

GETTING AHEAD OF THE DEVELOPING REGULATION OF THE USE OF ARTIFICIAL INTELLIGENCE TOOLS IN EMPLOYMENT

ROFFMAN HORVITZ, PLC
LEGAL COUNSELING
HUMAN RESOURCES COMPLIANCE & EMPLOYMENT DATA ANALYTICS

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AUGUST 13, 2025

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MEET THE TEAM



JOSHUA S. ROFFMAN
MANAGING ATTORNEY

Joshua S. Roffman is the Managing Attorney and co-founder of Roffman Horvitz, PLC. The Firm advises employers on a broad array of human resource compliance matters. Josh has been advising employers for more than 20 years. He has deep experience in advising clients regarding pay equity, inclusion and diversity programs, federal contractor employment regulations, and analysis of employment data. In assisting employers over the course of his career, he has developed a thorough understanding of the gamut of human resources issues and how they affect businesses and organizations. Josh combines his understanding of employment law, statistics, and how businesses and organizations operate to develop regressions and other statistical analyses of various employment practices, including compensation, that are tailored to the specific goals and circumstances of the individual client. Josh works closely with his clients to assess how best to run the analyses, which he and the Firm run in-house.

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MEET THE TEAM



ALISSA A. HORVITZ
MEMBER ATTORNEY

Alissa A. Horvitz is a Member Attorney and co-founder of Roffman Horvitz, PLC. The Firm advises employers on a broad array of human resource compliance matters. Alissa has been advising employers for more than 35 years. She has deep experience in advising clients regarding inclusion and diversity programs, federal contractor employment regulations, and analysis of employment data. In assisting employers of the course of career, she has developed a thorough understanding of the gamut of human resources issues and how they affect businesses and organizations. Alissa particularly enjoys conducting live and web-based training on various employment topics, including lawful inclusion and training programs, applicant tracking, and regulatory compliance.

OUTLINE

- How Artificial Intelligence is Being Used by Talent Acquisition and Human Resources Departments
- Trump Administration Perspective on Artificial Intelligence
- Challenges to Employers' Use of AI in the Hiring and Promotion Processes
- State Laws Regulating the Use of Artificial Intelligence in Employment
- EU Regulation of Artificial Intelligence
- Vetting Artificial Intelligence Products
- Validation Standards

HOW ARTIFICIAL INTELLIGENCE IS BEING USED BY TALENT ACQUISITION AND HUMAN RESOURCES DEPARTMENTS (1 of 2)

- Content development
 - Scripts candidate communications
 - Templates for emails
 - Job descriptions
 - Job announcements/advertisements
- Streamline work processes
 - Onboarding and free up company resources and time in performing those roles
 - Scheduling and managing calendars
- Planning
 - Plan and manage workforce needs
 - Inform recruiting initiatives

HOW ARTIFICIAL INTELLIGENCE IS BEING USED BY TALENT ACQUISITION AND HUMAN RESOURCES DEPARTMENTS (2 of 2)

- Establishing evaluation criteria
 - Hiring
 - Promotions
 - Compensation
 - Workforce Reductions
- Applying evaluation criteria
 - Evaluation of applicant and employee qualifications
 - Identifying candidates for talent acquisition to review
 - Selecting candidates for phone screen, interview, job offer
 - Determining employee raises and bonuses
 - Streamlining and informing performance ratings
 - Identifying reductions-in-force terminations

TRUMP ADMINISTRATION PERSPECTIVE ON ARTIFICIAL INTELLIGENCE (1 of 2)

- Executive Order 14179 (“Removing Barrers to American Leadership in Artificial Intelligence”) – January 23, 2025
 - Steps to undo policies and directives develop pursuant to revoked Executive Order 14110 and implementing OMB memorandums:
 - “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” – October 30, 2023
 - OMB Memorandum M-24-10 (“Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence”) – March 28, 2024
 - OMB Memorandum M-24-18 (“Advancing the Responsible Acquisition of Artificial Intelligence in Government”) – September 23, 2024
 - OMB Memorandum M-25-21 (“Accelerating Federal Use of AI through Innovation, Governance, and Public Trust”) – April 3, 2025
- Winning the AI Race: America’s AI Action Plan – July 23, 2025
- Executive Order 14319 (“Preventing Woke AI in the Federal Government”) – July 23, 2025

TRUMP ADMINISTRATION PERSPECTIVE ON ARTIFICIAL INTELLIGENCE (2 of 2)

