

2024 OSHA and Employment **Webinar** series

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The Intersection Between Artificial Intelligence and Employment and OSHA Law

Wednesday, November 13, 2024

The Attorneys in **Conn Maciel Carey LLP's**
National Labor • Employment and Workplace Safety Groups

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- Focuses on OSH compliance and litigation, including inspections, audits, investigations, and enforcement actions involving Cal/OSHA, fed OSHA, and other State OSH Plans.
- Represents employers and trade associations in Cal/OSHA and fed OSHA rulemakings.
- Previously, Rachel was a partner and led the national OSHA Practice at an AmLaw 100 law firm.



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- Represents employers in Cal/OSHA inspections, investigations, and enforcement actions.
- Provides employers with legal advice and counseling on employment law and Cal/OSHA compliance.
- Litigates discrimination, wrongful termination, PAGA, and class action cases in state and federal courts.
- Represents clients in OSHA rulemaking, including proposed rules regarding the worker walkaround rule and heat illness prevention.

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Darius Rohani-Shukla is an Associate in **Conn Maciel Carey's** OSHA • Workplace Safety and Labor • Employment Groups:

- Advises on AI, privacy, and data security issues across various domains, including state privacy laws, HIPAA, and employment-specific privacy matters, helping clients with compliance, employee monitoring, and data protection policies.
- Supports clients on various occupational safety and health law issues, including counseling on compliance with OSHA rules and standards, and representing employers in OSHA inspections, investigations, and enforcement actions.
- Represents clients in litigation, including matters related to restrictive covenants, wage and hour disputes, claims of discrimination and harassment, compliance with the ADA, and the FMLA.



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Samuel S. Rose is an Associate in the Los Angeles office of **Conn Maciel Carey** supporting the OSHA • Workplace Safety and Labor • Employment Practice Groups.

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- Assists employers with developing workplace safety and health programs and policies.
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Agenda

- Overview of AI
- Examples of How AI is Used in the Workplace
- Examples of How AI is Used to Promote Workplace Safety
- Regulatory Framework
- Employment Considerations
- OSHA Considerations
- Developing an AI Strategy for Your Company



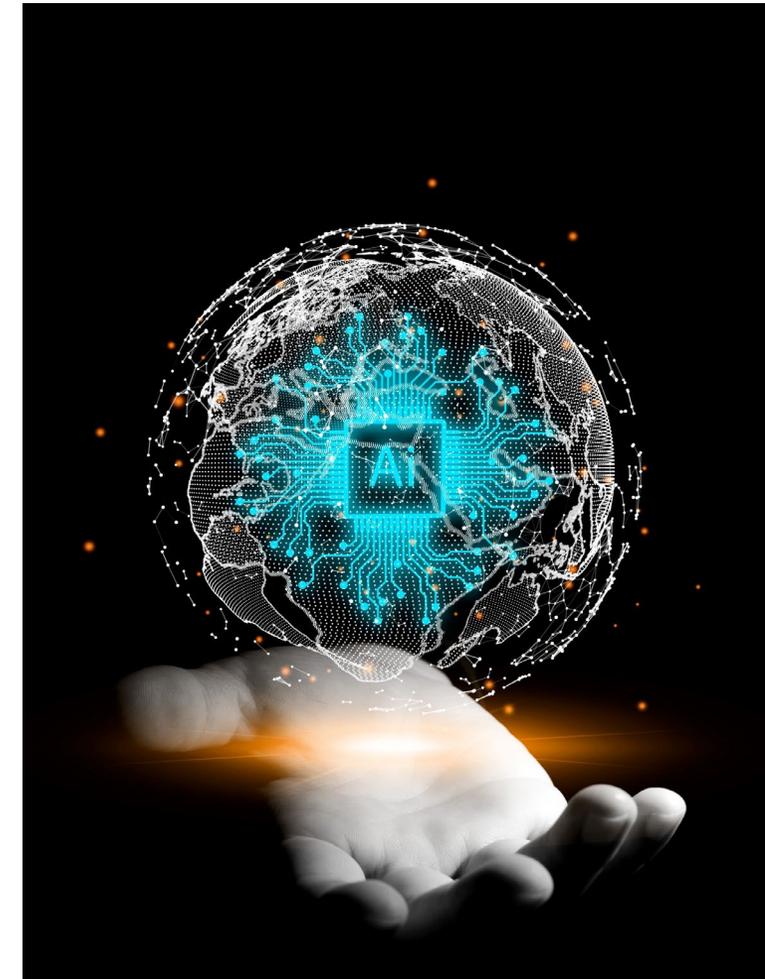
Overview of AI

What is Artificial Intelligence (“AI”)?

