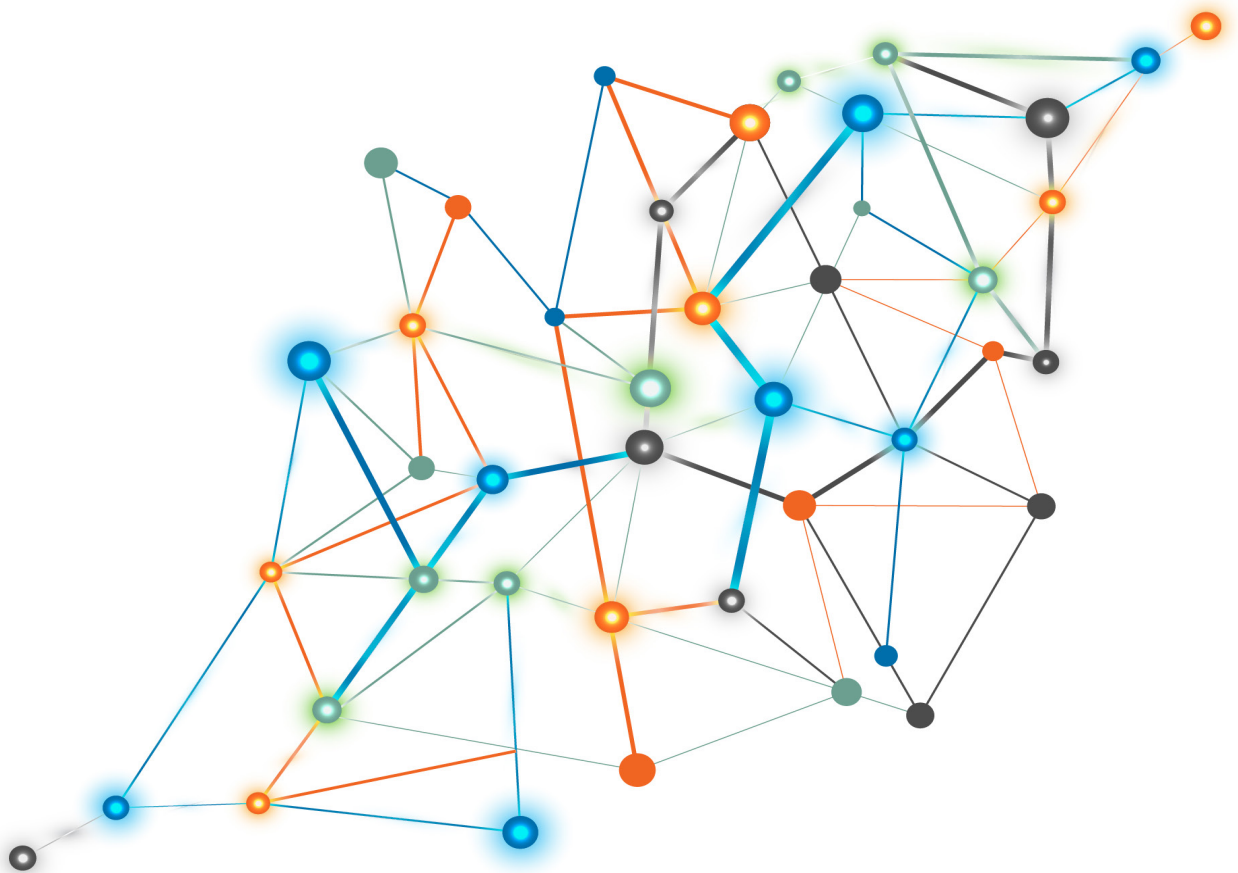# TORYS
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AI for employers: balancing risk and reward

By Irfan Kara, Rebecca Wise, Ryan Davis, Nic Wall and Alison Schwenk

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Using AI: key risks for employers

Employers are leveraging AI in the workplace, integrating increasingly sophisticated AI technology into employee recruitment and retention practices—and while it has the potential to streamline operations and enhance efficiency, its use raises important legal considerations and obligations. To that end, it is critical for employers to stay informed about, and compliant with, their legal obligations when using AI throughout the employment lifecycle.

This guide covers the evolving landscape as it relates to AI, including:

- an overview of the key legal risks associated with the use of AI for employment purposes;

- legislative and regulatory guidance that has been proposed or introduced (primarily in the U.S. and Canada) to address these risks;

- specific use cases for AI during the employment lifecycle; and

- strategies employers may wish to consider to mitigate some of the risks associated with the use of AI in the employment lifecycle.

Bias and discrimination

Many employers are turning to AI to streamline recruitment and retention processes; however, they must remain mindful of the extent to which AI systems may reflect the institutional and historic biases of their creators. AI (particularly generative AI models) are vulnerable to making decisions that unfairly disadvantage individuals or groups, including those protected under human rights laws, or creating content that perpetuates biases or stereotypes because the algorithms underlying them may be based on historical, biased data[1]. Considering this, the European Commission & Council of Economic Advisors raised concerns that the use of AI for employment purposes "could potentially introduce bias across nearly every stage of the hiring process"[2].

Every jurisdiction in Canada has human rights legislation that prohibits discrimination (i.e., differential treatment) in employment based on certain protected characteristics[3]. In Ontario, for example, employees may not be discriminated against on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. At the federal level, the United States has similar legislation which protects employees from discriminatory treatment[4]. Moreover, each U.S. state, the District of Columbia and Puerto Rico have adopted laws with protections against employment discrimination[5].

In both Canada and the U.S., discrimination may exist without any intent to harm[6], so no matter their intent

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[1] Information and Privacy Commissioner of Ontario, "Joint statement by the Information and Privacy Commissioner of Ontario (IPC) and the Ontario Human Rights Commission (OHRC) on the use of AI technologies", (May 2023).

