

(April 5, 2023)

# Artificial Intelligence in the Workplace

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# Welcome to the Matrix



# Goals for Today

- 1) Provide a high-level overview of AI and other advanced technologies
- 2) Discuss guidance (or lack thereof) from federal agencies and courts
- 3) Discuss key implementation considerations and issues you should be aware of as these technologies become more common in your workplace

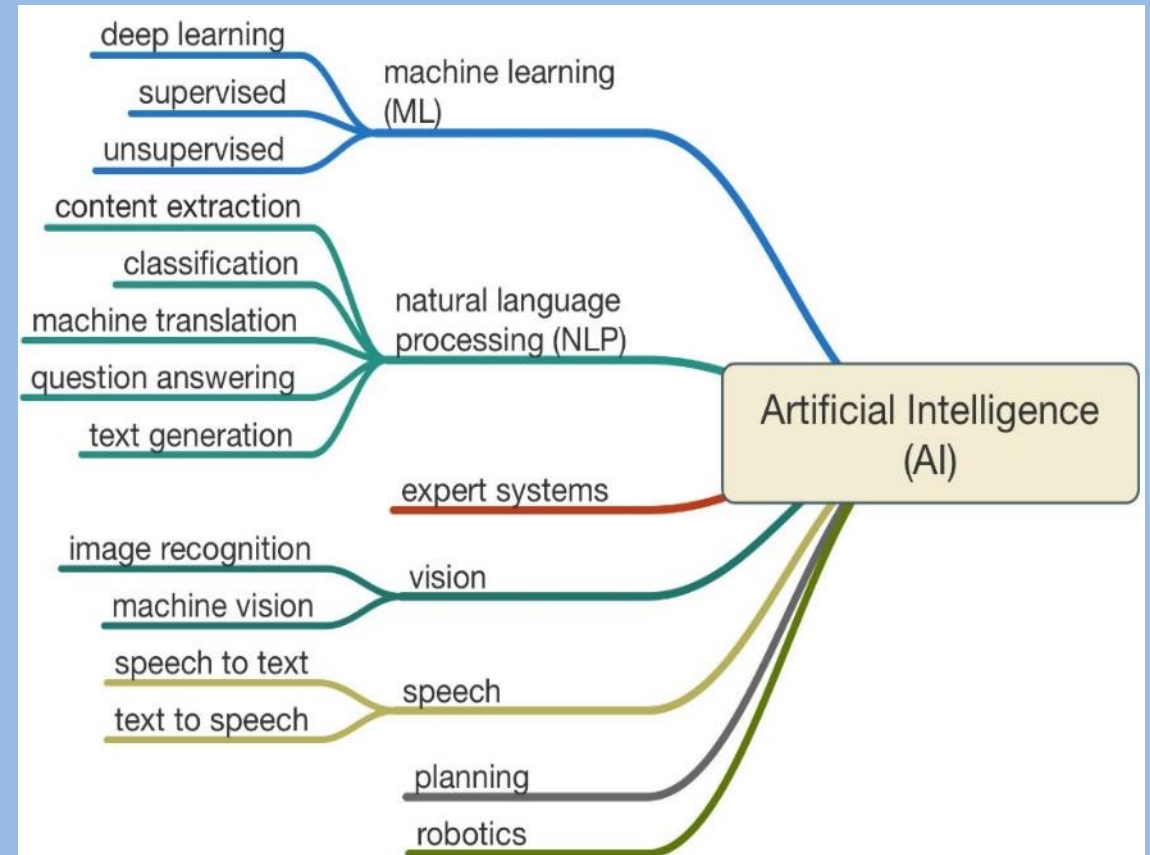


# What is AI?



# What is Artificial Intelligence?

- AI – stated simply – involves machines performing tasks in a way that is “intelligent”
- There are many different forms of AI



