WHAT TO EXPECT IN 2026—ENFORCEMENT INITIATIVES AND NEW LEGAL REQUIREMENTS AND OBLIGATIONS

DirectEmployers Association

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LEGAL COUNSELING
HUMAN RESOURCES COMPLIANCE AND EMPLOYMENT DATA ANALYTICS

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MEET THE TEAM

JOSHUA S. ROFFMAN

MANAGING ATTORNEY

Joshua Roffman is the Managing Attorney of the Firm. Josh's practice focuses on advising and assisting employers with using data and statistical tools to evaluate their employment practices. He has been advising federal contractor employers about compliance with federal and state equal employment opportunity and "affirmative action" requirements for over twenty years. He currently is guiding employers in assessing their DEIA and similar programs for risk mitigation and compliance with nondiscrimination laws.

Josh also advises and assists employers with privileged pay equity statistical analyses. He develops and runs the statistical analyses and combines that with knowledge of the law and a pragmatic understanding of businesses and other employers to ensure analytical rigor, usefulness, and legal soundness.

MEET THE TEAM

ALISSA A. HORVITZ

MEMBER ATTORNEY

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on evaluating nondiscrimination and equal opportunity throughout all phases of employment using data and employment analytics. This includes analysis and advice regarding EEO in recruiting, hiring, promotions, terminations, and compensation (pay equity), as well as DEI reviews for government contractor employers seeking to unwind their compliance with EO 11246. Alissa also does live and virtual training on relevant employment law topics.

MEET THE TEAM

JAMES M. MCCAULEY

OF COUNSEL

James McCauley is Of Counsel with Roffman Horvitz. James's experience includes evaluation and analysis of employment practices to ensure equal opportunity; preparation of EEO-1, VETS-4212, and California Pay Data Reporting filings; pay equity analyses; and analysis of applicant and hire records to address potential claims of hiring disparities.

TOPICS

- “Unlawful” DEI
- Disparate Impact
- Compensation Practices
- Artificial Intelligence Tools
- “Affirmative Action”

“UNLAWFUL” DEI

DOJ CIVIL RIGHTS FRAUD INITIATIVE

- May 19, 2025 Deputy Attorney General Memo
- Utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws
- Will be co-led by the Civil Division's Fraud Section, which enforces the False Claims Act, and the Civil Rights Division, which enforces civil rights laws
  - Each division will identify a team of attorneys to aggressively pursue this work together
  - Each of the 93 United States Attorney's Offices will identify an Assistant United States Attorney to advance these efforts
  - Will engage with the Criminal Division, as well as with other federal agencies that enforce civil rights requirements for federal funding recipients, including the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, and the Department of Labor
  - Will establish partnerships with state attorneys general and local law enforcement to share information and coordinate enforcement actions
- Encouragement of private party qui tam action under the False Claims Act
- Civil Investigative Demand Letters
  - Google
  - Verizon

CONTRACTOR CERTIFICATION

- That compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of the False Claims Act

- It does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws

- Interim Final Rule Implementing EO 14173 (FAR Council)
  - Submitted to OIRA on April 15, 2025

GUIDANCE ON “UNLAWFUL” DEIA

- EEOC DEI at Work Poster and DEI-Related Discrimination at Work FAQs – March 19
- Attorney General Memo – Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination – July 29
- Other Perspectives

AG MEMO: GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING REGARDING UNLAWFUL DISCRIMINATION (1 OF 2)

- DOJ Guidance
  - Provides guidance to federal agencies and public about how DOJ interprets laws
  - Does not change laws, regulations, or legal precedent
- Memo is focused on application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labelled as Diversity, Equity, and Inclusion ("DEI") programs
  - Largely focused on grant recipient and academic institution practices, but is instructive for employers
- Provides "best practices," but notes they are not mandatory
- Broader than prior guidance

AG MEMO: GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING REGARDING UNLAWFUL DISCRIMINATION (2 OF 2)

