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Employment-law litigation strategies in federal court

AVOIDING COMMON LITIGATION PITFALLS INCLUDING REMOVAL TO FEDERAL COURT

In employment-law cases, if you are suing an out-of-state employer, that employer defendant will almost always remove your case to federal court based on diversity of citizenship. As an employment lawyer, litigating in federal court is often necessary. The goal of this article is to provide some tips to avoid federal court in the first place and then to provide litigation strategies to enable you to set your federal employment-law case up for success if you cannot avoid removal.

First, we will discuss strategies to avoid removal to federal court and why you want to stay in state court. Second, we will discuss litigation strategies which are unique to federal court practice from the beginning of litigation through trial. Please keep in mind that these strategies generally apply to all employment cases but may not be applicable to every employment case you handle.

Avoiding removal to federal court

The first question we must ask ourselves is: Why do defendants remove employment cases to federal court in the first place? Federal court can and often does result in liability findings and damage awards that favor the defendant. The Federal Rules of Civil Procedure ("FRCP") and the district court local rules benefit defendants at nearly every stage of the litigation.

Unanimous jury requirement and other key differences between federal and state court

The principal reason you want to stay in state court for your employment case is because, in federal court, a unanimous jury verdict is necessary for a plaintiff to win. (FRCP 48). Furthermore, the jury size is smaller in federal court with juries typically comprised of eight persons, which include two alternates, and you only need six jurors to reach a verdict. In state court, on the other hand, the plaintiff wins if three-fourths (i.e., 9 out of 12 jurors) agree on a verdict. (Code Civ. Proc., § 613.) You don't need to be a social psychologist and an expert on group-decision making to appreciate that having only 75% of a twelve-person jury find in your favor both in terms of liability and damages makes a huge difference in the outcome, as opposed to needing six-to-eight jurors unanimously vote for the plaintiff. Unanimous jury verdicts make it much more likely that there will be a compromise verdict. A compromise verdict occurs when the jury cannot agree on certain issues relating to liability and/or proper compensation and vote against their true beliefs to avoid a deadlock.

Although I have a small sample size from my own personal experience, this reality of compromise verdicts hit home for me during my October 2023 federal employment jury trial when the jury announced they reached a unanimous verdict, came back with a finding in the plaintiff's favor but did not answer the damages questions. The verdict was resubmitted to the jury, who then reversed their liability finding from a verdict in favor of plaintiff to a verdict in favor of the defendant after resubmission, resulting in a defense verdict. This jury whiplash in my trial is a testament to the power of how unanimous verdicts can negatively impact both liability and damages for plaintiffs.

Another reason state court is preferred over federal court is that state court jurors are typically drawn from more plaintiff-friendly jury pools. In federal court, jurors are drawn from voter-registration records and from the entire district, which includes not only LA county, but also Ventura and Orange counties, for example, which are more conservative counties with more conservative jurors. The state-court jury pools typically are more plaintiff-friendly. A caveat is that if your employment-law case is venued in a conservative county, federal court drawing from a bigger jury pool may actually be more plaintiff-friendly. There is also limited voir dire in federal court with the judge conducting most, if not all, of the voir dire. There are also only a limited number of peremptory challenges in federal court, which are typically limited to three peremptory challenges per side.

There are also several procedural considerations that relate to the judge who will be deciding your case, and other rules relating to discovery and trial that favor keeping your employment law case in state court. These procedural considerations are too numerous to fully discuss in this article. One procedural difference is that in California state court, you may exercise one peremptory challenge to disqualify one judge without a showing of cause. (Code Civ. Proc., § 170.6.) In federal court, there is no equivalent to disqualify a judge without cause. In the past decades, most recently with former President Trump, there was an aggressive conservative campaign to reshape the federal judiciary, including the Ninth Circuit, which is where your employment- law case will be heard if there is an appeal.

Former President Trump named at least ten judges to the Ninth Circuit in four years, compared with only seven appointed by President Obama over eight years. Conservative judges are not as receptive and favorable to employees and consumers generally, and tend to favor corporations, which can influence the outcome of your employment-law case.

Destroy diversity of citizenship

You must begin to strategize about ways to avoid removal to federal court if you have an out-of-state defendant at the pleading stage. First, you can avoid removal if your employment case is

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against an out-of-state defendant by naming an individual defendant and destroying diversity of citizenship. There are at least four different ways to name an individual defendant: 1) alleging defamation against an individual defendant; 2) alleging a harasser, 3) alleging wage claims against an individual with control over the wages, and 4) alleging intentional infliction of emotional distress ("IIED").

