

Maddin Hauser's
Employment Law
Symposium

**WHO THE HECK ARE WE HIRING?
LEGAL ISSUES WITH ONBOARDING:
BACKGROUND CHECKS, PRE-EMPLOYMENT
TESTING, AND EMPLOYEE SOCIAL MEDIA**

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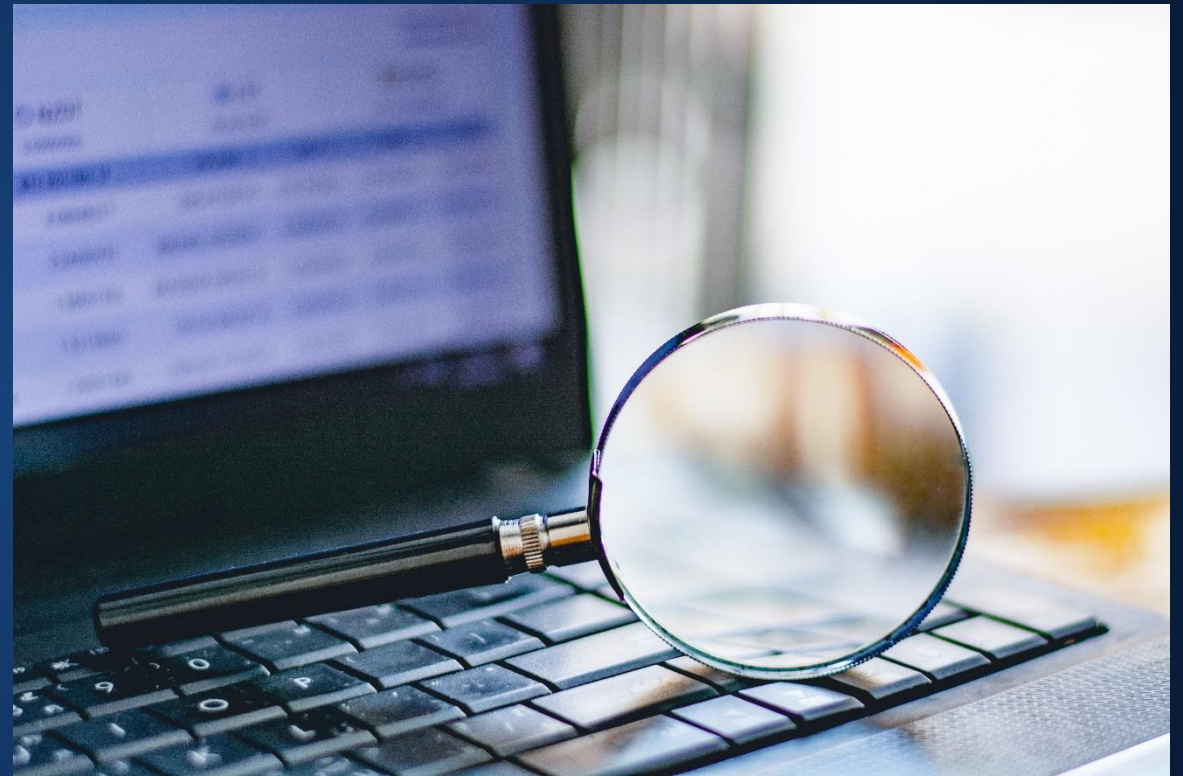
Overview

- Background Checks: FCRA mistakes and how to avoid them
 - Understand federal and state-level requirements to conduct proper background inquiries for incoming employees
- Job-Related Testing: Common issues with conducting pre-employment testing
 - Understand the potential legal issues surrounding the usage of pre-employment testing to evaluate candidates
- Likes and Dislikes: Employee social media activity
 - Help identify potential issues with employee social media usage and employer reactions

BACKGROUND CHECKS AND FCRA ISSUES

HOW DOES THE FCRA AFFECT HIRING?

- When employers run background checks through a company in the business of compiling background information, they must comply with the Fair Credit Reporting Act (FCRA)
- What is “background information”?



