EXECUTIVE SERIES:
LABOR & EMPLOYMENT

# THE EVOLVING LEGAL LANDSCAPE GOVERNING USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT DECISION-MAKING



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## AGENDA

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- Common Uses of AI in Employment
- AI Employment Law Tracking
- AI Employment Litigation Trends
- AI Impact on Anti-Discrimination Policies & Practices
- Best Practices for Technology Agreements
- Monitoring AI Usage and Internal Compliance

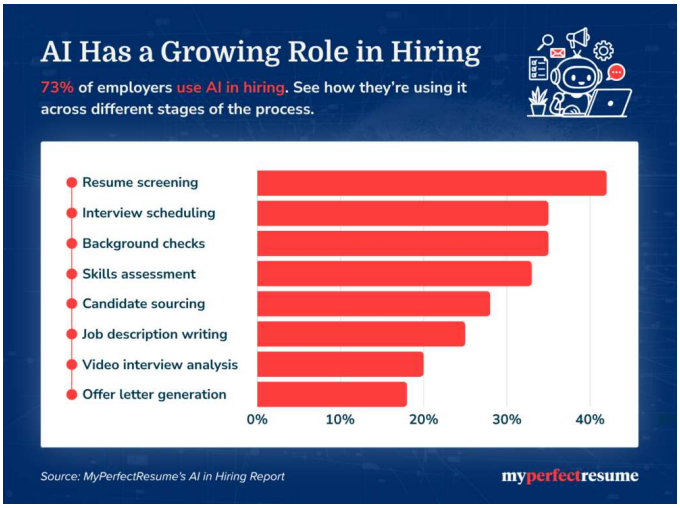


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## COMMON AI USES IN EMPLOYMENT PRACTICES

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## AI IMPACT ON EMPLOYMENT DECISIONS

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- A recent survey of 1,000 hiring managers revealed the following trends related to AI in workforce decision-making
- Nearly two-thirds of employers (65%) say AI automatically rejects candidates **before any human review**:
  - 26% of employers say AI rejects 1%–25% of applicants
  - 25% say it rejects 26%–50%
  - 11% say it rejects 51%–75%
  - 3% say it rejects over 75%

*Source: MyPerfectResume, 73% of Employers Say They Use AI in Hiring Decisions- https://www.myperfectresume.com/career-center/careers/basics/ai-in-hiring-layoffs*


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## AI IMPACT ON EMPLOYMENT DECISIONS

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- Nearly half (47%) say AI may have filtered out candidates they would have moved forward in the hiring process

- More than half of employers (51%) use AI to flag "risky" candidates, such as job-hoppers or those with employment gaps
- Another 12% are considering implementing this capability

*Source: MyPerfectResume, 73% of Employers Say They Use AI in Hiring Decisions- https://www.myperfectresume.com/career-center/careers/basics/ai-in-hiring-layoffs*


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## EXECUTIVE BRANCH APPROACHES TO AI REGULATION

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- Has been a dramatic shift toward deregulation under the current administration
- July 23, 2025 – Three executive orders to prevent "woke" AI in government, position the US as a global AI leader, and streamline approval for a new AI infrastructure
- Proposed 10-year moratorium on state AI laws in the One Big Beautiful Bill Act (did not make it into final version of bill)
- December 11, 2025 (EO – Aimed at forcing states to drop AI restrictions that are "barriers to United States AI leadership"
  - Targets state AI regulation through potential lawsuits, loss of Broadband Equity Access and Deployment funding, loss of other grant funding, potential FTC action, etc
- June 2, 2026 (EO 14409) – Charges the federal government with creating a voluntary program for review of "covered frontier models," as well as addresses certain national security issues


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## STATE AND LOCAL APPROACHES - CALIFORNIA

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- In September, California enacted the "No Robo Bosses Act" which takes effect July 1, 2027
- Applies to private and public sector employers
- Governs the use of **"automated decision systems" or "ADS"** in employment:
  - ADS includes any computational **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 assist or replace human discretionary decision-making and materially impacts natural persons**
    - Does not include a spam email filter, firewall, antivirus software, identity and access management tools, calculator, database, dataset, or other compilation of data

- **Employers are prohibited from using ADS to:**
  - Infer an employee's protected status (race, gender, age, etc.)
  - Predict and take adverse action against a worker for exercising their legal rights
  - Prevent compliance with the law


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## STATE APPROACHES – CALIFORNIA (CONT.)

