



Initial Discovery Protocols for Fair Labor Standards Act Cases

Part 1: Background and Definitions

Background

In 2018, The Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions were drafted by the Federal Judicial Center's (FJC) Fair Labor Standards Act Protocols Committee to provide a new pretrial procedure for certain types of Fair Labor Standard Act (FLSA) cases. Its purpose is to "encourage the parties and their counsel to exchange information and documents early in the case, help frame the issues to be resolved, and plan for more efficient and targeted discovery."¹ The FJC's FLSA Initial Discovery Protocols are the second set of case-specific discovery protocols developed and implemented in the federal courts. The Committee drafting the FLSA Initial Discovery Protocols was composed of a balanced group of highly experienced attorneys from across the country who regularly represent plaintiffs or defendants in FLSA matters.

The first set of protocols, the Initial Discovery Protocols for Employment Cases Alleging Adverse Action, were published as a pilot project by the FJC in November 2011,² and have been widely utilized by Courts, and were adapted by the American Arbitration Association (AAA) for use in employment arbitrations.

In October and November 2018, the AAA held two committee meetings to review the FJC FLSA protocol which as noted above would provide a new procedure for certain types of FLSA cases and assess if a similar protocol tailored to FLSA arbitration would benefit the process. The first meeting was attended by sixteen arbitrators on AAA's employment panel some of whom also represent plaintiffs and defendants in FLSA matters. Thereafter the protocols were presented at a New York Employment Arbitrator meeting attended by approximately thirty-five arbitrators including representatives of plaintiffs and defendants. The consensus of the working groups were that protocols tailored for FLSA arbitration should be drafted and piloted in New York and other regions. Comments were solicited at both meetings. In January 2019, a small working group of employment arbitrators and AAA staff drafted The AAA Initial Discovery Protocols for Fair Labor Standards Act (FLSA) cases (AAA FLSA Discovery Protocols).

The AAA's **Initial Discovery Protocols for Fair Labor Standards Act (FLSA) cases (AAA FLSA Discovery Protocols)**, while not mandatory, are presumptively applicable to all AAA FLSA arbitration cases unless determined otherwise by the arbitrator or mutually agreed by the parties not to be applicable or appropriate. These protocols do not apply to class or collective action cases.

¹ INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS (2018).

² FED. JUDICIAL CTR., PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2011).



Definitions.

(1) *Statement of purpose.*

- a. These Initial Discovery Protocols apply to FLSA claims not pleaded as collective actions. The Protocols are designed to encourage the parties and their counsel to exchange information and documents early in the case, help frame the issues to be resolved, and plan for more efficient and targeted discovery.
- b. The Initial Discovery Protocols apply to claims alleging minimum wage and overtime violations under the FLSA (the “FLSA Claims”). If any party believes that there is good cause why a claim should be exempted, in whole or in part, from the Protocols, that party may raise such reason with the Arbitrator and propose an alternative process for such early discovery no later than the initial management conference.
- c. The Initial Discovery Protocols require the early exchange of information and documents routinely requested in FLSA cases. They focus on the type of information most likely to be useful in narrowing the issues for FLSA cases.
- d. The Initial Discovery Protocols are not intended to preclude or modify the rights of any party for discovery.

(2) *Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.*

- a. **Concerning.** The term “concerning” means referring to, describing, evidencing, or constituting.
- b. **Document.** The terms “document” and “documents” shall mean any document or electronically stored information including writings, drawings, graphs, charts, photographs, recordings, images, and other data or data compilations, stored in any medium from which information can be obtained directly or after translations into a reasonably useable form.
- c. **Respondent.** Any person or entity alleged to be an employer or joint employer of the Claimant(s) in the operative case, unless otherwise specified.
- d. **Claimant.** Any named individual(s) alleging FLSA Claim(s) in the operative case.

