Warden AI

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AI Legal Updates in the Employment Context
September 24, 2025

Overview

- Setting the stage: New laws applying to AI in recruitment
  - EU AI Act
  - Colorado AI Act
  - NY Local Law 144
  - CCPA
- FEHA regulation amendments
- Key takeaways

High-Risk AI Systems in Recruitment

AI systems used for recruitment or selection (e.g., to place targeted job ads, to analyze and filter job applications, to evaluate candidates) are classified as high-risk.

Companies using high-risk AI system in recruitment must take measures such as:

- **Assigning human oversight**
- **Ensuring input data is relevant and sufficiently representative**.
- **Monitoring the operation of AI systems**
- **Informing individuals** that they are subject to the use of high-risk AI systems when such systems are used in decision-making (e.g., providing notice to candidates before they upload their application).

- The **scope of this high-risk classification** is uncertain.
  - EU Commission is preparing guidance to clarify high-risk use cases, including recruitment.
  - In absence of guidance, assume that use of AI in essential decision-making steps (e.g., who to interview, who to hire) increases risk of "high-risk" qualification.
- AI Act also applies more broadly to the use of **AI in the workplace**:
  - This includes AI systems for deciding on a promotion or termination, for performance evaluation or task assignment.
- High-risk AI obligations are set to apply from **August 2026**, unless the system was already on the EU market before then and has not subject to a significant design change.
  - However, the EU Commission may postpone this timeline due to concerns about legal uncertainty.

State AI Law Considerations

COLORADO AI ACT

- **Applicability**:
  - Applies generally to developers and deployers of "high risk AI systems," defined as AI systems that ***make***, or are a ***substantial factor*** in making, a "consequential decision."
  - A "consequential decision" is a decision that has a ***material legal or similarly significant effect*** on the ***provision or denial*** to any consumer of . . . employment or an employment opportunity.
- **Obligations**:
  - Imposes a duty of ***reasonable care*** on developers and deployers to avoid "algorithmic discrimination" in high-risk AI systems.
- **Defenses**:
  - Provides for a rebuttable presumption that reasonable care was used when a company complies with the Act's disclosure, risk assessment, and governance requirements.
  - Also provides an affirmative defense to enforcement for companies that have 1) cured violations as a result of external feedback or red teaming; and 2) complied with the latest version of the NIST AI risk management framework or an equivalent.
- **Enforcement**:
  - Colorado Attorney General ("AG") can enforce the law as an unfair or deceptive trade practice, with a penalty of up to $20,000 per violation.
  - No private right of action.

Effective ***July, 2026***

State AI Law Considerations

NYC LOCAL LAW 144

- **Applicability:**
  - Applies to employers or employment agencies in NYC when using "automated employment decision tools" ("AEDTs") for ***hiring*** or ***promotion*** (including ***screening***).
  - An AEDT is a computer-based tool that (1) uses AI, LLM, statistical modeling, or data analytics; and (2) helps employers / employment agencies make employment decisions; and (3) substantially assists or replaces discretionary decision-making.
- **Obligations:**
  - Requires employers and employment agencies to conduct an annual independent bias audit and to publicly release a summary of the results, among other notice and accommodation requirements.
- **Enforcement:**
  - Enforced by NYC Department of Consumer and Worker Protection ("DWCP"), who is empowered to impose fines that range from $500 to $1,500 per violation.

In Effect as of January 1, 2023 (enforcement began July 5, 2023)

Comprehensive Privacy Laws Affecting Employers

CALIFORNIA CONSUMER PRIVACY ACT ("CCPA")

- **Updates:**
  - Yesterday, September 23, the California Privacy Protection Agency ("CPPA") announced that the California Office of Administrative Law approved regulations covering automated decisionmaking technology ("ADMT") among other requirements.
- **Applicability:**
  - Applies to "businesses" (i.e., controllers) *and* to employment data.
  - Specifically, the new regulations apply to businesses that use ADMT to "make a significant decision" concerning a consumer. ADMTs mean any technology that processes personal information and uses computation to replace or substantially replace human decision making. "Substantially replace" means a business uses the ADMT's output to make a decision *without* human involvement.
  - A "significant decision" is a decision that results in, relevant part, the provision or denial of employment or independent contracting opportunities or compensation.
- **Obligations:**
  - Businesses that use ADMTs to make such a "significant decision" must: provide "pre-use" notices to inform consumers about the user of their data and their right to opt-out or access further information and to access information about about the ADMT's use and logic.

