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2025

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**HR Network:
US Legal Update Part One
– Discrimination in
Employment, DEI,
Artificial Intelligence and
Arbitration**

Employment Discrimination

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Agenda

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- US Supreme Court decisions
- Executive orders
- EEOC developments
- Disparate impact
- Religious discrimination
- Political discrimination
- State law updates

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Federal Landscape

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Supreme Court – *Muldrow v. City of Louis* (2023)

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- **Background**
 - Female police officer brought sex discrimination suit under disparate treatment theory after her employer transferred her to another division with the same pay, same job perks, same schedule and same responsibility. She argued that because of her transfer, she experienced harm (no longer working with high-ranking officials, lost access to take-home vehicle, had a less regular schedule and weekend shifts). Her employer argued she failed to establish an adverse harm.
 - In a landmark decision, the Supreme Court held that to make out a Title VII discrimination claim, the plaintiff must show “some harm” respecting an identifiable term or condition of employment, but not “significant” harm.
- **Result**
 - Before *Muldrow*, traditional “adverse” actions were terminations, demotions and reduced compensation.
 - Now ... undesirable work assignments, administrative leaves pending investigations, excluding employees from meetings or even admonishing an employee without imposing formal consequences qualifies as “harm.”
 - Courts are acknowledging that **precedent** has now been overruled, not just a change in interpretation.
 - “*Muldrow* overruled our precedent, our precedent which required the changes to a term and condition of employment be materially adverse.” *Back v. Hapoalim* (2nd Cir. 2024)
 - Vacating and remanding case for the court to decide whether plaintiff suffered “some harm” and not a “significant change” because of *Muldrow*. *Scheer v. Sisters of Charity of Leavenworth Health Sys., Inc.* (10th Cir. 2025)
 - Reversing and remanding Title VII discrimination and retaliation claims, holding that they need to be reevaluated in light of *Muldrow* decision, and that the court applied the wrong standard to the claims by requiring a showing of “material” or “tangible” impact. *Hui Xu v. Lightsmyth Technologies Inc. et al.* (9th Cir. 2024)
 - Applies to employment discrimination cases, **not just Title VII cases**
 - “*Muldrow* applies to discrimination claims under the ADEA and the ADA, given that the pertinent language in those statutes is similar to the pertinent language in Title VII.” *Mitchell v. Planned Parenthood of Greater New York, Inc.*, 745 F. Supp. 3d 68, 90–91 (S.D.N.Y. 2024)
 - Uptick in employment litigation
 - Cited more than 550 times since decided in 2024

Supreme Court – *Ames v. Ohio Department of Youth Service* (June 5, 2025, Jackson)

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- **Background**
 - A straight woman brought a claim on the basis of sex and sex orientation discrimination in violation of Title VII because she was denied a promotion. The district court held that under the “background circumstances” test, the plaintiff had to demonstrate that the defendant is the “unusual employer who discriminates against the majority” in order to establish a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964 (also known as “reverse discrimination suits”).
 - The Supreme Court held that the Sixth Circuit’s “background circumstances” rule could not be squared with the text of Title VII or the Court’s precedent. The rule required plaintiffs who are members of a majority group to bear an additional burden “at step one.” The Supreme Court explained: “the text of Title VII’s disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs. The provision focuses on individuals rather than groups, barring discrimination against ‘any individual’ because of protected characteristics. Congress left no room for courts to impose special requirements on majority-group plaintiffs alone.”
- **Result**
 - Lowers bar for reverse discrimination suits

Trump administration

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- President Donald Trump's administration has introduced significant changes through **executive orders** and **agency actions** that affect the legal landscape for employment discrimination (including DEI initiatives.)
- Executive actions have narrowed workplace protections, with an emphasis on limiting federal involvement in employer-employee disputes.
 - Includes the Equal Employment Opportunity Commission (EEOC) Department of Labor (DOL) and the National Labor Relations Board (NLRB)
 - The goals of agencies themselves have also shifted to match the executives' objectives
- **Note:** Although executive orders have created a big splash, shifting priorities between administrations **is common**. Depending on the outcome of the next administration, these policies likely will shift again.

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Executive orders affecting employment discrimination landscape

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- **EO 14281: Restoring Equality of Opportunity and Meritocracy**
 - Eliminates the use of disparate impact liability in the federal government; instructs the EEOC to assess all pending investigations, civil suits or positions taken in ongoing matters and take “appropriate action” with respect to such matters consistent with the policy of the order
- **EO 14202: Eradicating Anti-Christian Bias**
 - Establishes a task force at the DOJ (includes EEOC Chair Andrea Lucas); the task force is responsible for reviewing activities of the executive agencies to identify and address anti-Christian bias and make recommendations for the future
- **EO 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity**
 - Eliminates race- and sex-based “affirmative action” requirements for federal agency contractors and subcontractors, and requires that contractor “diversity, equity and inclusion” (DEI) programs and policies do not violate civil rights law
 - Applies to federal contractors and all executive departments and agencies
 - Directs general agencies to enforce civil rights laws that prohibit discrimination in employment and require equal employment opportunities
 - Revokes Executive Order 11246: Equal Employment Opportunity
 - Prohibited federal contractors from discriminating in employment based on race, color, religion and national origin, and encouraged taking affirmative action to ensure equal opportunity in employment
- **EO 14170: Reforming the Federal Hiring Process**
 - Requires the Office of Personnel Management (OPM) to create a “Federal Hiring Plan” that would prioritize those that want to improve efficiency and prevent hiring based on race, sex or religion
- **EO 14168: Defending Women from Gender Ideology Extremism:**
 - Requires recognition of two sexes, males and female; seeks to exclude transgender, nonbinary and intersex people from receiving certain protections; requires agencies to eradicate the term “gender identity” and remove the term from all federal policies and documents

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EEOC evolving priorities

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- **Andrea Lucas** designated as acting chair of the EEOC by Trump on January 20, 2025. On July 31, 2025, she was confirmed by the Senate for a second term.
 - “As the head of the EEOC, I am committed to dismantling identity politics that have plagued our civil rights laws.”
 - “The EEOC stands ready to help employers comply with their obligations not to discriminate. But, where necessary, the agency is also prepared to root out discrimination where it remains entrenched.”
- **The EEOC is no longer considering itself an “independent agency” but an “executive agency that must comply with the President’s orders.”**
 - In other words, the EEOC will now be moving to implement the executive’s goals.
- But still **no quorum** at the EEOC with the removal of Commissioners Charlotte Burrows and Jocelyn Samuels – impacting EEOC’s ability to issue, amend or rescind guidance and regulations.
- **EEOC agenda under Lucas**
 - Rooting out unlawful DEI-motivated race and sex discrimination
 - Protecting American workers from anti-American national origin discrimination
 - Defending the biological and binary reality of sex and related rights, including women’s rights to single-sex spaces at work
 - Protecting workers from **religious bias and harassment**, including antisemitism
 - Remedying other areas of recent under-enforcement
 - Rescinding/amending Pregnant Workers Fairness Act (PWFA) rules

