

# Workforce 2.0: Navigating Legal HR in the Age of AI

## Presented by:

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### Overview

- Counsels companies that develop and use artificial intelligence (AI) on AI governance and strategy, intellectual property, data privacy, and regulatory and compliance issues.
- Represents clients in commercial litigation, intellectual property matters, and with data privacy issues.

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### Overview

- Counsels clients on compliance with federal, state and local employment laws, employee handbooks and policies, employee training, and employment agreements.
- Assists employers with employment disputes, including litigation of discrimination, harassment, retaliation, unpaid wage and class action claims in state and federal courts as well as mediation.

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## AI Is Not New and Has Many Uses

- ▶ AI – “Intelligence” of machines or technology that mimics human intelligence
  - ▶ See 15 U.S.C. § 9401(3), adopted by White House Exec. Orders
- ▶ 1950’s – emerging use of machines for reasoning, problem-solving, etc.
  - ▶ 1952 - Arthur Samuel developed a computer program that could independently play checkers
  - ▶ 1955 – Workshop at Dartmouth on “artificial intelligence,” coined this new term
- ▶ Nov. 30, 2022 – ChatGPT launches
- ▶ AI was a part of our life before ChatGPT
  - ▶ Siri, Alexa
  - ▶ Habit monitoring and social media feeds
  - ▶ Deepfakes
  - ▶ Facial recognition technology
  - ▶ Self-driving cars
  - ▶ Strategic games

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## AI Terminology

- ▶ **Machine Learning (ML)** – AI involving algorithms that enable computer systems to iteratively learn from data and make decisions, inferences, and predictions
- ▶ **Generative AI (GenAI)** – AI that can produce “new” content in a manner that mimics human output
- ▶ **LLM** - Large Language Model – Based on a “neural network” with millions or billions of parameters
- ▶ **Hallucination** – Generating fictitious data
- ▶ **Automated or algorithmic decision-making** – An AI system that makes decisions without human involvement

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## AI Terminology

- ▶ **Model Drift** - Decline in an AI model's predictive accuracy over time due to changes in the real-world data it encounters
- ▶ **Impact Assessment** - Process to identify the positive and negative effects of an AI system for alignment with ethical principles, legal requirements, and organizational goals
- ▶ **Bias Audit** - Evaluate an AI system to identify and measure unfair or discriminatory outcomes arising from training data, algorithmic design, or development assumptions
- ▶ **Fine-tuning** - Further training a model on a task-specific dataset for a particular domain or function and improve its performance for a specific use case
- ▶ **Retrieval Augmented Generation (RAG)** - Connect an LLM to an external library of data to generate relevant responses

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## AI Use in Employment Practices

- ▶ Common uses of AI in employment practices
  - ▶ Applicant credential/resume screener
  - ▶ Applicant background checks
  - ▶ GenAI used to write performance reviews
  - ▶ Interview software
  - ▶ Employee activity monitoring software
  - ▶ Facial and voice recognition technology
  - ▶ Keystroke and employee movement monitoring
  - ▶ Computer-based skills testing

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## Title VII's Disparate Treatment and Disparate Impact Tests

- ▶ **Title VII** generally prohibits intentional discrimination, or “disparate treatment” in employment, including employment tests that are “designed, intended or used to discriminate because of race, color, religion, sex or national origin.”
- ▶ Title VII also generally prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, if the tests or selection procedures are not “job related for the position in question and consistent with business necessity.” This is called “**disparate impact**” discrimination.
- ▶ *Note: Although the current federal administration is not pursuing disparate impact discrimination cases through the EEOC, plaintiffs can still pursue these claims under federal (state and local) anti-discrimination laws.*

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## AI and the Principal/Agent Relationship

### Harper v. Sirius XM Radio

- ▶ New lawsuit filed in the Eastern District of Michigan on 8/4/25
- ▶ Class action alleging that Sirius used algorithmic decision-making tools, including AI and machine learning provided by 3<sup>rd</sup> party vendor iCIMS to screen and reject job applicants for the purpose of disqualifying African-Americans from securing employment
- ▶ Plaintiff worked in IT and applied for approximately 150 positions with Sirius via the ICIMS platform, and he received only 1 interview despite allegedly being qualified for these positions.
- ▶ Claims that Sirius used certain data points to screen candidates based on race, including their educational institution, employment history and zip code.
- ▶ Claims that the vendor used technology to identify and extract information from plaintiff's resume, including his name and demographic data and makes assessments about plaintiff's skills based on this data, which resulted in the rejection of Harper and other African-American candidates
  - ▶ Alleges that the algorithmic decision making tool was trained on data reflecting historical inequalities.

