

# Human Resources, AI & the Law

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# Presented By



**MATTHEW S. BROWN**

Of Counsel  
Charlotte, NC  
(704) 972-7037  
MAbrown@littler.com



**KELLEN M. SHEARIN**

Associate  
Charleston, WV  
(304) 599-4652  
KShearin@littler.com

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What is AI?

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Why Does it Matter?

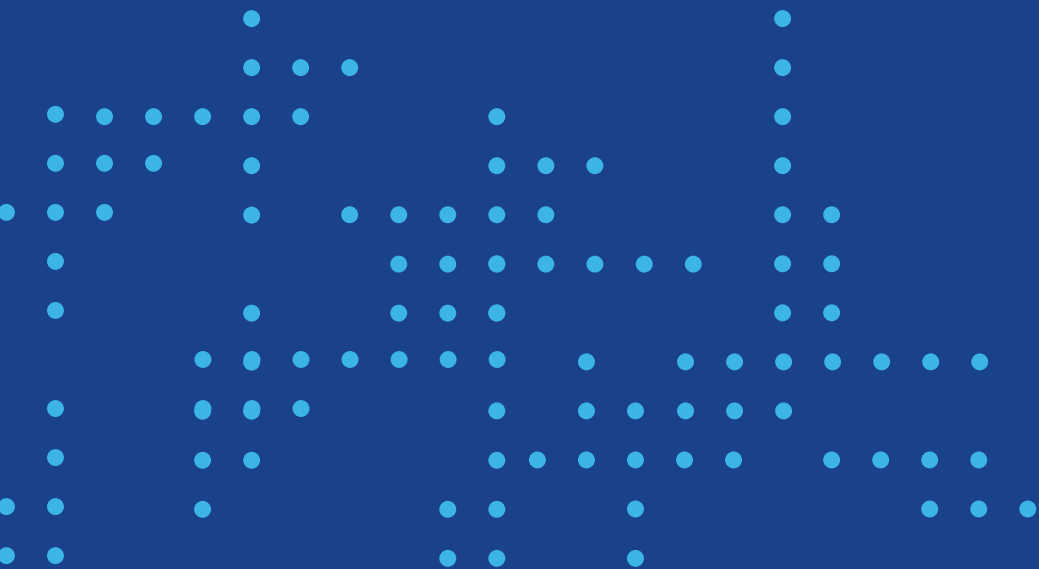
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Legislation and Regulation in the AI Space

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Takeaways

# Defining Artificial Intelligence



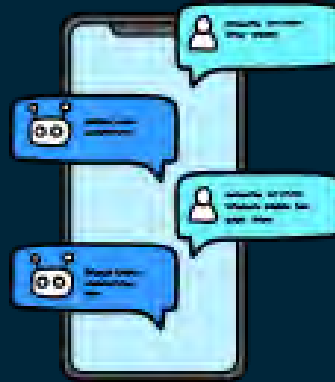


# Algorithms



pre-determined,  
human-driven  
sequence of steps  
(Reactive AI)

# Artificial Intelligence



pre-programmed  
mimicking of human  
actions  
(Limited memory AI)

# Machine Learning



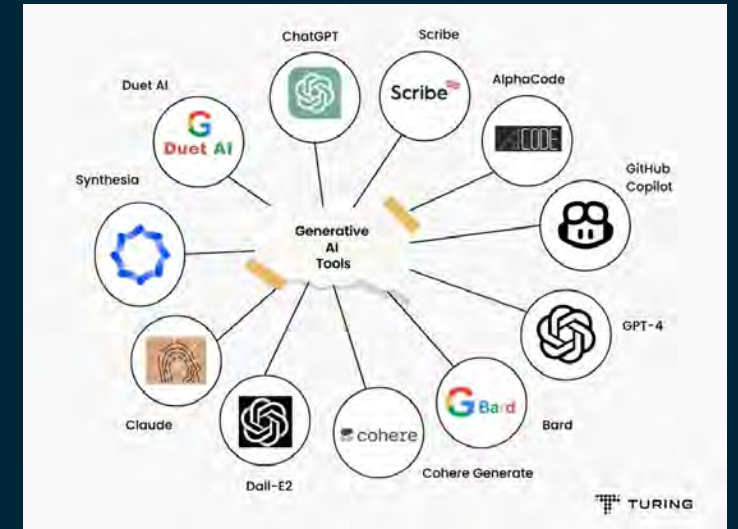
pre-programmed  
mimicking of  
human actions  
(Theory of mind AI)

# AI, In A Nutshell...

# The Game Changer.....

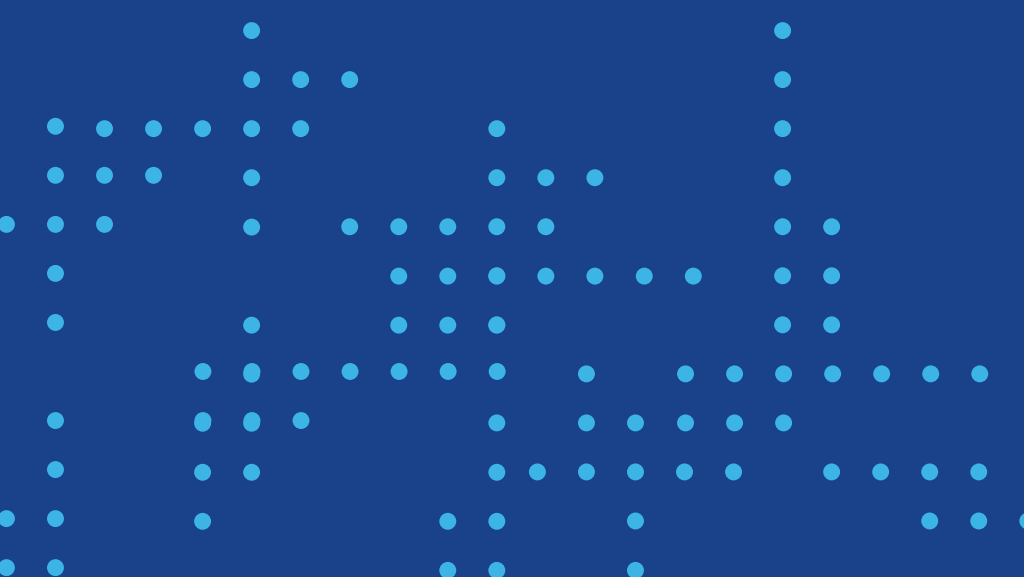
## Generative AI

is a type of artificial intelligence that focuses on creating new content. It's a subset of machine learning, drawing from techniques like deep learning and reinforcement learning to generate output that can include text, images, music, video, and more.



