ALGORITHMIC UNION BUSTING: HOW THE USE OF ARTIFICIAL INTELLIGENCE IN HIRING COULD LEAD TO VIOLATIONS OF THE NATIONAL LABOR RELATIONS ACT

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INTRODUCTION

Thanks to a flurry of recent activity, labor efforts to protect workers and push for better contracts have come to the forefront of the news.[1] From strikes in Hollywood[2] to the United Auto Workers ("UAW") picket lines in the Midwest,[3] union action has gained significant momentum. The increased frequency of strikes should come as no surprise. For the past decade, public support for labor unions has steadily increased and sits at approximately sixty-seven percent approval.[4] Issues that Americans identify with most include seeking higher pay, safer working conditions, and notably, protections from artificial intelligence ("AI").[5] AI systems encompass a broad array of applications, including workplace operations such as hiring and decision-making.[6] Sixty-two percent of Americans believe that artificial intelligence will have a major impact on workers over the next twenty years, with seventy-one percent opposing the use of AI to make final hiring decisions.[7]

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1. Chris Isidore, *America Is on Strike. Here's the Progress Unions Have Made*, CNN BUS. (Sept. 30, 2023, 10:25 AM), https://www.cnn.com/2023/09/30/business/us-labor-unions-strike-surge/index.html.

2. Antonio Pequeño IV, *Hollywood Writers' Strike: Here's a Timeline of What Led to the 100-Day Mark*, FORBES, https://www.forbes.com/sites/antoniopequenoiv/2023/08/09/hollywood-writers-strike-heres-a-timeline-of-what-led-to-the-100-day-mark/?sh=5c41c8677ad3 (Aug. 9, 2023, 7:36 PM).

3. Tom Krisher et al., *Workers Strike at All 3 Detroit Automakers, a New Tactic to Squeeze Companies for Better Pay*, ASSOCIATED PRESS, https://apnews.com/article/auto-uaw-workers-strike-gm-ford-stellantis-7ce3ca9d94b911250d07556b7af376c7 (Sept. 15, 2023, 8:55 PM).

4. Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way*, GALLUP (Aug. 30, 2023), https://news.gallup.com/poll/510281/unions-strengthening.aspx.

5. *Id.*

6. Lee Rainie et al., *AI in Hiring and Evaluating Workers: What Americans Think*, PEW RSCH. CTR. 3 (Apr. 20, 2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/04/PI_2023.04.20_AI-in-Hiring_FINAL.pdf.

7. *Id.*

According to some officials, more than eighty percent of employers are already using AI in their work and decision-making processes.[8] The use of AI in hiring raises concerns about algorithmic bias and how these technologies can pry into a candidate's background more thoroughly than ever before.[9] Without regulation or audits of the AI systems used in hiring, built-in biases have the potential to further limit the opportunities available to historically disadvantaged groups of people.[10]

One area in which the use of AI in hiring has not been explored is that of the labor union context. While Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on protected classes and can be used to combat AI bias in hiring,[11] labor law involves a unique and underdeveloped path to do the same. As a still-developing, yet increasingly relevant area of the law, the most likely avenue for workers to pursue a claim of AI discrimination in hiring based on union affiliation involves Section 8(a)(3) of the National Labor Relations Act ("NLRA"), which prohibits employment discrimination based on union activity or sympathy.[12] While some legal scholars have observed that using AI technology in the hiring process could lead to discrimination under Title VII,[13] this Comment will argue that AI could violate the NLRA's anti-discrimination provision when used to identify and reject certain union-affiliated applicants.

This Comment will proceed in four parts. Part I examines AI in the context of current hiring practices and traditional employment law. Part II discusses the prohibition against the discrimination of union employees in hiring under Section 8(a)(3) of the NLRA. Part III explores certain types of AI technologies used to hire or screen job applicants and the potential for proving AI discrimination under Section 8(a)(3). Part IV provides an overview of current efforts to regulate AI, offers suggestions for the protection of workers' rights, and advocates for greater transparency and regulation to minimize harm.

I. THE UNREGULATED USE OF AI IN HIRING PRACTICES PRESENTS OPPORTUNITIES FOR DISCRIMINATION

To capture a more comprehensive understanding of the ways in which AI can create bias against union members and supporters, it is important to first explore the history of hiring discrimination claims and how this new technology fits into

8. Jory Heckman, *EEOC, DOJ 'Sounding Alarm' Over AI Hiring Tools that Screen Out Disabled Applicants*, FED. NEWS NETWORK (May 12, 2022, 4:50 PM), https://federalnewsnetwork.com/artificial-intelligence/2022/05/eeoc-doj-sounding-alarm-over-ai-hiring-tools-that-screen-out-disabled-applicants/.

9. Courtney Vinopal, *A Growing Reliance on AI in Hiring Is Making Regulators and Lawmakers Nervous*, OBSERVER (Dec. 7, 2022, 5:30 AM), https://observer.com/2022/12/a-growing-reliance-on-ai-in-hiring-is-making-regulators-and-lawmakers-nervous/.

10. Nicol Turner Lee & Samantha Lai, *Why New York City Is Cracking Down on AI Hiring*, BROOKINGS (Dec. 20, 2021), https://www.brookings.edu/articles/why-new-york-city-is-cracking-down-on-ai-in-hiring/.

11. *Id.*

12. 29 U.S.C. § 158(a)(3) (1935).

13. McKenzie Raub, *Bots, Bias and Big Data: Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices*, 71 ARK. L. REV. 529, 544 (2018).

that issue. The following sections will consider the definition of AI, traditional claims of hiring discrimination, and the introduction of AI into employment practices.

A. What Is Artificial Intelligence?

Artificial intelligence is a technological web of concepts so broad it can be difficult to pin down a precise definition. Still, efforts have been made to conceptualize this phenomenon. Merriam Webster defines artificial intelligence as "the capability of computer systems or algorithms to imitate intelligent human behavior."[14] One law dictionary defines "machine learning" as "[u]sing repetition and experience as how humans seem to learn" and "[u]sing software whose operations mimic these methods, employing artificial intelligence techniques to enhance the ability of a machine to improve its own performance."[15]

Policy-wise, artificial intelligence has been characterized as:

> [A] machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to—
>
> (A) perceive real and virtual environments;
>
> (B) abstract such perceptions into models through analysis in an automated manner; and
>
> (C) use model inference to formulate options for information or action.[16]

These definitions may vary, but they provide a basis for understanding artificial intelligence as a process by which technology analyzes vast amounts of data and creates outputs of information that can be used to perform human-like cognitive functions. For the purposes of this Comment, the focus on artificial intelligence will be in relation to employment decision-making.

B. Claims of Hiring Discrimination Traditionally Fall Under Title VII

Historically, claims of bias in hiring have fallen under Title VII of the Civil Rights Act of 1964. As amended, this statute makes it an unlawful employment practice for an employer to

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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14. *Artificial Intelligence*, MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/artificial%20intelligence# (last visited Oct. 16, 2024).