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Disparate impact under fire

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- **Disparate impact liability**
 - Legal doctrine where a facially neutral policy can cause unlawful discrimination even without conscious intent (e.g., through policies, hiring practices)
 - Recognized in *Griggs v. Duke Power Co.*
 - Already was beginning to have a downward spiral with the *Ricci* case but impact has risen
- **Disparate treatment liability**
 - Legal doctrine in law that targets **intentional** discrimination
- **Responsive agency action following EO 14281**
 - DOJ abandoned four of its disparate impact cases against police and fire departments
 - EEOC sent letter memo noting fair employment practices agencies will lose federal resources if they investigate disparate impact claims
- **Disparate impact is still a viable theory of employment discrimination under federal and state law**
 - But experts predict that the theory will be brought up to the Supreme Court in the coming years ... they are just waiting for the “right” case

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Recent religious discrimination EEOC cases

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- Recent lawsuits/settlements:
 - **Mercyhealth (IL):** \$1 million settlement on allegations that Mercyhealth discriminated against employees based on their religion when it denied religious accommodations to employees who requested to be exempt from receiving the COVID-19 vaccine.
 - **Martinez Animal Hospital (CA):** \$20,000 settlement on retaliation charges alleging hospital subjected an employee to mandatory training that he objected to because it incorporated religious content contrary to his beliefs; he also requested to be excused from any future trainings with similar content. The hospital subsequently terminated the employee.
 - **Teeth Doctors (NC):** \$61,000 settlement on allegations that a dentist violated federal law when he terminated an employee after she requested to wear a scrub skirt instead of scrub pants due to her sincerely held religious beliefs.
 - **FCA US, LLC (MI):** Lawsuit alleging employer terminated an employee for attendance violations for not working during the Sabbath (after it initially granted a reasonable accommodation that excused the employee from working during the Sabbath but then revoked it).

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Political speech in the workforce

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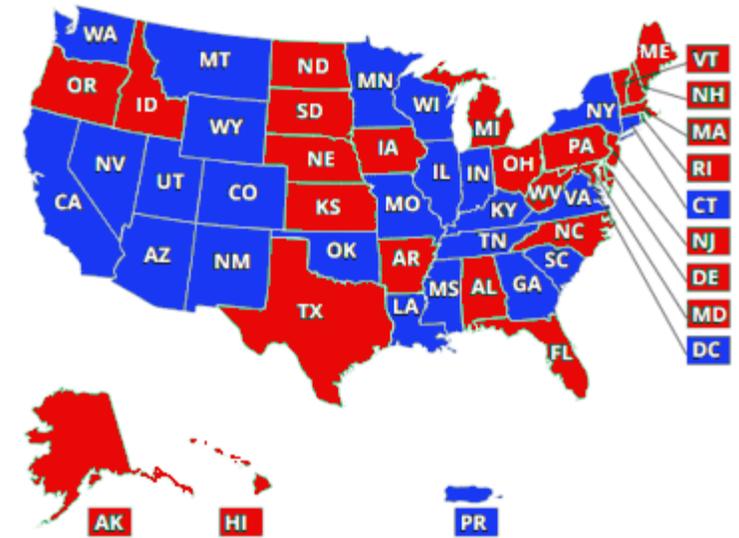
- Recently, hot-button topics have permeated the US and ... into the workforce
 - Israel/Hamas war
 - Ukraine war
 - Presidential election
 - Immigration policies
 - Abortion rights
 - Gender identity rights
 - Gun violence
 - Diversity, equity and inclusion (DEI)
- While “political affiliation” is not a traditionally protected class under federal law, these conversations can bleed into protected characteristics such as sex, national origin and religion, which **are protected classes**
 - Potential for claims of a hostile work environment or even discrimination
 - For example, *Roe v. Wade* may implicate “sex” discrimination, and DEI could implicate “race” and “sex” discrimination
- EEOC Acting Chair Lucas on political speech:
 - “My perspective at the employer level is to encourage people to rethink whether or not you really like weighing in on every single controversy ... If you’re going to have Black Lives Matter discussions in the workplace, you should be prepared to have ‘blue lives matter’ discussions as well.”

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State laws with political discrimination protections

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- While no federal law exists directly on political discrimination, state laws do have prohibitions
- The magnitude differs by state:
 - Making an employment decision based on a political party (hiring, firing, disciplining or threatening employees due to political affiliation, activity or free speech)
 - Safeguards of freedom of expression
 - Explicitly forbidding discrimination because of political opinions, contributions or beliefs
 - Limitations on employers interfering with political activity off duty
 - Influencing or coercing an employee's vote



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State laws on political activity

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- California: Employer policies can't forbid or prevent employees from political activity
- Colorado: Employers can't coerce or try to coerce employees by discharging or threatening to discharge them due to a political affiliation
- Connecticut: Employers can't discipline or discharge employees for exercising free speech rights at work, unless it materially disrupts work
- DC: Employers can't discriminate based on political affiliation, based on employee membership in a political party with unlawful goals, or provide support for political parties or candidates, or contribute to fundraising campaigns
- Louisiana: Employers can't discharge workers because of their political opinions
- Minnesota: Employers can't threaten loss of employment because of an individual's or association's political contributions or political activity
- Mississippi: Employers can be penalized for interfering with the social, civil or political rights of employees
- Missouri: Employers can't prevent an employee from engaging in political activities
- Montana: Employers can't terminate employees solely based on their legal expression of free speech, including statements made on social media
- Nevada: Employers can't make any rules or regulations prohibiting or preventing employees from engaging in politics

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State laws on political activity (cont.)

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- New Mexico: Employers can't discharge or threaten to discharge employees based on their political opinions or beliefs or their voting intentions
- New York: Employers can't discriminate against employees based on their political activities during nonwork hours, off employer premises, and without the use of employers' equipment or other property
- South Carolina: Employers can't discharge employees because of their political opinions or exercise of political rights
- Utah: Employers can't discriminate or retaliate against or harass an otherwise qualified person for lawful expressions of political convictions, including convictions about marriage, family or sexuality, unless the expressions or activities directly conflict with the employer's essential business-related interests
- Washington: Employers can't discriminate against employees because they support, oppose, or fail to support or oppose a candidate, ballot proposition, political party or political committee in any way
- Wyoming: Employers can't prohibit or prevent an employee's candidacy for public office or a position on a public board or commission

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Policies on political activity

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- If you would like to create a policy on political activity, it is advisable to:
 - Define what political activity is in the context of your workforce
 - Apply the policy consistently and uniformly throughout all political topics
 - Specify where the policy applies (in the workplace, outside the workplace, on clothing, etc.)
 - Clarify proper usage of company property
 - Ensure compliance with your state law (and implicit federal law)
 - Outline reporting process for violations of the policy
 - Acknowledge the right to free expression on personal accounts but explain that speech cannot violate anti-harassment policies or imply company endorsement
 - Clarify extension to social media policies and how employee posts may be interpreted to reflect on the company
 - Reserve the right to restrict political activity **if permitted by law** (i.e., if you are in a state with a “business necessity exception”)
 - Clarify time-off allocations for civic duties