[2] European Commission & Council of Economic Advisors, "The Impact of Artificial Intelligence on the Future of Workforces in the European Union and the United States of America", (December 2022).

[3] *Human Rights Code*, RSO 1990, c. H.19, s .5. See also: *Human Rights Code*, RSBC 1996, c. 210, s. 13; *Alberta Human Rights Act*, RSA 2000, c. A-25.5, s. 7; *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2, s. 16; *The Human Rights Code*, CCSM c. H175, s. 14; *Charter of Human Rights and Freedoms*, CQLR c. C-12, s. 10; *Human Rights Act*, RSNB 2011, c. 171, s. 4; *Human Rights Act*, RSNS 1989, c. 214, s. 8; *Human Rights Act*, RSPEI 1988, c. H-12, s. 6; *Human Rights Act*, 2010, SNL 2010, c. H-13.1, s. 14.

[4] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2077 (1978); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008).

[5] National Conference of State Legislatures, "Discrimination and Harassment in the Workplace", (August 2021).

[6] Ontario Human Rights Commission, "What is Discrimination?", (March 2008).

employers may face liability if their use of AI results in discrimination against current and prospective employees. It is therefore important for employers to take necessary precautions to avoid the potentially discriminatory impact of AI technology.

Privacy

AI use in the workplace raises risks under privacy laws. Canadian and U.S. privacy laws place importance on providing notice to individuals regarding the collection, use and disclosure of their personal information. There may also be circumstances where individual consent should be obtained. Privacy laws emphasize the importance of proportionality when collecting, using and disclosing personal data, requiring companies to use the least invasive means possible to achieve a given objective. They also require employers to comply with certain standards regarding data security, retention, disposal, quality and accuracy.

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> Employers may face liability if their use of AI results in discrimination against employees (or prospective employees), whether or not they intended that result.

AI systems are developed by consuming large amounts of data, including personal information. It is important for businesses that use or develop AI in their operations to develop an understanding of how their employees' personal information is being collected, used and disclosed, and must comply with all notice and/or consent requirements under applicable privacy laws.

Some jurisdictions require organizations to notify individuals if their personal information is going to be used to make an automated decision, or if they are being monitored electronically.

Regulatory landscape

Although existing human rights and privacy legislation may address some of the issues associated with AI, there is growing recognition that existing regulatory frameworks may be insufficient to properly regulate AI and address the risks it presents. Below, we outline current regulatory measures and offer insight on proposed regulation in Canada, the U.S., and Europe.

United States federal guidance

Though the U.S. currently lacks federal legislation addressing the use of AI in the workplace, there is federal guidance that demonstrates a developing regulatory framework addressing the use and development of AI, and provides guidance that applies pre-existing laws to AI tools, including in the workplace.

In October 2022, the White House Office of Science and Technology Policy issued the blueprint for an AI Bill of Rights[7], which provides principles and guidance pertaining to the use of AI systems, with an emphasis on protecting individuals' civil rights, civil liberties and privacy.

Although the principles described in this document were aspirational and non-binding, the AI Bill of Rights has informed subsequent federal guidance and proposed legislation, including the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence[8] (the Executive Order).

Signed by President Biden on October 30, 2023, the Executive Order is arguably the most important federal guidance addressing AI released to date, both due to its far-reaching application and its binding, prescriptive nature. The Executive Order directs almost every cabinet-level federal agency to perform specific tasks to further the development of guiding policies and priorities with respect to its use of AI, encompassing areas as far-reaching as safety and security, innovation and competition, labor and employment, equality and civil rights, consumer protection, privacy and international law.

> ### Summarization of U.S. AI Bill of Rights: Five Principles
>
> 1. AI should be safe and effective
>
> 2. It should not (purposefully or inadvertently) be used to discriminate or promote bias
>
> 3. The protection of individuals' privacy and data should be of central importance
>
> 4. People should be aware of when AI is being used, how it's being used and how the information it collects is informing decisions that impact them
>
> 5. There should always be a human available to address errors made by AI or to whom AI-based decisions may be appealed

Emergence of best practices frameworks

Under the Executive Order, the Department of Labor was tasked with, among other things, publishing principles and best practices for federal employers and software developers in order to mitigate AI's potential harms and maximize its potential benefits, to employees' well-being. Released in May 2024, these principles reflect those contained in the AI Bill of Rights and include:

- **promoting economic security** by emphasizing the use of AI to enhance worker productivity and improve job quality, while supporting workers who face job displacement as a result of AI;

- **preventing the use of AI in ways that violates workers' or human rights** or promotes bias or discrimination;

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[7] The White House Office of Science and Technology Policy, "Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People", (October 2022).

[8] *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Exec. Order No. 14110, 88 F.R. 75191, (2023).

- **protecting the safety of workers' data and the privacy** of personal information collected by AI tools;

- **ensuring transparency in the use of AI by employers** and informing and educating workers regarding their AI-related rights and protections; and

- **acquiring worker input** when promulgating rules and regulations and establishing mechanisms for overseeing the use of AI in the workplace and reviewing AI-based decisions[9].

Although only binding on federal employers (with certain limited exceptions), these principles may still influence private employers' AI use policies, including through new standards and requirements incorporated into federal contracts, as well as the voluntary inclusion of these principles by private employers in their AI use policies in order to attract talent from the public sector. These principles are reflected in legislation that has been proposed at the federal level, as well as legislation that has been proposed and enacted at the state and local level.

Interfacing with existing workplace law

The federal government has also issued guidance applying pre-existing laws to the use of AI in the workplace, particularly with respect to Equal Employment Opportunity (EEO) laws, which address harassment, discrimination and bias in the workplace. The seminal law in this area is Title VII of the Civil Rights Act of 1964 (Title VII), which applies to most private and public employers and prohibits intentional and unintentional discrimination and bias in the workplace based on protected characteristics, such as race, ethnicity, national origin, sex or religion. Through subsequent legislation and court rulings, the list of protected characteristics has grown over time to include disability, age, pregnancy and related medical conditions, sexual orientation, gender identity and genetic information[10].