FCRA BEST PRACTICES

- All applicants must sign a background check authorization form.
- Do not seek background information from references or prior employers prior to obtaining this authorization.
- Place information in personnel file, except if name of person making the reference would be disclosed.



STATE-LEVEL FCRA ISSUES

- In recent years, states have enacted laws that add requirements greater than FCRA policies.
- Some states, such as Minnesota and Oklahoma, require an employer to provide the subject of the check an opportunity to check a box to receive any report provided by a FCRA.



ADVERSE ACTION NOTICE

Employers must notify a job candidate before and after adverse action is taken based on information received from a consumer report

FCRA DAMAGES

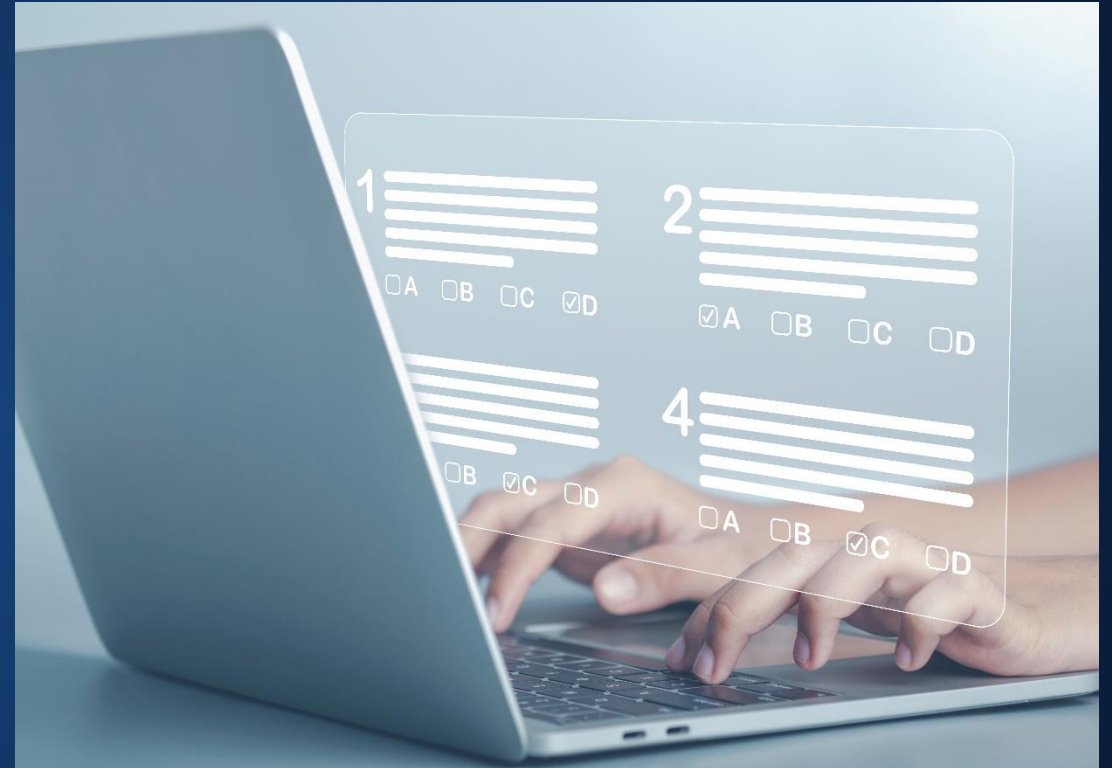
- Consumers may seek their actual damages arising from an FCRA violation
- Consumers alleging a willful failure to comply with an FCRA requirement may seek actual, statutory, and punitive damages
- May recover costs and reasonable attorneys' fees



JOB-RELATED TESTING

ASSESSING JOB CANDIDATES THROUGH TESTING

- Assessments are general predictors of a candidate's future performance and behavior
 - Precautions:
 - Should always be used in combination with other tools in the selection process
 - Ensure the assessment has a high degree of validity



SCIENCE-BASED ASSESSMENTS TO SCREEN CANDIDATES

- Applicant Tracking Systems
- Leadership Assessments
 - Meyers-Briggs Assessment
 - Emotional Intelligence Assessments
- Behavioral and Motivator Assessments
 - DISC and Motivators Assessment
- Skills Assessments
 - Hard skills
 - Work sample
 - Cognitive ability



HIRING ASSESSMENTS AND DISCRIMINATION

- Hiring assessments should not discriminate based on protected characteristics such as race, color, ethnicity, religion, national origin, sex, gender identity, sexual orientation, age, familial status, disability, or genetic information.