# The fuel for AI...

# DATA



# Data Never Sleeps 11.0





# WHY DOES AI MATTER?



AI can perform in ways humans simply cannot



AI is becoming more widely used

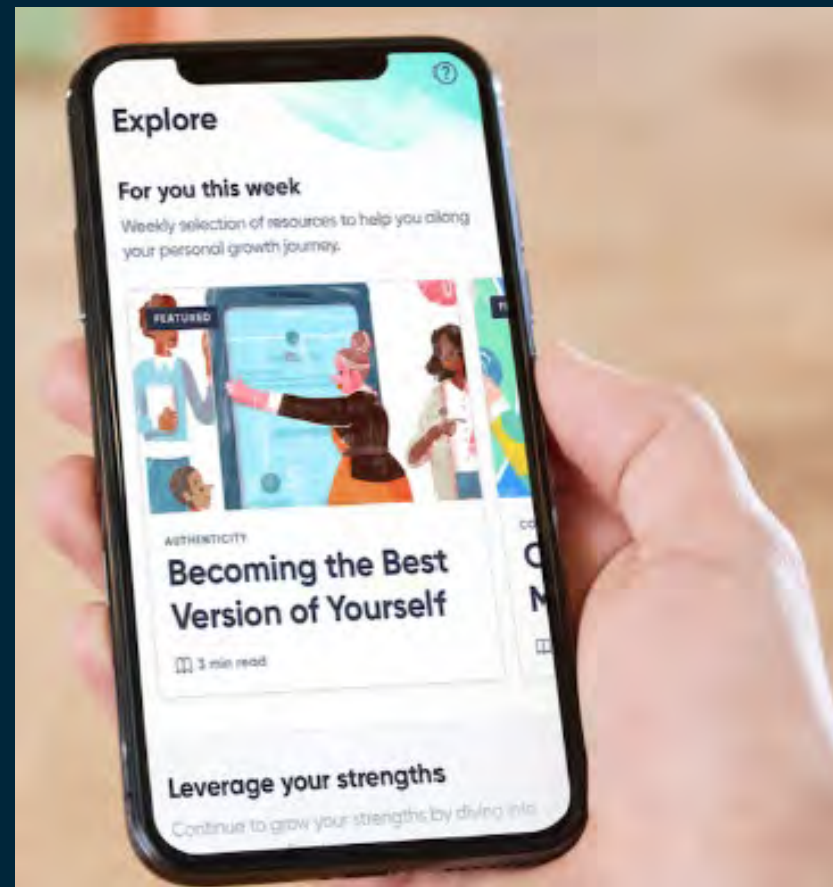


Regulators are closely scrutinizing AI use

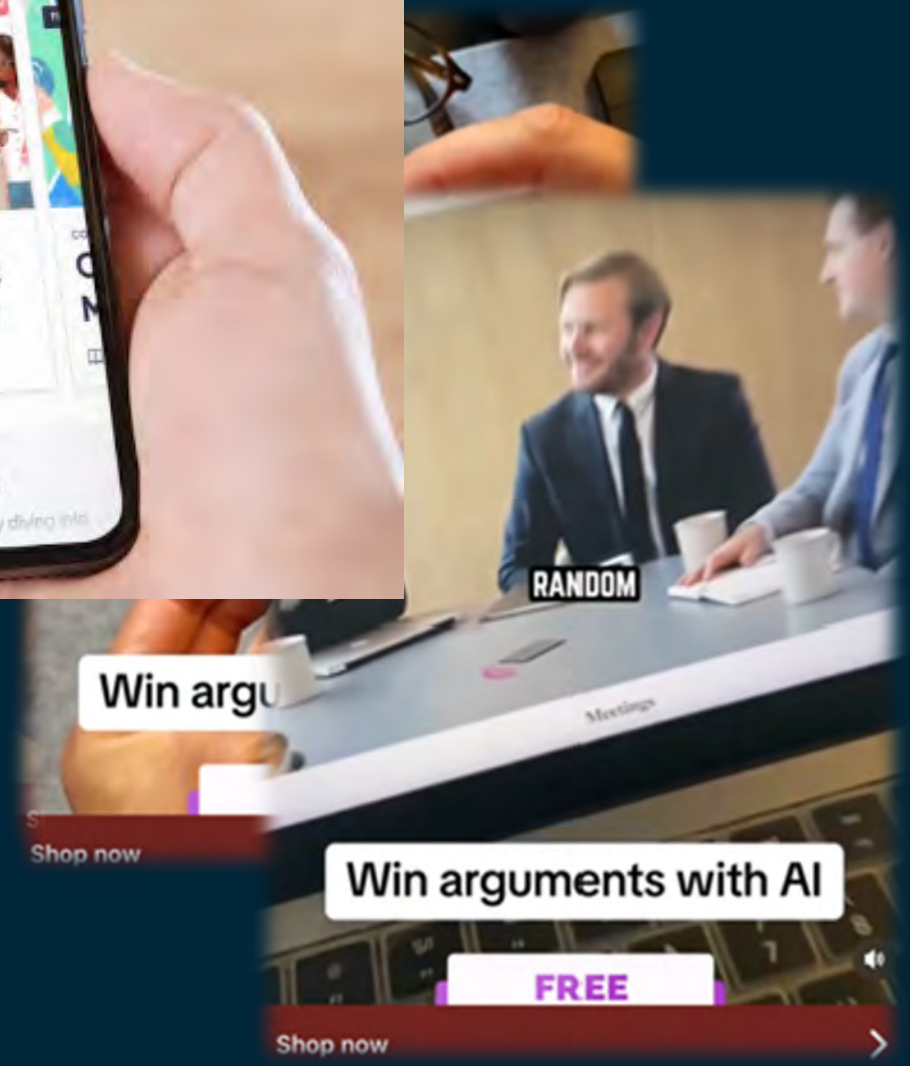
# A Race to Win

75% of CEOs believe that the enterprise with the most advanced GenAI will win.