- AI and Crypto Czar
 - David Sacks
 - Executive Order 14177 – President’s Council of Advisors on Science and Technology – January 23, 2025
- AI.gov
- Other Executive Orders
 - 13859 – Maintaining American Leadership in Artificial Intelligence – February 11, 2019
 - 13960 – Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government – December 3, 2020
 - 14277 – Advancing Artificial Intelligence Education for American Youth – April 23, 2025
 - 14318 – Accelerating Federal Permitting of Data Center Infrastructure – July 23, 2025
 - 14320 – Promoting the Export of the American AI Technology Stack – July 23, 2025
- Provision in One Big Beautiful Bill Act that would have placed a 5-year moratorium on regulation of AI by the states – removed from bill by the Senate 98-1

CHALLENGES TO EMPLOYERS' USE OF AI IN THE HIRING AND PROMOTION PROCESSES (1 of 3)

- *Mobley v. Workday, Inc.* (Age Discrimination in Hiring)
 - Brief background of the litigation
 - Complaint filed in 2023 in federal court in the Northern District of California
 - Court certified the case as a collective action in May 2025, on behalf of applicants aged 40 and over who were allegedly denied employment recommendations through Workday's platform
 - Discovery in the case goes back to September 2020
 - And the class will include workers who applied through part of a technology platform that Workday acquired in 2024, after the lawsuit was filed
 - "... at this stage, the fact that Workday has expanded or made changes to its AI features over time does not mean that newer AI features are outside the scope of the unified policy" challenged in the First Amended Complaint.

CHALLENGES TO EMPLOYERS' USE OF AI IN THE HIRING AND PROMOTION PROCESSES (2 of 3)

- *Mobley v. Workday, Inc.* (Age Discrimination in Hiring) (continued)
 - Artificial Intelligence vendors can be held liable as agents of employers
 - "Workday's software is not simply implementing in a rote way the criteria that employers set forth, but is instead participating in the decision-making process by recommending some candidates to move forward and rejecting others. Given Workday's allegedly crucial role in deciding which applicants can get their 'foot in the door' for an interview, Workday's tools are engaged in conduct that is at the heart of equal access to employment opportunities."
 - Employers cannot avoid liability by outsourcing hiring to AI tools
 - Bias in training data can lead to disparate impact claims

CHALLENGES TO EMPLOYERS' USE OF AI IN THE HIRING AND PROMOTION PROCESSES (3 of 3)

- *D.K. v. HireVue and Intuit* (Disability Discrimination in Promotion Process)
 - Filed by the ACLU on March 19, 2025 with the Colorado Civil Rights Division and the Equal Employment Opportunity Commission [180 days is September 15]
 - Native American woman alleged that she was denied a promotion after an automated video interview
 - She further alleged that the HireVue interview tool failed to include subtitles for all audible questions and instructions provided during the interview, and it couldn't convert the employee's speech to text due to her accent as a deaf and Native American person

STATE LAWS REGULATING THE USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT – CALIFORNIA (1 of 2)

- Employment Regulations Regarding Automated-Decision Systems – approved June 27, 2025; effective October 1, 2025
 - “It is unlawful for an employer or other covered entity to use an automated-decision system or selection criteria (including a qualification standard, employment test, or proxy) that discriminates against an applicant or employee or a class of applicants or employees on a basis protected by the Act, subject to any available defense.”
 - “Relevant to any such claim or available defense is evidence, or the lack of evidence, of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.”
 - “Automated-Decision System”
 - “A computational process that makes a decision or facilitates human decision making regarding an employment benefit . . .”
 - “An Automated-Decision System may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques.”

STATE LAWS REGULATING THE USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT – CALIFORNIA (2 of 2)

• Employment Regulations Regarding Automated-Decision Systems (continued)

• Automated-Decision Systems perform tasks such as:

- (A) Using computer-based assessments or tests, such as questions, puzzles, games, or other challenges to: (i) Make predictive assessments about an applicant or employee; (ii) Measure an applicant's or employee's skills, dexterity, reaction-time, and/or other abilities or characteristics; (iii) Measure an applicant's or employee's personality trait, aptitude, attitude, and/or cultural fit; and/or (iv) Screen, evaluate, categorize, and/or recommend applicants or employees.
- (B) Directing job advertisements or other recruiting materials to targeted groups;
- (C) Screening resumes for particular terms or patterns;
- (D) Analyzing facial expression, word choice, and/or voice in on-line interviews; or
- (E) Analyzing employee or applicant data acquired from third parties.

• "Any policy or practice of an employer or other covered entity that has an **adverse impact** on employment opportunities of individuals on a basis enumerated in the Act is **unlawful unless** the policy or practice is **job-related and consistent with business necessity**."