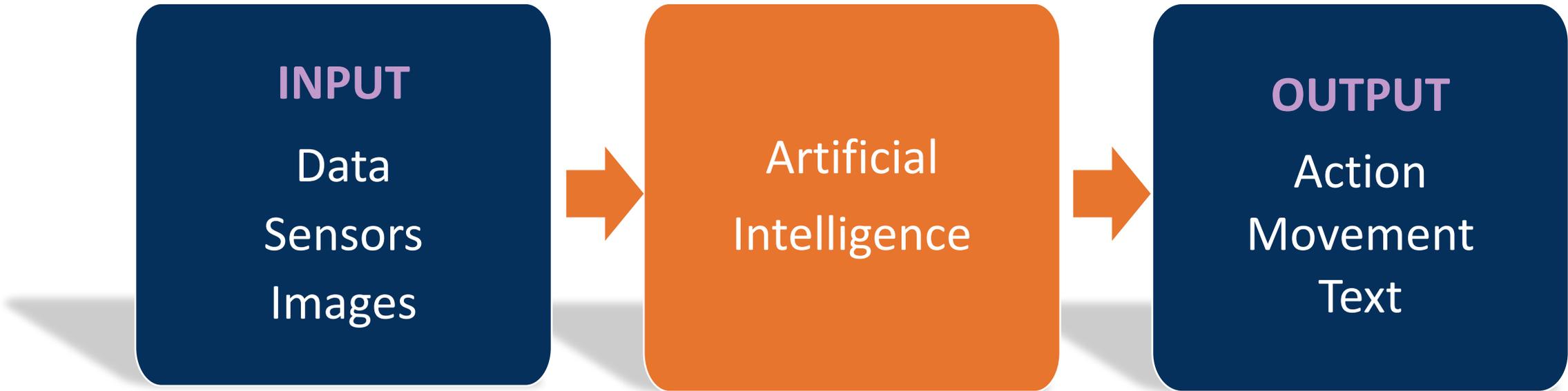
- AI is a field of computer science that focuses on the development of intelligent machines that can perform tasks that typically require human intelligence, such as visual perception, speech recognition, decision-making, and language translation.
- AI has a broad scope, which includes various subfields, such as machine learning, natural language processing, robotics, and computer vision. These subfields have the potential to transform various industries, such as healthcare, finance, manufacturing, and transportation.

