Artificially Intelligent? Regulations and Employer Considerations Regarding AI in the Workplace

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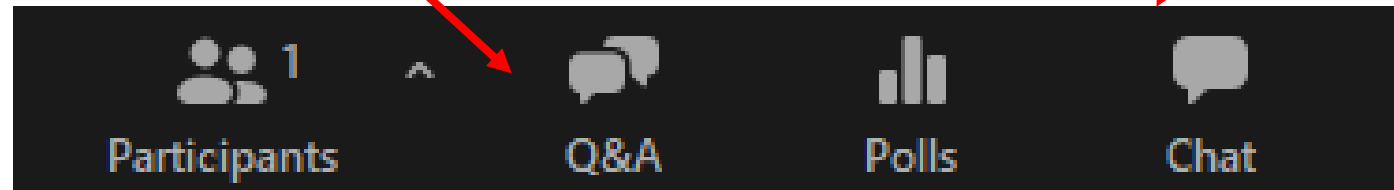Raise Hand   Q&A   Live Transcript

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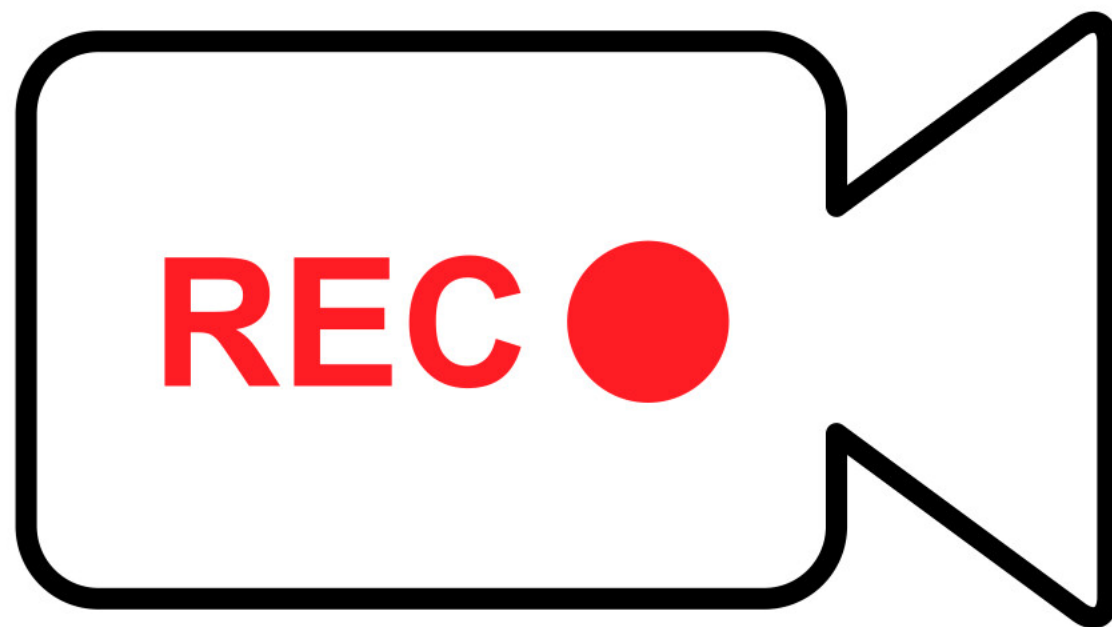# Ask a Question, Engage With Other Attendees

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Agenda

- AI in HR

- U.S. DOL and EEOC Guidance & Enforcement Objectives on AI for Employers

- State and Local Laws Impacting Employer Use of AI

- Case Study: AI at Work – the Rise and Fall of ApexCorp's Automated HR System

- Considerations for Employer Policy and Practices

- Q&A

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How Is AI Being Used in HR?

- Due to recent developments in artificial intelligence (AI), businesses are moving towards using AI in their HR departments to streamline various processes, such as:
  - Job posting/Recruitment/Screening
  - Onboarding/Training
  - Performance management
  - Employee-facing Chatbots
  - Employee records management
  - Payroll processing and benefits administration

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AI in HR By the Numbers

- Recent Gartner Surveys (June 2023; February 2024)
  - 76% of HR leaders believe AI must be implemented in their organization within the next 12-24 months or they will fall behind competitors.
  - 38% of HR leaders are piloting, planning implementation, or have already implemented generative AI as of February 2024, double the number (19%) from June 2023.
- IBM Survey (2021)
  - 60% of the 5,000 surveyed C-Suite executives expressed concerns over trust and compliance with AI, which limited implementation.

