



The AI Paradox: Unraveling Complex and Evolving Employment Law Issues

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Presenters



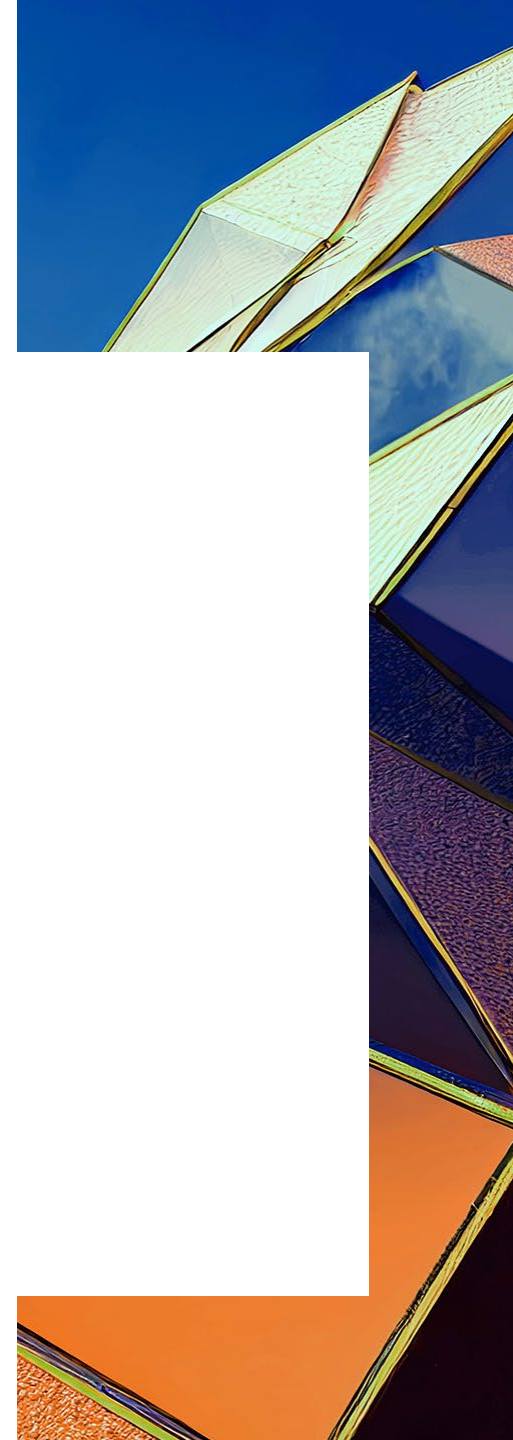
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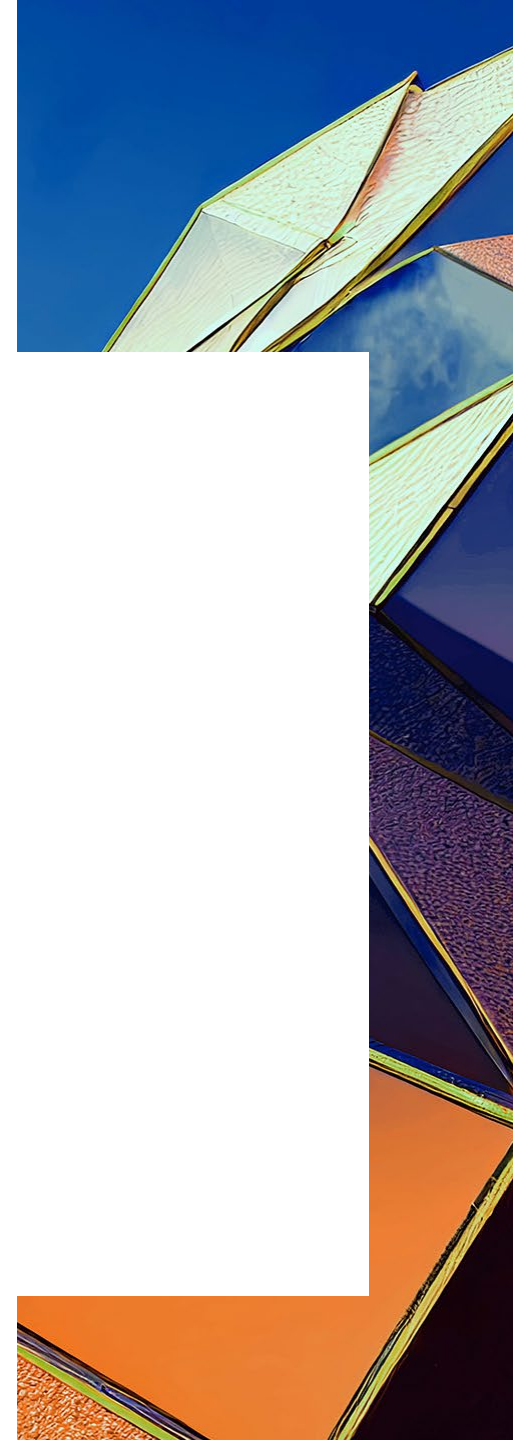
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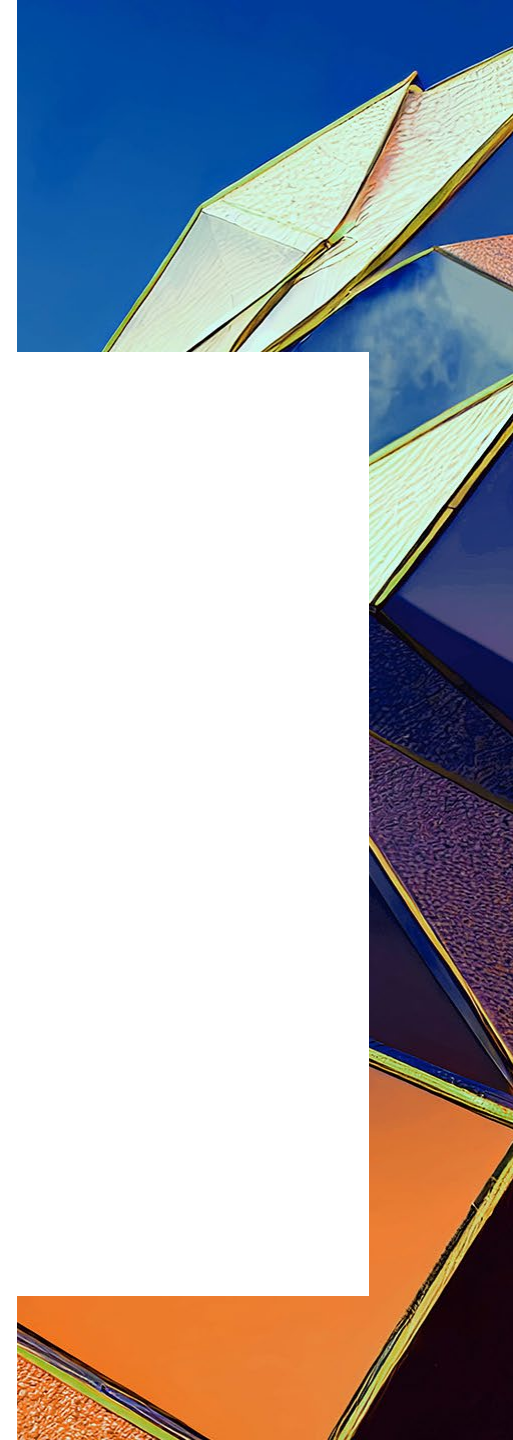
Introduction

