

FROM SALE TO SEPARATION: NAVIGATING HR ISSUES THROUGH TRANSITIONS

By Mariel G. Newhouse, Esq.

I. KEY CONSIDERATIONS IN REDUCTIONS IN FORCE (RIFs)

A. **Worker Adjustment Retraining Notification (WARN) Act**

1. **Basic Premise – covered employers must provide 60 days’ advance notice of a covered plant closing and mass layoffs.**

2. **Definitions:**

a. Covered Employer

i. Employer with at least 100 full-time employees

ii. Part-time employees may be included under certain circumstances

b. Covered Employees

i. Full-time employees and some part-time employees

ii. Does NOT include

(A) Employees who have worked less than 6 months in the last 12 months;

(B) Workers who perform, on average, less than 20 hours of work per week;

(C) Workers who are on strike or those affected by a lockout as part of a labor dispute;

(D) Temporary workers who do not have a reasonable belief that work was anything but temporary;

(E) Contractors, consultants, or other workers who may work at a given site but have an independent business relationship with the company.

c. Plant Closing: permanent or temporary shutdown of a single site of employment, one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at a single site of employment during any 30-day period for 50 or more employees, excluding part-time employees.

- d. Mass layoff: reduction in force that is not the result of a plant closing and that results in an employment loss at a single site of employment during any 30-day period for either: (1) at least 33% of employees, excluding part-time employees, and at least 50 employees; or (2) at least 500 employees, excluding part-time employees.
- e. Employment loss may include:
 - i. Termination, other than discharge for cause, voluntary departure, or retirement
 - ii. Layoff exceeding six months in duration
 - iii. Reduction in hours of work of more than 50% during each month of any six-month period

3. Exceptions

- a. Unforeseen business circumstances
- b. Faltering companies
- c. Natural Disasters
- d. Pay in lieu of notice
- e. Note: exceptions may allow for less than 60 days' notice, but do not eliminate the notice requirement entirely.

4. Other Details:

- a. Small events can be aggregated
- b. Counting Remote Employees
- c. Mini-Warn Laws

5. The WARN Act Notice

- a. Written in clear and specific language that employees can easily understand
- b. Contain an indication as to whether the planned action is expected to be temporary or permanent
- c. Anticipated date of pending closure/layoff
- d. Name and telephone number of the company official who can provide further information

- e. Reasonable method of delivery

6. Penalties

- a. Backpay and benefits for the period of violation up to 60 days
- b. Civil penalty of up to \$500 per day
- c. Reasonable attorneys' fees.

B. Who do you choose?

1. Seniority, status, merit, skills

- a. Document legitimate, non-discriminatory business reasons for selection criteria

2. Adverse Impact Analysis

- a. Review selections for disparate impact on protected classes before finalizing decisions

C. Release Agreements

1. Older Worker Protection Benefits Act (“OWBPA”)/Age Discrimination in Employment Act (“ADEA”)

- i. 21- versus 45-Day Review Period

2. Severance

- a. Salary continuation
- b. Lump sum
- c. Healthcare continuation

3. Released Parties

- a. Are there parent companies and/or subsidiaries that should be included

4. Governing Law

- a. Where is company located?
- b. Do you have remote employees?

5. Reaffirmation

- a. Are you asking key employees to stay on for a certain period of time during a transition?

- b. Will you offer the severance in multiple payments or after the reaffirmation is signed?

II. PERSONNEL CONSIDERATIONS WHEN SELLING A BUSINESS

A. Consolidated Omnibus Budget Reconciliation (“COBRA”)

1. What is it?

- a. Provides temporary continuation of group health coverage

2. Covered Employer

- a. Generally applies to all private-sector group health plans maintained by employers that have at least 20 employees on more than 50% of their typical business days in the previous calendar year.
- b. Full-time and part-time employees are counted; however, part-time employees are counted as a fraction of full-time employees.

3. Qualified Beneficiary

- a. An employee who was covered by a group health plan on the day before a qualifying event occurred; or
- b. That employee’s spouse, former spouse, or dependent child

4. Qualifying Event

- a. Events that cause an individual to lose group health coverage
- b. Covered employee:
 - i. Termination of employment for any reason other than “gross misconduct”; or
 - ii. Reduction in covered employee’s hours of employment.
- c. Spouse and dependent child:
 - i. Termination of covered employee’s employment for any reason other than “gross misconduct”;
 - ii. Reduction in hours worked by covered employee;
 - iii. Covered employee becomes entitled to Medicare;
 - iv. Divorce or legal separation from covered employee; or

- v. Death of covered employee.
- d. Dependent child:
 - i. Loss of “dependent child” status (i.e., child turns 26)

5. Who pays for COBRA?

- a. The qualified beneficiaries must pay for COBRA continuation coverage; however, plans can choose to provide continuation coverage at reduced or no cost.
- b. Maximum amount charged to qualified beneficiaries cannot exceed 102% of the cost to the plan for similarly situated individuals

B. Effects of a Sale on Employees

1. Types of Transactions:

- a. Stock Purchase – Buyer purchases all of the stock in a company; seller does not retain any employees or benefit plans.
- b. Asset Purchase – Buyer chooses which assets and liabilities to purchase, including employees.

2. Employees:

- a. Stock Purchase –The buyer takes over the entire business entity and the employees typically remain employed unless the buyer chooses to terminate.
- b. Asset Purchase –The employment relationship does not necessarily transfer in the asset purchase. To the extent employees are retained by the buyer, they will need to be re-hired by the new entity.

3. Prior Policies

- a. Stock Purchase – All existing employment agreements, handbooks, benefits, and other employment documents remain in play after the transaction; therefore, the purchaser must ensure it understands and reads these documents.
 - i. Ex: certain contracts/benefit plans may contain severance obligations that apply to the new entity.
- b. Asset Purchase – The buyer will have to ensure new employment agreements are issued and distribute handbooks, benefit information to the employees.

4. Payroll

- a. Stock Purchase –The FEIN does not change, so payroll does not need to be transitioned.
- b. Asset Purchase - There is a new FEIN; therefore, a transition service agreement may be needed to allow the seller to continue to process payroll on behalf of the buyer.

5. Culture

- a. Culture shocks are often one of the biggest transition issues.
- b. Even if there is a stock purchase and the existing policies remain in place, management has likely changed and the implementation of policies may look different.
- c. Consider retention bonuses for key employees critical to business continuity.

III. OTHER COMMON TRANSITION ISSUES

A. SUTA Dumping

1. What is it?

- a. State Unemployment Tax Act (“SUTA”)
- b. Tax evasion tactic in which an employer manipulates the unemployment insurance to receive a lower tax rate
- c. Typically occurs when a business transfers payroll tax out of an existing organization into a new organization.

2. Types of SUTA dumping

- a. Vertical – create a “new” employer that is assigned a “new” tax rate, then transfer payroll to the new employer
- b. Horizontal – transfer payroll to a subsidiary with a lower tax rate
- c. Acquired – find an employer with a lower tax rate and transfer payroll to that employer

3. Penalty

- a. If intentional - penalty of up to four times any savings you would have received
- b. UI tax rate increase to maximum tax rate for the year determined you engaged in intentional SUTA dumping and for the next three years
- c. Civil penalty up to \$5,000 for a person who advises another business to participate in SUTA dumping

B. New Employment Documents

1. Handbooks

- a. Key policies to review and update
- b. Obtaining handbook acknowledgments
- c. State-specific policies for remote employees

2. Employment Agreements

- a. Review existing agreements for surviving provisions
- b. consider whether new agreements are needed

3. Non-Compete Agreements

- a. Ensuring your new hire is not subject to a non-compete
- b. Consider whether the non-compete is enforceable where the employee is located

4. Confidentiality and Non-Disclosure Agreements

- a. Consider whether new hire is subject to existing confidentiality agreements
- b. Consider what information you want to specifically include

BETTER SAFE THAN CITED: **OSHA IN THE WORKPLACE**

By Jonathan M. Sollish, Esq.

I. OVERVIEW

- A. General duty and industry-specific standards
- B. Complaints, investigations, and inspections
- C. The new era of workplace safety

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT

- A. The Occupational Safety and Health (The “OSH Act”) is a federal law intended to assure “safe and healthful” working conditions for all employees.
- B. The OSH Act only applies to private sector employers; however, states may regulate workplace safety in the public sector.
- C. The Occupational Safety and Health Administration (“OSHA”) was born out of the OSH Act.
- D. Under the OSH Act,
 - 1. Each employer—
 - a. shall furnish to each employee employment and a place of employment which are free from recognized hazards that cause or are likely to cause death or serious physical harm to employees;
 - b. shall comply with occupational safety and health standards promulgated under [the OSH Act].
 - 2. Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to [the OSH Act] which are applicable to the employee’s own actions and conduct.
- E. The OSH Act led to the creation of the Occupational Safety and Health Administration (“OSHA”).
- F. OSHA promulgates standards and regulations.
 - 1. Standards are the workplace safety rules that employers legally have to follow.
 - 2. There are four categories of standards:

- a. General Industry
 - b. Construction
 - c. Maritime
 - d. Agriculture
- G. The OSH Act permits states to assume responsibility for development and enforcement of occupational safety and health standards.
- 1. State plans must be approved by the Secretary of Labor.
 - 2. States must designate a state agency to be responsible for administering the plan.
 - 3. State standards must be “as effective in providing safe and healthful employment and places of employment as the standards promulgated” by OSHA.