DISCRIMINATION RISKS

- Hiring assessments should measure traits and skills that are important to job performance.
- Assessments based on criteria that are unnecessary to job performance risk creating artificial or discriminatory barriers to employment opportunity.



HIRING ASSESSMENTS AND DISCRIMINATION

- **February 2024:** Hospital Housekeeping Systems, LLC (HHS), will pay \$520,000 as part of settlement with EEOC.
- Company required employees to take an Essential Functions Test (EFT) at hire, annually, and upon the return from a medical leave of absence, even when portions of the test were not job-related.



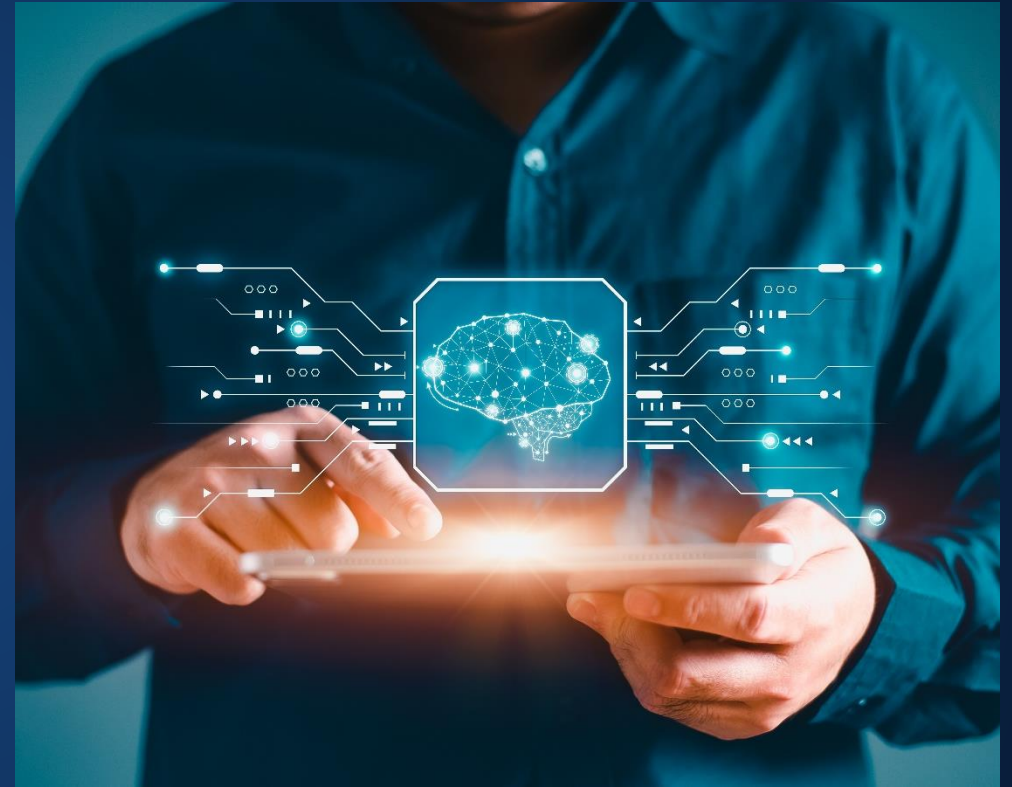
HIRING ASSESSMENTS AND DISCRIMINATION

- **August 2020:** Walmart settled a nationwide sex-discrimination complaint with the EEOC for \$20 million.
- Walmart violated Title VII by using a physical abilities test that had a disparate impact on female applicants.



HIRING ASSESSMENTS AND DISCRIMINATION

- Hiring assessments should be thoroughly and regularly audited before and after deployment for discrimination and job-relatedness.
- Widespread integration and unknown impact of artificial intelligence.