- Welcome!
- What is AI?
 - AI stands for **Artificial Intelligence**
 - Computer software that engages in humanlike activities
- We will discuss how it applies in the employment context
 - Streamline processes
 - Aggregate data
- We will discuss how to use it ethically and responsibly



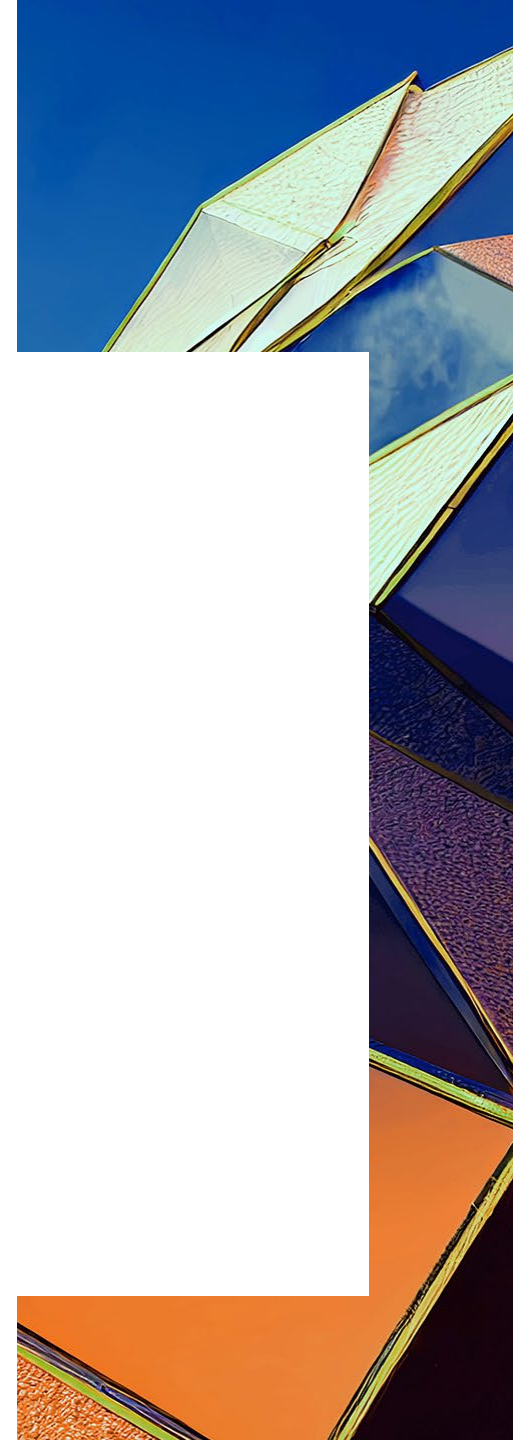
Introduction (cont.)

- Analyze data
 - Identify patterns and anomalies
 - Uses in decision making
- Monitor performance, behavior, and engagement
 - Analyze emails, chats, work patterns
 - Signs of burnout
 - Misconduct