- Effective ***January 1, 2027***

California's Fair Employment and Housing Act ("FEHA")

- FEHA prohibits discrimination and harassment based on: race, religious creed, color, national origin, ancestry, physical and mental disability, reproductive health decision-making, medical conditions, genetic information, marital status, sex, sexual orientation, gender, gender identity, gender expression, veteran or military status, and age (40 or older).
- Disparate Treatment.
- Disparate Impact.

FEHA Regulation Changes

- The California Civil Rights Department ("CRD") passed changes to the FEHA regulations.
- The changes go into effect on **October 1, 2025**.
- The main regulation changes include:
  - Prohibited discrimination can occur even with the use of automated-decision systems (as specified by the regulations).
  - The definition of the employer's "agent," which, just as the employer, may be held liable for FEHA violations.
  - Record keeping requirements.

Discrimination Through "Automated-Decision System" ("ADS")

FEHA regulations now define "ADS" specifically:

- **Automated-Decision System (ADS)**: A computational process that makes a decision or facilitates human decision making regarding an employment benefit (i.e., hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge, compensation, provision of a discrimination-free workplace, etc.). An Automated-Decision System may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques.
- **ADS does NOT include**: word processing software, spreadsheet software, map navigation systems, web hosting, domain registration, networking, caching, website-loading, data storage, firewalls, anti-virus, anti-malware, spam- and robocall-filtering, spellchecking, calculators, database, or similar technologies, provided that these technologies do not make a decision regarding an employment benefit.

What Can Be Considered Uses of ADS Under the FEHA Regulations?

- The definition of ADS provides examples of what could be considered uses of ADS, including:
  - Using computer-based assessments or tests (questions, puzzles, games, or other challenges) to assess applicants and/or screen, evaluate, categorize, or recommend applicants for employment;
  - Directing job advertisements or recruiting materials to targeted groups;
  - Screening resumes for particular terms or patterns;
  - Analyzing facial expression, word choice, and/or voice in online interviews; or
  - Analyzing employee or applicant data from third parties.

Defenses to Discrimination Through ADS

- All traditional FEHA defenses still apply to discrimination claims involving ADS:
  - Disparate treatment – legitimate, non-discriminatory reason. The goal is to show no intent to discriminate based on a protected characteristic.
  - Disparate impact – job-related and consistent with business necessity (necessary to the safe and efficient operation of the business), and there was no less discriminatory alternative that would have worked just as well.
- "Relevant to any such claim or available defense is evidence, or the lack of evidence, of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results."

Covered Persons Under FEHA

- The FEHA provisions prohibiting discrimination in employment have traditionally applied to:
  - **Employer** - any person or individual engaged in any business or enterprise regularly employing five or more individuals.
  - **Employment Agency** - Any person undertaking, for compensation, to procure job applicants, employees or opportunities to work.
  - **Employer's "Agent"** - "any person acting as an agent of an employer" if that agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer.
  - **Labor Organization or Apprenticeship Program**
- FEHA regulations expanded the definition of "employment agency" and provided a definition of "agent."

Expanded Definition of "Employment Agency"

Employment agency now "includes" (but is not limited to) any person undertaking, for compensation, the procurement of job applicants, employees or opportunities to work, "including persons undertaking these services through the use of an automated-decision system."

