Damage Discovery Checklist

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This outline is designed to provide practitioners on each side with a handy description of items to review in making written discovery requests and conducting depositions. This listing may also serve as a helpful reference tool when conducting an investigation of a claim or potential claim for an employer or seeking documents and information from an employee client in evaluating and organizing the evidence for presenting a claim.

When formulating requests for information, include both document requests and interrogatories. The latter should be used to seek identification of witnesses or persons with knowledge of particular subjects, to require the other side to compile and provide detailed information and to require the opposing party to set forth its contentions specifically. Sometimes a simple, direct question interrogatory is a good method of committing the opposing party to a specific position on a factual matter early in the litigation.

A response to an interrogatory may designate documents in lieu of answering, but a party responding in this manner is required to confirm that *all* of the information sought is contained in the documents or supply the information that is not in the documents. The response is also required to state where in the documents the pertinent information is located. Where a response of this kind is received, the admissions sought can be nailed down by compiling the information from the documents provided and posing a request for admission that the compiled information has been obtained from the documents designated and that it is both accurate and complete.

Rule 30(b)(6) deposition notices may be used to require the defense to present a witness able to explain the position the employer takes on damage issues, or contention interrogatories may be used for this purpose.

I. Former Employer's Discovery From Plaintiff/Investigation Requests

General

1. The defense's calculation of damages. The point of this exercise is to nail down a theory of damages that requires the defense to identify where and how the defense differs with the employee side concerning the recoverable damages. This can provide early notice of damage issues rather than finding out about them when discovery is complete and any opportunity to get information to shoot down the defense theory has been foreclosed by the passage of time. It can also affect how the defense evaluates the value of the case for settlement purposes by ensuring that the defense does not value the case with a "back of the napkin" calculation that omits important elements of what is being claimed. The request for documents may identify sources of damage information that are known only to the defense.

    a. Identify each of the elements of damages sought separately in the request and structure the request or interrogatory to require that it address each one of them.

    b. Computation: outline and explain each formula, including an explanation of the formula, its source and the actual mathematical formula. The formula can be as simple as subtracting interim earnings from the salary for the position plaintiff had held while employed to a complicated accounting exercise for incentive compensation, to valuations of company stock. It is important to know what the formula is that is being used and why it is being used.

    c. Data relied upon, with source of information and documents relied upon tied to each element of the calculation. You need to know where each of the numbers used actually came from and what documentation there is for those figures.

d. If there is a denial of damages in the pleading, as opposed to a statement of lack of knowledge sufficient to admit or deny, ask for the factual basis that denial and any documents, witnesses or other information that will support the denial.

Mitigation of Damages and Back Pay/Front Pay Issues

2. If the employer pleads a failure to mitigate damages, the factual basis and any documents, witnesses or other information that will support the denial should be requested, including identification of persons having knowledge of failure to mitigate and any statements obtained from witnesses pertaining to plaintiff's failure to mitigate.
3. Records or documents concerning plaintiff's post-employment activities and job search or otherwise relevant to plaintiff's damages/loss of income from termination in employer's possession. This is to locate evidence that former employer may have gathered from investigation that you do not know about.
4. All statements known to former employer that have been made by plaintiff relating to job search or other mitigation of damages issues. This should include the statement, to whom it was made, when it was made and by whom.
5. Communications to the former employer from prospective employers. This tends to support the plaintiff's claim to have been engaged in an active search. If there are no communications where a prospective employer sought references, this points up an area for further investigation.
6. Communications from the former employer to prospective employers. If the plaintiff had difficulty in obtaining new employment, this could explain why that occurred. If what the former employer said was negative, this could also give rise to another cause of action. If what the former employer said was positive, it could constitute an admission concerning

performance or impeach the former employer's explanation for discharge or failure to promote. The employer will point out that its positive statements tend to show that it acted without malice or spite.

