

Investing in AI? Help the law protect you by having policies, procedures in place

■ CAURIE PUTNAM

The use of generative artificial intelligence (AI) in business continues to increase at a rapid pace, with McKinsey & Company projecting that over the next three years, 92 percent of companies plan to increase their AI investments in the workplace.

With this growth in mind, we checked in with local attorneys who are leaders in the space to find out the importance of AI policies and procedures for businesses.



Jenny Holmes

“As with all new technologies, it is critically important for businesses to have well-defined policies and procedures,” said Jenny Holmes, a partner at Nixon Peabody who is also the deputy leader of the firm’s Cybersecurity & Privacy team. “Businesses need to define their risk appetite for new technology. In doing so, they need to inventory their confidential or sensitive data and make sure

they are setting guidelines for the appropriate use of AI tools.”

While creating policies and procedures around AI is a business-specific endeavor, businesses should be aware of both employee and customer privacy concerns during their development.

“Businesses need to understand the AI tools they have in place and ensure that there are appropriate safeguards to protect sensitive information,” Holmes said. “Further, in terms of work product, businesses must ensure that employees still play a role; AI cannot fully replace human review. Oversight of AI tools will be an important role.”

Holmes says that a strong business AI policy should clearly define its scope, as well as incorporate clear guidelines for AI usage, monitoring and review processes, and procedures for addressing potential issues with AI systems.

“The policy should also clearly state safeguards that are in

place for data privacy and security, ethical principles, risk management, and compliance with other regulations,” she said. “We recommend that businesses revisit and update their AI policies at least once a year. Any significant development such as new, applicable AI regulation should also trigger a review for potential policy updates.”

Holmes adds that legal counsel can be a great sounding board for businesses when it comes to AI policy development and make sure that a business’s policies consider any legal or regulatory guidance in place now and that they will be flexible enough to evolve with laws that may come later.

“We see what others are doing to protect the business while allowing for the use of AI tools, and we can help guide policy creation that is based on the business’s risk appetite,” she said. “The law in this area is developing; it always takes some time for the laws to catch up to technologies.



Anna Mercado Clark

Anna Mercado Clark, a partner and Chief Information Security Officer at Phillips Lytle LLP, says that it's important for all organizations to understand they may already be using AI, even if they don't think they are.

"Many commonplace applications, websites, products, and tools have integrated AI, so companies may already be unwittingly using AI," Clark said. "Furthermore, without guidance, employees may use products generally available to the public for business purposes, which may raise confidentiality, privacy, security, and intellectual policy concerns."

She explains that the use of AI may be subject to various laws, regulations, regulatory guidelines, and even industry standards, so it is therefore when creating policies and procedures, it's important to work with counsel who is not only familiar with the relevant framework but also understands technology, the relevant industry, and how regulators and courts interpret these requirements and standards.

"After all, compliance is about protecting the organization, employees, business partners and consumers, and failure to do so

can be quite harmful and costly," said Clark, who notes that businesses shouldn't rely on pre-drafted policies because policies should be tailored to the particular organization.

When developing or fine tuning their AI policies and procedures, litigation is something to also keep in mind as many laws have been enacted just in the last 18 months or so that Clark says range from clarifying AI's impact on existing laws (such as how a "person" is defined) to criminalizing certain uses.

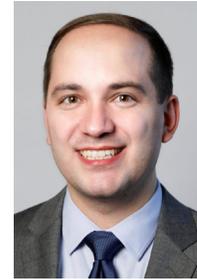
"Companies involved in litigation should also be aware that many courts around the country have rapidly promulgated rules regarding the use of AI in litigation itself," Clark said.

She notes that, overall, generative AI, like other forms of technology, can present exciting opportunities for organizations as long as they pursue a thoughtful and reasonable approach guided by experts in technology and the law.

Andrew J. Olek is a partner at Lippes Mathias LLP who is also the Artificial Intelligence Practice Team Leader and a member of the Intellectual Property Team.

Olek stresses the importance of keeping intellectual property top-of-mind when it comes to AI policies and procedures. It's important to develop AI policies that limit the

risk of materials that your workforce is going to produce using AI in some facet, he said, and limiting the risk those materials are going to infringe on someone else's intellectual property.



Andrew Olek

"Making sure your work product that's going out the door is not infringing on some third party's intellectual property," is so important, Olek said. "I've always told clients that intellectual property litigation is very expensive which is why it's critical to avoid it. And I think given the uncertainty around AI, it's ten times more important."

With the increased use of generative AI, there will potentially be cases of first impression (those that present a legal issue that has never been decided by the governing jurisdiction) that will dictate the future of how generative AI is used and what it means in terms of intellectual property rights.

"I think it's going to be very interesting to see where the laws come down and how they evolve because I do think they're going to evolve," Olek said. "It will be interesting to see where the federal government steps in and says we need a national AI law and that ties into intellectual property."