The Robots Are Coming: Navigating AI and The Growing US Regulatory Landscape

Association of Corporate Counsel
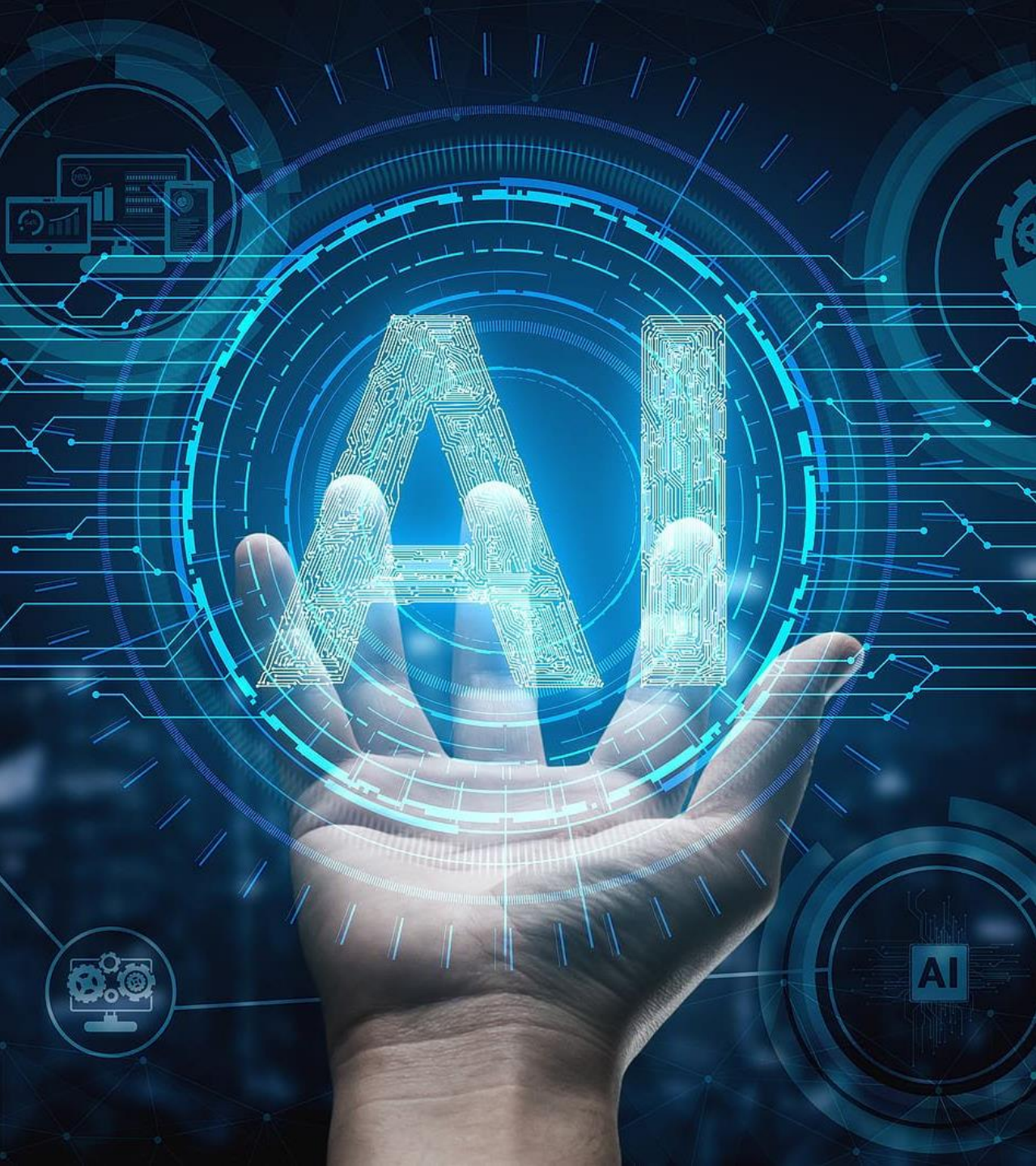**San Diego**

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Agenda

❑ Setting the table – what is AI?

❑ Unpacking generative AI

❑ Deep dive into the US legal landscape

❑ Mapping and mitigating AI risk

❑ Key takeaways

❑ Questions throughout

Setting The Table
What is AI?

What is AI?

- **NIST**: A machine-based system that can generate outputs for a given set of objectives, such as predictions, recommendations, or decisions influencing real or virtual environments.

- **IEEE**: Computer systems that are able to perform tasks that normally require human intelligence, such as perception, speech recognition, learning, decision-making, and natural language processing.

