



## Session #6

# AI at work – taking the "Human" out of Human Resources?

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# Speakers



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# Session Content



- 1 What is AI and how is it used in employment law?
- 2 The UK regulations on the use of AI in employment law
- 3 Looking to Europe- The AI Act
- 4 AI in action - case law examples
- 5 The US position
- 6 Looking ahead

# #1

## What is AI and how is it used in employment law?

# What is AI?



- No single definition but some broadly agreed terms
- 3 key uses of AI in employment law
  - Recruitment
  - Task allocation and performance management
  - Surveillance and monitoring

# #2

## The UK regulations on the use of AI in employment law

# The UK regulations on the use of AI in employment law



- Currently no express regulations that govern the use of AI in the workplace. However...
  - Common law
    - Duties between employer and employee, e.g. implied duty of mutual trust and confidence
  - Equality Act
    - Protection against discrimination
  - Privacy laws and data protection
    - Risk of confidential data being used in generative AI technologies, e.g. ChatGPT
- UK Government's White Paper on AI Regulation
- TUC aims to publish AI and Employment Bill in early 2024

# #3

## Looking to Europe- The AI Act



# Europe (The Netherlands/Germany) – the EU AI Act



## Looking at the future: the EU AI Act

- Current boundaries: privacy and discrimination
- Introduction: classifies AI applications by level of risk associated with use
- AI-driven tools in the field of recruitment classified as high risk
- Consequences: only pre-approved systems, retention of data, human supervision
- Steps forward towards 2025 / 2026

# #4

## AI in action – case law examples

# Europe (The Netherlands/Germany) – An algorithm as an employer



## An app as your boss?

- Algorithm giving instructions – relationship of authority – employment contract
- Two recent cases:
  - Uber: app assigns rides, gives advisory route, rates drivers (disciplining effect) – Amsterdam court of appeal: modern employer authority
  - Deliveroo: Frank picks most efficient rider, scores them – Sepreme Court: indication of

# Europe (The Netherland/Germany) – AI-driven warning emails



## Court of appeal Amsterdam – October 2022

- Summary dismissal by ABN AMRO after automated warnings
- Strict conditions for termination under Dutch employment law
- Automated warning emails versus investigation by human beings
- No legally valid termination
- Practical tips

# Europe (The Netherlands/Germany – self care apps




## Self care apps, a good thing?




- Metadata determine your fitness level in MyAnalytics
- From monitoring to giving feedback
- App nudges employees to improve work patterns
- Also to live healthier private lives
- Updates / modifications in leave policies?
- Tailored leave rights?

# #5


## The US position






 Home
  My Network
  Jobs

**PREMIUM**



**Ian Carleton Schaefer** 


Partner at Sheppard Mullin |  
Employment and Human  
Capital Advisor |  
Investigations and Crisis  
Management | Dot  
Connector | Artistic Citizen


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#covid19, #returntowork, and  
#employmentlaw

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 **Ian Carleton Schaefer** • You ⋮

Partner at Sheppard Mullin | Employment and Human Capital Advi...  
1mo • Edited • 


TRIO by ICS (Issue 7) - "Gigs"


We are in a wild, wild labor market.

From quiet quitting to quiet cutting, to debates about the economy, to whether your non-compete means anything, to the Summer/Fall of strikes, to record low unemployment (3.8%), there has been a LOT happening.

What the #\*!& is going on?

