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The State of AI Legislation

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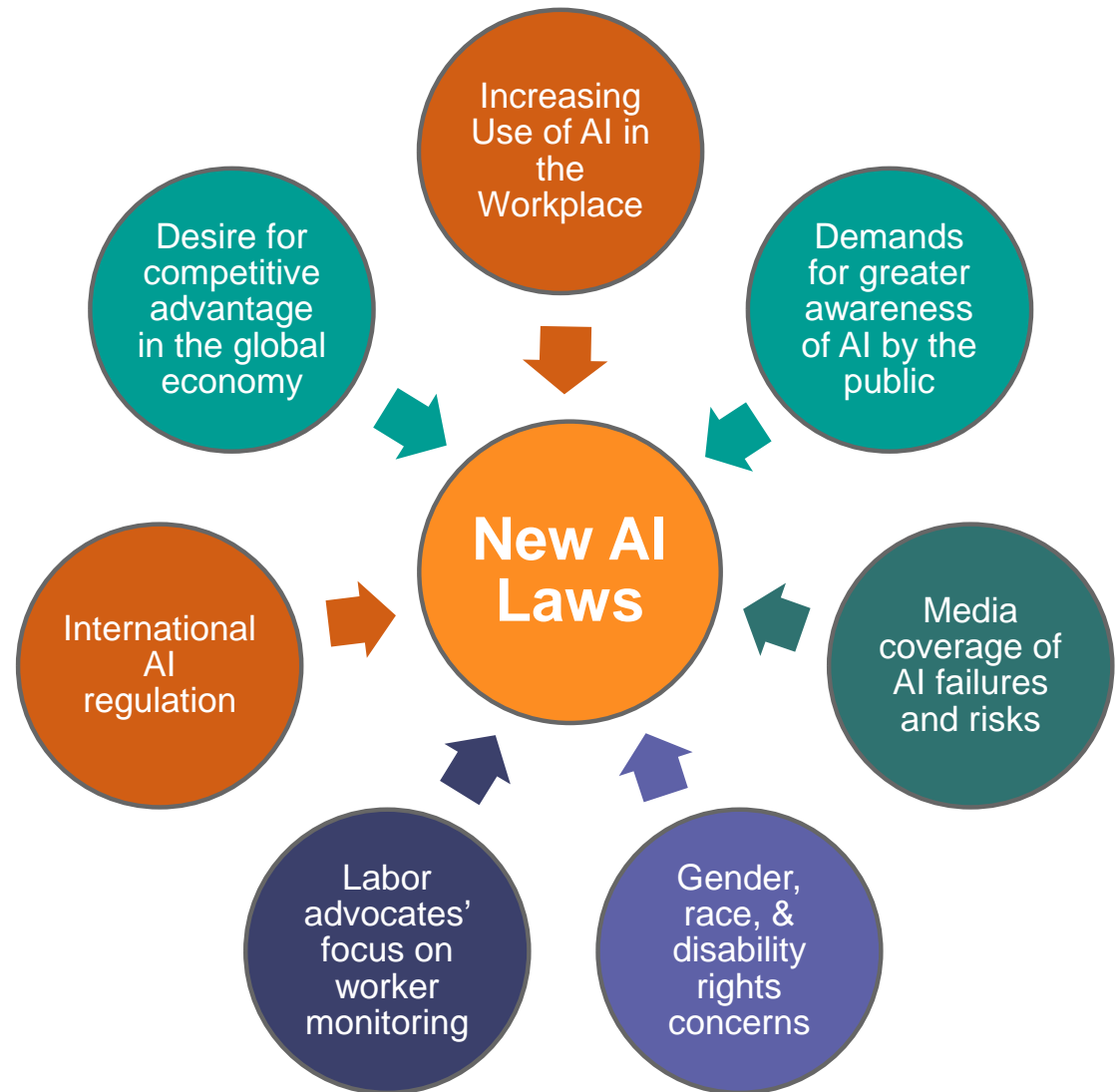**Rachel See**
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Our Agenda Today

1. Brief overview of existing nondiscrimination obligations under federal law and themes in ongoing federal agency activities

2. Summary of State Enacted Legislation (Colorado, Illinois, NYC) or almost enacted (Connecticut, California)

3. Common Substantive Themes in State Legislation
   – Consumer Notice and Opt-Out
   – Testing and Monitoring for Bias
   – Disability Accommodations

