AI IS IN THE WORKPLACE – ARE YOU READY?

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Introduction to Generative AI ("GAI")

- What is Generative AI?

- How is GAI different than just a Google Search?

- List of employers who are using your data to train GAI?
  - Microsoft, Google, Instacart, Zoom and more

- Which parts of your data is being used?
  - Just about everything.

GAI TOOLS
General Uses Across Many Fields

1. General Workplace Efficiency

   - GAI can help you create work product like PowerPoints, letters and emails.

2. Healthcare and Medicine

   - GAI can personalize treatment plans, speed up diagnosis, and improve patient outcomes.

3. Robotics and Automation

   - GAI-powered robots can perform complex tasks in manufacturing, logistics, and other industries.

4. Research and Scientific Discovery

   - GAI can analyze vast amounts of data, identify patterns, and make novel discoveries.

5. Education and Learning

   - GAI can provide personalized tutoring, adapt to individual learning styles, and enhance educational experiences.

GAI TOOLS IN THE EMPLOYMENT SETTING

- **GAI Recruitment Tools** – screening candidates, onboarding new hires and *interviewing* candidates.

- **Performance Management GAI Tools -** tracks attendance, performance ratings, and project completion rates to measure overall effectiveness at work.

- **Employee Engagement GAI** – surveys, quizzes, polls to determine how to motivate and direct workforce.

- **Workplace Planning GAI** – identifies skill gaps in current employee roster.

- **HR Chatbots** – yes, you can direct employees to ask all of their HR questions to an AI-powered chatbot.

GENERAL DANGERS POSED BY GAI

Generative AI is trained to be agreeable and helpful, and will give you seemingly helpful answers even when its wrong.

GAI is never completely up-to-date. It's limited by the dataset loaded into it.

Copyright violations – GAI doesn't typically create new data. It relies on the data loaded into it. And if that data is copyrighted…

GAI hallucinates and lies.

MOST REGULATED EMPLOYMENT TOOL TO DATE

Automated Employment Decision Tool ("AEDT")

Or

Automated Decision Tool ("ADT")

- What is an AEDT/ADT?
  - *A computer-based tool that uses machine learning, statistical modeling, data analytics, or artificial intelligence to substantially help with employment decisions.*

- Why has it become the focus of legislation?

ENACTED LEGISLATION ON GAI IN THE WORKPLACE

- New York's Local Law 144 –the first piece of legislation restricting employer's use of artificial intelligence-driven employment tools.

- Illinois' AI Video Interview Act (820 ILCS 42) –governs the use of AI to assess video interviewees for jobs.

- Maryland Bill 1202 –prohibits use of facial recognition tools in interview process.

EMERGING LEGISLATION ON AI

- **Vermont proposed bill – H114 –** restricts the use of automated decision systems for employment-related decisions.

- **New Jersey proposed bill – A4909 –** restricting hiring software to products that have been subjected to a "bias audit."

- **Georgia proposed bill – HB890 –** Expand scope antidiscrimination laws to include discrimination resulting from reliance on AI.

- **Washington proposed bill - HB 1951 –** requires developers of ADTs to complete annual impact assessments and make mandatory disclosures.

LEGISLATION IN MICHIGAN

Well...There is none. Currently.

FEDERAL OVERVIEW ON AI

In May 2023, U.S. Senators Gary Peters, Chairman of the Homeland Security and Governmental Affairs Committee introduced bipartisan legislation to create an artificial intelligence (AI) training program for federal supervisors and management officials.

BIDEN EXECUTIVE ORDER ON AI

- On October 30, 2023, President Biden issued an Executive Order, along with a summary Fact Sheet concerning the safe, secure, and trustworthy use of AI.

- The Order mandates various federal agencies to develop new rules and regulations reflective of the administration's goals.

EEOC GUIDANCE REFRESHER

- EECO issued May 12, 2023, guidance on employers' use of artificial intelligence (AI) during the hiring process. This guidance finds its basis in past EEOC statements regarding the hiring process.

- Title VII prohibits employers from using neutral selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, if the selection procedures are not "job related for the position in question and consistent with business necessity."

EEOC GUIDANCE ON USAGE OF GAI IN EMPLOYMENT

- Could an employer's use of an AI tool be a "selection procedure" under Title VII?