In May 2023, the Equal Employment Opportunity Commission (the EEOC), an independent agency tasked with the enforcement of EEO laws, issued technical assistance documents addressing the use of AI in employment decisions in the context of Title VII[11]. Specifically, these documents affirmatively stated that algorithmic decision-making tools, including AI, used in making employment decisions would be subject to Title VII and clarified how its anti-discrimination framework would be applied to these decision-making tools.

Proposed and enacted legislation

Although no federal legislation has been enacted in the U.S., multiple bills pertaining to AI in the workplace have been introduced in the U.S. Senate:

- **The No Robot Bosses Act**[12] would subject employers to various requirements when using AI in connection with employment-related decisions. In addition to requiring disclosure by employers regarding when and how AI is being used in making these decisions and requiring the performance of regular discriminatory impact analyses with respect to these tools, the Act would prohibit employers from relying exclusively on AI when making employment-related decisions by requiring some level of human involvement.

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[9] U.S. Department of Labor, "Artificial Intelligence and Worker Well-being: Principles for Developers and Employers", (May 2024).

[10] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973); Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2077 (1978); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008).

[11] The Equal Employment Opportunity Commission, "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964", (May 2023).

[12] No Robot Bosses Act, S. 2419, 118th Congress (2023); No Robot Bosses Act, H.R. 7621, 118th Congress (2024).

- **The Algorithmic Accountability Act**[13] would also require employers to perform a discriminatory impact assessment of AI tools used to inform employment decisions. However, this legislation goes further than the No Robot Bosses Act by calling for information from those assessments to be included in a publicly accessible database maintained by the U.S. Federal Trade Commission.

- Another proposed piece of legislation, the **Stop Spying Bosses Act**[14], seeks to specifically address AI tools used to monitor employees. This legislation would require employers to disclose details about what employee data is being collected and how it affects the employer's employment-related decisions, while also limiting the types of information that may be collected and with whom it may be shared.

Legislators have been more successful at passing laws addressing the use of AI in the workplace at the state and local levels. In July 2023, the New York City Council passed the Automated Employment Decision Tools Law[15], which requires transparency from employers that use AI to make hiring and promotion decisions and mandates that companies using AI tools in this manner undergo annual bias audits. Moreover, it requires that individuals—including, but not limited to, individuals with disabilities—who request an alternative, non-AI assessment process must be accommodated.

Illinois and Maryland have passed legislation requiring employers to obtain applicants' consent before video interviewing AI tools can be used to assess candidates in the hiring process[16]. The Illinois law also addresses potential bias resulting from the use of these tools, requiring the employer to submit demographic information about those applicants not offered in-person interviews and those ultimately hired[17].

Earlier this year, Colorado passed what is widely considered to be the farthest-reaching AI legislation in the country. Effective February 1, 2026, Colorado's Artificial Intelligence Act[18] (the AIA) applies to both developers and deployers of AI decision-making tools and prohibits algorithmic discrimination with respect to protected groups. This legislation applies to tools used in a wide range of decisions, including those related to education opportunities, financial services, housing access, healthcare, government services and employment. Similar to other legislation mentioned earlier, the AIA requires transparency regarding when these tools are used and how they inform decision-making, mandates the regular performance of discrimination impact assessments, and requires that employment decisions made using AI tools must be appealable to human beings. Similarly far-reaching laws have been introduced or are being considered in other states, most notably California[19], and Illinois recently passed similar legislation focused exclusively on employment-related decisions[20].

Canada

In Canada, frameworks for regulating the use of AI in the public sector have been proposed both federally and

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[13] Algorithmic Accountability Act of 2022, H.R. 6580, 117th Congress (2022); Algorithmic Accountability Act of 2022, S. 3572, 117th Congress (2022); Algorithmic Accountability Act of 2023, H.R. 5628, 118th Congress (2023); Algorithmic Accountability Act of 2023, S. 2892, 118th Congress (2023).

[14] Stop Spying Bosses Act, S. 262, 118th Congress (2023); Stop Spying Bosses Act, H.R. 7690, 118th Congress (2024).

[15] New York City Local Law 144 of 2021, Int. No. 1894-A (December 2021).

[16] Artificial Intelligence Video Interview Act, IL HB2557 (2019); Labor and Employment – Use of Facial Recognition Services – Prohibition, MD HB1202 (2020).

[17] Video Interview Demographic, IL HB0053 (2021); Forbes, "Balancing Innovation And Compliance: Navigating The Legal Landscape Of AI In Employment Decisions", (October 2023).

[18] Concerning Consumer Protections in Interactions with Artificial Intelligence Systems, CO SB 24-205 (2024).

[19] Automated Decision Systems, CA AB 2930 (2024).

[20] An Act Concerning Employment, IL HB 3733 (2024).

in Ontario[21]. At the federal level, Bill C-27, also known as the *Artificial Intelligence and Data Act* (AIDA), proposes new legislation governing AI systems in Canada. AIDA has been making its way through Parliament for the past three calendar years, but has not yet passed.

As proposed by the Minister of Innovation, Science and Industry, AIDA would govern the use of AI systems "in matters relating to determinations in respect of employment, including recruitment, referral, hiring, remuneration, promotion, training, apprenticeship, transfer or termination"[22]. It would also impose a number of requirements on the use of AI systems, including those related to accountability, transparency, testing, documentation, testing, monitoring, and incident reporting.

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In public consultations, Ontario's Human Rights Commission advocated for even more robust regulation of the use of AI for employment purposes, reflecting that this is a significant issue for the Commission.