III. MICHIGAN OSHA

- A. The Michigan Occupational Safety and Health Act regulates private sector and public sector workplace safety in Michigan.
- 1. The Michigan Occupational Safety and Health Administration (“MIOSHA”) is responsible for enforcement.
 - 2. The Michigan Occupational Safety and Health Act and standards set forth by MIOSHA typically adopt by reference OSHA’s standards.

IV. MIOSHA INVESTIGATIONS, INSPECTIONS, AND COMPLAINTS

- A. Programmed Inspections
- 1. Planned inspections for employers in the targeted industries.
 - 2. Employers are randomly selected.
 - 3. No advance notice is given.
- B. Unprogrammed Inspections
- 1. Unplanned inspections that arise from complaints, referrals, imminent dangers, fatalities or catastrophes.
- C. Wall-to-Wall inspections.
- D. MIOSHA Off-Site Complaints

1. Employer will receive a letter stating that a complaint has been made and the nature of the complaint.
2. MIOSHA will give employers 15 or 30 days (depending on the seriousness of the allegations) to investigate the complaint and provide a response.
3. Typically, MIOSHA wants to know whether a safety and/or health hazard existed and, if so, has it been remediated.
4. If the employer does not respond or provides an inadequate response, MIOSHA will conduct an onsite inspection.

E. Recent examples of Off-Site Complaints:

1. Alleged lack of bathroom access.
2. Cold temperatures due to broken HVAC unit.
3. Exposure to fumes due to floor refinishing.
4. An On-Site Complaint is a complaint with an allegation serious enough to automatically trigger an inspection.

F. Most common citations issued by MIOSHA in 2025:

1. Construction – Accident Prevention Program
2. Construction – First Aid Training
3. Hazard Communication – Written Hazard Communication Program
4. The Control of Hazardous Energy Sources – Energy Control Procedures
5. Record Keeping – Annual Electronic Submission
6. Construction Fall Protection – Residential
7. Construction PPE – Head Protection
8. Medical Services and First Aid – Eye Wash
9. Construction PPE – Eye and Face Protection
10. General Industry Control of Hazardous Energy Sources – Training and Communication

V. INSPECTION PROCESS

- A. Arrival
 - 1. Investigator will arrive unannounced.
 - 2. Staff should be trained to do the following:
 - a. Notify management immediately
 - b. Ask the inspector to wait until management arrives
 - 3. You can require the investigator to get a warrant
 - a. There are pros and cons to requesting a search warrant.
- B. Opening Conference
 - 1. The Opening Conference is an initial meeting in which the inspector will explain the reason for and the scope of the inspection.
 - 2. You can and should ask to see the inspector's credentials.
 - a. Write down the inspector's ID number and MIOSHA reference number.
 - 3. The meeting may include a union representative, if applicable.
- C. The Inspection
 - 1. Following the Opening Conference, the Inspector will physically inspect the employer's facility and document their findings.
 - a. The inspection should be limited to the scope of the complaint.
 - 2. Management representative should accompany the Inspector.
 - a. A union representative may also accompany the inspector.
 - 3. The inspector will likely take photographs.
 - a. Management should instruct the investigator to label photographs that contain trade secrets.
 - 4. The inspector will likely want to interview employees.
 - a. The inspector has the right to conduct private interviews with non-management employees.

1. Serious and Other-Than-Serious Violations
 - a. Not more than \$7,000, but normally much lower than for Serious violations.
 2. Willful violations
 - a. Not more than \$70,000 and not less than \$5,000, If an employer acted knowingly and purposefully.
 3. Repeated violations
 - a. Not more than \$70,000 and not less than \$5,000.
 4. Failure-to-Correct violations
 - a. Not more than \$7,000 a day.
- E. Options for Resolving a Citation
1. Request a Penalty Reduction Agreement.
 - a. Allows for significantly reduced penalties.
 - b. Not available for inspections involving a fatality, a willful citation, or employers that qualify for the Severe Violator Enforcement Program.
 2. Accept the investigator's findings
 3. Submit information about abatement and pay fine.

VII. CONTESTING A CITATION

- A. If an employer disagrees with the inspector's findings, it can appeal.
1. A written appeal must be submitted within 15 working days of the receipt of a citation.
 2. MIOSHA will make a decision within 15 days of receipt of appeal.
 - a. An employer can (1) accept the decision or (2) file a second appeal.
 3. A second appeal can be filed with the Board of Health and Safety Compliance and Appeals (the "Board").
 - a. The Board will hold a conference with parties in an attempt to reach a settlement. If there is no settlement, there will be a hearing in front of an ALJ, who will issue a decision. The ALJ's decision can be appealed to a circuit court.

VIII. NEW ERA OF WORKPLACE SAFETY

- A. Workplace violence is on the rise.
 - 1. Disgruntled employees
 - 2. Relationship violence
 - 3. Political violence
 - 4. Random acts of violence
 - 5. Pandemics
- B. Remember the general duty clause.
- C. Employers should consider having a workplace violence prevention policy.

WHY EMPLOYEE-SPECIFIC POLICIES MATTER: BUILDING CLARITY, COMPLIANCE, AND TRUST TO PROTECT YOUR BUSINESS

By Anaria D. Rambus, Esq.

I. IMPORTANCE OF CREATING JOB DESCRIPTIONS

A. **Why do job descriptions matter?**

1. Define essential duties
2. Establish performance expectations
3. Clarify reporting structure
4. Identify required qualifications

B. **Essential Functions & Legal Protection**

1. Clear identification of “essential functions” is critical.
2. Clear policies are essential for:
 - a. Requests
 - b. Performance
 - c. Termination
3. Americans with Disabilities Act (“ADA”)
 - a. What employers must show
 - b. What courts and agencies look to

C. **Equal Employment Opportunity Commission (“EEOC”)**

1. Protection in EEOC Matters
2. Job descriptions help defend against claims of:
 - a. Discrimination
 - b. Failure to Accommodate
 - c. Wrongful Termination

D. Best Practices for Job Descriptions

1. Have them
2. Annual review
3. Update when duties materially change
4. Avoid vague language
5. What to include:
 - a. Physical requirements
 - b. Required certification or licenses
 - c. Supervisory Authority
 - d. Work Environment Expectations
6. Risk-Reduction Tips: Make sure that the description aligns with: (a) performance evaluations; (b) actual day-to-day responsibilities; (c) organizational chart

II. SPECIFIC POLICIES TO ENSURE COMPLIANCE

A. Immigration (I-9 Forms)

1. Federal Law
 - a. Employers' duties:
 - i. Verify the identity and employment authorization of each person they hire;
 - ii. Complete and retain a I-9 form, Employment Eligibility Verification; and
 - iii. Refrain from discriminating against individuals on the basis of national origin, citizenship or immigration status.¹
 - b. Why a Written Policy Matters
 - i. Standardizes onboarding process

¹ <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274/10-why-employers-must-verify-employment-authorization-and-identity-of-new-employees>

- ii. Assigns responsibility
- iii. Establishes document retention procedures
- iv. Reduces exposure during audits by agencies

B. Background Checks

1. Federal Law

a. Fair Credit Reporting Act (“FCRA”)

- i. When employers run background checks through a company in the business of compiling background information, they must comply with FCRA
- ii. What is “background information”?
 - (A) Credit reports
 - (B) Criminal record checks
 - (C) Consumer report

b. FCRA Best Practices

- i. All applicants must sign a background check authorization form
- ii. Do not seek background information from references or prior employers prior to obtaining this authorization
- iii. Place information in personnel file, except if name of person making the reference would be disclosed

c. State-Level FCRA Issues

- i. States have enacted laws that add requirements greater than FCRA policies.
 - (A) Arizona, Georgia, California, Maine, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, and Washington
- ii. Must be aware of any state-level FCRA requirements before requesting or acting on a background report
- iii. Employers must notify a job candidate before and after adverse action is taken based on information received from a consumer report
 - (A) Pre-Adverse Action Report

(B) Adverse Action Report

- d. FCRA Damages
 - i. Consumers may seek actual damages arising from a violation
 - ii. Consumers alleging a willful failure to comply with an FCRA requirement may seek actual, statutory, and punitive damages
 - iii. May recover costs and reasonable attorney's fees
2. Strong Policies Should Include:
 - a. When? Who?
 - b. Individualized Assessment Procedures
 - c. Confidentiality Safeguards
3. Why Does It Matter?

C. Non-Discrimination & Harassment Prevention

1. Statement of Non-Discrimination
 - a. Best Practices According to the EEOC²:
 - i. State that discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, or transgender status), national origin, disability, age (40 or older) or genetic information (including family medical history) is illegal and will not be tolerated. Provide definitions and examples of prohibited conduct, as needed.
 - ii. State that you will provide reasonable accommodations (changes to the way things are normally done at work) to applicants and employees who need them for medical or religious reasons, as required by law.
 - iii. Explain how employees can report discrimination.
 - iv. If possible, designate more than one person to receive and respond to discrimination complaints or questions.

