

DIVERSITY BRIEF

ARTIFICIAL INTELLIGENCE AND BIAS IN RECRUITMENT AND HIRING: RISKS, REGULATION, AND STRUCTURAL IMPACTS

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The State Bar of *California*

ABOUT THE COUNCIL ON ACCESS AND FAIRNESS

The Council on Access and Fairness (COAF) supports the Board of Trustees of the State Bar of California in advancing diversity and inclusion across the legal profession, including efforts to strengthen the pathways into the profession, promote retention and career advancement, and support judicial diversity. COAF's work is funded entirely through voluntary attorney contributions to the State Bar's Elimination of Bias fund.

SUMMARY

Amid a rapidly changing technological landscape, attorneys and employers have a vested interest in understanding how artificial intelligence is reshaping recruitment and hiring. Automated decision-making systems, often developed and sold by private vendors, are transforming hiring but can also expose organizations to liability under California's civil rights and employment laws if their use leads to discriminatory outcomes. Beyond compliance, unchecked reliance on opaque algorithms can pose larger questions about core professional values of fairness, transparency, and accountability that undergird the legal system itself. Lawyers and legal employers have a stake in ensuring that technology used in recruitment and hiring advances, rather than undermines, equal opportunity and public well-being.



AI IN THE CONTEXT OF HIRING

AI is often used as shorthand for a broader set of technologies known as automated decision-making (ADM) systems. While the two categories overlap, they are not the same: not all ADM tools rely on AI and not all AI applications involve ADM. The term “AI” has nonetheless become a convenient umbrella for the predictive and rule-based systems that increasingly shape hiring processes.

Machine learning, a subset of AI, enables computers to learn from data and improve performance without explicit programming. Unlike traditional software that follows fixed instructions, machine learning models identify patterns in data to refine predictions over time.

More than 90 percent of employers¹ and over 98 percent of Fortune 500 companies² use ADM tools in hiring, primarily to filter, rank, and screen candidates.

While these tools streamline recruitment and reduce costs, they risk reinforcing longstanding inequities while also reducing transparency in hiring decisions.

FOUR MAJOR AREAS OF CONCERN

As AI use becomes widespread in recruitment and hiring, researchers have identified several recurring areas of risk that raise equity and compliance concerns.

1. Hiring discrimination

AI tools replicate the same patterns of exclusion seen in human decision-making, reinforcing racial, gender, class, and other disparities embedded in historical hiring data.³

2. Algorithmic bias

When trained on biased or incomplete datasets, models can amplify inequality, producing systematically unfair outcomes while appearing neutral.⁴

3. “Black box” systems

AI-driven hiring tools are frequently unexplainable and difficult to audit, making it difficult for applicants, or even employers, to identify or challenge decisions.⁵

4. Regulatory tension

Legal frameworks lag behind technological innovation, and can create frictions between civil rights laws and AI use in employment.

COMMON USES OF AI IN HIRING

AI and ADM tools are increasingly used across many stages of recruitment, offering new efficiencies but also risks for fairness and access.

- **Resume screening and keyword matching:** Algorithms analyze resumes to rank candidates by perceived fit, often relying on past hiring data.
- **Chatbots for candidate engagement and scheduling:** These tools streamline communication but its language processing can favor communication systems associated with particular demographic groups.
- **Video interviews and soft-skill analysis:** Some systems use facial recognition and speech pattern analysis to evaluate tone, affect, or “cultural fit,” raising major concerns about privacy, validity, and discrimination.
- **Automated background checks:** Predictive analytics can exacerbate bias when using data tied to credit, criminal, or employment histories, which themselves reflect longstanding racial and socioeconomic inequities.