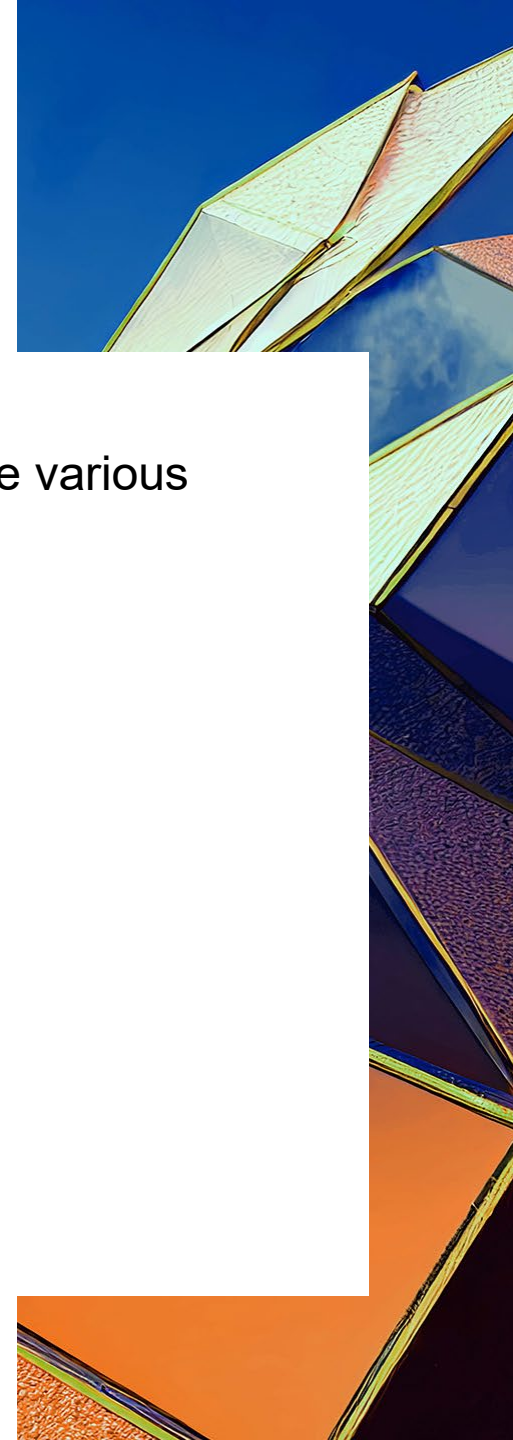
Introduction (cont.)

- We will further discuss
 - Use of AI in employment processes
 - Potential bias in the use of AI
 - Approaches to auditing potential bias and minimizing legal risks
 - EEOC and other guidance on the use of AI
- With that — let's begin our program!



Understanding AI in Employment

- Due to recent developments in AI, businesses are moving towards using AI to streamline various employment processes, such as:
 - Employee records management
 - Payroll processing and benefits administration
 - Recruitment/Screening
 - Onboarding
 - Performance management
 - Job posting



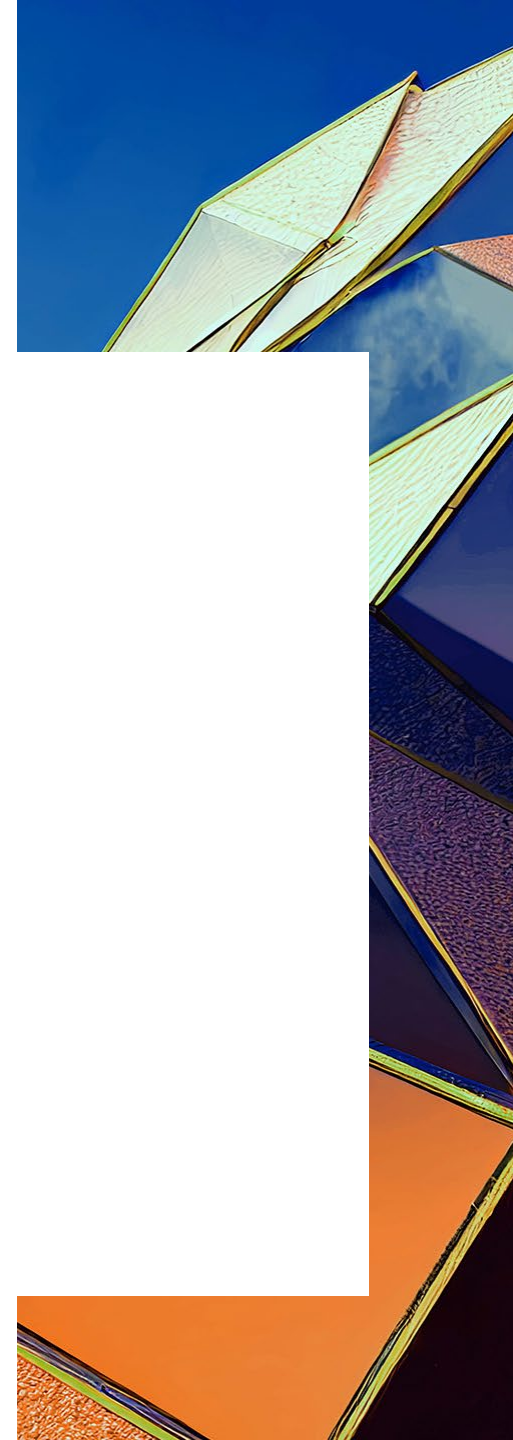
Understanding AI in Employment (cont.)

- The backdrop:
 - 43% of respondents to the February 2023 Fishbowl survey said they use ChatGPT at work
 - 70% of those respondents say their managers do not know
 - But 91% of businesses hiring want individuals with ChatGPT experience (April 2023 Resume Builder Survey), and 60% say it will give them a competitive edge
 - Others prohibiting the use of chatbots and other AI



Understanding AI in Employment (cont.)

- Benefits of AI in employment process management
 - Streamlines work processes
 - Reduces costs
 - Enhances decision-making
- Challenges with AI in HR management
 - Flawed datasets can result in biases
 - AI cannot evaluate human emotion
 - Outliers may be left out of AI screening
 - Data privacy and cybersecurity risks



Understanding AI in Employment (cont.)

