

SWEEPING CHANGES IN WORKPLACE LAWS

Mark A. Konkel

Chair, Labor & Employment Group

KELLEY DRYE & WARREN LLP

mkonkel@kelleydrye.com

www.kelleydrye.com

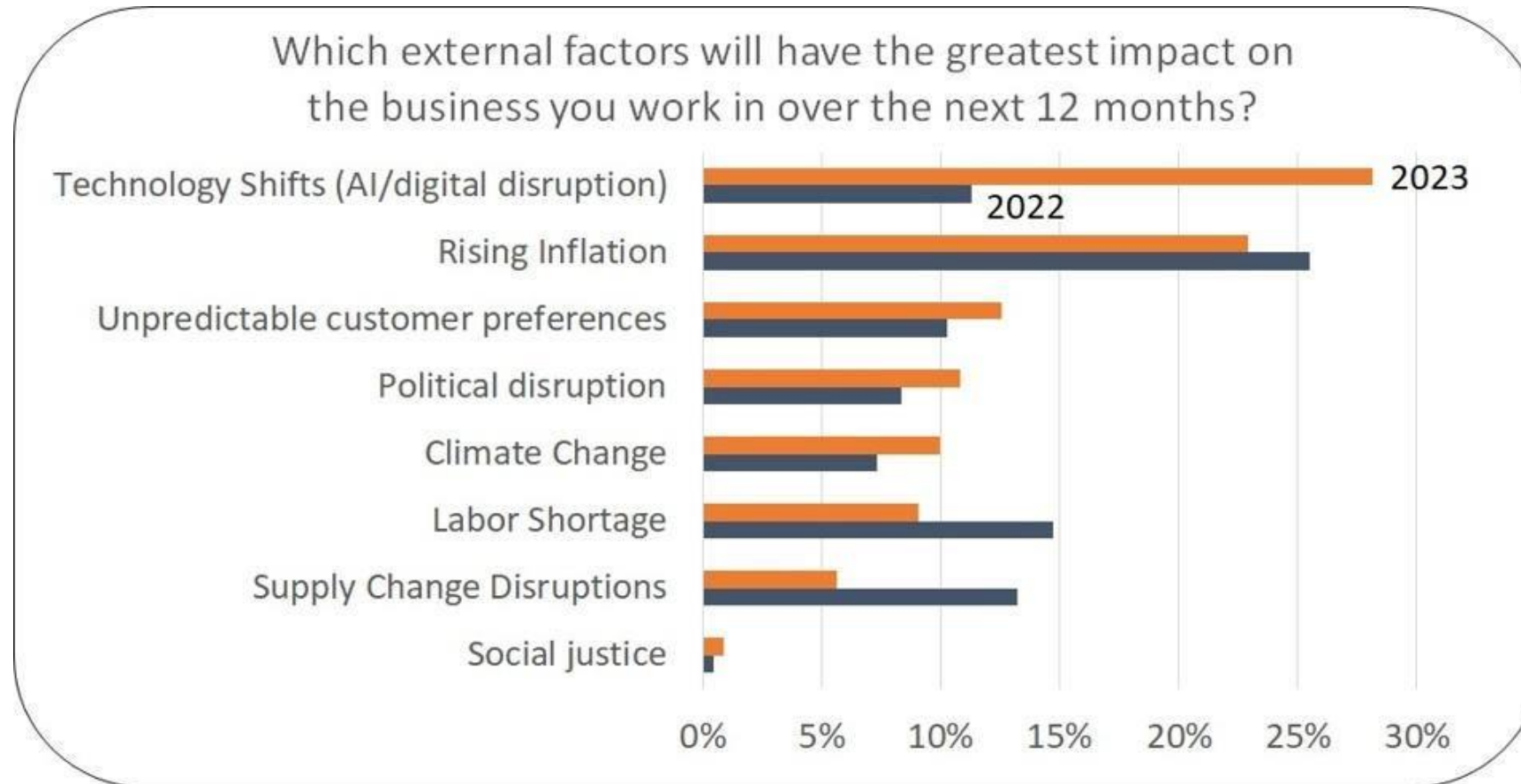
Today's Discussion

- Noncompetes
- Pay transparency
- AI workplace regulations and trends

Bonus round:

