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ACC Association of Corporate Counsel
SOUTH FLORIDA

FOCUS

President's Message

Aline V. Drucker

South Florida is often maligned for being a "bandwagon" community when it comes to sports fandom. Bandwagon – as in - very few people are genuinely consistent and longtime fans of any sports franchise based in South Florida but are very quick to jump on the bandwagon once that team starts performing well. The classic example are the Miami Marlins, who are a relatively new Major League Baseball franchise. They have won not one but two World Series titles since they were founded in 1991 (that's practically the 19th century by Miami standards of longevity). Two World Series titles in just over 30 years is pretty darn good when you consider the fate of some other historical and storied baseball teams like the Chicago Cubs or the New York Mets. The Cubs date back to 1870, the actual 19th century. The Mets have been around decades longer than the Marlins. Yet both the Cubs and the Mets had to wait many decades, generations even, without any World Series titles at all.

So when the Marlins started winning in the late 1990s and early 2000's, it seemed like everyone was suddenly a diehard Marlins fan anywhere in South Florida, even though the team has been around for 10 years or less at that point in time. Whether this accusation is fair or not, these days South Florida sports fans have finally earned bona fide bragging rights. We are, of course, talking about the Miami Heat and the Florida Panthers. Both of these South Florida teams have done remarkably well, outpacing expectations, and giving fans true thrills this summer.

I have been fortunate to attend both of these teams' games live and it really is quite a thrill each time. These teams deliver for our South Florida fans and it is finally safe to say that our local community and our fans are no longer simply getting on the "bandwagon." While sports is but one fun activity to enjoy this summer, as in-house counsel, we are always mindful of honing our skills, increasing our network, and gaining valuable practice points and legal education credits. ACC South Florida continues to deliver on all these fronts for our members and make long-term and deeply rooted partnerships with our sponsors. Our chapter is growing in its member ranks of in-house counsel, and now is a terrific time to get involved in all that ACC has to offer, for members and sponsors alike.

Our largest event of the year is our annual all-day CLE Conference, which is coming up in September, and plans are moving at full speed ahead throughout this summer. Registration for this all-day event will be rolling out online in July so do not miss the early bird registration specials and your opportunity to register. Several hundred in-house counsel will be meeting in person at the Hollywood Hard Rock & Casino Hotel in Hollywood, FL for an all-day CLE and networking event taking place on Friday, September 29th. Do not miss this go-to conference and reception for in-house counsel all over South Florida, sponsored by dozens of our law firm and legal professional sponsors. You can pick up many hours of CLE credit at our ACC South Florida conference (including those sought-after technology and ethics credits). Please look out for invitations in your inbox and check our Chapter's website for details.

Wishing each of you a fun, sun-soaked, exciting summer full of health, enjoyment, and long-lasting memories. I look forward to seeing you all in the fall with your stories of summer adventures. And now, without further ado…play ball!

Your Organization, AI and Possible EEOC Employment Violations – 5 Things Employers Need to Know

By Alex Castro & Matthew Korn, Fisher Phillips

Employers using or thinking about using *artificial intelligence* (AI) to aid with workplace management received more word from the federal government that their actions will be closely scrutinized by the EEOC for possible employment discrimination violations. The federal agency released a technical assistance document on May 18, 2023, warning employers deploying AI to assist with hiring or employment-related actions that it will apply long-standing legal principles to today's evolving environment in an effort to find possible Title VII violations. What are the five things you need to know about this latest development?

1. EEOC Confirms That Employers' Use of AI Could Violate Workplace Law

The EEOC started by confirming its crystal-clear position in its technical assistance document: an improper application of AI could violate Title VII, the federal anti-discrimination law, when used for recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, or dismissal. The EEOC outlined four instances where use of AI during the hiring process – and one example during an employment relationship – could trigger Title VII violations:

- Resume scanners that prioritize applications using certain keywords;
- "Virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements;
- Video interviewing software that evaluates candidates based on their facial expressions and speech patterns;
- Testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test; and
- Employee monitoring software that rates employees on the basis of their keystrokes or other factors.

