

HCP MANAGEMENT CONFERENCE & EXHIBITION 2025

Confidence in Care: Resilience, Readiness, and Results

WELCOME

TITLE

2025 Employment Law Update – The Trump Administration (2.0) Changes; Home Care Litigation, Non-Competes, and AI Update; and Steps to Take to Protect Yourself As An Employer

SPEAKER

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YOUR EMPLOYMENT LAW PARTNER:





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AGENDA

- 1. *BREAKING NEWS*** – FLSA Companionship & Live-In Exemption
- 2. Trump Administration 2.0 Changes**
- 3. Wage & Hour Mistakes & Tips for Compliance**
- 4. Update on Non-Competes**
- 5. Updates on AI Use in the Workplace**

LEGAL NOTICE

The materials and opinions presented by  at this presentation represent  's views, are for educational and informational purposes only, are not intended to be legal advice and should not be used for legal guidance or to resolve specific legal problems.

In all cases, legal advice applicable to your organization's own specific circumstances should be sought.

We strongly encourage you to consult legal counsel of your choice on specific matters involving employment law, and important personnel policies and practices prior to adoption or implementation.



BREAKING

NEWS

U.S. DOL PROPOSED COMPANIONSHIP & LIVE-IN EXEMPTION REGULATIONS



FAIR LABOR STANDARDS ACT (1974) – COMPANIONSHIP EXEMPTION

Minimum Wage

(a) MINIMUM WAGE AND MAXIMUM HOUR REQUIREMENTS

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

Overtime

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or **any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary);** or

FAIR LABOR STANDARDS ACT (1974) – LIVE-IN EXEMPTION

Overtime

(b) MAXIMUM HOUR REQUIREMENTS

The provisions of section 207 of this title shall not apply with respect to—

(21) any employee who is employed in domestic service in a household and who resides in such household; or

HISTORY OF COMPANIONSHIP / LIVE-IN EXEMPTION

HISTORY OF THE “COMPANIONSHIP” AND “LIVE IN” EXEMPTIONS

Time Period	Exemption Status	President(s)
1975 to 2013	Exempt	
2016 <u>to Present</u>	Non-Exempt	

CURRENT LAW

CURRENT REGULATION (29 C.F.R. §552.109) EXCLUDES THIRD-PARTY EMPLOYERS FROM CLASSIFYING AS EXEMPT

§ 552.109 Third party employment.

- (a) Third party employers of employees engaged in companionship services within the meaning of § 552.6 may not avail themselves of the minimum wage and overtime exemption provided by section 13(a)(15) of the Act, even if the employee is jointly employed by the individual or member of the family or household using the services. However, the individual or member of the family or household, even if considered a joint employer, is still entitled to assert the exemption, if the employee meets all of the requirements of § 552.6.

FUTURE LAW?

ON JULY 2, 2025 U.S. DOL PROPOSED REGULATIONS . . .



FEDERAL REGISTER

The Daily Journal of the United States Government



PR Proposed Rule

Application of the Fair Labor Standards Act to Domestic Service

Vaughn, Joshua (JVaughn@littler.com) is signed in

A Proposed Rule by the Wage and Hour Division on 07/02/2025

This document has a comment period that ends in 43 days. (09/02/2025)

SUBMIT A PUBLIC COMMENT

44 comments received. [View posted comments](#)

PUBLISHED DOCUMENT: 2025-12316 (90 FR 28976)

- PDF
- Document Details
- Document Dates
- Table of Contents
- Public Comments
- Regulations.gov Data
- Sharing

DOCUMENT HEADINGS

Department of Labor
Wage and Hour Division
29 CFR Part 552
RIN 1235-AA51

AGENCY:
Wage and Hour Division, Department of Labor.

ACTION:
Proposed rule; request for comments.

SUMMARY:
In 1974, Congress applied the Fair Labor Standards Act (FLSA) to "domestic service" employees, but exempted employees who provide "companionship services" from the minimum wage and overtime

SO WHAT HAPPENS NEXT?



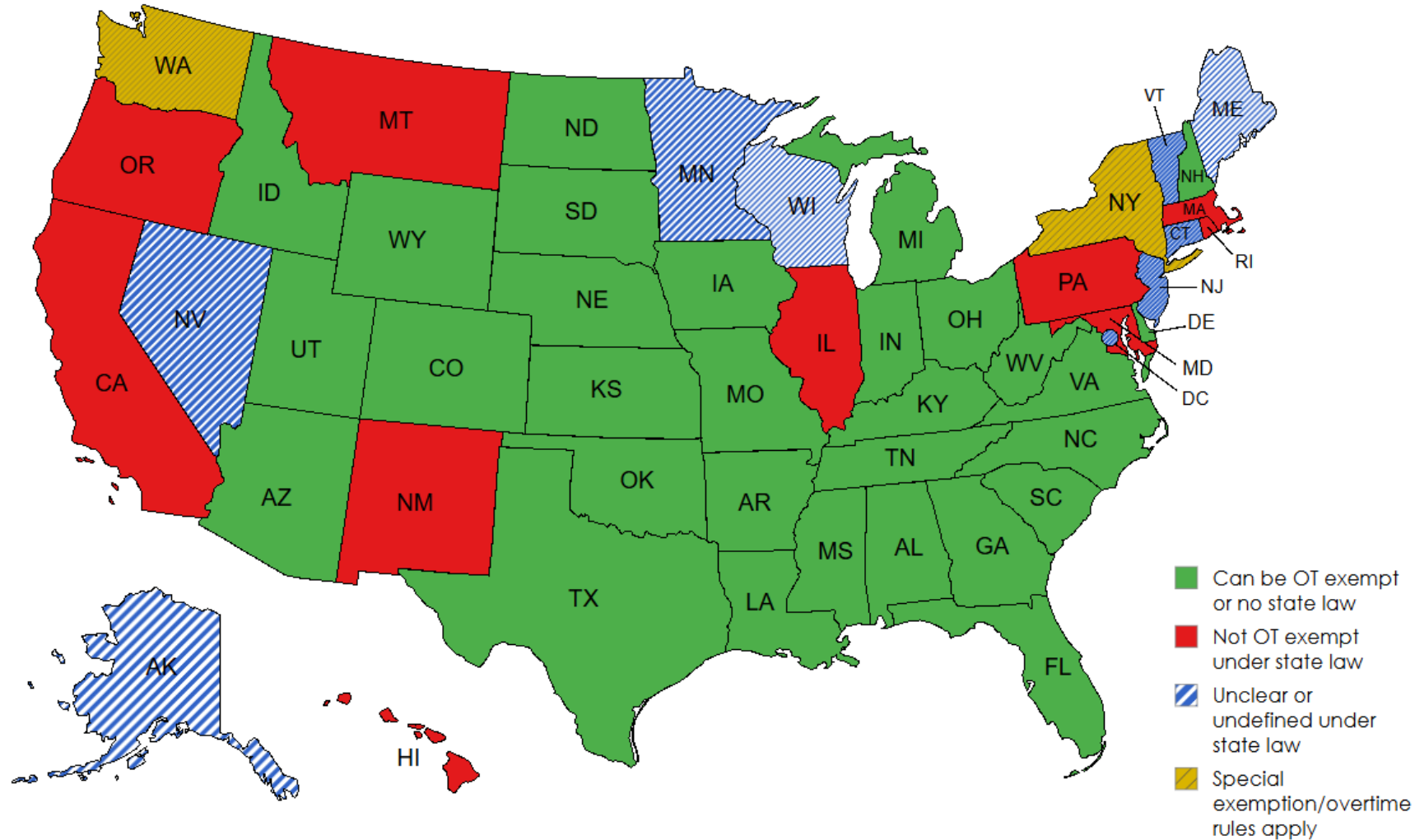
**SO WHAT DOES THIS MEAN
IF DOL REGS ARE FINALIZED AND YOU OPERATE IN CERTAIN STATES?**

