



Risk Insights: Senior Living & LTC

Episode 25: AI in Senior Living: Managing Employment, Privacy, and Litigation Risk

Welcome to the Risk Insights: Senior Living & LTC podcast, hosted by Tara Clayton with Marsh's Senior Living & Long-term Care Industry Practice. Tara, a former litigator and in-house attorney, speaks with industry experts about a variety of challenges and emerging risks facing the industry.

Tara Clayton

Welcome back to Risk Senior Living and Long Term Care, where we explore the intersection of care compliance and real-world impact in senior living and long-term care. I'm your host, Tara Clayton. Today's episode tackles a topic that's moving fast, but it requires a lot of thoughtful attention and that's the rising utilization of artificial intelligence and the risks that come with it. From automated care tools to data driven decision making. AI has the potential to improve efficiency and even quality of care, but it also raises serious legal, ethical and safety questions. To help us unpack this, I'm joined today by Laurel Cornell, Regional Managing Partner with Fisher Phillips. Hey Laurel, thanks for joining today.

Laurel Cornell

Hey Tara, thanks so much for having me.

Tara Clayton

Yeah, Laurel, I know you focus on the employment side of the business and I'm sure you're seeing a host of challenges associated with the use of AI from that perspective. But before we get into our discussion, can you talk to our audience just a little bit about your background and role at Fisher Phillips?

Laurel Cornell

Absolutely. So I am the regional managing partner of the Louisville office of Fisher & Phillips. For those of you who aren't familiar with the firm, we are a national labor and employment boutique firm and we exclusively focus on representing management and employers in the full gamut of employment-related issues that employers may need support on. I'm also the co-chair of our firm's healthcare industry group and part of the reason for me being in that role is I have extensive experience helping advise senior living providers specifically with respect to the full gamut of employment-related needs.

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Tara Clayton

Thanks Laurel. And I know you and I talk quite a bit, so I appreciate you being on. And speaking of us talking, I know we had a fantastic conversation at our annual Risk Summit last year where you spoke to attendees about AI risk and employment. Really focused around the privacy angle and maybe let's kind of start big picture. To get into this discussion, can you talk a little bit from the federal landscape, what you've been seeing on AI regulation and how are you seeing current federal regulations respond in our states responding to that?

Laurel Cornell

Yes, absolutely. So dating back to late 2023 to early 2024, this has been an ever-evolving legal landscape. Starting with late '23, the Biden administration issued an executive order which was essentially focusing on some of the cautionary tales with respect to the use of AI. And the use of AI in employment was mentioned in the executive order. As a result of that executive order, in 2024 both the EEOC and the DOL also issued somewhat cautionary guidance. The EEOC indicated that they were planning to make part of their strategic enforcement plan to focus on the potential for AI tools to have a disparate impact or discriminatory effect unintentionally if used for certain employment related decisions, and mentioned that was going to be a key aspect of their enforcement plan going forward from 2024 through 2028.

Likewise, the DOL also issued some cautionary guidance about the use of AI for any sort of automated system that could affect employee wages, leave or other federally protected rights. So in late '23-'24, it's really sort of more of a cautionary approach to AI and some specific employment-related cautionary guidance that was issued at the federal level....

So Trump issued an executive order in early 2025 which essentially revoked the executive order that the Biden administration had issued in late 2023. Trump was calling for much more of a sort of entrepreneurial approach to AI and sort of touting how AI could really help the United States be a leader, be on the forefront of using it. So as opposed to the more cautionary approach, Trump is sort of all in, you know, very much in favor of widespread use of AI in all facets, including for employment-related purposes. Somewhat in response to that. But also before the Trump administration issued this executive order, states had already started sort of taking action. I think states started introducing legislation that would restrict the use of AI around the time that the Biden administration issued their executive order.

But then also specifically in response to the Trump administration taking a more free-range approach to it, states across the country started implementing legislation. So we now have multiple states who in some way shape or form have implemented laws restricting the use of AI for employment-related purposes. So just for example, Colorado, California, Illinois, New York City, there's all sorts of state and local laws that now restrict this to some degree. And then more recently, seemingly in response to some of the states taking a more restrictive approach, the Trump administration just in late 2025... issued another executive order. This one is essentially directing the Attorney General and others to focus on challenging state AI laws that are deemed inconsistent with federal policy.