First, you can allege a defamation claim against an individual defendant. You should calendar a one-year statute of limitations, typically from the termination date but sometimes earlier, for potential defamation claims, and include a defamation cause of action to defeat diversity. (Code Civ. Proc., § 340.) False reasons for an employee's termination may give rise to a defamation claim. (*King v. U.S. Bank* (2020) 53 Cal.App.5th 675, 704.)

Second, you can name an individual defendant as a harasser not only in sexual harassment cases, but also harassment on any protected characteristic. As the California Supreme Court made clear in *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, "[H]arassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives...." *Roby* expanded the ability of plaintiffs to allege harassment causes of action, at least in the context of disability discrimination cases. Make sure to allege sufficient factual allegations regarding harassment against an individual defendant in your CRD (formerly DFEH) complaint and your complaint filed with the court if you know that removal to federal court is a likely possibility.

Third, other employment cases in which an individual may be named as a defendant include wage claims, where the individual defendant exercises control over the wages. For example, Labor Code section 558 provides that an employer "or other person acting on behalf of an employer" who violates or causes a violation of the state's applicable wage and hour laws shall be subject to a civil penalty. Similarly, Labor Code section 558.1 applies to "[a]ny employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802." Section 558.1(a) expressly states that any such person "may be held liable as the employer for such violation." Section 558.1(b) limits the term "other person acting on behalf of an employer" to "a natural person who is an owner, director, officer, or managing agent" of the employer. Additional theories of individual liability include pursuant to Labor Code sections 1197.1 and 351.

Fourth, you can allege claims against individual defendants for intentional infliction of emotional distress. In *Barsell v. Urban Outfitters, Inc.* (C.D. Cal. July 1, 2009) 2009 WL 1916495, *4, the court held that there was a "non-fanciful possibility" that plaintiff could state a claim for IIED against her supervisor where plaintiff alleged that the supervisor had falsified a report about plaintiff's work history and retaliated against plaintiff based on that report. (See also *Martinez v. Michaels Stores, Inc*. (C.D. Cal. July 15, 2015) 2015 U.S. Dist. LEXIS 92180, at *26-29, 2015 WL 4337059 [holding that "courts ordinarily find IIED claims based on workplace harassment or discrimination viable even when asserted against individual employees"].)

In the event that you are in federal court without an individual defendant, make sure to calendar the deadline based on the court's scheduling order as to when you can add defendants to the case, and strictly comply with those deadlines if naming an individual defendant was not included in your initial complaint. Be prepared for the defendant to argue that the individual defendant is fraudulently joined and is a "sham" defendant to keep the case in federal court. (*Ritchey v. Upjohn Drug Co*. (9th Cir. 1998) 139 3d 1313, 1318. Allege sufficient facts in your complaint to keep the individual defendant in your employment law case to destroy diversity.

Lack of subject matter jurisdiction

Filing a motion for lack of subject-matter jurisdiction is an often overlooked but viable reason you can have your case remanded to state court and it is a non-appealable order. Courts strictly construe the removal statute against removal jurisdiction. (*Boggs v. Lewis* (9th Cir. 1988) 863 F.2d 662, 663.) Defendant bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met. (*Harris v. Rand* (9th Cir. 2012) 682 F.3d 846, 850-851.) Normally, this burden is satisfied if the plaintiff claims a sum greater than the jurisdictional requirement. (*Pachinger v. MGM Grand Hotel-Las Vegas, Inc*. (9th Cir. 1986) 802 F.2d 362, 363.)

This is why you never want to allege an actual monetary amount of damages in your complaint, particularly if you know removal is a possibility. Many courts in the Central District have declined to project future lost wages beyond the date of removal. (See *Ramirez v. Builder Servs. Grp., Inc*. (C.D. Cal. Jan. 5, 2023) Case No. 5:22-cv-1571-JGB (KKx), 2023 WL 115561, at *4.) Courts are not required to include emotional-distress damages in the amount in controversy when the party asserting jurisdiction fails to provide evidence of jury awards from similar cases. (*Aguilar v. Wells Fargo Bank, N.A*. (C.D. Cal. Nov. 4, 2015) Case No. 5:15-cv-01833-AB (SPx), 2015 WL 6755199, at *6.) Therefore, it is incumbent upon you to scrutinize the defendant's notice of removal, and if you do not have an individual defendant to name in the complaint, consider filing a motion for lack of subject matter jurisdiction based on a failure to satisfy the $75,000 amount-in-controversy requirement.

