to document demands:

- **Lack of specificity.** Responding party objects to the demand on the grounds that it fails to comply with the requirement of Cal. Code Civ. Proc. § 2031.030(c)(1) in that the request fails to describe the documents or things sought by "specifically describing each individual item or by reasonably particularity each category of item."
- **Inaccessible data.** Responding party objects to the request on the grounds that the data sought is inaccessible, and therefore requires undue burden or expense.
    - If you serve this objection and the requesting party files a motion to compel, the burden to prove inaccessibility remains with the responding party. See Cal. Code Civ. Proc. § 2031.310(d).

For sample objections to document requests in a federal single-plaintiff discrimination lawsuit, see Objections to Document Requests (Defendant to Plaintiff) (Single-Plaintiff Discrimination Case).

Sample Objections Applicable to Interrogatories

The following is a list of objections to consider using specifically in response to interrogatories:

- **Contains preface.** Responding party objects to the entire set of special interrogatories propounded by the plaintiff on the grounds that it contains a preface of definitions or instruction in violation of Cal. Code Civ. Proc. § 2030.060(d).
- **Calls for burdensome summary.** Responding party objects to this interrogatory on the grounds that an answer to this interrogatory would necessitate the preparation or making of a compilation, abstract, audit, or summary of or from the documents of responding party and the burden or expense of preparing or making it would be substantially the same for the propounding party as for responding party. Cal. Code Civ. Proc. § 2030.230. A response to this interrogatory can be derived or ascertained from the following documents, which will be made available for propounding party's inspection and review at a mutually convenient date, place, and time.
- **Second request.** Responding party objects to this interrogatory on the grounds that it is improper for a

party to propound a discovery request a second time to avoid the consequences of delay in bringing a motion to compel further answers to interrogatories that were previously propounded. Professional Career Colleges, Magna Institute, Inc. v. Superior Court, 207 Cal. App. 3d 490, 494 (1989).

- **Incomplete.** Responding party objects to this interrogatory on the grounds that it is not full and complete in and of itself, in direct violation of Cal. Code Civ. Proc. § 2030.060(d).
- **Continuing request.** Responding party objects to this interrogatory on the grounds that it constitutes a continuing one, in direct violation of Cal. Code Civ. Proc. § 2030.060(g). See, e.g., Catanese v. Superior Court, 46 Cal. App. 4th 1159, 1164 (1996) (abrogated on other grounds).
- **Subparts.** Responding party objects to this interrogatory on the grounds that it contains subparts or is [compound / conjunctive (and) / disjunctive (or)], in direct violation of Cal. Code Civ. Proc. § 2030.060(f).

For sample objections to interrogatories in a federal single-plaintiff discrimination lawsuit, see Objections to Interrogatories (Defendant to Plaintiff) (Single-Plaintiff Discrimination Case).

Sample Objections Applicable to Requests for Admission

The following is a list of objections to consider using specifically in response to requests for admission:

- **Contains preface.** Responding party objects to the entire set of special interrogatories propounded by the plaintiff on the grounds that it contains a preface of definitions or instruction in violation of Cal. Code Civ. Proc. § 2033.060(d).
- **Insufficient information to admit or deny.** Responding party objects to this interrogatory on the grounds that, although a reasonable inquiry was made, the information known or readily obtainable is insufficient to enable this responding party to admit or deny the matter. Cal. Code Civ. Proc. § 2033.220(c).
- **Incomplete.** Responding party objects to this interrogatory on the grounds that it is not full and complete in and of itself, in direct violation of Cal. Code Civ. Proc. § 2033.060(d).
- **Subparts.** Responding party objects to this interrogatory on the grounds that it contains subparts or is [compound / conjunctive (and) / disjunctive (or)], in direct violation of Cal. Code Civ. Proc. § 2033.060(f).
- **Other entity's records.** Responding party has no reasonably way of verifying the genuineness of another entity's or individual's records and therefore denies this request in its entirety.

