ACC Association of Corporate Counsel
BALTIMORE

FOCUS

President's Message

Taren Butcher

Happy Fall! While it doesn't quite feel like Fall yet, school is in full swing, and football is back on TV so it is only a matter of time before those crisp Fall days are upon us. The Fall has traditionally been a busy time of year for the Baltimore Chapter and this year is no different!

By the time this article comes out, we will have hosted our second community service event of the year with Maryland Food Bank helping to pack food for those in need. We hope to host at least one more service event before the end of year; so be on the lookout in the coming weeks about another opportunity to give back!

We have two other exciting events planned for September! On September 21, we will host our Fall Social with Womble Bond Dickinson at Copper Shark, a new restaurant in the Locust Point neighborhood.

On September 26, Nelson Mullins will host a lunch presentation on banking considerations, including the risk of doing business with third-party vendors, such as Venmo and PayPal. In response to our member survey about hosting lunches outside of Baltimore City, we will be hosting the lunch at Matthews 1600 in Catonsville. We look forward to seeing some new faces with the change in location!

None of these events and programming would be possible without the support of our amazing sponsors!! As such, every year we host a sponsor social which gives the Chapter an opportunity to thank sponsors for their contributions throughout the year and share details about sponsorship opportunities for the next year. We are excited to share that this year's event will be hosted on October 11 at Keystone Korner, a lively jazz venue in downtown Baltimore. I look forward to sharing some exciting changes to the sponsorship package for 2024 that will translate into more diversified programming for members.

ACC Baltimore members will have yet another opportunity to connect with each other at an October 26th social event at 5:30 pm, hosted by Jackson Lewis, just outside of the city at Citron at Quarry Lake.

Lastly, it is not too late to register for the 2023 ACC Annual Meeting, October 22-25, 2023 in San Antonio. Act now before rates increase on September 28! More details can be found here.

Finally, if you haven't done so yet, please take a moment and follow ACC Baltimore on LinkedIn.

I look forward to connecting with you all at our upcoming events.

All the best,
Taren Butcher

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

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Wisdom of the Crowd: ACC Thought Leaders on AI and Governance

By Michael Greene, Legal Resources Manager

In a recent facilitated discussion, ACC members talked about how they use AI, what they are worried about, and how they are moving forward. The dialogue was conducted under the Chatham House Rule so no speakers nor organizations are identified.

Lots of potential, for good and ill

The conversation underscored the enormous opportunities artificial intelligence presents for busin esses. AI capabilities are increasing at a staggering pace; large language models will get 100 times better than the current offering. But as a society, we need to align superintelligent AI and human needs. The last thing we need is AI "going rogue," as the ChatGPT's creator recently said.

Check out ACC's curated library of relevant AI resources here.

There is no roadmap available. This is trial and error and seeing what works for your business.

Create a task force with the IT and compliance teams

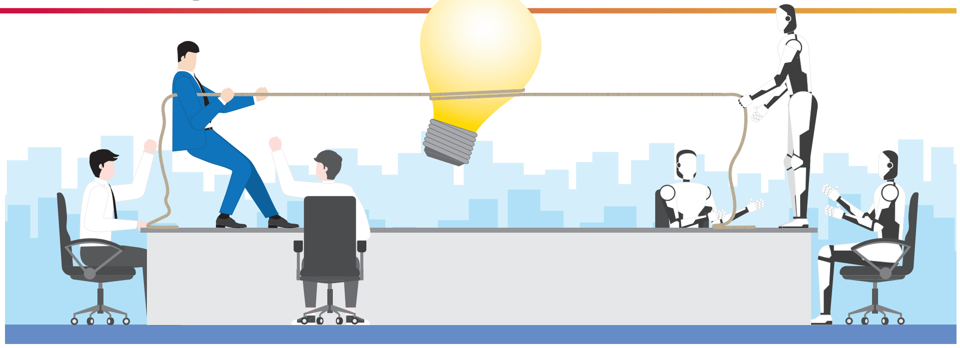
ACC members discussed aligning the legal department with the IT and compliance teams in their organizations to create an internal playbook for the contract review process for any outside vendor utilizing AI. This team also published guidelines for the organization for the data use process for AI technologies.

Implicit bias

ACC members discussed concerns about implicit bias, particularly in the use of generative AI. They also shared concerns about any customer facing products utilizing AI, including chatbots.

AI use for creative projects

An ACC member discussed the discovery of AI generated content having been unknowingly utilized in creative intellectual property development. They also discussed the potential trademark and copyright issues involved.



Artwork by kora_sun / Shutterstock.com

Use cases

ACC members said they use AI to expedite contract review. By training it to only process contracts that meet certain requirements, AI flags those that contain substantial deviations.

