



The Hidden Rocks of Labor and Employment Law

Annee Duprey | March 28, 2024

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1

The Usual Suspects

Title VII

Americans with Disabilities Act

Age Discrimination in Employment Act

Fair Labor Standards Act

Family Medical Leave Act

ORC 4112

2

Hidden Rocks

- Sherman Anti-Trust Act
- Sarbanes-Oxley
- Employee Privacy
- Electronic Communications Privacy Act (“ECPA”)
- Employee Polygraph Protection Act (“EPPA”)
- Fair Credit Reporting Act (“FCRA”)
- Genetic Information Nondiscrimination Act (“GINA”)
- Health Insurance Portability and Accountability Act (“HIPPA”)
- Employee Medical Records
- PWFA / Pump Act
- WARN Act
- USERRA
- Immigration
- Defense Trade Secrets Act
- Artificial Intelligence in the Workplace

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Out-of-State Employees & the IRS

What is required:

- When it comes to taxes, payroll primarily follows the rules of the state where the work is performed.
- If an employee works remotely in a different state for number of days that exceeds the threshold for that state, the employer must generally recognize the change and begin to submit taxes to the state where the employee is working, not where the business is located.

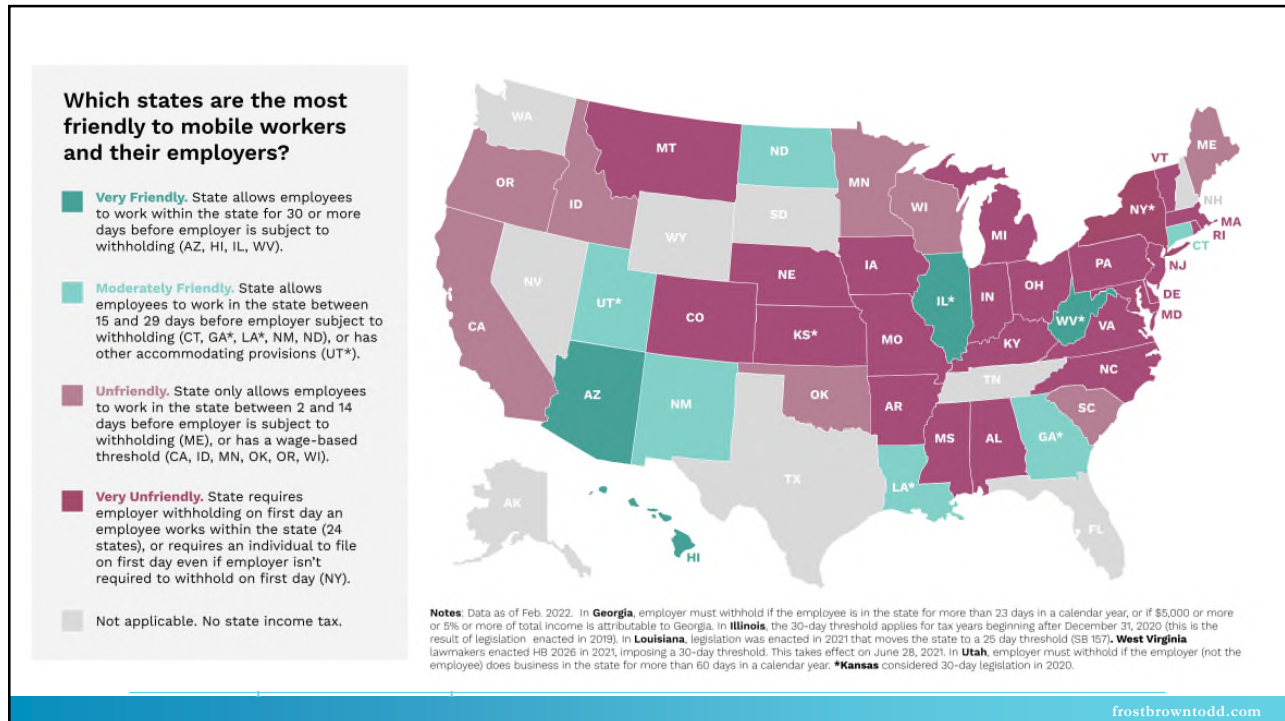
When problems arise:

- Employees working remotely in other states
- Employees travel for work and earn income in other states

What you should do:

- Get assistance from a tax expert

4



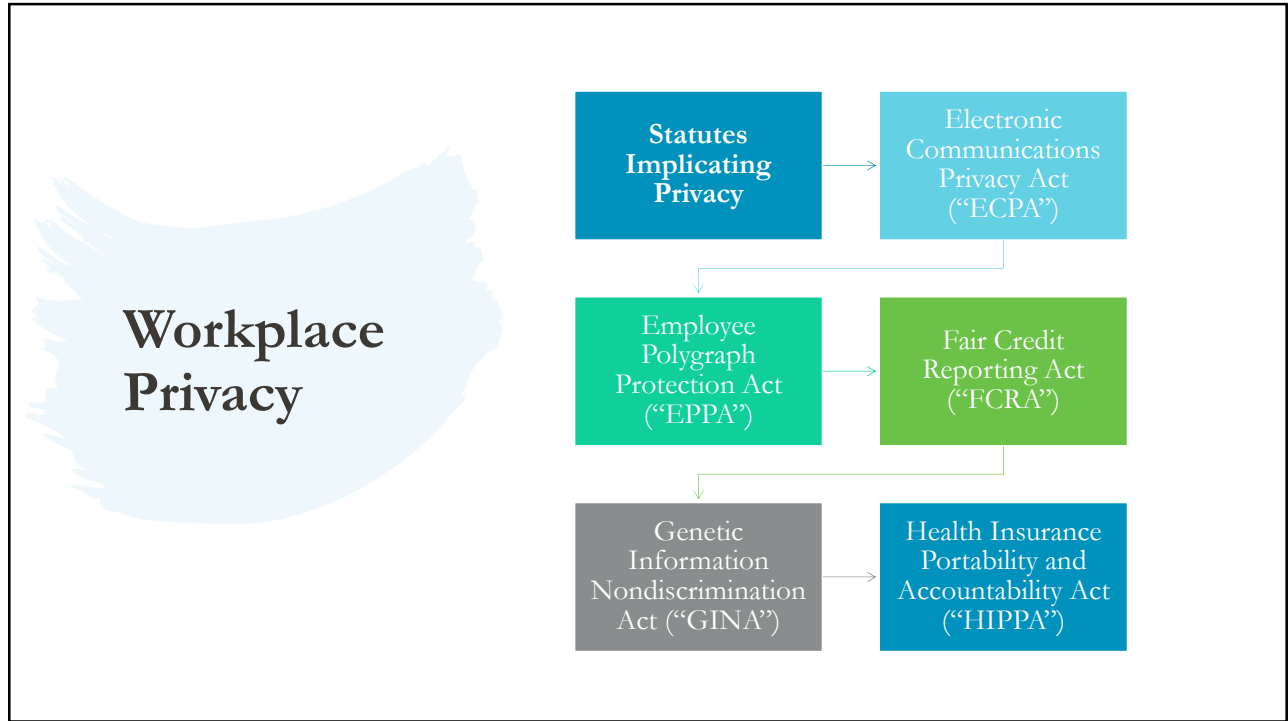
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Reciprocity Agreements

A reciprocity agreement: agreement between two states that each state's residents only pay tax to their resident state, and the employer in the nonresident state does not withhold state taxes

Ohio: Indiana, Kentucky, Michigan, Pennsylvania, and West Virginia

6



7

Employee Privacy Concerns

- Video and audio surveillance
- Email, computer, and Internet monitoring
- Social media
- Location tracking
- Data tracking
- Biometric information
- Employees' confidential information

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8



Employer Justification

Employee onboarding and related compliance (e.g. wage and hour, immigration, etc.)

Monitoring productivity

Compliance for regulated industries (e.g., FINRA, HIPAA, etc.)

