



Using Artificial Intelligence to Support DEIB Efforts

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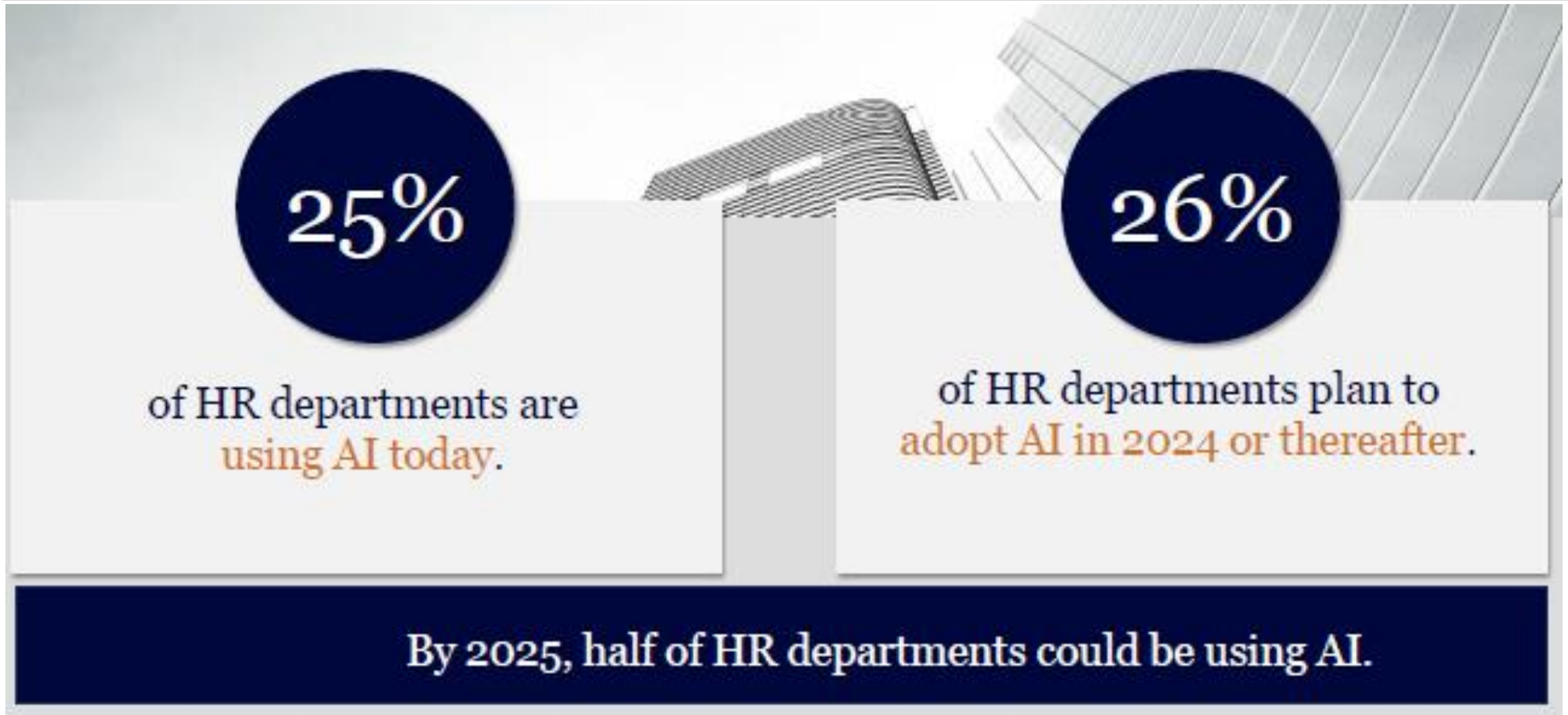


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AI Use In HR Is Already Here, And Is Becoming More Common



Source: SHRM “State of the Workplace” research survey conducted in November 2023.

Nearly 2 in 3 organizations only began using AI to support HR-related activities within the past year.



■ Within the past year ■ 1-2 years ago ■ 3-4 years ago ■ 5+ years ago ■ Don't know



47% of HR professionals say using AI to support HR-related activities has become *somewhat* (37%) or *much more* (10%) of a priority for their organization in the last 12 months.