7. Post-employment restrictions on employment.

   a. Is there a non-compete or non-solicitation agreement? An employee will have difficulty finding comparable new employment if, as is increasingly the case, the employer has required employees to sign an agreement not to compete. It may also explain a sales employee's low production in a new position, as building a new customer base can be expected to take time. In argument, it can be pointed out that the income the plaintiff lost was presumably obtained by the former employer through the sales it retained because of this restriction. The non-compete opens the door to arguing that the hardship imposed on the plaintiff by being fired was doubly cruel.

   b. Provisions limiting disclosure and use of confidential information with broad definitions of what is confidential are often contained in confidentiality agreements. Even without such agreements, common law of fiduciary duty or the Uniform Trade Secrets Act can impose limitations as a matter of law. Rarely will an employer deny that it has provided confidential information to an employee, and even more rarely will it acknowledge that its information does not come within the standards for legal protections. As a result, the employee may be significantly limited in being able to work in any similar position for another employer, particularly a competitor. There is a body of case law holding that certain position may be prohibited without a non-compete agreement because the disclosure or use of trade secrets or confidential

information would necessarily occur (the "inevitable disclosure" doctrine). Many employers will be reluctant to make statements on the record that could limit their ability to assert such limitations on other employees in the future. This can provide an explanation for the employee's failure to seek, or inability to obtain, a comparable position.

8. The basis or reasons for termination that were given to plaintiff at the time of termination or that are recorded in company records. The "compelled self-defamation" liability theory is accepted in some jurisdictions and rejected in others, but it is perfectly proper for the plaintiff to explain difficulty in finding new employment by describing the dilemma all people fired for cause or performance issues face: "What do you tell the prospective employer about the reason for leaving the former employer?" The former employer's judgment will certainly make most prospective new employers reluctant to hire the plaintiff—all the more if the prospective employer knows that a legal controversy has ensured. Lying about this is morally wrong and potentially self-defeating. Discovery of the lie would justify discharge when discovered by a new employer—which will happen when a subpoena from the former employer arrives. This is another damage point that allows the plaintiff to demonstrate through the evidence the hardship resulting from termination.

Plaintiff's Compensation While Employed & What Plaintiff *Would Have* Earned

What the plaintiff would have earned but for the termination is rarely the same amount as what s/he was earning when terminated. Sometimes the former employer's business is in a downward spiral, and if so, the defense will rely on that circumstance to reduce the recoverable loss. Pretending that the problem does not exist is rarely an effective strategy for countering such an argument.

Where the employer is not facing financial reversals or hardship, most employees who perform satisfactorily customarily receive annual pay increases. It is not realistic to say that a plaintiff has been put in as good a position as s/he would have occupied but for the termination when the loss is measured based strictly on compensation at the time of termination. In depositions, the former employer's witnesses will almost certainly agree that people receive pay increases every year, and this is an important part of the foundation for seeking more than simply what the former employee made at the time of termination as a basis for calculating back and front pay. It is also important to make requests that permit tracking of changes over time.

Unless the law precludes it, not finding a reasonable basis on which to estimate increased future income with the former employer means leaving money on the table. The problem lies in identifying a method of estimating post-termination increases in compensation that is reasonable and reliable.

9. Subsequent layoff or reduction in force information. Employers often assert as a defense that the plaintiff who claims to have been wrongfully discharged would have lost the job at some point anyway, which can cut off recoverable back and front pay. If not made the subject of discovery, it will emerge after it is too late to uncover information that can be used to challenge the factual premise, which maybe entirely speculative.
10. Job opportunities and persons hired for better positions that plaintiff could have obtained, both at time of termination and after termination of employment. This information can not only identify a potential for a failure to transfer or rehire claim, but also support the theory that but for the termination, the employee would have been promoted and received pay

increases. Where the plaintiff's job was in a recognized chain of progression, this can be an easy case to make.

11. Salary ranges, job evaluation systems and points associated with the former position or jobs to which plaintiff might have been promoted. This is another base of information that can be used to estimate what plaintiff would have earned.

12. Compensation levels and position descriptions for other persons reporting to plaintiff's former supervisor. Where movement upwards is not so well defined, one approach is to identify a cohort sample or group of comparable employees, track their salary increases and use that information to project the earnings plaintiff would have obtained if not fired. What the employer actually paid people, and what their raises were on average, is perhaps the most probative evidence of what increases plaintiff would have obtained.

13. Salary & benefits history for predecessors or successors in plaintiff's former position and level/grade. This is another way to estimate what the plaintiff would have earned if employment had not ended.