Another successful use of AI involved a company that had multiple contracts across different jurisdictions and when it was appropriate to change jurisdiction.

Another member asked if AI has the ability to make comments into a contract, as this member often used the same comments to redline contracts again and again. While no one knew if this was possible, they suggested asking an AI vendor to look into the capability.

Negotiating with AI technology vendors

When looking to contract with an AI vendor, understand the functionalities you want in a solution. The more customization, the more expensive the solution will be, generally speaking.

One of the challenges is negotiating indemnity provisions, because this area is so new. Get prior right of approval of unilateral changes of terms by technology vendors.

One of the challenges is negotiating indemnity provisions because this area is so new.

Zoom was recently in the news because its terms of service update appeared to provide access to users' data for AI training. It clarified its service terms in a blog post after the backlash. The episode underscores the importance of knowing if the vendor will use your data to train its AI. It may be worthwhile to check your Master Services Agreement to see if any vendors use your company's data to train their AI.

OpenAI now allows internet users to block its web crawler from scraping data to train GPT models.

For vendors that are deemed data processors, make sure they sign a Data Processing Agreement, which places restrictions on what they can do with Personally Identifiable Information.

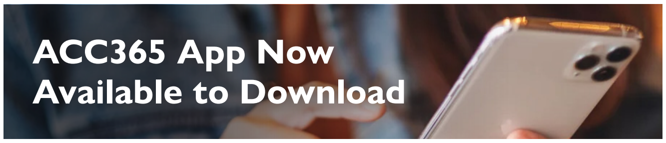
Formal company policies are on the way

Several members said they are working on formal company policies to address AI. Some mentioned looking at independent contractor agreement and amending it to specify that they cannot use AI to create content. Others noted to have humans review any code created by AI.

Takeaways

- Approach this responsibly and remind people of their ethical obligations to their company and to themselves.
- Be mindful when negotiating with an AI vendor and understand your risk appetite, and their process for changing their T&Cs.

ACC News



ACC365 App Now Available to Download

Your work goes beyond your desktop and now so does the ACC member experience. The brand-new ACC365 app is now available to download. Stay connected and get the ACC experience in the palm of your hand. With one tap, you are plugged into the people, resources, and knowledge that accelerate your career. Download the ACC365 App today!

Artificial Intelligence Insights for In-House Counsel

AI is changing legal departments and businesses. ACC has curated this selection of tools and insights to support you navigate regulatory trends, find sample corporate policies, and gain insights on risks and opportunities. Learn more about regulations, policies, IP, HR, cybersecurity, and other AI issues in the ACC Artificial Intelligence Resource Collection.

The Changing Landscape for Religious Accommodation Requests After *Groff v. DeJoy*

By Darryl G. McCallum, Shawe Rosenthal LLP

On June 29, 2023, a unanimous U.S. Supreme Court issued a ruling that changed the requirement for establishing a reasonable accommodation for sincerely held religious beliefs. In *Groff v. DeJoy*, 143 S. Ct. 2279 (2023), the Supreme Court ruled that religious accommodations under Title VII of the Civil Rights Act must be provided to employees or prospective employees unless the employer is able to demonstrate that the burden is **substantial**. The Court rejected the former "de minimis" standard as a misreading of the Court's precedent in *TWA v. Hardison*. This article addresses the change to the reasonable accommodation standard in light of the *Groff* decision as well as questions left unanswered by the Court's opinion.

I. Background of the Case.

Groff v. DeJoy involves a rural mail carrier for the U.S. Postal Service who is a strict observer of the Sunday Sabbath. For the first several years of his employment with the USPS, the carrier was exempted from Sunday work (which involved package deliveries pursuant to a USPS contract with Amazon) as a reasonable accommodation.

The USPS subsequently entered into a Memorandum of Understanding with the carriers' union that resulted in the carrier being required to work Sundays. The Postmaster of the facility tried to find others to cover the Sunday shifts, but that was not always possible and the carrier was scheduled to work a number of Sundays. Because he repeatedly failed to report to work, he was disciplined. Moreover, his refusal to work Sundays required others to cover those shifts, including the Postmaster himself. It also may have resulted in increased overtime pay, increased the workload for those working, and created resentment among his co-workers.

The carrier eventually resigned based on the lack of accommodation for his religious beliefs and sued the USPS. The trial court found that, as a matter of law, the carrier's legal claims failed. This ruling was affirmed by the U.S. Court of Appeals for the Second Circuit, leading to the appeal to the Supreme Court.

II. The Prior Standard.

Under Title VII, a private employer with 15+ employees must provide reasonable accommodations for employees' sincerely held religious observances that conflict with work requirements, absent an undue hardship. While this requirement sounds very much like the reasonable accommodation requirement under the Americans with Disabilities Act, the interpretation by most courts of the standard for establishing an undue hardship under Title VII has been far less than under the ADA.