15. *Machine Learning Definition & Legal Meaning*, L. DICTIONARY, https://thelawdictionary.org/machine-learning/ (last visited Oct. 16, 2024).

16. National Artificial Intelligence Initiative Act of 2020, Pub. L. No. 116-283, 134 Stat. 4524 (2021).

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[17]

Title VII paved the way for employees to bring legal claims of discrimination against their employers, but only under certain parameters. Typically, Title VII only covers companies and labor unions with fifteen or more employees, employment agencies, and state and local governments, but not federal government employees or independent contractors.[18] It also provides employees with legal claims to pursue, two of which are disparate treatment and disparate impact. Disparate treatment occurs when an employer intentionally treats an applicant or employee differently than a similarly situated applicant or employee based on protected characteristics such as race, gender, or national origin.[19] Disparate impact involves a seemingly neutral policy or practice that disproportionately results in disadvantages for individuals based on those same protected characteristics.[20]

While proof of disparate treatment can be obvious based on the face of the law, proving disparate impact is more complex. The Supreme Court created a burden-shifting framework in *McDonnell Douglas Corp. v. Green* that first requires plaintiffs to establish a prima facie case for discrimination.[21] If successful, the burden shifts to require the employer to demonstrate a "legitimate, nondiscriminatory reason" for the employment action.[22] The plaintiff must then demonstrate the employer's reasoning was merely pretext for discrimination.[23] In *Griggs v. Duke Power Co.*, the Supreme Court held that under Title VII, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[24] Following *Griggs*, disparate impact theory was sharply limited in *Washington v. Davis*, where the Court held a disparate impact claim could not be established unless a plaintiff could show a facially neutral policy was adopted with discriminatory purpose or intent.[25]

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17. 42 U.S.C. § 2000e-2(a)(1)-(2) (1964).

18. *Title VII and Employees' Legal Rights*, JUSTIA, https://www.justia.com/employment/employment-discrimination/title-vii (last visited Oct. 16, 2024).

19. *Discrimination Under Title VII: Basics*, WESTLAW 14, https://us.practicallaw.thomsonreuters.com/6-518-4067 (last visited Oct. 16, 2024).

20. *Id.* at 17.

21. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

22. *Id.*

23. *Id.* at 807.

24. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

25. Washington v. Davis, 426 U.S. 229, 239 (1976). This case involved a lawsuit initiated by two Black men whose applications to become police officers in Washington, D.C. were rejected after a series of hiring practices eliminated them from the candidate pool. These practices included a written test that disproportionately excluded Black applicants. Despite arguing that these tests were racially discriminatory and unrelated to job performance, the Court held that there was no discriminatory intent behind the practices.

Since the passage of Title VII, additional legislation has been enacted to supplement prohibitions on discriminatory hiring, including: The Age Discrimination in Employment Act of 1967[26] ("ADEA"); Title I of the Americans with Disabilities Act of 1990[27] ("ADA"); The Genetic Information Nondiscrimination Act of 2008[28] ("GINA"); and the Pregnant Workers Fairness Act[29] ("PWFA"). These statutes, and their related case law,[30] provide a basis for legal claims of employment discrimination that can also be used in the context of AI bias.

C. The Introduction of AI into Employment Practices Has Created New Legal Implications for Hiring Discrimination Issues

Artificial intelligence is being used in the workplace in a myriad of ways. Generative AI tools have the capacity to perform tasks such as text analysis, image generation, and speech recognition.[31] Chatbots and virtual assistants are helping organizations automate their business processes.[32] Human resources departments are also using AI to guide decision-making in areas such as hiring, performance monitoring, setting compensation, and determining the likelihood of an employee to terminate the employment relationship.[33] They are using tools that scan and sort applications, job tests that predict future performance, video-recorded interviews that analyze language patterns, and even video games that analyze risk tendencies and mental agility.[34]

While it may be argued that the goal of these technologies is to increase efficiency, there exists a serious threat of algorithmic bias against job applicants

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26. 29 U.S.C. § 623(a)(1) (2023) (prohibiting age discrimination in hiring practices).

27. 42 U.S.C. § 12112(a) (1990) (prohibiting employment discrimination against otherwise qualified individuals on the basis of disability).

28. 42 U.S.C. § 2000ff-1(a)-(b) (2023) (making it an unlawful employment practice to discriminate against an employee based on their genetic information or history. The law also restricts employers from requesting or purchasing genetic information with respect to an employee and also limits disclosure of genetic information).

29. 42 U.S.C. § 2000gg-1(1)-(3) (2023) (making it an unlawful employment practice for certain employers to not make reasonable accommodations for a pregnant employee or deny employment opportunities to a qualified employee based on the employer's responsibility to make reasonable accommodations).

30. *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003) (acknowledging that both disparate treatment and disparate impact claims are applicable under the ADA); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (holding that a disparate treatment claim under the ADEA requires an employee's protected trait to have had a "determinative influence" on the outcome of the employment decision); Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (holding the disparate impact theory of liability is available under the ADEA).

31. Laurie A. Harris, CONG. RSCH. SERV., ARTIFICIAL INTELLIGENCE: OVERVIEW, RECENT ADVANCES, & CONSIDERATIONS FOR THE 118TH CONGRESS (2023), https://crsreports.congress.gov/product/pdf/R/R47644.

32. Naveen Joshi, *Yes, Chatbots and Virtual Assistants Are Different!*, FORBES, https://www.forbes.com/sites/cognitiveworld/2018/12/23/yes-chatbots-and-virtual-assistants-are-different/?sh=44f043836d7d (Dec. 23, 2018, 8:17 PM).

33. Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 9 (2020).

34. *Id.* at 10-13.

and employees. One concern is, despite seeming objectivity, algorithms can reproduce human biases depending on how they were built and trained.[35] AI can be used to intentionally screen out a disfavored applicant based on a particular characteristic or attribute used to build its data set.[36] It can also unintentionally produce biased results if it is based on employer data that is limited in diversity or has excluded certain groups in the past.[37] For example, in 2018, it was reported that Amazon developed an AI-based recruiting tool that inadvertently disfavored women.[38] The recruiting system Amazon developed used data patterns found in resumes submitted to the company over a period of ten years, which came from a largely male demographic that dominated the tech industry.[39] Essentially, Amazon's model "taught" itself to prefer male candidates while penalizing aspects of resumes submitted by women.[40] Despite attempting to edit the programming to make it more neutral, the company decided there was no way to ensure that other issues of bias would not arise and chose to scrap the effort altogether.[41]

In response to these and other growing concerns posed by AI, the United States government has responded in various ways. The National Artificial Intelligence Initiative Act of 2020 was passed to provide for a coordinated program across the federal government to accelerate AI research and development.[42] As of June 2023, at least forty bills had been introduced in Congress that pertained to AI topics such as federal government oversight and disclosure of AI use, though none have been enacted thus far.[43] In September 2024, the House Committee on Science, Space, and Technology passed nine bipartisan AI bills that included support for AI research and development, as well as education and training programs.[44] The White House published the Blueprint for an AI Bill of Rights in October 2022, identifying principles to guide the design, use, and deployment of AI.[45] In May 2022, the Department of Justice ("DOJ") and the Equal Employment Opportunity

35. Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy*, 35 A.B.A. J. LAB. & EMP. L. 289, 294 (2021).