- Examples of AI applications in employment
 - **Recruitment and talent sourcing:** From job posting to sending job offers, AI allows more engagement with candidates and allows recruiters to identify their most successful outreach strategies
 - **Onboarding:** AI can develop and automate the onboarding process for new hires, allowing HR staff to focus on more complex tasks without leaving new hires' questions unanswered
 - **Employee learning and development:** AI can provide personalized employee training by catering to each employee's unique learning style
 - **Streamlining internal mobility:** AI tools can assist in the promotion and career development of employees, helping employers find the right internal candidates without having to make generic job postings

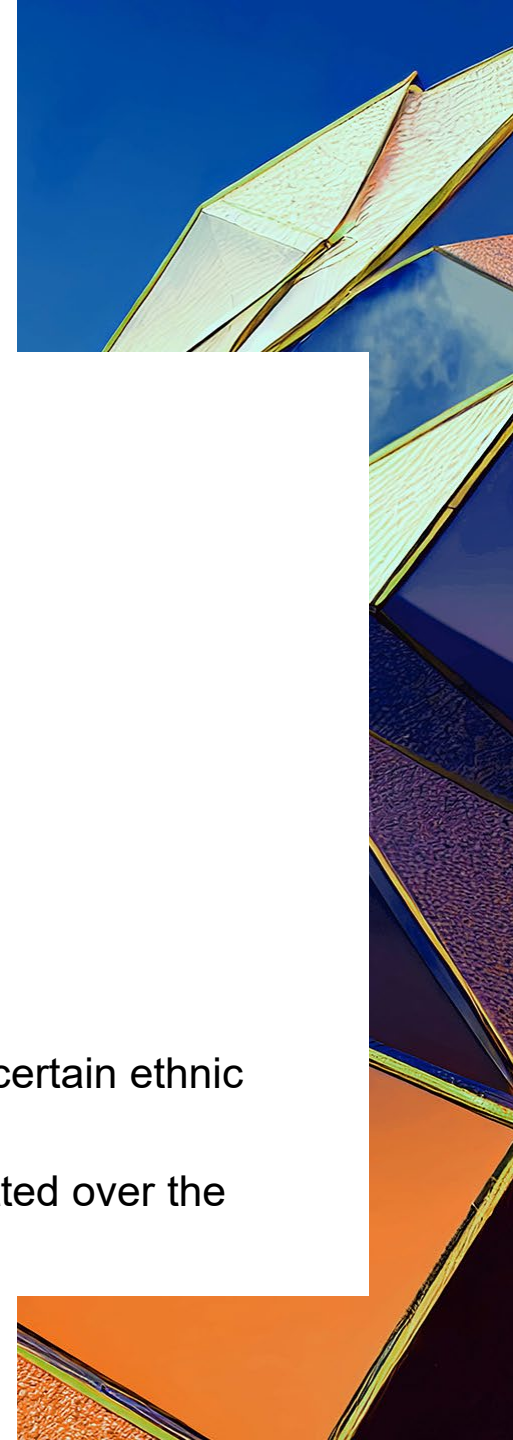
Employment Law Considerations – Employee Use

- Employment law considerations for employees' use:
 - Potential bias
 - Confidentiality
 - Accuracy
 - Authenticity of employee work product
 - Fairness
 - Interplay with other company policies (i.e., timekeeping, reimbursements, anti-harassment/non-discrimination, ADA reasonable accommodations, etc.)



AI and Potential Bias

- ***On the one hand:***
 - AI can help reduce or eliminate potential subjective bias in decision-making
 - e.g., eliminate name, gender, ethnicity, etc., from consideration
 - Focus solely on qualifications and experience
- ***On the other hand:***
 - The potential for bias and discrimination exists
 - AI algorithms designed by humans — potential to interject bias (conscious or unconscious)
 - Potential bias in algorithms used, e.g.:
 - Place of residence/ZIP code as a qualifier or disqualifier could have a disparate impact on certain ethnic groups
 - Retail company applicant tool algorithm used was based on the number of resumes submitted over the last decade (mostly by men) — tool trained to favor men over women (abandoned)



Auditing for Potential AI Bias

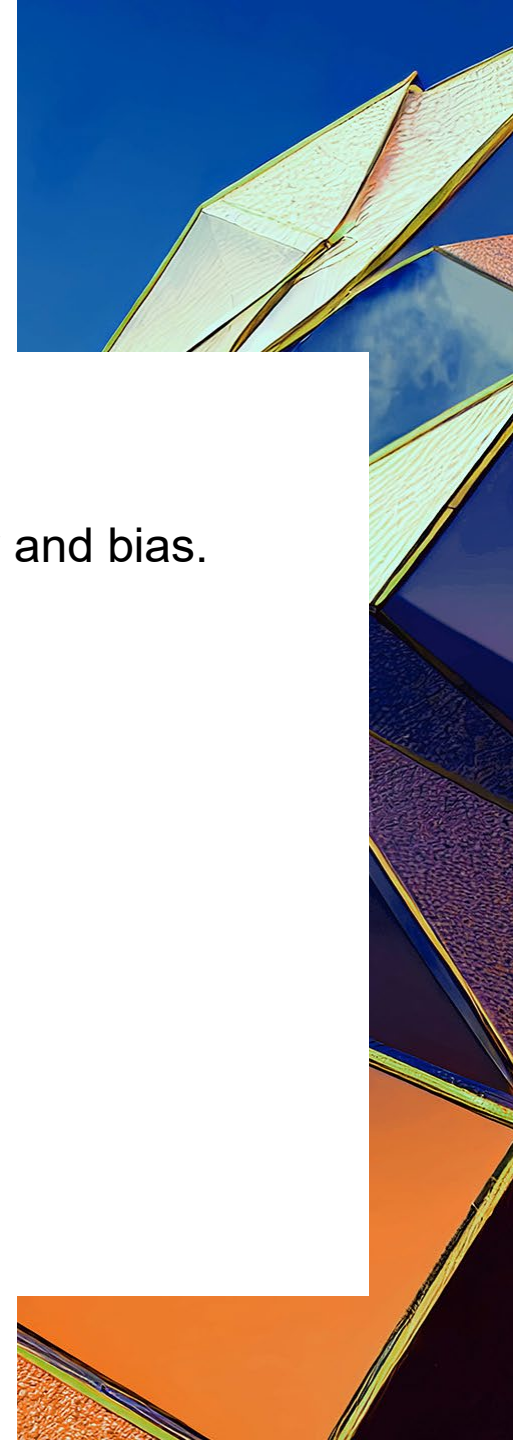
- *A continuously developing and evolving area — no clear guidance on what auditing should entail.*
 - How does an employer help ensure AI tools are accurate, fair, and reliable?
 - Bias can be very subtle and difficult to detect
 - Quality of input vs. quality of output
 - Accuracy and fairness depend on quality and quantity of data utilized
- Essential:
 - A company must have an understanding of how AI systems and algorithms work “in practice” and how decisions are made (e.g., the criteria by which individuals are screened, selected, etc.).
 - What data is being utilized and why?
 - Regular view of information and results to help ensure fairness and lack of bias.