And one of the specific things he ordered the Secretary of Commerce to do was to publish an evaluation of onerous state laws that conflict with the federal policy. And since then, states like California have introduced even more legislation to further curtail the use of AI. So from both a ... national and a state perspective, the legal landscape with respect to AI has just been constantly evolving. And so we do have a whole host of both federal and state activity, specifically with respect to the use of AI.

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Tara Clayton

It's hard to forecast, especially when it sounds like it's a pretty murky landscape that you just laid out. But based on that..., where do you kind of see this going in the next couple of years as far as from a regulatory and litigation standpoint?

Laurel Cornell

Well, we do expect to see a lot more activity at the state level. Again, you know, states have been introducing all different sorts of legislation with respect to the different aspects of the use of AI. So, you know, for example, biometrics and privacy laws, all the different types of laws that can be triggered by the use of AI. We're seeing states just rapidly introducing new legislation. There's obviously also a conflict between the federal policy and where the Trump administration hopes to see the use of AI going versus the states. With this new executive order directing the Secretary of Commerce to sort of identify and challenge these state laws, we just expect that there's going to be all sorts of litigation over this, as well as ...the states continuing to introduce more and more legislation with respect to the use of AI.

Tara Clayton

Well, speaking of litigation, that makes me think of something else, Laurel, I wanted to talk with you about. I mentioned you and I had a great conversation about AI and privacy, and I read actually, an article that your firm had put out probably a couple of weeks, maybe a month or so now about the use of AI meeting tools and how that's the latest target of BIPA class actions in Illinois. Right. Where they have a BIPA statute. And I guess my big question is, how can AI notetaker apps or other listening tools that we have now through the use of AI, how can that run afoul of state privacy laws?

Laurel Cornell

Yeah. So as you mentioned, this is definitely becoming a big battle, a big issue in litigation, the use of these notetakers in Zoom calls and Teams meetings. And it's basically using machine learning to process the content of communication. So oftentimes, these notetakers don't just simply transcribe the discussions, so they have a whole host of functions that they can perform. They can generate summaries of the meetings. They can also identify speakers and contribute or attribute comments to the speakers. They can build charts and visual aids. There's just all sorts of things that these notetakers can be used to accomplish. And there's several different legal issues that can be triggered by the use of the notetakers in these meetings.

And as you mentioned, BIPA, which is an Illinois law that governs the use of biometric information, is one that has recently been triggered by the use of these notetakers. And part of the reason for this is because somebody's voice print is a biometric data point. So as I mentioned, these AI notetakers can not only transcribe the meetings, but also analyze the voices and attribute certain comments to certain people who participate in the discussions. And some states, like Illinois, have biometric laws, which have very specific and strict requirements with respect to the notice that must be given to individuals whose biometric information is being collected and analyzed, as well as to obtain consent from them to get this biometric information. So that is one of the legal implications of using notetakers.

But there's also a whole host of other potential issues that can be triggered. One of the issues is whether this notetaker, is it a third party? You know, some plaintiffs' attorneys have dubbed these notetakers as a third-party

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eavesdropper that is eavesdropping into these communications, into these private meetings. And if there's any discussion of, for example, privileged information, has there been a waiver of the privilege because this third-party eavesdropper has participated in the discussion? Similarly, there's also concerns about potential HIPAA implications, or is there any discussion of private health information? And if we use this notetaker, you know, has there been some sort of a violation of the privacy rules under the HIPAA laws? So there's all sorts of confidentiality privilege issues that could be triggered. Of course, there's also the consent issue.

So different states have different laws about whether just one person who is participating in a discussion must consent to recording of it, or if all participants need to consent to the recording. So those are just some of the examples of the laws that can be potentially triggered and potentially violated by using these notetakers to record and analyze discussions, particularly if there hasn't been informed notice and consent that has been given by all the people who are participating in those discussions.

