


Employment Law Changes, Updates and Issues Causing Ripples for Providers

Robert W. Marquette, Jr.  
May 21, 2026



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Agenda



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DOL Brings Back Companionship Services Exemption

- On July 2, 2025, the DOL published a Notice of Proposed Rulemaking, "Application of the Fair Labor Standards Act to Domestic Service."
- More than 12 years after the DOL eliminated its use by homecare providers, the DOL is proposing to rescind the 2013 changes to the companionship services exemption.



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### DOL Brings Back Companionship Services Exemption

- Unfortunately, this will not help Michigan providers, because state law has to be considered.
- Michigan's wage and hour law limits the use of the companionship exemption.



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### DOL Brings Back Companionship Services Exemption

- Michigan's Workforce Opportunity Wage Act ("WOWA") "does not apply to an employer that is subject to the minimum wage provisions of the fair labor standards act of 1938, [29 USC 201 to 219](#), unless those federal minimum wage provisions would result in a lower minimum hourly wage than provided in this act." M.C.L.A. 408.420(1).



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### DOL Brings Back Companionship Services Exemption

- Because Michigan minimum wage is higher than federal, FLSA does not apply.
- BUT, WOWA then states it does not apply to "an employee who is exempt from the minimum wage requirements of the fair labor standards act of 1938, 29 USC 201 to 219." M.C.L.A. § 408.420(1)(b).



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### DOL Brings Back Companionship Services Exemption

- The companionship services exemption arises out of 29 U.S.C. § 213(a)(15).
- This "exception to the exception" would seem to bring back the exemption.



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### DOL Brings Back Companionship Services Exemption

- Unfortunately, "**Notwithstanding** subsection (1), an employee **must be paid** in accordance the minimum wage and overtime requirements of [WOWA] if....
- He or she is employed in domestic service employment to provide companionship services as defined in [29 CFR 552.6](#) for individuals who, because of age or infirmity, are unable to care for themselves **and** is not a live-in domestic service employee as described in [29 CFR 552.102](#).



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### DOL Brings Back Companionship Services Exemption

- Exception to exception to exception.
- Employees who are companions under the DOL definition (the exemption, which is about to change) are subject to the minimum wage and overtime requirements of WOWA.



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### DOL Brings Back Companionship Services Exemption

- This means the proposed federal changes will not help Michigan homecare employers.
- Likely the federal exemption will go away with next Democrat President.
- Already seeing pushback at the federal level



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### DOL Brings Back Companionship Services Exemption

- On March 12, 2026, Senators Patty Murray and Andy Kim along with Congresswoman Alexandria Ocasio-Cortez introduced the "Fair Wages for Home Care Workers Act."
- This legislation would permanently eliminate the use of the companionship services exemption in homecare.
- Not surprisingly SEIU and a number of other unions are pushing this.



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### Minimum Wage

- Under WOWA, Michigan's minimum wage is adjusted every year.
- As of January 1, 2026 Michigan Minimum Wage is \$13.73/hour.
- It will increase to \$15.00/hour on January 1, 2027.



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### Earned Sick Time Act

- The Earned Sick Time Act guarantees paid sick leave, up to 72 hours (or 40 for small businesses) per year, to employees for certain specific uses.
- The Earned Sick Time Act also includes use of paid leave for public health emergency purposes.



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### Earned Sick Time Act

- Took effect February 1, 2025 (October 1, 2025 for a "small business.")
- Employer - any person, firm, business, educational institution, corporation, limited liability company, government entity, or other entity that employs 1 or more individuals."
- Small Business – 10 or fewer "individuals who work for compensation" in a week in 33 or more weeks in prior year. (10+ in 20 or more weeks is not a small business.)



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### Earned Sick Time Act

**Requirements:**

- Employee of small business
  - Accrue 1 hour of paid sick time for every 30 hours worked.
  - Use up to a minimum of 40 hours of paid sick time in a year (employer can set a higher limit).
  - Alternative: provide employee 40 hours of paid sick time for immediate use at the beginning of the year.