57% of CEOs are concerned about the security of data and 48% worry about bias or data accuracy.



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CEOs say remaining competitive demands taking significant risk.

67%

of CEOs say the potential productivity gains from automation are so great *they must accept significant risk* to stay competitive

62%

say they will take *more risk than the competition* to maintain their competitive edge



Most CEOs are acting fast on generative AI—but fewer understand its workforce implications.

51%

of CEOs are currently hiring for generative AI-related *roles that didn't exist last year*

and

40%

plan to *hire additional workforce* because of generative AI in 2024

But only

44%

have *assessed the impact* of generative AI on their workforce

CEOs remain optimistic about their organization's readiness for generative AI, but hiring challenges may offer a warning sign.

63%

of CEOs say their team has the *knowledge and skills* necessary to incorporate generative AI

and

67%

say their recruiting efforts deliver the skills and expertise necessary to achieve *business objectives*

But 53%

are having *difficulty filling key technology roles*

# What are these HR AI systems...?



- Video Interviewing
- Video Assessments
- Blind Resumes
- Utilizing chat bots to give candidates access to information they need at anytime
- Mining social media for potential candidates
- Having algorithms screen resumes for you
- Using chat bots to prescreen, replacing the phone screen



Using AI to monitor employee communications – emails, Team & Zoom chats, instant messaging

Purpose is to identify

- toxic work environments
- Bullying
- Harassment
- Discrimination
- Noncompliance
- Who is at risk of leaving



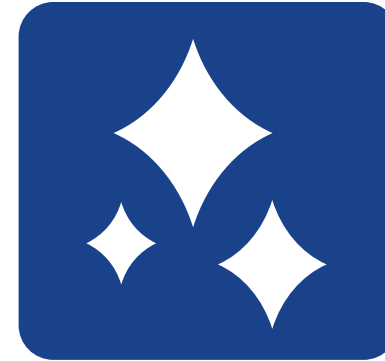
## Litigation

- Research case law
- Outline depositions
- Doc review



## Contracts

- Draft/revise agreements
- Negotiation
- Contract management and automation



## Products

- Issue-spotting
- Benchmarking
- Predictive analytics
- Chatbots for legal advice



## Other

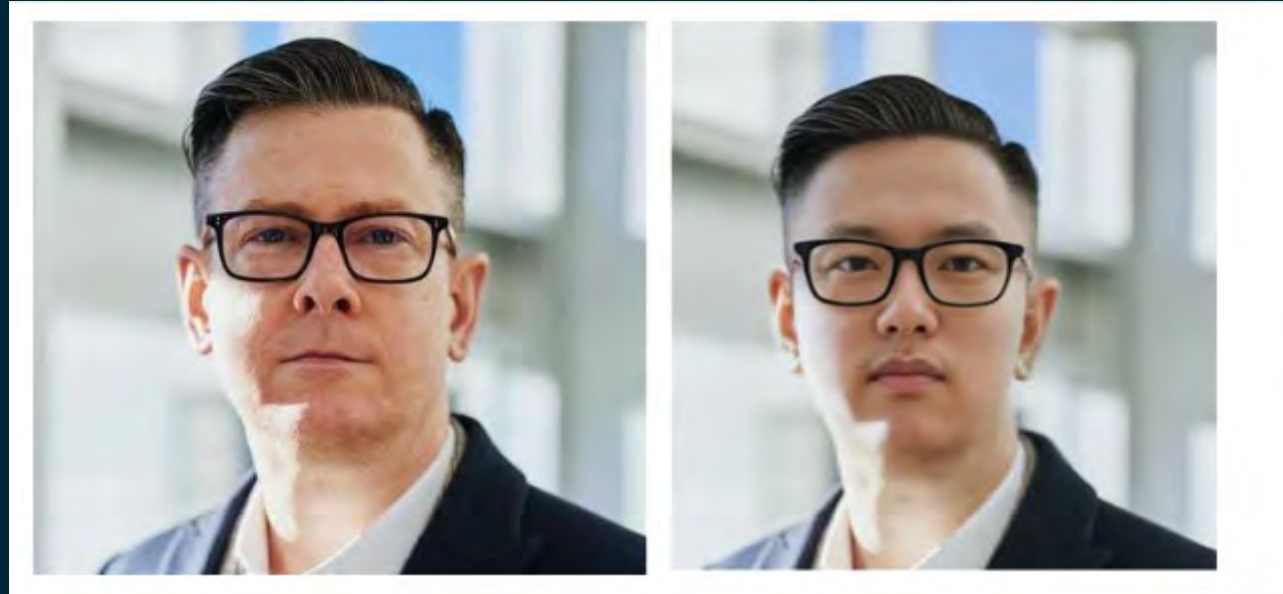
- Translate
- Summarize legal narratives
- Write/rewrite emails
- Brainstorming

# A Case of Mistaken Identity



Scammers used AI in the recruitment process to obtain employment and access to confidential information