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State Law Updates

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State law updates – California

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- **CA AB 1815:**
 - Amended the CROWN Act, including the definition of “race” and “protective hairstyles.” As amended, race is “inclusive of traits associated with race, including but not limited to hair texture and protective hairstyles.” “Protective hairstyles include but are not limited to such hairstyles as braids, locs, and twists.”
- **CA SB 1137:**
 - Expands CA Fair Employment and Housing Act (FEHA) to clarify that protected characteristics include a combination of those characteristics (intersectionality).
- **CA SB 1100:**
 - Makes it an unlawful employment practice for an employer to include a statement in various employment materials that an applicant must have a driver’s license unless the employer reasonably expects the duties of the position to require driving and the employer reasonably believes that satisfying that job function using an alternative form of transportation would not be comparable in travel time or cost to the employer, as specified.
- **CA AB 2499:**
 - Amends the victims of crime leave law by expanding the definition of “family member” who may be a victim of crime, by expanding the types of things an employee can take off work to attend to, and extending the obligation to provide reasonable accommodations to an employee whose family member is a victim of a qualifying act of violence.
- **CA SB 1100:**
 - Makes it an unlawful employment practice for an employer “to include a statement in a job advertisement, posting, application, or other material that an applicant must have a driver’s license” unless the employer meets certain conditions.
 1. The employer must reasonably expect driving to be one of the position’s job functions.
 2. The employer must reasonably believe that satisfying the job function using alternative transportation “would not be comparable in travel time or cost to the employer.”

State law updates

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- **Iowa SF 418:**
 - Eliminates “gender identity” from anti-discrimination law protected categories
- **Oregon HB 3187:**
 - Employers and employment agencies are prohibited from asking for an applicant’s age, date of birth and educational institution attendance or graduation date unless an initial interview was already completed, or if there was no initial interview, a conditional employment offer was already extended.
- **Washington Ordinance C36666:**
 - Expands fair chance hiring practices, ensuring that qualified job applicants are not excluded from an applicant pool due to not having a brick-and-mortar address, or because of housing status. Bans requesting address or residency history until after granting a provisional offer of employment.
- **Washington SB 5104:**
 - Protects employees from coercion in the workplace based on immigration status. Specifically, if an employer coerces an employee in furtherance of the employer committing a violation of wage payment or labor condition requirements, an employee may file a complaint with the state’s Department of Labor and Industries within 180 days of the coercive action.
- **Colorado HB 25-1312:**
 - Amends the state’s Anti-Discrimination Act so that the prohibition on gender expression-based discrimination includes an employee’s “chosen name” and “how the individual chooses to be addressed.”
- **Rhode Island S 519:**
 - Expands the Fair Employment Practices Act and RI Civil Rights Act to include a definition of race to mean and include “traits historically associated with race, including but not limited to hair, texture and protective hairstyles,” and to then define “protected hairstyles” to include hair textures or hairstyles commonly associated with a particular race or national origin, “including a hairstyle in which hair is tightly coiled or tightly curled, locks, cornrows, twists, braids, Bantu knots, and Afros.”

DEI

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Agenda

- Overview of US DEI laws
- Updates to the federal landscape in DEI
- Employer responses
- Considerations

Overview of US DEI laws

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- Federal and state anti-discrimination laws
 - **Prohibit** discrimination on the basis of protected classes such as race, color, religion, sex or national origin in all aspects of employment

However ...

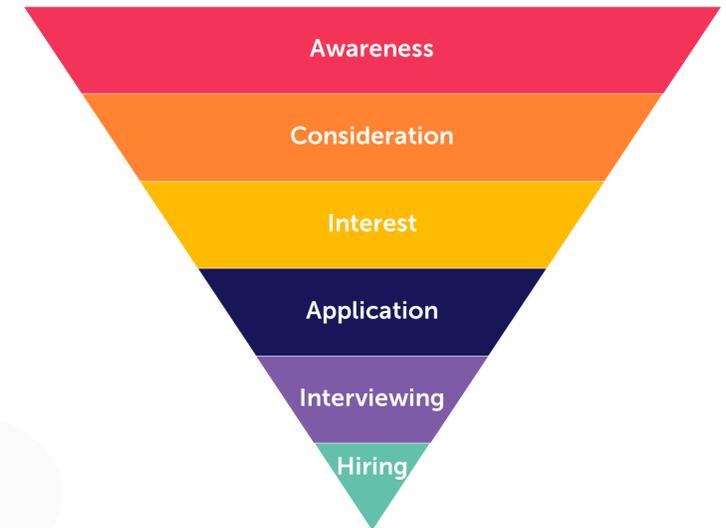
- **Permit** efforts designed to open employment opportunities (which don't disadvantage any protected group)
- **But** ... when does a diversity initiative “go too far” and risk being deemed unlawful discrimination?

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Overview of US DEI laws (cont.)

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- **Answer:** If employment action is motivated, in whole or in part, by a protected characteristic
- Pay special attention to:
 - Hiring practices (including candidate slates and interviewer panels)
 - Fellowships, internships, grant programs
 - Compensation and promotion decisions
 - Training, mentorship, networking programs
 - Employer-sponsored affinity groups



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Employer responses to DEI

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- Since **2020**, companies have increasingly invested in DEI
- But since **2023**, there's been increased pushback on DEI
 - Individual plaintiffs and conservative activist groups have been spearheading litigation against companies to challenge DEI efforts under Title VII and Section 1981
 - America First Legal (AFL), the American Alliance for Equal Rights (AAER) and other groups are on the rise
- In **2025**, DEI programs continue to be pushed back with the new administration, but employer responses differ
 - Some have pushed back given the legal landscape and public pressure
 - Others have continued to invest in DEI
 - Workers increasingly look for employers' DEI commitment
 - Studies continue to show diverse teams are more profitable

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Students for Fair Admissions (SFFA) v. Harvard: The anti-DEI legal underpinning

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- The US Supreme Court held in **June 2023** that Harvard and UNC's use of affirmative action programs must satisfy "strict scrutiny" by showing they serve a compelling government interest and are narrowly tailored to achieve that interest
- The Supreme Court found violations of the equal protection clause and Title VII because the programs, while commendable:
 - Lacked sufficiently focused and **measurable** objectives warranting the use of race
 - Unavoidably employed race in a negative manner
 - Involved racial stereotyping
 - Lacked meaningful end points
- Classifying **college applications** by race, for any purpose, is now considered discriminatory

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Legal challenges in the wake of *SFFA v. Harvard*

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- **July 2023:** 13 state attorneys general wrote a letter to Fortune 100 companies stating their intention to draw parallels from the *SFFA* decision to **race-based discrimination in employment and contracting**
- **August 2023:** AAER sued the Fearless Fund, alleging that a **grant program open only to Black women violates Section 1981's prohibition on race discrimination in contracting**
 - 11th Circuit found the grant program was a contract and thus Section 1981 applied, and that Fearless Fund had likely violated Section 1981
 - 11th Circuit rejected arguments based on standing, as well as “remedial program” and First Amendment-related exceptions
 - The parties settled in September 2024

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Legal challenges in the wake of *SFFA v. Harvard* (cont.)

