

INITIAL DISCOVERY PROTOCOLS NONCOMPETE DISPUTES

**For cases arising out of contractual agreements or other business dealings, including
licensing, trade secret, intellectual property, antitrust, securities, noncompete,
nonsolicitation, and confidentiality agreements
(Ref. LAO 2013-02 Par.2.b.iii)**

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

- a. The Initial Discovery Protocols for Business Cases is a proposal designed to be implemented as a pilot project by individual judges throughout Michigan Business Courts.
- b. The Initial Discovery Protocols for employer/employee noncompetition, nondisclosure and nonsolicitation agreements (hereinafter “Noncompete Protocols”) will be implemented by local administrative order and will apply to all cases which contain allegations regarding employer/employee noncompetition, nondisclosure, and nonsolicitation agreements as designated by each business court judge.

If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from the Noncompete Protocols, that party may raise such reason with the Court.

- c. The Noncompete Discovery Protocols are not intended to preclude or to modify the rights of any party for discovery as provided by the Michigan Court Rules of 1985 and other applicable local rules. The purpose of the pilot project is to encourage parties and their counsel to exchange the most relevant information and documents early in the case, to assist in framing the issues to be resolved and to plan for more efficient and targeted discovery.
- d. In the event that the parties’ claims apply to more than one of the initial discovery protocols (for example Employment, Non-Competition, Business Contract, Business Organization Dispute, etc), and the parties cannot agree upon which to follow, the parties’ must contact the Business Judge’s clerk within 10 days after the initial responsive pleading is filed to obtain clarification upon which to follow.
- e. The Noncompete Discovery Protocols were prepared by a group of highly

experienced attorneys from Macomb County who regularly represent plaintiffs and/or defendants in employment and business matters. The information and documents identified are those most likely to be automatically requested by experienced counsel in any similar case. They focus on the type of information most likely to be useful in narrowing the issues for employment and business cases.

(2) Definitions.

The following definitions apply to cases proceeding under the Noncompete Protocols.

- a. Concerning.* The term "concerning" means referring to, describing, evidencing, or constituting.
- b. Document.* The terms "document" and "documents" are defined to be synonymous in meaning and equal in scope to the terms "documents" and "electronically stored information" as used in MCR 2.310 (A)(1) and MCR 2.302 (B)(5).
- c. Identify (Documents).* When referring to documents, to "identify" means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent; or, alternatively, to produce the document.
- d. Identify (Persons).* When referring to natural persons, to "identify" means to give the person's: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

(3) Instructions.

- a. For this initial discovery pursuant to the Noncompete Protocols, the relevant time period begins three years before the date of the adverse action, unless otherwise specified.
- b. The Noncompete Protocols are not subject to objections except upon the grounds set forth in MCR 2.309(B) and MCR 2.310(C)(2).

- c. If a partial or incomplete answer or production is provided, the responding party shall state specifically any reason that the answer or production is partial or incomplete.
- d. If any document(s) required under this Initial Discovery Protocol are not produced, a producing party must provide a Privilege Log that (1) states the document number (e.g. Bates number) of the document, (2) describes the nature and general subject matter of the document not produced, (3) states the date and type of document (e.g., e-mail, notes, memo, etc.), (4) the name(s) of the author/sender, recipient, and any third parties recipients copied, (5) and the privilege(s) asserted as to the withheld document. Privilege must be asserted in the producing party's written response under M.C.R. 2.310. Privilege claims not timely asserted are waived in the instant action.

Privileged documents which are inadvertently produced by the producing party may be subject to waiver of the claimed privilege or clawback of the document consistent with MCR 2.302 (B)(7).

- e. This Initial Discovery is subject to MCR 2.302(E) regarding supplementation and MCR 2.302(G) regarding certification of responses.
- f. This Initial Discovery is subject to MCR 2.302(H) and MCR 2.310(C)(5) regarding form of production.
- g. Prior to seeking a Protective Order from the Court, the parties shall confer in an effort to enter a Stipulated Protective Order regarding the disclosure and exchange of any Initial Discovery documents. The Court will deny any Protective Order sought if the parties have not personally conferred first regarding same.

PART 2: PRODUCTION BY PLAINTIFF.

(1) Timing.

- a. The plaintiff's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Plaintiff must produce to Defendant.