In Ontario, the government is seeking to establish the "Trustworthy AI Framework" that would be made up of policies, products and guidance that set out risk-based rules for the transparent, responsible and accountable use of AI by the Ontario government. The government undertook a consultation in 2021 and is still in the process of establishing a formal framework.

There have also been efforts to strengthen the regulation of employers' use of AI in the private sector. For example, Ontario recently passed the *Working for Workers Four Act*, which requires employers to disclose in publicly advertised job postings whether AI is being used in the hiring process to screen, assess or select candidates (although it is not yet in force)[23]. In the public consultations leading to the introduction of this legislation, Ontario's Human Rights Commission (OHRC) advocated for even more robust regulation of the use of AI for employment purposes, reflecting that this is a significant issue for the OHRC[24].

In Québec, recent privacy reforms require employers to provide notice of any automated decision made using personal information (such as a screening decision)[25]. Further, employers need to provide a channel for individuals to submit questions, comments or complaints to a representative who can review the decision; allow people to request correction of the personal information used in the decision; and inform the individual, upon request, of (i) the personal information used in the decision; (ii) the reasons, principal factors and parameters that led to the decision; and (iii) the individual's right to correct the personal information used in the decision[26].

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[21] *Digital Charter Implementation Act*, Bill C-27, 1st session, 44th Parliament, (2022); Government of Ontario, "Ontario's Trustworthy Artificial Intelligence (AI) Framework", (September 2023).

[22] House of Commons, "Correspondence from the Honourable Francois-Philippe Champagne, Minister of Innovation, Science and Industry - Amendments to AIDA", (November 28, 2023).

[23] *Working for Workers Four Act*, Bill 149, SO 2024, c. 3.

[24] Among other things, the OHRC advocated for (a) a requirement that employers test their AI technologies prior to deployment for compliance with their obligations under Ontario's privacy and human rights laws, and publicly disclose their testing methodology and results; and (b) a requirement to disclose when and for what purpose AI technologies are used in recruitment and hiring, and how data associated with personal characteristics of the applicant may be used by AI technologies. See Ontario Human Rights Commission, "Ontario Human Rights Commission Submission to the Standing Committee on Social Policy Regarding Bill 149, *Working for Workers Four Act, 2023*" (February 2024).

[25] *An Act respecting the protection of personal information in the private sector*, CQLR c P-39.1, s. 12.1.

[26] Torys, "Automated decision-making: what Québec's Bill 64 reforms mean for business", (April 2022).

In addition, Canadian privacy regulators have jointly issued guidance in relation to generative AI entitled *Principles for responsible, trustworthy and privacy-protective generative AI technologies*[27]. This guidance interprets existing Canadian privacy legislation and principles as they apply to organizations that develop, provide, and use generative AI systems, and emphasizes the protection of vulnerable groups with a view to ensuring that no discriminatory output is generated. It also focuses on preventing inappropriate uses of AI and ensuring that users are provided with sufficient information about the systems they interact with and mechanisms to enforce their privacy rights. While the guidance does not bind the regulators, its content is likely to influence future regulatory decisions, investigations, and policy statements.

For more on existing and emerging developments in AI regulation, read [What's new with artificial intelligence regulation in Canada and abroad?](#)

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[27] Privacy Commissioner of Canada, "[Principles for responsible, trustworthy and privacy-protective generative AI technologies](#)", (December 2023). See also Torys, "[Canadian privacy regulators weigh in on how to comply with privacy laws when using generative AI systems](#)", (January 2024).

AI throughout the employment life cycle
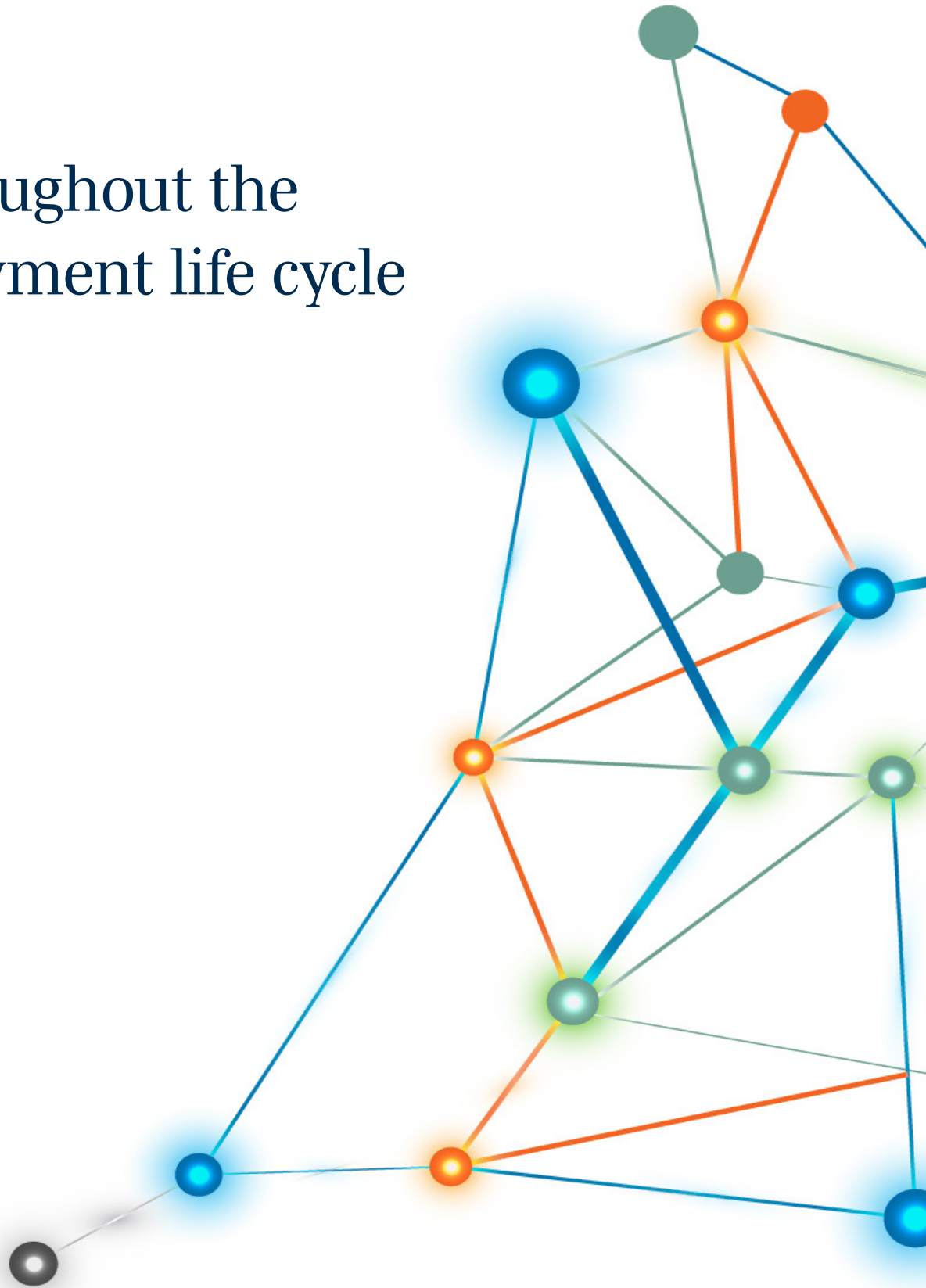
Recruitment and hiring

