



EMPLOYMENT LITIGATION CONFERENCE

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Emerging Technology & Resulting Employer Liability (AI)



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21st Century Employment Claim Drivers



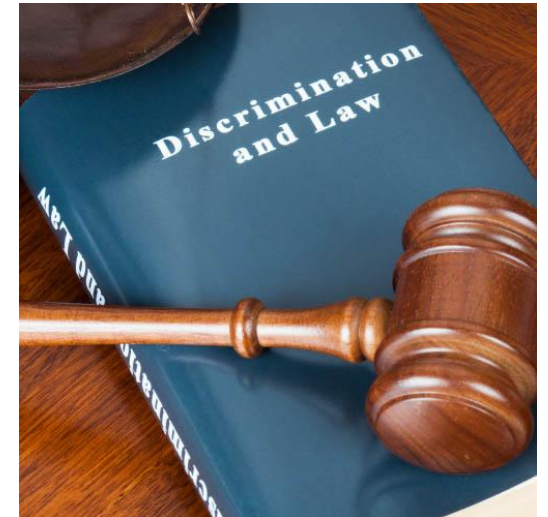
- Infusion of political/social issues into work environment
- Prominence of artificial intelligence, less privacy, more cyber crime
- Democratization of information
- More regulation with expectation of employer perfection
- Proliferation of litigation finance
- Increase in size/complexity of businesses
- Management complexities resulting from remote work
- Less training/experience plus expectation of higher proficiency
- Growing workloads and faster speed of business
- Employee turnover/active job market, burnout, mental health issues



21st Century Employment Claim Drivers



- Effects of social inflation
 - Convince jurors that the defendant is a threat to jurors and to society at large;
 - Establish premise that perfection is necessary to not endanger the public;
 - Demonstrate the defendant was imperfect and this endangered the public;
 - Argue that the jury has the power to improve safety of society by siding with Plaintiff;
 - Send a message to prevent further harm.
- Increased/better coordination among Plaintiff's bar
- Evolution/growing sophistication of professional expert world
- Use of technology by plaintiff firms
- Ready accessibility of information



Salient 2025 Federal Updates

One BIG Beautiful Bill
Act (OBBBA/ HR 1)

DEI Deconstruction

Immigration and the
Workplace

Evolving Government
Agencies: EEOC & NLRB

“America’s AI Action
Plan” in Workforce/
Courts

Other Key Employment
Developments

- Non-competes, Independent Contractors, Social Media Use and more

Emerging Technology & Resulting Employer Liability



AI is already embedded in everyday employment decisions

Employers face outsized litigation and regulatory risk

AI does not eliminate liability; it often reallocates and magnifies it

What Is “AI” in the Employment Context?



- Common tools employers are already using:
 - Resume screening
 - Candidate ranking
 - Automated interviews (video, voice, facial analysis)
 - Predictive analytics (performance, retention, promotion)
 - Algorithmic scheduling
 - Productivity and monitoring software
 - HR chatbots and automated decision tools

Core Liability Framework: Where Employers Get Hit



Discrimination & Bias

- Disparate impact without intent
- Biased or incomplete training data
- Proxy discrimination
- Ex. AI flags “communication style” in performance reviews, penalizes non-native English speakers

Disability Discrimination

- AI often assumes a “standard worker”
- Automated testing can disadvantage neurodivergent candidates
- Inflexible tools that lack override mechanisms create liability
- Ex. Timed online assessments screen out candidates with anxiety disorders



Mobley v. Workday – AI, Algorithms, and Employer Liability

- First major federal case squarely challenging AI-driven hiring tools
- Plaintiff alleged race, age, and disability discrimination
- Claims based on automated resume screening and rejection decisions
- Court allowed Title VII, ADEA, and ADA claims to proceed
- Employers cannot outsource discrimination to algorithms or vendors
- Signals heightened scrutiny of AI in employment decisions



Wage & Hour Exposure



Algorithms that optimize productivity may encourage off-the-clock work



Scheduling software can violate predictive scheduling laws



Productivity monitoring used to justify exempt classification is risky



Ex. Monitoring software tracks keyboard activity, leading to unpaid pre- and post-shift work