Source: SHRM 2024 “Talent Trends” survey

SHRM Survey Responses

How HR Uses Artificial Intelligence

*Question was select all that apply. Among those who indicated their organization uses AI to support HR-related activities.



“Other” areas HR uses AI

- “Administrative tasks”
- “Policy writing and communications”
- “General communication (announcements, social media posts, company emails, etc.)”
- “Forms and resource writing”
- “Drafting documents, communications, messages, and tasks lists”
- “Internal communications, policy and procedure drafting”
- “Content generation for documents, presentations, and awards.”
- “Answering FAQs”

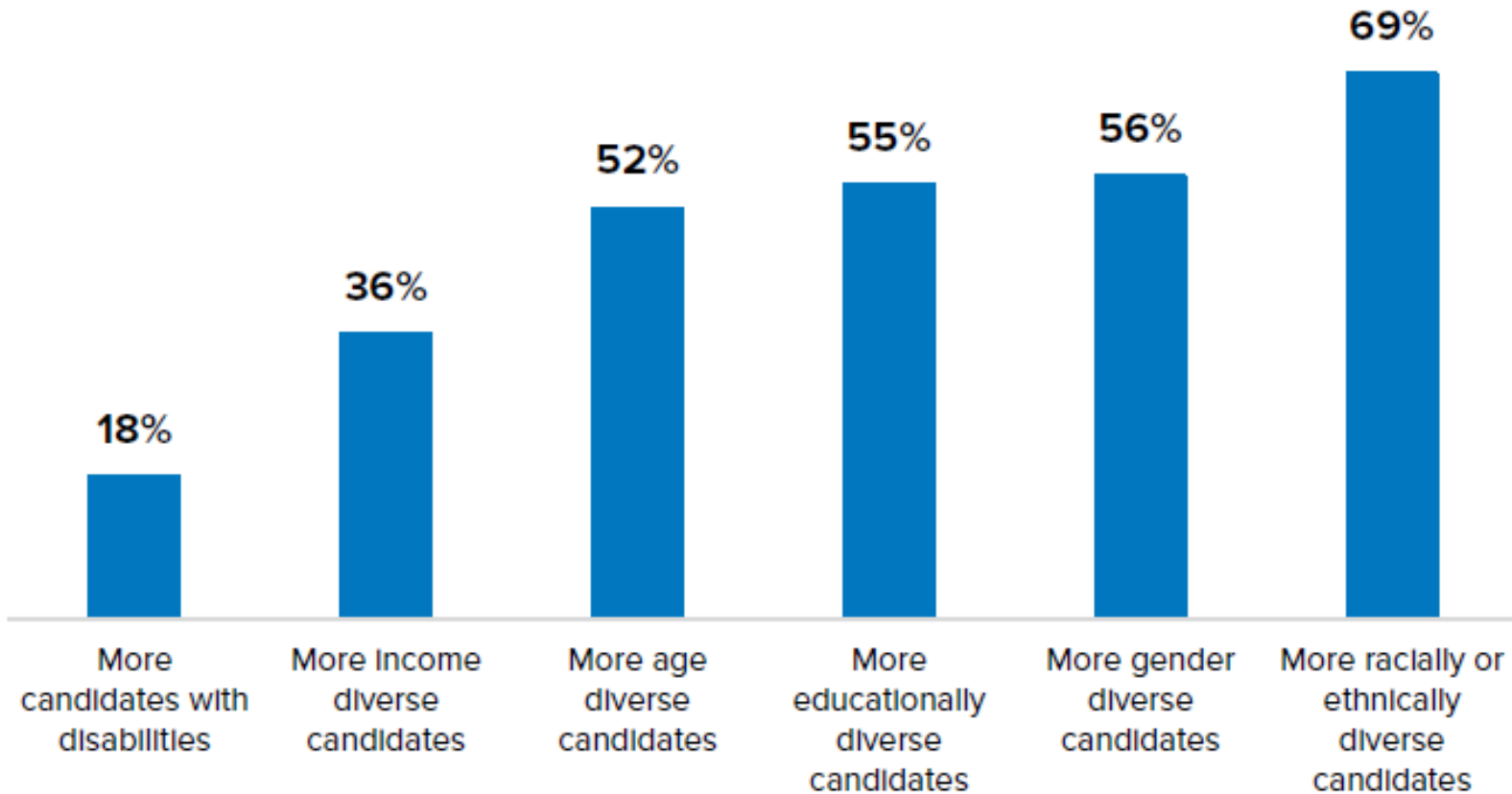
Source: SHRM 2024 “Talent Trends” survey

AI for DEI?