Employers are increasingly using AI to find, screen, and assess candidates as part of the recruitment and hiring process, with tools that take over recruitment-related functions including:

- creating targeted job advertisements;

- screening applications using predictive evaluation criteria and automating invitations to candidates to apply;

- using data from recorded interviews and "gamified" assessments (e.g., personality tests, cognitive ability tests or other skill-specific tests), to assess a candidate without interviewing them directly; and

- assigning candidates competency-based scores and rankings.

While using AI for recruitment and hiring can streamline the recruitment process and provide more objective assessments of candidates' skills and abilities, employers must be mindful that they are conducting their hiring in compliance with privacy and human rights laws.

Human rights considerations

AI-based recruitment and hiring tools raise potential risks under human rights legislation. As it relates to targeted job advertisements, the use of algorithms created by AI to identify or target job applicants may create discrimination risk if particular groups or people are more likely to be targeted over other groups or people. In December 2020, the Ontario Human Rights Commission published an open letter to Facebook detailing the potential risks that AI-based recruitment and hiring tools raise under human rights legislation and urging the company to address potential bias in its algorithm[28].

Problems with screening

These concerns are not unique to Facebook: other AI-based screening tools present the risk of improperly "screening out" candidates based on personal characteristics protected under human rights legislation, depending on the algorithm upon which the tools are based. There have been several illustrations of this issue to date—for example:

- Between 2014 and 2017, a company created an algorithm to predict who would make the best employees and screen applicants based on those criteria. The algorithm was based on data from its current workforce over the prior 10 years. Because the organization had comparatively few women in its workforce, the algorithm predicted that women would not be good employees and screened out female applicants.

- In Ontario, the Peel District School Board relied on an algorithm for vetting prospective teacher candidates, using historical data to select candidates that mirrored previous hires. The Minister of Education's 2020 *Review of the Peel District School Board*[29] found that the algorithm appeared to inappropriately screen out otherwise qualified racialized candidates, perpetuating historical (racist) preferences in hiring[30].

Interviewing

AI-powered interview and candidate evaluation technologies can also have discriminatory impacts on protected

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[28] Ontario Human Rights Commission, "Letter to Facebook on enforcing safeguards to prevent discriminatory housing, employment and credit ad targeting in Canada", (December 2020).

[29] Ena Chadha, Suzanne Herbert, and Shawn Richard, "Review of the Peel District School Board", (February 2020).

[30] Ontario Human Rights Commission, "Submission on Ontario's Trustworthy Artificial Intelligence (AI) Framework", (June 2021).

groups in some circumstances[31]. For example, interview technologies may not be as reliable for assessing applicants with speech impediments or for those who require a screen reader, which could result in differential treatment of prospective employees with disabilities[32]. Further, researchers have found racial disparities in automated speech recognition tools and in some facial recognition software[33]. For example, technologies that can be used to analyze applicants' emotional expressions may be more likely to incorrectly assign negative emotions to Black faces than White faces[34].

U.S. guidance

In the U.S., the EEOC has addressed how discriminatory impact may be determined in this context. According to EEOC guidance, if an AI tool used in an employment decision-making process results in a substantially lower selection rate for members of a protected class, the AI tool would likely be found to violate Title VII[35]. A selection rate may be considered to be substantially lower when members of a protected group (or individuals possessing a combination of protected characteristics) are 80% less likely to be selected compared to similarly situated individuals that are not part of the protected group[36]. For example, the interview technologies and automated speech recognition tools described in the preceding paragraph could run afoul of Title VII if they resulted in applicants from a protected group receiving second-round interviews at less than 80% the rate of other applicants.

EEOC technical assistance documents also address how AI tools used in making employment decisions, including hiring decisions, are to be assessed under the Americans with Disabilities Act[37] in order to determine whether individuals with disabilities are being screened out (the "ADA Guidance").[38]

Under the ADA Guidance, screen out occurs when:

1.   an applicant's disability does not allow the applicant to be accurately assessed by an AI tool or lowers their score on an AI-based assessment;

2.   the applicant would be able to perform the job for which he or she is applying with reasonable accommodation, but one is not provided during the assessment process; and

3.   the applicant is not selected as a result[39].

