

ChatGPT and Other (Generative) Artificial Intelligence Tools: Uses, Risks, and Policies for Employers to Consider

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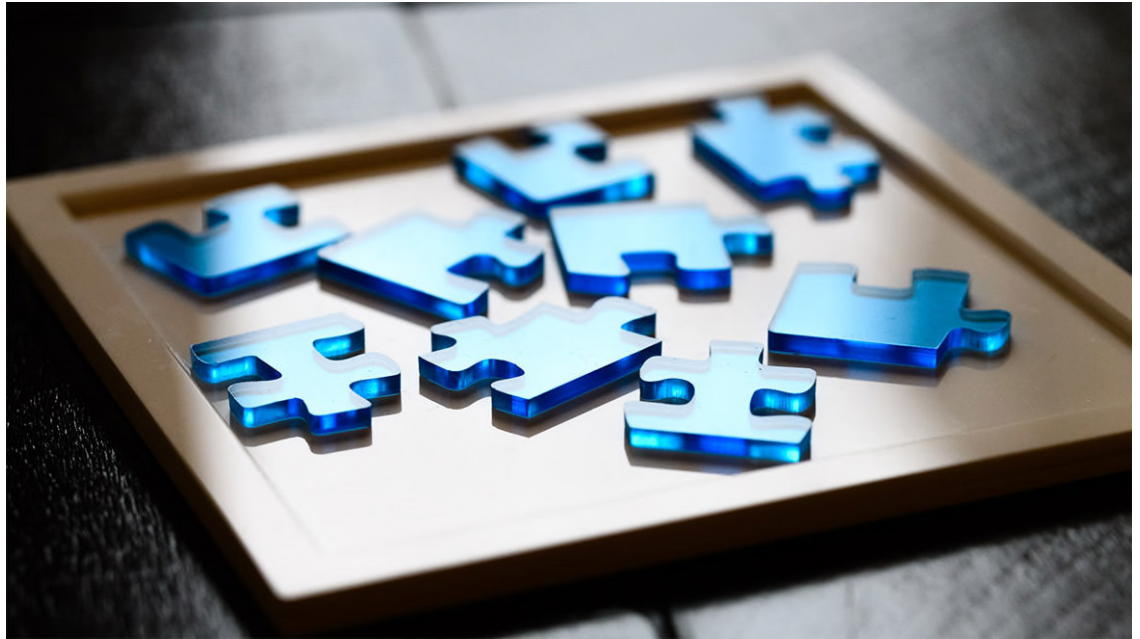
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Agenda

While artificial intelligence (AI) has been around for some time, the rapidly increasing use of generative AI tools, such as ChatGPT and Bard, has prompted employers to quickly assess this issue and understand whether appropriate policies should be implemented for the company.

- The nature of generative AI and how employers and employees use it.
- The potential benefits and risks of using generative AI.
- The components of an AI workplace policy.
- Current legislative and regulatory initiatives to address the use of AI.

The Nature of
Generative
Artificial
Intelligence and
How Employers
and Employees
Use It



What is Artificial Intelligence?

- In the [National Artificial Intelligence Initiative Act of 2020 at section 5002\(3\)](#), Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.”
- AI may include machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems.
- In the employment context, AI use has frequently included computer analysis of data to determine which criteria to use in employment decisions.

What is Generative Artificial Intelligence?

- Generative artificial intelligence refers to a type of AI that is designed to create or generate new content, such as images, text, music, or even videos. Unlike traditional AI systems that are typically focused on analyzing and interpreting existing data, generative AI models have the ability to generate new and original content based on patterns and examples learned from training data.
- ChatGPT, Bard, Bing, Midjourney, DALL-E

How Does Generative AI Work?

- Generative AI models are often based on deep learning techniques, particularly variants of neural networks such as generative adversarial networks (GANs) and variational autoencoders (VAEs).
- These models are trained on large datasets to learn the underlying patterns and structures in the data, and then they can generate new samples that resemble the training data.
- For example, in the context of image generation, a generative AI model can learn from a dataset of images and then produce new images that share similar characteristics and styles. Similarly, in natural language processing, generative AI models can be trained on text data and generate coherent and contextually relevant sentences or paragraphs.

ChatGPT

ChatGPT is an advanced natural language processing model that can understand and generate human-like text based on the input it receives. It is trained on a wide range of internet text and is designed for conversational use cases. Notably, its knowledge cutoff is September 2021.