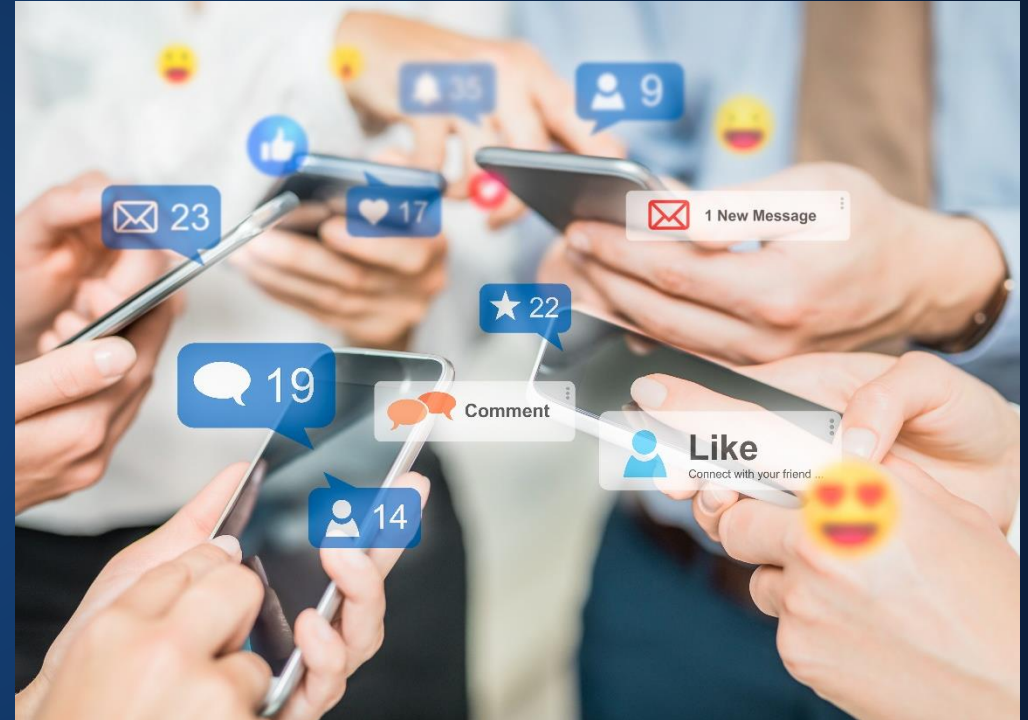




EMPLOYEE/JOB CANDIDATE SOCIAL MEDIA

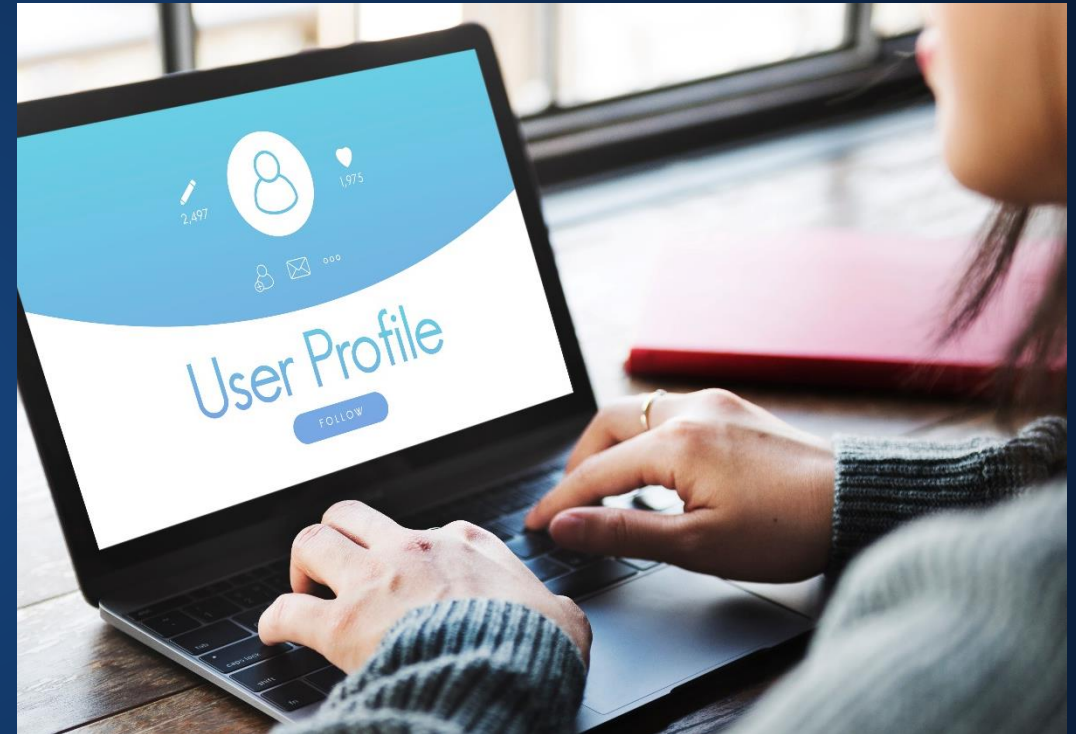
SOCIAL MEDIA AND THE WORKPLACE

- 4.3 billion active users of social media worldwide
- November 2022 survey found almost 40 percent of Gen Z in the U.S. spent more than four hours on social media platforms daily.
- 90.4% of Millennials use social media actively.



