AI and HR: Transforming the Future of Workforce Management

Presented by:
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How do you feel about AI?

A. Excited

B. Concerned

C. Both concerned and excited

D. Just plain confused

Do you currently use a form of AI in your business?

A. Yes

B. Not yet, but planning to

C. No, because I don't understand what AI is or how it can help our business

D. I have no idea

What is true about AI?

A. AI is without bias because it is a computer

B. AI results are always accurate

C. AI is a confidential tool

D. None of the above

E. All of the above

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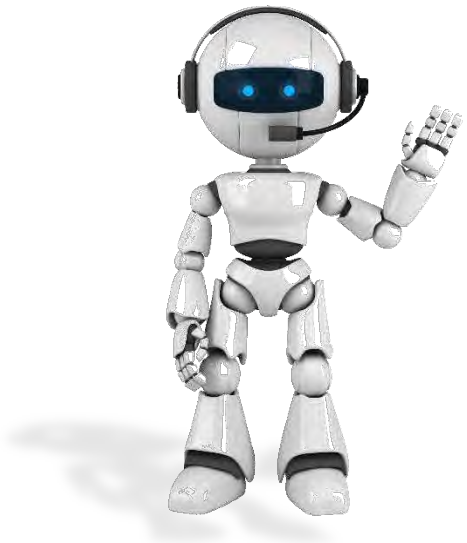
Meet Miles - Our AI For the Day

Hi Miles, nice to meet you. Looking forward to working with you.

Hello. It's nice to meet you.



Can you give me some examples of AI?

- Think Siri, Alexa, Chat GPT, Gemini, *etc.*

What is AI?

- AI is a tool that processes information based on algorithms and patterns found in data, not through conscious thought or understanding.

How Does AI Learn?

Traditional Computing

Human defines the rules and the computer applies it to data to create answers.

(*i.e.*, calculators, Google)

Input Data + Algorithm = Output

Artificial Intelligence

Human defines the data and output (or examples of answers). The system is programmed to yield the results.

Input Massive Amounts of Data → Patterns, Decisions, Predictions, Understanding

Is this a Sandwich?

What are Some Major HR Risks Associated with the Use of AI?

- Bias
- Inaccuracy and Hallucinations
- IP
- Privacy and Confidentiality violations
    - Especially open-source AI tools
- Transparency *(How did you get that answer and who can challenge it?)*

What Laws are in Place That Regulate AI?

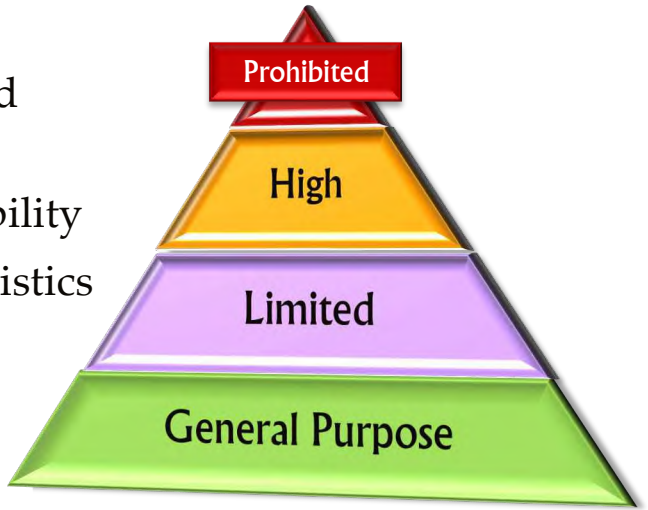
The world's most robust AI legislation is in the European Union. The ("EU AI Act") establishes a common regulatory and legal framework.

- Became effective August 1, 2024.
- EU AI Act adopts a risk-based approach for categorizing AI systems into four tiers: unreasonable risk, high risk, limited risk, and minimal risk.
- Users (deployers), as well as developers and importers, have compliance obligations.
- Systems used in employment, employee management, access to self-employment are considered "high risk" and are heavily regulated.

Prohibited and High Risk AI (EU AI Act)

Examples of Prohibited AI:

- Social credit scoring systems
- Emotion recognition systems in the areas of workplace and education institutions
- AI that exploits a person's vulnerabilities, like age or disability
- Biometric categorization systems using sensitive characteristics