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**123+ cases filed since June 2023
challenging DEI programs and policies**

5 cases
Directors' duties

13 cases
Diversity targets

16 cases
Diversity training

28 cases
Freedom of speech and religion

45 cases
Government programs

8 cases
School and university admissions

57 cases
Targeted programs

47 cases
Workplace discrimination

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US DOJ memo on DEI compliance for federal funding recipients

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- DOJ issued on July 29, 2025, **banning the use of policies that:**
 - Use preferential treatment based on race, sex or other protected traits (e.g., scholarships, hiring, and program access)
 - Use proxies as a substitute for race/sex (e.g., “lived experience,” “cross-cultural skills”)
 - Segregating participants of facilities by protected traits, unless narrow exceptions apply (e.g., race-based training groups, “safe spaces”)
 - Use protected characteristics as candidate selection criteria including in diverse slate requirements, by prioritizing contracts for minorities, and selections for internships, scholarships or fellowships
 - Use training programs that promote discrimination or hostile work environments; for example, trainings that “single out, demean or stereotype individuals on protected characteristics”

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Other DEI Enforcement at Agencies

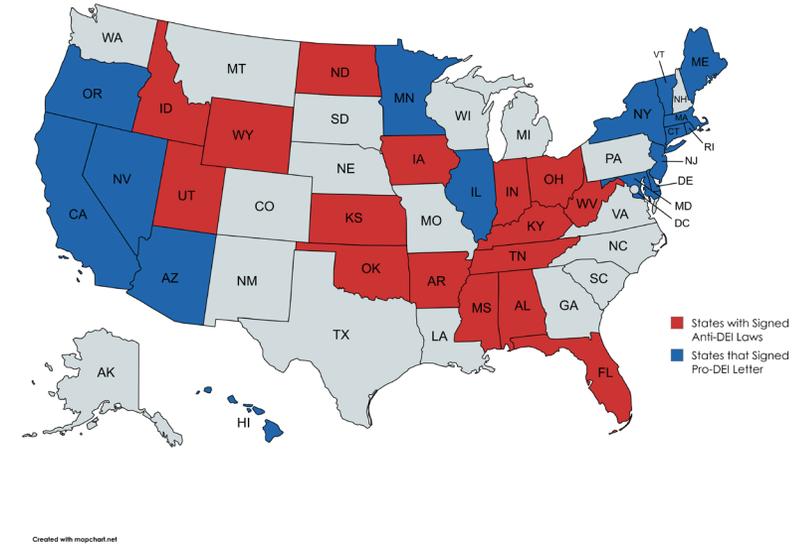
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- **Department of Justice:** In May 2025 launched the Civil Rights Fraud Initiative – goal is to enforce “certification requirement” in January 2025 executive order by pursuing False Claims Act claims against federal fund recipients “that knowingly violate civil rights laws”; agency also explicitly encourages private whistleblowers to come forward
- **Department of Education:** In February and March 2025 launched investigations into DEI practices of over 50 universities across 41 states
- **Federal Trade Commission:** In February 2025 announced taskforce to prioritize investigations of unfair or deceptive practices, including “collusion or unlawful coordination on DEI metrics”
- **Federal Communications Commission:** Threatened to block mergers within its jurisdiction if companies involved engage in “DEI discrimination”; resulted in DEI-related concessions from Verizon and T-Mobile

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State responses differ

- Since 2023, 135 **anti-DEI bills** have been introduced in 29 states, and 28 have become law. Many focus on restricting DEI in public universities.
- In February 2025, 16 state attorneys general issued **pro-DEI** guidance and best practices for employers.



Employer Responses

DEI disclosure trends

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- In 2025 10-K and proxy filings, many companies have **significantly scaled back** on, or entirely removed, **diversity-related disclosures**, including discussion of workforce DEI initiatives and board diversity
- This follows the Fifth Circuit's decision to strike down Nasdaq's board diversity rule and the **Trump administration's whole-of-government approach to push companies to drop DEI activities**, including executive orders and investigations
- **ISS and most large institutional investors** (including BlackRock, Vanguard and State Street) **have dropped their quantitative board diversity voting policies**, removing one of the key factors in driving proxy disclosure
- While many companies have removed matrix-style disclosure, **basic aggregate diversity disclosure remains common** (e.g., "our board has X women directors and X directors from diverse backgrounds") to satisfy Glass Lewis and other stakeholders

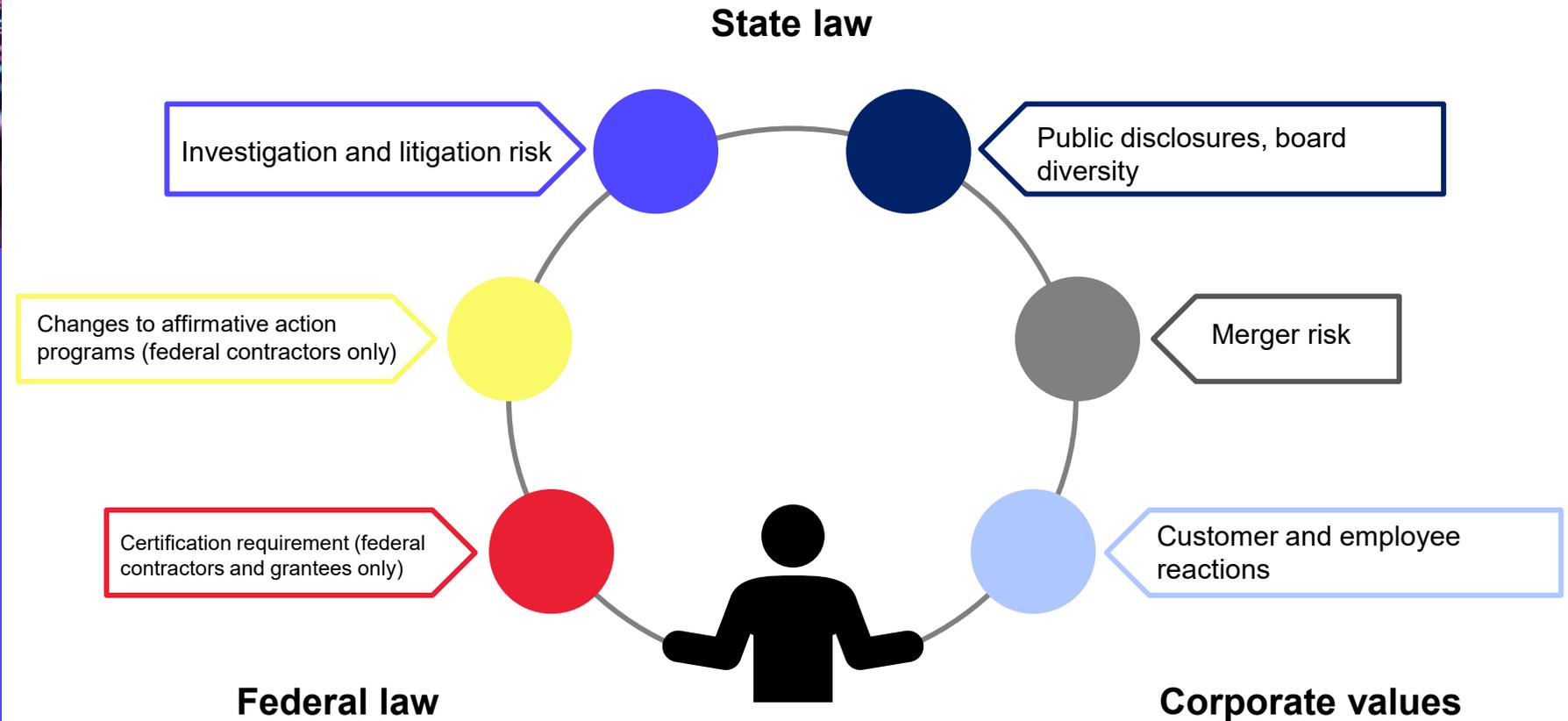
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Considerations