Qualifying companions and
live-in caregivers could be
exempt under FLSA !!!

But wait, there's more . . .



WHICH STATE DO YOU OPERATE IN?



SO WHAT DOES THIS MEAN FOR A NEW YORK HOME CARE EMPLOYER IF DOL REGS ARE FINALIZED?

- Must still keep records of hours worked
- Must still pay home health aid minimum wage
- Must still pay 1.5x *basic* (i.e., not regular) rate for hours over 40 in a workweek



SO WHAT DOES THIS MEAN FOR A NEW YORK HOME CARE EMPLOYER?

- New York Home Health Aide **Minimum Wage** (Public Health Law § 3614-f):

Minimum Wage Rate Schedule					
Location	Minimum Wage for Home Care Aides as of 10/01/2022	Minimum Wage for Home Care Aides as of 12/31/2022	Minimum Wage for Home Care Aides as of 1/1/2024	Minimum Wage for Home Care Aides as of 1/1/2025	Minimum Wage for Home Care Aides as of 1/1/2026
New York City	\$17.00	\$17.00	\$18.55	\$19.10	\$19.65
Long Island & Westchester	\$17.00	\$17.00	\$18.55	\$19.10	\$19.65
Remainder of New York State	\$15.20	\$16.20	\$17.55	\$18.10	\$18.65

- Plus **overtime** (per § 142-2.2) – but at the rate of 1.5x the applicable *basic* rate:

Location	January 1, 2025	January 1, 2026
New York City, Nassau, Suffolk, Westchester	\$24.75 (i.e., 1.5 x \$16.50)	\$25.50 (i.e., 1.5 x \$17.00)
Remainder of New York State	\$23.25 (i.e., 1.5 x \$15.50)	\$24 (i.e., 1.5 x \$16.00)

NOTE THE FAMILY CAREGIVER EXCLUSION TO THE HOME HEALTH AIDE MINIMUM WAGE

- Public Health Law § 3614-f):

"Home care aide" means a home health aide, personal care aide, home attendant, personal assistant performing consumer directed personal assistance services pursuant to section three hundred sixty-five-f of the social services law, or other licensed or unlicensed person whose primary responsibility includes the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks; provided, however, that home care aide DOES NOT INCLUDE any individual:

- (i) working on a casual basis, or
- (i) (except for a person employed under the consumer directed personal assistance program under section three hundred sixty-five-f of the social services law) who is a relative through blood, marriage or adoption of: (1) the employer; or (2) the person for whom the worker is delivering services, under a program funded or administered by federal, state or local government.

OTHER NEW YORK OBLIGATIONS

1. **Call in Pay** – 4 hours or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage
2. **Spread of Hours Pay** – 1 hour of pay at basic minimum hourly wage for any day that exceeds 10 hours or that there is a split shift
 - What if HHA works for 2 clients in same day?
3. **Wage Parity Compensation, Notice, & Pay Stub** - for Medicaid-reimbursed work in New York City and the counties of Nassau, Suffolk, and Westchester
 - paid both a base wage and a supplemental benefit to satisfy a minimum rate of total compensation
 - required benefit portion of total compensation for home care aides is currently at a set value of \$3.22 per hour in Nassau, Suffolk and Westchester counties, and \$4.09 in New York City
 - wage parity requirement can be satisfied entirely through a payment of wages or through a combination of both wages and supplemental benefits
 - Covered employers must provide a notice which details the supplemental benefit portion of the minimum rate of home care aide total compensation

OTHER NEW YORK OBLIGATIONS

4. NYC – Unlawful use of AI in Employment

- ✓ Cannot use “**automated employment decision tool**” (AEDT) unless (1) it has been subject of bias audit within last year; and (2) summary of audit and distribution date of AEDT has been made public prior to use
- ✓ “Automated employment decision tool” means any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.
- ✓ AEDT does not include a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

COMMON WAGE AND HOUR VIOLATIONS

NEW YORK SOL = 6 YEARS!