# Stock Photo Modified by AI



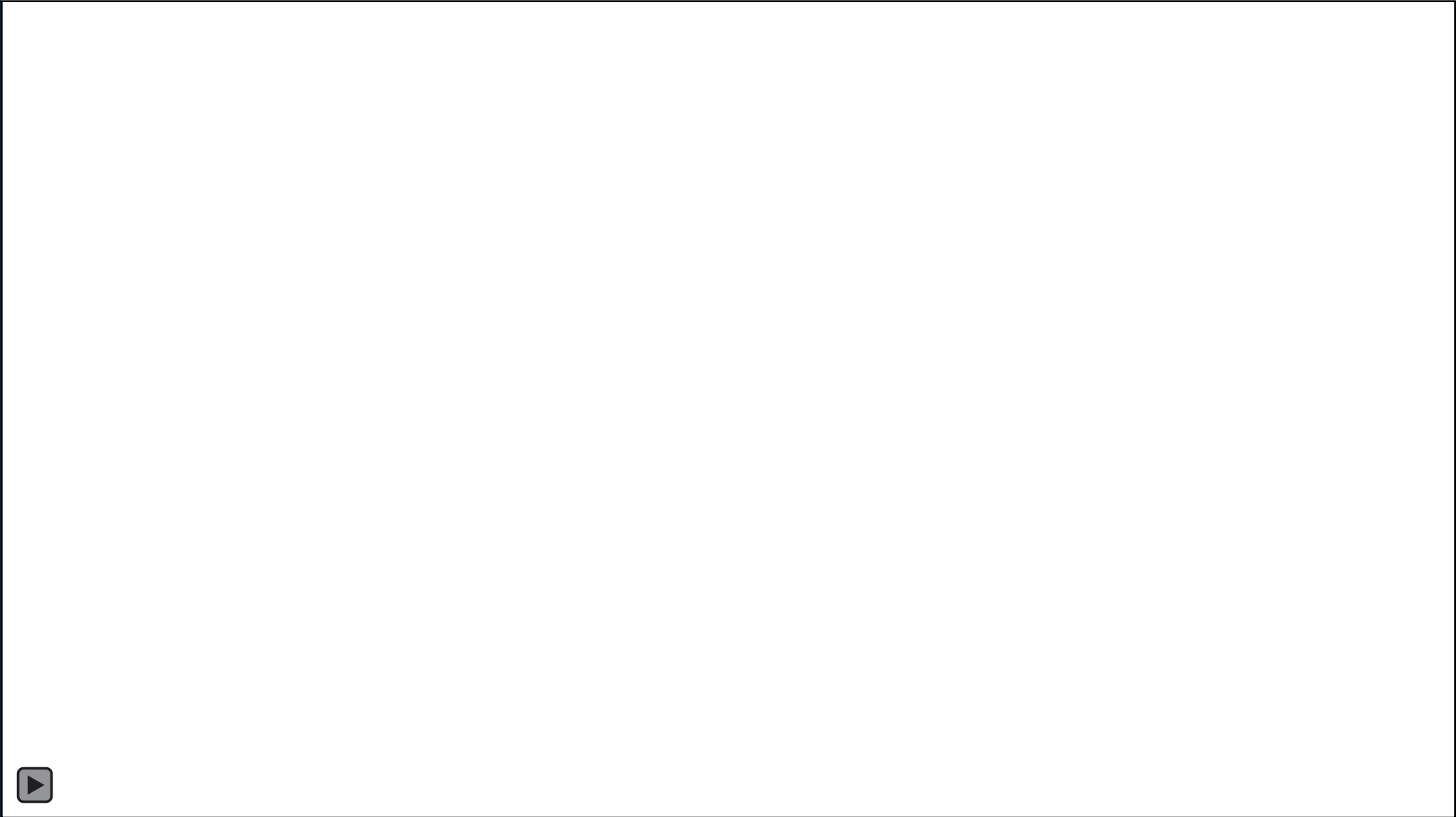
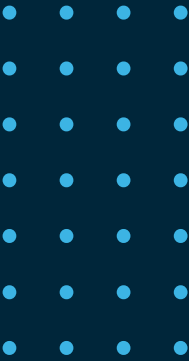
*On the left is the original stock photo. On the right is the photo edited by the scammer.  
Source: the company*



# Video Call with Deepfake “CFO”



A finance worker at a multinational firm was tricked into paying out approximately \$25 million to fraudsters using deepfake technology to pose as the company’s CFO in a video conference call.



# Chatbot Encourages Businesses to Break the Law **Littler**<sup>®</sup>

An AI chatbot set up to help small firms quickly obtain legal advice encourages business owners to break the law.



# Professor Falsely Accused



Generative AI tool falsely accused a law professor of sexual harassment, even citing a (non-existent) Washington Post article.

## Jonathan Turley

American attorney ⋮



Jonathan Turley is an American attorney, legal scholar, writer, commentator, and legal analyst in broadcast and print journalism. A professor at George Washington University Law School, he has testified in United States congressional proceedings about constitutional and statutory issues. [Wikipedia](#)





