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FOS NEWS - *Our Clients Come First*

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Editor: Diane Slomowitz

RISKY BUSINESS: BE CAREFUL IN CLASSIFYING GIG WORKERS

By Laurna Kinnel

No doubt we live in a "gig" economy. Uber drivers. Etsy artisans. Door Dashers.

These workers make our lives easier. They allow us to outsource work we'd rather not do, or have no time or expertise to do.

How do businesses deal with gig workers, particularly in the context of payrolls or insurance expenses? Can using "gig" workers help streamline these processes?

In some cases, yes – when the gig worker is truly an independent contractor, as many businesses view and classify them, and not an employee.

Businesses generally do not have to withhold social security, pay overtime, or pay worker's compensation premiums for independent contractors, which they must for formal employees.

However, businesses should be very careful before categorizing workers as independent contractors, as the rules for determining proper classification of independent contractors are byzantine, and the penalties for misclassifications can be significant.

Properly classifying a worker as an independent contractor involves more than simply labeling them to be so (and getting the worker to agree to such classification).

According to the Wisconsin Department of Workforce Development, "worker misclassification occurs when an employer treats individuals as independent contractors when they are employees."

Also, "*workers are presumed to be employees* unless the employer proves that workers meet the legal criteria to be independent contractors."

So, what are the legal criteria for determining whether an individual is an independent contractor or employee?

There is, unfortunately, no easy answer.

Wisconsin's worker's compensation laws have a nine-part test for determining status.

Wisconsin's unemployment insurance laws have a two-part test, with workers having to meet six out of nine conditions in the second part of the test.

The IRS used to apply a 20-part test but now generally looks to three broad categories regarding control.

It's enough to make a business owner's head spin. And what if you get it wrong?

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FOS WELCOMES LIZ SIMONIS

Attorney **Liz Simonis,** who has several years of corporate and business transaction experience, has joined Fox, O'Neill & Shannon, S.C. as an associate.

Liz, a Wisconsin native, is a member of FOS's business and transactional practice groups.

Liz counsels corporations, limited liabilities and other business entities and assists the firm's transactional practice group in business sales and acquisitions.

Before joining FOS, Liz provided similar legal services for two respected area law firms.

FOS is excited to welcome Liz and looks forward to her contributions.

IF YOU WANT IT DONE RIGHT……. USE AI?

AI is everywhere.

AI assembles more information than we ever could and, in an instant or two, it tells us the history of Italy.

It writes papers. It answers our questions.

AI, however, is "artificial." It is fallible.

And some of its answers to questions posed to it can be incomplete or inaccurate.

Many businesses now use AI to help with hiring.

AI can be very helpful in this circumstance by, among other things, reviewing applicants' submissions and related appropriate information or answering basic questions, in record time.

These efficiencies can increase the productivity of existing employees, who would otherwise spend significant time initially reviewing submissions.

AI, cont. pg. 3

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GRAND JURY SUBPOENAS: REQUESTS IN CRIMINAL CASES

By Jacob Manian

A criminal grand jury subpoena is an indispensable tool for government prosecutors to gather evidence in a criminal investigation.

Prosecutors can use a grand jury subpoena to compel individuals to testify under oath before a federal grand jury.

They can also use it to obtain documents.

Prosecutors can have a grand jury subpoena served on a company as well as an individual.

The company can be required to produce its documents.

An individual designated as the company's records custodian can be required to answer questions under oath before a federal grand jury.

Sounds pretty simple, right?

If you or your company have nothing to hide, why not just show up to the grand jury or send over documents without a lawyer?

One reason is that you have no idea what evidence the prosecutor already has.

You also have no clue how the prosecutor, through a prosecutor's lens, views conduct in which you or your company may have engaged.

A seemingly harmless transaction, email, note, text or off-hand remark from years prior can quickly become the intense focus, and potential target, of a prosecutor.

Attempting to navigate the minefield of a grand jury subpoena, without the guidance of experienced counsel, can prove disastrous.

A lawyer well versed in federal criminal investigations can analyze all relevant information.

The lawyer can then ascertain where the individual or company fits in the context of the overall investigation.

Counsel can then determine potential legal threats that may face the witness.

In practice, your lawyer can talk to the prosecutor to negotiate the scope of production and even whether you may produce documents without appearing or giving testimony.

Some may think having a lawyer represent you or your company in response to a subpoena implies guilt.

It does not. It signals to the prosecutor that you take your civic duties seriously, and it can streamline the entire process.

An experienced lawyer can work to prevent you or your company from becoming ensnared in a limitless government probe filled with potential traps and abuses.

SUBPOENA DUCES WHAT?? REQUESTS IN CIVIL CASES

By Lauren Maddente

Subpoenas are not only issued in the criminal context. They may also be issued in civil proceedings.

Let's say you own a business and things have been rough lately. You're staying afloat, for now.

Your receptionist pings you.

Someone has a document for you and wants you to accept it in person.

Is it an unanticipated payment? A birthday card? A bill? No. It's a civil subpoena duces tecum.

How do you even pronounce that? And what is it?

A subpoena duces tecum compels the production of documents and sometimes an appearance at a deposition.

It is issued typically, but not always, in civil litigation.

Like a criminal grand jury subpoena, it is a tool used to gather evidence consisting mostly of print or electronic information.

These subpoenas are primarily directed by litigants to third parties.

It is important not to destroy any records upon receiving a subpoena.

Your first step, as with grand jury subpoenas, should be to contact your attorney.

Your attorney will first evaluate the subpoena's validity.

If the subpoena is invalid, your attorney can file a motion to quash (reject) it.

If the subpoena is valid and was validly issued, your attorney will advise you as to its scope and what, when and where production should occur.

In that case, your attorney will assist you in determining what you need to search for and potentially provide.