# The World of AI & Data Science

- **Statistics:** foundational inference/modeling to understand relationships in the world around us; heavy on data and theory; interdisciplinary
- **Data Analytics:** tends to focus on exploring and modeling data once you have it; words like descriptive, predictive, prescriptive
- **Data Science:** extracting value from data to solve real world problems; combination of technical and non-technical skills; grounded in context
- **Machine Learning:** building models and algorithms to help machines improve using data, external knowledge, experience, and interactions with the environment; associated w/large amounts of data, black box algorithms; applied/theoretical
- **Deep Learning:** machine learning methods based on (multi-layered) neural networks
- **Artificial Intelligence:** using technology to understand human needs and make related decisions; involves computer science, human-computer interaction, modeling, data management, devices (e.g. apps, robots), computing

# AI in Your Daily Life (and Near Future)



Google Duplex – Next  
Gen Assistant

# Another Example - ChatGPT

- It is an artificial-intelligence (AI) chatbot designed to interact conversationally with humans. It can generate content based on prompts and answer questions posed by users.
- Free to use.
- It can write and debug computer programs; compose music, teleplays, fairy tales, and student essays; answer test questions (sometimes at a level above the average human); write poetry and song lyrics; play games like tic-tac-toe; ***compose briefs to the supreme court.***



# ChatGPT

In every company, there's a team we should know  
They keep us safe from legal woes  
They're the in-house counsel, always on the go  
Helping us to grow and to flow

In-house counsel, they're our legal queens  
Guiding us through every legal scene  
In-house counsel, our trusty friends  
They're the ones who help us make amends





# ChatGPT

As an AI language model, there are several things that I cannot do that lawyers can. Here are a few examples:

- Provide legal advice.
- Represent clients in court.
- Draft legal documents.
- Provide emotional support.
- Advocate for clients outside of the legal system.

# Mr. Roboto: Robots in the Workplace

- Robotics are reshaping the workplace, and not just in the manufacturing sector
- Robots are starting to perform job roles like:
  - Interviewing job candidates
  - Taking food orders at restaurants
  - Bank teller
  - Making pizza?



# Real-World Examples of Employer Use of Software, Algorithms, & AI

**Resume screeners:** can prioritize applicants who use certain keywords

**Testing software:** can provide “job fit” scores for applicants or employees relating to their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or a more traditional test

**Employee monitoring software:** can rate employees on the basis of their keystrokes or other factors

**Virtual assistants or chatbots:** can ask job candidates about their qualifications and reject those who don't meet pre-defined requirements