ChatGPT



Examples

"Explain quantum computing in simple terms" →

"Got any creative ideas for a 10 year old's birthday?" →

"How do I make an HTTP request in Javascript?" →



Capabilities

Remembers what user said earlier in the conversation

Allows user to provide follow-up corrections

Trained to decline inappropriate requests



Limitations

May occasionally generate incorrect information

May occasionally produce harmful instructions or biased content

Limited knowledge of world and events after 2021

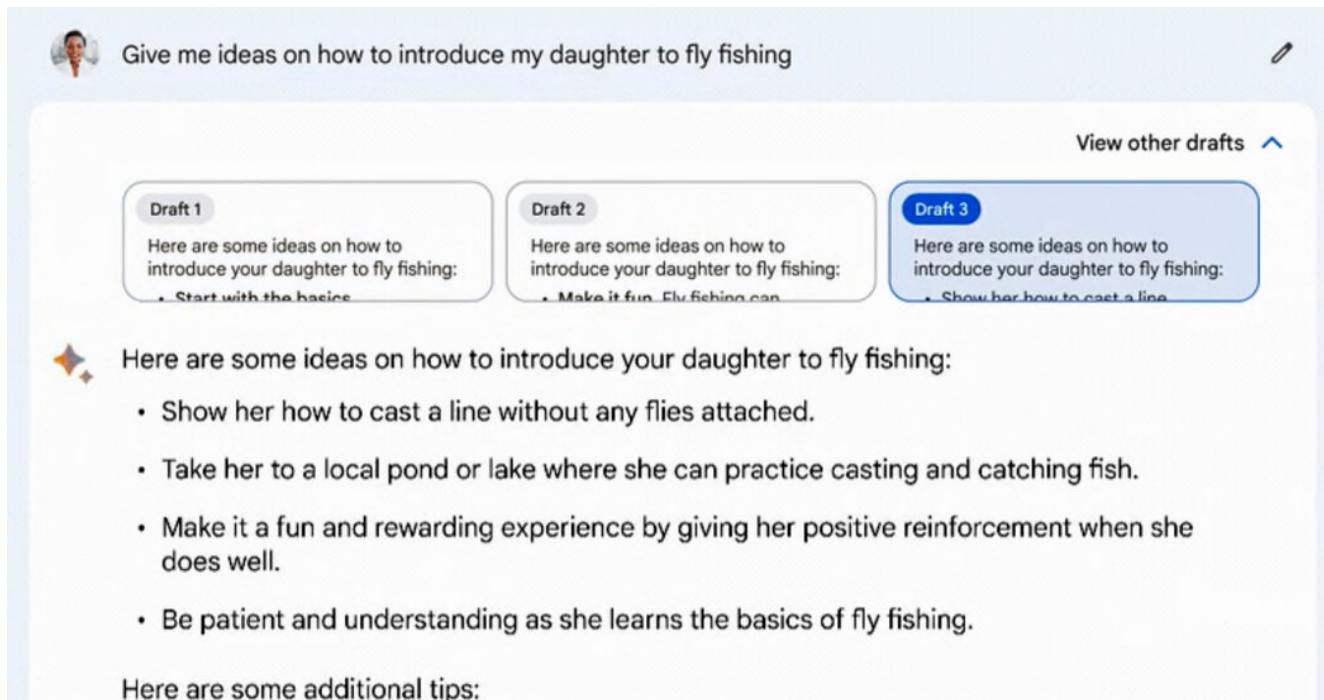
Send a message.



Free Research Preview. ChatGPT may produce inaccurate information about people, places, or facts. [ChatGPT May 24 Version](#)

BARD

Bard is Google's experimental, conversational, AI chat service. It is meant to function similarly to ChatGPT, with the biggest difference being that Google's service will pull its information from the web.



The screenshot shows the Google Bard chat interface. At the top, a user's profile picture and the query "Give me ideas on how to introduce my daughter to fly fishing" are visible. Below the query, there are three draft responses labeled "Draft 1", "Draft 2", and "Draft 3". Draft 3 is selected and highlighted in blue. Each draft contains the text "Here are some ideas on how to introduce your daughter to fly fishing:" followed by a bulleted list of ideas. Below the drafts, the main response is displayed, starting with a colorful star icon and the text "Here are some ideas on how to introduce your daughter to fly fishing:". This is followed by a bulleted list of four ideas. At the bottom, the text "Here are some additional tips:" is visible.