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Competing considerations and concerns

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Competing considerations and concerns (cont.)

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- **Highest risk**
 - Exclusions, quotas, preferences or special advantages in any term or condition of employment to a particular protected group
- **Also risky**
 - Aspirational goals, candidate slates, tying of compensation to DEI-related metrics, proxies
- **Less risky**
 - Programs, trainings, employer groups focused on expanding opportunity, inclusion, belonging for all without disadvantaging any particular group
 - Cultural celebrations open to all

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Best practices

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- **Inclusive access:** Make all programs and resources available to qualified individuals, regardless of protected characteristics, and avoid titles that may be perceived as limiting access based on race or ethnicity (Be advised that DOJ's memorandum states, however, that some sex separation "is necessary where biological differences implicate privacy, safety or athletic opportunity")
- **Skills-based selection:** Base decisions on specific, role-related skills and qualifications; if criteria like socioeconomic status, first-generation status or geographic diversity are considered, ensure their use is justified on grounds unrelated to conferring an advantage based on a protected characteristic
- **Avoid demographic targets:** Eliminate programs and selection criteria designed to achieve specific demographic representation
- **Document criteria rationale:** If using selection criteria that may correlate with protected characteristics, clearly document the legitimate, nondiscriminatory reasons for using that criterion and apply those rationales consistently; for example, if applicants are asked to describe "obstacles they have overcome" or submit a "diversity statement," institutions and employers should document that this information is used to assess neutral attributes such as resilience or perseverance (these should be reviewed by counsel)
- **Review neutral criteria:** Ensure that facially neutral criteria are not indirectly serving as proxies for protected characteristics; as an example, the memo states that "a program targeting 'low-income students' must be applied uniformly without targeting areas or populations to achieve racial or sex-based outcomes"

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Best practices (cont.)

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- **No diversity quotas:** Remove any diversity quotas from programs or policies, including any requirements that a specific protected group be represented in candidate pools, hiring panels or final selections
- **Open trainings:** Ensure all qualified individuals can participate in training programs; avoid segregating groups or requiring agreement with particular beliefs based on protected characteristics
- **Nondiscrimination clauses:** Include nondiscrimination clauses in all vendor and third-party contracts, monitor for ongoing compliance and terminate funding for noncompliant programs
- **Anti-retaliation measures:** Establish anti-retaliation procedures and safe reporting mechanisms, including in employee handbooks and program guidelines; provide confidential, accessible channels for individuals to report concerns about unlawful practices
- **Review public disclosures:** Consider whether to continue providing individualized director diversity data in the proxy statement or whether aggregating diversity disclosure is sufficient to satisfy the needs of various stakeholders (the most common approach)

Reminder, this is a highly contested and quickly evolving area of law. Above all else, keep a watchful eye on new developments, and revise policies and practices accordingly.

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AI in Employment

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- How employers are using AI tools
- Concerns related to AI tools
- Limitations of AI tools
- AI regulation
- Potential rise in employment litigation
- Best practices for employers

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How are employers using AI tools

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Résumé scanners

- Can identify and prioritize certain key words or relevant experience, education and skills to better source candidates
- Software that rates employees based on their keystrokes or other factors

Employee engagement software

- Software that rates employees based on their keystrokes or other factors

Virtual assistants/ chatbots

- Ask job candidates about their qualifications and reject those who do not meet predefined requirements

Video interviewing software

- Evaluate candidates based on their facial expressions and speech patterns

Testing software

- Provide “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills or perceived “cultural fit” based on their performance on a game or a more traditional test
-

Recruiting

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- **Improved candidate matching** – Recruiting tools can scan thousands of applications and identify ones that match your job description; experts have found a 75% decrease in time spent on screening by using these tools
- **Improving cost per hire (CPH)** – AI tools can minimize the need for significant job advertising and can reduce the efforts necessary to hire by automating large parts of the process and driving down CPH
 - AI also can be used to identify inefficiencies in the hiring process to conserve time and resources
 - AI recruitment is reducing CPH by as much as 30%
 - 86.1% of recruiters utilizing AI reported that it accelerates the hiring process

Recruiting (cont.)

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- **Reaching a wider talent pool** – AI recruiting software can source talent from multiple platforms and pass those applicants through more applications than a human being could on their own, allowing HR and recruiters to consider a broader variety of talent
- **Filling positions faster** – AI recruiting tools speed up the hiring process at multiple points; many AI tools automate various administrative tasks and may cut the overall hiring time by nearly 90%
- **Improving candidate experience** – AI tools personalize communication with candidates and provide information about the company and the job; this leads to faster hiring times, meaning candidates don't need to wait nearly as long to hear whether they got the job

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Employee productivity

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- **Efficiency/productivity gains**

- Generative AI (gen AI) tools can help employees by freeing up time spent on lower-value tasks to engage in higher value-added activities (e.g., by streamlining workflows, automating repetitive tasks and providing quick access to data)
- A July 2024 Sage Journals study found that frequent usage of gen AI tools during a workday was associated with greater knowledge gain and, subsequently, better task performance

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Employee data collection

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- **Using AI tools to collect employee data**
 - Track work hours, measure worker performance, set work schedules, assign tasks and perform other more complex HR functions
 - Examples:
 - **Tracking work time:** An employee-monitoring tool used to analyze worker activity in real time via computer keystrokes and mouse clicks, website browsing and presence in front of a web camera to determine active or idle status
 - **Processing leave requests:** An AI tool used to process leave requests, track time off and integrate absence calendars

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Employee data collection (cont.)