**Video interviewing software:** can evaluate candidates based on their facial expressions and speech patterns





# How Will Advanced Technologies Impact Your Workplace?

# The Resume Pile – A Relic of the Past?

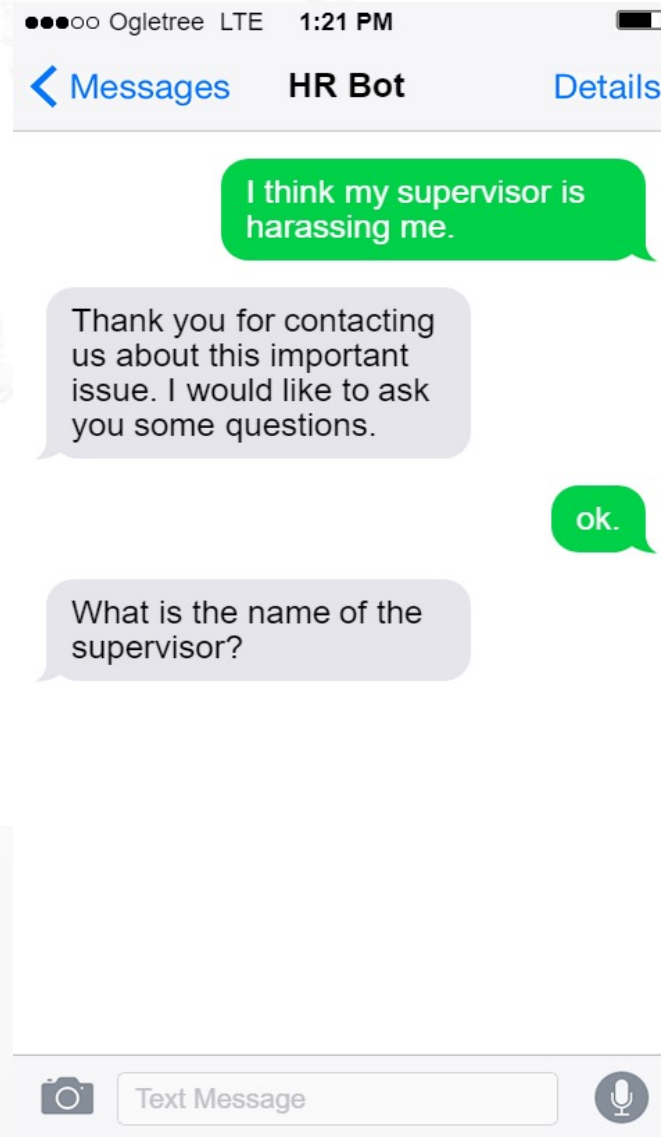




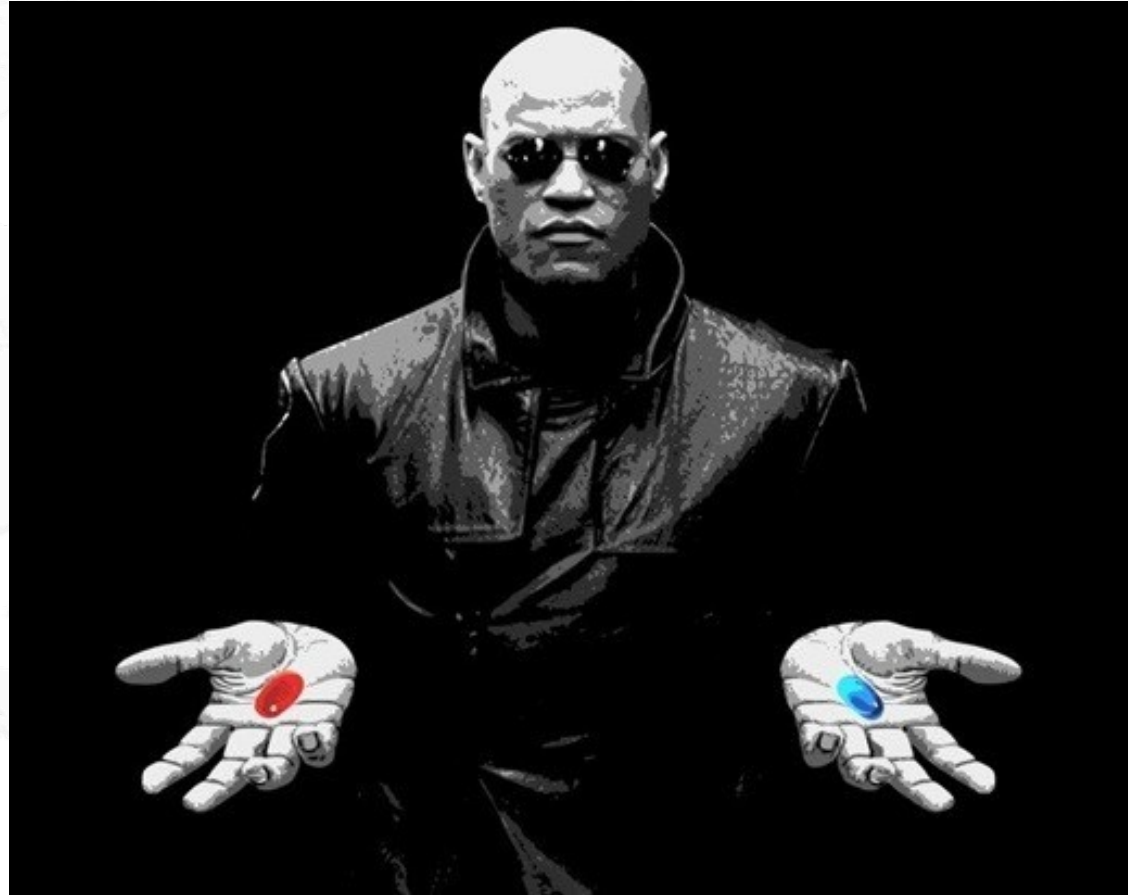
# HR Data Streams



# Intelligent Self Service Tools



# Red or Blue Pill?!



# AI Risk and Reward Calculation

## Rewards

- Better accuracy
- Better speed
- Better outcomes\*
- Increased efficiency
- Lower cost

## Risks

- Employee distrust
- Disparate impact
- State legal compliance hurdles
- Labor organizing

# Traditional HR Intake



or







# Labor and Employment Issues

# Amazon scraps secret AI recruiting tool that showed bias against women

Jeffrey Dastin

8 MIN READ