- ✓ Failure to Pay for compensable time worked (e.g., travel time, meals, sleeping time)
- ✓ Failure to Correctly Calculate the Regular and Overtime Rates when certain bonuses are paid
- ✓ Misclassified Employees (e.g. classifying all office employees as exempt regardless of duties) and Independent Contractors
- ✓ Off-the-Clock Work
- ✓ Failure to Properly Pay On-Call Shifts, reporting time pay, and spread of hours pay





HOME CARE LITIGATION

FAILURE TO PAY TRAVEL TIME – US DOL COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN J. WALSH, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

[REDACTED]
d/b/a [REDACTED]
AND [REDACTED]

Defendants.

Civil Action No. _____

JURY TRIAL DEMANDED

COMPLAINT

8. For example, during the time period from at least November 9, 2015 through at least November 4, 2018, Defendants failed to pay certain employees the statutory minimum wage for all hours worked. The minimum wage violations are the result of [REDACTED] failure to compensate certain employees for travel time, which, at times lowered the employee's regular rate of pay below the statutory minimum wage during some workweeks. Defendants failed to compensate certain employees for travel time between patients' homes in the same workday, and for travel time between [REDACTED]'s administrative office and patients' homes in the same workday. These certain employees traveled up to an hour or more, and this travel was performed in excess of forty (40) hours per workweek. This resulted in Defendants not paying employees the statutory minimum wage for hours worked.

TRAVEL TIME & INAPPROPRIATE ROUNDING/TIME SHAVING – \$3.5 MILLION SETTLEMENT

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF THE CLASS AND COLLECTIVE ACTION SETTLEMENT AND RELATED RELIEF

The settlement provides an excellent result—substantial **\$3,500,000 monetary relief** and reforms that have a present and future value of an additional \$1,300,000. One of the keystones of

AMERICANS WITH DISABILITIES ACT FAILURE TO CONSIDER UNPAID LEAVE AS ACCOMMODATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

Civil Action No.:
Honorable:

COMPLAINT AND JURY
TRIAL DEMAND

Defendant.

- b. [REDACTED] has been diagnosed with severe anxiety, adjustment disorder, bipolar disorder and depression.
- i. [REDACTED] was on approved FMLA leave for her disability from approximately February 3, 2021 through April 6, 2021.
- j. Prior to the expiration of her FMLA leave on April 6, [REDACTED] requested a reasonable accommodation **in the form of a 30-day extension of unpaid leave.**
- k. [REDACTED] provided Defendant medical documentation indicating she would be able to return to work on April 18.
- l. Defendant refused to consider [REDACTED]'s request or engage in an interactive process regarding the request.

AMERICANS WITH DISABILITIES ACT FAILURE TO CONSIDER UNPAID LEAVE AS ACCOMMODATION

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

Civil Action No.:
Honorable:

COMPLAINT AND JURY
TRIAL DEMAND

[REDACTED]

Defendant.

***Monetary settlement
reached September 2024***

(FREE!) TIPS FROM A WAGE & HOUR ATTORNEY

- 1. Arbitration Agreement** (with Class/Collective Action Waiver!)
2. Conduct **Employment Practices Audit** (see next slide for more resources)
3. Have **written Live-in / 24-Hour** caregiver agreement
4. Update outdated **Handbook**
5. Confirm in writing any requests to alter time punches.
6. Investigate punch deviations from approved service plan and schedule.

AUDIT, FIX, GOOD FAITH!

1. Audit Your Practices!
2. Fix Mistakes
3. Develop records to establish *good faith defense*

These 3 steps helps avoids having to pay *back wages, liquidated damages, and civil money penalties*



TOOLS TO HELP ENSURE WAGE AND HOUR COMPLIANCE – LITTLER’S HOME CARE TOOLKIT W&H AUDIT RESOURCES

Littler Home Care Toolkit Local Contacts Subject Matter Contacts Third Party Resources ComplianceHR

Home Surveys Global Surveys Legislation Client Documents Documents & Templates Forms & Notices Reference Learning News & Analysis

Search Home Care Toolkit

- Template Policy and Document Library**
VIEW
- State-Specific Resources**
Guides, New Hire Notices, Termination Notices, and Posting Requirements
VIEW
- Client Documents**
VIEW
- Multi-State GPS Surveys**
State and Federal Law on 80+ Areas of Employment Law
VIEW
- News & Analysis**
Littler's Latest Articles on Changes in Employment Law

- First 100 Days: Executive Order & Rescinded Order Trackers**
- Subject Matter Contacts**
- Local Contacts**
- Learning**

TOOLS TO HELP ENSURE WAGE AND HOUR COMPLIANCE – LITTLER’S HOME CARE TOOLKIT W&H AUDIT RESOURCES

Template Policies

- W Cell Phone Reimbursement Form
- W Cell Phone Use While Driving Policy
- W Conflicts of Interest Policy
- W Disability and Accommodation Policy
- W Employment At Will Policy
- W Equal Employment Opportunity Policy
- W Example Remote Work Policy
- W Example Travel Time Policy
- W Family and Medical Leave Act Policy
- W FLSA Safe Harbor Policy for Exempt Employees
- W General On-Call Policy and Acknowledgment (Exempt Employee)
- W General On-Call Policy and Acknowledgment (Non-exempt Employee)



Wages, Hours and Pay Practices

- W Basic Wage & Hour Audit Checklist
- W Non-Exempt Employee Compensation Agreement
- W On-Call Time Log
- W Pay Equity and Pay Audit FAQs
- W Risks of Misclassification of Employees as Independent Contractors
- W Sample Time Adjustment Request
- W Wage & Hour Audit Considerations

COVID-19 and Return to Work Resources

- W ***Remote Work Guide For Adapting the Sample Policy and Agreement
- W **Remote Work Sample Policy
- W *Remote Work Sample Agreement

TIPS FROM A WAGE & HOUR ATTORNEY – TIME CERTIFICATION

[COMPANY NAME]

Time Log and Certification for Non-Visit Working Time

EMPLOYEE NAME _____ EMPLOYEE ID NUMBER _____

Date	Description	Start Time	End Time	Total Time	Client Name (if applicable)	Superv. Initials

