



Navigating the AI Regulatory Storm

What Employers Need To Know

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AI Use in the Employment Context

Hiring process

HR functions, timekeeping, and payroll

Workplace monitoring of employees

Use of generative AI by employees

Legal Landscape

Federal and
state anti-
discrimination
laws

Little-to-no AI-
specific federal
guidance

Patchwork of
state AI-specific
laws

Federal

- No comprehensive legislation addressing AI in the workplace
- Executive Order rescinded EEOC guidance for employers
- No guidance about impact of AI on FLSA overtime exemptions

Federal

- AI screening tools that scrape information commonly retrieved in a background check may implicate the Fair Credit Reporting Act (FCRA)
 - Which may require disclosures to job applicants or employees, or their written consent
- Federal Trade Commission (FTC) guidance has been removed
- The Consumer Financial Protection Bureau (CFPB) also issued guidance
- There is recent litigation in this area that we are monitoring

California

- California Civil Rights Council regulations on AI discrimination in hiring
- California Privacy Rights Act
- Transparency in Frontier AI Act
- Pending restrictions on AI and workplace monitoring tools

California Civil Rights Council regulations

- Effective Oct. 1, 2025
- Directly address how employers may and may not use AI, algorithms, and automated employment decision tools (AEDTs)
- Designed to prevent discrimination against applicants and employees
- Significantly increase recordkeeping obligations

Key Definitions: Employer

- Any person or entity with 5 or more employees, regardless of whether all employees work in California
- Includes agents acting on employer's behalf
 - Recruiting, screening, hiring, promotions, or decisions about pay, benefits, or leave
- Outside vendors may face potential liability

Key Definitions: Applicant

- Individuals who submit applications
- Individuals who claim they were deterred from applying due to an alleged discriminatory practice
- Employers could face claims from individuals they never directly interacted with

Key Definitions: Employee

- Individuals working under an employer's direction and control
 - Whether by appointment, contract, apprenticeship, or other arrangement, written or unwritten
- Does not include independent contractors, but poorly documented relationships can still give rise to disputes



Key Definitions: Employment Benefits

- Any favorable term, condition, or privilege of employment
- Includes hiring, promotion, compensation, selection for training programs, a discrimination-free workplace

Key Definitions: Automated Decision Systems

- Computational processes often powered by AI, machine learning, algorithms, or statistical models that make or assist in employment-related decisions
- Examples include tools that:
 - Screen resumes or applications
 - Administer skills, aptitude, or personality assessments
 - Analyze video interviews for facial expressions, tone, or word choice
 - Target job advertisements or recruiting materials for certain groups
 - Analyze applicant or employee data obtained from third parties



Prohibitions

- Unlawful for employers to use automated-decision systems or selection criteria that discriminate against applicants or employees based on any FEHA-protected characteristic
 - Includes race, religion, sex or gender, disability, age, medical condition, national origin, and other protected categories
- Courts and enforcement agencies can consider employers' proactive anti-discrimination efforts
 - Quality, scope, timing, results of those efforts, and employer's response to them may all be relevant



Prohibitions

- Prohibit discrimination tied to factors such as accents, English proficiency, immigration status, possession of a driver's license, citizenship, or certain height and weight requirements
 - Employers can't use automated tools to inquire about criminal history before conditional offer, or to ask about age, marital status, or disability
 - Employers can't use automated systems to publicize job opportunities in a way that discourages disabled individuals from applying
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Adverse Impacts

- Facially neutral technology may be unlawful if it has an adverse impact on protected groups
- Exception: practice is (1) job-related; (2) consistent with business necessity; and (3) no less discriminatory alternative exists

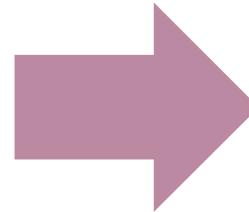
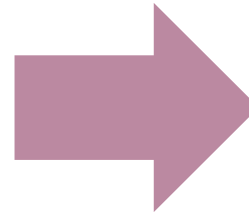
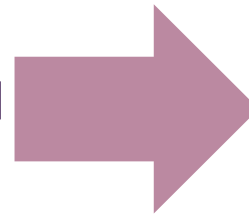
Adverse Impacts

AI tools and systems...

Tools that rank or screen applicants based on schedule availability

Systems that measure reaction time or physical abilities

AI tools that analyze facial expressions, voice, or behavior



Can adversely impact...

Individuals with religious obligations, disabilities, or medical conditions

Individuals with certain disabilities unless reasonable accommodations are provided

Race, national origin, gender, or disability



Recordkeeping

- Must retain covered records for at least 4 years from the later of record's creation or relevant personnel action
 - Includes applications, personnel files, selection criteria, automated-decision system data, other records related to employment practices or benefits
- If a complaint is filed, records must be reserved until matter is fully resolved, including through appeals
- Data storage, hosting, and cybersecurity protections can increase compliance costs



Key Takeaways

- Regulations reflect broader trend toward increased oversight of workplace technology
 - Employers shouldn't treat AI adoption as a one-time decision
 - Employers should:
 - Involve experienced employment counsel when implementing AI-based tools
 - Regularly review systems for potential bias or adverse impact
 - Conduct and document anti-bias testing and corrective actions
 - Weigh operational benefits of AI against compliance, recordkeeping, and data protection costs
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California Privacy Rights Act (CPRA)