36. *Id.*

37. *Id.* at 295.

38. Jeffrey Dastin, *Insight – Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 10, 2018, 8:50 PM), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G.

39. *Id.*

40. *Id.*

41. *Id.*

42. 15 U.S.C. § 9411 (2021).

43. Harris, *supra* note 31.

44. *Science Committee Passes Nine Bills to Support the Advancement of Artificial Intelligence*, HOUSE COMM. ON SCI., SPACE, & TECH. (Sept. 11, 2024), https://science.house.gov/2024/9/science-committee-passes-nine-bills-to-support-the-advancement-of-artificial-intelligence.

45. *See generally* WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYS. WORK FOR THE AM. PEOPLE (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

Commission ("EEOC") simultaneously released guidance about disability discrimination when employers use AI to make employment decisions.[46]

Finally, the EEOC issued comprehensive guidance for assessing algorithmic discrimination under Title VII in May 2023.[47] The EEOC's technical assistance document explained the legal application of Title VII to an employer's use of automated technologies in the hiring process. This includes how selection procedures that create disparate impact based on race, color, religion, sex, or national origin can be subject to a legal claim under Title VII.[48] The guidance also explained that employers can assess their selection procedure's tendency to create an adverse impact on a particular group "by checking whether use of the procedure causes a selection rate for individuals in the group that is 'substantially' less than the selection rate for individuals in another group."[49] Additionally, the EEOC explained that employers can be held responsible for the use of AI tools in hiring even if those products are developed by a third-party software vendor.[50]

Notably, two cases relating to Title VII and AI discrimination were recently litigated. *EEOC v. iTutorGroup, Inc.* involved a virtual tutoring company that programmed their application software to reject female applicants age fifty-five or older and male applicants age sixty and older, eliminating more than two-hundred qualified applicants based on their age.[51] The EEOC alleged a violation of the ADEA and the case was ultimately settled.[52] In *Mobley v. Workday, Inc.*, the plaintiff alleged that human resources and financial software company Workday used algorithmic screening tools to discriminate against and disparately impact applicants based on race, age, and disability.[53] In July 2024, a district court judge granted in part and denied in part Workday's motion to dismiss the plaintiff's First Amended Complaint.[54] The court rejected the idea that Workday was an "employment agency," but accepted the theory that the company acted as an "agent" of the employer.[55] The court also found that the plaintiff adequately alleged disparate impact claims under Title VII, the ADEA, and the ADA.[56] The ruling is significant in that it presents, for the first time, a path for holding AI vendors liable for employment discrimination.

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46. *Justice Department and EEOC Warn Against Disability Discrimination*, OFF. OF PUB. AFFS. U.S. DEP'T OF JUST. (May 12, 2022), https://www.justice.gov/opa/pr/justice-department-and-eeoc-warn-against-disability-discrimination.

47. *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*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 18, 2023), https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used.

48. *Id.*

49. *Id.*

50. *Id.*

51. Complaint at 1, EEOC v. iTutorGroup, Inc., No. 1:22-cv-02565-PCK-RLM (E.D.N.Y. May 5, 2022).

52. Consent Decree at 1, EEOC v. iTutorGroup, Inc., No. 1:22-cv-02565-PCK-PK (E.D.N.Y. Aug. 9, 2023).

53. Mobley v. Workday, Inc., 2024 WL 208529, at *1 (N.D. Cal. 2024).

54. Mobley v. Workday, Inc., 2024 WL 3409146, at *1 (N.D. Cal. 2024).

55. *Id.* at *7.

56. *Id.* at *8-9.

Despite the emphasis the federal government has placed on AI, there remains a lack of comprehensive legislation to regulate its development. The issue is so new that legal strategies and court decisions pertaining to AI are only in their early stages. Still, guidance similar to what the EEOC has provided can act as navigation tool for those looking to pursue claims of AI discrimination in hiring. What remains to be explored are the implications for labor law.

II. THE NATIONAL LABOR RELATIONS ACT OFFERS A PATH FOR PROHIBITING AI HIRING DISCRIMINATION BASED ON UNION AFFILIATION OR SUPPORT

A. Structure and History of the National Labor Relations Act

In 1935, Congress enacted the NLRA to address relations between unions and private sector employers.[57] To minimize obstructions to the flow of commerce, the NLRA encouraged collective bargaining and freedom of association among workers for the purpose of negotiating the terms of their employment.[58] Its jurisdiction applies to most private sector employers, including manufactures, retailers, private universities, and health care facilities.[59] In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, the constitutionality of the NLRA was upheld as consistent with the Commerce Clause.[60]

Under Section 7 of the NLRA, employees are guaranteed "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."[61] They also have the right to "refrain from any or all such activities."[62] Section 8(a)(1) makes it an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the NLRA.[63] These two sections prohibit employers from threatening employees with adverse consequences if they support a union or threaten employees if they engage in protected concerted activity.[64]

In providing these protections to employees, the question remains as to where job applicants fit into this larger framework. It is considered a violation of Section 8(a)(1) to question an applicant about their union membership because such questioning implicates the applicant's chance of being hired and may lead to

57. *National Labor Relations Act (1935)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/national-labor-relations-act (last visited Oct. 17, 2024).

58. 29 U.S.C. § 151 (2023).

59. *Jurisdictional Standards*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards (last visited Oct. 17, 2024).

60. *See generally* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

61. 29 U.S.C. § 157 (1935).

62. *Id.*

63. *Id.* § 158(a)(1).

