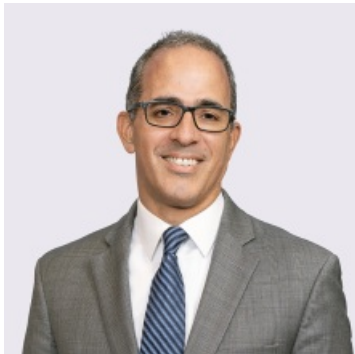Podcast

We Get AI for Work: An Exclusive Interview with American Staffing Association GC Brittany Sakata

By Joseph J. Lazzarotti, Eric J. Felsberg &

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Meet the Authors

Joseph J. Lazzarotti
Principal
908-795-5205
Joseph.Lazzarotti@jacksonlewis.com

Eric J. Felsberg
Principal
631-247-4640
Eric.Felsberg@jacksonlewis.com

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INTRO

AI technology has introduced new complexities both into the workplace and the workforce, as well as novel—and sometimes conflicting—regulatory developments.

On this episode of We get AI for work, we speak with our special guest, Brittany Sakata, General Counsel for the American Staffing Association, who joins us to discuss the expanding effect of these regulations and the latest guidance, as well as some of the most pressing concerns facing the staffing and recruiting industries. Brittany advises ASA members on a broad range of legal matters. She is the principal ASA liaison to the formal ASA/OSHA Temporary Worker Safety Alliance, the Office of Disability Employment Policy Alliance, and the ASA employee safety committee.

Today's co-hosts are Eric Felsberg, principal in Jackson Lewis's Long Island office, and Joe Lazzarotti, principal in the firm's Tampa office and co-leaders of the firm's AI Group.

Eric, Joe, and Brittany, the question on everyone's mind today is: Who is using AI, where is AI being regulated, and what should businesses do to comply, and how does that impact my organization?

CONTENT

Eric J. Felsberg
Principal and Artificial Intelligence Co-Leader

Hello, everyone, and welcome to our latest episode of *We Get AI for Work*. My name is Eric Felsberg, and I'm here with my colleague Joe Lazzarotti. So, Joe, this should be a fun episode. We have the pleasure of speaking with Brittany Sakata,

GC at the American Staffing Association. Welcome, Brittany, how are you?

Brittany Sakata
General Counsel, American Staffing Association (ASA)

Hi, Eric, Joe, great to be here. Thanks for having me.

Felsberg

We're thrilled to have you with us. I know we have a bunch of stuff we want to talk about. Before we get into the substance, maybe the best place to start is to have you tell us a little bit about your organization, your members, what you do at the association and the role AI plays in your organization.

Sakata

I am thrilled to talk about all of those things. ASA is the voice of the US staffing, recruiting and workforce-solution industry. We advance the interests of the staffing industry across all sectors through advocacy, research, education. We have around 1500 members and they place, source, find workers for every industry in the US. From C-level executive, industrial workers, IT, healthcare, you name it, our members are finding workers in those spaces.

As for the ASA legal team, we work really hard to keep our members up to date on changes in laws and regulations, and we advocate for the industry. Every year we track hundreds of federal and state bills, court decisions, agency rulings, and provide our members with really that comprehensive legal information and guidance and also resources to really help manage and protect their businesses. And AI has introduced yet another wrinkle into the world of employment and HR. It's a unique issue that seems to touch on all of our members, regardless of size and sophistication and industry in which they place. So thrilled to be here today to talk to you about it.

Joseph J. Lazzarotti
Principal and Privacy, Data and Cybersecurity Co-Leader

Yes. Excellent. As we were getting ready for our discussion today, we were talking about the regulatory landscape and how it just seems to be developing almost on a daily basis. We're seeing guidance and regulations on the federal level, state level — I sit not too far outside New York City where we have the New York City AEDT law. With all these regulatory developments across the US potentially affecting AI, what are some of the most pressing concerns that you have as you see some of this legislation emerge?

Sakata

You hit the nail on the head when you said it's rapidly developing and it's coming from all directions. We monitor, as I said, at both the state and federal level. The federal bills we've seen have been pretty broad and they touch on things as broad as child pornography all the way to privacy, deep fakes — really just a variety of pieces. Not so much on the employment aspect, though, so we've been taking more of a wait and see approach with those bills.