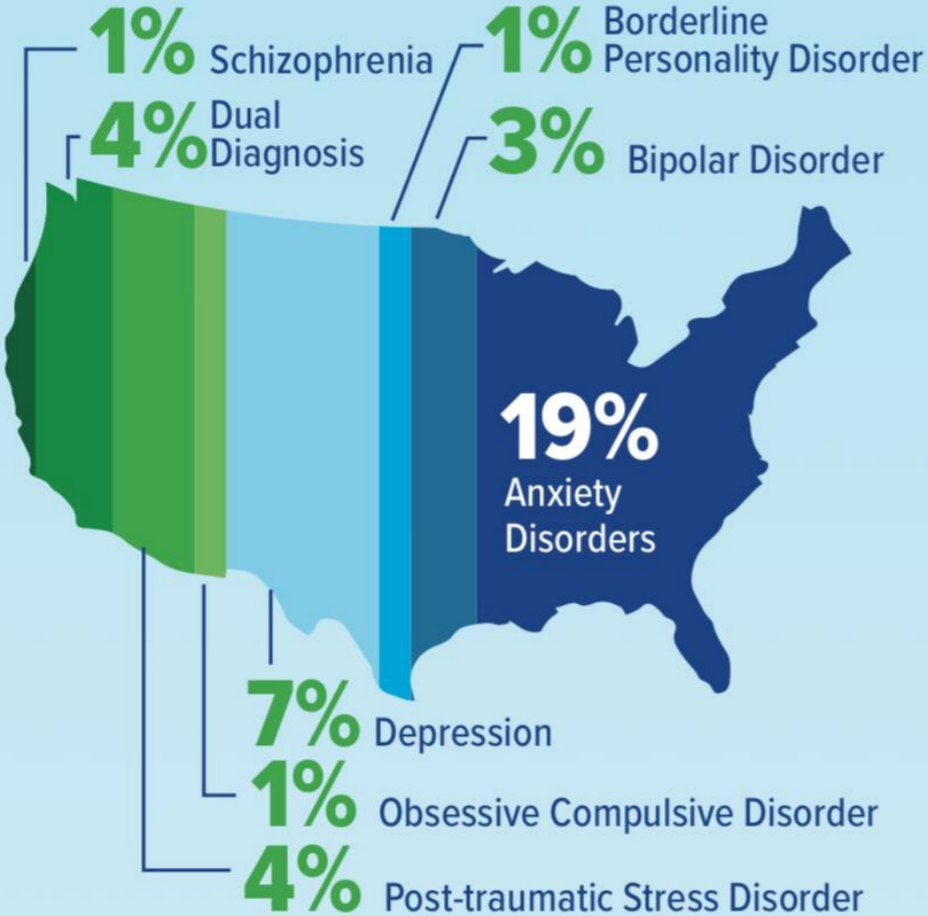
Here's my take on the State of Gigs. Views are my own.

 1. **The Writers are Back – Now What? Aside from the immediate benefits of seeing Fallon and Colbert back on the regular after the 146 day #WGA strike, the biggest takeaway for me can be summarized in two letters – AI.** From its potential impact on the size of writing rooms to demand for writers writ-large were the major obstacles in reaching resolution in this historic stalemate as well covered by the [The New York Times](#). What I'm interested in: the same AI concerns are underpinning much of the UAW labor dispute, transposed to the factory floor. And as [Forbes](#) also pointed out, AI doesn't go on strike (yet). The tale of the [#WritersGuild](#) may well be the blueprint for future labor negotiations in other industries, creative and otherwise, and the impetus for a long-anticipated resurgence of the labor movement (currently at 6% of private sector workers).

