SHAWE ROSENTHAL LLP

E-UPDATE

June 30, 2023

RECENT DEVELOPMENTS

Generative AI in the Workplace – What Employers Need to Know

ChatGPT and other generative artificial intelligence tools are having a significant impact in the workplace – whether on administrative functions (like resume screening, applicant selection, employee evaluations, etc.) or production (like research, writing, and other content creation). These generative AI tools are already transforming the way that many employees – including higher-level white-collar workers – do work, or even the need for such workers. But the use of these tools carry risks that employers need to recognize and address.

Generative AI Risks and Concerns. There are a multitude of media stories about ChatGPT gone wrong – whether trying to break up a journalist's marriage or creating fake case citations and opinions. But the concerns go far beyond that, including the following:

- Discrimination in employment decisions. The data used by the generative AI can be biased in several ways. This bias may arise from the individuals collecting the original data and training the tool. The tool itself may have a learning bias. Or there may be bias in the way the data is deployed.
- False information. As media reports have highlighted, these generative AI tools readily provide false answers and, when pressed, create fake sources – what has famously been termed "hallucinations."
- Limitations on knowledgebase. The data used by the generative AI tool may not be entirely up to date. For example, ChatGPT was trained on a dataset that cut off in 2021, so it does not have any information after that point.
- Client/Company Confidentiality. Employees may upload confidential and proprietary information into generative AI tools, without realizing that such information may then enter into the tool's public database.
- Employee Confidentiality. Personal data that is entered into an AI tool may result in the disclosure of protected information (e.g. health, financial, etc.)
- Transparency. It is not always clear when and how generative AI is being used – both internally and externally. This may be by applicants and third parties, as well as by employees.
- Copyright Infringement. Without knowing where generative AI tools are gathering data to create content, it is possible that the tools are improperly using copyrighted material.
- Intellectual Property Rights. If content is created by generative AI, it cannot be copyrighted – or the copyright may lie with the toolmaker. If employees are using AI to assist in content

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creation, they may be the copyright owners for such content, unless there are specific written provisions that vest ownership in the employer.

- Other Compliance Issues. There may be other regulatory requirements that intersect with the use of AI, including in the areas of consumer protection, financial services, and protected health information under HIPAA, among other things.
- Impact on Staffing. With AI, certain job functions – or entire jobs – may be eliminated. This may result in organizational restructuring and reductions in force. It may also result in the creation of new duties and job positions, and require training on new skills for existing employees.
- Environmental Impact. For companies that are focused on environmental issues, including ESG investing concerns, it may be important to know that generative AI tools can use tremendous amounts of energy.

Governmental Regulation of AI. Governmental entities at all levels in the US, as well as in other countries, have developed AI regulations/guidance or are in the process of doing so. Thus, it is important for employers to monitor legislative or regulatory developments in the jurisdictions in which they operate. Some of the more major initiatives include the following:

- The White House's Blueprint for an AI Bill of Rights, which sets out five principles that should guide the design, use, and deployment of AI: (1) safe and effective systems; (2) algorithmic discrimination protections; (3) data privacy; (4) notice and explanation; and (5) human alternatives, consideration and fallback.
- A joint statement from the Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission, the Consumer Financial Protection Bureau, and the Justice Department's Civil Rights Division (DOJ) on their enforcement efforts against discrimination and bias in the use of automated systems or artificial intelligence (AI) in the workplace. As further discussed in our April 2023 E-Update, the statement identifies the roles each agency plays, as well as the specific concerns raised by the workplace use of AI.
- EEOC guidance on Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964, as discussed in our May 26, 2023 blog post.
- EEOC technical assistance document on The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, which we discussed in our May 2022 E-Update.
- DOJ guidance on Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring, also discussed in our May 2022 E-Update.
- A memo from the General Counsel of the National Labor Relations Board, targeting employers' use of electronic monitoring and algorithmic management technologies, which we discussed in our November 2022 E-Update.

It is important for employers to monitor developments at the state and local level as well. For example, New York City has just implement regulations on the use of AI in employment screening and hiring. In addition, multi-national employers should be aware that other countries are taking measures to regulate the use of AI, like the European Union's draft AI Act.