- Can employers assess their use of an AI tool for adverse impact in the same way they assess more traditional selection procedures?

- Is an employer responsible under Title VII for its use of AI tools even if the tools are designed or administered by another entity, such as a software vendor?

- What is a "selection rate"?

EEOC GUIDANCE ON USAGE OF GAI IN EMPLOYMENT

- What is the "four-fifths rule"?

- Does compliance with the four-fifths rule guarantee that a particular employment procedure does not have an adverse impact for purposes of Title VII?

- If an employer discovers that the use of an AI tool would have an adverse impact, may it adjust the tool, or decide to use a different tool, in order to reduce or eliminate that impact?

CURRENT LITIGATION

- Mobley v. Workday, Inc.
- EEOC v. iTutorGrouo, Inc.

EEOC ADA REFRESHER

EEOC warns of disadvantage AI tools may create for individuals with disabilities in workplace and hiring with another Q and A document in May of 2022.

- Reasonable accommodation may be needed at hiring.
- And it may be different than accommodations needed on the job.
- Algorithms can be biased in sneaky ways
- AI tools must not ask disability related inquiries or seek medical examinations

Important to think through how AI can assist individuals with disabilities too

US Code currently defines aides as:

- Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- Acquisition or modification of equipment or devices;
- Other similar services and actions.

2024 DOL Field Assistance Bulletin

DOL warns of issues AI tools may create related to various laws including the FLSA, FMLA Employee Polygraph Protection Act – April 2024.

- Time spent working is paid regardless of productivity
- Break time requires being completely off duty
- Without human oversight – there may be issues with processing leave requests or miscounting days where leave is being utilized
- Systems tracking leave use cannot be used to retaliate
- Employers cannot use **any** form of deception review software unless a permissible exemption applies

Important, always, to make sure employers are applying typical standards and protocols in ensuring legal compliance

EMPLOYMENT POLICY CONSIDERATIONS

- Employers must make the decision to embrace or avoid.

- Legal Landscape is Unknown.

- What is known is AI is inaccurate, biased and false.

- Navigate with Caution.

WHY DO YOU NEED A POLICY?

- Integrity of Work Product?

- Protection of private or confidential information?

- Concern of bias?

- Concern of other contractual obligations?

- Concern of intellectual property?

- Other?

AI AND EMPLOYEE MISCONDUCT

- What is Employee Codes/Handbooks are Key

- Encourage as much Notice Regarding Use of AI as Possible.

- Words Matter

- Be careful in Monitoring

- Proposed:
  [Employer] prohibits the use of generative artificial intelligence to create work product unless expressly permitted in writing by [Enter Appropriate Supervisor]. If the use of generative artificial intelligence is approved, the employee must identify the portion(s) of the work-product generated by artificial intelligence and the artificial intelligence platform utilized."

AI AND INTERNAL USE
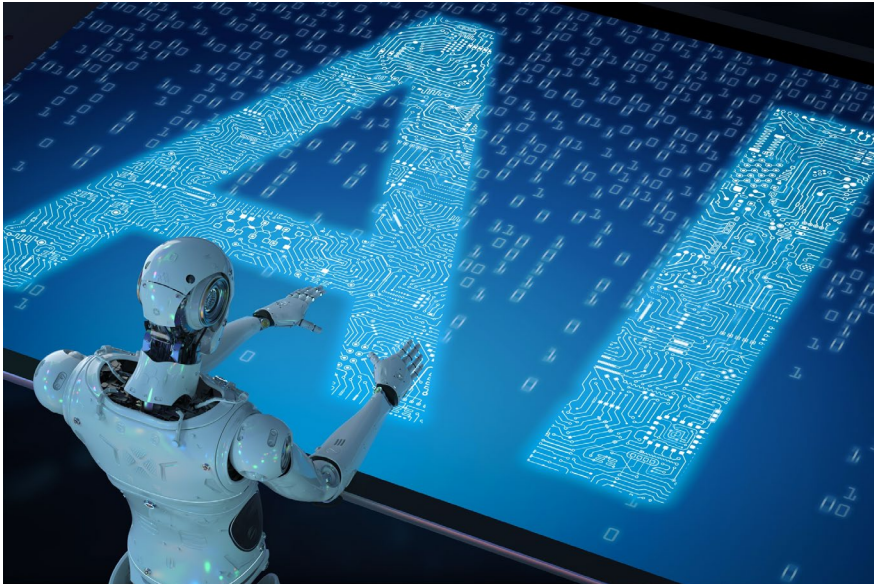
- AI is a great recruitment and performance management tool

- Regardless of current law, monitoring is critical
  - Review for bias
  - Review for accessibility
  - Create outward facing policies

AI AND CONFIDENTIAL INFORMATION

GAI promises productivity and efficiency gains in the workplace. It is not going anywhere and will become more widespread and better over time.