SAN FRANCISCO (Reuters) - Amazon.com Inc's (AMZN) machine-learning specialists uncovered a big problem: its new recruiting engine did not like women.

## Beat the Robots: How to Get Your Resume Past the System & Into Human Hands

themuse



ERIC NILLER BUSINESS 03.25.19 07:00 AM

### CAN AI BE A FAIR JUDGE IN COURT? ESTONIA THINKS SO



WIRED STAFF: GETTY IMAGES

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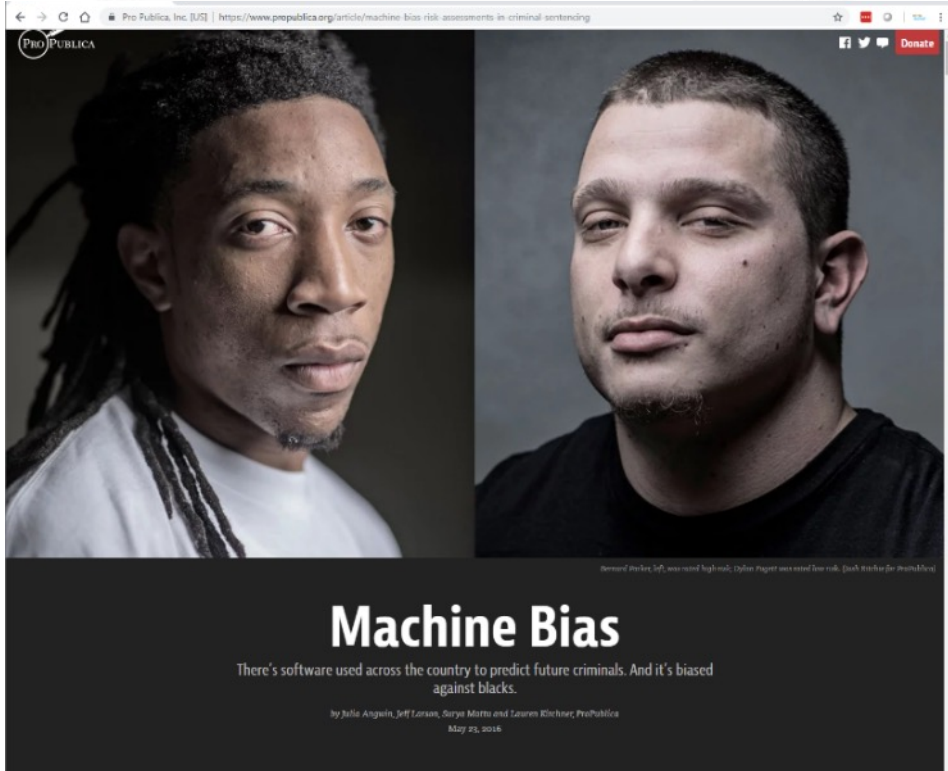
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GOVERNMENT USUALLY ISN'T the place to look for innovation in IT or new technologies like artificial intelligence. But Ott Velsberg might change your mind. As Estonia's chief data officer, the 28-year-old graduate student is overseeing the tiny Baltic nation's push to insert artificial intelligence and machine learning into services provided to its 1.3 million citizens.

