Patent lawsuits on the rise

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Patent disputes are increasing, according to recent information gathered by Unified Patents, an organization that works to reduce patent abuse.

According to the data, nearly 900 district court lawsuits relating to patents were filed in the second quarter of 2019.

Patent fights tend to increase when the economy experiences a slowdown. New areas of patents, such as new smartphone-related technology, new cannabis products and new products in the life sciences space, may be behind an uptick in filings.

A bill recently reintroduced in the Senate, known as the Support Technology and Research for Our Nation's Growth and Economic Resilience Patents Act of 2019, aims to prevent patent infringement.

Other proposed federal legislation could make it easier for patent owners to protect their copyrights. The Copyright Alternative in Small-Claims Enforcement Act of 2019, known as the CASE Act, would make it possible for copyright holders to obtain compensation for infringed works through a small-claims process. A copyright holder could recover up to $15,000 per work.

Under current law, it can be cost-prohibitive for a copyright holder to pursue a claim in federal court, because the legal costs can be greater than the judgment.

Businesses should engage an attorney to determine whether a dispute is worth fighting.

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'Joint employers' rules clarify FLSA responsibilities

New "joint employer" rules make it easier for franchise owners to understand their responsibilities under the federal Fair Labor Standards Act.

The final rule from the Department of Labor limits situations in which franchisors and franchisees are considered "joint employers" of workers under the act.

It modifies a policy, enacted under the Obama administration, that potentially made a franchisor liable for the failure of a franchisee to pay overtime or minimum wage, even if the franchise operated as a legally independent business.

The rule covers scenarios in which an employee works for one business, but another entity or individual benefits from the work at the same time.

Businesses that have typical contracting and franchising relationships say that the rule allows them to require certain standards from their suppliers or franchises without being considered the employer of the other business's workers.

However, labor groups argue that the rule makes it harder for employees to fight overtime or minimum wage violations.

Determining if a person or an entity qualifies as a joint employer depends on whether that person or entity has the power to:

- hire or fire the employee;
- supervise and control the employee's work schedule or conditions of employment to a substantial degree;
- determine the employee's rate and method of payment; and
- maintain the employee's employment records.

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A determination of whether a person or entity is a joint employer depends on the facts of each case, and different weights are given to each factor, depending on the situation.

Under the rule, operating a business as a franchisor or entering into a brand and supply agreement or using a similar business model is considered not relevant to joint employer status. Also considered not relevant:

- a potential joint employer's contractual agreements with an employer requiring the employer to comply with its legal obligations or to meet certain standards to protect the health or safety of its employees or the public;
- potential joint employer's contractual agreements with an employer re-

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OSHA increases maximum fines for 2020

The Occupational Safety and Health Administration has boosted its maximum fines for workplace safety violations.

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The new maximum fine for "serious" violations is $13,500 per violation, while the top fine for "willful" or "repeated" violations is $135,000 per violation.

Typically, an OSHA investigation is prompted by a worker contacting OSHA anonymously or an employer filing a required report.

Employers generally are not obligated to inform OSHA about workplace injuries except in certain circumstances:

- a fatality must be reported within eight hours;
- an incident involving inpatient hospitalization of one or more employees must be reported within 24 hours; and
- any incidents involving amputation or the loss of an eye must be reported.

After an incident, OSHA inspectors typically arrive unannounced. Usually an inspector observes the accident site and takes images or videos. Employers should expect to provide safety policies and records, logs of illnesses and injuries, and information on personal protective equipment, hazard communication, etc. They should also expect OSHA to conduct interviews of managers and other employees.

After an inspection, OSHA may issue written citations with proposed fines. Companies can dispute fines through an informal settlement conference or through litigation before the Occupational Safety and Health Review Commission.

Be prepared before an OSHA inspector arrives. It helps to form an OSHA Response Team at your workplace. Maintain updated safety policies and conduct regular safety audits.

Consult with a lawyer to be sure your policies are sufficient and your audits are complete.