• "The Council herein adopts the **Uniform Guidelines on Employee Selection Procedures** promulgated by various federal agencies, including the EEOC and Department of Labor."

STATE LAWS REGULATING THE USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT – OTHER JURISDICTIONS (1 of 2)

• New York City

- Local Law 144 of 2021 – Automated Employment Decision Tools
 - effective since January 1, 2023; enforced starting on July 5, 2023
- Automated Employment Decision Tools (AEDT) – "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 substantially assist or replace discretionary decision making for making employment decisions that impact natural persons."
- Bias audits

• Illinois

- AI amendments to Illinois Human Rights Act (IHRA) – effective January 1, 2026
 - "Artificial intelligence" means a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments."
 - It is a civil rights violation:
 - (1) With respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or the terms, privileges, or conditions of employment, for an employer to use artificial intelligence that has the effect of subjecting employees to discrimination on the basis of protected classes under this Article or to use zip codes as a proxy for protected classes under this Article.
 - (2) For an employer to fail to provide notice to an employee that the employer is using artificial intelligence for the purposes described in paragraph(1).

STATE LAWS REGULATING THE USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT – OTHER JURISDICTIONS (2 of 2)

- Colorado
 - Consumer Protection in Interactions with Artificial Intelligence Systems – scheduled to go effective February 1, 2026
 - “High-Risk Artificial Intelligence System”: “Any artificial intelligence system that, when deployed, makes, or is a substantial factor in making, a consequential decision”
 - Governor Polis seeking special legislative session to weaken AI law before it goes into effect on February 1, 2026
- Texas
 - Texas Responsible Artificial Intelligence Governance Act – enacted June 22, 2025; effective January 1, 2026
 - “A person may not develop or deploy an artificial intelligence system with the intent to unlawfully discriminate against a protected class in violation of state or federal law.”
 - “a disparate impact is not sufficient by itself to demonstrate an intent to discriminate”
- Digital Likeness (California, Illinois)
- Video Interviews (Illinois)

EU REGULATION OF ARTIFICIAL INTELLIGENCE (1 of 2)

- EU Artificial Intelligence Act – Passed July 2024
- Article 2 (Scope) – Applies to:
 - (a) providers placing on the market or putting into service AI systems or placing on the market general-purpose AI models in the Union, irrespective of whether those providers are established or located within the Union or in a third country;
 - (b) deployers of AI systems that have their place of establishment or are located within the Union;
 - (c) providers and deployers of AI systems that have their place of establishment or are located in a third country, where the output produced by the AI system is used in the Union;
 - (d) importers and distributors of AI systems;
 - (e) product manufacturers placing on the market or putting into service an AI system together with their product and under their own name or trademark;
 - (f) authorized representatives of providers, which are not established in the Union;
 - (g) affected persons that are located in the Union.

EU REGULATION OF ARTIFICIAL INTELLIGENCE (2 of 2)

- “Employment, workers management and access to self-employment” AI systems are classified as high risk:
 - AI systems intended to be used for the recruitment or selection of natural persons, in particular to place targeted job advertisements, to analyze and filter job applications, and to evaluate candidates;
 - AI systems intended to be used to make decisions affecting terms of work-related relationships, the promotion or termination of work-related contractual relationships, to allocate tasks based on individual behavior or personal traits or characteristics or to monitor and evaluate the performance and behavior of persons in such relationships.

VETTING ARTIFICIAL INTELLIGENCE PRODUCTS

- Process for identifying all AI tools that organization is using or considering using
- Internal AI Review Taskforce
 - Composition
 - Legal
 - SMEs
 - Talent acquisition
 - Human resources
 - Validation professionals
 - AI technical expertise
- Categorize risk level of AI Tool
 - Low Risk – common sense review; is the tool effective at doing what it’s designed to do well
 - Higher Risk – need for formalized validation, conformity assessment (EU AI law), or similar vetting process
- Department of Commerce National Institute of Standards and Technology (NIST) AI Risk Management Framework - 2023

VALIDATION STANDARDS AND GENERALLY APPLICABLE NONDISCRIMINATION LAWS

- UGESP – 29 CFR Part 1607 (1978)
- SIOP Principles for the Validation and Use of Personnel Selection Procedures (2018)
 - SIOP Statements: Considerations and Recommendations for the Validation and Use of AI-Based Assessments for Employee Selection (2023)
- Title VII
 - Disparate treatment, pattern and practice
 - Disparate impact (Civil Rights Act of 1991)
- State Laws

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**THANK
YOU**