Nearly 1 in 3 HR professionals say the **diversity of their organization's hires** is somewhat **(29%)** or much better **(3%)** due to their use of AI.

Diverse or underrepresented talent pools AI has helped organizations reach

**Among organizations using AI to improve their ability to identify more diverse candidates or to access underrepresented pools of talent they weren't previously reaching.*



Source: SHRM

- *“We use an AI software that writes job descriptions to be more inclusive based on research. It allows us to write JDs that make minorities feel more welcome to apply.”*
 - Small employer in the Software Development industry
- *“The AI [we use] scans applications for those with not only the educational requirements we list, such as a college degree, but it also scans for experience in the position posted as well so that those who do not have a college degree are brought forward and interviewed too, leading to a bigger applicant pool and better fill rate.”*
 - Large employer in the Healthcare industry
- *“AI reaches out to passive candidates for us. These passive candidates have diverse backgrounds, and if not for AI, we would have missed them.”*
 - Large employer in the Retail industry
- *“AI via [our Customer Relationship Management software] presents/suggests jobs to candidates proactively rather than the candidate having to find jobs they may not realize they qualify for/are interested in, to which they can apply.”*
 - Small employer in the Professional, Technical, and Scientific Services industry
- *“In areas where we are looking to increase diversity, AI has been able to target quality candidates through analytics that meet the pool of candidates we are seeking (example, new to the workforce, return to workforce, female leaders, underserved communities, more cultures).”*
 - Medium employer in the Software Development industry

Risks Associated with the use of AI in hiring and employee selection processes



- Despite the goal of neutrality and objectivity, AI and algorithms can reproduce or introduce bias, depending upon how those tools are built and trained.
- AI and algorithms can produce biased results, unintentional or not, if they are trained using biased data. Examples include:
 - An algorithm that selects candidates by comparing them with an employer's current employees may replicate biased decision-making if the employer's past practices (even if unintentionally) excluded certain groups.
 - If the data used to train the AI is less complete or less accurate for some groups, the algorithm will be less accurate in identifying the most promising candidates from that group or may systematically underestimate their likelihood of success.
- The risks of discriminatory effects arise because certain AI models "learn" to make predictions by analyzing data about past patterns of behavior.
- The technology's utility can depend significantly on the training data.

Employers using AI are already facing a patchwork of overlapping AI regulatory efforts

There is no pathway this Congress to ***federal*** AI legislation focused on the use of AI for hiring. **State legislatures are not waiting for the federal government to act.**

- **New York City** Local Law 144, enforcement began July 2023, requiring pre-deployment “bias audits” of “automated employment decision tools”
- **Colorado SB 205** was signed on May 17, 2024, regulating the use of AI to make “consequential decisions”.
- **Illinois HB 3773** signed on August 9, 2024, requiring the disclosure of an employer’s use of AI in “recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or the terms, privileges, or conditions of employment.”
- **California AB 2930** had momentum but did not progress at the end of the legislative session on August 31, 2024.

US Civil Rights Laws Apply to the Use of Artificial Intelligence

“Many automated systems rely on **vast amounts of data to find patterns or correlations**, and then apply those patterns to new data to perform tasks or make recommendations and predictions. While these tools can be useful, they also have the potential to produce outcomes that result in unlawful discrimination...

“Automated system outcomes can be skewed by **unrepresentative or imbalanced datasets**, datasets that **incorporate historical bias**, or datasets that **contain other types of errors.**”



From the Joint Statement on Enforcement of Civil Rights, Fair Competition, Consumer Protection, and Equal Opportunity Laws in Automated Systems (April 4, 2024)

EEOC's Strategic Enforcement Plan Emphasizes AI and Hiring

The EEOC's Strategic Enforcement Plan for FY24-28 puts an emphasis on the use of any technology, and not just AI in hiring.

EEOC's own explanation says the SEP:

Recognizes employers' increasing use of technology including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring and other employment decisions, practices, or policies;

The SEP itself emphasizes the EEOC's scrutiny on:

the use of technology, including artificial intelligence and machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups;

the use of screening tools or requirements that disproportionately impact workers on a protected basis, including those facilitated by artificial intelligence or other automated systems, pre-employment tests, and background checks.