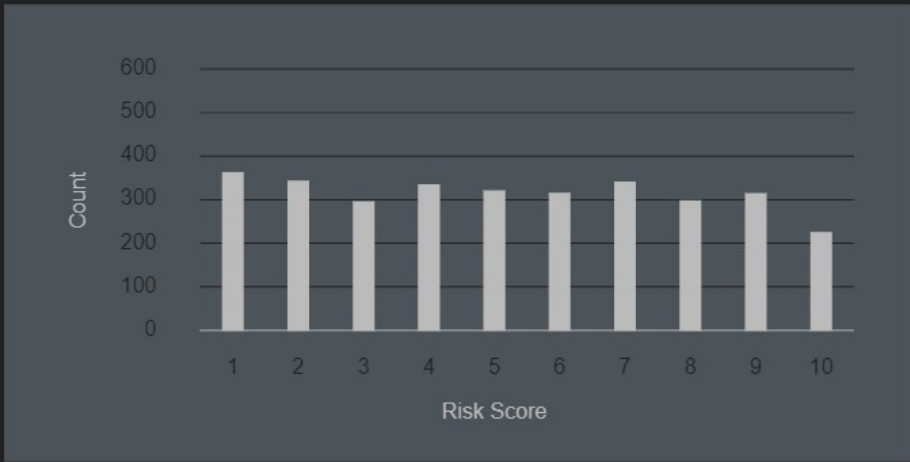
# Combating AI Bias



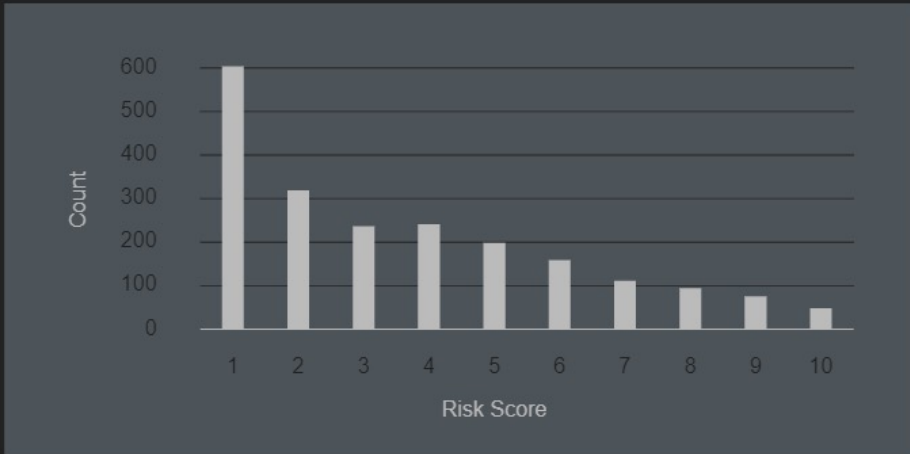
May 23, 2016



Black Defendants' Risk Scores



White Defendants' Risk Scores



These charts show that scores for white defendants were skewed toward lower-risk categories. Scores for black defendants were not. (Source: ProPublica analysis of data from Broward County, Fla.)

# Key Questions for L&E Compliance

1. Through the tech, is data being collected, stored, or transmitted?
2. Is the tech changing employees' terms and conditions of employment?
3. Is the tech changing the physical working environment?
4. Is the tech affecting employment-related decision-making?







