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AI Under Scrutiny:

Insights from AI-Focused Privacy Laws and FTC Enforcement Actions

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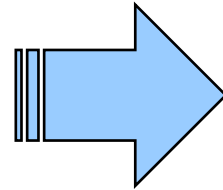+1 858 550 6062
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Agenda

- AI Privacy Laws

  - State consumer privacy laws

  - Utah and Colorado

  - Other laws

- AI-Focused FTC Guidance and Enforcement Actions

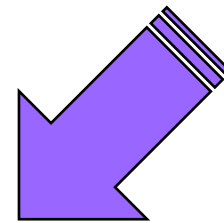- Key Takeaways Based on Common Themes

AI Privacy Laws

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Evolution of Privacy Laws
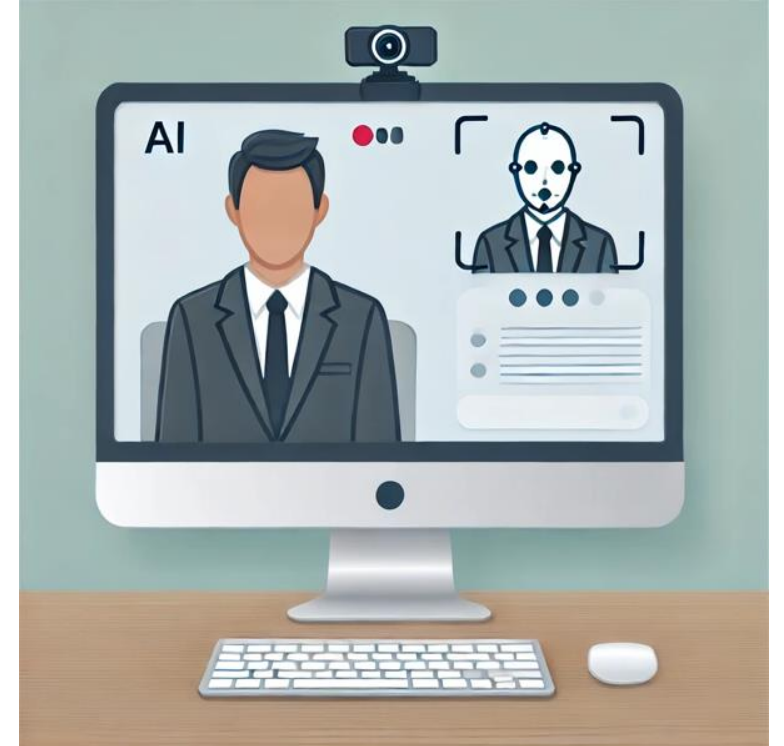
Employment AI Privacy Laws

Consumer Privacy Laws with automated decision-making requirements

AI Privacy Laws

Early Privacy Laws Impacting AI

- State and local laws focused on use in employment
  - Illinois Artificial Intelligence Video Interview Act (2019)
  - Maryland HB 1202 (2020)
  - New York City's Artificial Intelligence in Hiring Law (NYC 144) (2021)

State Consumer Privacy Laws

- Regulates use of automated decision-making (ADM) that makes decisions that produce legal or similarly significantly effects concerning a consumer

  - Example: Decision that results in the provision or denial of financial or lending services, housing, insurance, education enrollment or opportunity, criminal justice, employment opportunities, healthcare services, or access to essential goods or services

- Gives consumers certain rights with respect to this use

  - Example: Right to know, right to opt-out, right to appeal

Utah Artificial Intelligence Policy Act

- Effective May 1, 2024

- Imposes disclosure requirements

  - Certain professionals must disclose when they use generative AI in their services

  - Businesses using generative AI to interact with consumers must disclose

- Establishes Office of Artificial Intelligence Policy for AI regulation and research

- Liability for consumer protection violations involving AI

Colorado AI Act

- Effective February 1, 2026

- Regulates use of high-risk AI systems in consequential decisions affecting employment, housing, healthcare, education, and more

- Includes obligations on both developers and deployers of AI systems

Colorado AI Act *(continued)*

- Developer Obligations
  - Use reasonable care to avoid risks
  - Disclosure obligations, including documentation requirements

- Deployer Obligations
  - Implement risk management policies and impact assessments
  - Disclosure obligations
  - Consumer rights

Other Laws Focusing on AI

- **Illinois HB 3773**: amends IHRA to address risks associated with use of AI in employment context

- **California AB 2013**: developers of AI systems must publicly post on their websites information about data used to train AI systems

- **California SB 942**: covered providers must embed certain disclosures in AI-generated content and provide public AI detection tools

What's On the Horizon

- Themes:
  - Transparency
  - Disclosure
  - Accountability
  - Ethical use
  - Consumer rights
- Many new laws proposed at state and federal levels

AI-Focused FTC Business Guidance and Enforcement Actions

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Overview

- FTC has issued detailed business guidance for developers and deployers of AI

- Punctuated by at least 7 enforcement actions since 2021

- Themes:
  - Avoiding biased or discriminatory impacts
  - Substantiation of AI performance claims
  - Transparency and accountability
  - Avoiding foreseeable misuse

Key FTC Business Guidance: Avoiding Bias and Discriminatory Impacts

- Datasets used to train models should be inspected to ensure they are not missing information from particular populations.