- a. All communications concerning the factual allegations or claims at issue in this lawsuit between the plaintiff and the defendant, and/or defendant's manager(s), and/or supervisor(s), and/or the plaintiff's human resources representative(s).

- b. The contract in question.
- c. Documents concerning the formation and termination, if any, of the employment relationship at issue in this lawsuit, irrespective of the relevant time period.
- d. All documents which demonstrate the noncompetition, nondisclosure or non solicitation agreement is reasonably tailored to justify Plaintiff's legitimate business interests as to geographic scope, duration, and type of employment or line of business.
- e. History of the application of the noncompetition, nondisclosure or non solicitation agreement, as it applies to prior employees.
- f. The defendant's personnel file, in any form, maintained by the Plaintiff, including files concerning the defendant maintained by the defendant's supervisor(s), manager(s), or the plaintiff's human resources representative(s), irrespective of the relevant time period.
- g. The defendant's performance evaluations and formal discipline.
- h. Any and all evidence of the employer's proprietary information, including but not limited to customer lists, company policies, pricing information, vendor information and the like, currently in the possession of the former employee.
- i. Workplace policies or guidelines relevant to the litigation in effect at the time of the adverse action. Depending upon the case, those may include policies or guidelines that address:
 - i. Discipline;
 - ii. Termination of employment;
 - iii. Promotion;
 - iv. Nature of the employment relationship.
- j. The table of contents and index of any employee handbook, code of conduct, or policies and procedures manual in effect at the time of the adverse action.
- k. Job description(s) for the position(s) that the defendant held.
- l. Documents showing the defendant's compensation and benefits. Those normally include retirement plan benefits, fringe benefits, employee benefit summary plan descriptions, and summaries of compensation and cost of fringe benefits.
- m. Agreements between the plaintiff and the defendant to waive jury trial rights, arbitrate disputes, or shorten statute of limitations.

- n. Documents concerning investigation(s) of any complaint(s) about the defendant or made by the defendant, if relevant to the plaintiff's factual allegations or claims at issue in this lawsuit and not otherwise privileged.
- o. Any and all documents filed with the Michigan Administrative Hearing System or Unemployment Insurance Agency (UIA) or received from the UIA regarding the Plaintiff and Defendant in this case, including decisions, determinations, redeterminations and responses to fact finding requests.
- p. Any other document(s) upon which the plaintiff relies to support the plaintiff's claims.

(3) Information that Plaintiff must produce to Defendant.

- a. Identify persons the plaintiff believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.
- b. Describe the categories of damages the plaintiff claims.

PART 3: PRODUCTION BY DEFENDANT.

(1) Timing.

- a. The defendant's Initial Discovery shall be provided within 30 days after the defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that Defendant must produce to Plaintiff.

- a. All communications concerning the factual allegations or claims at issue in this lawsuit among or between the plaintiff and the defendant.
- b. Documents concerning: (i) communications with potential employers; (ii) job search efforts; and (iii) offer(s) of employment, job description(s), and income and benefits of subsequent employment or potential employment. The plaintiff shall not contact or subpoena a prospective or current employer to discover information about the claims without first providing the defendant 30 days notice and an opportunity to file a motion for a protective order or a motion to quash such subpoena. If such a motion is filed, contact will not be initiated or the subpoena will not be served until the motion is ruled upon.

- c. Defendant's current resume(s).
- d. All communications between any and all potential employers and/or third party employers concerning solicitation of former employees, clients, customers, or vendors.
- e. Any and all proprietary information of Defendant's former employer currently in his/her possession including but not limited to customer lists, company policies, pricing information, vendor information and/or lists, et al.
- f. Documents in the possession of the defendant and/or the defendant's agent(s) concerning claims for unemployment benefits unless production is prohibited by applicable law.
- g. Any other document(s) upon which the defendant relies to support the defenses, affirmative defenses, and counterclaims.

(3) Information that Defendant must produce to Plaintiff.

- a. Identify persons the defendant believes to have knowledge of the facts concerning the claims or defenses at issue in this lawsuit, and a brief description of that knowledge.
- b. Identify all factual assertions upon which Defendant will rely to support its defenses, affirmative defenses and counterclaims.
- c. Identify all persons Defendant has contacted since his employ with Plaintiff ended who are potential employers, vendors of Plaintiff, customers of Plaintiff, were contacts obtained while employed by Plaintiff or otherwise at all related to Defendant's employment with Plaintiff.