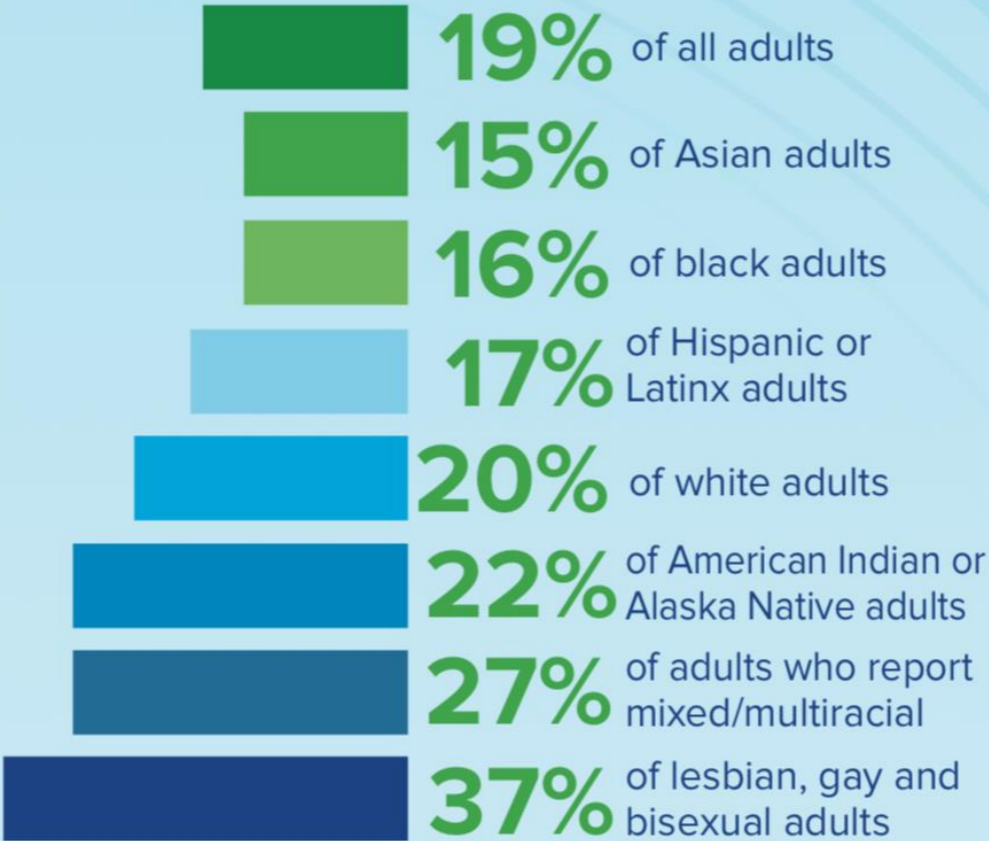
 2. No Backsliding – Breaking up is hard (says every therapist and country music song ever written). Getting back with an ex? Questionable, and even harder. The simple explanation: there was a reason you broke up in the first place, and the circumstances around the breakup portend whether a rekindling is likely to be successful. But what about in the workplace? Well, there's reporting around companies like [Salesforce](#) and [Meta](#) who are looking to rehire employees who recently were laid off due to over-hiring during the pandemic, and now need to rebuild certain talent pipelines with a particular focus on (is this getting old?) – [#AI](#). But whether backsliding and/or boomeranging will be successful really comes down to trust.