# Legislation Trends and the Growing Regulatory Environment

# Pending and Enacted AI Legislation



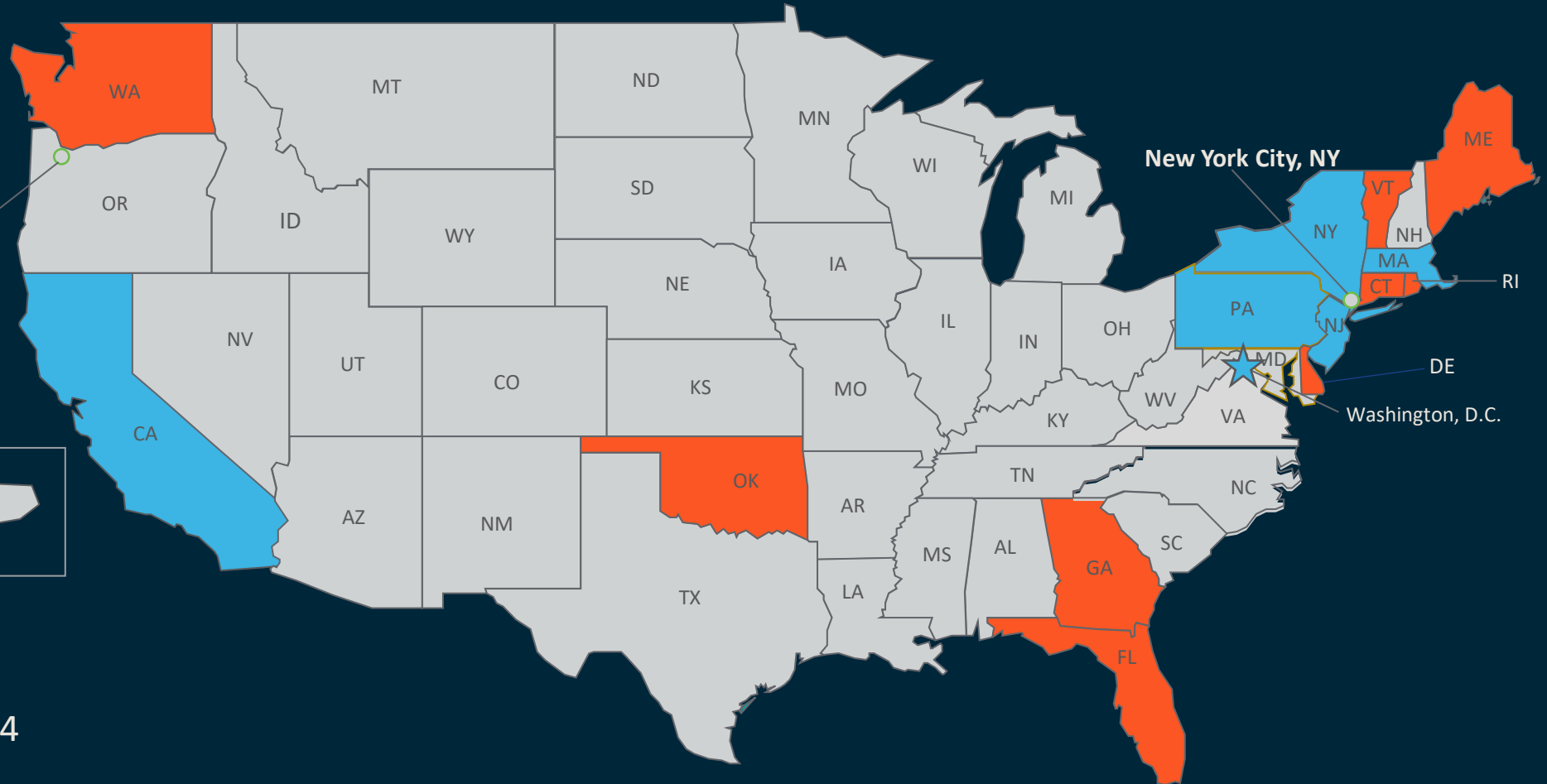
- Proposed
- Enacted

*\*Note: There is federal legislation pending as well.*

Portland, OR

New York City, NY

Washington, D.C.



As of September 2024

# Current State and Local Laws

- California Consumer Privacy Act
  - Effective 1/1/23, exception for employment-related information sunset and employers must now put in place data privacy compliance programs for employee and HR data in compliance with the Act
- Illinois AI Video Interview Act
  - Adds demographic reporting requirements for employers using video interviews for job applicants
  - Training requirements for HR and those involved in the hiring process
- Maryland Facial Recognition in Interviews
  - Prohibits employers from using certain facial recognition services during an applicant's interview w/o consent
- New York City Final Rules re Automated Employment Decision Tools
  - Employers using this tool must have an independent bias audit, publish a summary of results, notice requirements
- Portland, Oregon
  - Prohibits private entities from using facial recognition technology in places of public accommodation
- Many other states and localities have consumer data privacy laws





# The Road Ahead

# What Government Agencies are interested in how you use AI - the question is Who isn't?



# White House

## AI Blueprint (**Oct. 2022**)

- Focuses on five areas of protections re AI:
  - system safety and effectiveness;
  - algorithmic discrimination;
  - data privacy;
  - notice and explanation when AI is used; and
  - access to human alternatives when appropriate.
- Not prescriptive: no force of law.

## Biden Executive Order (**Oct. 2023**)

- All the goals: “Safe” AI. Innovation. Support for US workers. Equity & civil rights. Consumer protection. Privacy. Cybersecurity. Global change.
- Orders DOJ, NSF, FTC, DOL to develop standards, raise awareness, and increase regulation of AI uses.
- Forms WH AI Council to coordinate agency efforts.
- Agencies have 30-365 days to fulfill mandates.
- Significant reporting requirements for employers.
- Covers GenAI.

# EEOC “Technical Guidance”

## 2022 Guidance

- **ADA** compliance is high-priority enforcement issue
- visual, auditory, other impairments must not limit access
- barring undue hardship, alternatives must be given
- assessment must account for reas. accommodation
- avoid disability-related inquiries (direct or indirect)
- notice: AI use, function, alternatives/accommodation

## 2023 Guidance

- **Title VII** compliance is high-priority enforcement issue
- resume scanners, monitoring apps, chatbots, video-interview tools, “job fit” testing tools all may discriminate
- employer may be liable even for third-party tool
- multiple statistical analyses required
- self-audits urged
- defense of job-relatedness/business necessity applies

**Bottom Line: Traditional Law Still Matters**

## Scheduling Letter: New Item 21

Identify and provide information and documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.

## Internet Applicant Rule

Expressions of interest that are (1) made through the Internet or related electronic technologies and (2) which are considered for a particular position must be retained.

