

Managing Responsible Use of **AI in HR**



Employment Law *Advisor*

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Executive summary

Artificial intelligence has gained a foothold in all industries and professions, including HR. Alarmists warn that robots will take over the world—and that AI will be to blame. With all that negativity, you might be tempted to wait before looking into this technology for your business.

However, according to AI expert Shawonna Hoffman, president of Guardrail Technologies, that is exactly the wrong thing to do. Your business can lose a competitive edge if you choose that approach, Hoffman and other experts contend. Artificial intelligence is here to stay, and by investigating possibilities now, you'll be better positioned for future workforce changes.

The Society for Human Resource Management agrees, saying generative AI is redefining the landscape of the professional labor market. "As we uncover its full implications over the coming years, HR leaders will be at the forefront of navigating the associated challenges and capitalizing on the opportunities it presents. This transformation demands a recalibration of workforce composition and management," according to SHRM.

While experts agree on the opportunities AI presents for HR professionals, they also acknowledge the risks.

"AI is fallible," says Jennifer Morehead, CEO of Flex HR. "Employers may face liability for decisions they make or actions they take based on AI recommendations. Since people design AI systems, they can inadvertently incorporate human biases. ... AI systems can make mistakes, necessitating ongoing oversight and review."

With so many sources of information to weed through and competing views regarding this technology, this report gathers the key materials related to AI that HR professionals must know. This

includes federal guidance and state laws for developing a clear framework and policies.

Employers cautious about integrating AI into HR

AI in the Workplace, a survey report released by the Littler Mendelson employment-law firm in September 2023, found that 56% of organizations have yet to incorporate generative AI tools—technologies like ChatGPT and DALL-E, which can generate fresh content or data—into their HR functions. Among HR functions that have adopted AI, content creation is the most prevalent application, streamlining HR processes by generating job descriptions, onboarding materials and employee communications.

Lily McNulty and Shira Yoshor, attorneys at the Greenberg Traurig law firm, outline other common ways AI is being used in the workplace:

- Résumé scanners that select résumés based on certain keywords
- Employee-monitoring software that notes when employees are at their computers or rates employees based on the number of keystrokes they make
- Software for video interviews that scans facial expressions or speech patterns to determine trustworthiness or honesty
- Software that tests applicant or employee personality traits, aptitude or cognitive skills
- Chatbots that automatically reject applicants who do not meet specific requirements.

They also note that many job seekers use ChatGPT to create résumés and cover letters.

How employers are using AI in the application process

Employers are adapting AI technology to:

- Source candidates
- Screen candidates, by ranking résumés based on objective qualifications such as skills and education
- Measure a candidate's soft skills and technical competencies through games and questionnaires
- Read applicants' body language
- Provide objective and consistent questions to ask applicants
- Streamline and personalize the application process.

Workplace AI risks

As with any emerging technology, there are risks to keep in mind. McNulty and Yoshor warn that AI:

- May unintentionally discriminate against members of protected groups. AI “learns” by observing repetitions of previous behavior. There is a risk it will adopt biases from those patterns if it is not updated properly.
- Is only as powerful as the person inputting the information. It requires human direction. It only works if you've done the work to identify valid success criteria for the role.
- Can result in bias by selecting certain neutral characteristics that have a discriminatory impact against protected classes, such as minorities and women.
- Can result in bias when an employer tries to hire workers based on the profiles of successful employees at the company. If high-performing employees are men, an AI algorithm may exclude women.

- May violate candidates' privacy, collecting personal data about them, such as biometrics, without their consent or knowledge.
- Lacks a “gut instinct” and cannot assess tone, personality or soft skills.

AI and diversity goals clash

According to research performed by SHRM in conjunction with the Burning Glass Institute, generative AI will challenge HR leaders to maintain a commitment to diversity, equity and inclusion. While it will be tempting to leverage AI for HR practices such as sourcing and assessing new hires, leaders must be mindful that these tools will likely replicate existing biases and may work against DEI goals. Adjustments in hiring practices and revisions of DEI metrics may be needed, SHRM warns.