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- **Employers cannot solely rely on ADS when making a disciplinary or termination decision**
  - If an employer primarily relies upon an ADS output to make a disciplinary or termination decision, the employer shall direct a human to corroborate the decision using data that was collected or used to produce the ADS output or other relevant corroborating or supporting information
  - "Corroborating or supporting information" may include, but is not limited to, any of the following:
    - Supervisory or managerial evaluations
    - Personnel files
    - Work product of employees
    - Peer reviews
    - Witness interviews, that may include relevant online customer reviews

- If an employer primarily uses an ADS to make a disciplinary or termination decision, the impacted employee can request, and require an employer to provide, a description of the employee's own data primarily used by an ADS to make a disciplinary or termination decision, as specified
- Also prohibits employers from discharging, threatening to discharge, demoting, suspending, or in any manner discriminating or retaliating against any employee for taking certain actions asserting their rights under this law


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## STATE APPROACHES – CONNECTICUT

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- The **Connecticut Artificial Intelligence Responsibility and Transparency Act (CART Act)** takes effect in phases from October 2026 to January 2028
  - Applies to employers that use AI tools in the state and companies that build or substantially modify those tools
- **Covered technology:** any AI or automated system that processes personal data and generates an output — a score, ranking, recommendation, or prediction — that is a major factor in an employment decision
  - Not covered: ordinary business software (spreadsheets, databases, antivirus), tools used only incidentally, and purely descriptive or statistical information
- **Covered decisions:** hiring, promotion, discipline, discharge, renewal, and selection for training — plus terms and conditions of employment
- **Interaction disclosure:** When an AI tool interacts with an employee or applicant, tell them — in plain language — that they are dealing with the technology. No notice needed if it would be obvious to a reasonable person
- **Pre-decision written notice:** Before using AI to make or heavily influence an employment decision, give the person written notice covering six points:
  - That AI is being used
  - Purpose of AI
  - Trade name
  - Data categories used and how they're assessed
  - Data sources
  - Employer contact information
- The Act amends Connecticut's anti-discrimination law so that using an automated employment-related decision technology is **not a defense** to a complaint alleging a discriminatory employment practice
- Any employer that files a federal WARN Act layoff notice with the Connecticut Labor Department must also state whether the layoffs are tied to the employer's use of AI or other technological change


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## STATE AND LOCAL APPROACHES – NEW YORK CITY AND ILLINOIS

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### NYC Local Law 144 (2023) – Using AI in hiring and job promotion

- 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 distress damages, hiring, promotion, reinstatement, front pay where reinstatement is not possible, and attorneys' fees


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## STATE APPROACHES – COLORADO

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- Automated Decision-Making Technology (Senate Bill 26-189), effective January 1, 2027
- Senate Bill 26-189 rewrites Colorado's AI law, replacing the earlier Colorado Artificial Intelligence Act with a new framework on "automated decision-making technology" (ADMT) in important decisions
- Covered technology is broad: any technology that processes personal data and uses computation to generate output, including predictions, recommendations, classifications, rankings, scores and other information that is used to make, guide or assist in an employment decision
- Covered decisions are employment decisions the technology helps "materially influence" — access to, eligibility for, selection for, or compensation for a job, covering both internal and external hiring
- Before using covered ADMT to influence an employment decision, the employer must give a "clear and conspicuous" notice that it uses the technology, plus how to get more information
- Within 30 days of an adverse outcome materially influenced by ADMT, the employer must give the person an individualized disclosure, which includes a plain-language description of the consequential decision and the ADMT's role in the decision, how to request more information (tool name, version, developer, data categories and sources of data used), and an explanation of their rights