Added Definition of "Agent"

- **Agent**: An agent includes any person acting on behalf of an employer, directly or indirectly, to exercise a function traditionally exercised by the employer or any other FEHA-regulated activity, which may include applicant recruitment, applicant screening, hiring, promotion, or decisions regarding pay, benefits, or leave, including when such activities and decisions are conducted in whole or in part through the use of an automated decision system. An agent of an employer is also an "employer" for purposes of the Act.
- This definition largely adopts the definition of "agent" established by the California Supreme Court in *Raines v. U.S. Healthworks*, 15 Cal. 5th 268 (2023). Because of this, FEHA's definition of "agent" does not materially expand FEHA's reach to previously unregulated entities.

Mobley v. Workday, Inc.

Case No. 3:23-cv-00770 (Dkt. No. 128) (N.D. Cal. May 16, 2025)

- Interpreted federal discrimination laws similar to how FEHA regulations clarified application of FEHA
- Workday used its AI tool to help employers screen and evaluate candidates. An applicant sued Workday alleging race, age, and disability discrimination.
- The Court found that Workday could be held liable for discriminatory acts as an "agent" of the employer because it conducted a traditional employer function. Its AI tool made its own independent assessment in the hiring process by scoring, ranking, or screening applicants and then recommending them as "strong" "good" or "fair" and making determinations about which candidates would be a good fit for the job. Workday's software did not merely apply the employer's selection criteria in a rote manner (like an Excel sheet), which ordinarily would have escaped "agent" liability.

Workday Takeaways

- Changes to federal discrimination laws are developing through case law, similar to the FEHA regulation changes, even without formal changes to federal statutes or regulations.
- The application of federal discrimination law to AI use might differ from one circuit to another as judicial circuits could split on their legal interpretations.
- Until more formal statutory or regulatory changes/clarifications are implemented on the federal level, safest practice is to assume that, throughout the U.S., federal discrimination laws will be interpreted to cover AI use and employers' "agents" as described in *Workday*.

Changes to Record-Keeping Requirements

- Record retention periods changed from two to **four years** from the date of making the record or date of the personnel action involved, whichever occurs later.
- Records to retain include: all applications, personnel records, membership records, employment referral records, selection criteria, **ADS Data**, and other records created or received by the employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee.
- **ADS Data:**
  - Any data used in or resulting from the application of ADS, such as data provided by or about individual applicants or employees, or data reflecting employment decisions or outcomes.
  - Any data used to develop or customize an ADS for use by a particular employer or other covered entity.
- If a complaint was filed or threatened, the respondent must maintain employment records until the later of (i) the expiration of time to file a complaint or (ii) first date after the complaint has been fully and finally disposed.

Upcoming Employment-Related AI Legislation in California

- **No Robo Bosses (SB 7)**
  - California's recently proposed "No Robo Bosses Act" has not been enacted into law, but if implemented (effective January 1, 2026 if signed), it would preclude employers from relying solely on ADS for critical employment decisions, including employee discipline or termination.
  - Employers would also need to provide employees with notice in connection with using ADS for hiring or employment-related decisions and limit data collection through ADS.
- **Workplace Surveillance Bills (AB 1221 and AB 1331)**
  - AB 1221: seeks to impose transparency requirements for use of workplace surveillance technology and limit employers in collecting and using certain types of employee data.
  - AB 1331: focuses on setting boundaries and geographic limits as to where and when employers can surveil employees. Employers would be prohibited, for example, to monitor workers in employee-only areas, such as break rooms and cafeterias.

Recommendations

- Consult legal counsel for legal advice.
- Review current use of AI and similar tools in hiring and employment practices, and consider them in light of these legal changes.
- Be purposeful in selecting vendors, and do your diligence. Carefully review and analyze the steps taken by your vendors, and work with them closely.
- Audits are critical (but remember privilege).
- Comply with the record keeping requirements, and confirm your vendor is complying as well.
- Train HR and managers who are involved in hiring or employment decisions on the proper use of ADS in such matters.
- Consider using contractual protections (i.e., indemnification and arbitration provisions).

Thank you

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