

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

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I. AI IN HIRING AND ONBOARDING

A. Companies small and large are deploying AI in their hiring process – AI is rapidly becoming a large part of many companies' hiring strategy.

1. **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>)

- a. Chipotle launched an AI program on its recruitment website, which claims to have shortened the average time it takes a job seeker to fill out an application and has helped the restaurant chain increase its application-completion rate to 85% from 50%.
- b. Applicants have a conversation with the AI-generated “Ava Cado” which helps them complete their applications and identify roles that fit their needs.
- c. Chipotle’s AI was developed with Paradox, Inc., a company which was used by GM, and estimated to have generated \$2 million in annual cost savings.

2. **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>)

- a. Mercor uses AI to automate the hiring process. Its platform automates resume screening, candidate matching, offers AI-powered interviews, and payroll management.
- b. Mercor alleges that its AI systems “remove bias from the process” because AI systems are less biased than human ones.
- c. The company has already helped HR teams evaluate 468,000 applicants.

3. **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/>)

- a. Nearly seven in ten employers say that they plan to use AI in the next year to screen and reject candidates **without any human oversight.**
- b. 70% of employers use AI to automatically reject candidates at the initial stage

- c. The number of employers who use AI throughout their hiring process will increase in 2025.
- B. How is AI being used?
 - 1. **Companies are using AI in virtually all aspects of the hiring process**
 - a. According to a survey from Resume Builder:
 - i. **Resume review—83%**
 - ii. **Candidate assessment analysis—69%**
 - iii. **Social media and personal website scan—47%**
 - iv. **Chatbots to communicate with candidates—39%**
 - v. **New hire onboarding—36%**
 - vi. **Conducting interviews—19%**
- C. Despite the proliferation in AI – over a third (34%) of HR professionals do not have official AI guidelines in their workplace.
- D. Why is this problematic?
 - 1. **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)**
 - 2. **Additionally, Employers need to be aware of emerging laws directly related to the use of AI in hiring.**
- E. Laws to Consider for AI in Hiring
 - 1. The EEOC’s 2022 Guidance on AI in Hiring: This focuses on potential ADA violations when using AI tools that may screen out individuals with disabilities and recommends providing specific disclosures and accommodations in AI-driven hiring processes.
 - 2. Utah, Colorado, Illinois, New York City laws
 - 3. EU/UK regulations
- F. What to do?
 - 1. TRAIN!

2. Know your vendor
3. Implement AI policies
4. Allow for opt-outs
5. Audit bias
6. Avoid fully-automated processes

II. NLRB & HANDBOOKS

A. NLRA Overview

1. **What is the NLRA?**

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

B. *Stericycle* and Handbooks

1. **The *Stericycle* Decision**

- a. August 2, 2023 – NLRB issues *Stericycle Inc.* decision regarding unlawful work rules under Section 8(a)(1) of the NLRA.
 - b. 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.
 - i. **Ask yourself: Does the work rule have a reasonable tendency to interfere with, refrain, coerce or restrict the employee who contemplates engaging in protected concerted activity?**
2. 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.

C. Changes to NLRB Board

1. Removal of NLRB counsel Jennifer Abruzzo
2. Removal of NLRB chair Gwynne Wilcox
3. Potential quorum issue?

D. Potential Changes

1. **How could the changes to the NLRB board affect these rules?**

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

III. FCRA UPDATES

A. NLRA Overview

1. **FCRA Refresher**

- a. 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)
- b. What is “background information”?

2. **FCRA Best Practices**

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

3. **Updated FCRA Summary of Consumer Rights**

- a. In 2023, the CFPB (Consumer Financial Protection Bureau) 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.”
- b. Supersedes 2018 version
- c. Available on CFPB website
- d. Place information in personnel file, except if name of person making the reference would be disclosed.
- e. Forms required to be updated with the revised summary by March 20, 2024.

4. **Potential Intersection with AI**

- a. In November 2024, CFPB issued guidance on the FCRA which affects virtually every employer using third-party vendors for employee screening, monitoring, or assessment.
- b. 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
- c. “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.”