64. *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1 (last visited Oct. 17, 2024).

interference with Section 7 rights.[65] This is true if an applicant does not "openly advertise" their support for a union, such as by wearing union insignia during an interview or other employment discussions.[66]

The NLRA created the National Labor Relations Board ("NLRB" or "the Board") to enforce and maintain the rights specified under the Act.[67] It permits the Board to "arbitrate deadlocked labor-management disputes, guarantee democratic union elections, and penalize unfair labor practices by employers."[68] When an employee seeks to file charges against an employer for an alleged violation under the NLRA, they begin by filing charges with their NLRB regional office.[69] Charges are then investigated by Board agents and the findings are evaluated by the Regional Director, who then makes a decision about the merits of the charge.[70]

Should an NLRB investigation find sufficient evidence to support the charge, efforts are made to facilitate settlement between parties.[71] If settlement is not reached, the agency issues a complaint and this leads to a hearing before an Administrative Law Judge ("ALJ"), whereby the NLRB acts as a representative for the charging party.[72] Statutorily, the NLRB cannot assess penalties, but it may seek certain remedies such as reinstatement and backpay, or informational remedies such as having an employer post notice that the law may not be violated.[73] The NLRB estimates that it receives twenty to thirty thousand charges per year from employees, unions, and employers specifically pertaining to unfair labor practices under Section 8 of the NLRA.[74]

B. Understanding Section 8(a)(3) of the NLRA

1. Foundations of Section 8(a)(3)

Section 8(a) of the NLRA outlines the various ways in which an employer might commit an unfair labor practice. The first five paragraphs of the Section prohibit employers from: (1) interfering with employees exercising their Section 7 rights; (2) interfering with the formation or administration of a labor organization; (3) discriminating in employment to encourage or discourage membership in a labor organization; (4) discriminating against an employee for filing charges; and (5) refusing to bargain collectively with a union employee representative.[75]

Section 8(a)(3) specifically focuses on discrimination against employees because of their union activities or sympathies. The subsection itself is lengthy and

65. Facchina Constr. Co., 343 N.L.R.B. 886, 886 (2004).

66. *Id.*

67. *National Labor Relations Act (1935)*, *supra* note 57.

68. *Id.*

69. *Investigate Charges*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/investigate-charges (last visited Oct. 18, 2024).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 29 U.S.C. § 158(a)(1)-(5) (1935).

includes a number of provisions relating to certain agreements between an employer and labor organization, though for present purposes the initial clause is most important. The beginning of Section 8(a)(3) states it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[76] Under this section, employers are prohibited from discharging, demoting, disciplining, or taking any other adverse action against employees because of their union support or activities.[77] Thus, an employer violates Section 8(a)(3) when it engages in discriminatory conduct motivated by "some element of antiunion animus."[78] Employers also cannot engage in discriminatory conduct that violates employee rights under the NLRA, unless the employer can show a "substantial and legitimate business end" outweighs the violation of employee rights.[79] An employer that violates Section 8(a)(3) derivatively violates Section 8(a)(1), as well, by taking action to discourage union membership or activities.[80]

The inclusion of Section 8(a)(3) developed out of Congress's concern for employer discrimination against labor unions and organizers.[81] Debate around 8(a)(3) emphasized the importance of establishing anti-union animus as the motivating factor for an employer's conduct and whether the section itself was intended to more clearly define the types of conduct that would constitute anti-union discrimination.[82]

2. Case Law Under Section 8(a)(3)

In cases alleging an unfair labor practice under Section 8(a)(3), courts apply the causation test established in *Wright Line*. This test involves a burden-shifting framework resembling the *McDonnell Douglas* framework used in traditional employment discrimination cases. The *Wright Line* test first requires the NLRB's General Counsel to make a prima facie showing that the employee's protected activity was a "motivating factor" in the employer's action.[83] If this showing is established, the burden then shifts to the employer to demonstrate the action still would have occurred without the employee's protected activity.[84] By considering

76. *Id.* § 158(a)(3).

77. *Discriminating Against Employees Because of Their Union Activities or Sympathies (Section 8(a)(3))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/discriminating-against-employees-because-of-their-union (last visited Oct. 18, 2024) [hereinafter *Discriminating Against Employees*].

78. NLRB v. Brown, 380 U.S. 278, 286 (1965).

79. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

80. *Discriminating Against Employees*, *supra* note 77; Indep. Elec. Contractors of Hous., Inc. v. NLRB, 720 F.3d 543, 553 (5th Cir. 2013) (citing Ind. & Mich. Elec. Co. v. NLRB, 599 F.2d 227, 229 n.2 (7th Cir. 1979)).

81. *Proving an 8(a)(3) Violation: The Changing Standard*, 114 U. PA. L. REV. 866, 867 (1966).

82. *Id.*

83. Wright Line, A Div. of Wright Line, Inc., 251 N.L.R.B. 1083, 1089 (1980).

84. *Id.*

causation and the motivation behind the employer's action, the court attempts to determine whether this action was prompted by anti-union animus.

Additionally, it is an unfair labor practice under Section 8(a)(3) for employers to "refuse to hire or consider job applicants because of their union membership, activities, or sympathies."[85] This interpretation is significant in that it expands the protections of the NLRA beyond just employees to include applicants. In *Phelps Dodge Corp.*, the Supreme Court held that refusal to hire job applicants because of their union membership was an unfair labor practice under Section 8(a)(3).[86] The Court reasoned that hiring discrimination against union labor undermines essential principles for maintaining "industrial peace."[87]

Subsequent case law has determined the scope of protection under Section 8(a)(3). In *NLRB v. Town & Country Electric*, the Supreme Court granted certiorari to clarify the meaning of "employee" under the NLRA.[88] *Town & Country* dealt with union member applicants who intended to organize the company they applied to if they were able to secure the job.[89] The company refused to interview ten out of the eleven union applicants (known as "salts") and dismissed the eleventh applicant after only a few days on the job.[90] The union then filed a complaint with the NLRB alleging the applicants were denied an employment opportunity because of their union membership.[91] In affirming *Phelps*, the Court broadly interpreted the definition of "employee" to include workers who were applicants and also paid organizers.[92] The Court stated the broad interpretation was consistent with several purposes of the NLRA, including the right of employees to organize without employer interference.[93]

In 1998, *NLRB v. Fluor Daniel* held that a violation of the NLRA is not established where the failure to hire is due to a lack of openings or the absence of qualified applicants, as opposed to anti-union animus.[94] In 2000, *FES* essentially modified the *Wright Line* test for refusal-to-hire and refusal-to-consider cases. In refusal-to-hire cases, the General Counsel must first show: (1) the employer was hiring; (2) the applicants were qualified; and (3) anti-union animus contributed to the applicant not being hired.[95] In refusal-to-consider cases, the General Counsel must show: (1) the employer excluded applicants from the hiring process, and (2) anti-union animus contributed to the applicant not being hired.[96] In both circumstances, once these showings are made, the burden then shifts to the employer to

85. *Discriminating Against Employees*, *supra* note 77.
86. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 210 (1941).
87. *Id.* at 185.
88. NLRB v. Town & Country Elec., 516 U.S. 85, 89 (1995).
89. *Id.* at 88.
90. *Id.* at 87.
91. *Id.*
92. *Id.* at 98.
93. *Id.* at 91.
94. NLRB v. Fluor Daniel, Inc., 161 F.3d 953, 967 (6th Cir. 1998).
95. FES (A Division of Thermo Power), 331 N.L.R.B. 9, 12 (2000).
96. *Id.* at 15.

demonstrate the same decision would have been made regardless of the applicant's union status.[97]