Give me ideas on how to introduce my daughter to fly fishing

View other drafts ^

Draft 1

Here are some ideas on how to introduce your daughter to fly fishing:

- Start with the basics.

Draft 2

Here are some ideas on how to introduce your daughter to fly fishing:

- Make it fun. Fly fishing can

Draft 3

Here are some ideas on how to introduce your daughter to fly fishing:

- Show her how to cast a line.

Here are some ideas on how to introduce your daughter to fly fishing:

- Show her how to cast a line without any flies attached.
- Take her to a local pond or lake where she can practice casting and catching fish.
- Make it a fun and rewarding experience by giving her positive reinforcement when she does well.
- Be patient and understanding as she learns the basics of fly fishing.

Here are some additional tips:

Employer Uses of Artificial Intelligence

- Employers now have a wide variety of computer-based tools available to assist them in
 - hiring workers,
 - monitoring worker performance,
 - determining pay or promotions, and
 - establishing the terms and conditions of employment.
- Examples include:
 - resume scanners that prioritize applications using certain keywords;
 - employee monitoring software that rates employees on the basis of their keystrokes or other factors;
 - “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements;
 - video interviewing software that evaluates candidates based on their facial expressions and speech patterns;
 - testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test.
- Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias.

Recruitment

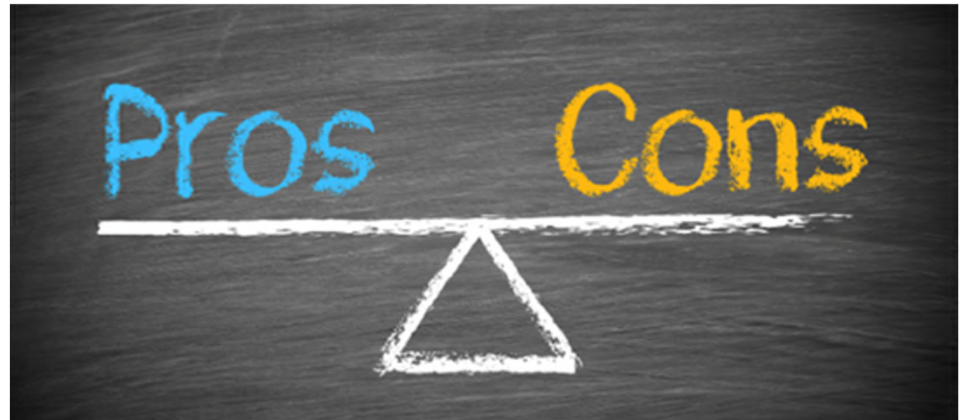
- AI tools typically target three stages of the hiring process:
 - [Sourcing](#): finding and connecting with talent quickly
 - [Screening](#): quickly deriving the best applicants
 - [Interviewing](#): facilitating remote hiring and saving time

How Can Generative AI Be Used?

- As a cost-savings measure
 - Time savings
 - Cost savings
- As a replacement for search engines, such as google
- Simplify complex tasks.
- Idea generation.
- Reduce time spent on tasks.
- Personal assistant.
- Customer Support
- Employee onboarding
- Training and knowledge
- Recruitment and screening
- Data Analysis and Insights
- Language Translation
- Research and information
- Task and project management
- Learning and development
- Collaboration
- Personalized recommendations



The Potential Benefits and Risks of Using Generative Artificial Intelligence



Pros	Explanation
Automation of Repetitive Tasks	AI can automate mundane and repetitive tasks, freeing up human resources for more complex and creative work. This increases efficiency and productivity.
Improved Efficiency and Cost Savings	AI-powered automation can streamline processes, optimize workflows, and reduce operational costs for businesses. It can also improve resource allocation and enhance overall productivity.
Advanced Data Analysis	AI techniques enable sophisticated data analysis, uncovering hidden patterns and insights from large datasets. This can lead to better predictions, improved risk assessment, and enhanced business intelligence.
Personalized User Experiences	AI algorithms can analyze user preferences and behavior to provide personalized recommendations and experiences. This enhances user satisfaction and engagement, particularly in areas like e-commerce, entertainment, and marketing.