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The Governing Law and Legal Framework

- **Civil Rights laws set the stage**
 - Title VII, ADA, ADEA, Section 1981 and state laws
- **Race/Gender-based preferences are unlawful except in very narrow circumstances:**
 - when specifically designed and narrowly tailored to temporarily correct a “manifest imbalance” in the workplace. (This is rarely exercised; use caution)

U.S. Law Requires Balance

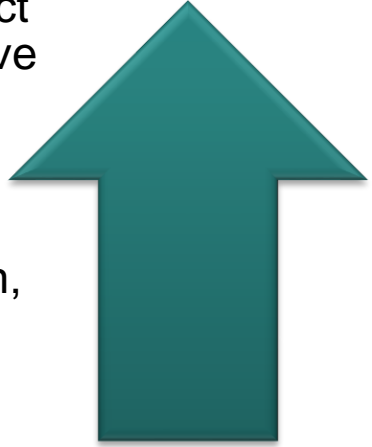
There are risks to doing too much (risks related to “reverse discrimination” claims or challenges from detractors) AND risks to doing too little (discrimination claims and stakeholders who question the company’s commitment to DEI)



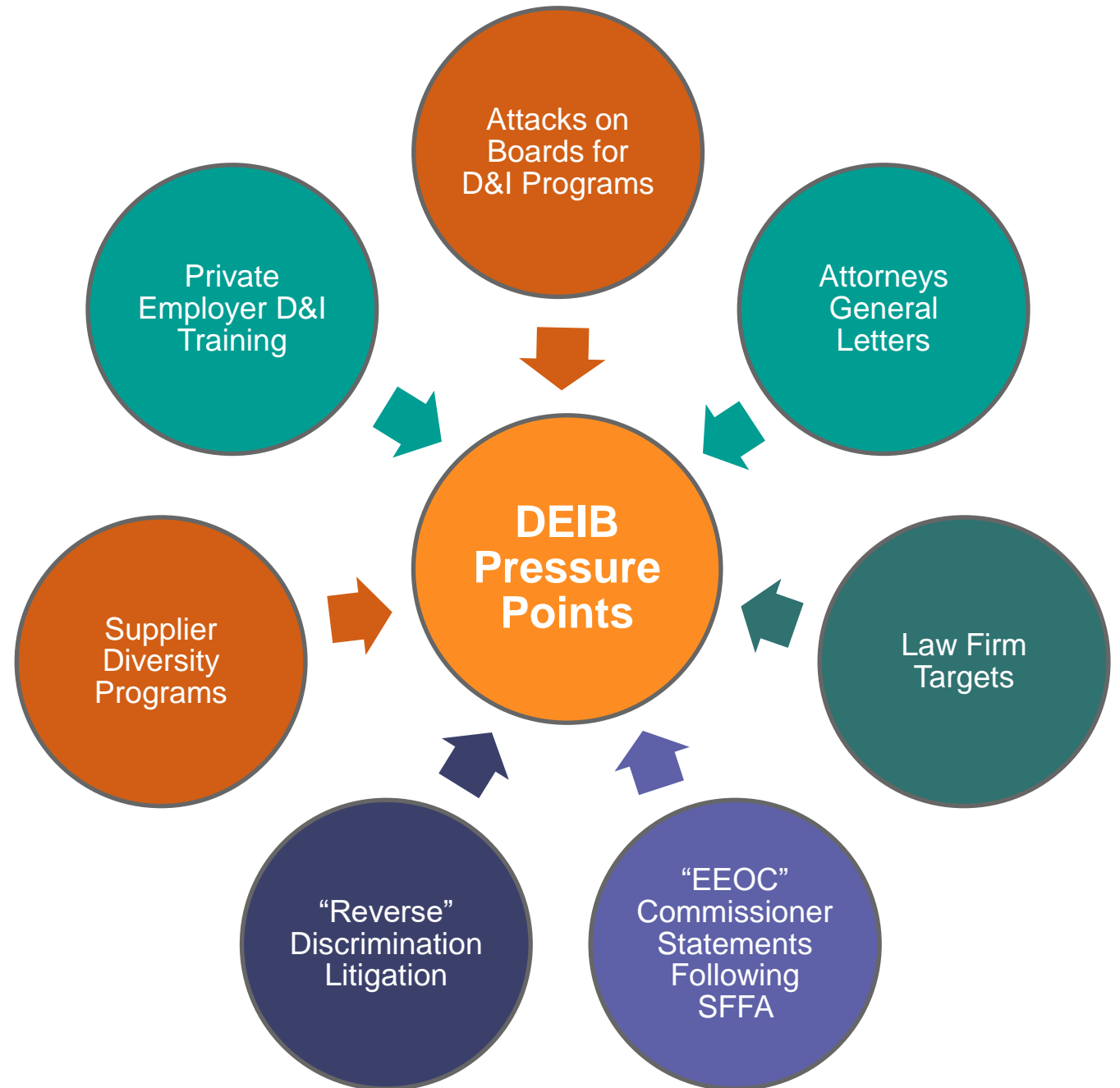
Employee demands, the need to attract top talent, company culture, competitive advantages, public and shareholder pressures