The agency didn't say that these are the only types of workplace-related AI methods that could come under fire – or that these types of tools are inherently improper or unlawful. It did say, however, that preexisting agency regulations (the Uniform Guidelines on Employee Selection Procedures) that have been around for over four decades can apply to situations where employers use AI-fueled selection procedures in employment settings.

The agency said this is especially true in "disparate impact" situations – where employers may not intend to discriminate against anyone but deploy any sort of facially neutral process that ends up having a statistically significant negative impact on a certain protected class of workers.

2. "Four-Fifths Rule" Can Be Applied to AI Selections

The EEOC pointed out that employers can use the "four-fifths" rule as a general guideline to help determine whether an AI selection process has violated disparate impact standards. The test checks to see if a selection process is having a disparate impact on a certain group by comparing the selection rate of that group with the most "successful" selection rate. If it's less than four-fifths of that selection rate, then you might be subject to a disparate impact challenge. If that sounds confusing to you, here is the example provided by the EEOC.

Assume your company is using an algorithm to grade a personality test to determine which applicants make it past a job screening process.

- 80 White applicants and 40 Black applicants take the personality test.
- 48 of the White applicants advance to the next round (equivalent to 60%).
- 12 of the Black applicants advance to the next round (equivalent to 30%).
- The ratio of the two rates is thus 30/60 (or 50%).
- Because 30/60 (or 50%) is lower than 4/5 (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants – which *could* be evidence of discrimination against Black applicants.

Note, however, that the EEOC said that this kind of analysis is merely a rule of thumb. It's a rudimentary way to draw an initial inference about the selection processes. If you end up finding problematic numbers, it should prompt you to acquire additional information about the procedure in question, according to the EEOC, and isn't necessarily indicative of a definitive Title VII violation. Similarly, just because your numbers clear the four-fifths hurdle doesn't mean that the particular selection procedure is definitely lawful under Title VII. It can still be challenged by the agency or a plaintiff in a charge of discrimination.

3. EEOC Encourages Proactive Self-Audits

In a statement accompanying the release of the technical assistance document, EEOC Chair Charlotte Burrows said that employers should test all employment-related AI tools early and often to make sure they aren't causing legal harm. This doesn't mean just using the four-fifths rule, but also using a thorough auditing process involving a variety of potential examination methods on all AI functions. "I encourage employers to conduct an ongoing self-analysis to determine whether they are using technology in a way that could result in discrimination," she said.

But not mentioned by the EEOC: a reminder that you should approach any self-audit with the help of legal counsel.

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Not only can experienced legal counsel help guide you about the best methodologies to use and assist in interpreting the results of any audit but using counsel can help cloak your actions under attorney-client privilege, potentially shielding certain results from discovery. This can be especially beneficial if you identify changes that need to be made to improve your process to minimize any unintentional impacts.

4. You're on the Hook For Problems Caused by Your AI Vendors

The agency also noted quite clearly that you can't duck your responsibilities by using a third party to deploy AI methods and then blaming them for any resulting discriminatory results. It said that you may still be responsible if the AI procedure discriminates on a basis prohibited by Title VII even if the decision-making tool was developed by an outside vendor.

"In addition," said the EEOC, "employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf." This may include situations where you rely on the results of a selection procedure that an agent administers on your behalf.

The EEOC recommends that you may want to specifically ask any vendor you are considering to develop or administer an algorithmic decision-making tool whether steps have been taken to evaluate whether that tool might cause an adverse disparate impact. And it also recommends asking the vendor whether it relied on the four-fifths rule of thumb or whether it relied on a standard such as statistical significance that is often used by courts when examining employer actions for potential Title VII violations.

5. EEOC's Guidance is Part of Bigger Trend

This technical assistance document is part of a bigger trend we're seeing from federal agencies that are increasingly interested in the ways that AI may lead to employment law violations. Just last month, in fact, EEOC Chair Burrows teamed up with leaders from the Department of Justice, the Federal Trade Commission and the Consumer Financial Protection Bureau to announce that they would be scrutinizing potential employment-related biases that can arise from using AI and algorithms in the workplace.

