

AI-lympic Games

The Possibilities and Pitfalls of AI in the Workplace

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HR Virginia Conference

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WOODS ROGERS
VANDEVENTER BLACK

Agenda

1. Current Use of AI in the Workplace
2. Understanding AI
3. Core AI Legal Risks
4. Governing Law
5. Workplace Legal Risks and Use Cases
6. AI Governance



Anne Bibeau



King Tower



Ross Broudy

AI in Human Resources



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How is AI currently being used in HR?

① Start presenting to display the poll results on this slide.

SHRM Survey: Automation & AI in HR

(February 2022)



1,688 SHRM Members Surveyed
Source: [SHRM](#)

SHRM State of the Workplace Report 2023-24

(November 2023)

For which HR functions do you use AI?



2,028 HR Professionals Surveyed
Source: SHRM

What Changed from Feb. 2022 to Nov. 2023?



Talent Acquisition

79% > 42%
(-37%)



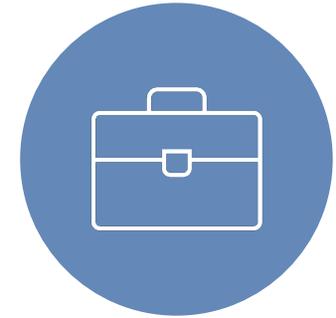
Employee Training

41% > 36%
(-5%)



People Analytics

38% > 21%
(-17%)



Promotion Decisions

4% > 0%
(-4%)

Understanding AI



AI - Definition & Elements

Evolving definition of AI...

A machine-based system that uses mathematical computational techniques to perform human-like activities or tasks.

Sources: 15 U.S.C. § 9401(3); IAPP, *Key Terms for AI Governance*; Forbytes

*An AI system is a machine-based system that, for **explicit or implicit objectives, infers, from the input it receives, how to generate outputs** such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment*

Source: [OECD, Updates to the OECD's definition of an AI system explained \(Nov. 29, 2023\).](#)

TARO

Technology

Engineered, or machine-based systems with logic, knowledge or learning algorithm

Automation

Varying levels of decision-making without human involvement

Role of Human

Defining objectives or providing data

Output

Content, predictions, recommendations, or decisions

Generative AI

AI that generates new content (such as text, images, and videos) based on learned patterns of data.

- E.g., ChatGPT and Google Gemini (formerly Bard)



How can I help you today?

The Gemini logo, featuring the word "Gemini" in a blue and purple font with a small star above the 'i'.

Chat with Gemini to
supercharge your ideas

Current Abilities of Gen AI

- Streamline interactions with business software
- Generate text, answer questions, chat bots
- Generate images, music, videos
- Enhance/refine style and quality of existing content
- Summarize and classify text
- Quickly retrieve and present enormous amounts of info
- Generate code and assist with code debugging



Source: [SHRM, The Burning Glass Institute \(Feb. 1, 2024\)](#)

Current Limitations of Gen AI

- Not creative or original
- Limited critical thinking
- Low emotional intelligence
- Limited factual accuracy; “hallucinations”
- Challenges with math functions
- Likely to reproduce any bias in its training data

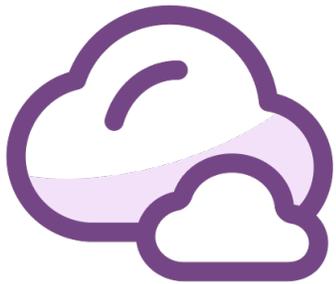


Source: [SHRM, The Burning Glass Institute \(Feb. 1, 2024\)](#)

AI Core Legal Risks



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What are the legal risks for implementing AI in the workplace?

① Start presenting to display the poll results on this slide.



Core Legal Risks

- Discrimination
- Tort Liability
- Data Privacy
- Consumer Protection
- Contract Liability

Core Legal Risks

A

Discrimination

- AI can inadvertently perpetuate bias, especially if training on random historical data

B

Tort Liability

- Legal damages may result if an AI system produces inaccurate or negligent results that harm others or other systems

Core Legal Risks

C Data Privacy

- Relying on vast amounts of data to train and improve algorithms brings into question how to comply with privacy laws, especially when sensitive personal information is involved.

D Intellectual Property

- Issues include ownership of training data (copyright, trademark, patent), ownership of AI-created content, and the potential to lose sensitive protected information when inputting it into AI.

Core Legal Risks

E

Consumer Protection

- AI-use in anything affecting commerce could implicate scrutiny by the FTC or state regulators for unfair, deceptive, or abusive trade practices.

F

Contract Liability

- Depending on contractual terms, use of AI or sharing confidential information or trade secrets with AI could result in breach.

Laws Governing Use of AI



The Race to Regulate AI



Executive Orders



OCTOBER 30, 2023

Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence



BRIEFING ROOM

PRESIDENTIAL ACTIONS



Commonwealth of Virginia
Office of the Governor

Executive Order NUMBER THIRTY (2024)

IMPLEMENTATION OF STANDARDS FOR THE SAFE USE OF ARTIFICIAL INTELLIGENCE ACROSS THE COMMONWEALTH

By virtue of the authority vested in me as Governor, I hereby issue this Executive Order to promulgate important safety standards to ensure the responsible, ethical, and transparent use of artificial intelligence technology by state government in order to protect the rights of Virginians, to provide best-in-class state government services, and to ensure that our students are well prepared for this technology.

Executive Order 14110

Source: [E.O. 14110 \(Oct. 30, 2023\)](#).

Virginia Executive Order 30

Source: [VA AI EO 30 \(Jan. 2024\)](#)

Existing Law Applies to AI

**“There is no AI exemption
from the laws on the
books...”**

-Lina M. Khan, FTC Chair

Source: [Remarks of Chair Lina M. Khan, FTC Tech Summit \(Jan. 25, 2024\)](#)

Joint Statement from Four Federal Agencies (April 2023)

- These agencies enforce civil rights
- Existing legal authorities apply to use of AI



JOINT STATEMENT ON ENFORCEMENT EFFORTS AGAINST DISCRIMINATION AND BIAS IN AUTOMATED SYSTEMS

Agency	Rights Enforced & Protected
Consumer Financial Protection Bureau (CFPB)	Consumer financial laws, guards from unfair, deceptive, or abusive acts and practices
Department of Justice's Civil Rights Division	Constitutional provisions, federal statutes prohibiting discrimination
Equal Employment Opportunity Commission	Employment bias and crimation under laws like Americans with Disabilities Act
Federal Trade Commission	Deceptive and unfair business practices and unfair methods of competition

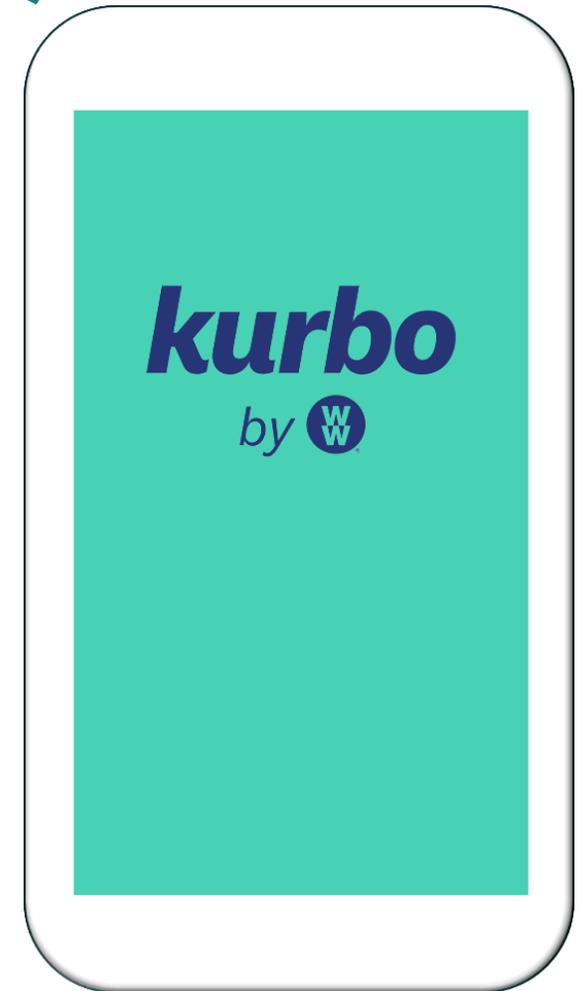
Source: [CFPB, DOJ, EEOC, FTC \(April 2023\)](#).

FTC v. Kurbo (Weight Watchers)

- WW marketed a weight loss app for children
- FTC alleged WW collected and stored children's PI w/o notice or parent consent
 - Violation of Children's Online Privacy Protection Act Rule (COPPA)
- In settlement, WW ordered to pay \$1.5M, delete data, destroy algorithms that used data

Sources:

- *United States v. Kurbo*, 3:22-cv-00946 (N.D. Cal. 2022), complaint, [Complaint \(ftc.gov\)](#), Stipulated Order, [Weight Watchers/Kurbo: Stipulated Order \(ftc.gov\)](#)
- *FTC Takes Action Against Company Formerly Known as Weight Watchers for Illegally Collecting Kids Sensitive Health Data*, FTC (March 4, 2022), [FTC Takes Action Against Company Formerly Known as Weight Watchers for Illegally Collecting Kids' Sensitive Health Data | Federal Trade Commission](#)



AI Hiring Discrimination

EEOC v. iTutorGroup

9-11-2023

- EEOC settled its first-ever AI discrimination in hiring lawsuit
- iTutorGroup used recruitment software
- Software automatically rejected older applicants (40+)
- iTutorGroup will pay \$365,000 to a group of rejected job seekers age 40+

Sources: [EEOC](#) (Sept. 11, 2023); [Equal Employment Opportunity Commission v. iTutorGroup, Inc. et al, Docket No. 1:22-cv-02565 \(E.D.N.Y. May 05, 2022\), Court Docket](#)

AI Legal Risks in the Workplace



Workplace Use Cases

- **“Use case”** means a specific situation in which a product or service could potentially be used
- Core legal risks and harms best demonstrated through use cases
- Today’s examples
 - Hiring and selection tools
 - Employee use of ChatGPT

Use Case: Hiring and Selection Tools

- Title VII, ADEA, ADA, and other discrimination laws
- EEOC Guidance - "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964" (5/18/2023)
 - Disparate impact analysis under the Uniform Guidelines on Employee Selection Procedures (4/5ths rule)
 - Employer cannot rely on vendor representations
- Best practices for AI and workplace tech: [FPF-Best-Practices-for-AI-and-HR-Final.pdf](#)

AI & Workplace Assessment Technologies

Future of Privacy Forum

- Organizations should not secretly use AI tools to hire, terminate
- AI tools should be tested for intended purpose and assessed for bias
- Avoid facial characterization and emotion inference in hiring without public disclosure
- Implement AI governance frameworks under the National Institute of Standards and Technology (NIST) risk frameworks

Source: Future of Privacy Forum, Best Practices for AI and Workplace Assessment Technologies, [FPF-Best-Practices-for-AI-and-HR-Final.pdf](#)

Amazon Scrapped AI Recruiting Tool

Experimented with AI tool to review applicants' resumes and score applicants based on review of resumes of successful candidates, who were mainly men.

Result:

- AI taught itself that male candidates were preferable
- Penalized resumes that included words such as "women's" and downgraded graduates of women's colleges
- Amazon tried to correct the tool but ultimately abandoned it in 2018 because of concerns the bias could not be eliminated

Best Practices as a Defense

- Keeping records can guard against “discriminatory hiring” claims
- Accurate records detail essential functions
- Importance of job descriptions
 - ADA
 - FLSA
 - Regular review
- Show company has established and adhered to valid selection guidelines
- Third-party expert analysis to identify and eliminate adverse impact



Best Practices

- Develop policies on employee use of AI and train employees
- Beware “Algorithm Drift”
 - AI tools change as they are fed data
 - Tool that initially tested as unbiased may become biased.
- Guard trade secrets and other confidential information
 - Employee data

Use Case: Employee Use of ChatGPT

OpenAI Privacy Policy

1. Personal information we collect

We collect personal information relating to you ("Personal Information") as follows:

Personal Information You Provide: We collect Personal Information if you create an account to use our Services or communicate with us as follows:

- **Account Information:** When you create an account with us, we will collect information associated with your account, including your name, contact information, account credentials, payment card information, and transaction history, (collectively, "Account Information").
- **User Content:** When you use our Services, we collect Personal Information that is included in the input, file uploads, or feedback that you provide to our Services ("Content").
- **Communication Information:** If you communicate with us, we collect your name, contact information, and contents of any messages you send ("Communication Information").
- **Social Media Information:** We have pages on social media sites like Instagram, Facebook, Medium, Twitter, YouTube and LinkedIn. When you interact with our social media pages, we will collect information that you elect to provide to us, such as your contact details (collectively, "Social Information"). In addition, the companies that host our social media pages may provide us with aggregate information and analytics about our social media activity.

2. How we use personal information

We may use Personal Information for the following purposes:

- To provide, administer, maintain and/or analyze the Services;
- To improve our Services and conduct research;
- To communicate with you;
- To develop new programs and services;
- To prevent fraud, criminal activity, or misuses of our Services, and to protect the security of our IT systems, architecture, and networks;
- To carry out business transfers; and
- To comply with legal obligations and legal process and to protect our rights, privacy, safety, or property, and/or that of our affiliates, you, or other third parties.

As noted above, we may use Content you provide us to improve our Services, for example to train the models that power ChatGPT. See [here](#) for instructions on how you can opt out of our use of your Content to train our models.

Source: [Privacy policy \(openai.com\)](https://openai.com/privacy) (June 23, 2023)

Use Case: Employee Use of ChatGPT

OpenAI Privacy Policy

3. Disclosure of personal information

In certain circumstances we may provide your Personal Information to third parties without further notice to you, unless required by the law:

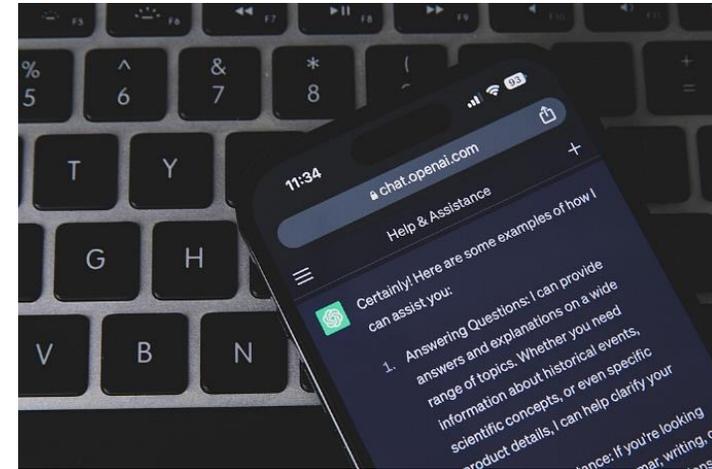
- *Vendors and Service Providers:* To assist us in meeting business operations needs and to perform certain services and functions, we may provide Personal Information to vendors and service providers, including providers of hosting services, cloud services, and other information technology services providers, email communication software, and web analytics services, among others. Pursuant to our instructions, these parties will access, process, or store Personal Information only in the course of performing their duties to us.
- *Business Transfers:* If we are involved in strategic transactions, reorganization, bankruptcy, receivership, or transition of service to another provider (collectively, a "Transaction"), your Personal Information and other information may be disclosed in the diligence process with counterparties and others assisting with the Transaction and transferred to a successor or affiliate as part of that Transaction along with other assets.
- *Legal Requirements:* We may share your Personal Information, including information about your interaction with our Services, with government authorities, industry peers, or other third parties (i) if required to do so by law or in the good faith belief that such action is necessary to comply with a legal obligation, (ii) to protect and defend our rights or property, (iii) if we determine, in our sole discretion, that there is a violation of our terms, policies, or the law; (iv) to detect or prevent fraud or other illegal activity; (v) to protect the safety, security, and integrity of our products, employees, or users, or the public, or (vi) to protect against legal liability.
- *Affiliates:* We may disclose Personal Information to our affiliates, meaning an entity that controls, is controlled by, or is under common control with OpenAI. Our affiliates may use the Personal Information we share in a manner consistent with this Privacy Policy.

Source: Privacy policy (openai.com) (June 23, 2023)

Use Case: Employee Use of ChatGPT

Privacy and Security Risks

- Data breach: leaking personally identifiable information
 - SSN, driver's licenses, financial info
- Compromised login credentials
- Leaking company trade secrets or proprietary information
- Unfair and deceptive trade practices
 - Using customer or EE data contrary to business privacy policy
- Reputational harms



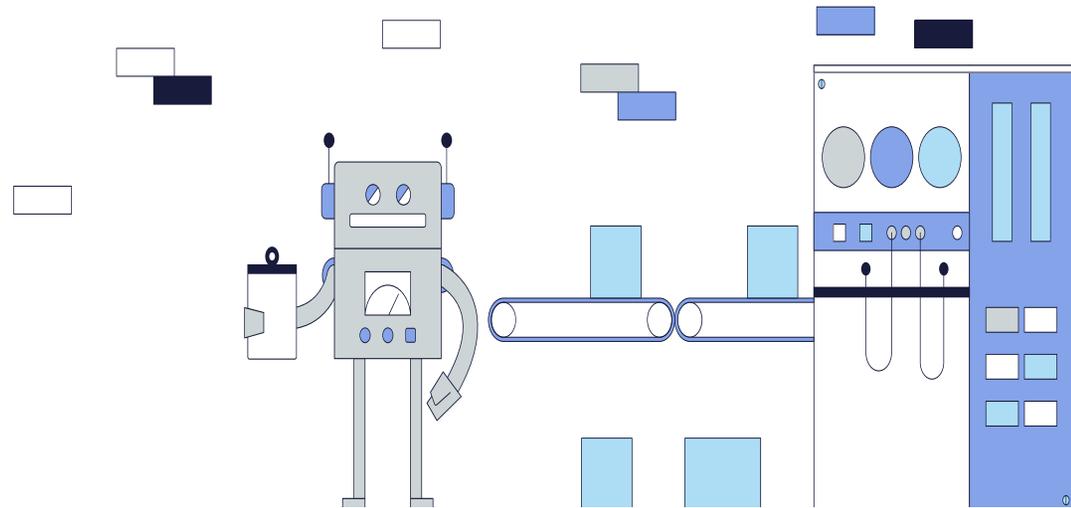
AI Governance & Deployment



AI Governance

“Organizational AI governance refers to the internal guidelines and practices organizations follow to ensure responsible development, deployment or use of AI by that organization.”

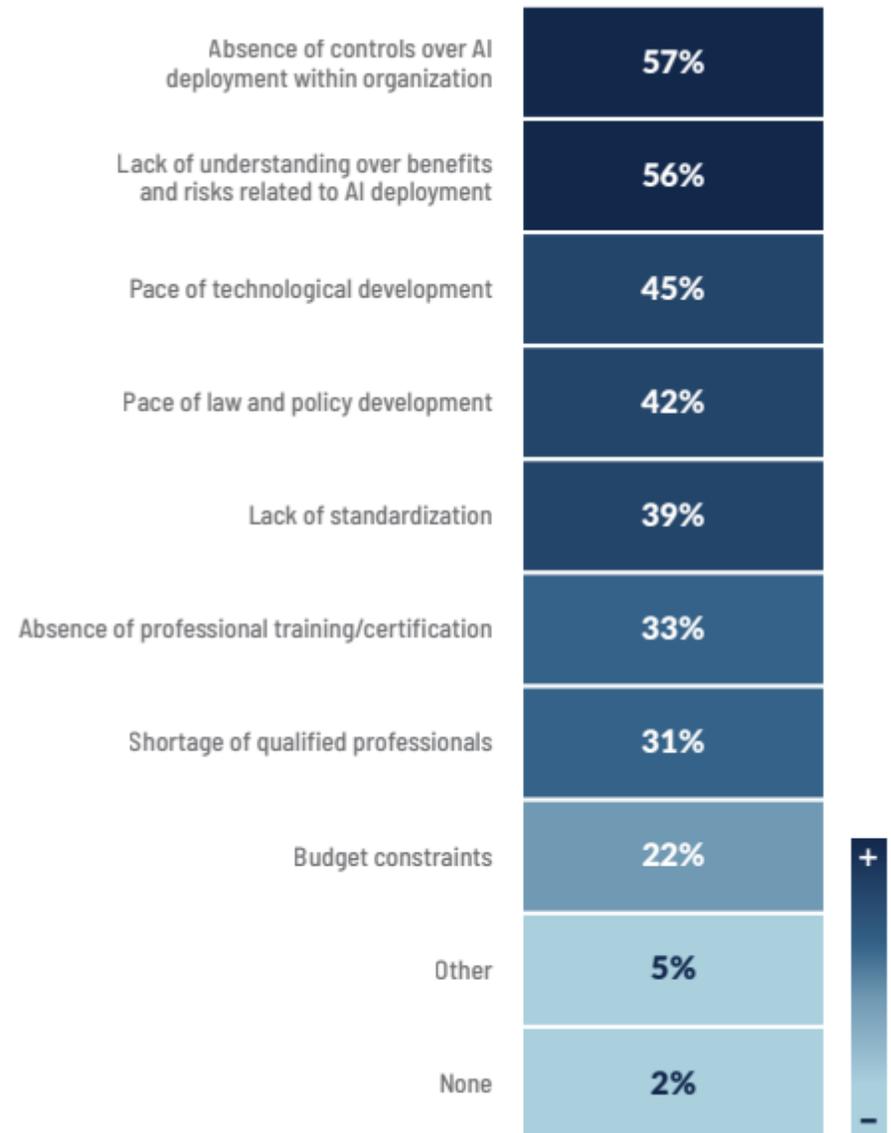
Source: [IAPP/EY \(Dec. 2023\)](#)



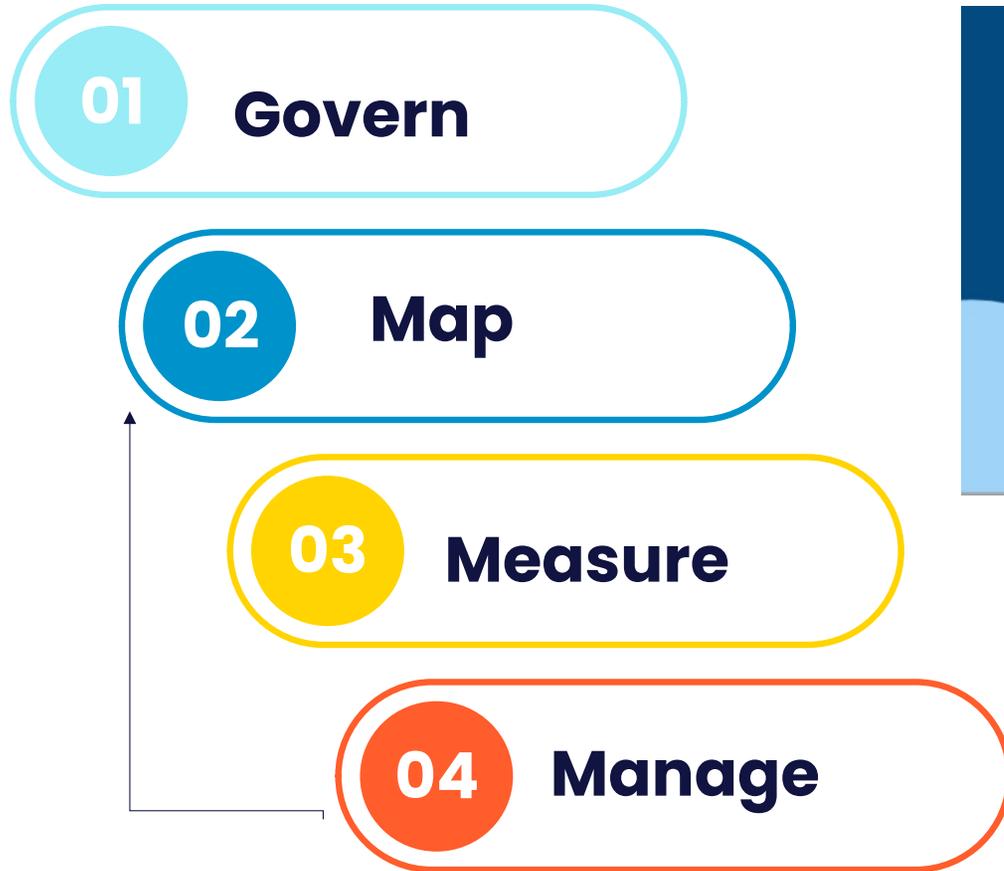
Challenges in Implementing AI Governance



Source: [IAPP/EY \(Dec. 2023\)](#)



AI Governance: Example Framework



NIST AI Risk Management Framework ("RMF") Playbook

AI Challenges & Issues in HR

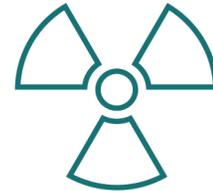


Inaccuracies
and Trust

Productivity

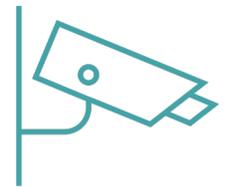


Job
Displacement



Abusive Use
of AI

Workplace
Surveillance



Ongoing
Compliance

Q&A



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