² <https://www.eeoc.gov/employers/small-business/general-non-discrimination-policy-tips>

- v. Consider permitting employees to report discrimination to any manager.
- vi. State that employees will not be punished for reporting discrimination, participating in a discrimination investigation or lawsuit or opposing discrimination.
- vii. State that you will protect the confidentiality of employees who report discrimination or participate in a discrimination investigation, to the greatest possible extent.
- viii. Require managers and other employees with human resources responsibilities to respond appropriately to discrimination or to report it to individuals who are authorized to respond.
- ix. Provide for prompt, thorough and impartial investigation of complaints.
- x. Provide for prompt and effective corrective and preventative action when necessary.
- xi. Consider requiring that employees who file internal complaints be notified about the status of their complaint, the results of the investigation and any corrective and preventative action taken.
- xii. Describe the consequences of violating the non-discrimination policy.

2. Harassment Prevention

- a. Informing employees that harassment is prohibited;
- b. Identifying who employees should contact to discuss harassment questions or concerns;
- c. Assuring employees that they will not be punished for asking questions or sharing their concerns;
- d. Responding to harassment questions or concerns and investigating harassment complaints promptly and effectively; and
- e. Ensuring that managers understand their responsibility to stop, address and prevent harassment.³
- f. Policy Tips:

³ <https://www.eeoc.gov/employers/small-business/5-how-can-i-prevent-harassment>

- i. State that harassment based on race, color, religion, sex (including pregnancy, sexual orientation, or transgender status), national origin, disability, age (40 or older) or genetic information (including family medical history) is illegal and will not be tolerated. Provide definitions and examples of prohibited conduct, as needed.
- ii. Explain how employees can report harassment.
- iii. If possible, designate at least one person outside an employee's chain of command who can receive harassment complaints.
- iv. Consider permitting employees to report harassment to any manager.
- v. State that you will protect the confidentiality of employees who report harassment or participate in a harassment investigation, to the greatest possible extent.
- vi. State that employees will not be punished for reporting harassment or participating in a harassment investigation or lawsuit.
- vii. Require managers and other employees with human resources responsibilities to respond appropriately to harassment or to report it to individuals who are authorized to respond.
- viii. Provide for prompt, thorough and impartial investigation of harassment complaints.
- ix. Provide for prompt and effective corrective and preventative action when necessary.
- x. Consider requiring that employees who file internal complaints be notified about the status of their complaint, the results of the investigation and any corrective and preventative action taken.
- xi. Describe the consequences of violating the harassment policy.⁴

III. PAID TIME OFF POLICIES AND THE MICHIGAN EARNED SICK TIME ACT

A. **PTO Policies**

1. Clarity is critical

⁴ <https://www.eeoc.gov/employers/small-business/harassment-policy-tips>

- a. With unclear policies, employers risk:
 - i. Under-accrual or over-accrual errors
 - ii. Improper denials of leave
 - iii. Retaliation claims
 - iv. Wage and hour disputes

- 2. Michigan Earned Sick Time Act (“ESTA”)
 - i. Employers covered: All MI employers that have one or more employee(s), including any person, firm, business, educational institutions, corporations, limited liability company, governments entities, excluding the US Government.
 - ii. Employees covered: individuals engaged in service to an employer in the business of the employer.
 - iii. Under ESTA, employers must
 - (A) Provide earned sick time
 - (B) Track accrual
 - (C) Allow use for qualifying reasons
 - (D) Avoid retaliation
 - iv. Common Compliance Mistakes
 - (A) Assuming a general PTO policy satisfies ESTA
 - (B) Failing to define qualifying reasons
 - (C) Not updating employee handbooks
 - (D) Inconsistent application across departments

HR AS THE BUSINESS'S FIRST LINE OF LEGAL PROTECTION: HOW HR PROTECTS THE COMPANY'S BUSINESS INTERESTS EVERY DAY

By Jordan B. Segal, Esq.

I. INTRODUCTION: HOW LAWYERS SEE YOUR WORK LATER

- A. Lawyers don't see intentions — they see documents.
- B. Lawyers don't hear conversations — they read emails and notes.
- C. Lawyers don't fix facts — they work with the record HR created.
- D. Good HR systems shrink disputes; bad ones expand them.
- E. Everything that follows is about controlling that record.

II. ACT 1: ESSENTIAL BUSINESS PROTECTIONS

- A. Focus on protecting revenue, customers, data, and deal readiness.
 - 1. These are the risk surfaces where value is lost or preserved.
- B. Anti-discrimination and harassment: protecting reputation and talent.
 - 1. Inconsistent treatment becomes the company's story.
 - 2. Retaliation risk often eclipses the original complaint.
 - 3. Clean intake and investigation paths protect credibility.
 - 4. Michigan reality: comparators and consistency drive outcomes.
 - 5. Business impact: brand, recruiting, and leadership bandwidth.
 - 6. Case Study: the two-employee problem.
 - a. Two similar violations, two different outcomes.
 - b. A later complaint reframes the issue as inconsistency.
 - c. The rule wasn't the problem — the variance was.
 - d. Lesson: explainable, repeatable outcomes protect the business.
- C. Acceptable use of AI: speed with guardrails.

1. AI increases speed and scale — but also amplifies mistakes.
 2. Risk areas: hiring, reviews, discipline drafts, investigations.
 3. No confidential or regulated data in unapproved tools.
 4. AI assists; humans decide; outputs are drafts.
 5. Business impact: decision quality, record quality, and trust.
 6. Case Study: the magical AI performance review.
 - a. AI-generated praise conflicts with later termination.
 - b. The record looks clean — but is wrong.
 - c. The dispute becomes about the company's own document.
 - d. Lesson: guardrails and human review protect narrative control.
- D. Confidential information and trade secrets: protecting the crown jewels.
1. Most valuable assets walk out the door every night.
 2. Courts look at behavior, not labels, to decide what is "secret."
 3. Access limits, training, and exits create the protection story.
 4. Business impact: customer relationships, know-how, and leverage.
- E. Leave, wage and hour: protecting operations and financing.
1. Overlapping rules create decision risk under pressure.
 2. Manager-level mistakes drive most exposure.
 3. Class and collective actions affect financing and M&A.
 4. Michigan overlay: ESTA plus federal regimes.
 5. Business impact: cost, distraction, and deal friction.

III. ACT 2: OPERATIONALIZING PROTECTION

- A. Policies don't protect businesses — systems do.
 - 1. Process creates consistency; consistency creates defensibility.
 - 2. This is where HR turns intent into outcomes.
- B. Discipline systems: turning risk into predictability.
 - 1. Progression and documentation control the story over time.
 - 2. Surprise terminations create disruption and exposure.
 - 3. Standard paths protect managers and the company.
 - 4. Business impact: morale stability and leadership focus.
 - 5. Anecdote: the surprise termination.
 - a. Years of complaints, zero documentation.
 - b. First time the employee hears it is the termination meeting.
 - c. The question becomes "why now?" not "what happened?"
 - d. Lesson: predictable systems protect credibility.
 - e. Documentation: narrative control.
- C. Disputes are stories told with paper and email.
 - 1. Facts beat conclusions; boring beats clever.
 - 2. Assume every note is future evidence.
 - 3. Business impact: smaller, faster, cheaper disputes.
 - 4. Anecdote: the email that wouldn't die.
 - a. A venting email becomes the headline exhibit.
 - b. Tone, not substance, drives the narrative.
 - c. Lesson: write like a neutral third party is watching.

- D. Confidentiality controls and access management.
 - 1. Role-based access limits the blast radius.
 - 2. Clean onboarding and offboarding prevent lingering risk.
 - 3. HR and IT together own the human side of security.
 - 4. Business impact: containment instead of crisis.

- E. BYOD: convenience versus containment.
 - 1. Personal devices increase speed — and risk.
 - 2. Without clear rules, data and relationships leave with the device.
 - 3. Security requirements and exit steps matter.
 - 4. Business impact: customer and data leakage.
 - 5. Anecdote: the pocket sales database.
 - a. Contacts sync to a personal phone.
 - b. Clients get calls from the new employer.
 - c. The fight is about controls, not loyalty.
 - d. Lesson: exits and access control protect value.

- F. Restrictive covenants: protecting relationships and revenue.
 - 1. Tools to protect legitimate business interests.
 - 2. Most value is deterrence and leverage, not litigation.
 - 3. Work only when tied to roles and handled consistently.
 - 4. Business impact: goodwill, pipelines, and deal value.

- G. Investigations and litigation holds: defensibility under stress.
 - 1. Who leads, who decides, who communicates.
 - 2. When to involve outside counsel.
 - 3. Preserve documents early; control the process.
 - 4. Business impact: credibility and outcome control.

- H. Social media and off-duty conduct: reputation risk.
 - 1. Screenshots travel faster than explanations.
 - 2. Clear boundaries on work-related use and branding.
 - 3. Consistent enforcement avoids viewpoint or favoritism claims.
 - 4. Business impact: brand and customer trust.

- I. Leave law interplay: a simple decision path.
 - 1. Is there a medical issue? Think ADA/FMLA/ESTA/workers' comp.
 - 2. Is the employee requesting time or an accommodation?
 - 3. Centralize decisions; don't let managers freelance.
 - 4. Business impact: fewer missteps at high-risk moments.

IV. ACT 3: WHAT TO DO MONDAY MORNING

- A. Turn principles into repeatable tools.
 - 1. Reduce variance, increase speed, protect value.