On the state level, though, it's wild. You mentioned the New York bill, which of course was the first of its kind. We were heavily involved in both the lobbying aspect of it and, then at the regulation stage, trying to get language that would permit our employers to comply in a way that was within the spirit of the law but also recognize the business challenges that employers of all sizes face in navigating the requirements of that New York bill.

Since then, it seems like the states are just trying to compete to see who can be the first to roll out the next thing: We saw it with Colorado; California, until the very last minute, had a very robust AI bill that would have impacted all employers that do business in California. It's a hotbed of topics and issues within the legislation that we're engaging on as well.

As it relates to employers, staffing firms are uniquely impacted by these laws because what they seek to do is impose a lot of record keeping, audit requirements, impact assessments, data sharing with candidates. Staffing firms are in the business of hiring people and so their databases of candidates can be tens of thousands deep. When they run a keyword search to figure out, for instance, what are the top 10 candidates for a particular job opening that needs to be filled by tomorrow, the obligation to perhaps put out notices, give opt-out rights, which is something we saw in some states, creates a huge headache and a compliance quagmire for our members.

So, when we're engaging at the state level, it's really around educating legislators around our business model, the work that we do, the turnaround time that's needed, and how AI is a tool that can be used, when effective, in a way that really supports the job growth in the local economy. It's a challenging environment because legislators on the other hand also don't a lot of times truly understand frankly what AI is. And if they do understand it, they struggle to grasp sort of how broad the language in the bills that they're putting together, how far it goes.

Felsberg

That's always a challenge, right? I was kind of grinning as you were saying that. A lot of times these regulators are in a difficult position and legislators, as you mentioned, because they know this is out there. They know, at least in some respect, it needs to be addressed. But AI is complicated. How does this work? Without knowing exactly how it operates, how are you to then regulate it?

Just sticking with the legislation: As we understand it, you're not seeing the partisan divide in the area of AI that you typically see with other legislative proposals and regulatory activity in your industry. Can you elaborate a little bit on what you see as the implication for that in your business?

Sakata

We have members that place in all industries all across the US, and employment law, typically as it relates to staffing, falls into buckets: Either laws that are directly aimed at the industry — thankfully which are pretty few and far between — and then laws that just have unique impacts on the industry. The states where we tend to see more employment-related laws that have a unique impact on

staffing *and* those that just impact staffing as employers typically fall in your more blue states: California, New York, New Jersey, Massachusetts, Illinois. Those are where I used to spend the majority of my time.

Now, I'm engaged through the U S Chamber. We're part of their working group with employers in conversations with legislators in Texas. As other states get in on this and they're trying to figure out how to take, let's say, a conservative-leaning approach, a more business friendly approach, they don't know how to do it because again, these issues are new, they're challenging: You want to make sure that you're protecting consumers but you also want to take an approach that businesses can comply with regardless of their level of sophistication and size.

And so, I think 2025 is going to be really interesting. We're not seeing the typical states where we're engaged and we're going to start picking up lobbyists in new areas in an effort to make sure that our voices are heard in states where we frankly typically haven't had to have a big presence.

Lazzarotti

That's really interesting. Switching gears for a moment: One of the questions that I always have in my mind, and I think it's top of mind for a lot of lawyers out there and perhaps even regulators, is the allocation of liability. This is generally speaking a big concern for all employers for obvious reasons.

But in the staffing industry, I think it's a little bit more complicated because there's a lot more nuances. You have the staff and company who's supplying the labor. They're using perhaps an AI tool to kind of vet that labor or those candidates and ultimately select folks that may be referred to another employer. A lot of times the AI tool is being developed and deployed by a third-party developer. And then you have the end user, if you will, which is the employer, the ones receiving the labor from you.

So, there's a lot of moving parts here. And when you think about liability, what if there's an employment-discrimination challenge there, perhaps on the issue of bias? We've seen a lot of these. We were just talking about New York City being a prime example where bias is kind of the main point of that whole requirement around AEDT regulation. Maybe there's a bias concern, maybe there's disability discrimination stemming from a pre-employment assessment.

With all of these moving parts, from your perspective, who holds that liability? Maybe it's not just one of those parties, it may be multiple. I would love to hear from you on that because this is an issue, in your industry in particular, where the answer's not always very clear.