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[31] Carmen Fernández-Martínez and Alberto Fernández, "AI and recruiting software: Ethical and legal implications", *Paladyn, Journal of Behavioral Robotics*, 11(1) (2020); Brookings, "For some employment algorithms, disability discrimination by default", (October 2019). See also Center for Democracy & Technology, "Algorithm-Driven Hiring Tools: Innovative Recruitment or Expedited Disability Discrimination?", (December 2020); ACCESS, "Unintended Machine Learning Biases as Social Barriers for Persons with Disabilities", (October 2019).

[32] Ontario Human Rights Commission, "Ontario Human Rights Commission Submission to the Standing Committee on Social Policy Regarding Bill 149, *Working for Workers Four Act*, 2023", (February 2024); Disability Ethical AI, "HR has an AI powered disability problem", (September 2023).

[33] Allison Koenecke et al., "Racial disparities in automated speech recognition", *Proceedings of the National Academy of Sciences*, 117(14) (2020). See also Abubakar Abid, Maheen Farooqi, and James Zou, "Large language models associate Muslims with violence", *Nature Machine Intelligence*, 3 (2021).

[34] Ontario Human Rights Commission, "Ontario Human Rights Commission Submission to the Standing Committee on Social Policy Regarding Bill 149, *Working for Workers Four Act*, 2023", (February 2024); Brookings Institution, "Why New York City is cracking down on AI in hiring", (December 2021). See also MIT Media Lab, Gender Shades Project, (2020).

[35] The Equal Employment Opportunity Commission, "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964", (May 2023).

[36] *Ibid*

[37] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

[38] The Equal Employment Opportunity Commission, "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees", (May 2022).

[39] *Ibid*

For example, an applicant with a disability that limits manual dexterity may receive a lower score from an AI assessment tool that measures typing speed, even though this individual would be able to perform the job in question with a reasonable accommodation. Under this circumstance, if the employer does not provide a reasonable accommodation that would allow the applicant to be assessed fairly, and the applicant is not selected as a result, the employer's use of the AI tool could be in violation of the ADA.

Privacy considerations

The use of AI for recruitment and hiring raises unique considerations when it comes to the issue of privacy. In most cases, companies are required to obtain consent from, or provide notice to, candidates before handling their personal information. As AI tools collect large volumes of personal information, these tools can create a risk that a company engages in over- or unnecessary collection of personal information, which is prohibited by privacy laws. Companies should consider whether candidates' personal information is being used to train their AI system, and if so, how it impacts consent or notice obligations.

Employee monitoring and performance evaluation

Employers are more frequently using AI to monitor and assess the performance of employees in the workplace. Among other things, AI tools have the power to:

- track employee messages, phone screens, cameras, key-strokes, and mouse clicks;

- observe employee behaviour through webcam monitoring and eye tracking;

- analyze employee performance data (including data generated from other AI-based tools) to identify employee strengths and weaknesses; and

- generate performance ratings and reviews.

AI monitoring and productivity tools offer powerful insights into employee behaviour and performance, supporting decisions related to discipline, performance, compensation and more. However, managers and HR professionals who rely on what AI tools tell them—without consideration for the individual employee's circumstances—risk running afoul of human and privacy rights.

In recent years, workers' advocate groups and unions have been campaigning for protections to ensure there is clear oversight over algorithmic management.

Machine unlearning

Unsuccessful candidates are increasingly requesting the deletion of their data or withdrawing their consent to the business's handling of their data following the assessment process. In the European Union, GDPR protections give job candidates the legal right to have their data deleted upon request, and companies who have collected data from these candidates must comply, regardless of the company's jurisdiction.

As deleting data that has been fed into an AI model can be very difficult, conversations about "machine unlearning" are taking place. This emerging field focuses on deleting the memory of AI models: a complicated feat, given that these models rely on mass reproduction of data subsets. Businesses need to consider how they will address such requests.

- In 2022, workers at Germany's largest telecommunications company, **Deutsche Telekom**, successfully argued for a ban on employers using digitally collected data to discipline or dismiss individual workers and won a prohibition against employers using algorithms to fire workers without any human involvement[40].

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[40] Frontiers in Artificial Intelligence, "Human-centred AI through employee participation", (February 2024).

- In 2023, the **Communications Workers of America** (CWA) union presented principles and recommendations to the CWA Executive Board regarding how to protect members from negative effects of AI tools in the workplace. These recommendations include employee education and a re-evaluation of current contract language[41].

Human rights considerations

AI monitoring and productivity tools are often based on algorithms that might not account for individual circumstances, which could result in disparate outcomes for employees based on protected characteristics. For example, a tool that measures an employee's time in their office may not consider factors such as breast-feeding or prayer breaks[42]. Similarly, it may not account for how an employee's disability might impact their productivity or performance: an AI model that evaluates keyboard strokes, for example, might not account for a worker who has a medical condition that impacts their ability to use a keyboard. Depending on how these tools are used by employers, blind reliance could result in unintended discriminatory effects.

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The use of generative AI to draft performance reviews may also raise concerns under human rights legislation. A recent study found that when a generative AI tool was prompted to write feedback for specific job titles and personality traits, the resulting output reflected gender bias and stereotypes. Specifically, the word "she" was used 90% of the time when writing reviews for a receptionist, while "he" was used in 100% of reviews generated for a construction worker. Further, prompts for "confident" and "ambitious" workers were more likely to generate reviews for male employees[43].

Privacy considerations

AI monitoring and surveillance tools raise particular issues under privacy laws because they can more easily intrude into an employee's personal and private life, including spaces like an employee's home. For example, AI tools which monitor employee conversations on their cell phone may not be able to effectively differentiate between business and personal conversations[44].

While employers are generally permitted to supervise and monitor employee performance, they need to be mindful of employee privacy rights. In 2015, the Information and Privacy Commissioner for British Columbia found in a report on a public sector workplace that technological monitoring involving screenshots, keystroke logging and tracking of online activity amounted to excessive and unauthorized collection of personal information[45].

