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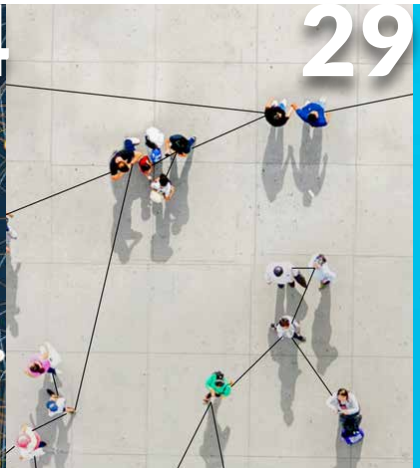


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Discovery in **Single-Plaintiff Employment Discrimination Cases (CA)**

This article excerpt containing legal analytics from Context® 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).[1]

THIS EXCERPT ADDRESSES THE FOLLOWING TOPICS:

- Resolving discovery disputes
- E-discovery in California—best practices

The unabridged version of this article addresses the following additional 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[2]

Resolving Discovery Disputes

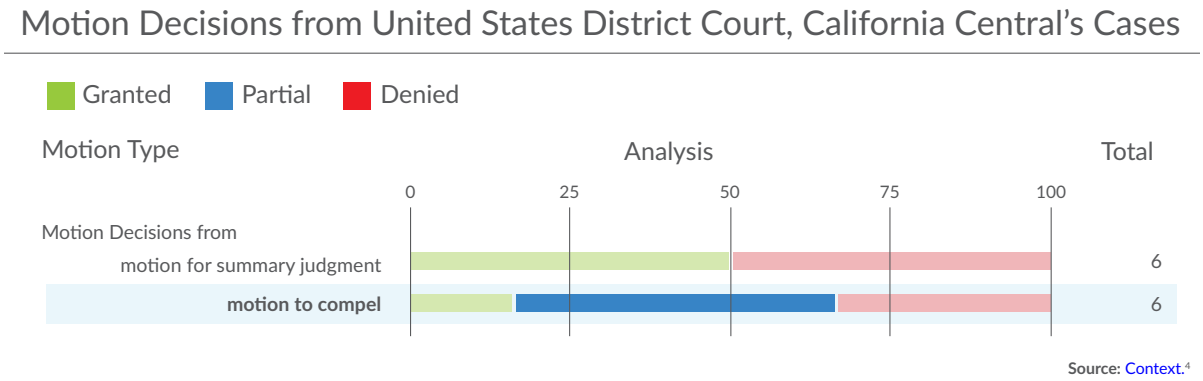
If you reach a point in the discovery process where there is a disagreement that cannot be resolved consensually, then you must engage in discovery motion practice to either (1) move to compel the production of information or responses by the plaintiff or (2) move for a protective order to prevent the 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.[3]

According to data provided by Context, in discrimination law cases, the U.S. District Court for the Central District of California has granted fewer than 25% of the motions to compel discovery since January 1, 2010 (current as of 9/11/2020).

1. Cal. Gov. Code § 12900 et seq. 2. To read the unabridged version of this article, go to Discovery in Single-Plaintiff Employment Discrimination Cases (CA). 3. *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).

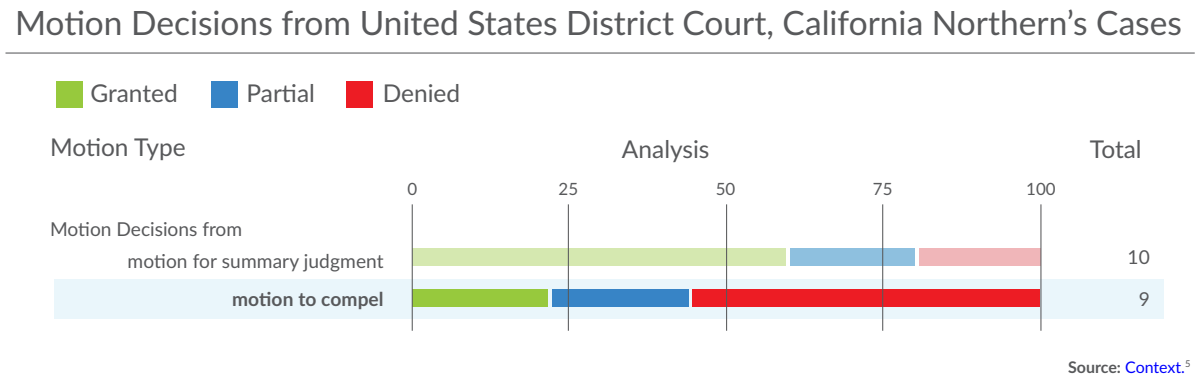
Motion to Compel Discovery Decisions in Discrimination Cases Since January 1, 2010—U.S. District Court, Central District of California