- The future of DEI and dealing with “reverse discrimination” lawsuits

What the C-Suite Thinks the Big Challenges Are





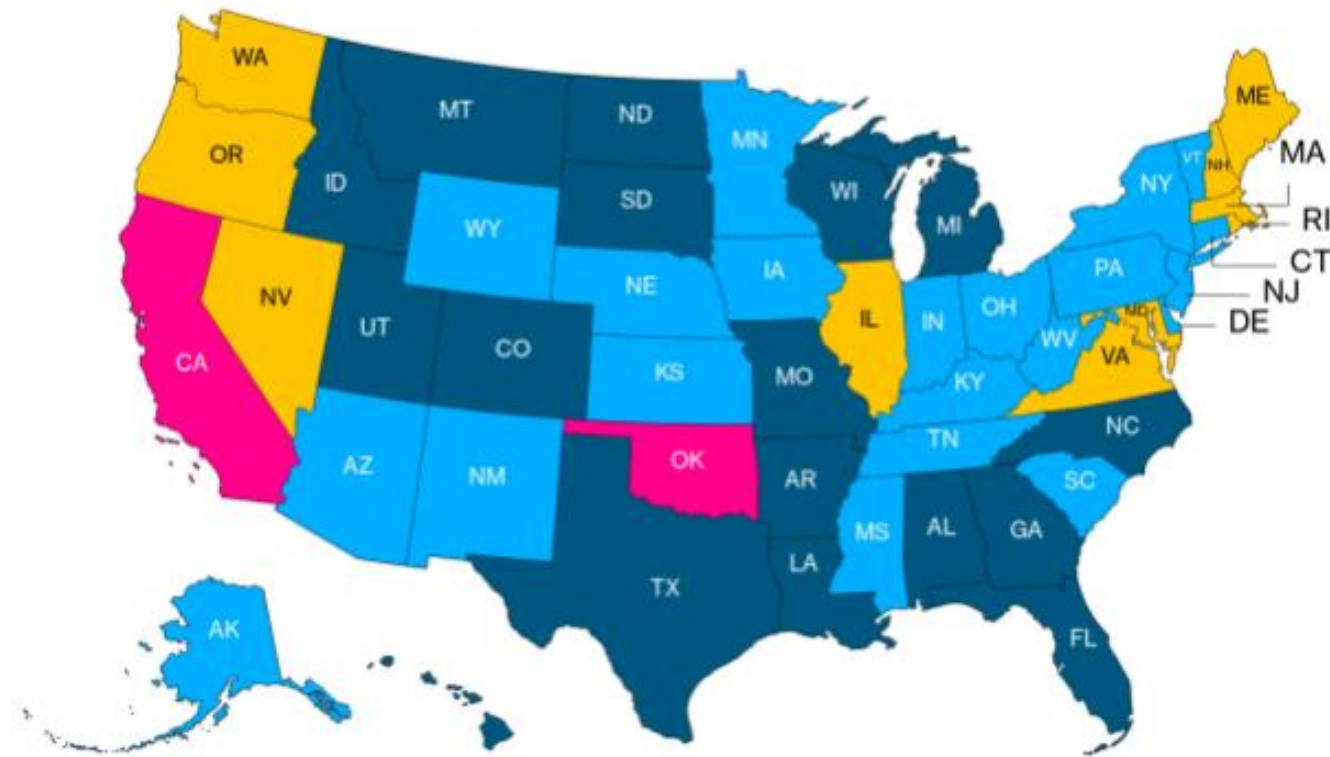
Kelley
Drye

IS THE NONCOMPETE DEAD?

