# The Future is Now: Navigating through the Intersections of AI and Recruiting Technologies

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Valerie Hoffman advises employers of all varieties and sizes, including *Fortune 100* technology, financial services, professional services, hospitality, and manufacturing companies. While Valerie has a broad-based employment law advice and counsel practice, she has a particular focus on strategies to prevent and resolve issues relating to employment discrimination, including pay equity and glass ceiling issues, OFCCP defense and affirmative action compliance, and advice about legally defensible diversity practices and metrics.

She is a core leader of the firm's Pay Equity Group and founded and is co-chair of the firm's nationally prominent OFCCP, Affirmative Action, and Diversity practices. Valerie also co-founded and co-chairs Seyfarth's People Analytics group. Valerie provides counsel and advice on diversity and inclusion best practices, metrics, progress management and change management. She has extensive experience counseling senior leaders about these issues and their intersection with employment discrimination law.

Valerie receives national media coverage of her observations about issues involving employment-related issues. She is a member of NILG's Advisory Council, co-chaired NILG's Compensation Roundtable and is a member if ILGs in Los Angeles, Chicago and Michigan.

Jason Capili is a Director in PwC US' Ethics & Compliance team, leading firmwide employment-related compliance, governance, and risk, emphasizing intersections of non-discrimination and equal employment opportunity; diversity, inclusion, and belonging; government contracting; corporate sustainability and human rights; and, supplier risk management.  His industry experience includes professional services; financial services and investment banking; insurance and asset management; HR and diversity management consulting; law firms; deathcare products and services; and, multi-platform media.

Jason is also a frequent national industry speaker on these topics. Highlights include CEO Council Forum, American Bar Association, National Minority Supplier Diversity Council, Forum for Workplace Inclusion, Center for Workplace Compliance, Disability:IN, Student Veterans of America, and NILG.  He is also affiliated with professional associations in the areas of employment legal and regulatory risk management; development and training; diversity and inclusion; and, ethics and compliance.

Currently, Jason serves on the Board of Lime Connect (a global organization that rebrands disability through achievement) and is a 2020 Co-Chair of the Northeast Region Corporate ILG (also Chair in 2009). Previous Board/Leadership roles: Mercer's US Workforce Opportunity Network (Advisory Board Co-Leader), DirectEmployers Association (Board Member; Recruiting Regulatory Compliance Committee Chair), National Labor Exchange (NLX) Steering Committee (Member), and 2015 ILG National Conference (Program Co-Chair).

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# AGENDA

- What is Artificial Intelligence (AI)?

- Validation of Employment Selection Procedures

- Examples of Artificial Intelligence (AI) in Recruiting

- Five Compliance and Risk Areas To Consider

- Getting Ahead of the Risks

- Final Thoughts

# WHAT IS ARTIFICIAL INTELLIGENCE (AI) ?
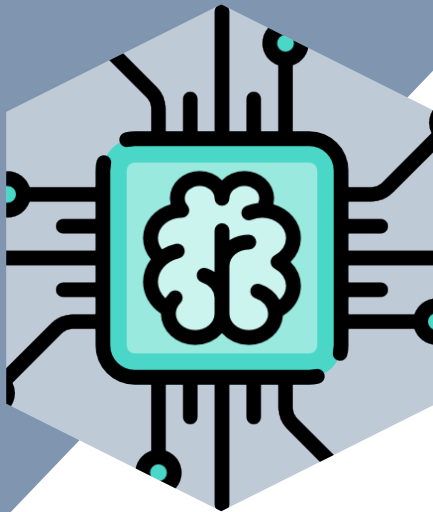
**Artificial intelligence (AI)** is wide-ranging branch of computer science concerned with building smart machines capable of performing tasks that typically require human intelligence.

AI is an interdisciplinary science with multiple approaches, but advancements in machine learning and deep learning are creating a paradigm shift in virtually every sector of the tech industry.