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Possible Steps for Employers. Among the things that employers can do to address the risks and concerns associated with the use of generative AI in the workplace are the following:

- Develop an AI policy. Among the issues the policy could address are the following: explanation of how AI is being used by the Company; permitted/forbidden use of AI by employees; procedures for receiving approval for the use of AI; limitations on what data may be input into general AI tools – including a clear prohibition on the use of confidential or proprietary information; independent verification of information or output from the AI tool; ensuring that the use of the AI tool does not result in discrimination, harassment, or defamation; compliance with regulatory requirements; and clarification of intellectual property rights.
- Review existing policies that may be impacted by AI, including confidentiality and trade secret policies and codes of conduct, as well as policies on computer systems use and intellectual property.
- Consider whether a Chief AI Officer position would be warranted.
- Carefully review HR software vendor contracts to ensure that appropriate validation studies have been done to comply with the EEOC's Uniform Guidelines on Employee Selection Procedures and to avoid bias in other situations.
- Routine audits of the use of AI to ensure nondiscrimination and appropriate use.
- Train employees on the use of AI.
- If unionized, bargaining may be required over the use of AI.
- Ensure that there is appropriate disclosure to third parties, applicants and employees about the use of AI, as well as the availability of reasonable accommodations with regard to its use.

This is an area of explosive growth and development. Employers must be certain to ensure that they are staying abreast of any legal obligations and requirements in this fast-changing environment.

Rap Music Can Create a Sexually Hostile Work Environment – for Both Women and Men

Even though both men and women were exposed to – and offended by – "sexually graphic, violently misogynistic" rap music, the U.S. Court of Appeals for the Ninth Circuit held that such music, played constantly and publicly throughout the warehouse, could constitute harassment based on sex.

Hostile Work Environment Harassment. Title VII prohibits employers from discriminating against employees because of their sex. Such discrimination includes a sexually hostile work environment (HWE), arising from multiple acts over a period of time that are so severe or pervasive that they alter the conditions of employment.

Background of the Case. In *Sharp v. S&S Activewear, LLC*, the employer permitted its managers and employees to play rap music that denigrated women and contained extremely offensive sexual lyrics. Both women and men were offended by the music. Management characterized the music as "motivational" and continued playing it for several years – until this lawsuit was filed. In its defense, the employer argued that there was no harassment because of sex because the music offended both men and women – a principle called "equal opportunity harassment" – meaning that there can be no discrimination where the offensive conduct is equally directed to everyone. The federal district court agreed, and dismissed the case. The employees then appealed the dismissal to the Ninth Circuit.

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The Court's Opinion. The Ninth Circuit found that "a workplace saturated with sexually derogatory content can constitute harassment 'because of sex.'" Such content can come from "sexually foul and abusive music," which the Ninth Circuit characterized as "actionable, auditory harassment that can pollute a workplace and violate Title VII." In so holding, the Ninth Circuit noted that it was joining sister Circuits, such as the Eleventh (HWE based on crude and gender-derogatory radio programming), Second, Fourth, and Sixth.

The Ninth Circuit went on to note that male and female plaintiffs can coexist in the same Title VII action. It specifically rejected the "equal opportunity harasser" defense, noting that "an employer cannot evade liability by cultivating a workplace that is broadly hostile and offensive." Rather "sexually charged conduct may simultaneously offend different genders in unique and meaningful ways." In other words, the same conduct may have different – but still illegal – impacts on women v. men.

Lessons for Employers. As we discussed in our blog post on the federal district court's dismissal of this case, employers should be proactive in addressing employee complaints about offensive conduct in the workplace – particularly if related to a protected characteristic like race or sex.

TAKE NOTE

Didn't We Just Do This? Employers Must Update the Mandatory EEOC Poster Again. The federal Equal Employment Opportunity Commission has released a revised "Know Your Rights" poster (dated June 27, 2023), now including reference to the new Pregnant Workers Fairness Act (which we discussed in detail most recently in our March 2023 E-Update). This version replaces the "Know Your Rights" poster and supplement that was just released in October 2022. Employers with 15 or more employees are required to display this poster in the workplace.

The latest version of the poster consists of two pages – the first is applicable to all covered employers, while the second page is relevant to federal contractors and entities receiving federal financial assistance. The EEOC also provided FAQs that make the following points:

- Employers have "a reasonable amount of time" in which to replace the old poster with the new one.
- Employers may download the new two-page poster from the EEOC's website.
- With regard to employees with visual disabilities, the poster is available as a PDF that has been optimized for screen readers.
- The poster is available in English and Spanish, with other languages forthcoming.
- It should be placed in a conspicuous location in the workplace where notices to applicants and employees are customarily posted (typically a breakroom or common hallway).

If the EEOC discovers that an employer has failed to display this mandatory poster, there is a penalty of $659 per violation. So, employers, make sure to get that updated poster up asap!

Employers Might Have a Duty of Care to Protect Employees from Cybertheft. In an increasingly electronic world, the U.S. Court of Appeals for the Eleventh Circuit has found that an employer might owe employees a duty of care to protect their personal information from cybertheft. Although the decision was based on Georgia state law, we note that the legal principles for

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negligence claims are quite similar in other states, and courts in those states might find the Eleventh Circuit's reasoning appealing.

In *Ramirez v. The Paradies Shops, LLC*, the individual, on behalf of himself and a class of similarly-impacted individuals, sued his former employer (who has over $1 billion in sales and 10,000 employees) for negligence following a ransomware attack in which current and former employees' personally identifiable information (PII), including Social Security numbers, was obtained by the cybercriminals. The former employee argued that the company did not sufficiently protect the PII from a data breach by maintaining the PII in an unencrypted internet-accessible database without complying with industry standards of protection.

The Eleventh Circuit noted that, to bring a negligence claim under Georgia law, a defendant must owe the plaintiff a duty of care. Such a duty is owed to those with whom the defendant has a special relationship. Here, the Eleventh Circuit found that the employer obtained the PII as a condition of employment and "employers are typically expected to protect their employees from foreseeable dangers related to their employment." The Eleventh Circuit then went on to find that a company of the employer's size and sophistication that was maintaining an extensive database of current and former employee PII could have reasonably foreseen being the target of a cyberattack. Thus, the Eleventh Circuit found that the former employee could sustain a negligence claim against the company.

While this case involved a large, sophisticated company, it would be wise for all employers who receive and retain employee PII to take appropriate measures to protect it from cyberattacks. What is appropriate may depend on the situation, but it seems that, at a minimum, employers can certainly take basic measures, like encrypting the information and ensuring that it is not internet-accessible.

Employers Must Protect Employees from Third-Party Harassment. A recent case reminds employers that they must take reasonable steps to protect employees from third-party harassment, including from patients with mental illness.

In *Davis v. Elwyn of Pennsylvania and Delaware*, the employee worked with patients with severe mental, developmental, behavioral or physical disabilities. A patient with severe behavioral disorders regularly called the employee racial slurs, and acted in sexually inappropriate ways with her and others. The employee asked the facility director for guidance and was told to ignore the behavior. She and others were told to "tap out," meaning to ask to be relieved of responsibility for the patient, when they reached their limits, but were not offered any additional help or support to stop the patient's behavior or protect the employees. After another incident in which the employee twice asked her on-duty supervisor for help because of her fear that the irate and uncontrolled patient would become physical, but was refused, she ended up being terminated for failing to follow her supervisor's order to care for the patient. She then sued for hostile work environment harassment, among other things.

The U.S. Court of Appeals for the Third Circuit rejected the employer's argument that a reasonable caretaker in a locked down psychiatric institute should not have been affected, and further that it changed its treatment strategy for the patient several times to try to protect its staff, but that he

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harassed everyone so that they could not reassign everyone who provided care for him. Specifically, the Third Circuit noted that the on-duty supervisor ordered the employee "to reenter an intolerably harassing and perhaps even dangerous situation." It went on to note that "a reasonable employee could expect to receive support and protection from her employer rather than instructions to submit to dehumanizing and potentially dangerous behavior." Thus, the Third Circuit found that the employee's claim for hostile work environment harassment should not be dismissed.

This case has several lessons for employers. The context of the work environment is important – in this case, because of the patients' mental illness, there was no way to prevent them from engaging in inappropriate conduct towards the employees. Employees in that type of environment can reasonably be expected to tolerate some inappropriate behavior. However, the employer must still step in to protect the employee when the behaviors become extreme – and certainly when an employee's safety is at stake.

A Poor Performance Review Does Not Create a Hostile Work Environment. In a common-sense ruling, the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of an employee's hostile work environment (HWE) harassment claim that was based, in part, on a poor performance review.

Under Title VII, HWE harassment consists of multiple acts over a period of time that are so severe or pervasive that they alter the conditions of employment and create an abusive working environment. In order to bring a claim of Title VII harassment, an employee must file a timely charge of discrimination with the Equal Employment Opportunity Commission – meaning within 300 days of the alleged harassment. In the case of HWE harassment, at least one of the harassing events must fall within the 300-day time period; if it does, then all the prior acts of alleged harassment can be considered.