SCREENING JOB CANDIDATES SOCIAL MEDIA

- 70% of employers check out applicants' profiles as part of their screening process, and 54% have rejected applicants because of what they found
- Are you legally allowed to act on this information?
- Is it actually related to job performance?



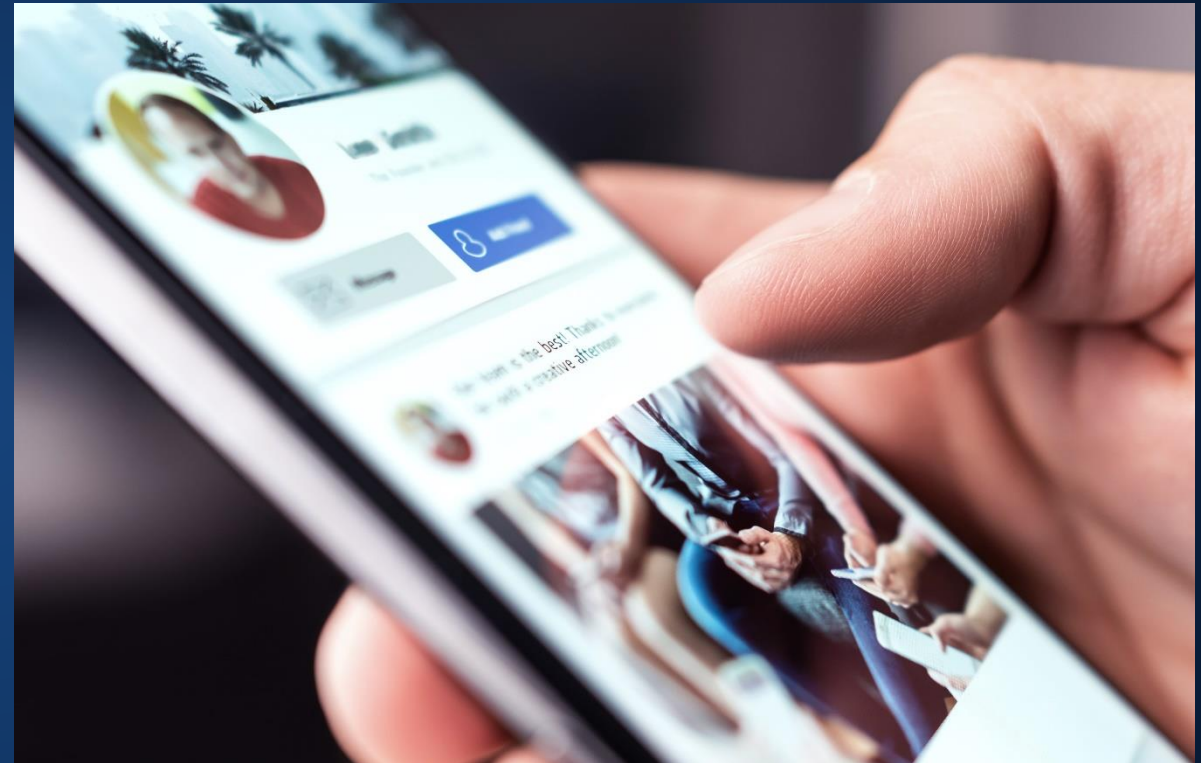
CONSIDERATIONS WITH CANDIDATES SOCIAL MEDIA