The broad interpretation of an applicant as an employee was limited in *Toering Electric Co*. The Board held an applicant is entitled to protection under Section 8(a)(3) only if it can be shown that they are "genuinely interested" in establishing an employment relationship.[98] The General Counsel bears the burden of proving the applicant's genuine interest as an element of their prima facie case under *FES*.[99] This decision was significant in that it no longer required the Board to "conclusively presume that an applicant is entitled to protection as a statutory employee."[100] The decision also attempted to distinguish discrimination claims under Title VII from those under the NLRA, noting the two statutes have distinct purposes and statutory schemes.[101]

Following *Toering*, the court in *NLRB v. Beacon Electric Co.* examined the frameworks under *Wright Line*, *FES*, and *Toering* and held the Board was not required to retroactively apply *Toering* in place of *FES*.[102] The decision affirmed that applicants may still litigate claims of hiring discrimination based on union affiliation, but must do so under a framework that does not presume their genuine interest. More recently in *Aerotek, Inc. v. NLRB*, the court applied the *Toering* and *FES* frameworks to find, even in "salting" cases, the General Counsel met its burden in showing that the applications were genuine, there were openings for applicants, and anti-union animus contributed to the employer's action.[103]

Importantly, in *Contractors' Labor Pool, Inc. v. NLRB*, the court held the NLRB may not support its decisions based on disparate impact theory under Title VII.[104] The court noted the statutory language of Title VII is broader than Section 8(a)(3).[105] It also emphasized the court's reluctance to "extend the disparate impact theory to other laws prohibiting discrimination even where the statutory language bears greater resemblance."[106] Although the justification for this line of reasoning seems tenuous, it remains current law that disparate impact cannot be used to bolster an argument for an 8(a)(3) violation. Rather than look to disparate-impact theory, legal counsel must adhere to 8(a)(3) and other provisions of the NLRA to make their case for discrimination based on union activity.

97. *Id.*

98. Toering Elec. Co., 351 N.L.R.B. 225, 228 (2007).

99. *Id.* at 234.

100. *Id.* at 233.

101. *Id.* at 231-32.

102. NLRB v. Beacon Elec. Co., 504 F. App'x 355, 373 (6th Cir. 2012).

103. Aerotek, Inc. v. NLRB, 883 F.3d 725, 728, 730 (8th Cir. 2018) (stating that a "salting" campaign involves union members who "actively try to organize and recruit for their union on non-union jobsites.").

104. Contractors' Lab. Pool, Inc. v. NLRB, 323 F.3d 1051, 1059 (D.C. Cir. 2003).

105. *Id.*

106. *Id.* at 1060.

C. Section 8(a)(3) Within the Context of AI

In October 2022, the General Counsel for the NLRB released a memorandum warning against intrusive electronic monitoring and algorithmic management practices.[107] In the memorandum, the General Counsel referred to algorithmic management as "a diverse set of technological tools and techniques to remotely manage workforces, relying on data collection and surveillance of workers to enable automated or semi-automated decision-making."[108] To address concerns that enhanced surveillance and algorithmic management tools have the capacity to interfere with workers' Section 7 rights, she urged the Board to apply the NLRA to protect employees from such threats.[109] The memorandum provided that protections could be achieved by both enforcing existing laws and applying established labor law principles in new ways.[110]

A significant portion of the memorandum considers employer surveillance and monitoring practices. It identifies the ways in which workers' conversations and movements can be tracked by wearable devices, how computer software tracks user data, and how apps can track location and communications even when an employee is no longer at work.[111] The memorandum notes how the data generated by AI monitoring technologies is used by some employers to manage employee productivity and even discipline or penalize them for missing quotas or taking leave.[112] It also observes how employers can use AI during the hiring process to dissect applicants' private lives through administering personality tests and scrutinizing social media accounts.[113]

In cases where surveillance is at issue, the Board balances the employer's justification for the action against the tendency of that surveillance to interfere with the employee's right to engage in concerted activity.[114] Employers violate Section 8(a)(1) of the NLRA when instituting technologies in response to protected activity, utilizing technology to discover protected activity, or creating an impression of doing so.[115] Employers also violate Section 8(a)(1) when they discipline employees who protest the surveillance or the pace of work set by AI management.[116] Additionally, employers violate Section 8(a)(5) when failing to provide information about and bargain over the use of tracking technologies and the subsequent data collected.[117]

The General Counsel's framework for assessing employer electronic monitoring and algorithmic management acknowledges employers may sometimes

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107. Memorandum from Jennifer Abruzzo, Gen. Counsel, NLRB, to All Reg'l Dirs., Officers-in-Charge, and Resident Officers (Oct. 31, 2022) [hereinafter Abruzzo].

108. *Id.* at 1 n.1

109. *Id.* at 1.

110. *Id.*

111. *Id.* at 2.

112. *Id.* at 2-3.

113. *Id.* at 2.

114. *Id.* at 3; F.W. Woolworth Co., 310 N.L.R.B. 1197, 1197 (1993).

115. Abruzzo, *supra* note 107, at 3.

116. *Id.* at 4.

117. *Id.* at 5; Anheuser-Busch, Inc., 342 N.L.R.B. 560, 560 (2004).

have a legitimate need to electronically monitor employees.[118] In such instances, the employer's interests must be balanced against the employee's rights under the NLRA.[119] The General Counsel urges the Board to find an unfair labor practice where an employer's use of algorithmic management practices would interfere with an employee's ability to engage in protected activity.[120] To avoid this violation, an employer must establish the practice at issue is "narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights."[121] Should the employer's business need outweigh the employee's rights, the General Counsel further encourages the Board to require the employer to disclose its algorithmic monitoring and management technologies to employees, as well as its reasons for using such technologies and the information obtained.[122] The General Counsel argues that providing employees with this information is the best way to ensure they can efficiently exercise their protected rights under such circumstances.[123]

Finally, the memorandum addresses Section 8(a)(3) concerns in relation to the screening of job applicants. It states that employers relying on AI to screen job applicants may violate Section 8(a)(3) if the algorithm makes decisions based on an employee's protected activity.[124] The guidance implicates both employers and third-party software providers as being liable for such decision-making.[125] These considerations provide an important basis for examining this aspect of labor law.