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- **Providing and tracking data from employer-sponsored wearable technologies (“wearables”)**
 - Digital devices embedded with sensors and worn on the body that may keep track of bodily movements, collect biometric information and/or track location
 - Examples:
 - Smart watches or rings that track activities and monitor physical or mental condition in the workplace
 - Environmental or proximity sensors warning wearers of nearby hazards
 - Smart glasses and smart helmets that can measure electrical activity of the brain
 - Exoskeletons and other aids that provide physical support and reduce fatigue
 - GPS devices that track location

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Concerns related to AI tools: Bias

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- **Americans with Disabilities Act (ADA)**
 - Employers are prohibited from discriminating against qualified persons from employment, or in employment on the basis of their actual or perceived disability
- **Three ways an employer can violate the ADA using AI-related tools**
 1. Failure to provide reasonable accommodations
 - A group of Amazon workers recently alleged systemic discrimination by AI systems that automatically denied their requests for accommodation requests, in violation of the ADA
 2. Unlawful “screen outs” of individuals with disabilities even if they could perform the job duties with an accommodation
 - **Example:** Applicant with limited dexterity struggling on a typing test and screened out
 - **Example:** Applicant with a gap on résumé because of a disability, resulting in résumé being screened out
 - **Example:** Applicant with a speech impairment scoring low on a video interview and screened out
 - Recently, a deaf applicant for an internal promotion at Inuit filed a claim against her employer alleging she was discriminated against because the interview software used lacked captioning (subtitles) and was not programmed to respond to her deaf accent, allegedly putting her at a disadvantage and resulting in a denial of her promotion
 3. Adopting an algorithmic decision-making tool that uses disability-related inquiries/medical exams

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Concerns related to AI tools: Bias (cont.)

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- **Title VII**

- Focus on disparate impact of “algorithmic decision-making tools” used in the employment process
 - **Examples:** Résumé scanners, employee monitoring software, “virtual assistants” or “chatbots,” video interviewing software or testing software that provides “job fit” scores
- Automated decision-making tools are treated as a “selection procedure” subject to the EEOC’s Uniform Guidelines on Employee Selection Procedures when used to “make or inform decisions about whether to hire, promote, terminate, or take similar actions toward applicants or current employees”
- Tools may violate Title VII, unless the employer can show that their use is “job-related and consistent with business necessity”

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Concerns related to AI tools: Bias (cont.)

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- **Design choices can result in inadvertent or intentional bias**
 - ***EEOC v. iTutorGroup, Inc.* (E.D.N.Y., May 2022):** Tutor application software programmed to automatically reject women applicants aged 55 or older and men applicants aged 60 or older. The EEOC argued that the automated decision-making tool, therefore, had been purposely designed to discriminate against applicants based on their age. In settling the case, iTutorGroup agreed not to ask for age-related information, such as birth date, from future applicants.
 - ***Mobley v. Workday, Inc.* (N.D. Cal., May 2024):** A Black male over the age of 40 alleged Workday's AI-driven applicant screening tools unlawfully screened him and other applicants out in violation of Title VII, Section 1981, ADEA and ADA, alleging both intentional discrimination and disparate impact discrimination. The plaintiff claimed that despite having requisite experiential and educational qualifications, he was denied employment on every application almost immediately after submitting the application. Litigation is ongoing, but motion to dismiss has been denied and nationwide class certified.
 - ***Harper v. Sirius XM Radio* (E.D. Mich., August 2025):** A job applicant filed a lawsuit against Sirius XM Radio alleging the company's AI-powered hiring tools violated federal anti-discrimination statutes by embedding historical biases into the evaluation process. The lawsuit specifically alleges that the iCIMS Applicant Tracking System used by Sirius XM disproportionately disadvantaged Black candidates. The plaintiff claimed he was rejected for around 150 positions despite being qualified, receiving only one interview and no job offers. The lawsuit argues that the use of the AI tool violates Title VII under both disparate treatment and disparate impact liabilities in violation of Title VII and Section 1981. The plaintiff is also seeking class action status for the case.
 - These are allegations at the initial stage of litigation. Sirius XM has not yet filed a response, and the court has not yet made any findings regarding the case.
- **Bias can be introduced through the tool's training process:** Training data may reflect developers' biases or institutional and systemic inequities if the training data is unrepresentative.
- **Bias can be introduced through the deployment of a tool:** If a tool is used to make decisions that it was not designed to assess, deployment may amplify bias and systemic inequities. Deployment can create a "feedback loop," where a biased tool contributes to⁴⁹ discriminatory decisions that are then introduced back to the tool for continuous training.

Bias in the employment decision-making process

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- **Algorithmic bias**
 - Potential unintentional consequence of algorithms or machine-learning processes that use biased/prejudiced assumptions
 - Examples of AI biases that create biased outputs:
 1. **Algorithm bias:** Biased assumptions in the machine-learning process
 2. **Data bias:** Incomplete, flawed or unrepresentative data
 3. **Human bias:** How we use AI
- **Black box problem**
 - Difficulty in understanding how AI models arrive at their conclusions
- **Disparate impact**
 - Neutral practices exclude employees based on protected classes; use a practice that is not job-related, or employer refuses to adopt a comparably effective – but less discriminatory – alternative practice

Bias in the employment decision-making process (cont.)

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- **Algorithmic bias in résumé screening**
 - University of Washington, late 2024 study: Large language models (LLMs) screening résumés for nine occupations found that the models were significantly biased
 - Models significantly favored white-associated names in 85.1% of cases and women-associated names in only 11.1% of cases, even for roles more commonly held by women
 - It also found Black males are disadvantaged in up to 100% of cases
 - “Masculine and [w]hite concepts seem to be treated as the ‘default’ value by models with other identities diverging from this, rather than a set of equally distinct alternatives”
 - Simply anonymizing résumés does not mitigate bias, because “résumés from real-world job seekers differ on many additional dimensions which can signal social group membership, including educational institutions, locations, and even lexical content choices”

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Concerns related to AI tools:

Accuracy

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- Some predictive AI tools that rely on facial, audio or physical interaction with a computer may lead to inaccurate (and biased) results
- Using these tools could lead to an increased risk that individuals will be automatically rejected or scored lower based on disabilities, race and other protected characteristics
- **Example:** A 2020 study on automated speech recognition (ASR) systems, which use machine-learning algorithms to convert spoken language to text, found they do not work equally well for all subgroups of the population. The study examined five ASR systems to transcribe structured interviews conducted with white versus Black speakers.
- **Findings:** All five ASR systems exhibited substantial racial disparities with an average word error rate (WER) of 0.35 for Black speakers compared with 0.19 for white speakers. The discrepancy could be traced to disparities in the underlying acoustic models used by the ASR systems.