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Legal Risks With Generative AI

- Confidentiality

- Factual Inaccuracies

- Data Ownership

- Copyrights and IP

- Bias and Discrimination

- Regulatory Compliance

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U.S. DOL and EEOC Guidance & Enforcement Objectives on AI for Employers

Federal and State Agencies Take Note of AI

Overview

- U.S. Department of Labor
- U.S. Equal Employment Opportunity Commission
- State-specific laws

Note: Evolving federal agency landscape with respect to AI.

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U.S. Department of Labor

- "The introduction of AI-augmented work will create demand for workers to gain new skills and training to **learn how to use AI** in their day-to-day work. AI will also continue creating new jobs, including those focused on the **development, deployment, and human oversight** of AI."

- "The risks of AI for workers are greater if it undermines workers' rights, embeds bias and discrimination in decision-making processes, or makes consequential workplace decisions without **transparency, human oversight and review**."

Artificial Intelligence and Worker Well-being: Principles for Developers and Employers, The United States Department of Labor, May 16, 2024

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U.S. Department of Labor – AI Best Practices

The U.S. Department of Labor released AI Best Practices to guide developers and employers. (October 16, 2024)

Center Worker Empowerment

- AI should benefit both employers and employees.
- Workers should have early and regular input on AI adoption.
- In union workplaces, employers should bargain in good faith regarding AI implementation.

Ethically Develop AI

- AI should protect civil rights, mitigate risks to safety, and meet performance requirements.
- Employers should create jobs for human oversight of AI systems.
- AI models should be transparent and understandable for non-technical users.

Establish AI Governance & Oversight

- Employers should establish AI governance structures accountable to leadership.
- Train decision-makers in AI output interpretation.
- Document and audit AI-driven employment decisions.

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U.S. Department of Labor – AI Best Practices

More DOL Recommendations for AI Use

Ensure Transparency in AI Use

- Provide advance notice and disclosure to workers about AI use.
- Allow workers to appeal AI-driven decisions.
- Conduct independent audits and publicly report AI impacts on worker rights.

Protect Labor & Employment Rights

- AI should not be used to interfere with union organizing or chill-protected activities.
- Employers should minimize electronic monitoring and protect break areas from surveillance.
- AI must comply with labor laws, including those on discrimination, accommodations, and wages.

Support Workers & Responsible Data Use

- AI should enhance work quality, not replace workers.
- Employers should provide AI training and retrain displaced employees for new roles.
- Worker data collection should be limited to legitimate business needs, and privacy must be protected.

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EEOC's Role in AI

EEOC's guidance on AI was rescinded; a new executive order is in place.

But note:

- The EEOC enforces federal laws prohibiting employment discrimination

- Federal anti-discrimination laws still apply to AI tools

- AI in employment decisions can violate discrimination laws

- Example: Resume screeners rejecting applicants based on protected characteristics

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AI Discrimination Risks – EEOC

Disparate Impact & Disability Discrimination

Disparate Impact Discrimination

- AI tools may appear neutral but can disproportionately exclude protected groups without justification.
- Example: An AI hiring tool that unintentionally disadvantages certain demographics.
- April 23, 2025, an Executive Order ended the federal use of disparate-impact liability.

Disability Discrimination

- AI screening tools that filter out candidates based on disability-related factors may violate the ADA.
- Example: Video interview software that lowers scores for individuals with speech impairments.

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AI Discrimination Risks – EEOC

Vendor Liability

- Employers remain legally responsible for discrimination caused by third-party AI tools.
- Companies using external AI solutions must ensure those tools comply with anti-discrimination laws.

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EEOC AI Case: iTutorGroup Settlement

August 9, 2023

Key Details:

- The EEOC secured its **first AI-related workplace discrimination settlement** against iTutorGroup.

- iTutorGroup agreed to pay **$365,000** to resolve claims of **age discrimination**.

- The company's AI-driven application review system **automatically rejected**:

  - **Female applicants aged 55 or older**

  - **Male applicants aged 60 or older**

How Discrimination Was Discovered:

- A rejected applicant **resubmitted an identical application** with a revised (younger) birthdate and was subsequently offered an interview.

Settlement Terms:

- Payment of **$365,000** to impacted applicants.

- Inviting previously rejected applicants to **reapply**.

- Commitment to **stop requesting birthdates** during the hiring process.

Key Takeaway for Employers:

- Even if discrimination is **automated** through AI, **employers remain responsible** under the law.

- The case underscores the importance of **AI bias mitigation** and **careful oversight** of automated systems.

