UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

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FIELD ASSISTANCE BULLETIN No. 2024-1

MEMORANDUM FOR:	**Regional Administrators** **District Directors**
FROM:	**Jessica Looman** **Administrator**
SUBJECT:	**Artificial Intelligence and Automated Systems in the Workplace under the Fair Labor Standards Act and Other Federal Labor Standards**

INTRODUCTION

This Field Assistance Bulletin (FAB) provides guidance to Wage and Hour Division (WHD) field staff regarding the application of the Fair Labor Standards Act (FLSA) and other federal labor standards as employers increasingly use artificial intelligence (AI) and other automated systems in the workplace.[1]

AI and other automated systems can provide ways to streamline tasks for employers, improve workplace efficiency and safety, and enhance workforce accountability. However, without responsible human oversight, the use of such technologies may pose potential compliance challenges with respect to federal labor standards. As new technological innovations emerge, the federal laws administered and enforced by WHD continue to apply, and employees are entitled to the protections these laws provide, regardless of the tools and systems used in their workplaces.[2]

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[1] On October 30, 2023, President Joseph R. Biden, Jr. issued Executive Order 14110 ("Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence"), calling for a coordinated U.S. government approach to ensuring the responsible and safe development and use of AI. The EO requires that "the Secretary of Labor shall issue guidance to make clear that employers that deploy AI to monitor or augment employees' work must continue to comply with protections that ensure that workers are compensated for their hours worked, as defined under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, and other legal requirements."

[2] Given the ongoing evolution of artificial intelligence, this FAB does not identify all possible relevant technologies or every possible interaction between AI and other technologies and the federal labor standards discussed herein. Rather, this FAB provides an overview of the application of certain labor standards enforced by WHD and potential compliance issues that may arise due to the use of some types of AI systems and automated management technologies. Regardless of the exact AI or other technologies used, the principles described here provide guidance for evaluating how to comply with the law.

These laws are sufficiently flexible to meet the needs of changing workplaces and remain as critical today as when they were enacted.

A. Background

For purposes of this FAB, the term "artificial intelligence" or "AI" is used in accordance with the definition under 15 U.S.C. § 9401(3) as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to - (A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action." The term "automated system" is used to refer to computer or software-based tools that perform workplace management tasks typically performed by humans. Finally, the term "algorithm" refers to the use of a set of rules applied to data gathered in or around the workplace to make decisions in the workplace.

Some AI systems perform multiple functions for employers, such as track work hours, measure worker performance, set work schedules, assign tasks, and perform complex human resources functions, while other tools specialize in more specific or limited functions. Some of these tools are used with primarily remote or hybrid workforces, but similar systems are also deployed in onsite workplaces, including, for example, offices, restaurants, retail stores, call centers, and warehouses. Because the federal labor standards enforced by WHD apply to remote and hybrid work as well as work performed at the employer's location and other onsite workplaces, this guidance applies equally to all covered employment, regardless of where the work is performed.

B. AI and the FLSA

i. Hours Worked

The FLSA generally requires that covered employees be paid at least the federal minimum wage for every hour they work and at least one and one-half times their regular rate of pay for each hour worked in excess of 40 in a single workweek. 29 U.S.C. §§ 206(a) and 207(a). Time spent working must be paid regardless of the level of productivity or performance of the employee. Furthermore, "hours worked" are not limited solely to time spent on active productive labor but may, for instance, include certain time spent waiting and breaks of short duration. 29 C.F.R. §§ 785.14 and 785.18.

If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. 29 C.F.R. §§ 785.11 and 785.12. *See also* Field Assistance Bulletin No. 2023-1. An employer has an obligation to exercise reasonable diligence to acquire knowledge regarding hours worked by employees, whether scheduled or unscheduled by the employer, and to keep accurate records of hours worked.[3]

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[3] Other laws enforced by WHD also incorporate FLSA hours worked principles. For example, in the H-1B, H-2B, and H-2A temporary work visa programs, employers generally must pay required wage rates to workers for all hours worked within the meaning of the FLSA. *See, e.g.*, 20 C.F.R. §§ 655.20(a), 655.122(l), and 655.731(c)(7)(i); 29 C.F.R. § 503.16(a). Similarly, under the McNamara-O'Hara Service Contract Act and the Davis-Bacon and Related Acts,

a. Tracking work time

Employers must pay employees for all hours worked in accordance with the FLSA regardless of the employee's level of productivity or performance. By statutory definition, the term "employ" includes "to suffer or permit to work." The workweek ordinarily includes all time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace. "Workday," in general, means the period between the time on any particular day when an employee commences their first "principal activity" and the time on that day at which they cease their last principal activity or activities. Work suffered or permitted to be performed is work time that must be paid for by the employer.

