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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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FCRA LITIGATION CHALLENGES EMPLOYERS' USE OF AI HIRING PLATFORMS

A January 20, 2026, class action filed against Eightfold AI, Inc. in California is sending shockwaves through the employer and AI community. *Kistler v. Eightfold AI, Inc.*, Superior Court of the State of California, County of Contra Costa. The class action lawsuit alleges that over 100 employers including Microsoft, Morgan Stanley, Starbucks, BNY, Paypal, Chevron and Bayer use hidden AI technology to collect sensitive and often inaccurate information about job applicants and score them from 0 to 5 for potential employers based on their supposed "likelihood of success" on the job. Using its evaluation tools, Eightfold allegedly provides prospective employers with reports that assess job applicants not only as individuals, but also relative to one another, and employers then use these reports to sift through applications, typically only reviewing highly-ranked candidates. The poor-ranked candidates are often discarded before a human being ever looks at their application, according to the lawsuit.

Plaintiffs contend that in passing the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 et seq., in 1970, the law includes a broad definition of consumer reports as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's . . . character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes." The FCRA requires consumer reporting agencies to make certain disclosures, obtain certain certifications, and insure that consumers (here, job applicants) have a mechanism to review and correct reports that are provided to prospective employers for purposes of determining eligibility for employment. Further, in 2024, the Consumer Financial Protection Bureau, the federal agency that administers the FCRA, published a guidance document in the Federal Register entitled "Background Dossiers and Algorithmic Scores for Hiring, Promotion, and Other Employment Decisions." According to the plaintiffs, this guidance documents how longstanding protections for job applicants and employees under the FCRA applied to new AI employment technologies.

It should be noted that the FCRA guidance of 2024 was rescinded in 2025 under the current Administration, but still serves as legal support for the plaintiffs' theory. If the plaintiffs prevail, it will trigger the FCRA's full list of obligations, including stand-alone written disclosures, applicant authorization, and pre-adverse action and adverse action notice requirements. The FCRA provides for a private right of action, statutory damages of $100 to $1,000 per violation, punitive damages for willful violations, and a lot of case law precedent in support of plaintiffs, including the right to bring class actions.

Note also that while this particular case was brought against a vendor, a similar type cause of action can be brought against the employer using the services. Both the vendor and the employer have potential liability.

While some vendor contracts include AI-specific provisions, it is rare for a vendor contract to include full indemnification for regulatory fines and class action exposure. In addition, it should be considered that employers using any type of hiring criteria, including an AI hiring tool, have legal exposure for adverse impact type discrimination claims, in which a plaintiff alleges that an employer's selection tools are discriminatory in effect, even if neutrally applied without discriminatory motive. Although such claims are not currently being processed by the Equal Employment Opportunity Commission (EEOC), the theory remains available for plaintiffs in private litigation. Employers in such situations have to show that the selection tool is a job-related business necessity or otherwise "valid" for its use.

Other AI Uses for Employment Purposes Raise Similar Issues

Selection tools like AI are used by employers not only in the hiring process, but also in performance appraisals, promotions, lay-off decisions, and even in the immigration process, and this information may be used not only currently but also for future decisions, without current consent or disclosure. For example, suppose an employer as part of the employment verification process uses some type of "connect the dots" AI platform to determine employment authorization. The same type legal issues could arise.

Editor's Note: The growth of AI affects Human Resources (HR) as much as any area of work. It offers massive opportunities for potential productivity improvements, but there are emerging concerns that are developing almost weekly as to potential legal issues. A company should first review how it is currently using AI, in order to determine what safeguards are necessary. The no-brainer steps to take would include an AI policy as to usage and careful review of vendor contracts. An approach to consider involving the FCRA issue is to consider an in-house company AI system, as the FCRA only applies to "consumer reports" from a "consumer reporting agency," a third party.

THE DANGERS OF EMPLOYERS USING AI RESEARCH TOOLS AS TO DISCOVERY REQUESTS FROM PLAINTIFFS

A second "bombshell" affecting HR pertaining to AI is a federal court ruling in New York, that a defendant's use of AI in researching and planning the defense was not subject to the attorney-client or work product defense, and thus was disclosable to the other side in litigation. The idea was that the defendant was not getting advice from an attorney, as AI is not an attorney. Consider the case of an HR director that does his or her own research on certain legal points or how to handle certain personnel situations. Plaintiffs' attorneys are already reacting to the New York federal district court ruling by routinely requesting AI inquiries performed related to their cases. Some embarrassing facts could be revealed where the HR director disclosed as part of the AI research process various potential legal defenses or weak points in the defense.

The above situation is a scary one to this writer. There is the potential of elements not only disclosing important facts and legal theories to the opposition, but the potential embarrassment to the employer of a plaintiff's attorney telling a jury that this employer has turned over its decision-making process to a "black box" that the employer knows little or nothing about. Who knows how the jury will react to this type of argument. This is why so many commentators suggest that employers should have human review of significant employment-related decisions, and not rely totally on AI.