By signing this Time Log and Certification for Non-Visit Time (“Time Log”), I certify that I have carefully reviewed this Time Log and that I have accurately recorded all non-visit time worked. I hereby certify that I have accurately reported my non-visit time worked, that I have not reported more or less time than I actually worked, and that I have not rounded up or down any start or stop time. I have not been pressured, coerced, or directed by anyone to

The screenshot shows a mobile application interface for submitting a timecard. At the top, the time is 2:50 PM. The main heading is "Done your shift?" with a sub-instruction: "Review your clock out time and submit your timecard to complete your shift." Below this, there are several data points: "Shift time" is 7:00 am - 3:00 pm; "Hours worked" is 7.50 hr; "Clock out location" is "at the facility" (indicated by a green checkmark); and "Clock out:" is "Wed 02/22/2023, 2:50pm". A "Break" section asks "Have you taken your unpaid meal period?" with radio buttons for "Taken" and "Not taken" (selected). Below this is a text input field for "Reason for not taking a break:" with the placeholder text "Please explain why you didn't take your unpaid meal period." At the bottom, there is a blue button labeled "Proceed to submit timecard".

SO HOW VALUABLE IS IT TO ACT IN GOOD FAITH?

Example – No Good Faith

$\$779.64 - \$771 = \$8.64$ per week

$\$8.64/\text{wk} \times 156 \text{ weeks} = \$1,347$ per EE

$\$1,347 \times 100 \text{ EEs} = \$134,700$ back wages

$\$134,700$ back wages

$\$134,700$ liquidated

damages

$\$269,400$ Total

PLUS Civil Money Penalties

Example – Good Faith

$\$779.64 - \$771 = \$8.64$ per week

$\$8.64/\text{wk} \times 104 \text{ weeks} = \898.56 per EE

$\$898.56 \times 100 \text{ EEs} = \$89,856$ back wages

$\$89,856$ Total

No liquidated damages

No Civil Money Penalties

This is 1/3 the potential exposure even before CMPs are considered!!

YOU LAST UPDATED YOUR HANDBOOK WHEN?!?

- Action Steps:
 1. Determine when you last updated your handbook. Has the law changed since then? *Answer – especially in NY – likely YES!*
 2. How to update? Options:
 - On your own – e.g., review Littler GPS Surveys (in Littler’s Home Care Toolkit) or a trusted online legal source to identify all changes since you last updated your handbook.
 - Ask counsel to help you revise – e.g., Littler’s Template Handbooks
 3. Send new version to employees and ask to acknowledge receipt

Find

Home » Topics



Arbitration

Arbitration Procedures & Proceedings

Artificial Intelligence (AI) and Robotics

Background Checks

Credit Checks
Criminal Background Checks

Business Restructuring and M&A

Bankruptcy
Furloughs
Reductions in Force (RIFs/WARN)
Successorship Obligations

Domestic Partners/Civil Unions

Employee Benefits

401k/Retirement/Pension
Consolidated Omnibus Budget Reconciliation Act (COBRA)
Employment Retirement Income Security Act (ERISA)
Benefits Eligibility
Equity Compensation
Executive Compensation
Government and Tax Exempt Plans
Health and Welfare Plans
Health Savings/Flexible Spending Accounts
Other Employee Benefits

Labor Management Relations

Captive Audience
Collective Bargaining
Grievance/Arbitration
Right to Work
Union Organizing

Leaves of Absence

Bone Marrow/Blood/Organ Donation Leave
Crime Victim Leave
Disability Leave
 State Disability Insurance (SDI)
Domestic and Sexual Violence Leave
Emergency Responder Leave

Wage and Hour

Lactation Breaks
Business Expenses
Compensable Time/Off the Clock
Living Wages
Meal and Rest Breaks
Minimum Wage
Misclassification
Holidays and Days of Rest
Other Wage and Hour Requirements
Overtime/Exemptions
Prevailing Wage Obligations
Predictive Scheduling
Tips
Uniforms

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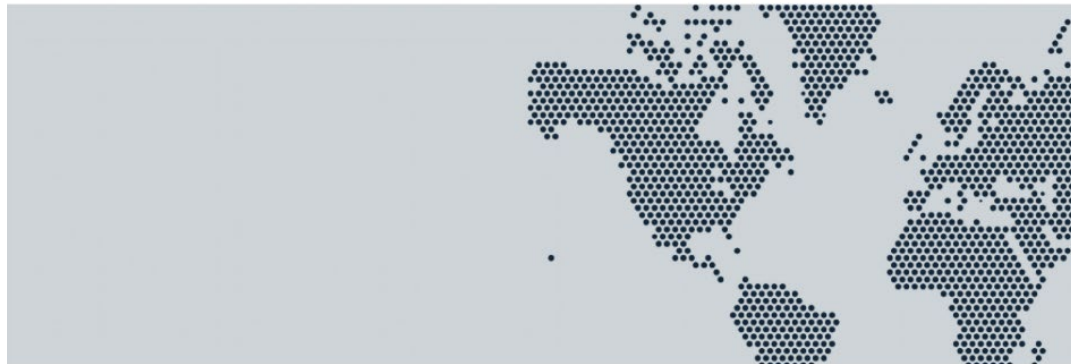


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Fields with an Asterisk (*) are required.