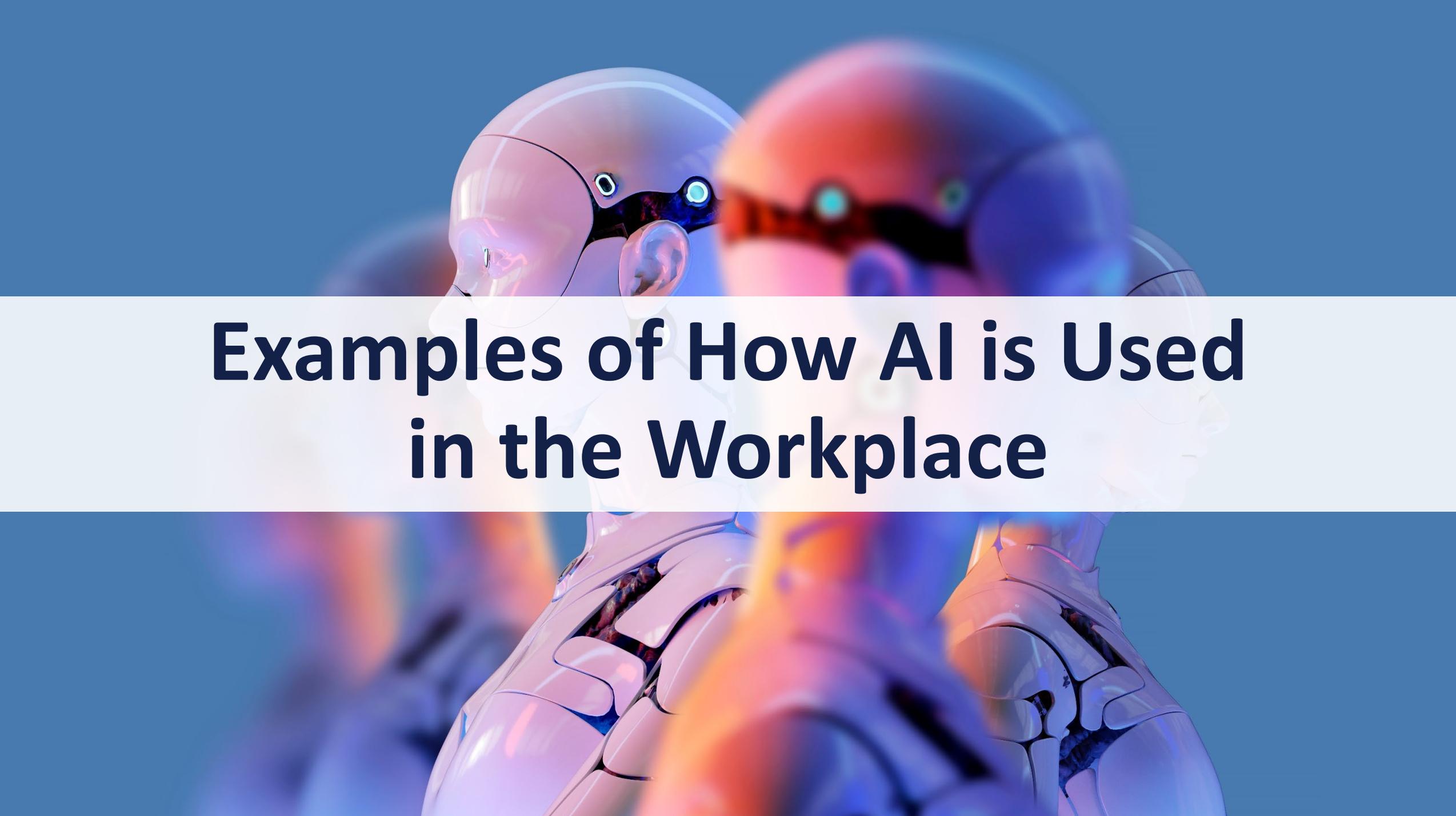
Two Main Types of AI

- Machine Learning
 - Machine learning is a type of AI where the system learns from data without being explicitly programmed.
- Deep Learning
 - Subset of machine learning - enables automatic learning through absorption of huge amounts of unstructured data such as text, images, or video



How does AI work?





Examples of How AI is Used in the Workplace

Using AI to Recruit



Screening and assessing candidates



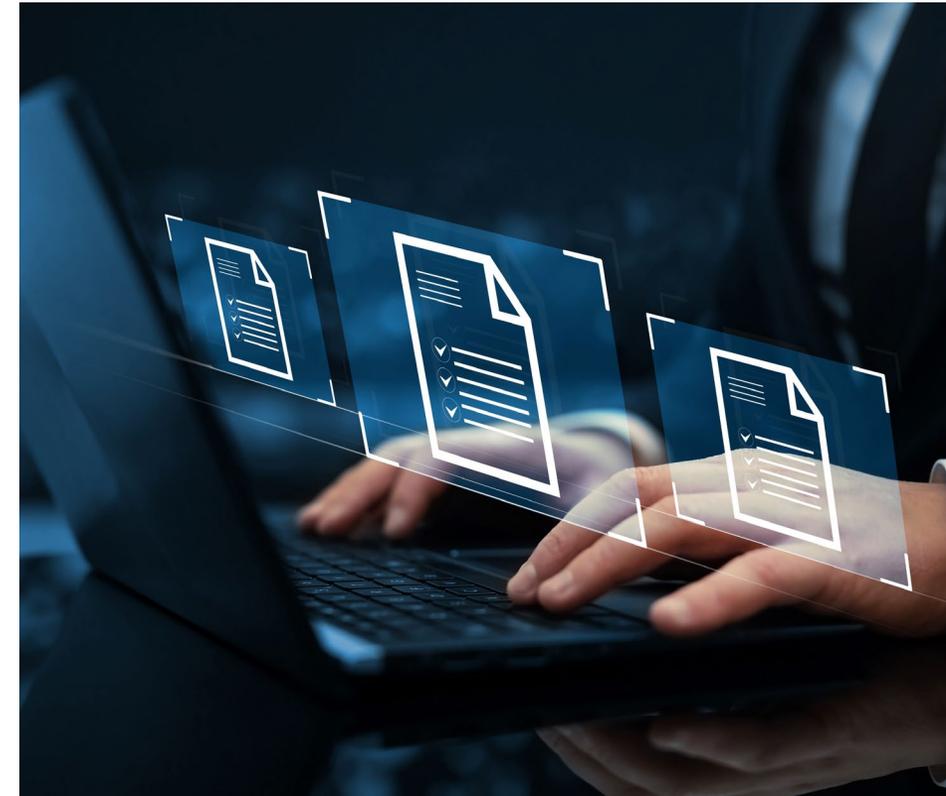
Identifying the best candidates based on publicly available data, like social media profiles