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# WHAT IS MACHINE LEARNING AND DEEP LEARNING ?
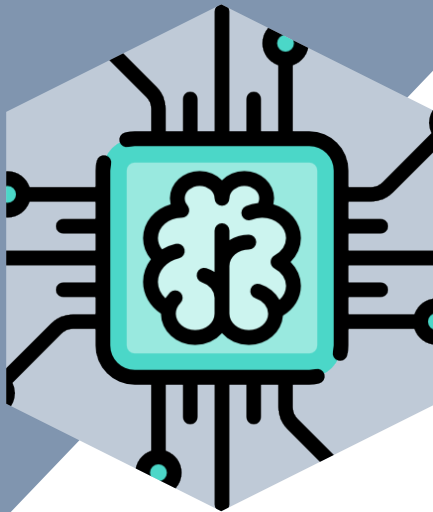
**Machine learning (ML)** is the study of computer algorithms that improve automatically through experience

Machine learning algorithms build a mathematical model based on sample data, known as "training data", in order to make predictions or decisions without being explicitly programmed to do so.

**Deep Learning** is a subfield of machine learning concerned with algorithms inspired by the structure and function of the brain called **artificial neural networks.**

# What is a selection procedure?

A selection procedure is any measure, combination of measures, or procedure that a contractor uses to make employment decisions. There may be a passing score, and/or applicants may be ranked on the score, with selection made from the top-down. The following are common examples of selection procedures: mental ability (cognitive) tests, mechanical aptitude evaluations, personality inventories, interest and values inventories, interviews, scored background questionnaires, job knowledge exams, job simulations, measures of "job fit," physical ability tests, situational judgment scenarios, reading tests, medical or drug screening, credit checks, reference checks, typing tests, evaluations of voice quality, evaluations of personal appearance and grooming, etc.

# VALIDATION OF EMPLOYMENT SELECTION PROCEDURES

## How are employee selection procedures validated?

When a selection procedure has adverse impact on a protected group, the UGESP require evidence of validity from validity studies. There are three main approaches to validation: content validation, criterion-related validation, and construct validation. Evidence of the validity of a selection procedure by a content validity study consists of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which candidates are to be evaluated. Criterion-related validation of a selection procedure consists of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance (criteria). Construct validation of a selection procedure consists of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

*Source: OFCCP's Frequently Asked Questions (https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures)*

# VALIDATION OF EMPLOYMENT SELECTION PROCEDURES

## What about "new technology" screening devices like games, challenges, and video submissions that use artificial intelligence (AI) algorithms to assess qualifications?

Irrespective of the level of technical sophistication involved, OFCCP analyzes all selection devices for adverse impact. If OFCCP discovers that a contractor's use of an AI-based selection procedure is having an adverse impact at a contractor's establishment, the contractor will be required to validate the selection procedure using an appropriate validation strategy as described in the answer to question 3 above.