Prior to *Groff*, based on the Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), courts had determined that "undue hardship" existed when there was more than a *de minimis* (or minimal) cost to the employer. *Hardison* involved an airline employee who had requested to be excused from working on Saturday, which was his observed Sabbath day. The employer denied the accommodation request, taking the position that granting the request would impose an undue hardship because it would require other workers to be assigned to cover the Saturday shifts, in violation of the seniority rights in the applicable collective bargaining agreement. In the majority opinion, the Hardison court stated: "[t]o require TWA to bear more than a *de minimis* cost in order to give [the employee] Saturdays off would be an undue hardship." *Id.* at 84. Subsequently, the EEOC accepted the *de minimis* cost language in the Supreme Court's opinion as the standard for whether a proposed religious accommodation would constitute an undue hardship. In addition, courts have found undue hardship where there were negative impacts on productivity or quality, personnel or overtime costs, increased workload for other employees, and reduced employee morale.

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III. The Supreme Court Changes the Standard.

In *Groff*, the Supreme Court held that to establish that a religious accommodation presents an undue hardship, employers must present evidence that the burden is "substantial in the overall context of an employer's business." *Groff*, 143 S. Ct. at 2294. Writing for a unanimous Court, Justice Alito explained that, in common parlance, a hardship is, at minimum, something that is "hard to bear." *Id.* Further, for a hardship to be "undue" as naturally understood by its dictionary definition, "the requisite burden, privation or adversity must rise to an 'excessive' or 'unjustifiable level.'" *Id.* (citing several dictionaries).

The Court stated, "What matters more than a favored synonym for 'undue hardship' (which is the actual context) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular impact in light of the 'nature, size and operating cost of [an] employer.'" *Id.* at 2295 (citing the Solicitor General's brief).

The Supreme Court provided the following "guideposts" for future analysis:

First, courts should assess the impact of the proposed accommodation on the conduct of the employer's business. While impacts on coworkers are relevant, they are not dispositive. Second, Title VII requires that the employer not simply assess the employee's requested accommodation and reach a conclusion, such as that it will lead to increased overtime pay (which, by itself, may not be an undue burden for some employers). Instead, employers must consider whether other accommodations may be appropriate. In the context of scheduling accommodations such as that at issue in *Groff*, considering other options such as voluntary shift swapping, is also necessary. *Id.* at 2296-2297. The Court remanded the case to allow the lower court to consider the facts of the case in light of the Court's clarified standard.

Since *Groff* was decided, at least one district court applying the new standard has found that a plaintiff was able to state a claim for failure to accommodate his religious beliefs where the plaintiff might not have been able to state a claim under the prior standard. In *Payne v. St. Charles Health System*, Case No. 6:22-cv-01998-MK, 2023 WL 4711431 (D. Ore. July 6, 2023), the U.S. District Court for the District of Oregon held that a plaintiff healthcare worker's lawsuit alleging that his employer failed to accommodate his religious objection to the state government's Covid-19 vaccine mandate for healthcare workers was sufficient to survive a motion to dismiss. The employer had argued, based on the *Hardison de minimis* standard, that allowing the plaintiff to work while unvaccinated would have posed more than a *de minimis* hardship. Based on the new standard articulated in *Groff*, the court found that:

> [t]here is nothing in the record thus far to show that allowing Plaintiff to adhere to his proposed accommodations – wearing an N-95 mask and antibody testing – while continuing to work as a facilities supervisor would constitute an undue hardship by resulting in substantial increased costs in relation to the conduct of Defendant's business.

Id. at *3.

IV. Unanswered Questions and Future Impact.

Based on the *Groff* decision, employers should now review their current practices for considering religious accommodations (and take a fresh look at pending requests). The need to demonstrate a substantial burden before denying an accommodation is a significant change but not necessarily one that places employers in "unfamiliar territory." As with analysis under the ADA, inconvenience to other employees is not dispositive and costs of granting the accommodation must be considered in light of the size of the employer and its overall resources, financial and otherwise.

It remains to be seen how courts will decide what costs are insubstantial such that an accommodation will not be required and what costs are substantial such that an accommodation will be required. The Payne case makes clear that employers will have to take a close look at accommodation requests on a case-by-case basis to determine whether a proposed accommodation will impact the business in such a way as to impose a substantial increased cost. The employer in Payne, for example, needed to closely examine whether the accommodations proposed by the unvaccinated worker would eradicate the health risks that would otherwise be imposed based on the employee's unvaccinated status such that there would not be a substantial increased cost.

