



2023 
**STAFFING
LAW**
CONFERENCE

★ **MAY 18–19**
WASHINGTON, DC

★ ★ ★ ★ #ASASTaffingLaw



The IT Factor: Emerging Technologies and Potential Liability



#ASAstaffinglaw

Sponsored by



NEW ERA ADR



The IT Factor: Emerging Technologies and Potential Liability

Christy S. Hawkins, Esq., partner, Akerman LLP

Helen L. Konrad, Esq., director, McCandlish Holton PC



U.S. Patchwork

- No comprehensive data privacy/security law
 - There are a number of sector-specific federal laws and regulations (e.g., GLBA, HIPAA)
- States are enacting their own data privacy, security and breach notification laws
- At state level, three types of laws:
 - Data privacy
 - Data security
 - Breach notification
- Topic-specific: biometrics, children's privacy, AI?
- State of the union so far...



Common Features of Privacy Laws

- Privacy rights
- Privacy notice
- Contract and vendor requirements
- **Business obligations**
 - Reasonable security measures
 - Privacy principles
 - Privacy by design
 - Data inventory/mapping
 - Data retention
 - Data protection impact assessments
 - Discrimination prohibited
 - Opt-out of sale, targeted marketing, automatic profiling



Scope of U.S. Data Privacy and Security Laws

U.S. data security scope: data breach notification; Health Insurance Portability and Accountability Act

- United States: more focused on security than privacy
- Data security law scope:
 - Information that can be used for identity theft (e.g., data breach notification)
 - Medical / patient information (HIPAA)

Data Breach Notification Laws (PII):	HIPAA (PHI):
Name +	Name +
<input checked="" type="checkbox"/> Bank account number	<input checked="" type="checkbox"/> Beneficiary number
<input checked="" type="checkbox"/> Bank routing number	<input checked="" type="checkbox"/> Dates of health service
<input checked="" type="checkbox"/> Payment card number	<input checked="" type="checkbox"/> Diagnosis
<input checked="" type="checkbox"/> Driver's license number	<input checked="" type="checkbox"/> Disease/disorder
<input checked="" type="checkbox"/> Govt-issued ID number	<input checked="" type="checkbox"/> Genetic information
<input checked="" type="checkbox"/> Immigration/VISA	<input checked="" type="checkbox"/> Health records
<input checked="" type="checkbox"/> Passport number	<input checked="" type="checkbox"/> Health symptoms
<input checked="" type="checkbox"/> Social Security number	<input checked="" type="checkbox"/> Health treatments
<input checked="" type="checkbox"/> State ID Card	<input checked="" type="checkbox"/> Insurance information
	<input checked="" type="checkbox"/> Insurance policy numbers
	<input checked="" type="checkbox"/> Medical claim history
	<input checked="" type="checkbox"/> Medical conditions
	<input checked="" type="checkbox"/> Medical device identifiers
	<input checked="" type="checkbox"/> Medical photo images/X-Rays
	<input checked="" type="checkbox"/> Medical record number
	<input checked="" type="checkbox"/> Medical test results
	<input checked="" type="checkbox"/> Subscriber number



Scope of U.S. Data Privacy and Security Laws

Data Privacy Laws = Personal Information

Data Breach Notification Laws (PII): HIPAA (PHI):

Name +

- Bank account number
- Bank routing number
- Payment card number
- Driver's license number
- Govt-issued ID number
- Immigration/VISA
- Passport number
- Social Security number
- State ID Card