- B. Tool: policy and process audit (business lens).
 - 1. Where do we lose time, money, or momentum?
 - 2. Where do managers improvise the most?
 - 3. Where are records weakest?
 - 4. Which exits were messiest?
 - 5. Prioritize by business impact, not by statute count.

- C. Tool: manager documentation template.
 - 1. Date and context.
 - 2. Objective facts.
 - 3. Business impact.
 - 4. Employee response.
 - 5. Next step and expectation.

- D. Tool: incident response playbook.
 - 1. Who decides, who investigates, who communicates.
 - 2. Preserve evidence and control messaging.
 - 3. Escalate early, not emotionally.
 - 4. Goal: contain the blast radius and keep operating.

- E. Tool: exit checklist.
 - 1. Return property and shut off access.
 - 2. Reconfirm confidentiality and covenants.
 - 3. Document the reason cleanly.
 - 4. Business goal: protect data, customers, and momentum.

- F. When to call your lawyer.
 - 1. Before terminating someone who complained or requested leave.
 - 2. Upon receiving a charge, subpoena, or agency inquiry.
 - 3. When planning a reduction in force.
 - 4. When a data breach or leak is suspected.
 - 5. When a key employee is exiting to a competitor.

INSURANCE ISSUES FOR HUMAN RESOURCES PROFESSIONALS

By Kathleen H. Klaus, Esq.

I. LITIGATION FUNDING AND WORKERS' COMPENSATION CLAIMS

- A. Introduction to litigation funding.
 - 1. Litigation funding, also known as legal financing or third-party funding, provides plaintiffs and law firms with funds to cover legal fees and living expenses while a case is pending.
 - 2. In workers' compensation contexts, pre-settlement funding provides injured workers with immediate financial assistance while their claims are being processed.
- B. How pre-settlement funding works in workers' compensation.
 - 1. Pre-settlement funding is a non-recourse cash advance provided in exchange for a portion of a worker's potential future settlement.
 - 2. If the worker loses the case, they are not required to repay the advance.
- C. Market overview: the growth of litigation funding. The global litigation funding investment market was valued at \$19.0–20.64 billion in 2024–2025, with an estimated growth rate of 8-14% through 2036.
- D. Key growth drivers.
 - 1. Rising litigation costs and complexity.
 - 2. Increased awareness and acceptance by corporate and legal firms.
 - 3. Institutional investor participation (pension funds, hedge funds, sovereign wealth funds).
 - 4. Regulatory shifts and growing transparency in funding frameworks.
- E. Current state of the workers' compensation industry.
 - 1. Key trends
 - a. Lost-time claim frequency declined by 5% in 2024, exceeding the long-term average annual decline of 3.6%.
 - b. Medical and indemnity severity both increased by approximately 6% in 2024.
 - c. Net written premium decreased 3% to \$41.6 billion in 2024.
 - 2. Litigation in workers' compensation: a growing concern

- a. According to the 2025 Annual Workers' Compensation Industry Insight Survey, slightly more than 61% of survey participants cited litigation as the top challenge facing the industry—a 14-point year-over-year increase.
- b. Concerns justified. In a 2018 study, attorney involvement increased the median claim duration from 305 days to 901 days. A different study found that attorney involvement increases expense payment by 200% and increases lost time days by 284%.
- c. Newer employees more likely to hire attorneys.

F. Why injured workers seek legal representation and funding.

- 1. Primary reasons workers hire attorneys (WCRI research): Fear of being fired when injured (48% of workers who hired attorneys); concern that their supervisor questions the legitimacy of the claim (42%); belief that the payer/insurer has denied the claim (46%).
- 2. Additional contributing factors: difficulty navigating the workers' compensation system; lack of communication from employer or insurer/adjuster; denial or delay of prescribed medical treatment; loss of employer-paid health insurance during claim period; lack of modified work duty opportunities.
- 3. Role of financial strain. Workers' compensation claims can be contested by employers and insurance companies, causing delays in paying benefits or reaching a settlement. Financial strain can add to the stress, leading injured workers to seek pre-settlement funding to make ends meet and keep up with bills.

G. Impact of litigation funding on employers.

- 1. Increased claim duration and costs: Litigation funding allows workers to hold out longer for larger settlements rather than accepting early offers. Insurance companies and defense attorneys may intentionally extend proceedings; litigation funding counters this but prolongs overall claim resolution.
- 2. Impact on workers' compensation premiums: Workers' compensation premiums are based on industry, number of employees, payroll, and claims history over the past three years. Multiple claims or high-cost claims can cause insurance premiums to increase significantly.

H. Employers fight back. Employer lobby groups are seeking increased regulation. Also, cases that don't settle pose complete capital loss risk for funders and lengthy case durations erode investor confidence and reduce capital efficiency.

II. EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI) – CURRENT TRENDS

A. EPLI fundamentals

1. EPLI protects businesses against claims by employees alleging violations of their legal rights, including claims of discrimination, harassment, wrongful termination, and retaliation.
 2. Policies typically cover defense costs, settlements, and judgments arising from employment-related claims.
 3. Current market dynamics: Defending wrongful employment practices claims has become increasingly costly, with higher wages and attorneys' fees making EPLI claims more expensive. The average cost to settle a discrimination or disability claim now exceeds \$125,000, and court judgments can easily double that amount.
- B. AI and EPL Issues
1. According to the Society for Human Resource Management's 2025 survey, over 50% of employers now use AI in recruiting.
 2. AI is being implemented across several HR processes: Resume screening; candidate assessments; video interviews; performance management; compensation decisions.
 3. Legal risks: algorithmic discrimination and disparate impact. One of the biggest legal risks associated with using AI in recruitment is the concept of disparate impact—a policy or practice that seems neutral on its face but ends up disadvantaging a protected group.
 - a. The EEOC has issued guidance warning that automated decision-making tools fall under the same anti-discrimination laws as traditional practices. Rescinded, but likely to come back or be implemented at the state level.
 - b. The case *Mobley v. Workday* is a significant example, where plaintiffs argue that software discriminated against job applicants over age 40 in violation of the Age Discrimination in Employment Act (ADEA). Federal case filed in California. They submitted hundreds of applications; no interviews. The court found that there could be a class action, based on the common factor that all of the applicants were viewed through Workday's AI program.
 4. State-level AI regulation
 - a. Illinois' Artificial Intelligence Video Interview Act requires employers to disclose when AI is being used in video interviews and to obtain applicant consent.
 - b. New York requires permission before a company can use AI-generated likenesses of employees.
 - c. California and Colorado now require companies to be transparent about when and how AI influences hiring decisions.
 5. Employer liability and insurance coverage

- a. Employers remain responsible for compliance with anti-discrimination and privacy laws, regardless of whether errors originated in-house or through an external AI service.
 - b. EPLI policies may not cover certain AI-related claims unless additional riders are purchased.
 - c. Contracts with vendors should be explicit about risk allocation.
 - d. EPLI policies typically provide coverage for acts or omissions alleged to have been discriminatory, and the use or involvement of AI should not create an impediment to coverage.
6. Key AI-related EPLI concerns
- a. AI for HR purposes is among the areas most likely to lead to employment-related claims.
 - b. Risk mitigation strategies:
 - i. Conduct regular bias audits of AI tools.
 - ii. Require human review of AI-generated outputs.
 - iii. Train HR professionals to identify and respond to AI red flags.
 - iv. Implement stronger employee education and training related to the use of AI for HR purposes.
- C. EPL and the shifting DEI landscape
- 1. Companies' DEI policies have significantly impacted the EPLI market. DEI initiatives have prompted lawsuits claiming reverse discrimination against majority-group employees.
 - a. Federal regulatory and executive actions.
 - i. On January 21, 2025, President Trump signed Executive Order 14173, designed to combat DEI practices at the federal level and question practices among private sector employers.
 - ii. On March 19, 2025, the EEOC and the Department of Justice jointly issued guidance cautioning employers that certain DEI initiatives may violate Title VII of the Civil Rights Act of 1964.
 - iii. The guidance marked a significant shift in federal enforcement priorities, emphasizing that employment actions motivated—even in part—by an individual's race, sex, or other protected characteristic could constitute unlawful discrimination.

- iv. The Supreme Court's impact: *Ames v. Ohio Department of Youth Services*. In a unanimous decision on June 5, 2025, the U.S. Supreme Court rejected the heightened burden test faced by plaintiffs in demonstrating "reverse discrimination" under Title VII.

D. EPL and Managing the Risk

1. Review and update coverage: Employers should ensure EPL policies cover modern exposures, including wage and hour disputes, remote work, and HR automation.
2. Insurance coverage that can respond to AI and DEI risks.
 - a. EPLI policies typically provide coverage for third-party claims of discrimination, and the involvement of AI does not eliminate coverage.
 - b. Other relevant policies may include: Commercial General Liability (CGL); Directors and Officers (D&O); Errors and Omissions (E&O); cyber insurance.
 - c. Risk management best practices.
 - d. General employment best practices:
 - i. Update and enforce hiring, evaluation, termination, and remote work policies.
 - ii. Provide regular training on harassment, discrimination, and compliance.
 - iii. Document employee disputes and corrective actions.
 - iv. Consult with legal counsel to navigate potentially conflicting state and federal requirements.

