

# Tech in the Workplace: AI, Recordings & Social Media

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## Overview

- Technology continues to transform the workplace and presents both opportunities and legal risks for employers
- Employers must approach emerging technologies carefully to protect their organizations and ensure compliance with employment, privacy, and human rights obligations
- This webinar will review legal issues relating to artificial intelligence, workplace recordings, and employee social media activity, and provide practical guidance for employers navigating these evolving challenges
- This webinar should not be relied on in lieu of legal advice, and you should always consult with your employment lawyer to understand your legal rights and obligations

# Agenda

1. The Use of AI in the Workplace
  - a. In hiring
  - b. In performance management and promotions
2. Employee Recordings in the Workplace
3. Social Media Use
4. Privacy and Policy Considerations

# 1) The Use of AI in the Workplace

## a) In hiring

- As everyone is aware, the use of Artificial Intelligence (“AI”) is becoming more and more prevalent throughout society
- Employers have not been immune to this development, with more employers than ever taking advantage of what is perceived to be the benefits of using AI
- A recent US study found that between 35% - 45% of companies are regularly using AI in their hiring processes
- Using AI during the hiring process creates many possibilities for employers but there also exists some risks

# 1) The Use of AI in the Workplace

## a) In hiring

*AI, the Ontario Employment Standards Act, 2000 (“ESA”) and the Ontario Human Rights Code (the “Code”)*

- Employers must be mindful of amendments to the ESA which took effect on January 1, 2026, and which address job postings and the hiring process
- Amongst other things, the amendments require that employers with 25 or more employees must disclose AI use in the hiring process
- This requires employers to disclose in every publicly advertised job posting whether AI is being used to screen, assess or select applicants
- Pursuant to Ontario Regulation 476/24, AI means:
  - “a machine-based system that for explicit or implicit objectives, infers from input it receives in order to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments”

# 1) The Use of AI in the Workplace

## a) In hiring

- Needless to say, this definition covers a broad range of AI tools
- On February 4, 2026, the Ontario Ministry of Labour posted unofficial guidance for employers on its website
- This guidance indicated it is not necessary for employers to provide a detailed description of the AI system or the employer's use of the system
- As a result, based on the Ministry of Labour's guidance, currently it is enough for an employer to state that AI is used to screen, assess or select applicants
- As the unofficial guidance is unofficial, one can expect that further, more formal and binding regulations will follow
- As with other violations of the ESA and Regulations, corporations can be liable for fines up to \$100,000.00, with higher fines for corporations with previous ESA convictions

# 1) The Use of AI in the Workplace

## a) In hiring

- The Ontario Human Rights Commission and the Information and Privacy Commissioner of Ontario have issued the *IPC-OHRC AI Principles* which outline the following expectations regarding employer AI use:
  - Employers must conduct impact assessments for bias and human rights risk before implementing AI in the hiring process;
  - Employers must ensure there is still human oversight for significant decisions;
  - Employers must be able to provide explanations for AI-influenced outcomes; and
  - Employers must take steps to mitigate to adverse impacts of AI on protected groups
- As these are principles, they are not binding, but they do provide guidance

# 1) The Use of AI in the Workplace

## a) In hiring

### *The benefits of using AI in the hiring process*

- It is estimated that recruiters can spend up to 30 hours a week screening candidates, reviewing resumes and scheduling and co-ordinating interviews
- It is felt that AI can greatly reduce the number of hours spent by recruiters on these kinds of administrative tasks
- While AI cannot fully replace recruiters, it can take on tasks relating to screening and initial interactions
- AI can engage candidate pools based on skills and other factors
- AI can be used to review candidate resumes and job applications, screen candidates and conduct pre-employment assessments
- Using AI can allow hiring managers to be spending more time with a short list of qualified candidates, rather than spending the time required to go through the initial pile of resumes which an employer will receive

# 1) The Use of AI in the Workplace

## a) In hiring

- Also, depending on how the AI is structured, it can be trained to find skill sets which may not have been obvious based on the position an applicant currently holds or has held
- For instance, if the position being filled involves conflict resolution, the AI could be trained to highlight employees with customer service experience, even in unrelated fields or industries

# 1) The Use of AI in the Workplace

## a) In hiring

### *The Risks of using AI in the hiring process*

- AI does, however, run the risk of perpetuating biases
- For instance, resume screening tools that penalize gaps in employment can lead to discrimination in the hiring process relating to women and caregivers
- Another risk is resume screening tools that downgrade candidates with certain name patterns
- Employers should audit the AI algorithms it uses, it should ensure that diverse training data is used and it should conduct regular bias testing
- When using AI as part of the recruitment process, recruiters need to understand what criteria the AI has used when making any decisions as to the ranking or grading of a candidate
- If recruiters do not understand how and on what basis AI is making a decision this can lead to bias or unfair decisions