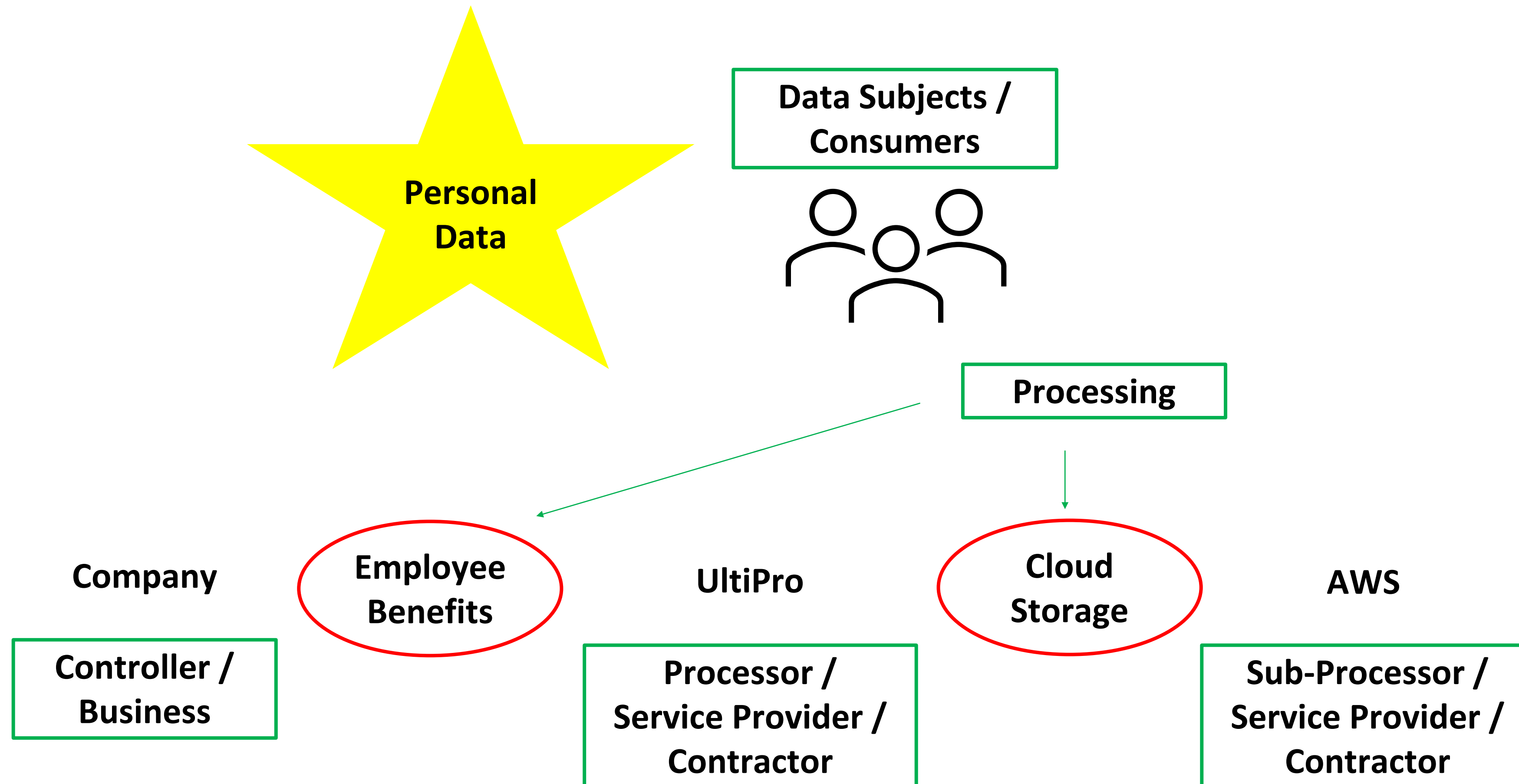
Name +

- Beneficiary number
- Dates of health service
- Diagnosis
- Disease/disorder
- Genetic information
- Health records
- Health symptoms
- Health treatments
- Insurance information
- Insurance policy numbers
- Medical claim history
- Medical conditions
- Medical device identifiers
- Medical photo images/X-Rays
- Medical record number
- Medical test results
- Subscriber number