Stipulating to the jurisdiction of state superior court

You can also stipulate to the

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jurisdiction of the state superior court with opposing counsel, particularly if they want you to dismiss the individual defendants. So, it is important not to overlook the importance of a phone call to stay in state court.

Only include state claims in your complaint to avoid removal based on federal questions

In California, there should not be any reason to include any federal claims in your complaint. If you include federal claims, defendants can remove your case to federal court under 28 U.S.C. § 1331, based on the existence of a federal question. Use the Fair Employment and Housing Act ("FEHA") for discrimination rather than Title VII, the FEHA's federal counter part. The FEHA provides recovery for more claims and damages than does Title VII. You can also bring claims under the California Family Rights Act ("CFRA") rather than the Family Medical Leave Act ("FMLA"), a federal statute. There are a few situations where you may want to include a federal claim, such as claims under the Sarbanes-Oxley Act for example, or claims against religious organizations under Title VII, but your employment case will typically be sufficient with California's favorable anti-retaliation statutes such as Labor Code sections 1102.5 and 6310.

Strategies for litigating your employment case in federal court

Despite the advantages of litigating in state court outlined above, federal court does have several advantages, and there will be employment cases where you cannot destroy diversity and will have to litigate in federal court. As an initial matter, cases move much faster in litigation up through trial in federal court. That can be a good thing as trial dates often drive a case toward settlement. The cases are ordered to settlement conferences with magistrate judges or private mediation. Stipulations to continue trial are almost always denied absent a showing of good cause in federal court. Therefore, you must plan your litigation strategy and initiate discovery early on in your federal case. You need to leave yourself sufficient time to file motions to compel well before the fact and expert discovery cut-off dates.

FRCP 26

It is often easy to get concerned or feel overwhelmed by applying the Federal Rules of Civil Procedure and local rules as opposed to state court rules. There are fewer differences than you may think, and you can actually learn the federal procedural rules you will need in discovery and trial within a couple hours. The FRCP rule you want to be most familiar with if you don't know any other rule, is FRCP 26, with all its subparts, which govern fact and expert discovery.

In federal court, each party must disclose to the other party multiple key pieces of information through its initial disclosures pursuant to FRCP 26(b), such as documents, identification of witnesses, insurance and damages information. Furthermore, there is a continuous duty to supplement the disclosures. (FRCP 26 (e).) This means that the Defendant cannot sandbag you with a key piece of undisclosed evidence at trial. It also means that you do not need to serve supplemental interrogatories and supplemental document requests as you do in state court. There are also no motion-to-compel deadlines and you can bring a motion to compel at any time subject to your discovery and motion cut-off dates.

However, if all parties faithfully complied with the requirements of FRCP 26(b) there wouldn't be a need for any discovery, which we know is never the case. When it comes to key evidence, including communications such as emails and text messages, which are crucial in employment cases, the defendant will often not produce such documents through its initial disclosures. It is therefore incumbent upon you to serve discovery early on in the litigation, particularly given the speed with which federal cases move and the likely inability to continue the trial date by stipulation of the parties.

In federal court, discovery disputes are handled by the magistrate judges. One benefit to federal court is that it is relatively easy to get a motion to compel on calendar with a magistrate judge, who is often inclined to liberally allow for more rather than less discovery. This can help avoid delays in obtaining discovery you need and getting a motion to compel date on calendar.

The joint FRCP 26(f) report

Pursuant to FRCP 26(f), the parties are required to submit a joint report that outlines the key issues of the case, statement of facts, any potential discovery disputes, anticipated motions, etc. at the outset of the litigation, which is similar to but more detailed than a case management statement in state court. Under FRCP 6, the notice of motion is to be filed and served no later than 28 days before the hearing date with oppositions due 21 days before the date designated for the hearing under Central District Local Rule 7-9. That means you could have just seven days to oppose a motion for summary judgement ("MSJ") although most judges require 14 days for MSJ oppositions. In state court, you have 61 days to file an opposition to an MSJ under Code of Civil Procedure section 437. There are also no employment-law form interrogatories or any form interrogatories in federal court at all, which is a very helpful tool for the employment-law attorney. Each party is also limited to no more than 10 depositions, which includes expert depositions and Person Most Knowledgeable depositions. (FRCP 30(a)(2)(A)(i)). Under FRCP 33, you are limited to 25 interrogatories per party. These are examples of how the procedural and discovery rules allow for greater discovery and are more favorable in state court than federal court.