EVIDENCE OF BIAS AND RISK

Empirical studies consistently show that both human and AI-driven hiring processes reproduce systemic bias, with algorithmic systems often reflecting and amplifying historical patterns of discrimination found in human decision-making:

- The 2004 landmark study “Are Emily and Greg More Employable Than Lakisha and Jamal?” found that applicants with white-sounding names had a 50 percent higher callback rate than those with Black-sounding names, revealing how racial bias persists even under standardized hiring conditions.⁶
- According to legal scholar Pauline T. Kim, there are additional risks that stem partly from whose interest AI tools serve. Because predictive systems are designed to optimize employer outcomes rather than worker equity, they often encode unequal power dynamics into their design, reinforcing the very hierarchies they purport to neutralize.⁷
- These same human biases are often embedded into the data that train AI models. In 2024, Bloomberg replicated similar experiments using AI screening tools and found that algorithms amplified racial and gender bias. The results underscore how automated systems can scale discrimination faster and less transparently.⁸
- Collectively, these findings show that AI models trained on biased human data not only perpetuate existing inequities but can also intensify them when deployed without adequate oversight and transparency.

MECHANISMS OF BIAS⁹

Bias in AI-driven hiring is often subtle and structural rather than explicit.

Proxy variables

Seemingly neutral factors such as zip codes and degree fields can stand in for class, race, or gender, allowing bias to enter models indirectly. For example, screening out candidates based on certain geographic areas can mirror historic patterns of segregation or redlining.

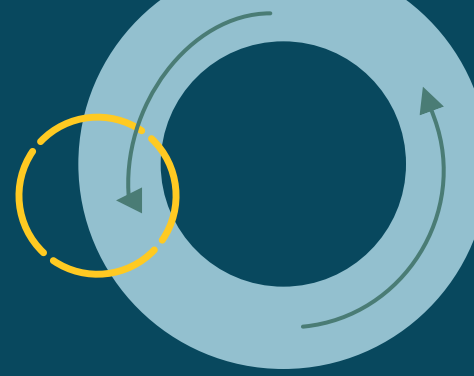
Data gaps

Underrepresented groups are often absent or undercounted in training datasets, leading AI tools to misclassify or exclude them altogether. This can result in qualified applicants never appearing in searches or rankings. The process can then become circular as AI use widens.

Automation bias

Employers may trust algorithmic outputs, assuming computer-generated results are objective. This can reduce human oversight and accountability, and validate biased outcomes when left unchallenged.

REGULATORY AND LEGAL LANDSCAPE



FEDERAL PROTECTIONS

- Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA)¹⁰ prohibit discrimination in hiring and employment. However, enforcement remains retrospective: individuals must first experience discrimination and then prove bias, a process that is difficult when AI systems operate as black boxes—internal decision-making processes that are not transparent or understandable to users, developers, or affected individuals.
- The Equal Employment Opportunity Commission launched the AI and Algorithmic Fairness Initiative (2021–2023) to ensure that automated hiring complied with federal civil rights law. The program was disbanded in 2025, through executive order, removing clear federal guidance on responsible AI use.¹¹
- Federal policy has since prioritized innovation and competitiveness in AI governance.¹²

CALIFORNIA AI REGULATION

California is emerging as a national leader in regulating AI and automated decision systems (ADS) in employment. State policymakers and civil rights agencies have advanced efforts to align technology governance with anti-discrimination law. Building on the Fair Employment and Housing Act (FEHA), California's recent legislation introduces regulations that hold employers, and their third-party vendors, accountable for bias and discrimination in AI-driven hiring.

- FEHA: California's Fair Employment and Housing Act provides broader anti-discrimination protections than federal law. The California Civil Rights Department (CRD) enforces these provisions, including those governing employment practices.
- SB 53 (Transparency in Frontier Artificial Intelligence Act): Authored by Senator Scott Wiener (D–San Francisco), this law makes California the first state to enact a statute specifically on frontier AI safety and transparency. It regulates developers of advanced and high-resource AI models by requiring written governance frameworks, safety incident reporting, and transparency disclosures.¹³
- New Regulations (Effective October 1, 2025): Under Cal. Code Regs. § 11008.1, employers are legally responsible for discrimination resulting from the use of ADS, AI, or algorithms, even when those systems are provided by third-party vendors.¹⁴

CASE STUDY: THE WORKDAY LAWSUIT AND ALGORITHMIC DISCRIMINATION

In 2024, Derek Mobley filed a lawsuit against Workday, a large provider of human resources and AI-driven hiring software, alleging that its algorithms discriminate against older, Black, and disabled applicants.¹⁵ Workday is the most widely used software among Fortune 500 companies.¹⁶ The case argues that Workday's screening systems function as an "agent" of employers under Title VII, ADA, and ADEA, making both Workday and its client employers liable for bias. If Workday's algorithms are found to have systematically filtered out protected groups, the case could set a precedent for treating AI vendors as co-employers or agents under anti-discrimination law.