Auditing for Potential AI Bias (cont.)

- Possible approaches to AI vendor selection/oversight and bias auditing:
 - AI vendor confirmation of its own internal auditing/statistical analysis and continuous improvement of its AI tool.
 - How are algorithms developed?
 - What are they doing to mitigate risks? How often? Ongoing?
 - Test for disparate impact? Results?
 - Are employment counsel or others experienced with disparate impact and other EEO laws on the team?
 - Are diversity professionals on the team?

Auditing for Potential AI Bias (cont.)

- Combination approach to auditing:
 - Multidisciplinary team with the skill set to oversee and audit AI outcomes for accuracy and bias.
 - Third-party independent “bias audit”/statistical analysis of AI tools and data utilized.
 - Run a “bias” hypothetical study, utilizing:
 - AI tool;
 - Manual internal review and disparate impact analysis;
 - Run the same data through two (2) AI vendors; and
 - Compare results/outcomes. If different, evaluate why.



Employment Law Considerations – Employer Use

- Legal considerations for employer's use:
 - EEOC focuses on fair and unbiased use of AI in employment systems and processes (i.e., protections under Title VII, ADA, ADEA, EU, etc.)
 - OFCCP Uniform Guidelines on Employee Selection Procedures
 - State/local law considerations and compliance
 - Recruitment, hiring, evaluation, compensation, promotion, work allocation, monitoring...



Employment Law Considerations – Employer Use (cont.)

- EEOC First-Of-Its-Kind AI Discrimination Lawsuit Settled (August 2023)
 - Tutoring company allegedly used an AI hiring tool that automatically rejected women applicants over age 55 and men over age 60
 - Applicant claims to have been rejected, but later reapplied with the same resume (using a younger birthdate) and secured an interview
 - Case settled for US \$365,000 on behalf of 200+ applicants alleged passed over because of age (although the company denied any wrongdoing)



Legal and Regulatory Landscape

- **THE WHITE HOUSE** – July 21, 2023, FACT SHEET: *“Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI”*
 - Administration committed to managing the risks posed by AI, including protecting Americans from bias and discrimination
 - Convened seven leading AI companies at the White House (Amazon, Anthropic, Google, Inflection, Meta, Microsoft, and OpenAI) and secured voluntary commitments that the companies would “help move toward safe, secure, and transparent development of AI technology”
 - Administration currently developing an EO and will pursue bipartisan legislation

Legal and Regulatory Landscape (cont.)

- **THE WHITE HOUSE** – October 30, 2023, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI)*
 - President Biden recently signed a 53-page EO that builds on the directive of the Administration’s previous Blueprint for an AI Bill of Rights and significantly advances the United States’ policy framework regarding AI
 - The EO sets out eight guiding principles and priorities regarding the responsible deployment and use of AI:
 - Save and Secure AI
 - Leadership by the US
 - Support for American Workers
 - Equity and Civil Rights
 - Consumer protection
 - Privacy and Civil Liberties
 - Responsible use by Federal Government
 - International Coordination

Legal and Regulatory Landscape (cont.)

- **THE WHITE HOUSE** – October 30, 2023, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI)*
 - The EO sets goals and directs certain implementation steps, such as for federal agencies to develop guidelines and best practices, and references concerns about the impact of AI on the workplace.
 - Some key takeaways from an employment standpoint include the following:
 - The EO specifically refers to supporting workers, and cautions against AI being used to undermine worker rights, to “encourage undue worker surveillance... or cause harmful labor–force disruptions,” or to be misused to cause or contribute to discrimination and bias, among other harms
 - Sections 7.1 and 7.3 of the EO specifically address concerns about discrimination in the workplace

Legal and Regulatory Landscape (cont.)