4. Looking Over the Horizon: Important Themes Coming up in 2025 and Beyond
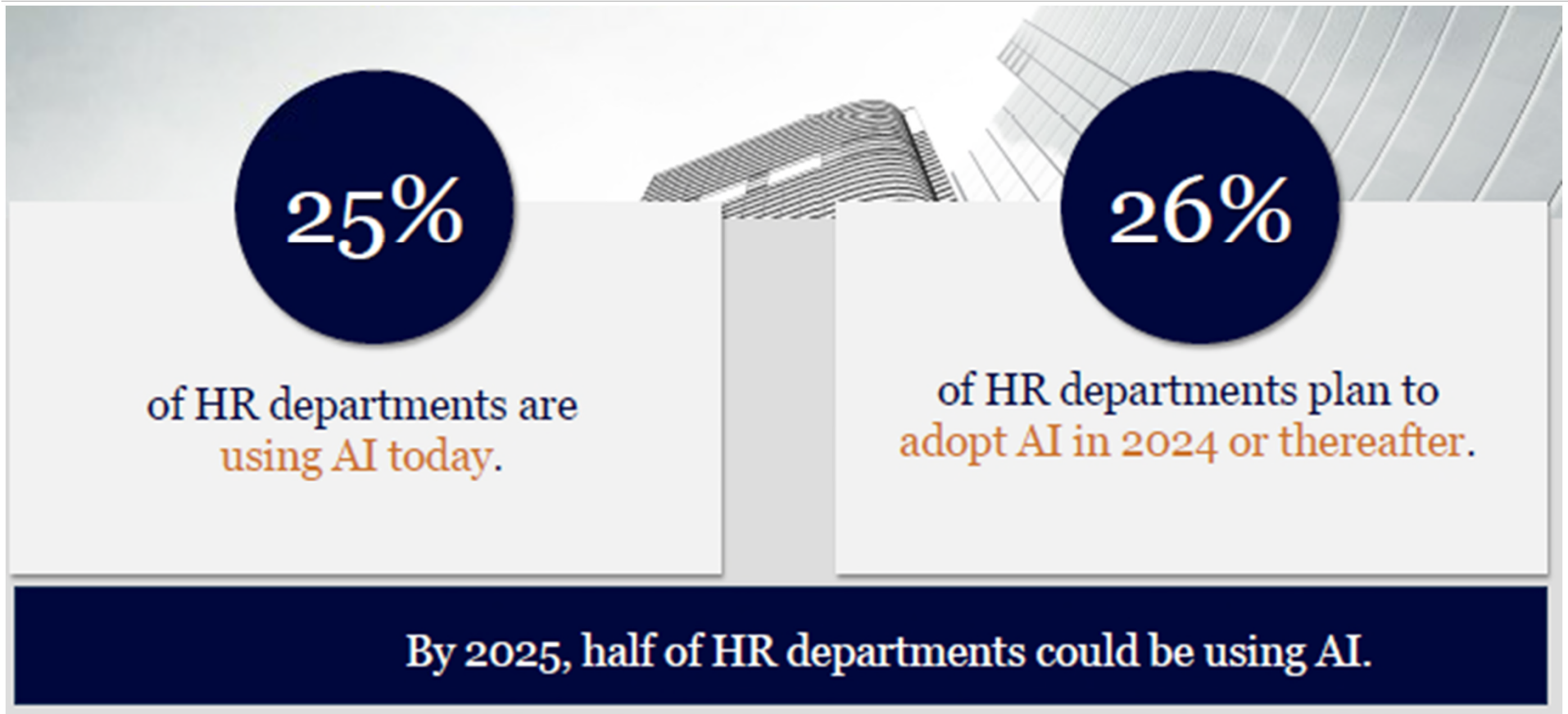
5. Key Focus Areas for Employers

1. Brief overview of existing nondiscrimination obligations under federal law and themes in ongoing federal agency activities.

Factors Driving AI Legislation and Regulation in Employment

Increasing Use of AI in the Workplace

Desire for competitive advantage in the global economy

Demands for greater awareness of AI by the public

New AI Laws

International AI regulation

Media coverage of AI failures and risks

Labor advocates' focus on worker monitoring

Gender, race, & disability rights concerns

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

25% of HR departments are using AI today.

26% of HR departments plan to adopt AI in 2024 or thereafter.

By 2025, half of HR departments could be using AI.

Source: SHRM "State of the Workplace" research survey conducted in November 2023

Federal Legislators and Regulators are Continuing to Propose New Laws Regulating the use of AI

"AI is all around us. Much of it is making our lives better…."

--President Biden, October 30, 2023, signing a far-ranging Executive Order regarding artificial intelligence.