Tara Clayton

There's so many efficiency reasons and other reasons why I think it's such a popular tool and... I think you've hit on it. Now, consent notice, maybe a couple other things. But from a takeaway standpoint, what are some practices that a company should be thinking about, especially if they allow employees to use notetaker apps?

Laurel Cornell

Well, the most important thing is, of course, having policies and procedures in place that make very clear when these notetakers are appropriate for use can be used and how to appropriately use them. Which would also of course include the providing of notice to all participants as well as getting consent.... There have also been lawsuits and threats that have focused on whether or not consent can be implied. So, you know, sometimes we get on these calls and we see that there's a notetaker or a notetaker pops up after we get on the call and is just the simple fact that we see it and continue to participate in the discussion, is that implied consent and is that enough?

Many of the states that have laws that restrict this type of transcribing or use of the recording would say no. It

needs to be explicit. So Illinois, for example, would certainly say there can be no implied consent, especially if there's a biometric issue. It has to be informed consent. So really important to have specific policies and procedures in place about when it's appropriate to use the notetakers and if you're using it, what needs to happen in terms of notice to all participants and getting consent from all participants.

Tara Clayton

I'm thinking even outside of the notetaker apps and when you made me think about it, you know, I think when you're, when you get on a call and the notetaker apps and you're not thinking about what all is happening in the background and that's where the exposure is coming from. And so thinking away from notetaker apps and more around just AI, where we see AI or even forensic analysis of AI utilized in our, in the either employment space or specific to the senior living space, are you seeing other types of litigation coming out of that forensic analysis outside of just the notetaker?

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Laurel Cornell

Yeah, there's all sorts of issues now that are starting to pop up and come out of the use of AI ... in many different ways. So one example is a forensic analysis of calls. So, you know, not necessarily a notetaker that is transcribing or recording a group teams call, but rather you know, there may be some AI tool that is analyzing calls between prospective residents or family members and employees of senior living communities. And they may be monitoring and analyzing these calls for various different reasons. You know, one just quality assurance. But also some of these can be used from a training standpoint and just to help get the policies and procedures for responding to prospective residents and their families just very buttoned up.

And, you know, these types of AI tools, if they're analyzing voices, once again, could potentially trigger the biometric laws as well as consumer privacy laws. So again, you know, more of a state issue, depending upon the state that you're in. But there are also some federal laws that could potentially be triggered. So monitoring of calls, both for quality assurance, also to help with implementing or enforcing policies and procedures, could also potentially trigger some of these issues specific to employment and the use of AI for making employment decisions. We've also seen some litigation stemming from employers using AI tools to screen candidates. So it could be a prospective new hire, it could be to screen internal candidates for promotions. But one of the most common examples we're seeing is employers using AI tools to screen resumes, for example.

So they may train the AI tool to look for certain keywords or buzzwords or certain attractive qualifications of a certain candidate. And often those are based on prior incumbents. So people who have been in this role before that are very successful. And we've seen some litigation stemming from employers using that strategy. And it just so happens that the incumbents may all have been white males, for example. And so inadvertently, the AI tool is disproportionately screening out women or minorities because of the focus on these characteristics or these buzzwords from the incumbent's resume. So we're seeing that type of litigation as well. And then, you know, another very recent development that we're seeing is litigation over the use of ChatGPT, whether or not those communications are privileged or if they can be shielded from discovery in any way.

So this is coming up both on the defense as well as the plaintiff side, where there's questions about any communications that either party has with ChatGPT. Is there free rein to this in discovery? And when can a party successfully say that these communications are privileged? And so that becomes really important for employers because we are seeing a rise in the use of ChatGPT or AI tools for purposes of making employment-related decisions, like, for example, disciplinary action.

So if we are either trying to find out if there's any issue with taking the disciplinary action, or if we're using ChatGPT to help us draft a disciplinary, not just know that there's a very good chance if you're not in litigation, if you're not working with an attorney who has instructed you to use the ChatGPT for that purpose, very good chance that there is going to be no privilege attached. And so any ChatGPT communications the employer has had will likely be discoverable in subsequent litigation.