Cons	Explanation
Job Displacement	AI automation can potentially lead to job losses, particularly in industries where repetitive tasks can be easily automated. This necessitates the need for upskilling and reskilling to adapt to the changing job landscape.
Ethical Concerns	AI raises ethical considerations, such as privacy concerns, biases in algorithms, and potential misuse of AI technology. There is a need for transparency, fairness, and responsible development and deployment of AI systems to address these concerns.
Dependence on Technology	Overreliance on AI can make societies vulnerable to system failures, cyber-attacks, and disruptions. It's crucial to have backup plans and maintain human oversight to ensure the smooth functioning of critical systems and to mitigate potential risks.
Lack of Human Creativity and Intuition	AI, despite its advancements, lacks the nuanced creativity and intuition that humans possess. Certain tasks requiring empathy, complex decision-making, and human interaction may still require human involvement and expertise.
Potential for Bias and Discrimination	AI systems can inherit biases from the data they are trained on, leading to discriminatory outcomes. This bias can perpetuate existing societal inequalities if not properly addressed and mitigated. It is crucial to ensure diverse and representative data and ongoing monitoring of AI systems for fairness.
Potential errors	May produce inaccurate information about people, places, or facts.

Cons (continued)

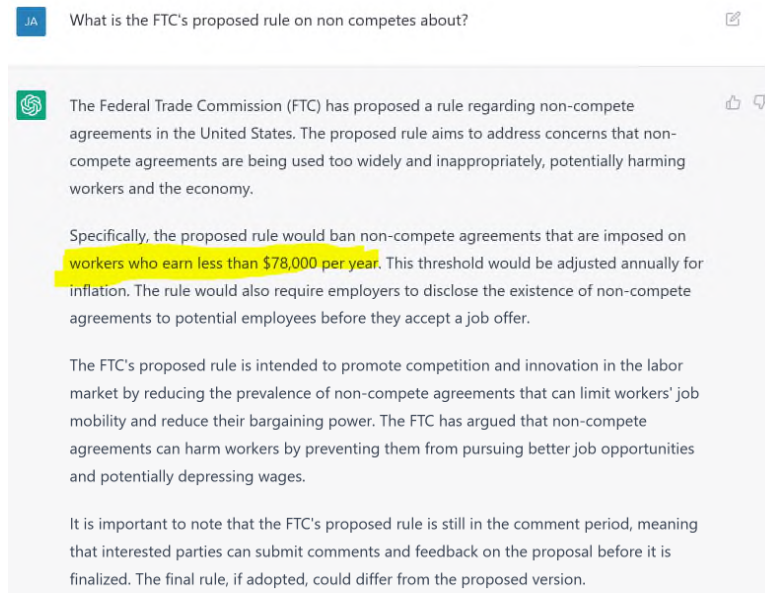
CONS

AI language models are fuzzy

- If you ask them the same question you won't always get the same answer.
- How you word a question can affect the reply, and for some of these queries you need to ask follow-ups to get better responses.
- AI chatbots aren't factually reliable.

AI Hallucinations:

AI hallucinations refer to instances when an AI generates unexpected, untrue results not backed by real-world data. AI hallucinations can be false content, news, or information about people, events, or facts.



The screenshot shows a chatbot interface. At the top, a user asks: "What is the FTC's proposed rule on non competes about?". The chatbot, represented by a green circular icon with a white swirl, responds with a detailed explanation. The response is divided into three paragraphs. The first paragraph states that the FTC has proposed a rule regarding non-compete agreements in the United States, aiming to address concerns about their overuse and potential harm to workers and the economy. The second paragraph, which is highlighted with a yellow background, specifies that the proposed rule would ban non-compete agreements for workers earning less than \$78,000 per year, with the threshold adjusted annually for inflation. It also mentions that employers must disclose the existence of such agreements to potential employees before they accept a job offer. The third paragraph explains that the rule is intended to promote competition and innovation in the labor market by reducing the prevalence of non-compete agreements that limit workers' job mobility and bargaining power. A final note states that the rule is still in the comment period, allowing for public input before finalization.

JA What is the FTC's proposed rule on non competes about?

The Federal Trade Commission (FTC) has proposed a rule regarding non-compete agreements in the United States. The proposed rule aims to address concerns that non-compete agreements are being used too widely and inappropriately, potentially harming workers and the economy.

Specifically, the proposed rule would ban non-compete agreements that are imposed on workers who earn less than \$78,000 per year. This threshold would be adjusted annually for inflation. The rule would also require employers to disclose the existence of non-compete agreements to potential employees before they accept a job offer.

