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Protecting employee privacy rights in employment litigation

When an employee files suit against his or her former employer for claims arising out of the termination of the employment relationship, the employer often tries to use the discovery process to initiate an extensive inquiry into the employee's personal life and background. This may include subpoenaing past and current employment records, subpoenaing medical records and engaging in other discovery that clearly implicates the employee's privacy rights. The employer argues that medical records are discoverable because the employee is claiming emotional distress, and that past employment records are relevant to see if the employee lied on his or her employment application such that the after-acquired evidence defense may be applicable. Often, however, these fishing expeditions seem like nothing more than an attempt to harass and intimidate the employee, trample his or her privacy rights, and drive up the costs of litigation.

This article discusses the privacy implications of certain discovery routinely sought by employers during litigation of employment claims, and the arguments plaintiffs' counsel should make to prevent or limit unreasonable intrusions into the employee's right to privacy.

An individual's medical records are protected by the constitutional right to privacy

Often in employment cases, the employer will seek to compel the production of its former employee's medical records, typically going back a decade or more, either through subpoenas issued to the employee's medical providers, or through a request for production of documents directed to the employee. In an ordinary employment case, even where the employee is seeking to recover emotional distress damages, plaintiffs' counsel should respond with objections, a motion to quash deposition subpoenas and/or a motion for protective order. Plaintiffs' counsel should always immediately notify the person or entity served with a deposition subpoena that the plaintiff objects to the production of records, and request that documents not be produced early, in order to give counsel time to try to either informally resolve any disputes regarding the scope of the subpoena with opposing counsel or timely file a motion to quash or limit the subpoena.

Article I, section 1 of the California Constitution guarantees all individuals a right to privacy. It provides:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, *and pursuing and obtaining* safety, happiness, and *privacy*." California Constitution, Art. I, §1 (emphasis added).

The privacy clause of article I, section 1 of the California Constitution protects against invasions of privacy by private citizens, as well as the state. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 20 [26 Cal.Rptr.2d 834, 845]; *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 Cal.App.4th 345, 353 [101 Cal.Rptr. 2d 916, 920].)

An individual's medical and psychological records are within the zone of privacy. (See, e.g., *Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 842 [228 Cal. Rptr. 545, 549]; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal. App.3d 669, 678 [156 Cal.Rptr. 55, 60].)

These records are also subject to the statutory physician-patient privilege established in Evidence Code sections 990, et seq. and 1010, et seq.

Where a party seeks to discover documents subject to the constitutional right to privacy, that party bears the burden of establishing a *compelling need* for the discovery. (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014 [9 Cal.Rptr.2d 331, 335]; *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853 [34 Cal.Rptr. 2d 358, 366].) This burden is significant and not easily overcome.

To meet this burden, the party seeking discovery must first establish that each of the records sought is *directly relevant to the action* and *essential to its fair resolution*. (*Lantz, supra,* at page 1854 [34 Cal.Rptr.2d at 367].) (*See also, Britt v. Superior Court of San Diego County* (1978) 20 Cal.3d 844, 859 [143 Cal.Rptr. 695, 704].) The normal standard for discovery set forth in Code of Civil Procedure section 2017.010 – i.e., that the information sought need only be reasonably calculated to lead to the discovery of relevant or admissible evidence – is inapplicable to discovery of items protected by a constitutional right to privacy. Rather, in such cases, the items sought must be *directly relevant*. (*Britt, supra,* at page 859 [143 Cal. Rptr. 695, 704]; *Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1387 [64 Cal.Rptr.2d 731, 736].)

In an ordinary employment-termination case, it is difficult to conceive of any reason why *all* of a former employee's medical records would be directly relevant to the action and essential to its fair resolution. At most, the employer should be entitled to records of consultation or treatment for the emotional injuries proximately caused by the employer's conduct. The employer often wants more, arguing that because the employee is seeking damages for emotional distress, it is entitled to discover other possible stressors that may have caused the employee distress. This contention – that a defendant may engage in a wholesale fishing expedition into other possible stressors – has been expressly rejected under California law.

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In *Tylo*, the Second District Court of Appeal held that the simple fact that a plaintiff in an employment discrimination case claims emotional distress does not allow the defendant to engage in a "fishing expedition" seeking all other potential stressors in the plaintiff's life. (*Tylo, supra,* 55 Cal.App.4th 1379, 1388 [64 Cal.Rptr.2d 731, 736].) In *Tylo,* the plaintiff provided all information about psychological treatment she received for injuries caused by the employer's conduct. The employer defendant sought additional medical records, arguing that because the plaintiff sought emotional distress damages in her lawsuit, the defendant had the right to discover "other stressors that *might* have caused, or contributed to [the plaintiff's] alleged emotional injuries." (*Id.* at p. 1386 [64 Cal.Rptr.2d 731, 736] (emphasis in original).) The employer relied on the broad discovery rights set forth in Code of Civil Procedure section 2017(a), which has since been renumbered as section 2017.010. Recognizing that the normal standard for discovery set forth in section 2017 does not apply where the constitutional right to privacy is implicated, the court rejected the defendant's broad claim of waiver, and refused to allow the employer defendant to inquire into the nature of the plaintiff's marital relationship and her husband's medical history, which were alleged alternative sources of distress. (*Id.* at p. 1389 [64 Cal.Rptr.2d 731, 737].) (*See also, Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 571 [253 Cal.Rptr. 731, 739] ["we have difficulty accepting the defendants' basic notion that plaintiff's claimed injury of severe emotional distress is somehow apportionable between preexisting anxieties and the mental trauma caused by the defendants' alleged conduct."].)