And within the past year, the EEOC teamed up with the DOJ to release a pair of guidance documents warning that relying on AI to make staffing decisions might unintentionally lead to discriminatory employment practices, including disability bias, followed by the White House releasing its "Blueprint for an AI Bill of Rights" that aims to protect civil rights in the building, deployment, and governance of automated systems.

While none of these guidance documents create new legal standards or can be relied upon with the force of law like a statute or regulation, they do carry weight, may signal where the agencies are focusing their enforcement efforts, and can be cited to by agencies and plaintiffs' attorneys as best practices that employers should follow. And some states have gotten into the action too, with New York City's law set to take effect in July, and a new bill advancing towards the Governor in California. Florida, typically a state cautious against regulating the employment relationship, has no similar pending legislation, but that can always change. Nevertheless, the EEOC's guidance comes from a federal level and is applicable in Florida just as elsewhere. And so, you should take this guidance seriously and adapt your employment practices as necessary to stay up to speed with the pace of change that is rapidly unfolding before our eyes.

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The FTC and Non-Competes – Impact on M&A Transactions

By Jose Sariego, Bilzin Sumberg

Non-competition agreements and similar restrictive covenants form a bundle of rights and obligations that are hotly negotiated between buyers and sellers in every M&A transaction. These covenants often represent tradeoffs affecting the purchase price as well as post-closing rights and obligations of sellers such as continued employment. Buyers view these and the other covenants imposed on sellers as essential to securing the benefit of their bargain and realizing on the goodwill of the acquired business for which they have paid dearly.

The Federal Trade Commission, however, now seeks to upend this carefully negotiated bundle by proposing to outlaw virtually all non-compete agreements, including those of sellers in M&A and similar transactions. Despite their widespread long-standing use in these transactions and regulation by every state, the feds want to do away with non-compete agreements because they are "a widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses."

For the uninitiated, a non-compete agreement essentially prevents a worker from seeking a job with a competitor for a period of time after cessation of employment with the worker's current employer. Non-competes have been around for hun-

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dreds of years and, although courts consider them to be somewhat malodorous as "restraints on trade", they are nonetheless mostly enforceable except in three of the 50 United States. In fact, all 50 states regulate their use, with varying requirements and degrees of enforceability.

Just last month, for example, the Delaware Chancery Court struck down a non-compete provision in connection with the sale of a business because it was "unreasonable and unenforceable". (*Intertek Testing Service NA, Inc. vs Eastman*, 2023 WL 2544236 (Del. Ch. Mar. 16, 2023).) This case marked the third time in the last six months that the Court, one of the most watched business courts in the country, has stuck down or limited non-competes in the sale of business context.

In fairness, non-competes have crept from their historical use to bind high-level executives, highly-skilled technicians and business owners who have sold their businesses to run of the mill workers such as security guards and fast-food employees. There is no question that some non-competes are unfair to low-level workers who could be prevented from earning a livelihood. All of the state statutes permitting non-competes require to varying degrees that they be "reasonable" in scope and time period. However, even a prohibition against working for a competitor for a relatively short duration and geographic area can be devastating to an hourly worker with barely a week's worth of savings in the bank. Moreover, lower level employees often lack the bargaining power to negotiate the terms of non-competes, which in these situations take the form of "contracts of adhesion" that the law historically has disfavored.

These are all sound reasons for limiting or even banning non-compete agreements in certain circumstances. However, in typical regulatory fashion, the FTC has taken a meat cleaver to these agreements and proposed banning them even where the justifications are weak.

In the case of the seller of a business, who typically rakes in millions from the sale and then hundreds of thousands more under long-term employment agreements designed to help the buyer with the transition, there is little justification for the FTC to regulate non-competes. These folks have plenty of bargaining power and the ability to cool their heels for extended periods of time without suffering economically. They could even start a business unrelated to the one they sold. The FTC admits there is little empirical research of the impact of non-competes in this context. So why do they need the FTC's protection applicable to ordinary workers?

The FTC notes that the proposed rule would not apply to a seller unless the seller was also a "worker", that is, continued to work for the buyer after the transaction closed. On the other hand, a seller who simply walked away after the closing could be restricted from competing. This is a distinction without a difference. Whether or not the seller continues to be employed, a seller has the same leverage to negotiate an appropriate agreement. Many sellers want to remain employed after the sale to, among other reasons, receive additional compensation, assure an orderly transition of the business, and ensure that the business is run in a way that will maximize any post-closing earn-out or other purchase price adjustment. Upsetting this mutually beneficial arrangement will require recalibration of the interconnected consideration negotiated by sellers in these transactions.