# Federal Guidance



# Breaking the Code



# EEOC Takes on AI

- **October 2016** – Commission Meeting on Big Data in the Workplace
- **October 2021** – EEOC launches the Artificial Intelligence and Algorithmic Fairness Initiative
- January 2022 - EEOC and the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) announced a new “Hire” Initiative
- **May 5, 2022** – *EEOC v. iTutorGroup, Inc., et al.* (U.S. District Court for the Eastern District of New York)
- **May 12, 2022** – EEOC issues Technical Guidance: *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*
- **January 2023** – EEOC’s draft Strategic Enforcement Plan Issued
- **January 31, 2023** – EEOC holds hearing: *Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier*

# *EEOC v. iTutorGroup, Inc., et al.*, E.D.N.Y, 1:22-cv-02565

- Alleges that iTutorGroup programmed their tutor application software to automatically reject female applicants over age 55 and male applicants over age 60
- Alleges that more than 200 qualified applicants were rejected because of their age
- Such conduct violates the Age Discrimination in Employment Act (ADEA)

# EEOC's Technical Guidance

Only relates to the Americans with Disabilities Act (ADA)

Confirms that an employer can be responsible for ADA violations even if the tools are designed or administered by another entity (vendor)

Identifies **3 ways** an employer's use of algorithmic decision-making tools could violate the ADA:

Remember:

- \*\*Non-binding
- \*\*Technical assistance guidance



The employer does not provide a reasonable accommodation that is necessary for a job applicant or employee to be rated fairly + accurately by the algorithm

The employer relies on an algorithmic decision-making tool that "screens out" an individual with a disability even if that individual can do the job with a reasonable accommodation

The employer's algorithmic decision-making tool violates the ADA's restrictions on disability-related inquiries and medical examinations

# Reasonable Accommodation Guidance

EEOC endorses an employer announcing that reasonable accommodations are available to applicants/employees who are evaluated by an algorithmic decision-making tool and inviting a request

- **To make the request:** employees need only tell the employer that a medical condition may make it difficult to take a test or that it could cause an assessment that is less acceptable to the employer
- **Possible accommodations:** provision of an alternative testing format or a more accurate assessment of the applicant's or employee's skills unless doing so would involve significant difficulty or expense (i.e., undue hardship)



# The “Screen Out” Phenomenon

## What is “screen out”?

- “Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is *able to perform the essential functions of the job* with a reasonable accommodation if one is legally required.”

EEOC views “bias free” tools as unlikely to, in fact, be bias-free from potential disability discrimination

Example: a chatbot programmed to reject all applicants who had gaps in their employment history. If a gap is caused by a disability, then the chatbot may screen out because of disability.

# Disability-Related Inquiries And Medical Examinations

Disability-related inquiries may occur if an algorithmic decision-making tool asks applicants or employees questions likely to elicit information about a disability

- If administered before a conditional offer, unlawful
- If administered after employment, may only be required if inquiries are legally justified under the ADA
- Violations can occur even if someone does not have a disability

# “Promising Practices” for Employers

- EEOC has identified various practices that employers should consider:
  - Training to recognize and process requests for reasonable accommodations
  - Alternative means of rating job applicants and employees if evaluation process is inaccessible or otherwise unfairly disadvantages some because of a disability
  - If the tool is administered by a vendor, ask the vendor to promptly forward all requests for accommodation to be processed by the employer
  - Using tools designed to be accessible to individuals with different kinds of disabilities
  - Informing all job applicants and employees who are being rated that reasonable accommodations are available for individuals with disabilities, and providing clear and accessible instructions for requesting such accommodations

# “Promising Practices” for Employers (cont.)

- EEOC has identified various practices that employers should consider:
  - Describing, in plain language and in accessible formats, the traits that the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating
  - Ensuring that the tool only measures abilities or qualifications that are truly necessary for the job
  - Ensuring that necessary abilities or qualifications are measured directly, rather than by characteristics or scores that are correlated with those abilities or qualifications
  - Before purchasing a tool, asking the vendor to confirm that the tool does not ask job applicants or employees questions that are likely to elicit information about a disability or seek information about an individual’s physical or mental impairments or health, unless such inquiries are related to a request for reasonable accommodation

