u.s. department of labor issues helpful guidance on employers' use of artificial intelligence in the workplace

Jeremy Mittman & Talya Seidman Cytryn
MSK Client Alert

June 11, 2024

Recently, the U.S. Department of Labor's (DOL) Wage and Hour Division issued guidance on the application of federal labor standards to employers' use of artificial intelligence (AI) and other automated systems in the workplace. Field Assistance Bulletin (FAB) No. 2024-1 warns employers that using these technologies can run afoul of the Fair Labor Standards Act (FLSA) and other federal laws.

In particular, the FAB addresses the interplay of AI and the FLSA in tracking employee work and break times, calculating wages due, and in allotting lactation breaks. It also discusses issues that may arise with the use of AI and the Family Medical Leave Act ("FMLA").

AI and the FLSA

Tracking work time. Employers are increasingly using AI monitoring tools and facial recognition technologies to analyze whether employees are "active" or "idle." Monitoring tools measure things like computer keystrokes, mouse clicks and website browsing, and facial recognition technologies can track employee eye movements by webcam. While these computerized metrics may establish some level of employee productivity, the DOL nonetheless advises that they do not determine whether an employee is performing "hours worked" according to the FLSA. If the AI applications determine that an employee is not "working" and then incorrectly categorizes working time as non-compensable, the employer may miscount compensable time and thus fail to pay wages for all "hour worked," leading to an unintentional violation of the FLSA.

Auto-deducting break time. Some automated timekeeping systems use AI to predict and auto-populate employee break time entries based on past breaks taken, regular shift and break schedules, and other factors. Employers using

attorneys

Jeremy Mittman

Talya Seidman Cytryn

practice areas

employment litigation & counseling

labor & employment

msk.com

los angeles
t 310.312.2000
f 310.312.3100

new york
t 212.509.3900
f 212.509.7239

washington, dc
t 202.355.7900
f 202.355.7899

"auto-deduct" tools must still make sure that employees are completely relieved of duty during their recorded breaks, that time records accurately reflect employee breaks taken, and that employee wages are not deducted for breaks they did not take.

Waiting time. Waiting time is compensable under the FLSA if employees are on-duty, expected to be fully available to work, remain near the workstation, and do not have enough free time between tasks for their own non-work pursuits. While many employers are using AI technologies to assign tasks and adjust schedules based on real-time data, they must remember to compensate employees for the periods of time during which employees are "engaged to wait." The FAB gives an example of a hotel that uses automated systems to assign tasks to its housekeeping staff. When a hotel guest checks out of their room, the system automatically delegates a cleaning assignment to a particular housekeeping employee based on their availability and reassigns tasks based on data gathered throughout the day. The employees are still working and entitled to wages if they are "engaged to wait" between the assignments, even as tasks are reassigned over the course of a shift.

Multiple locations. Under the FLSA, employees may perform "hours worked" not just at the employer's primary worksite, but in a number of different places. Geolocation software that tracks an employee's location, such as automatically clocking in and clocking out the employee when they enter and leave a designated job site, may fail to account for the employee's compensable time before arriving or after departing the job site. For example, an employee's workday may start with picking up tools at the employer's plant and then traveling to the job site, and may continue after leaving a job site and unloading supplies at an off-site location. Employers must account for all of an employee's compensable time, both at and outside of the main job site.

Calculating wages owed. Some AI technologies can automatically recalculate and adjust an employee's pay rate based on a number of factors throughout the workday. Employers that use these systems must make sure that they accurately calculate the regular wage and overtime rates. AI systems must also account for the many other types of payments, including nondiscretionary bonuses, commissions, or other compensation, that factor into an employee's regular rate of pay.

AI and Nursing Employee Protections

The FLSA, as amended by the Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act, requires employers to provide employees with reasonable break times and spaces to express breast milk. The FAB warns employers against using AI to limit the length, frequency, or timing of such breaks. It also cautions that technologies that generate productivity scores may improperly penalize employees who take pumping breaks for failing to meet productivity standards. Employers must therefore be vigilant with such automated systems to ensure that they are compliant with the FLSA.

AI and the FMLA

Processing leave requests. AI technologies can be used to process leave requests, track time off, and integrate absence calendars. It is important to keep in mind that such automated systems may lead to incorrect conclusions pertaining to employee FMLA rights, and must regularly be monitored to ensure compliance.

msk.com

los angeles
t 310.312.2000
f 310.312.3100

new york
t 212.509.3900
f 212.509.7239

washington, dc
t 202.355.7900
f 202.355.7899

Certifications. An AI system may violate FMLA's certification requirements by asking an employee to disclose more medical information than is allowed by law. It also runs the risk of violating the FMLA's notification and deadline requirements.

Interference and retaliation. If the use of AI or automated systems results in adverse action against employees because of their use of FMLA leave, that may result in unlawful retaliation or interference prohibited by the FMLA. For example, employers may not use technologies to categorize FMLA leave as any kind of negative factor in employment actions, such as hiring, promotions, disciplinary actions, or assigning an employee negative attendance points.

Other Provisions

The FAB also notes that using AI technologies to determine an individual's truthfulness may be subject to the Employee Polygraph Protection Act and its restrictions on using lie detector tests in connection with employment. Finally, the FAB cautions against using AI to take adverse action against employees for engaging in activities protected by federal law.

Conclusion

In short, the FAB makes clear that employers must exercise "**responsible human oversight**" whenever using AI or other automated systems in ways that can affect employee wages, leave, or other federally protected rights. As AI continues to rapidly expand and its use becomes even more prevalent to employers' needs, MSK is available to assist with any questions that arise and will provide updates on applicable rule and regulations relating to this quickly advancing topic.

msk.com

los angeles
t 310.312.2000
f 310.312.3100

new york
t 212.509.3900
f 212.509.7239

washington, dc
t 202.355.7900
f 202.355.7899