OFCCP FAQ: A job seeker is "considered" ... if the contractor assesses the substantive information provided in the resume.

So: The entire scanned database may need to be included in adverse-impact analysis.

## **Algorithmic Accountability Act**

FTC to promulgate AI assessment and reporting criteria.

Self-reporting of AI use cases, testing, and impact assessments.

Annual aggregate reporting on trends.

Creation of public-access database of reported data (anonymized ... maybe).

Not just employment: insurance, diagnostics, finance, other consumer activity.

Aims to avoid “burdensome licensing regimes”, “broad new categories of liability”.

# States: California – Game Changer?

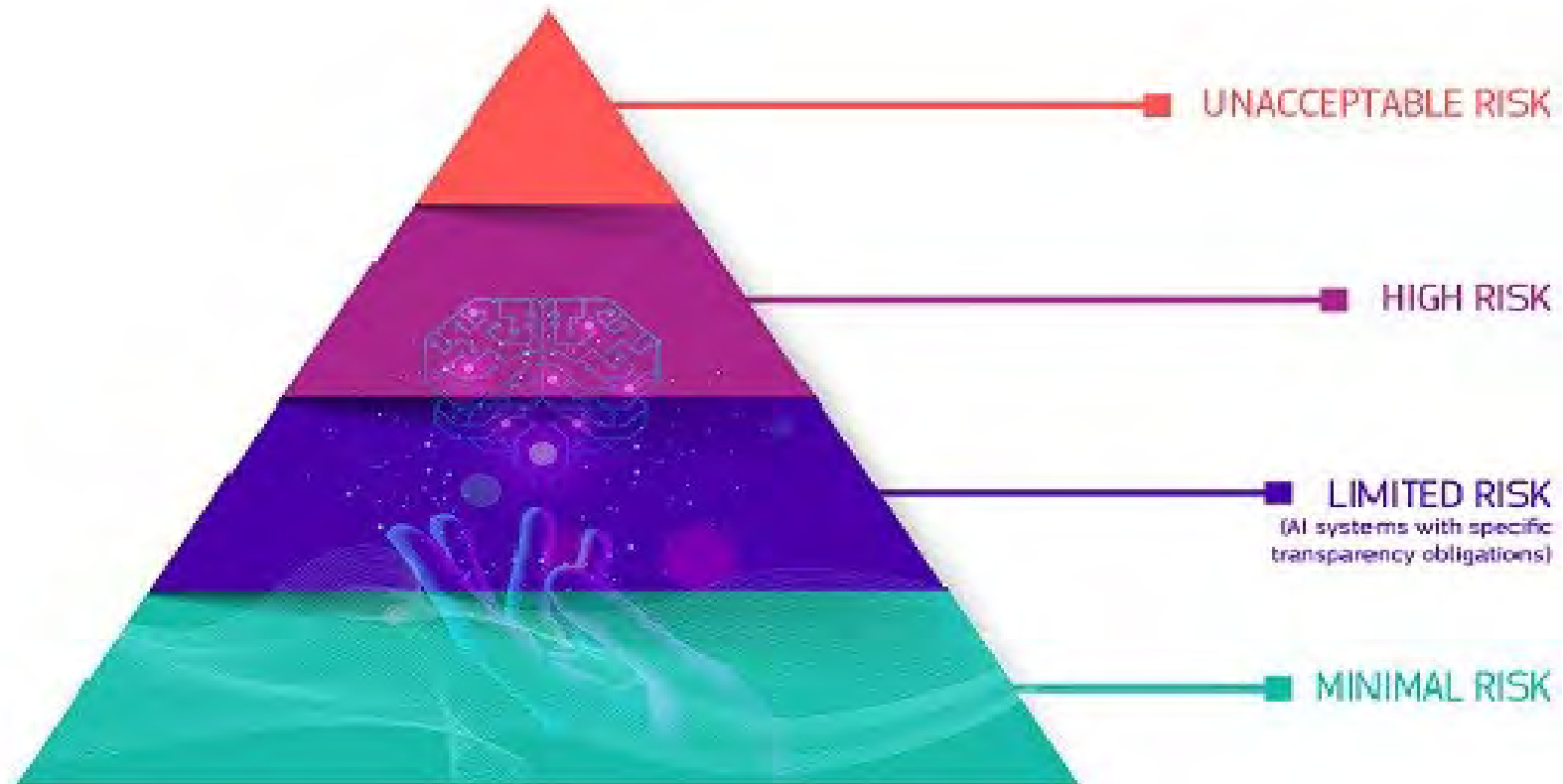
## Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems (ADS)

- Joint & several liability contemplated across supply chain for ADS **and beyond**
- “Agent” includes “third party that provides services related to making hiring or employment decisions”
  - and **agent = employer** already (pursuant to existing regs)
  - *Raines v. US Healthworks* bolsters this **joint and several liability** outcome
- “Employment agency” covers those who “identify, screen, and/or to procure” candidates, incl. via ADS
- Aiding and abetting liability expanded to “advertising, sale, provision” of ADS
- Significant new record retention requirement – 4 years, all ML data
- Additional restrictions on pre-offer personality assessment, gamified testing, AI background checks



# European Union AI Act

Expected to be fully effective by 2026



# European Union AI Act

Employment, management of workers, recruiting are all considered “high risk.”

High-risk AI systems will be subject to strict obligations before they can be put on the market:

- Adequate risk assessment and mitigation systems;
- High quality of the datasets feeding the system to minimize risks and discriminatory outcomes;
- Logging of activity to ensure traceability of results;
- Detailed documentation providing all information necessary on the system and its purpose for authorities to assess its compliance;
- Clear and adequate information to the deployer;
- Appropriate human oversight measures to minimize risk;
- High level of robustness, security and accuracy

Legislation that simplifies the regulatory environment, such as the EU AI Act, appears poised to accelerate investment in generative AI.