Noncompetes: Vocabulary Level-Set

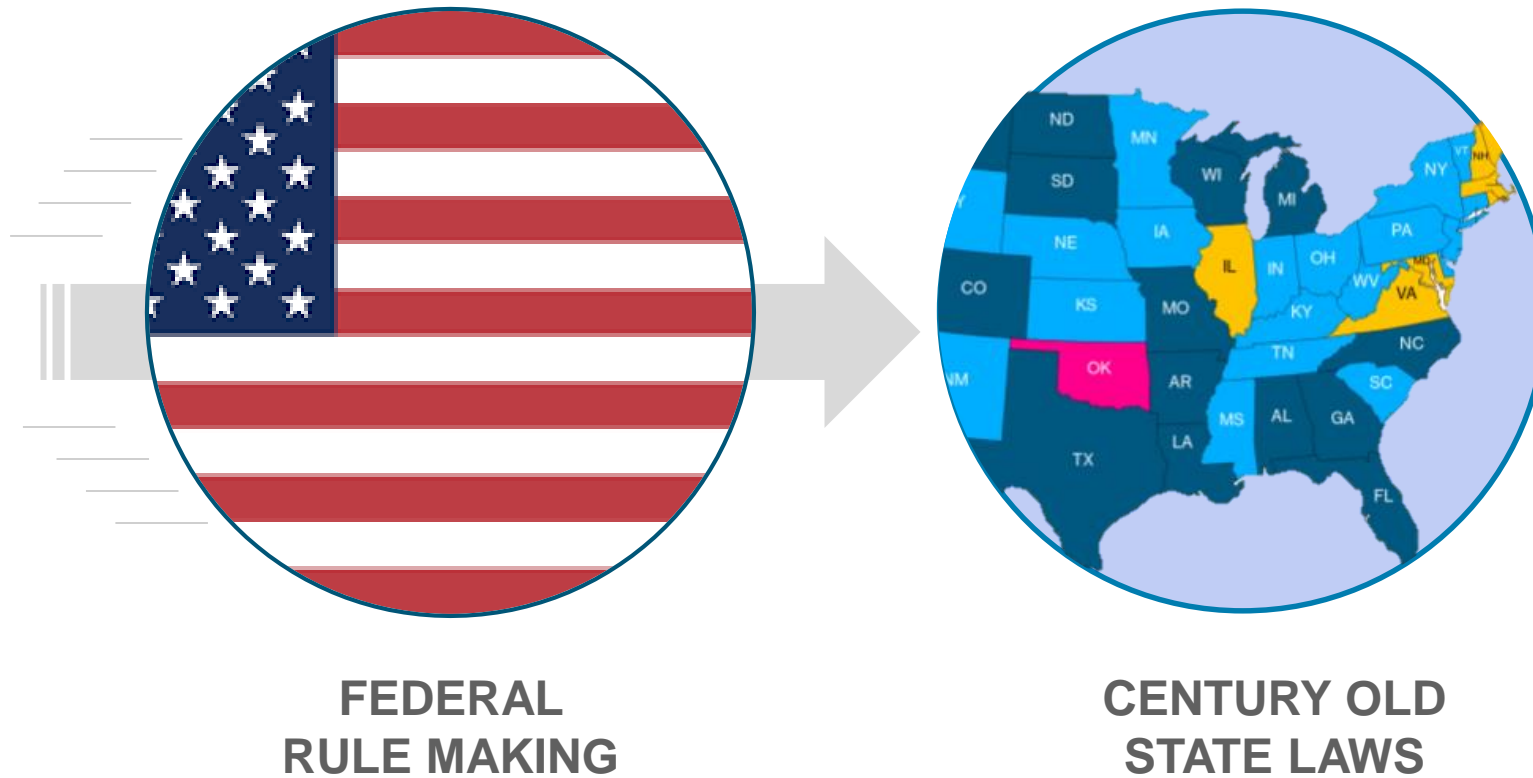
- Types of agreements:
 - Noncompetition agreement
 - Non-solicitation agreement
 - Nondisclosure agreement
- Compensation
- Legitimate Competitive Interest – limits the scope
- Limited Duration

Most States Still Permit Noncompetes



Source: Bloomberg Law analysis

FTC and NLRB:



The Real Challenge: State Law

- *Anything* that restricts post-employment activity is a noncompete
- Noncompetes can't be used for every worker
- May have to pay for period of noncompetition
- Some states make it easier: Texas, Florida

The trick: it's *not* a question of federal law. Realistically, you have to contend with ~10 different approaches across states. So how to bridge that gap?

Contracts/Agreements at Risk

- Overly broad agreements and contracts that do not target specific information or business interests
- Agreements targeting lower-wage workers or workers with skills that are not specialized
- Agreements that serve as *de facto* noncompetes, including agreements focused on training

Audit Your Agreements

- Be aware of state laws regarding enforceability of noncompetes
 - Questionable enforcement in some jurisdictions
 - Some 11 other jurisdictions (Washington D.C., Massachusetts, Maryland, Virginia and Illinois) only enforce them for specific groups of workers, often related to earnings
 - Lawmakers in other states, including New York and New Jersey, have proposed similar legislation

Alternatives to Noncompetes

- Non-Solicitation Agreements
- Non-Disclosure Agreements (NDA) / Confidentiality Agreements Protecting:
 - Existing Client Information and Contacts
 - Proprietary Information
 - Internal Processes and Procedures
- Trade Secret Laws (State and Federal)

Pay Transparency Laws

The Problem

- Women are still paid 83% of what men are paid for no discernable reason
- Intersection of race, ethnicity, and gender has always had compounding effects, leading to lag in compensation behind peers

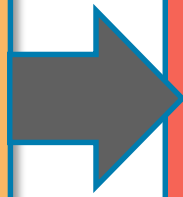
The Solution

- Pay Transparency – the theory behind this solution is workers need to be able to know other salaries and discuss pay to counteract a perceived imbalance in negotiating power with their employers

Pay Transparency as an Evolution

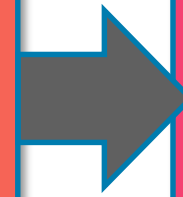
Equal Pay Act

Generally require men and women receive equal pay for equal work; states expand to broader protected categories.