Employee Benefits

14. Benefit Package.

    a. Employees do not always know all of the employee benefits associated with the position they held, so begin by obtaining a list, plan documents and summary descriptions for the complete list of benefits.

    b. Some benefits that have value may not be immediately identified as such. For example, if the plaintiff's new position is as an independent contractor or free-lance worker, the three or four weeks of vacation/personal time/holidays the former employer provided to employees can represent 5-10% of annual income. This is all

money paid to the employer in consideration of the time the employee actually does work. As an employee, the plaintiff was paid for those days without having to work, while now the employee is only able to earn income by working for those three to four weeks.

c. Employer cost of providing each benefit. Most cases now hold that a plaintiff may not recover the employer's out-of-pocket cost of medical benefits, but must either purchase and pay for private medical insurance (often cost-prohibitive for people who are out of work) or incur actual medical expenses to be able to recover. But other benefits, such as a company car, can properly be calculated or at least estimated based on employer cost.

d. Plans, rules and procedures. Even if the plaintiff has found comparable work for a different employer, careful examination of plan features can identify additional losses. If, for instance, the former employer matched employee saving plan contributions up to 8% and the new employer matches only 4%, there is an identifiable and quantifiable loss that should be part of the damage claim. The medical co-pay or deductible may be different between the former employer's plan and that of the new employer.

15. Pension & Profit-Sharing. Plan and summary plan description, annual reports and communications with plaintiff, appeal and administrative regulations or guidelines. Post-termination amendments to Plan. Records of past interpretations on any identifiable issues pertaining to pension rights. Records of contributions and pension or profit-sharing interest of the plaintiff.

16. Medical Benefits. Medical Plan/insurance policy/PPO or HMO descriptions and information provided to participants. Post-termination amendments to Plan. These can be important to compare with any individual medical insurance or benefits obtained by the plaintiff to ensure that benefits of purchased plan are not more generous than plaintiff would have obtained if employed. It is also critical to proving that out-of-pocket medical costs paid of the plaintiff qualify as recoverable damages.
17. Stock Options. Stock Option Plan, Stock Option Agreements with plaintiff, option grants and records of stock price. Post-termination amendments to Plan. To value a stock option, the strike price, conditions, vesting schedule, duration, termination date and market price of the stock over time will be needed.
18. Life, AD&D and Long-Term Care Insurance. Benefit Plan or company policy and insurance policy, summary plan descriptions, records showing plaintiff's benefits as of termination date. Post-termination amendments to Plan.
19. Vacation, Holiday & Personal Time. Vacation & Personal Time Policy, employment dates, attendance/ vacation records of plaintiff. Post-termination amendments to Vacation & Personal Time Policy.
20. Company Car: Company Car Policy, any agreement relating to plaintiff's company car, vehicle records including original cost, mileage, repair history and current valuation or resale price.

Bonuses & Commissions

21. Incentive Compensation/Bonuses: Compensation plans, policies or agreements. Chart showing compensation/bonuses provided to named comparable employees/peers of plaintiff/others reporting to same supervisor/same grade or compensation level/plaintiff's

predecessor and successor in the disputed position. Records supporting differentiation between amount paid to others and what is claimed to be properly part of plaintiff's damage claim.

22. Commissions: Commission plans, policies or agreements. Documents/records supporting amounts asserted by former employer to be due under it and which would be due if plaintiff not terminated. Records of sales to plaintiff's commissionable customers before and since termination.

Emotional Distress

23. Medical Records of any kind concerning plaintiff that are in the former employer's possession.

24. Psychological Records of any kind concerning plaintiff that are in former employer's possession.

25. Statements made by plaintiff known to former employer relating to emotional distress and cause(s) of same (when said, by whom, where, and content of statement). This will be an interrogatory.

26. Worker's compensation file, if any, on plaintiff.

Punitive Damages

27. Other Discrimination: lawsuits (pleadings, discovery, depositions, motions and orders), charges of discrimination, internal complaints and investigations (including all records of investigations and resulting actions by employer, names and addresses of complainants & witnesses).

28. Financial Information.

    a. Balance sheet, income statement, statement of cash flows.

b. Hard asset inventory/valuations.

c. Share trading transactions.

II. Plaintiff's Discovery From Former Employer

General

1. Damages Statement. A request for specification of each element of damages claimed, the factual basis for the element, the amount sought, the formula or measure used for that element of damages, the specific calculation for the element and the source for each item of data included in the calculation. It should be possible to secure this information without using an interrogatory by following up on the required Rule 26(a) disclosure and demanding all of the supporting specifics. See the detailed outline of the first item of the former employer's discovery from Plaintiff.
2. Plaintiff's Tax Returns. These are the starting point for calculation of back pay and investigation of mitigation issues. They may also contradict plaintiff's assertion of extreme financial hardship by showing a spouse's income or investments permitting a comfortable lifestyle.
3. Unemployment Benefit Records. In most jurisdictions this is not a recoverable offset to back pay, but unemployment records may include information about the plaintiff's job search and may also contain records of factual assertions that pertain to liability issues.
4. Plaintiff's E-mail Records. This request should first seek to identify the e-mail mailboxes used by plaintiff, whether personal (e.g., hotmail) or business (e.g, subsequent employer mailboxes). These e-mail messages may be of significance for liability issues as well.

5. Plaintiff's Computer Records. This request includes both personal home computer and any computer used by Plaintiff (e.g, subsequent employer computer) or memory storage device (e.g., thumb drive). This should be examined for postings on job-seeking websites and correspondence, resumes and other documents pertaining to job search. There may be items of importance for liability issues here as well.
6. Loans. Plaintiff may assert a claim for interest paid on loans required to pay expenses resulting from loss of income. Loan applications are likely to contain optimistic statements about the financial well-being of the plaintiff; they may contain outright lies, which if admissible in evidence can affect the plaintiff's credibility; and they may contain statements about the employment situation or the litigation.
7. Insurance & Benefits. This includes applications for disability benefits (insurance or social security), waiver of insurance premiums due to unemployment or disability, retirement benefits from former employers, other government or insured benefit programs and loan programs that waive payments during unemployment. Applications for insurance and other benefits may contain useful information on both damage and liability issues. There can be questions about employment status and the circumstances surrounding termination, ability to work. Sources of income not included on tax returns may be disclosed. Correspondence, claim forms completed and other records pertaining to benefits obtained by the plaintiff should also be sought.

Back Pay/Mitigation

8. Job Search Records. Documents include diaries, correspondence files, resumes, expense records, advertisements answered, and notes of communications with prospective employers and referral sources or headhunters or personnel/temporary employment agencies.

Interrogatories include specification of applications or employment inquiries submitted, to whom, dates, responses, job offers and plaintiff's response, reasons for not accepting offered employment.

9. Subsequent Employment History. Employers, positions held, dates, term of position (temporary, seasonal, fixed term, indefinite), compensation, job description, supervisors, compensation arrangements, employee benefits.

10. Subpoena to Subsequent Employers. Request resumes and applications, employment history, hiring correspondence and records of job interviews, offers, compensation, job descriptions, supervisor assignments, compensation arrangement and records of payment, employee benefit plans (including summary plan descriptions and statements of benefits).

11. Persons With Whom Plaintiff Has Discussed Job Search. The plaintiff may have a career counselor, outplacement consultant or may have attended job fairs or participated in programs during the job search. An interrogatory should raise these specific possibilities and require the identification of any such persons. Documents and records may be subpoenaed from the third party thereafter.

Emotional Distress

12. Records of doctors, psychiatrists, psychologists, therapists, counselors, mental health professionals or anyone else from whom plaintiff has sought treatment subsequent to termination of employment and in three years before termination (which could provide baseline information). The request should seek not only identification of the providers, whose records can be sought by subpoena, but also notes of the plaintiff pertaining to or created as part of the treatment and any documents (bills, claim forms, treatment plans) received from the provider.

13. Vacation or party photos and videos. If the plaintiff asserts that the discharge resulted in damages relationships with children or grandchildren, photographic or video evidence that the relationship remains warm and playful can impeach that testimony. Candid photographs and videotape of the plaintiff having a good time can also detract from exaggerated claims of persistent symptoms. It may be wise to inquire about the existence of such items in depositions of the plaintiff or family members before requesting them to improve the chances of actually obtaining them from a document request.
14. Persons with firsthand knowledge of plaintiff's alleged mental or emotional distress or any symptoms of mental or emotional distress. These will likely include family members, friends and mental health professionals and each is a potential deposition witness.