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**Earned Sick Time Act**

**Requirements:**

- All other Employees
  - Accrue 1 hour of paid sick time for every 30 hours worked.
  - Use up to a minimum of 72 hours of paid sick time in a year (employer can set higher limit).
  - Alternative: provide employee at least 72 hours of paid sick time for immediate use at the beginning of the year.



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**Earned Sick Time Act**

**Requirements:**

- Unused sick time carries over from year to year, but 40 hr/72 hr/other higher limit set by employer still apply.



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**Earned Sick Time Act**

**Requirements:**

- Employers who award the full paid sick time amount at the beginning of the year:
  - Do not need to allow employees to carry over sick time to the next year.
  - Do not need to track and calculate accruals
  - Do not have to pay the employee the value of unused sick time at the end of the year.



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### Earned Sick Time Act

- Part Time Employees. As an alternative to accrual:
  - May provide earned sick time at the beginning of the year based upon projected work hours.
  - Must provide employee "a written notice of how many hours the part-time employee is expected to work for a year at the time of hire."
  - Amount provided must be proportional (1 to 30) to the projected work hours.
  - If employee works more than projected, employee earns more sick time.



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### Earned Sick Time Act

- What happens to unused sick time when employee's employment ends?
- "This act **does not require an employer to provide financial or other reimbursement to an employee for accrued earned sick time that was not used** upon the employee's termination, resignation, retirement, or other separation from employment." M.C.L.A. 408.965(3).



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### Uses of Earned Sick Time

- Employee's or employee's family member's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of the employee's mental or physical illness, injury, or health condition; or preventative medical care for the employee.
- If employee or employee's family member is a victim of domestic violence or sexual assault, for medical care or psychological or other counseling for physical or psychological injury or disability, to obtain services from a victim services organization, to relocate due to domestic violence or sexual assault, to obtain legal services, or to participate in any civil or criminal proceedings related to or resulting from the domestic violence or sexual assault
- To attend meetings at a child's school or place of care related to the child's health or disability, or the effects of domestic violence or sexual assault on the child
- Absences related to public health emergencies and certain issues related to communicable diseases.



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### Uses of Earned Sick Time

- If absence is foreseeable, "employer may require advance notice, not to exceed 7 days, before the date the earned sick time is to begin."
- If absence is not foreseeable, employer may require notice:
  - As soon as practicable; or,
  - In accordance with employer's policy on requesting sick time, if:
    - Employee provided with a copy of the policy that includes the procedures for requesting time use of sick time, on date of hire, date statute took effect or date policy took effect.
    - Policy allows employee to provide notice after sick time is needed.
- Cannot deny unforeseeable sick time if
  - Employer did not provide policy
  - Employer changed policy and did not communicate change within 5 days.



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### Uses of Earned Sick Time

- For use of Sick Time of more than 3 consecutive days, employer may request reasonable documentation that earned sick time has been used for an allowed purpose.
- Once requested, employee has 15 days to provide notice.
- Employer shall not delay the commencement of sick time on the basis of not receiving documentation.
- "Documentation signed by a health care professional indicating that earned sick time is necessary is reasonable documentation for purposes of this subsection."
- Sets out reasonable documentation for DV an Sexual Assault matters.
- Employer pays the costs for requested documentation.



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### DOL Enforcement Update

- DOL Annual Report for FY 2025:
  - \$259 Million recovered for 176,957 workers.
  - Healthcare - \$53,291,920 in back wages and \$4,687,560 in CMPs. That is up from FY 2024.
  - Healthcare was the largest industry in terms of dollars recovered, but only the second largest in terms of number of compliance actions.
- The Report did not focus on homecare as in years past.
- As expected, a large focus on immigration.



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### DOL Enforcement Update

- Report also notes DOL's increased efforts to assist with FLSA compliance.
- DOL brought back the opinion letter program
- DOL has launched a number of efforts related to employer compliance:
  - They launched a FLSA compliance webpage: <https://www.dol.gov/agencies/whd/compliance-assistance>
  - They updated their compliance videos: <https://www.dol.gov/agencies/whd/flsa/videos?lang=en>



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### DOL Opinion Letters

- DOL Opinion FLSA 2026-2: Found that an employee safety, job duties and performance bonus MUST be included in the regular rate calculation. The bonus program uses "detailed criteria and one or more formulas both to determine whether a bonus is earned and to calculate the hourly bonus amount each employee earns." DOL concluded, "because the policy automatically triggers the bonus upon meeting the criteria, the employer has effectively "abandoned" its discretion with respect to the fact and amount of the payment."
- Not a surprising outcome. A reminder that bonuses that are earned must be part of the Regular Rate.