- Noteworthy Sections
  - Unlawful Proxies for Protected Classes
    - Selection or eligibility criteria designed to target certain protected classes
    - Geographic or institutional targeting in recruitment strategies
    - Best practices: document legitimate nondiscriminatory reasons for criteria
  - Segregation
    - Access to programs, activities, or resources based on protected classes
    - Separation of groups allowed to access or participate (i.e. target group and allies)
    - Programs, activities, or resources that are “technically” open to all, but identity-based in focus
      - Perception of segregation
      - Hostile work environment
  - DEI Trainings and Harassment
    - Programs that through content, structure, or implementation stereotype, exclude, or disadvantage individuals based on protected characteristics
      - Excludes or penalizes individuals
      - Creates hostile work environment – severe or pervasive
      - Retaliation – adverse action against individuals that object or refuse to participate in trainings
  - Optional nondiscrimination flow-down clauses, and third-party liability

EEOC/DOJ GUIDANCE ON "UNLAWFUL" DEIA (Slide 1 of 2)

- EEOC DEI at Work Poster and DEI-Related Discrimination at Work FAQs – Issued March 19
  - Illegal DEIA
    - Disparate treatment in:
      - Hiring
      - Firing
      - Promotion
      - Demotion
      - Compensation
      - Fringe benefits
      - Access to or exclusion from training (including training characterized as leadership development programs)
      - Access to mentoring, sponsorship, or workplace networking / networks
      - Internships (including internships labeled as "fellowships" or "summer associate" programs)
      - Selection for interviews, including placement or exclusion from a candidate "slate" or pool
      - Job duties or work assignments

EEOC/DOJ GUIDANCE ON “UNLAWFUL” DEIA (Slide 2 of 2)

- EEOC DEI at Work Poster and DEI-Related Discrimination at Work FAQs (continued)
  - Illegal DEIA (continued)
    - Limiting membership in ERGs or employee affinity groups
    - Separating employees based on race, sex, or another protected category
    - Harassment
      - DEI training messaging
- Attorney General February 5 Memorandum
  - Footnote: “This memorandum is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. It does not prohibit educational, cultural, or historical observances-such as Black History Month, International Holocaust Remembrance Day, or similar events-that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.”

ADDITIONAL GUIDANCE ON “UNLAWFUL DEI”

- Department of Education Dear Colleague Letter – February 14
- Counterviews:
  - Civil Rights Groups Joint Statement on July 29 DOJ Guidance to Recipients of Federal Funds – July 29
  - Statement of Former EEOC Officials In Response to March 19 DOJ/EEOC Guidance Poster and FAQs – April 3
  - “Blue State” Attorneys General Guidance Concerning DEIA Employment Initiatives – February 13
  - “Blue State” Attorneys General Response to US Department of Education’s “Dear Colleagues” letter – March 5

ANTI-DEIA ACTIVITY (Slide 1 of 2)

- Department of Education
  - "Dear Colleague" Letter and FAQs – February 14
    - "Blue State" Attorney Generals Response Letter – March 5
  - Office of Civil Rights Investigations of 51 universities for violation of Title VI of the Civil Rights Act
  - Certification Requirement for K-12 School Districts Receiving Federal Financial Assistance – Announced April 3
    - Cites Title VI and *Students for Fair Admissions v. Harvard*
    - Follow up from February 14 "Dear Colleague" Letter
    - Certification document explicitly references "illegal DEI practices" without specifying what practices are illegal
  - Settlements: Columbia, Brown, Penn, Northwestern, Cornell, University of Virginia
  - Pressure campaigns
  - Use of IPEDS data to monitor race-based admissions

ANTI-DEIA ACTIVITY (Slide 2 of 2)

- Federal Communications Commission
- EEOC Letters to 20 Large Law Firm (and Follow-Up By “Red State” Attorneys General)
- EEOC Northwestern Mutual Charge and Subpoena

EEOC'S ROLE

- Andrea Lucas December 17, 2025 LinkedIn Post Recruiting White Male Victims of Discrimination (link)
- DEI Discrimination Webpage/Poster
  - Webpage (link)
  - Poster (link)
- Centralizing Policy and Litigation Decisions with EEOC Chair and EEOC Majority