Moreover, with respect to the issue of Sabbath observance addressed in *Groff*, if granting an employee's request to be off on their Sabbath day would result in other employees having to work a shift in violation of their seniority rights under a collective bargaining agreement, this would likely still be considered an undue hardship that would justify denial of the proposed accommodation. On the other hand, the mere fact that some employees may be disgruntled because they have to fill in for an employee who is observing their Sabbath would likely not be considered sufficient to meet the new undue burden standard. Time will tell where courts ultimately draw the line between undue hardship and insubstantial burden.

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Darryl G. McCallum

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In the Calm Before the Storm, Insurance Companies Race for the Exits – But Fortunately Not in the Baltimore Region.

By Rhonda D. Orin and Cameron R. Argetsinger, Anderson Kill P.C.

As another busy hurricane season gets underway, insurance companies stand ready. But what they are ready for -- unfortunately for many policyholders – is either limiting their obligations or walking away from geographic markets altogether.

Ever since Hurricane Andrew hit Florida and Louisiana in 1992, insurance companies have focused on ensuring that they minimize their hurricane losses. This, of course, is a contradiction in terms. Insurance companies are *supposed to have* losses at times of catastrophe. Their reason for existing is to bear the losses that the catastrophes inflicted on their policyholders. That is the purpose of insurance.

In the past year, insurance companies have escalated this tactic to a new level. They have started curtailing or completely abandoning geographic markets they deem high-risk due to the likelihood of natural disasters such as hurricanes and wildfires. These markets include certain southern states, like Florida and Louisiana, and now California as well.[1]

According to the National Association of Insurance Commissioners, several major property insurance companies recently took steps either to exit these areas, to revise their policies to exclude weather-related coverage, and/or to hike rates and deductibles.[2] State Farm and Allstate, for example, announced recently that they will stop issuing homeowners insurance policies altogether in the state of California.[3]

Fortunately, the Baltimore area is not one of the regions at risk. Commercial property insurance remains widely available here. But simply having a policy is not enough. When bad weather hits, policyholders must be proactive in ensuring that they receive the coverage to which they are entitled. The following steps are a roadmap for doing so.

1. Give Notice

The first step: give notice -- to anyone and everyone – that you have suffered a loss. Don't wait until you know its full extent; give notice first and analyze it later. This means calling your insurance companies *immediately*, even if you don't have hard copies of your policies and don't remember the policy numbers. It means getting the names, agent numbers, emails and addresses of the people with whom you speak. It also means sending follow-up writings that confirm your timely report of the claim.

Late notice is one of the principal excuses used by insurance companies to deny coverage. Don't give any insurance company an opportunity to use this excuse against you.

2. Find Your Insurance Policies

The second step: find your insurance policies. Start with your insurance broker. If you know the names of at least some of your insurance companies, you should send them a written request for hard copies, either by mail or PDF.

You should throw a wide net, locating copies of any insurance policies that you have ever purchased that could possibly be applicable. Look for primary, excess, local and global property insurance policies; general, umbrella and excess liability insurance policies; and also specialized policies, such as marine, multi-peril, fire and business owners policies. Until you know the extent of the claims for property damage, liability or business interruption that you may ultimately pursue, you can't possibly know which insurance policies will apply.

3. Evaluate Your Coverage

The third step: evaluate the scope of your insurance protection. While insurance policies are complicated, all policyholders should have a basic understanding of what they have purchased. For example, most policyholders appreciate that they have purchased basic coverage for tangible property damage, but they may not realize that those policies typically cover damage to intangible property as well.

In brief, standard-form property policies typically cover three different types of damage: property damage, business income losses and extra expenses. Property damage coverage pays for physical loss or damage to buildings and business property – machinery, equipment, inventory, raw materials – as well as property of others in the policyholder's control. Business income coverage pays for the policyholder's loss of net revenue after expenses (profit) and the policyholder's unavoidable continuing expenses during the loss period. Extra expense coverage pays for both the policyholder's costs in minimizing or avoiding a business income loss.

Certain types of intangible property coverage may be particularly significant in the wake of severe storms that affect a broad area. Due to transportation shutdowns, evacuations and other problems, many businesses may suffer acute business losses even though their operations are physically unscathed and open for business. Such losses are subject to coverage under specific provisions in standard-form property and liability insurance policies.

In property policies, check for provisions regarding contingent business income coverage, contingent extra expense coverage, civil authority coverage, ingress/egress coverage and utility and

[1] Home Insurers Cut Natural Disasters from Policies as Climate Risks Grow, Washington Post, https://www.washingtonpost.com/business/2023/09/03/natural-disaster-climate-insurance/ (Sept. 3, 2023).
[2] *Id.*
[3] Viewpoint: Property Market Takes Hits, Business Insurance, https://www.businessinsurance.com/article/20230712/NEWS06/912358427/Viewpoint-Property-market-takes-hits (Jul. 12, 2023).

