

# The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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## The Discoverability of AI: What Employers Need to Know Now

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Artificial intelligence (AI) is everywhere, including in the workplace. Employers and their employees who use AI tools to draft performance reviews, screen candidates, summarize investigations, analyze productivity, and even recommend disciplinary action may be seeking efficiency and process improvement. What many organizations have not fully internalized, however, is that AI-generated content—and potentially the prompts that created it—may be discoverable in litigation. As courts and regulators catch up to workplace AI adoption, discoverability of AI-generated content and potential waiver of attorney-client privilege are emerging considerations that should be front of mind for employers.

A recent court decision from a New York federal court serves as a cautionary tale that merits reviewing AI policies (or implementing a policy if one does not exist).

### Judicial Recognition of Discoverability of AI Queries and Logs

In one of the first cases to address the issue of the application of attorney-client privilege or the work-product doctrine to AI-generated documents, a Southern District of New York judge declined to extend either protection to the defendant's AI-generated documents.

In *United States v. Heppner*, the defendant had used an AI platform "Claude" to develop reports that outlined potential defense strategies and legal arguments after he received a grand jury subpoena to produce documents and understood that he was a target of investigation. Despite his counsel's argument that the defendant prepared the reports in anticipation of a potential indictment and to obtain legal advice, the court found that the AI-generated documents did not

meet the criteria for attorney-client privilege because they were not communications between Heppner and his counsel, were not confidential because he had shared them with a “third party”, and were not created for the purpose of obtaining legal advice from Claude. The Court further found that because the documents were not prepared by or at the request of counsel and did not reflect defense counsel's strategy at the time of their creation, they were not protected by the work-product doctrine. In closing, the court issued a reminder that “AI’s novelty does not mean that its use is not subject to longstanding legal principles, such as those governing the attorney-client privilege and the work product doctrine.”

Though this decision arises from a criminal case, it is an indicator that courts will analyze issues of privilege and discoverability of these AI-related materials under familiar legal frameworks. For example, when faced with questions surrounding search history and internet activity – which can also give a look behind the curtain into one’s internal thought process – courts apply case-specific analysis when determining whether the requested data is relevant and proportional to the needs of the case.

### **Employer Risk and the Reality of AI Discovery**

AI queries and outputs create an electronic paper trail of thoughts that previously may have gone undocumented. And, that electronic paper trail is likely to be discoverable if there is a lawsuit or administrative action. AI usage that is discoverable could include such things as drafting a termination memo, generating interview questions, summarizing complaints or witness interviews, and preparing investigation reports.

Even if plaintiffs and their attorneys have not been asking for AI data, it is only a matter of time before discovery requests or information requests from administrative agencies include requests for such things as: prompt history, system logs, and policies regarding AI usage.

### **Mitigating Your Risk**

The discoverability of AI prompts and outputs fundamentally shifts employment litigation strategy because it creates contemporaneous evidence of decision-making processes and informal brainstorming. Employers should consider implementing AI usage policies that address both acceptable usage and retention practices, particularly in the employment context. Additionally, employers should conduct training, particularly for managers or decisionmakers who are likely to turn to AI on the privacy and security differences between enterprise level AI and public AI, as well as responsible prompting. AI governance is no longer simply an IT function; it is a core employment law risk management issue.

AI’s integration into the workplace promises efficiency, consistency, and scalability. But it also results in a digital footprint that could be an evidentiary asset or liability. Organizations that treat AI use with the same rigor applied to email, performance documentation, and compliance audits will be better positioned to defend employment claims in an increasingly algorithm-aware legal landscape.

The Bassford Remele Employment Law Group closely monitors legal developments at both the state and federal levels—including emerging issues such as AI usage in employment decision-making and the discoverability of AI-generated content and prompts. We advise clients on the practical implications of these developments, including litigation exposure arising from AI use in hiring, discipline, and termination decisions, and whether policies, procedures, data retention practices, and AI governance frameworks should be updated to ensure compliance with evolving legal standards.

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