On the flip side, in its *AI in the Workplace Playbook*, SHRM contends that AI supports inclusivity and well-being in the workplace. An estimated 386 million working-age people have some kind of disability. Generative AI has the potential to help individuals with disabilities find and excel in jobs. And employers can build inclusivity into the design of the technology. The rewards of designing AI capabilities for accessibility and inclusivity are significant. AI-powered tools such as ChatGPT are invaluable to communicate effectively and access information efficiently.

Beware discrimination risks of using AI in HR

With all the warnings that come with artificial intelligence, particularly discrimination concerns, it's no surprise that the technology has triggered lawsuits.

The first related case involved a Chinese company using AI software to screen job applicants. The company hires American tutors to teach English to Chinese students, using AI to sort through applications. An EEOC lawsuit alleged that the software automatically screened out 200 older applicants who sought the gig assignments, rejecting women over age 55 and men over age 60.

Instead of going to court, the company agreed to pay \$365,000 to settle the case. (*EEOC v. iTutorGroup*, ED NY, 2022)

Hiring managers should be aware: Never consider where an applicant was born when making hiring decisions. AI technology is not that smart, as highlighted in two recent court cases related to AI-aided applicant screening.

Avoid screening applicants by national origin

DHI Group operates Dice.com, a job-search website for technology professionals that uses AI to match applicants with employers. The site lets companies seeking new workers set up a variety of search filters to sort whose résumés are matched with their openings. Some Dice.com customers screened out applicants of American national origin in favor of those holding various classifications of visas. They did this by putting the words “only” or “must” close to “H-1B” or “visa.” *The result:* American-born candidates were screened out.

One excluded applicant filed an EEOC complaint. The EEOC reached a settlement requiring DHI Group to reprogram its AI software to exclude listings that push only applicants of foreign national origin to potential employers.

The EEOC says the settlement demonstrates that AI software can be both discriminatory and anti-discriminatory depending on how its algorithms are coded.

Beware AI screening based on race, age and disability

A class-action complaint filed early in 2024 takes direct aim at the discriminatory practices inherent in AI tools. Workday, a human resource management service that provides applicant-screening services as one of its capabilities, is accused of using machine-learning algorithms and artificial-intelligence tools to screen out applicants who are Black, disabled or over age 40.

In May 2023, the Bureau of Labor Statistics reported more than 9.8 million job openings in the U.S. According to Workday recruiting, it processed 2.2 million U.S. job-requisition transactions in May 2023, representing nearly 22% of all U.S. job openings that month. At that time, Workday projected it would process more than 36 million requisitions, screen 266 million applications and make 24 million job offers in 2023 alone.

The plaintiff and the class he seeks to represent have made numerous applications for employment using the Workday platform, only to be rejected. Since 2017, the plaintiff has applied for more than 100 positions that exclusively use Workday as a screening platform for talent acquisition. Each time, he has been denied.

Most recently, the EEOC entered the fray as a friend of the court, filing an *amicus* brief arguing that AI software developers can be held liable for the discriminatory effects of their programs just as can employers and search firms deploying this software. This is consistent with its current enforcement focus, which includes examining the impact of potentially discriminatory AI on screening and hiring.

The EEOC, White House, DOL weigh in on AI

With so many AI-related concerns, federal agencies have adopted a proactive approach to regulating the technology.

EEOC guidance

The EEOC is one of the agencies warning employers that using AI in the hiring process could lead to violations of anti-discrimination laws. The commission is worried that certain AI programs may be designed in ways that actively discriminate against members of protected classes.

To help EEOC investigators and others assess how employers use AI, in May 2023 the commission issued a technical assistance document entitled [Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964](https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial) (<https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>). The guidance:

- Applies to the use of AI in making decisions about hiring, promotions and terminations, including determining who will go and who will stay during reductions in force
- Covers the use of AI to screen résumés, conduct initial video interviews, sort candidates based on their interview performance and test applicants for subjective qualities such as cultural fit.

Third-party AI

The EEOC recognizes that most employers aren't big enough and don't have enough experience to create artificial-intelligence tools of their own. Instead, they contract with third-party vendors to purchase AI software.

Worried about letting employers off the hook for discriminatory effects AI may have on applicants and employees, the EEOC clarified that employers are responsible for any adverse impacts no matter who developed the software. In short, employers can't blame discrimination on the vendor and walk away.