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### DOL Opinion Letters

- DOL Opinion FLSA 2026-1. Request by a Licensed Clinical Social Worker who had been reclassified from exempt to non-exempt. Requestor's state licensure required a master's degree to apply for an LCSW license.
- Based on that, DOL stated that based on the facts provided, "it is likely that your primary duty necessitates the requisite advanced knowledge and academic requirements to qualify you as an exempt learned professional." Reiterates that LCSW's can qualify as exempt professionals.
- Notes that duties and salary are required.



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**DOL Opinion Letters**

- DOL Opinion FLSA 2026-1. Cont'd
- DOL states, "Ultimately, even if all the criteria for an FLSA exemption are met, it is the employer – not the employee – that claims the exemption."
- Just because someone meets the exemption education requirements does not automatically make them exempt.
- Employer can choose to treat an eligible individual as non-exempt.



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**DOL Opinion Letters**

- DOL Opinion FMLA 2026-2
- Addresses whether employee time spent traveling to get medical care or to assist family with medical care.
- DOL concludes that "an eligible employee may use FMLA leave that counts against his or her FMLA entitlement to travel to or from a medical appointment for a serious health condition, *whether or not the medical certification indicates the need for, time required, or other particulars of, such travel time.*"
- Certification need not address travel time.



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**DOL Opinion Letters**

- DOL Opinion FMLA 2026-2
- If travel time is not related to employee's or family member's medical care, then it is not covered.
- DOL specifically stated, "FMLA-protected leave for travel time discussed above does not encompass travel to or from, or stops for, other unrelated activities. Where "absences are not attributable to a serious health condition . . . FMLA is not implicated and does not protect an employee against disciplinary."



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### Independent Contractors

- On February 27, 2026, DOL issued a Notice of Proposed Rulemaking: "Employee or Independent Contractor Status Under the Fair Labor Standards Act, Family and Medical Leave Act, and Migrant and Seasonal Agricultural Worker Protection Act."
- Trump DOL "proposing to rescind the analysis for determining employee or independent contractor status under the Fair Labor Standards Act (FLSA) currently set forth in 29 CFR part 795 and replace it with the analysis that it published and adopted in a prior final rule dated January 7, 2021, with a few modifications."



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### Independent Contractors

- NPRM proposes to bring back the "core factors" from the prior Trump DOL rule.
- Comment deadline was April 28, 2026.
- DOL concerned that the 2024 Rule was not clear, included a lot of repetition and overlap and might lead to confusion.
- DOL notes that the economic realities test was established by the U.S. Supreme Court.



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### Independent Contractors

- DOL reviews the history of the economic realities test.
- DOL concludes that the federal courts tend to focus on 2 of the economic reality factors: "control and opportunity for profit and loss."
- "An individual is an independent contractor, as distinguished from an "employee" under the Act, if the individual is, as a matter of economic reality, in business for him- or herself. Though both employees and independent contractors are dependent on others in some sense, economic dependence in this context means the dependence that a typical employee has on an employer for work, as opposed to an individual who has more of the nature and character of a business owner who has a separate business. Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income."



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## Independent Contractors

- Economic Reality – Core Factors
- Nature and Degree of Control: "weighs towards the individual being an independent contractor to the extent the individual, as opposed to the potential employer, exercises **substantial control** over key aspects of the performance of the work."
  - "setting his or her own schedule, by selecting his or her projects, and/or through the ability to work for others."



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## Independent Contractors

- Economic Reality – Core Factors
- The individual's opportunity for profit or loss. "weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work."
  - "weighs towards the individual being an employee to the extent the individual is unable to affect his or her earnings or is only able to do so by working more hours or faster."