The privacy considerations relating to the use of AI in connection with recruitment and hiring (i.e., collection and handling of personal information, notice and consent considerations, etc.) are equally relevant when AI is being used for employee monitoring and evaluation.

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[41] CWA Committee on Artificial Intelligence, "Report to the CWA Executive Board on AI Principles and Recommendations", (November 2023).

[42] Insurance Journal, "EEOC Warns Employers to Check AI Workplace Monitoring Tools for Bias", (May 2023).

[43] Textio, "ChatGPT writes performance feedback", (January 2023).

[44] Centre for International Governance Innovation, "Privacy in the Precision Economy: The Rise of AI-Enabled Workplace Surveillance during the Pandemic", (June 2021).

[45] Information and Privacy Commissioner for BC, "Investigation Report F15-01: Use of Employee Monitoring Software by the District of Saanich", (March 2015).

Reviews, judgments, and subjective statements made about employees in the context of an evaluation, including those gathered by AI tools, can be considered "sensitive personal information"—a category which often attracts heightened privacy expectations from both employees and regulators. Employers may consider being more explicit regarding the content of a privacy notice and the means of bringing the notice to the employee's attention if using AI tools to evaluate employee performance.

Making employment decisions: promotion, compensation, termination

Employers can use AI to assist in making decisions relating to employee promotions, compensation, discipline and, ultimately, termination. These tools are often tied to tools that monitor employee performance and productivity: for example, one large employer reportedly relies on a "deeply automated tracking and termination process," using an AI system to monitor and automatically issue warnings to—and fire workers for—failing to meet productivity quotas.

Using AI to make, or assist in making decisions relating to an individual's employment, including termination, raises many of the same human rights and privacy considerations as it does when used for recruitment or monitoring. Given that termination is often the subject of litigation, the risks associated with using AI for such decisions is particularly pronounced.

In the U.S., a federation of teachers challenged a school district's use of an AI tool in its employment decisions[46]. The aim of the tool was to help the school district decide who to fire based on whose performance the tool deemed ineffective. The Court denied the school district's motion for summary judgment as the AI tool offered no meaningful way to ensure that it was correctly calculating teachers' scores, nor did it offer an opportunity to independently verify or replicate those scores. This was a problem given that a low effectiveness score could lead to termination[47]. The Court found that teachers were "unfairly subject to mistaken deprivation of constitutionally protected property interests in their jobs."

In Canada, historical and recent case law suggests that employers are expected to act in good faith towards their employees, including in the manner of dismissal or termination[48]. While it has not yet been established whether decisions made by AI that may be viewed as invalid, unfair or unexplainable constitute a breach of that duty, it is advisable for employers to be aware of the potential risks of using AI tools to make significant employment decisions.

Should you be able to "explain" AI-based decisions?

The UK House of Commons has recognized that using AI for employment-related decisions creates problems of "explainability"—that is, the idea that a machine learning model and its output can be acceptably explained to the average human being.

Last year, the House of Commons released a research briefing that highlights the duty of mutual trust and confidence between an employer and employee. This duty requires an employer to be able to explain decisions around recruitment, pay, promotion, and dismissal.

The House of Commons acknowledged that where AI has been involved in a dismissal decision, that decision could be in violation of employees' unfair dismissal rights if the AI system used to make that decision is flawed.

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[46] *Houston Federation of Teachers v Houston Independent School District*, 251 F.Supp.3d 1168 (SD Tex 2017).

[47] *Ibid.*

[48] *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, para. 98.

Managing risk

To mitigate the human rights and privacy risks described above, employers should focus on complying with existing regulations and legislation, as well as remaining abreast of emerging legal obligations and AI governance best practices related to the use of AI in the workplace. Further, employers may wish to consider adopting AI governance best practices, which could include practices related to accountability, transparency, testing, data governance, documentation, and monitoring.

Guidance from Canadian regulators

Canadian federal, provincial and territorial privacy regulators across the country have called for governments to take steps to ensure that employee rights to privacy and transparency are respected and protected, "particularly in a modern work context that relies increasingly on electronic monitoring and surveillance of employees' activities"[49]. Recommendations include reinforcing statutory privacy protections by strengthening transparency and accountability requirements, prohibiting inappropriate employment practices, and defining "no-go zones" beyond a certain threshold of risk.

Privacy regulators also suggested that employers:[50]

- **limit the use of electronic monitoring tools** (i.e., only for fair and appropriate purposes and only to the extent they are reasonably necessary to manage the employer-employee relationship);

- **inform employees of the electronic monitoring tools** and AI systems being used and for which purposes, explain their implications using clear and plain language and provide them with copies of relevant policies and procedures; and

- **provide employees with clear information about how to object** to the collection, use, or disclosure of their personal information, how to challenge decisions made about them, and how to exercise access rights.

Guidance from U.S. regulators

The U.S. federal government has issued a number of guidance documents, and several state and local jurisdictions have introduced legislation, that contemplate the use of AI during the hiring process. Other guidance and legislation is directed at regulating employers' use of AI for its existing workforce, such as for monitoring employees or evaluating them for promotion or termination. Although these items differ in scope and focus, they all reflect similar principles to those enumerated in the AI Bill of Rights and by the Department of Labor in response to the Executive Order. Their requirements are broadly similar and provide employers with a roadmap for addressing current and future developments in this area.

For example, current guidance and legislation typically address the issue of transparency by requiring employers in certain circumstances to provide advance notice to, and possibly obtain consent from, individuals who are subject to algorithmic decision-making tools and inform them as to how information collected by these tools will be used in the employment decision-making process. Employers may want to consider implementing safeguards and best practices for protecting employee data and private information, and limit what information may be gathered and with whom it is shared.