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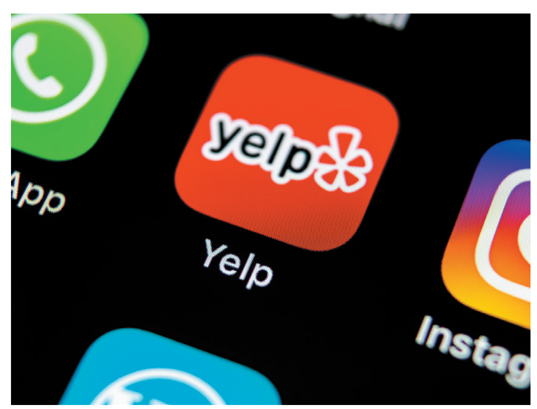
FTC settles case involving privacy violation on Yelp

A Federal Trade Commission settlement with a California mortgage broker who posted personal information about consumers on Yelp after they posted negative reviews of his services is a cautionary tale to businesses, which should never publicly disclose clients' personal information.



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According to a Department of Justice complaint filed on behalf of the FTC, mortgage broker Ramon Walker, owner of Mount Diablo Lending, responded to negative Yelp reviews by posting information about customers' health, taxes, credit history, sources of income and family relationships. In some cases, he posted their first and last names.

In one response, Walker wrote, "The high debt-to-income ratio was caused by this borrower cosigning on multiple mortgages for his children. The borrower was also self-employed and took high deductions from his business."

The DOJ argued that Walker and his company violated the Fair Credit Reporting Act, the FTC Act and the Gramm-Leach-Bliley Act by not implementing an information security program until September 2017 and not testing the program once it was implemented.

Under the settlement, Walker and his company agreed to pay a $120,000 penalty for the FCRA violations. The proposed order requires the defendants to implement a comprehensive data security program to protect clients' personal information, and it requires the company to conduct third-party assessments of the information security program every two years. It also must designate a senior corporate manager to oversee the program, certifying compliance with the order each year.

'Joint employers' rules clarify FLSA responsibilities

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quiring quality control standards to ensure the consistent quality of the work product, brand, or business reputation; and

- potential joint employers' practice of providing an employer with a sample employee handbook, or other forms, allowing the employer to operate a business.

Here are some examples that clarify when an entity is a joint employer:

Example 1: A franchisor provides franchisees with a sample employment application, sample employee handbook and other forms for use in operating the franchise. According to the licensing agreement, the franchisee is solely responsible for hiring and firing, setting pay rates, supervising employees and maintaining employment records.

In this case, the franchisor would not be considered a joint employer. Providing sample forms and documents does not constitute direct or indirect control over a franchisee's employees.

Example 2: A cook works for two different franchisees of the same national franchise. The two local establishments do not coordinate with respect to the employee.

In this case, the restaurants are not considered joint employers, because they are not acting in each other's interest in relation to the cook.

Example 3: A country club hired a landscaper on contract to maintain its grounds. While the club does not have authority to supervise landscaping employee work under the contract, there is an employee of the club who supervises the work, instructs on tasks and keeps some records of the work. In addition, the club employee reports an employee of the landscaper who failed to follow directions, and he or she is then fired In this case, the country club is a joint employer, because the club employee exercises sufficient control over the terms and conditions of the landscaping employee's employment.

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Example 4: A cook works for two different restaurants with the same owner. The restaurants coordinate the cook's hours and decide jointly on the cook's hourly rate.

This is considered a joint employment relationship under the rule, because there is common ownership and there are joint decisions about the cook's schedule and pay rate.

Example 5: A big company imposes a code of conduct and a minimum wage on suppliers for those suppliers to be part of the company's supply chain.

That does not lead to a joint employer relationship, because the company does not exercise sufficient direct or indirect control over supplier employees.

Businesses should consult attorneys for help reviewing all licensing agreements and vendor contracts for any requirements related to control over employee work, pay rates and responsibility for record-keeping. Actual staff practices must also be reviewed for possible exposure to joint employer liability.

New rule raises the bar for immigrant investors

A new rule raises the minimum amount foreigners need to invest to qualify for a U.S. green card under the EB-5 program.

Created in 1992, the program grants green cards to foreign nationals who make the necessary investment in a commercial enterprise in the U.S. In addition to minimum financial benchmarks, the program stipulates that an investment must also create (or, in certain circumstances, preserve) 10 permanent full-time jobs for U.S. workers.

The EB-5 Modernization Rule raises the EB-5 minimum investment rate to $900,000 for targeted employment area (known as TEA) projects and $1.8 million for non-TEA projects.

In practice, most EB-5 investments are pooled into large development projects. EB-5 has come under scrutiny as developers have been accused of defrauding investors or creating projects that don't fairly meet the economic goals of the program.

Critics of the old rule say state and local officials were able to manipulate TEA designations to maintain eligibility at the lower investment threshold.