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## Independent Contractors

- Economic Reality – Other Factors
- The amount of skill required for the work. Specialized training or skill (independent contractor) v. no specialized training or skill (employee).
- The degree of permanence of the working relationship between the individual and the potential employer. work relationship is by design indefinite in duration or continuous (employee) v. definite duration or sporadic (independent contractor).
- Whether the work is part of an integrated unit of production. Work a "component of the production process" (employee) v. "segregable from the production process" (contractor).



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### Independent Contractors

- Economic Reality – Other Factors
- **Additional Factors:** "Additional factors may be relevant in determining whether an individual is an employee or independent contractor for purposes of the FLSA, **but only if** the factors in some way indicate whether the individual is in business for him- or herself, as opposed to being economically dependent on the potential employer for work."
- DOL investigators may attempt to use factors beyond the ones listed under the rule. This attempts to narrow their use.



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### Independent Contractors

- Michigan Courts similarly apply the "economic reality test" under WOWA.
- "Under Michigan law, the **economic reality** test considers "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal," though no one factor is controlling. *Clark v. United Techs. Auto., Inc.*, 459 Mich. 681, 688, 594 N.W.2d 447 (1999) (alteration in original) (quoting *Askew v. Macomber*, 398 Mich. 212, 217-18, 247 N.W.2d 288 (1976)).



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### Independent Contractors

- Much like the proposed DOL rule, Michigan's test considers control an important factor.
- Also considers whether work is an "integral part of a unit of production."
- Does not consider one factor controlling.
- Considers totality.



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## Independent Contractors

- For homecare employers, proposed rule not likely to change reality – homecare workers are employees.
- Whenever you think a worker is an independent contractor, it is best to review with knowledgeable counsel.



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## EEOC Enforcement Update

- Enforcement down in FY 2025.
  - EEOC only filed 94 lawsuits in FY 2025. Not the lowest total in the last 10 years, but one of the lowest.
    - Is this sign of new leadership or merely the change of administrations? EEOC litigation filings peaked at 217 in 2017, which was the same time frame under Trump's first administration. Stay tuned.
- In FY 2025 Title VII cases represented more than 50% of the EEOC's lawsuits.
- Two main industry targets for lawsuits – healthcare and hospitality.
- Unfortunately, the EEOC has not issued a more detailed Annual Performance Report as it has in years past.



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## EEOC DEI

- EEOC continues to object to DEI efforts.
- November 20, 2025, EEOC announced it was asking a federal court to enforce an administrative subpoena to disclose details about its DEI policies.
- EEOC was investigating a complaint by an employee of northwestern mutual that employees had been denied promotions as the result of his sex, race, color or national origin due to Northwestern's DEI programs.
- EEOC continues to pursue "illegal DEI."



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### DOJ DEI Guidance

- On July 30, 2025, Pam Bondi, U.S. Attorney General, issued, "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination."
- This set the stage for the DOJ/EEOC efforts regarding DEI.
- Memorandum, "clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion ("DEI") programs."



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### DOJ DEI Guidance

- Guidance addresses 4 categories:
  - Explicit Preferences Based on Protected Traits.
  - Use of Proxies for Protected Status.
  - Segregated Spaces or Participation Tracks.
  - Stereotyping or Hostile DEI Content.

Further evidence that the Trump administration is taking a very clear and specific stance on DEI that diverges from the prior administration.



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### EEOC - DEI

- February 26, 2026 letter to Fortune 500 CEOs.
- This letter specifically noted that the rebranding a program as Inclusion & Diversity; Belonging; People & Culture; or Opportunity & Inclusion did not matter when the program was "functionally similar" to the programs to which the EEOC has objected.
- Letter notes that the EEOC is the "the *Equal Employment Opportunity* Commission, **not** the *Equitable Employment Outcomes* Commission."
- Letter expresses concern that these questionable DEI programs are discriminatory.



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**EEOC - DEI**

- Whatever it is called: DEI, Inclusion & Belonging, etc., employers need to be aware of current EEOC focus.
- EEOC has published information for employees.
- <https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work>
- <https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work>



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**Cases**

**Muldrow v. St. Louis (U.S. S.Ct.) (2024)**

- a plaintiff under Title VII "need show only some injury respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so."
- Reduces the plaintiff's burden, which makes it easier to bring a claim.
- There have been a number of cases that have looked at *Muldrow*.



