

Maddin Hauser's
Employment Law
Symposium

**HR, AI, FCRA, NLRB, AND EVERY ACRONYM
IN BETWEEN: BEST PRACTICES AND RISKS
DURING THE ONBOARDING PROCESS**

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Overview

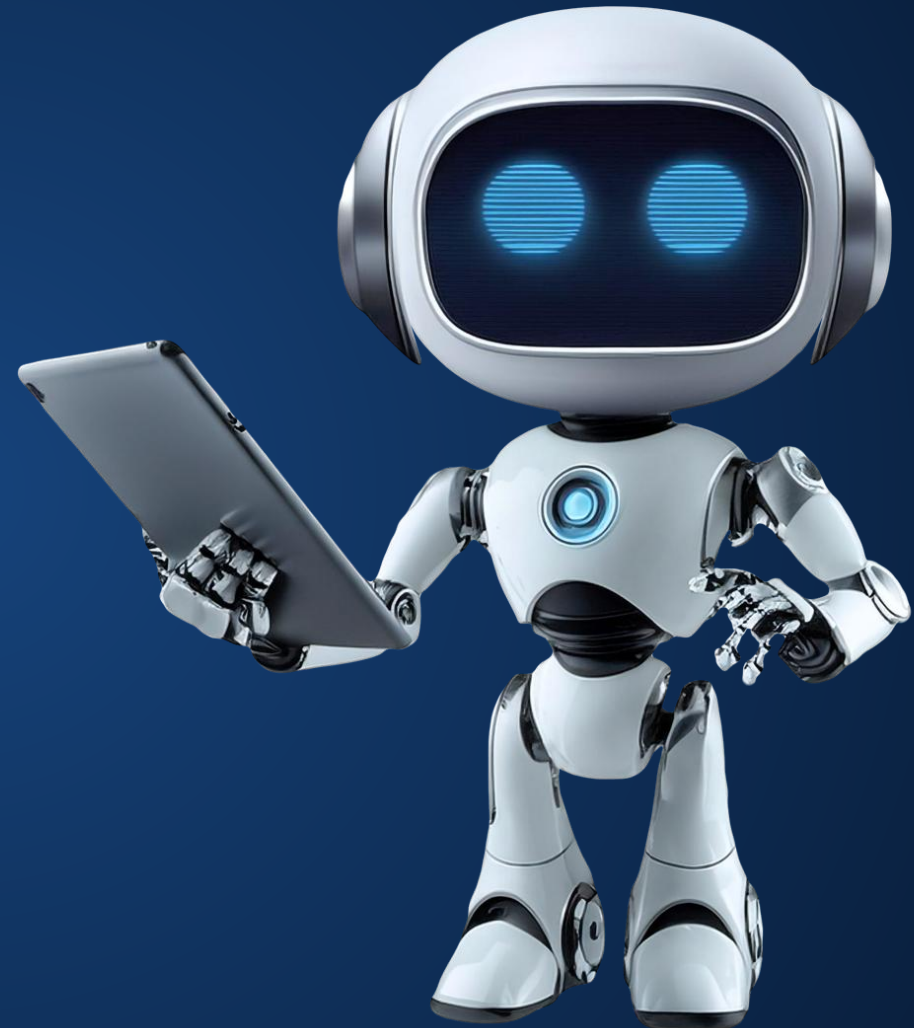
- The proliferation of AI in hiring and its potential risks
- New NLRB handbook rules and how they affect the policies that should – or shouldn't – be included in handbooks
- FCRA update – proposed rule changes and how they would affect employers

AI IN HIRING AND ONBOARDING

- Companies small and large are deploying AI in their hiring process
 - Why Chipotle is turning to AI as it steps up its seasonal hiring to 20,000 (<https://www.marketwatch.com/story/chipotle-recruiting-20-000-seasonal-workers-using-ava-cado-ai-program-b287da22>)
 - Mercor, an AI recruiting startup founded by 21-year-olds, raises \$100M at \$2B valuation (<https://finance.yahoo.com/news/mercor-ai-recruiting-startup-founded-140000777.html>)
 - 65% Of Employers To Use AI To Reject Candidates In 2025 (<https://www.forbes.com/sites/rachelwells/2024/10/27/65-of-employers-to-use-ai-to-reject-candidates-in-2025/>)

AI IN HIRING AND ONBOARDING

- How is AI being used?
- According to survey of 1,000 employers from Resume Builder:
 - Resume review—83%
 - Candidate assessment analysis—69%
 - Social media and personal website scan—47%
 - Chatbots to communicate with candidates—39%
 - New hire onboarding—36%
 - Conducting interviews—19%



AI IN HIRING AND ONBOARDING

Despite the proliferation in AI – over a third (34%) of HR professionals said that they do not have official AI guidelines in their workplace.