Salary Bans

Generally prohibit or limit employers' ability to gather information about a candidate's past salary and/or use that information when making compensation decisions.



Pay Disclosure Transparency Laws

Generally constructed to promote transparency about pay practices, either by requiring reporting or by making more information available to employees or prospective employees.

“Transparency” Moving Beyond “Equity”

- “Equity” is great
- But “transparency” gives workers tools to test whether pay is *really* equitable
- More states moving to require employers to provide candidates with clear salary information
 - CA started the trend in 2018
 - Soon after MD, OH (Cincinnati and Toledo)
 - 2021: CT, NV, RI, CO
 - 2022: NYC, Ithaca, Westchester, Jersey City
 - 2023: RI, CA, Washington
 - 2024: New York pay transparency legislation pending

State Pay Disclosure/Transparency Laws

State	Law
California*	SB 1162 (amends Cal. Lab. Code § 432.3)
Colorado*	Equal Pay for Equal Work Act, Title 8, Article 5, Part 2 (C.R.S. §§ 8-5-201 to 8-5-203) (2021) ("Transparency in Pay and Opportunities for Promotion and Advancement")
Connecticut	Public Act 21-30 (amending Conn. Gen. Stat. § 31-40z)
Maryland	HB 123, c. 67 (amending MD LABOR & EMPLOY § 3-304.2)
Nevada	SB 293, § 1.3 (amending NRS 608.012)
New York (Ithaca, NYC, Westchester)*	Ithaca Ordinance 2022-03; New York City Pay Transparency Law, Int. No. 134-A ; Westchester County Human Rights Law , Local Law Intro. No. 119-2022
New Jersey (Jersey City)*	Pay Transparency Ordinance, Ord. 22-045
Ohio (Cincinnati, Toledo)	Cincinnati Ordinance No. 83 "Prohibited Salary History Inquiry and Use"; Toledo Pay Equity Act O-173-19
Rhode Island	S 0270 (amending R.I. Gen. Laws §§ 28-6-17(10) and 28-6-22(c))
Washington	SB 5671 (amends WA's Equal Pay & Opportunities Act)

Pay Transparency Laws Vary

- Some laws require the candidate to ask for pay range information; others affirmatively require employers to provide it without request.
- Disclosure of wage range upon request (MD)
- Disclosure after a conditional offer (Cincinnati and Toledo)
- Proactive disclosure of pay scale information (CT, NV, RI, CO)
 - E.g., in CT, employers must provide the wage range to external candidates at offer and to current employees at hire, at the role change, or upon first request