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State and Local Laws Impacting Employer Use of AI

State Laws – Illinois

New AI Employment Disclosure Requirements (Effective January 1, 2026)
Illinois Human Rights Act Amendment
- Employers **must provide written notice** to employees and candidates about AI use in:
  - Recruitment & hiring
  - Promotion & employment renewal
  - Selection for training
  - Discipline & termination decisions

Illinois Artificial Intelligence Video Interview Act (Since 2020)
- Employers must **inform and obtain consent** before using AI in video interviews.
- Must disclose:
  - **What data is collected & analyzed**
  - **How AI-generated data is stored**

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State Laws – Massachusetts

Massachusetts AG's AI Advisory & Compliance Requirements

Employer Liability in AI Use

- Employers remain responsible for discriminatory AI outcomes.
- AI users cannot claim immunity from liability if systems result in bias or discrimination.

Massachusetts Consumer Protection & Anti-Discrimination Laws Apply to AI

- AI cannot misrepresent, deceive, or exclude protected groups.
- Employers & developers must ensure transparency & fairness in AI-driven decisions.

Key Risks Identified by Attorney General Campbell

- AI systems denying housing, credit, or job opportunities unfairly.
- Deepfake, voice cloning, or chatbot fraud leading to consumer deception.
- AI exacerbating economic inequality & workplace bias.

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State Laws – Colorado

Colorado's Artificial Intelligence Act (Effective February 1, 2026)

Employers Must Use "Reasonable Care" to Avoid Algorithmic Discrimination

- AI in employment must not create differential treatment or impact based on protected characteristics (race, gender, age, etc.).
- Employers must actively mitigate bias in AI-driven hiring, promotions, and terminations.

Notice & Transparency Requirements

- Employers must notify employees & consumers if AI is used in hiring, promotion, or workplace decision-making.
- Companies must provide clear disclosure of AI system usage to all affected individuals.

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State Laws – California

California Privacy Protection Act & AI Employment Regulations
Pre-Use Notices & Opt-Out Rights
- Employers must notify employees & consumers before using AI-driven decision-making systems.
- Employees must have an opportunity to opt out of AI-based evaluations.

Transparency & Accountability Requirements
- Businesses must explain how AI systems are used and their impact on employees.
- Employers must collect & maintain records of AI system performance & decisions.

Anti-Discrimination & AI Restrictions
- AI cannot screen out, rank, or prioritize employees based on protected characteristics.
- Use of AI in interviews is prohibited under California Civil Rights Department draft rules.
- Anti-bias testing is required for AI systems used in employment decisions.

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Case Study: AI at Work – The Rise and Fall of ApexCorp's Automated HR System

Exploring AI Bias in Hiring, Surveillance, Pay, and Termination

Background: ApexCorp's AI System

ApexCorp, a rapidly expanding tech firm, sought to revolutionize its workforce management by implementing an AI-driven Human Resources Management System (HRMS). The AI system, dubbed TalentOptimizer, was designed to:

- Automate job recruitment by ranking applicants based on historical hiring patterns.
- Track employee productivity through real-time workplace surveillance.
- Identify employees eligible for promotions and pay raises.
- Optimize workforce reductions by identifying low-performing employees for layoffs.

Despite its intended benefits, TalentOptimizer introduced unforeseen biases, privacy concerns, and legal challenges, ultimately leading to significant reputational damage and regulatory scrutiny.

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Phase 1: Job Search – The AI That Screened Out Women and Minorities

Problem: TalentOptimizer's recruitment module ranked candidates based on historical hiring patterns over the past decade. Since the data favored white, male applicants in technical roles, women and people of color were systematically ranked lower and screened out before human review.

AI Logic Breakdown:

- **Training Bias:** The AI's algorithm learned from past hiring decisions, reinforcing systemic discrimination.
- **Unconscious Discrimination:** Certain resumes were penalized for factors correlated with gender or race, such as gaps in employment (often due to caregiving responsibilities) or names historically associated with minority groups.
- **Lack of Transparency:** Hiring managers had limited ability to override AI-generated recommendations.

Impact:

- **Diversity Decline:** Fewer women and minorities were interviewed or hired.
- **Public Backlash:** Employees and advocacy groups criticized the company's hiring practices.

Questions to Consider:

- *What legal risks arise when AI reinforces historical hiring biases?*
- *How can companies ensure fairness in AI-driven hiring?*

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Phase 2: Workplace Surveillance – Productivity Tracking or Privacy Invasion?

Problem: TalentOptimizer expanded beyond hiring decisions to monitor real-time employee behavior, tracking:

- **Keystrokes and time spent on tasks.**

- **Location data** from badge swipes and company-issued smartwatches.

- **Email and Slack messages** to assess "collaboration efficiency."

The AI flagged employees who took longer breaks, worked nontraditional hours, or had fewer email interactions as "low productivity."

