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We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

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Another Strike Against Non-Competes

We recently shared with you the details of a trade regulation rule proposed by the Federal Trade Commission banning non-compete agreements. (See "[FTC Proposed Regulation Places Non-Competes in Jeopardy.](#)") The proposed rule would prohibit non-competes in the workplace and require employers to rescind non-compete agreements currently in place. The FTC's proposed rule, if enacted, would have an immediate and profound impact on businesses and workers throughout the country, particularly as it concerns the employment relationship, employee retention and mobility, customer relationships and the treatment of confidential and proprietary information.

The proposed FTC rule remains in the comment stage with many companies and organizations voicing strong objections to a complete ban where businesses have heavily invested in establishing a loyal customer base. It is commonly believed that if the rule is ultimately enacted, it will be considerably reduced in scope and impact.

Almost two years ago, President Biden issued Executive Order 14036, which broadly addresses promoting competition in the American economy. Among the measures considered in that executive order was greater scrutiny of employee non-compete agreements. Now, in addition to the President and the FTC, the General Counsel of the National Labor Relations Board has inserted her agency's authority in hopes of further restricting employee non-compete agreements. On May 30, 2023, NLRB General Counsel Jennifer Abruzzo sent a memorandum to the various Regional Directors and other NLRB officials explaining her theory that most employee non-compete agreements violate the National Labor Relations Act (NLRA). In the memorandum, Abruzzo directs the various NLRB regions to be on the lookout for cases to bring against employers that enter into, or even propose, employee non-compete agreements.

The NLRA, enacted by Congress in 1935, has never been interpreted to prohibit, or even to limit, employee non-compete agreements. Abruzzo, however, explains in her memorandum that, in her opinion, most such agreements are unlawful throughout the United States because they "interfere with, restrain, or coerce employees in the exercise" of their right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Essentially, Abruzzo argues that non-compete provisions interfere with workers' rights because they limit an employee's option to threaten to or actually quit or change jobs in support of demands to an employer for different or better pay and working conditions, either individually or in a group. She argues that while there might be some "special circumstances" that would make an employee non-compete agreement lawful, as a general rule, "the proffer, maintenance, and enforcement of a non-compete provision that reasonably tends to chill employees from engaging in ... activity as described above violates" the NLRA.

The good news for businesses that proffer, maintain, and enforce employee non-compete agreements is that the NLRB General Counsel does not have the power to make rules like this. Instead, she acts as a prosecutor, choosing certain cases as vehicles to try to convince the full NLRB to adopt her (unconventional) view of the scope of the NLRA. Even if she found an appropriate case and convinced the NLRB to adopt her view, that decision itself would be subject to review by a federal court. We are likely years away from any sort of definitive ruling that the NLRA restricts employee non-compete agreements.

While the NLRB is unlikely to hold that the NLRA prohibits employee non-compete agreements, and it is particularly unlikely to do so soon, businesses that use employee non-compete agreements should take this as yet another warning that such agreements are subject to increased scrutiny. Businesses are well advised to limit non-compete agreements to employees with significant customer contact and/or access to confidential business information. They should also consider confidentiality provisions in both their employee handbooks and employment agreements.

For more information or any questions, please contact Norm Finkel at norm.finkel@sfbbg.com or Robert Goldberg at robert.goldberg@sfbbg.com, or call 312-648-2300.



Balancing the BOTS: How to Harness the Power of AI without Falling Down the Rabbit Hole

Trial Victory

After a 3½ day trial in Bucks County, PA for a sales rep who saw his contractual commission rate cut just as the production orders were ramping up, the jury took slightly over two hours (including lunch) to return a unanimous verdict for the full amount requested. SFBBG trial attorneys Adam Glazer and Andrew Johnson will now seek to recover from the court multiple times the amount of the mid-six figure award under the applicable sales rep statute, plus attorney's fees, costs and prejudgment interest. The client was obviously thrilled and commented that watching these proceedings was "much better than any TV trial."

Retirement & Promotions

On June 29, long-time Firm attorney Gerry Newman retired after serving with SFBBG for over 30 years.

The Firm would like to extend an official congratulations to newly named Firm partners, Adam Maxwell and Jason Newton. Adam's practice area includes commercial litigation and employment law, while Jason's practice area is real estate tax appeal work.

Welcome Aboard!

The Firm is proud to announce two new attorneys joining us: Kelly Cronin and George Banakis. Kelly joined SFBBG's litigation practice group and George works with our real estate tax appeal group.

Published Articles

On June 29, Chicago Lawyer magazine published an article written by Rich Goldwasser: "More work to be done: The difference between winning and collecting a judgment."

Presentations

On July 17, Joan Berg provided a presentation to the 2023 class of incoming credit analysts of Byline Bank concerning construction lending and corporate structure.

Also on July 13, Joan provided a presentation on non-profit tax-exempt corporations and corporations governance to the National Forum of Greek Orthodox Musicians in St. Louis, MO.

Dan Beederman presented at the Electrical Equipment Representatives Association (EERA) on May 22-23 in Palm Beach, Florida. The topic of his presentation was "Achieving and Maintaining Success as a Sales Representative."

New Addition to SFBBG Website

Visit our website now to see the newly added reference section entitled: Employment Spotlight. In this segment, our best employment law attorneys will contribute new and updated information for employers and employees.