However, the FRCP 26 conference required prior to the filing of the joint FRCP 26 (f) report, is your opportunity to request more discovery and longer time frames to oppose dispositive motions. Therefore, plan ahead and do not take

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the joint FRCP 26(f) report and conference of counsel lightly. This is another key reason you want to plan your litigation strategy as early as possible in federal court. If you anticipate needing more than 25 interrogatories and more than 10 depositions, which can be necessary in employment cases, discuss it with opposing counsel and put it within your joint FRCP 26(f) report. I also ask for at least 30 days to oppose an MSJ and defense counsel often agrees to more time than allowed under the FRCP to start the litigation off on the right foot, and you can horse-trade if necessary.

Expert discovery and disclosures under FRCP 26

You can easily miss the expert disclosure deadlines in federal court. Often, the judge's scheduling and civil trial order require a different expert disclosure date than that called for under FRCP 26. That is why you want to always triple check and calendar the deadlines outlined in the court's civil trial order. If the judge does not require a date for expert disclosures, then the date is prescribed by FRCP 26(a)(2)(D), which is 90 days before the trial date. A key difference with expert disclosures in federal court is that all retained experts must prepare a report, which must be produced at the time of designation, and the duty to supplement the disclosures applies to experts as well. (FRCP 26(a)(2)(E).) Under FRCP 26(b)(4)(C), communications between a party's attorney and expert witness are protected communications except to the extent outlined within the rule itself, which can work to your advantage.

Another key difference with expert disclosures in federal court is that pursuant to FRCP 26(e)(2), the duty to supplement also includes testimony provided during the expert's deposition. Therefore, if your expert provided any testimony at deposition that is not included within your expert's report, it is important to review the deposition testimony and supplement your expert's report immediately.

Expert disclosures are required earlier in federal court than in state court. If the defendant has filed a motion for summary judgment, it could take months for the court to rule on the motion, which is well beyond the discovery cut-off dates. If you have a psychological expert for example, it could have been months or years since your expert examined the plaintiff, which is often a cross-examination tactic of the defense to argue that your psych expert does not know your client's current psychological state because the examination occurred well over a year ago. To rebut this defense, I thought I would be smart and have my client re-examined in the weeks prior to trial, but I did not disclose this reexamination. I think a good trial tip is to discuss with defense counsel about having your client potentially re-examined by your experts prior to trial and give them the same opportunity, otherwise it could lead to the expert's testimony being excluded altogether.

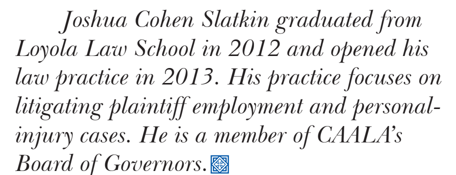
In disability discrimination cases, for example, you may and often should have testimony from your client's treating physician who wrote the doctor's notes, etc. It is better to err on the side of designating such a treating physician in your FRCP 26 expert disclosures as an expert witness and providing a report so they can opine on whether or not your client could perform the essential functions along with other critical testimony that could assist the jury. If you fail to designate treating physicians as expert witnesses also, you may risk a motion to exclude or limit the treating doctor's testimony altogether, which I had to deal with.

Financial-condition discovery

Unlike under the Code of Civil Procedure, the FRCP allows for discovery of defendant's financial condition. Discovery of defendant's net worth and financial condition is clearly relevant to the issue of punitive damages. (*City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 270. Under California law, this information is a prerequisite to an award of punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 114-116. With discovery often closed months before the MSJ is ruled upon, if your punitive-damages claim survives MSJ and you do not conduct financial-condition discovery prior to the discovery cut-off in federal court, you will be unable to present evidence on and argue for punitive damages. This is a key distinction in federal-court litigation practice that you must make part of your federal litigation strategy, so you obtain the necessary discovery to present financial condition evidence at trial for purposes of punitive damages.

Conclusion

Do not let the challenges of litigating employment cases in federal court dissuade you from taking on a righteous employment case. With these strategies in mind, you can either keep the case out of federal court altogether, and if not, take advantage of the many benefits of federal court. With a well-developed litigation strategy at the outset of your federal employment law case, you can maximize your chance of success through settlement or trial.



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