### 12 MONTH PREVALENCE OF COMMON MENTAL ILLNESSES (ALL U.S. ADULTS)



### 12 MONTH PREVALENCE OF ANY MENTAL ILLNESS (ALL U.S. ADULTS)

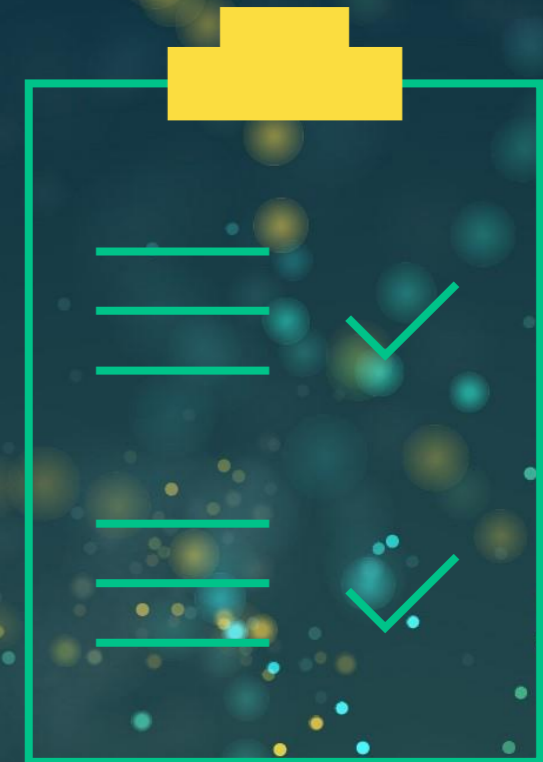






# Legal Concerns addressed at Federal, State and Local Level

- Impact on Workforce, Job Displacement, Equity and Well-Being
- Bias and Discrimination in the Hiring Tools
  - Beware of federal, state and local anti-discrimination laws
  - Neutral tools may have unanticipated consequences
- Candidate Privacy Considerations
  - What information is the AI tool considering in making hiring recommendations?
  - Where and how is this data being stored?
- Heightened Regulations
  - Federal – Executive Order, EEOC Guidelines and OFCCP Requirements
  - State – California and Illinois
  - Local – New York City





# Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

A screenshot of the White House website page for the Executive Order on AI. The page has a white background with a blue header. The header includes 'THE WHITE HOUSE' on the left, the White House logo in the center, and navigation links for 'Administration', 'Priorities', 'The Record', 'Briefing Room', and 'Español' on the right. Below the header, the date 'OCTOBER 30, 2023' is centered. The main title of the executive order is displayed in a large, dark blue serif font. Below the title is a breadcrumb trail: 'BRIEFING ROOM &gt; PRESIDENTIAL ACTIONS'. The body of the text begins with 'By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:'. This is followed by 'Section 1. Purpose. Artificial intelligence (AI) holds extraordinary potential for both promise and peril. Responsible AI use has the potential to help solve urgent challenges while making our world more prosperous, productive, innovative, and secure. At the same time, irresponsible use could exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security. Harnessing AI for good and realizing its myriad benefits requires mitigating its substantial risks. This endeavor demands a society-wide effort that includes government, the private sector, academia, and civil society.' The text continues with 'My Administration places the highest urgency on governing the development and use of AI safely and responsibly, and is therefore advancing'.





# President Biden Issues Executive Order on Safe, Secure and Trustworthy Artificial Intelligence

A screenshot of the White House website's fact sheet page. The page is white with a blue header containing 'THE WHITE HOUSE' and the White House logo. The date 'OCTOBER 30, 2023' is centered above the main title. The title is 'FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence'. Below the title is a breadcrumb trail: 'BRIEFING ROOM &gt; STATEMENTS AND RELEASES'. The main text begins with 'Today, President Biden is issuing a landmark Executive Order to ensure that America leads the way in seizing the promise and managing the risks of artificial intelligence (AI). The Executive Order establishes new standards for AI safety and security, protects Americans' privacy, advances equity and civil rights, stands up for consumers and workers, promotes innovation and competition, advances American leadership'. On the left side of the screenshot, there are two small icons: a blue circle with a white 'i' and a blue square with a white 'Tr'.



# The Big Picture

## The effect of the Executive Order will be far reaching:

- Will impose testing obligations on developers of the most powerful systems and require sharing results
- Directs many agencies to take specific actions to protect consumers, patients, students and workers and industries; mandates interagency cooperation
- Assess potential job displacement due to AI and how to remedy
- Mandates efforts for managing content authentication and provenance (e.g., to prevent deepfakes)
- Calls on Congress to implement federal privacy legislation
- Takes aim at “BAD” AI (**b**iased and **d**iscriminatory AI) to promote equity and civil rights
- Focuses on US Government’s responsible use of AI
- Creates programs and provides resources to enhance US leadership in innovation
- Promotes US leadership in coordinating



# Workers

- To protect against the dangers of increased **workplace surveillance, bias, and job displacement**, the EO proposes to:
  - Support workers' ability to bargain collectively
  - Invest in workforce training and development accessible to all
  - Develop principles and best practices to mitigate the harms and maximize the benefits of AI for workers by addressing job displacement; labor standards; workplace equity, health, and safety; and data collection