- Effective Jan. 1, 2026
- Extends consumer data privacy to employees, applicants, and independent contractors, including:
 - The right to notice of what information is collected and how it is used
 - The right to correct inaccurate personal data
 - The right to deletion
 - The right to opt out of sharing personal information
 - Limitations on use of sensitive information, such as social security numbers, health data, or geolocations
 - The right against retaliation

California Transparency in Frontier AI Act

- Effective Jan. 1, 2026
- Whistleblower protection
- Applies to "frontier developers," persons trained or imitating training of frontier models using high-power advanced AI models
- TFAIA requires that employers:
 - Not retaliate against employees disclosing to authorities that the frontier developer's activities pose a catastrophic risk of danger to public health or safety
 - Provide notice of whistleblower rights to employees
 - Have processes for employees to anonymously report safety risks internally

California: Pending Restrictions on Workplace Monitoring

Assembly Bill 1331

- Limit workplace surveillance tools in private, off-duty areas
- Require workplace surveillance tools be disabled during off-duty hours
- Prohibit employers from requiring employees to "physically implant" a device that collects or transmits data

Assembly Bill 1898

- Require employers to provide written notice to employees and union reps that AI assisted in making employment-related decisions or surveilling the workplace

Assembly Bill 1883

- Prohibit use of surveillance tools to the extent they infer a worker's protected status or identify workers engaging in protected activity

Colorado: Colorado AI Act

- Effective June 30, 2026
 - proposed amendments may push it to Jan. 1, 2027
- Regulates employer use of AI in significant employment decisions
- Protects workers from algorithmic discrimination
- Employers must use reasonable care to protect workers from known or reasonably foreseeable risks of algorithmic discrimination

Rebuttable presumption of reasonable care if...

- Implement a risk management policy and program
- Complete an impact assessment
- Annually review deployment of system
- Notify employees if system will be a substantial factor in consequential decision
- Allow employee to correct personal data and appeal decision with human review
- Post mandatory disclosures on employer's website
- Disclose discrimination to AG within 90 days of discovery

Illinois

- AI Video Interview Act
 - Effective Jan. 1, 2020
 - Amended Jan. 1, 2022
- Bias in Hiring Law
 - Effective Jan. 1, 2026



Illinois AI Video Interview Act

- Employers must:
 - Notify applicant that AI may be used to analyze video interview and assess applicant's fitness for position
 - Inform applicant how the AI works and what general characteristics it uses to evaluate
 - Get applicant's consent to be evaluated by AI program
- Employers relying solely on AI analysis of video interview to select who advances to in-person interview must collect and report demographic data



Illinois Bias in Hiring Law

- Amends the Illinois Human Rights Act (IHRA)
- Civil rights violation to use AI in employment decisions that would discriminate against protected classes
 - Includes using ZIP codes as proxy for discrimination
- Employer must give notice to employees if they use AI in employment decisions

Maryland: facial recognition laws

- Effective Oct. 1, 2020
- Employers cannot use facial recognition to create facial templates during employment interviews without consent
- Consent waiver must state in plain language:
 - Applicant's name
 - Date of interview
 - That the applicant consents to using facial recognition during the interview
 - Whether the applicant read the consent waiver



New York: proposed legislation

- Senate Bill S-9028 would prohibit employers from discriminating against protected classes by using AI in employment decisions

NYC: regulations on bias audits

- Effective July 5, 2023
- Employers must undergo bias audit within 1 year before implementing AI decision tools
- Independent bias audit must assess tool's disparate impact on protected categories of employees
- Summary of results must be publicly available on employer's website



NYC: notice requirements for AI screening tools

- Effective July 5, 2023
- Notify employees and candidates at least 10 business days before using tool
- Notice must specify job qualifications and characteristics the tool will assess
- Employer must provide information about type of data collected within 30 days of written request

Texas: Responsible AI Governance Act

- Effective Jan. 1, 2026
- Prohibits employers from deploying AI systems with intent to unlawfully discriminate
- Disparate impact alone is not sufficient to demonstrate intent
- Enforced by state Attorney General
 - no private right of action

Guidance from state Attorneys General

State anti-discrimination laws apply to algorithmic discrimination caused by employers' use of AI

- California
- Connecticut
- Massachusetts
- Oregon
- New Jersey



Case Study

What if an employer used AI tools to screen resumes, and the tool used work history to screen out applicants based on age?

- Texas would require evidence of intent
- Employers in CA and NY would have to or be strongly encouraged to conduct bias audits and testing
- Employers in CA, CT, MA, OR, and NJ could face liability under state anti-discrimination laws

Case Study

- A company is considering using an in-headset AI tool to monitor and evaluate employees' interactions with customers for 'friendliness.'
- What should the company consider?
- Understand evaluation criteria
- Diverse training data
- Bias audits for adverse impacts
- Disability accommodations





Employee use of AI

- Errors and inaccuracies in work product due to hallucinations, model drift, or other issues
- Intellectual property violations
- FLSA exemption issues

Workplace monitoring with AI

- Tracking employee time
- Monitoring break time
- Employee privacy



Best Practices

- Due diligence on third-party vendors
 - Audit history of AI tool
 - Factors and traits measured by AI tool
 - Disability accommodation and accessibility options
 - Biometric privacy implications
 - Develop a comprehensive governance plan
 - Establish a system for monitoring outcomes
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Best Practices: Policy Implementation

- Selection and evaluation of AI before implementation
- Testing the AI tool before and after implementation
- Authorized and unauthorized employee use of AI tools
- Clear rules for employee use of generative AI



Questions?

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