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## AI and the Principal/Agent Relationship

### Mobley v. Workday, Inc. (N.D. Cal. 2024)

- ▶ A job applicant sued software company Workday Inc., alleging that its automated tools rejected him from roles based on race, age, and disability
- ▶ Claims based on the theory that a vendor could be liable as the agent of its employer-customer
- ▶ July 2024 MTD Denied - adequately alleged that the customers delegated traditional employment tasks to Workday
- ▶ Workday is “an agent because its tools are alleged to perform a traditional hiring function of rejecting candidates at the screening stage and recommending who to advance to subsequent stages, through the use of artificial intelligence and machine learning”
- ▶ May 2025 – court granted conditional certification of the Age Discrimination in Employment Act (ADEA) claims

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## AI and Privacy Concerns

### ▶ Brewer v. Otter.ai (N.D. Cal. Aug. 2025)

- ▶ Alleged that Otter secretly records private conversations through its AI meeting assistant, *Otter Notetaker*
- ▶ Alleged that Otter Notetaker records without notice or consent of meeting participants
- ▶ Alleged that Otter uses meeting transcripts for training its tool

### ▶ Organizational and HR Implications

- ▶ Privacy-based claims in the lawsuit, but a concern when employees are discussing confidential and sensitive business information
- ▶ Vet your vendors
- ▶ Train employees on when and when not to use AI notetakers
- ▶ Obtain consent, have a prepared script

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## EEOC and Algorithmic Discrimination

### EEOC v. iTutorGroup

- ▶ EEOC sued claiming that the company's employment application software automatically rejected female applicants age 55 and older and male applicants age 60 or older
  - ▶ Named plaintiff initially applied for position using her real birthdate and her application was rejected. The next day, she applied using a more recent birthdate and submitted an otherwise identical application and was offered an interview
- ▶ Settled in September 2023
  - ▶ **\$365,000** paid by iTutor
  - ▶ Extensive continued training for employees who hire tutors
  - ▶ Issuance of a more robust anti-discrimination policy
  - ▶ EEOC monitoring at least the next **five years**

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## AI and Algorithmic Discrimination

- ▶ **California** approved new regulations in June, which goes into effect on **October 1, 2025**.
- ▶ Impact of Regulations:
  - ▶ Confirms that an automated-decision system may violate California law if it harms applicants or employees based on protected characteristics, such as gender, race, or disability.
  - ▶ Employers must maintain employment records, including automated decision data, for a minimum of 4 years.
  - ▶ Affirms that automated-decision system assessments, including tests, questions, or puzzle games that elicit information about a disability, may constitute an unlawful medical inquiry.
- ▶ The law considers relevant any evidence of, or lack of evidence, of anti-bias testing or similar protective efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and other response to the results.

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## California AI Regulations Cont'd

- ▶ “Automated-Decision System”: A computational process that makes a decision or facilitates human decision making regarding an employment benefit, which may include artificial intelligence, machine-learning, algorithms, statistics and/or other data processing techniques.
  - ▶ Examples:
    - ▶ Tools to make predictive assessments about an applicant or employee
    - ▶ Measuring an applicant/employee’s skills, dexterity, reaction-time, and/or other abilities or characteristics.
    - ▶ Directing job advertisements or other recruiting materials to targeted groups
    - ▶ Screening resumes for particular terms or patterns
    - ▶ Analyzing facial expression, word choice and/or voice in online interviews; or
    - ▶ Analyzing employee or applicant data acquired from third parties.

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## AI and Algorithmic Discrimination

- ▶ **NYC Local Law 144 (2023) – Using AI in hiring and job promotion decisions**
  - ▶ Prohibits employers and employment agencies from using an automated employment decision tool (AEDT) in NYC unless a bias audit was performed
  - ▶ Employers must give notice that AI tools will be used and provide a summary of the audit on its website
- ▶ **Illinois HB 3773 – 1/1/26 Effective Date**
  - ▶ Amends Human Rights Act and prohibits using AI that “has the effect of subjecting employees to discrimination on the basis of protected classes under Illinois HRA”
  - ▶ Requires employers to provide notice that the employer is using AI for purposes identified in the law
  - ▶ Extended protection to recruitment and hiring so applicants appear to be covered
  - ▶ Potential remedies include back pay, lost benefits, clearing of personnel file, emotional damages, hiring, promotion, reinstatement, front pay where reinstatement is not possible, and attorneys’ fees

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## Colorado's AI Act - "High Risk" Systems