Where the issue is whether the employee suffered discrimination, was harassed, or was wrongfully terminated, any medical treatment he or she has undergone is not directly relevant, is not essential to a just resolution of the action, and should not be discoverable, even where the employee seeks damages for emotional distress. Medical records will contain treatment for wholly unrelated medical issues and likely include irrelevant medical histories, possibly including medical histories of the employee's family members and potentially, extremely private sexual history or contraceptive practices. It is important for counsel to protect the employee's privacy in these records.

Even if in a particular case an employer can establish direct relevance and essentiality of medical records, the court must still carefully balance the need for production against the fundamental right to privacy. (*Lantz v. Superior Court, supra,* 28 Cal.App.4th 1839, 1854 [34 Cal. Rptr.2d 358, 367].) Moreover, any intrusion on the right to privacy "should be the minimum intrusion necessary to achieve its objective." (*Id.* at p. 1855 [34 Cal.Rptr.2d 358, 367].)

If medical records are directly relevant and essential, counsel should obtain and review a copy of the records to determine if any information should be redacted. For example, a treating therapist's notes may include medical histories of family members, whose privacy rights would separately be impacted by production of the records. Where necessary, counsel may need to request that the court conduct an in camera review of the records before their production to ensure the proper balance between the need for production and the right of privacy, and to ensure that the intrusion on privacy rights is the minimum necessary. The cost of any such in camera review should be borne by the defendant. (See *San Diego Unified Port District v. Douglas E. Barnhart, Inc.* (2002) 95 Cal.App.4th 1400, 1404 [116 Cal.Rptr.2d 65, 68] ["Each party to litigation normally bears the ordinary burden of financing his or her own suit ... That principle is violated when a party is ordered to pay for discovery sought by another party."].)

Employment records are also protected by the constitutional right to privacy

Like medical records, an individual's employment records are also within a constitutionally protected zone of privacy. (See, e.g., *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516 [174 Cal.Rptr. 160].) Nevertheless, it is common for defendant-employers to subpoena their former employees' personnel records from both past employers and the current employer once the employee has filed suit.

Because the employment records are within the constitutionally protected zone of privacy, the same standards for discovery apply as discussed above with respect to the discovery of medical records: the party seeking production must establish that the records are directly relevant and essential to a just resolution of the action. (*See, Lantz v. Superior Court, supra,* 28 Cal. App.4th 1839, 1854 [34 Cal.Rptr.2d 358, 367].)

With respect to past employment records, the most common arguments relied upon by employers is that the employment records are relevant to issues of credibility, work performance and mitigation of damages.

The most common justification asserted by the employer is a need to discover whether the employee made misrepresentations on his or her employment application. This, the argument goes, may allow discovery of an after-acquired evidence defense, or may be useful to attack the employee's credibility. Unless the employer has some credible evidence that a misrepresentation was made by the employee when he or she was hired that was so material that the employee would have been terminated if the employer had discovered that misrepresentation, the employer is engaging in a fishing expedition, which is not permitted when the constitutional right to privacy is at issue. Mere speculation as to the possibility that some portion of the records *might* be relevant to some substantive issues does not suffice. (*Davis v. Superior Court, supra,* 7 Cal.App.4th 1008, 1017 [9 Cal.Rptr.2d 331, 337]; *Mendez v. Superior Court, supra*, 206 Cal.App.3d 557, 570-571 [253 Cal.Rptr. 731, 739] [mere conjecture about what might be found is an insufficient basis for discovery of matters protected by the constitutional right to privacy]; *Huelter v. Superior Court* (1978) 87 Cal.App.3d 544, 549 [151 Cal. Rptr. 138, 140] ["mere speculation ... does not justify the discovery of privileged matter."].)

The employer also often claims that the employee's performance at his or her past employment may help establish that the employee was terminated from the job at issue in the lawsuit not for discriminatory or retaliatory reasons, but because of poor performance. This argument is invalid.