- Is the employee exhibiting a behavior that would actually affect them in a work-related context?
- University of Iowa study found that social media assessments from recruiters could not accurately predict job performance or turnover intentions.



SOCIAL MEDIA MONITORING RISKS

- Is the employee exhibiting a behavior that would actually affect them in a work-related context?
- *Watson v. Phila. Parking Auth., Civil Action 21-1514*: gay man was unlawfully fired as a data analyst at the Philadelphia Parking Authority shortly after supervisors discovered his LGBT status via his Facebook posts.



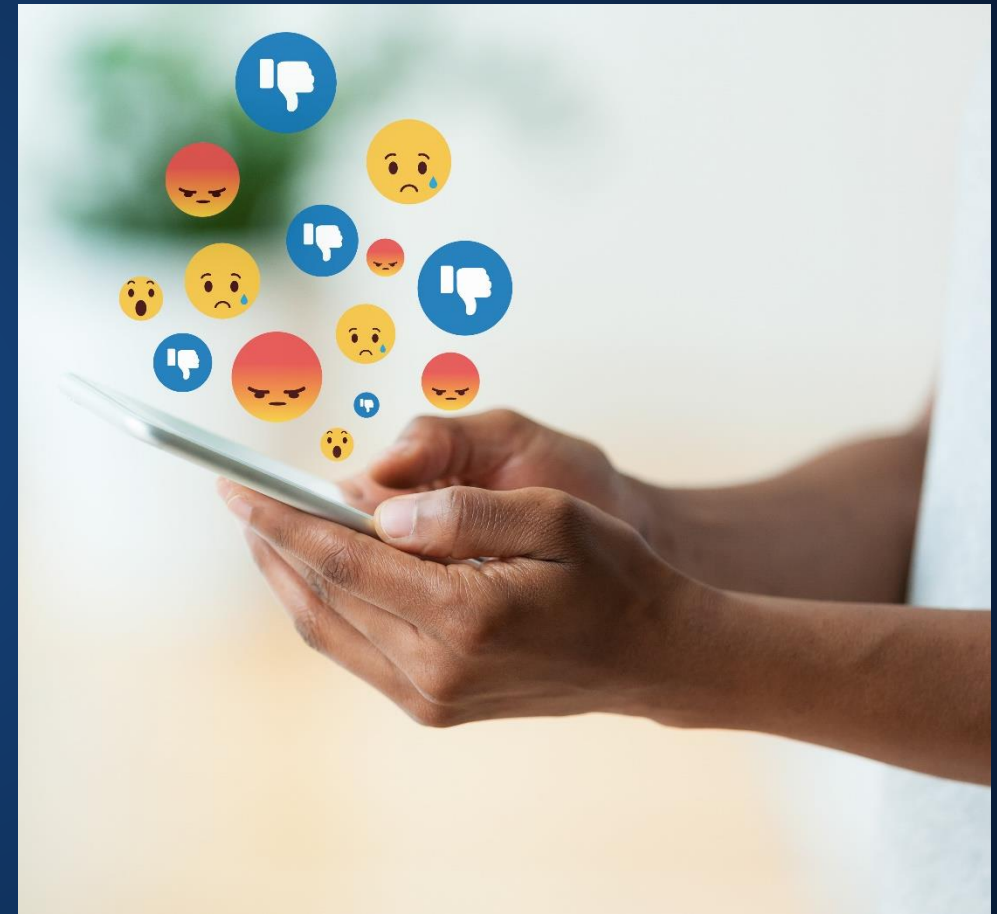
CAN I MAKE THEM ADD ME?