First Name *

Last Name *

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- ERISA and Benefit Plan Litigation
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- Legislative and Regulatory Practice
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- Occupational Safety and Health
- Pay Equity Compliance
- Privacy and Data Security
- Unfair Competition and Trade Secrets
- Wage and Hour
- Whistleblowing, Compliance and Investigations
- Workers' Compensation
- Workplace Training
- Workplace Violence Prevention and Crisis Response

+ Industries

+ States/Territories

+ Industries

- Construction
- Emerging Companies and Venture Capital
- Energy
- Financial Services
- Healthcare

+ States/Territories

- Healthcare - Home Care
- Higher Education
- Hospitality
- Retail
- Sports
- Transportation



Image Source:
[whitehouse.gov](https://www.whitehouse.gov)

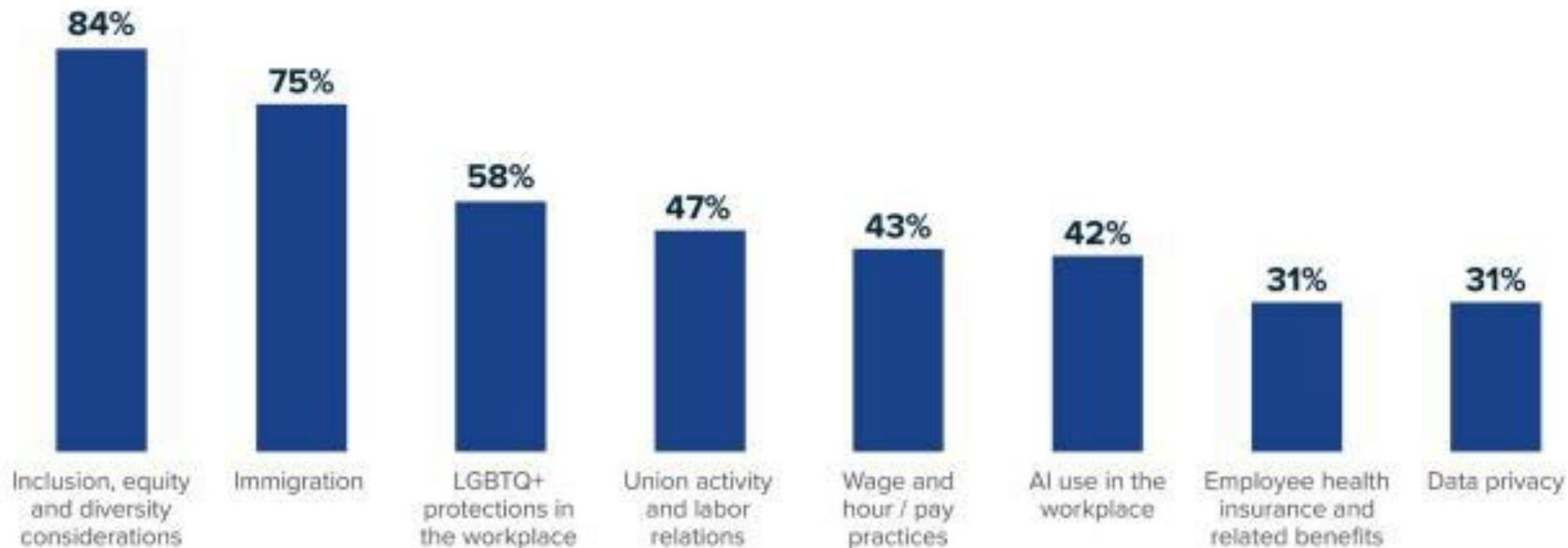


Image Source:
[vance.senate.gov](https://www.vance.senate.gov)

Trump Administration Changes

LITTLER SURVEY – TRUMP IMPACT ON EMPLOYMENT?

In which of the following areas do you expect changes to workplace policy and regulation during the first year of the Trump administration that will impact your business?
(Select all that apply)



The Littler Annual Employer Survey Report – May 2025

US DEPARTMENT OF LABOR



AGENCY ACTION – U.S. DEPARTMENT OF LABOR

- Companionship / Live-In Exemption
 - FAB No. 2025-4: Discontinuing home care audits
 - FAB No. 2023-3: **NO Liquidated Damages** in audits
- Payroll Audit Independent Determination (PAID) Program
- Expanded Opinion Letter Program – “**Dear DOL**”
- Reconsidering **independent contractor rule**
 - FAB No. 2025-1: FLSA enforced pursuant to 2008/2019 rules
 - Opinion Letter FLSA 2025-2: Relaxed IC test / approval of gig economy
- Reconsidering **White collar overtime exemption rule**




Homeland Security

IMMIGRATION AND CUSTOMS ENFORCEMENT

WHAT IS AN ICE I-9 AUDIT?

- ICE agents hand-deliver (or FedEx) a Notice of Inspection (NOI)/ subpoena to employer's facility;
- NOI/subpoena demands employer produce:
 - ✓ I-9 forms for current & terminated EEs with supporting docs
 - ✓ List of current EEs;
 - ✓ payroll and quarterly reports;
 - ✓ names of owners & staffing companies;
 - ✓ Articles of Incorporation and business licenses; and
 - ✓ whether a participant in E-Verify.

PRO TIPS – WHAT TO DO IN ICE I-9 AUDIT

- Pre-designate point person to communicate with ICE
- Get copy of NOI + business cards from ICE agents
- Never waive the 3-day period to produce I-9s
- Immediately contact your  time is of essence
- Only allow ICE into public areas of worksite

PRO TIPS – HOW TO PREPARE FOR ICE I-9 AUDIT

- **Internal I-9 audit** – cure errors on I-9 forms & ID and discharge undocumented workers.
- Ensure staff are properly trained on completing / storing I-9 forms.
- Consult ICE website or counsel about any types of ID you are not familiar with.
- Keep copies of documentation accepted as proof of identity & employment authorization with Form I-9.

PRO TIPS – HOW TO PREPARE FOR ICE I-9 AUDIT

Hiring Resources

 Employee Information and Emergency Contact Form

 I-9 Form

 I-9-FAQs – Steps to Ensure I-9 and Immigration Compliance

 Multi-Jurisdiction Offer Letter Template

 Template Employment Agreement

 W-4 Form

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



AGENCY ACTION -- EEOC

Priorities will include:

- “rooting out **unlawful DEI-motivated race and sex discrimination**”
- “protecting American workers from **anti-American national origin discrimination**”
- “defending the **biological and binary reality of sex and related rights**, including women’s rights to single-sex spaces at work”
- “**protecting workers from religious bias** and harassment, including antisemitism”

AGENCY ACTION -- EEOC

Early 2025, Technical Assistance Documents:

- What To Do If You Experience Discrimination Related to DEI at Work
- What You Should Know About DEI-Related Discrimination at Work

On October 7, 2025, the U.S. Senate confirmed the nomination of Brittany Panuccio to be a commissioner of the Equal Employment Opportunity Commission (EEOC) – restores EEOC's Quorum. Expected Actions:

- ✓ Target DEI that gives preferential treatment to one category over another
- ✓ Discontinuing lawsuits alleging gender-identity discrimination
- ✓ EEOC to close all disparate impact only investigations
- ✓ Revise or withdraw Pregnant Worker Fairness Act Regs?
- ✓ Revise harassment guidance as it relates to gender identity and bathroom access.