STRUCTURAL EQUITY AND IMPLICATIONS

- AI does not eliminate bias in recruitment and hiring, it can automate and scale it. When hiring decisions are delegated to ADM, biased patterns in historical data can be replicated thousands of times faster and across multiple employers.
- Data-driven hiring mirrors existing inequities in race, class, gender, and disability. Because these systems learn from past employment data, they often reproduce structural barriers such as unequal access to education, professional networks, or caregiving accommodations.
- Legal and ethical standards lag behind technology adoption, leaving gaps between practice and policy. Employers may deploy AI tools faster than regulators can assess them, creating uncertainty about accountability and responsibility, and compliance with civil rights law.
- Transparency and oversight are essential to ensuring fairness, yet both remain underdeveloped. Policymakers and advocates continue to debate who should audit, govern, or certify AI hiring tools, and how those processes can be credible and enforceable as the AI market booms.

USING AI RESPONSIBLY IN HIRING

As employers and attorneys integrate AI or other ADM tools into recruitment and hiring, several key principles can help align efficiency with fairness and professional responsibility.

Clarify purpose and scope

Identify the specific goal of adopting AI. Is it to increase efficiency, manage volume, or support consistency? Consider whether automation is the most appropriate tool for that goal.

Ensure human oversight

AI should assist, not replace, human judgement. Include manual review for candidates screened out or flagged by automated systems to prevent bias from going undetected.

Audit for bias

Regularly test the system's outcomes to ensure that they do not disparately impact individuals based on race, gender, disability, or other protected characteristics.

Maintain transparency

Inform applicants when automated tools are used and provide clear avenues for inquiry or reconsideration. Transparency reduces risk.

CALLS TO ACTION

AI offers opportunities to enhance efficiency and innovation across the legal sector, but it also raises new questions about equity, accountability, and public trust. Additionally, under Rule 8.4.1(b) of the California Rules of Professional Conduct, lawyers have an ethical duty to prevent unlawful discrimination and bias in connection with their practice; a duty that extends to the use, design, and oversight of AI tools that may influence employment or advancement decisions. The following calls to action identify practical strategies for employers and attorneys to adopt AI responsibly and ensure that technology strengthens, rather than undermines, the legal profession's commitment to fairness.

FOR EMPLOYERS AND HIRING ORGANIZATIONS



Promote accountability

Request vendor documentation, and establish internal oversight to review outcomes.



Audit data for bias

Evaluate training data for representation gaps or proxy variables that may encode race, gender, or class bias.



Maintain human oversight

Use AI to support, not replace, human decision-making, and train hiring teams on algorithmic bias.



Track equity outcomes

Regularly analyze recruitment results by demographic category to identify disparities and guide corrective actions.

FOR ATTORNEYS AND LEGAL PRACTITIONERS



Understand and evaluate AI systems

Ask how hiring tools are designed, what data they rely on, and whether they comply with civil rights law.



Integrate ethics and compliance

Apply professional duties of competence, fairness, and transparency to technology adoption.



Advocate for responsible use

Encourage bias auditing, clear disclosure, and ethical governance within firms, organizations, and professional associations.



Promote awareness and accountability

Mentor and educate peers about ethical implications of AI and algorithmic accountability.

