Outside Counsel

SDNY Automatic Referrals and Pre-Mediation Discovery

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Over the past two years, the Southern District of New York has enhanced its court-annexed Mediation Program with measures intended, in part, to address the many employment-related cases filed with the court. These enhancements include automatic referrals to the SDNY Mediation Program as well as pre-mediation disclosure provisions which differ from the commonly known initial disclosure requirements of Fed. R. Civ. P. 26(a)(1).

The SDNY's embrace of mediation, as an alternative to costly and time-consuming litigation, is evident in the breadth of the court's orders referring employment cases to the Mediation Program. The first order, issued on Jan. 3, 2011 and amended on Oct. 1, 2015, refers all counseled employment discrimination cases to court-annexed mediation.[1] The second set of orders, made effective on Oct. 3, 2016, refers Fair Labor Standards Act (FLSA) wage and hour cases, assigned to seven SDNY judges, to court-annexed mediation.[2] Of note, these automatic referral mediations are typically conducted before the parties' initial case management conference and thus very early in any litigation.[3]

Challenge of Automatic Referrals

Early intervention mediations, such as the SDNY automatic referrals, proceed without the benefit of any formal discovery. As a result, the parties cannot always fully assess the strengths and weaknesses of their case, and negotiations can stall. For example, an employer at mediation may withhold a backpay offer if it never received any mitigation of damages proof, i.e., whether the plaintiff searched for other employment and how much post-termination income he or she earned. A mediation may also grind to a halt when an employer fails to previously disclose its financial status to support its "ability to pay" defense. Simply stated, the exchange of information is essential to any successful mediation.

New evidence presented at mediation also invariably leads to delay when a party must investigate and verify previously unseen documents. Examples include undisclosed documents concerning the plaintiff's work performance when wrongful termination is alleged, and undisclosed written complaints to supervisors when the claim is workplace retaliation. When a mediation involves a wage and hour complaint, both sides should exchange a damages spreadsheet prior to the mediation, especially when liability is a nonissue.

These examples are illustrative and merely intended to underscore the importance of pre-mediation disclosure. Fortunately, the SDNY's recent automatic referral orders, for employment-related cases,

contain their own discovery protocols that list the documents and other information which must be disclosed prior to mediation. The two sets of protocols separately address employment discrimination and FLSA wage and hour claims.

Protocols for Discrimination Claims

The SDNY's 2015 amended order for counseled employment discrimination cases establishes a fairly extensive list of disclosure protocols. Under the amended order, both parties must produce the plaintiff's application for employment or promotion when the allegation is failure to hire or promote. When the allegation is wrongful termination, both sides must exchange documents sent to, or received from, the other side regarding the termination. If the claim is a denied reasonable accommodation based on disability, the parties must exchange any written requests for an accommodation and the employer's responses thereto. Also, both parties are expected to produce the plaintiff's employment contract if one exists.

When failure to hire or promote is alleged, the plaintiff alone must disclose all documents sent to, or received from, the other side concerning the adverse action. In a wrongful termination case, a plaintiff must also produce all documents reflecting his or her efforts to find other employment and obtain disability or unemployment insurance benefits, and any awards granting said benefits. A plaintiff is also generally expected to identify the following: all persons who made discriminatory comments or engaged in harassment; the comments or act of harassment; and any witnesses to the comments or harassment. Finally, a plaintiff must disclose the categories and amounts of damages he or she seeks.

An employer, in employment discrimination cases, must produce documents that record the reasons it terminated the plaintiff's employment, failed to hire or promote the plaintiff, or failed to accommodate the plaintiff's disability. An employer must also disclose the plaintiff's job description, personnel file and performance reviews (for the most recent five years), together with documents reflecting: plaintiff's compensation and benefits; relevant workplace policies; and any disciplinary action taken against the plaintiff. An employer is also obligated to disclose its written responses to any claims which the plaintiff filed with a "government agency," provided the administrative claim was based on the same factual allegations made in the lawsuit. Finally, an employer must disclose information regarding any "ability to pay" defense, including its financial records and insurance coverage.

Protocols for FLSA Claims

The SDNY automatic referrals for FLSA cases have their own pre-mediation disclosure requirements which address wage and hour essentials such as calculating damages and determining whether a plaintiff qualifies as an "employee" within the meaning of the Act.

Specifically, the protocols require both sides to produce documents describing the plaintiff's job duties and responsibilities. In addition, the parties must disclose any existing documents that record the plaintiff's wages and hours worked, including: payroll records, time sheets, work schedules, wage statements and wage notices. The plaintiff alone must produce a spreadsheet listing underpayments and any other alleged damages. The employer, in turn, must produce documents describing its compensation policies and practices, as well as tax and business records demonstrating its financial condition if an "ability to pay" defense is raised.

Conclusion

The SDNY's pre-mediation disclosure requirements, for its employment-related automatic referrals, supplement other SDNY procedures which generally govern the court-annexed Mediation Program.[4] These other SDNY procedures cover virtually all aspects of the mediation process, including

scheduling, pre-mediation statements, confidentiality, and mandatory attendance. By issuing discovery protocols for its automatic referrals, the SDNY wisely recognized the value of pre-mediation disclosure, especially when no formal discovery precedes the mediation. Having established its discovery protocols, the SDNY took the necessary steps to create meaningful early intervention mediations.

Endnotes:

1. Second Amended Standing Administrative Order, M10-468, S.D.N.Y. Oct. 1, 2015.

2. The SDNY FLSA Pilot Program, which applies to cases assigned to Judges Abrams, Briccetti, Carter, Daniels, Ramos, Seibel and Woods, is set forth in the judges' Mediation Referral Orders executed in 2016.

3. The SDNY also has an automatic referral program for counseled cases brought against the City of New York, or its employees, alleging the use of excessive force, false arrest, or malicious prosecution by New York City Police Department employees in violation of 42 U.S.C. §1983. See Local Civil Rule 83.10.

4. See Local Civil Rule 83.9(c)(3) and its express reference to the "Procedures of the Mediation Program of the Southern District of New York" which is available on the court's official website, www.nysd.uscourts.gov.

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