**EXAMPLES OF ARTIFICAL INTELLIGENCE (AI) IN RECRUITING**
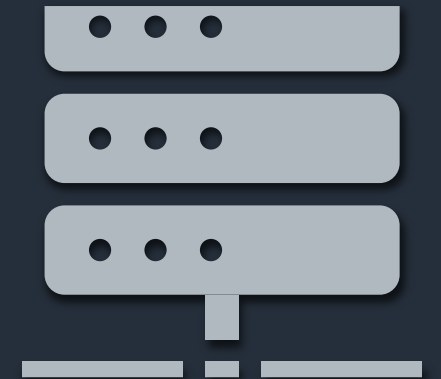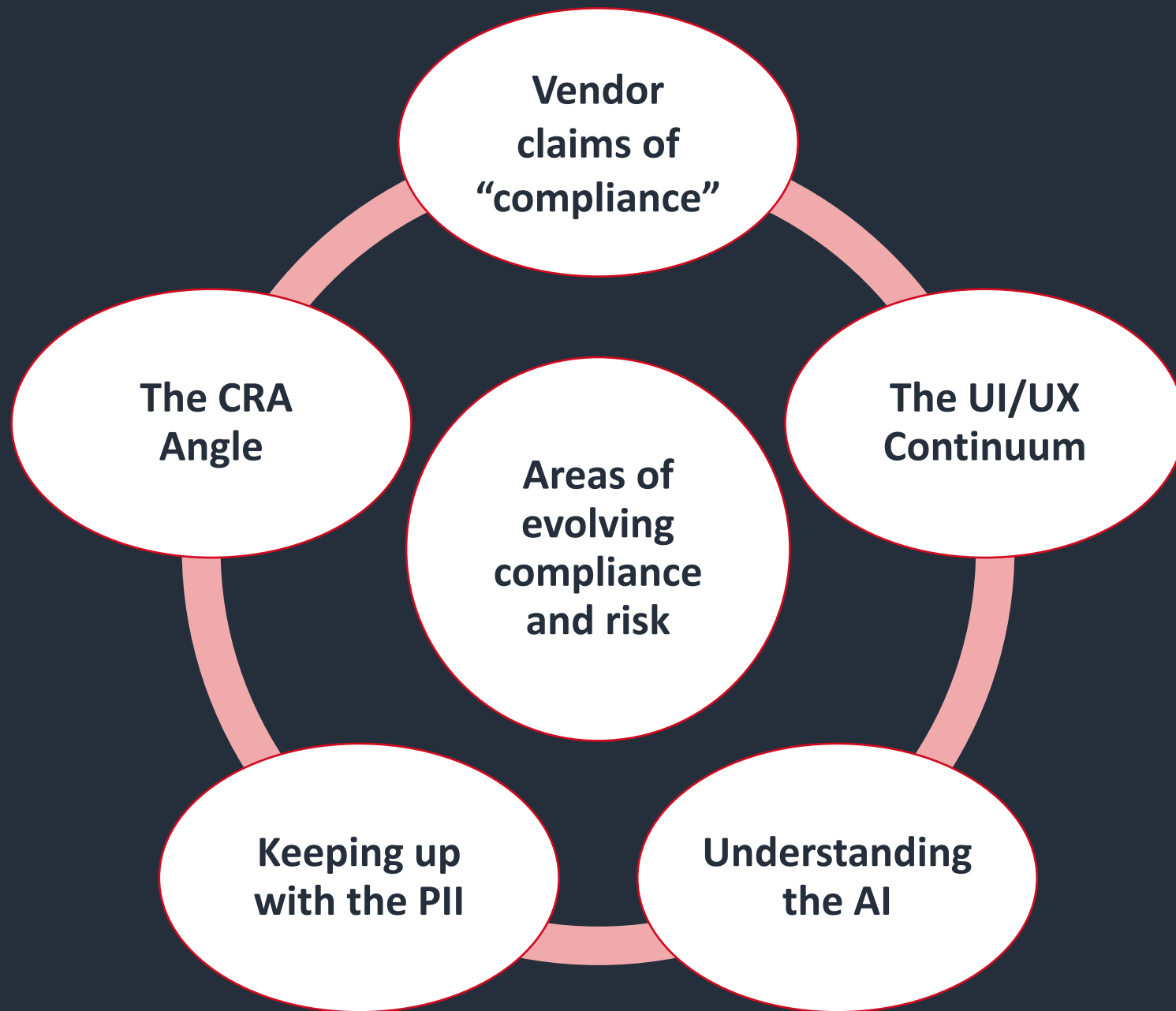
Sourcing
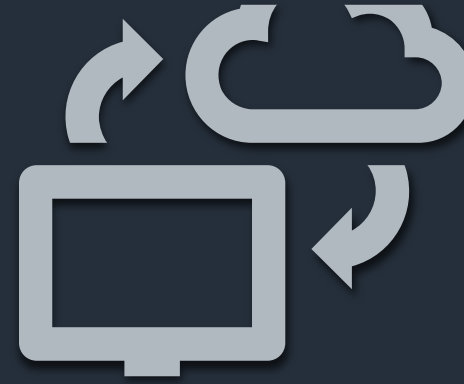
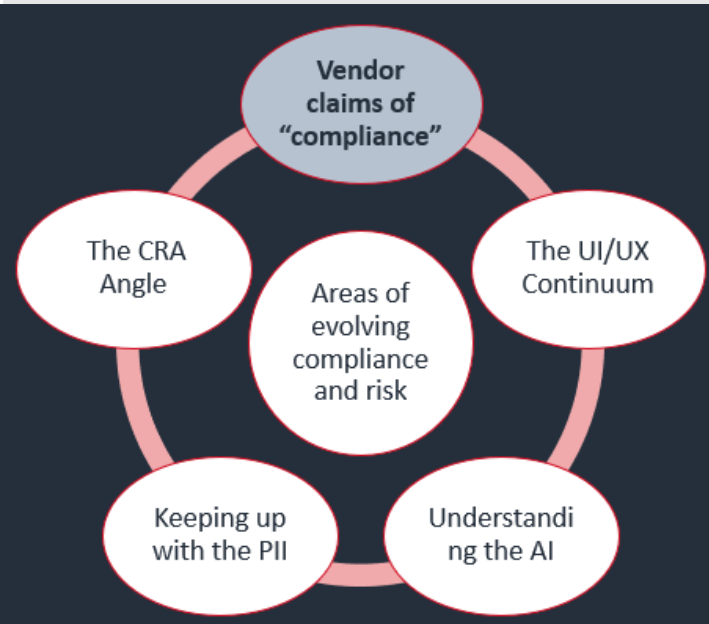Screening