Employers using AI technology in this manner may also consider performing bias audits or impact assessments, put processes in place to address discriminatory results and, where appropriate, make these results available to the government or the public. Another recurring requirement is the provision of alternative, non-AI selection

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[49] Office of the Privacy Commissioner of Canada, "Protecting Employee Privacy in the Modern Workplace", (October 2023).

[50] Ibid.

procedures and the presence of processes that allow decisions to be appealed to a human arbiter. Further, EEOC and ADA Guidance described earlier with respect to hiring decisions demonstrate the importance of providing reasonable accommodations to certain applicants, and employers should be prepared to readily address those requests. Finally, employers may be held accountable for AI tools and software that are developed by, acquired from or administered by third parties, so employers should generally diligence these vendors accordingly.

AI risk mitigation strategies

- Develop governance structures and processes that promote accountability and transparency in AI use, including defining roles and responsibilities.

- Take steps to better understand how AI tools work (including the underlying algorithms) prior to implementation.

- Conduct regular bias audits/assessments to determine whether the tools are having any unintended discriminatory impacts.

- Enhance transparency, including communicating to employees (and potential employees) about how AI will be used, what data will be collected and what the employer will do with personal information.

- Have a human "in the loop"—that is, allow a human user to intervene and change the outcome of an event or process if necessary. This is consistent with guidance from the Canadian federal, provincial and territorial Privacy Commissioners and Ombudsman.

The path forward
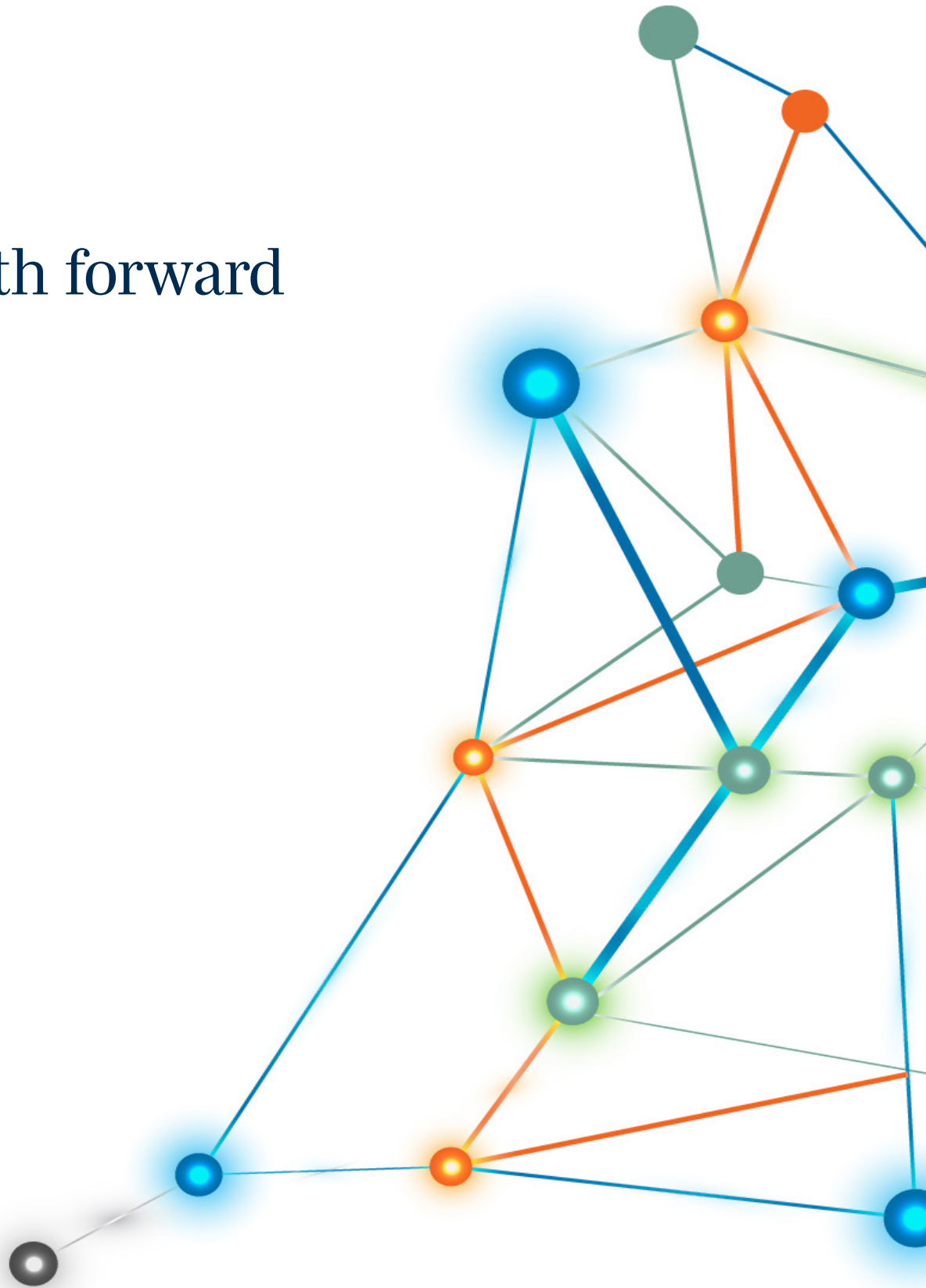
The use of AI continues to grow within the workplace. In light of this growth, it is increasingly important for employers to stay informed about current legislation and the legal risks associated with its use. By understanding the legal landscape and potential implications of AI on human rights and privacy, employers can take proactive steps to mitigate these risks. Among other things, implementing workplace policies, conducting regular reviews/audits of AI technologies and fostering a culture of transparency and accountability will assist employers in complying with existing regulations, and better position them to adapt to future developments in AI and its governance.

For more on how to effectively integrate AI into your business, access Torys AI insights for business leaders.