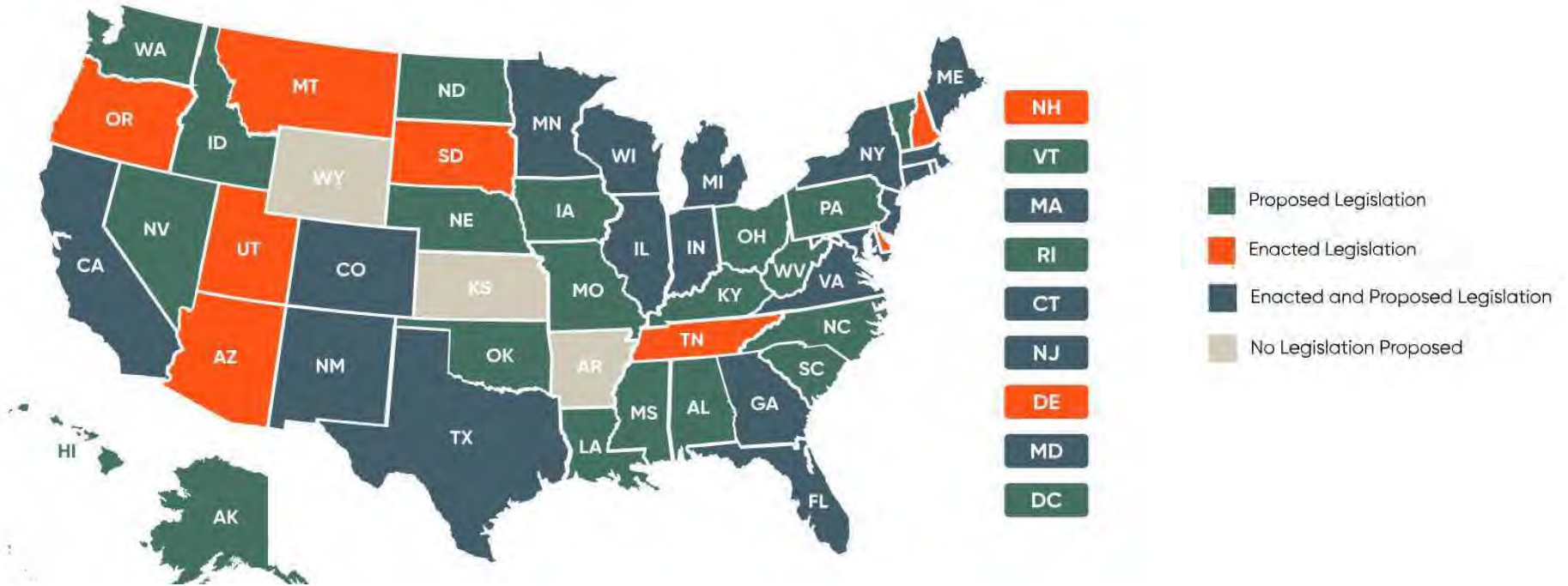


Examples of High Risk AI:

- Systems in education or vocational training, including admissions
- Systems used in employment and employee management
- Access to self-employment

VJ

Which U.S. States Have Considered/Enacted AI Legislation?



Source: https://www.bclplaw.com/en-US/events-insights-news/us-state-by-state-artificial-intelligence-legislation-snapshot.html

Please summarize the enacted AI state laws.

California - mandates that AI systems implement comprehensive measures to disclose when content has been generated or modified by AI. Opt-out rights re: profiling ***including performance at work.***

Colorado - prohibits employers from using AI to discriminate against workers and requires ***developer and deployer*** to take reasonable care to avoid such algorithmic discrimination. Opt-out rights re: profiling***, including employment decisions***.

Illinois - Notice re: AI and predictive data analytics cannot use race or zip code/proxy to reject applicant or employee.

New York City - obligatory bias audits – but is only triggered when automated tools play a predominant role in decisions.

Is there any Federal regulation on AI?

- The EEOC had guidance on AI, but it was taken down.

- America's AI Action Plan is built on three pillars: Accelerating AI Innovation; Building American AI Infrastructure; and Leading in International AI Diplomacy and Security.

"Build, Baby, Build!"

Could the use of AI violate existing laws?

- Yes, AI could discriminate against protected classes.
- AI could also create "disparate impact," which is a form of unintentional discrimination.
  - A neutral test or selection procedure
  - Has a disproportionate impact on individuals with protected characteristics
  - An example is a physical strength test requiring applicants to lift 75 lbs. Women are more likely to fail this test than men.

How would a plaintiff prove disparate impact?

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- The proportion of individuals in a protected class that are negatively impacted by the practice is statistically significant as compared to the proportion of individuals not in the protected class who are negatively impacted.
  - For example, 80% of women fail the 75 lb. lifting test, while only 20% of men fail

How does an employer defend disparate impact?

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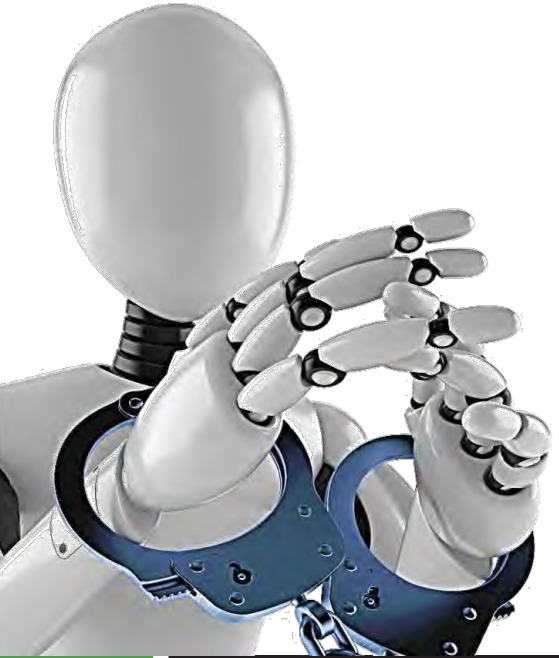
- Show that the practice is "job-related and consistent with business necessity”:
  - The test relates to the job;
  - The test is predictive of success in the job; and
  - There is not a substitute that would have a lesser disparate impact.
  - This may require job analysis, validation studies, and expert testimony.

Who is responsible if AI violates employment laws?



- Employers are ultimately responsible for any employment discrimination, whether intentional or unintentional.
- Third-party vendors may be responsible for adverse impact caused by AI tools that are purchased from them or administered by them.
- Employers may be able to negotiate indemnity against liability.

How can employers protect themselves?

- Employers cannot rely only on the vendor's predictions or studies of whether their AI tools will cause discrimination. They must monitor AI to ensure no discrimination occurs in their own processes.
- Before "going live" with an AI selection tool, employers should perform analyses or run models to ensure that the use of AI does not result in discrimination.
- Require contractual indemnity if promises of nondiscrimination do not hold up.