The Basics Are the Same

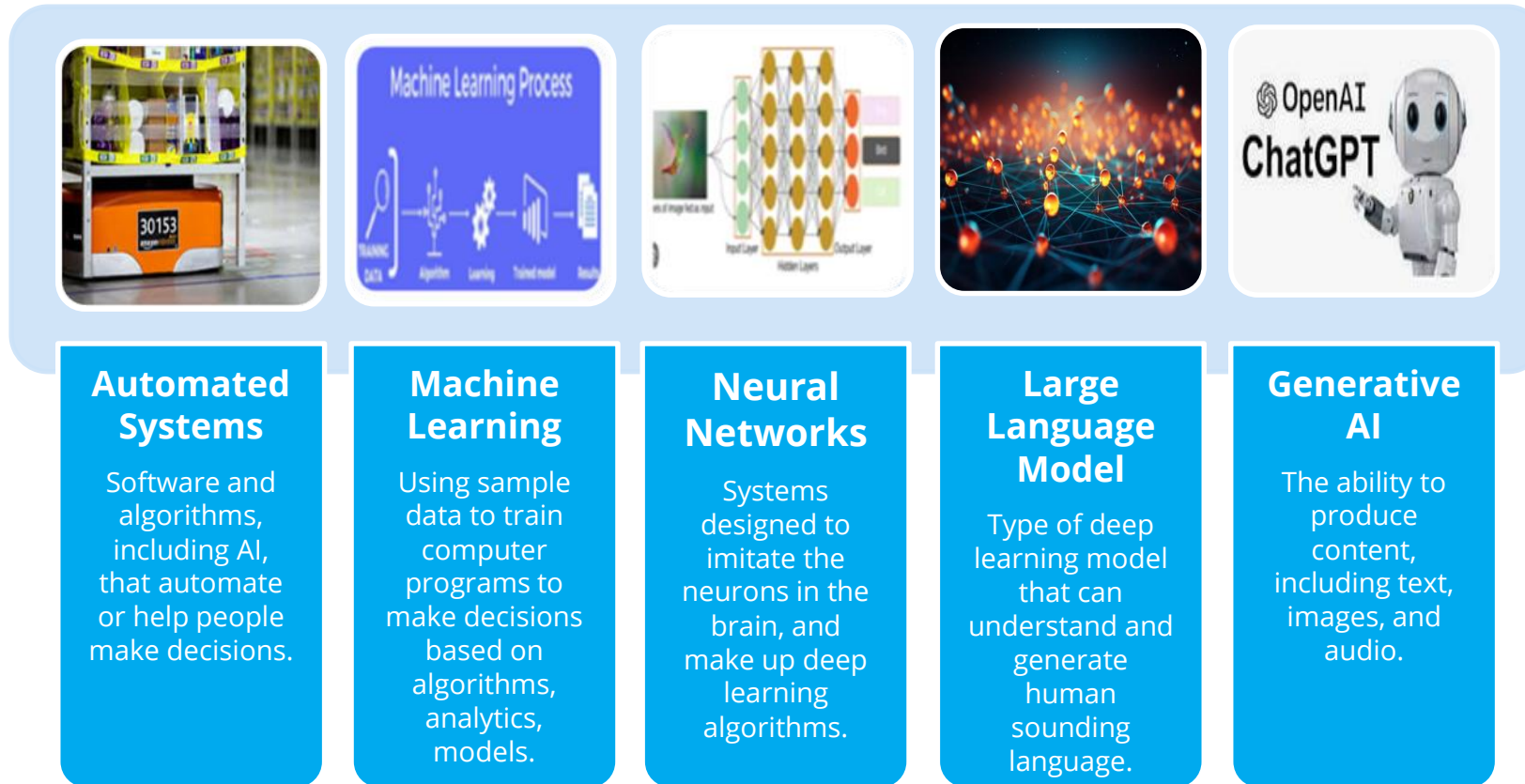
- Employers need to tell employees what they can expect to be paid.
- This information is essentially public.
- And, if an employer deviates from this published range, it may be in violation of the laws.
 - **The problem for employers is that there are lots of legitimate reasons to deviate from a range.**
 - So the best protection an employer can have is a rigorous process of determining the right range, and documenting that process.

Thinking Ahead

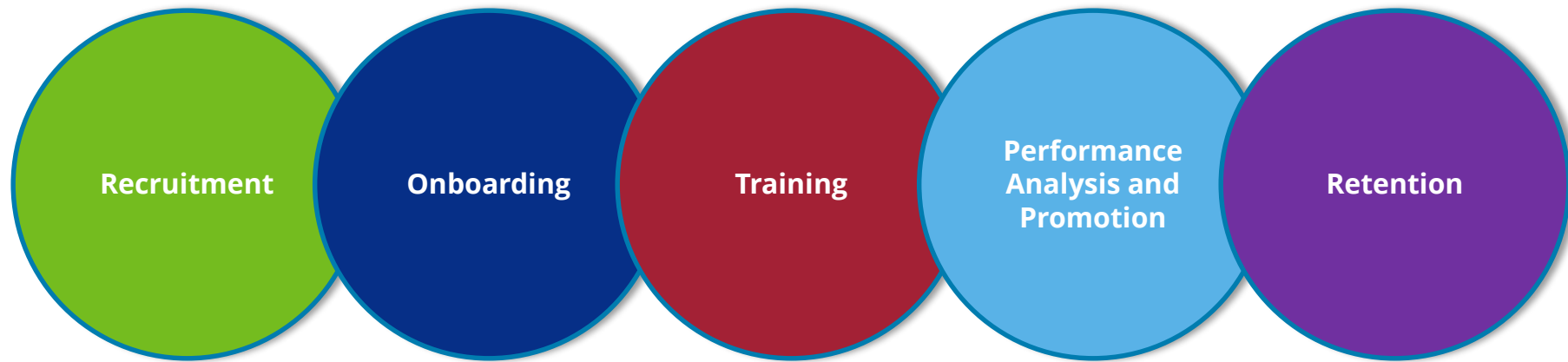
- How to deal with remote postings?
- When can a state regulate postings outside of the state?
- Where do we start?
- Are we losing something with transparency?

