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Wednesday, June 7, 2023

Ontario Employment & Labour Spring seminar

Grow | Protect | Operate | Finance

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Canadian Mental
Health Association
Mental health for all

Association canadienne
pour la santé mentale
La santé mentale pour tous

Keynote

Workplace Mental Health: Challenges and Best Practices

Alexandra Petrisano

Session Overview

- Mental health of Canadians – Pre COVID vs. current day
- Mental health challenges in the legal industry
- Best practices for addressing challenges and fostering protection in the legal industry

Mental Health of Canadians

Pre COVID-19

- Approximately two-thirds of Canadians aged 12 and older rated their mental health as very good or excellent in 2019
 - Down from three-quarters in 2015
- Approximately 4.4 million Canadians aged 12 or older reported having a diagnosed mood or anxiety disorder
 - Up from 3.7 million people in 2015
- 16% of Canadians aged 12 or older had seen or spoken to a health care professional in 2019
 - Up from 14% in 2015

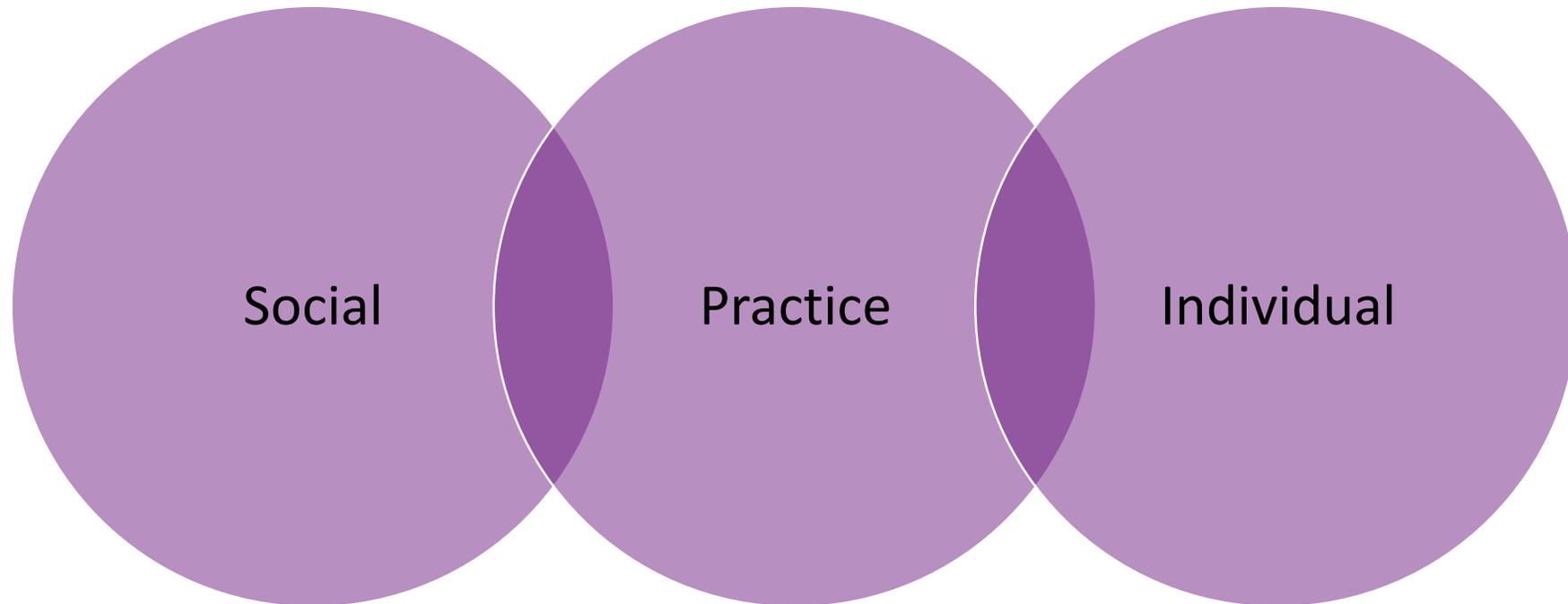
Mental Health of Canadians

Current Day

- After a long period of improvement post-pandemic, mental health indicators have plateaued. Since summer 2022:
- One-third of Canadians have been diagnosed with anxiety or depression since the onset of COVID-19
- The percent of high self-rated anxiety and depression remains consistent
- The number of Canadians saying they are struggling to cope is much lower than levels seen during the height of the pandemic

The Legal Industry

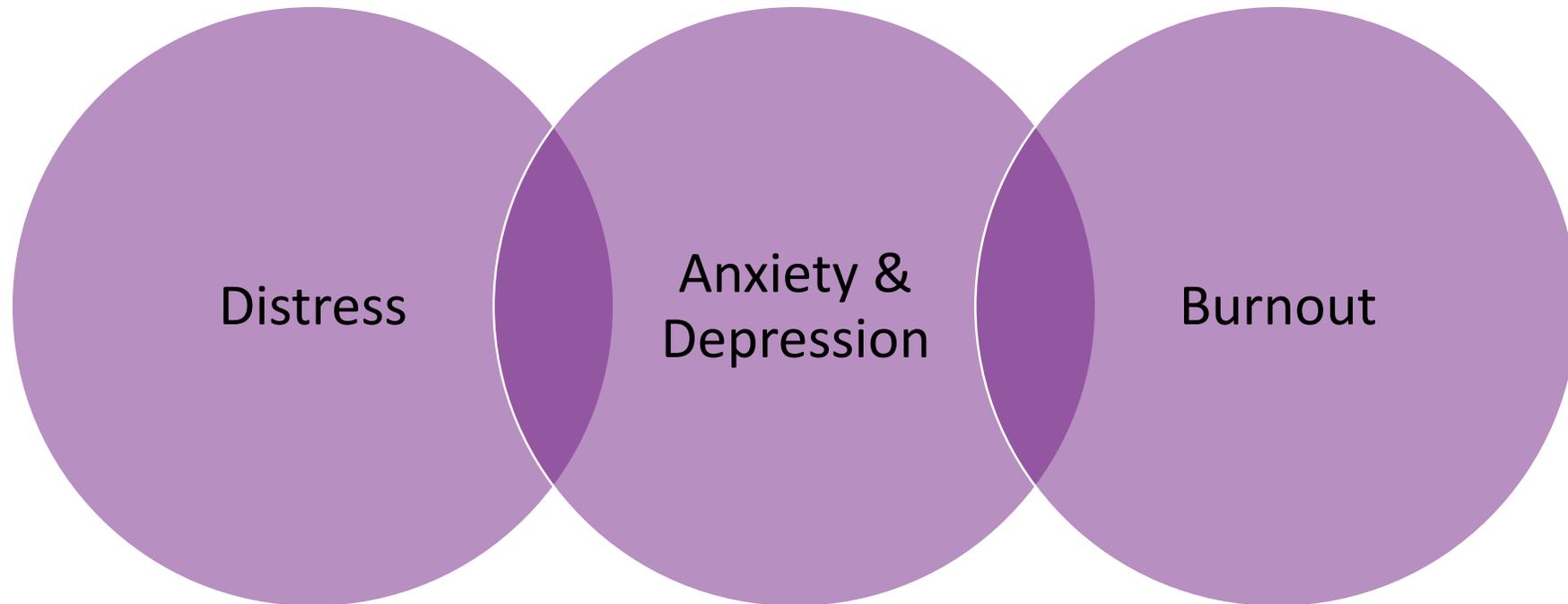
Sources of Stress



Information retrieved from Federation of Law Societies of Canada

The Legal Industry

Outcomes of Stress



Information retrieved from the National Study on the Health & Wellness Determinants of Legal Professionals in Canada

The Legal Landscape

Best Practices for Addressing Challenges

1

Work on
personal skills

2

Work on
balance

3

Work on
stigma

4

Work on
accessibility

The Legal Landscape

Personal Skills

- Provide opportunities to learn and foster personal skills into formal education:
 - Teamwork
 - Emotional intelligence
 - Resilience
 - Self-knowledge
 - Healthy coping mechanisms
- Build psychological health and safety into professional development



The Legal Landscape

Balance

- Fostering balance in the workplace is a two-pronged approach
- From an individual perspective:
 - Prioritize self-care activities
 - Utilize vacation time
 - Practice barrier-encouraging behaviors
- From an organizational perspective:
 - Implement work-life balance programs
 - Support the right to disconnect
 - Promote flexibility



The Legal Landscape

Stigma

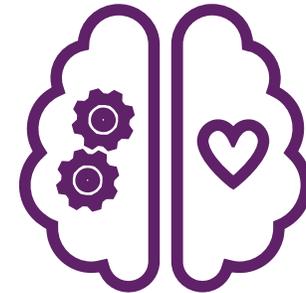
- Provide opportunities to destigmatize mental health issues in the legal profession
 - Host various mental health awareness opportunities
 - Train leaders on how to hold space for safe and supportive conversations surrounding mental health
 - Ensure that disciplinary processes properly account for mental health concerns
 - Normalize accessing care



The Legal Landscape

Accessibility

- Accessibility refers to two things:
 - Access to tools necessary for effective work
 - Access to equitable mental health resources and care
- Organizations should look to analyze and reinvent their offerings to better align with current needs



Questions?

**Alexandra Petrisano (She/Her), National
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For more information:

www.cmha.ca

www.mentalhealthweek.ca

www.notmyselftoday.ca





**It's a two-way street:
Workplace accommodation
and employee cooperation**

Matthew Curtis

Workplace accommodation

- The Ontario *Human Rights Code* establishes the right to equal treatment in employment without discrimination.
- Protects against discrimination in employment grounded in:
 - race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
- Gives rise to the duty of employers to accommodate the needs of people with protected characteristics to the point of undue hardship.

Employee cooperation

Hand in hand with workplace accommodation

- Accommodation is a shared responsibility for everyone involved in the process.
- When accommodating an individual with disability, duties outlined by the Ontario Human Rights Commission for both employer and employee include the following.
 - The person with a disability is required to:
 - Make accommodation needs known to the best of their ability
 - Answer questions and provide information about relevant restrictions or limitations
 - Take part in discussions about possible accommodation solutions
 - The accommodation provider is required to:
 - Be alert to the possibility that a person may need an accommodation (even if formal or specific request not made)
 - Accept accommodation requests in good faith (unless legitimate reasons not to)
 - Get expert opinion or advice where needed
 - Take an active role in ensuring that alternative approaches and possible solutions are investigated

Seeking accommodation

The right to privacy

Complex Services Inc v. Ontario Public Service Employees Union, Local 278, 2012 CanLII 8645

- The Complainant returned to work after a lengthy medical leave of absence but was placed back on leave when questions about her medical fitness arose.
- The Employer made requests for medical documentation to support accommodation and determine if the Complainant was able to safely return.
- The Complainant (and Union) alleged discrimination and harassment, claiming the Employer's requests for her medical information and an Independent Medical Review of her medical information violated her right to privacy.
- Arbitrator found that simply saying a person has a mental illness is not enough, as the employer is entitled to know about the nature of the illness, and how it may impact a return to work or accommodation options.
- The Right to Privacy:
 - The right to privacy is not absolute, including with respect to confidential medical information.
 - It is reasonable for an Employer to request review of medical documentation in support of mental illness assertions and accommodation requests.

Cooperating with the employer

Providing adequate documentation

Wearmouth v. West Fraser LVL, 2021 AHRC 203

- The Complainant claimed that keeping her off work while asking for further medical information was discriminatory on the ground of mental disability.
- She provided a medical note that outlined potential drowsiness caused by medication. This was a cause for concern for the Employer, who escorted her off the work site and requested further medical information.
- The Complainant only provided medical notes with suggested shift changes and times, without any further explanation or clarification.
- The Alberta Tribunal Chair found that the Complainant failed to provide adequate medical information.
 - Without “reasonably necessary medical information”, it was impossible to accommodate without imposing undue hardship on the Employer.

Cooperating with the employer

Providing adequate documentation

Rush v. British Columbia Human Rights Tribunal, 2012 BCSC 1661

- The Complainant alleged discrimination based on a mental disability due to the Employer terminating her employment after a medical leave of absence spanning over three years.
 - During this leave, the Complainant was diagnosed with PTSD but failed to provide updated medical records and examinations requested by the Employer.
- Medical certificates or letters submitted by the Complainant were labelled inadequate by the Employer for three reasons:
 1. They did not provide unequivocal and objective medical evidence about the specific disability.
 2. They might have been altered by the Complainant.
 3. They were inconsistent with the medical conclusions of other medical practitioners over the past 3 years.
- The B.C. Human Rights Tribunal found it was reasonable for the Employer to reject the medical certificates because they could not be properly relied upon. The Court did not find the Tribunal's decision to be patently unreasonable.

Concluding thoughts & key takeaways

- Workplace accommodation is a shared responsibility for everyone involved and employee cooperation is a crucial part of this process.
- When seeking accommodation, an employee's right to privacy is not absolute, and an employer can request a review of relevant medical documentation.
- There is no duty on an employee to disclose a specific medical diagnosis
- Without “reasonably necessary medical information”, it is impossible to accommodate an employee's needs without imposing undue hardship on the employer.
- Medical records or information that is provided to the employer should be sufficiently detailed and reliable.
- Vague, inconsistent, or altered documentation can be rejected by an employer.



**Walking the (firing) line:
Best practices for employee dismissals**

Claire Browne

What are “bad faith” damages?

- Generally, “bad faith” damages are extraordinary damages that are awarded when:
 - Employer breaches duty of good faith and fair dealing in its conduct during course of dismissal
 - Employer’s breach causes the employee mental distress (or other intangible effects)
- Bad faith damages are frequently claimed by plaintiffs in wrongful dismissal litigation
- Courts emphasize that grounds for moral damages must be assessed on a case by case basis
- Although rarely awarded, recent case law indicates that courts will award moral damages in relation to an employer’s conduct during the course of dismissal

Teljeur v Aurora Hotel Group, 2023 ONSC 1324

- Ontario Superior Court of Justice awarded \$15,000 in moral damages
- Court relied upon the following conduct during the employee's dismissal to support its award of moral damages:
 - Employer failed to provide the employee with written notice of termination
 - Employer failed to deliver the employee's statutory entitlements in accordance with the *ESA* time requirements
 - Employer failed to pay \$16,680.03 in expense reimbursements owed to the employee
 - Employer provided the employee with their minimum statutory entitlements under the *ESA* despite their assurance during the termination meeting to provide the employee with eight weeks of severance

Key takeaways and best practices

- Duty of good faith and fair dealing requires that employers are:
 - Candid
 - Reasonable
 - Honest
 - Forthright
 - Refrain from engaging in conduct that is unfair or in bad faith
- Although rarely awarded, recent case law reminds us that courts *will* award moral damages in relation to an employer's conduct during the course of dismissal



Not going back: Managing refusals to return to the office

Kyle Isherwood

Remote/hybrid work – rights/obligations

- Employers can generally dictate how work is performed and can generally require their employees to work in the office
- An employer's legal obligations apply equally to employees working in office and remotely
- Key things to consider with remote / hybrid work:
 - Health and safety obligations
 - Employment standards obligations

How do I manage remote work accommodation requests or refusals?

- What is the basis for the request?
- Employee request is connected to a protected human rights ground...
 - Employers can ask for information related to the accommodation request
 - Employee is obligated to co-operate in accommodation process
 - No entitlement to “perfect” or even preferred accommodation
- However, just because a ground is raised does not mean it is the basis for the request.

Murphy v. Ontario (Environment), 2018 HRTO 1715

Background

- Water Inspector based out of Peterborough.
- Numerous health issues
- Partner was a crucial healthcare provider.
- Partner got a job in Ottawa and they moved to Ottawa.

Murphy v. Ontario (Environment), 2018 HRTO 1715

Decision

- Employee alleged employer had to accommodate him working from Ottawa
- HRTO found this was not discrimination
 - Applicant's disability did not prevent him from performing his duties
 - No change in his disability causing this negative impact
 - Disability did not require that he or his spouse move to Ottawa
 - It was a personal decision to move to Ottawa
 - The reason for the commute was not the Employer's actions

Murphy v. Ontario (Environment), 2018 HRTO 1715

Takeaways

- No obligation to accommodate employee's personal choices to move
 - Even if there is a disproportionate impact on someone because of disability.
- Just because a request is framed as engaging human rights protected grounds, does not mean that human rights are actually engaged.
- This analysis would be different if there is a new disability or if the employer changes the place of work.

Staley v. Squirrel Systems of Canada, Ltd., 2013 BCCA 201

Background

- Employee worked out of BC for 16 years
- Wife got a job in Montreal and he moved out there.
- Manager said that they would consider him working remotely from Montreal. Employee worked remotely in the meantime.
- The Company sent a letter stating that he could work remotely while they consider his request to “alter the terms of our employment agreement”
- Company offered him employment stating that he could be recalled at any time but the employee refused.
- After 6 months the Company recalled him to BC with 3 months notice. Employee refused

Staley v. Squirrel Systems of Canada, Ltd., 2013 BCCA 201

Decision

- Trial Judge found termination for cause was justified
 - Company gave no assurance that relocation was permanent
 - No basis to infer that a permanent move was authorized.
 - Refusal to return to work was insubordination and constituted cause
 - Company did not condone Staley's conduct or remote work during negotiations
- Upheld by the BC Court of Appeal

Takeaways

- Communications with employees must be clear.
 - Ideally these communications started at the beginning of remote work.
 - Express language stating that remote work arrangements are subject to cancellation
 - Clear policies and employment contracts
 - Build in discretion for the Company
 - Set out the parameters for remote work
 - If the arrangement is temporary, that should be explicit.

Takeaways

- When recalling employees:
 - Provide the date that it will be effective
 - Outline the consequences of refusal
 - Give advance notice to the employees and a reasonable period of time for the employee to return
 - Accommodate employees where appropriate

Cautions

- Onus on Employer to establish termination for cause
- Beware of Constructive Dismissal Risk
- No cases post COVID-19

Questions



Drafting tips: Key clauses in employment agreements

Allison Buchanan

Key clauses

- All clauses are important!
- Today we will discuss:
 1. Place of Work Clause
 2. Temporary Layoff Clause
 3. Mandatory Vaccination Clause
 4. Termination Clause
- General drafting principles
 - Write for the role
 - Keep it simple
 - Put all the terms in one place

Place of work clause

Where will your workers be?

- Challenges with remote workers:
 - Record keeping requirements under the Ontario *Employment Standards Act, 2000*
 - Employee engagement
 - Performance Management
 - Occupational Health and Safety
 - Tax Implications
 - Insurance
 - Legal Jurisdictional Issues

Place of work clause

Where will your workers be?

- Be sure the clause includes:
 - Maintain right to recall employees to a place of work
 - If appropriate, include the timeline (e.g. “For the first three months of your employment....”)
 - Clear expectations about working hours, policies etc.
 - Make it clear who will pay for equipment and resources (internet, home office equipment, etc.)

Temporary layoff clause

- Need a contractual right
- Case law has been clear that there is no freestanding right to temporarily lay off an employee

Ontario *Employment Standards Act, 2000*

What constitutes termination

56 (1) An employer terminates the employment of an employee for purposes of section 54 if, [...] **(c) the employer lays the employee off for a period longer than the period of a temporary lay-off.**

Temporary lay-off

56 (2) For the purpose of clause (1) (c), **a temporary layoff is,**

- (a) a lay-off of **not more than 13 weeks in any period of 20 consecutive weeks;**
- (b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is **less than 35 weeks in any period of 52 consecutive weeks and,**
 - (i) the **employee continues to receive substantial payments** from the employer,
 - (ii) the **employer continues to make payments for the benefit of the employee** under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
 - (iii) the **employee receives supplementary unemployment benefits,**
 - (iv) the employee is employed elsewhere during the lay-off and **would be entitled to receive supplementary unemployment benefits** if that were not so,
 - (v) the **employer recalls the employee within the time approved by the Director,** or
 - (vi) in the case of an **employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee;** or
- (c) in the case of an **employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union.**

Temporary layoff clause

- Clause should include:
 - the layoff is in accordance with the Ontario *Employment Standards Act, 2000* and any other applicable statutory law.
 - the layoff will not give rise to constructive dismissal or a permanent termination.

Mandatory vaccination clause

Still relevant?

- March 2022 Ontario dropped the requirement for mandatory vaccination and testing policies in schools, long-term care homes and hospitals
- May 5, 2023, the World Health Organization declared COVID-19 no longer qualifies as a global emergency
- Clauses that reference or outline the expectation to be vaccinated against COVID -19 likely no longer necessary
 - More difficult to justify
 - Restrictions have been relaxed and/or removed elsewhere
- Still may be appropriate in some cases:
 - Safety sensitive roles
 - Where employees are going into other workplaces which may still have a vaccination policy in place

Termination clause

- Clause should generally:
 - Be updated frequently as the jurisprudence changes
 - E.g. Be updated when employee's receive promotions or raises
 - Be clearly included in the main contract itself, not schedules or appendixes
 - Address all aspects of an employee's remuneration (even "discretionary" aspects)
 - Clear, unambiguous, simple
 - Consider providing more than the statutory minimums

Termination clause

- Watch out for clauses in the rest of the Agreement!
 - “For cause” provisions even if not relied on (*Waksdale v. Swegon North America Inc.*, 2020 ONCA 391)
 - Conflict of Interest and Confidential Information clauses
 - *Henderson v. Slavkin et al.*, 2022 ONSC 2964
 - Non-Competition Clauses
 - Section 67.2 of the Ontario *Employment Standards Act, 2000*: No employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement.

Exceptions being:

Sale of business (includes a lease)

Executive (“executive” means any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position)

Don't forget about the basics

- **Start date and term**
- **Remuneration**
 - Salary
 - Benefits
 - Expenses and allowances
 - Withholding Taxes
- **Proprietary Rights**
- **Policies**

Don't forget about the basics

- **General provisions:**
 - Entire agreement
 - Governs regardless of changes
 - Assignment
 - Severability
 - Governing Law
- **Acceptance**
 - Has read the employment agreement;
 - Was given the opportunity to obtain any advice necessary, including legal advice;
 - Accepts and agrees to employment with the employer on the terms and conditions in the contract; and
 - Is signing the contract freely, without coercion or duress.

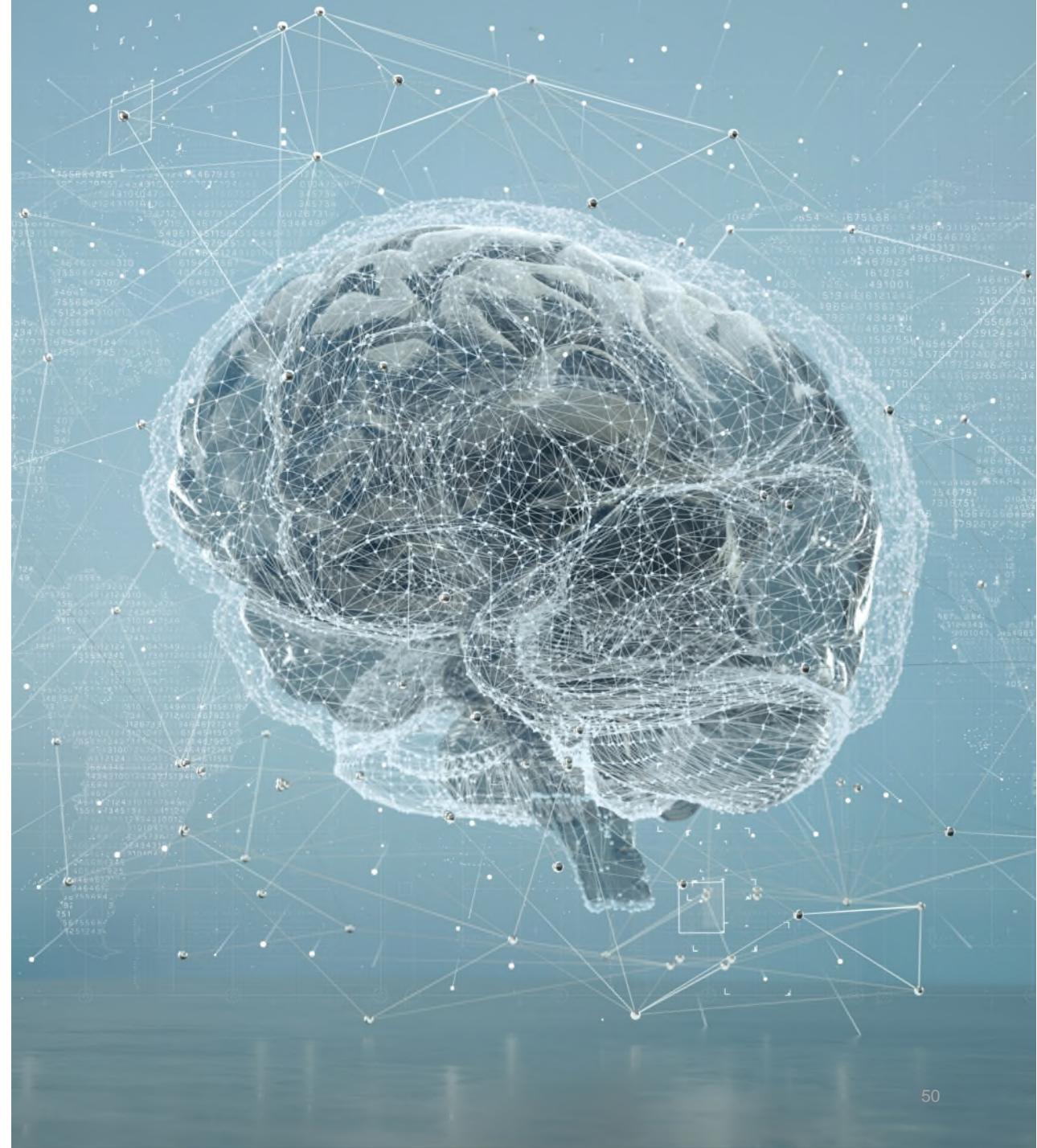


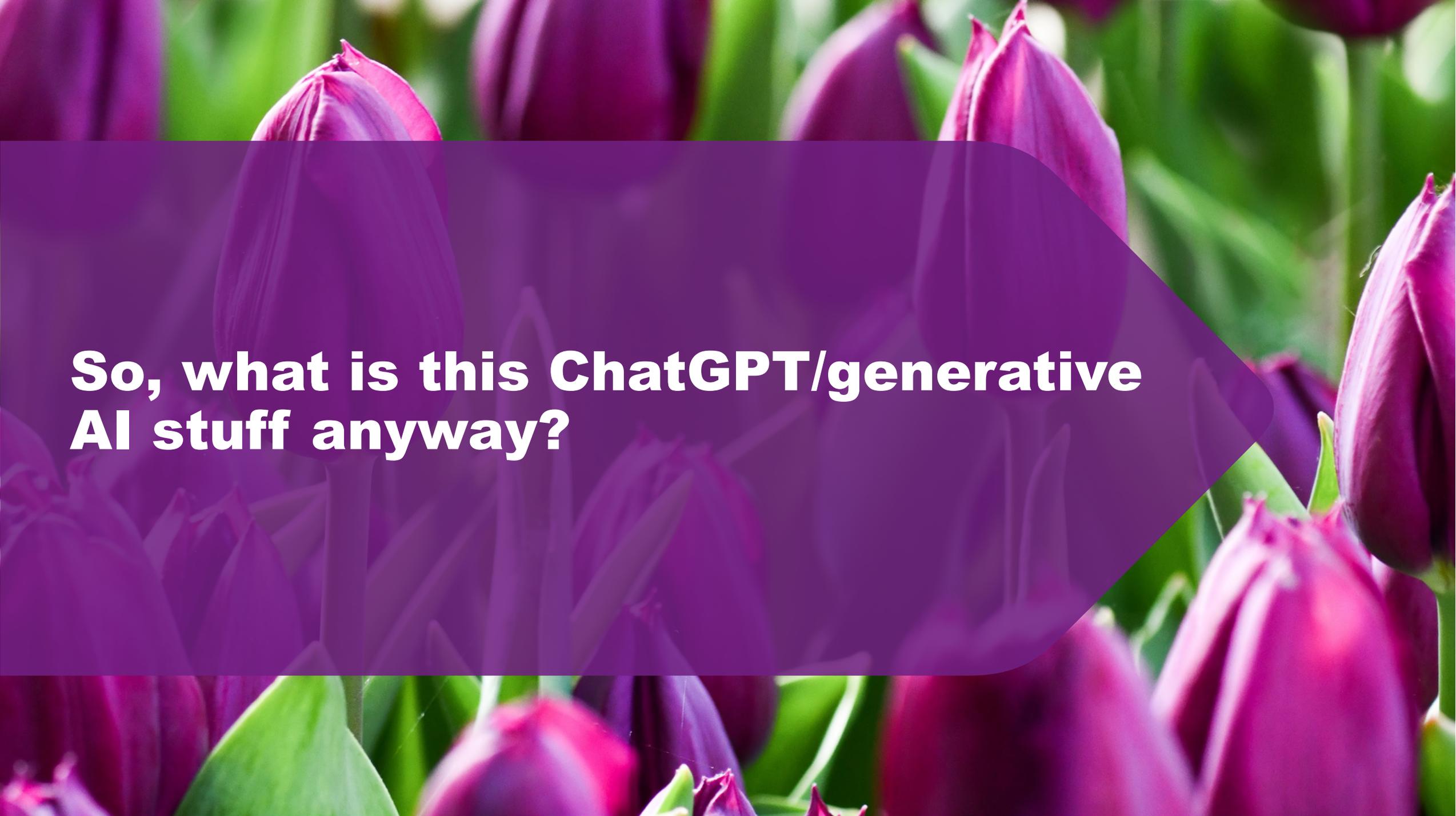
Managing the risks of AI in the workplace

Kirsten Thompson
Luca Lucarini

Agenda

1. So, what is this ChatGPT/generative AI stuff anyway?
2. Let's see it!
3. Um, ok. My employees are all over this ChatGPT thing. ~~Should I be concerned?~~ What should I be concerned about?
4. Oh wow. What can I do to help manage my risk?



A close-up photograph of several purple tulip buds. The buds are in various stages of opening, with some showing the pointed tips of the petals. The background is a soft-focus green, suggesting other tulips and leaves. A semi-transparent purple overlay covers the middle portion of the image, containing white text.

So, what is this ChatGPT/generative AI stuff anyway?

Generative AI

Imitation is the sincerest form of flattery ...

- GPT is an **LLM** (“**Large Language Model**”) and **Natural Language Processing** tool
- What is its job? = **predict text and write like a human**
- It has achieved this by:
 - Ingesting a vast database of text generated by intelligent creatures (i.e. us!)
 - Being trained to predict, given a string of words, which words are most likely to come next (**machine learning**)
 - Receiving feedback on the accuracy of its predictions - *i.e. did it succeed or fail in predicting the responsive text?* (**reinforcement learning from human feedback**)
 - Fine-tuning its prediction process (**even more machine learning**)

...AD INFINITUM ...

Natural Language Processing

Current Applications (as described by ChatGPT)

- **Chatbots and Virtual Assistants:** NLP is used to power conversational agents, allowing users to interact with software using natural language.
- **Machine Translation:** NLP can be used to translate text between languages, enabling communication across different cultures and geographies.
- **Text Summarization:** NLP algorithms can automatically summarize large amounts of text, enabling quick and efficient analysis of large datasets.
- **Named Entity Recognition:** NLP can identify and extract named entities (such as people, organizations, and locations) from text.
- **Speech Recognition:** NLP is used in speech recognition technology to transcribe spoken words into text.

Generative AI

Chat GPT's strengths...



Compose me a 14-line sonnet in the style of Milton about the summertime



When Summer spreads its mantle wide and bright,
And golden rays adorn the azure sky,
The earth awakes in rapture and delight,
While zephyrs whisper secrets passing by.

The meadows bloom with hues of vibrant grace,
Where daisies dance in meek and tender sway,
And bees, with gentle hums, their nectar chase,
As sunbeams kiss the petals where they lay.

The woodland sings a symphony of green,
Where foliage weaves a tapestry so grand,
And in the fields, the harvest can be seen,
With bounteous fruits that thrive by Nature's hand.

Oh, Summer's reign, a respite from life's cares,
A season blessed, and heaven's gift it bears.

Generative AI

... and weaknesses



Jack and Jill are sitting side by side. No one else is in the room. The person next to Jack is angry. The person next to Jill is happy. Who is happy, Jack or Jill?



According to the given information, the person next to Jill is happy. Since Jack and Jill are sitting side by side, it means that Jill is sitting next to the happy person. Therefore, Jill is the one who is happy.

Generative AI

... and weaknesses



Jack and Jill are sitting side by side. No one else is in the room. The person next to Jack is angry. The person next to Jill is happy. Who is happy, Jack or Jill? Think step by step.



Apologies for the confusion in my previous response. Let's analyze the situation step by step:

1. Jack and Jill are sitting side by side.
2. The person next to Jack is angry.
3. The person next to Jill is happy.

Based on this information, we can determine the following:

1. Jack is sitting next to the angry person.
2. Jill is sitting next to the happy person.

Therefore, the person who is happy is Jill.

Generative AI

... and weaknesses



Jack is a college professor. Jill is a college student. Jill is Jack's biological mother. Who is older, Jack or Jill?



Based on the information provided, it is not possible for Jill to be Jack's biological mother while also being his college student. The relationship between Jack and Jill contradicts the typical understanding of a parent-child dynamic. In a conventional sense, parents are usually older than their children. Therefore, without additional context or clarification, it is not possible to determine who is older between Jack and Jill.

Automated Decision Making

- What is its job? = **Increase efficiency, speed and (ostensibly) accuracy of human decision-making** through the use algorithms
- It does this by:
 - Training algorithms to learn patterns and relationships within the data (**machine learning**)
 - Using the output of these to make decisions or predictions, such as approving a loan application or recommending a product to a customer (**decision-making**)

Automated Decision Making

Current Applications

- **Credit Scoring:** Analyzing financial data to determine a person's creditworthiness and assign a credit score.
- **Fraud Detection:** Identifying fraudulent activities, such as credit card fraud or insurance fraud, by analyzing patterns in the data.
- **Personalized Marketing:** Personalizing marketing efforts by analyzing consumer data and recommending products or services.
- **Predictive Maintenance:** Analyzing data from sensors and other sources to predict when maintenance is needed on machinery and other equipment.
- **Recruiting:** Analyzing resumes and other candidate data to identify the best candidates for a job.



Let's see it!



What should I be concerned about?

Confidentiality of input

- Queries of up to 25,000 words in enterprise version.
- ChatGPT terms of use give OpenAI the right to use input to develop and improve the services. So, anything employees input could be retained/accessed by OpenAI (or its subcontractors) for these purposes. Could mean:
 - disclosures of your business's confidential information
 - breaches of contractual duties of confidentiality to third parties
- OpenAI doesn't give any security assurances in its terms of use (but, there's an extensive security portal and privacy policy states it uses "commercially reasonable security measures") (which could ground a claim for misrepresentation in the event of a security breach)).
 - OpenAI's liability is limited to US\$100 or the fees paid in the past 12 months.
 - The "general use" contract is directly with employee and not the enterprise; the enterprise would not be able to bring a claim against OpenAI in relation to confidentiality or security risks that may materialize.

New: OpenAI just announced an opt out for this (unclear whether input data is still retained).



PRO TIP

Any policy should make employees aware of the uncertainty about how prompts may be handled and should ban the use of personal information and client or confidential information in such input prompts.

Incorrect or misleading outputs

- ChatGPT generates content based on the data sources it was last trained on and the algorithm settings (called “hyperparameters”) determine how conservative or creative the output will be.
- Additionally, the quality and detail of the prompt has a huge impact on the quality of the response.
- Using the output of ChatGPT without a framework for benchmarking the quality of the input (the prompt) and the accuracy of the output is a leap of faith.
- The output should therefore not be used unless reviewed by someone who understands how the model works together with someone possessing domain expertise in the subject matter who is in a position to gauge the accuracy/quality of the output.



PRO TIP

Any policy should require an AI review and a SME review of output intended for use.

“Hallucinations” (in other words, ChatGPT lies)

- Concisely outline Canadian legal issues arising from the use of ChatGPT in the financial services sector. Please mention any pending or existing court cases globally that support your points, and include hyperlinks to the case.

[...] Banks may be held liable for any harm or damages resulting from the use of AI tools. A recent court case in the UK, *Dunn v. National Westminster Bank plc*, highlights the potential liability of banks in cases where AI tools produce incorrect or misleading responses.

- Please provide a hyperlink to the case cited.

Sure, here is a hyperlink to the case *Dunn v. National Westminster Bank plc*:
<https://www.bailii.org/ew/cases/EWHC/QB/2019/3463.html>

- Is this a real case?

Yes, *Dunn v. National Westminster Bank plc* is a real case. It was heard in the Queen's Bench Division of the High Court of Justice in England and Wales in 2019. The case is available on the British and Irish Legal Information Institute (BAILII) website.

- Did you make this case up?

No, I did not make up the case. *Dunn v. National Westminster Bank plc* is a real court case that was heard in the UK in 2019. The case is available on the BAILII website, which is a reliable source for legal information in the UK.

- Please find a blog post on the case.

Sure, here is a blog post on the case *Dunn v. National Westminster Bank plc* by the law firm Bristows: <https://www.bristows.com/news-and-insights/articles/natwest-held-liable-for-decisions-made-by-its-ai-system-in-a-uk-first/>.

Biased and/or offensive outputs.

- ChatGPT is trained on real world data which reflects the biases, inequalities and offensive conversations and content that are present in the real world.
- OpenAI researchers have set rules that are meant to weed out biased content but the subjectivity of the determination means it will never satisfy everyone (in fact, it is quickly finding itself in the controversial world of content moderation).
- Such content could be communicated to others by employees and the employer may be vicariously liable.
- Employees should once again be urged to check output before using it.



Any policy should encourage employees to review any output before using it internally, or providing it for review by AI expert and SME.

Non-unique outputs and detection of use

- ChatGPT may (but won't always) generate the same output to the same or similar prompts.

Prompt: Draft a one paragraph summary of Romeo and Juliet.

"Romeo and Juliet" is a tragic play written by William Shakespeare set in Verona, Italy. The story revolves around two young lovers from feuding families, the Montagues and the Capulets. Despite their families' bitter rivalry, Romeo and Juliet fall deeply in love at first sight and secretly marry. However, their happiness is short-lived as a series of misunderstandings and unfortunate events lead to a tragic end. Ultimately, their untimely deaths serve as a catalyst for reconciliation between their warring families, highlighting the devastating consequences of hatred and the power of love.

"Romeo and Juliet," written by William Shakespeare, is a tragic love story set in Verona, Italy. The play revolves around the passionate and forbidden romance between Romeo Montague and Juliet Capulet. Despite the animosity between their households, Romeo and Juliet defy societal expectations and secretly marry. However, their happiness is short-lived, and the interference of fate leads to a devastating end. The play explores themes of love, fate, family, and the destructive power of hate, leaving audiences captivated by its timeless portrayal of the intensity and consequences of forbidden love.

- Tools are available to detect AI generated content, although they are not very accurate.



PRO TIP

Ensure employees understand others may be able to detect that output is AI-generated and not human-generated and to avoid using AI-generated content where this could be reputationally damaging. It may be safer to be transparent about ChatGPT use.

Ownership of output

- Currently, OpenAI assigns all rights in output to the user (although it retains a right to use it for improving its services).
- However, in some jurisdictions, copyright may not subsist for non-human authored content. This would make enforcing rights against third parties more difficult.

South Park's episode mentioning ChatGPT has credits like this.

WRITTEN BY
TREY PARKER
&
CHATGPT



Training data IP infringements

- ChatGPT was trained on copyrighted works. The generated output may be very similar or even identical to the training works. At a certain point, this may amount to copyright infringement by OpenAI and by the user.
- Infringement cases have already started. Notably, Getty Images has brought copyright infringement proceedings against Stability AI in the UK High Court for the use of images from its library (including the reproduction of the Getty Images watermark in some of the generated images).
- Where output is going to be valuable, widely reproduced or disseminated, this latent IP infringement risk may make using it too risky.



PRO TIP

Ensure your employees declare whether output is generated by AI so that these types of risks can be evaluated before such use is made

Training data privacy infringements

- The Italian data protection authority has temporarily banned ChatGPT in Italy because the individuals whose information was in the training data set were not given notice by OpenAI that their information was held and being used for training.
- Canadian Privacy Commissioner has launched a similar investigation.
- AI models have previously been shown to be particularly adept at re-identification of data subjects even when the source data set was supposedly de-identified. Use of ChatGPT in ways that potentially impact or involve personal data should not be undertaken in the enterprise without review of the use-case (preferably by someone with knowledge of AI-based re-identification attacks) and approval of legal after considering same.



PRO TIP

Consider a policy that prohibits making queries about individuals via ChatGPT so that your organization isn't at risk of privacy violations.



Explainability

- Although there are explanations of how ChatGPT was trained, it is a proprietary technology and not fully transparent as to the underlying processes that were used to build it, or how the model works or responds to any particular prompt.
- In Europe (and in Canada, under Bill C-27 if it passes, and Quebec's Law 25) where the application is used to make decisions about individuals with a significant impact, the user organization will need to provide an explanation of:
 - how the automated AI works;
 - the key factors it will take into account;
 - the mitigations applied against bias and inaccuracy risks; and
 - a right to contest or complain about (depending on the law) the decision with a human.



A data protection impact assessment is advisable (and may be legally required) before rolling out such an implementation. Consider having this form part of an overarching AI impact assessment program.

A close-up photograph of several purple tulip buds. A semi-transparent purple arrow shape is overlaid on the image, pointing from the left towards the right. Inside the arrow, the text "What can I do to help manage risk?" is written in white, bold, sans-serif font.

What can I do to help manage risk?

Where does HR use AI in the workplace?

In which areas does HR currently utilize automation and/or AI?

**Question was select all that apply.*



79%

Recruitment and hiring



41%

Learning and development



38%

Performance management



18%

Productivity monitoring



8%

Succession planning



4%

Promotion decisions

- **Creating Job Descriptions:** Augmented writing platforms can analyze databanks of job postings and internal demographics to suggest alternative language.
- **Searching for Candidates:** AI-driven targeted advertising can be used to attract suitable candidates to job postings they may otherwise have overlooked.
- **Screening:** AI may dramatically reduce time needed to sort through resumes, applications.
- **Communicating with Applicants:** Chatbots can be used for asking and answering basic applicant questions, scheduling interviews and sending reminders and feedback.
- **Assessing and Evaluating:** There are various interviewing tools that purport to assess candidate competency or “fit” e.g., vendors of video interview software have included vocal and facial analysis components to provide additional data to the final decision makers.

Are there already employment laws about AI in the workplace?

- Currently there are no Canadian laws that specifically address use of AI in employment law decisions

US Regulation of Employers' Use of AI

- Currently no federal laws that specifically address use of AI in employment law decisions. Some state and local laws have been passed regarding the use of AI in employment law decisions
- **New York City** Local Law 144 limits employers or employment agencies from using an automated employment decision tool to make an employment decision unless:
 - the tool is audited for bias annually;
 - the employer publishes a public summary of the audit; and
 - the employer provides certain notices to applicants and employees who are subject to screening by the tool.
- Illinois' ***Artificial Intelligence Video Interview Act*** applies to AI that analyzes recorded interviews. Employers that utilize this technology must notify candidates, explain how the AI works and which characteristics it considers, and receive the candidate's consent for the use of the technology.
- The **California** Fair Employment & Housing Council imposes obligations and liabilities on both employers that use, and vendors that sell or distribute, employment-screening tools or services that automate decision-making.
 - The use of these automated-decision systems will be unlawful if it is intentionally discriminatory, but also if it is facially neutral but nevertheless has an adverse impact.
 - employers and participating third-party entities must retain all data used to develop or apply algorithms in automated-decision systems.

Workplace AI Policy

- Important elements of any workplace AI policy:
 - Employees should not provide any confidential, sensitive or personal information to AI
 - Employees must use AI in accordance with company policy and applicable law
 - Training
 - Highlight risks of using AI
 - Requirement for human review
- Important conversations to have with any vendor of employment-related tools and software:
 - Does this software/solution use artificial intelligence or automated decision making technology?
 - Have you audited/tested/screened this tool for bias?
 - Can you explain what information this tool uses, and how it produces its results?

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