57%

of CEOs say the regulatory guidelines provided by the EU AI Act will *increase their willingness to invest* in generative AI.

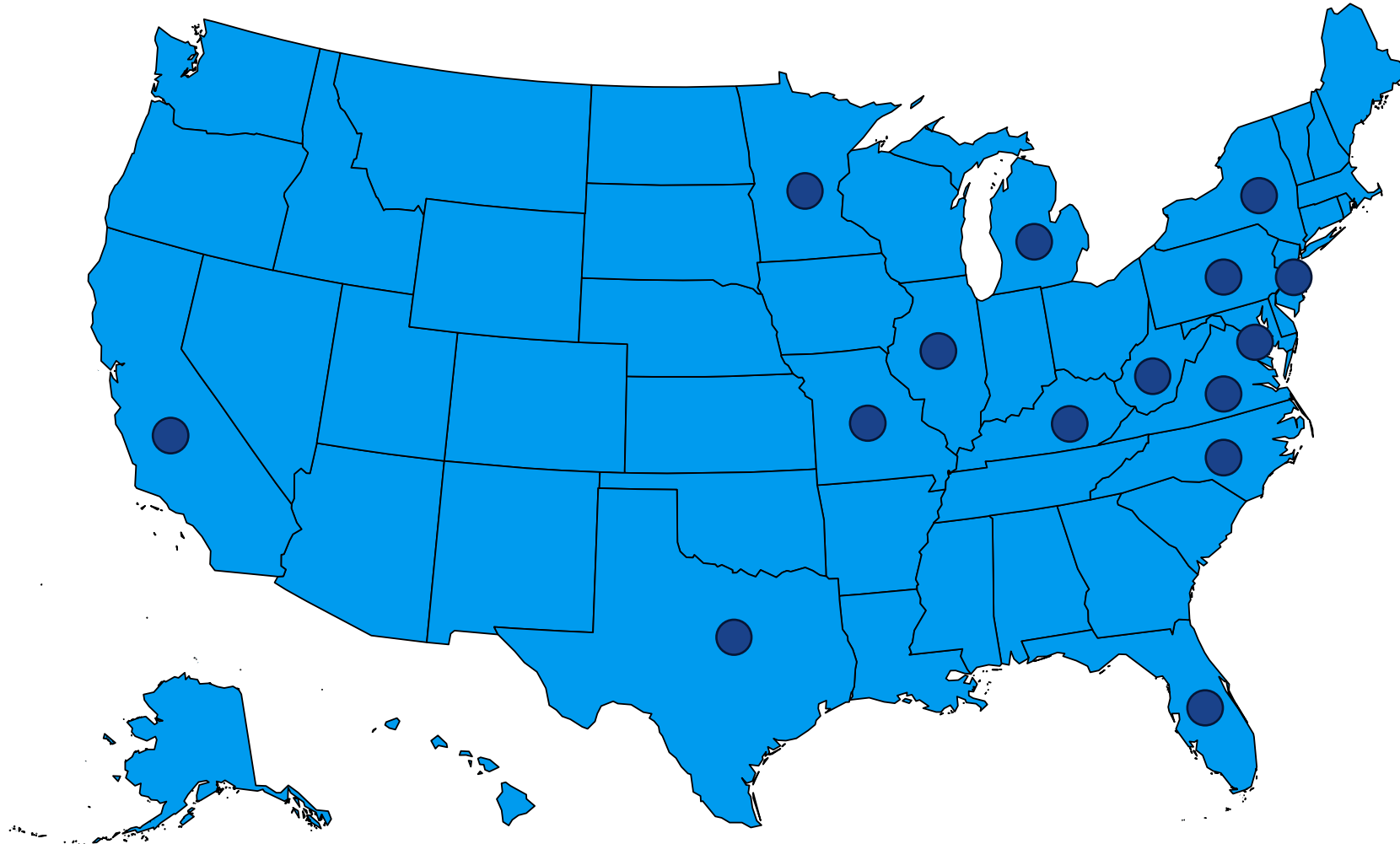
and

81%

say given the requirements of the EU AI Act, they will maintain or accelerate their organization's *pace of generative AI adoption* in 2024.

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# Ethics Opinions and Guidance