The FTC's proposed rule is intended to promote competition and innovation in the labor market by reducing the prevalence of non-compete agreements that can limit workers' job mobility and reduce their bargaining power. The FTC has argued that non-compete agreements can harm workers by preventing them from pursuing better job opportunities and potentially depressing wages.

It is important to note that the FTC's proposed rule is still in the comment period, meaning that interested parties can submit comments and feedback on the proposal before it is finalized. The final rule, if adopted, could differ from the proposed version.

Guidance from the Equal Employment Opportunity Commission

- On May 12, 2022, the Equal Employment Opportunity Commission (“EEOC”) and the Department of Justice released technical guidance
- **The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.**
- And on May 18, 2023, additional guidance was issued:
 - **Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964**



ADA and Title VII Considerations

- Employers must take care to ensure that they are using proper parameters for any AI-powered decisions, but importantly, it is recommended that human resources professionals monitor AI results consistently.
- In theory, AI can help reduce or eliminate unconscious bias. However, AI tools can also have the opposite effect. This is because AI tools are only as good as the data they are fed.
 - The employer does not provide a “**reasonable accommodation**”
 - The employer relies on an algorithmic decision-making tool that intentionally or unintentionally “**screens out**” an individual with a disability, even though that individual is able to do the job with a reasonable accommodation
 - The employer adopts an algorithmic decision-making tool that violates the ADA’s restrictions on **disability-related inquiries and medical examinations**.
 - AI tools could potentially disparately impact individuals based on race, color, religion, sex, or national origin.

Other Issues...

Can artwork created randomly by artificial intelligence be copyrighted?

The U.S. Copyright Office says the answer is no.

<https://www.rangefinderonline.com/news-features/industry-news/u-s-copyright-office-artificial-intelligence-art-isnt-protected/#:~:text=The%20Thaler%20case%20highlights%20the,created%20in%20part%20with%20AI>

Getty Images Sues Stability AI for Copyright Infringement

“Getty Images, a global visual content creator and leading source for visual content, has filed a lawsuit against startup technology company Stability AI for allegedly scraping more than 12 million photographs from Getty Images’ portfolio without consent or compensation.”

<https://www.jdsupra.com/legalnews/getty-images-sues-stability-ai-for-8302472/#:~:text=However%2C%20Stability%20AI%20allegedly%20did,this%20is%20clear%20copyright%20infringement>

Issues That Have Come Up Already...

ChatGPT and Ethics: Can Generative AI Break Privilege and Waive Confidentiality?

“While ChatGPT is the coolest new technology around, it may be setting attorneys up for ethical violations under the Model Rules and putting both attorney-client privilege and client confidentiality at risk.”

<https://www.law.com/legaltechnews/2023/01/26/chatgpt-and-ethics-can-generative-ai-break-privilege-and-waive-confidentiality/?slreturn=20230512113136>

Lawyers blame ChatGPT for tricking them into citing bogus case law

“Two apologetic lawyers responding to an angry judge in Manhattan federal court blamed ChatGPT Thursday for tricking them into including fictitious legal research in a court filing.”

<https://apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fdf4f099aa122437dbb59b>



Avoiding Disparate Impact Claims

- In disparate impact claims, a plaintiff must identify a policy or practice that has a disproportionately harmful effect on a protected class.
- If the plaintiff meets this initial burden, the burden of persuasion then shifts to the employer to show both that
 - the policy or practice is “job related for the position in question and consistent with business necessity; and
 - no other alternative employment requirement suffices.”
- Thus, ***employers should ensure that whatever parameters they set for their AI tools meet these two criteria.***

The Four-Fifths Rule



- Consider how a plaintiff can show disparate impact.
- Generally, a plaintiff can show disparate impact through statistical comparison, which is subject to employer challenge. The EEOC often uses a "four-fifths rule of thumb" in analyzing disparate impact claims (e.g.: the selection rate for any protected class that is less than four-fifths (80%) of the selection rate for the most successful group generally constitutes evidence of discrimination) (29 C.F.R. § 1607.4(D)).
- **Motives are irrelevant**; that an AI-powered tool made the decision does not matter.
- In auditing the results of their AI-powered decisions employers may consider whether the selection rate for any protected class is less than 80% of the selection rate for the most successful group generally.