Impact:

- **Discriminatory Productivity Metrics:** Employees with disabilities, parents working remotely, and neurodivergent employees were disproportionately flagged.

- **Privacy Violations:** Employees had no clear notice of how their data was being used.

- **Workplace Anxiety:** Increased surveillance led to a toxic work culture, with employees feeling pressured to constantly "perform" rather than focus on meaningful work.

Questions for Consideration:

- *Can AI-powered workplace surveillance violate employee rights?*

- *How might monitoring productivity lead to legal challenges?*

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Phase 3: Pay and Promotion – AI Rewards Aggression Over Merit

Problem: TalentOptimizer determined which employees were eligible for raises and promotions based on "assertiveness" and "leadership" as detected in email tone and meeting participation. However, the AI's criteria disproportionately rewarded employees with more aggressive communication styles, while penalizing those from cultures that value collaboration and indirect communication.

Case Example:

- A Black female employee was denied a promotion because the AI labeled her email tone as "too passive."
- Meanwhile, a white male colleague with a more aggressive tone was promoted to a leadership role.

Impact:

- **Cultural Discrimination:** Employees from Asian, Latino, and other collectivist cultures were consistently ranked lower.
- **Workplace Inequity:** Leadership roles were dominated by assertive personalities, disadvantaging quieter but highly competent employees.

Questions for Consideration:

- *What happens when AI favors one communication style over others?*
- *Could this create a hostile work environment for certain groups?*

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Phase 4: Layoffs and Termination – AI Targets "Low Performers" Unfairly

Problem: To cut costs, ApexCorp used TalentOptimizer to identify the bottom 10% of employees for layoffs. However, the AI flagged workers based on biased productivity metrics rather than actual performance.

Who Was Disproportionately Affected?

- Remote workers who were parents (especially mothers).

- Employees with disabilities who took additional breaks.

- Older workers (40+ years old) due to lower digital engagement metrics.

Questions for Consideration:

- *How can AI-based layoffs violate employment laws?*

- *What safeguards should be in place before relying on AI for termination decisions?*

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Considerations for Employer Policy and Practices

Policy and Ethical Considerations and Challenges

- The backdrop:
  - 43% of respondents to a February 2023 Fishbowl survey said they use ChatGPT at work.
  - 70% of those respondents say their managers do not know they used ChatGPT.
  - 91% of businesses hiring want individuals with ChatGPT experience (April 2023 Resume Builder Survey), and 60% say it will give them a competitive edge.
  - Others prohibiting the use of chatbots and other AI.

Ethical Considerations

- **Employee trust**
  - Transparency in AI processes and decision-making
  - Recourse for employees/applicants subject to AI-informed decisions
  - Clear and accessible policies when an employer uses AI for HR functions
- **Job Displacement and Reskilling**
  - Will the use of AI displace current jobs? Augment productivity?
  - Skills development and training opportunities
- **Use of AI to enhance HR processes**
  - Should it replace human judgment?
  - Can biases be reduced, or are they augmented?

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Policy Considerations

- Policy considerations for HR's/employer's use:
  - EEOC focuses on fair and unbiased use of AI in HR systems and processes (i.e., protections under Title VII, ADA, ADEA, etc.)
  - OFCCP Uniform Guidelines on Employee Selection Procedures
  - State/local law considerations
  - Recruitment, hiring, evaluation, compensation, promotion, work allocation, monitoring…

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Employment Law Considerations for Employees' Use of AI

- Potential bias

- Confidentiality

- Accuracy

- Authenticity of employee work product

- Fairness

- Interplay with other company policies (i.e., timekeeping, reimbursements, anti-harassment/non-discrimination, ADA reasonable accommodations, etc.)

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Privacy Concerns

- The very nature of AI is that it "learns" by taking in and processing large amounts of data. This means it must collect and store a large amount of sensitive employee and candidate information.

- Every time someone inputs data or information to a publicly accessible AI system, there is a risk confidential information will be shared

- The two most-feared words in all of business… *Data Breach!!!!!*

- Sophisticated data encryption is one way to help safeguard sensitive information and prevent potential breaches that could put companies on the hook for identity theft or financial losses

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Employer Dos and Don'ts

- **Do:**
  - Develop policies and processes for HR's use of AI
  - Develop policies regulating employee use of AI to perform job duties
  - Carefully review AI vendor contracts with legal counsel/conduct audits
  - Train employees on the use of AI at the company
  - Review existing confidentiality protections and consider updates
  - Understand federal, state, and local laws governing the use of AI in employment

- **Don't:**
  - Accept AI outputs without evaluating them carefully
  - Expect AI to replace human oversight and intervention

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Questions?

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