Privacy & Surveillance



Employee data is now protected consumer data in California

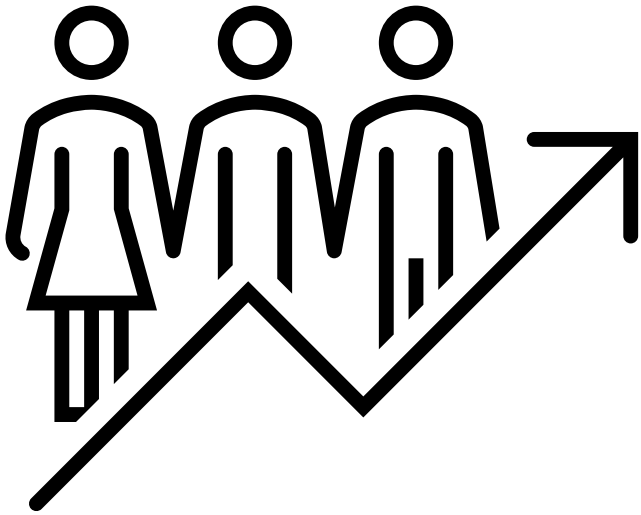
Employers must disclose what is collected, why, and how it is used

Biometric data is especially sensitive

Ex. Facial recognition used in video interviews without adequate disclosure



Hiring & Recruiting



Resume screening

Automated interviews

Candidate ranking

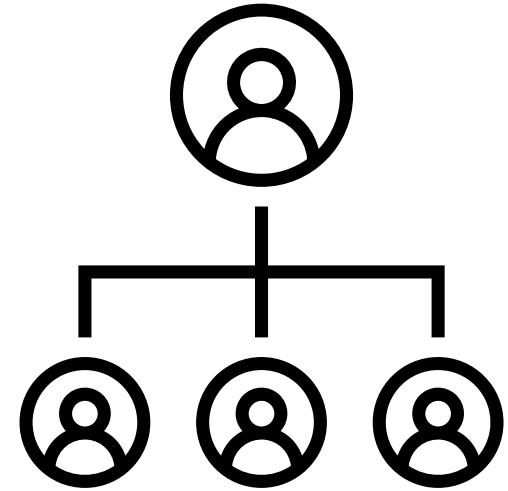
Examples:

- Video interview tool scores facial expressions—disadvantages candidates with disabilities
- Resume screener penalizes employment gaps tied to caregiving or military service

Performance Management, Discipline & Termination



- Algorithmic performance scoring
- Automated discipline triggers
- Reduction-in-force analytics
- Litigation reality – discovery requests increasingly seek:
 - Algorithms and logic
 - Training data
 - Vendor communications
- Ex. Employee terminated after productivity score drops during pregnancy-related leave





Emerging Regulations



CPRA EXPANSION OF
EMPLOYEE RIGHTS



CIVIL RIGHTS DEPARTMENT
ENFORCEMENT TRENDS



INFLUENCE OF NYC LOCAL
LAW 144

The Insurer Lens: How Everyday Decisions Create Risk



- Decision-making tech (AI hiring, performance, scheduling)
- Monitoring & surveillance tech (productivity, biometrics)
- Communication & impersonation tech (deepfakes, GenAI)

Emerging Technology a Force Multiplier for Employment Liability

- Emerging tech doesn't create new duties → it scales old ones
- One supervisor → one decision
- One algorithm → thousands of decisions
- Why insurers see frequency + severity risk → not novelty