Have there been lawsuits related to AI?

- Tutoring company agreed to pay $365,000 to resolve EEOC complaint that its AI-powered hiring selection tool discriminated against women over 55 and men over 60.
  - Rejected applicants resubmitted their same resume with a later birthdate – and this time secured an interview.
- Workday was sued by plaintiff alleging that its AI-powered applicant screening tools discriminate on the basis of race, age, and disability; Workday claims it is not an "employer."
  - Motion denied, based upon the theory that Workday could be an "agent" of the employer and thereby liable.
  - Class preliminarily certified – 1.1 billion applications rejected by software

How are HR Professionals Using AI in Their Business?

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In many ways but some examples include:

- Recruitment and Talent Acquisition
- Performance Management
- Compensation and Benefits
- Diversity, Equity, and Inclusion (DEI)

Recruitment and Talent Acquisition

AI-powered video interview platform that analyzes candidate responses during interviews. It evaluates not only the content of responses but also non-verbal cues such as facial expressions, tone of voice, and body language to help HR teams assess candidates more effectively and objectively.

- **Pros**: Consistency
- **Cons**: Privacy, Bias (disability). How do you check the model?

Predominant role in decision-making?

Performance Management

AI to provide continuous performance management. It offers AI-powered weekly check-ins, goal tracking, and feedback tools to help managers stay connected with employees and ensure consistent performance monitoring.

- **Pros**: Consistency, more recordkeeping
- **Cons**: Privacy, Performance management isn't one size fits all, more recordkeeping

Compensation and Benefits

AI to analyze compensation data across industries, regions, and job functions. HR teams can use these insights to ensure their compensation packages are competitive and equitable, adjusting salary structures to attract top talent.

- **Pros**: Consistency, removes/reduces bias
- **Cons**: Hallucinations (fake job posting), privacy, lack of transparency, risky to question/tweak, Pandora's box

Diversity, Equity, and Inclusion (DEI)

AI-driven writing platform helps eliminate biased language in job descriptions and HR communications. It scans the text and provides suggestions to make the language more inclusive, helping organizations attract a more diverse candidate pool.

- **Pros**: Consistency, removes/reduces bias
- **Cons**: Confidentiality, false sense of perfection, accuracy/effectiveness, lack of transparency

Buyer Beware

When choosing an AI tool:

- Understand the source of underlying data feeding AI.
- Be sure to ask the vendor whether the tool has been validated (but remember, that is not enough).
- Assess AI selection tools early and often regarding the impact on employment decisions.
- Check with organization if open-source AI tools violate your company's confidentiality policy.
- Review contract provisions regarding privacy, confidentiality, indemnity.

Best Practices

When implementing AI use in business:

- Disclose the use of AI
- Trust but verify its results
- Exercise caution if inputting confidential information into certain AI tools

Thank you for your help today.

- Do you have any more questions?

KE

What's Buzzing: Navigating Challenging Workplace Issues

Presented by:
Suzzanne Decker
Sasha Hodge-Wren

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Fort McHenry Manufacturing Co.

Imagine you're the Human Resources Officer at the Washington Monument Manufacturing Company, a baseball glove design and production company in Washington DC with 75 employees. WMM sells to big box retailers and the U.S. Navy.

Hypothetical

Recreational use marijuana is legal in Washington DC, and Teddy Roosevelt is talking with his best work friend James Madison about how much fun he had getting high over the weekend. You overhear them talking. They both work in safety sensitive positions on the manufacturing line.

Do you need to do something about this behavior?

A. No, unless you believe that he is high at work.

B. Yes, given the nature of his job.

C. Yes, the company is a government contractor.

D. None of the above.

Marijuana Usage

- Legal in MD and DC
- Can still enforce no on-duty usage and prohibit being under the influence
- Difficult with remote work
- Treat like any substance abuse issue
- Federal contractors have different considerations

Hypothetical

A manager of your company, TJ, is very religious and routinely posts articles about her pro-life views. Recently, she posted multiple times, calling out certain large companies as "murderers" for supporting certain non-profits such as Planned Parenthood. Unfortunately, some of those companies are your clients. A member of the public has posted on X and identified TJ as working at WMM.

Can TJ be disciplined for this behavior?

A. No, because TJ was posting her personal opinions on her own time.

B. No, TJ was posting about a protected political opinion.

C. Yes, if the posts caused reputational or other harm to WMM.

D. None of the above.

Off Duty Conduct

- Some states protect legal off duty conduct generally
  - California, Colorado
- Public employers must consider First Amendment
- Consider the conduct and the implication on the business
- Could also implicate NLRA

Off Duty Conduct

- Recommend clear guidelines for social media.
- Can generally enforce policy that employees cannot post harassing, intimidating, offensive, abusive, or threatening language.
- Employees also cannot post privileged, confidential, or business information.
- Easy to check where somebody works.

Hypothetical

Alice Paul, a machinist, is pregnant and requests to have her customized uniform refitted.

Does Alice need to provide medical verification?

A. No, you can tell she looks pregnant.

B. Yes, the need for a reasonable accommodation is not obvious.

C. Neither, because she has no right to this accommodation regardless.

D. None of the above.

Hypothetical

Alice usually works a 12-hour shift on her feet all day. A job opens up that would allow her to sit the majority of the day. You move her into that position, which is an 8-hour shift.

Should you have adjusted her job?