Sakata

You said it. We at ASA spend a lot of time telling our members, the clients that utilize our members, regulators and lawmakers that joint employment or co-employment is not a bad thing. It's just a thing. And when you have a staffing relationship, you inherently have two employers and, depending on the laws involved, there's very likely co-employment risk and liability potentially involved. As it relates to OSHA, right, you don't get to expose a temporary worker to job

hazards just because they're a temporary worker. You still have to ensure that temporary workers are entitled to all the same safety and health protections as an internal worker. You can't sexually harass a temporary worker just because they're a temporary worker.

The EEO laws out there exist to protect workers regardless of who the supervising employer is. And so, as we think about liability as it relates to employment decisions and the use of AI, there are going to be some cases and some decisions that come out in the next few years that say, "Hey, this party actually had a bit of decision-making involved here and they had some skin in the game." And so, with the EEO laws as written — and again, they were written pre-AI technology — there's going to potentially be some liability found.

We've seen it in California as it relates to a job board. There was an agency argument put forth by the EEOC out there saying that the job board couldn't hide behind the claim that they weren't an employer, rather they were an agent and so there should be some liability. That's still pending. That's a novel legal issue. Clients and staffing firms alike are right to be cognizant of this gray area that you've just identified. What does your contract language say about it? What are the expectations around your staffing firm provider? And what due diligence are you expecting your staffing firm provider to do as part of their onboarding and recruiting process for your positions open at your business? Those are good conversations to be having, and they can't be had once. They need to be had regularly because the technology is evolving.

Liability in the AI context is incredibly unknown at this point, but I suspect within the next couple of years, we'll see some really interesting case law that will put your clients, my members on notice and probably have some best practices around contracting and compliance conversations.

Felsberg

It's a fascinating area because, as you touched on, you have a lot of rapidly developing laws out there but there's a whole body of law that was written when AI wasn't a thing. Maybe it was being developed, but certainly back in the '70s when some of these laws were kind of written, nobody was thinking about AI. So, it is going to be interesting to see how this develops.

I agree with you. Over the next several years, it almost seems like a foregone conclusion that we will have at least a body of case law start to develop around this issue. So again, something else for employers to think about in the AI space.

Brittany, this has been an excellent discussion, very thought-provoking. Joe and I like to put our guests on the hot seat just for a minute here and ask you to leave us with your top three takeaways as they apply to the use of AI in your business.

Sakata

I had a hard time coming up with just three because it is such a unique area that's rapidly developing. Perhaps we get together in six months and see if the top three have changed, Eric.

1. As a starting point, your clients, members of mine, non-ASA members — they should be understanding what AI is being utilized currently. There should be an AI audit of what's being used currently in their business, use cases developed. Recently at ASA, I underwent that analysis on behalf of the Association with our staff. I was frankly very surprised by not just the number of ASA employees using AI, but the variety and what they were using it for. And I had the very distinct impression that if I asked the question again, three months from now, it would be a much different response. It's just such a rapidly developing area.

   AI is not evil, it just is. And so, understanding why it's being used, how it's being used, what are the policies and procedures in place to address those uses, what are the contract terms of the products that are being used? For the lawyer in me, those are the things that I think about.

2. Two, I would say as you're assessing vendors, a number of the proposed state laws have disclosure requirements, information that would be required by the vendors, the developers of AI, that would need to be shared with employers to allow them to assess whether the AI could survive an audit, an impact assessment from a discrimination standpoint. Are you having those conversations? Are you understanding what you're entitled to from a state law perspective? Are you getting that information? Some states are requiring, at least in draft bills, annual reviews. What are the expectations of that vendor? Will they be providing that to you? Do you have to go out and ask for it? Understanding and calendaring those obligations will help you stay on top of this really rapidly changing area.

3. Finally, stay connected with some organization that will help keep you up to date on these issues and the development of these laws. Become an ASA member, join your state or federal US Chamber, sign up for Eric's privacy newsletter.

Being on top of these things will allow you to play offense and not defense. And I think that's really critical right now when things are coming at employers so fast.

Felsberg

Thanks again, Brittany. We were excited for this discussion and we had a good reason to be excited. That was terrific content, great discussion.

For all of our listeners, we hope you found this discussion helpful. If you have any questions or would like us to cover a certain AI related topic, please do not hesitate to contact us at ai@JacksonLewis.com.

Until next time, thanks for listening.

OUTRO

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