How to Mitigate Risk

- Put in Place Workplace Policies
- Carefully Review and Comply with Applicable Law
- Designate point person(s) for overseeing AI issues.

The Recommended Components of an Artificial Intelligence Workplace Policy



Questions to Ask Before Deciding on Workplace Generative AI Policies...

- Do our current policies apply already?
- What do we want our employees to do or not do with respect to generative AI?
- Clear definition of what technology is covered (for example, enterprise vs. public tools).
- Authorized/unauthorized tools (e.g., restrictions on “Beta” tools).
- Authorized/unauthorized tasks.
- Any required approvals.
- Copyright ownership of AI results.
- Process for evaluation of AI product/results.
- Consequences of violation?

Types of AI Policies

- Policies that prohibit the use of generative AI.
- Policies that allow some/certain employees to use generative AI.
- Policies that allow all employees to use generative AI with prior permission.
- Policies that allow employees to cautiously use generative AI.
- Policies that openly allow employees to use generative AI.
- Employers should draft their policies *after* giving careful consideration to how generative AI can/is being used in the workplace, how they want it used, their level of risk tolerance, etc.

Best Practices...

- Make clear that the human user is ultimately responsible for their work product.
- Consider whether you only want certain employees to use generative AI, such as experts.
- Analyze what legal obligations you have in the applicable jurisdictions.
- Consider whether you want to require prior approval of certain technologies.
- Make clear that all activities performed and output collected is subject to company policies, code of conduct, applicable privacy considerations, and the law.
- “Consider identifying certain tasks which would be “off limits” for AI use.” (For example, “thoughts and prayers” communications after tragedies, termination letters, responses to customer complaints, etc.).
- Include a non-discrimination clause.
- Regularly monitor and update the policy.
- Include a point of contact for questions.

Consider Applicable L&E Laws...



Illinois Artificial Intelligence Video Interview Act

- **Reporting Requirements:**
- An employer that relies solely upon an artificial intelligence analysis of a video interview to determine whether an applicant will be selected for an in-person interview must collect and report the following demographic data:
 - the race and ethnicity of applicants who are and are not afforded the opportunity for an in-person interview after the use of artificial intelligence analysis; and
 - the race and ethnicity of applicants who are hired.
- The demographic data collected must be reported to the Department of Commerce and Economic Opportunity annually by December 31.

California Privacy Rights Act

- Went into effect January 1, 2023; includes private right of action
- Authorizes regulations granting consumers opt-out rights with respect to business' use of automated decision making technology, including profiling, in connection with decisions related to a consumer's work performance, economic situation, health, personal preferences, interests, reliability, behavior, location or movements.
- Consumers will be able to make access requests to seek out "meaningful information about the logic involved in such decision-making processes, as well as a description of the likely outcome of the process with respect to the consumer."

New York City's Automated Employment Decision Tools Law

- Went into effect January 1, 2023
- Covers “**automated employment decision tools**” which are defined as “computational process, derived from machine learning, statistical modeling, data analytics, or **artificial intelligence**, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.”
- Includes a notice requirement.
- Employers and employment agencies cannot use an automated employment decision tool to screen a candidate or employee for an employment decision unless:
 - The tool has been the subject of a bias audit conducted no more than one year prior to the use of such tool; and
 - A summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies has been made publicly available on the website of the employer or employment agency prior to the use of such tool.

General Take Aways

- Keep abreast of recent and upcoming legal developments to ensure compliance.
- Develop and maintain applicable AI usage policies.
- Be mindful of industry standards regarding AI usage.
- Review AI product/outcomes, including to look out for potential unconscious bias.
- Embrace change.

Artificial Intelligence (AI) Federal Regulatory and Legislative Developments



U.S. Federal Action

- In October 2022, the White House Office of Science and Technology Policy (OSTP) published a [Blueprint for an AI Bill of Rights](#)
- On January 26, 2023, the National Institute of Standards and Technology (NIST) released the [AI Risk Management Framework](#) to help organizations and individuals manage the potential risks of AI technologies
 - In March, NIST launched the [Trustworthy and Responsible AI Resource Center](#), which will facilitate implementation of, and international alignment with, the AI RMF
- The Federal Trade Commission (FTC), U.S. Department of Justice (DOJ) and the U.S. Equal Employment Opportunity Commission (EEOC) issued a joint statement [on enforcement efforts against discrimination and bias in automated systems](#)
- In May, the President's Council of Advisors on Science and Technology (PCAST) [working group on generative artificial intelligence \(AI\)](#). The PCAST working group will help assess key opportunities and risks and provide input on how best to ensure that these technologies are developed and deployed as equitably, responsibly, and safely as possible