Interviews

Assessments
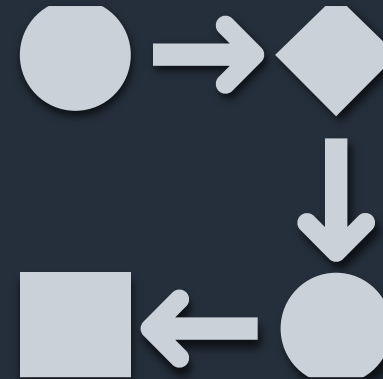
Automatic Shortlisting

Candidate Database Management

## FIVE COMPLIANCE AND RISK AREAS TO CONSIDER:



- OFCCP's Frequently Asked Questions on Employment Selection Procedures:

"…contractors that use off-the-shelf tests that have adverse impact will not be able to defend their use of the tests unless they validate them at their own facilities. Claims by test sellers that their tests are 'validated' or 'EEO compliant' are not considered acceptable evidence of test validity."

- Consider the appropriateness of validation approaches and testing methodologies when determining compliance

# FIVE COMPLIANCE AND RISK AREAS TO CONSIDER:
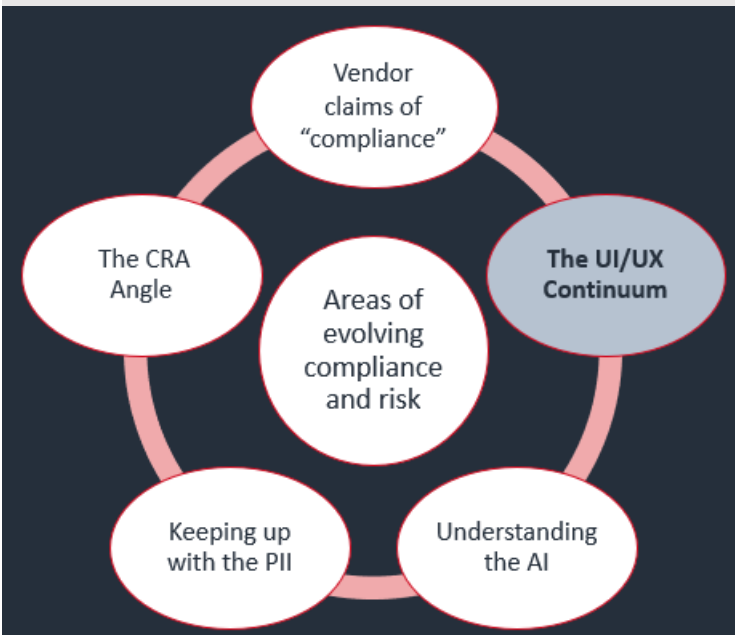


- OFCCP's Frequently Asked Questions re: Disability Issues Related to Online Applicant Tracking Systems:

  "…The ADA, Section 503, VEVRAA, and their regulations require that a contractor provide equal opportunity to qualified applicants with disabilities and disabled veterans to compete for jobs. This obligation includes, if necessary, making reasonable accommodations to qualified individuals with disabilities, unless doing so would impose an undue hardship (significant difficulty or expense) on the contractor…. Utilizing "universal design" techniques can be a cost-effective and efficient way to minimize the need for individual reasonable accommodations… "

- Considerations:
  - The degree to which UI/UX technology compatibility and universal design development are part of the vendor's products and services
  - The types of offered recruiting-focused disability accommodations the vendor has made available through their platform
  - Warranties and indemnifications

## FIVE COMPLIANCE AND RISK AREAS TO CONSIDER:
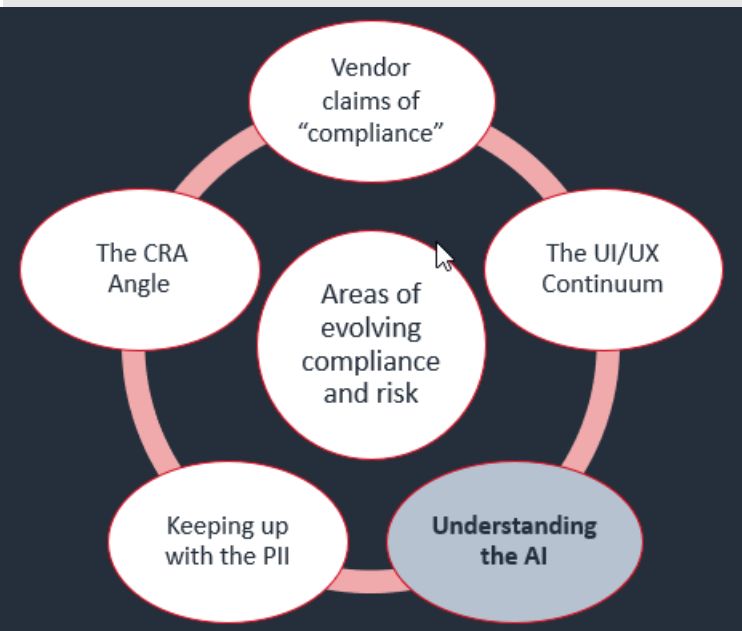


- Algorithm*: A set of steps that a computer program follows to make a decision about a particular course of action

- Black Box vs. White Box Software Testing Methods**:
  o Black Box Testing- the internal structure/ design/ implementation of the item being tested *is NOT known* to the tester
  o White Box Testing - the internal structure/ design/ implementation of the item being tested *is known* to the tester.

- Considerations:
  o How and where can potential bias be introduced and measured in the type of recruiting AI platform that is being considered?
  o To what degree is there transparency and algorithmic accountability in the development and testing of AI models?
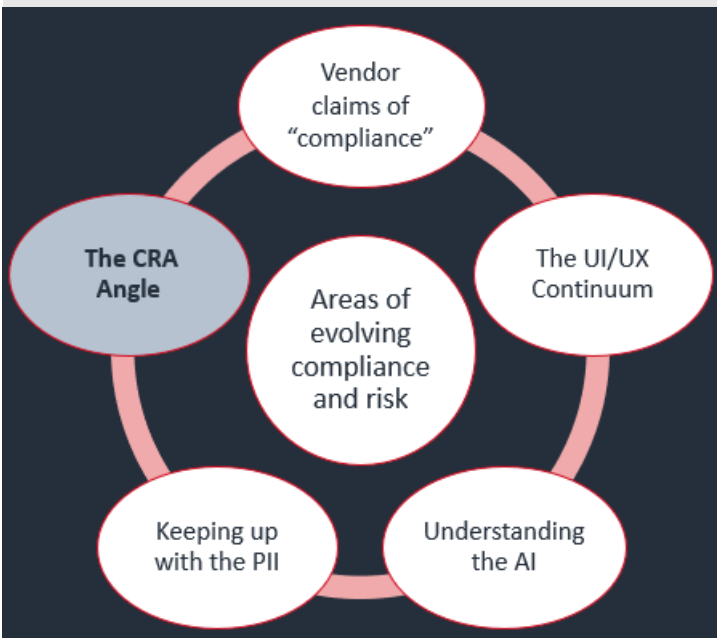  o Consideration of AI-related ethical frameworks? (EU Guidelines)