EEOC'S FOUR ENFORCEMENT PRIORITIES

- Combatting unlawful DEI-motivated discrimination
- Protecting American workers from anti-American national origin discrimination
- Defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work
- Protecting workers from religious bias and harassment, including antisemitism and other areas of recent under-enforcement

TEXAS AND FLORIDA ATTORNEYS GENERAL ON STATE LAWS AND PROGRAMS

- Texas
  - Opinion Letter on “Diversity, Equity and Inclusion” in Texas
- Florida
  - Identification of Laws That Discriminate Based on Race

DISPARATE IMPACT

EXECUTIVE ORDER 14281: RESTORING EQUALITY OF OPPORTUNITY AND MERITOCRACY

- What It Does
  - Defines the executive branch's view of disparate impact liability
  - Instructs federal agencies not pursue disparate impact claims

    “all agencies shall deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability”

- What It Can’t and Doesn’t Do
  - Remove disparate impact from Title VII and other federal civil rights laws
  - Override state laws and practices related to disparate impact that don’t “have constitutional infirmities”
  - Eliminate the use of statistics in employment discrimination cases

DISPARATE IMPACT

In the context of employment practices, disparate impact liability establishes that if a **facially neutral employment practice** has a disparate impact on the basis of race, religion, sex, or national origin, the **employer must show that the practice is job related for the position and consistent with business necessity**

DISPARATE TREATMENT, INTENTIONAL DISCRIMINATION

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin

- Title VII prohibits both (1) intentional discrimination (known as disparate treatment) and (2) practices that are not intended to discriminate but in fact have a disproportionately adverse effect on a race or sex (known as disparate impact)

- A disparate treatment plaintiff must establish that the employer had a discriminatory intent or motive for taking a job-related action.

DISPARATE TREATMENT, PATTERN AND PRACTICE

- The Supreme Court in 1977, in a case involving the Teamsters, recognized that if an employer engaged in a systemwide pattern or practice of employment discrimination by regularly and purposefully treating minorities less favorably than Whites, which the government could demonstrate using “pervasive statistical disparities” bolstered by “considerable testimony of specific instances of discrimination,” the government had proven its case.

DISPARATE TREATMENT, PATTERN AND PRACTICE

- The use of statistics to try to establish an inference that the employer was discriminating against a race or sex was often how the OFCCP would allege discrimination during compliance evaluations
  - If the employer was following principles of equal opportunity in decision-making, then we would expect roughly the same proportion to exist in its selection decisions
  - But if the pattern of decisions favored one race or sex, and mathematically we would not expect that to happen, the data could create an inference that the employer was not following principles of equal employment opportunity, and then it would be important for the employer to offer evidence of a legitimate, nondiscriminatory reason.

LEGAL STATUS OF ADVERSE IMPACT THEORY

- EEOC
  - The Trump administration EEOC won't pursue cases on a disparate impact theory
  - If the EEOC does not conduct an investigation or elects not to enforce alleged violations, the Charging Party will receive a Notice of Right to Sue and may file a lawsuit in federal court within 90 days.
  - Litigation
- Civil Rights Act of 1991
- State Laws
  - New York State – Codification of Disparate Impact
  - New Jersey – New Regulations

TRUMP ADMINISTRATION USE OF DATA AND STATISTICS

- EEOC Letters to Large Law Firms
- Investigations of educational institutions
  - IPEDS data to monitor race-based admissions
    - August 7, 2025 Presidential Memorandum
- EEOC Chair Andrea Lucas Social Media Post

ACTING EEOC CHAIR ANDREA LUCAS STATEMENT ABOUT THE USE OF STATISTICAL EVIDENCE IN PURSUING UNLAWFUL DEI – MAY 7, 2025 POST ON X

"[E]mployers should take care not to conflate disparate impact claims arising from neutral employment practices with a materially different type of Title VII claim: intentional discrimination claims proven via the "pattern or practice" model of proof first set out by the Supreme Court in Teamsters v United States, which may entail the use of statistical evidence, along with other evidence, to prove disparate treatment.