Some AI and employee monitoring tools have the ability to measure and analyze metrics of worker productivity or activity. These systems are used to analyze worker activity in real time, such as computer keystrokes and mouse clicks, website browsing, presence and activity in front of a web camera, or other data to determine when an employee is "active" or "idle." Some programs have the ability to send real-time alerts to employers when the system determines that an employee is not "working," including by using facial recognition technologies to monitor workers by webcam.

Reliance on automated timekeeping and monitoring systems without proper human oversight, however, can create potential compliance challenges with respect to determining hours worked for purposes of federal wage and hour laws. An AI program that incorrectly categorizes time as non-compensable work hours based on its analysis of worker activity, productivity, or performance could result in a failure to pay wages for all hours worked. Artificial intelligence or monitoring systems that use keystrokes, eye movements, internet browsing, or other activity to measure productivity are not determinative of whether an employee is performing "hours worked" under the FLSA. Such metrics do not substitute for the analysis of whether the employee was suffered or permitted to work during that time and thus performed "hours worked" under the FLSA.

b. Monitoring break time

The Department's regulations explain that short breaks of 20 minutes or less taken during the workday are generally counted as compensable hours worked. 29 C.F.R. § 785.18. Employees often take short breaks to go to the bathroom, get a cup of coffee, stretch their legs, or engage in other similar activities. Short breaks primarily benefit the employer by reducing employee fatigue and helping employees maintain focus and be more productive at work. Longer breaks "during which an employee is completely relieved from duty, and which are long enough to enable [the employee] to use the time effectively for [their] own purposes are not hours worked." 29 C.F.R. § 785.16. These principles apply regardless of whether the work is performed at the employer's worksite or at some other location.

To be completely relieved from duty, the employees must be told in advance that they may leave the job and they will not have to commence work until a specific time. 29 C.F.R. § 785.16. An employee may generally also be completely relieved from duty when the employer allows the

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contractors are required to pay workers not less than the required wage rates for all hours worked on covered contracts, as determined in accordance with FLSA principles. 29 C.F.R. §§ 4.178; 5.5(a)(3).

employee to freely choose the hour at which they resume working and the time is long enough for the employee to effectively use it for their own purposes.

Employers often use timekeeping systems or software to assist in fulfilling their obligations of accounting for hours worked under the FLSA. Traditionally, timekeeping systems have been based on entries that are required to be created by workers to mark the beginning and end of their breaks as well as the beginning and end of their workdays. Some timekeeping systems now incorporate AI to make predictions and to auto-populate time entries based on a combination of prior time entries, regularly scheduled shift times and break times, business rules, and other data. Use of these "smart" entries, however, does not relieve an employer of the obligation to ensure that records are accurate and that an employee is paid for all hours worked.

Employers must ensure that employees are completely relieved of duty in order for time to be counted as unpaid break time. Systems that automatically deduct meal breaks and other longer break periods from an employee's compensable work hours, even if the employee is not completely relieved from duty, may result in an FLSA violation. For example, an employee usually takes a 30-minute unpaid meal break but skips the break on a particular day due to their workload. Without appropriate human oversight, a system that automatically deducts the break from the employee's work hours based on the employee's past time entries could result in the employer failing to properly record and pay the employee's hours worked.

The use of AI does not relieve an employer of the responsibility to ensure that records accurately reflect breaks taken and that employees are properly compensated for all hours worked under the minimum wage and overtime requirements of the FLSA.

c. *Waiting time*

In some instances, the time during which employees are required to wait are "hours worked" for which an employer has an obligation to pay minimum wage and overtime under the FLSA. Whether waiting time is hours worked under the FLSA depends upon the particular circumstances. The facts may show that the employee was "engaged to wait," meaning that the employer requires the employee to be available and prepared to perform work, in which case the employee's waiting time is "hours worked." Alternatively, the facts may show that the employee was "waiting to be engaged," which are not "hours worked." Generally, periods during which an employee is completely relieved from duty and which are long enough to enable them to use the time effectively for their own purposes are not hours worked. An employee is not completely relieved from duty and cannot use the time effectively for their own purposes unless they are told in advance that they may leave the job and are given a specified time when work will commence. 29 C.F.R. §§ 785.14-17. The principles for determining whether an employee is engaged to wait, and thus performing hours worked, apply equally when tasks or schedules are set by AI or an automated system.

AI and other technologies may have the ability to assign tasks and set work schedules. For example, automated systems used by some hotels independently prioritize and assign tasks to housekeeping workers. When a guest checks out of their room or requests service, these systems automatically delegate the task of cleaning that hotel room to a worker based on their availability and other factors. These systems often reassign and change tasks throughout the day based on

current data, as well as provide managers with real-time tracking of worker activities. Similarly, some algorithmic systems used in warehouses and distribution centers have the ability to analyze workflow to determine optimal task routes and pace and provide real-time instructions to workers for the performance of each task. Systems like these generate and adjust schedules or task routes in real time based on current data.

In the case of automated scheduling and task assignment programs, potential hours worked issues may arise when an employee is waiting for their next task to be assigned or their schedule of assignments to be updated. When the employee is not provided with sufficient time that they can use for their own purposes, is not completely relieved from their duties, or is expected to remain nearby their workstation and is not given a set time when to report back to work, they are generally considered to be "engaged to wait." The FLSA considers such periods of waiting to be hours worked. In order to ensure compliance with the FLSA, employers must ensure that they accurately account for increments of time when the employee was waiting for their next assigned task, as well as the time the employee was completing assigned tasks, regardless of technologies used to assign tasks, set schedules, or complete other management functions.

    d. *Work performed at multiple geographic locations*

Because an individual is "employed" during the time that they are "suffer[ed] or permit[ted] to work," the location of the work is not determinative of whether the employee has performed hours worked. In some cases, the workday may be longer than the employee's scheduled shift or tour of duty or their presence at a particular worksite or location. 29 C.F.R. § 790.6. *See also* [Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)](). Employers are responsible for accounting for work performed beyond the scheduled shift or away from the employer's premises.

Some employers use location-based monitoring to track employees, which an automated system processes to determine whether an employee is "working." Some geolocation software has the ability to track employees' locations and automate the clocking in and clocking out process, based on what the system determines to be hours worked. These systems often use GPS technology from an employee's phone or other wearable device to determine the worker's location relative to a job site. Based on location, an automated system records what it determines to be employees' "work hours" as they enter and leave the job site.

The use of location monitoring to determine work hours may create compliance problems where such systems fail to account for work performed in different locations. For example, a construction worker might begin their workday before they arrive at the designated worksite if the employer asks them to pick up tools at the company headquarters or purchase supplies at the store on their way to the worksite. Similarly, an employee's workday may continue after leaving the worksite if the employer asks them to unload supplies or complete other tasks offsite. A system that records only the time the worker spent at the worksite as compensable work hours when the worker is performing work away from the worksite may fail to account for travel time between worksites or hours worked at other locations and may result in minimum wage or overtime pay violations. Employers should exercise responsible human oversight when using such systems to ensure that they are properly accounting for and compensating employee work hours.

Summary

AI and the use of automated technologies for scheduling, timekeeping, and tracking employee location may undercount hours worked, particularly during possible break times, when employees perform work in multiple locations, or when employees have periods in which they are waiting to be engaged. Regardless of the technologies and systems used, employers are responsible for ensuring that they are paying employees for all hours worked under the law.

ii. Calculating Wages Owed under the FLSA

As mentioned above, employers must pay employees at least the federal minimum wage for every hour they work and at least one and one-half times their regular rate of pay for each hour worked in excess of 40 in a single workweek. 29 U.S.C. §§ 206(a), 207(a). Wages required by the FLSA are due on the regular payday for the pay period covered.

The amount of overtime pay due to an employee is based on the employee's regular rate of pay and the number of hours worked over 40 in a workweek. The regular rate includes "all remuneration for employment paid to, or on behalf of, the employee." 29 U.S.C. § 207(e). Wages included in the regular rate can include piece rates, commissions, hourly wages, salaries, non-discretionary bonuses, or other compensation. The FLSA provides an exhaustive list of types of payments that can be excluded from the regular rate of pay when calculating overtime compensation. *See* Fact Sheet #56A: Overview of the Regular Rate of Pay Under the Fair Labor Standards Act (FLSA).

The regular rate is calculated by dividing the total pay for employment (except for the statutory exclusions) in any workweek by the total number of hours actually worked during that same workweek. The overtime premium is calculated by dividing the regular rate in half. The overtime premium is then multiplied by the number of hours worked in a workweek that exceed 40 to determine the total overtime premium compensation due for that workweek. *See* Fact Sheet #23: Overtime Pay Requirements of the FLSA. During overtime workweeks the employer must pay the employee for all hours worked plus at least an extra half-time rate for all overtime hours less the total wages actually paid. Before an employee can be said to be paid overtime compensation due, they must be paid their straight-time compensation due for all hours worked under any express or implied agreement or under any applicable federal, state, or local statute. 29 C.F.R. § 778.315; WHD Field Operations Handbook Ch. 32j02.

Where an employee is paid multiple different wage rates (including hourly and/or piece rates) for work performed in a single workweek, the employee's regular rate for that week is typically the weighted average of such rates. That is, the employee's total compensation from all such rates is added together and then divided by the total number of hours worked during that week. 29 C.F.R. § 778.115. For example, employees and employers may agree to compensate one type of work at a different hourly or piece rate from another type of work. During an overtime workweek, the employee's regular rate would be the weighted average of these different rates for the applicable workweek. 29 C.F.R. § 778.318(b). Alternatively, where an employee is paid multiple wage rates, the employee and employer may agree in advance of the performance of the work that the employee will be paid during overtime hours at a rate not less than one and one-half times the hourly non-overtime rate established for the type of work they are performing during such overtime hours. 29 C.F.R. §§ 778.415-778.421; *See also* Fact Sheet #23: Overtime Pay Requirements of the

[FLSA.](#)

Employers that use AI or other technologies to calculate wage rates must ensure that employees are paid in accordance with federal minimum wage, overtime, and other wage requirements, even when those wage rates vary substantially due to a host of inputs. Some AI systems use automated algorithms to independently calculate and determine workers' rates of pay based on a variety of data and metrics collected by the systems. Such data can include fluctuating supply and demand, customer traffic, geographic location, worker efficiency or performance, or the type of task performed by the employee. Some systems have the ability to automatically recalculate and adjust a worker's pay rate throughout the day (including rates paid by the piece, or on a per task basis), which may result in significantly different regular rates from one workweek to the next. Similarly, some automated task assignment systems have the ability to determine the number or types of tasks assigned to individual workers, based on a variety of factors and metrics. Where a worker is paid on a piece rate or per task basis, and where their assigned tasks fluctuate throughout the day, this may also cause the worker's regular rate to differ from workweek to workweek.

Employers should exercise proper human oversight to ensure that such systems pay employees the applicable minimum wage and accurately calculate and pay an employee's regular rate and overtime premium. For example, in the case of an employee who is paid multiple or different wage rates based on different metrics, the employer must ensure that the different rates are properly calculated into the regular rate of pay by adding together the employee's total earnings for the workweek (including earnings from hourly rates, piece rates, or other compensation), and then dividing these earnings by the total number of hours the employee worked during that same week. The regular rate would then be divided in half, and then multiplied by the number of hours worked in excess of 40 to determine the employee's total overtime premium compensation. Alternatively, where an employee is paid multiple rates, the employee and the employer may agree to compute overtime pay at one and one-half times the hourly rate in effect when the overtime work is performed.

Summary

Employers are responsible for ensuring that the use of AI or other technologies to calculate and determine workers' wage rates does not cause workers to be paid in violation of federal wage standards. Employers must comply with minimum wage and overtime pay requirements under the FLSA and other applicable laws regardless of the use of AI or other technologies.

C. AI and the Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act (FMLA) provides eligible employees of covered employers with job-protected leave for qualifying family and medical reasons and requires continuation of their group health benefits under the same conditions as if they had not taken leave. FMLA leave may be unpaid or used at the same time as employer-provided paid leave. Employees must be restored to the same or a virtually identical position when they return to work after FMLA leave. 29 U.S.C. §§ 2601, 2612, and 2614; 29 C.F.R. § 825.100. *See also* [Fact Sheet #28: The Family and Medical Leave Act](#).

Employees are generally eligible for federal job-protected FMLA leave if they work for a covered

employer for at least 12 months, have at least 1,250 hours of service with the employer during the 12 months before their FMLA leave starts, and work at a location where the employer has at least 50 employees within 75 miles. 29 U.S.C. § 2611; 29 C.F.R. § 825.110. For most employees, the 1,250 hours of service requirement is determined according to the FLSA's principles for determining compensable hours of work. 29 U.S.C. § 2611(2)(C); 29 C.F.R. § 825.110(c). Once an employer determines an employee's eligibility for leave, an employer cannot retest employee eligibility until the beginning of a new 12-month period or if the employee requests FMLA leave for a different reason in the same 12-month period.

i. Processing Leave Requests

AI or other technologies are sometimes used to process leave requests, track time off, and integrate absence calendars. Without responsible human oversight, relying on automated systems to process leave requests, including determining eligibility, calculating available leave entitlements, or evaluating whether leave is for a qualifying reason, can create potential compliance challenges.[4] For example, as noted above, timekeeping programs may incorrectly determine the hours an employee has worked, which may result in a failure to correctly determine an employee's FMLA eligibility. Similarly, an automated system that "tests" for eligibility more frequently than permitted under the FMLA could result in employees' leave being denied impermissibly. Such systems could also undercount how much FMLA leave an employee has available, for example, by incorrectly dictating which days should be counted against an employee's leave entitlement. This undercounting could prompt a leave denial in violation of the FMLA. While these types of violations could also occur under human decision making, the use of AI or other automated systems could result in violations across the entire workforce.

ii. Certifications to Support FMLA Leave

Under the FMLA, an employee may be required by the employer to submit a certification from a health care provider to support the need for FMLA leave to care for a covered family member with a serious health condition, for the employee's own serious health condition, or for leave related to a family member's military service. 29 U.S.C. § 2613; 29 C.F.R. §§ 825.305, 825.309, and 825.310. The FMLA limits the amount of information that may be required for a certification to be considered complete. The employee must be notified each time a certification is required and provided at least 15 calendar days to provide the requested certification, or more time if it is not practicable for the employee to submit within 15 days despite their diligent, good faith efforts to do so.

The use of AI by an employer to administer FMLA leave can create potential risks of violating the FMLA's certification requirements for determining whether leave is FMLA-qualifying. For example, an automated system that propagates rules for FMLA leave certification that results in an employee being asked to disclose more medical information to an employer than the FMLA allows would violate the FMLA. Similarly, a system that triggers penalties when an employee misses a certification deadline could violate the FMLA if the deadline should not have been imposed or the system failed to appropriately take into account circumstances that permit extra time for submission. As with the eligibility determinations, the use of AI or other automated technologies

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[4] The use of AI to determine FMLA eligibility or benefits may also raise compliance challenges under federal, state, and local anti-discrimination laws enforced by other agencies, such as the EEOC.

for medical certifications could result in systemic violations across the workforce.

iii. FMLA Interference and Retaliation

Employers are prohibited from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right. 29 U.S.C. § 2615; 29 C.F.R. § 825.220. This includes, but is not limited to, discriminating or retaliating against an employee or prospective employee for having exercised or attempting to exercise any FMLA right.

Some AI systems also track and analyze leave use. Systems used to track leave use may not be used to target FMLA leave users for retaliation or discourage the use of such leave. Employers are also prohibited from using such systems to count FMLA leave use as a negative factor in employment actions such as hiring, promotions, or disciplinary actions or assign negative attendance points to FMLA-protected absences. An employer would also violate the FMLA if an automated system fails to provide benefits to an employee on FMLA leave if the employer provides those benefits to employees who use other similar types of leave. In instances in which employers use AI or automated systems to take adverse action against employees based on the use of FMLA leave, unlawful retaliation or interference may occur across a large group of employees.

Summary

Employers must comply with the FMLA regardless of whether they use AI or other automated systems to track and manage the administration of federally protected leave. Violations of the FMLA include interfering with, restraining, or denying the exercise of rights provided by the FMLA, including failing to authorize or otherwise interfering with or restraining FMLA leave through an automated management tool. The use of AI or automated technologies should be overseen by the employer to avoid the risk of widespread violations of FMLA rights when eligibility, certification, and anti-retaliation and anti-interference requirements are not complied with. Employers are ultimately responsible for ensuring that these systems comply with the law.

D. AI and Nursing Employee Protections

Under the FLSA, as amended by the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), most nursing employees have the right to reasonable break time and space to express breast milk while at work. The space provided cannot be a bathroom and must be shielded from view and free from intrusion. This right is available for up to one year after the child's birth. The PUMP Act generally does not require that employees be compensated for break time needed to pump breast milk unless otherwise required by federal or state law or municipal ordinance. 29 U.S.C. § 218d. *See also* [Field Assistance Bulletin No. 2023-02](#) and [Fact Sheet #73: FLSA Protections for Employees to Pump Breast Milk at Work](#).

The FLSA requires employers to provide nursing employees reasonable break time each time such employee has a need to pump breast milk at work. An employer may not deny a covered employee a needed break to pump. The frequency, duration, and timing of breaks will vary depending on factors related to the nursing employee and the child. Factors such as the location of the space and the effort reasonably necessary to express breast milk can affect the duration of time an employee will need to express milk. An employee and employer may agree to a certain schedule based on the

nursing employee's need to pump, but an employer cannot require an employee to adhere to a fixed schedule that does not meet the employee's need for break time each time the employee needs to pump. Additionally, any agreed-upon schedule may need to be adjusted over time if the nursing employee's pumping needs change. The FLSA also prohibits retaliation against employees "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). For example, retaliation could include an employer penalizing an employee for requesting or taking pump breaks at work. *See* Field Assistance Bulletin No. 2023-02.

As described above, AI and other technologies are sometimes used to track and make determinations concerning employee work hours, set employee work schedules, assign tasks, manage break time requests, and assess worker productivity. However, automated scheduling or timekeeping systems that limit the length, frequency, or timing of a nursing employee's breaks to pump would violate the FLSA's reasonable break time requirement. Additionally, productivity scoring and monitoring systems that penalize a worker for failing to meet productivity standards or quotas due to the worker having taken pump breaks would violate the FLSA. An automated scheduling system that requires an employee to work additional hours to make up for the time they spent taking pump breaks or reduces the number of hours a worker is scheduled in the future because they took pump breaks would also be unlawful retaliation under the FLSA.

Summary

Regardless of the technologies and systems used, employers are responsible for ensuring that they are providing breaks for nursing employees as required by law. Employers are responsible for ensuring that AI or other automated systems do not impose adverse actions on employees for exercising their rights to pump at work.

E. AI and the Employee Polygraph Protection Act (EPPA)

The Employee Polygraph Protection Act of 1988 (EPPA) generally prohibits private employers from using lie detector tests on employees or for pre-employment screening of individuals. The EPPA defines the term lie detector to include "a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual." 29 U.S.C § 2001(3).

Additionally, employers cannot:
- Require, request, suggest or cause an employee or prospective employee to take or submit to any lie detector test,
- Use, accept, refer to, or inquire about the results of any lie detector test of an employee or prospective employee,
- Discharge, discipline, discriminate against, deny employment or promotion, or threaten to take any such action against an employee or prospective employee for refusal to take a test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding, or for exercising any rights afforded by the EPPA.