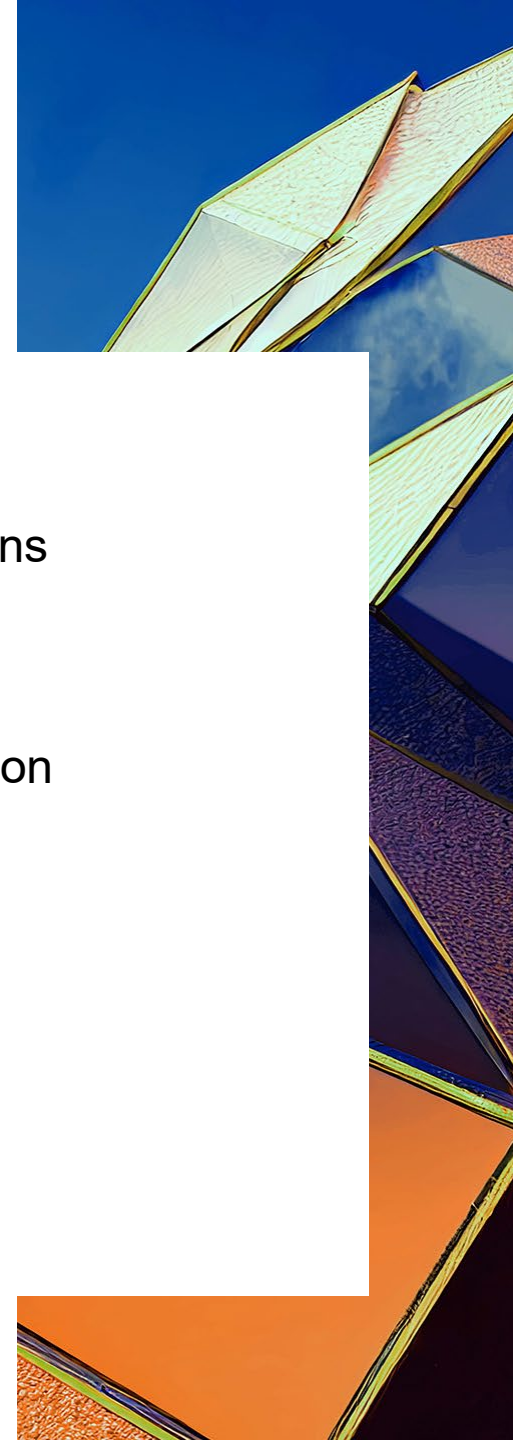
■ ILLINOIS

- Artificial Intelligence Video Interview Act (820 ILCS 42/)
 - When asking applicants to record video interviews and using AI analysis, the Act requires **all** the following **before** asking applicants to submit video interviews:
 - Notice to applicants that AI may be used
 - Provide applicants with information explaining how AI works and what general types of characteristics it uses to evaluate applicants
 - Consent from applicants before the interview
 - Applicants can request the destruction of videos
 - Demographic information reporting to Illinois Department of Commerce and Economic Opportunity annually, if solely using AI video to select candidates for in-person interview

Legal and Regulatory Landscape (cont.)

- **NEW YORK CITY**

- 2021 NYS regulations (NYC 144) impact the use of AI in hiring and promotion decisions
 - Notification to applicants and employees before being subject to AI tool
 - Listing job qualifications and characteristics utilized by the tool
 - Candidate option to opt out and request alternative selection process/accommodation
 - Mechanism to detail data collection and analysis
 - Annual independent, third-party “bias” audit, made publicly available



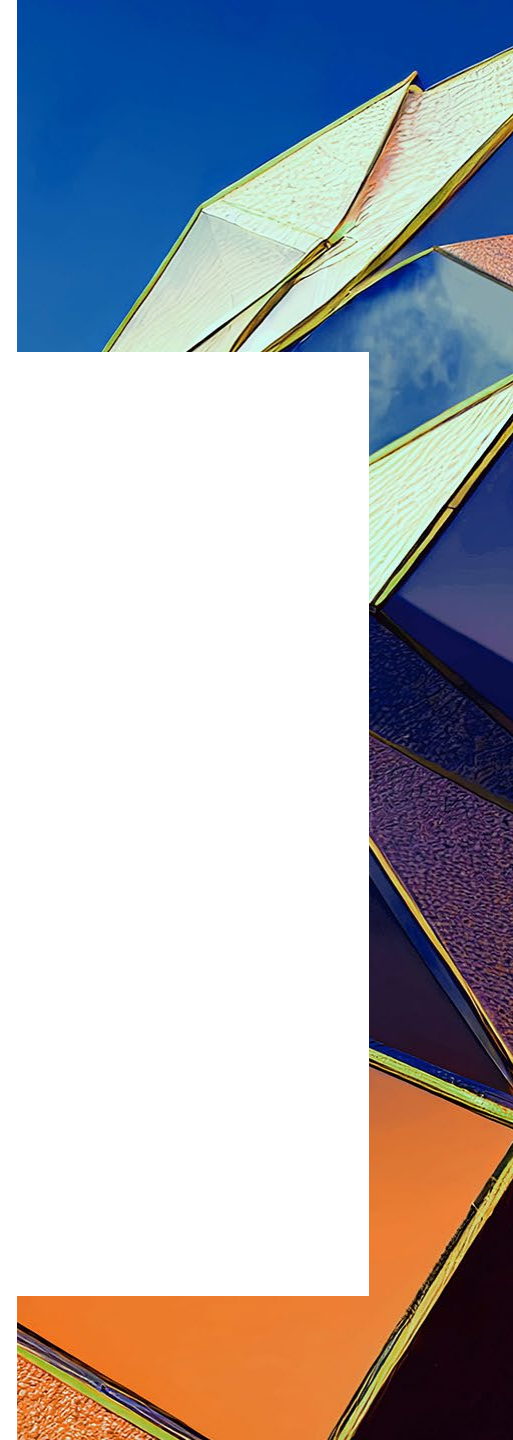
Ethical Considerations

- Employee trust.
 - Transparency in AI processes and decision-making.
 - Resource for employees/applicants subject to AI-informed decisions.
 - Clear and accessible policies when an employer uses AI for HR functions.
- Job displacement and reskilling.
 - Will the use of AI displace current jobs? Augment productivity?
 - Skills development and training opportunities.
- Use of AI to enhance employment processes.
 - Should it replace human judgment?
 - Can biases be reduced, or are they augmented?



Ethical Considerations (cont.)

- Employer “To Dos”
 - Develop policies regulating employee use of AI to perform job duties
 - Develop policies and processes for the use of AI in all aspects of employment
 - Carefully review AI vendor contracts with legal counsel
 - Schedule audits with vendors to test AI systems for biases
 - Consider training employees on AI to reduce obsolescence
 - Review existing confidentiality protections and consider updates
 - Understand federal, state, and local laws governing the use of AI in employment
 - Regularly evaluate the utility of AI vs. risks



AI-Based Recruitment Management

AI tools: Chatbots, virtual assistants, resume screening software, applicant tracking systems (ATS), automated onboarding software

- **Efficiency:** Automates high-volume, low-skill tasks
- **Proactiveness:** Available 24/7; responds even when a human cannot
- **Consistency:** Avoids idiosyncratic grading practices

Millennials aren't buying diamonds - why?