Need to manage risks associated with the technology, including risks to proprietary and confidential information in your possession –

E.g., personnel files, financial data, trade secrets and proprietary information, protected health information, confidential investigatory material, etc.

AI AND CONFIDENTIAL INFORMATION

Use of Private or Confidential Information on GAI Tools Creates Risks

- Public-Facing Tools

- Third-Party Compliance

- Preexisting Agreements (e.g., NDAs)

- Attorney Client Privilege

AI AND CONFIDENTIAL INFORMATION - EXISITING LAWS

Various existing laws impact or prohibit the unauthorized disclosure of confidential employee, patient, taxpayer, customer, and/or client information, for example:

- Michigan Identity Theft Protection Act, MCL 445.61

- HIPAA, Public Law 104-191

- Michigan FOIA (and exemptions), MCL 15.231; MCL 15.243

AI AND CONFIDENTIAL INFORMATION

QUICK TIPS

- AI Policies and Training

- Closed GAI Tools

- Due Diligence on Third-Party Vendors' AI Use

- NDAs/Contractual Provisions

AI AND INTELLECTUAL PROPERTY - COPYRIGHT LAW

- Copyright is a form of protection grounded in the U.S. Constitution

  - Copyright Clause: "[the United States Congress shall have power] to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Constitution, Art. I, Section 8, Clause 8.

- Copyright gives authors of creative works a bundle of exclusive rights related to those works for a limited period of time.

AI AND INTELLECTUAL PROPERTY COPYRIGHT SUBJECT MATTER

- Literary Works
- Musical Works
- Pantomimes and Choreographic Works
- Computer Programs

- Pictorial Graphic and Sculptural Works
- Motion Pictures
- Sound Recordings
- Architectural Works

AI AND INTELLECTUAL PROPERTY

COPYRIGHT RIGHTS

- Reproduce the Work in Copies

- Modify/Adapt and Prepare Derivative Works

- Distribute Copies to the Public for Sale, Rental, Lease or Lending

- Perform Publicly

- Display Publicly

AI AND INTELLECTUAL PROPERTY

COPYRIGHT INFRINGEMENT

- Copyright infringement is the act of exercising, without permission or legal authority, one or more of the exclusive rights granted to the copyright owner under the Copyright Act (Title 17 of the United States Code).
  - *Downloading, uploading, sharing, or posting parts of a copyrighted work without authority*

- Individual Liability/Criminal Penalties. Severe for "willful" violations.

- Vicarious Liability. If the employer/defendant directly benefits from the infringing activity and the employer/defendant had the right and ability (but failed) to control the infringing activity.

AI AND INTELLECTUAL PROPERTY – OPEN QUESTIONS

Who Owns AI-Generated Content?

- Because AI platforms are trained on and use data sets, they learn from and use information from the data set.
- On the one hand, creators of that data may have some claim to the AI-generated content; meanwhile, the AI platform may be an original creation and the rights to its output could be owned by the creators of the AI.

Debates Over "Derivative Works" vs "Fair Use"

- "Derivative Works" are based on pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, **or any other form in which a work may be recast, transformed, or adapted**.
- Fair Use" allows copyrighted work to be used **without the owner's permission** "for purposes such as criticism (including satire), comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." Fair use is often described as "transformative" use of a work.