"I am introducing the Artificial Intelligence Civil Rights Act to ensure that the AI Age does not replicate and supercharge the bias and discrimination already prevalent in society today."

--Sen. Ed Markey, September 24, 2024

However, no **new** federal laws have passed specifically addressing the use of AI to make employment decisions.

US Civil Rights Laws Apply to the Use of Artificial Intelligence

In April 2023, the leaders of the EEOC, Department of Justice Civil Rights Division, the CFPB, and the FTC issued a "Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems" reasserting, "***Existing legal authorities apply*** to the use of automated systems and innovative new technologies just as they apply to other practices."

Nine federal agencies joined in affirming this statement in April 2024.

Federal enforcement of existing civil rights laws

- The EEOC is actively seeking to investigate and litigate charges that AI (or any use of technology) causes discrimination in hiring. (This is a "Strategic Enforcement Priority" for the EEOC.)

  – EEOC's 2022 and 2023 technical assistance documents emphasize obligations under existing civil-rights laws when using AI (including the need for disability accommodations).

- OFCCP's audits of federal contractors now inquire into the contractors' use of AI in their hiring processes and require automatic disclosures from contractors.

- Department of Labor's "Promising Practices" regarding contractors' use of AI issued 4/29/2024 reflects federal regulators' evolving expectations surrounding employers' use of AI.

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

Government regulators are using concepts from the NIST AI RMF

Non-binding aspirational federal guidance, such as OFCCP's "Promising Practices" (April 2024) and ODEP's "AI & Inclusive Hiring Framework" (September 2024) closely align with the NIST AI Risk Management Framework, originally published in January 2023.

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

Map
Context is recognized and risks related to context are identified

Measure
Identified risks are assessed, analyzed, or tracked

Govern
A culture of risk management is cultivated and present

Manage
Risks are prioritized and acted upon based on a projected impact

2. State legislation that has been enacted (Colorado, Illinois, NYC) or almost enacted (Connecticut, California)

State Legislators and Regulators are Continuing to Propose New Laws Regulating the Use of AI

In 2024, state legislatures have taken up the issue, with new laws enacted in **Colorado** and **Illinois** (and an existing law in New York City), with more on the horizon next year.

State legislatures have **also** been active in passing or considering legislation:
- Prohibiting some uses of AI-generated content, including "deepfakes" (e.g. CA SB 942 (watermarking), CA SB 926 (deepfakes))
- Requiring AI safety testing of the most-advanced AI models (*e.g.* California SB 1047, vetoed by Governor Newsom on 9/29/2024)
- Regulating the state's own use of AI

Legislative history: Colorado

(SB 205 enacted in 2024)

- **Colorado SB 205** was signed on May 17, 2024, making Colorado the first state to enact broad legislation regulating the use of AI.

- Requirements go into effect in **February 2026**.

- No private right of action -- enforcement is reserved to the Colorado Attorney General

  – A private right of action continues to exist under Colorado's nondiscrimination laws.

- When signing the bill, Governor Polis acknowledged that SB 205 "creates a complex compliance regime for all developers and deployers of AI doing business in Colorado"

- On June 13, 2024, Governor Polis, Colorado AG Weisler, and Colorado Senate Majority Leader Rodriguez (the sponsor of SB 205) issued a joint statement committing to revise the new law and "minimize unintended consequences".

Legislative history: Illinois

(HB 3773 enacted in 2024)

- **Illinois HB 3773** was enacted on August 9, 2024.

- Requirements go into effect on **January 1, 2026**.

- Requires employers to notify employees when the employer uses AI for employment decisions.

- Illinois Department of Human Rights (IDHR) has been granted authority to "adopt any rules necessary for the implementation and enforcement of this subdivision, including, but not limited to, rules on the circumstances and conditions that require notice, the time period for providing notice, and the means for providing notice."

- HB 3773 affirms that it is unlawful for an employer to use AI to discriminate. It was already a violation of the Illinois Human Rights Act, 775 ILCS 5/2-102, for an employer to engage in discriminatory conduct on the basis of protected classes.

Legislative history: New York City

(LL 144 enacted 2022)

- **New York City Local Law 144** was passed in 2022, enforcement started July 2023.

- Criticized by worker advocates as being too-narrow and without public enforcement.

- LL144 applies only to tools which substantially assist or replace discretionary decision-making.