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Concerns related to AI tools: Privacy and security

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- Recruiting tools may collect, store and analyze personal data that might infringe on an applicant's privacy rights
- **US state privacy laws**
 - Only the **California Consumer Privacy Act (CCPA)** applies to the processing of employee personal information (PI) – other US state privacy laws carve out PI related to individuals acting in a commercial or employment context
 - The CCPA requires a **notice at collection** at or before the point of collection of PI of California resident employees (in addition to a **privacy policy**)

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Concerns related to AI tools: Privacy and security (cont.)

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- Generally, employees have **no expectation of privacy** with respect to information on company devices or disclosed over company networks, especially where they are provided notice of monitoring (including audio/video recording).
 - Some states specifically require notice of employee monitoring – including, in some cases, advance written notice (e.g., Connecticut, Delaware and New York)
- But still, there are potential risks:
 - AI tools (chatbots, employee monitoring tools) have access to sensitive employee data and communications, leading to increased risk of unauthorized access
 - Tools may collect, store and analyze personal data that might infringe on applicants' privacy rights
 - Potential loss of confidentiality and trade secret protections if information is disclosed to third parties
 - Disclosure of personal health conditions/details can trigger employer obligations regarding protecting medical information and could constitute notice of Family and Medical Leave Act (FMLA) leave request or ADA accommodation
 - Employees using AI tools unregulated by the employer

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Limitations of AI use in employment

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- **Accuracy issues:** Output from AI tools may not be accurate due to limitations in the technology (e.g., alignment problems) or based on problems in the data used to train the tool
- **Waste of time for less frequent users:** There's a learning curve that comes with use of many of the tools, so if they are being used for smaller sets of applicants, it may not be much of a time saver or worth the cost
 - Incorporating the right AI tools for employers requires identifying the right use cases, selecting the right tools, training staff and changing workflows
- **Automation errors**
 - Use of AI or other automated systems can result in violations across the entire workforce versus with human decision-making, which is likely to affect a much more limited population
 - Example: An automated system that "tests" for FMLA eligibility more frequently than permitted under law could result in employees' leave being denied impermissibly on a systemic level
- **Distrust and employee morale:** Distrust and employee morale issues may stem from overreliance on AI technologies in employment decision-making
 - A 2023 American Staffing Association Workforce Monitor survey found 49% believe AI tools used in job recruiting are **more biased** than their human counterparts
 - A 2023 Pew Research Center study found 71% oppose AI making a final hiring decision, while just 7% favor it and 22% are not sure

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Limitations of AI use in employment (cont.)

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- **Strict adherence to algorithms can lead to screenouts of highly qualified candidates:** A Harvard Business School survey discovered 88% of employers found automated tools had screened out qualified, high-skilled candidates because they did not match the exact criteria established by the job description; that number rose to 94% in the case of middle-skilled workers
- **Lack of personal touch:** While the communications might be personalized, messages won't feel as human as they would if a person wrote them
 - Candidate experience can be integral to the recruitment process
 - Example: Automatic rejection of candidates taking AI-powered personality assessment tests during recruitment without human review of the application or rejection decision

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White House and agency action

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- **White House AI Action Plan**
 - Policy roadmap anchored in EO 14179; key provisions include:
 - **Workforce training:** Expansion of AI literacy across education, apprenticeships and retraining, with the Treasury Department considering tax-free treatment of employer-sponsored AI training; the Department of Labor (DOL) may use discretionary funds for displaced workers and launch retraining pilots
 - **Labor market monitoring:** Bureau of Labor Statistics, Census Bureau and Bureau of Economic Analysis must analyze AI's impact on jobs and wages, supported by a new DOL Workforce Research Hub
 - **Regulatory and fund levers:** Federal agencies may weigh a state's AI regulatory climate when awarding funds; the plan directs a review of Federal Trade Commission enforcement to avoid hindering innovation and updates procurement rules requiring contracted AI systems to be free of ideological bias
- **Under the Biden administration, the EEOC and DOL issued guidance, signaling enforcement efforts in the area of AI, but the trajectory was since reversed ...**
 - **EEOC:** Originally focused on monitoring employer AI (including AI and machine learning) but ... unsure how guidance will play out in new administration
 - The May 2023 technical assistance document on AI compliance issues under Title VII, advising employers to assess AI tools for potential adverse impacts on any group protected under Title VII
 - **No longer available**
 - The December 2024 fact sheet, "Wearables in the Workplace: The Use of Wearables and Other Monitoring Technology Under Federal Employment Discrimination Laws," which warned that tracking technology embedded in wearable devices could violate the ADA
 - **No longer available**

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White House and agency action (cont.)

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- **Department of Labor**
 - Warned AI use can violate federal employment laws, such as the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) and even the Employee Polygraph Protection Act (EPPA)
 - **No longer available**
 - Released a best practices roadmap for “AI for worker well-being,” emphasized employers’ use of AI for the benefit of workers, and encouraged responsible data use and job protection
 - **No longer available**
- **Office of Management and Budget (OMB)**
 - OMB issued two memoranda, “Accelerating Federal Use of AI through Innovation, Governance, and Public Trust (M-25-21” and “Driving Efficient Acquisition of Artificial Intelligence in Government (M-25-22),” which provide guidelines and requirements for the procurement and use of AI by US federal agencies

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AI regulation in the states

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- Most regulations for AI remain with the states and most have established task forces
- 34 states are actively studying AI
 - 24 created a group to study AI
 - 10 delegated task to a standing committee
- All but three of the 50 states introduced AI-related legislation in 2025

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“How Different States are Approaching AI,” Brookings Institution

Notable state (and city) AI laws related to employment

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- **California:** Using an automated-decision system (ADS) can violate state anti-discrimination law if they negatively affect applicants or employees based on protected traits
 - ADS: “a computational process that makes a decision or facilitates human decision making regarding an employment benefit ... [and] may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques”
 - Imposes requirements for using ADSs for employment-related decisions, including notification to workers if an ADS is used, informing job applicants if an ADS is used in hiring decisions, record-keeping requirements, etc.
- **Colorado:** Mandates “reasonable care” be taken when using any high-risk AI system to make consequential decisions, which includes those that make or are a substantial factor in making employment decisions; employers using these systems are required to conduct annual impact assessments and comply with certain transparency obligations designed to protect against algorithmic discrimination
- **Illinois:** Illinois’ law amends the state’s Human Rights Act to prohibit using AI tools in a way that results in discrimination, which can include using AI tools to exclude applicants from certain zip codes, a practice often referred to as digital redlining
- **Maryland:** Employers cannot use facial recognition services for creating a facial template during an applicant’s interview for employment unless the prospective employee consents

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Notable state (and city) AI laws related to employment (cont.)

