

THE CHATGPT PLAINTIFF: HOW AI IS TRANSFORMING EMPLOYMENT LITIGATION, DRIVING UP DEFENSE COSTS, AND WHAT IN-HOUSE COUNSEL CAN DO ABOUT IT

Insights
Feb 26, 2026

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When a pro se plaintiff recently filed a more than 40-page memorandum accompanied by hundreds of pages of evidence, the FP attorney defending the case realized that artificial intelligence was at play. And even though the judge ultimately convinced the plaintiff to accept a settlement that spared the expense of having to draft a reply brief, the settlement amount hardly reflected the norm for a pro se case. AI tools like ChatGPT are emboldening pro se plaintiffs, empowering them to generate professional-looking pleadings and other communications. This is not only driving up defense costs and inflating settlement values but forcing businesses and their lawyers to deploy new litigation strategies. We interviewed several Fisher Phillips attorneys handling these cases to better understand the impact and develop a playbook for what in-house counsel should do in this new era.

The Old Days: Pro Se Plaintiffs Before Generative AI

Pro se plaintiffs in the employment arena have always had unreasonable settlement expectations and often forced defendants to litigate longer than was necessary. But along the way, they had trouble following complex litigation rules, could not generate significant amounts of written discovery, and were not able to engage effectively in motion practice.

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Few pro se plaintiffs generated more work for the defendant than an effective plaintiff's counsel. Courts would often dismiss pro se cases at the early stages of litigation, or defense counsel would be able to convince them to accept nuisance value settlement offers after the plaintiff realized the amount of effort needed to maintain their case.

The Scale of the Problem


AI tools like Chat GPT can help pro se plaintiffs overcome their lack of knowledge and experience to create vastly more work for defense counsel. The rise of the ChatGPT plaintiff has led to three major problems: a surge in the volume of pro se cases; an increase in the speed in which pro se filings are created; and a drastic shift in the quality of pro se materials.

Volume Surge

Our attorneys are reporting an increase in AI-driven pro se cases, and the numbers are backing it up. According to data compiled by our firm, pro se employment lawsuit filings across the country increased from 4,100 to 6,400 last year, a 49% jump compared to the year prior.



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EVAN SHENKMAN
– Chief Knowledge & Innovation Officer

“Our attorneys are seeing a dramatic increase,” said Evan Shenkman, FP’s Chief Knowledge & Innovation Officer. “And it doesn’t surprise me, because now every pro se plaintiff considers themselves a subject matter expert on the law because they have ChatGPT to guide them to write pleadings.”

Speed of Filings



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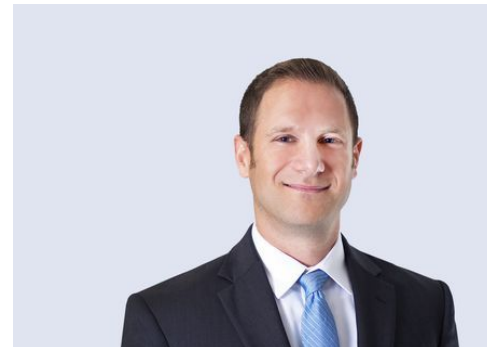
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In addition to the sheer frequency of filings that can be produced with the assistance of generative AI, the technology can also create these documents in seconds, adding significant pressure on counsel.

For example, FP partner Steve Cupp (Gulfport) said that, after recently filing an answer to a pro se case, “literally within 30 minutes, they had filed a seven-page memo moving to strike my affirmative defenses.”

Quality Shift

The advent of AI has also “taken away the intimidation factor” from pro se litigants who previously might have been tripped up by local court rules, or simply where and how to file a case, our attorneys say. And AI is making their arguments stronger. In the past, a pro se plaintiff might not say the magic words that state a cause of action and the case might get thrown out. But now they merely have to prompt the AI to find “What do I have to say to win my case?”

“It gives pro se plaintiffs more confidence and more credibility, because they now have a better sounding, better written pleading that’s less likely to be subject to a motion to dismiss,” said Shenkman.

But there’s also limitations to relying on AI as your attorney, including hallucinations from the technology or forgetting to remove prompts from the AI-generated filing.

Todd Ewan (Philadelphia), Co-Chair of FP’s Litigation Practice Group, said his team was unable to find the cases cited by a recent pro se plaintiff in the complaint, and the case law was misrepresented. As a result, Ewan said, his team has been more cautious and digs much deeper into verifying the legal arguments brought by opposing counsel in these cases.

“The pro se plaintiff is reading the rules of case law in a slightly different way that’s not consistent with the way it should be,” Ewan said. AI offers a more “off-kilter” way of filing a lawsuit, “but you still have to look into it and figure out how to combat it.”

How Can You Tell AI is Being Used?