v.

Legal constraints, “anti-woke” litigation, conservative advocacy groups, public response and boycotts; board and shareholder demands



Areas of Challenge





Key Risk Management Tool:

DEI Review or Audit

Responding to the Increased Scrutiny

- A privileged DEIB audit is key
- Practices may have become lax with lack of threatened legal enforcement and spotlight
- Misconceptions about what is “legal”
- Presents a good opportunity to look under the hood and kick the tires of company’s DEIB programming
- Highlights potential vulnerabilities in current litigation environment and allows the company to shore those up
- Provides an opportunity to update and “reset”
- Does not mean withdrawing from DEI commitments... rather, a chance to affirm them and ensure their legality

Where We Are Headed: Shifting AI Regulation and Enforcement: From End Result to Process + Results



Traditional Framework: Look At The End Result

- 1) Is there evidence of disparate treatment?
 - 2) Is there evidence of disparate impact?
- If so, validation is required



Shifting Framework: Focus On The PROCESS To Avoid A “Bad” End Result:

- Review the processes used by developers
deployers
- Assess the training data sets and inputs
- Be Transparent
- Mandatory self-assessments and reporting

The Department of Labor issued AI “Promising Practices” to employers on April 29

- The document is addressed to federal contractors, but **all private-sector employers using or considering AI** should pay attention.
- OFCCP first reiterates the uncontroversial position that existing civil rights laws apply to AI-driven results
- OFCCP also identifies “Promising Practices” designed to mitigate AI risks in employment



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LEGAL UPDATE May 3, 2024

Department of Labor Issues Comprehensive Artificial Intelligence “Promising Practices” Designed to Avoid Bias: All Employers Should Take Note

Many of the “Promising Practices” align with the NIST AI RMF

Many of the Department of Labor’s “promising practices” closely align with the NIST AI Risk Management Framework (January 2023)

Multiple state governors have signed executive orders requiring state governments to follow the NIST AI RMF when using AI.

The federal government’s own internal risk-management practices (OMB M-24-10, 3/28/24) closely track the NIST AI RMF).

Many private-sector employers have worked to operationalize the NIST AI RMF.



**Key Takeaways from
the Department of
Labor’s AI “Promising
Practices”**

Transparency and notice to employees and applicants.

Stakeholder engagement. Consult with employees and/or their representatives in the design and deployment of AI systems.

Fairness assessments and ongoing monitoring.

Analyze AI tools for discriminatory impact before use, at regular intervals during use, and after use.

Meaningful human oversight of AI-based decisions.

Documentation and recordkeeping.

AI vendor-selection best practices.

Final AI risk management thoughts

“All models are wrong. Some models are useful.”

- Mathematician George Box, 1976

“All models are wrong or will be wrong. What matters is how much ‘wrong’ can you accept?”

- Agus Sudjianto, Former Chief Model Risk Officer, Wells Fargo



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Final AI risk management thoughts

In the context of using AI to support DEIB efforts:

1. What is the intended application and the result? Some applications are lower-risk than others!
2. “Human in the loop”: How is human decisionmaking being assisted? Or replaced?
3. How does might the underlying technology be “wrong”? What testing and monitoring do you have to identify if it’s “wrong”? (Are you relying solely on your AI vendor?)



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