Monitoring employee engagement

Customer satisfaction

Health and safety objectives

Numerous Laws at Issue

Electronic Communications Privacy Act of 1986 (ECPA)


- Prohibits anyone from unlawfully and intentionally intercepting oral, wire, or electronic communications
- **Title I – Wiretap Act**
 - Prohibits the interception of electronic communications during transmission and the use of those communications
- **Title II – Stored Communications Act**
 - Protects electronic communications in storage

State laws

- Social Media laws
- Wiretapping laws
- Privacy laws
- Off-duty conduct laws

Federal and state employment laws implicated too

- FCRA
- HIPAA
- Title VII
- ADA
- EPPA
- FMLA
- OSHA
- GINA
- NLRB



Exceptions to Electronic Communications Privacy Act (ECPA)

- Ordinary Course of Business Exception
- Normal Course of Employment Exception
- Consent* by a Party to the Communication
- Other Exceptions (unlikely to apply unless you are an Electronic Communication Service Provider, foreign country, or are involved in federally sanctioned surveillance)

11



Monitoring Employees

- Generally, employees do not have a reasonable expectation of privacy on employer-owned equipment or technology, when:
 - Employer has a legitimate business interest, and
 - Information relates to events during normal work hours

12

Monitoring Employees



TELEPHONE
CALLS



INTERNET
ACTIVITY



COMPUTER
ACTIVITY



VEHICLE
LOCATION (GPS)



CELL PHONE
LOCATION

13

Tread Carefully!



IF A MONITORED CONVERSATION
BECOMES PERSONAL – THERE IS
NO LONGER A BUSINESS PURPOSE







BE WARY OF STATE CONSENT
LAWS



THINK ABOUT THE IMPACT ON
WORKPLACE CULTURE

14

Best Practices

-  Know what you're monitoring
-  Have a policy setting forth monitoring activities
-  Provide written notice with acknowledgement
-  Call your favorite lawyer

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Red Flags

-  Monitoring an employee's off-duty activities
-  Monitoring an employee's location after hours
-  Monitoring an employee's personal device
-  Capturing non-work-related information
-  Employees are completely unaware of monitoring



16



17

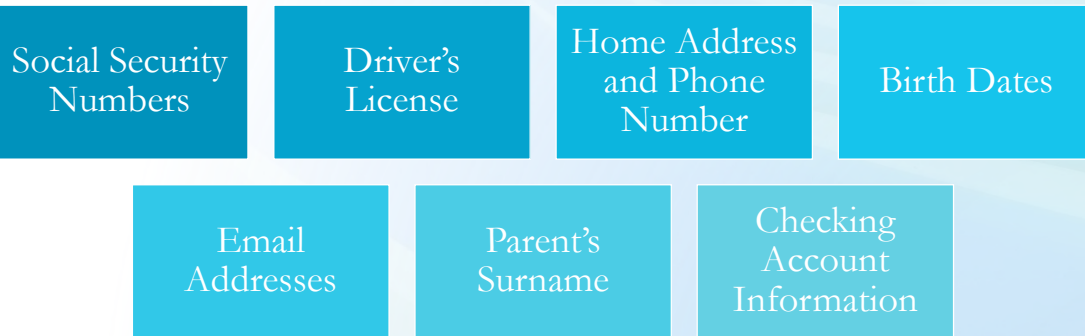
“Old School” Privacy Concerns

- Background Checks
- Physical Work Area
- Drug Testing
- Pre-Employment Testing
- Personnel Records and Medical Records

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18

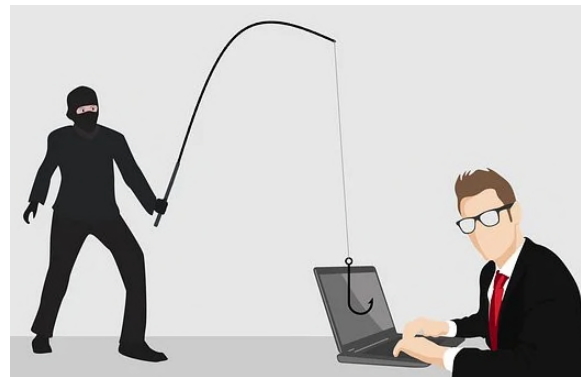
Sensitive Personally Identifiable Information