## FIVE COMPLIANCE AND RISK AREAS TO CONSIDER:
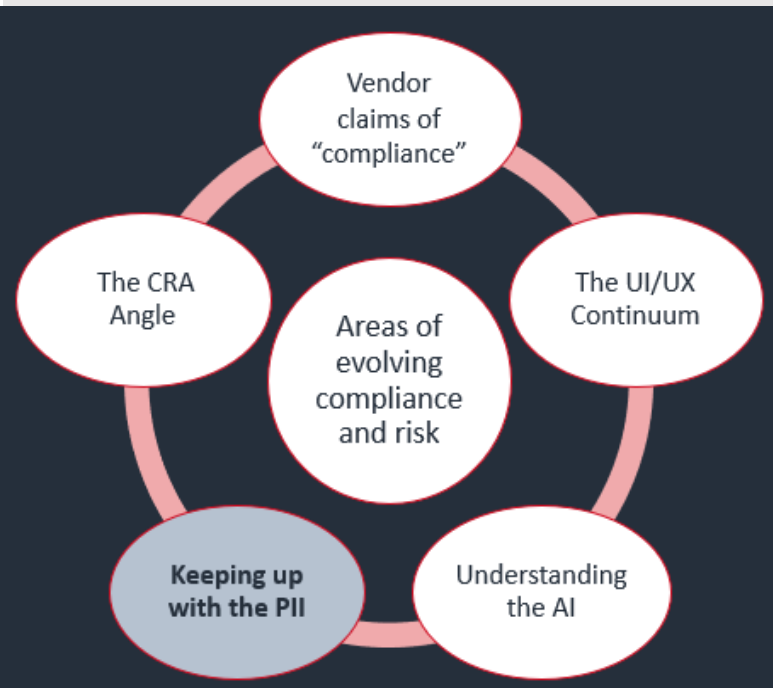


- <u>Personally Identifiable Information (PII) definition*</u>:
  "(1) any information that can be used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information."

- Intersections between data privacy and protections, PII, and employment regulations are currently evolving:

  o <u>Examples</u>: EU GDPR, California Consumer Privacy Act, Illinois Artificial Intelligence Video Interview Act, Illinois Biometric Information Privacy Act, NY SHIELD (Stop Hacks and Improve Electronic Data Security) Act

- Considerations:
  o Organizational risk tolerance when AI involves the use of PII
  o The degree to which vendors comply with and have built accountability frameworks for, and stay current on, data privacy/PII/employment laws
  o Data privacy safeguards and transparency, including use of data and opt-in language, and related safeguards

# FIVE COMPLIANCE AND RISK AREAS TO CONSIDER:



- FAIR CREDIT REPORTING ACT (FRCA) has strict notice, disclosure and other requirements involving the use of information collected by consumer reporting agencies (CRA)
  - Q: When using AI-based recruiting technologies, are these activities covered by CRAs? A: Unclear at this time

- Federal Trade Commission, April 2020*: "The FTC's law enforcement actions, studies, and guidance emphasize that the use of AI tools should be transparent, explainable, fair, and empirically sound, while fostering accountability."

- Consumer Protection Finance Bureau, July 2020**: "One important issue is how complex AI models address the adverse action notice requirements in the Equal Credit Opportunity Act (ECOA) and the Fair Credit Reporting Act (FCRA)...These notice provisions serve important anti-discrimination, educational, and accuracy purposes. There may be questions about how institutions can comply with these requirements if the reasons driving an AI decision are based on complex interrelationships"

- Considerations:
  - Vendor's awareness and understanding of how their technologies could have implications related to CRAs, including notice and disclosure requirements
  - Organizational risk tolerance, as AI tools and CRA-related activities continue to intersect

# GETTING AHEAD OF THE RISKS

**Who is involved in the decision making?**

**What is your organization's risk profile?**

**What opportunities exist to improve processes?**

**What programs or policies are in place to address accessibility?**

**What guardrails are in place to address vendor compliance?**

**What safeguards exist in vendor agreements?**

**Sample agreement provision to provide safeguards**

Indemnification.