Using Chatbots to engage with candidates during onboarding

Using AI to Draft Written Materials

- One of the most time-consuming parts of Human Resources work can be drafting written materials such as:
 - Job Descriptions
 - Performance Reviews
 - Marketing Materials
 - Safety Policies



Using AI to Manage Employee Performance



Performance Management Algorithms



Employee Efficiency Monitoring



Employee Retention Predictions

Using AI to Manage Employee Compensation



Customization or Improving Benchmarking in Compensation



Higher Employee Engagement



Closing Pay Gaps

Using AI to Shape Employee Career Paths



Suggesting job openings or career paths for current employees



Providing recommendations for learning and training to employees



Examples of How AI is Used to Promote Workplace Safety

Surveillance Systems and Monitoring

- **Real-Time Hazard Detection:** Uses computer vision to identify safety risks, like lack of PPE, spills, equipment malfunctions, or other unsafe practices.
- **Behavior Monitoring:** Tracks activities and movements to ensure compliance with safety protocols. Detects unsafe behaviors (e.g., improper lifting, lack of protective gear).
- **Biological Monitoring:** Involves the detection of biomarkers in biological samples (e.g., breath, urine, blood, hair, etc.) from workers. Enables employers to monitor and prevent over exposure to workplace hazards.
- **Automatic Alerts and Notifications:** Instantly alerts supervisors or safety personnel of detected hazards or non-compliance. Enables faster response to emerging safety issues, reducing the risk of accidents.

Predictive Analytics and Predictive Maintenance

- **Predictive Analytics:** Collects data on incidents, near misses, and trends over time to forecast future trends, preventing future hazards by identifying high-risk areas and practices.
- **Predictive Maintenance:** Uses sensors and data analysis to anticipate equipment failures before they happen. Utilizes machine learning algorithms to identify patterns that indicate wear and potential breakdowns.

Automation in High-Risk Tasks

- Reduces human involvement in tasks that have a high risk of injury, minimizing exposure to potential injuries.
 - E.g., heavy lifting, repetitive tasks, hazardous material handling, high-temperature, confined space, or toxic environment work.





Regulatory Framework

Current State of AI Laws – AI Specific

- NYC Local Law 144
- Colorado AI Act
- IL Video Interviewing Act; IL Limit Predictive Analytics (2026)
- MD Labor & Employment –Video Interviewing Act
- CA Civil Right Council Regulations on ADT in Employment (DRAFT)
- EU AI Act
- Over 100 bills pending
 - AI Disclosure Act of 2023 (HR 3831) would require GenAI systems to disclose that their output has been generated by AI. Violation would be treated as UDAP violation under FTC Act.
 - Eliminating Bias In Algorithmic Systems Act of 2023 (SB 3478) would require agencies to establish an office of civil rights focused on bias and other algorithmic harms.