# Ethics Rules Impacted by GenAI Tools



Rule 1.1 Competence

Rule 1.3 Diligence

Rule 1.4  
Communications

Rule 1.5 Fees

Rule 1.6 Confidentiality  
of Information

Rule 3.1 Meritorious  
Claims and Contentions

Rule 3.3 Candor Toward  
the Tribunal

Rule 5.1 Responsibilities  
of Partners, Managers,  
and Supervisory  
Lawyers

Rule 5.2 Responsibilities  
of a Subordinate Lawyer

Rule 5.3 Responsibility  
Regarding Nonlawyer  
Assistance

Rule 5.5 Unauthorized  
Practice of Law

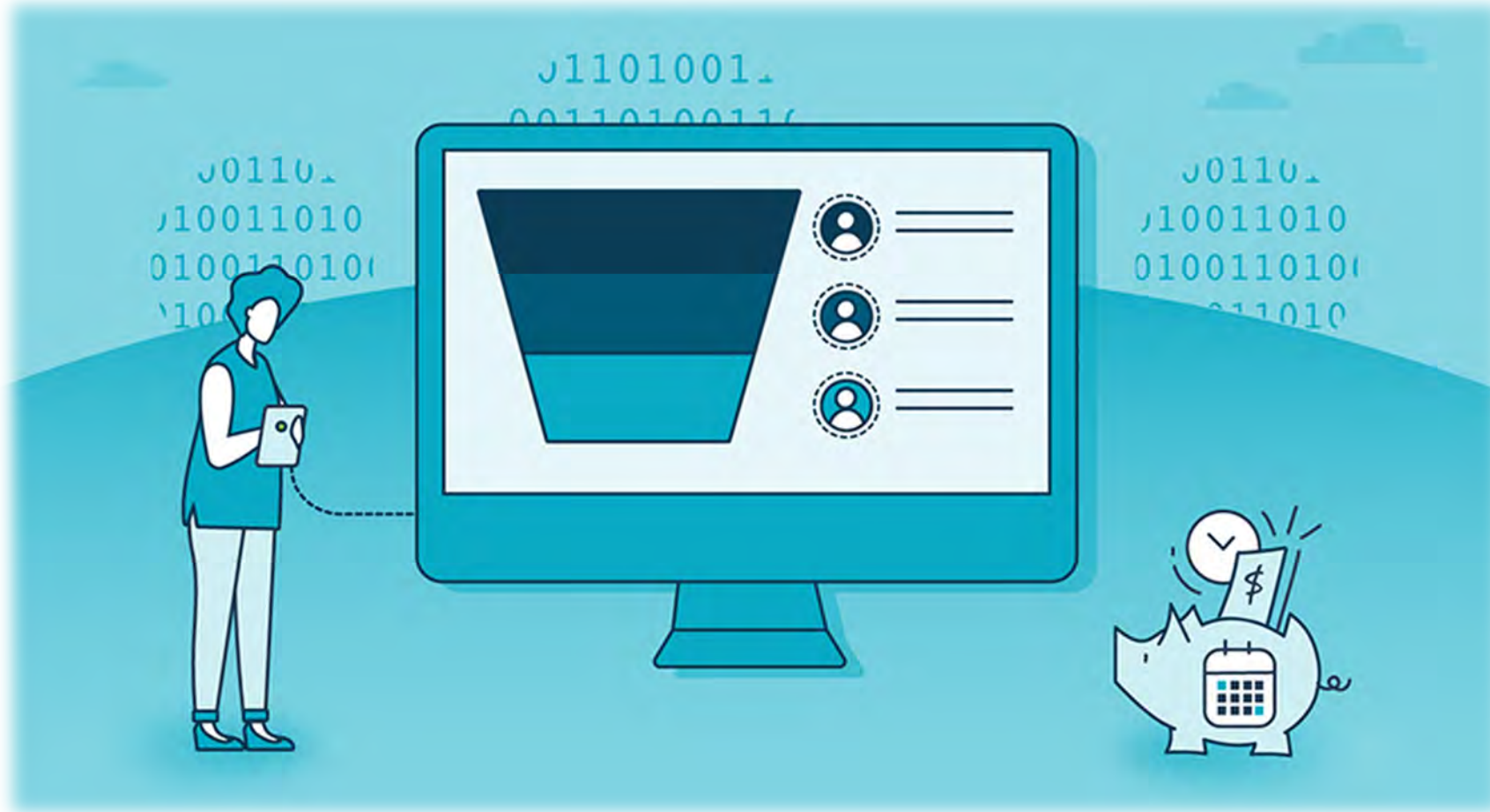
Rule 8.4 Discrimination  
and Harassment



# Going forward, What is an Organization to do?



# Identify and assess AI use cases.



# Implement an AI policy.

- explanation of AI
- standards & expectations
- permitted/prohibited AI uses
- approved AI tools
- risks/need for compliance
- general use guidelines/FAQs



# Review contractual obligations. Seek contractual protection.





# Takeaways...

- Vendor due diligence is a must – assign Legal and HR professionals to vet applications
- Avoid replacing discretion with algorithms wholesale – importance of human review is critical and the potential to change the decision



# Takeaways...

- Situational awareness: Need to follow emerging AI regulations and the legal landscape.
- Navigating the legislative and regulatory environment and anticipating the coming regulatory environment.



Littler is at the forefront of the AI revolution.

We work with leading companies, AI developers, Congress, and federal and state regulators to shape the future of how AI will be used in the workplace. We provide practical, business-minded counsel, empowering companies to embrace innovation while mitigating risk. This includes:



Advice and Counsel



Regulatory and Legislative



Litigation

## AI and Technology | Littler Mendelson P.C.

- <https://www.littler.com/practice-areas/ai-and-technology>





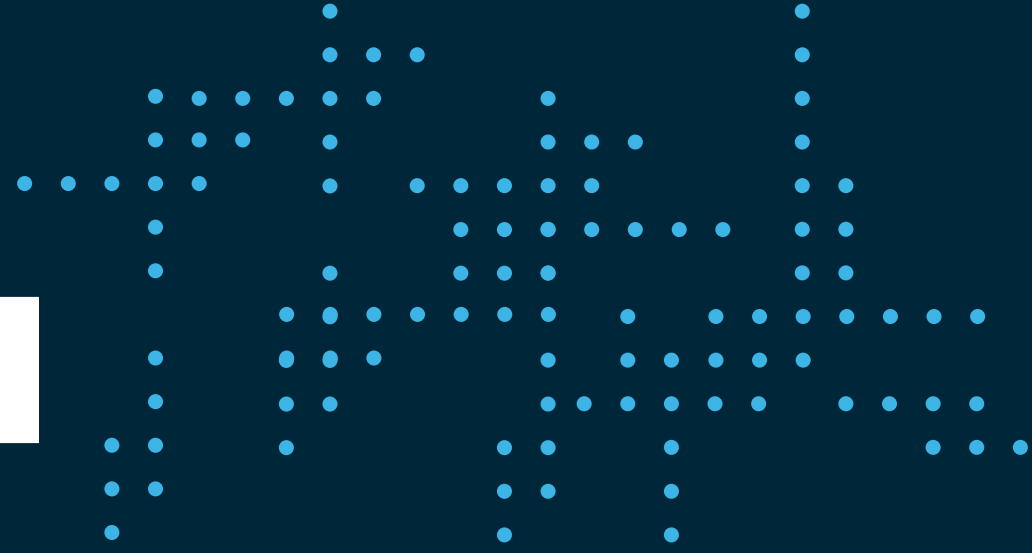
# Questions?

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# Thank You



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