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AI Made the Call: Governing AI in Hiring, Performance, and Terminations

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AI Adoption in HR – 2026 Snapshot

SHRM Survey, December 2025 (1,908 HR professionals)

- **39%** of HR professionals report AI already adopted in their HR function
- **60%** of extra-large organizations have implemented AI in HR (vs. 33% of small organizations)
- **31%** of organizations have no plans to launch AI initiatives anywhere
- Recruiting is the top AI use case. Larger firms focus on talent analytics; smaller ones on performance management

Eight Compliance Risks

Top pitfalls: legal standards, transparency, human oversight, vendor diligence, biased data

Example: AI résumé screener rejects 15% of women, with no explanation — Title VII risk

- 1. Failure to Meet Legal Standards
- 2. Insufficient Transparency
- 3. Neglecting Human Oversight
- 4. Vendor Reliance Without Due Diligence
- 5. Biased Training Data
- 6. Proxy Discrimination
- 7. Algorithmic Drift
- 8. Accessibility

Failure to Meet Legal Standards

Jurisdiction	Law and Status	Key Employer Duty
Federal	Title VII, ADA, ADEA — in force	Employer, not vendor, liable for AI disparate impact
Illinois	AI Video Interview Act; IHRA amendments — eff. Jan. 1, 2026	Notice of AI use; no discriminatory AI, including zip-code proxies
Maryland	Facial recognition law — in force	Applicant consent before facial recognition in interviews
New York City	AEDT Law — in force	Independent bias audit, public summary, advance notice
California	Civil Rights Council ADS rules — eff. Oct. 1, 2025; CPPA ADMT rules — final, compliance Jan. 1, 2027	AI can be employer's agent; pre-use notice for significant decisions
Colorado	SB 26-189 (repeals SB 24-205) — signed May 14, 2026; eff. Jan. 1, 2027	Notice; explanation after adverse outcome; human review on request
Texas	HB 149 — eff. Jan. 1, 2026	Bars intentional AI discrimination
Connecticut	Public Act 26-15 (SB 5) — signed 2026	AI-related WARN disclosure from Oct. 1, 2026; pre-decision AI notice from Oct. 1, 2027
Utah	AI Policy Act; consumer protection — in force	May reach employer AI use

Privacy laws (GDPR, CCPA, state statutes) also apply to AI-processed personal data.

Vendor Reliance Without Due Diligence

- Employers assume third-party AI tools are compliant, but liability falls on the employer
- Due diligence, audits, and contracts must explicitly address compliance responsibilities
- Before deploying any AI tool, know what factors it uses, how it weights them, and who validated that those factors are job-related

Tip: Require bias audit reports and validity studies from every AI vendor

Case Study: Amazon

Amazon's résumé screener, trained on past male-heavy data, down-ranked résumés from women's colleges

— **the algorithm**—*not a human*—made the call.

Mobley v. Workday: Landmark Litigation

Background: Derek Mobley, a Black man over 40 who self-identifies as having anxiety and depression, applied to 100+ Workday-screened jobs. Rejected every time

Claims: Race, age, and disability discrimination. Workday sued as agent of employer-clients

Key Rulings:

- July 2024 — Motion to dismiss denied; disparate impact proceeds
- May 2025 — ADEA collective certification (applicants 40+ since Sept. 2020)
- March 2026 — ADEA protections extend to applicants; Loper Bright defense rejected
- June 2026 — All core claims survive

Why It Matters: One lawsuit can sweep in every employer using the same tool

Kistler v. Eightfold AI: A New Theory of Liability

Filed: Kistler v. Eightfold AI (N.D. Cal., Jan. 2026).

Allegations: Eightfold scraped online data to build candidate dossiers and scored applicants 0-5 without consent

FCRA Theory: Unregistered consumer reporting agency. $100-$1,000 per willful violation

Why It Matters: A "match score" may be both disparate impact (Title VII) and an unregulated consumer report (FCRA)

Action: Ask vendors whether the tool accesses third-party data. Confirm FCRA disclosures

Proxy Discrimination

- AI may use neutral-seeming factors (zip code, college, employment gaps) as proxies for protected characteristics, causing disparate impact
- Omitting protected-class data does not fix the problem — the algorithm relies on indirect indicators
- **Example:** One tool found a correlation between being named Jared, playing high school lacrosse, and job success — no rational connection to performance
- **Tip:** Review AI outputs for disparate impact at every decision point — screening, interview, offer, and hire — annually, under privilege

Algorithmic Drift

- AI models drift over time, creating new biases without any code change. The tool you audited at deployment may produce different outputs 12 months later
- **Example:** A pre-2020 model penalized employment gaps. Post-pandemic, gaps became common and unrelated to performance — a model that didn't recalibrate is still penalizing them
- Require your vendor contract to specify when and how the model is retrained, and whether revalidation occurs before changes go live
- **Tip:** Review AI tool outputs for disparate impact, accuracy, and reliability annually under privilege

Accessibility

- AI-driven assessments (gamified testing, voice analysis) may disadvantage people with disabilities, non-native speakers, or underrepresented groups
- Require vendors to document WCAG compliance at the highest level and to provide accommodations for visual, hearing, physical, and cognitive impairments
- Ensure applicants have a clear process to request disability accommodations and are notified of it
- **EEOC:** Charges filed in 2025 allege a video interview platform's speech recognition performed worse for a deaf applicant, her accommodation request was denied, and the AI told her to "practice active listening"