A. Yes, her job would likely become too strenuous.

B. Yes, the need for a reasonable accommodation is obvious.

C. No, she needs to make the request through the formal accommodation process.

D. None of the above.

Pregnant Workers Fairness Act ("PWFA")

- Covers "known limitations" related to pregnancy, childbirth, or related medical conditions
- Employee need not be "disabled"
- Generally, cannot require employee to go on leave
- Medical verification not required in 4 common scenarios or when breastfeeding/lactation is the request
- May require temporary suspension of an essential element of position

Hypothetical

A new employee Edgar Allen informs you that his grandfather suffered a fall over the weekend and that he'd need leave to care for him while he recovers. Edgar has only been working for three months.

Is Edgar eligible for leave and benefits?

A. No, he has not worked long enough at the company.

B. No, his grandfather is not an immediate family member.

C. Yes, because he is his grandfather's caretaker.

D. None of the above.

Navigating State Paid Family Medical Leave and the FMLA

- California, Colorado, Connecticut, District of Columbia, Delaware, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, and Washington
- Maryland FAMLI contributions begin July 1, 2026 (maybe)

Navigating State Paid Family Medical Leave and the FMLA

- An event may qualify for leave through both FMLA and state Paid Family Medical Leave
- There will be cases when an event only qualifies for state Paid Family Medical Leave, and the employee does not use any FMLA time
- In most cases, state Paid Family Medical Leave laws apply to employers with one or more employee without needing to meet the FMLA's 50 employee threshold

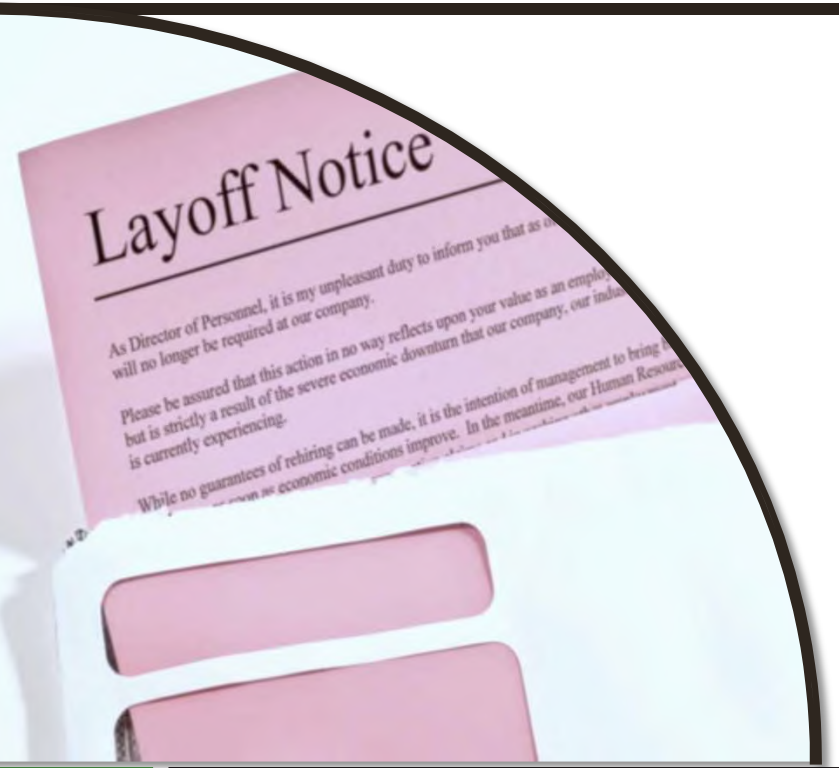
Reduction in Force

The company lost a large contract with the Chicago White Sox. As a result, the company determines that it needs to cut one employee from every department.

Hypothetical

While Alice is on FMLA leave, the company decides to move forward with the RIF. Alice is the least senior and third lowest performing employee, and you decide that she should be the employee selected from her department.

Hypothetical



Can you include Alice in the RIF even though she is on protected leave? If so, when?

Are There Obligations Under WARN Act Related to the RIF?

- **Mass layoff:** at least 50 employees are laid off in a 30-day period, or at least one-third of the full-time workforce is laid off in a 30-day period
- **Plant closure:** a plant closure affects 50 or more employees
- **Relocation:** a relocation of at least 100 miles affects any number of employees

Local Considerations

- **DC:** Displaced Workers Protection Act: applies to service contracts, provides job protection when change in service contract
- **MD:** 50+ employees, if layoff is 25% of workforce or 15 employees over any 3-month period, also note unemployment notice obligations
- **Philadelphia**: voluntary permanent shutdowns

The Non-Compete

As a part of the offer, the company required Alice to sign a Non-Compete which it requires all employees to do under company policy. The agreement prohibits Alice from working for any competitor in any capacity and in any jurisdiction for 2 years after her employment ends and from soliciting the company's customers and employees for the same period. The agreement advises Alice to confer with an attorney before signing and gives her 21 days to consider the agreement.

Did the company do anything wrong?

A. Yes, the non-compete lasts for too long to be enforceable.

B. No, the company has a legitimate interest in preventing Alice from sharing its trade secrets with a competitor.

C. Yes, because a machinist is not an employee for which a non-compete is appropriate.

D. No, because the Agreement advises Alice to confer with an attorney and gives her 21 days to consider the agreement.

What About the FTC's Non-Compete Ban?