These calls to action are grounded in existing ethical obligations and reinforced by guidance from professional bodies interpreting how those duties apply to AI. The resources below provide frameworks for responsible use of AI in legal practice:

State Bar of California's Standing Committee on Professional Responsibility and Conduct

Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law

<https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf>

American Bar Association's Standard Committee on Ethics and Professional Responsibility

Formal Opinion 512: General Artificial Intelligence Tools (July 28, 2024)

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf

ENDNOTES

1. World Economic Forum: Hiring with AI Doesn't Have to Be So Inhumane (March 28, 2025), <https://www.weforum.org/stories/2025/03/ai-hiring-human-touch-recruitment/>.
2. Kelsey Purcell, 2025 Applicant Tracking System (ATS) Usage Report: Key Shifts and Strategies for Job Seekers, Jobscan (July 14, 2025), <https://www.jobscan.co/blog/fortune-500-use-applicant-tracking-systems/>.
3. Ifeoma Ajunwa, *The Quantified Worker: Law and Technology in the Modern Workplace* (Cambridge University Press, 2023).
4. Ruja Benjamin, *Race After Technology: Abolitionist Tools for the New Jim Code* (Polity, 2019).
5. Hilke Schellmann, *The Algorithm: How AI Decides Who Gets Hired, Monitored, Promoted, and Fired and Why We Need to Fight Back Now* (Hachette, 2024).
6. Marianne Bertrand and Sendhil Mullainathan, "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination" (September 2004) 94(4) *American Economic Review* 991–1013. A 2022 study by economists at the University of California, Berkeley and the University of Chicago found that while the racial callback rate has narrowed, 20 percent of Fortune 500 firms analyzed accounted for half of all racial bias in hiring, suggesting that discrimination remains concentrated and structural within certain corporate practices, and endemic in specific sectors. See Patrick Kline, et al. "Systematic Discrimination Among Large U.S. Employers" (November 2022) 137(4) *The Quarterly Journal of Economics* 1963–2036.
7. Pauline T. Kim, "AI and Inequality," in *The Cambridge Handbook on Artificial Intelligence and the Law*, eds. Kristin N. Johnson and Carla Reyes (Cambridge University Press, 2024).
8. Leon Yin, et al., "Open AI's GPT is a Recruiter's Dream Tool. Tests Show There's Racial Bias," *Bloomberg Technology*, March 7, 2024.
9. Emilio Ferrara, "Fairness and Bias in Artificial Intelligence: A Brief Survey of Sources, Impacts, and Mitigation Strategies" (2024) *Sci* 6 (3); Pauline T. Kim, "Race-Aware Algorithms: Fairness, Nondiscrimination and Affirmative Action" (2022) *California Law Review* 110, pp. 1539–1596; Janice Gassam Asare, "What the Workday Lawsuit Reveals About AI Bias—and How to Prevent It," *Forbes* (June 23, 2025).
10. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on the protected categories of race, color, religion, sex, national origin, among others. The Americans with Disabilities Act of 1990 prohibits discrimination against individuals with disabilities in employment and other areas of public life. The Age Discrimination in Employment Act of 1967 protects workers aged 40 and older from age-based discrimination in hiring and employment.
11. The January 23, 2025, executive order, Removing Barriers to American Leadership in Artificial Intelligence, revoked the previous administration's executive order, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (EO 14110).
12. *America's AI Action Plan* outlines a federal strategy focused on advancing national competitiveness and security, replacing earlier guidance on fairness and civil rights oversight. See White House: *White House Unveils America's AI Action Plan* (July 23, 2025), <https://www.whitehouse.gov/articles/2025/07/white-house-unveils-americas-ai-action-plan/>.
13. SB 53 amends the Business and Professions Code, the Government Code, and the Labor Code, relating to artificial intelligence.
14. Civil Rights Department, State of California, "Civil Rights Council Secures Approval for Regulations to Protect Against Employment Discrimination Related to Artificial Intelligence," press release, June 30, 2025, <https://calcivilrights.ca.gov/2025/06/30/civil-rights-council-secures-approval-for-regulations-to-protect-against-employment-discrimination-related-to-artificial-intelligence/>.
15. *Mobley v. Workday, Inc.*, United States District Court N.D. Cal. Case No. 23-cv-00770-RFL.
16. Purcell, *supra*.

