BUSINESS IN 2023

WEEKLY WEBINAR SERIES

BOND SCHOENECK & KING ATTORNEYS

Your Host

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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Intros / Agenda
- New York State Policy and Legislation
- NYC Activity

Kate McClung – (12:05PM-12:15PM)

- Common Overtime Mistakes

Emily Fallon (associate trainee, under supervision with Gabe Oberfield) – (12:15PM-12:25PM)

- Developing Dynamics Concerning Housing Asylees in New York State

Mark Beloborodov – (12:25PM-12:35PM)

- The Supreme Court Opines on Intellectual Property

Kevin Cope – (12:35PM-12:45PM)

- New York State Considers Ban of Non-Compete Agreements in the Shadow of the FTC's Proposed Nationwide Ban

G. Oberfield – (12:45PM)

- Questions / Wrap Up

Developments in NYS Legislature

- Legislative session is expected to end on June 8, 2023
  - What will get approved before then?

    - Data privacy (e.g., A7423 / S365A)
      - Language advancing through the legislature
        - Affects consumer data, notices opt-outs, and data deletion
        - NB: national trend of state-level privacy laws

    - Speed limit reductions in NYC (20 MPH in some areas?)

    - ‘Clean Slate’ Act –
      - Would remove records of justice involvement in certain instances:
        - 3 years following incarceration for certain misdemeanors, and
        - 7 years following certain felonies;
        - Employment and workforce implications…

New York State Capital – Office of General Services

COVID Sick Leave – Still on the Books, but for How Long?

- COVID Sick Leave (S7250)
  - The Bill proposes to make changes to the NYS COVID Sick Leave law (originally passed in March 2020).
    - Would *replace* the 14-day period of sick leave required of private employers with 100+ employees;
      - Instead, *any* employer with 11 or more employees would have to provide a period of **5 days of sick leave** (which could be followed by overlaying benefits, e.g., paid family leave or disability).
    - Would change the 14 days of sick leave required of public employers … also to **5 days**.
    - By April 1, 2024, the NYSDOL and NYSDOH prepare a report …
      - If the Legislature does not adopt a resolution declaring the continued need for the sick leave within 60 days of receipt of the report, *the law would expire and be deemed repealed*.

New York State Capital – Office of General Services

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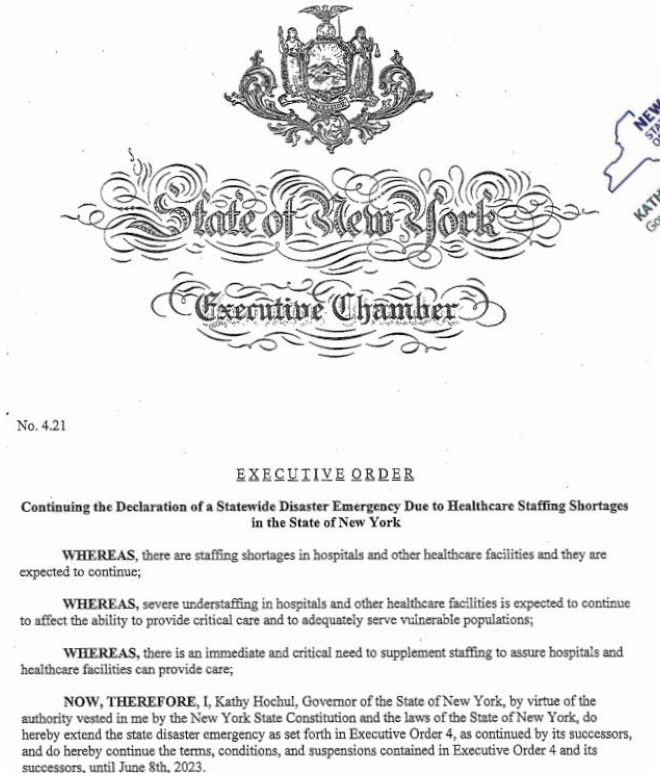
Healthcare Vaccination Requirement

