

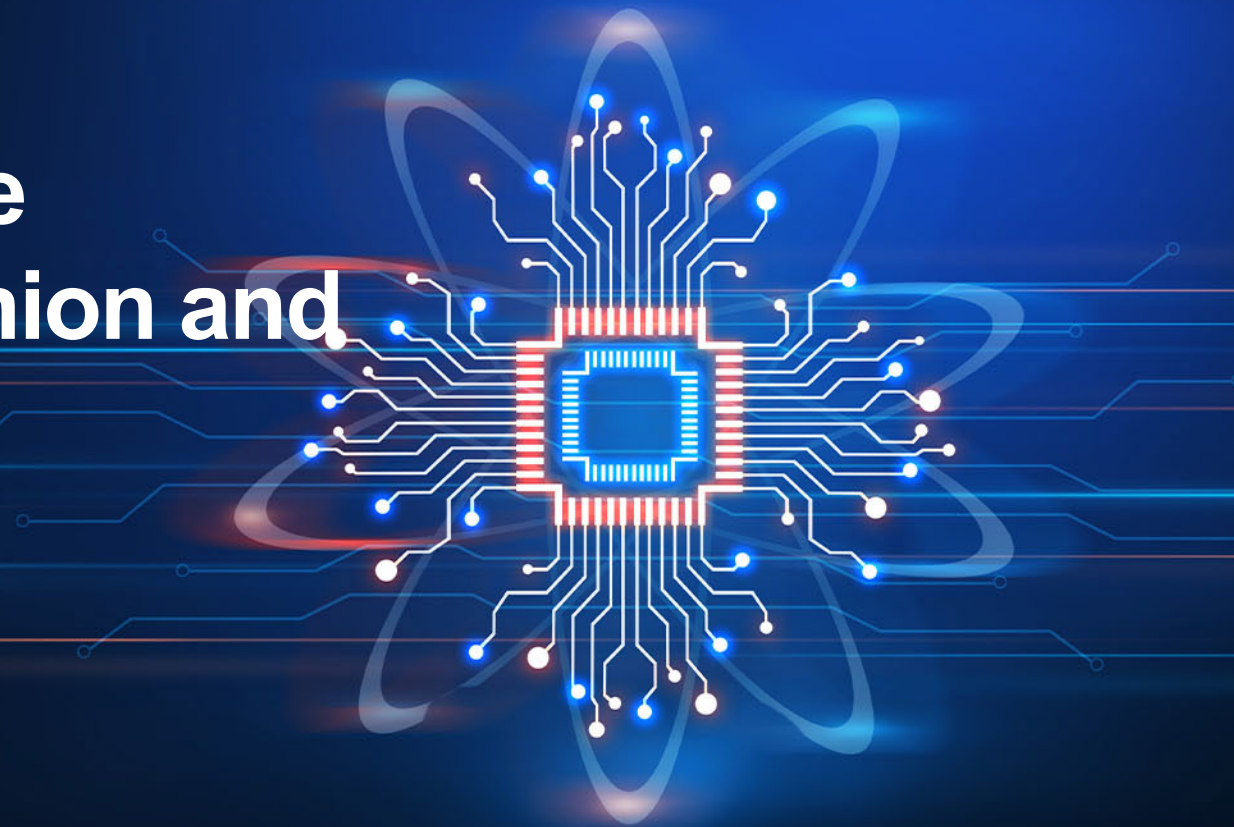
The Age of AI: Key Legal and Governance Considerations for Non-Union and Unionized Employers