19

HR is a Target for Hackers

- **Be vigilant!**
- You hold the keys to the vault as far as hackers are concerned
- Work with IT to understand your obligations and vulnerabilities
- Request incident response training



20

Takeaways on Employee Privacy

- Create or revisit your policies
 - Do you have operations in a state with privacy laws?
 - Do you have an electronic use policy for company phones, computers, tablets, Internet, and email?
 - Do you make clear when employees do **not** have a reasonable expectation of privacy?
 - Do you have a solid BYOD policy?
- Consider where written notices may be appropriate or required
 - Tracking software on company computers, remote access, and company phones and emails

21

FCRA (Fair Credit Reporting Act)

- The FCRA applies to employers using third-party consumer reporting agencies to obtain background information (e.g. criminal history, financial data, personal information) on job applicants or employees.
- It mandates various notices before the information is obtained and before and taking adverse action based on the data received from the background check.
- Mini-FCRA (e.g. NY, CT, MD, IL, VT, etc.)

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FCRA (Fair Credit Reporting Act)

- From the FTC:
- Background screening reports are “consumer reports” under the FCRA when they serve as a factor in determining a person’s eligibility for employment, credit, insurance, housing, or other purposes and they include information “bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.”
- Companies that sell or provide those reports are “consumer reporting agencies” under the FCRA. So even if you don’t think of your company as a consumer reporting agency, it may be one if it provides information about people to employers for use in hiring or other employment decisions.

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FCRA (Fair Credit Reporting Act)

- **FCRA Notices**
 - **Before the background check is performed**
 - Must be in writing and in a **stand-alone** format
 - Cannot be in the employment application
 - Right to description of nature and scope of “investigative report”
 - **Pre-adverse action**
 - Employer must provide applicant with a copy of the report and a copy of “A Summary of Your Rights Under the FCRA”
 - **Post-adverse action**
 - Employer must provide notice of the action, the contact information for the reporting agency, and a statement that the reporting agency did not make the decision. Applicant must be notified of the right to dispute the accuracy of the report

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Cory Groshek

- Applied to 562 jobs in 18 months, specifically looking for FCRA violations
- Filed 40+ lawsuits or demand letters
- Received over \$230,000 in settlements
- Other companies have faced \$1 million+ class action lawsuits:
 - Swift Transportation – settled for \$4.4 million
 - Home Depot – settled for \$3 million
- Keep your FCRA disclosure and authorization **completely separate** from other applicant materials or hiring documents

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HIPAA Privacy Rule

- Prohibits “covered entities” from disclosing “protected health information”
- **Covered Entities**
 - Most employers are **not** “covered entities,” and not subject to HIPAA, only: (1) a health plan; (2) a health care clearinghouse; and (3) a health care provider who transmits health information in electronic form
 - **Does not apply to:** employers providing health coverage to employees via health insurance policy. The insurance company is the covered entity (it is considered the health plan) and will be required to comply with HIPAA.
 - **Caution for Self-Insured Plans:** While the employer is still not considered a “Covered Entity,” the employer becomes the entity responsible for the health plan’s HIPAA compliance when the plan is not fully insured by an insurance company. Such employers may contract out most of the HIPAA obligations to a service provider, but they will still have some HIPAA responsibilities, and their employees are much more likely to have access to PHI.

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HIPAA cont.

• Protected Health Information

- PHI is individually identifiable health information created or received by a Covered Entity about (1) an individual's past, present or future physical or mental health or condition, (2) the provision of health care to an individual, or (3) the receipt or payment for health care. This can be paper or recorded in any form or medium.
 - Examples: medical record, bill, EOB, diagnosis information, dates of birth, social security numbers, health plan enrollment elections
- Most of the information contained in an employer's personnel files and records is not PHI.
 - PHI excludes "individually identifiable health information ... in employment records held by a covered entity in its role as an employer." Thus, even the information held in employment records by health care institutions is generally not governed by HIPAA.