There are some obvious signs that AI is being used to help generate or guide pro se litigation. Our attorneys have



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identified some common red flags:

- **Citation errors.** References to case law that doesn't exist or misrepresents what the law says.
- **Lengthy, unnecessary background, or excessive descriptions of legal concepts.** Trained attorneys understand that the court doesn't need a full explanation of what the law is.
- **Left-in ChatGPT instructions.** Language like "Would you like me to develop additional arguments you can use in your next filing?" at the end of a document is a dead giveaway (and more commonly included than you might think).
- **Extremely quick turnarounds.** Court filings entered within minutes or hours of litigation could suggest automated assistance in drafting.

How Has AI Changed The Litigation Landscape?

Our attorneys have identified three key ways in which ChatGPT plaintiffs have changed the litigation landscape in the last few years.

1. Inflated Settlement Values

Our attorneys have experienced pro se plaintiffs making astronomical demands in these suits, partially driven by AI. Without having experienced counsel to guide a pro se plaintiff towards a realistic settlement, the financial threat of these types of cases can become serious.

Kristin White, an FP partner (Denver), says this really forces in-house counsel to take the case to court rather than resolving the case at the demand letter stage. "There's not really the option of a nuisance settlement, because for these individuals it's hundreds of thousands of dollars to make them go away," she said. "So you have to litigate, and you have to be aggressive."



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2. Warped Budgets and Increased Costs

AI also assists plaintiffs in filing multiple motions or navigating the appeals process, all actions that typically require a lawyer's response. The additional time it takes for counsel to review AI-generated lawsuits for accuracy, and to get through the sheer volume of documents, is making it much harder for organizations to plan their legal budgets. "AI allows the other side to easily create work for you to deal with, increasing the number of hours that defending a lawsuit takes," says FP Regional Managing Partner Ed Harold (New Orleans). "Which translates to higher costs."

FP's Cupp estimates that businesses should plan for 10 to 15% increase in spending to respond to this surge in pro se litigation. "The more time in the life cycle of a case, the more spending cost," Cupp said.



“Plan for a 10 to 15% increase in your litigation spending. The more time in the life cycle of a case, the more spending cost.”



Major cost drivers include:

- Time spent having to review citations in every case to catch hallucinations
- Substantial increase in email and document volume
- Unrealistic discovery demands
- Inflated settlement valuations

“Once you get one, they don’t seem to stop or go away,” added White. “You fight it back in state court, then they go to federal court, and then they go to the appeals court. Now they just linger.”

3. New Defense Tactics Required

Media reports indicate that the courts have been cracking down on attorneys that use shoddy or hallucinated citations or clear AI-generated errors in their legal filings ([a database of legal decisions in this field can be found here](#)). The problem is compounded with pro se plaintiffs. “There’s not a lawyer on the other side that has an ethical obligation to make sure these cases are real, or are based on true facts,” said White.

Generally, pro se plaintiffs are given greater leniency by the court than sworn attorneys given the nature of their status. However, with AI-fueled cases increasing, our attorneys say they’re starting to see a shift in the way judges respond to case errors by pro se plaintiffs.

“They’re coming down on it a little bit more than they used to do,” Cupp said of the court’s response to AI issues in pro se litigation. He’s been in front of at least one judge that expected the defense bar to bring hallucinated citations to their attention. “So we can’t just passively let it go,” Cupp said, “because then we can get called out on it.”

5 Strategies for In-House Counsel in Era of ChatGPT Plaintiff

Given the new reality in which litigators find themselves in, we’ve assembled five strategies for you to adopt in coordination with your outside counsel when it comes to dealing with AI-enabled pro se plaintiffs.

1. Adjust Budget Assumptions

- Build in 10 to 15% contingency

- Expect more filings, more motions, and more discovery disputes

- Don't assume a quick resolution

2. Develop AI Detection Protocol

- Ask outside counsel to flag AI indicators
- Work with outside counsel to develop cost-effective methods of verifying citations

3. Rethink Settlement Strategy

- Recognize that nuisance value has increased
- Balance case economics vs. encouraging more AI-fueled suits

4. Control Your Own AI Use

- Set clear policies on when employees can and cannot use AI
- Require lawyer review of all AI-generated communications
- Train managers and staff on risks presented by AI
- Consider upskilling workers to better utilize AI

5. Leverage the Weaknesses

- If feasible, be prepared to authorize outside counsel to take pro se cases to trial – where AI can't help pro se litigants as much
- Make sure your outside counsel is using court rules and oversight to your advantage
- Work with outside counsel to document and build a record of plaintiff's AI errors and authorize them to seek sanctions where necessary

Conclusion

We will continue to monitor developments in this area and provide updates as warranted, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. If you have questions, please contact your Fisher Phillips attorney, the

authors of this Insight, or any member of our [Litigation Practice Group](#) or our [AI, Data, and Analytics Practice Group](#).