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communications service interruption coverage. In liability policies, check for a definition of "property damage" that includes property that is not physically injured. These and similar provisions may provide coverage for events that interfere with suppliers or customers or prevent or hinder access to premises.

4. Keep Careful Records

The fourth step: start a diary. Right away. Facts decide insurance claims, and no one is closer to the facts of a particular policyholder's claim that the policyholder itself. It is a wise practice for policyholders to take photographs of damaged property before anyone, including civic authorities, have a chance to alter the scenes. Policyholders also should take notes of key developments in the upcoming days, including notes about all actual or attempted communications with their insurance companies. It also could be extremely valuable for policyholders to locate and secure key records from their operations, varying from receipts for physical property that has been damaged to information about income patterns for businesses that are dependent on the seasons.

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These steps will start the process for moving forward with a storm damage claim. If you remember to take them, you will be ahead of the game in protecting your company from catastrophe losses to the fullest extent possible.

Authors:

Rhonda D. Orin and **Cameron R. Argetsinger** are shareholders in the Washington D.C. office of Anderson Kill P.C. Both have specialized for decades in representing policyholders against insurance companies, including in the recovery of insurance proceeds for for losses stemming from catastrophes.


Rhonda D. Orin


Cameron R. Argetsinger

A Practical Outlook on Non-Competes Amid the Evolving Landscape

By Chelsea Hartnett, Esq. and Elana Taub, Esq., Jackson Lewis, P.C.

Background and Current State of Non-Competes

Across the country, there is a movement that is chipping away at the use and enforceability of non-competes and other restrictive covenant agreements. While a national ban on non-competes has yet to be passed, the federal government and state legislatures continue to introduce and pass limitations. One thing is clear – the political consensus is that non-competes are too restrictive for employees. It is crucial that employers stay up to date on these developments when deciding whether to use these tools to protect legitimate business interests.

Limitations on Non-Competes in the Mid-Atlantic:

1. Maryland

Maryland prohibits employers from entering into non-compete agreements with low-wage earners, defined as workers who earn equal or less than $15.00 per hour or approximately $31,200 annually. Md. Code Ann., Lab. & Empl. § 3-716. The statute took effect on October 1, 2022, and defines non-compete provisions as terms that restrict the ability of an employee to enter into employment with a new employer or to become self-employed in the same or similar business or trade. Notably, the statute does not limit an employer's ability to prevent employees from taking or using client lists or other proprietary client-related information, regardless of how much the employees earn.

On October 1, 2023, Senate Bill 591 goes into effect, changing the income threshold to include workers who earn equal to or less than 150% of the state minimum wage, providing greater protection for workers. The threshold for large employers will be $19.88 or approximately $41,350 annually. Effective January 1, 2024, the Fair Wage Act of 2023 increases the minimum wage rate to $15.00 for Maryland employers; therefore, the threshold will be $22.50 per hour, or approximately $46,800.

2. Virginia

Virginia also prohibits employers from entering into, enforcing or threatening to enforce a restrictive covenant against "low wage" earners, which are defined as employees who earn less than the annual average weekly wage in the Commonwealth and independent contractors who earn less than the median hourly wage for the Commonwealth. Va. Code Ann. §40.1-28.7:8. The statute also prohibits the use of non-competes with interns, students, apprentices or trainee employees, with or without pay, at a trade or occupation in order to gain work or educational experience. Under the statute, which took effect on July 1, 2020, restrictive covenants are defined as "an agreement that restrains, prohibits, or otherwise restricts an individual's ability to compete with his former employer."

3. District of Columbia

Effective October 1, 2022, the District of Columbia amended its Ban on Non-Compete Agreements Amendment Act of 2020 to render non-competes unenforceable for employees earning $150,000 or less in annual compensation (or $250,000 or less for medical

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specialists). See D.C. Code § 32-581.02. Covered employees include any employee who: (1) spends more than 50 percent of his or her work time for the employer working in the District or (2) whose employment is based in the District and the employee regularly spends a substantial amount of his or her work time for the employer in the District and not more than 50 percent of his or her work time for that employer in another jurisdiction.

The law permits enforcing restrictive covenants for highly compensated employees, defined as those receiving annual compensation exceeding $150,000. Compensation does not include fringe benefits other than those paid to the employee in cash or cash equivalents. Further, for highly compensated employees, the duration of non-competes cannot exceed 365 days from the date of separation. It must otherwise be drafted in accordance with the District's statutory requirement. See D.C. Code § 32-581.0.