In *Edwin v. Clean Harbor Environmental Servs., Inc.*, the employee claimed that he had been subjected to six incidents of harassment during his employment tenure, but only the negative performance review fell within the 300-day time period. However, as the Fifth Circuit noted, "criticism of an employee's work performance does not satisfy the standard for a harassment claim where the record demonstrates deficiencies in the employee's performance that are legitimate grounds for concern or criticism." In this case, Fifth Circuit noted that the employee was caught sleeping on site, was frequently late and left the plant without approval – all of which would support a negative review. Because the negative review was not deemed harassment, there was no timely charge filed with the EEOC, and the employee's HWE claim was properly dismissed.

It is reassuring for employers that holding an employee accountable for legitimate performance issues, assuming that performance standards are being applied consistently to all, will not be considered harassment.

What to Do With a Fired Employee's Things? Throwing them out is not the correct answer, according to the U.S. Court of Appeals for the Fourth Circuit.

In *Robinson v. Priority Automotive Huntersville, Inc.*, two employees resigned from their jobs and sued their employer. In addition to claiming a racially hostile work environment (which was dismissed by the Fourth Circuit for failing to meet the standard for a HWE claim under Title VII),

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the employees brought a rather unusual claim under state law – conversion – based on the allegation that the employer threw out several items that they owned and kept at their desks at work.

Under North Carolina law, a conversion claim exists when a defendant wrongfully takes another's property, resulting in an alteration of the property's condition or the owner's loss of the property. In this case, the employees owned the items, and the Fourth Circuit recognized that it was possible for a jury to find for the employees on their conversion claim if the evidence showed that the employer had, in fact, thrown out the items.

Although North Carolina law applied to this case, we note that the same principles generally apply to conversion claims in other states. So, the lesson here is that whatever personal property an employee leaves behind should be documented, boxed up carefully, and delivered to the employee. In our experience, although we have not seen formal conversion claims, we certainly have dealt with unhappy former employees who believed that the employer did not return all their property – sometimes because the employer thought it was junk that could be thrown out. It is best, particularly with contentious terminations, not to create additional areas of conflict.

Mid-Atlantic Employers – There Are Minimum Wage Increases in D.C. and Montgomery County (MD). Employers with employees in the District of Columbia and Montgomery County, Maryland should be aware that the minimum wage rate is increasing as of July 1, 2023. As discussed in our December 2022 E-Update, increases in Maryland, Howard County, New Jersey, Delaware, and Virginia took effect on January 1, 2023. In addition, under a new law, Maryland's minimum wage will increase again for all employers, regardless of size, to $15.00 an hour effective January 1, 2024 (with higher rates in Montgomery and Howard counties), as discussed in our April 12, 2023 E-lert.

- **Montgomery County, Maryland**: $16.70 per hour for employers with more than 50 employees, $15.00 for those with 11-50 employees, and $14.50 for the remaining smallest employers (although this rate will also go up to $15.00 on January 1, under the new state law). The tipped employee rate is $4.00 per hour. Our November 30, 2017 E-Update provides more detail on this law. The required poster is available here.
- **District of Columbia**: $17.00 per hour, with a tipped wage rate of $6.00 per hour. The required poster is available here.

CMS Withdraws COVID Vaccine Requirement for Health Care Workers. Following the end of the COVID-19 national and public health emergencies earlier this year (as discussed in our April 2023 E-Update), the Center for Medicare and Medicaid Services has now withdrawn its regulation requiring Medicaid and Medicare-certified healthcare providers to mandate COVID-19 vaccination for all applicable staff. Although the withdrawal is not technically effective until August 4, 2023, CMS states that it will no longer enforce the regulation.

Additionally, CMS confirmed that its COVID-19 testing requirement for long-term care facilities expired with the end of the public health emergency. However, long-term care facilities, as well as intermediate care facilities for individuals with intellectual disabilities, must still comply with CMS' rule requiring them to provide education on COVID-19 vaccines to residents, clients and staff, and to offer them COVID-19 vaccines, consistent with existing requirements as to other infectious diseases (e.g. flu and pneumococcal disease).