ONE BIG BEAUTIFUL BILL ACT



TRUMP'S "ONE BIG BEAUTIFUL BILL ACT"

Above-the-line tax deduction on:

1. Tips
2. Overtime



“ONE BIG BEAUTIFUL BILL ACT” SECTION 70202 (OVERTIME)

- Takes effect for 2025 tax year and set to expire after 2028 tax year.
- Deduction is capped at \$12,500 (\$25,000 in the case of a joint return)
 - Phaseouts if the taxpayer’s modified adjusted gross income exceeds \$150,000 (\$300,000 in the case of a joint return).
- **HOWEVER** - the **deduction applies only to overtime compensation that is “required” under the FLSA** and only to the amount that is in “excess” of the employee’s “regular rate”

SO WHAT IF CAREGIVERS ARE EXEMPT UNDER THE NEW RULES?



NON-COMPETES SWORD AND SHIELD

ANYONE REMEMBER THE FTC'S PROPOSED NON-COMPETE BAN?



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS



On August 20, a district court issued an order stopping the FTC from enforcing the rule on September 4. **The FTC has appealed that decision.** The district court's decision does not prevent the FTC from addressing noncompetes through case-by-case enforcement actions.

ACCORDING TO THE NEW YORK STATE ATTORNEY GENERAL

- A non-competition agreement (“non-compete”) prohibits an employee from working for a competitor or opening a competing business, typically for a certain period of time after an employee leaves a job
- Non-competes are legal to the extent it:
 - (1) is necessary to protect the employer’s legitimate interests,
 - (2) does not impose an undue hardship on the employee,
 - (3) does not harm the public, and
 - (4) is reasonable in time period and geographic scope

ACCORDING TO THE NEW YORK STATE ATTORNEY GENERAL

- An employer's legitimate interest may include protecting an employer's trade secrets and confidential information and preventing employees from taking specialized skills they gained on the job to a competitor.
- To determine if a non-compete is enforceable, courts consider an employee's job duties, the employer's business interest, and the language of the agreement.

ACTION STEPS FOR NON-COMPETE COMPLIANCE

1. Review any existing confidentiality, non-compete, and non-solicitation language *for state law compliance*.
2. If you don't have or want a non-compete, consider whether to implement a **Confidentiality & Restrictive Covenant Agreements**.
3. Protect and limit access to confidential information (e.g., customer lists, caregiver lists, pricing, referral sources, care models, etc)
4. Update Your **Offer Letter!**

EXAMPLE NON-SOLICIT & NON-COMPETE LANGUAGE

- b. Employee agrees that for a period of two (2) years after termination of Employee's employment with Employer, regardless of the reason of the termination of employment, Employee will not:
- (1) Divert, or attempt to divert, any business or customer of Employer's business, by direct or indirect inducement or otherwise;
 - (2) Own, maintain, operate, engage in, be employed by or have any financial or beneficial interest, or advise, assist or make loans to any business that is of a character and concept similar to a HOME INSTEAD Business, and which business is, or is intended to be located within a twenty-five (25) mile radius of the location of any HOME INSTEAD Business or which business provides similar care and companionship services.

EXAMPLE CEASE & DESIST LETTER




Dear Ladies and Gentlemen:

Please be advised that this office represents [REDACTED] with regard to a certain Administrative Employee Confidentiality and Non-Solicitation Agreement dated August 18, 2022, between my client and [REDACTED]

It has been brought to our attention that [REDACTED] individually and on behalf of [REDACTED] Home Care, has been unilaterally soliciting and communicating with existing customers and prospective customers of [REDACTED], in direct violation of paragraph 4 C of said Agreement, a copy of which is enclosed for your review.

A WELL-DRAFTED OFFER LETTER CAN HELP PREVENT NON-COMPETE ISSUES

Hiring Resources

-  Employee Information and Emergency Contact Form
-  I-9 Form
-  I-9-FAQs – Steps to Ensure I-9 and Immigration Compliance
-  Multi-Jurisdiction Offer Letter Template
-  Template Employment Agreement
-  W-4 Form