In limited industries and under prescribed conditions, polygraph tests may be administered to employees or prospective employees by qualified examiners. When applicable, an employee or prospective employee must be given a written notice explaining the employee's or prospective employee's rights and the limitations imposed. Where polygraph examinations are permitted, they are subject to strict standards concerning the conduct of the test, including the pre-test, testing, and post-test phases of the examination. *See* [Fact Sheet #36: Employee Polygraph Protection Act of 1988](#).

Some AI technologies have the ability to use eye measurements, voice analysis, micro-expressions, or other body movements to suggest if someone is lying or detect deception. An employer's use of any lie detector test, including any such device that utilizes or incorporates AI technology, would be prohibited by the EPPA unless used in accordance with the limited exemptions provided for in the law.

Summary

Employers' use of AI or other technologies to gauge an individual's truthfulness may be subject to the restrictions on lie detector tests provided under the EPPA.

F. AI and Prohibited Retaliation

Section 15(a)(3) of the FLSA provides that it shall be unlawful for "any person" to engage in retaliatory conduct, and that it is a violation for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to WHD are protected, and most courts have ruled that internal complaints to an employer are also protected. *See* [Fact Sheet #77A: Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)](#). Any employee who is "discharged or in any other manner discriminated against" because, for instance, they have filed a complaint or cooperated in an investigation, may file a retaliation complaint with WHD or may file a private cause of action. *See id*.

Anti-retaliation provisions are also found in regulations implementing various other laws administered and enforced by WHD. *See* [Field Assistance Bulletin No. 2022-02.](#) For example, retaliation is prohibited on certain contracts subject to the Davis-Bacon and Related Acts as well as on contracts subject to Executive Orders 13658, 13706, and 14026. 29 C.F.R. §§ 5.5(a)(11), 10.6, 13.6, and 23.60.

The use of AI and other technologies by employers to take adverse action against workers for engaging in protected activities under one or more laws enforced by WHD constitutes unlawful retaliation. An adverse action is any action that could dissuade an employee from raising a concern about a possible violation or engaging in other protected activity, such as filing a complaint or cooperating in a WHD investigation. For example, the use of AI for pretextual reasons to penalize or discipline an employee for engaging in protected activity could constitute unlawful retaliation.

Moreover, the use of AI and other automated systems to surveil the workforce for protected

activity and to take adverse actions could violate the anti-retaliation protections of the laws WHD enforces. For example, the use of automated worker surveillance systems to detect, target, or monitor workers whom the employer suspects have filed a complaint with WHD or have cooperated with WHD investigators could constitute unlawful retaliation. Additionally, employers have reportedly created systems to predict the likelihood that particular locations will unionize based on employee surveys and data analytics.[5] The use of such systems to predict the likelihood that a worker will file a complaint under one of the laws that WHD enforces or to predict any other type of protected activity could chill workers in the exercise of their rights and constitute unlawful retaliation.

As described above, AI and automated systems are now used by employers to manage many aspects of employees' work, including scheduling, leave, task assignment, and productivity, among others. When information regarding employees' protected activity or potential to engage in protected activity is used by AI to make determinations about scheduling, leave, or task assignments, this may constitute unlawful retaliation.

Summary

Employers who opt for integrating AI or automated systems into the workplace should take care to avoid using such technology to retaliate against workers in violation of federal labor standards. Employers continue to be responsible for compliance with the anti-retaliation provisions administered by WHD without regard to the technology they may incorporate into their business practices.

G. Conclusion

When used responsibly, AI has the potential to help improve compliance with the law. Without proper human supervision, however, these technologies can pose potential risks to workers with respect to labor standards and may result in violations of the laws enforced by WHD. Moreover, the use of AI in the workplace poses the risk of creating systemic violations across the workforce. Regardless of AI or other automated systems used, employers are responsible when the use of these technologies results in a violation of a law that WHD enforces. Ultimately, employers must ensure the responsible use of AI in order to continue to comply with the laws WHD enforces.

Please address any questions regarding this FAB to the WHD National Office, Office of Policy, through appropriate channels.

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[5] The use of electronic monitoring or AI systems to identify organizing activity may raise compliance challenges under the National Labor Relations Act. *See* General Counsel Memorandum 2023-02.