# National Labor Relations Board

- GC Memo 23-02, “Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights”
- Issued October 31, 2022
- Explains GC Jennifer A. Abruzzo’s perspective on existing violations AND announces a new standard





# Existing Violations Include

- The use of technology to obtain information concerning union activity/PCA, even if the activity is public on a social media page
- Instituting new technologies in response to Section 7 activity
- Spending money on surveillance technology to obtain information about the activities of employees or a union or otherwise spending money to interfere with employees' rights to organize without filing a Form LM-10

## ... and Include

- Discipline for employee protests of surveillance technology or algorithmic management technology
- Employers that “dismantle or preclude employee conversations or isolate union supporters or discontented employees to prevent Section 7 activity”
- Use of AI to screen job applicants if the algorithm makes decisions based on employees’ protected activity or propensity to engage in protected activity
- Discriminatory application of quotas or efficiency standards to rid an employer of union supporters
- Failing to supply information or bargain with existing unions about tracking technologies and their use of the data they accumulate

# And the New Standard ...

- “An employer has presumptively violated Section 8(a)(1) where the employer’s surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.”
  - If the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need – i.e., that its need cannot be met through means less damaging to employee rights – GC will urge the Board to balance the respective interests of the employer and the employees to determine whether the Act permits the employer’s practices.
  - “If the employer’s business need outweighs employees’ Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies, I will urge the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains. Only with that information can employees intelligently exercise their Section 7 rights and take appropriate measures to protect the confidentiality of their protected activity if they so choose.”



# State Guidance

# State Laws Regulating AI in Employment

- **Draft California Regulations:** Would make it unlawful for an employer to use qualification standards, employment tests, ADSs, or other selection criteria that screen out or tend to screen out applicants/employees based on protected characteristics unless shown to be job-related and consistent with business necessity
- **Maryland & Illinois:** Laws regulating the use of facial recognition software with employment applicants
- **Connecticut & New York:** Along with other states, require certain disclosures regarding any employer electronic monitoring



# California ... To Be Continued

- California Privacy Rights Act (CPPA) effective NOW
- CPPA has regulatory mandate as follows:
  - “Issuing regulations **governing access and opt-out rights** with respect to businesses’ use of ***automated decision-making technology, including profiling*** and requiring businesses’ response to access requests to include meaningful information about the **logic involved in such decisionmaking [sic] processes**, as well as a **description of the likely outcome** of the process with respect to the consumer.”
- No proposed regulations yet, but call for public comments issued Feb 2....stay tuned....



# Local Guidance (NYC)

# NYC's "Automated Employment Decision Tools" Law

"Automated Decision Tools" = "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 decisions making for making employment decisions that impact natural persons."

"Employment decision" = screening candidates for employment or promotion within New York City

Two broad components:

Enforcement through City, \$500-\$1,500 per violation (continuous accrual for each day used and for each failure)

A "bias audit" before use of any automated employment decision tool; and

Specific notice requirements



# Court Guidance

# *Mobley v. Workday, Inc.*, N.D. Cal., No. 23-cv-00770

- One of the first cases to allege discrimination based on an employer's use of AI tools in hiring.
- Class Action Complaint filed February 21, 2023.
- Claims arise under Title VII, 42 U.S.C. § 1981, ADA, and ADEA
- Mobley seeks to represent all applicants in those protected classes who haven't been referred or hired for employment as a result of the discriminatory screening process (from June 3, 2019 to present).
- Complaint alleges that Workday Inc.'s **artificial intelligence systems and screening tools** disqualify applicants who are Black, disabled, or over the age of 40 at a disproportionate rate.