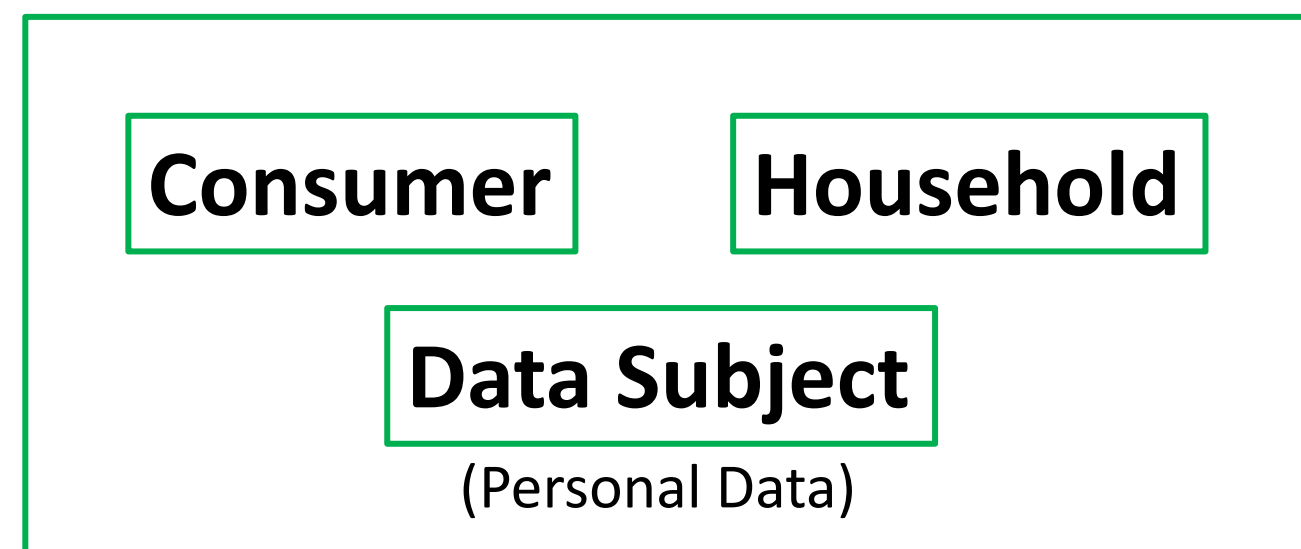
AND

- Abilities/aptitudes
- Address
- Attitudes
- CCTV footage
- Citizenship Status
- Compensation information
- Criminal history
- Date of birth
- Education history information
- Education records (e.g., transcript)
- Email address
- Employee ID
- Employment history
- Keystroke patterns
- Marital status
- Name
- National ID Card Number
- National origin/race/ethnicity
- Photographs
- Partial Social Security number
- Performance Evaluations
- Philosophical beliefs
- Political party
- Preferences, Trends, Predispositions
- Professional licenses
- Purchase/Service history
- Religion
- Resume
- Signature
- Survey responses
- Tax information
- Telephone number
- Union membership or information
- Vehicle License Plate Number
- Veteran/Military Status
- Voice patterns
- Voice recordings
- Videos