Protective Orders

If the plaintiff requests information that is privileged, confidential, or otherwise protected or would result in great prejudice to your client, meet and confer with opposing counsel and ask that they withdraw the request. If plaintiff's counsel refuses to do so, consider proactively moving for a protective order instead of merely serving written objections. Alternatively, serve your objections and put the onus on the plaintiff to file a motion to compel production of the withheld information. See Resolving Discovery Disputes, below.

Resolving Discovery Disputes

If you reach a point in the discovery process where there is a disagreement that cannot be resolved consensually, then you must engage in discovery motion practice to either (1) move to compel the production of information or responses by the plaintiff or (2) move for a protective order to prevent the production of information or responses by the defendant.

Be sure you have the law and argument on your side before you move to compel or move for protective order—a meritless motion will irritate the judge and could result in sanctions. See Cal. Code Civ. Proc. §§ 2023.010–2023.040, 2025.420(h), 2025.450(g), 2030.090(d), 2030.300(d), 2031.060(d), 2031.310(d), 2033.080(d), 2033.290(d).

For sample motions to compel discovery in California, see LexisNexis(R) Forms FORM 1290-6.76, LexisNexis(R) Forms FORM 1290-9.40, and LexisNexis(R) Forms FORM 1290-10.41.

For a sample, non-jurisdictional protective order, see Consent Protective Order (Long form), Larson on Employment Discrimination, FORM V-3. For sample motions for protective orders in California, see LexisNexis(R) Forms FORM 1290-6.72, LexisNexis(R) Forms FORM 1290-9.38, and LexisNexis(R) Forms FORM 1290-10.38.

Meet and Confer Requirement

In moving to compel or for a protective order, you must "meet and confer" and discuss the issues with the other side in an attempt to resolve disagreements before making a motion. See Cal. Code Civ. Proc. §§ 2016.040, 2025.420(a), 2025.450(b), 2030.090(a), 2030.300(b), 2031.060(a), 2031.310(b), 2033.080(a), 2033.290(b). You

should always confirm the meet and confer discussions in a letter so that your position is clearly stated in writing and sent to the other side.

When filing your motion, you must include a declaration attesting that you met the meet and confer requirement. Id. You should include as an attachment to the declaration the written confirmation of your meet and confer discussion.

Deadlines to File

You must file and serve a motion to compel written discovery within 45 days of the service of a verified response (although you get additional time if the responses were served by mail per Cal. Code Civ. Proc. § 1013). See Cal. Code Civ. Proc. §§ 2030.300(c), 2031.310(c), 2033.290(c). If you get an extension of time to move to compel, always confirm this in writing.

You should file any motion for a protective order before any discovery response is due to preserve your objections. For deadlines to respond to discovery, see "Discovery Response Requirements" in Responding to Written Discovery above.

E-Discovery in California – Best Practices

The Electronic Discovery Act became law in California in June 29, 2009. Its purpose was to eliminate uncertainty and confusion regarding the discovery of electronically stored information (ESI). ESI is broadly defined as "information that is stored in an electronic medium." Cal. Code Civ. Proc. § 2016.020(e). Common examples of ESI include emails, computer files, Microsoft Word and Excel documents, and electronic images.

Any party may obtain ESI discovery by "inspecting, copying, testing, or sampling" ESI that is in the possession, custody, or control of any other party to the action. Cal. Code Civ. Proc. § 2031.010.

In practice, employers are most often on the receiving end of requests for ESI since they control the servers on which most ESI resides. When plaintiff employees in FEHA cases request emails and other computer files relating to the plaintiff and other key custodians in the case, the employer must understand and comply with its obligations under California law in preserving and producing its ESI. This section discusses those obligations.

For more information on e-discovery in California, see California Points & Authorities CHAPTER 85A.syn. For more information on e-discovery in employment litigation generally, see Electronic Discovery in Employment Litigation.