POLICY PROVISIONS TO CONSIDER

- Unauthorized Software Prohibited

- Approval process

- Requirements even where approved

- Who makes decisions on approval

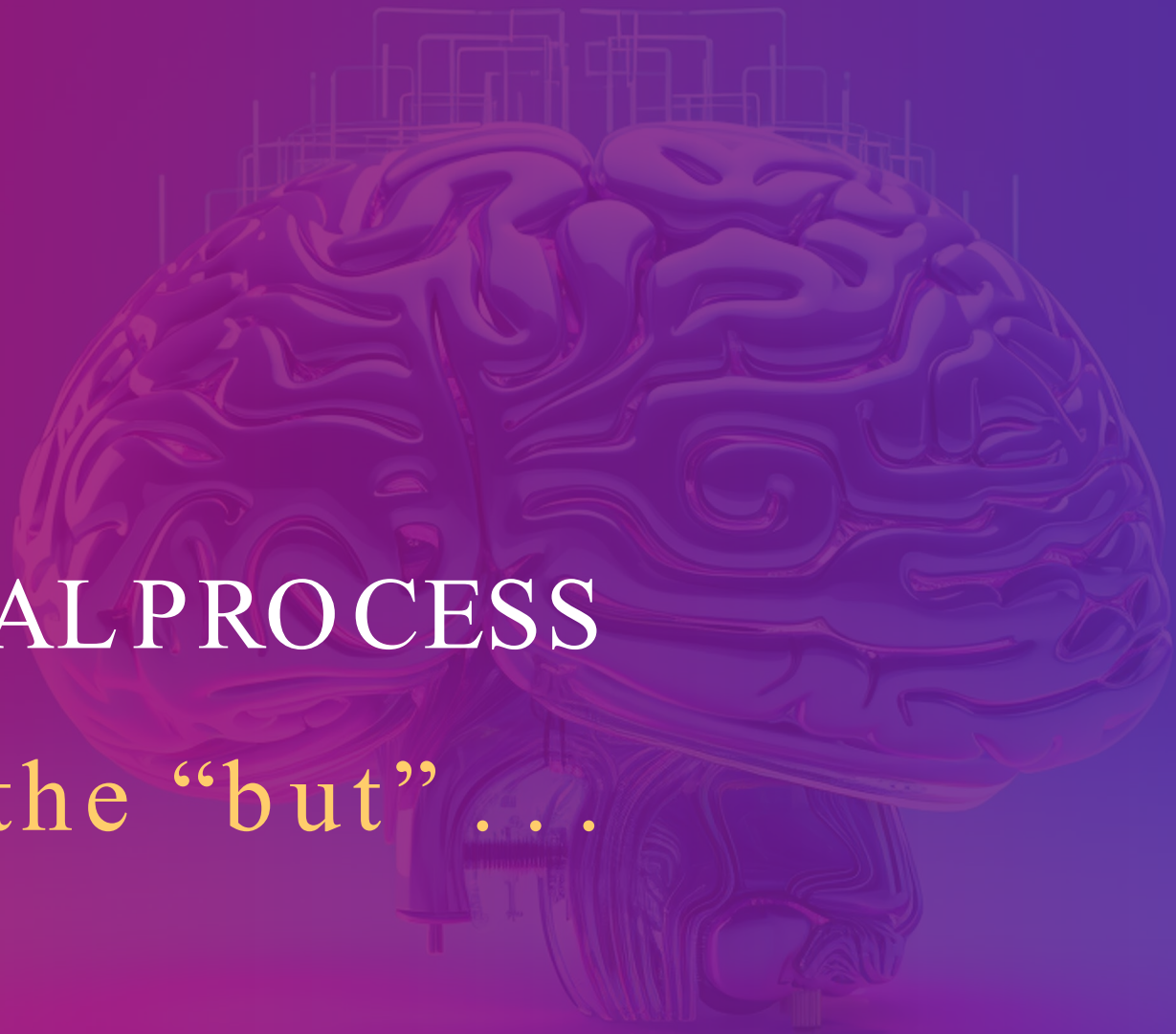- Manner of enforcement

START WITH UNAUTHORIZED USE PROHIBITION

Start with "no" . . . But!

APPROVAL PROCESS

Now for the "but"…

IF APPROVED, MORE CONDITIONS AS APPROPRIATE

- User must agree to review all work where AI is used for accuracy

- Agree to acceptable uses

ACCEPTABLE USES

- For general-knowledge questions meant to enhance your understanding on a work-related topic.

- To brainstorm ideas related to projects you are working on.

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UNACCEPTABLE USES

- Infringing the rights of others, including privacy and intellectual property rights.

- Interfere with the performance of job duties or of other employees' job duties.

- Using any text created by an AI chatbot in final work products of any kind, without fact-checking its accuracy and reliability.