- Federal Trade Commission issued a Final Rule banning non-compete clauses between employers and workers on April 23, 2024
- The FTC's Final Rule was set aside on August 20, 2024

Non-Competes Banned

- California*
- Minnesota
- Oklahoma
- North Dakota

Non-Competes Limited

- **Colorado:** $127,091 per year (adjusted annually)
- **District of Columbia:** Non-medical specialist employees – $154,200. Medical specialists – $257,000 (adjusts based on CPI)
- **Illinois:** $75,000 per year
- **Maine:** 400% of the federal poverty level (currently $62,600 for individuals)
- **Maryland:** 150% of state minimum wage ($22.50 per hour or $46,800 per year)
- **Massachusetts:** Must be exempt ($684* per week)
- **Nevada:** No hourly employees
- **New Hampshire**: 200% of federal minimum wage ($14.50)
- **Oregon:** $116,427 per year (adjusted annually)
- **Rhode Island**: Exempt and earning 250% of the federal poverty level ($39,125 for individuals)
- **Virginia:** $76,082 per year (adjusted annually)
- **Washington:** $123,394.17 per year (adjusted annually)

Non-Compete Provision

In addition, employers should:

1. Bolster the other provisions in their restrictive covenants on non-solicitation and non-disclosure;
2. Take steps to protect trade secrets and other confidential information appropriately; and
3. Solidify their practices and policies on onboarding and offboarding employees.

Any Questions?

The Post-Election Landscape: What Has Happened and What Employers Can Expect

Presented by:
Paolo Pasicolan
Gillian Santos
Stephanie Baron
Tyler Duckett-Oliver

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Hot Topics on Employee Benefits

DOL Regulatory Agenda

DOL issues regulatory agenda

- On September 4, the DOL releases its regulatory agenda for Spring 2025.

DOL Regulatory Agenda

Outsourcing HR

- Joint employer rules
- Pooled employer plans

DOL Regulatory Agenda

More transparency

- PBM fee disclosures
- Healthcare pricing info: actual prices (not estimates); standardized

DOL Regulatory Agenda

Long-awaited good ideas

- New e-disclosure rules
- Retirement Savings Lost and Found

DOL's Head of Benefits

Nominee: Daniel Aronowitz

- Attorney from Vienna, VA
- Owner of an insurance company that underwrites fiduciary liability insurance
- Writes a blog

Daniel Aronowitz

Plaintiffs' lawyers dictate laws

- "ERISA fiduciary rules are now whatever a plaintiff law firm can convince federal judges to allow"
- "new, retroactive regulatory liability through litigation"
- "different fiduciary standard in every federal court"

Daniel Aronowitz

DOL is MIA

- Too focused on ESG, fiduciary rule instead of
  - Plan forfeitures
  - 401(k) recordkeeping fees
  - PBM spread pricing
  - Pension risk transfers

401(k) Investments

New developments

- Crypto
- Private equity
- ESG funds

401(k) Investments

Crypto: Current rule

- DOL "cautions plan fiduciaries to exercise extreme care"
- "significant risks of fraud, theft, and loss"
- "speculative and volatile"
- "vulnerable to hackers and theft"
- "none of the [valuation models] are sound or academically defensible"

401(k) Investments

Private equity

- Current rule: Can't invest in collectibles, such as art, antiques, gems, coins, or alcoholic beverages; special rules for precious metals
- Already available; expect more choices

401(k) Investments

ESG: Current rule

- If two investments "equally serve the financial interests of the plan over the appropriate time horizon," you can pick based on "collateral benefits other than investment returns."

ESG Investing

Daniel Aronowitz's take:

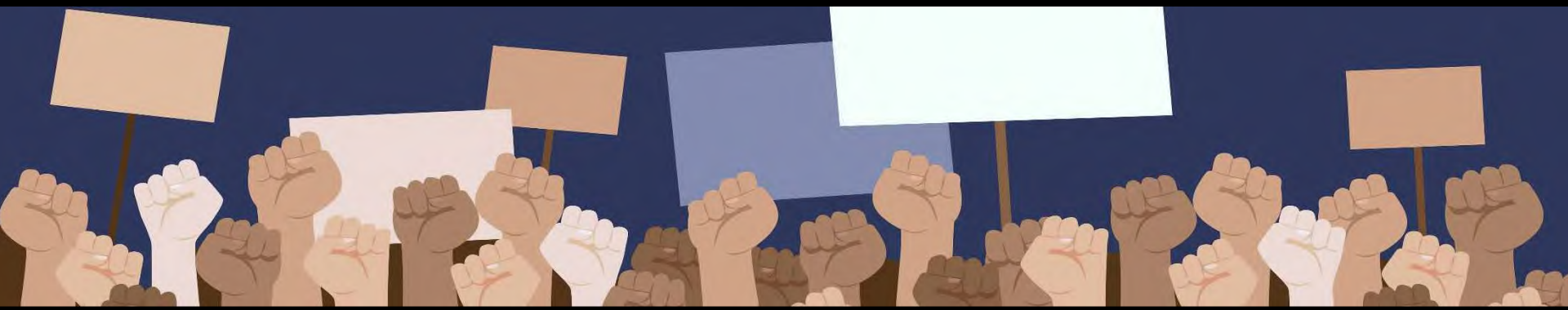
- "We think ESG investing is wrong."
- Fiduciaries "have a fiduciary obligation **not** to change the world with fiduciary retirement assets."

ESG Investing

Daniel Aronowitz (con't)

- "The vast majority of defined contribution plans in America do not offer ESG investments in their core lineup."
- ESG investing "is a political lighting rod with little actual bearing on the retirement security of 401k plan participants."

National Labor Relations Board (NLRB) Hot Topics



NLRB HOT TOPICS – BOARD STATUS

- NLRB only has 1 Board Member.
- NLRB cannot issue new decisions without a quorum (NLRA requires 3 Board Members to issue decisions that have the force of law).
- Fifth Circuit recently held NLRB's structure to be unconstitutional in *SpaceX v. NLRB*, effectively precluding the agency from pursuing enforcement actions and conducting unfair labor practice proceedings.
- Biden-era NLRB decisions still control until U.S. Supreme Court decision on *SpaceX v. NLRB* or quorum is otherwise reached.