Artificial Intelligence

Frequently Used Terms



AI & Human Resources



Examples of Automated Decision-Making

testing software that provides scores regarding personalities, aptitudes, cognitive skills, perceived “cultural fit” of applicants/employees based on performance on a game or on a more traditional test

resume scanners that prioritize applications using certain keywords

“virtual assistants” or “chatbots” that ask job candidates about qualifications and reject those who do not meet predefined requirements

video interviewing software that evaluates candidates based on their facial expressions and speech patterns

employee monitoring software that rates employees on the basis of their keystrokes or other factors

Federal and State AI Laws

- **No federal law**
- 2019 Illinois Artificial Intelligence Video Interview Act
 - Employers must make certain disclosures and obtain consent from applicants if the employers are using artificial intelligence enabled video interview technology during the hiring process
 - Employers relying solely on AI to make certain interview decisions maintain records of demographic data, including the applicants' race and ethnicity
 - Must submit that data on an annual basis to the state, which must conduct an analysis to determine if there was racial bias in the use of the AI
- 2020 Maryland followed with a similar law - HB 1202
 - restricting employers' use of facial recognition services during pre-employment interviews until an employer receives consent from the applicant

NYC: Broadest AI Law & Probably the Model

Local Law 144 of 2021

- **Effective January 1, 2023**, NYC employers and employment agencies are prohibited from using AI tools to screen candidates/employees unless a bias audit has been conducted
- Audit showing absence of bias must be completed no more than one year prior to using the tool
- Employers and employment agencies are ultimately responsible for ensuring a bias audit was done before using an AI
- The vendor that created the AI tool is **not responsible** for a bias audit of the tool

Potential New Laws On the Horizon

CA

Would require impact assessment for automated decision tools, and provide right to manual review of employment decisions.

DC

Would prohibit algorithmic decisions based on protected traits.

IL

Would prohibit using race or zip code as a proxy for race in automated hiring decisions.

MA

Would require notice about algorithmic decisions and monitoring, and provide right to request information processed through algorithms.

NJ

Would require bias audits for automated decision tools and notification to applicants that they were screened by these tools.

NY

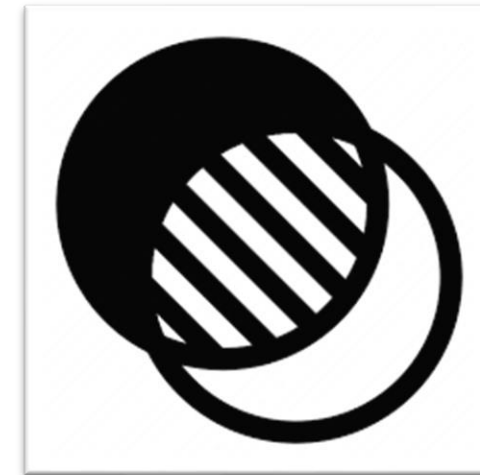
Would require disparate impact analysis for automated decision tools and notification if the tools are used.

VT

Would restrict use of automated decision systems in hiring, and the electronic monitoring of employees.

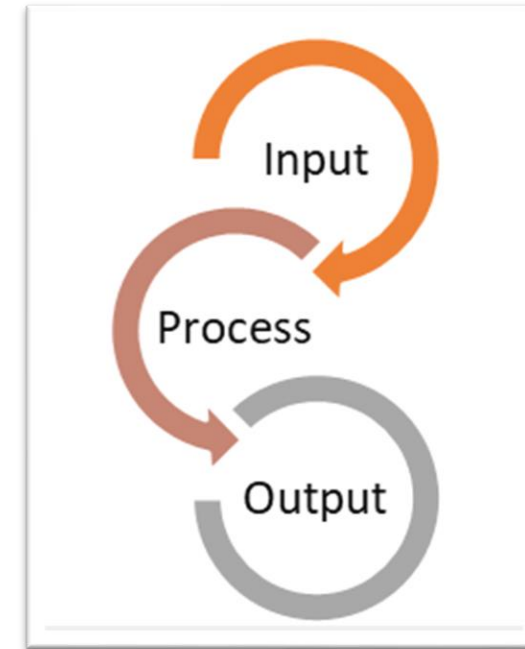
Best Practices: Transparency

- Let applicants know if you are using AI or other automated decision-making tools in your hiring process.
- If you use a consumer reporting agency to conduct background screening, you must provide applicants with notice and obtain their consent.
- If you take an adverse action based on information provided by a consumer reporting agency, you must give the applicant notice and a copy of the consumer report you relied on.