"The Commission will continue to relentlessly combat unlawful patterns or practices of intentional discrimination in violation of Title VII, including race and sex discrimination that may arise from DEI programs and national origin discrimination involving anti-American bias."

COMPENSATION PRACTICES

PAY EQUITY

- Applicable Federal Laws
  - Equal Pay Act
  - Title VII – Ledbetter Fair Pay Act
- State Pay Equity Laws
  - Most states have equal pay laws; most frequently similar to federal Equal Pay Act (typically encompass protected categories other than gender)
  - Notable alternate approaches:
    - California
    - Massachusetts

PAY DISCLOSURE TO EMPLOYEES AND APPLICANTS

- Require employers to disclose minimum and maximum salaries for positions
  - In job advertisements
  - At certain stages in the selection process
  - Upon request by employees or applicants

- Scope
  - Positions that could be filled by candidates in the state
  - Positions where the employee will report to a worksite or supervisor in the state

- May require a description of other types of compensation
- Some laws also may require employers to provide information on the salary range for an employee's current position upon request

BANS ON SALARY HISTORY CONSIDERATION

- Prohibitions on inquiring about or seeking salary history
  - Exception: May seek salary history to confirm information voluntarily provided by applicant after hire

- Prohibitions on relying on salary history to make offer or set starting pay
  - Exception: When salary history is voluntarily disclosed

- Prohibitions on retaliating against applicants for refusing to provide information on salary history

BANS ON EMPLOYER PAY SECRECY POLICIES

- Bans on employer policies that prohibit employees from discussing compensation
  - Exception for employees that have access to compensation information disclosing information to employees not authorized to access the information

- Bans on employers requiring that employees sign documents that purport to prohibit discussion of compensation

STATE PAY REPORTING REQUIREMENTS

- California
- Illinois
- New Jersey
- Massachusetts
- New York City

ARTIFICIAL INTELLIGENCE TOOLS

TRUMP ADMINISTRATION PERSPECTIVE ON ARTIFICIAL INTELLGENCE (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 INTELLGENCE (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
  - 14363 – Launching the Genesis Mission – November 24, 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**

MANDATE TO PURSUE STATE LAWS REGULATING AI

- Executive Order 14365 – Ensuring a National Policy Framework for Artificial Intelligence – December 11, 2025
  - "Policy. It is the policy of the United States to sustain and enhance the United States' global AI dominance through a minimally burdensome national policy framework for AI."
  - AI Litigation Task Force
    - "Within 30 days of the date of this order, the Attorney General shall establish an AI Litigation Task Force (Task Force) whose sole responsibility shall be to challenge State AI laws inconsistent with the policy. . . ."
  - Evaluation of State AI Laws
    - "Within 90 days of the date of this order, . . . publish an evaluation of existing State AI laws that identifies onerous laws that conflict with the policy set forth in . . . this order, as well as laws that should be referred to the Task Force established pursuant . . . this order."
    - "That evaluation of State AI laws shall, at a minimum, identify laws that require AI models to alter their truthful outputs, or that may compel AI developers or deployers to disclose or report information in a manner that would violate the First Amendment or any other provision of the Constitution."
  - Restrictions on State Funding
  - Preemption of State Laws
  - Legislative recommendation for "uniform Federal policy framework for AI that preempts State AI laws that conflict with the policy set forth in this order."

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

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."

OTHER JURISDICTIONS WITH EXISTING, NEW, OR PENDING LAWS ADDRESSING USE OF AI TOOLS IN EMPLOYMENT

- New York City
- Illinois
- Colorado
- Texas
- New York State
  - Disparate Impact
- New Jersey
  - Disparate Impact
  - Specific language addressing automated employment decision technology
  - Explicit incorporation of UGESP

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 June 30, 2026
  - "High-Risk Artificial Intelligence System": "Any artificial intelligence system that, when deployed, makes, or is a substantial factor in making, a consequential decision"

- 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.