(3) *Instructions.*

- a. For the Initial Discovery, the relevant time period begins three years before the date the claim was filed. If a claim is asserted under a relevant state statute that has a statute of limitations longer than such time period, the length of that longer state statutory time period of limitations will be applied (e.g. six years in New York State). If the Claimant alleges employment for a shorter relevant time period, then that is the time period for these Protocols.
- b. The relevant time period continues through the last date for which the Claimant seeks recovery or relief.
- c. The Discovery provided for in the Initial Discovery Protocols is not subject to objection except on the grounds of privilege or work product.
- d. If a partial or incomplete answer or production is provided, the responding party must state the reason that the answer or production is partial or incomplete.



- e. Documents to be produced under the Initial Discovery Protocols must be produced as they are kept in the usual course of business and in a reasonably useable form. Electronically stored information need not be produced in more than one form.

Part 2: Production by the Claimant

- (1) *Timing.* The Claimant's Initial Discovery must be provided no later than 30 days after the initial management conference or within the discretion of the arbitrator.
- (2) *Documents that the Claimant must produce to the Respondent.*
 - a. Documents created or maintained by the Claimant recording time worked.
 - b. Documents created or maintained by the Claimant recording wages or other compensation paid or unpaid by the Respondent not including personal tax returns or tax informational documents.
 - c. If the Claimant reported or complained internally to the Respondent about the FLSA Claim(s) (including but not limited to supervisors or administrative departments, such as human resources, payroll, timekeeping or benefits), the report(s) or complaint(s) and any response that the Respondent provided to the Claimant.
 - d. If applicable any offer letters, employment agreements, or compensation agreements relating to Claimant's employment with Respondent.
 - e. All other documents that the Claimant relies on to support the Claimant's FLSA Claim(s).
- (3) *Information that the Claimant must produce to the Respondent.*
 - a. Name persons the Claimant believes to have knowledge of the facts concerning the FLSA Claim(s) or defenses, and a brief description of that knowledge.
 - b. Identify the start and end dates for the FLSA Claim(s).
 - c. The Claimant's title or position and a brief description of the Claimant's job duties for the relevant time period.
 - d. A preliminary computation of each category of damages claimed by the Claimant, including i) applicable dates, ii) amounts of claimed unpaid wages, and iii) amount claimed for statutory or liquidated damages iv) the method used for computation (including applicable rates and hours).
 - e. The names of the Claimant's supervisors during the relevant time period.

Part 3: Production by the Respondent

- (1) *Timing.* The Respondent's Initial Discovery must be provided no later than 30 days after the initial management conference or within the discretion of the arbitrator.
- (2) *Documents that the Respondent must produce to the Claimant.*
 - a. Time and pay records created or maintained by the Respondent for the Claimant.



- b. If the Claimant reported or complained internally to the Respondent about the FLSA Claim(s), (including but not limited to supervisors or administrative departments, such as human resources, payroll, timekeeping or benefits), the report(s) or complaint(s) and any response that the Respondent provided to the Claimant.
- c. Documents that the Respondent relies on to support a claim that any alleged violation was in good faith.
- d. If applicable; any offer letters, employment agreements, or compensation agreements for the Claimant.
- e. The wage provisions of any collective bargaining agreement(s) applicable to the Claimant.
- f. The job description for the position(s) the Claimant held during the relevant time period(s), if the job duties are at issue in the FLSA Claim(s).
- g. The Respondent's policies, procedures, or guidelines for compensation that are relevant to the FLSA Claim(s).
- h. All other documents that the Respondent relies on to support the defenses, affirmative defenses, and counterclaims to the FLSA Claim(s).
- i. Any insurance agreement under which an insurer may be liable to satisfy all or part of a possible award in the case.

(3) Information that the Respondent must produce to the Claimant.

- a. Provide the following information related to the Claimant:
 - 1. Start and end dates for work performed;
 - 2. Work location(s);
 - 3. Job title(s);
 - 4. Employee or contractor identification number;
 - 5. In case alleging the misclassification of the Claimant, the classification status of the Claimant (i.e., exempt or non-exempt);
 - 6. Immediate supervisor(s) and/or manager(s).
- b. If the Respondent does not have a job description for the Claimant, a brief description of the Claimant's job duties for the relevant time period(s), if the job duties are at issue in the FLSA Claim(s).
- c. Name persons the Respondent believes to have knowledge of the facts concerning the FLSA Claim(s) or defenses, and a brief description of that knowledge.



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