- NYS DOH issues a 'Dear Administrator Letter' on May 24, 2023:
  - Calls for halt on enforcement of the healthcare vaccination requirement
  - Formal rollback will require Public Health and Health Planning Council (PHHPC) approval
- Recall: permanent regulation adopted during summer 2021 following EO by former Governor Andrew Cuomo
- Challenged in court, repeatedly (State and Federal)

- Relatedly – Gov. Hochul extends healthcare staffing EO to June 8, 2023



State of New York

Executive Chamber

No. 4.21

EXECUTIVE ORDER

Continuing the Declaration of a Statewide Disaster Emergency Due to Healthcare Staffing Shortages in the State of New York

WHEREAS, there are staffing shortages in hospitals and other healthcare facilities and they are expected to continue;

WHEREAS, severe understaffing in hospitals and other healthcare facilities is expected to continue to affect the ability to provide critical care and to adequately serve vulnerable populations;

WHEREAS, there is an immediate and critical need to supplement staffing to assure hospitals and healthcare facilities can provide care;

NOW, THEREFORE, I, Kathy Hochul, Governor of the State of New York, by virtue of the authority vested in me by the New York State Constitution and the laws of the State of New York, do hereby extend the state disaster emergency as set forth in Executive Order 4, as continued by its successors, and do hereby continue the terms, conditions, and suspensions contained in Executive Order 4 and its successors, until June 8th, 2023.

Credit: Office of the Governor

NEW YORK STATE OF OPPORTUNITY. Department of Health

KATHY HOCHUL Governor

JAMES V. McDONALD, M.D., M.P.H. Acting Commissioner

MEGAN E. BALDWIN Acting Executive Deputy Commissioner

May 24, 2023

DHDTC DAL
NH: DAL 23-09
DHCBS: DAL #23-02
DACF: DAL # 23-22

Dear Chief Executive Officers, Nursing Home Operators and Administrators, Adult Care Facility Administrators, Home Care and Hospice Administrators, and Local Health Department Commissioners/Directors:

On April 18 and 19, 2023, the Food and Drug Administration ("FDA") and the Centers for

Credit: New York State Department of Health

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New York City – Height and Weight Discrimination

- Bond Attorney Lisa Feldman presented a week ago on a bill that "would prohibit discrimination on the basis of a person's height or weight in employment, housing, and public accommodations [with limited exceptions]."

- Mayor Adams signed the bill into law, which will go into effect 180 days following his signature (Nov. 22, 2023).

- We will be tracking both the local and statewide implications…

New York City Mayor Eric Adams – NYC.gov

Common Overtime Mistakes

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Mistake #1: Regular rate vs. hourly rate

- "It's just time and a half the employee's hourly rate" – WRONG
- Overtime is time and a half the regular rate
- The regular rate is all remuneration, except a specific and narrow list of exclusions
- Don't forget to include non-discretionary bonuses, commissions, shift differentials, and tip credits in the regular rate

Regular Rate: Bonuses

- Regular rate excludes discretionary bonuses
- But non-discretionary bonuses must be included in regular rate
- Discretionary vs. non-discretionary
  - Pursuant to a contract
  - Shortly before payment:
    - Employer chooses whether payment is made
    - Employer determines amount of payment

Bonus Case Study

- ABC Company hires Wendy Worker for non-exempt position. In employment contract, ABC promises a $6,000 bonus if Wendy Worker stays at ABC for at least six months
- Wendy Worker is still employed at ABC six months later and receives the $6,000 bonus
- Does this bonus need to be included in her regular rate?
- If so, how does ABC calculate this overtime?

Bonus Case Study (cont.)