Tara Clayton

That's a question I've always had, Laurel is knowing. I've seen an assortment of different ways that employees are using either ChatGPT. Sometimes it's a public-facing account, sometimes it's a private company created account, sometimes ... it's any host of different tools. And I think that's a really important note that you hit on is this discoverability piece of the searches that you're putting in chat that could later be discoverable, depending on what the lawsuit's about. Knowing that and kind of what you're seeing with clients, what recommendation would you have for employers as it relates to allowing the use of a ChatGPT type search function?

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Laurel Cornell

Well, again, I think it kind of all comes down to the purpose that you may be using it for. But certainly for sensitive personnel-related decisions, I would be very cautious about using it, especially if there is no attorney involved. So for companies who have in-house attorneys, you know, if in-house attorneys are directing and overseeing the use of it, there's a greater argument that there would be some privilege that could apply. But you know, if it's for these types of sensitive decisions, and especially if you have any reason to think that the individual may be litigious, I would be very cautious about using ChatGPT or similar functions for those types of sensitive personnel decisions.

Also want to take a close look too at what type of AI tool you're using and sort of vet the vendor and find out what their policies and procedures are. There has been somewhat of a difference. Courts are coming down on this different ways. So we're seeing the potential for what we would call a circuit. So some of the federal circuits are saying that there is no privilege. The privilege, if there was one, has been waived. Others are saying for pro se litigants, for example, that this shows that, you know, they're acting as their own attorney and this shows their mental impressions. But one of the key issues is also going to be the terms and conditions of the tool that the individual is using. So in one of the recent cases, the individual was using Claude, I believe, or something similar.

And the terms and conditions actually said that the vendor reserved the right to share the information with third parties, specifically including governmental agencies. And that particular lawsuit happened to have been a criminal matter where the federal government was on the other side. And so the terms and conditions itself actually essentially waived any sort of privacy or confidentiality arguments that the plaintiff would have had there.

Tara Clayton

Yeah, those contracts that we enter into with business relationships are super important. We need to make sure we're reading and understanding what those different terms mean. Not always do you have the ability to negotiate them. But to your point, I think super important to understand up front, where's my exposure lie in the utilization of this tool?

Laurel Cornell

Absolutely. And another important thing, not only the terms and conditions, but also just verifying what, if anything, the vendor is doing with the information. You know, a lot of these lawsuits that we see, and I should have mentioned this earlier, but one of the reasons why this is such a critical issue is because these, the types of claims that can stem from the use of AI for employment purposes or other purposes can give rise to class-based claims. And attorneys are always very hungry for the opportunity to pursue claims on a class basis just because it of course, drives up the settlement value. So, you know, these are very critical issues. So in addition to knowing the terms and conditions, it's also very important to understand what, if anything, the vendor is doing with the information.

Because some of the lawsuits that we've seen, the plaintiffs are saying, you know, not only did you not tell me, for example, that you were recording these calls, so prospective residents, you didn't tell us as prospective residents that you were recording our calls, you didn't tell us that you were recording, and we shared confidential, sensitive medical information that we otherwise wouldn't have. Or maybe they say you told us that you were recording it, but you said it was just for quality assurance. But in actuality, you're using AI and you're analyzing this and you're doing a lot more with it, and we have no idea where that information is going, to, whom it's going, and is it being used by these third-party vendors for some other purpose.

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So that's another important thing to, from a best practice standpoint, is not only to understand the terms and conditions of the tool that you're using, but then also making sure that you understand what, if anything, vendors are doing with the information that's gathered by the use of the tools.

Tara Clayton

Laurel, we've talked about some best practices around the contracts you just laid out. And earlier you talked around best practices, around notices, consent, knowing a lot of providers are, they're either Already dabbling, you know, kind of putting their toe into the water with AI. Some are a little further along than others, some are like, oh, I haven't done it yet, but now I think we're ready to start. Start what? Like kind of out of the gate, you know, aside from some of the notices and consents that we've talked about on the contracts, what are some of those initial safeguards that if an employer is looking to utilize AI in the employment context, what are some of those guardrails they need to make sure that they have in place?