# *Mobley v. Workday, Inc.*, N.D. Cal., No. 23-cv-00770

- Focuses on Workday products that process and interpret an applicant's qualifications and make recommendations of acceptance or rejection.
- These are tools used by numerous private companies and Fortune 500 companies.
- Complaint does not give details about what exactly is discriminatory.
- Alleges that screening tools "rely on algorithms and inputs created by humans who often have built-in motivations, conscious and unconscious, to discriminate."

# *Mobley v. Workday, Inc.*, N.D. Cal., No. 23-cv-00770

- Takeaways
  - Make sure any test or selection procedures are job-related
  - Develop a review process to evaluate whether screening process is having unintended consequences and how any such risks can be managed
  - If successful, likely to see similar lawsuits across the nation

# What's Likely to Come?

- Possible guidance under other anti-discrimination laws
- DOL/OFCCP Guidance – EEOC Chair has indicated the EEOC is working with other agencies
- EEOC enforcement actions
- More litigation





# Key Implementation Considerations and Issues Relating to AI

# Avoiding AI Issues





# AI Checklist

- ✓ Develop multi-disciplinary innovation teams to assess AI tools
- ✓ Define the problem you're trying to solve with AI
- ✓ Make sure AI doesn't make job more complicated
- ✓ Assess how well AI integrates with your current software
- ✓ Link the ROI of the AI with a business outcome
- ✓ Continue human review of AI-assisted decision-making
- ✓ Impose tight controls on data access
- ✓ Engage in careful external vendor contract reviews
- ✓ Work with vendors that take an inclusive approach to design

# More on Contracts...

Provisions	Why This is Important
Enhancement of indemnification obligations to include indemnity against claims under federal, state, and local employment laws	Many software vendor agreements provide indemnity only for IP-related claims but the tools may create an equally great risk of employment discrimination/privacy litigation
Possible modification of indemnity language to require the vendor to provide a defense <b>OR</b> to reimburse company for its own defense at your option	Some companies don't like the defense provided by vendor companies. Further, strategically, if both entities are sued, we may not want to have a joint defense.
Enhanced cooperation language that requires vendor to share any and all information that may be necessary for company to evaluate litigation/threatened litigation, to comply or evaluate compliance with legal requirements, to conduct a validation analysis, or to perform an audit of the software	We may need a vendor to share information with us, including proprietary and confidential information about their software, so that we can respond to claims or threatened claims, comply with legal rules, evaluate compliance with legal rules, or to conduct our own internal audit. If there's not robust cooperation language, we would have to get subpoenas, which can be challenging
A requirement that the vendor provides at its own expense a third party audit of the software for compliance with operative laws	Auditing for disparate impact/bias is the trend the law is moving, we may want to shift the burden of procuring an audit to the vendor
Notification requirements relating to claims against the vendor concerning the software	If the software is subject to a large scale disparate impact claim, we'd want to know about this and consider discontinuing the tool
Reps and warranties relating to the compliance of the software with applicable employment and privacy laws	Usually the reps and warranties in SAAS agreement do not extend to such categories

# Employee Monitoring Checklist

- ✓ Assess all applicable jurisdiction-specific laws
- ✓ Prepare and distribute electronic communications / acceptable use policies
- ✓ Consider employee relations impact of monitoring program
- ✓ Notify employees of monitoring and lack of reasonable expectation of privacy
- ✓ Limit access to monitoring results
- ✓ Use monitoring on a consistent basis for legitimate business purposes
- ✓ Monitor during work hours only
- ✓ Take steps to ensure monitoring is only of work-related content
- ✓ Maintain confidentiality of any medical information gathered through monitoring

# Automation Checklist

- ✓ Incorporate communications team on rollout of automation plan
- ✓ Train decision makers on process and best practices
- ✓ Carefully create and vet documentation
- ✓ Perform disparate impact analyses
- ✓ Ensure compliance with all applicable legal requirements
- ✓ Ensure compliance with any bargaining agreements

# QUESTIONS??