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HIPAA cont.

Permitted Uses

- HIPAA does not require a Covered Entity to obtain an Authorization if a Use or Disclosure involves:
 - Treatment – Transfer from hospital to hospital
 - Payment – Medical records to justify claim
 - Health Care Operations
 - Quality assessments
 - Licensing and credentialing activities
 - Business management activities

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GINA (Genetic Information Nondiscrimination Act)

- **With certain exceptions, GINA:**
 - Prohibits the use of genetic information in making employment decisions;
 - Restricts employers from requesting, requiring or purchasing genetic information; and
 - Places strict limitations on employers' ability to disclose genetic information.
- **The exceptions include:**
 - Inadvertent acquisitions, e.g., a manager overhears an employee speaking with a co-worker;
 - Genetic information voluntarily offered as part of an employer's health or wellness program (certain exceptions apply);
 - Family medical history obtained as part of the FMLA certification process (or similar state laws) for leave to care for a family member with a serious health condition;
- **What is not genetic information:**
 - Information about an employee's or an employee's family member's age or gender; or
 - The fact that an applicant or employee currently has a disease or disorder. However, the fact that an applicant's or employee's family member has a disease or disorder would be considered genetic information under GINA.

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Employee Medical Records

- **Common Employer Pitfalls**
 - Failure to segregate medical records (especially: supervisors' files)
 - Failure to keep medical records in secure place
 - Failing to keep employees' medical conditions confidential
 - Failing to use the GINA "safe harbor" language when making medical inquiries
 - Assuming information is "HIPAA protected"
 - Not remembering ADA privacy rule

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Pregnancy and New Mothers

- **Nursing Mothers**

- Affordable Care Act requires employers covered by FLSA to provide “reasonable” break time for non-exempt nursing mothers to express milk
 - If employee does not have office with door, employers must temporarily create or convert a space for expressing milk shielded from view, and free from any intrusion from co-workers and the public.
 - NO bathrooms
- Frequency can vary
- Exception for fewer than 50 employees if undue hardship
- 1 year

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PUMP Act

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

- Expands existing protections for nursing employees in 2010 amendment to FLSA

FLSA already required:

- Employers must provide non-exempt employees with reasonable unpaid break time to express breast milk for **up to 1 year** after the birth of a child.
- Employers must provide a **place**, other than a bathroom, shielded from view and free from intrusion from coworkers and the public for employees to express breast milk.
- **Undue hardship** exception for employers with less than 50 employees.

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PUMP Act: What's New

Also applies to exempt employees

Break time may be unpaid unless otherwise required by federal, state, or local law.

If employees are working / not relieved of all duties while expressing breast milk, the break must be paid.

Exempt employees should be paid the full weekly salary regardless of whether they take a break to express breast milk

Employees must provide notice of an alleged violation of the PUMP Act and give the employer a 10-day window to cure the violation before filing a suit.

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Pregnancy and New Mothers

- **Pregnancy Discrimination Act**

- Prohibits discrimination against pregnant employees/applicants in every facet of employment
- In a nutshell: treat your pregnant employees/applicants the same as any other employee

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Pregnant Worker Fairness Act

Requires employers to make reasonable accommodations for qualified employees and applicants affected by pregnancy, childbirth, or related conditions.

Requires an interactive process between employers and qualified employees and applicants to determine appropriate reasonable accommodations.

It is intended to prevent women from being forced out on unpaid leave or out of their jobs.

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Who Is Covered by the PWFA?

- Qualified employee:
 - An employee or applicant who can perform the essential functions of the job, except that an employee or applicant shall still be considered qualified if –
 - The inability to perform an essential function is for a temporary period;
 - The essential function could be performed in the near future; and
 - The inability to perform the essential function can be reasonably accommodated.
- Covered employer
 - Employers with 15 or more employees.
- Known Limitation
 - Physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee's representative has communicated to the employer, whether or not the condition meets the definition of disability under the ADA.