SpaceX v. NLRB, No. 24-50627 (5th Cir. 2025)

- SpaceX and two other companies challenged the constitutionality of the NLRA's dual for-cause protections shielding NLRB board members and administrative law judges (ALJs) from removal.
  - Companies sought to advance theory that if NLRA's structure is unconstitutional, the NLRB cannot enforce the NLRA, and therefore, all administrative proceedings against them (and other employers) are unconstitutional.
- U.S. Court of Appeals for the Fifth Circuit sided with Employers, finding that the NLRA's dual for-cause provisions limits the President's ability to fire NLRB Board Members and ALJs, in violation of Article II (Executive Powers) of the Constitution.

SpaceX Immediate Impact – What Now?

- NLRB expected to appeal *SpaceX* decision before the U.S. Supreme Court.
- U.S. Supreme Court expected to uphold Fifth Circuit Decision with little to no impact on NLRB operations.
- NLRB has not issued a statement re *SpaceX* and immediate operational changes resulting from the Fifth Circuit's decision.
- August 7, 2025 Guidance Memo from NLRB Acting General Counsel directs NLRB Agents to evaluate whether unfair labor practice charges should be deferred to collective bargaining agreements' grievance/arbitration procedures instead of full NLRB processing.

Unfair Labor Practice Charges and Other Petitions – What Now?

- Expect new and pending unfair labor practice (ULP) to undergo "early-stage" processing until *SpaceX* appeal and quorum is restored (e.g. Board Agent to contact the employer for information on next steps).

- Employers should therefore continue to gather evidence and prepare for affidavits and investigations as if NLRB has quorum.

- Other NLRB petitions (*e.g.*, Unit Clarification, Decertification, and RM Petitions) will continue to be processed by Regional Directors.

Unfair Labor Practice Charges and Other Petitions

- Employers may continue to file request for review of ALJ adverse decisions to the full Board but should not expect processing until appointment of second and third NLRB Board members (quorum is reached).

Early Unionization Process – Voluntary Recognition Requests or Representation Petitions (RC-Petitions)

- Unions may file an RC Petition for recognition with the NLRB or submit a voluntary recognition request to employers (in lieu of seeking a union election).

- If faced with a voluntary recognition request from a union, immediately challenge the union's claim for majority status within two weeks by filing an RM-Petition.

- Failure to do so **will** result in an unfair labor practice charge, with the NLRB Regional Director issuing a bargaining order without holding a union election. *Cemex Construction Materials Pacific LLC, Pacific LLC*, 372 NLRB 130 (2023).

The Upshot: Nomination of New NLRB Board Members to Restore Quorum

- Trump has nominated two new NLRB Board members.
- Confirmation hearings to be held in late Spring or Summer 2026.
- Restoration of quorum means restoration of employer-friendly rules and policies.
- Unions likely to be reluctant to file unfair labor practice charges.

The Upshot: Appointment of Acting General Counsel and Expected Publication of New General Counsel Memos

- Trump appointed an Acting General Counsel in early Spring, who has since rescinded certain Biden-era policy guidance memos, including those on workplace rules, confidentiality and non-disparagement clauses, and non-compete agreements.

- Acting General Counsel expected to issue new policy guidance memos advocating for early dismissal of certain unfair labor practice charges, favorable settlement agreements for employers, and NLRA decisions restoring prior Trump-era rules and policies.

    - NOTE - General Counsel policy guidance memos do not have the force of law but influence the NLRB's top priorities and agenda.

NLRB Anticipated Changes - Workplace Rules

- *Stericycle Inc.,* 372 NLRB 113 (2023) established a new standard for evaluating whether a company's workplace rules violates the NLRA.
- NLRB held that a work rule is presumptively unlawful if an "objectively reasonable employee" could view the work rule as coercive or threatening toward employees' right to discuss working conditions or union affiliation with others. NLRB also imposed make-whole remedy for violations.
- **Trump NLRB** likely to return to prior Trump Board decision giving greater deference to an employer's legitimate business interests.

NLRB Anticipated Changes - Confidentiality and Non-Disparagement Provisions

- In *McLaren McComb*, 372 NLRB 58 (2023), Biden Board ruled that employers cannot offer severance agreements broadly prohibiting employees from making statements that could disparage or harm the image of the employer.
- Held that these provisions were overly broad and violated the employees' rights under Section 7 of the NLRA; and that former and current employees are entitled to the same protections under Section 7. Such provisions must be narrowly tailored to legitimate business interests.
- **Trump NLRB** expected to reverse *McLaren McComb* principles and allow significant limitations on employees' ability to discuss terms of severance agreements.

NLRB Anticipated Changes – Noncompete Agreements

- Biden NLRB General Counsel issued guidance memo asserting that noncompete and "stay or pay" provisions violate Section 8(a)(1).
- Both denied employees ability to switch employers by prohibiting them from pursuing other opportunities and creating fear that exercising their rights under Section 7 would trigger a payment obligation.

Politics, Religion, and DEI In The Workplace

Focus on Religious Accommodations

Groff v. DeJoy, 600 U.S. 447, 143 S. Ct. 2279 (2023)

- Previously, employers defending a claim of religious discrimination under Title VII had to show that the requested accommodation would be an undue burden, interpreted as "more than a *de minimis* cost."
- *Groff* holding – employers claiming undue hardship must show that the "burden is substantial in the overall context of an employer's business." Courts must make a fact-intensive inquiry and consider:
  - Requested accommodation;
  - Practical impact based on nature, size, and operating cost of employer.