- Yes: bonus must be included in regular rate
- ABC should pay bonus, plus increased OT earnings
- This is calculated retroactively for the period covered by bonus and allocated by (i) workweeks where bonus was earned, if possible, or (ii) in the alternative, a reasonable and equitable method of allocation
- Here, retention bonus earned evenly over entire six-month period

Bonus Case Study (cont.)

- $6,000 / 26 weeks = $230.77 / week
- Each week must be separately calculated based on overtime hours.
- For example, in a week where Wendy worked 50 hours:
  - $230.77 / 50 hours = $4.62 increase in regular rate
  - $4.62 x 0.5 = $2.31 increase in half-time premium
  - $2.31 x 10 overtime hours = $23.10 increase in overtime earnings due to bonus

Mistake #2: Missing Hours Worked

- Missed meal periods
  - Be careful with automatic deduction policies
- Rest breaks of 20 minutes or less
- Small periods of remote work (e.g., responding to e-mails after hours)
- Compensable on-call time
- Compensable waiting time
- Compensable training time
- Compensable travel time

Mistake #3: Unauthorized Overtime

ABC Company has a written policy prohibiting employees from working overtime without prior authorization from their supervisor. Wendy works 42 hours this week but failed to obtain prior authorization for the overtime work.

TRUE OR FALSE? ABC Company does not have to pay Wendy for the 2 overtime hours because she did not obtain authorization.

Developing Dynamics Concerning Housing Asylees in New York State

Emily A. Fallon

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(associate trainee, under supervision of Gabriel Oberfield)

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Background

- An asylee is a noncitizen of the United States who is found to be unable or unwilling to return to their country of nationality, or to seek the protection of that country because of persecution or a well-founded fear of persecution
  - **Refugees** – applies for protection while overseas and enters the United States as a refugee
  - **Asylee** – requests protection and is granted asylum while within the United States

Title 42

- Implemented by the Trump Administration as a COVID-19 travel restriction
  - Statutory authority derived from Title 42 of the Public Health Law
- Permitted U.S. authorities to turn away migrants who came to the U.S./Mexico border on the grounds of preventing the spread of COVID-19
  - Migrants were unable to cross the border and seek asylum once within the United States
- On Tuesday, May 11, 2023, the Biden Administration ended the COVID-19 public health emergency, which terminated Title 42 authority.

Impact on New York

- Nearly 41,000 migrants currently in New York City
  - Many currently being provided shelter in hotels at the City's expense
  - Mayor Eric Adams maintains the position that the City is at capacity and cannot provide shelter to any additional migrants that arrive in the City
- Relocation Plan
  - The City plans to relocate migrants by bus to surrounding NYC counties and pay for shelter in hotels
    - Rockland County
    - Orange County
    - Suffolk County

Relocation Plan Response

- 36 out of 57 counties outside New York City, along with two Towns, have declared a State of Emergency in an attempt to enjoin hotels within their respective perimeters to be used as migrant shelters as a result of Mayor Adam's Relocation Plan
  - Rockland County, Albany County, Oneida County, Cayuga County, Greene County, Delaware County, and Columbia County most recently declared States of Emergencies
  - Rockland County
    - State of Emergency allows the County to issue a license to a hotel to house migrants only if the contract limits their stay to 15 days and the City proves in advance it can pay for their lodging
    - $2,000 fine per day if a hotel lodges migrants without such license

Relocation Plan Response

- A group of hotel owners is suing New York counties that have blocked NYC's plan to relocate asylum seekers
  - Claim that they made a deal with the City to provide lodging to relocated migrants which has now lost effect
  - Filed a federal lawsuit arguing that county executives are targeting their businesses and threatening to negatively impact their income for agreeing to provide rooms to asylum seekers
    - Alleges that the 26 counties named in the lawsuit withheld the required permits interfering with their contracts

New York State's Possible Response

- Governor Hochul is considering providing potential SUNY/CUNY campuses for temporary migrant housing
  - Yet to confirm which campuses have the capacity and infrastructure to adequately support temporary migrant housing, while not substantially interfering with day-to-day operations
    - Determinative is number of open/available dorm rooms
      - Stony Brook University, SUNY Buffalo, and SUNY Albany are rumored locations

Developments to Watch

- NYS Response to Counties and Towns that have declared a State of Emergency
  - Possible Legal Action
- Federal action to alleviate on-going influx of asylees to New York City
- SUNY/CUNY campuses as temporary migrant housing locations
- Response by municipalities named in federal lawsuit brought by hotel owners
- Breaking news every day…

The Supreme Court Opines on Intellectual Property

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“The Supreme Court meets Andy Warhol, Prince and a case that could threaten creativity”*

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (Docket No. 21-869; argued October 12, 2022)

* NPR’s All Things Considered (aired on October 12, 2022)

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Copyright Act of 1976

17 USC §106 - Exclusive rights in copyrighted works

- Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) *to prepare* ***derivative works*** *based upon the copyrighted work*;….

17 USC §107 - Limitations on exclusive rights: Fair use

- Notwithstanding the provisions of sections 106 …, fair use of a copyrighted work, including such use by reproduction in copies …, for purposes such as criticism, comment, news reporting, teaching…, scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) **the purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

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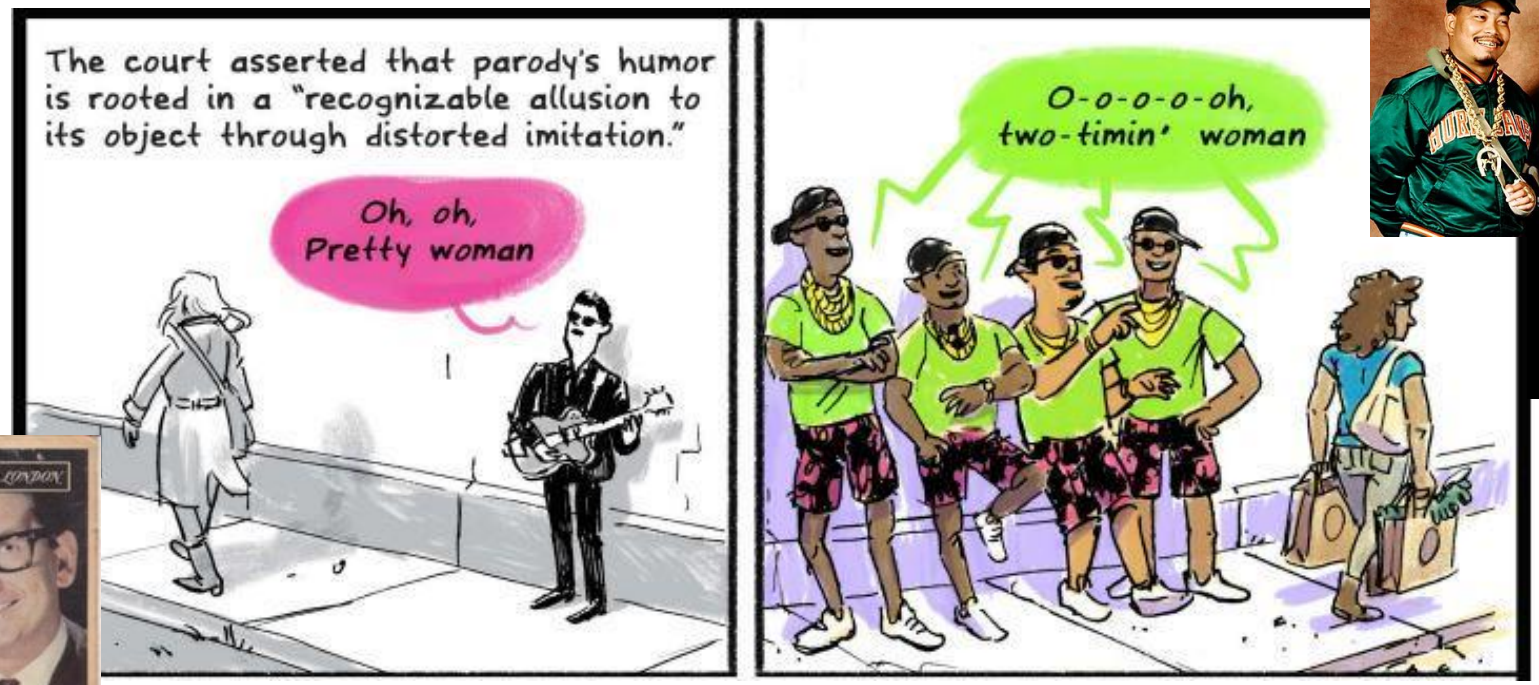
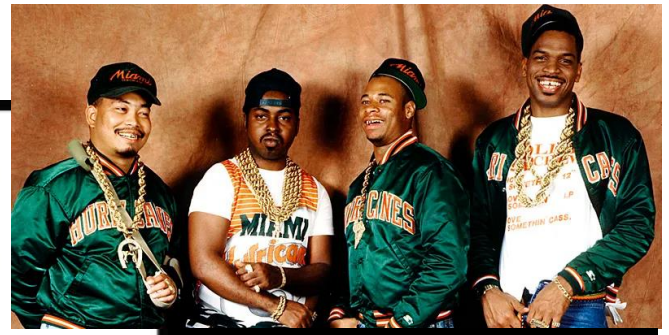
Campbell v Acuff-Rose (510 U.S.C. 569 (1994))