# Workers

- To help ensure that AI deployed in the workplace advances employees' well-being, The Secretary of Labor shall, within 180 days of the date of this order **develop and publish principles and best practices for employers that could be used to mitigate AI's potential harms to employees' well-being and maximize its potential benefits**
- To support **employees whose work is monitored or augmented by AI in being compensated appropriately for all of their work time**, the Secretary of Labor shall issue guidance



# Equal Employment Opportunity Commission (EEOC)

- EEOC launched the Artificial Intelligence and Algorithmic Fairness Initiative in 2021
- May 18, 2023 – EEOC issued technical guidance on Employer liability for discrimination by an “algorithmic decision-making tool”
- Chairwoman Charlotte Burrows: At an **American Bar Association conference in Berlin, Germany, in May 2022**, U.S. Equal Employment Opportunity Commission (EEOC) **Chair Charlotte Burrows** noted that she and the commission are particularly interested in guidance that could protect people from bias in AI tools. As she noted, as many as 83% of employers, and as many as 90% among Fortune 500 companies, are using some form of automated tools to screen or rank candidates for hiring, leading to a renewed focus on **understanding what is “under the hood” of the AI tool.**





# New York City on AI - Automated Employment Decision Tool Law (AEDT)

- **Took effect July 5, 2023**
- Restricts employers' ability to use "automated employment decision tools" in hiring and promotion decisions within New York City
- All employers covered, so long as the decision relates to hiring or promotion within New York City
- Automated Employment Decision Tool
  - 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

The screenshot shows the New York Law Journal website. The navigation bar includes 'New York Law Journal' and several dropdown menus: 'Law Topics', 'Surveys & Rankings', 'Cases', 'People & Community', 'Judges & Courts', 'Public Notice & Classifieds', and 'All Sections'. The main content area features an article titled 'New York City's AEDT, Part 3: The Final Regulation & Employer Compliance'. The article is categorized as 'ANALYSIS' and includes a sub-headline 'New York City's AEDT, Part 3: The Final Regulation & Employer Compliance'. The text states: 'Given the fast-approaching AEDT enforcement date (July 5, 2023), employers should immediately begin determining whether they use technology covered by the AEDT and, if so, whether they are in compliance with the regulation requirements.' The article is dated 'May 03, 2023 at 10:00 AM' and is estimated to be an '8 minute read'. The authors are listed as 'By Ian Carleton Schaefer, Brad Raboin and Avi Gholian | May 03, 2023 at 10:00 AM'. An image of a hand holding a tablet with a graph is shown on the left side of the article.





# New York City – Limits on Use of AEDTs

- Employers may not use AEDTs unless:
  - The tool has been the subject of a compliant bias audit conducted within the previous year; and
  - The employer has published a summary of the tool's most recent bias audit, as well as the distribution date of the tool to which such audit applies, on its publicly-available website
- Bias audits must:
  - Be performed by an independent auditor
  - Use historical data (i.e., data collected during the employer's use of the tool); if insufficient historical data is available to conduct a statistically significant audit, test data may be used, subject to certain disclosure requirements
  - Calculate the selection rate/scoring rate and impact ratio for sex categories, race/ethnicity categories, and intersectional categories of sex, ethnicity and race





# New York City – Notice and Disclosure Requirements

- Employers who use AEDTs must disclose the following information to candidates for hire or promotion at least 10 business days before the tool is used:
  - The fact that an AEDT will be used;
  - The job qualifications and characteristics that the AEDT will use in assessing the candidate; and
  - Instructions for how to request an alternative selection process or reasonable accommodation, if available
- Employers must also:
  - Provide information in the employment section of its website about its AEDT data retention policy, the type of data collected for the tool, and the source of the data;
  - Post instructions on the employment section of its website for how to make a written request for such information, and if a written request is received, provide such information within 30 days; and
  - If such a request is denied, explain why disclosure of such information would violate applicable law or interfere with a law enforcement investigation





## New York City – Penalties

- \$500-\$1500 per day that the employer does not comply with the law
- Neither permits nor prohibits a private right of action, but states that it shall not be construed to “limit any right of any candidate or employee for an employment decision to bring a civil action in any court of competent jurisdiction”