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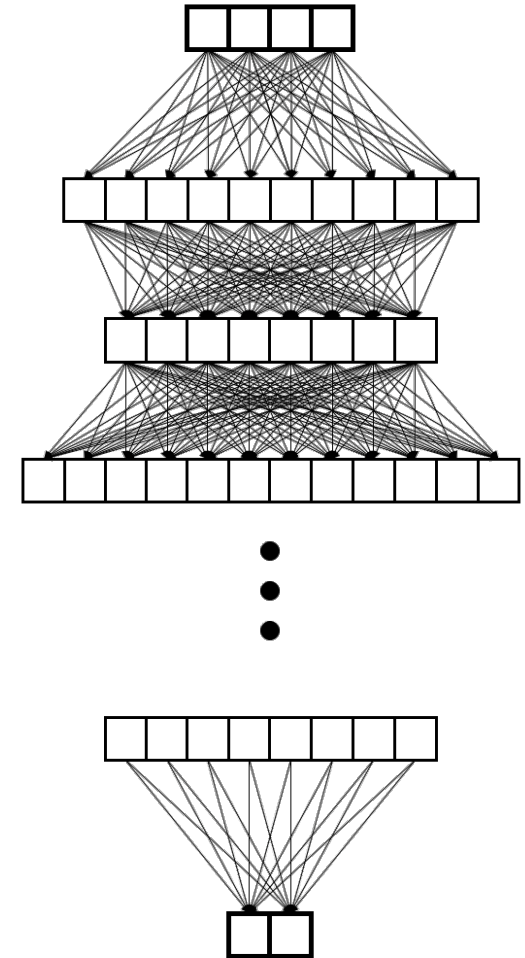
February 6, 2024

Proskauer»



Agenda

- AI and Generative AI in the Workplace
- Potential Risks for all Employers
- Emerging Laws
- NLRA Rights
- Collective Bargaining and AI
- Minimizing NLRA Risk
- Best Practices for Employers
- Employment Litigation Considerations



Introduction to AI: AI and GAI

AI:

Computer systems that are programmed to mimic human cognition and perform tasks that typically require human intelligence, such as visual perception, speech recognition, decision-making, and language translation. AI systems learn from data and experience to improve their performance over time.

GAI:

A subset of AI that involves machine learning models capable of generating new, original content such as text, images, audio, and video. GAI models are trained on vast datasets to identify patterns and create new outputs that are similar in style, tone and semantics to the training data. Unlike traditional AI, GAI systems do not need to be explicitly programmed for specific tasks.

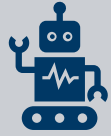
Generative AI (GAI)

How is GAI different?



- Accessibility and Ease of Use
- Immense Versatility
- Potentially Elusive Uses of Inputs
- Accurate Outputs Not Guaranteed

Why are Employers Turning to AI?



AI is often seen as a cost-reduction tool that also helps streamline and automate repetitive tasks, allowing employees to focus on higher-value work. AI can improve efficiency across the entire employment lifecycle.



The pandemic accelerated AI adoption as employers sought contactless solutions for remote work. AI helps manage distributed teams through virtual assistants, automated workflows and data-driven insights on employee engagement and productivity.



AI analytics on past successes and challenges can inform better decision making and strategy going forward.

Examples of GAI in the Workplace

Drafting Job Descriptions and Postings

Applicants Drafting Resumes and Application Responses

Applicant screening.

Onboarding: Answer common questions and guide new hires through required paperwork and setup.

Project planning: AI can analyze past projects and optimize resource allocation for future work based on employee skills and availability.

Summarizing Documents.
Drafting Meeting Agendas and Notes

Performance management: AI can gather data on employee productivity, track progress on goals, and provide coaching.

Discipline: AI may analyze past disciplinary actions and related employee behaviors to ensure consistency.

Considerations Related to GAI Integration

The time for GAI planning is now

- Recognize that applicants for jobs, and your employees are using GAI now
- Your competitors are adopting GAI tools

Understand the Limitations of GAI

- Importance of human oversight
- Not every job can be aided by (or replaced by) GAI
- Be skeptical of statements about the capabilities of any new tool
- Understand where the tool was trained
- Be on the lookout for erroneous output and hallucinations
- Adjust AI usage based on outcomes

Potential Issues with AI in Employment

- Discrimination: Preexisting law applies to AI systems.
- Algorithmic bias occurs when AI tools unintentionally produces unequal or prejudiced outcomes due to their reliance on biased, inaccurate, or discriminatory datasets, thus perpetuating existing disparities and compromising fairness.