Instead, the agency recommends that employers:

- Ask the vendor or developer whether they have tested their AI platforms for possible discriminatory impact. The EEOC warns employers that they are still liable for discrimination even if the vendor asserts that the program does not discriminate. In other words, due diligence requires asking the vendor if the software has been tested for discriminatory effects, but that doesn't excuse discrimination that results from using the software.
- Be mindful that even if the vendor claims its testing passes the "four-fifths rule" (a statistical measure of the expected impact of a selection method compared to its actual impact), the employer may still be liable for any disparate impact caused by the employer's actions. Thus, if the employer first chooses the applicants to be screened by the AI program, that could add to its discriminatory effect.
- Understand they should test the impact the AI tools have on their workforces. While a vendor may conclude that its AI tool has no adverse impact on its test sample, that may not be true when the tool is applied in a specific workplace. Employers should conduct audits to determine whether an AI platform might have a disparate impact on its applicant pool or workforce.

White House Blueprint

In 2023, the White House released its [Blueprint for an AI Bill of Rights](https://www.whitehouse.gov/ostp/ai-bill-of-rights/) (<https://www.whitehouse.gov/ostp/ai-bill-of-rights/>). That document states, "Algorithms used in hiring and credit decisions have been found to reflect and reproduce existing unwanted inequities and embed new harmful bias and discrimination." Therefore, the Biden administration argued, AI needs to be regulated. The blueprint highlights existing federal laws such as Title VII and their use in establishing liability for AI-based employment decisions that discriminate.

DOL guidance

In April 2024, the Department of Labor released [Artificial Intelligence and Automated Systems in the Workplace under the Fair Labor Standards Act and Other Federal Labor Standards](https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2024_1.pdf) (https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2024_1.pdf).

The document provides guidance to Wage and Hour Division field staff regarding application of the Fair Labor Standards Act and other federal employment laws as employers increasingly use AI and other automated systems in the workplace.

For example, it warns that without responsible human oversight, relying on automated systems to process FMLA leave requests (including determining eligibility, calculating available leave entitlements and evaluating whether leave is for a qualifying reason) can create potential compliance challenges.

Another potential problem: AI-driven timekeeping programs may incorrectly determine the hours an employee has worked, which may fail to correctly determine an employee's FMLA eligibility. Similarly, an automated system that "tests" for eligibility more frequently than permitted under the FMLA could result in employees' leave being impermissibly denied. Such systems could also undercount how much FMLA leave an employee has available, for example by incorrectly dictating which days should be counted against an employee's leave entitlement. This undercounting could prompt a leave denial in violation of the FMLA. While these types of violations could also occur under human decision-making, the use of AI or other automated systems could result in violations across the entire workforce.

The DOL guidance lines up with guidance from other experts: When used responsibly, AI offers time-saving workplace advantages. Without proper human supervision, however, the technology can pose potential risks to workers and result in federal labor violations.

States get in on the AI act

While federal agencies are taking a proactive approach to AI, many states have introduced AI-related legislation as well. Below is a chart showing a variety of AI legislation that has been enacted, much of which relates to HR. Almost double the amount is pending in various states. *HR Employment Law Advisor* is monitoring those bills and will update the below chart periodically as new legislation passes.

State	Law	Text	Effective Date
California	A 302 Department of Technology: Automated Decision Systems	Requires the DOT to conduct an inventory of all high-risk automated decision systems in use by state agencies to assist or replace human discretionary decisions that have a legal or similarly significant effect	Oct. 13, 2023
California	SB 1001 Chapter 6	An act to add Chapter 6 to Part 3 of Division 7 of the Business and Professions Code, relating to bots. Defines “bot,” “online,” “online platform” and “person.” Makes it unlawful for any person to use a bot to communicate or interact with another person in California online, with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person	July 1, 2019
California	SCR 17 Artificial Intelligence	Affirms the state legislature’s commitment to President Biden’s vision for safe AI and the principles outlined in the Blueprint for an AI Bill of Rights	Aug. 23, 2023
Colorado	Consumer Protections for Artificial Intelligence	Requires developers of high-risk AI systems to use reasonable care to avoid algorithmic discrimination	Feb. 1, 2026
Connecticut	S 1103 Artificial Intelligence Automated Decision	Provides that the Office of Policy and Management shall develop and establish policies and procedures concerning the development, procurement, implementation, utilization and ongoing assessment of systems that employ AI and are in use by state agencies	April 10, 2023
Illinois	HB 2557 Video Interview Act	Creates the Artificial Intelligence Video Interview Act. Provides that an employer that asks applicants to record video interviews and uses an AI analysis of applicant-submitted videos shall follow particular guidelines	Aug. 9, 2019
Illinois	HB 0053 Video Interview Demographic	Amends the Artificial Intelligence Video Act. Provides that employers that rely solely upon AI to determine whether an applicant will qualify for an in-person interview must gather and report certain demographic information to the Department of Commerce and Economic Opportunity	July 9, 2021

State	Law	Text	Effective Date
Illinois	H 3773 Human Rights Act	Amends the Human Rights Act, which provides that an employer that uses predictive data analytics in its employment decisions may not consider the applicant's race or ZIP code when used as a proxy for race to reject an applicant	May 24, 2024
Maryland	HB 1202 Labor and Employment – Use of Facial Recognition Services – Prohibition	Prohibits an employer from using certain facial-recognition services during an applicant's interview for employment unless the applicant consents under a certain provision of the act	Oct. 1, 2020
New York	S 5641 Use of Automated Employment Decision Tools	Establishes criteria for using automated employment decision tools and provides for enforcement for violations of such criteria	Jan. 8, 2024
New York	S 7543 Loading Act	Enacts the legislative oversight of automated decision-making in government acts to regulate the use of AI techniques by state agencies	Jan. 31, 2024
New York	S 7623 Use of Electronic Monitoring by Employer	Restricts the use by an employer or an employment agency of electronic monitoring or an automated employment decision tool to screen a candidate or employee for an employment decision unless such tool has been the subject of a bias audit within the last year and the results of such have been made public	April 12, 2024
New York City	2021/144 Automated Employment Decision Tools	A local law to amend the administrative code of New York City concerning automated employment-decision tools	Dec. 11, 2021
Rhode Island	H 5734 Business Regulation Regarding Insurance Discrimination	Prohibits the use of any external consumer data and information sources, as well as any algorithms or predictive models that use external consumer data and information sources in a way that unfairly discriminates	March 7, 2023
Vermont	H 114 Electronic Monitoring	Relates to restricting electronic monitoring of employees and employment-related automated decision systems	July 1, 2018
Washington	S 5356 Use of Automated Decision Systems	Establishes guidelines for government procurement and use of automated decision systems to protect consumers, improve transparency and create more market predictability	Jan. 1, 2023

Sources: nctl.org, csg.org

Policies and best practices

According to SHRM's *AI in the Workplace Playbook*, 78% of HR professionals report that their organizations have no policies or rules in place for using generative AI systems. But with so many factors at play, what could a comprehensive policy look like?

We culled a variety of sources to help employers develop AI best practices and policies. As always, consult your attorney for legal guidance on specific issues related to your organization.

Incorporating AI into HR: 4 essential policies

“As artificial intelligence becomes increasingly integrated into the workplace, it is more important than ever to place limits on its use,” says Jennifer Morehead, CEO of Flex HR. She advises following these principles when developing AI policies:

1. Define when and how to use AI. In your employee handbook, include a policy setting clear boundaries regarding which employees can use AI and for which tasks. Explicitly state tasks for which AI cannot be used. Ensure your policy communicates that every employee is responsible for their output, regardless of whether AI has been used. Consider requiring employees to receive approval before applying AI to certain tasks.

2. Be transparent. To ensure all employees, customers and stakeholders understand how AI is being used within a company, mandate disclosure of all AI methodologies and decision-making processes. Such a policy is crucial for building trust and maintaining legal and ethical standards.

3. Ensure compliance. Implement a series of data-security measures, such as encryption, secure storage and access controls, to comply with data-protection regulations. To prevent user error, require training for all employees using AI systems. Conduct regular reviews to ensure security systems are up-to-date and identify security vulnerabilities.