Employers may also continue to maintain and enforce policies that prohibit moonlighting (i.e., working for a different employer while still employed) for employees of all income levels provided that the employer reasonably believes that the circumstances will result in the employee's disclosure or use of confidential or proprietary employer information or may create a conflict of interest.

Federal Initiatives to Limit Non-Competes:

1. The FTC's Proposed Ban on Non-Competes.

Background

On January 5, 2023, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking ("NPRM") to broadly ban the use of non-compete covenants nationally. If passed in its current form, the proposed rule, which would supersede all contrary state laws, will effectively prohibit non-competes except under limited circumstances.

What is prohibited?

The proposed rule prohibits employers from engaging in an unfair method of competition with employees, independent contractors, interns and volunteers, which includes:

(1) Entering into a non-compete clause with a worker;

(2) Maintaining a non-compete clause with a worker; or

(3) Representing to a worker that the worker is subject to a non-compete clause where the employer cannot establish a good faith basis to believe the worker is subject to an enforceable non-compete.

The proposed rule defines a non-compete clause as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." The ban also extends to "de facto" non-compete clauses, which include other contractual provisions that have the effect of prohibiting workers from seeking or accepting employment or operating a business after the conclusion of the worker's current employment. The proposed rule provides two examples of "de facto" non-compete clauses:

(i) A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer; or

(ii) A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified period, where the required payment is not reasonably related to the costs the employer incurred for training the worker.

In light of the expansive definition, the proposed ban may implicate other contractual provisions or agreements such as non-disclosure agreements ("NDA"), confidentiality provisions, customer non-solicitations, employee non-solicitations, repayment of training costs, no-business agreements (prohibiting a worker from doing business with the employers' former customers), and liquidated damages provisions. It remains unclear whether these types of provisions or agreements that are broad in scope would be deemed an impermissible non-compete clause.

If the proposed rule is adopted, we anticipate litigation challenging the rule and disputes over whether restrictions an employer might use, such as NDAs and non-solicitation agreements, fall within the FTC's ban on "de facto" non-competes.

Employer's Recission Obligations

If adopted, the proposed rule would require employers that enter into non-compete clauses with workers to rescind such clauses. Notably, however, provisions negotiated in exchange for the non-compete, such as a severance payment, would remain intact. This obligation to rescind non-compete clauses would require individualized communications from the employer to all current and former employees subject to such clauses within a defined timeline.

Narrowly Tailored Sale-of-Business Exception

The proposed rule provides for a narrow sale-of-business exemption. Specifically, the rule does not apply to a non-compete clause that is entered into: (a) by a person who is selling a business entity or otherwise disposing of all the person's ownership interest in the business entity; or (b) by a person who is selling all or substantially all of a business entity's operating assets.

This exception only applies when the person restricted by the non-compete clause is, at the time the person enters into the non-compete, an owner, member

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or partner holding at least a 25 percent ownership interest in the entity.

What Happens Next?

The FTC expanded the public comment period, which closed in April 2023. The FTC is expected to vote on a final rule in April 2024. If issued, we expect significant and substantial legal challenges to the final rule.

2. The Workforce Mobility Act of 2023.

The Workplace Mobility Act of 2023, if passed, would codify the use of employment non-competes as an unfair trade practice under federal law. See S. 220, 118th Cong. (2023); H.R. 731, 118th Cong. (2023). The Act provides that, with certain limited exceptions, "no person shall enter into, enforce or attempt to enforce a non-compete agreement with any individual who is employed by, or performs work under contract with, such person with respect to activities of such person in or affective commerce," and that non-compete agreements will have no force or effect.

The Act defines a non-compete agreement as an agreement entered into after the date of the enactment of the Act between a person and an individual performing work for the person that restricts such individual, after the working relationship between the person and the individual terminates, from performing: (1) Any work for another person for a specified period of time; (2) Any work in a specified geographical area; or (3) Any work for another person that is similar to such individual's work for the person that is a party to such agreement.

Limited exceptions to the non-compete ban include the sale of certain interests in a business or the dissolution of, or dissociation from, partnerships.

The Act further authorizes the FTC, U.S. Department of Labor, state attorneys general and individual employees to bring actions against employers who violate the Act to seek penalties, damages, injunctions and other relief. The bill has been introduced and assigned to House and Senate committees for study.