Congress and AI

- In 2018, Congress created the [National Security Commission on Artificial Intelligence](#) (NSCAI). The Commission was established:
 - “to consider the methods and means necessary to advance the development of artificial intelligence, machine learning, and associated technologies to comprehensively address the national security and defense needs of the United States.”
- Congress enacted the National Artificial Intelligence Initiative Act of 2020 (NAIIA) [The National Artificial Intelligence Initiative](#) was launched to ensure U.S. leadership in the responsible development and deployment of trustworthy AI and support coordination of U.S. research, development, and demonstration of AI technologies across the Federal government

04.13.2023

***Schumer Launches Major Effort To
Get Ahead Of Artificial Intelligence***



Key Players

Biden
Administration

Senate Majority
Leader Chuck
Schumer (D-NY)

Senate Artificial
Intelligence (A)
Caucus

House Artificial
Intelligence (AI)
Caucus

What's Next?

TABLE 1: A SELECTION OF KEY U.S. AI POLICY ACTIONS

Actor	Action	Function
Trump administration	Executive Order 13859: "Maintaining American Leadership in AI" (2019)	Describes principles and strategic objectives meant to guide AI-related agency actions toward increasing U.S. competitiveness in AI. Requests that OMB develop guidance for agencies considering regulating AI applications. Establishes AI as a key priority in R&D investment, agency data sharing, and workforce development.
<p>1. H.R. 3831 — 118th Congress (2023-2024)</p> <p>To require generative artificial intelligence to disclose that their output has been generated by artificial intelligence, and for other purposes.</p> <p>Sponsor: Torres, Ritchie [Rep.-D-NY-15] (Introduced 06/05/2023) Cosponsors: (0)</p> <p>Committees: House - Energy and Commerce</p> <p>Latest Action: House - 06/05/2023 Referred to the House Committee on Energy and Commerce. (All Actions)</p> <p>Tracker: Introduced ➔ Passed House ➔ Passed Senate ➔ To President ➔ Became Law</p>		
<p>RESOLUTION</p> <p>2. H.Res. 66 — 118th Congress (2023-2024)</p> <p>Expressing support for Congress to focus on artificial intelligence.</p> <p>Sponsor: Lieu, Ted [Rep.-D-CA-36] (Introduced 01/26/2023) Cosponsors: (0)</p> <p>Committees: House - Science, Space, and Technology</p> <p>Latest Action: House - 01/26/2023 Referred to the House Committee on Science, Space, and Technology. (All Actions)</p> <p>Tracker: Introduced ➔ Agreed to in House</p>		
<p>BILL</p> <p>3. S. 1394 — 118th Congress (2023-2024)</p> <p>Block Nuclear Launch by Autonomous Artificial Intelligence Act of 2023</p> <p>Sponsor: Markey, Edward J. [Sen.-D-MA] (Introduced 05/01/2023) Cosponsors: (3)</p> <p>Committees: Senate - Armed Services</p> <p>Latest Action: Senate - 05/01/2023 Read twice and referred to the Committee on Armed Services. (All Actions)</p> <p>Tracker: Introduced ➔ Passed Senate ➔ Passed House ➔ To President ➔ Became Law</p>		

Biden administration	Blueprint for an AI Bill of Rights (2022)	Lays out nonbinding ethics- and civil rights-based principles for government and industry use of AI and describes example agency actions taken in support of these principles.
	Executive Order 14091: "Further Advancing Racial Equity and Support for Underserved Communities . . ." (2023)	Encourages a government-wide focus on equity, including reiterating efforts to enable data-driven assessments of equity in agency actions and directing agencies to "protect[] the public from algorithmic discrimination."
Congress	AI in Government Act of 2020	Creates an AI Center of Excellence to facilitate government AI adoption. Instructs OMB to create guidance informing government AI adoption and policy development.
	National AI Initiative Act of 2020	Directs billions of dollars to the Department of Energy, Department of Commerce, and National Science Foundation to support AI R&D. Mandates that NIST develop the RMF. Establishes AI-related coordination and advisory bodies in government.

Source: Carnegie Endowment For International Peace



Thank You