AI IN HIRING AND ONBOARDING

- Why is this problematic?
- Studies have shown that AI systems, when used in the hiring process, can create bias, and employers may violate existing anti-discrimination laws (such as Title VII of the Civil Rights Act)
- Additionally, employers need to be aware of emerging laws directly related to the use of AI in hiring.

AI IN HIRING AND ONBOARDING

- EEOC 2022 Guidance on Hiring
- Utah, Colorado, Illinois, and New York City laws
- EU/UK law for international companies



AI IN HIRING AND ONBOARDING

- How to combat potential dangers?
 - TRAIN!
 - Know your vendor
 - Implement AI policies
 - Allow for opt-outs
 - Audit bias
 - Avoid fully-automated processes



NLRB & HANDBOOKS

NLRA OVERVIEW

National Labor Relations Act (“NLRA”) governs relations between union employees and their employers but also protects some nonunion employee actions.

Applies to ALL “employees” EXCEPT supervisors, managerial employees, agricultural workers, individuals who work for their parents or spouse, railroad employees. Independent contractors are not considered “employees.” Management includes employees who act in a capacity for persons who determine or administer policy.

Guarantees all employees the, “right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in **protected concerted activities** for purposes of collective bargaining or other mutual aid or protection.” (Section 7 rights)

HANDBOOKS

August 2, 2023 – NLRB issues *Stericycle Inc.* decision regarding unlawful work rules under Section 8(a)(1) of the NLRA.

- If the employee establishes that the work rule has the reasonable tendency to chill an employee from exercising their rights, the rule is presumptively illegal.

Ask yourself: Does the work rule have a reasonable tendency to interfere with, restrain, coerce or restrict the employee who contemplates engaging in protected concerted activity?

Employer must prove that the work rule advances a legitimate and substantial business interest AND that employer cannot advance its interest with a more narrowly tailored rule.

IMMEDIATE STAFFING CHANGES TO NLRB

- Removal of NLRB counsel
Jennifer Abruzzo
- Removal of NLRB chair
Gwynne Wilcox
- Potential quorum issue?



POTENTIAL CHANGES

- The new NLRB board could likely return to the more consistent, employer-friendly *Boeing* standard that existed before *Stericycle*.
- Under that standard, the Board classified company rules into three categories:
 - Rules that are lawful to maintain under the NLRA;
 - Rules that warrant individualized scrutiny; and
 - Rules that are unlawful and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

FCRA UPDATES

FCRA REFRESHER

- 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.

UPDATED FCRA SUMMARY OF CONSUMER RIGHTS

- In 2023, the Consumer Financial Protection Bureau (CFPB) released an updated version of the publication titled “A Summary of Your Rights Under the Fair Credit Reporting Act,” commonly referred to as the “FCRA Summary of Consumer Rights.”
- Supersedes 2018 version
- Available on CFPB website
- Place information in personnel file, except if name of person making the reference would be disclosed.
- Forms required to be updated with the revised summary by March 20, 2024.

POTENTIAL INTERSECTION WITH AI?

- In November 2024, CFPB issued guidance on the FCRA which affects virtually every employer using third-party vendors for employee screening, monitoring, or assessment.
- Companies developing AI algorithms may qualify as consumer reporting agencies if they collect data from multiple sources to train their algorithms or generate worker assessments.

POTENTIAL INTERSECTION WITH AI?

“Similar to credit reports and credit scores used by lenders to make lending decisions, background dossiers—such as those that convey scores about workers—that are obtained from third parties and used by employers to make hiring, promotion, reassignment or retention decisions are often governed by the FCRA.”



CREDIT SCORE

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QUESTIONS

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THANK YOU



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