III. CYBER LIABILITY INSURANCE AND HUMAN RESOURCES

A. Why HR is a cybersecurity priority

1. The vulnerability of HR data
 - a. Human resources represents one of the most vulnerable cyber areas of any business. HR data found in 82% of data breaches. <https://lab-1.com/anatomy>
 - b. HR departments collect and maintain an extensive array of personally identifiable information (PII), including Social Security numbers, banking information, medical records, and personal identifiers.
 - c. HR data is highly valuable on the dark web.

- d. Organizations frequently retain more HR data than necessary—the total notification pool following a breach may be four times the number of current employees.
 - 2. The human element in data breaches
 - a. According to Verizon's Data Breach Investigations Report, 82% of data breaches involved a human element, whether through phishing, password mismanagement, or simple mistakes.
 - 3. Internal and external threats
 - a. Internal threats may originate from disgruntled employees or human error stemming from a lack of defense training.
 - b. External threats include sophisticated attacks where cybercriminals target organizations through HR systems.
- B. Understanding cyber liability insurance
 - 1. What cyber liability insurance covers
 - a. Cyber liability insurance protects businesses from impacts of online incidents, including data breaches, ransomware attacks, and phishing scams.
 - b. First-party cyber liability insurance covers losses sustained directly by the business during an attack, including:
 - i. IT forensics team costs.
 - ii. Costs of restoring damaged systems.
 - iii. Notifying affected customers.
 - iv. Legal services.
 - v. Data recovery operations.
 - vi. Business interruption losses.
 - c. Third-party cyber liability insurance protects businesses from claims made by affected parties, including payments to affected parties, settlement expenses, and regulatory fines.
 - 2. Common coverage areas relevant to HR
 - a. Customer/employee notifications—covers the cost of alerting customers and employees about a breach.

- b. Data recovery—pays for recovery of data compromised by an attack.
 - c. System damage repair—covers repairing computer systems damaged by a cyberattack.
 - d. Legal defense—covers legal fees incurred through privacy policy violations.
 - e. Credit monitoring—provides credit monitoring services to affected individuals.
 - f. Crisis management—connects organizations with PR experts to protect reputation.
3. What cyber liability insurance does not cover
- a. Poor security processes where an attack occurred as a result of poor configuration management.
 - b. Prior breaches or events that occurred before a policy was purchased.
 - c. Human error by an organization's employees.
 - d. Insider attacks where an employee was responsible for the incident.
 - e. Preexisting vulnerabilities that the organization failed to address.
 - f. Technology system improvements such as hardening applications and networks.

RETIREMENT PLANS THAT ARE RIGHT FOR YOUR BUSINESS

By: Gary M. Remer, Esq. and Nolan J. De Jong, Esq.

I. 401(K) PLANS

- A. There are approximately 730,000 401(k) plans in the U.S. covering about 70 million active participants and managing \$10 trillion in assets.
- B. A 401(k) is a feature of a qualified profit-sharing plan that allows employees to contribute a portion of their wages to individual accounts.
- C. Elective salary deferrals are excluded from the employee's taxable income (except for designated Roth deferrals).

II. 401(K) DESIGN OPTIONS

- A. Roth 401(k)
 - 1. A Roth 401(k) allows employees to make after-tax contributions, offering tax-free qualified withdrawals of both contributions and earnings in retirement.
 - 2. Withdrawals in retirement are 100% tax-free, provided you are at least 59½ and have held the account for at least five years.
 - 3. Unlike Roth IRAs, anyone can contribute to a Roth 401(k) regardless of income level.
 - 4. Under the SECURE 2.0 Act, required minimum distributions (RMDs) are no longer required for Roth 401(k)s.
 - 5. Employer matching and nonelective contributions have traditionally been deposited into a traditional 401(k) account and are taxable upon withdrawal. However, under SECURE 2.0 Act section 604, plans may now permit participants to elect to receive employer matching and nonelective contributions on a Roth basis. Traditional pre-tax treatment remains the default unless the plan is amended to offer this Roth option. Roth employer contributions are taxable when contributed, but qualify for tax-free distribution if the Roth requirements are met. (SECURE 2.0 Act section 604; IRC section 402A.)
 - 6. In-Plan Roth Conversion
 - a. An in-plan Roth conversion (or rollover) allows you to move pre-tax or after-tax 401(k) funds into a Roth account within the same plan, creating a taxable event now for tax-free growth and withdrawals later.
 - b. Converted pre-tax money is treated as ordinary income in the year of conversion.

- c. You can only convert funds you are fully vested in, or amounts that are otherwise permitted to be distributed (e.g., age 59½, separation from service).
- d. The 5-year clock for qualified Roth distributions begins January 1 of the first year any Roth contribution is made to the plan, not the date of the conversion. Converted amounts withdrawn within five years and before age 59 1/2 may still trigger the 10% early distribution penalty on taxable portions. (IRC section 402A(d)(2)(B); Treas. Reg. section 1.402A-1, Q&A-4.)
- e. Your employer's plan document must specifically permit in-plan Roth conversions.

B. Safe Harbor 401(k)

- 1. 401(k) Plans are subject to annual discrimination tests known as the Actual Deferral Percentage (ADP) Test and the Actual Contribution Percentage (ACP) Test.
- 2. The ADP Test ensures highly compensated employees (HCEs) do not contribute at a significantly higher rate than non-highly compensated employees (NHCEs). It compares the average employee salary deferrals of both groups, with failure leading to required refunds to HCEs.
- 3. The ACP Test works the same way but compares matching contributions received by the HCEs and NHCEs.
- 4. Safe Harbor 401(k) Plans are generally exempt from ADP testing if specific employer matching or non-elective contributions are made.
- 5. Safe Harbor Design Options
 - a. 3% Nonelective Contribution: The employer contributes at least 3% of compensation to all eligible employees, regardless of whether they contribute their own money.
 - b. Basic Match: The employer matches 100% of the first 3% of compensation deferred, plus 50% of the next 2% (totaling 4% if the employee contributes 5%).
 - c. Enhanced Match: A more generous formula that equals or exceeds the basic match (e.g., a 100% match on the first 4% of deferrals).
 - d. Qualified Automatic Contribution Arrangement (QACA): Combines safe harbor with automatic enrollment, allowing for a 2-year cliff vesting schedule and a lower matching formula (100% on first 1% + 50% on next 5%).
 - e. Deadline to Adopt: To adopt a 3% non-elective safe harbor, it can often be added mid-year, but most safe harbor designs require advanced notice and adoption prior to the plan year.

- f. Top-Heavy Exemption: Plans with only safe harbor contributions are generally exempt from top-heavy testing.
- C. Qualified Automatic Contribution Arrangements
- 1. Default Enrollment & Escalation
 - a. Initial Default Rate: Minimum of 3% of compensation, max of 10%. A Qualified Automatic Contribution Arrangement (QACA) is a safe harbor 401(k) design that requires automatic enrollment starting at 3% to 10% of pay.
 - b. Automatic Escalation: Must increase by 1% annually until it reaches at least 6% (max of 10% or 15% depending on interpretation).
 - c. Alternative: Set initial default at 6% or higher to avoid yearly increases.
 - 2. Employer Contribution Options (Choose One)
 - a. QACA Match: 100% match on the first 1% of deferred compensation, plus 50% match on the next 5% of deferred compensation (3.5% total).
 - b. QACA Enhanced Match: A more generous formula than the basic match, still subject to specific limitations.
 - c. QACA Nonelective: A minimum 3% contribution of compensation to all eligible employees, regardless of whether they contribute.
 - 3. Must include a qualified default investment alternative (QDIA) for employees who do not make an election.
 - 4. QACA plans are generally exempt from annual ADP/ACP non-discrimination testing and top-heavy testing.
 - 5. SECURE 2.0:
 - a. SECURE 2.0 Act requires most new 401(k) and 403(b) plans established after December 29, 2022, to implement an Eligible Automatic Contribution Arrangement (EACA) starting in 2025.
 - b. Initial default contribution must be between 3% and 10% of compensation, increasing by 1% annually to at least 10%, but not exceeding 15%.
 - c. Plans created before Dec. 29, 2022, small businesses (10 or fewer employees), new businesses (<3 years), church plans, and governmental plans are exempt.

- d. Employees have a 90-day window to withdraw automatically contributed funds without penalties.

III. DEFINED BENEFIT PLANS

- A. A defined benefit (DB) plan is an employer-sponsored retirement plan, commonly known as a traditional pension, which promises a specific, guaranteed monthly income upon retirement. Benefits are typically calculated based on a formula considering salary history and years of service, rather than investment performance.
- B. Unlike 401(k) Plan (a defined contribution plan) where there is no guaranty of the value at retirement, a defined benefit plan requires sufficient funds in the plan at the time participants' retirement.
- C. The employer, not the employee, is responsible for managing the plan's investment risk and ensuring enough funds are available to pay the promised benefits.
- D. Defined benefit plans have disadvantages like high costs and complexity for employers, lack of investment control and portability for employees, and financial risk if the employer underfunds the plan, often leading to less flexibility and potential benefit reduction if the company faces financial trouble, making them less popular than defined contribution plans such as a 401(k) Plan.
- E. A cash balance plan is a defined benefit plan that functions like a defined contribution plan (such as a 401(k)) by offering individual, hypothetical account balances. Employers guarantee a specific benefit (pay credits + interest credits) and bear all investment risk, making it popular for accelerating retirement savings and reducing taxes.