Laurel Cornell

Well, one of the first things that comes to mind is just making sure that you're aware of the different state and federal laws that could potentially apply. So for any multistate employers, just making sure that you're aware of the lay of the land in terms of, for example, if we're in Illinois, we've got the BIPA or the biometric restrictions. So one just sort of being cognizant that there are various different state laws that could be triggered by this as well as federal. And so just knowing that landscape. But then also too just really important to know exactly what it is that the AI tools you're planning to use are gathering and why and what that information is being used for, and then back to the notice and consent.

It may not be required in every state or under every law, but as a best practice, it's typically a good idea to be very informative about exactly what you're doing, what you're gathering and why you're gathering it, so that people can make an informed decision about whether or not to consent. Also too, it's important to keep in mind that some of these state and federal laws have some specific requirements as well as restrictions when it comes to retention of the information. So you just want to be mindful if you're using these different AI tools, being mindful of where all the information is being stored, making sure that to the extent there's any confidential information, any health-related information that's being gathered by this, that it's being appropriately safeguarded.

But then also knowing where everything is in the event there is some subsequent litigation and there's document requests or information request and the information would be responsive and relevant, but also being mindful of the fact that some of these laws, for example, has some restrictions on how long you can keep the information. So just retention can be another big concern. Making sure that the information is being safely and appropriately stored for as long as it needs to be, but not any longer than it needs to be based on any applicable requirements. And then also, as I mentioned before, just making sure that you have good policies and procedures in place to help your employees know when it's appropriate to use AI tools and how to best minimize risks by using the tools.

The policies and procedures can help put some of those guardrails in place.

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Tara Clayton

Yeah, to me, it always starts with those policies and procedures.

Laurel Cornell

Right.

Tara Clayton

Setting the expectation with employees. Laurel, we've talked quite a bit about the employer or employee use of AI, but I wanted to pick your brain a little bit about something that I've seen, and I'm curious what you're seeing on your side of the desk, and that is the use of AI by either the plaintiff's counsel or more so where I'm seeing it is with pro se litigants, particularly in the employment context. But I think any litigation where there's pro se, this is something that could be an issue. Are you seeing a rise in the use of AI by pro se litigants or on the other side of the bar?

Laurel Cornell

Absolutely. I can say I personally have seen it for some of the clients that I've been doing work for years, have clearly seen an uptick in pro se litigation. And our firm in particular, we actually went through and analyzed the number of pro se complaints that we had seen from 2024 and saw a 49% increase in the amount of pro se complaints that were filed from 2024 to 2025. So it is definitely a trend that we are seeing. And it's unfortunately what it means is likely it's going to increase the defense spend for employers or companies and also potentially raise the settlement value. So the best advice I can give is just to be very vigilant of what you're seeing. If you think that the pro se plaintiff is using AI, we typically will send discovery requests seeking it.

Although as mentioned earlier, courts have come down differently about whether or not for a pro se plaintiff, ChatGPT or the use of AI communications, if those could still potentially be privileged or work product because the pro se person is acting as their own attorney. But we do try to get as much as we can in discovery and then also just paying very close attention to citations and things in complaints or in motions. You know, AI, I think is getting more and more sophisticated, but depending upon what tool you're using, these tools do still sometimes have a tendency to hallucinate and to make up citations.

So we're just trying to be very vigilant when we think that a pro se plaintiff is using AI to sort of vet their filings pretty closely and just see if there are any mis-citations or anything that we feel we need to affirmatively advise the court because obviously the pro se plaintiffs, while they do still have to comply with the civil rules, the same ethical obligations don't necessarily apply to them as they would members of the bar. But we are definitely seeing a rise in pro se complaints.

And you know, one of the easiest ways that we've been able to detect it is, you know, we may file answer and within hours, sometimes even less, we get some, you know, 10-plus page motion to strike our affirmative defenses or some other sort of motion that several years ago, without the use of AI, most pro se plaintiffs would not be sophisticated enough to even think to file the citation reference that you made. You know, we've seen cases where attorneys have. You clearly used AI.

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Tara Clayton

And to your point about the hallucinations, citations to cases that don't exist. So I think that's a good flag of making sure, especially if you think it may be a pro se litigant, but honestly an attorney as well, double checking those citations. But that also makes me wonder knowing that there is this availability to access, quote, unquote legal type information through an AI type search, aside from the pro se litigant who is clearly saying, hey, I'm representing myself and coming up with their emotions and pleadings and arguments through the assistance of this tool.