Trends Since *Groff* in the VAX Cases – The Good News

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1st Circuit, 2nd Circuit, 3rd Circuit, 6th Circuit:

- Consistently ruled in favor of health care entities where the employer relied on:
  - "Objective, scientific information" from public health authorities to determine that granting a religious exemption for the COVID-19 vaccine would be an undue hardship; or
  - Potential violation of state law sufficient to show undue burden (*i.e.*, state law requiring vaccination at time of employment action).

Trends Since *Groff* - But Bad News

9th Circuit:

- Held that where alternative accommodations were available for an employee who requested a religious exemption for the COVID-19 vaccine with minimal cost to the employer, the employer's termination of the employees likely violated Title VII and FEHA.

4th Circuit, 10th Circuit:

- Strongly disfavor disposing of religious accommodation claims at the motion to dismiss phase or denying preliminary injunctions.
- Inquiry is very fact-specific for both elements of claim and employer defenses.

Trends Since *Groff* – Facial Hair

***Potter v. District of Columbia*, 2025 WL 310525 (D.C. Cir. Jan. 28, 2025)**

- Muslim firefighters had won an injunction in 2007 on a Religious Freedom Restoration Act claim that policies effectively banning facial hair violated free exercise clause.
- During the pandemic, N95 respirators were required. Muslim firefighters were transferred to administrative duty on grounds that beards interfered with function of the respirators.
- Firefighters moved for civil contempt, arguing N95 policy violated 2007 injunction after firefighters were returned to field duty but settlement negotiations failed.
- D.C. Circuit reversed dismissal of civil contempt determination and remanded to District Court to determine their rights.

Religious Accommodation – Employer Best Practices

- Evaluate religious accommodation requests on an individual basis
  - Is it sincerely held?
  - Is it religious in nature?
- Undue hardship – even more important to engage in good faith dialog. Do not have to consider other possible accommodations not proposed by employee but assessing one alternative accommodation probably not enough.
- Use a neutral policy, apply uniformly (can't favor one religion's beliefs over another's)

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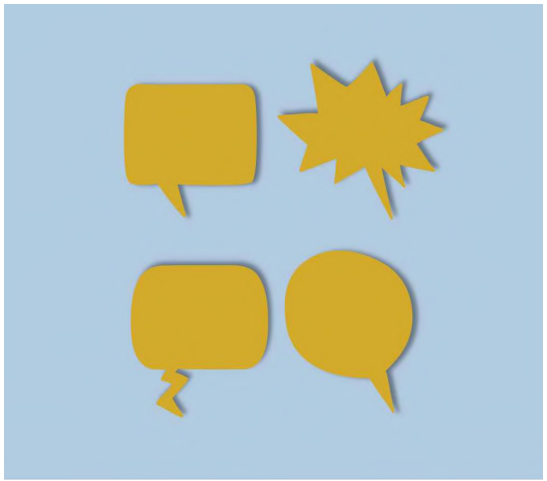
"YOU'RE FIRED": POLITICS IN THE WORKPLACE



Recently, dozens of employees at Google were terminated after engaging in a sit-in-style protest demanding an end to Google's contracts with the Israeli government due to the employees' views on the conflict in Gaza.

In the wake of the protests at Google, CEO, Sundar Pichai, sent a company-wide memo to staffers urging them to keep "politics" out of the workplace. The chief executive told workers that "this is a business, and not a place to act in a way that disrupts coworkers." Pichai went on to urge Googlers not to "fight over disruptive issues or debate politics" in the workplace.

These tensions are simmering in workplaces, especially as the Trump administration rolls out new policies, splitting employees and putting pressure on companies to act. Some employers have sought to prohibit or rein in political discourse on the clock.

Source: BBC

TMD

Political Discussions in the Workplace

In increasingly polarized times, how do employers manage political discussions in the workplace?

Political Discussions in the Workplace – Important Considerations

- Political discussions often involve issues of personal significance to employees – raised emotions and tensions
- Issues can negatively impact employee morale and working relationships
- First Amendment only applies to government entities.
  - However, there are various labor and employment laws that may protect political speech in the workplace.

Are Political Discussions Protected?

- Title VII does not protect "political affiliation" as a protected category.
  - Some jurisdictions (like Washington, D.C.) do
- Louisiana and South Carolina put strict limits on employer's ability to restrict political speech.
- The NLRA requires employees be able to discuss topics that relate to working conditions, like pay, benefits and workplace safety.

Managing Political Discussions in the Workplace

- Hard and fast rules banning all political discussions are likely not going to be effective – and in some cases may be unlawful
- Set expectations for employee conduct in the workplace with clear policies on tolerable (or intolerable) behavior
- Consider training or guidance where appropriate on professional communication and conflict resolution.

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FEDERAL GOVERNMENT TARGETING DEI PROGRAMS

The federal government has announced several executive actions and initiatives targeting DEI programs and efforts within the federal government, in federal contracting, and in the private sector.

Specifically, the White House has issued executive orders terminating internal DEI and DEIA offices and programs within the federal government, eliminating affirmative action and DEI requirements in federal contracting, and calling for increased enforcement actions against private sector companies with DEI initiatives – calling, for example, for the identification of 9 potential targets among publicly traded corporations, large non-profits and higher education institutions, and state and local bar and medical associations this year.