Current State of AI Laws – AI Covered

- CCPA
- State biometric laws
- All party consent laws
- Electronic monitoring laws
- GDPR/ UK GDPR

Current State of AI Laws – Regulates AI

- ADA
- Title VII of the Civil Rights Act
- FTC Section 5, State UDAP
- FCRA
- Age Discrimination in Employment Act

- Biden Executive Order - On October 30, 2023, the Biden-Harris Administration issued an Executive Order entitled “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” that emphasizes the need for regulation of high-risk AI and critically recognizes the link between privacy and AI.
 - Directs the Secretary of Labor to publish principles and best practices for employers that could mitigate AI’s potential harms to employees and maximize its benefits.
 - The principles and best practices will cover:
 - job-displacement risks and career opportunities related to AI, including effects on job skills and evaluation of applicants and workers;
 - labor standards and job quality, including issues related to the equity, protected-activity, compensation, health, and safety implications of AI in the workplace; and
 - implications for workers from employers’ AI-related collection and use of data about them, including transparency, engagement, management, and activity protected under worker-protection laws.
 - The EO further directs the Labor Secretary to issue guidance making clear that employers using AI to monitor or augment employees’ work must continue to ensure workers are compensated for their hours worked under the Fair Labor Standards Act.

The image features two futuristic robots. The robot on the left is shown in profile, facing left, with a white and blue metallic body and glowing blue eyes. The robot on the right is shown from a three-quarter view, facing forward, with a white and red metallic body and glowing red eyes. Both robots have a sleek, humanoid design with visible mechanical joints and components. The background is a solid blue color. A white horizontal band across the middle of the image contains the text.

Employment Considerations

Disparate Impact

- Algorithmic decision-making tool that intentionally or unintentionally “screens out” an individual based on a protected category (e.g., race, gender, age, disability)
- Algorithmic decision-making tool for use with its job applicants or employees that violates the ADA’s restrictions on disability-related inquiries and medical examinations.

iTutor Group Settlement

- May 5, 2022: EEOC filed a complaint against iTutorGroup, an organization that hires remote English tutors for students in China, in the Eastern District of New York.
 - iTutorGroup violated the Age Discrimination Employment Act by implementing a software hiring program that “intentionally discriminated against older applicants because of their age” by “automatically reject[ing] female applicants aged 55 or older and male applicants aged 60 or older,” effectively screening out over 200 applicants.
 - Discriminatory software was discovered when an applicant submitted two applications identical in all but birth date.
- iTutorGroup agreed to pay \$365,000 to a group of applicants whose applications had been rejected because of their age.
 - The Company also agreed to submit to the EEOC “proposed anti-discrimination and complaint procedures applicable to the screening, hiring, and supervision” of candidates and employees.

Employee Privacy Considerations

- AI-driven monitoring may collect data on employees, leading to potential privacy concerns.
- Any data collected through wearable devices must be treated as confidential.
- Data should only be used for lawful, intended purposes.
- Transparent communication about data collection practices is critical to maintaining trust and avoiding legal issues. Inform employees about any data being collected via wearables *before* data collection begins (e.g., What data will be collected? How and why data is collected and stored? Who will have access to the data?)

Employee Privacy Considerations Continued



- In many states, health and medical information is classified as personal information.
- If this information is breached, companies may be required by law to notify affected employees.
- Ensure such information is securely maintained.
- Reduce risk by limiting the storage duration of collected data.
- Limit access to those individuals who absolutely need it.

Tracking Off Duty Activities

- Surveillance and monitoring of employees, especially when discussing wearable devices, can monitor a user's movements, which may extend to off-duty activities if the device is not removed.
- Currently, California is the only state with a specific law governing employee GPS tracking.
 - Employers must notify employees that their location will be tracked.
 - Employees must voluntarily consent to location tracking before it can be enabled.
 - Usage Limitation: Location tracking is permitted only during working hours, and any data collected must be stored securely.
- Tracking employee locations may violate the NLRA if it occurs while employees are engaged in union-related or protected activities.



OSHA Considerations

Recordkeeping Considerations

- Data collected from monitoring may be considered an “employee exposure record” or “employee medical record” under OSHA’s Access to Employee Exposure and Medical Records Standard (29 CFR 1910.1020).

- Pertinent here, an employee exposure record is a record containing:
 - Environmental (workplace) monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to interpretation of the results obtained; or

 - Biological monitoring results which directly assess the absorption of a toxic substance or harmful physical agent by body systems (e.g., the level of a chemical in the blood, urine, breath, hair, fingernails, etc.) but not including results which assess an employee's use of alcohol or drugs.