36

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Practical Impact

- Provides an exemption for businesses if an accommodation imposes an undue hardship
 - Undue hardship includes action that fundamentally alters the nature or operation of the business OR is unduly costly, extensive, substantial, or disruptive
- Protects pregnant workers from retaliation, coercion, intimidation, threats or interference if they request or use an accommodation
- Key differences from ADA
 - Temporary nature of pregnancy
 - Must consider removing an essential function
 - May not *require* an employee to take paid or unpaid leave if another reasonable accommodation is available

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Examples of Accommodations

- Ability to sit;
- Ability to drink water;
- Access to closer parking;
- Flexibility in work hours;
- Issuance of “appropriately sized uniforms and safety apparel”;
- Additional break time allowances for bathroom use, eating, or resting;
- Use of leave to recover from childbirth; and
- Excusal from “strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

38

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USERRA

- Members of the uniformed services are entitled to return to their civilian employment upon completion of their service
- Must be reinstated with the seniority, status, and rate of pay they would have obtained had they remained continuously employed by their civilian employer
- Reasonable efforts must be made to enable returning employees to refresh or upgrade their skills to enable them to qualify for reemployment
- Also protects military members from discrimination in hiring, promotion, and retention on the basis of present and future membership in the armed services

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USERRA

Arroyo v. Volvo Group of North America, LLC dba Volvo Parts North America (7th Cir. 2015)

- Employee took significant amount of military leave for multiple deployments and training
- Supervisor sent several frustrated emails to other members of management:
 - Complaining the employee only contacted him once during her 13-month deployment to Iraq, to which management responded, “Unfortunately, there isn’t a lot we can do ... we have to wait for her. Sorry it isn’t what you wanted to here.”
 - During treatment for PTSD, the supervisor complained that the employee was “really becoming a pain with all this.”
 - While absent for an ER visit, the supervisor joked that there were rumors the employee was in Hawaii
- Employer implemented new discipline policy, which caused employee to earn occurrences for tardiness and led to her termination
- Court reversed summary judgment on USERRA discrimination claims and revived ADA claims

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Defend Trade Secrets Act

- Provides a cause of action in federal court for misappropriated trade secrets and includes whistleblower protection
- Enacted in 2016, the law requires notice in new and revised nondisclosure agreements about a whistle-blower's right to disclose trade secret information to federal enforcement authorities
- Include language from statute in any agreement addressing trade secrets (non-disclosure agreements, separation agreements, severance agreements, etc.)

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41

Remote I-9 Document Examination

USCIS issued Final Rule permitting certain E-Verify employers to conduct remote I-9 document examination

REQUIREMENTS:

- Must be registered in E-Verify and be a participant in good standing to utilize the remote I-9 procedure
- Be consistent



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42

Remote I-9 Document Examination

- **STEPS:**

1. Examine copies of Form I-9 documents (front and back, if the document is two-sided), or an acceptable receipt in limited circumstances, to ensure that the documentation presented reasonably appears to be genuine.
2. Conduct a live video interaction with the individual presenting the document(s) to ensure that the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per the first step above) and then present the same document(s) during the live video interaction.
3. Indicate on the Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete Section 2 or reverification, as applicable.
4. Retain a clear and legible copy of the documentation (front and back if the documentation is two-sided).
5. In the event of an I-9 audit or investigation by a relevant federal government official, make available the clear and legible copies of the identity and employment authorization documentation presented by the employee.

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Artificial Intelligence (AI)

- AI refers to computer systems capable of performing tasks that historically required human intelligence.
- For example: recognizing speech, making decisions, and identifying patterns.







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Common AI Applications


-  **ChatGPT:** Generates text responses using large language models.
-  **Computer Vision:** Identifies objects and patterns in images.
-  **Recommendation Systems:** Suggests movies, products, etc.
-  **NLP-based Search Engines:** Understands user queries.