- Requires employers using tools subject to the law to:

1. Conduct an independent "**bias audit**" within one year before the tool's use, and

2. Provides certain public **notices and disclosures**

Legislative history: Connecticut

(SB 2 did not pass in 2024)

- **Connecticut SB 2** was passed by the CT Senate on April 24, 2024, but died following CT Governor Lamont's threat to veto the bill if it reached his desk.

- SB 2 attempted to regulate broad categories of AI applications in Connecticut (not just employment).

- The bill's sponsor, Sen. James Maroney, said in a September 26, 2024 CT Mirror article that he is planning to introduce AI legislation again next session and that he is "participating in a working group with lawmakers from 46 other states to develop AI standards in an effort to avoid that "patchwork of disparate laws.""

Legislative history: California

(AB 2930 did not pass in 2024)

- **California AB 2930** was passed by the California Assembly in May 2024, but on August 31, 2024, the last day of the session, it did not progress in the California Senate despite significant momentum.

- AB 2930 was a re-introduced version of a California bill originally introduced in 2023.

- It originally covered a broad array of AI applications but in August 2024 was restricted only to employment.

- California regulatory agencies (the California Civil Rights Council and the California Privacy Protection Agency) have initiated rulemaking efforts seeking to implement regulations directly impacting employers' use of AI.

3. Common substantive themes in state legislation

Key Substantive Themes in State AI Legislation

Scope

Risk Management

Impact Assessments

Transparency

Accommodation

Enforcement

Scope considerations:

State AI laws supplement existing non-discrimination obligations

New state AI laws like the ones recently passed in Illinois and Colorado supplement **existing nondiscrimination obligations** under state laws.

- Illinois' new AI law makes it unlawful to use AI "that has the effect of subjecting employees to discrimination on the basis of protected classes"
- But Illinois law already prohibited employers from subjecting employees to discrimination on the basis of protected classes

The scope of the underlying non-discrimination obligations under state laws may be greater than under federal law. State laws may have broader protected categories than federal law.

For example, protected categories under the Illinois Human Rights Act include

- Reproductive decisions (as of January 2025)
- military status
- unfavorable military discharge
- order of protection status
- family responsibilities (as of January 2025)
- conviction record
- arrest record

Scope considerations:

The reach of an individual state's AI law can be very different from other state laws

- NYC LL 144 applies only to "automated employment decision tools" as defined in that law; many employers have interpreted this definition narrowly.

- Colorado SB 205 applies to AI systems that make, or are a substantial factor in making, a "***consequential decision***", defined as a decision that has a "material legal or similarly significant effect on the provision or denial to any consumer of, or the cost or terms of … employment"

- Illinois HB 3773 applies, ***without qualification*** in the statutory text, to AI applications used in "recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure, or the terms, privileges, or conditions of employment."

- California Civil Rights Council's proposed regulation, if passed, would apply to a "computational process that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts applicants or employees."

Scope considerations:

Developers vs. deployers

State laws such as Colorado's, as well as the bills that almost passed in CT and CA, create separate disclosure obligations between AI "developers" and AI "deployers." Under Colorado's law:

- Developers create or intentionally and substantially modify AI systems
- Deployers use AI systems to make or significantly influence "consequential decisions"

AI developers must disclose to AI deployers:

- Intended uses and known harmful uses
- Data types used in training
- Known limitations and risks
- Evaluation methods for performance and bias mitigation

AI deployer responsibilities (under the Colorado law) include, but are not limited to:

- Provide consumer notifications and disclosures
- Offer data correction and decision appeal processes

Risk management:

Some legislation tries to incentivize formal AI risk-management practices

Colorado's AI law attempts to incentivize operationalizing formal risk-management frameworks such as NIST's AI Risk Management Framework.

- Colorado SB 205 requires both AI developers and AI deployers to exercise "reasonable care"
- An AI developer or AI deployer has a rebuttable presumption of compliance if it demonstrates compliance with the NIST AI RMF, or a similar framework.

Colorado's AI law also establishes that correcting issues following certain proactive measures (e.g., user feedback, adversarial testing) can serve as an affirmative defense.

Similar concepts were present in CT and other proposed legislation, but these concepts were cut in the final iterations of California's AI bill (which died on August 31).

Impact Assessments / Bias Audits:

Colorado

Colorado SB 205 mandates impact assessments for high-risk AI systems:

- Deployers must conduct assessments before deployment and annually thereafter
- Developers must provide necessary information to deployers

Key components of impact assessments:

- Data categories used as inputs and outputs
- Data used for system customization
- Performance metrics and known limitations
- Transparency measures for consumer disclosure

Additional requirements:

- Annual reviews to ensure no algorithmic discrimination
- Updates required within 90 days of substantial modifications
- Records must be maintained for 3 years post-deployment

Impact Assessments / Bias Audits

Impact assessments are also required by the EU AI Act for "high risk" applications (including employment applications) and are also being required for the federal government's own use of certain AI applications, and by some state governments for their own use of AI.