RETWEETS 173 LIKES 309



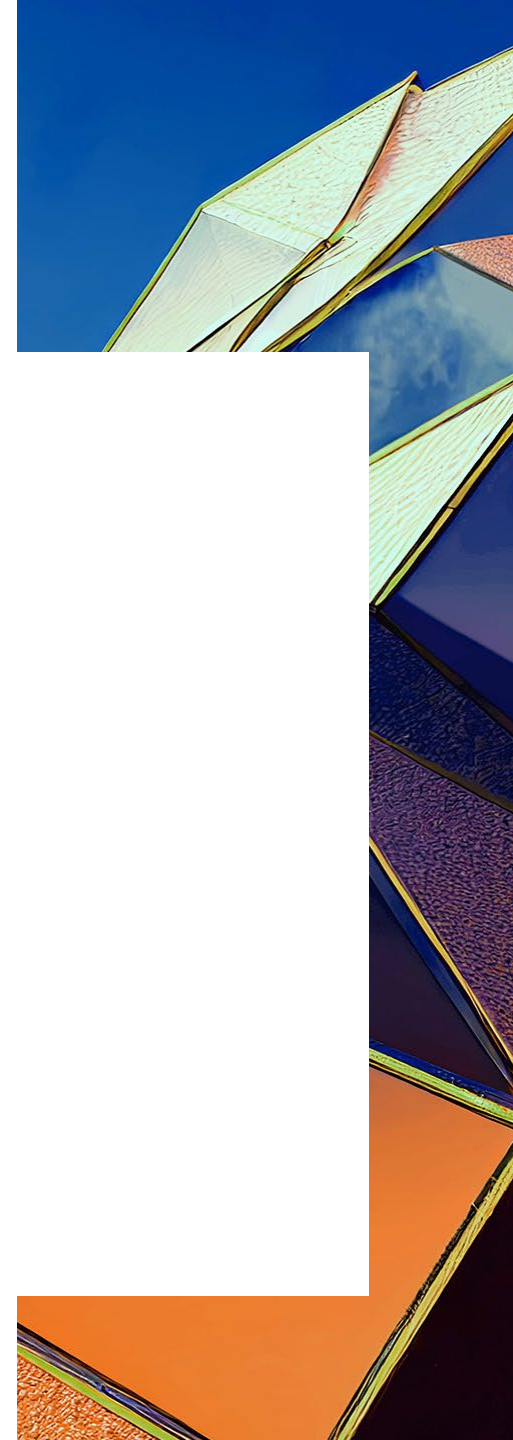
MistyKnightsTwistOut
@Steph_I_Will

Follow

Too busy filling out job applications that ask them to attach their resume and then enter what's on that same resume on the next page.

AI-Based Performance Management

- Goal-setting, progress, and productivity tracking, real-time feedback
- Data-driven decision-making, both individually and across teams
 - Customizable reports
 - Detects subtle trends
- Predicting future performance



AI Algorithms: Potential Risks

- **Bias:** Algorithms are only as good as the developer who creates them as well as the implicit or explicit biases they build into the algorithm.
- **Lack of transparency:** If you don't understand how the algorithm reaches its conclusion, neither will your employees.
- **Lack of judgment/empathy:** How does a computer value trust, loyalty, and the intangible?
 - Don't discount the psychological impact of Big Brother.

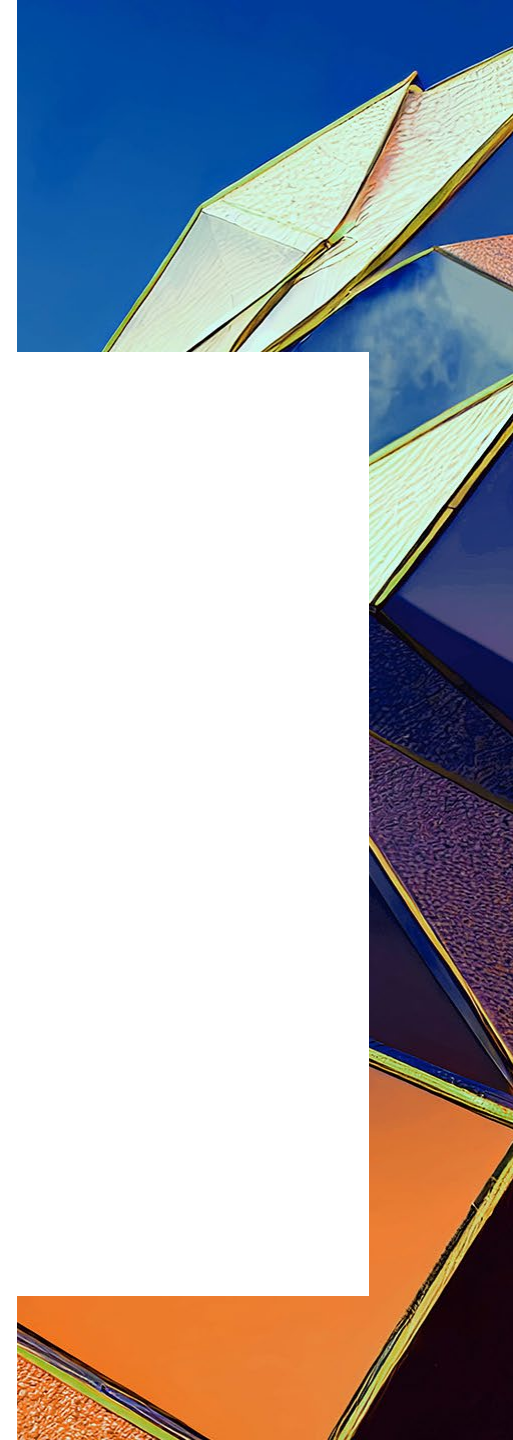
Identifying Suitable AI Solutions

- Start with organizational strengths and weaknesses.
 - High turnover?
 - Stretched too thin?
 - Company lack data to guide the business?
- Research AI technologies and tools that address the weaknesses.
 - Cost?
 - Timeline to implement?
- Collaborate with stakeholders.
 - What help do they want? What change do they want to see?