- Copying and pasting, typing, or in any way submitting entity, client, employee content or data of any kind into the AI chatbot. This includes personal, confidential, protected, proprietary or private information, and/or data that may be covered under a data use agreement.

- Failing to properly cite an AI chatbot when you incorporate its output into your work. This includes direct quotations, images, and data.

ENFORCEMENT

- Require reporting of violations

- Prohibition of retaliation for violation

- Reserve right to change policy

- Reserve right to contact law enforcement
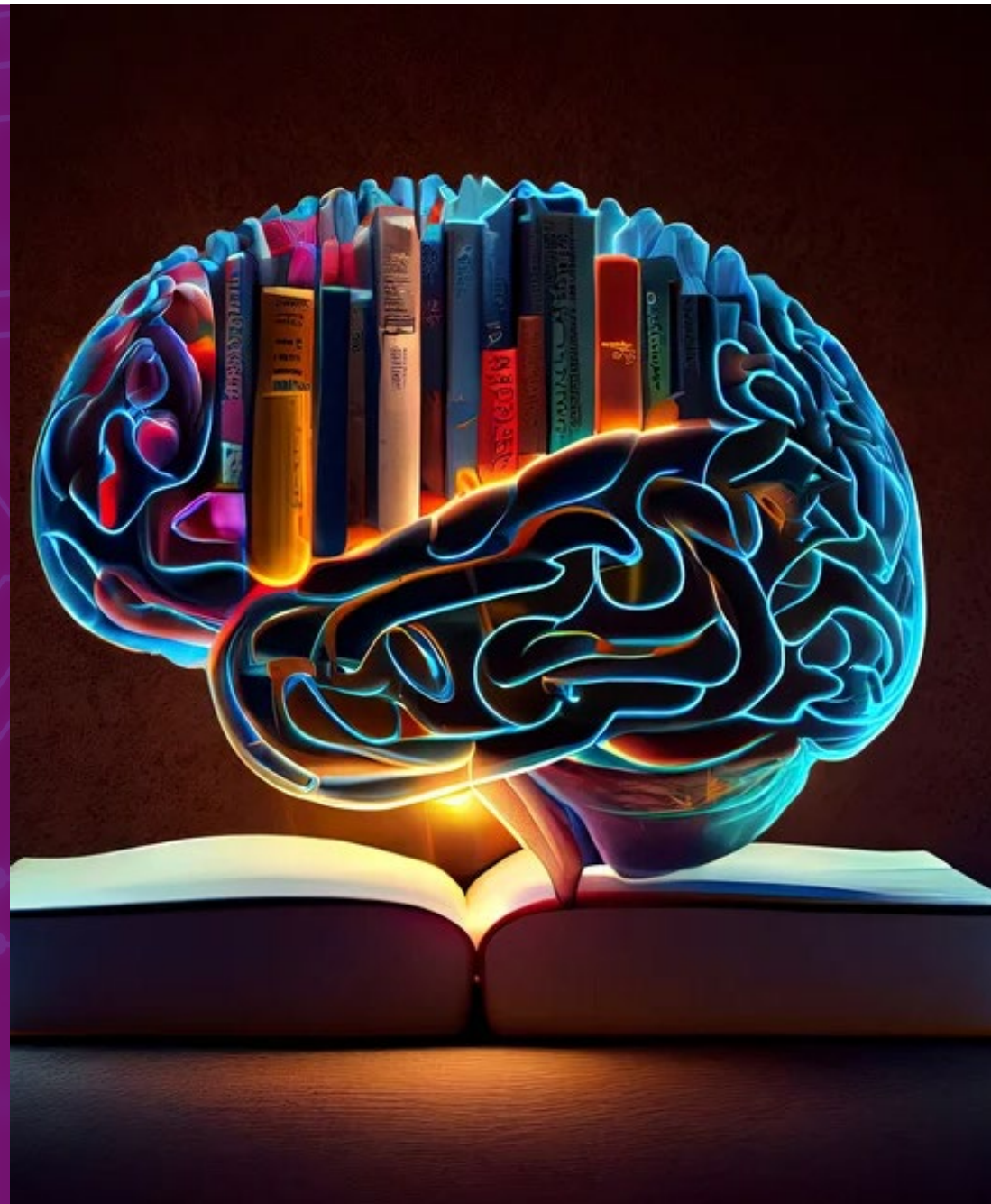
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THANK YOU!

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