The concept of an "impact assessment" is similar to the "bias audit" required under NYC LL 144.

- But in some respects, the scope of the "impact assessment" required by Colorado's new AI law and other proposed state laws is much broader than the very specific analysis mandated by New York City.

Validation of AI-powered selection procedures is a concept emphasized by federal enforcement officials.

"[Federal contractors] can't just pull something off the shelf and decide to use it, [and OFCCP expects them to] "drill down, under the Uniform Guidelines."

-- OFCCP Acting Director Michelle Hodge

Disclosures / Transparency

Illinois's new AI law requires broad-based consumer disclosures; IDHR is given rulemaking authority to define the scope and manner of these disclosures.

Colorado consumer disclosure requirements:
- Notify consumers about AI use in consequential decisions
- Provide purpose, nature of decision, and deployer contact information
- Explain adverse decisions, including AI's role and data sources
- Inform consumers about opt-out rights under Colorado Privacy Act

Also requires disclosure to the Colorado Attorney General –
- Mandatory disclosure of algorithmic discrimination within 90 days of discovery
- Deployers and developers must produce upon request:
  – Risk management policies
  – Impact assessments
  – Records of compliance

Accommodations

EEOC's 2022 technical assistance document emphasizes that the Americans With Disabilities Act's requirements regarding reasonable accommodations apply to AI-powered hiring.

Colorado SB 205 emphasizes accessibility:

- All notices, statements, and disclosures must be accessible to consumers with disabilities
- Information must be provided in plain language
- All languages used by the deployer in ordinary business
- Formats suitable for those with disabilities

Worker advocates see disclosures that AI is being used as a prompt for consumers to understand that they might want to request a reasonable accommodation in the first place.

Enforcement

Remember, private rights of action exist under underlying federal and state non-discrimination laws.

Enforcement provisions of current state AI in employment laws:

- NYC LL 144: Enforcement only by NYC DCWP
- Colorado SB 205: Enforcement only by the Colorado Attorney General
- Illinois HB 3773: Private right of action available under the Illinois Human Rights Act

The final version of California AB 2930 (which died on August 31) did not contain a private right of action.

4. Looking over the horizon: Important substantive themes coming up in 2025 and beyond

Future themes in state AI regulation

Colorado and Illinois passed AI laws in 2024, and we predict that 2025 will be a very busy year for state legislative efforts.

- Colorado lawmakers have promised to revise the new law to "minimize unintended consequences".

- Texas

- Connecticut

- California

- New York

- …and almost certainly more!

Future themes in state AI regulation

In April 2024, the EEOC filed an amicus brief in the *Mobley v. Workday* class action.

- EEOC argued that an AI service provider was an "agent" under Title VII (and thus potentially liable for unlawful discrimination allegedly caused by the use of the provider's AI system).

- In July 2024, the District Court agreed, denying the motion to dismiss, and the case is proceeding.

California is leading efforts to codify that interpretation into law and regulation.

- *Raines v. US Healthworks*, 15 Cal.5th 268 (2023)

- California AB 2930 (died on August 31) contained expansive definition of "agent"

- California Civil Rights Council proposed AI regulations also contain a similarly expansive definition of "agent"

State privacy laws and regulations also are touching on AI regulation – e.g. California Privacy Protection Agency efforts.

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5. Key Focus Areas for Employers

Questions to focus on if you are already using AI in your employment processes

Exactly how are you using AI? What vendors or in-house resources are you using?

How have you or your vendor tested the AI systems for unlawful bias?

What ongoing steps are you or your vendor taking to monitor the AI system?

How are you disclosing the use of AI tools in the employment process to applicants and employees?

How confident are you in your ability to disclose your testing or monitoring processes and results to the public, to regulators, or to private litigants?

What risks might those disclosures create?

Questions to focus on if you are thinking about AI

What *specific benefits* are you seeking to achieve by using AI in your employment processes?

How are you *identifying and measuring* the risk that using AI might result in unlawful bias?

What are you doing to identify and manage risks associated with *people and processes*, combined with the *technical* risks?

What efforts have you made to consider how *individuals with disabilities* may be affected?

Employers should consider these questions even if they're not in a state that's recently passed legislation.

thank you

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