Aid employment-law compliance by aiming to eradicate algorithmic bias or discrimination that can creep into AI systems. Establish policies that improve data-collection practices, such as using representative and inclusive data, conducting frequent reviews of algorithms and following the principle of data minimization.

4. Encourage reporting. Set a policy requiring employees to report any AI problems they discover, especially those involving discrimination or security. Establish a clear reporting protocol that outlines a specific, accessible communication pathway for employees to report AI-related concerns. Assign a dedicated individual or team responsible for promptly addressing problems.

Other policy considerations

Lily McNulty and Shira Yoshor offer the following guidelines regarding ChatGPT policies:

- Ensure the company's intellectual property isn't lost and trade secrets are not disclosed.
- Prohibit employees from including trade secrets or other confidential information in their queries and conversations with AI tools.
- Set standards about how and when employees may use AI in performing their job duties.
- Require employees to vet information provided by AI.

AI best practices

The attorneys also offer some AI best practices for companies to consider:

- Provide notice before using AI software in HR functions.
- Obtain employee consent.
- Confirm AI vendor compliance.
- Conduct bias audits; review external validation studies.
- Train HR teams.
- Stay up to speed on developing laws.

Sample AI policy

Keeping all the previous guidance in mind, draft your company's AI policy, including clear instructions on what employees must and must not do, and the ramifications of violating the policy.

Look to sample policies drafted by reputable law firms to ensure you don't miss any key elements. Following is one created by the Fisher Phillips law firm:

- [Sample Policy: Acceptable Use of Generative AI Tools](https://www.fisherphillips.com/a/web/du6wach1kmRuPCgDcMLJ5Z/ai-policy.pdf)
<https://www.fisherphillips.com/a/web/du6wach1kmRuPCgDcMLJ5Z/ai-policy.pdf>

Online resources

Here are some of the resources mentioned in this AI report, along with additional links:

- [EEOC's Artificial Intelligence and Algorithmic Fairness Initiative](https://www.eeoc.gov/ai)
<https://www.eeoc.gov/ai>
- [SHRM AI in the Workplace Hub](https://www.shrm.org/topics-tools/topics/artificial-intelligence-in-the-workplace)
<https://www.shrm.org/topics-tools/topics/artificial-intelligence-in-the-workplace>
- [The White House Blueprint for an AI Bill of Rights](https://www.whitehouse.gov/ostp/ai-bill-of-rights/)
<https://www.whitehouse.gov/ostp/ai-bill-of-rights/>
- [The White House Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence](https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/)
<https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>
- [EEOC Assessing Adverse Impact in Software, Algorithms and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964](https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial)
<https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>

- [DOL Field Assistance Bulletin No. 2024-1: Artificial Intelligence and Automated Systems in the Workplace under the Fair Labor Standards Act and Other Federal Labor Standards](https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2024_1.pdf)
https://www.dol.gov/sites/dolgov/files/WHD/fab/fab2024_1.pdf
- [Artificial Intelligence and Equal Employment Opportunity for Federal Contractors](https://www.dol.gov/agencies/ofccp/ai/ai-eeo-guide)
<https://www.dol.gov/agencies/ofccp/ai/ai-eeo-guide>

Final thoughts

Like any new technology, using AI in the workplace comes with inherent risks, as SHRM points out in its *AI in the Workplace Playbook*. “When workplaces are well-informed about these risks, they are better positioned to harness the exponential possibilities that AI offers. ... Thoughtful implementation of AI and its capabilities will empower leaders to embrace and optimize AI workplace applications, establish trust and confidence among their workforce, and maximize AI’s value for their organization.”

In all industries, HR included, the use of AI will only increase. Give thoughtful consideration as to how you may incorporate the technology into your HR practices, establish clear policies and procedures, safeguard against risks and continually evolve your procedures along with the technology.

Final note: Chances are good that you’re not the only leader in your organization who’s interested in how artificial intelligence can improve performance. See if you can collaborate across functions. Reach out to other departments to find out if your peers have begun exploring how to use AI in their work. Seek advice from colleagues in IT on how to incorporate AI into your overall tech strategy for HR.



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