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- **New Jersey:** Employers are violating the state's Law Against Discrimination if their AI results in discrimination against employees based on a protected class
- **New York:** Gov. Kathy Hochul announced New York will expand the New York Worker Adjustment and Retraining Notification (WARN ACT) to require employers to report AI-driven layoffs
- **New York City:** Unlawful for employers to use an automated employment decision tool (AEDT) to screen candidates for employment or promotion in NYC
 - AEDT: any process "derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation that is used to substantially assist or replace discretionary decision making
- **Texas:** Employers who deploy AI systems are prohibited from using AI in a way that intends to unlawfully discriminate against a protected class but not including disparate impact

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Proposed state laws

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- **Hawaii SB 59:** Prohibits users of algorithmic decision-making tools from using algorithmic eligibility determinations in a discriminatory manner, send notices to individuals when using algorithmic decision-making and submit annual reports to the attorney general
- **New York SB 1169:** Regulates the development of AI systems to prevent algorithmic discrimination; requires independent audits of AI systems
- **New Mexico HB 60:** Requires detailed documentation about AI systems, implementation of risk assessment policies, conducting of regular impact assessments and giving notice to candidates of regular use of AI in decision-making
- **Pennsylvania SB 293:** Would amend Pennsylvania Human Relations Act to provide for use of automated employment decision tools and further provide for civil penalties

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Potential rise in employment litigation

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- Empowerment of **pro se** litigants to file more coherent and sophisticated legal claims
 - AI can outline the process by which plaintiffs can bring their claims and notify them of requisite deadlines, making the process easier and more digestible for them to file on their own
 - High reward, low risk
- AI-related claims are likely to garner class action lawsuits (likely easy class to certify)

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Steps for employers

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- **Establish an AI governance program:** Develop clear systems and guardrails for AI use before deployment, consistent with the NIST AI Risk Management Framework. Include a human oversight component, specify roles and responsibilities, and regularly evaluate outcomes to ensure your governance measures are working.
- **Vet and audit your vendors:** Require vendors to document their bias testing, data sources, and accessibility features. Build in contractual assurances for nondiscrimination, data transparency, cooperation with audits and indemnification. If you need guidance on the right way to approach this dynamic, [this Insight reviews the right questions to ask at the outset of the relationship and along the way.](#)
- **Be transparent with candidates:** Consider clearly communicating when and how AI tools are used in the hiring process. Transparency may soon be required in some jurisdictions and is emerging as a best practice nationwide.
- **Offer and publicize accommodation options:** Consider whether you can offer applicants a path to request alternative assessments or human review. Options might include specialized equipment, alternative test formats or modified interview conditions. This may not be possible for all circumstances or at each step of the application process, but document any accommodation pathway you offer and make it visible in job postings and application portals.
- **Align AI-driven questions with job requirements:** When providing questions or criteria to an AI tool, make sure they relate directly to the role's essential functions. Avoid irrelevant prompts or stock materials pulled from unknown sources that could introduce bias.

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Steps for employers (cont.)

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- **Retain human oversight in decision-making:** Train HR and talent management teams to review and, when appropriate, override AI recommendations. Regularly audit hiring outcomes to ensure fairness and compliance with applicable laws.
- **Document your process and rationale:** Maintain detailed records of how hiring decisions are made, including the objective criteria used and any adjustments to AI-driven scores. Avoid relying on vague or opaque “fit scores” that can’t be explained.
- **Conduct regular accessibility audits:** Test your systems for compliance with disability accommodation requirements and correct any accessibility gaps promptly.
- **Monitor for disparate impact and adjust:** Run periodic analyses to identify disparities across protected classes (age, race, gender, disability, etc.). Treat significant disparities as red flags and take steps to mitigate them.
- **Stay informed on legal developments:** Track new legislation, court rulings and agency guidance that could affect your AI practices.
- **Compliance training:** HR and management teams should be trained on appropriate uses of AI technologies, as well as the risks of relying on such tools, including those used in the accommodations processes.
- **Prepare for rise in litigation:** Prepare a process for documenting/tracking employment-related decisions as they relate to AI and other employment-related decisions.

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Arbitration

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Agenda

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- Caselaw updates to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA)
- New American Arbitration Association (AAA) rules
- Pending federal legislation
- Mass arbitration

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Ending Forced Arbitration of Sexual Assault and Harassment Act (EFAA)

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- EFAA
 - Enacted in 2022
 - Invalidates pre-dispute arbitration agreements for claims of sexual assault/harassment
 - Employees may choose to opt out of pre-dispute arbitration agreements and choose to litigate in court
 - Shifted away from presumption **in favor** of arbitration under the Federal Arbitration Act (FAA)
 - Courts are now weighing what allegations are necessary to invoke the EFAA

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Jurisdictional split(s)

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- Courts have disagreed on what it means for a claim to “plausibly” claim sexual harassment to determine whether the EFAA protections are triggered
 - **Strict standard:**
 - Applying the Twombly/Iqbal standard to the EFAA to require that, where a party seeks to invoke the EFAA based on a claim of sexual harassment, such a claim must have been plausibly pled. *Yost v. Everyrealm* (S.D.N.Y. 2023); *Gonzales v. Carnival Corp* (S.D. Fla. 2024)
 - **Non-frivolous standard:**
 - The plaintiff need only plead nonfrivolous claims relating to sexual assault or conduct alleged to constitute harassment, with sufficiency of these claims to be reserved for proper merits adjudication. *Diaz-Roa v. Hermes Law, P.C.* (S.D.N.Y 2024); *Thomas v. Poo Bah Enterprises, Inc.* (N.D.Ill. July 24, 2025); *Anderson v. Louis Vuitton N. Am.* (C.D. Cal. June 5, 2025)
- Courts have also disagreed on whether the EFAA applies to the **entire case**, so long as one of the claims alleges sexual assault or harassment, or if just the sexual harassment claim cannot be compelled to arbitration
 - “The plain language of the EFAA supports the conclusion that *the arbitration agreement is not valid or enforceable with respect to the entirety of the case*, as the case relates to a sexual harassment dispute. Thus the court concludes the parties’ arbitration agreement is invalid and unenforceable.” *Van Meurs-Bradley v. AutoNation, Inc.* (Cal. App. July 14, 2025)
 - “Since Plaintiff’s wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, *they must be arbitrated*, as the Arbitration Agreement requires.” *Mera v. SA Hosp. Grp., LLC* (S.D.N.Y. 2023)

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Rise of mass arbitrations

- Many arbitration agreements prohibit employees (or consumers) from bringing class actions
- To get around this, employees (and consumers) are instead bringing “mass arbitrations”
 - This can be a heavy lift for both employee counsel and employer
 - Mass arbitrations can quickly generate hundreds of thousands of dollars in fees → incentivizing settlements to avoid upfront costs
 - Described as a “structural shift” reviving enforcement rights previously sidelined by arbitration clauses

Takeaways

- Keep arbitration agreements up to date
- Monitor state and federal developments
- Prepare for challenges to arbitration agreements

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