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Benefits of AI

- **Efficiency:** Automates repetitive tasks.
- **Accuracy:** Reduces human error.
- **Innovation:** Drives new solutions and technologies.
- **Forecasting:** Predict outcomes, demand, and growth.
- **Enhanced Experiences:** Instant replies, appointment reminders, feedback.



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Challenges and Dangers

- **Bias:** AI can inherit biases from training data.
- **Ethical Concerns:** Privacy, job displacement, and accountability.
- **General Artificial Intelligence (GAI):** The quest for true human-like intelligence.
- **Privacy Violations:** Confidential information (personal and business) and trade secrets at risk.
- **Deepfakes:** Spreading misinformation.

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Is AI really being used that frequently? YES!

- **Half** of U.S. mobile users use voice search every day.
- AI is expected to see an annual growth rate of **37.3%** from 2023 to 2030.
- A **quarter** of companies are adopting AI because of labor shortages.

Statistics taken from Forbes Advisor: [24 Top AI Statistics & Trends In 2024 – Forbes Advisor](#)

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AI Impact on the Workforce

- 77% are concerned that AI will cause job loss in the next year.
- 400 million workers could be displaced because of AI.
- Research estimates AI will create 97 million jobs.
- Software engineers and data engineers are being recruited for AI support.
- The manufacturing industry is expected to see the largest financial impact due to AI.

Statistics taken from Forbes Advisor: [24 Top AI Statistics & Trends In 2024 – Forbes Advisor](#)

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Recruitment and Hiring

- **Automated Resume Screening:** AI algorithms analyze resumes, identify relevant skills, and rank candidates based on qualifications.
- **Chatbots and Virtual Assistants:** AI-powered chatbots conduct initial interviews, answer candidate queries, and schedule interviews.
- **Predictive Analytics:** AI predicts candidate success based on historical data and behavioral patterns.
- **Targeted Job Advertisements:** AI analyzes data to determine most effective platforms for reaching potential candidates.

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Employee Onboarding and Training

- **Automated Onboarding Tasks:** Setting up profiles, sending emails, granting access to tools and files, assigning mentors and teams.
- **Personalized Learning Paths:** AI recommends customized training modules based on an employee's role and performance.
- **Chatbot Assistancess:** AI-driven chatbots assist new hires with onboarding information and policies.



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Performance Management

- **360-Degree Feedback Analysis:** AI processes feedback from colleagues, managers, and self-assessments to evaluate performance.
- **Real-Time Performance Monitoring:** Continuous data analysis, identifying patterns and highlighting areas of success and potential improvement.
- **Predictive Analytics for Attrition:** AI models predict employee turnover risk, allowing proactive interventions.
- **Generative AI Summaries:** Summarizing information, drafting performance evaluations based on performance data.

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52

Diversity and Inclusion

- **Bias Detection:** AI algorithms identify potential biases in job descriptions, interview questions, and performance evaluations.
- **Diverse Candidate Sourcing:** AI tools search for candidates from diverse backgrounds.
- **Inclusive Hiring Practices:** AI can help create inclusive job postings by suggesting gender-neutral language and avoiding biased terms.
- **DEI Chatbots:** Providing training on DEI topics.



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Workforce Analytics

- **Predictive Workforce Planning:** AI forecasts staffing needs, skill gaps, and workforce trends.
- **Employee Sentiment Analysis:** AI analyzes employee surveys and sentiment to gauge workplace satisfaction.
- **Skill Matching for Career Pathways:** AI analyzes skills and experience to match employees with opportunities.

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Drafting Documents and Communications

- AI can be used to draft a variety of HR documents and communication:
 - Policies
 - Job descriptions
 - Employee Communications
- **Caveat:** Think, review, and edit before implementation.
- AI is not infallible.

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EEOC on AI

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Artificial Intelligence and Algorithmic Fairness Initiative

- Began in 2021
- Goal: “to guide employers, employees, job applicants, and vendors to ensure that these technologies are used fairly and consistently with federal equal employment opportunity laws.”