True, the FTC has proposed a carve-out for a seller of a business who enters into a non-compete in connection with the sale, but only if the owner held 25% of the company that is being sold. The FTC picks this percentage out of thin air without any justification. Some business owners who hold far less of a company nonetheless rake in millions for their stake. Why pick this artificial dividing line?

It is also true that the FTC proposes to allow other restrictive covenants, such as no-solicitation and confidentiality provisions, to persist. These other covenants, while useful in certain contexts, require buyers to surmount additional hurdles to protect their valuable purchased goodwill. And the FTC could challenge even these restrictive covenants if they are "so broad in scope that they serve as *de facto* non-compete clauses."

The biggest issue with the FTC's proposed rule, however, is that it applies retroactively and requires the termination of existing non-competes. In the case of business owners, the non-compete is but one aspect of a carefully crafted deal negotiated by persons with equal bargaining leverage at arms' length. To now willy-nilly abrogate one key aspect of that hard-bargained deal without considering the other interconnected considerations provides a windfall to these individuals without addressing the evils that non-competes supposedly cause at lower levels.

Most sellers of a business have the leverage and bargaining power to negotiate lucrative deals for themselves, and if they have to sit on the sidelines for a year or two if they decide to leave their company or are bid adieu, they can certainly afford to do so. They don't need Big Brother tipping the scales on their behalf. The FTC should create a broad exclusion from the rule for the seller of a business in all cases except those where the seller receives only a *de minimus* share of the consideration for the sale.

Author:

Jose Sariego is a Corporate Partner at Bilzin Sumberg with over 30 years of experience negotiating and closing domestic and international mergers and acquisitions, investments, joint ventures, divestitures and other transactions. Jose has particular experience in media, entertainment and technology law, having previously served as General Counsel of HBO Latin America and as head of Business & Legal Affairs for Telemundo Network. Jose also has extensive experience in negotiating and closing talent, executive employment, and other related agreements.

ACC South Florida Upcoming Events

JUNE

June 21
Cooking Class
presented by Gunster

JULY

July 19
Women's Event
presented by Fisher Phillips

AUGUST

TBD
Broward/Palm Beach
New Member Happy Hour

SEPTEMBER

September 29
Save the Date!
13th Annual CLE Conference
Seminole Hard Rock Hotel & Casino

OCTOBER

October 20
Mini MBA
presented by Foley & Lardner

October 22-25
ACC National Conference
San Antonio, TX

NOVEMBER

Week of Nov 13
Palm Beach Progressive Dinner
presented by FTI Consulting

November 30
Miami-Dade Holiday Party
presented by Cozen O'Connor

DECEMBER

December 7
Palm Beach Holiday Party
presented by Barnes & Thornburg

Welcome New Members!

Natasha Alcivar
Watsco, Inc.

Edward Black
Workday, Inc.

Carolina Borroto
AMC Networks International - Latin America

Mayte Cabada
PayCargo, LLC.

Matthew Davidson
UKG Inc.

Elena de Blank Paylor
DUAL North America, Inc.

Lyall Duncan
Windstar Cruises

Melissa Dursi
JM Family Enterprises, Inc.

Rachel Evans
Workday, Inc.

Robert Gravois
ADT LLC

Corina Gugler
UNICEF

Chelsea Hackman
NextEra Energy, Inc.

Shobha Lizaso
Deutsche Bank

Alexa Martinez
Heico

Marilia Mayaki
Americaribe LLC

Bryan McCully
North American Risk Services, Inc.