Your lawyer can also help you decide whether discussions with the issuer, particularly concerning the subpoena's scope and timing, may be helpful.

If you receive a subpoena, whether in the criminal or civil context, contact your FOS attorney.

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CALIFORNIA'S PROPOSITION 65 REACHES INTO WISCONSIN

By Liz Simonis

It seems almost every product we buy in Wisconsin has a warning referencing Proposition 65 (Prop 65).

Prop 65 is a California law enacted by the state's voters through a referendum.

It requires that a product contain a clear and reasonable warning of the presence of an ever-changing list of thousands of chemicals contained on or in the product, which may pose a significant risk of cancer, birth defects or other reproductive harm.

If Prop 65 is a California law, what does it have to do with Wisconsin? For once, a simple question with a relatively simple answer.

Prop 65 applies to all products sold in California, wherever they are made.

Given the national (and international) scope of the country's internet economy, products sold or produced in one state, including Wisconsin, will likely end up being purchased by or delivered to companies or individuals in California.

While the required warnings may be simply educational for consumers of products containing them, the law's requirements should be up front and center to businesses whose products are or may be sold in California.

Many companies located outside California place Prop 65 warnings on applicable products to avoid legal problems that may ensue if their products end up being sold in California.

That is because penalties for violating Prop 65 by failing to provide warnings can be as high as $2,500 per violation per day.

Anyone in the "stream of commerce," including manufacturers, distributors or retailers can be liable.

Private individuals can also seek to enforce Prop 65.

Businesses whose products have no statutory warnings can be sued with claims the chemical thresholds have been met or exceeded and seeking large penalties.

Businesses with fewer than 10 employees and government agencies are exempt from Prop 65's requirements.

Sellers are also exempt if the products' relevant chemical exposures are so low as to create no significant risk of cancer or are significantly below levels observed to cause birth defects or other reproductive harm, in accordance with defined safe harbor levels established by the state.

More information about Prop 65 can be found at *https://www.p65warnings.ca.gov/*.

The website lists chemicals currently on the state's warning list and warning language.

Your FOS attorney can also answer your questions regarding Prop 65 compliance.

Risky Business, cont. from pg. 1

In Wisconsin, you can be subject to taxes, interest charges, civil penalties and, for particularly egregious examples, criminal prosecution.

While independent contractors play an important role, lending expertise and increasing efficiency, the potential consequences of misclassification are substantial.

Given these high stakes, carefully consider whether an individual proposed to be or having been hired as an independent contractor actually qualifies for such designation.

If you have questions about proper worker classifications, contact your FOS attorney.

AI, cont. from pg. 1

Care should be taken, however, to review and verify the results provided by an AI search.

Equally important is to ensure that the parameters given for an AI review do not unwittingly subject a business to discrimination or other civil claims based on a biased or inaccurate search.

AI has even reached the legal profession. FOS's attorneys are very careful in its use.

FOS, for example, won't submit to a court or opposing counsel a legal brief generated by AI.

Why?

Because we won't risk our or our clients' reputation on someone else's work, especially if that someone is an AI-powered chat bot.

Several courts, for example, have sanctioned attorneys who based legal briefs on AI research, which relied on nonexistent court decisions. *See, for example, Attorney faces sanctions for filing fake cases dreamed up by AI • The Register*.

While these attorneys did not even check their AI results to confirm their legitimacy, the courts and opposing counsel did.

FOS's clients can rest assured that our attorneys do their own research, read actual legal authorities, and write their own briefs.

We use AI, like with any resource, to enhance – not replace – our work.

AI can be a useful tool to amalgamate and categorize information according to tailored parameters provided by a user.

Be careful, however, in reviewing both the prompts used in an AI search and the substance of the results generated by such prompts.

Use AI to enhance your team's efficiency, not borrow legal problems.

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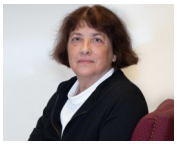
IS THE FTC NONCOMPETE RULE HEADED FOR THE DUSTBIN?



By Diane Slomowitz

FOS has previously advised clients regarding the Federal Trade Commission's (FTC) rule (the Rule) barring most noncompete agreements in employment contracts, which was issued in 2024 under the Biden administration.

See https://foslaw.com/update-ftc-noncompete-ban-blocked-nationwide-by-federal-judge/.

After legal challenges, the Eastern District of Pennsylvania preliminarily upheld the Rule.

The Northern District of Texas, however, ruled it unenforceable and issued a nationwide ban on its enforcement.

The Middle District of Florida also decided against the Rule, but limited its decision to the plaintiff in that case.

The Texas and Florida decisions are currently on appeal to the Fifth and Eleventh Circuit Courts of Appeals.

With the change in presidential administrations and the appointment of a new FTC chairman, the FTC is reconsidering whether it wants to retain or withdraw the Rule.

Current FTC Chairman Andrew Ferguson has publicly taken the position that the FTC may need to consider whether to continue defending the Rule.

The FTC also sought and obtained a 120-day stay in both appeals (with status reports due July 10 and July 18, respectively) to allow it to consider what position it wants to take regarding the Rule and on the appeals.

The stay will last *until these July 2025 status reports*, at which time the FTC will advise the courts of its position.

The FTC could maintain the Rule, withdraw it, or modify it in some manner.

Hopefully we will know in a month or so what position the FTC ultimately takes.

In the meantime, the Trump administration's general positions suggest it may seek to modify the Rule to lessen its application or withdraw the Rule altogether.

If the Rule is withdrawn, noncompete agreements will once again be allowed in many employment contexts.

State statutes and judicial decisions regarding the validity and enforcement of noncompete agreements, including Wis. Stat. § 103.465, will remain in effect and govern enforcement.

FOS will continue to monitor these proceedings and other employment-related issues.