- **ISO**: Engineered systems that generate outputs such as content, forecasts, recommendations or decisions for a given set of human-defined objectives.

- **US DOD**:The ability of machines to perform tasks that normally require human intelligence (e.g., recognizing patterns, learning from experience, drawing conclusions, making predictions, or taking action).

AI v. ML v. DL v. GenAI

- **Artificial Intelligence (AI)**. Technology that processes data to produce information that augments human intelligence, perception, and predictive abilities.

- **Machine Learning (ML)**. This is a subset of AI in which computer programs use certain methods to detect relationships and patterns in data.

- **Deep Learning (DL)**. This is a type of ML based on artificial neural networks in which multiple layers of processing are used to extract progressively higher-level features from data.

- **Generative AI**. This is a collection of models and systems that can produce new text, images, video, audio, code and synthetic data. These models can also be used to predict future outcomes, such as the next word in a sentence.

Generative AI

- New technology in which software is trained to identify relationships and patterns in data and create new content such as text, images, and audio.

- **Text Models**. Some models are trained on vast text repositories to be able to predict the sequence of words best suited to respond to a question, complete lines of code, or create original stories. Chat GPT is a text model of generative AI.

- **Image Models**. Other models are trained on billions of publicly available images on the Internet to recognize the quintessential characteristics and dimensions of the people, places, and things depicted in them, and, in turn, generate new images in response to natural language text prompts.

ChatGPT: Optimizing Language Models for Dialogue

We've trained a model called ChatGPT which interacts in a conversational way. The dialogue format makes it possible for ChatGPT to answer followup questions, admit its mistakes, challenge incorrect premises, and reject inappropriate requests. ChatGPT is a sibling model to InstructGPT, which is trained to follow an instruction in a prompt and provide a detailed response.

TRY CHATGPT ↗

November 30, 2022
13 minute read

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FEBRUARY 14, 2023

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US Legal Landscape

Federal and State AI Developments

FTC

- **Existing Authorities**. FTC Act, FCRA, and ECOA.

- **2016**. FTC issued a report titled "*Big Data: A Tool for Inclusion or Exclusion?*" Advised companies using AI to reduce risk of bias.

- **2018**. Held a series of hearings on AI, algorithms, and predictive analysis.

- **2020**. Issued a blog post providing best practices for the use of AI (e.g., be transparent, use explainable models, etc.).

- **Congressional Report (Jan. 2022)**. Warning Congress to not rely on AI to solve online problems.

- **Commercial Surveillance Rulemaking (Aug. 2022)**. May address automated decision-making and general use of AI. May require impact assessments. Comments under review.

- **Blog - AI Powered Product Guidance (Feb. 2023)**. Be careful about AI hype. Don't exaggerate what your AI product can do. Don't promise your AI product does something better than a non-AI product.

White House

- **September 2022**. Released "*Principles for Enhancing Competition and Tech Platform Accountability*," advocating for increased transparency and discrimination mitigation in automated decision-making.

- **October 2022**. Released the "*Blueprint for an AI Bill of Rights*", advocating for all AI systems to be safe, prevent discrimination, protect privacy, be transparent, and have human accountability.

- **February 2023**. Executive Order 14091 on "*Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*", requiring all federal agencies to take into account equity in their regulation of AI.

- **March 2023**. Released "*National Strategy to Advance Privacy-Preserving Data Sharing and Analytics*", establishing a national approach to privacy and exponential technologies like AI.

Department of Commerce

- **January 2023**. National Institute of Standards & Technology (NIST) issued version 1.0 of its AI Risk Management Framework. The tool allows organizations to design and manage trustworthy and responsible AI programs.

- **Compare**: Department of Energy's AI Risk Management Playbook (more controls focused).

- **April 2023**. National Telecommunications and Information Administration (NTIA) is asking for public comment on what role the DOC should play to ensure AI is not causing harm. Range of actions could be taken by DOC, such as mandating audits as part of its procurement standards and offering prizes to those who find bias within algorithms.

EEOC

- **2021**. EEOC launched an agency-wide "*Artificial Intelligence and Algorithmic Fairness Initiative*" to ensure that the use of AI and other emerging technologies used in hiring and other employment decisions comply with federal civil rights law.

- **2022**. EEOC released new guidance entitled "*The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*," providing guidance on how employers can mitigate discrimination to avoid claims under the ADA and Title VII.

- **2023**. New Strategic Enforcement Plan (SEP) includes focusing on regulating the use of AI tools that result in discriminatory decision-making.