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Technical Guidance on AI and Disability Discrimination

- The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees – issued in May 2022.
- Guidance on how software relying on algorithmic decision-making can violate ADA requirements.
 - Employers must provide reasonable accommodation to applicants or employees to be rated fairly and accurately by the algorithm.
 - Employers must be careful to not intentionally or unintentionally screen out an individual with a disability.
 - Employers must be careful to ensure no disability-related inquiries are asked by AI tools.
- Focus on ensuring that AI-powered software does not discriminate against individuals with disabilities.

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Best Practices for ADA Compliance

- Be prepared to offer reasonable accommodations.
 - Talk to software vendor about recommended accommodations built-in to software.
 - Train staff on how to provide alternative means of rating candidates and applicants.
- Vet your software.
 - Use tools designed with access in mind.
 - Make sure the software only measures abilities and qualifications that are truly necessary for the job.
 - Know what the software is asking and is designed to do.
- Advise candidates and employees about the AI, how it works, and what it is being used to assess.

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Technical Guidance on Artificial Intelligence

- Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 – issued in May 2023.
- Focused on potential disparate impact of use of AI.
- Does an employers “selection procedures,” such as hiring, promotion, and firing, disproportionately affect individuals based on a protected characteristic under Title VII?
- The Uniform Guidelines on Employee Selection Procedures under Title VII apply to AI when used to make or inform decisions.

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Adverse Impact Analysis

Does the selection procedure cause a selection rate for individuals in a protected group that is “substantially” less than the selection rate for individuals in another group?

If so, the use of the tool will violate Title VII unless the employer can show that the procedure is “job related and consistent with business necessity.”

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\$365,000 Settlement in First EEOC AI Case

- August 2023.
- iTutorGroup used AI programmed to automatically reject female applicants over 55 and male applicants over 60.
- EEOC filed an age discrimination suit in May 2022.
- Settlement and consent decree for \$365,000.



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62

2023 Executive Order on AI Development and Use

October 2023 - Executive Order on AI Development and Use

Instructs the Secretary of Labor to:

1. “[D]evelop and publish principles and best practices for employers” that shall include specific steps for employers to take with regard to “labor standards and job quality, including issues related to the equity, protected-activity, compensation, health, and safety implications of AI in the work place” and “AI-related collection and use of data about [employees], including transparency, engagement, and activity protected under worker-protection laws.”
2. “[I]ssue guidance to make clear that employers that deploy AI to monitor or augment employees’ work must continue to comply with protections that ensure that workers are fairly compensated for their hours worked...and other legal requirements.”

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63



Important Considerations

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Privacy

- Protect confidential information, trade secrets, and intellectual property.
- What data is being inputted into the AI?
 - Is it a public source?
 - Are trade secrets being compromised?
 - Is confidential information being disclosed?
 - Are intellectual property rights being lost?

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Workplace Culture

- How does AI impact your culture?
 - Increase productivity.
 - Potential for less collaboration.
 - Conflicting views on trusting of AI.
 - In-person communication still important.
- Will AI help or hurt employee engagement?
 - Can you find the balance?

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What's an HR Professional to do?

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67



Tips for Human Resources Professionals



Stay Informed and Plan Ahead



Assess Technology Trends



Leverage AI for HR Functions

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68

Tips for Human Resources Professionals



ETHICAL
CONSIDERATIONS



HUMAN-AI
INTERACTION



LEGAL REVIEW OF
VENDOR
AGREEMENTS



CALL YOUR
FAVORITE LAWYER

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69


AI Acceptable Use/Governance Policy

- Educate employees on responsible AI use.
- Explicitly address AI tools in your policy.
- Be specific on permitted and prohibited uses.
- Include data collection and storage guidelines.
- Reinforce privacy policies.



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70



Takeaways on AI

-  Sticking your head in the sand is not an option.
-  Trust, but verify.
-  Continuous learning and responsible development are crucial.
-  Prepare now for rapid change.

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71

thank
you



Annee Duprey
aduprey@fbtlaw.com
614.559.7203
Columbus, Ohio
frostbrowntodd.com



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72