Key Terminology

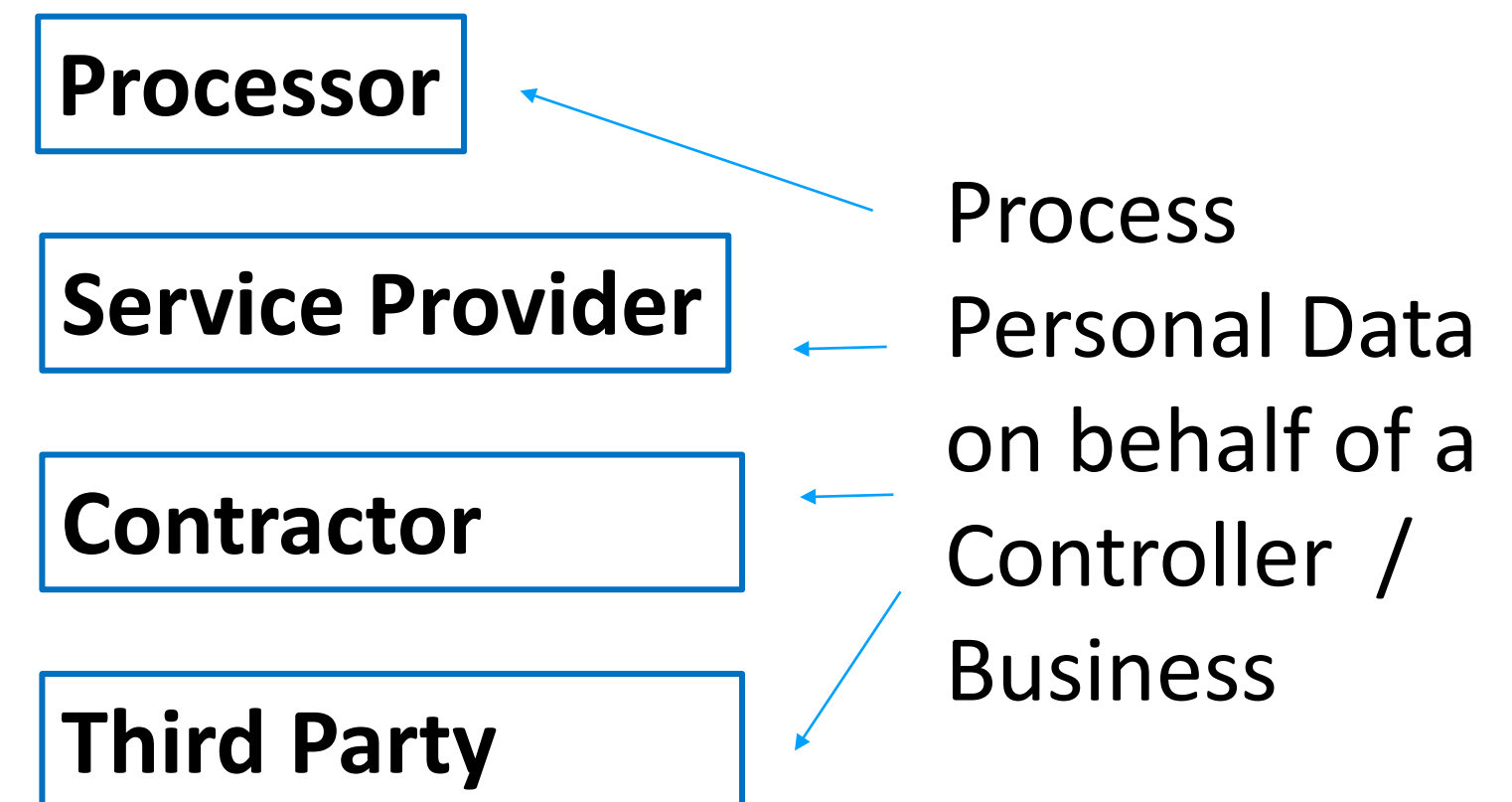


Who Do U.S. Privacy Laws Cover?



Controller / Business
Decides:

- What Personal Information is processed?
- For what purpose?
- How is it processed?





What Activities Do U.S. Privacy Laws Cover?

Processing = any operation or set of operations that are performed on personal information or sets of personal information, whether or not by automated means

Examples:

- Aggregating
- Advertising and Marketing
- Providing / performing services
- Research
- Collection
- Selling
- Sharing
- Buying
- Combining
- Organizing
- Retaining
- Using
- De-identifying
- Anonymizing
- Dark patterns
- Pseudonymizing
- Inferences
- Transferring
- Receiving
- Viewing
- Accessing
- Disclosing
- Profiling



Issue Spotting: Sensitive Personal Data

- Sensitive personal data
 - Defined by privacy laws
 - Includes: racial or ethnic origin
 - Religious or philosophical beliefs
 - Data related to sex life or sexual orientation
 - Special rules apply →
 - Consent, opt-out, limit sharing / processing
 - Notice requirements
- Potential areas of concern:
 - DE&I
 - Discrimination (overt vs. inadvertent)

When poll is active, respond at pollev.com/asaasa640

Text **ASAASA640** to **22333** once to join

Do you use AI at work (whether or not your use is work-related) or as part of your job?

Yes

No



Basic Steps for AI Development

- Define the goal/use case
- Data collection
- Data processing
- Algorithm development
- Training the model
- Evaluation and validation
- Deployment and monitoring
- Continuous improvement



AI: Key Terminology

- Artificial Intelligence—so shared definition; general term used to describe a computer’s ability to perform tasks that typically require human intelligence
- Machine Learning—subset of AI involving training algorithms to learn from data and improve their performance over time
- Deep Learning—subset of Machine Learning that uses neural networks (which are designed to emulate the structure and function of the human brain) to process and analyze data using layered interconnected nodes that learn from previous layers
- Programming—the process of creating software applications using programming languages by writing code so a computer can understand and execute instructions



Issue Spotting: Using AI in Employment

Are there problems with using AI in the employment context?

- Bias
- Job Displacement
- Lack of transparency
- Privacy concerns
- Legal and regulatory risks



Issue Spotting: Using AI In Employment

MI Are there problems with using AI in the employment context?



There are several potential problems with using AI in the employment context, including:



1. Bias: AI systems can perpetuate or even amplify existing biases in the data they are trained on, leading to unfair or discriminatory outcomes in hiring and other employment decisions.
2. Job displacement: AI and automation have the potential to displace workers, particularly in low-skilled jobs, leading to unemployment and economic insecurity.
3. Lack of transparency: It can be difficult to understand how AI systems make decisions, making it challenging to identify and address bias or errors in the system.
4. Privacy concerns: The use of AI in the employment context can raise privacy concerns, particularly around the collection and use of personal data.
5. Legal and regulatory risks: The use of AI in employment may raise a host of legal and regulatory risks, including potential violations of anti-discrimination laws or other regulations.

It's important to note that these challenges can be mitigated if the AI is developed, validated and deployed with proper ethical considerations and transparency.



Issue Spotting: Bias and Discrimination

How to issue spot:

- What are the existing rules on discrimination?
- How might this model discriminate?
- Are humans introducing bias, intentionally or unintentionally?

Examples:

- Data used to train is skewed or biased in a certain way (e.g., past practices weren't inclusive)
- Models teach themselves to continue past practices
- Models teach themselves in ways that we don't intend
 - Gendered names
 - Shaun White vs. Sundar Pichai



Issue Spotting: The Black Box Problem

The Black Box Problem: Humans aren't able to see how AI makes decisions

- AI lost track of the inputs on which its decisions and outputs are based
- We can't recreate the thought processes because of deep learning, training, etc.

Resulting problems:

- We can't "show our work" —cannot show there was no bias or discrimination
- Difficult to fix when the outcomes aren't what we want
- Lack of transparency—cannot explain what data points were considered for a decision
 - Therefore, difficult to say the decision was "fair"
 - How do we comply with privacy law → privacy notices?



Agenda

- Citizenship Status Discrimination implications with use of AI
 - What is Citizenship Status Discrimination?
 - What are possible (inadvertent?) uses of AI for a staffing firm?
 - Online job applications
 - Posting advertisements
 - Scraped to third party platforms
 - Applicant tracking systems
 - Screening applicants
 - Onboarding

How can I get in trouble with each?



Citizenship Status Discrimination

Employers cannot discriminate in hiring, firing, recruitment, or referral for a fee based on citizenship or immigration status

- Enforced by the U.S. Dept of Justice, Immigrant and Employee Rights Division
- Protected individuals
 - U.S. citizens
 - U.S. nationals
 - Recent lawful permanent residents
 - Asylees
 - Refugees



Examples of Citizenship Status Discrimination

- U.S. citizens only
- U.S. citizens or lawful permanent residents only
- Refusing to hire asylees or refugees
- Refusing to consider non-U.S. citizens unless they have a green card
- Preferring workers on temporary visas over U.S. workers
- Asking for more or different documents than what the law requires to hire

Do you post ads for openings on third-party platforms?

Yes

No

Do you review the ad once it is posted?

Yes

No



Recruiting

Lots of ways to get into trouble:

- Text of the ads—are you encouraging a certain group of applicants to apply?
- Third-party platforms
 - Do they change the text of your ad?
 - Do they control who can apply?
 - Do they control which résumés are passed on?



Application Process

Online applications:

- Applying for “any” job or tied to a particular online opening?
- Who can apply? Everyone, right? “I want to hire everyone,” but:
 - Do you have questions about authorization to work?
 - Do you have questions about immigration status?
 - Do you have questions about document(s) that will need to be presented?



How Does It Go Wrong?

Over \$1,000,000 fine assessed against 20+ very large employers (including staffing firms) for relying on a third-party platform to post openings on a college website's platform:

- Dropdown menu of who can apply for positions limited to U.S. citizens and lawful permanent residents
 - Non-U.S. citizens with unrestricted work authorization could not apply
- No immunity just because it was not your platform



How Does It Go Wrong?

Staffing firm fined \$17,000 because four ads said U.S. citizens and permanent residents could apply (excluding asylees, refugees and U.S. nationals) and two ads targeted those with Optional Practical Training (OPT).

Different staffing firm fined \$12,000 because ads confirmed that company would sponsor H-1B visas.

Think you are widening the net, but IER reads the ads restrictively. Potential applicant believes that is the only status that the employer will accept.



How Does It Go Wrong?

In January 2023, staffing firm fined \$250,000 and \$100,000 back pay

- Requiring lawful permanent residents to show green card and aliens authorized to work to show Employment Authorization Document



Onboarding

Electronic I-9 (and E-Verify) systems:

- Requesting specific documents?
 - Candidate completes Section 1 and uploads documents for Section 2.
 - Candidate comes in office and wants to present different original documents.
- Need to make a change to Section 1 or Section 2. Does system prompt you to create a whole new I-9?
 - Is E-Verify run a second time?
- Does system ask you to reverify expiring permanent residence cards?



How Does It Go Wrong?

Staffing firm fined \$67,778 because electronic I-9 system prompted them to reverify expiring permanent resident cards, which is not required

Cannot defend yourself that “you” didn’t do it—the system did it!