AI and Employment - Examples
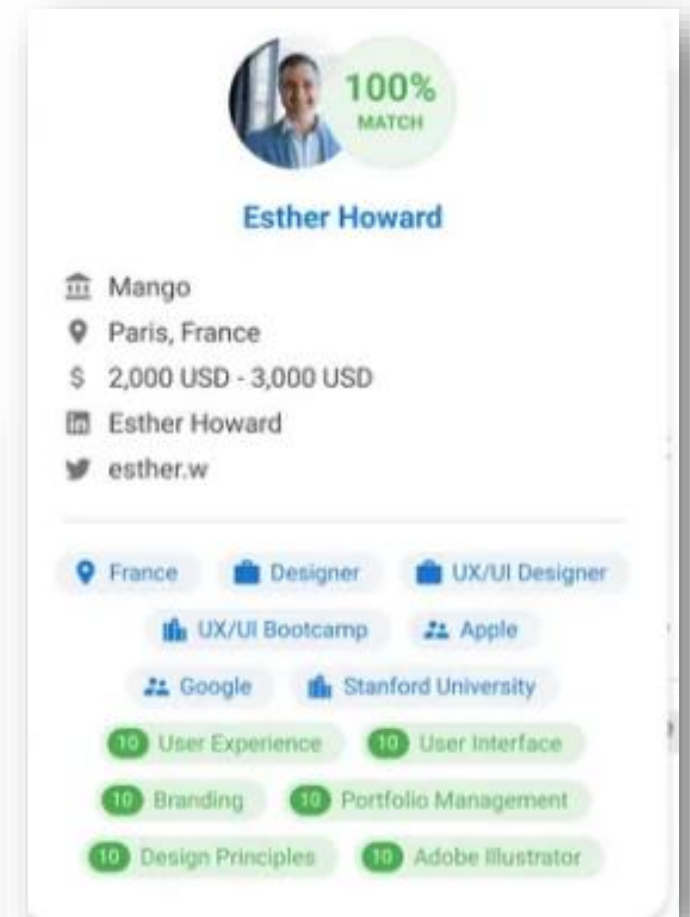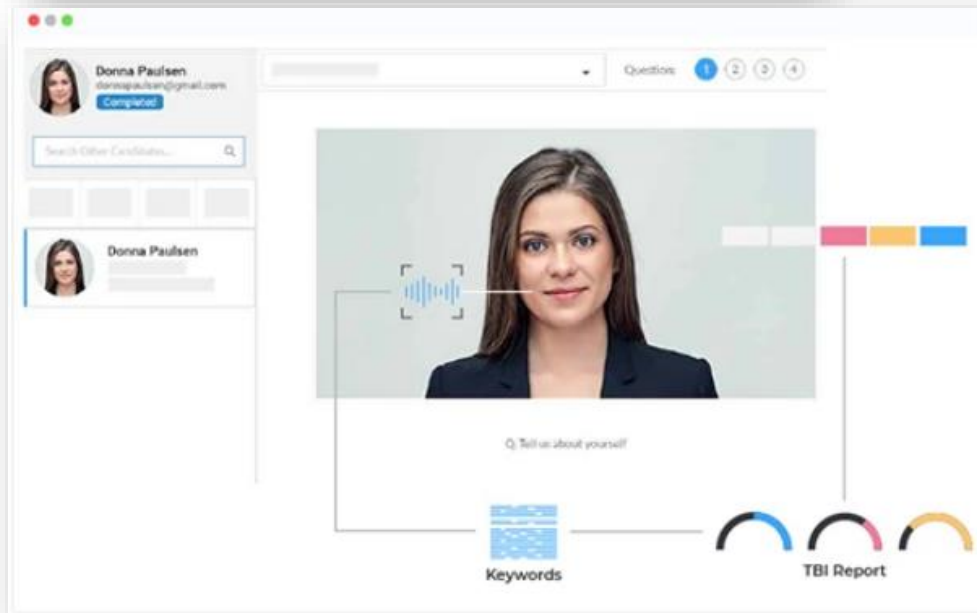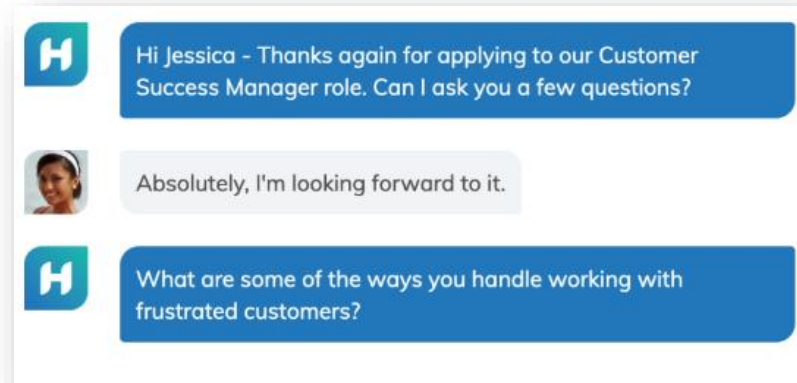
State AI Regulation

CCPA Rulemaking. The California Privacy Protection Agency is considering rulemaking on regulating automated-decision making.

Draft Regulations. The California Civil Rights Department is considering amendments to the California Fair Employment and Housing Act to prohibit discriminatory outcomes in the use of algorithms in employment decision making.

California. AB 331. Proposed bill that would require impact assessments to be performed on any deployment of an automated decision-making tool and provide a copy of the assessment to the Civil Rights Department.

The Others…

Colorado. New law prohibits insurers from using external consumer data and information sources and algorithms or predictive models in a manner that results in discriminatory outcomes.

Illinois. Artificial Intelligence Video Interview Act. New requirements call for certain information to be reported.

Texas, Alabama and Others. Bills to create AI working groups that will issue recommendations.

Multiple States. Multiple states have draft bills to address omnibus privacy. These laws often govern algorithms, automated decision-making, and the intersection with privacy.

New York City. Local Law 144 Requires a "bias audit" conducted no more than 1 year prior to the use of such tool around HR and make publicly available. Enforcement delayed to July 2023. Ongoing debate on rules.

Mapping and Mitigating AI Risk

AI Risks

- **Reliability**. AI system should be correct over time, perform under a variety of use cases, and failure-tested.

- **Safety**. AI should not put an individual, property, or environment in danger.

- **Security / Resilience**. AI should not introduce security risks, and should be resilient against adversarial use.

- **Accountability / Transparency**. Must provide access to appropriate levels of information. There should be accountable individuals.

- **Explainable / Interpretable**. What happened, why, and how?

- **Privacy Focused**. Privacy-by-design must be considered, especially as models are trained.

- **Fair / Mitigating Bias**. Avoid discriminatory outcomes in the use of AI.

Managing AI Risk

- **Map**. Gather information about the need for AI, leveraging vendors, business cases, model management, engaging stakeholders. Think about level 1.5 to translate…

- **Measure**. This step involves using various techniques to measure and assess AI risk and its impacts. This may include conducting impact assessments, code review, reporting, and documentation.

- **Manage**. Implementing controls to address the risks measured and identified. These may include limitations on outputs, limitations on tools being used, and other mitigating steps.

- **Govern**. Implementing a culture of AI risk management. This includes processes, documentation around ethics, and internal and external facing statements.

Key Takeaways

- **#1 – Analyze Your Current Needs**. Does your organization currently use its own AI? Leveraging vendors? Using it in the legal function?

- **#2 – Carefully Map The Current Legal Landscape Governing Your Industry**. Are you using AI in an area with significant focus? Watch out for the HR side of the house.

- **#3 – Build Stakeholder Teams**. AI governance includes security, data scientists, HR, privacy, and security.

- **#4 – Find Your Framework**. Whether you leverage the NIST framework or a more control focused framework like that offered by DOE, benchmark your progress.

- **#5 – Don't Recreate The Wheel**. When conducting diligence and asking the questions – use existing questionnaires from security and privacy to leverage AI insights. Nothing is new under the sun…

Questions?

Global Dentons AI Resources

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BACKGROUND

- Peter Stockburger is the managing partner of the Dentons San Diego office. Peter is a member of the Firm's Global Data Privacy and Venture Technology and Emerging Growth Companies Groups. Peter is also co-lead of the Firm's Global Autonomous Vehicles practice.

- Peter partners with emerging and established clients around the globe to strategize about how they can best leverage data and talent to grow, operate, and protect their business.

- With a focus on data privacy, security, and AI, Peter works with clients of all sizes and maturity to build and shore up their privacy and security programs, deploy technology, enhance compliance and stakeholder confidence, take new products to market, work through data governance and retention challenges, navigate workplace disputes, and harness emerging technologies such as artificial intelligence.

- Peter frequently partners with companies deploying autonomous systems and leveraging AI to mitigate risk and increase market share, including original equipment manufacturers and secondary market organizations in the autonomous vehicles sector.