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NEWS AND EVENTS

Honor – We are delighted to announce that, for the 17th consecutive year, Shawe Rosenthal LLP has been ranked in the top tier of Maryland labor and employment law firms by *Chambers USA: America's Leading Lawyers for Business* – one of only two firms in the state to receive this prestigious recognition.

In addition to the firm's ranking, eleven Shawe Rosenthal partners were honored as leading individual labor and employment law practitioners – an increase of one from the prior year and the most (by far) of any firm practicing labor and employment law in Maryland. They are: Co-Managing Partners Gary L. Simpler and Teresa D. Teare, as well as Eric Hemmendinger, Darryl G. McCallum, J. Michael McGuire, Fiona W. Ong, Stephen D. Shawe, Mark J. Swerdlin, Parker E. Thoeni, Elizabeth Torphy-Donzella, and Lindsey A. White.

Honor – Lindsey A. White was selected to participate in the American Bar Association Section of Labor and Employment Law's 2023 Leadership Development Program. The program is highly selective, and participants are chosen based on their dedication to the practice of labor and employment law, past accomplishments, and vision for the future.

Media Appearance – On June 14, 2023, Fiona W. Ong was a guest on NewsNation's Dan Abrams Live show. Fiona commented on the Starbucks jury verdict of $25 million to a White manager for her claim of reverse race discrimination. The manager had been fired in the wake of the unjustified arrests of two Black men at a store in Philadelphia.

Webinar – In partnership with the Maryland Manufacturing Extension Partnership (MEP) and the Regional Manufacturing Institute of Maryland, Parker E. Thoeni presented a webinar, "Marijuana in the Workplace: An Employer's Guide" on June 14, 2023.

Presentation - Lindsey A. White was a panelist at the Maryland State Bar Association's Legal Summit, held in Ocean City from June 7-9, 2023. Lindsey provided guidance to employers on "COVID's Long Tail."

Presentation On June 28, 2023, Lindsey A. White and Maya R. Foster presented on Leave & Accommodations for the National Creditors Bar Association's (NCBA) "Three-Part Legal Learning Series with Shawe Rosenthal," which has been focused on employment laws and regulations. Lindsey and Maya covered several key topics including religious and medical accommodations, employer obligations under leave laws, employee leave rights, and damages for noncompliance. NCBA members may access a recording of the webinar here.

TOP TIP: Recreational Marijuana in Maryland

As most Marylanders probably know, on July 1, 2023 recreational marijuana use will become legal in Maryland. We have some tips for employers in navigating this new territory.

Under the new Maryland law (2022 MD H.B. 1), individuals 21 or older are permitted to use marijuana while off duty so long as they do not report to work under the influence (or, of course,

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smoke weed on the job). The law also includes some restrictions on off-duty use; it is impermissible to smoke in public areas, motor vehicles, and private property where use of marijuana is prohibited.

Given these scant restrictions, employees may be under the impression that their employer has no right to impose penalties for off-duty legal use of the drug that is found after a drug test. Such employees are WRONG!

Employers remain free to prohibit on-the-job marijuana use or intoxication and to require drug testing of employees, with discipline or termination permitted for a positive test (regardless of whether there is on-duty impairment). Thus, off-duty use may lead to employment consequences if a workplace drug test is positive for THC.

Employers should be aware (if they already do not understand this) that THC levels detected by current drug tests do not demonstrate intoxication, only marijuana use within the past few days, weeks or even months. People metabolize the drug differently. Thus, in this new world of legalized use, a positive drug test is not necessarily a sign of marijuana use during or just before working hours.

Given all of this, we have the following tips for employers:

- Employers should make clear that on-the-job use of marijuana or impairment during working hours is strictly prohibited.
- Employer that intend to take action based on a positive drug test, regardless of when marijuana is used, would be wise make this clear to employees NOW.
- Employers may want to consider whether to reserve marijuana testing to a segment of positions, such as those with safety-sensitive duties. If it is a "some not all" approach to testing, employers would be wise to make this clear and provide an explanation for the distinctions chosen to avoid creating the impression that the decision is arbitrary.
- Employers may choose to reserve testing to situations involving suspected impairment. If this is the case, it would be prudent to train managers about the signs of impairment. These may include, but not be limited to, red eyes, poor coordination, delayed reaction times, increased appetite, sleepiness or lethargy, anxiety, panic, hallucinations, odor of drugs (e.g. marijuana), excessive talkativeness or liveliness, memory impairment, and impaired judgment.

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RECENT BLOG POSTS

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