3. The NLRB's General Counsel's Initiative to Invalidate Non-Competes for Non-Supervisory Employees.

On May 30, 2023, the National Labor Relations Board ("NLRB") General Counsel Jennifer A. Abruzzo issued a controversial enforcement memorandum that asserts that certain non-compete agreements in employment contracts and severance agreements violate the National Labor Relations Act ("NLRA") by interfering with employees' rights to form, join or assist labor organizations, to bargain collectively, and to engage in other concerted activities for their mutual benefit or protection ("Section 7 activity"). *See* GC Memo 23-08. This memo applies to non-supervisory employees in both non-union and union settings.[1]

The General Counsel asserts in the memo that overbroad non-compete agreements deny employees access to employment opportunities, which chills employees from engaging in Section 7 activity. Further, the GC believes that overbroad non-competes violate the NLRA when employees reasonably interpret the terms to deny them the ability to quit or change jobs by cutting access to other employment opportunities. For example, under the GC's theory, a non-compete could chill an employee from concertedly threatening to resign to demand better working conditions.

The GC memo further provides that only non-competes with narrowly tailored provisions for "special circumstances" would be found lawful and that "a desire to avoid competition," "retaining employees," or "protecting special investment in training employees" are unlikely to justify an overbroad non-compete clause.

The GC recognizes that non-compete provisions may be lawful if they "clearly restrict only individuals' managerial or ownership interests in a competing business or true independent-contractor relationships" or if they protect proprietary information or trade secrets. The memo further provides that the NLRB will consider the compensation and level of the employee and whether such employee is privy to trade secrets or other protected interests.

The memo is not binding law, but it is the latest in federal initiatives to restrict non-compete agreements nationwide, and it signals to employers the areas that the NLRB is focusing on and cases that the GC will prosecute – especially in the non-union workplaces.

Take-Away: The Road Ahead is Uncertain, But Don't Panic.

With the FTC's proposal rule and other federal initiatives in flux, restrictive covenants and non-competes remain enforceable in many states. Employers should continue to follow the case law in this area. Additionally, employers should:

Confirm that the states where you have workers subject to these agreements, including remote workers, still permit non-competes.

Review the clauses in states that still permit non-competes to ensure they are compliant. For example, the language should be narrowly tailored to protect the employer's legitimate business interests, such as trade secrets, confidential information, or customer goodwill and should be limited in geography, duration (generally not to exceed one year) and scope of activities prohibited.

Non-competes should only be applied to employees that pose a competitive threat (*e.g.*, higher-level employees with access to trade secrets). Avoid using non-

[1]This memorandum does not apply to non-compete agreements with employees who are statutory supervisors under the NLRA, meaning that they exercise the authority to hire, fire, discipline, assign and direct work among other factors.

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competes for all employees, especially for low-wage earners or low-level employees.

If there is a legitimate reason for applying a non-compete union elections, collective bargaining and contract administration. to a low-wage worker, confirm that the clause is compliant with any state restrictions on income thresholds.

Draft such agreements in a way to increase the likelihood that any provisions found to be unlawful can be severed from the agreement, leaving other restrictions intact.


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SCOTUS Coinbase Decision Gives Leverage to Parties Enforcing Arbitration Agreements

By Brian L. Moffet, Principal, and Michael B. Brown, Associate, Miles & Stockbridge

The U.S. Supreme Court held in June that litigation before the district court must be halted when a party appeals a denial of a motion to compel arbitration. In *Coinbase v. Bielski*, the court resolved a split among lower courts as to whether a stay of the proceedings was required during an interlocutory appeal on the question of arbitrability. This decision impacts countless business and consumer contracts containing arbitration clauses governed by the Federal Arbitration Act.

Pointing to its holding in *Griggs v. Provident Consumer Discount Co.* – that an interlocutory appeal "divests the district court of its control over those aspects of the case involved in the appeal," – the court concluded that "[b] ecause the question on appeal is whether the case belongs in arbitration or instead in the district court, the entire case is essentially 'involved in the appeal,'" and, therefore, must be stayed.

In her dissent, Justice Kentaji Brown Jackson (joined by Justices Sonia Sotomayor and Elena Kagan in full and by Justice Clarence Thomas in part) argued that the majority's decision departs from the "traditional approach," whereby the trial judge "makes a particularized determination upon request, based on the facts and circumstances of that case, as to whether the remaining part of the case should continue unabated or be paused (stayed) pending appeal."

Strategically, the court's decision grants significant leverage to parties seeking to compel arbitration, particularly in "close call" cases where the existence or enforceability of an agreement to arbitrate is hotly disputed. On one hand, if a motion to compel arbitration is granted, litigants so situated will get exactly what they seek. But if a court denies a motion to compel, then the party wishing to arbitrate will be able to forestall discovery and the district court proceedings for several months (at least) while awaiting a decision from the appellate court. The Coinbase decision should prompt a shift in litigants' strategic calculus and may lead to more frequent appeals of decisions denying motions to compel arbitration.