III. EMPLOYERS UTILIZING AI TECHNOLOGY TO HIRE WORKERS MAY FACE CHARGES OF DISCRIMINATION UNDER THE NLRA

Although the threat of algorithmic bias in traditional employment matters is increasingly being understood and covered, the exploration of hiring bias within the labor sector remains in its early days. Still, researchers and scholars have attempted to identify issues that are likely to arise. As support for workers' rights grows, the continued introduction of AI into the workplace poses the question of whether data-driven technologies will be cautiously implemented to benefit workers or used to suppress employee rights and organization.[126]

A. Predictive Algorithms Used in Hiring

Today, employers increasingly use predictive technologies in their hiring processes. At their most basic, predictive tools attempt to predict outcomes and

118. Abruzzo, *supra* note 107, at 7.
119. *Id.* at 7-8.
120. *Id.* at 8.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 5.
125. *Id.*
126. Annette Bernhardt et al., *Data and Algorithms at Work: The Case for Worker Technology Rights*, UC BERKELEY LAB. CTR. 4 (Nov. 2021), https://laborcenter.berkeley.edu/wp-content/uploads/2021/11/Data-and-Algorithms-at-Work.pdf.

behavior through analysis of existing data.[127] Employers may turn to hiring-specific technology vendors to build and incorporate predictive features into tools used throughout their hiring process.[128] By using machine-learning, computers detect existing patterns of data to then build models that predict future outcomes based on scoring, rankings, and other evaluations.[129] Employers tend to use hiring technologies to maximize efficiency and the quality of their hires.[130] However, these technologies may inadvertently eliminate candidates based on qualities the system identifies as unfavorable. They may also allow employers to intentionally avoid hiring "toxic" employees and go as far as preempting labor organizing activities by filtering out certain candidates.[131]

Predictive tools can perpetuate bias in various ways. When an algorithmic model's training data is inaccurate, under representative, or otherwise biased, its predictive output could reflect these inadequacies and therefore create inequitable outcomes.[132] More subtly, models can be built to adapt to a user's preferences over time, which has the potential to perpetuate social patterns and disparities.[133] Automation bias can occur when users give deference to predictions and analytic data over other factors that might better evaluate a job candidate's qualifications.[134]

1. Chatbots and Resume Scanners

In the screening stage of the hiring process, employers review applications and prioritize applicants that best match what they are looking for in a worker.[135] Predicative technologies can be used to assess applicants according to their qualifications and eliminate those who do not appear to be the right "fit."[136] Mya, a chatbot system, engages in an automated screening process that asks jobseekers basic questions before they apply.[137] It then extracts details from these text-based conversations to determine if candidates meet the employer's predefined requirements.[138] Should the candidate qualify, they are then moved to the next stage of the process, but if the bot determines them to be a "poor fit," they are discouraged from applying altogether.[139] Similarly, a screening tool called Ideal predicts how closely an applicant's resume will match the employer's qualifica-

127. Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, UPTURN 3-4, https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20--%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms,%20Equity%20and%20Bias.pdf (Feb. 15, 2019).

128. *Id.* at 6.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 8.

133. *Id.* at 8-9.

134. *Id.* at 9.

135. *Id.* at 26.

136. *Id.*

137. *Id.* at 26-27.

138. *Id.* at 27.

139. *Id.*

tions.[140] Using the employer's past screening and hiring decisions, Ideal interprets an applicant's resume and assigns it a letter grade based on the closeness of the match.[141]

A job applicant affiliated with a union or with union support may find themselves at odds with an employer who utilizes such screening technologies. If the technology has been built with data skewing against considering applicants with a history of union membership or experience with labor organizing, it may discourage them from applying or eliminate them as candidates based on their union affiliation. Because it is understood that these screening technologies replicate and reflect an employer's prior hiring decisions or preferred qualifications, the models are likely to reflect any such biases in screening out applicants of certain backgrounds.[142] This has the potential to not only discriminate against applicants based on characteristics like race, gender, age, and disability, but also for their affiliation with groups like unions.

2. Pre-Hiring Assessments

Another category of job screening involves the use of pre-employment assessments to measure aptitude, skills, and personality traits among applicants.[143] These assessments can be ready-made to predict general job performance or custom-built for employers to evaluate applicants for specific roles.[144] The technology vendor Koru offers an assessment tool that predicts job performance based on a candidate's personality traits.[145] Through a self-assessment survey, candidates' answers are scored based on personal attributes and the employer's desired traits.[146] The desired trait profile is developed by having current employees complete the assessment and cross-referencing that information with the employer's own performance indicators.[147] This generates a "fingerprint" for a specific position, in which the personality traits best correlating with success on the job are used to evaluate applicants.[148]

The roots of workplace personality assessments can be traced back to the anti-union strategies used by companies during the 1930s.[149] To combat the power of union organizing drives, many companies refused to hire workers with a history of union membership and often forced new hires to sign contracts agreeing to never join a union in the future.[150] Once the NLRA became law in 1935, employers spent

140. *Id.*
141. *Id.*
142. *Id.* at 28.
143. *Id.* at 29.
144. *Id.* at 29-30.
145. *Id.* at 30.
146. *Id.*
147. *Id.*
148. *Id.* at 30-31.
149. Nathan Newman, *Reengineering Workplace Bargaining: How Big Data Drives Lower Wages and How Reframing Labor Law Can Restore Information Equality in the Workplace*, 85 U. CIN. L. REV. 693, 710 (2017).
150. *Id.*

decades developing more subtle methods of screening out union members and potential supporters.[151] They hired "industrial psychologists" and business experts to create surveys and aptitude tests designed to reveal union sympathies among potential employees.[152] Detailed "psychological profiles" were developed to help employers screen out potential union supporters, asking questions revealing certain personality "types."[153] For example, in the late 1970s, "types" recognized as being union-leaning included those who "hold office in several outside clubs" and "that person loving a challenge and always ready for competition."[154]

When used in their worst form, modern pre-hiring personality assessments function as extensions of the historical anti-union blacklists.[155] As opposed to the unintentional effects of screening out union supporters based on flawed algorithmic data, pre-employment assessments have the ability to function in more intentionally discriminatory ways. In modern hiring, most employers are aware it is illegal to deliberately screen out applicants based on their union affiliation. Instead, some assessment technologies are marketed to, and used by, employers to screen out potentially "disgruntled" future workers who might persuade other employees that their workplace needs change.[156] Personality tests and similar assessments are advertised as being able to identify those traits associated with a willingness to unionize so employers may screen out those applicants and avoid union activity altogether.[157] Journalist Liza Featherstone identified how this happens in practice by noting that Walmart administers personality tests to screen for union sympathizers.[158] She also found one store's handbook encouraged a practice of avoiding applicants deemed as "cause-oriented associates" who had been involved in political demonstrations in high school.[159] The handbook also advised managers to look out for the "[o]verly-qualified associate… who has formerly made substantially more money with other employers."[160]

3. Social Media Screening

While general background checks are a familiar part of the applicant screening process, social media screening technologies have developed to enable an even closer look at a job candidate's online presence. Employers frequently review a candidate's publicly available social media accounts to decide if their online history should disqualify them or not.[161] The emergence of AI recruiting

151. *Id.* at 711.
152. *Id.* at 711-12.
153. *Id.* at 712-13.
154. *Id.* at 713.
155. Nathan Newman, *How Workers Really Get Canceled on the Job*, AM. PROSPECT (Apr. 6, 2021), https://prospect.org/labor/how-workers-really-get-canceled-on-the-job/.
156. Newman, *supra* note 149, at 709-10.
157. *Id.* at 710.
158. LIZA FEATHERSTONE, SELLING WOMEN SHORT: THE LANDMARK BATTLE FOR WORKERS' RIGHTS AT WAL-MART 198-99 (2005).
159. *Id.*
160. *Id.*
161. Bales & Stone, *supra* note 33, at 20-21.

tools has expanded this process by allowing for a more efficient and scalable algorithmic evaluation of a candidate's potential fit.[162] Despite the efficiency of these "social-profiling" tools, concerns about perpetuating bias and harm to career prospects have also been raised.[163] Thus, AI-powered social media screening presents the problem of identifying information about a candidate that could ultimately be used against them.