- Vendor will indemnify, defend and hold the company and its respective directors, officers, employees, agents and representatives harmless from and against any and all claims, demands and actions, and any liabilities, damages and expenses (including court costs and attorneys' fees and government fines or penalties) arising from any Covered Claim.

- (Define Covered Claims)

- Cooperation.

- Regardless of whether or not a claim is indemnified, each party agrees to provide reasonable cooperation and make its staff, expertise and other resources reasonably available to assist the other party with respect to any investigation, claim or demand made that relates to or arises out of the services provided in this Agreement.
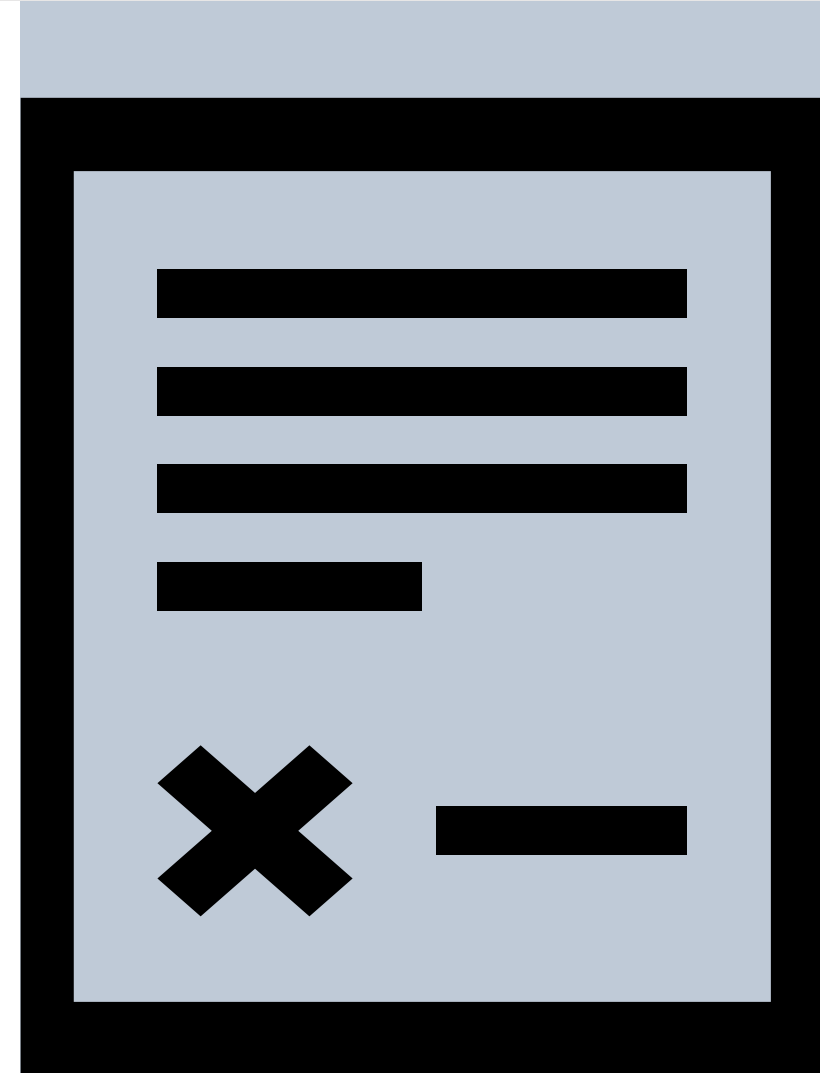
"The relationship between human intelligence and artificial intelligence (HI + AI) will necessarily be one of symbiosis. The challenge and potential of exploring this co-evolutionary future is the biggest story of the next century and one in which a closeness in development velocity is a necessity."

–Bryan Johnson, Founder and CEO of Kernel, and Founder of OS Fund, Braintree and Venmo

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