# 1) The Use of AI in the Workplace

## a) In hiring

- Depending on the nature of the hiring process, employers must also assess the risk of candidates using AI
- When assessments are administered as part of the hiring process in an unsupervised environment the risk of a candidate using unauthorized resources including generative AI tools increases
- As such, employers should clearly outline whether or not candidates are permitted to use AI and should also require that candidates acknowledge that they have not if the uses of AI is not permitted, or if AI use is permitted, then candidates should be required to disclose exactly what they have used

# 1) The Use of AI in the Workplace

## b) In performance management and promotions

### *The Benefits of Using AI in Performance Management and Promotions*

- In addition to assisting in the hiring process, AI is being used by employers as part of ongoing employee performance management and also when deciding on employee promotions
- An advantage to using AI in performance management is that predictive analytics can identify employees with transferable skills and knowledge
- This can be done by analyzing the employees' performance over time, analyzing what kind of skills the employee would have developed in previous roles as well as identifying the training which an employee has previously received
- Promotion models can also increase efforts to diversify the workforce by considering workers with non-traditional career paths

# 1) The Use of AI in the Workplace

## b) In performance management and promotions

- These workers may not be considered if the focus is only on titles and credentials
- It is felt that AI will improve performance management process in specific ways
- For instance, AI powered chat bots can evaluate employee performance and provide feedback
- AI algorithms can analyze performance data to determine which employees are high performers
- AI can automate aspects of the performance review process, such as collecting data and preparing reports which can then be used by Managers
- By doing these tasks on a constant basis, AI can assist Managers in identifying and responding to issues more quickly than will be the case with a system of annual or even quarterly reviews

# 1) The Use of AI in the Workplace

## b) In performance management and promotions

- Two specific types of AI performance monitoring which are becoming more common are keystroke monitoring and video analytics
- This can lead to employers discovering whether any of its employees are using mouse jiggling software or other methods to hide inactivity
- This can be a particular concern with remote workers
- Mouse jiggers can simulate user activity

# 1) The Use of AI in the Workplace

## b) In performance management and promotions

### *The Risks of Using AI in Performance Management and Promotions*

- As is the case with hiring, risks can emerge when AI tools are used for performance management and promotions
- Many of these risks arise from how the models are trained and what data they rely on. For instance, issues can arise with the use of historical data to define “successful employees”
- While AI can make evaluations more fair by standardizing criteria, it can also worsen bias
- This will happen if historical performance data is used unquestioningly as part of the hiring or performance management processes
- These data sets may reflect past inequalities such as biased performance evaluations, unequal access to development opportunities and underrepresentation of certain groups in senior roles

# 1) The Use of AI in the Workplace

## b) In performance management and promotions

- AI tools and skills based on generic input such as job titles and career gaps can have issues with respect to discrimination based on sex, race, age, disability
- In order to avoid against unintentional bias, employers should:
  - Audit data sets for bias before using
  - Combine human oversight with automated scoring
  - Introduce the AI slowly starting as opposed to a full rollout
  - Conduct periodic tests to guard against unintentional bias

## 2) Employee Recordings in the Workplace

- Many employers are surprised to learn that workplace recordings are often lawful under the Criminal Code
- Under section 184 of the Criminal Code, only one-party consent is required to record a private communication
- Accordingly, an employee who participates in a conversation may lawfully record that conversation without informing the other participants
- This remains true even where multiple individuals are involved in the meeting or discussion
- The fact that a recording is secret or unexpected does not, by itself, make the recording illegal
- However, the legality of a recording under criminal law does not mean that the employee is immune from consequences under employment law

## 2) Employee Recordings in the Workplace

- Although employees may lawfully make recordings, employers are not required to simply accept the practice
- Secret recordings can undermine trust, damage working relationships, and discourage candid communications in the workplace
- Secret recordings can also raise serious concerns regarding privacy and the protection of confidential business information
- For this reason, many employers adopt policies restricting or prohibiting workplace recordings
- Such policies help establish clear expectations and provide employees with notice regarding unacceptable conduct
- They also place employers in a stronger position to defend disciplinary decisions

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## 2) Employee Recordings in the Workplace

- Employers who choose to restrict workplace recordings should ensure that the policy clearly addresses:
  - ✓ Whether audio recordings, video recordings, photographs, and screenshots are prohibited
  - ✓ Whether consent from all participants is required before any recording is made
  - ✓ Which areas of the workplace or types of meetings are considered confidential
  - ✓ The treatment of confidential business information and personal information
  - ✓ The potential consequences for unauthorized recordings, including discipline up to and including dismissal
  - ✓ Any exceptions that may apply, such as recordings authorized by the employer

## 2) Employee Recordings in the Workplace

- The importance of maintaining a clear recording policy was illustrated in Winn v. Costco Wholesale Canada Ltd.
- The employee had been off work for approximately one year following rehab and was engaged in discussions regarding his return to work
- During those discussions, he became concerned about management's intentions and secretly recorded at least three meetings with various managers
- However, the employer had addressed workplace recordings in its Employee Handbook
- The Handbook characterized recording conversations without the permission of all participants as an unauthorized collection of confidential information and identified such conduct as cause for dismissal