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## STATE AND LOCAL APPROACHES – TEXAS AND MINNESOTA

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### Texas

- Responsible AI Governance Act, effective January 1, 2026
- Prohibits the development or deploying of an AI system with the intent to unlawfully discriminate against a protected class in violation of state law
- Expressly rejects disparate-impact theory

### Minnesota

- No law relating to the use of AI in the employment context yet
- SF4573 – Proposed legislation amending Minn. Stat. § 363A.08 (Minnesota Human Rights Act)
  - Would make it illegal to use AI in a manner that discriminates against individuals based on membership in a protected class
- SF4686 – Proposed legislation creating Minn. Stat. §§ 181.9931-181.9938
  - Would create significant notice, recordkeeping, human review, and audit requirements, as well as limit permitted uses of "electronic monitoring tools"
- Proposed Minn. Stat. § 181.9937
  - Would provide for WARN-style notice for workers whose positions are affected by technological displacement


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## AI AND PRIVACY CONCERNS

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**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


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## TITLE VII'S DISPARATE TREATMENT AND DISPARATE IMPACT TESTS

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- 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

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- **Mobley v. Workday, Inc. (N.D. Cal. 2023)**
  - 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
  - In July 2024, the court denied a motion to dismiss, concluding that the plaintiff 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
  - June 2026 – Judge denied Workday's motion to dismiss certain class action claims under FEHA


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## EEOC AND ALGORITHMIC DISCRIMINATION

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- **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 for at least the next **five years**


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## THE ADA AND REASONABLE ACCOMMODATIONS

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- 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

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- **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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## AI AND REASONABLE ACCOMMODATIONS

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**Example of pending legal action: ACLU v. Criteria Corp**

- October 6, 2026 - ACLU filed a complaint with the CA Civil Rights Department alleging that Criteria Corporation, a technology corporation that develops and sells assessments used for hiring and other employment processes, raise concerns about discrimination against applicants based on disability, race, and sex.
- The ACLU's complaint focuses on Criteria's assessment products, Emotify, which claims to measure "emotional intelligence" and an applicant's ability to perceive, understand, and manage emotions by asking candidates to interpret facial expressions and match them to descriptions of emotions.
- The ACLU alleges that Emotify's assessment closely mirrors clinical diagnostic tests for autism and related neurodevelopmental conditions, and it may screen out or disproportionately impact qualified individuals with those conditions.
- Claims that the assessment parallels the content of clinical diagnostic tools and is likely to reveal information pertaining to a disability, it likely constitutes a disability-related inquiry, or medical or psychological examination, and is likely to result in unfairly excluding applicants, in violation of the FEHA and ADA.


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## WHAT HAPPENS NEXT?

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- Inventory AI tools used in hiring and personnel decisions
- Discuss compliance obligations with vendors, legal and HR
- Run and document appropriate bias testing of those tools
- Build plain-language interaction disclosures and standardized pre-decision notices
- Review vendor contracts to allocate compliance duties and secure required information
- Update WARN-notice procedures to capture the AI/technology question, as appropriate


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## AI TECHNOLOGY AGREEMENTS

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- 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 – protects an organization 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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## MONITORING GENAI USAGE

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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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## COMPLIANCE THROUGH GOVERNANCE

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- AI risk management should be part of an organization's risk management strategy and tailored to the organization
- AI adoption best practices
  - Executive buy-in and messaging
  - Establish an AI task force, working group, committee
  - Cross-functional team of subject matter experts who own AI
- Implement written AI policies for the organization
  - Leverage existing policies (cyber, privacy, data loss prevention, intellectual property)
  - Identify use cases, permitted and prohibited activities
  - Stress respect for ethical use, minimizing biased outcomes, and IP and data privacy rights
  - Accountability for violations
- AI impact/bias assessment
- Vendor diligence


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