IV. COMBINING - COMBO PLANS

- A. A defined contribution plan can include what is known as a new comparability formula or cross testing.
- B. A defined contribution plan defines the amount that will be contributed currently with no guaranty as to the amount of the benefit at the time of retirement. A defined benefit plan specifies the benefit at retirement without a predetermined annual contribution.
- C. The underlying principle determining the funding of a defined benefit plan is the time value of money. For example, a participant who is age 60 needs to have a larger contribution made to a retirement plan today to have that amount grow to \$100 at retirement compared to the contribution required for a participant who is age 20 to have their benefit grow to \$100 at retirement.
- D. Each year, a defined benefit plan is required to have an actuary calculate the required contribution by projecting the retirement benefit to be funded.
- E. In simple terms, cross testing works by looking at the contribution made to each participant currently and demonstrating that although each participant may receive a different contribution percentage compared to the other participants, the amount received is projected to be the same benefit at retirement.

- F. Key technical requirements must be satisfied to demonstrate that the cross-tested plan does not discriminate in favor of HCEs.
- G. Cross-tested plans must also satisfy one of two minimum contribution requirements, in addition to the technical requirements described above:
1. A minimum 5% allocation rate to each non-highly compensated employee (NHCE); or
 2. A minimum allocation rate to the NHCEs equal to 1/3 of the highest allocation rate for any highly compensated employee (HCE).
- H. What it may look like:

NAME	AGE	PLAN COMP.	ASSUMED DEFERRALS	3% SAFE HARBOR	PROFIT SHARING	CASH BALANCE	TOTAL AMOUNT
Owner	50	\$360,000.00	\$32,500.00	\$0.00	\$20,282.00	\$200,000.00	\$252,984.00
NHCE #1	37	\$52,300.00	\$0.00	\$1,569.00	\$2,144.30	\$1,830.50	\$5,543.80
NHCE #2	29	\$18,800.00	\$0.00	\$564.00	\$770.80	\$658.00	\$1,992.80
NHCE #3	34	\$28,600.00	\$0.00	\$858.00	\$2,030.60	\$1,001.00	\$3,031.60
GRAND TOTAL							\$263,552.20

96% of the total contributions to the owner.

V. RETIREMENT PLAN DOLLAR LIMITATIONS

- A. The elective deferral limits under IRC § 402(g) for 401(k) plans are \$24,500 in 2026, with cost-of-living increases in \$500 multiples.
- B. The dollar limit under IRC § 415(c)(1)(A) for annual additions with respect to defined contribution plans is the lesser of \$72,000 or 100% of compensation for 2026, with cost-of-living increases in \$1,000 multiples.
- C. The compensation dollar limit under IRC § 401(a)(17) is \$ 360,000 for 2026, with cost-of-living increases in \$5,000 multiples.
- D. The deductible contribution under IRC § 404(a)(3) is 25% of aggregated participant compensation.

- E. Deferrals for 401(k) plans are separately deductible with regard to the 25% limit and do not count toward the 25% limit applicable to other employer contributions (e.g., matching contributions, non-elective contributions).
- F. Participant compensation used to calculate the 25% limit under IRC § 404(a)(3) is based on IRC § 415 compensation, which means it is “grossed up” for elective deferrals made by participants under 401(k) plans, cafeteria plans, etc.
- G. Catch-Up Contributions for Individuals Age 50 and Older. Ages 50–59 & 64+: is an additional \$8,000. Ages 60–63: is an additional \$11,250.
- H. Roth Catch-Up Mandate for High Earners. For participants 50+ with prior-year wages exceeding \$150,000, enrolled in 401(k), 403(b), or 457(b) plan - all catch-up contributions must be made on a Roth basis. This requirement is effective for taxable years beginning after December 31, 2025. (SECURE 2.0 section 603; IRC section 402A(a); IRS Notice 2024-02.)

VI. THE NEED FOR LOANS AND IN-SERVICE DISTRIBUTIONS

- A. Provided a retirement plan allows for loans, a participant can avoid being taxed on the receipt of funds as a distribution if a loan is made pursuant to an enforceable agreement, and the agreement meets certain requirements with respect to the term of the loan, the repayment schedule, and the dollar amount loaned.
- B. The specific requirements for a loan are as follows:
 - 1. A loan must be evidenced by a legally enforceable agreement, which may be composed of more than one document.
 - 2. Generally, the term of the loan must be no longer than 5 years. An exception to the 5-year rule exists for principal residence loans. A principal residence loan is used to acquire a dwelling unit which is to be, within a reasonable time, the principal residence of the participant.
 - 3. The loan must provide for level amortization over the term of the loan with payments not less frequently than quarterly.
 - 4. The loan must bear a reasonable rate of interest.
 - 5. Generally, the amount of the loan (when added to the outstanding balance of all other loans, whenever made, from all plans of the employer) may not exceed the lesser of (i) \$50,000 (reduced by the excess of the highest outstanding balance of plan loans during the one year period ending on the day before the date when the loan is made over the outstanding balance of plan loans, the date when the loan is made), or (ii) one-half of the present value of the employee's non-forfeitable accrued benefit under such plan. A plan may provide that a minimum loan amount of up to \$10,000 may be borrowed, even if it is more than one-half of the present value of the employee's non-forfeitable accrued benefit.

C. In-Service Distributions

1. Pre-tax contributions to 401(k) plans may not be distributed prior to the occurrence of certain distributable events: severance of employment, death, disability, attainment of age 59 ½, hardship, and termination of the plan.
2. In-service distributions may be made from a qualified profit-sharing plan to participants who have not separated from service upon attainment of a stated age (usually age 59½) and for emergency purposes.
3. Even if a plan does allow for in-service distributions prior to age 59 ½, the distribution may be subject to a 10% premature distribution penalty.

VII. COMMON PROBLEM AREAS

A. Depositing Contributions

1. The making of late deposits of contributions (or forgetting to make them) is an issue for both salary deferral and employer contributions.
2. The U.S. Department of Labor (DOL) rules emphasize that deposits should be made as soon as administratively feasible, not just by the 15th-day deadline.
3. Employers with fewer than 100 participants are considered to have complied if they deposit contributions within 7 business days of withholding.
4. Late deposits are considered prohibited transactions, which may require filing with the DOL's Voluntary Fiduciary Correction Program (VFCP) and paying excise taxes to the IRS.

B. Top-Heavy Violations

1. A plan is top-heavy with respect to a plan year if the aggregate account balances (or the present value of the cumulative benefits) for the key employees exceed 60% of the aggregate account balances (or the present value of the cumulative accrued benefits) of all employees.
2. A common problem found in a top-heavy defined contribution plan is that the required top-heavy minimum contribution is not provided to the non-key participating employees. The employer must provide each non-key employee participant with a contribution equal to 3% of his or her annual compensation or such lower percentage as is provided to the key employee who receives the highest percentage of compensation for the plan year.
3. Another problem occurs in top-heavy 401(k) plans. Elective contributions under a 401(k) plan on behalf of key employees are taken into account in determining the top-heavy minimum contribution. However, elective contributions on behalf of employees other than key employees may not be treated as employer contributions for purposes of satisfying the top-heavy contribution. Regulation Section 1.416-1 (M-20). Many employers are not aware of their

requirement to make a top-heavy minimum contribution when only elective deferrals are made to a plan.

- C. Loans - The most common problems relate to the loans not being repaid within five years, loan payments not being made quarterly, and the plan not containing language that allows for plan loans.
- D. Others
 - 1. Inadequate documentation from the employee that a hardship or emergency exists for hardship and emergency distributions.
 - 2. Failing to follow the terms of the plan.

VIII. WE MADE A MISTAKE, WHAT DO WE DO?

- A. The Employee Plans Compliance Resolution System (EPCRS) permits plan sponsors to correct these failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis.
- B. Key terminology used within the Revenue Procedure includes the Self-Correction Program (SCP), the Voluntary Correction Program (VCP), and the Audit Closing Agreement Program (Audit CAP).
- C. Under SCP, a plan sponsor that has established compliance practices and procedures may, at any time without paying any fee or sanction, correct insignificant operational failures of a qualified plan, a 403(b), a SEP or a Simple IRA plan, provided the SEP or the Simple IRA is established and maintained under a document approved by the Internal Revenue Service. SECURE 2.0 section 305 significantly expanded the SCP to permit self-correction of most eligible inadvertent failures, whether significant or insignificant, and removed the prior time limitation for correcting significant failures, provided correction occurs within a reasonable period after discovery and the failure was not first identified by the IRS (i.e. The plan is not under audit). (SECURE 2.0 section 305; Rev. Proc. 2021-30 as modified; Rev. Proc. 2024-15.)
- D. VCP provides that a plan sponsor, at any time before audit, may pay a limited fee and receive the Internal Revenue Service's approval for correction of a qualified plan, 403(b) plan, SEP, or Simple IRA plan. Under VCP, there are special procedures for anonymous submissions and group submissions.
- E. Audit CAP occurs when a failure (other than a failure corrected through SCP or VCP) is identified on audit. The plan sponsor may correct the failure and pay a sanction. The sanction imposed will bear a reasonable relationship to the nature, extent, and severity of the failure, taking into account the extent to which correction occurred before audit.

