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# 2025 Labor & Employment Seminar

DENVER, CO

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# Today's Presenters

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# To Post, or Not To Post: Understanding Colorado's Pay Transparency Laws

**John Melcon**

Attorney / Taft – Colorado Springs

# Colorado's Equal Pay for Equal Work Act

- Enacted in 2019 (effective in 2021, amended in 2024) to help "close the pay gap in Colorado and ensure that employees with similar job duties are paid the same wage rate regardless of sex, or sex plus another protected status."
- Covers *all employers*—public and private—that employ at least one person in Colorado.
- EPEWA Part 2 (the "Act") is one of the "Posting, Screening, and Transparency" (POST) statutes.
- The Act generally requires disclosure of pay and other information in job postings; disclosure of available job opportunities to current employees; disclosure of selected candidates; disclosure of career progression requirements; and preservation of certain records.

# When is a job posting or notice required?

- The Act does *not* mandate external job postings, but it does impose content requirements for many external job postings if they are made.
- Internal notice of job opportunities must be provided to all Colorado employees when considering one or more candidates for the following, regardless of whether the opportunity is in Colorado (subject to limited exceptions):
  - Vacancies, i.e., an open or soon-to-be open position.
  - New positions, i.e., an entirely new job or an existing job changed enough to make it a different position, e.g., a change in title and pay; a material change in authority, duties, or opportunities.

# When is a job posting or notice required?

- Limited exceptions – internal notice is *not* required for:
  - Acting, interim, or temporary ("AINT") positions, i.e., positions lasting up to 9 months, unless held by another AINT worker for 7 of the previous 12 months without an internal notice.
  - Confidential replacements, i.e., where an employee to be replaced is not yet aware of the coming separation. But if any employee is notified, all qualified or similarly situated employees must be notified. Notice to all employees is required as soon as confidentiality needs end.

# When is a job posting or notice required?

- Limited exceptions – internal notice is *not* required for:
  - Non-competitive promotions:
    - *Career progression promotions*, i.e., regular/automatic promotions based on time in a specific role or other objective metrics (not discretionary or competitive).
    - *Career development promotions*, i.e., updating an employee's title and/or pay to reflect work performed or contributions already made by the employee. The work or contributions cannot be part of a different, existing position into which the employee is promoted.

# How and when must internal notices be made?

- Manner: notices must be in writing (e.g., email or intranet posting) by a method that reaches *all* Colorado employees. One notice can encompass multiple job opportunities.
- Timing: notices must be made to all Colorado employees on the same calendar day and far enough in advance of the hiring decision so employees receiving notice may apply. Individual employees can still be notified in advance of the general notice (that same day) if desired.

# Must employers interview multiple candidates?

- The Act is about job postings and notices; it does not require employers to consider or interview a certain number of internal or external candidates.
- If a specific person is expected to be selected, this may be included in the notice.
  - CDLE example: "*Jo Doe is recommended for promotion to senior accountant. Salary $50-70,000; health ins.; PTO; 401k. To apply by January 1, or to express interest in similar jobs, email interest@CompanyHr.com*."
- The consideration process must be non-discriminatory.
- Some employers have policies or procedures dictating when multiple candidates must be interviewed.

# What content is required in postings/notices?

- Note: If the job *cannot* be performed in Colorado (e.g., an in-person job based in Atlanta) and does not require more than modest travel to Colorado, or if the posting is in print and distributed entirely outside Colorado, EPEWA's *content requirements* do not apply.
- If the job *can* be performed in Colorado (including any job that can be fully remote from Colorado), internal and external postings must contain three items:
  - Compensation, i.e., rate of pay or range of rates, plus a general description (not amount) of other compensation such as bonuses, tips, or commissions.
  - Benefits, i.e., a list of all benefits (e.g., health insurance, retirement benefits, paid time off) but not specific details/values and not minor perks (e.g., employee discounts).
  - How and when to apply, i.e., where to access or submit applications, and the deadline.

# What post-selection notices are required?

- Within 30 days after selecting a candidate for an opportunity where internal notice was required, Colorado employees who will regularly work with the candidate must be notified of the selected candidate's name, new title, and former title (if applicable), plus information on how to express interest in similar opportunities.
- Compensation information is not required to be disclosed (but other laws protect employees who discuss their compensation).
- Regularly work with means employees who, as part of their job responsibilities, either collaborate or communicate about their work at least monthly, or have a reporting relationship (e.g., supervisor). Employers may comply by providing notice to a broader range of, or all, employees.

# What career progression notices are required?

For positions with career progression, the requirements for such progression, as well each position's terms of compensation, benefits, full- or part-time status, duties, and access to further advancement, must be made available to all eligible Colorado employees, i.e., those in a position that, when the requirements in the notice are satisfied, would move to another position listed in the notice.

# What are the record-keeping requirements?

Employers must keep records of job descriptions and wage rate history for each employee for the duration of employment plus two years after the end of employment.

# What are the consequences of noncompliance?

- Aggrieved persons (need not be employees) can file written complaints with the CDLE within one year.
- The CDLE “shall investigate complaints.”
- Upon finding a violation, the CLDE can fine employers $500 to $10,000 per violation.
- There is no private right of action for violations of the Act, but if an employee is suing for violations of EPEWA Part 1 (unequal pay) they can tack on claims related to the Act.

| | |
|---|---|
| **Total Complaints filed since January 1, 2021:** | 2,348 |
| **Voluntary compliance letters sent to employers before formal investigations:** | 605 |
| **Cure rate after employer receives voluntary compliance letter:** | 76.85% |
| **Formal investigations:** | 199 |
| **Total citations issued:** | 24 |
| **Citations with fines:** | 10 |
| **Total fines in all citations:** | $841,500.00 |
| **Total citation fines after post-citation settlements and waiver:** | $482,450.00 |
| **Total pre-citation settlements:** | 42 |
| **Pre-citation settlement fines:** | $248,500.00 |

# Further Information

- EPEWA Part 2, C.R.S. § 8-5-201 et seq. (some definitions in § 8-5-101)
- POST Rules, 7 CCR 1103-18 (superseding the Equal Pay Transparency Rules, 7 CCR 1103-13)
- CDLE INFO #9A, May 29, 2024 (not binding law)

# Immigration Updates 2025

**Emily Cashell**

Attorney / Taft - Cincinnati

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# Enforcement and Removal Strategies

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# Enforcement and Removal Strategies

Publicly set a goal of deporting 1 million immigrants annually, a figure more than triple the highest annual removal record on record (267,000 in fiscal year 2019).

Established new daily arrest quotas.

Increased enforcement activities, including growing numbers of collateral arrests of bystanders and family members.

Increased issuance of Notices to Appear.

Recommended for all individuals in the U.S. (even visitors) to carry evidence of status at all times.

# ICE Raid Reminders

**Can remain silent if ICE agents ask questions** or say, "I do not want to answer any questions," or "I need to wait until my supervisor arrives before proceeding with your request."

**Staff should NOT,** however, hide or conceal any person on the premises.

**Staff can remind any workers** they have the right to remain silent or have the right to contact an attorney.

**DO NOT tell workers** "Do not answer their questions."

# Prepare for raids in advance

**Create an internal action plan** to confirm:

- Who needs to be contacted within the organization.
- Who will be the direct communicators with the ICE agents.

**Designate spaces within the workplace** as private vs. public:

- ICE Agents can enter **public spaces** such as parking garages and lobbies.
- Cannot enter **private spaces** without a valid warrant, such as offices.

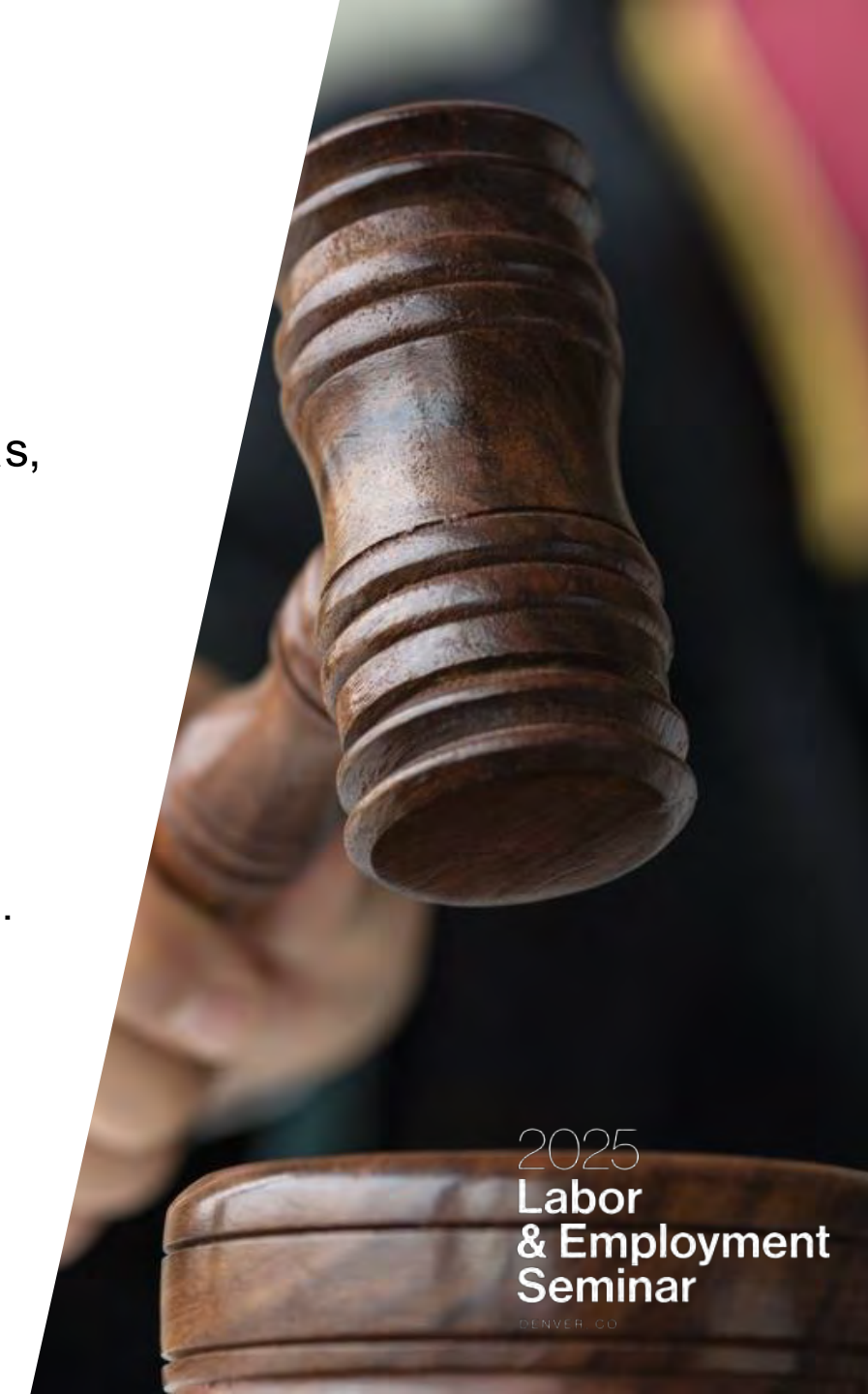
# Validating Documentation

**ICE Agents need a valid judicial warrant** to enter private areas, which includes:

- Signed and dated by a judge.
- Specific worksite location (address must be correct).
- Specific timeframe when search is to happen.
- Specific description of premises to be searched/items to be seized.

**Request** to make a copy of the warrant.

**An administrative warrant** is not enough.

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# Discretionary Ending of Parole Programs

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# Discretionary Ending of Parole Programs

**Department of Homeland Security has discretionary authority** to designate Temporary Protected Status or Parole programs for individuals from specific countries experiencing ongoing armed conflict, environmental disaster, epidemic, or other extraordinary and temporary conditions.

**In the first 6 months,** the administration has rolled back a number of these programs.

# TPS Programs – Current Country List

Afghanistan

Burma (Myanmar)

Cameroon

El Salvador

Ethiopia

Haiti

Honduras

Lebanon

Nepal

Nicaragua

Somalia

South Sudan

Sudan

Syria

Ukraine

Venezuela

Yemen

# TPS Programs

**Individuals under these programs** hold Employment Authorization Documents (EADs) in A12 or C19 categories.

**Documents presented to employers** may be facially valid but due to revocation of specific programs, may no longer be utilized for employment authorization.

# CHNV Parole Program

**Individuals under these programs** hold Employment Authorization Documents (EADs) in C11 category.

**E-Verify has created revocation reports** for cases opened with these specific EADs due to the program cancellation, causing employers to be required to reverify individuals.

**Litigation currently pending,** but the administration is continuing to revoke C11 EADs.

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# Intensifying Vetting and Travel Bans

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# Intensifying Vetting

**Emphasis on national security resulting in stricter vetting processes for USCIS applications and visa issuance:**

- Increased issuance of Requests for Evidence.
- Regulatory standards applied harsher than prior administrations.
- Review of social media and online presence to confirm if ‘anti-American activity’ is present.
- Results in longer wait times to secure work authorization.

# Travel Ban

**Current travel bans in place** imposing restrictions on certain countries. Recommended to be mindful to manage expectations for individuals from these countries.

**Travel bans differ per country,** some individuals cannot seek immigrant visas, whilst some banned for specific purposes like tourism, work, or study.


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# Travel Bans

## Total Visa Bans:

- Afghanistan
- Burma
- Chad
- Republic of the Congo
- Equatorial Guinea
- Eritrea
- Haiti
- Iran
- Libya
- Somalia
- Sudan
- Yemen

## Ban on Immigrant, Tourist, Student and Exchange Visas:

- Burundi
- Cuba
- Laos
- Sierra Leone
- Togo
- Turkmenistan
- Venezuela

# Exemptions that may apply for Travel Bans

- Individuals currently holding an approved visa.
- Dual-national individuals.
- Immediate relative green card applicants (spouses, minor children, and parents of US Citizens).
- Refugees.
- Members of athletic teams traveling for major sports events like World Cup and Olympics.

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# H-1B Presidential Proclamation

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# H-1B Presidential Proclamation - $100,000 Fee on New H-1B Cases

Taking effect on September 21, proclamation bans the following without payment of $100,000 fee or exemption:

- Approval of new H-1B petitions filed for individuals who are outside the U.S.
- Approval of new H-1B visas without payment of a $100,000 fee.

# H-1B Presidential Proclamation - $100,000 Fee on New H-1B Cases

## What we know:

- Individuals with valid H-1B visa stamps can continue to travel as usual.
- Individuals are eligible to receive an H-1B visa stamp if petition was filed BEFORE Sept. 21.
- Individuals with previously approved H-1B status can file for extensions.

## What we still need confirmation on:

- Will a foreign national who was physically present in the U.S. on Sept. 21, 2025, who then files for a Change of Status to H-1B at a future date be exempt from the entry restriction?
- How does this impact lottery-exempt employers?
- What factors will be considered in deciding whether to grant a National Interest Exemption (NIE) to an industry, company, or person? What does the application process look like?

# Supreme Court Update

**Raymond M. Deeny**

Partner / Taft - Colorado Springs

# Is DE&I Moribund Or Dead?

## *Ames v. Ohio Dep't of Youth Services*, 605 U.S. _____ (2025)

- Ms. Ames, a heterosexual woman, had been employed in Youth Services since 2004. In 2019, the Employer interviewed her for a new management position but hired a lesbian woman. The Employer demoted Ames from Program Director and hired a gay man to fill that role.
- Ames sued under Title VII, claiming that she had been discriminated against in both instances because of her sexual orientation.

# Is DE&I Moribund Or Dead?

## *Ames v. Ohio Dep't of Youth Services*, 605 U.S. _____ (2025)

- The Federal District Court of Ohio granted the Employer's Motion for Summary Judgment. The 6th Circuit Court of Appeals affirmed; both of whom followed the traditional *McDonnell Douglas* analysis, which relies on "circumstantial evidence". The District Court and Court of Appeals both concluded she failed because she failed to show **"background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority."** 78 F.4th 822, 825 (emphasis added).

# Is DE&I Moribund Or Dead?

## *Ames v. Ohio Dep't of Youth Services*, 605 U.S. _____ (2025)

- "Congress left no room for courts to impose special requirements on majority-group plaintiffs alone. This Court's precedents reinforce that understanding of the statute, and make clear that the standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group. *See, e.g., Griggs v. Duke Power Co*., 401 U. S. 424, 431 …." Unanimous decision, Justice Jackson delivered the opinion of the Court.
- The Circuit Courts have been split as to whether majority-group plaintiffs are subject to a different evidentiary burden than minority-group plaintiffs at the *McDonnell Douglas* first step. [The Circuit split includes the 8th Cir., the 7th Cir., the D.C. Cir. and the 10th Cir. – ***Notari v. Denver Water Dep't.*, 971 F.2d 585 (10th Cir. 1992).**

# Is DE&I Moribund Or Dead?

## *Ames v. Ohio Dep't of Youth Services*, 605 U.S. _____ (2025)

- **Question – Does "background circumstantial evidence" include DE&I?**
- FN3 (Thomas and Gorsuch Concurrence): "American employers have long been 'obsessed' with 'diversity, equity, and inclusion' initiatives and affirmative action plans. … Initiatives of this kind have often led to overt discrimination against those perceived to be in the majority."
- Thomas and Gorsuch questioned whether *McDonnell Douglas* framework is an appropriate tool to evaluate Title VII claims at summary judgment. *See* The Problem With Pretext, 85 Denver U. L. Rev. 503, 507 (2008) (Tymkovich).
- Practical Advice – Redo all your employment discrimination training. Do not create "background circumstantial evidence." If you don't, you will likely not get summary judgment in your employment discrimination litigation.

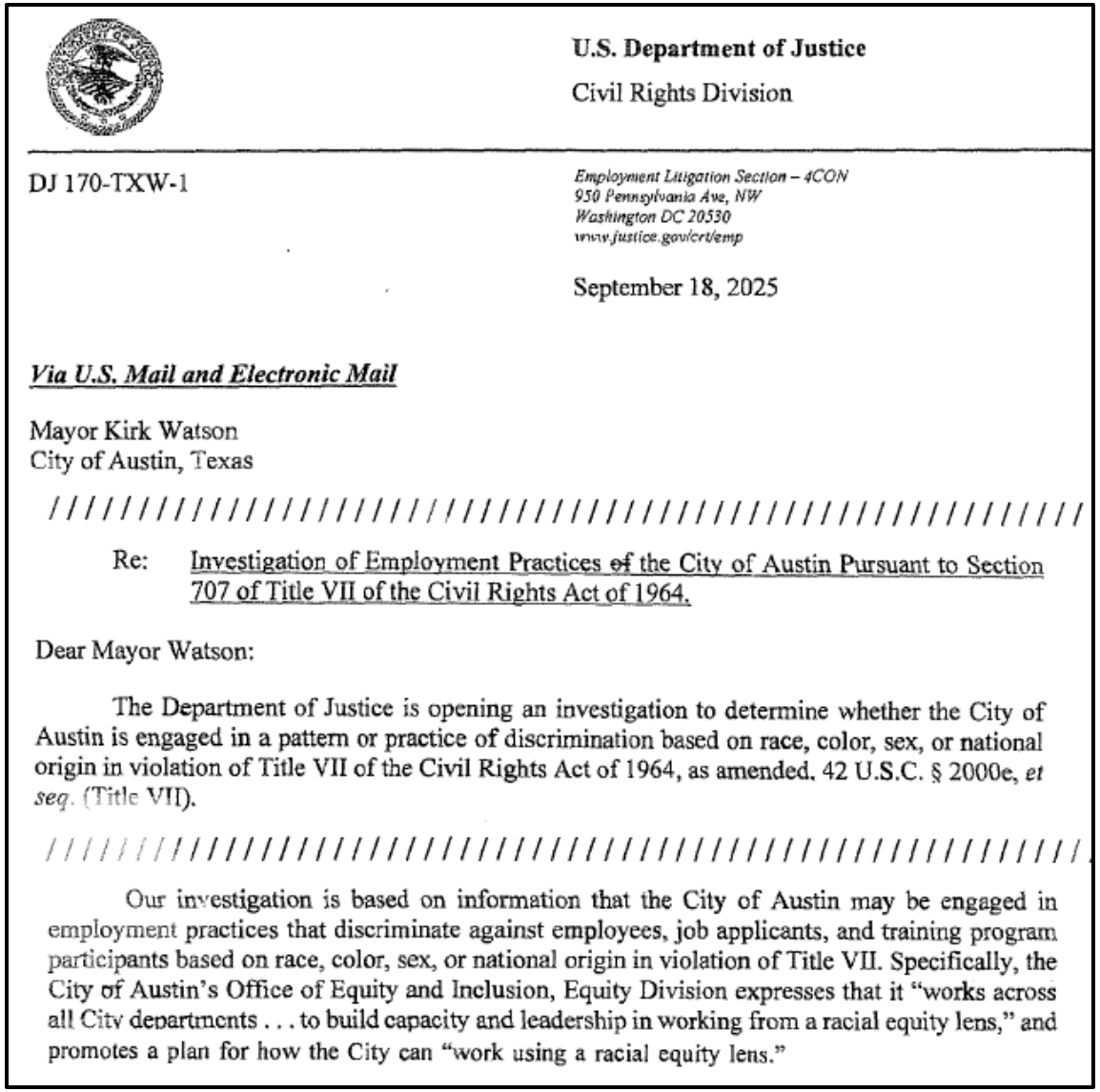
# Is DE&I Moribund Or Dead?

## The Background Circumstantial Evidence Ended With Executive Order 141173

- President Trump ended the “obsession” with DE&I programs by revoking Executive Order 11246 on February 12, 2025, in Executive Order 141173 for federal contractors and subcontractors and in the administration of federally assisted construction contractors
- EO 14173 also orders the DOL to cease promoting “diversity.” Contractors must certify that the contractor does not operate any programs promoting DEI that “...violate any applicable Federal anti-discrimination laws.”
- On January 24, 2025, the Acting Secretary of Labor issued an order directing the OFCCP and all other DOL employees “To immediately cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246...” and its regulations. All existing investigations are closed.
- An abundance of suits have been initiated against employers, public and private, who are making employment decisions based on their DE&I programs and “goals.”

# Is DE&I Moribund Or Dead?

***Department of Justice Investigating the City of Austin's practices***



U.S. Department of Justice
Civil Rights Division

DJ 170-TXW-1

*Employment Litigation Section – 4CON*
*950 Pennsylvania Ave, NW*
*Washington DC 20530*
*www.justice.gov/crt/emp*

September 18, 2025

***Via U.S. Mail and Electronic Mail***

Mayor Kirk Watson
City of Austin, Texas

Re: Investigation of Employment Practices of the City of Austin Pursuant to Section 707 of Title VII of the Civil Rights Act of 1964.

Dear Mayor Watson:

The Department of Justice is opening an investigation to determine whether the City of Austin is engaged in a pattern or practice of discrimination based on race, color, sex, or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (Title VII).

Our investigation is based on information that the City of Austin may be engaged in employment practices that discriminate against employees, job applicants, and training program participants based on race, color, sex, or national origin in violation of Title VII. Specifically, the City of Austin's Office of Equity and Inclusion, Equity Division expresses that it "works across all City departments . . . to build capacity and leadership in working from a racial equity lens," and promotes a plan for how the City can "work using a racial equity lens."

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# Is DE&I Moribund Or Dead?

## *EEOC v. District of Columbia Water and Sewer Authority,* Civil Action No. 25-3189 (D.D.C. 9-12-25)

- The EEOC sued the District of Columbia Water and Sewer Authority for age bias, alleging the agency targeted and terminated older, high-performing employes in favor of younger, less qualified candidates.
- The EEOC attempted pre-litigation settlement through conciliation.
- This case had been stayed pending further court order due to the federal government shutdown.

# Is DE&I Moribund Or Dead?

## Editorial *The Gazette* newspaper on September 1, 2025

An editorial by *The Gazette* Editorial Board on September 1, 2025, titled "DU just says 'no' to fashionable racism states:

- In a commendable move toward meritocracy, the University of Denver has announced the elimination of race-based scholarships and a scaling back of diversity, equity, and inclusion (DEI) initiatives." …
- "This shift at DU is part of a broader national trend of American institutions abandoning affirmative action and DEI frameworks. Following the U.S. Supreme Court's 2023 ruling against racist, anti-Asian admissions at Harvard University, numerous colleges have reevaluated their policies."
- "In February 2025, the Department of Education issued directives instructing universities to suspend all race-based programs, including scholarships and DEI efforts, with threats to withhold federal funds. Ohio State University, the University of Pennsylvania, and the University of Iowa are among those reversing their DEI stances amid this surge of cuts."

https://www.denvergazette.com/2025/09/01/editorial-du-just-says-no-to-fashionable-racism-3f354562-2b77-5524-8ce7-5e193c6cb571/

# Is DE&I Moribund Or Dead?

## EEOC Plans to Administratively Close All Pending Worker Charges Based Solely on Unintentional Discrimination Claims, says Bloomberg Law.

- Bloomberg Law reported that the EEOC issued an internal memo that instructs EEOC staff to close all pending worker charges based solely on unintentional discrimination claims, with limited exceptions, and issue right to sue letters for those cases by October 31, 2025.
- It's the latest major enforcement shift for the civil rights agency based on executive orders from President Donald Trump.

# Is DE&I Moribund Or Dead?

## EEOC Plans to Administratively Close All Pending Worker Charges Based Solely on Unintentional Discrimination Claims, says Bloomberg Law.

- The Director of the Labor Department's Office of Federal Contract Compliance Programs (OFCCP), Catherine Eschbach,  told staff she will transition into the principal deputy general counsel of the EEOC.
- Eschbach was appointed to lead the OFCCP in March, overseeing the Trump administration's moves to gut its power and slash its staff, as part of its plan to ultimately eliminate the office entirely.

# Is DE&I Moribund Or Dead?

## Time to Re-Educate about the History of Voluntary Affirmative Action:

- ***United Steelworkers v. Weber,***
  443 U.S. 193 (1979)
- ***Grutter v. Bollinger,***
  539 U.S. 306 (2003)
- ***Gratz v. Bollinger***,
  539 U.S. 244 (2003)
- ***Fischer v. Univ. Texas at Austin***,
  579 U.S. 365 (2016)

# Other Significant Decisions

## E.M.D. Sales, Inc. v. Carrera, 604 U.S. ____ (Nov. 5, 2024)

- ***Justice Brett Kavanaugh authored the unanimous opinion in the E.M.D.*** *Sales* case that overturned the Fourth Circuits ruling and held, across all circuits "that the default preponderance standard governs when an employer seeks to prove that an employee is exempt under the Fair Labor Standards Act."
- **The Court reasoned that** "courts usually apply the default preponderance standard" when faced with a statute that is silent on the standard of proof, as is the FLSA, and that the narrow circumstances when the Court has deviated from that approach do not implicate the FLSA.

# Other Significant Decisions

## E.M.D. Sales, Inc. v. Carrera, 604 U.S. ____ (Nov. 5, 2024)


- The Supreme Court's decision in this case is a win for employers, as it assures that they will not incur a heightened evidentiary standard in any jurisdictions when seeking to prove that an employee is FLSA-exempt.
- It establishes a consistent standard of proof across all federal circuits rather than subjecting employers to a steeper one in the Fourth Circuit and other circuits that could have potentially joined it.

# Other Significant Decisions

## Stanley v. City of Sanford, Florida, No. 23-997 (June 25, 2025)

- Karyn Stanley, a firefighter for the City of Sanford, Florida, since 1999, was forced to retire in 2018 due to a disability.
- When she was hired, the City provided health insurance until age 65 for retirees with 25 years of service or those who retired due to disability.
- In 2003, the City revised its policy, limiting health insurance to 24 months for those retiring due to disability. Stanley, who retired under the revised policy, received only 24 months of health insurance.

Primary Holding:

- The employment discrimination provision of the Americans With Disabilities Act does not reach discrimination against retirees who neither hold nor desire a job whose essential tasks they can perform with reasonable accommodation.

# Stay Tuned for the Next Term

## Is the NLRB Constitutional?

# Stay Tuned for the Next Term

## All Kinds of Executive Power Cases


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# AI is Everywhere, and Other Colorado State Law Updates

**Rick Rivera**

Attorney / Taft - Denver

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# Colorado State Law Update

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# Qualifying Reasons for Paid Family and Medical Leave Insurance Act ("FAMLI")

Current reasons an employee may take up to twelve weeks of paid FAMLI leave:

- Because of birth, adoption or placement through foster care, is caring for a new child during the first year after the birth, adoption or placement of that child;
- Caring for a family member with a serious health condition;
- The employee has a serious health condition;
- Qualifying military exigency leave (based on a need arising out of an individual's family member's active-duty service or notice of an impending call or order to active duty in the armed forces);
- Safe leave (time off to attend to their needs if they or a family member have experienced domestic violence, stalking, abuse, sexual assault, or other situations; and
- There is an additional four weeks of paid leave available for employees with "a serious health condition related to pregnancy complications or childbirth complications."

# Updated Qualifying Reasons and Changes in Premiums (SB 25-144)

Beginning January 1, 2026

- An additional 12 weeks of paid family medical leave will be available for parents of children receiving inpatient care in a neonatal intensive care unit (“NICU”).
- FAMLI premiums will be adjusted from 0.9% of wages per employee to 0.88%.
- Employers with 10 or more employees will be responsible for the full premium, which may be split with employees by deducting half of the premium from wages.
- Employers with nine or less employees will be responsible for paying half the premium, which may be deducted from employee wages.

# Changes in the Colorado Wage Act (HB 25-1001)

- **Definition of Employer:** Now includes individuals who own or control at least 25% ownership interest in the employer entity. Does not apply to a minority owner who has fully delegated their authority to control the day-to-day operations of the employer entity.
- **Increase in Amount a Claimant may Seek:** Beginning July 1, 2026, the cap for wage claims adjudicated by the CDLE will increase from $7,500 to $13,000 through December 31, 2027. Starting in 2028, administrative claim limits will increase by $1,000 (or more) every other year to account for inflation.

# Changes in the Colorado Wage Act (HB 25-1001)

**Standard for Employers to Recover Costs and Attorneys' Fees:** When an employer pays all amounts demanded in good faith within 14 days of an employee's demand, the employer may recover its costs and attorneys' fees in an associated civil action if a court finds that the employee's wage claim is "lacking substantial justification." The bill does not define "lacking substantial justification." Previously, an employer could recover such costs and fees if it made payment within 14 days of a demand and the employee failed to recover a greater amount in a subsequent court proceeding.

**New Transparency Requirement:** Requires the CDLE to publish information about adjudicated wage violations on the CDLE's website. Further, the CDLE must report an employer's willful violation not remedied within 60 days to any government agency that can deny, withdraw, or otherwise limit the employer's business license, permit, registration, or other credentials, which may impact the employer's ability to operate in the state.

# Changes in the Colorado Wage Act (Cont'd.)

- **Encouraging Local Enforcement:** A city, county, or city and county may enact and enforce enhanced laws relating to the payment of wages for work performed within its jurisdiction.
- **Protections Against Retaliation:** The bill expands retaliation protections to cover any person or entity that is "regularly engaged in a business or commercial activity" that contracts for labor, not just direct employers. The bill also extends anti-retaliation protections to employees or workers who raise "concerns in good faith" about compliance with wage and hour laws. Further, retaliation may be presumed if an adverse action occurs within 90 days of a worker's protected activity. Last, available remedies have been expanded to include compensatory damages for economic or noneconomic loss.

# Changes in the Colorado Wage Act (Cont'd.)

- **Increased Penalties for Willful Misclassification of Workers:** Employers found to have willfully misclassified an employee as a non-employee may be fined up to $5,000 per offense. Violations not remedied within 60 days will incur an additional $10,000 fine per offense. Employers facing subsequent violations within five years may incur fines between $25,000 and $50,000.
- **Authorizing CDLE to Waive Employer Penalties:** Under the Wage Claim Act, employers are subject to statutory penalties if they do not pay wages or other compensation owed within 14 days of receiving a demand for wages or compensation. The bill amends the Wage Act to allow the CDLE to waive such penalties if an employer remits payment within 14 days of being served with an administrative claim for the same wages. However, the CDLE is not permitted to waive penalties if the employer previously failed or refused to pay wages owed within the previous five years.

# Limitations on Restrictive Employment Agreements (SB 25-083)

**Effective August 6, 2025**

- Physicians, dentists, and advanced practice registered nurses are exempt from noncompete and non-solicitation agreements, **regardless** of the current highly compensated individual exemptions. Further, healthcare providers are permitted to disclose certain information to their existing patients related to their departure from a medical practice. This includes their continued practice of medicine, their new professional contact information, and the patients' right to choose a healthcare provider. These amendments apply to covenants not to compete entered into or renewed **on or after August 6, 2025**.

# Legal Protections for Transgender Individuals (HB 25-1312)

**Effective May 16, 2025**

- Expands legal protections for transgender individuals in Colorado. The Act codifies that a chosen name can reflect gender expression, which is a protected class under the Colorado Anti-Discrimination Act ("CADA"). Any instance of misgendering or "deadnaming" may be considered a discriminatory act under CADA.

# Biometric Data Privacy Amendment

**Effective July 1, 2025**

- Amends the Colorado Privacy Act.
- Governs two categories of biometric data.
- **Biometric Identifiers**: "data generated by the technological processing, measurement, or analysis of a consumer's biological, physical, or behavioral characteristics which can be processed for identification." Includes fingerprints, retina scans, palm prints, and facial recognition.
- **Biometric Data:** means one or more "biometric identifiers" that "are used or intended to be used" for identification purposes, either alone or in combination with other "biometric identifiers" or personal data. "Biometric data" does not include digital or physical photograph, an audio or voice recording, or data generated from those sources unless they are used for identification purposes.

# Biometric Data Privacy Amendment (Cont'd)

- **Must Obtain Consent Before Collecting Biometric Identifiers:** Employers may require consent as a condition of employment only when the data is used: (1) to permit access to a secure physical locations and secure hardware or software; (2) record the commencement and conclusion of the employee's full work day, including meal breaks and rest breaks in excess of thirty minutes; (3) improve or monitor workplace safety or security or ensure the safety or security of employees; or (4) improve or monitor the safety or security of the public in the event of an emergency or crisis situation.
- **Create a Written Policy:** must include a retention schedule for biometric identifiers and biometric data, a plan for responding to a data security incident that may compromise the security of biometric identifiers or biometric data, and guidelines for the deletion of biometric identifiers.

# Biometric Data Privacy Amendment (Cont'd)

**Steps for Employers to consider:**

- Conduct an audit to determine what technology at the organization, if any, collects information within the scope of the Biometric Amendment and other biometric laws. Employers should bear in mind that, with the growth of artificial intelligence, an increasing number of workplace technologies collect biometric information in some form.
- Identify the states where the employer collects biometric information and purposes of use to determine consent and other compliance requirements.
- Obtain appropriate consent and implement biometric policies, as needed.

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# Colorado AI Act

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# Background

- Signed into law May 17, 2024.
- Designed to be the nation's first comprehensive law regulating artificial intelligence systems used in high-stakes decisions like employment, housing, loans, and healthcare. The act requires a developer of a high-risk artificial intelligence system to use reasonable care to protect consumers from any known or reasonably foreseeable risks of algorithmic discrimination.
- The CAIA would require companies to conduct impact assessments, provide consumer disclosures, and maintain risk management programs when using a "high risk" AI system for "consequential decisions."
- "High-risk" means "any artificial intelligence system that, when deployed, makes, or is a substantial factor in making, a consequential decision."
- Originally slated to go into effect February 1, 2026.
- During the previous legislative special session, effective date was moved to June 30, 2026.

# Background (Cont'd)

"Consequential decisions" include:

- Education enrollment or opportunity;
- Employment or employment opportunity;
- Financial or lending service;
- Essential government service;
- Healthcare service;
- Housing;
- Insurance; and
- Legal service.

# Algorithmic Discrimination

The use of an AI system results in unlawful differential treatment or impact that disfavors an individual or group based on:

- Actual or perceived age
- Color
- Disability
- Ethnicity
- Genetic information
- Limited proficiency in English language
- National Origin
- Race
- Religion
- Reproductive health
- Sex
- Veteran status

# Covered

**Who is covered? Deployers and developers.**

- Deployers: a person doing business in Colorado who deploys a high-risk AI system.
- Developers: a person doing business in Colorado who develops or intentionally and substantially modifies an AI system.

# Deployment

**How is AI deployed in the employment context?**

- Recruiting: resume screening, candidate sourcing.
- Candidate Engagement: initial interviews and screenings, assessing candidates to move to the next round.
- Performance Management: Tracking performance, employee metrics, providing data and insights for reviews and promotions.

# Obligations

**Developers must disclose** any known or reasonably foreseeable risks of algorithmic discrimination arising from the intended use of a high-risk AI system to the AG and to all known deployers within 90 days if:

- The developer discovers the system has been deployed and has caused or is reasonably likely to have caused algorithmic discrimination.
- The developer receives a credible report from a deployer that the system has caused algorithmic discrimination.

# Obligations (Cont'd)

**Deployers must:**

- Conduct annual impact assessments.
- Notify the Colorado Attorney General that a high-risk AI system they deployed has caused algorithmic discrimination within 90 days after discovering that discrimination.

# Guidance

**EEOC:**

- Gives guidance on validity studies.
- EEOC Four-fifths Rule.

**Impact Assessment Studies:**

- Examines how the system will impact users.
- Looks at training data.
- How the system was developed.
- Have flaws been updated?
- How does it work in practice?

# Enforcement

- AG has excessive enforcement authority to address violations.
- Can assume there will be auditing mechanisms implemented at some point.
- Penalties include fines of up to $20,000 per violation and injunctive relief.
- No private right of action.
- If a developer or deployer has complied with the Act's obligations, there is a rebuttable presumption they used reasonable care to avoid algorithmic discrimination.

# Concerns

**Governor Polis Signing Statement:**

- “This law creates a complex compliance regime for all developers and deployers of AI doing business in Colorado, with narrow exceptions for small deployers. There are also significant, affirmative reporting requirements between developer and deployer, to the attorney general, and to consumers.”
- “I am concerned about the impact this law may have on an industry that is fueling critical technological advancements across our state for consumers and enterprises alike. Government regulation that is applied at the state level in a patchwork across the country can have the effect to tamper innovation and deter competition in an open market.”

# Concerns

NEWS: TECHNOLOGY

## Colorado lawmakers abandon special session effort to tweak AI law, will push back start date to June 2026

# NLRB Developments (emphasizing impact on non-union employers, too)

**Grant Gibeau**

Partner / Taft - Minneapolis

# Current NLRB Make-Up

**David Prouty**
Appointed 2021
Term through August 2026

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# Trump Fires Wilcox

## Democrat appointee (Biden, 2023)

- Term was to run through 2028.
- Terminated by President Trump on January 27, 2025.

  29 U.S.C. § 153(a)
  "may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."

Termination *flipped* by D.C. Circuit – April 7
Supreme Court Issued Emergency Stay – April 9

# Pending Trump Appointees

**Scott Mayer**

- Currently chief labor counsel at Boeing Corporation.

**James Murphy**

- Former chief counsel for NLRB Member Marvin Kaplan.

# Major Update #1 – General Counsel

- NLRB's General Counsel is appointed by the President to a 4-year term.
- Independent from the Board.
- Responsible for investigation and prosecution of Unfair Labor Practice Charges.

**Acting GC – William Cowen**

**Current Nominee – Crystal Carey**

# GC Memos – GC 25-05 (Feb. 14, 2025)

Revoked several prior, controversial GC memos, including:

- **GC 23-08**
  - Non-Competes.
- **GC 24-04**
  - Expanded Remedies for ULP Victims.
  - GC 21-07; 24-04; 25-02.
  - Securing “Full” Remedies in Settlement.
- **GC 23-05**
  - McLaren Macomb Interpretation Issues.

# Newly Issued GC Memos

GC 25-07 – Surreptitious Recordings of Bargaining Sessions.

GC 25-08 – Salting Investigation.

GC 25-11 – Factors for 10(j) Relief:

(1) likelihood of success on the merits;

(2) likelihood of irreparable harm in the absence of an injunction;

(3) the balance of equities favoring injunctive relief; and

(4) injunctive relief being in the public interest.

# *Siren Retail Corp. d/b/a Starbucks*
# November 8, 2024

**Comments made during union drive.**

**"Unlawful threats":**

- "Unionization would be futile";
- "Would cause Employees to lose certain benefits"; and
- "Collective bargaining would not redress the employees' current inability to receive tips from customers' credit card payments."

# *Siren Retail Corp. d/b/a Starbucks – cont.*

**Starbucks did *not* violate the Act** by engaging in the following activities during the organizing campaign:

**Providing manager statements** concerning the impact unionization would have on the employees' ability to address issues individually with management;

**Holding** an employer-mandated campaign meeting; and

**Making factual statements** concerning the duration of collective bargaining, including that it takes "on average a year to eighteen months" for the parties to reach an agreement.

# *Siren Retail Corp. d/b/a Starbucks*

**Holding**:

Statements made during an organizing campaign that would result in the loss of an existing benefit, needs to be nuanced to make sure it is lawful.

# *Amazon.com Services LLC*
# November 13, 2024

**Mandatory** *captive audience* meetings no longer lawful.

**Safe harbor,** inform employees in advance:

1. The employer intends to express its views on unionization at a meeting at which attendance is voluntary.
2. Employees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting.
3. The employer will not keep records of which employees attend, fail to attend, or leave the meeting.

# *Endurance Environmental Solutions, LLC* - December 10, 2024

Union waiver of bargaining.

- Contract Coverage
  - *MV Transportation* (Trump Term 1).
    - "Compass or scope of CBA language."
- Clear and Unmistakable Waiver
  - High bar to meet.
    - "Fully discussed and consciously explored."

# But is the NLRB even constitutional?

*Space Exploration Technologies Corp. v NLRB* – 5th Cir. Aug. 19, 2025.

- Removal protections of NLRB.
  - Board members – "neglect of duty or malfeasance in office."
  - ALJs – "good cause" and a merit protection hearing.
- Petitioner argues, and Fifth Circuit agreed – being subjected to proceedings by unconstitutionally insulated officers constitutes irreparable harm, leading to preliminary injunctions blocking the NLRB cases.
- Supreme Court paused reinstatement of former board member Gwynne Wilcox on May 22, 2025.

# “Unlawful DEI” Defined Updates Since January 2025

**Sharon Ng**

Partner / Taft – Phoenix

# EO # 1 (Brief Jump Back in Time)

Ending Illegal Discrimination and Restoring Merit-based Opportunity

- Signed January 20, 2025

Key Provisions:

- Stated purpose – to end “illegal preferences and discrimination”
- Federal contractors
- Private employers

# EO #2

- Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
- Signed January 20, 2025
- Key Provisions

# EO #3

- Ending Radical and Wasteful Government DEI Programs and Preferencing
- Signed January 20, 2025
- Key Provisions


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# Since EOs #1-3

- February 21, 2025 (Initial Injunction)
- March 14, 2025 (Injunction Lifted)
- March 19, 2025
- EEOC & DOJ provide guidance:
  - What To Do If You Experience Discrimination Related to DEI at Work | U.S. Equal Employment Opportunity Commission
- “What is considered ‘unlawful’ DEI”
- Employment actions may not be motivated by an employee’s protected characteristic

# Attorney General's Memo

**July 29, 2025: Memo: AG Pam Bondi Memo**

- "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination"

**Offensive Practices DOJ Identified**

- Granting Preferential Treatment
- Use of "proxies"
- Segregation based on protected characteristics and failure to segregate
- Use of protected characteristics in candidate selection
- Training programs that stereotype

# What Now?

Next steps for federal contractors/subcontractors and federal grant recipients

- Continue to ensure DEI policies and programs comply with Title VII/Civil Rights Act of 1964
- Revise any policies or programs that allow preferences for any race, sex, or other protected characteristics
- Be aware of enforcement agency investigation risk
- Reaffirm your commitment to equal employment opportunity

# What Now?

**Considerations and next steps for private employers**

- Audit DEI statements, recruitment and hiring practices, and programs for compliance with federal civil rights laws
- Do your DEI efforts align with your organization's values?
- How are you communicating changes and commitments internally?


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# OSHA Update

**Pat Miller**

Partner / Taft - Denver

# End Of *Chevron* Deference

## *Loper Bright Enterprises v. Raimondo*

- Courts, not agencies, should interpret ambiguous statutes.
- OSHA interpretations will no longer receive deference from ALJs.

# OSHA Under Trump 2.0

- Fewer inspectors (hiring freeze) and inspections.
- Reduced budgets for agencies.
- Reduced emphasis on enforcement.
- And, obviously, the shutdown.

# OSHA Under Trump 2.0

## Secretary of Labor Lori Chavez-DeRemer

- Former representative from Oregon.
- Pro-Union.
- Republican support questionable.
- Confirmed.

# OSHA Under Trump 2.0

## New Head of OSHA David Keeling

- Formerly at Amazon.
- Also worked at UPS for 37 years and headed its safety compliance from 2011-2018.

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# Will OSHA Survive?

**February 2, 2025:**

Republican-Backed Bill “Nullify the Occupational Safety and Health Administration (NOSHA) Act”

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# New PPE Standard

## Requires that PPE properly fit employees

- Necessitates that employers take into account sizes and body types.

# Response From States?

Colorado is proposing a heat stress statute (including private right of action).

Increased state plan enforcement?

More state plan states?

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# Managing Privacy & Security Risk in the Workplace:

## 10 Things You Can Do Right Now

**Scot Ganow, CIPP/US**

Partner / Chair Taft – Data & Security
Dayton

# Multi-Factor Authentication (MFA). Please. Do it. Now.

By Scot Ganow on June 10, 2021

Posted in Data Breach

I am often asked by clients and my partners alike, "What is the #1 thing companies should be doing to secure their data and systems?" Usually when I get requests to boil down everything involved in my practice area to one topic, I balk. And for good reason. However, this one is easy.

**Multi-Factor Authentication or "MFA."**

After entering an ID (email address) and password, MFA simply requires a user to receive and enter a second form of authentication sent via a mobile text, a phone call, email, or from a security token to gain access to systems or accounts. Because the hacker attempting access likely does not have access to both forms of authentication, the access is denied. Attack stopped. *The overwhelming majority of the data security*


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# 2. Administrative, Technical and Physical Safeguards (“ATP”)

- Basic building blocks of any Data Governance Program
- Rooted in law and industry standards
- Safeguard the confidentiality, integrity, & availability of the data

# 2. Administrative Safeguards

- Develop both policies (the “WHY”) and procedures (the “HOW”)
- Train on both policies and procedures
- Regularly scheduled training sessions
  - Assessments
  - Evaluation of competency
  - Awareness program (there is a difference)

# 2. Administrative Safeguards

## Avoid the “Costanza Defense”


# 3. Privacy

# 3. Privacy: Personally Identifiable Information ("PII")

| Direct Identifiers | Indirect Identifiers |
|---|---|
| First and Last Name | Marital Status |
| Telephone Number | Number of Children |
| Email Address | Geographic Subdivisions |
| Employee Identification Number | Skin Color |
| Date of Birth | Gender |
| Home Address | Hair Color |
| Credit Card Information | Behavioral Data |
| Employee Performance Data | Salary or Bonus Information |
| Social Security Number | Nationality |
| Driver's License Number | Ethnicity |
| Tax Identification Number and Category | Health Information |
| Information about criminal history | Disability Status |
| Biometric Data (Pictures, Fingerprints) | Sexual Orientation |
| Genetic Data | Records on Working Times, Breaks, Holidays |

# 4. Privacy: Set and Manage Boundaries

- Employees: “No Expectation of Privacy” on Company Systems
- Boundaries: Employee Information vs. Company Information
- Trust, but verify: Monitor and Audit Employee Activity

# 5. Privacy:  Employee Surveillance

- Acceptable when disclosed to employees in advance
  - Signage
  - Policy
- Limited to company-owned information systems and property
- Limited to areas of employee safety/company security/business continuity
- Must comply with other laws (i.e. not in bathrooms, private offices)

# 6. Security: Go with Layers

- Administrative:  Policies, procedures, training, audits, agreements

- Physical:  Locks and keys, passkeys, role-based access controls, ID badges, visitor management

- Technical:  Strong passwords, encryption, firewalls, and…..wait for it….

**Q: What is the best defense against a "data breach?"**

**A: Not having the data in the first place.**

# 7. Record Retention Policy

- Consider all records, both digital and hard copy
- Email is “different”
- Develop & implement a policy rooted in: legal, contractual & business principles
- Slow and steady
- Just. Get. Started.

# 8. There’s this new thing …..AI?

# 8. AI: Yeah, Not Really New

- Email/Smartphones
- E-discovery (IRT)
- Television
- Advertising
- Recruiting
- Training

# 8. AI: Generative Artificial Intelligence

**A trained computer system that generates content**

- Trained on large volumes of text, images, sound, voice, or video
- System: Deep learning algorithm (e.g., large language model ("LLM"))
- AI → Machine Learning → Deep Learning
- Neural networks
- Content: text, images, sound, voice, video

# 8. AI: Issues with Confidentiality

**Confidentiality with Third Party Platforms:** **Read the terms of service carefully.**

- Understand terms can be updated at any time without prior notice.
- ZOOM: Recently updated its terms to obtain ownership of call data for purposes of AI training and processing.

**Disclosure of private/client/health/employee data:** You may breach an agreement or violate state or federal law, or foreign regulations is sharing data with a platform.

**AI Training:** **Prompt content and user data may be used to train and improve algorithms (Bard, ChatGPT, etc.).**

- Samsung employees upload proprietary code into ChatGPT.

**Data breaches:** **User data susceptible to hacking.**

- 100,000 ChatGPT user accounts hacked.

# 8. AI: Compliance – Best Practices

**Policy Guidance:** Implement an internal-use policy or a ban on using AI platforms; or set up a process by which new AI platforms are evaluated and access granted.

**Data Governance:** Do not disclose proprietary or sensitive customer or employee/customer personal information through AI.

**Training:** Require training for all authorized users of AI and do not allow AI access without completion of said training.

# 9. AI: Employment Issues

## Bias:

Bias is a big criticism of the GAI training process, so it is important to understand how the platforms were trained on how bias factors into generated content.

- DOJ guidance
- EEOC guidance
- Colorado AI Act (SB24-205):
  Concerns with “high-risk” AI systems

## Adverse Impact:

If the platform has an adverse impact on people of a particular race, color, religion, sex, or national origin, or on individuals with a particular combination of such characteristics, using it in making employment decisions could violate Title VII.

# 9. AI: Employment — Best Practices

## Have a written policy:

Implement an internal-use policy on how AI will be used in the employment space – and not.

## Assess risk during:

Regularly self-audit your AI platform and tweak the tool if adverse impact arises.

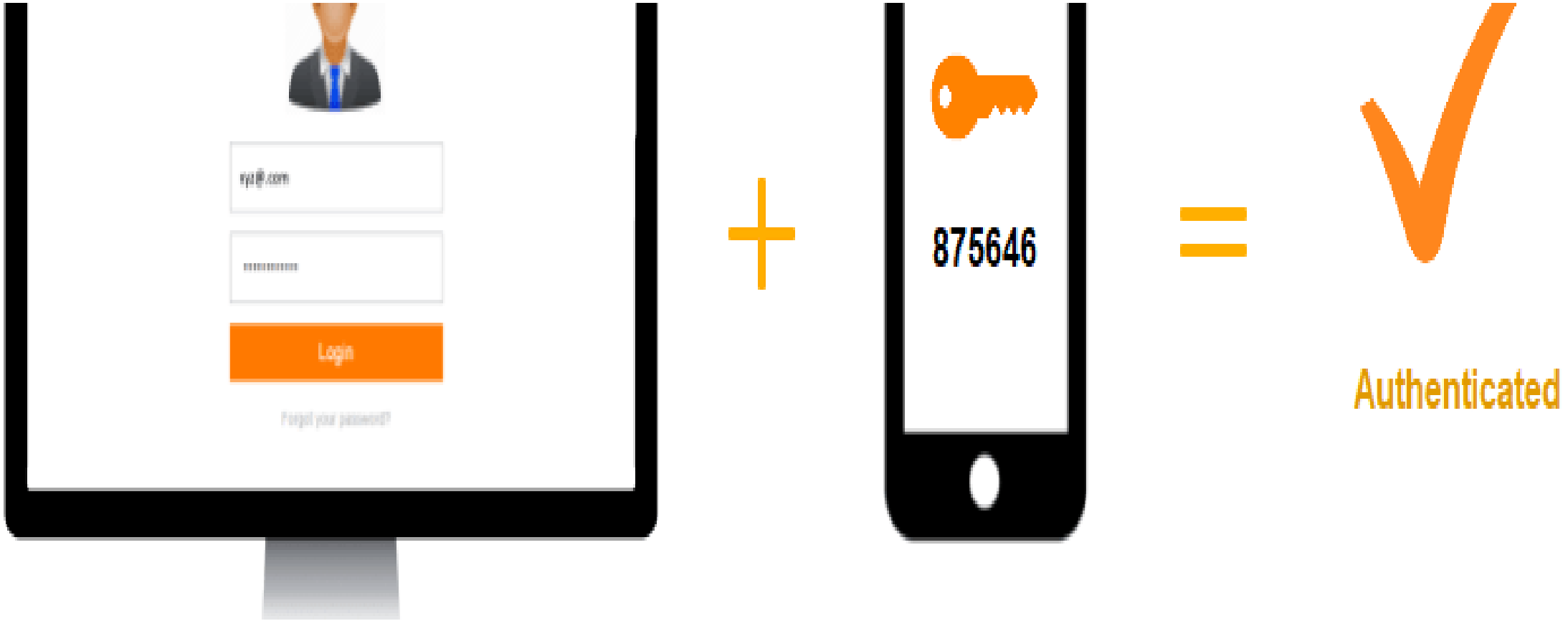
## Assess risk before:

Analyze AI decision-making tools for adverse impact.

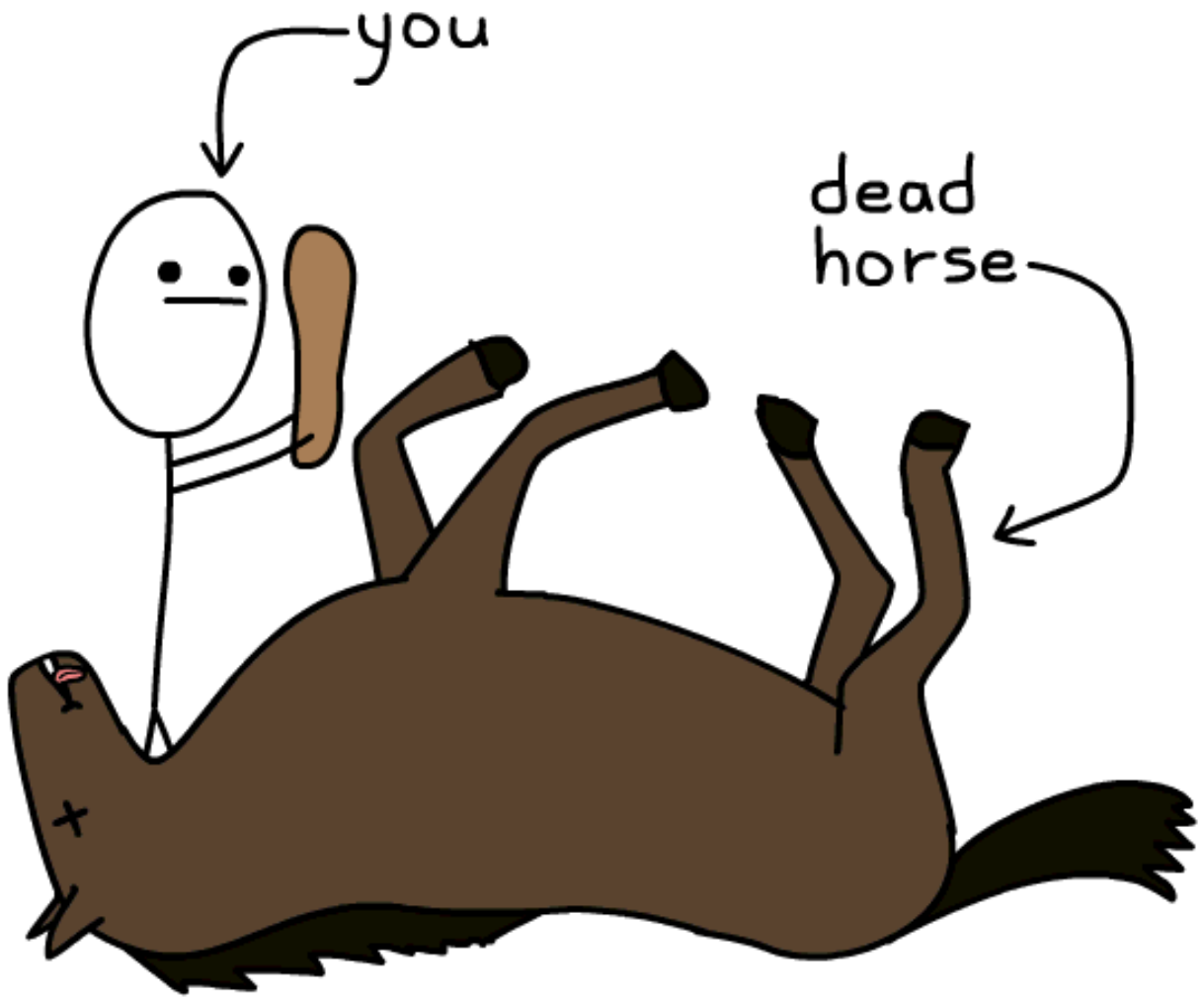
## Remain flexible and diligent:

- Be aware of less discriminatory alternatives during the development or selection process.
- Failing to choose a less discriminatory algorithm that it considered during the software selection process may give rise to liability.

# 10. Oh yeah, in case we didn't mention it…



# O.K. Scot…….. you and this MFA thing….



# Privacy & Data Security Practice ("PDS")

- 28 attorneys, firm-wide
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  Privacy & Data Security Insights


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