Source: Buzzfeed

TMD

DEI – What's Changed

Recent Executive Orders/Actions

- DEI efforts prohibited in federal contracting and spending
- Reporting obligations on race and gender revoked
- Contractors and grantees required to affirm they will not engage in DEI efforts
- All federal departments and agencies encouraged to take action to end private sector DEI efforts, including civil compliance investigation and litigation

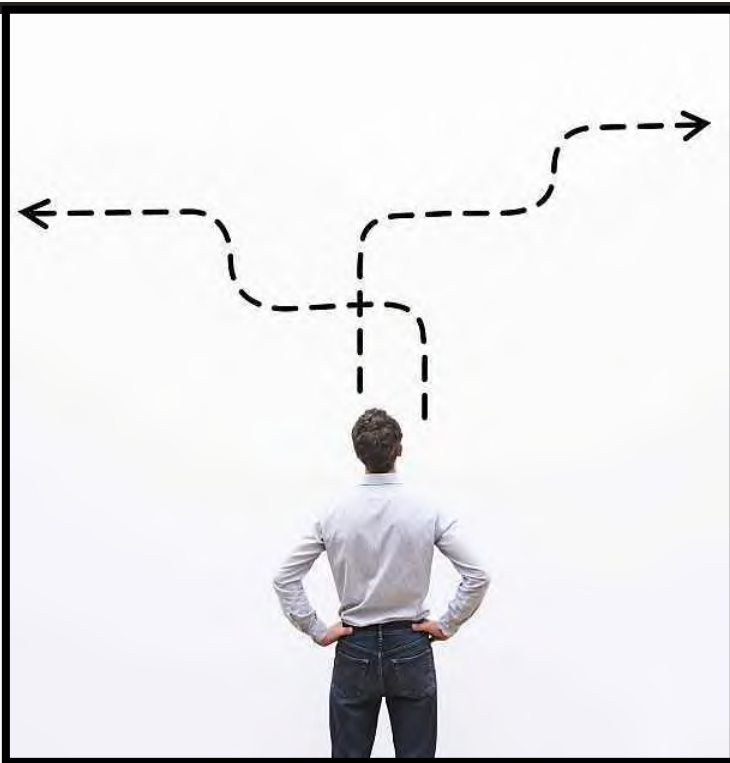
DEI – What Hasn't Changed

Discrimination based on race, color, religion, sex, and/or national origin remains illegal

General Parameters

Programs that address race, gender, religion, *etc.*, on their face are likely to be problematic, especially as they relate to ultimate employment actions like hiring and promotion.

- Quotas are unlawful because they indicate that the ultimate employment decision was based on a protected characteristic.
- Providing "extra credit" to a minority or female candidate is likely to also be unlawful.



Recent DOJ Memo

- U.S. Attorney General Pam Bondi recently issued new guidance aimed at clarifying the current administration's stance on the permissibility of diversity, equity and inclusion policies and procedures under federal anti-discrimination laws such as Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972
- Particularly affects entities that receive federal funding, such as schools, universities, state and local governments, health care providers, nonprofits and other private employers.

"Unlawful Discriminatory Policies & Practices" According to the Memo

- Race-based scholarships, mentorships, fellowships and other programs
- Preferential admission, hiring or promotion policies
- Policies that restrict access to facilities or resources based on race or ethnicity, such as racially designated "safe spaces" or BIPOC (Black, Indigenous, and People of Color)-only study lounges

"Unlawful Discriminatory Policies & Practices" According to the Memo cont'd

- Race-based training programs, including trainings that stereotype individuals based on their protected characteristics, such as programs that reference "white privilege" or "toxic masculinity" or require participants to separate into race-based groups
- Limited eligibility programs, such as DEI-focused workshops or events that mandate sex-specific eligibility requirements
- "Diverse slate" hiring practices, such as those that require a minimum number of candidates for a program or position to be from specific racial groups

"Unlawful Discriminatory Policies & Practices" According to the Memo cont'd

- Sex-based selection preferences, such as policies that prioritize awarding contracts to women-owned businesses;
- Allowing transgender employees or students to share intimate facilities with members of the opposite biological sex; and
- Allowing transgender females to compete in female athletic competitions.

What Can We Expect?

- Greater scrutiny over public facing statements, such as on websites and application materials
- Increased investigations and potential litigation
  - Reverse discrimination claims
  - Increased claims under the False Claims Act for contractors and grantees
  - Continued change

DOJ Recommendations

- Opening all programs, trainings and resources to qualified individuals regardless of protected characteristics
- Basing selection decisions on specific skills and qualifications directly related to job performance or program participation, rather than criteria related to socioeconomic status "first-generation" status, or geographic diversity – though universally applicable criteria, such as "financial hardship," can be permissible
- Documenting legitimate selection rationales unrelated to race, sex or other protected characteristics in hiring, promotion and contract awards

DOJ Recommendations

- Eliminating diversity quotas and "diverse slate" mandates;
- Auditing "facially neutral" selection criteria to ensure they do not serve as "unlawful proxies";
- Including nondiscrimination clauses in contracts with third parties, such as grant agreements, contractors and partnership agreements and actively monitoring third-party compliance; and
- Establishing anti-retaliation policies and safe reporting channels.

Evaluate

- Is the availability of the program effectively communicated to all individuals so that participation is open to all?
- What is the overall intent of the program? What is being done, how is it being done, and why?

What Can Employers Do?

- Increase the pipeline of qualified candidates by expanding recruitment and advertising, such as developing relationships and recruiting at HBCUs, women's colleges, and specialized schools.
- Implement blind application screening to avoid unconscious bias/allegations of preference.

Any Questions?

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