The court's decision also raises question about proceedings before the district court in class actions where a petition for interlocutory appeal is granted under Rule 23(f). Under the "*Griggs* principle" discussed in *Coinbase*, the district court would lose jurisdiction over "those aspects of the case involved in the appeal," potentially mandating a stay of all class discovery (and forcing a rethinking of the discretion afforded in the rule itself).

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New Legal Challenge to Generative AI Providers Alleges Privacy and Other Violations

By Matthew D. Kohel , Partner, Erin Westbrook, Counsel, Saul Ewing LLP

A recently filed class action lawsuit raises more legal challenges to providers of generative artificial intelligence (AI) tools that are used to create content. The suit cautions that a doomsday scenario is approaching and alleges a host of privacy and other violations occurring along the way.

What You Need to Know:

- The class action lawsuit against OpenAI, Microsoft, and others warns of profit-driven corporations who have allegedly neither reigned in their AI technology nor waited for appropriate regulations and safeguards before deploying that technology.
- The plaintiffs are individuals, including children, alleging their data has been improperly mined and broadly used for improper purposes, such as to lure children into dangerous situations and to obviate the need for the plaintiffs' professions.
- While making reference to alleged copyright violations, the suit asserts privacy violations under federal and state laws as well as state law tort claims.
- The relief sought is extensive, including restitution, injunctive and declaratory relief, disgorgement, punitive damages and other money damages.

In *P.M., et al. v. OpenAI LP*, et al., a group of plaintiffs filed a class action lawsuit in the Northern District of California claiming that OpenAI, a developer of generative AI tools such as ChatGPT and DALL-E, and related entities violated federal privacy laws and improperly used their personal information. The Complaint is lengthy and asserts 15 claims, perhaps most notably violations of the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act—federal statutes intended to address privacy, cybercrime and related issues.

The suit predicts a dark future for AI, arising in part out of the alleged business practices of OpenAI and others. The Complaint delves into OpenAI's corporate background, alleging that OpenAI raised money as a non-profit and then converted to a for-profit organization. The plaintiffs even cite Elon Musk's concerns over his $100 million "donat[ion]" to an entity that later "became a $30B market cap for-profit." The lawsuit's answer to the legality of this maneuver: "It isn't."

Also, the suit makes seemingly bold claims reminiscent of science fiction, including that AI may "decide" to eliminate the human species if it determines we are a threat to its goals. On this point, the Complaint references, among others, a highly publicized open letter signed by more than 1,000 tech leaders in March 2023, warning that AI presents "profound risks to society and humanity," and calling for a six-month moratorium on the development of certain aspects of AI. The open letter counts well-known tech leaders, including Musk, Steve Wozniak, and other big tech CEOs and founders, among its signatories.

These predictions serve as the backdrop for the plaintiffs' allegations of privacy violations, and echo tech leaders' request to "pause the unfettered and further commercial deployment" of the defendants' AI tools pending further policymaking to ensure proper safeguards.

The plaintiffs, identified only by their initials, include individuals who used, among other things, various social media and AI platforms. They claim that the defendants misappropriated the information submitted to these platforms and used it for their own purposes in a way that went well beyond their reasonable expectations. The plaintiffs' stated concerns include, not only that the material allegedly appropriated by the defendants may be used to create harmful or illegal content, but that it may lead to the "collapse of civilization as we know it."

Notably, the suit emphasizes that the defendants' use of their information allegedly infringes their individual rights, arguing, for example, that the defendants have used or will use the plaintiffs' content to create products that would make their jobs obsolete. The plaintiffs' professions range from software engineers to professors to artists. But much more than the users' professions are at stake, according to the suit. The users' entire private lives are at the mercy of OpenAI and its products, according to the Complaint. The plaintiffs warn of the possibility of the products creating a "digital clone" able to replicate every aspect of their lives and leading to identity theft, financial fraud, extortion and other malicious purposes.

After painting this bleak picture, the 157-page Complaint identifies six separate classes of plaintiffs, a slew of statewide subclasses, and 15 separate claims. Some of the claims are brought under federal and state privacy laws, while others are based on state law claims for theft, negligence, unfair business practices and the like. Interestingly, the Complaint refers to the alleged "theft of ... copyrighted information," but does not include a claim for copyright infringement. This is in contrast to other recent lawsuits filed against providers of generative AI products, where copyright infringement is a primary claim.

Given the novelty of the technology, it remains to be seen how courts will address the panoply of issues raised by

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these plaintiffs on the privacy and state law claims. And, it will be interesting to see how these issues play out while the regulatory landscape is taking shape at the same time. While the grim picture painted by these plaintiffs may not come to fruition, one thing is certain –the landscape of legal claims relating to AI and the use of intellectual property and personal information is going to continue to evolve, much like the underlying technology that is the subject of these lawsuits.

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