President Biden Signs Landmark Executive Order on use of Artificial Intelligence

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On October 31, 2023, President Biden signed an Executive Order on the "Safe, Secure and Trustworthy Development and Use of Artificial Intelligence" in order to advance "a coordinated, Federal Government-wide approach to address growing concerns regarding the safe and responsible use of Artificial Intelligence [AI]."

The Order establishes security and safety standards for AI and calls on multiple federal agencies to achieve the goals articulated for each of them within deadlines ranging from 90 days to one year. The Order further identifies various areas of concern with the use of AI, including labor, cybersecurity, competition, education, health, and privacy.

The Order directs the Secretary of Commerce in coordination with other federal agencies, to develop guidelines and best practices to promote "consensus industry standards" for deploying *inter alia*, secure and trustworthy AI systems, establishing benchmarks, model evaluation tools, technical conditions and reporting requirements, record-keeping obligations regarding foreign transactions, requirements relating to foreign resellers, conditions having "potential capabilities that could be used in malicious cyber-enabled activity," and related foreign transactions.

Labor

The Executive Order directs the Secretary of Labor, in conjunction with outside entities including labor unions, to develop principles and best practices to mitigate AI's potential harms to workers by addressing job displacement; labor standards; workplace equity, health and safety; and workplace surveillance, data collection and privacy concerns. The Order further instructs the Secretary of Labor to issue guidance highlighting that employers must ensure employees are properly compensated for all hours worked under the Fair Labor Standards Act when using AI tools to monitor or enhance employees' work.

The Order also requires these new principles and best practices to provide guidance to prevent employers from unfairly evaluating job applications and impinging on workers' ability to organize. In order to mitigate these potential risks, entities must support workers' ability to bargain collectively and invest in workforce training and development.

Once the best practices are established, the agencies, in consultation with the Secretary of Labor, must consider encouraging implementation of the guidelines into their programs as appropriate, to the extent permitted by applicable law.

Privacy

The Executive Order calls on Congress to pass bipartisan data privacy legislation to protect all Americans, especially children, from the exploitation of personal data. The Order funds a "Research Coordination Network" to advance rapid breakthroughs and developments in strengthening privacy-preserving research and technologies, and directs the prioritization of federal support for accelerating the development and use of privacy-preserving techniques. The Order requires federal agencies to evaluate how they collect and use commercially available information and strengthen future privacy guidelines for federal agencies.

Safety and Security

The Executive Order requires that all companies developing AI tools that pose a serious risk to national security, national economic security, or national public health and safety, to notify the federal government when training the model and to share the results of all "red-team" safety tests (as defined in the Order). Companies are required to develop standards, tools, and tests to help ensure that AI systems are safe, secure, and trustworthy. The Order requires the National Institute of Standards and Technology to set rigorous standards for red-team testing to ensure that AI tools are safe before public release.

Further, the order requires the Departments of Homeland Security and Energy to address threats from the use of AI to engineer dangerous biological materials, and the Department of Homeland Security to establish an advanced cybersecurity program to develop AI tools to find and fix vulnerabilities in critical software.

Civil Rights and Equality

The Executive Order aims to ensure that AI advances equity and civil rights by providing clear guidance to landlords, federal benefits programs and federal contractors to keep AI algorithms from being used to exacerbate discrimination. The Order requires the Department of Justice and federal civil rights offices to coordinate on best practices for investigating and prosecuting civil rights violations related to AI and to ensure fairness throughout the criminal justice system by developing best practices on the use of AI used in policing and criminal prosecution context.

Consumers

The Executive Order calls for the advancement of the responsible use of AI in healthcare and the development of life-saving drugs, and directs the Department of Health and Human Services to establish a safety program to receive reports of harms or unsafe healthcare practices involving AI.

The Order further requires the Federal Housing Finance Agency and the Consumer Financial Protection Bureau to address bias caused by the use of AI for loan underwriting and the sale of other financial products.

The Executive Order further directs agencies to consider "clarifying the responsibility of regulated entities to conduct due diligence on and monitor any third-party AI services they use,

and requirements and expectations related to the transparency of AI models and regulated entities' ability to explain their use of AI models."

Because the Executive Order urges agencies to develop AI principles and best practices, employers should stay alert to new guidance and regulations that could affect business operations.

While an Executive Order can be withdrawn or revised by a President, in the absence of legislation the present Order is a comprehensive and innovative plan for the fast developing world of AI. This Order brings the United States to the forefront of emerging regulatory developments around the globe.

We will continue to monitor future AI developments.