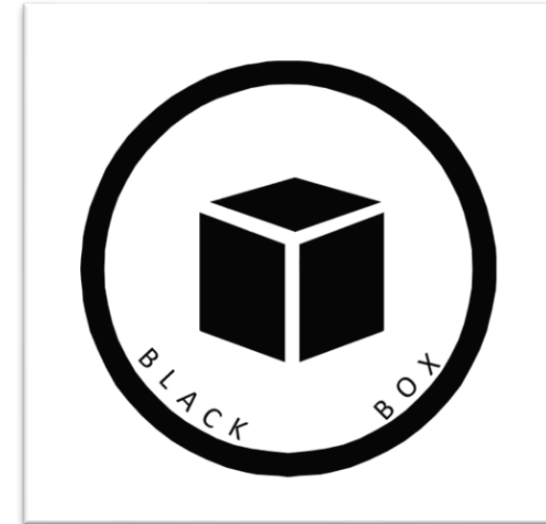
Best Practices: Test inputs and outputs

- Make sure that the inputs used to train tool are free from bias, and accurately represent your applicant and employee population.
- Test for biased outputs to ensure that the tool is not adversely affecting individuals with protected characteristics.



Best Practices: Explainability

- You need to be able to explain the results of your automated decision-making tool.
- Regulators are not going to accept attempts to blame the black box, and say that you can't explain how or why an automated tool made its decision.



Best Practices: Disputes

- Consider implementing a process for applicants to dispute information used to make an adverse decision that they believe is inaccurate.
- Prepare and distribute required notices and postings



