

The Impact of New Requirements and Guidance for AI Governance

By Adam Gutbezahl on April 9, 2024



On March 28, 2024, the U.S. Office of Management and Budget (“OMB”) released OMB Memorandum M-24-10, titled “**Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence**.” OMB issued this Memorandum pursuant to President Biden’s October 30, 2023, Executive Order concerning Artificial Intelligence (“AI”) (which I previously addressed in a [prior article](#)). The OMB Memorandum sets federal agency “requirements and guidance for AI governance, innovation, and risk management,” as well as “specific minimum risk management practices.”

The OMB Memorandum has no legal effect on the private sector; however, it may be a sign of things to come in the near future. The Executive Order provided the U.S. Department of Labor a deadline of April 27, 2024, to publish “principles and best practices for employers that could be used to mitigate AI’s potential harms to employees’ well-being and maximize its potential benefits.” The OMB Memorandum likely hints at what we may expect from the Department of Labor at the end of this month.

Under the OMB Memorandum, a wide array of AI uses in the employment context are automatically *presumed* to be “rights-impacting,” which means they are subject to detailed minimum risk management processes. The OMB Memorandum even defines “rights-impacting AI” to include AI whose output has a legal, material, binding, or similarly significant effect on an individual’s employment. The OMB Memorandum includes a broad list of AI uses that are presumed to be “rights impacting.” These include:

- Conducting biometric identification for one-to-many identification in publicly accessible spaces (e.g., facial recognition software in public places);
- Detecting or measuring emotions, thought, impairment, or deception in humans; and
- Replicating a person’s likeness or voice without express consent.

The automatic presumption that AI used to detect or measure “emotions, thought, impairment, or deception in humans” is “rights-impacting” is significant given the litigation presently pending in the U.S. District Court for the District of Massachusetts, where an individual brought suit against CVS alleging it used this type of AI system as part of its hiring process in violation of Massachusetts state law. Be sure to stay tuned here on developments in *Baker v. CVS Health Corp., et al.*, C.A. No. 23-cv-11483-PBS.

As for the OMB Memorandum, the most pertinent language to the employment context is that AI applications are automatically presumed to be “rights-impacting” if they are used (or are expected to be used) “to control or significantly influence the outcomes” of the following:

PRACTICES

Employment Law

- Determining the terms or conditions of employment, including:
 - Pre-employment screening;
 - Reasonable accommodation determinations;
 - Pay or promotion;
 - Performance management;
 - Hiring or termination; or
 - Recommending disciplinary action;
- Performing time-on-task tracking; or
- Conducting workplace surveillance or automated personnel management.

The OMB Memorandum therefore covers a vast array of AI systems and their respective uses in the workplace. Since this governs public sector usage at the federal level, it has no effect on utilizing AI in the private sector – *for now*. That may very well change in the weeks and months to come. Private sector employers using (or considering the use of) AI would be wise to evaluate their present use of AI and ensure whether it comports or conflicts with the OMB Memorandum.

A company's AI use policy therefore should be reviewed to align with the information outlined in the OMB Memorandum. If your company does not yet have a documented AI use policy, then it is high time you are prepared. Whether businesses want to believe it or not, AI is here to stay and its use in the workplace is becoming commonplace. The use of AI systems in the workplace is up 62% from November 2022, and more than two-thirds of polled employees acknowledged using AI systems like ChatGPT for work-related tasks without their manager's knowledge. RIW is ready, willing, and able to set you and your business up for success by preparing, or updating, a written and robust AI policy that meets this ever-changing landscape.

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