Artificial Intelligence and Discrimination



All AI models are likely to have inherent biases reflecting the datasets they are trained on.



In hiring applications, algorithmic bias may result in the exclusion of viable candidates from consideration or the promotion of certain candidates, over others, based on biased conclusions.



Difficult for employers to provide precise explanations for algorithmic decisions sufficient to explain why a candidate's resume or interview was approved or rejected by the algorithm.

Examples of biased AI algorithms

A recent study documented in the New York Times demonstrated that certain GAI Image generators struggle to realistically depict black women and locations in Africa.

A researcher recently studied 5,000 images generated using text to image GAI.0

- Images generated for high paying jobs had lighter skin tones. Minimum or low wage positions generated darker skin tones.
- The Same bias was illustrated with regard to gender.
- When asked to generate images of “inmates” or “drug dealers” the models favored darker skin tones.

CNBC reported on problems with biometric identification systems that misidentify the faces of minorities, and voice recognition that struggles with regional accents.

Social media ad generating algorithms. Carnegie Mellon system revealed a study that algorithms directing ads tended to direct ads for high paying jobs to more men than women.

Prepare an Image of a Brain Surgeon



Prepare an Image of a CEO



Potential Issues with AI in Employment: Disclosing Confidential Information and Trade Secrets

- Protecting trade secrets as GAI evolves.
- Once a trade secret is lost, it's lost forever.
- No confidential relationship between a person and a computer.

Whoops, Samsung workers accidentally leaked trade secrets via ChatGPT

ChatGPT doesn't keep secrets.

By [Cecily Mauran](#) on April 6, 2023

Mashable



Other Potential Risks

Emerging Laws



Illinois AI Video Interview Act



New York City Local Law 144:

Similar bills pending in NY, NJ, and Washington, DC

CA proposed employment regulations regarding automated-decision systems and a proposed law requiring “impact assessments.”



Maryland Use of Facial Recognition Services



Equal Employment Opportunity Commission

Regulation at the Federal Level

OFCCP

- Revised Combined Scheduling Letter and Itemized Listing (8/25/23).

Biden Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

- Builds on the White House’s previously-released “Blueprint for an AI Bill of Rights.”

EEOC, FTC, DOJ, and CFPB joint statement:

- Pledging to increase “enforcement efforts to protect the public from bias in automated systems and artificial intelligence.”

Is federal legislation possible? Probable?

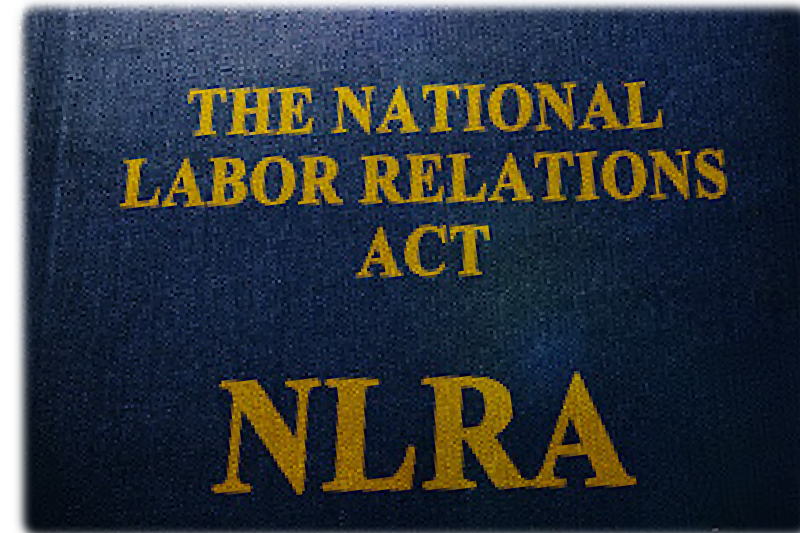
National Labor Relations Act – Employee Rights and the Duty to Bargain