- Michigan employers cannot ask current or prospective employees for passwords or other information in order to access private social media accounts.
- 26 states have laws that address social media privacy and either protect employee privacy or create additional discrimination protections.



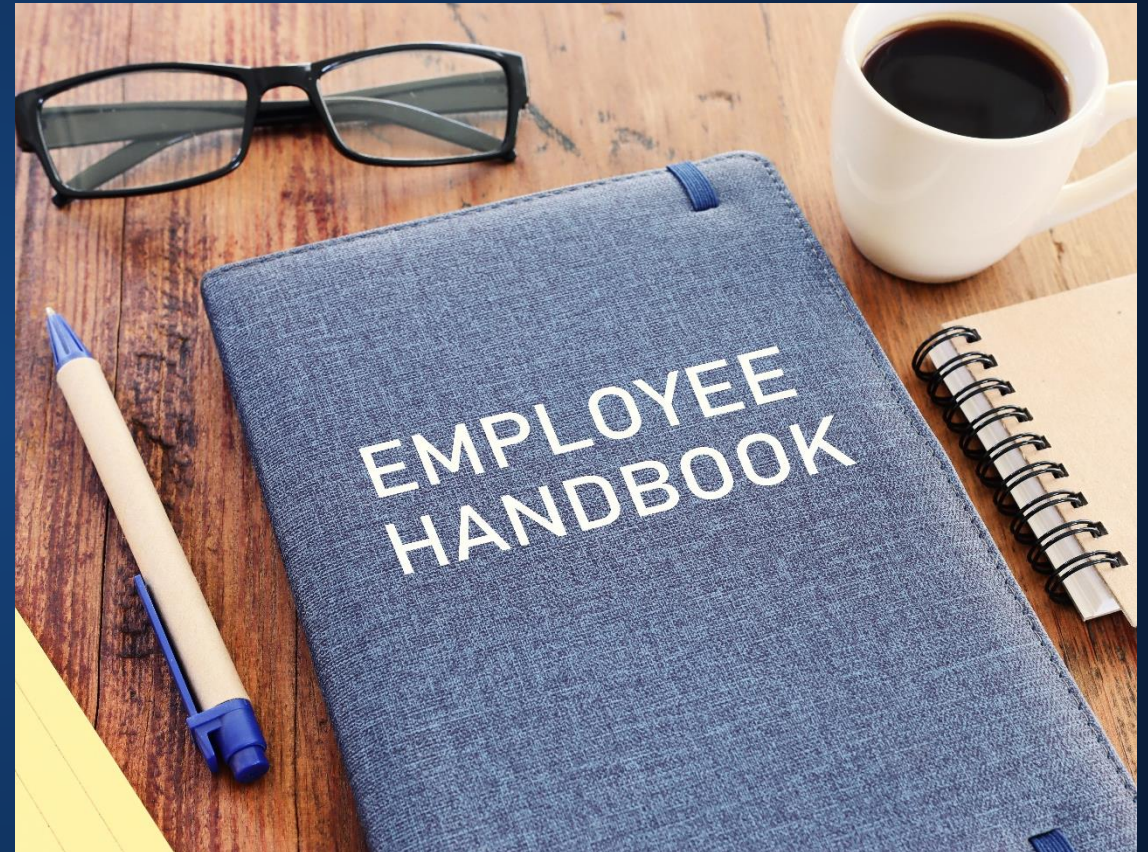
NEGATIVE SOCIAL MEDIA POSTS FROM EMPLOYEES

- Is this protected concerted activity?
- Address terms and conditions of employment?
- Employers that discipline employees for actions and comments that fall under protected concerted activities risk committing an unfair labor practice and violating the employee's rights under Section 7 of the NLRA.



SOCIAL MEDIA MONITORING RISKS

- Can a social media policy violate the NLRA?
- Could your policy be construed to prohibit discussions of wages or working conditions?
- Has your policy been reviewed in light of new NLRA decisions?



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THANK YOU



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