ESI Preservation and Spoliation

As with physical records, employers must retain certain ESI to be used as evidence in litigation. Failure to do so is known as "spoliation."

In California, "spoliation occurs when evidence is destroyed or significantly altered or when there is a failure to preserve property for another's use as evidence in current or future litigation." Strong v. State, 201 Cal. App. 4th 1439, 1458 (2011) (quoting Hernandez v. Garcetti, 68 Cal. App. 4th 675, 680 (1998)); see also Kearney v. Foley & Lardner, LLP, 590 F.3d 638 (9th Cir. 2009) (applying California law).

The exact time at which employers must begin to preserve evidence in California is not yet clear. However, destroying evidence in response to or in anticipation of a discovery request after litigation has commenced "would surely be a misuse of discovery." See Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 12 (1998).

In FEHA cases where an employee worked for the company for a long period of time, some relevant information may no longer exist. When plaintiffs discover that the employer no longer has responsive ESI, they may petition the court for relief, claiming the employer knew that the documents might be used but nevertheless destroyed them.

The remedies in California for spoliation of evidence can be severe, and include:

- A discretionary jury inference against the party who destroyed the evidence or rendered it unavailable (see Cal. Evid. Code §§ 412, 413; Walsh v. Caidin, 232 Cal. App. 3d 159, 164–65 (1991); Bihun v. AT & T Information Systems, Inc., 13 Cal. App. 4th 976, 994–95 (1993))
- Various discovery sanctions ranging from monetary and contempt sanctions, to issue, evidentiary, and even terminating sanctions (see Cal. Code Civ. Proc. § 2023; Puritan Ins. Co. v. Superior Court, 171 Cal. App. 3d 877 (1985))
- Injunctive relief
- An obstruction of justice charge and criminal penalties (see Cal. Pen. Code § 135; Smith v. Superior Court, 151 Cal. App. 3d 491, 497–500 (1984)) –and–
- State Bar discipline against any attorney involved in spoliation of evidence (see Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 11–13 (1998))

California courts may also draw adverse evidentiary inferences and impose other orders against a litigant who benefitted from a third party's spoliation when a sufficient relationship existed between the litigant and third party.

See Temple Community Hospital v. Superior Court, 20 Cal. 4th 464, 473–74, 476–77 (1999).

To avoid sanctions and adverse inferences resulting from spoliation claims, consider whether the information was intentionally destroyed. For instance, California trial courts only instruct juries with a "spoliation inference" where a litigant is found to have willfully destroyed or concealed evidence during the underlying litigation. See, e.g., Cedars-Sinai Med. Ctr., 18 Cal. 4th at 12. Specifically, the party seeking the benefit of an inference from spoliation "must demonstrate first that the records were destroyed with a culpable state of mind (i.e., where, for example, the records were destroyed knowingly, even if without intent to violate [a] regulation [requiring their retention], or negligently)." Reeves v. MV Transp., Inc., 186 Cal. App. 4th 666, 681–82 (2010) (quoting Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107, 109 (2d Cir. 2001)).

In practice, plaintiffs often lack evidence of any willful spoliation and courts do not seem eager to impose sanctions without some egregious behavior. California law also provides a safe harbor for employers that destroy ESI as part of their routine operations. See Cal. Code Civ. Proc. § 2031.320(d)(1) ("absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system."). Be sure to marshal these defenses when faced with spoliation allegations.

ESI Meet and Confer Requirement

Unless the court orders another time period, no later than 30 calendar days before the date set for the initial case management conference, the parties must meet and confer, in person or by telephone, to consider a number of ESI-related issues, including:

- Issues relating to the preservation of discoverable ESI
- The form or forms in which information will be produced
- The time within which the information will be produced
- The scope of discovery of the information
- The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production
- The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings
- How the cost of production of ESI is to be allocated among the parties
- Any other issues relating to the discovery of ESI, including developing a proposed plan relating to the discovery of the information

Cal. Rules of Court, Rule 3.724(8).