Records of the employee's performance at past employers are inadmissible as a matter of law on the issue of his or her performance with the defendant-employer, since it would constitute inadmissible character evidence. Evidence Code section 1101(a) provides,

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Evidence of a person's character or trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Thus, in *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App. 3d 1110, 1120 [267 Cal.Rptr. 503, 508-509], overruled on other grounds in *Alexander v. Superior Court* (1993) 5 Cal. 4th 1218, 1228 [23 Cal.Rptr.2d 397, 403]. the court relied on section 1101(a) in excluding evidence concerning the defendant doctor's performance at past employers, finding such evidence inadmissible under Evidence Code section 1101(a) to prove that the doctor performed poorly on the occasion at issue. Similarly, the defendant employer cannot introduce evidence of poor performance at prior employers to establish that it terminated the employee for poor performance. This information is therefore not discoverable.

Finally, records of past employment are not relevant to the issue of mitigation of damages. The employer may assert that it needs to know what the employee was earning at prior jobs to determine if he or she is properly mitigating damages. Aside from the fact that such information can be discovered without seeking production of constitutionally protected personnel records, this argument is not persuasive because the past employment earnings are not relevant to the issue of the employee's ability to mitigate his or her damages. An employee's duty to mitigate requires that the employee seek employment which is comparable or substantially similar to *that which was deprived*. (See, *Parker v. Twentieth Century-Fox Film Corp*. (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 740].) Thus, the employee's duty is to seek employment comparable or substantially similar to the position he or she held with the defendant-employer. Jobs held at prior places of employment are not relevant.

With respect to records from the plaintiff's current employer, the defendant-employer may have a valid argument that earnings from the current employer are directly relevant, in that they bear on the issue of mitigation of damages. However, this information may be discoverable from other sources, such as written interrogatories directed to the employee or production by the employee of his or her pay stubs from the current employer. In such a case, there would be no need to subpoena the current employer's records.

Moreover, even where it is appropriate to obtain current personnel records to establish what the employee has earned in mitigation, counsel should ensure that the scope of the defendant's subpoena is narrowly tailored to request only such documents, and not the employee's entire personnel file. The employee's performance records, attendance records and other such documents contained in the personnel file will ordinarily not meet the standard allowing their production.

The right to financial privacy also precludes intrusive discovery seeking the employee's personal financial information

As part of their zealous pursuit of information regarding the plaintiff, some employment defense counsel routinely seek to discover detailed information about the employee's finances, both during and after his or her employment with the defendant, including the amount and source of all income, whether earned income or passive income, and tax returns. Tax returns may be protected by the taxpayer's privilege. (See, *Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 513-514 [319 P.2d 621, 624]; *Sav-On Drugs, Inc. v. Superior Court of LA County* (1975) 15 Cal.3d 1, 6 [123 Cal.Rptr. 283, 286-287].) In addition, these discovery attempts also implicate privacy rights.

The right to privacy extends to one's confidential financial affairs as well as to the details of one's personal life. (*Valley Bank of Nevada v. Superior Court of San Joachin Valley* (1975) 15 Cal.3d 652, 656 [125 Cal.Rptr. 553, 555].) Thus, the defendant seeking to discover intimate details of the plaintiff's finances must meet the same stringent burden of demonstrating that the financial records sought are both directly relevant and essential to a just resolution of the case.

While information regarding an employee's salary post-termination may be relevant to the issue of mitigation, the same is not true of passive income. Details of the plaintiff's investment portfolio and real estate holdings and other financial information are not directly relevant to the employee's claim for damages. The employee's economic losses are calculated by comparing what the employee earned from the employer prior to his or her wrongful termination with the amount he or she earned or could have earned in mitigation. (*Parker v. Twentieth Century-Fox Film Corp., supra,* 3 Cal.3d 176, 181 [89 Cal.Rptr. 737, 740]. See also, *Ackerman v. Western Electric Co.* (N.D.Cal. 1986) 643 F.Supp. 836, 855, *affirmed,* 860 F.2d 1514 [awarding back pay in a FEHA disability discrimination case based on the employee's compensation level at the time of her termination, including benefits she would have received but for the employer's unlawful conduct.].) Anything else is not relevant.

But there can be situations where the plaintiff may put this information at issue in the lawsuit, thereby increasing the chances that a court will allow discovery of financial information. For example, where the employee contends that economic hardship caused by the loss of the job caused or added to his or her emotional distress, the employer may try to argue that the plaintiff's overall financial condition is thus directly relevant to the level of distress. Counsel should be aware of the risk that the defendant may be allowed to delve into the plaintiff's personal financial affairs if the plaintiff makes such a claim.

Conclusion

By filing a lawsuit to protect his or her rights, an employee does not thereby abdicate his or her constitutional right to privacy. (Cf. *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841-842 [239 Cal. Rptr. 292, 298].) Although this article is not intended to be an exhaustive look at all privacy issues that arise during discovery in employment litigation, it is designed to alert counsel to the potential privacy implications. Counsel must take steps to ensure that their client's privacy rights are not trampled.

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