IX. STATE-MANDATED RETIREMENT PROGRAMS

- A. As of early 2026, 17 states have active, mandatory state-sponsored retirement programs, with more than 20 states in total having enacted legislation to require private-sector employers to offer retirement plans.
- B. These programs are designed to cover employees without access to employer-sponsored plans, often forcing employers to choose between the state plan or setting up a private 401(k).

- C. The state of Michigan is actively considering a mandated state-facilitated retirement program, with legislation (HB 5336 and formerly HB 5461) introduced in late 2025 to create the "Michigan Secure Retirement Savings Program".
- D. This plan would require employers with 5 or more employees who do not offer a retirement plan to automatically enroll employees into a state-administered IRA via payroll deductions, allowing employees to opt-out.

X. SOCIALLY RESPONSIBLE INVESTING (SRI)

- A. Socially Responsible Investing (SRI) is an investment strategy that aims to generate financial returns while supporting positive environmental, social, and governance (ESG) outcomes.
- B. It involves investing in companies with strong sustainability practices, ethical labor, and transparent management, often excluding industries like tobacco or weapons.
- C. Impact Investing is a proactive subset of SRI focused on generating specific, beneficial social or environmental effects, such as funding renewable energy or affordable housing. Under the DOL 2022 final ESG rule, ERISA fiduciaries may consider ESG factors when such factors are relevant to the risk-return analysis of an investment. (29 CFR section 2550.404a-1; 87 Fed. Reg. 73822 (Dec. 1, 2022)).
- D. Fiduciary Responsibilities Under ERISA. ERISA imposes core fiduciary duties on those who manage retirement plans: (1) Prudence, acting with the care, skill, and diligence of a prudent person; (2) Loyalty, acting solely in the interest of plan participants and beneficiaries; (3) Diversification, diversifying plan investments to minimize the risk of large losses; and (4) Adherence to Plan Documents, following the terms of the plan documents to the extent consistent with ERISA. (ERISA section 404(a)(1)).

THE INVESTIGATOR'S ROADMAP: CONDUCTING FAIR AND EFFECTIVE WORKPLACE INVESTIGATIONS

By Breanne N. Gilliam, Esq.

I. PURPOSE AND IMPORTANCE OF WORKPLACE INVESTIGATIONS

A. Key purposes:

1. Avoid or minimize legal liability
2. Improve factual basis for decisions
3. Improve morale
4. Demonstrate the Company's commitment to enforcing policies and creating a healthy working environment

B. When should you investigate?

1. An employee files a formal complaint
2. An employee makes an informal complaint
3. An employee reports a questionable situation, even if they say they do not want to make any trouble
4. All allegations of violations of harassment and discrimination policies

C. Selecting the investigator

II. THE INVESTIGATION PROCESS

A. Step 1: Plan the Investigation

1. Who will investigate?
 - a. HR staff, in-house counsel, outside counsel
2. What are the specific allegations?
3. What evidence needs to be collected?
4. Who needs to be interviewed and what information is needed from them?
5. Does the accused need to be removed from the workplace pending investigation results?

B. Step 2: Interview the Complainant

1. Your goal in this interview is to uncover the who, what, where, when, why, and how of the incident.
2. Use open-ended questions and never promise confidentiality.
3. Sample questions:
 - a. What happened? Be as specific as possible.
 - b. How many times did this happen?
 - c. Where did it happen?
 - d. Did anyone else see it happen? Who? What did they say and/or do in response?
 - e. Do you have any physical evidence (e.g., notes, emails, text messages) you can share?
 - f. Do you know anyone else who can shed light on this incident?

C. Step 3: Interview Witnesses

1. Witnesses can help to corroborate or refute the complainant's account of what happened
2. Sample questions:
 - a. What did you witness?
 - b. Where did it happen?
 - c. Did you do or say anything?
 - d. Was anyone else around who may have also witnessed it?
3. Witness Statements

D. Step 4: Interview the Accused

1. Be objective. Don't be adversarial.
2. Sample questions:
 - a. Do you recall having a conversation with Sally on [insert date]? What happened?
 - b. What were the circumstances leading up to the incident?
 - c. Do you have any witnesses whom you think I should talk to?

d. Do you have any physical evidence (e.g., notes, emails, text messages) you can share?

E. Step 5: Collect Evidence/Documentation

1. Examples: signed witness statements, emails, text messages, attendance records, phone logs
2. Review your interview notes to confirm you aren't missing any evidence referenced by a witness

F. Step 6: Create an Investigation Report

1. The investigation report should include:
 - a. The scope of the investigation
 - b. A description of the allegation(s)
 - c. The facts surrounding the allegation(s) with specific dates or timeframes
 - d. Applicable policies or guidelines
 - e. The witnesses interviewed
 - f. Summaries of witness statements
 - g. Documents reviewed
 - h. Key factual findings and credibility determinations
 - i. When assessing credibility, consider:
 - (A) Plausibility
 - (B) Demeanor
 - (C) Motive
 - (D) Corroboration
 - (E) Past record
 - i. Specific conclusions
 - j. Recommendation of next steps, if requested

G. Step 7: Determine Appropriate Remedial Action

1. Disciplinary actions for substantiated misconduct

2. Targeted training or educational interventions
 3. Policy revisions or organizational practice improvements
- H. Step 8: Inform the Parties of Findings
1. Tell the parties whether the allegations were substantiated or unsubstantiated
 2. Do not tell the complainant about the specific corrective action taken against the accused
- I. Step 9: File Records in Investigation File
1. Maintain a separate investigation file, separate from the personnel file
- J. Step 10: Investigation Follow-Up
1. Set a timeframe to follow up with the complainant to ensure the conduct is no longer occurring.
 2. Review investigation and look for patterns in complaints that might suggest more training is needed to avoid similar problems in the future

III. COMMON PITFALLS TO AVOID

- A. Failing to plan
- B. Ignoring complaints
- C. Delaying investigations
- D. Using overly aggressive interview tactics
- E. Promising confidentiality
- F. Failing to listen during interviews and not asking important follow-up questions

IV. BEST PRACTICES

- A. Act promptly
- B. Be thorough
- C. Maintain objectivity and treat all parties fairly
- D. Use open-ended questions
- E. Document everything
- F. Communicate the no retaliation rule

BUILDING BETTER ORGANIZATIONS: HIRING THE BEST AND KEEPING THE BEST

By Ronald A. Sollish, Esq.

I. THE EVOLUTION OF THE HIRING AND APPLICATION PROCESS¹:

A. At the onset of the 21st century, employers and job seekers alike relied on the newspaper's 'Help Wanted' section, cold-calling, dial-up internet, and recruiters to fill open positions. In the early 2000s, online job boards were created, allowing applicants to filter their searches by location, position, industry, and keywords. In the mid-2000s, companies and recruiters were able to reach applicants through online social media (Indeed launched in 2004); however, the employers' reach was limited to an applicant's access to a computer at their home or office. With the introduction of smartphones in the late 2000s, the job-hunting process became more fluid. In the 2010s, employers began using HR software, Applicant Tracking Systems (ATS), to collect, sort and rank resumes received for open roles. At the same time, employers began to utilize video conferencing to conduct initial screenings. From the late 2010s through present, a new focus on skills-based hiring, along with the integration of AI again transformed the hiring process.

However, like the evolution of the hiring process, so, too, has the data used to make hiring decisions². The internet revolutionized the hiring process. Employers can rely on company websites and social media sites (LinkedIn, X, Facebook, and Instagram) to reach qualified candidates. A candidate's experience, once limited to Degrees and Certificates have expanded to include data-driven tools, skills, and competencies as equally important determining factors.

Current Hiring Trends

In 2025, Glassdoor³ data reported online applications resulted in twice as many interviews and 1.5 times as many job offers as opposed to other relied upon sources such as in-person applications, use of recruiters, or referrals. However, since 2023, recruited-sourced candidates increased 72%. Referrals reported between July 2024 and July 2025 led to 7.9% of interviews. And from those referral-based interviews, applicants were 35% more likely to be extended a job offer as opposed to applicants who submitted their resumes through an online application.

SHRM⁴ reports hiring forecast for 2026 will not differ much from what occurred in 2025. According to some experts, 2026 will be slow respective to hiring, quitting, and layoffs, while other experts predict a gradual increase in hiring. In considering the current interest rates and labor shortages, while employers may have capital and opportunity to increase headcount, experts opine employers will

¹ Indeed articles: 20 Years of Job Hunting and What are Application Tracking Systems

² Spark hire article: Then vs Now _ How the Hiring Process Has Changed

³ Glassdoor article: AI has not killed the online job application yet

⁴ SHRM article: 2026 Labor Market Outlook: Stuck in Place

remain hesitant to increase headcount due to AI changes to the workforce, inflation, and economic conditions.

Of the January-November 2025 jobs reported as added to the U.S. economy, ~65% were in the health care sector, affording opportunities for applicants interested in health care support, home health care, and nursing positions. While an increase in health care sector roles was reported, the opposite was reported with respect to white-collar entry-level roles. AI workplace integration is affecting the entry-level workforce. With near historic low quit rates, employees are choosing to remain in their current positions and fixed pay.