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Oral Hearing at the US Supreme Court

October 12, 2022

Issue

- Does a work of art that visually resembles its copyrighted source material, but conveys a different **message or meaning**, constitute fair use? Is a court permitted to consider *meaning* when evaluating copyright infringement claims?

Roman Martinez argues on behalf of the Andy Warhol Foundation. (artwork by William Hennessy)(as reported by SCOTUSblog)

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U.S. Supreme Court rules against AWF

May 18, 2023

- Ruled 7-2 on May 18, 2023 for photographer Lynn Goldsmith, affirming the Second Circuit opinion, with Kagan and Roberts dissenting
  - “Fair use” is an objective inquiry, and subjective intent, meaning or impression is not relevant.
  - Transformativeness is evaluated by comparing the difference between the works,” and weighing it against the commercial nature of the use. Different meanings is not dispositive to transformativeness, “purpose and character” is a matter of degree.
- If an original work and secondary use share the same or similar purposes, and the secondary use is commercial, it is likely to weigh against fair use, absent some other justification for copying. Here, the purposes were “substantially similar,” and any differences were trumped by the commercial nature.
  - "Because AWF's commercial use of Goldsmith's photograph to illustrate a magazine about Prince is so similar to the photograph's typical use, a particularly compelling justification is needed," Justice Sonia Sotomayor wrote for the majority. "AWF offers no independent justification, let alone a compelling one, for copying the photograph, other than to convey a new meaning or message,"
  - “Goldsmith's original words...are entitled to copyright protection, even against famous artists,”
- Campbell case “cannot be read to mean that §107(1) weighs in favor of any use that adds some new expression, meaning, or message.” To do so would mean that “’transformative use’ would swallow the copyright owner’s exclusive right to prepare derivative works.” Here, the purpose of the use, illustrating a magazine about Prince with a portrait of Prince, was not different enough for the first fair use factor to favor AWF.

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Stifling creativity by constricting “fair use” boundaries?