A WELL-DRAFTED OFFER LETTER CAN HELP PREVENT NON-COMPETE ISSUES

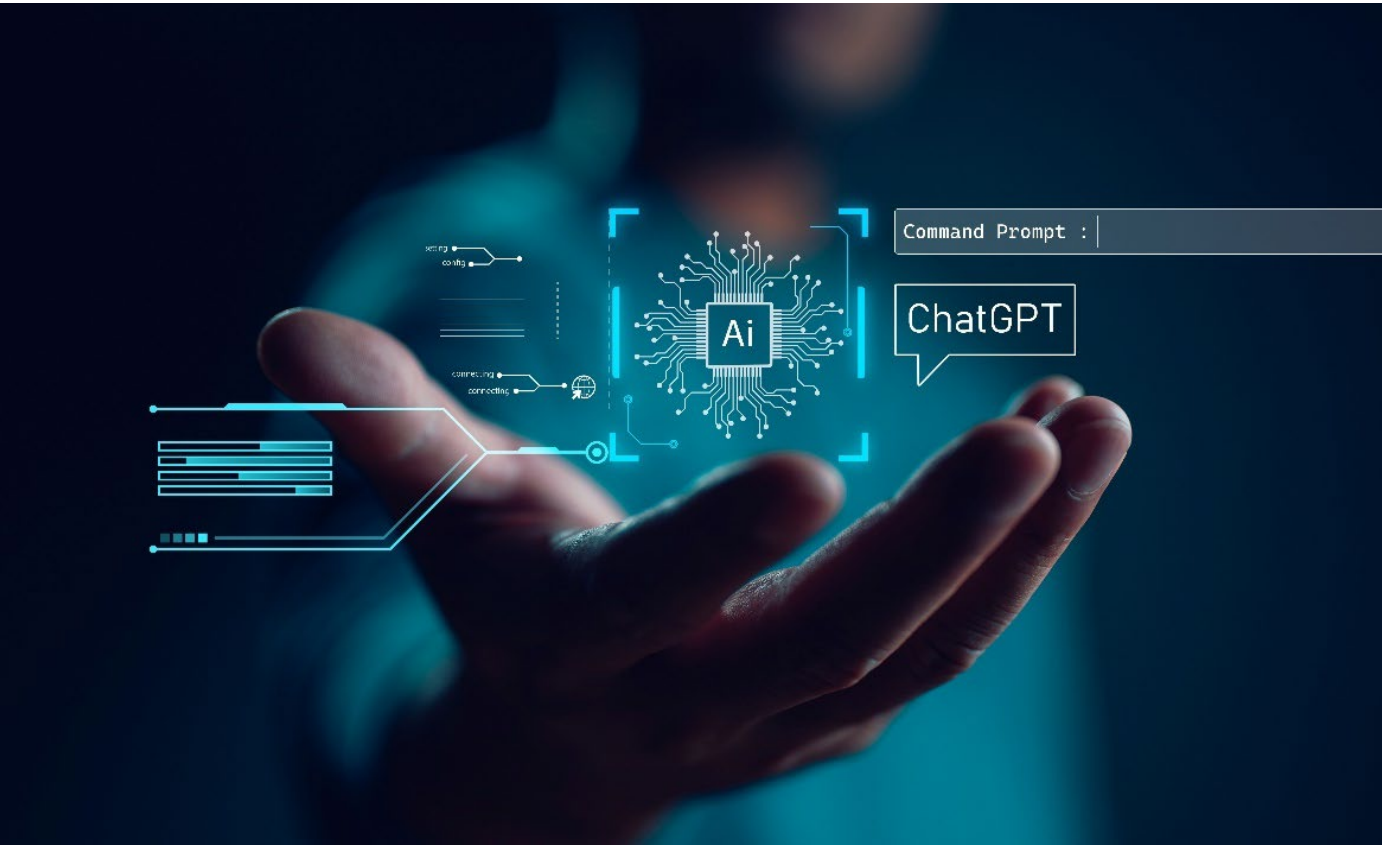
Offer Contingencies

This offer is contingent upon the following:

- 
- Confirmation that you are not subject to any legal restrictions on your employment (see below);

Restrictions on Employment

By signing this offer letter, you represent and warrant that you are not party to any agreement or subject to any policy applicable to you that would prevent or restrict you from engaging in activities competitive with the activities of your former employer or from directly or indirectly soliciting any employee, client, or customer to leave the employ of, or transfer its business away from, your former employer. Alternatively, if you are subject to such an agreement or policy, you have informed or will promptly inform the Company of that fact, you affirm that you have provided or will provide promptly a copy of any such agreement or policy to the Company, and you affirm that you have complied and will comply with it, and that your employment with the Company does not violate any such agreement or policy. You further confirm that you will not remove or take any documents or proprietary data or materials of any kind, electronic or otherwise, with you from your current or former employer to the Company without written authorization from your current or former employer. If you have any questions about the ownership of particular documents or other information, discuss such questions with your former employer before removing or copying the documents or information.



AI USE IN THE WORKPLACE

HOW ARE EMPLOYERS UTILIZING AI?

Recruiting & Hiring

- Resume screening & ranking
- Chatbots for candidate engagement
- Predictive analytics for job fit and turnover risk

Performance Management

- Productivity tracking and behavior analytics
- AI-generated summaries
- Personalized coaching & development plans

Training & Development

- Adaptive learning platforms
- AI-curated training content

Workplace Investigations

- Summarizing Interviews
- Pattern recognition in complaints & misconduct
- Drafting preliminary findings or reports

LEGAL RISKS WHEN USING AI?

Use Case	Benefits	Legal Risks
Recruiting & Hiring	<ul style="list-style-type: none">• Faster resume screening• Predictive job fit• Reduced manual bias	<ul style="list-style-type: none">• Algorithmic bias• (<i>Disparate impact claims</i>)• Lack of transparency
Employee Relations & HR Operations	<ul style="list-style-type: none">• 24/7 support via chatbots• Streamlined documentation• Investigation Assistance• Sentiment analysis or morale	<ul style="list-style-type: none">• Inaccurate or misleading responses• Privacy concerns• Hallucinations & disinformation
Performance Management	<ul style="list-style-type: none">• Real-time productivity• Standardized evaluations• Personalized coaching	<ul style="list-style-type: none">• Surveillance concerns• ADA implications for neurodiverse employees• Bias in scoring algorithms

LEGAL RISKS WHEN USING AI IN HIRING?

AI Use Case	Legal Risk	Example
Resume screening	Disparate impact on race, age, or gender	AI tool screens out older applicants at higher rates (<i>Mobley v. Workday</i>)
Video Interviews	Disability discrimination	AI scores applicants lower due to speech patterns linked to disability
Chatbots & prescreening	Lack of accommodation	Chatbot disqualifies candidates who cannot meet rigid criteria due to disability
Facial Recognition	Racial bias	Software less accurate for darker skin tones, leading to unfair outcomes
Automated ranking	Lack of transparency	Candidates cannot challenge or understand why they were rejected

ANTIDISCRIMINATION LAWS & AI IN HIRING

- Key federal laws that apply to AI use:
 - Title VII of the Civil Rights Act
 - Americans with Disabilities Act
 - Age Discrimination in Employment Act
 - Genetic Information Nondiscrimination Act
- EEOC guidance highlights
 - Employers are liable for discrimination caused by AI—even if developed by third-party vendors
 - *Disparate impact claims can arise from facially neutral tools*
 - Employers must audit and validate AI systems used in hiring

ANTIDISCRIMINATION LAWS & AI IN HIRING – EXAMPLE: GAPS IN RESUME

Don Do-Right Dutton owns and operates Bluestone Ranch. Business is booming so Mr. Dutton needs to increase his hiring. Mr. Dutton calls Rocky Optimal Hiring Solutions, a vendor that provides AI tools for recruiting and hiring. Mr. Dutton says that he wants the AI tools to screen out any resumes with gaps of 6 months or more.