The January – November 2025 separation data reported by Bureau of Labor Statistics (BLS) reflected a total of ~19.1 million separations, inclusive of both layoffs and discharges, as compared to the 20.2 million separations reported for 2024.

In its 2025 Talent Trends report, SHRM noted that the positions which were most difficult to fill were candidate-skilled positions including medical, trades, engineering and architecture, community and social service workers, technicians, construction and extraction, protective social workers, and transportation⁵.

In 2026, as certain organizations face hiring constraints and uncertainty, a renewed internal focus on the current organization structure will ensue as Employers will focus on employee development, employee retention and internal mobility⁶.

II. DEVELOPING CULTURE OF RETENTION AND UPSKILLING

A. Identify Business Need and Department Skills Gap Analysis

1. HR records
2. Individual interviews
3. Surveys, questionnaires, and self-assessment
4. Observation
5. Organizational changes
 - a. Succession planning
 - b. Restructuring

⁵ SHRM report: 2025 Talent Trends

⁶ SHRM article: Precision Over Scale: The New Rules of Hiring in 2026

- (E) Identifies opportunities for increased training
- iii. Who participates in a 360° review
 - (A) HR or evaluation administrator
 - (B) Manager or direct supervisor
 - (C) Direct reports
 - (D) Four or five team members
 - (E) Customers or clients
- iv. Incorporating change after the 360° review
 - (A) Create individual development plan
 - (B) Identify training programs and professional development workshops
 - (C) Mentoring opportunities
 - (D) Calendar regular check-ins to monitor progress

C. Retaining Talent

1. As researched by Kaplan, employers will be faced with addressing the specific expectations and values of generations in the Workplace⁹:
 - a. Baby Boomers – 15% of the American Workforce
 - i. Monetary focus on enhanced financial security and health & wellness provisions
 - ii. Non-monetary focus includes work-life balance, continued learning, acknowledging contributions
 - b. Generation X – 31% of the American Workforce
 - i. Monetary focus on enhanced compensation structures
 - ii. Non-monetary focus includes flexibility, professional development, recognizing and rewarding achievements, and endowing autonomy

⁹ <https://kaplan.com/about/trends-insights/generations-in-workforce-industry-analysis-hr-professionals>

- c. Millennials – 36% of the American Workforce
 - i. Monetary focus not identified
 - ii. Non-monetary focus includes:
 - (A) Integrate tasks with broader mission
 - (B) Comprehensive coaching and development
 - (C) Flexible work arrangements
 - (D) Collaborative work environment
 - (E) Technology integration
 - d. Generation Z – 18% of the American Workforce
 - i. Monetary focus not identified
 - ii. Non-monetary focus includes:
 - (A) Offering remote work and flexible hours
 - (B) Commitment to social responsibility, inclusivity and sustainability
 - (C) Access to mental health resources
 - (D) Ensuring transparent communication surrounding opportunities for growth
- 2. Perform stay interviews
 - a. Improve engagement
 - b. Reduce turnover
 - 3. Build a skills-based workplace
 - 4. Companies investing in employees
 - a. Amazon¹⁰ - offerings vary by country

¹⁰ <https://www.aboutamazon.com/news/workplace/amazon-employees-upskilling-education-training>

- i. Enhancing career choice education program offering prepaid tuition program for eligible hourly employees to grow their skills for career success
 - ii. Since 2022, more than 2,000 employees have secured their high school diploma through Career Choice
 - iii. Launching new robotics training and apprenticeships in U.S. to improve participants' skill sets and earnings
 - iv. Over 425,000 U.S. Amazon employees have participated in skills training programs since 2019¹¹
 - b. Walmart¹²
 - i. Creating opportunities for frontline associates to move into higher-paying, in-demand roles including management, truck drivers, pharmacy technicians, and HVAC technicians
 - ii. Philanthropic arm to focus on helping frontline workers advance
 - iii. Skills-first workforce initiative to develop a framework for skills-first hiring for common roles
 - iv. Skills in the states to create skills-based systems in certain states (AR, AL, CO)
 - c. McDonald's¹³
 - i. Improve English skills
 - ii. High school and college degree assistance
 - iii. Management training program teaching employees leadership, operations, culture and preparing them for management and/or corporate roles
 - iv. Assistance in making education and career plans with advisors
- D. Non-Economic Offerings Attracting / Retaining Employees

¹¹ <https://www.aboutamazon.com/news/workplace/our-upskilling-2025-programs>

¹² <https://corporate.walmart.com/skillsfirst>

¹³ https://www.archwaystoopportunity.com/about_archways.html

1. Takeaways from the top 3 of the 2026 Best Places to Work as reported by Glassdoor (a car wash, a burger joint, and a tech giant)
 - a. Commitment to internal promotion
 - b. Hands-on leadership development
 - c. Flexibility “that respects life outside of work”
 - d. Clear progression for long-term career goals
 - e. Minimal bureaucracy
 - f. Empowering environment
 - g. Transparent leadership
 - h. Open communication
 - i. Autonomy to work on meaningful projects
2. Office culture / mission
3. Work Preferences - In-person, hybrid, and remote work

Gallup polling identifying work preference by generation¹⁴

Generation	Exclusively Remote	Hybrid	On-Site
Baby Boomers 1946-1964	35%	54%	10%
Gen X 1965-1979	35%	56%	60%
Millennials 1980-1996	35%	60%	4%
Gen Z 1997 – after	23%	71%	6%

- a. Return to Office trends¹⁵

¹⁴ Gallup article: “Fully Remote Work Least Popular with Gen Z”

¹⁵ <https://founderreports.com/return-to-office-statistics/>

DAYS IN OFFICE	COMPANY
5	Amazon (350,000 employees) AT&T Dell JPMorgan Chase TikTok Truist U.S. Federal Government (all) Washington Post
4	3M Southwest (*4-5 days per week)
3	IBM (management) Uber US Bank

b. A survey conducted by Resume Templates surveyed 849 companies to determine RTO trends¹⁶.

i. 2025:

- (A) 5-day in-office: 27% of companies surveyed plan to return to a full 5-day in office work schedule by end of the year
- (B) Hybrid model: 67% of companies
- (C) Fully remote: 6% of companies

ii. 2026:

- (A) 30% of companies will no longer allow for remote work in 2026
- (B) 8 out of 10 companies will increase measures to enforce the return-to-office

III. INTEGRATING AI INTO THE WORKPLACE

A. AI in HR¹⁷ - transforming traditional HR functions and processes with the application of AI

¹⁶ <https://www.resumetemplates.com/3-in-10-companies-will-enforce-a-full-5-day-in-office-workweek-this-year/>

¹⁷ <https://www.ibm.com/think/topics/ai-in-hr>

1. Presently, HR leaders are being challenged with the change AI brings forth in the workplace.
 - a. Employee expectations.
 - b. Growing skills gap.
 - c. Global labor shortage.
2. In the future, use of AI in HR departments will drastically change and streamline the current systems and processes in place.
 - a. Improve planning and management processes.
 - b. Foster a new mindset and culture to embrace change and implement new ways to work.
3. Use of AI in HR provides benefits which include:
 - a. Increase in efficiency and productivity.
 - b. Decision-making driven by data.
 - c. Improving employee experience through the personalization of an employee's needs and preferences, increase in their professional growth opportunities, and reduction in negative experiences.
 - d. Improved strategic planning.
 - e. Reduce HR department costs through a decreased time-to-hire, improvement in training, and reduction of hindering HR processes.
4. Creation of new roles¹⁸.
 - a. Chief AI Officer (CAIO). – oversees the deployment of AI technology development, while managing benefits and risks.
 - i. Responsibilities
 - (A) Identification of the opportunities where AI improves operations, enhances customer experience and increases income channels.
 - (B) Technology oversight focused on algorithms and models.

¹⁸ <https://www.ibm.com/think/topics/chief-ai-officer>

- (C) Creating teams and identifying talent to successfully execute AI initiatives.
- (D) Creating policy guidelines for use of AI and ensuring it stays in line with the governing ethics and compliance models.
- (E) Providing education to the organization regarding the approach and vision for using AI.

B. Benefits of Using AI Interview Process¹⁹:

1. Job description
 - a. Input basic information re role responsibilities, skills/qualifications, salary range / benefits.
 - b. Prompt AI to create job description (streamlined / comprehensive).
 - c. Reviewing current employees to determine the existence of in-house candidates for screening, upskilling, promotion opportunities.
2. Application screening
 - a. AI assessment of applicants' employment / skills history.
 - b. AI conducted internet searches for qualified applicants via social media platforms.
3. Interview scheduling
 - a. Minimizes delay in assessing availability and coordinating calendars.
 - b. Efficiency and speed.
4. Pre-interview analysis
 - a. Requires human professional review of AI assessments.
5. Customizing interview questions
6. Post-interview analysis
 - a. AI review provides data-driven insight for making decisions.

¹⁹ SHRM article: How to Effectively Leverage AI in Interviews

C. Benefits of Using AI in Employee Management

1. Onboarding.
2. Performance management.
3. Salary decisions.
 - a. Using AI tools for labor market trends / skills demand.
 - b. Decreased employee attrition as data can be provided to employees detailing skills/compensation align with market trends.
4. Employee performance development plans.
 - a. Objectives
 - b. Training / certifications
 - c. Skill development
 - d. Goals
 - i. Definition
 - ii. