

Why IT and HR Need to Align **New Technologies Generate New Employment Liability**

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Part 2

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Goals for this Presentation



Gain a better sense of risks – both known and unknown – associated with increased use of technology



Breakdown silos between IT and HR to ensure your company is aware of all risk while also maximizing advantages new technologies have to offer



Remove assumptions that HR and IT have may have about their respective departments when making decisions



Identify key topics where the departments should collaborate

Survey Questions

How frequently do your IT and HR leaders meet to address strategic matters?

- a) monthly 4.5%
- b) quarterly 14.5%
- c) annually 18%
- d) no regular meeting 63%

Survey Questions

In the assessment of potential new technology, HR personnel are included in the vetting process?

- a) Yes 50%
- b) No 50%

Survey Questions

In the rollout of software applications, HR policies are reviewed and updated?

- a) Yes 55%
- b) No 45%

Survey Questions

Our standard workplace investigation procedure includes IT personnel in the fact gathering stage?

- a) Yes 56%
- b) No 44%

Questions from Part 1

Workplace Investigations



Why IT and HR Must Align

“Alignment supports proactive risk governance and minimizes reactive clean-up.”

What Role Does IT Play in Investigations?

- While typically managed by HR, IT should play an important role in employer investigations – whether those are for discrimination, harassment, safety, trade secrets, or any other matter relating to employer liability.
- What actions are within IT's purview?
 - Preserves electronic records, including emails, messages, system logs, badge access data, deleted files
 - Restricts access to information relevant to the investigation
 - Maintains chain of custody.
 - Governs access to employee accounts

Investigations – Shared responsibilities

- Developing investigation protocols
 - Identifying proper custodians, preserving relevant documents,, and maintaining data security in the context of an investigation.
 - Includes developing procedures that balance legal requirements (like employee privacy) along with technical feasibility with HR understanding IT's abilities and limitations.
- Ensure technical controls align with employer policies
- Aligning on employee separations and access
 - Do separated employees still have access to employer systems?

Investigations – Themes for Cooperation

- **Speed of cooperation**
 - Alignment is crucial, particularly when assessing employment liability or theft of trade secrets/company data
- **Corroboration**
 - Digital evidence within the employer's control, or ability to control, is key. AI and digital image distortion or edits requires IT to verify images or messages for accuracy.
- **Documentation**
 - Both IT and HR should ensure they are creating complementary records (investigation notes, policies, retention, etc.) that can withstand legal scrutiny.
- **Escalation**
 - Both departments should be aware of when to involve law enforcement, regulators, and outside counsel.

Investigations – Case Study

- In 2023, a law firm associate allegedly downloaded thousands of potentially confidential documents (including client information) prior to resigning from her firm.
- The associate also leveled allegations of harassment and retaliation against the firm
- She sought to use the documents as leverage and in her social media campaign against the employer
- The associate’s “downloading habits” were flagged by IT prior to her departure.
- Law firm sued to return the documents and assure they were not disseminated.
- Court ordered a temporary injunction, which allowed firm’s forensic consultant to identify and protect confidential documents.

Case Study – Lessons Going Forward

- Risk of insiders (including vendors) and employees downloading or sharing confidential information is real.
 - IT and HR should develop policies and methods for flagging when downloads or email behavior becomes suspicious.
- Educating employees on the nature of confidential information and their obligations concerning such information.
- Offboarding employees must be treated as a security event
 - IT and HR must be aware of when an employee is leaving (voluntarily or involuntarily).

Unionized Workplaces



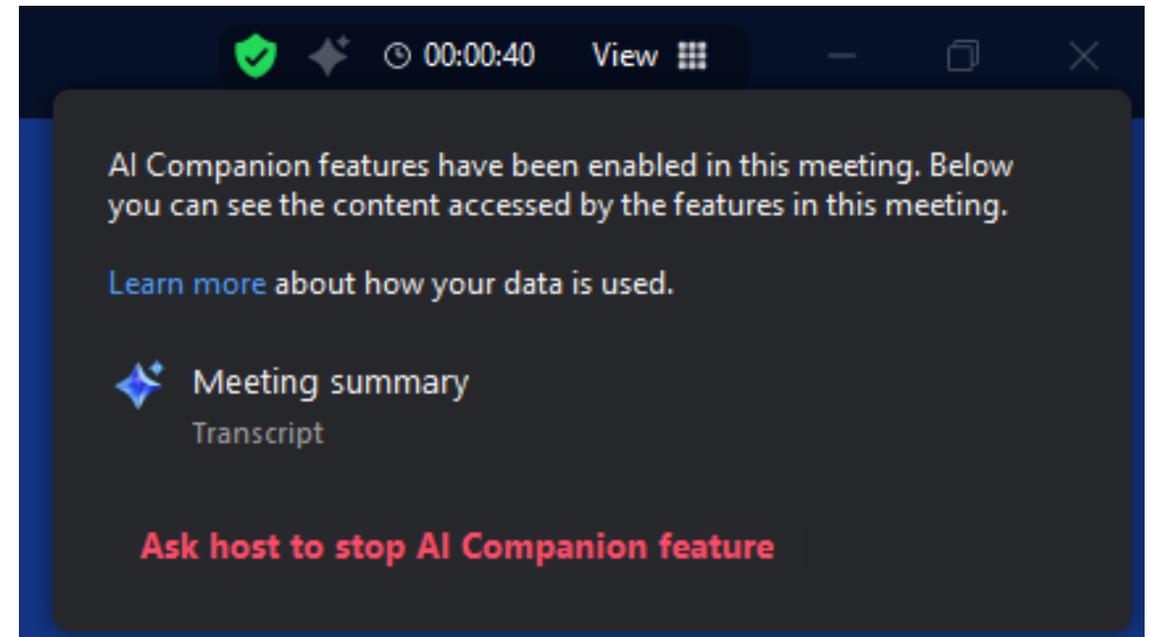
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Unionized Workplaces

- In the context of union organizing and unionized workplaces, employers should expect to have their IT providers weigh in on aspects of bargaining.
- IT providers must also be aware of the relevant CBA between the parties to determine whether new or novel systems they intend to introduce do not violate the CBA.
- This relates to issues of employee surveillance under the NLRA, recording bargaining sessions (whether knowingly or not), and potential employee replacement by technology.

Bargaining and Recording

- Since 2020, employers and unions have taken advantage of bargaining via videoconference (Zoom Google, etc.).
- Some parties have surreptitiously recorded bargaining sessions, but now AI tools make this even easier (or inadvertent).
- GC Memo 25-07 indicates that the General Counsel will pursue cases for bad faith bargaining if a party nonconsensually records bargaining.
- The idea is that banning secret recordings is necessary to prevent employers and unions from creating a “culture of suspicion and fear,” where people may think their every word could be used against them.



IT and Unilateral Changes

- NLRB precedent generally requires the employer to bargain with the union when it implements a unilateral change impacting the terms and conditions of employment.
 - While a management rights clause may cover certain changes, broader changes could implicate bargaining obligations.
- Epic Games / Llama Productions (SAG-AFTRA ULP – AI displacement)
 - Unfair Labor Practice (ULP) charge filed May 19, 2025, alleging replacement of union voice actors with an AI-generated voice without bargaining.
 - Allegations: The union claims that the company's use of AI to generate the voice of Darth Vader in its video game violates federal collective bargaining law.
 - Why it matters: AI substitutions can trigger NLRA issues, especially in unionized workplaces.

IT Policies and the NLRA

- HR and IT must collaborate on IT policies as well to ensure they are NLRA compliant.
- Current Board standard: *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019).
- Overbroad with respect to surveillance too?
 - Advice Memo regarding IT Policy: “Electronic Communications are not confidential or private. The company’s right to use, access, monitor, record and disclose Electronic Communications without further notice applies equally to employee-provided systems or equipment used in the workplace, during working time, or to accomplish work tasks.”

Surveillance and Disparate Treatment

- Employees generally have no Section 7 right to use their employer's IT systems and equipment and employers have a property right to control the use of their systems. *Caesars Entertainment*, 368 NLRB No. 143 (2019).
 - If discrimination is alleged, the Board utilizes the standard from *Register Guard*, 351 NLRB 1110 (2007), in which it determined that discrimination is established if an employer treats communications of similar character disparately because of their union or other Section 7 status, thus drawing a distinction along Section 7 lines.
- The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not “do something out of the ordinary.” *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991).

Litigation – The Future is Now as AI and Technology Issues are Already in Court



EEOC v. iTutorGroup

- EEOC brought a lawsuit alleging age and sex discrimination against iTutorGroup based on the use of AI in hiring
- Individual applied using her real birthdate and was immediately rejected because she was over the age of 55
 - First problem – online application asked applicants for their birthdate
- Individual reapplied using identical information and a younger birthdate. This time she was offered an interview
 - Second problem – the AI’s programming caused it to reject female applicants 55 or older and male applicants 60 or older
 - As a result, iTutorGroup rejected more than 200 applicants aged 55 and over
- Settlement included substantial monetary payment and EEOC monitoring for 5 years.

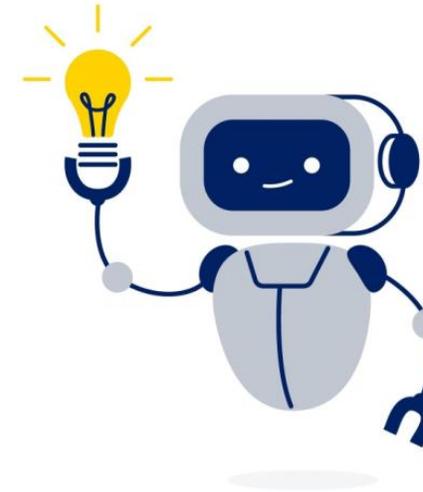
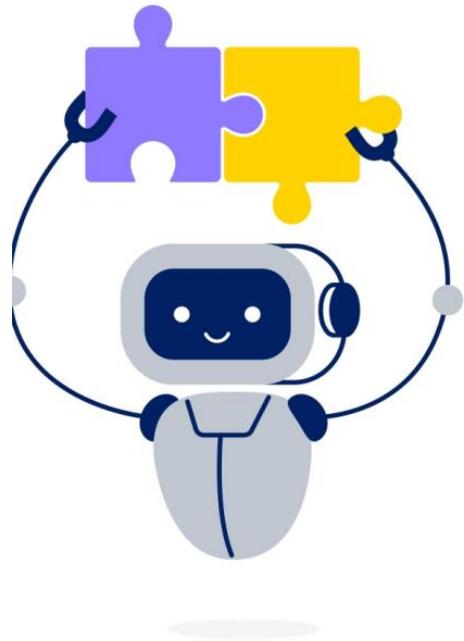
***Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796 (N.D. Cal. 2024)**

- Class action lawsuit brought against Workday
- Alleges Workday's AI and algorithms are more likely to deny job applicants who are African-American, over 40, and have a disability
- Plaintiff claims he has been rejected from more than 100 jobs that use Workday's platform
 - Claims companies rejected him within hours of applying, even though he met or exceeded the requirements for the position
 - Seeks class action status to include tens of thousands of people

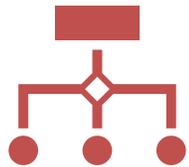
ADA Hypothetical

- Plaintiff alleges that her ability to type and use a computer keyboard are limited.
- She uses speech-to-text software and artificial intelligence technologies to do her work.
- Employer policies prohibit the use of unauthorized AI software.
- Plaintiff claims that defendant wrongly accused her of inappropriately using ChatGPT and denied her the ability to use the technology to complete her work.
- She contends that the use of AI would be a reasonable accommodation of her disability.

Generative and Agentic AI



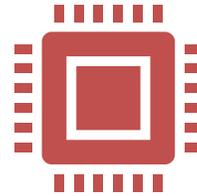
What's new, and what's not, about AI and the Workplace?



What's New?

Shift in agency and capabilities of software, including the ability to analyze documents, create content from scratch, and operate with less supervision.

Opacity of decision making – putting inputs into a black box and not knowing why certain outputs are the way they are.



What's Old?

Bias and discrimination – these are likely baked into the AI software

Vendor selection and dependency – these companies are vendors like any other, choose them wisely.

Quality control – Maintaining accuracy of underlying data and avoiding “hallucinations” with data



What should employers do?

AI and tech companies are pushing their products on individuals and companies – partly because its helpful, but also partly to justify their existence. What does this mean for employers?

Don't uncritically adopt new AI technology. Assess whether the business needs it and whether there are any unknown HR risks.

Agentic AI vs. Generative AI

Agentic AI

- Can create original content, such as text, images, video, or code in response to a user's prompt or request.
- Often acts without express approval, meaning this type of AI could review data and make decisions based on user initial inputs
- More proactive. (e.g. pulling candidates from applicant tracking systems, filtering candidates based on criteria, automatically scheduling interviews or contacting candidates).

Generative AI

- Relies on machine learning to simulate the learning and decision-making processes of the human brain.
- Usually needs explicit instructions and produces one-off responses.
- Helpful for generating documents, summaries, or visuals. (e.g. drafting job descriptions based on prompts, summarizing applicant resumes, etc.).

What do IT and HR need to know about this?

- Simply put – Generative AI creates content, while agentic AI performs actions
 - HR uses generative AI for drafting job descriptions, communications, and training materials; IT ensures safe implementation. Agentic AI, however, automates real HR tasks—like scheduling interviews or running onboarding workflows—which requires deeper IT governance and HR workflow redesign.
- Generative AI is reactive, while agentic AI is proactive (and autonomous)
 - Proactive AI can create agency issues, rendering the company liable for actions it might not want to be liable for (e.g. purchases, statements, interviews, etc.)

Why do Employees Need to Know the Difference?

- Employees still own the decisions of AI use
 - Generative AI still requires authority, while agentic AI does not. For example, employee has Agentic AI tool to respond to emails. Is the employee still responsible even if he's sleeping?
- Professional protections
 - AI can make its own mistakes. An employee needs to know if she's delegating a task to an agent or using generative AI as a tool.
- Training and knowing what tool you are using
 - Employees should know the scope of the tool they are using. It is incumbent upon IT and HR to ensure employees are trained on risks and benefits.

IT's Role in Adopting AI Technologies

- IT is responsible for assessing what controls to place on AI Tools like ChatGPT or Copilot.
- IT is responsible for establishing approved platforms employees can access – which is another way for IT to provide guardrails and restrictions.
 - Because agentic AI, for example, takes actions, only certain users should have access.
- IT is responsible for monitoring data security and preventing inadvertent disclosure.
 - Includes establishing audit logs, monitoring, and human oversight.
- Leading or devising trainings for these tools to ensure proper use.

HR's Responsibilities

- HR is not off the hook if IT suggests a new or novel technology for the workplace.
- HR's responsibility is to establish acceptable use policies for AI tools.
 - Also includes ethical guardrails on how AI systems interact with employees, including issues related to fairness, transparency, and inclusion.
- Training employees on those permissible uses – including issuing discipline for improper use
- Addressing productivity expectations around AI tools and handling employee relations around AI tool adoption.
 - Providing or withholding AI tools to employees should not be based on any protected characteristic.

“A computer can never be held accountable. Therefore a computer must never make a management decision.”

- IBM Training Manual, 1979

New and Proposed Legislation



New York City's Upcoming Pay Equity Reporting

- In December 2025, New York City enacted two bills that create a framework requiring private employers to report pay and demographic data
 - Employers with 200 or more employees required to submit annual pay report.
- Law requires employers to submit data to a designated city agency annually and sign a statement certifying the accuracy of the information.
- Where do IT and HR need to collaborate here?
 - Understanding what information is required and how it is to be reported. Open questions to be established by future regulation.
 - Ensuring accuracy of data, including location of employees (physically or remotely in New York City) demographics, and earnings.
 - Conduct periodic reviews of employee data – ensures accuracy and headcounts.

Notable Proposed Legislation – New York

- Expect New York and New York City, in particular, to lead on the implementation of new regulations on employers.
 - NY AB 1952: Requires employers to notify candidates if AI was used to make hiring decisions.
 - Still in committee
 - NY SB 1854: Establishes NY Workforce Stabilization Act to require businesses to conduct artificial intelligence impact assessments on the application and effect of AI in employment decisions
 - Still in committee
 - NY SB 4394: Development of criteria for use of AI employment decision making tools
 - Still in committee
 - NY AB 768: New York Artificial Intelligence Consumer Protection Act: regulates algorithmic decision making and prevent unlawful differential treatment or impact against any individual or a group of individuals based on age, race, disability, ethnicity, national origin, religion, etc.
 - Still in committee

Notable Proposed Legislation

- New Federal Legislation virtually non-existent.
 - TAKE IT DOWN Act is the only key piece of legislation in 2025.
 - Prohibits anyone from publishing “intimate visual depictions” of minors and non-consenting adults, including use of deepfakes and images edited or generated by AI.
 - Creates criminal liability.
 - But regulations and executive action remain prevalent.
- Other states
 - California: AB 316: in any civil action against a defendant who "developed, modified, or used" an AI system alleged to have caused harm, the defendant may not assert as a defense that "the artificial intelligence autonomously caused the harm."
 - Illinois HB 3773: prohibits employers from using AI that has the effect of subjecting employees to discrimination or using zip codes as a proxy for protected classes; Requires employers to notify employees of the employer's use of AI.

Questions?

Thank You

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