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

  - Opt-In Notice Process

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

“AFFIRMATIVE ACTION”

EXECUTIVE ORDER 14173

- Rescinded EO 11246, eliminating federal contractor affirmative action plans for women and minorities
- Requires recipients of federal funds to certify that they do not operate any programs promoting DEI that violate federal anti-discrimination laws

VEVRAA AND SECTION 503

- Contractors are still required to prepare AAPs for protected veterans and individuals with disabilities
  - Contractor Portal certification
  - Compliance reviews
  - Complaints

CHANGES TO VEVRAA AND SECTION 503 REGULATIONS

- Proposed revisions:
  - VEVRAA
    - Principally to remove cross references to the enforcement provisions previously set out in the EO 11246 regulations
  - Section 503
    - Remove cross references to the enforcement provisions previously set out in EO 11246 regulations (OFCCP)
    - Eliminate the collection of disability self-identification data from applicants and employees
    - Eliminate data collection analyses for individuals with disabilities
    - Eliminate the disability utilization analysis
    - Retain requirement to annually assess effectiveness of efforts in identifying and recruiting individuals with disabilities

CHANGES TO VEVRAA AND SECTION 503 REGULATIONS

- Adjusted thresholds:
  - VEVRAA
    - Adjusted from $150,000 to $200,000
  - Section 503
    - Basic coverage: Adjusted from $10,000 to $20,000
    - AAP requirement: $50,000, no change
- VEVRAA Hiring Benchmark: 5.1%
- Information Collection Requests
  - Renewal of VEVRAA data collection, AAP preparation, and recordkeeping requirements
  - Modification of Section 503 data collection, AAP preparation, and recordkeeping requirements and self-identification form
  - Revision of complaint collection forms to remove references to EO 11246

STATUS OF THE OFCCP

- House Consolidated Appropriations Act
  - Allocates $100,976,000 to OFCCP – for salaries and expenses
  - OFCCP received about $110,000,000 in FY 2024 and FY 2025
- Director: Ashley Romanias
  - Previously a Senior Policy Advisor at DOL
  - Replaces Catherine Eschbach
- New Deputy Director: Diana Sen
  - Previously the Regional Director (Northeast, Southeast Regions) and Acting Regional Director (Mid-Atlantic)

DOJ LAWSUIT AGAINST MINNESOTA

- DOJ alleges Minnesota affirmative action requirements for state and state agencies violate Title VII
  - Requirement to assess utilization and set placement goals
    - Timetables
    - Pre-hire review for job groups with placement goals
    - Pre-layoff reviews for effect on goals and timetables
    - Required justification of non-affirmative action hires in competitive and noncompetitive appointments if goals not met
  - Claim 1: Minnesota makes staffing and personnel decisions based on race, color, national origin, and sex
  - Claim 2: Minnesota limits, segregates, and classifies employees based on protected categories

STATE AFFIRMATIVE ACTION: SUMMARY OF APPROACHES

- Track Federal Executive Order 11246 AAP Requirements
- EEO-1 Type Reporting
- Pay Reporting
- Certifications
- Required Adoption of Policies
- Utilization of Minority, Women, Disadvantaged, and Small Business Enterprises as Subcontractors
- Passive Enforcement In Most States
  - Attestations in standard state contracting clauses
  - Some require submission only on request
- Information is very decentralized

JURISDICTIONS WITH CONTRACTOR AAP / EEO OR EMPLOYMENT DATA REPORTING REQUIREMENTS

- California
- Connecticut
- District of Columbia
- Illinois
- Kentucky
- Maine
- Minnesota
- New Jersey
- New York
- Pennsylvania
- Rhode Island
- Virginia
- Wisconsin

NOTE – There may be other states that have contractor AA/EEO obligations. Also, several municipalities have contractor AA/EEO obligations.

CHANGES TO STATE AFFIRMATIVE ACTION REQUIREMENTS

- Ohio
  - Revoked affirmative action requirements for state contractors (Effective September 30, 2025)
- Minnesota
  - Many revisions to affirmative action materials and reports
  - Still requires utilization analysis
    - Removed instructions referring to the exercise as “setting goals”
  - Added note specifying that underutilizations are not quotas
  - Compliance Plan – replaces Affirmative Action Plan and removes affirmative action terminology

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THANK YOU