Ted McCutcheon
Locust Point Capital

Fabiola Moya
CONCACAF

James Moye
Coastal Construction

Amy Mugherini
State Street Corporation

Ashley Rivas Crooks
Publicis Re:Sources

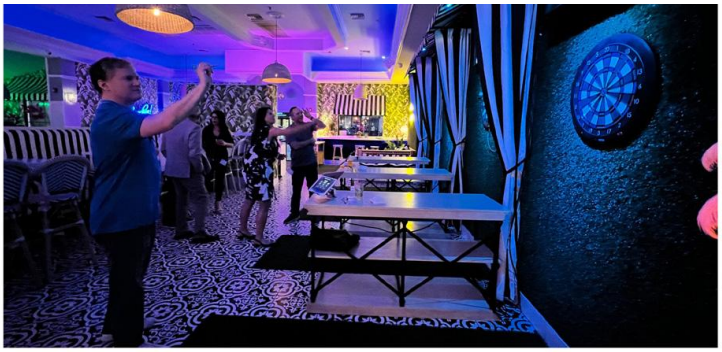
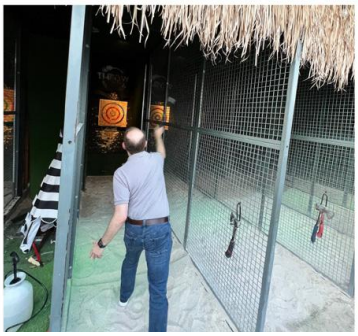
Jason Romrell
LeadsMarket.com LLC

Virginia Sandor
Workday, Inc.

Tereza Widmar
NextEra Energy, Inc.

EVENT PHOTOS

Axe and Dart Throwing – Presented by Fisher Phillips


Miami-Dade New Member Happy Hour

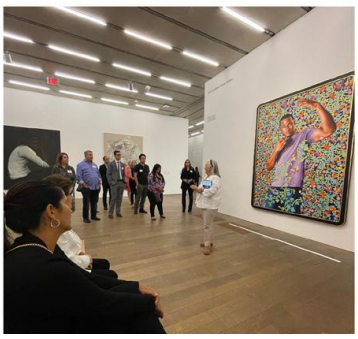





Perez Art Museum Tour & Dinner – Presented by FordHarrison








Miami-Dade Progressive Dinner – Presented by Shook, Hardy & Bacon; Hamilton, Miller & Birthisel; RumbergerKirk








Wine Tasting – Presented by Nelson Mullins







Sponsors for 2023

Platinum

Bilzin Sumberg

Gold

Fisher Phillips
Gunster
Nelson Mullins

Silver

Barnes & Thornburg
FordHarrison LLP
Jackson Lewis
King & Spalding
Littler
Saul Ewing Arnstein & Lehr LLP
Shook, Hardy and Bacon LLP
Squire Patton Boggs
TCDI
Winston & Strawn

Bronze

Akerman
Armstrong Teasdale
Exterro
FTI Consulting
Latitude
Omni Bridgeway
Robert Half Legal

Miami-Dade Progressive Dinner

Shook, Hardy and Bacon LLP (Premier)
Hamilton, Miller & Birthisel LLP (Dinner)
RumbergerKirk (Dessert)

Palm-Beach Progressive Dinner

FTI Consulting (Dinner)

GC/CLO Dinner

Saul Ewing Arnstein & Lehr LLP

CLO Legal Roundtable

Armstrong Teasdale

Mini MBA

Foley & Lardner

Holiday Party

Barnes & Thornburg (Palm Beach)
Cozen O'Connor (Miami)

Newsletter Article

Barnes & Thornburg

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Executive Director
Christina Kim

ACC Association of Corporate Counsel
SOUTH FLORIDA

Christina Kim
Executive Director

Executive Director Note

Dear Members,

Christina + Family at the Miami Open

Summertime is upon us – longer daylight hours, less traffic (crossing my fingers!), some vacation time and most importantly, we will be launching registration for our 13th Annual CLE Conference! Our sponsors have been busy putting together some informative and timely seminars for our members and our CLE Conference committee has been diligently planning all the various aspects of the day. Please keep an eye out for registration to launch in mid-July.

We also have some great summer events coming up which we hope to see you at – Gunster will be hosting a delicious cooking class on June 21 and on July 19 we will have an engaging women's event with Fisher Phillips. More information can be found on our website.

Wishing you all safe, fun and relaxing summer!

Sincerely,
Christina Y. Kim
Executive Director, ACC South Florida