What Employers Must Do

First task: If you are using an AI hiring tool and have not run an adverse impact analysis, start there

- **Outcome analytics:** Document hiring decisions and override criteria. Analyze outcomes across age, race, gender, and disability status
- **Bias audits and human review:** Pre-deployment and annual audits under privilege. Maintain qualified human review with documented override authority
- **Vendor indemnity:** Require bias audit reports and validity studies. Contracts must address nondiscrimination, indemnification, and data transparency
- **EPLI and arbitration:** Review coverage for AI-related claims. Confirm mandatory arbitration agreements cover AI-driven employment decisions

AI in Termination: Entry Points and Disparate Impact

Four Entry Points:

- **1. Stack-ranking:** Bell-curve performance scores; bottom percentage terminated
- **2. Predictive attrition:** "Flight risk" models forecast resignations
- **3. Automated PIPs:** Systems flag underperformance algorithmically
- **4. AI-assisted RIF:** AI scores employees for layoff selection

Illinois: 775 ILCS 5/2-102(L) — notify employee when AI facilitates discharge

Connecticut: Public Act 26-15 § 26 — WARN notice must state if AI informed the RIF

Tip: Run the hiring funnel in reverse — same analytics, applied to who exits

The "Black-Box" Termination: Explainability and Human Review

The problem: "The system flagged her" is not a valid explanation. The employer must articulate a clear, legitimate reason a decision-maker can explain.

- Unexplainable reasons look like pretext. Shifting explanations support an inference of discrimination
- An employer who adopts a biased AI output without independent review inherits its bias

CA SB 947 ("No Robo Bosses Act"): Enacted Sept. 30, 2026; operative July 1, 2027. Regulates employer use of automated decision systems in discipline and termination decisions.

AI-Assisted RIFs: Adverse Impact and Override

Pre-RIF: Analyze the AI list under privilege. Define decisional unit; compare rates by class

Four-fifths rule: If one group keeps jobs at <80% the best-faring group's rate, red flag. 29 C.F.R. § 1607.4(D)

Age exposure: Tenure, salary, attrition risk can track age. ADEA claims available

OWBPA: Disclose what AI did. Defective disclosure may void the ADEA waiver

Override: Document authority to reject AI, reviewer's access and reasons, and override rate

Vendor Due Diligence: Five Questions To Pressure Test Your Vendor

Five Questions To Pressure Test Your Vendor:

1. "Can you give us the full bias audit report, including selection rates by race and sex — not a summary?"
2. "Has this tool been the subject of litigation or administrative charges anywhere?"
3. "Has the tool been validated for our specific use case, not just generally?"
4. "Does the tool access any third-party data beyond what the candidate submitted?"
5. "What are your litigation hold procedures, and can we access the algorithm if we face a claim?"

GenAI Risks and Policy Must-Haves

Risks:

- **Trade secrets:** Public AI input may destroy DTSA/UTSA protection
- **Privilege:** *Heppner* (S.D.N.Y. 2026) — public AI may waive attorney-client privilege
- **Privacy:** Employee/customer data in public AI may violate GDPR, CCPA, BIPA
- **Accuracy:** Unreviewed AI output creates liability exposure

Three Must-Haves:

1. Approved tools: Specify platforms; prohibit confidential data in non-approved tools

2. Verification: Human review of all AI work product; disclose AI use where required

3. NLRA guardrail: Do not ban AI use for discussing wages or conditions — Section 7 applies

AI Deep Fakes and Job Seeker Cheats

Gartner 4Q24 survey (3,290 candidates):

- 4 in 10 candidates used AI during the application process — résumé (54%), cover letter (50%), writing sample (36%), assessment answers (29%)

Gartner 2Q25 survey (3,000 candidates):

- 6% admitted to interview fraud — posing as someone else or having another person sit in

Gartner predicts: by 2028, one in four candidate profiles worldwide will be fake

AI Deepfakes in Workplace Investigations

Only 17% of HR professionals say they are confident they can distinguish authentic video from AI-generated video in investigations.

40% of organizations are taking no action — one investigation away from acting on fabricated evidence.

Risk: A fabricated video or audio introduced during an investigation could drive wrongful termination or legal exposure.

Recommended Steps:

- Update AI use policies and codes of conduct to address AI misuse
- Train HR staff on detecting red flags (audio/video inconsistencies, metadata anomalies)
- Engage third-party forensic experts when AI-generated content is suspected

Fake Candidates: Red Flags and Controls

Red Flags — Hiring:

- Inconsistent LinkedIn; no photo or AI image; near-perfect résumé
- Scripted answers; refuses camera; can't answer location questions
- References lack real emails; no digital footprint; fraudulent documents

Red Flags — Post-Hire:

- Looks different; refuses video; foreign IP; immediate address change

Controls:

- Photo ID on camera; spontaneous questions; prohibit headphones
- EDR software; detect RDP/multi-location logins; retain location records
- In-person I-9 and onboarding; verify direct-deposit name match

Rule: Three or more flags — pause and verify

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