- ▶ The first comprehensive US risk-based AI legislation
- ▶ Focus is on "high risk systems" – can result in the denial of important services to consumers, including employment
- ▶ AI developers and deployers must use reasonable care to protect consumers from known or reasonably foreseeable risks of algorithmic discrimination
  - ▶ Disclose use of high risk AI systems to consumers
  - ▶ Implement risk management policies that address AI
- ▶ AI deployers must conduct AI impact assessments annually
- ▶ Update (Summer 2025) – law is delayed until June 2026 to allow revisions

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## Algorithmic Discrimination –Common Legislative Themes

- ▶ Burden and potential liability on AI deployers, not just AI tool developers
- ▶ Implement AI governance policies
- ▶ Mandatory impact assessments and audits
- ▶ Disclose use of AI to potentially affected individuals
- ▶ Provide the right to opt out of AI ADM use
- ▶ *Key Takeaway - Develop a formalized approach to managing AI risk!*

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## The ADA and Reasonable Accommodations

- Employers must provide reasonable accommodations to individuals with disabilities, including during the hiring process, unless doing so would create an undue hardship for the employer (42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9)
- Reasonable accommodation – a change in the way things are usually done to give equal opportunities to a person with a disability in applying for a job, performing a job, or accessing the benefits and privileges of employment

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## AI and Reasonable Accommodations

- **When a reasonable accommodation could be needed:**
  - Use of GenAI by employees who are vision or hearing-impaired
  - AI interview technology that does not work with a blind applicant's computer reading program
  - Video interviewing software that analyzes applicant speech patterns and an applicant with a speech impediment is rejected or given a low or unacceptable rating
  - AI tool's accuracy is reduced because it cannot properly assess an applicant with an impairment, leading to biased outcomes
  - Vision-impaired employee who uses voice to text software instead of a keyboard may be rated poorly by keystroke monitoring tools and loses a promotion
  - Applicant with limited manual dexterity has difficulty taking a test that requires use of a keyboard

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## Monitoring GenAI Usage

- Limiting the use of GenAI while performing work to only specific tasks with manager approval.
- Employees must discuss the use of GenAI with manager if they intend to use AI for work purposes.
- All AI-generated content must be reviewed for accuracy before relying on it for work purposes. If a reliable source cannot be found to verify factual information generated by GenAI, that information cannot be used for work purposes.
- Exclude all AI-generated works from work that is eligible for company copyright, trademark or patents.
- Zoom AI Companion and similar programs: Determine when and how employees may use this tool, and provide guidance on usage of Zoom when AI Companion is present.

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## AI Technology Agreements

- ▶ Diligence before signing – understand the bias implications
- ▶ Addressing bias and discrimination in an AI contract
  - ▶ Reps and warranties on system performance and output quality
    - ▶ Tie reps and warranties to specific metrics, standards, or requirements (impact ratios)
    - ▶ AI model development complies with best practices for transparency, fairness, and to identify and mitigate bias in the training data and algorithms
  - ▶ Indemnification section – protect organizations against discrimination suits and violations of consumer protection statutes
  - ▶ Limitation on liability – caps on damages arising from high-risk uses; make sure the vendor still has financial accountability
  - ▶ Audit rights – can request a variety of information, such as testing methodology and results, validation reports

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## Compliance Through Governance

- AI risk management should be part of an organization's risk management strategy and tailored to the organization
- AI adoption best practices
  - Establish an AI task force, working group, committee
  - Cross-functional team of SMEs and who own AI
  - Implement written AI policies for the organization
    - Leverage existing policies (cyber, privacy, DLP, IP)
    - Identify use cases, permitted and prohibited activities,
    - Stress respect for ethical use, minimizing biased outcomes, and IP and data privacy rights
    - Accountability for violations
  - Executive buy-in and messaging
  - AI Impact/Bias Assessment and Vendor Diligence

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## AI Impact Assessment & Bias Mitigation

- **Goals of an AI Impact Assessment**
  - Identify opportunities where AI can provide value, improve efficiency, and create new revenue streams.
  - Assess risks related to data privacy, ethical considerations, and workforce implications
- **Impact Assessment methodology - qualitative and quantitative**
  - Define metrics and indicators to measure impact
  - What data is being used for development and training?
    - Data quality is critical
    - Have permissions to use this data?
    - Leveraging third party models?
  - Geography – where is the AI system developed and deployed?
  - What type of output is expected and how will it be used?
  - Oversight of AI development, deployment, maintenance, and output use
  - Impact on biased data on individuals and groups?

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## Questions?



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