One recent study evaluated two leading social-profiling tools to understand their processes. The first tool, Humantic AI, has the ability to evaluate user-generated digital content including posts, likes, forwards, endorsements, and images.[164] From this information, Humantic AI generates personality and skills analytics to predict a candidate's potential career-related strengths and weaknesses.[165] The second tool, Social Intelligence, uses an applicant's resume information to search for user-generated data across social media platforms and forums, such as Facebook and Reddit, and includes engagement activities such as the user's likes, shares, and follows.[166] Although Social Intelligence has not disclosed their algorithmic process, the researchers believe the algorithm could use software that identifies certain key words, as well as a "sentiment analysis" of the candidate's opinions, attitudes, and evaluations.[167]

The capacity for such expansive assessment of a job candidate's online presence could lead to real issues of bias if left unregulated or unsupervised. When such algorithms lack oversight, they could flag aspects of a candidate's background—such as their union affiliation—that an employer might otherwise be unconcerned with until identified. Even more harmful is the potential for employers to use such AI screening tools to find instances of union support in a candidate's social media history and prevent the candidate from moving forward in the hiring process. Without transparency or disclosure rules for this kind of screening, the ability to detect a pro-union job candidate based on social media indicators is virtually limitless.

B. Proving Union Discrimination Under Section 8(a)(3)

To litigate claims of AI hiring discrimination based on anti-union animus, both litigants and courts will likely look to the familiar *Wright Line* burden-shifting framework. Central to a Section 8(a)(3) violation is a finding of discriminatory motive.[168] In "mixed motive" cases, the challenge arises when "*both* the employee's claim of unlawful motive and the employer's asserted business justification are found to be of merit."[169]

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162. Yequing Kong & Huiling Ding, *Tools, Potential, and Pitfalls of Social Media Screening: Social Profiling in the Era of AI-Assisted Recruiting*, 38 J. BUS. & TECH. COMMC'N 33, 35 (2023).

163. *Id.*

164. *Id.* at 43.

165. *Id.* at 43-44.

166. *Id.* at 45.

167. *Id.* at 46.

168. Joanne S. Marchetta, NLRB v. Transportation Management Corp.*: Allocation of the Burden of Proof in Section 8(a)(3) Mixed Motive Discharge Cases*, 33 CATH. U. L. REV. 279, 280 (1984).

169. *Id.*

Recalling that applicants are afforded the same protections as employees under Section 8(a)(3), *Wright Line* can be used to argue and evaluate allegations of hiring discrimination. A recent NLRB decision, *Intertape Polymer Corp.*, reaffirmed that the framework under *Wright Line* remains good law.[170] The decision reiterated the elements of the General Counsel's initial burden of proof to include a showing of: (1) union or other protected activity by the employee; (2) employer knowledge of that activity; and (3) animus against union or other protected activity on the part of the employer.[171] It also described motivation as "a question of fact that may be inferred from both direct and circumstantial evidence on the record as a whole."[172]

Intertape went on to state circumstantial evidence of discriminatory motive may include factors such as "the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee."[173] The decision also permits the General Counsel to establish discriminatory motive and animus through the employer's response to the alleged charges.[174] This can include "proof that the employer's asserted reasons for the adverse action were pretextual," as well as proof of the lack of a legitimate basis for such action.[175]

Should applicants with union membership status or a history of union support apply for jobs that utilize AI in their hiring practices, and they suspect anti-union animus or discrimination during that process because of their union affiliation, the first step is to consider filing a charge with their regional NLRB office. The job applicant filing the charge should be prepared with as much documentation as possible, including any copies of application materials, employer communications, and records of when interviews took place. The applicant should also make note of any questions asked about their union affiliation, either by an AI-based assessment tool or directly by the employer. If the matter proceeds, any data relevant to the hiring process should be requested from the employer, including the AI systems used and evidence of decision-making criteria. Counsel should look for any patterns revealed by this data and whether complaints have been made by similarly situated applicants. Ultimately, the charging party will try to demonstrate an employer's attempt to use AI hiring tools to identify union-affiliated applicants or how the hiring technology was built upon data that skewed against such applicants.

170. Intertape Polymer Corp., 2023 WL 9291828, at *2 (N.L.R.B. 2023).
171. *Id.* at *7.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

IV. CLEAR REGULATIONS AND TRANSPARENCY LAWS CAN HELP MINIMIZE POTENTIAL HARMS

A. Government Actions

1. Executive Order on AI

In October 2023, President Biden issued an executive order on the "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence."[176] The order outlines several safeguards for managing the growth and risks of AI, including a section on "Supporting Workers." This section directs the Secretary of Labor to consult with federal agencies and labor unions to develop a report on best practices for mitigating AI's potential harms to employees.[177] These principles must cover "job-displacement risks and career opportunities related to AI, including effects on job skills and evaluation of applicants and workers."[178] It must also review any implications of AI-collected data on workers relating to "transparency, engagement, management, and activity protected under worker-protection laws."[179]

The executive order represents an important step forward in creating transparency regarding AI's effect on workers and minimizing those risks, though it can only go so far. Reporting on the order acknowledges that, while the President "has broad powers to regulate how the federal government uses artificial intelligence," private sector regulation remains largely out of reach.[180] More robust progress on AI regulation will require action on behalf of Congress, or alternatively, a piecemeal approach by states.

2. State Regulation of AI

Rather than wait for national action, several states have already begun tackling AI issues, specifically in regard to hiring. In January 2020, the Artificial Intelligence Video Interview Act went into effect in Illinois. In part, the law requires employers who use AI analysis of video-recorded interviews to provide disclosure information to applicants before the interview and obtain consent from the applicant to be evaluated by the AI program.[181] Further, employers who rely solely on AI analysis of a video interview to select applicants for in-person interviews must collect and report various demographic data.[182]

176. Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Oct. 30, 2023).

177. *Id.* at 75,210.

178. *Id.*

179. *Id.*

180. Cecilia Kang & David A. Sanger, *Biden Issues Executive Order to Create A.I. Safeguards*, N.Y. TIMES (Oct. 30, 2023), https://www.nytimes.com/2023/10/30/us/politics/biden-ai-regulation.html.

181. 820 ILL. COMP. STAT. 42/5 (2020).