Recordkeeping Considerations Continued

- Unless an exception or another standard applies, employers must provide employees or designated representatives access to such records within 15 days of a request and preserve and maintain:
 1. Employee medical records for at least the duration of employment plus thirty (30) years;
 2. Employee exposure records for at least thirty (30) years; and
 3. Analyses using exposure or medical records for at least thirty (30) years.



Joint Liability and Multi-Employer Worksite Considerations

- In using devices to monitor and surveil workers, companies may monitor and surveil workers who are not their employees, triggering joint employer issues in the employment realm and multi-employer worksite issues in the OSHA realm.
- Things to think about:
 - Who and what should you be monitoring/surveilling?
 - When there is an issue with a contractor's worker, what should you do with that information?
 - Who is responsible for correcting the hazard?

AI and Workplace Violence & Harassment

- AI is increasingly used to replace humans in workplace interactions, increasing employee communications with AI.
- Regulations generally do not consider AI when discussing workplace violence & harassment because while AI can generate human-like communications, it lacks true understanding or intent.
 - AI may use language that employees consider threatening or harassing.
- Ensure employees engage with AI according to company policy.
- Carefully train AI language models.
- Ensure employees know how to report issues with AI.

Accuracy Considerations with AI

- AI is not 100% accurate and should not be fully relied upon.
- Human oversight is essential.
 - When using AI for drafting policies or other critical documents, it's crucial that a human carefully reviews and fact-checks the output.
 - If AI is used to monitor the workplace or employees, any logs it creates should be regularly reviewed for accuracy, especially when submitted to OSHA because they will be subject to increased scrutiny. It is currently unclear how OSHA will interpret and evaluate automated reports.





Developing an AI Strategy

Tips for Developing an Organizational AI Strategy

1

Define the purpose and scope of your organization's policy, specifying its applicability to different departments, roles, and responsibilities within the organization.

- Is AI helpful to your organization? How?
- Are there any “no-go” uses for generative AI?
- Is employing generative AI necessary? Will it be effective?
- How does your business use data?
- Is there performance data that can be organized? Deep amounts of data?

Tips for Developing an Organizational AI Strategy

2

Set Your Company's AI Principles

Consider establishing a set of principles that will guide the ethical use of generative AI within the company. Ensure employees and management are trained on the appropriate use of AI in the workplace.

Ex. Fairness, accountability, and respect for privacy, etc., or other alignments with corporate mission, values and goals

Tips for Developing an Organizational AI Strategy

3

Be careful when utilizing sensitive data

Sharing confidential company or client information with generative AI systems may violate contractual obligations or expose trade secrets to public disclosure.

Employees **must** be aware of the risks of sharing confidential information with AI tools.

4

Don't forget about quality control

AI is not perfect and is often susceptible to producing erroneous outputs.

- A company's acceptable use policy or guidance should ask that employees review any output generated for accuracy and correctness.
- AI tools can produce incorrect results in a very convincing manner, mimicking human-like generation and causing users to trust in their authenticity.

5

Preserve Authenticity and Avoid Misrepresentation

- Claiming or implying output is human-generated when it's not can lead to consumer protection claims, public relations issues, or customer mistrust depending on use.
- Transparency is key when using AI tools.
 - Social media is notorious for calling out content that was created using generative AI
 - Consumers value authenticity. Revealing the use of generative AI is not only ethical, but could be appreciated by the audience.

6

Conduct AI Training and Provide Employees Notice

- Providing periodic training is a smart way to manage the legal, commercial, and reputational risks of using AI at work. Training should:
 - Educate HR staff on all the components of any AI tool that is being used.
 - Reiterate what uses of AI are generally acceptable, and what uses require prior authorization from a designated authority.
 - Provide employees notice if they are going to be monitored or surveilled in any way.

Tips for Developing an Organizational AI Strategy

7 Take the Time to Carefully Draft a Comprehensive AI Policy

- Establish AI uses and risks
- Establish accountability and governance
- Encourage Continuous monitoring and evaluation
- Communicate the AI Policy
- Explain legal compliance risks

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Questions?



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