From Technology Deployment to Claims Activity

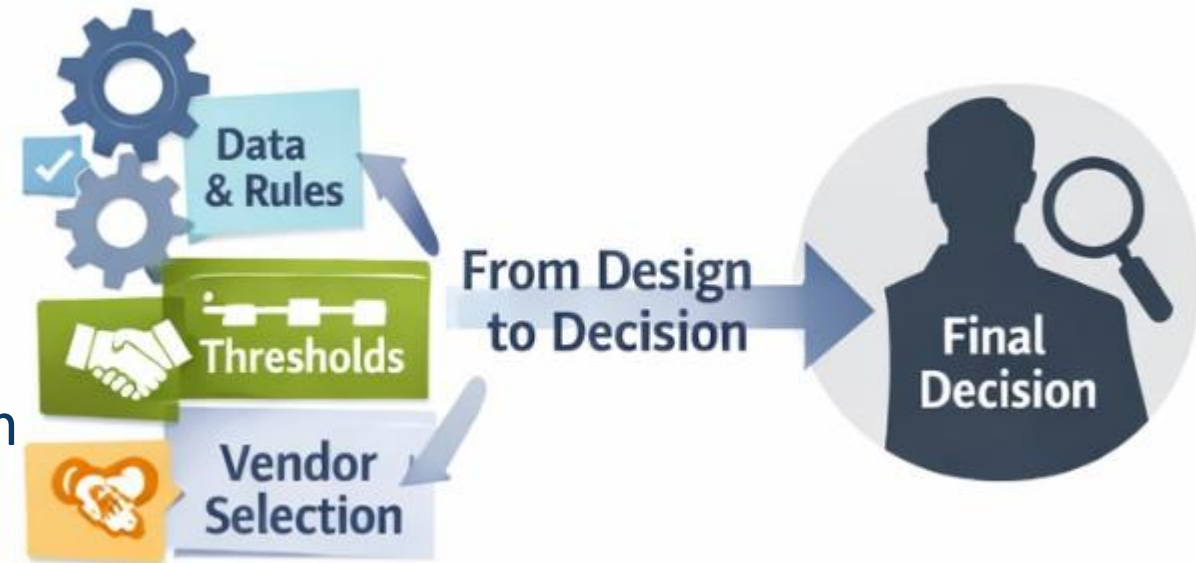


- Emerging tech scales employment decisions
- Perceived liability shifts from individuals to systems
- Outcomes matter more than intent
- Claims move quickly from individual to pattern-based

Automated Decisions Create Scaled Risk



- Automated tools are now embedded in core employment decisions
- Federal and state guidance treat automated systems as employer agents
- Liability attaches regardless of intent or third-party vendor involvement
- Tech-driven decisions scale exposure from isolated acts to systemic outcomes
- Claims increasingly framed as pattern-based discrimination or retaliation



Risk Controls That Influence Underwriting Decisions



- Inventory of employment-related technology
- Clear ownership (HR, Legal, IT alignment)
- Human review and override processes
- Vendor due diligence and audit rights
- Documentation of compliance efforts
- Incident response planning for tech failures

Employment Practices as a Governance Exposure



FIDUCIARY DUTY



Corporate Waste

DUTY OF CARE



Reputational Harm

DUTY OF LOYALTY



Disgorgement

Emerging Technology and Real-World Enterprise Risk Exposure



Example 1: Deepfake Social Engineering (\$25M loss)

- Crime/Cyber trigger
- Board oversight and authentication protocols questioned

Example 2: Tech-Enabled Harassment Verdict (\$4M)

- EPL exposure
- Failure to supervise digital environments
- Employer liability even without direct participation

Reducing Risk Before It Becomes a Claim



- Inventory of employment-related technology
- Assign ownership (legal + HR + IT)
- Test decision defensibility before litigation forces it

Decision Defensibility





Vendor Selection Considerations

- Exercise due care in the selection of AI vendors.
- Work with a qualified IT consultant to vet your vendors
 - In-house resource or Managed IT Services Contractor
 - AI Consultant
- Understand the product
 - Product specifications
 - Vendor privacy and security policies
- Make sure vendors have considered product risks
 - Product testing and audits
- Consider necessity of warranties, indemnity provisions and adequate insurance limits
- If you are using a vendor to provide AI services consider requesting additional insured status



Internal Protocols

- Develop Internal AI policy for use of the technology
- Work with your Managed IT service provider or outside consultant
- Have policy reviewed by legal counsel
- Take steps to ensure ongoing oversight of the use of AI products in your business – governance committee.
- Ensure your employees who are responsible for AI tools have the proper training.
- Transparency. Take reasonable steps to ensure that employees understand that you are using AI in employment decision-making.
- Arrange for regular auditing to validate that AI tools are not being misused or demonstrating bias.



Risk Management Considerations

- If using AI tool to screen applicants for employment, consider using a clickwrap on scroll wrap agreement as a condition of submitting a résumé for review.
- Most jurisdictions hold these valid
- Allows for disputes resolved by arbitration rather civil suit.
- Work with your broker to review your insurance program to ensure adequate coverage for AI exposures.