How to Vet Your Vendor

- Expertise/track record
- Reputation/references
- Scalability/integration
- Data privacy/security
- Ongoing support/maintenance for tools/clients
- Cost/value in the short/long term



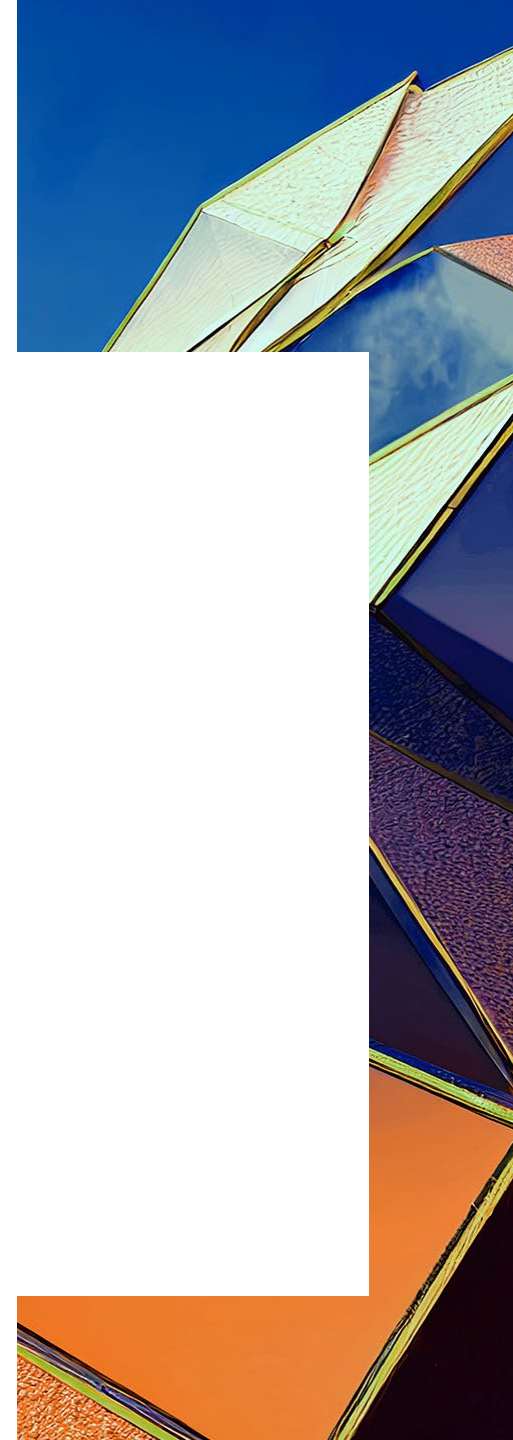
Ensuring Proper Training and Implementation

- Educate, educate, educate.
 - AI tools are a new language. This is not a Baby Boomer/Millennial issue.
 - Why is AI a resource, and not a replacement for the employee?
- Train those providing the inputs.
- Train those evaluating the outputs.
- Training is not a one-time event.



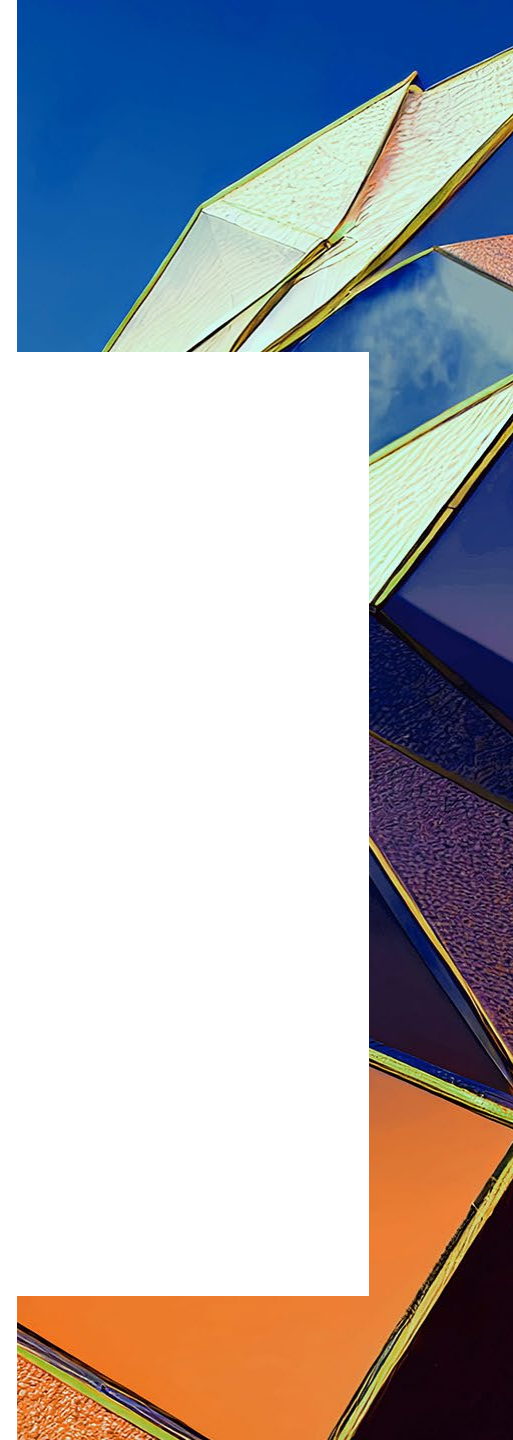
Wrapping Up

- Recap of key takeaways
- Embrace AI for future success



Thank You

- Questions?



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