# California on AI – Governor Newsome’s Executive Order (September 6, 2023)

- Newsom’s Executive Order won’t immediately impact private employers, but it will have a spillover effect
- It directs **state agencies to study the development, use, and risks of generative AI.**
- The order calls on state departments to perform a **joint analysis** on how AI could affect various aspects of life in the state, from the energy sector to vulnerable communities.
- It also calls for **guidelines on the ethical development and usage** of AI technology, as well as employee training within state government on how to best utilize these new tools.
- The order specifically instructs state agencies to create **risk assessment reports**, focusing on the technology’s implications for California’s economy, energy consumption, and ethical considerations.
- State agencies are also required to devise **policies and regulations for AI**, setting the stage for California to become a model for how governments can integrate AI into their operations.





# California – Proposed Legislation and Regulation

- California lawmakers and regulators have introduced three bills designed to regulate AI in employment:
  - February 10, 2023 – California Civil Rights Council (CRC) issued updated proposed regulations governing automated-decision systems
  - May 15, 2023 – AB No. 331 to add regulations relating to AI and automated decision tools (ADTs)
  - June 1, 2023 - SB No. 721 to create the California Interagency AI Working Group
  - September 14, 2023 – SB No. 294 to create Safety Framework for AI Models





# Illinois on AI - Artificial Intelligence Video Interview Act

- Went into effect January 1, 2020
  - First state law to regulate the use of AI in the hiring process
- Covers positions based in Illinois
- An employer that asks job applicants to record their interviews and then relies on an analysis by an AI system analysis when considering the prospective employees must:
  - Notify applicants before the interview that AI may be used to analyze the applicant's video interview and to consider the applicant's fitness for the position
  - Provide information before the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants
  - Obtain consent from the applicant before the interview





# Best Practices

- **Develop an AI Strategy:** Create a strategic plan for AI adoption that aligns with your organization's goals and the potential regulations that could be introduced
- **Conduct an AI Audit:** Assess your current and potential use of AI (particularly GenAI) to help you understand both the risks and opportunities associated with integration into your operations.
- **Identify any tools** that you currently use or are planning to use that may be considered an automated or algorithmic employment decision making tool.
  - Conduct an independent bias audit of any tools used
  - Backstop a tool's decisions with human review
  - Routinely test and monitor a tool's performance
  - Consider non-technological alternatives
  - Comply with any notice/disclosure requirements
  - Use algorithmic employment decision making tools with great care
- **Engage Critical Stakeholders:** Consider creating a multi-stakeholder committee that includes representatives from various departments, including HR, IT, Legal, and DEI, to oversee your organization's AI adoption and usage.
- **Employee Training:** To stay ahead of the curve, consider rolling out training programs to improve your employees' proficiency in AI-related skills.



## Best Practices (cont'd)

- **Coordinate With Counsel:** Consult with legal advisors to understand how future laws might impact your business operations and what preemptive steps can be taken to proactively address the main concerns.
- **Create Comprehensive AI Policies:** Ensure your policies cover ethical guidelines, data privacy concerns, etc.
- **Beef Up Your Data Protection Measures:** Ensure you have robust data protection and privacy measures in place – and that they have been adapted where necessary to contemplate the use of AI.
- **Review Procurement Policies:** Revisit your procurement policies to ensure that any AI tools or services you purchase comply with ethical and possibly upcoming regulatory standards.
- **Deploy Pilot Testing:** Before a full-scale implementation of new AI tools, consider running a “sandbox” test to identify any potential issues in a controlled environment and make necessary adjustments.
- **Monitor Regulatory Updates:** Stay updated on United States AI legislative environment and adapt your policies and practices accordingly. This is particularly important for employers in highly regulated sectors like healthcare, financial services, and life sciences.



# #6

## Looking ahead



# Q&A





# Tech Me Up!

AI webinar series  
by TaylorWessing

[taylorwessing.com](https://www.taylorwessing.com)

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