

Practical Insights For Employers Using AI

By **Vivek Mohan and Emily Lamm** (December 14, 2023, 5:44 PM EST)

We have been witnessing an absolute whirlwind of artificial intelligence policy developments around the globe.

On Dec. 8, European Union policymakers reached a historic agreement on the AI Act — the world's most comprehensive risk-based framework governing AI systems.[1] Although details will be finalized in the coming weeks, the AI Act's full set of requirements is expected to go into effect in approximately the next two years.

This is just the latest significant development in AI regulation and governance — following the release of the risk-based AI international code of conduct by G7 leaders,[2] 18 countries signing onto international guidelines on safe AI development and deployment,[3] and the UK's AI Safety Summit.[4]

Additionally, in the U.S., the White House recently issued its AI executive order.[5] At the same time, AI-related developments have been continuing at the state level, including the California Privacy Protection Agency, or CPPA, publishing discussion draft regulations relating to automated decision-making technology.

Each of these developments shows keen interest in AI regulation and is a road map to the potential requirements and guardrails for those developing and deploying AI tools.

There is a recognition that AI has the potential to transform a range of industries, and that we are merely at the beginning of this technological journey.

In this article, we will seek to move past AI buzzwords and amorphous definitions to distill the array of major AI developments to spotlight a narrow — but vitally important area — practical insights for employers using AI in the workplace.

In particular, we will address how:

- The now officially forthcoming EU AI Act may impose compliance obligations on U.S. employers deploying AI systems;



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- The U.S. Department of Labor's new role as articulated under the AI executive order and recent coordinating efforts with two federal agencies is likely to result in increased AI enforcement actions and influence how AI in the workplace is regulated;
- The recently released draft AI guidance from the White House's Office of Management and Budget — while not directly applicable to most companies, other than government contractors — is likely to be an instructive guide as to expectations at the federal level; and
- California's recently published automated decision-making prerulemaking efforts might shape regulation at the state level.

AI Systems Deployed in the Workplace Are High Risk Under the EU AI Act

The AI Act is just the latest EU legal framework that claims to have extraterritorial effect — many companies are familiar with the expansive long-arm reach of other frameworks such as the General Data Protection Regulation.

As such, U.S.-based employers may find themselves subject to the AI Act if AI systems they develop or deploy affect EU individuals or are deployed in the EU.

While the journey to the AI Act compromise text was long and winding, one area of consensus between the three key European bodies — the European Commission, the European Parliament, and the Council of Europe — was that the use of AI in the employment context was an area of particular concern.

The AI Act proposes to codify the use of AI systems in "employment, workers management, and access to self-employment" as high risk, a designation that comes with a number of compliance requirements.[6] While the final text of the AI Act is not yet available, the announcement of a compromise suggests that these requirements will include implementing a risk-mitigation system, technical documentation, recordkeeping, a conformity assessment, data governance and human oversight.

As we await the next steps from the EU, employers should ensure their road map for technology development and deployment builds in enough lead time to assess proposed uses of AI tools against these requirements.

The DOL Will Be Stepping up its Role in AI

While much of the discussion of AI in employment has come from the U.S. Equal Employment Opportunity Commission, or EEOC, with Chair Charlotte A. Burrows and Commissioner Keith E. Sonderling leading the way, the AI executive order calls upon the DOL — which administers and enforces laws spanning several areas, including workplace safety, wage and hour, and workers' compensation — to step into the AI regulatory ring.

Further, the AI executive order directs the DOL to "develop and publish principles and best practices for employers that could be used to mitigate AI's potential harms to employees' well-being and maximize its potential benefits."

Notably, these best practices and principles must address the "implications for workers of employers' AI-related collection and use of data about them, including transparency, engagement, management, and

activity protected under worker-protection laws."

Although merely guidance, the DOL's best practices and principles on AI in the workplace will likely provide insight into how it will approach AI-related enforcement actions in the future.

The AI executive order also requires the DOL to issue guidance on how to "ensure that workers are compensated for their hours worked," under the Fair Labor Standards Act, which could involve the use of AI in the context of rest and meal breaks as well as recording compensable work time.

To inform its new best practices and principles, the DOL announced that it is launching an AI listening session series, which will include discussions with AI developers and employers.[7]

Federal Agencies Are Coordinating on AI in the Workplace

In addition to its new role under the AI executive order, the DOL has signed a memorandum of understanding with the Federal Trade Commission — which recently authorized[8] compulsory civil investigative demands in investigations related to the use of AI — and the EEOC.[9]

In so doing, the DOL has effectively aligned three federal regulators — two of which already have experience with algorithm-related resolutions — in a triangle of MOUs that will enable them to consult with one another on investigations and other enforcement activities, including discussing specific complaints, reviewing information obtained during an investigation, and coordinating on requests for information.

The ability to share this valuable information is likely to bolster the DOL's ability to tackle AI-related issues and may result in a further increase in regulatory investigations and enforcement actions relating to AI and automation in the workplace.

The AI executive order also calls out the use of AI in employee surveillance and its potential effect on protected activity.

In late October 2022, Jennifer A. Abruzzo, the general counsel of the National Labor Relations Board, issued a memorandum in which she raised concerns regarding the use of monitoring technologies and automated management tools to intentionally surveil or discriminate against organizing activities.[10]

More recently, in March, the NLRB and Consumer Financial Protection Bureau signed a MOU to "better protect American workers and address practices of employer surveillance [and] monitoring." [11] The press release announcing the MOU specifically noted the general counsel's view that "[e]mployers' practices and use of artificial intelligence tools can chill workers from exercising their labor rights."

The NLRB and CFPB should therefore be watched closely for potential forthcoming enforcement actions and investigations.

The White House's OMB Guidance on Government AI Use Will Be Impactful

Candidly, most employers might not immediately have a reason to care about the AI executive order since its focus is primarily on the federal government (and companies developing the most powerful AI systems). However, the standards the federal government sets for itself are likely instructive on expectations for the private sector.

Shortly after the AI executive order was published, the White House's OMB issued draft guidance to the federal government regarding the government's own use of AI.[12] The OMB's guidance emphasizes notice, testing and impact assessments as central safeguards in effective AI governance.

This should not come as a surprise to employers who have seen notice and auditing as key requirements in existing laws governing AI in employment in New York City, Illinois and Maryland.

Note that the OMB's guidance endorses a risk-based approach — similar to certain drafts of the EU's AI Act — that would require "rights-impacting" AI applications to be subject to impact assessments, performance testing and an independent evaluation.

Although the OMB's guidance is focused on the federal government, the manner in which the federal government conceives of AI risk and best practices will likely impact how the private sector is regulated. Indeed, how the EEOC or DOL choose to handle AI risk management for themselves is also likely to become core to their expectations for employers deploying AI tools.

Further, federal agencies are already significant consumers of AI, so requirements imposed upon government agencies will influence how AI systems are developed for sale to the government.

For example, under the section titled "Managing Risks in Federal Procurement of Artificial Intelligence," agencies should consider contracting provisions under which AI products and services sold to the federal government cannot be subsequently used to train the functionality of the commercial AI offerings without express permission.[13]

Accordingly, under this current approach, vendors would need to ensure that their AI systems and tools have the ability not to use customer data to improve the model.

California Proposes Discussion Draft Automated Decision-Making Regulations

Although the AI executive order could help shape future legislative efforts, and instructs a number of executive agencies to conduct studies and take further action, there is no clear road map for Congress to enact an omnibus AI law.

Predictably, in this absence, state and local AI legislative proposals have been proliferating — raising concerns of an untenable patchwork of laws for employers operating across jurisdictions.

One of the leaders of the pack has been California, and the fairly new CCPA. The CCPA, together with the California Attorney General Rob Bonta, are charged with enforcement of the California Consumer Privacy Act, a statute amended by voters in 2020 to create this relatively uncommon dual regulator structure.

The CCPA as operative today covers the personal information of employees, job applicants, directors and independent contractors, and covered employers must inform California residents about employment-related personal information collected — e.g., through the deployment of AI in the workplace — as well as how that data is subsequently used.

Among states with so-called comprehensive privacy laws, California is unique in covering employees. This has not been lost on the regulators.

Notably, on July 14, Bonta announced an investigative sweep into some large employers over their compliance with the CCPA's requirements regarding the handling of employees' and job applicants' personal information.[14]

The CPPA has been tasked with relatively broad rulemaking authority, including in the space of automated decision-making technology. On Nov. 27, the CPPA released discussion draft regulations governing automated decision-making technology, including profiling,[15] which were discussed during its board meeting on Dec. 8.[16]

While the discussion draft is not a surprise to followers of the language and history of the CCPA statute, the breadth of the requirements — if promulgated as proposed — may present a significant scoping and compliance challenge for companies.

The CPPA has telegraphed some of these moves in prior discussions,[17] including the relatively broad definition of automated decision-making technology — broader than how the EU defines AI systems under the forthcoming AI Act, or as it is defined under the existing GDPR — to include any computational system that merely facilitates human decision making.

Notably, the draft introduces a right to opt out of automated decision-making technology for decisions that produce "legal or similarly significant effects" on an individual, which includes decisions that result in access to certain key life opportunities, including employment, and not solely their "provision or denial."

The CPPA is also considering additional opt-out rights for when automated decision-making technology processes personal information to train the system, which can have significant implications on the design of AI tools.

Notably, during the CPPA's Dec. 8 board meeting,[18] two board members expressed concerns that the discussion draft regulations were overly broad. Board members suggested narrowing the definition of profiling to target automated decision-making technology, which is particularly concerning and intrusive, and concerns were aired that the proposal could be read to regulate all software, including every day low-risk tools.

Nonetheless, there was consensus around the importance of regulating AI in the employment context, including putting guardrails around employee surveillance, wellness programs and personality-based recruitment screenings. We will be watching this area closely, and expect that some of these provisions may be informed by the EU's approach to regulating AI systems under the AI Act.

Conclusion

Keeping up with the relentless pace of regulatory and legislative AI developments in 2023 has been a challenge for employers.

In anticipating a rapidly evolving regulatory landscape, the best advice for employers remains as it was — ask rigorous questions about the use of new systems or tools.

As lawyers know, the challenge lies not only with enabling the business to keep up with this pace, but

also offering practical and creative solutions to abstract problems and risks — and when it comes to the question of responsible deployment of AI in the workplace, there are no neat and easy answers.

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[13] *Id.* at Section D.IV (pp. 21-22).

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