182. *Id.*

In New York, a 2023 law requires employers to conduct bias audits on automated employment decision tools ("AEDTs"), such as those using AI technology, and make those results available on the employer's website.[183] The law also provided notice requirements about the technology being used, as well as limits on AEDTs that have not been audited in more than one year.[184] Job candidates must also be provided an opportunity to request an alternative selection process or accommodation.[185]

While such state legislation seems aimed at combatting discrimination based on protected class characteristics, it could also be applied to aspects of labor law. Disclosure laws in hiring would allow for more transparency as related to decision-making for applicants with union backgrounds or affiliations.

B. Drawing on the Power of Collective Bargaining

As workers across the United States wait for Congress to enact comprehensive AI legislation, unionized workers should consider using collective bargaining to ensure at least some protections. Section 158(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees."[186] Section 158(d) requires employers and employee union representatives to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[187] Whether a party has bargained in good faith involves looking at the totality of the party's conduct, including delay tactics and unilateral changes to mandatory bargaining subjects in which both parties must come to the table.[188] In situations where the employer is not required to bargain over a certain decision, it still must bargain about the decision's *effects* on employees.[189]

In terms of AI systems used in the hiring process, it could be argued "[d]ata collection, electronic monitoring, and algorithmic management all impact the terms and conditions of employment."[190] For this reason, unions should be able to access information about the technologies used in the workplace and employers should be required to bargain about this kind of disclosure.[191] Undoubtedly, the use of AI in this capacity will have effects on the ability of applicants to be hired and employees to access job opportunities.

Another layer of protection comes from the collective bargaining agreement ("CBA"). To proactively establish workplace protections, unions may attempt to "include language in [their] CBAs that establish, in advance, their rights and roles

183. The New York City Council, Local Law No. 144 (2021).

184. *Id.*

185. *Id.*

186. 29 U.S.C. § 158(a)(5) (1935).

187. *Id.* § 158(d).

188. Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1603 (1984).

189. NAT'L LAB. RELS. BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT (1997), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf.

190. Bernhardt et al., *supra* note 126, at 24.

191. *Id.*

regarding the decision to adopt and implement new technology."[192] This might include "preemptive rights clauses," outlining procedures for how labor and management will address technological change.[193] One such example that could be effective in regard to hiring is the use of "union rights clauses." These clauses would incorporate provisions guaranteeing notice to unions about new technology and introducing union participation into the decision-making process of AI implementation.[194] These rights to notification, negotiation, and participation can go a long way in advancing protections for workers alongside the development of AI systems within the workplace.

C. Looking to Europe

While the United States incrementally develops its AI policy, the European Union ("EU") has taken action to enact comprehensive legislation. The "EU AI Act" was introduced by the European Commission in 2021 as a means of providing a regulatory framework for the development and use of AI systems.[195] The European Parliament, which is comprised of more than seven-hundred elected members representing the twenty-seven Member States of the EU,[196] has made it a priority to ensure AI systems within the Union are "safe, transparent, traceable, non-discriminatory and environmentally friendly."[197] Parliament has also called for AI systems to be overseen by actual people instead of automation and seeks to establish a "technology-neutral, uniform definition for AI that could be applied to future AI systems."[198]

The Act was published in the Official Journal of the European Union in July 2024 and went into effect across Member States on August 1, 2024, with staggered deadlines for implementation.[199] One of the most interesting features of the Act is its framework for categorizing different levels of risk for AI systems. The highest tier, Unacceptable Risk, bans AI that involves "social scoring" systems that classify people based on certain traits, as well as systems that use deceptive techniques to impair or distort decision-making.[200] This includes biometric categorization systems that infer sensitive attributes, such as race, sexual orientation, and

192. Lisa Kresge, *Union Collective Bargaining Agreement Strategies in Response to Technology* 1 (U.C. Berkeley Labor Center, Working Paper, 2020), https://laborcenter.berkeley.edu/wp-content/uploads/2022/01/Working-Paper-Union-Collective-Bargaining-Agreement-Strategies-in-Response-to-Technology-v2.pdf.

193. *Id.*

194. *Id.*

195. *EU AI Act: First Regulation on Artificial Intelligence*, EUR. PARLIAMENT 1, https://www.europarl.europa.eu/pdfs/news/expert/2023/6/story/20230601STO93804/20230601STO93804_en.pdf (June 18, 2024).

196. *Members of the European Parliament*, EUR. PARLIAMENT, https://www.europarl.europa.eu/meps/en/home (last visited Oct. 18, 2024).

197. *EU AI Act*, *supra* note 195, at 2.

198. *Id.*

199. *Implementation Timeline*, EU A.I. ACT, https://artificialintelligenceact.eu/implementation-timeline/ (last updated Aug. 1, 2024).

200. *High-Level Summary of the AI Act*, EU A.I. ACT, https://artificialintelligenceact.eu/high-level-summary/ (May 30, 2024).

even trade union membership.[201] The Act allows for some exceptions for law enforcement in instances of searching for missing or trafficked people, as well as to identify suspects in serious crimes.[202]

Developers of High-Risk AI systems face the majority of obligations under the Act. AI systems are considered high-risk if they utilize "automated processing of personal data to assess various aspects of a person's life, such as work performance, economic situation, health, preferences, interests, reliability, behaviour, location or movement."[203] Developers or "providers" of these technologies must comply with certain requirements, including establishing a risk management system and conducting data governance to ensure datasets are "relevant, sufficiently representative and, to the best extent possible, free of errors…."[204]

Finally, General Purpose AI ("GPAI") models are trained with "a large amount of data using self-supervision at scale" and can be integrated into many other AI systems.[205] Developers of these models must provide technical documentation and instructions for use, comply with copyright law, and publish a summary about the content used for training.[206] GPAI models with systemic risk are subject to additional requirements and assessments.

AI systems that pose much more limited risk are subject to lighter transparency and disclosure obligations. For example, developers would be required to ensure that end-users are aware when they are interacting with a chatbot or a deepfake.[207] Overall, this landmark legislation reflects Europe's commitment to regulating AI sooner rather than later and can offer a helpful roadmap for other nations to follow.

CONCLUSION

The advancements of artificial intelligence are rapidly transforming our world each day, and many of these technologies are being incorporated into the workplace in various ways. Hiring is one area of the employment process in which automated technology continues to engrain itself. While AI has the capacity to help create more efficient hiring procedures, it also poses a serious risk of bias. When left unchecked, this technology has the power to both intentionally screen out applicants with certain characteristics and unintentionally eliminate applicants due to unconsciously biased data. In terms of labor hiring, AI can be used to screen applicants based on their union status or affiliation. Such circumstances would present a violation of Section 8(a)(3) of the NLRA in the form of anti-union discrimination. As AI systems become savvier and more widely implemented, it is imperative that legal structures be developed to ensure protections for union-affiliated workers. Though it might be difficult for the legal field to develop on

201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*

pace with AI, it remains essential that the law strives to be as dynamic as the technology itself.