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**Cases**

**Russel v. Driscoll (10<sup>th</sup> Cir.)**

- Muldrow applies to discrete act claims, not hostile work environment claims.

**Walsh v. HNTB Corporation (1<sup>st</sup> Cir.) (March 2026)**

- 1<sup>st</sup> Circuit assessed whether a PIP was an adverse action concluded, "there is no one-size-fits-all answer for whether a PIP constitutes an adverse employment action. Rather, the inquiry is fact-intensive and PIP-specific."
  - This case may be important – does every PIP now carry risk?



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### AI and Hiring

- AI continues to be a hot topic in many areas, including HR.
- A flurry of lawsuits across the country involving the use of AI hiring tools by employers.
- Issues: discrimination, bias, FCRA...



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### AI and Hiring

- No federal law directly addresses AI in hiring.
- Courts are addressing application of Title VII, ADEA, ADA, FCRA and other current laws to this area.
- This means uncertainty.



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### AI and Hiring

- Eightfold AI provides a number of AI powered tools designed to automate certain aspects of hiring, such as screening applicants.
- Job applicants filed a lawsuit against the software company alleging that the company "unlawfully compiles sensitive personal information about applicants."



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### AI and Hiring – Eightfold AI

- Complaint alleges that the AI uses more than 1.5 Billion data points compiled from scraping profiles of more than 1 Billion people.
- The plaintiffs allege that the AI uses data about candidates that the AI obtains from public sources, other comparable employees, the AI's training data and more. It did not just rely upon the candidate's application and resume.



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### AI and Hiring – Eightfold AI

- Complaint also alleges that the AI keeps the candidate's data and uses it for evaluating other applicants or for the original applicant for other jobs in the future.
- The plaintiffs argue that the AI functions as a credit report and is, therefore, subject to FCRA.



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### AI and Hiring – Eightfold AI

- This is not a bias or discrimination case.
- **This is a consumer protection case.**
- It alleges that use of these AI tools requires compliance with FCRA.
- This shows another potential vulnerability for AI hiring technology.



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**AI and Hiring – Workday**

- This is a discrimination case against an AI company.
- Plaintiff is an African American over the age of 40. He applied for multiple positions through Workday's website.
- He was rejected 100 times.



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**AI and Hiring – Workday**

- Mobley filed an age discrimination lawsuit against Workday.
- Mobley alleges that Workday's screening algorithms were trained on biased data resulting in the algorithm.
- The court has approved his claim to proceed as a collective action – potentially millions of plaintiffs.



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**AI and Hiring – Workday**

- Mobley alleges disparate impact – the algorithm disproportionately screened out candidates in protected classes.
- Trump EEOC has moved away from disparate impact.
- Private lawsuits may still rely on it.



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### AI and Hiring – Workday

- Neither suit involves employers, but these cases are likely only the beginning.
- Employers need to be cautious with AI tools.
- A recent survey showed that:
  - 88% of AI vendors cap their liability to clients.
  - 83% **DO NOT WARRANT** regulatory compliance.



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### AI and Hiring

- Carefully review contracts with vendors.
  - Provisions related to non-bias/non-discrimination
- Need to negotiate issues related to apportioning of risk.
- Vendor warranties and reps.
- Be aware of and negotiate to limit damage caps/waivers
- Indemnity for employer?
- Whose data?
- Need to carefully vet vendors for bias and other non-compliance.



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### AI and Hiring

- Harper v. Sirius XM Radio
  - This case involves an employee suing the employer, rather than the vendor.
  - Employee alleges that the AI hiring tools Sirius XM uses have a disparate impact on minorities.
  - AI assigned applicants scores based upon application and a number of data points.
  - Plaintiff alleges due to biased data algorithm employer screened out minorities disproportionately.



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## AI and Hiring

• Important considerations:

- Do not rely upon AI "in a vacuum."
- Have a human in the loop.
- Have an AI governance committee.
- Transparency – be transparent with candidates.
- Document process
- Monitor results – are candidates in particular classes rejected or accepted at noticeable dissimilar rates?



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## Questions?



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