Responding to Requests for ESI

Employers must follow general California discovery rules when responding to requests for ESI, but you should be aware of certain requirements that pertain specifically to the production of electronic information.

Reasonable Accessibility

If the plaintiff requests ESI from a source that is not reasonably accessible because of undue burden or expense, the employer may object. The employer must identify in its response the types or categories of sources of ESI that it asserts are not reasonably accessible to preserve the objections. Cal. Code Civ. Proc. § 2031.210(d). The employer may also seek a protective order. Cal. Code Civ. Proc. § 2031.060. Whether a source is "reasonably accessible" is a factual question for the court to decide, but factors can include:

- The media on which the ESI is stored
- The volume of the ESI
- The time and cost required to restore, search, and review the ESI
- The amount at issue in the case
- Whether the ESI is cumulative and/or available from other sources –and–
- The relevance of the ESI to key issues in the case

See California Points & Authorities § 85A.07[3]–[4].

ESI Format

While not required, most plaintiffs specify in their demands the form in which they want the employer to produce ESI (e.g., native format or TIFF images). If the employer objects to that form, or if no form is specified, the employer must state in its response the form in which it intends to produce each type of information. Cal. Code Civ. Proc. § 2031.280(c). If no form is specified, the employer must produce the information in the form in which "it is ordinarily maintained" or in "a form that is reasonably usable." Cal. Code Civ. Proc. § 2031.280(d)(1). Parties need not produce the same ESI in more than one form. Cal. Code Civ. Proc. § 2031.280(d)(2). Additionally, the requesting party has to bear the "reasonable expense" of "translat[ing] any data

compilations included in the demand into reasonably usable form." See Cal. Code Civ. Proc. § 2031.280(e).

Inadvertent Disclosures of ESI

One concern when producing ESI is the inadvertent production of privileged or work product materials. In California, there are procedures in place to address the inadvertent production of ostensibly privileged information.

Specifically, if a responding party discovers the inadvertent production of privileged material and notifies a party who received the information, the receiving party must sequester the information immediately, and either return the information or present it to the court under seal for a ruling on the claim of privilege. Cal. Code Civ. Proc. § 2031.285(b).

The party in possession is precluded from using or disclosing the information until the claim of privilege or protection is resolved by the court. See Cal. Code Civ. Proc. § 2031.285(c)(1), (d)(2). Note, however, that these provisions govern only the procedure for dealing with inadvertently produced materials pending a determination of whether they are in fact privileged—they do not affect the actual analysis of whether such inadvertent production waived the asserted privilege. To ensure the employer does not waive the privilege with respect to any privileged documents it inadvertently produces, be sure to enter into a clawback agreement with the plaintiff prior to producing ESI. For a sample clawback agreement in federal court, see Stipulated Protective Order With Clawback Provision (Federal).

Differences between California ESI Rules and the Federal Rules of Civil Procedure

While California's ESI rules closely follow the FRCP, there are a couple of notable differences:

- Federal Rules do not require the production of ESI that is "not reasonably accessible because of the undue burden or cost" (Fed. R. Civ. P. 26(b)(2)(B)), and the requesting party bears the burden of showing "good cause" before a claimed inaccessible data source has to be searched. As discussed above, California law presumes that all ESI is accessible and the burden of showing inaccessibility falls on the responding party. Cal. Code Civ. Proc. §§ 2031.060(c) and 2031.310.
- The Federal Rules expressly require discussion of e-discovery matters no later than 21 days prior to the first scheduling conference. Fed. R. Civ. P. 26(f)(3). California rules require specific topics relating to e-discovery be discussed no later than 30 days prior to the first case management conference. Cal. Rules of Court, Rule 3.724, 3.727.

For more information on electronic discovery in federal employment litigation, see Electronic Discovery in Employment Litigation. For more information on federal e-discovery generally, see Electronic Discovery: Planning for and Conducting E-Discovery (Federal).

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