- What protected groups are more likely to be disproportionately impacted by the screening policy?
- Intentional or unintentional discrimination?

LEGAL RISKS WHEN USING AI IN PERFORMANCE MANAGEMENT?

Use Case	Description	Legal Risk	Example Tools
Keystroke monitoring	Tracks every key pressed to analyze productivity, detect insider threats, and monitor workflow efficiency.	<ul style="list-style-type: none"> • Privacy concerns • Risk of overcollection of personal data • Potential NLRA/Title VII implications • Potential FLSA implications 	Termaind, Time Champ, Controlio, ActivTrak
Automated goal tracking & real-time feedback	Tracks KPIs and milestones to assess alignment with goals & Provides continuous performance insights based on work patterns and productivity data	<ul style="list-style-type: none"> • Algorithmic bias may skew assessments • May overlook ADA accommodations • Risk of disparate impact claims • Potential misclassification implications 	15Five, Lattice, ActivTrak

PRIVACY LAWS & AI IN PERFORMANCE MANAGEMENT – EXAMPLE: ENGAGEMENT MONITORING

Morgan Lopez, HR Director at BrightPath Consulting, deploys an AI tool that analyzes Slack messages for “positive sentiment” to identify highly engaged employees for leadership programs. Employees with low positivity scores are excluded from consideration.

- Could this create bias against employees from cultures with different communication norms?
- What privacy concerns arise from monitoring internal communications?
- How defensible is this metric in litigation?

LEGAL RISKS WHEN USING AI IN WORKPLACE INVESTIGATIONS?

Use Case	Benefit	Legal Risk	Example Tools
Compliance & Risk Management	<ul style="list-style-type: none"> Automated policy monitoring Early detection of misconduct Audit trail generation 	<ul style="list-style-type: none"> False positives or missed violations Over-monitoring (NLRA concerns) Data retention risks 	<ul style="list-style-type: none"> ComplyAdvantage; OneTrust; LogicManager; IBM OpenPages with Watson; Case IQ; RiskWatch; Agentic AI Workflows (Thomson Reuters)
Workplace Investigations	<ul style="list-style-type: none"> Faster document review Pattern recognition Drafting summaries 	<ul style="list-style-type: none"> Hallucinations or disinformation Misinterpretation of evidence Lack of explainability in findings 	<ul style="list-style-type: none"> Case IQ; Sonix; Relativity; Everlaw; AllVoices; Microsoft Copilot/ChatGPT Enterprise

AI IN WORKPLACE INVESTIGATIONS – EXAMPLE: “THE HARASSMENT CASE THAT WROTE ITSELF”

Ava, an ER investigator, is overwhelmed with a backlog of cases. Ava received a vague complaint and three supporting witness statements filled with buzzwords like “toxic,” “gaslighting,” and “unsafe,” but lacking dates or specific behaviors. To save time, Ava pasted the statement into ChatGPT and asked it to “summarize the situation in third person.

ChatGPT produced a dramatic narrative involving “psychological manipulation” and “verbal abuse,” none of which were actually alleged. Ava’s investigation concluded legal violations had occurred, and the accused employee was terminated. Months later, during litigation, it was revealed the narrative was based solely on unverified, one-sided accounts.

- How did Ava misuse ChatGPT, and what should she have done differently to preserve fairness and credibility in the investigation?

AI IN WORKPLACE INVESTIGATIONS – EXAMPLE: THE TERMINATION NO-ONE COULD EXPLAIN

- **Jessica** is investigating a series of performance complaints involving a mid-level manager **Alex**. The complaints were vague: missed deadlines, poor team morale, and unprofessional behavior.
- To help clarify the situation, Jessica turned to a third-party AI tool the Company had recently licensed. The tool promised to analyze behavioral data—email tone, meeting attendance, and task completion rates—and generate a “risk score” for misconduct or performance failure.
- Alex’s score came back as “**High Risk**.” The report did not explain how the score was calculated—no weighting of factors, breakdown of inputs—just a number and a recommendation: “**Consider termination**.”
- Jessica, under pressure to act quickly, included the score in her investigation summary and recommended termination. No interviews were conducted, additional documentation gathered, and the score became the centerpiece of the decision.
- The termination was approved. But when HR and Level reviewed the file later, they realized they could not explain how the AI tool reached its conclusion. ***The vendor refused to disclose the algorithm citing proprietary protections.*** The Company had no way to defend the decision internally or in subsequent litigation by Alex.

REMINDER ABOUT NEW YORK CITY OBLIGATIONS

4. NYC – Unlawful use of AI in Employment

- ✓ Cannot use “**automated employment decision tool**” (AEDT) unless (1) it has been subject of bias audit within last year; and (2) summary of audit and distribution date of AEDT has been made public prior to use
- ✓ “Automated employment decision tool” means any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.
- ✓ AEDT does not include a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

EMPLOYER TAKEAWAY?

1. **Audit** any “automated employment decision tool” and post summary of audit on your website.
2. Create an **AI Use Policy**
3. Ensure **privacy** of employee and client data – remember you cannot completely offload some of your employer obligations.
4. Encourage **AI literacy**, usage, and **ethics** with your workforce.
5. Avoid overreliance on automation.

Session Survey

Thank You!

JOSHUA C. VAUGHN

Shareholder

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