- "Andy Warhol is the avatar of transformative copying," Justice Elena Kagan dissented, joined by Justice John Roberts *"There is precious little evidence in today's opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning.“*
- Overly stringent copyright regimes as stifling creativity since artists cannot build on the works of others
  - “It will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer,”.
- Museum and art foundations now fear “a deep chill on artistic progress, as creative appropriation of existing images has been a staple of artistic development for centuries”
- Creative artists should welcome this new ruling
- Narrowing the decision to the licensing issue ignores the importance and creativity of transformative copying
  - Lower courts may read future cases both ways: competitive licensing use or creation of derivative works, suggesting an interpretation that may vary

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Rethinking the quid pro quo bargain of the U.S. patent system

Amgen Inc. v Sanofi (Docket No. 21-757; cert. granted on November 3, 2022)

35 U.S.C. §112(a) requires that a patent's specification must contain "a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same."

- This statutory requirement dictates that patent applications contain sufficient disclosure to allow one skilled in the relevant art to make and use the claimed invention ***without undue experimentation***. It is the essence of the quid pro quo bargain between the inventor and the government where a temporary right to exclude others from making or using the invention is granted to the inventor in exchange for the enabling description of their invention

Rethinking the quid pro quo bargain of the U.S. patent system

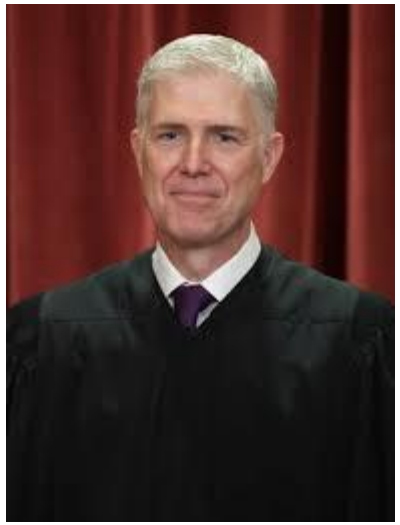
Amgen Inc. v Sanofi (Docket No. 21-757; cert. granted on November 3, 2022)

- Amgen Inc. owns several patents on monoclonal antibodies used to treat high cholesterol. The initial patents claimed the antibodies structurally, but Amgen later obtained patents that claimed the antibodies generically according to their function of "binding" with certain amino acids. In 2014, Amgen sued Sanofi, for infringing the functionally claimed patent on the antibodies.
- Sanofi prevailed on its invalidity challenge to Amgen's patents and CAFC affirmed

- **Issue**: Whether enablement is governed by the statutory requirement that the specification teach those skilled in the art to "make and use" the claimed invention, or whether it must instead enable those skilled in the art "to reach the full scope of claimed embodiments" without undue experimentation—i.e., to cumulatively identify and make all or nearly all embodiments of the invention without substantial "time and effort."

Opinion of the US Supreme Court

May 18, 2023



- Justice Gorsuch delivered the unanimous opinion of the Court, affirming the Federal Circuit's decision that Amgen's claims to antibodies based on their function to bind with a certain protein that blocks that protein from interfering with the liver's ability to remove LDL cholesterol are invalid for lack of enablement under 35 U.S.C. 112, writing that "*Amgen has failed to enable all that it has claimed, even allowing for a reasonable degree of experimentation*."
- Amgen insists its "broad claims are enabled because scientists can make and use every undisclosed but functional antibody if they simply follow the company's 'roadmap' or its proposal for 'conservative substitution," Justices disagreed, stating. "These two approaches, however, amount to little more than two research assignments." Amgen's advice on how to engage in "trial and error" is not enough for enablement.

New York State Considers Ban of Non-Compete Agreements in the Shadow of the FTC's Proposed Nationwide Ban

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Your Questions

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New York State Policy and Legislation (COVID / Data Privacy)

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Common Overtime Mistakes

Kate McClung, kmcclung@bsk.com

Developing Dynamics Concerning Housing Asylees in New York State

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The Supreme Court Opines on Intellectual Property

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New York State Considers Ban of Non-Compete Agreements in the Shadow of the FTC's Proposed Nationwide Ban

Kevin Cope, kcope@bsk.com

New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar here.
Non-NYS Bar Association Members can purchase through Amazon here.

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Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.