Two Subsequent Cases Protect Defendant's Use of AI as Subject to Work-Product Protection

Soon after the deciding of the above-discussed case on February 17, 2026, in *U.S. v. Heppner*, a criminal case in the District Court for the Southern District of New York, two other courts found that such communications were nevertheless protected by Federal Rule 26(b)(3) in its work-product protection for a party's use of AI tools for purposes of litigation. *Warner v. Gilbarco,* No. 2:24-cv-12333, 2026 WL 373043 (E.D. Mich. Feb. 10, 2026) and *Morgan v. V2X Inc.*, No. 25-cv-01991-SKC-MDB, 2026 WL 864223 (D. Colo. Mar. 30, 2026). In the *Warner* case, the defendants' argument was also rejected that any work-product protection had been waived by the plaintiff's disclosure to ChatGPT, which the plaintiff's argued was akin to disclosing information to an adversary. The courts in *Warner* and in *Morgan* indicated that ChatGPT and other generative AI programs are tools, not persons. The *Morgan* case did indicate, however, that the plaintiff had not shown that the work-product doctrine extended to the identification of the precise AI tool the plaintiff had used. Thus, this information would still be subject to discovery. Further, the Rule 26(b)(3) work product defense is limited to issues prepared "in anticipation of litigation," and it is not clear that all such AI inquiries would come under this exemption.

Editor's Note: The issues are new, as these three cases are the first to address whether a client employer's communications with an AI tool are privileged. It is likely that the *Heppner* case might not be binding in civil cases, as it was a criminal case that did not explicitly address work-product protection from discovery under the federal rules. Nevertheless, some employers may want to be conservative in considering these matters, and follow the strategy below as to doing internal research on legally sensitive matters, particularly since other distinctions might conceivably be drawn in the future based on whether the AI communication was to an open or closed platform.

Is There Anything An Employer Can Do to Avoid Waiving Privileges In Using AI Research Tools?

There are no easy answers to the above question, but some general observations will nevertheless be made. First, the New York district court ruling mentioned above did not address the issue of what the result would be should HR conduct research at the direction of an attorney. In analogous situations, such as an attorney-directed internal investigation, the employer is allowed to assert the attorney-client or work product privilege in connection with the investigation and the conclusions therein. This principle would suggest that AI research conducted by the employer at the direction of the attorney would remain privileged. However, few attorneys will recommend this approach, as the "prompts" used in AI research are so critical themselves as to warrant the attorney's expertise.

Thus, a potential solution is to only conduct internal employment dispute-related AI research at the direction of an attorney. It would seem to be good advice which could be written into the employer's AI Policy. In these circumstances, it is probably a good idea to put into the AI prompt that you are doing this research at the direction of counsel.

Courts will ultimately have to resolve the question of whether the use of AI in discussing the decision-making process by an employer is to be considered as if it is an outside report to a human or instead one's interaction with software.

SUGGESTIONS ON USE OF AI

Perhaps the starting point is to look at the type of AI platforms generally available. At a recent conference about AI use for HR, speakers addressed the generally available platforms and which platform offered the best information. The speakers stated the following as useful to HR:

- ChatGPT - It is the largest data base and is good for drafting and brainstorming.
- Claude - Good analysis and good for review of long documents.
- Microsoft Copilot - Good integrator that connects to the user organization's own data.
- Gemini - Good researcher.
- Perplexity - A good fact checker and always shows its sources.
- Notebook LM - The document expert, as if you upload your own documents, you can ask questions about them, making it good for policies and reports.

These speakers also addressed the "prompts" that are useful to get the best information from AI. Their advice was to first let AI know what it's role is to be in providing their response, i.e., tell them they are an HR director. Second, give AI some background information or framework, as much as practical. Third, tell them the format of exactly what you want AI to produce. Last, give AI the constraints, by telling AI what not to assume.

The conference speakers also noted that AI can be a great language service provider. There are various AI translation programs available that work quite well and quickly. Some programs work better for rare languages.

Editor's Note: With any use of AI by HR, it is important to note which AI platforms are open, meaning the information is entered into the public realm of information. Sensitive company information and perhaps inquiries should generally not be entered into an open AI system. The reason is that such information then loses its confidential nature, potentially for purposes of attorney-client and work product privileges, and even company trade secrets and other confidential information. The reckless use of company information on an open AI platform creates significant legal exposure to the company. It is probably the first critical issue of AI usage for HR or other company use.

In determining which of the AI platforms is "closed," an issue is that there are different type platforms even under the above-listed headings, but one starting point is whether the AI tool trains on your data. If such training is off, the remaining evaluation is essentially the same as for any other software, i.e., contractual protections, security certifications, and data-retention policies. It should be noted that many of these same concepts apply to AI research performed by attorneys. Even a lawyer should not put client information into a tool that trains on your data. There are few guidelines available as to what adequate confidentiality and security protections are, but use of the business or enterprise tier of the platform usually eliminates training on your data. The Florida Bar Special Committee on AI Tools and Resources has published a guide that gives some very plain advice: Free AI models may train on your data, so don't use them for client work. The Guide has a chart that lists confidentiality as an explicit criterion, marking which tools meet it and links to each vendor's security documentation. If you follow these guidelines, there is still some question of what adequate confidentiality and security protections really mean.

In evaluating existing policies as to AI-related issues, the necessary actions usually start with a clear and practical AI acceptable use policy that empowers employees while protecting the organization from undue

risks. A number of questions should be addressed such as: Which platforms are approved?; What settings are required, for example, should learning mode be turned off?; What types of data are off limits?; and, of course, any policy should require employees to verify the accuracy of the data generated by AI.

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