- Section 7 of the NLRA guarantees 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 other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."
 - NLRA Section 8(a)(1) – Interference with Section 7 Rights
 - NLRA Section 8(a)(3) – Discriminating for engaging in protected activity
- Duty to bargain over changes to mandatory subjects of bargaining – wage, hours and other terms and conditions of employment
 - Technological change that has a material and substantial impact on employees terms of employment



AI and Protected Rights Under the NLRA

- **2022 General Counsel Memo**
 - “It is the Board’s responsibility to adapt the Act to changing patterns of industrial life.”
 - **Surveillance**
 - “[c]lose, constant surveillance and management through electronic means represent severe threats to employees’ basic ability to exercise their rights to self-organization.”
 - **Improper Use of AI Tools**
 - Like other bias concerns, anti-Union bias caused by the automated tools will violate labor laws



Negotiations: Technological Change is a Mandatory Subject

- This is not a new issue
 - Impact of technological change on the workplace has been a bargaining issue since the passage of the NLRA
 - Many collective bargaining agreements already have provisions addressing new technology
- First question – does your contract have provisions addressing technological change?
 - Management Rights clauses
 - Automation
 - Layoff and Subcontracting provisions
- Duty to Bargain
 - Absent contractual provisions, there will be “effects” bargaining obligations on the introduction of new technology
 - Layoffs?
 - Training obligations?
 - Wage rates?

Union Proposals on AI

- AI is seen by some as an existential threat – particularly in the world of creative professionals and artistic guilds
 - WGA and SAG-AFTRA strikes had AI as centerpieces
 - Resulted in a balancing of protecting work opportunities and image control, and the continued drive to using new technology in film and TV
- Unions are regularly proposing AI Protective proposals
 - Range from no use of AI to layoff protections from its use
 - Very similar to other industries that have seen workforce reductions through the rapid escalation of technological change

Minimizing NLRA Risk

- Pre-Implementation Transition Planning
- Adhere to Collective Bargaining Contractual and Negotiations Obligations
- Ensure AI Systems Do Not Interfere With Employees' Rights
 - Education
 - Understanding the AI tool design
 - Periodic audits
 - Human oversight
 - Engagement

Best Practices

- Before deployment, start transition planning for impacted employees. Consider effects of bargaining, if unionized.
- Meet with stakeholders (legal, IT, workers) when evaluating AI to address concerns early.
- Work closely with AI providers/developers on extensive bias testing and audits. Perform ongoing internal audits.
- Educate employees on AI capabilities, risks, and policies. Emphasize AI is to assist, not replace, human decision-making.
- Review and update existing policies on equal employment, privacy, and conduct to address AI. Ensure AI aligns with organizational values.
- Plan for AI policy modifications as technology evolves. Allow employee feedback.



Best Practices (Cont'd)

- Provide comprehensive training on AI systems. Ensure understanding on appropriate usage and human oversight.
- Establish oversight mechanisms with structured human-in-the-loop reviews of AI outputs before use. Designate who can use AI tools.
- Clearly define the permitted uses and prohibited misuses of AI tools based on job analyses.
- Mandate human review of AI outputs, establish protocols to override incorrect or biased results.
- Maintain detailed documentation of AI systems, algorithms, and datasets. Prepare for potential litigation discovery.



Employment Litigation Considerations

- Delegating employment decisions to AI will not insulate you from potential liability
- Burden shifting in an employment litigation has not changed
 - Need to explain the legitimate non-discriminatory reason for a decision/action
- Record Keeping/Data Retention
 - Records related to the “basis” upon which the AI tool made a decision
 - AI systems and a mechanism for litigation holds