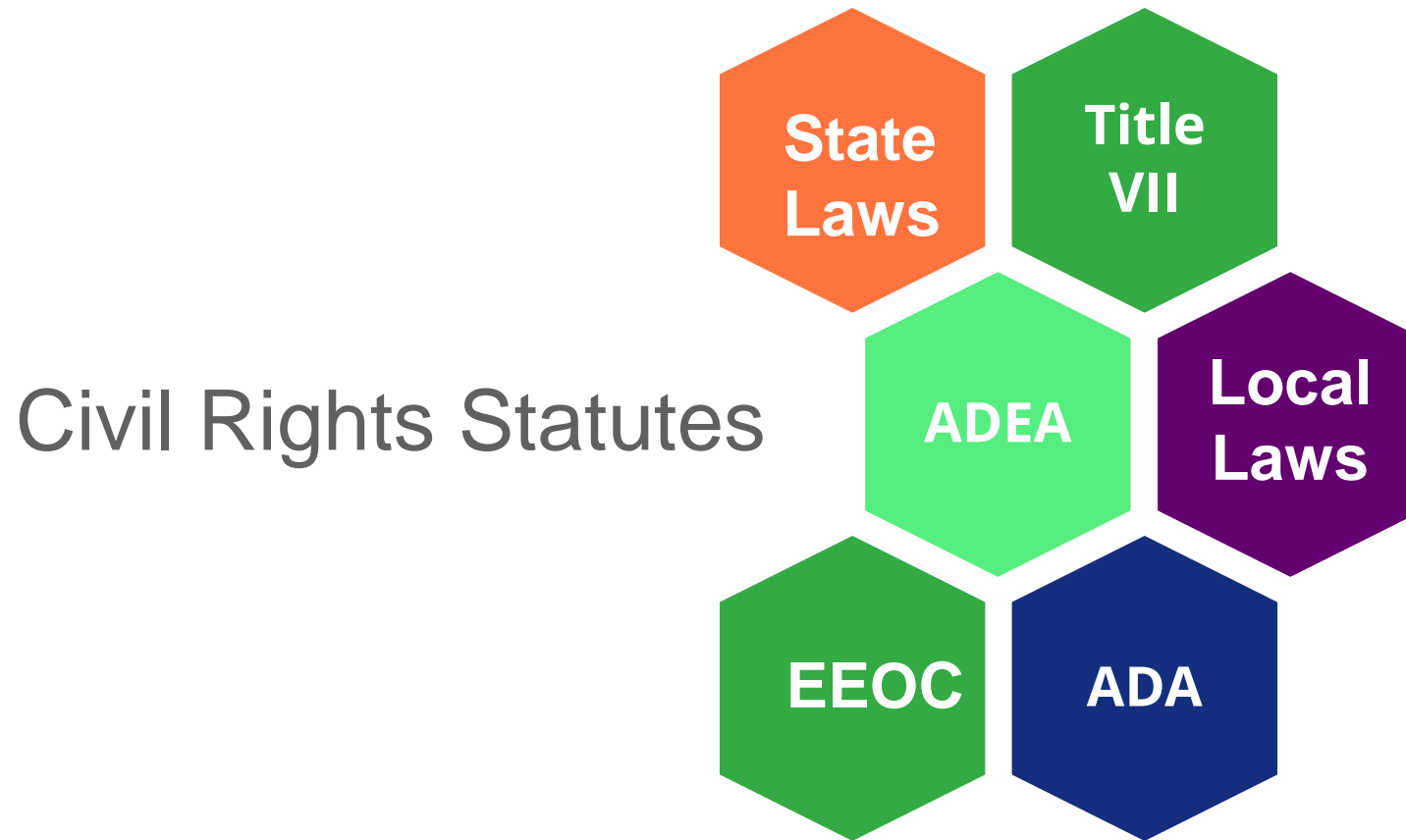
DISPUTE

Best Practices: Technology Policy

- Clearly communicate the purpose of Company issued technology and how such technology may be used.
- Consider restricting access to or the use of applications or websites on Company issued technology that may subject you to potential liability.

Diversity, Equality and Inclusion

DEI Programs Pre-SFFA



DEI Programs Gain Popularity

- Hundreds of companies implement and advertise
- Statements in public filings
- Promotional strategies, leadership pipelines, EEG's, internships, scholarships, etc.
- Unconscious bias training
- Incentives and punishments if objectives not met

Did SCOTUS Make DEI Unlawful?

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)

- June 29, 2023, the Court struck down affirmative action programs at Harvard and the University of North Carolina
- SCOTUS held that Affirmative Action within admissions programs at both universities violated the Equal Protection Clause of the 14th Amendment



What Did The Court *Actually* Say?

- Chief Justice Roberts writes:
 - The “twin commands of the Equal Protection Clause” dictate that **race may never be used as a “negative”** and that race may not operate as a stereotype.
 - College admissions are “zero-sum.”
 - ♦ “A benefit provided to some applicants but not to others *necessarily advantages the former group at the expense of the latter.*”
 - ♦ What helps one applicant hurts another.

How Could Schools Promote “Diversity”?

- The SFFA Plaintiff’s submitted evidence that the schools could achieve their stated goals if they:
 - Provided socioeconomically disadvantaged applicants with *half* of the application boost they give recruited athletes;
 - Eliminated boosts for the children of donors, alumni, and faculty.

Other Methods to Achieve Diversity

- Schools were encouraged to:
 - Recruit and enroll students who are first-generation college applicants
 - Recruit students who were raised in multi-lingual households
- Such factors, the Court found, are explicitly not “interchangeable” with race, and the Court noted that its opinion “does not, and cannot” stop schools from using such considerations

Did SFFA invalidate all DEI Programs?

- No.
 - **SFFA does not outlaw employer efforts to foster a diverse and inclusive workforce:**

It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

[EEOC Statement 06-29-2023](#)

Post SFFA – Emerging Cohorts of Plaintiffs

Well organized, well-funded, and committed activist/political advocacy groups pursuing injunctions and non-monetary resolutions

- The American Alliance for Equal Rights (AAER) targeted the legal industry and law schools challenging DEI programs
- The America First Legal Foundation (AFL) sent letters to the EEOC calling for the Commission to initiate investigations into the DEI initiatives of American Airlines, United Airlines, Southwest Airlines, NASCAR, Mars, Anheuser-Bush, Hershey and Starbucks

General Rules

- It has never been lawful to favor one person over another because of race, gender or any protected characteristic
- It has never been lawful to “require” the hiring or promotion of any person based on a protected characteristic
 - Applicants and employees should be judged equally and based on merit and qualifications

So How Do We Feel about DEI?

91% of employers still prioritize diversity

70% said “had not changed their approach”

But greater prudence is warranted

Review Your DEI Programs

NO:

- mandates to “favor” or “target” certain groups for hiring or promotion
- direct numerical targets, such as “10% of this team must be a certain demographic”
- linking DEI goals with raises or other compensation
- leadership training, internships, and scholarships, open only to underrepresented groups
- reserving hiring or promotion slots for underrepresented groups
- ask managers to use race or sex as a “tiebreaker” when choosing between candidates

Additional Steps to Avoid Being in the Headlines

- It's a question of equal parts law and public relations strategy
- Good training and employee relations
- Good advance PR strategy



THANK YOU



Mark A. Konkel

Chair, Labor & Employment Group

Kelley Drye & Warren LLP

mkonkel@kelleydrye.com

(212) 808-7959

Subscribe: www.LaborDaysBlog.com