- Examine inputs to model – such as whether model includes ethnically-based factors, or their proxies, such as census tract.

- Regardless of inputs, algorithms should be tested before and after deployment to ensure they do not discriminate, *in fact*, on basis of race, gender or other protected class.
  - FTC encourages independent audits and opening source code to outside inspection.

Key FTC Business Guidance: Substantiating AI Performance Claims

- "Artificial Intelligence" is not advertising puffery.
  - While concepts like "AI-powered" or "AI-enabled" are ambiguous, they are factual claims that can be overused or abused.
    - Ask: Do core functions or features use computation to perform tasks such predictions, decisions or recommendations?
  - Merely using AI in the *development* of a product is not the same as deploying a product with AI in it.

Key FTC Business Guidance: Substantiating AI Performance Claims

- **Don't exaggerate what your AI product can do. And establish what it actually can do *before* making a performance claim.**

  - FTC prior substantiation doctrine requires marketers to establish (i.e., document) a reasonable basis for all factual advertising claims *before they are published.*

  - Advertisers must possess and rely upon competent and reliable evidence showing that the claim is true before it is made.

  - The failure to document such support prior to publication is itself a violation of Section 5 even if the claim is later shown to be supported.

Key FTC Business Guidance: Substantiating AI Performance Claims

- FTC expects AI performance claims to be based on actual scientific support – not science fiction.

    - Marketers must possess sufficient evaluations to determine their AI product will work as advertised, including marketers of AI products developed by third parties.

    - Marketers of AI products developed by others cannot defend on basis that technology is a "black box" they did not understand or know how to test.

- Performance claims that only apply to certain types of users or under limited conditions may be deceptive unless limitations are clearly disclosed.

- Comparative superiority claims that an AI product is better than a competitive (or predecessor) non-AI product must be substantiated by actual data – usually head-to-head testing results.

Key FTC Business Guidance: Transparency and Accountability

- Transparency has many different dimensions:

- If companies deny something of value based on algorithmic decision making, they should be able to explain why.

  - This ordinarily requires the company to be prepared to explain to the consumer *what* data is used in a model and *how* that data was used to arrive at a decision affecting their interests.

  - More prescriptive Fair Credit Reporting Act requirements apply when basing decisions affecting eligibility for credit, employment, insurance, housing or similar transactions on information from third party vendors.

- If companies collect sensitive data to feed an algorithm, this data collection must be disclosed. And data collection should be consistent with opt-in or opt-out rights described to users.

- When using AI to interact with customers (think chatbots), don't misrepresent the automated nature of the interaction.

Key FTC Business Guidance: Controlling Foreseeable Misuse

- FTC encourages companies developing AI to sell to other businesses to evaluate how customers may abuse their tools and establish access controls or other measures to prevent foreseeable abuse.

- Guidance uses example of voice cloning platform that enables other companies to use a clip of an individual's speech to generate a realistic audio of their voice saying anything. Although technology can help people who have lost ability to speak, it is also susceptible to fraudster abuse to perpetrate imposter schemes.

  - FTC cited with approval voice cloning AI firm's policy of vetting customers and running technology on its own servers to aid in detecting and stopping misuse.

  - Guidance asserts that FTC may use unfairness prong of Section 5 to challenge any AI model that does more harm than good – i.e., if it is likely to cause substantial injury not reasonably avoidable by consumers and not outweighed by countervailing benefits to consumers or competition.

Key FTC AI Enforcement Actions

- *Everalbum*

- *Kurbo*

- *Rite Aid*

- *Operation AI Comply*

- *Rytr*

Algorithmic Disgorgement: *Everalbum (2021)*

- FTC alleged that photo app that derived facial recognition data from users' photos to create databases to build and improve app's features made false representations to users regarding the ability to delete their data and prevent its continued use by company.

- Settlement with the FTC required the company, among other things, to delete or destroy any algorithms or models developed using the data that it retained from users who had not granted their affirmative consent to use (or keep) that data.