Are you seeing situations where someone's trying to act as though they are an attorney and maybe using this or maybe acting outside the scope of a jurisdiction in which they're allowed? I'm just curious of some of the traps that employers need to be a little bit wary of when they see EEOC charges and other complaints coming in.

Laurel Cornell

Yeah. So first I did just want to say you're absolutely correct that the hallucination issue definitely goes both ways. I have certainly seen sanctions being imposed against attorneys for missed citations or, you know, hallucinations that the AI tools. Even more embarrassingly, we've seen some situations where an attorney used AI tools to summarize depositions and or to create an affidavit based on a deposition. And there were factual allegations that were nowhere in the deposition transcript. So it certainly goes both ways. And courts have started sanctioning. There are also some courts who will affirmatively require any party to advise the court up front if AI is used for any purpose in certain motions. So did just want to mention that you're absolutely correct. It goes both ways.

In terms of what we're seeing with respect to maybe not the plaintiff using AI and some potential pitfalls, we have had a couple of situations where clients, you know, obviously legal spend in litigation can sometimes be very unattractive for clients, and clients are always looking for ways to maybe reduce the cost. And we've had a couple situations where clients have, on their own, wanted to say, hey, you know, we got these discovery requests, you know, thank you for sending them to us. If you don't mind, we're going to take a first pass at putting some responses together and we find out in sort of talking with them. What are you planning to do? Well, the plan was they were going to use ChatGPT or some AI tools to help them basically do the legal work using these tools so as to reduce legal spend.

And we had to advise them that, you know, anything you put into these ChatGPTs, these AI tools that is not at our direction is very likely not going to be privileged. And so, you know, hopefully there haven't been other examples of clients sort of on their own doing it without checking with us first. But that's one of the, really, one of the big pitfalls to be on the lookout for is, you know, again, can certainly appreciate the desire to want to conserve legal spend, but there can be some major privilege implications of clients trying to use ChatGPT to, you know, do some legal work themselves to try to reduce the spend.

Tara Clayton

Well, on that topic of luckily, clients talking to you before they do it, I guess here's my kind of closing question to sum up our discussion. And we've talked about some best practices exposure with litigation. What is one thing you wish more of your clients would ask you about AI?

Laurel Cornell

Well, I guess, you know, just what I would say is I wish that clients would talk with us first. You know, often we get questions on the back end after these tools have been implemented. And, you know, sometimes it's too late and

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some of the potential legal implications that are triggered can very easily be reduced or eliminated, again just by the notice and consent. So I wish that some clients, and, you know, obviously clients come to us, and our role is not to tell you that you can or can't do something. It's just to help make you as the client, aware of the potential legal risks and how can we reduce or minimize those risks.

And so there have just been a few situations where ideally the client would have come to us first and said, "Hey, we're planning to implement this tool, or we would like to implement this tool for this purpose, what do I need to know? How, how can I do this in a way that minimizes the risk? Or, you know, what are some of the potential consequences I should be aware of? And, and how, if at all, can we reduce those on the front end?" So just being more proactive and getting some counsel on the front end is always the preferable approach.

Tara Clayton

Yeah, I think that's great advice, especially I think as we started the conversation of how these laws are constantly changing and evolving. What may be OK today may have great risk two, three weeks or two, three months from now. So I think proactively seeking feedback and help around risk mitigation makes complete sense. Laurel, I really appreciate you hopping on with me today. I think this is incredibly valuable conversation.

Laurel Cornell

No, thanks so much for having me.

Tara Clayton

As we heard today, AI is already shaping the workplace, but it's not without legal and ethical risk. Senior living organizations need to be thoughtful about how they implement these tools and stay aligned with evolving laws. If you're using AI in your workplace, now is the time to ask the right questions and put the right safeguards in place. To learn more about resources around AI, please contact us at the email address in the Show Notes. Be sure to subscribe so you don't miss any future episodes. You can find us on your favorite podcast platforms, including Apple and Spotify. Thank you all for listening and stay tuned for our next Risk Insight.