## 2) Employee Recordings in the Workplace

- In upholding the termination, the Board placed considerable weight on the existence of a clear and reasonable policy
- The employee's conduct was found to be deliberate, as he knowingly violated a policy with which he was familiar
- The Board further noted that there was nothing unreasonable about the policy, nor did compliance with it require employees to act unlawfully
- Accordingly, the employee's conduct constituted "wilful misconduct" under the Employment Standards Act, 2000
- Winn demonstrates that lawful recordings can still justify dismissal where they violate clear workplace rules

## 2) Employee Recordings in the Workplace

- Employers must be careful though not to be hasty to discipline an employee who makes recordings in violation of company policy
- Employees who exercise rights under workplace legislation may be protected from reprisals in certain circumstances
- For example, section 50 of the Occupational Health and Safety Act prohibits employers from penalizing workers for acting in compliance with the Act or seeking its enforcement
- However, the existence of statutory protections does not mean that employees have an unrestricted right to secretly record others

## 2) Employee Recordings in the Workplace

- This issue was addressed in *Ardila-Zuluaga v. IO Industries Inc.*, where the employee disclosed that he had secretly recorded workplace conversations over a two-year period
- Prior to that disclosure, the employer had been entirely unaware that the recordings were being made
- The Tribunal accepted that the employee's purpose was to gather evidence to support his legal claims
- However, it held that collecting evidence through surreptitious recordings was not a right protected under the Human Rights Code
- The employer's concerns regarding the recordings were found to be legitimate, and the employee's refusal to stop recording provided a non-discriminatory reason for termination

### 3) Social Media Use

- Social media has created new challenges for employers that did not exist a generation ago
- Employees are increasingly using platforms such as Facebook, Instagram, LinkedIn, X, and TikTok to share opinions, interact with others, and document aspects of their personal and professional lives
- However, social media activity is often treated as an extension of the workplace and may have consequences for the employment relationship
- Posts, photographs, videos, comments, and even the accounts and content that employees choose to like, follow, or endorse may affect workplace relationships and the employer's reputation
- Accordingly, social media activity can give rise to discipline or dismissal

### 3) Social Media Use

- Employers should adopt a social media policy that clearly establishes expectations regarding both corporate and personal accounts, including:
  - ✓ The appropriate use of company social media accounts
  - ✓ Expectations regarding what company accounts may post, like, share, follow, or endorse
  - ✓ Expectations regarding personal social media activity both during and outside working hours
  - ✓ The prohibition against posts that are discriminatory, harassing, or damaging to the employer's reputation
  - ✓ Expectations regarding confidentiality and the protection of proprietary information
  - ✓ The use of photographs, videos, and recordings involving the workplace
  - ✓ The consequences of non-compliance
  - ✓ The requirement that employees conduct themselves professionally when identifying themselves with the organization

### 3) Social Media Use

- The ability of employers to discipline or dismiss employees for harmful social media activity was recently confirmed in *Cai Song v. Ontario Labour Relations Board*
- The employee made social media posts accusing the employer of racism and discrimination and compared the employer to the "majesty of the party state"
- After becoming aware of the posts, the employer directed the employee to remove them
- The employee refused to do so and the employer subsequently terminated the employee's employment
- In response, the employee filed a claim and alleged that the termination constituted an unlawful reprisal arising from internal complaints, a Ministry of Labour complaint, and his union-related activities
- In review, the Ontario Labour Relations Board concluded that the dismissal was not motivated by prohibited considerations
- This decision was subsequently upheld by the Ontario Division Court

## 4) Privacy and Policy Considerations

### *Personal Information Protection and Electronic Documents Act ("PIPEDA")*

- Employers in Ontario must be mindful that its obligations under PIPEDA do continue to apply when an employer is using AI in the hiring, performance management and promotion processes
- Pursuant to PIPEDA, employers must “collect, use and disclose personal information fully and transparently”
- Under PIPEDA employers are also not permitted to collect more information than is necessary to perform the tasks it needed for
- If any identifiable information about a prospective employee is subject to AI use, the employer must disclose this

## 4) Privacy and Policy Considerations

- Employers must also limit collection of the personal information to what is necessary to perform the function and the employer must take steps to secure AI data breaches

## 4) Privacy and Policy Considerations

### *Best Practices*

- Before implementing a full system of AI use, employers should do the following:
  - Identify any areas in which the company's human resources departments are already using AI
  - Develop AI policies which address matters such as privacy, bias checks and oversight
  - Comply with all relevant employee disclosure rules and regulations
  - Train human resources recruiters and managers on the potential risks of AI and on the responsible use of AI
  - Maintain records of the company's involvement with AI and the human overrides put in place

## 4) Privacy and Policy Considerations

- Employers should also be mindful to remain aware of any legislative or regulatory developments in the area
- One assumes that as AI use becomes more prevalent in workplaces, governments will respond with increased rules and regulations regarding its use
- Employers must remember that they will remain liable under the Code for any discrimination in the workplace which results from the use of AI, even if the decision reached was fully automated
- AI does not remove the need for human interaction and human oversight
- Final decisions still need to be made by humans, not by AI

# Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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