- **Takeaway**: FTC can and will utilize disgorgement as a remedy for legal violations, which, in the context of products and services dependent on machine learning and AI algorithms, could effectively prevent further use of those products/services or require retraining/redevelopment of algorithms and models from scratch.

Algorithmic Disgorgement:
Kurbo (2022)

- DOJ, on behalf of the FTC, filed a complaint against the company f/k/a Weight Watchers and a subsidiary alleging that they collected personal information from children under the age of 13 without parental permission in violation of COPPA in connection with their marketing of a weight loss app.

- Settlement with the FTC required the company to delete illegally obtained data and destroy "any models or algorithms developed in whole or in part" using illegally collected data.

- Algorithms and models trained on illegally collected data <u>could not be preserved</u> even if the company cured it COPPA violations (obtained verifiable consent from parents of users under 13, whose data was used to train algorithms/models).

- **Takeaway:** provides further evidence of the FTC's propensity to use the disgorgement remedy in the context of AI algorithms and models built / trained on ill-gotten data.

Algorithmic Unfairness:
Rite Aid (2022)

- FTC consent decree settlement for Rite Aid's use of facial recognition technology (FRT) in connection with anti-theft surveillance systems deployed in retail stores.

  - FTC alleged Rite Aid failed to take reasonable measures to prevent false positive matches with suspected shoplifters and to control for bias in technology and geographic deployment patterns that disproportionately impacted women and people of color.

  - Alleged shortcomings included reliance on a low quality image database and failures to: test the accuracy of technology before and after deployment, track false positive rates, adequately train employees using FRT on risks of misidentification (including "automation bias"), and control for heightened risks to certain consumers because of their race or gender.

- Order banned Rite Aid from using FRT for 5 years, required it to destroy related FRT data and algorithms and required adoption of a comprehensive AI bias monitoring program, including vendor assessments.

- Also requires consumer notifications when they are enrolled in a FRT system and when adverse actions are taken based on outputs of system.

Operation AI Comply (2024)

- FTC enforcement initiative targeting companies deploying AI technologies in violation of consumer protection laws

  - Focused on misleading claims about AI capabilities or performance and using such tools in connection with deceptive practices

- Cases:

  - *DoNotPay*

  - *Ascend Ecom*

  - *Ecommerce Empire Builders*

  - *Rytr*

  - *FBA Machine*

Unfairness by Design:
Rytr (2024)

- Rytr LLC offered users AI powered writing assistant tools, including a "Testimonial & Review" tool that allowed paid users to generate an unlimited number of product/service reviews to be posted online.

- FTC alleged that Rytr's "Testimonial & Review" use case was a "means" to generate false and deceptive consumer reviews, likely to cause substantial injury to consumers due to the *ability* of the tool to generate an unlimited number of reviews and output content in reviews exceeding information users provided.

- Rytr settled the FTC's claims by agreeing to stop offering its "Testimonial & Review" tool to customers altogether.

- **Takeaway:** consider the potential (and scale) of misuse of AI products or services by <u>customers and users</u>, even if tool has neutral or positive applications.

Looking Ahead – Did *Rytr* go too far?

- *Rytr* was decided 3-2, with Republican Commissioners Holyoak and Ferguson dissenting.

- Dissents disagreed with the FTC's **<u>entire basis</u>** for filing a complaint against *Rytr*, citing:

  - That the "means and instrumentalities" theory should not have been applicable to Rytr

  - Theories of harm to consumers were speculative, and not based on documented injures

  - A failure by the FTC to weigh the benefits to consumers that Rytr's AI services offered

  - A neutral approach to the scale/function of an AI tool, and to avoid categorical bans

  - A general need to avoid regulations that would smother AI innovation in its infancy

Looking Ahead – New FTC Leadership?

- Dissents in *Rytr* may signal that new Republican FTC leadership may be more willing to credit social benefits of AI and AI innovation in the U.S.

- However, the political split in *Rytr* is unique. The FTC's notable AI settlements were generally decided 5-0.

- *Rytr* does not suggest any change in FTC perspective on the remedies Commission may seek from AI companies in deception or unfairness cases, including algorithmic disgorgement.

Key Takeaways
Based on Common Themes

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Key Takeaways

- **Takeaway 1**: Ensure you have proper rights to the data before training AI using such data

- **Takeaway 2**: Disclose, disclose, disclose

- **Takeaway 3**: Conduct assessments of your AI, including assessments re bias and discriminatory impact and how your AI may be used (or misused)

- **Takeaway 4**: Ensure AI performance claims are substantiated

Q&A

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