Source: Context.[4]

Similarly, according to data provided by Context, in discrimination law cases, the U.S District Court for the Northern District of California has also granted fewer than 25% of the motions to compel discovery since January 1, 2010 (current as of 9/11/2020).

Motion to Compel Discovery Decisions in Discrimination Cases Since January 1, 2010—U.S. District Court, Northern District of California



Source: Context.[5]

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.[6] 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.[7] 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).[8] 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.

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4. Source: Context (U.S. District Court, Central District of California) (current as of 9/11/20) (click here for updated analytics). To learn more about Context, click here. **5.** Source: Context (U.S. District Court, Northern District of California) (current as of 9/11/20) (click here for updated analytics). To learn more about Context, click here. **6.** *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). **7.** *Id.* **8.** *See* Cal. Code Civ. Proc. §§ 2030.300(c), 2031.310(c), 2033.290(c).

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."[9] 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.[10]

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.

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."[11]

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."[12]

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[13]
- Various discovery sanctions ranging from monetary and contempt sanctions, to issue, evidentiary, and even terminating sanctions[14]
- Injunctive relief
- An obstruction of justice charge and criminal penalties[15]
- State bar discipline against any attorney involved in spoliation of evidence[16]

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.[17]

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9. Cal. Code Civ. Proc. § 2016.020(e). **10.** Cal. Code Civ. Proc. § 2031.010. **11.** 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). **12.** *See* Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 12 (1998). **13.** *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). **14.** *See* Cal. Code Civ. Proc. § 2023; Puritan Ins. Co. v. Superior Court, 171 Cal. App. 3d 877 (1985). **15.** *See* Cal. Pen. Code § 135; Smith v. Superior Court, 151 Cal. App. 3d 491, 497–500 (1984). **16.** *See* Cedars-Sinai Med. Ctr., 18 Cal. 4th 11–13. **17.** *See* Temple Cmty. Hosp. 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.[18] 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)."[19]

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.[20] 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[21]

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.[22] The employer may also seek a protective order.[23] 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
- The relevance of the ESI to key issues in the case[24]

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.[25] 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."[26] Parties need not produce the same ESI in more than one form.[27] Additionally, the requesting party has to bear the "reasonable expense" of "translat[ing] any data compilations included in the demand into reasonably usable form."[28]

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.

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18. *See, e.g.*, Cedars-Sinai Med. Ctr., 18 Cal. 4th at 12. **19.** 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)). **20.** *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."). **21.** Cal. Rules of Court, Rule 3.724(8). **22.** Cal. Code Civ. Proc. § 2031.210(d). **23.** Cal. Code Civ. Proc. § 2031.060. **24.** *See* 8 California Points & Authorities § 85A.07[3]–[4]. **25.** Cal. Code Civ. Proc. § 2031.280(c). **26.** Cal. Code Civ. Proc. § 2031.280(d)(1). **27.** Cal. Code Civ. Proc. § 2031.280(d)(2). **28.** *See* Cal. Code Civ. Proc. § 2031.280(e).

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.[29]

The party in possession is precluded from using or disclosing the information until the claim of privilege or protection is resolved by the court.[30] 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.

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,"[31] 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.[32]
- The Federal rules expressly require discussion of e-discovery matters no later than 21 days prior to the first scheduling conference.[33] California rules require specific topics relating to e-discovery be discussed no later than 30 days prior to the first case management conference.[34]

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29. Cal. Code Civ. Proc. § 2031.285(b). 30. *See* Cal. Code Civ. Proc. § 2031.285(c)(1), (d)(2). 31. Fed. R. Civ. P. 26(b)(2)(B). 32. Cal. Code Civ. Proc. §§ 2031.060(c) and 2031.310. 33. Fed. R. Civ. P. 26(f)(3). 34. Cal. Rules of Court, Rule 3.724, 3.727.