Cook Co. Property Tax Bills Delayed

It was recently announced that the second installment property tax bills for Cook County will be available to property owners on November 1, 2023. The due date for the bills will be December 1, 2023.

What is ChatGPT and How Will It Affect My Business?

Business owners should be aware of the benefits and legal pitfalls that lurk under the world of Artificial Intelligence ("AI"). OpenAI's latest creation, ChatGPT, is a language-based AI chatbot that relies on user inputs to generate conversational, human-like responses. ChatGPT boasts a broad range of skills, including proofreading, translating, researching and analyzing large bodies of data efficiently.

AI can assist companies in optimizing processes for customer support, data analysis, employee training and onboarding, and can even automate other processes such as the dissemination and execution of consent forms, disclosures and disclaimers. Automating some of these procedures may be enticing to a company looking to reduce overhead.

But which of AI's skills should your company take advantage of? And which should it avoid?

1. Be Careful What You (and Your Employees) Say to ChatGPT.

Unlike a typical chatbot, ChatGPT's knowledge is based on user input. Any data disclosed to ChatGPT is retained by the AI model to 1) personalize future conversations and 2) expand its knowledge base.

In April of 2023, Samsung's code engineers were utilizing ChatGPT to analyze bugs in the source code for a new program when they mistakenly leaked top-secret codes and internal meeting notes to ChatGPT. Samsung subsequently banned its employees from using generative AI models for work-related purposes, citing a "growing concern about security risks presented by generative AI".

When disclosing data to ChatGPT, take heed that any user inputs could be inadvertently disclosed to a third-party.

2. Consider Adding a ChatGPT Provision to Your Employee Handbook and Business Contracts.

To combat potential exposures related to employee use (or misuse) of AI, consider implementing a ChatGPT prohibition to your company's employee handbook, particularly if numerous employees have access to sensitive data.

If an employee inadvertently submits a document to ChatGPT which has any type of confidential or sensitive data, such as trade secrets, price lists, client contacts, or budgets, the company could open itself up to liability, particularly if it is contractually obligated to keep that information confidential.

Depending on the terms of the agreement, a company that breaches a confidentiality provision could lose its contractual rights or face penalties. The agreement could even be terminated, causing a loss of revenue and reputation. Finally, the company in violation could potentially face a negligence lawsuit based on the disclosure.

Adding an AI provision to an employee handbook can help a business defend itself should an employee misuse AI while on the clock. The handbook should warn employees not to disclose private, confidential or proprietary information to any generative AI platform, such as ChatGPT.

For the same reasons, companies should consider an AI provision in contracts with vendors and subcontractors to ensure the integrity of their data and security.

3. Do Not Rely on AI in Employment Practices.

In the employment realm, ChatGPT can screen candidates and evaluate resumes. However, these tools have been the subject of criticism from diversity advocates as well as the subject of legislation. On July 5, 2023, New York City's Local Law 133 went into effect, prohibiting employers from using automated employment decision-making tools [such as ChatGPT] unless the tool has been subject to a bias audit within one year.

Since ChatGPT's knowledge base is extrapolated from multiple sources, including thousands of users, it is subject to the same bias its users and sources may possess. In January of 2023, German researchers found that ChatGPT has a political affiliation, raising concerns about AI's objectivity. In February of 2023, a Forbes editorial accused ChatGPT of political bias after it provided favorable commentary of some politicians, but not others.

In 2018, Amazon was building an AI recruitment tool, intended to streamline its hiring process. Amazon engineers abandoned the project after they determined that selection results were biased against women. But why would AI have a bias against women? Well, the data ChatGPT pulls from is only as good as the data it has been provided. Amazon's algorithm was relying on *historical data* to screen and select its candidates. When looking at the data, it may have noted that in 2021, women made up only 15% of C-suite executives at S&P 500 companies. Accordingly, when ChatGPT attempts to "analyze the data", one of the findings it will make is that men are statistically more likely to hold C-suite positions. This is how AI could silently bring bias into the hiring process. A best hiring practice requires humans with hemis and minds to make thoughtful employment decisions.

4. Do Not Rely on AI for Legal Advice.

Whatever your legal needs, it is critical to consult with an experienced attorney who is familiar with the laws in your jurisdiction. The law changes frequently and varies greatly between jurisdictions, such that AI should never be relied on for legal advice.

ChatGPT has been known to fabricate data to fill in gaps in its knowledge. In May of 2023, a New York City litigator asked ChatGPT to conduct legal research for a brief. ChatGPT generated false citations to fictional cases and then assured the unsuspecting attorney that the citations were real and could be "found in reputable legal databases such as LexisNexis and Westlaw." Such responses from ChatGPT are now referred to as "hallucinations."

ChatGPT is aware of its own limitations. When asked if it can provide legal advice, ChatGPT wisely responds with "[n]o, I cannot provide legal advice. I am an AI language model and not a licensed attorney. Legal matters require expertise and knowledge of specific laws and regulations that can vary by jurisdiction. It is always recommended to consult with a qualified attorney or legal professional for personalized legal advice pertaining to your specific situation."

For more information, please contact Kelly Cronin at kelly.cronin@sfbbg.com or at 312-648-2300.