



LEGAL NEWS FOR YOUR BUSINESS

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Employment Alert

AI IN THE WORKPLACE: WHAT EMPLOYERS NEED TO KNOW

With the rise of ChatGPT and other technology, artificial intelligence (“AI”) is all the rage these days. Although automated systems, with and without AI, certainly can make tasks easier and more efficient, they also have inherent risks. Further, when employers use AI in the workplace, they must ensure compliance with all applicable laws, regulations, and guidance. In response to AI’s increasing popularity, multiple regulatory bodies have issued additional memos, guidance, and information for employers to be fully informed.

On April 25, 2023, officials from the Federal Trade Commission (“FTC”), Department of Justice (“DOJ”), Consumer Financial Protection Bureau (“CFPB”), and the Equal Employment Opportunity Commission (“EEOC”), released a joint statement regarding their commitment to promote responsible innovation and use of automated systems and other forms of AI. Additionally, on May 18, the EEOC released a technical guidance document, **“Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964.”** This guidance document specifically focuses on employers’ hiring practices and how AI might disproportionately affect different populations.

While employers typically monitor their traditional hiring practices for disproportionate impact on minority groups and to comply with employment laws, AI systems can make monitoring more difficult and complicated. Additionally, just as humans may be biased in making hiring decisions, AI systems may be biased based on the qualifications and characteristics they are programmed to look for or weed out. The EEOC stresses that employers are still responsible under Title VII if their automated systems or AI negatively impact protected groups. This liability remains even if an employer engages an outside

vendor for their selection procedures. The EEOC advises employers to self-monitor and analyze whether their systems have a disparate impact. If one is discovered, employers are encouraged to revise the use of the tool or choose an alternative tool to quickly and efficiently address the problem. In their April joint statement, the FTC, DOJ, CFPB, and EEOC emphasized that “there is no AI exemption to the laws on the books” and the agencies will “vigorously enforce the law to combat unfair or deceptive practices.”

As AI continues to grow, employers will have to take additional care to comply with all laws and regulations.

If you have questions about employment considerations of AI in the workplace, please contact any member of Gardner Skelton’s employment team.

Healthcare Alert

HHS PROPOSED REPRODUCTIVE HEALTHCARE RULE

On April 12, 2023, the Department of Health and Human Services’ (“HHS”) Office for Civil Rights (“OCR”) released a proposed rule (the “Rule”) that would modify the HIPAA Privacy Rule to include stricter standards for the use or disclosure of PHI to investigate or prosecute patients, providers, and others receiving, providing, or involved in reproductive health care.

Following *Dobbs v. Jackson Women’s Health Organization*, the Supreme Court decision that overturned *Roe v. Wade* in June 2022, OCR issued additional guidance for providers regarding disclosing PHI related to reproductive health care. Currently, the HIPAA Privacy Rule permits, but does not require, providers to disclose PHI when (1) required by law; (2) for law enforcement purposes; and (3) averting serious threats to health and safety. Guidance issued soon after the *Dobbs* decision clarified that providers may only release information in these permitted circumstances, such as in response to a court order, but that they were not explicitly required by the HIPAA Privacy Law to do so.

However, the Rule would enhance protections for PHI related to reproductive health care by prohibiting “the use or disclosure of PHI for the criminal, civil, or administrative investigation of or proceeding against an individual, regulated entity, or other person” who may have received or been involved in the provision of such services. Additionally, the Rule would create a new category of PHI, defining “reproductive health care” as “care, services, or supplies related to the reproductive health of the individual.” This definition is broad enough to include fertility treatments.

The Rule would specifically prohibit disclosing PHI in three situations:

1. ***Reproductive health care is “sought, obtained, provided, or facilitated in a state where the health care is lawful and outside of the state where the investigation or proceeding is***

authorized. For example, if a patient’s state of residence prohibits a procedure and they travel into another state that allows that procedure, healthcare providers are prohibited from releasing PHI as a result of any investigation occurring in the patient’s home state.

2. **When reproductive health care is “protected, required, or expressly authorized by federal law, regardless of the state in which such health care was provided.”** This provision refers to reproductive care mandated under the Emergency Medical Treatment and Labor Act (“EMTALA”), which requires providers to stabilize a pregnant person experiencing an emergency medical condition.
3. **Reproductive health care is “provided in the state where the investigation or proceeding is authorized and is permitted by law of the state in which such health care is provided.”** In states where reproductive health care is legal, including abortion services, providers may not disclose PHI to any law enforcement.

OCR reports that the Rule has been proposed in response to providers nationwide seeking clarification of their legal rights and responsibilities. The Rule’s comment period closes June 16, 2023. OCR is expected to publish a final rule after that time.

If you have questions or concerns about the HIPAA Privacy rule, please contact any member of Gardner Skelton’s healthcare team.



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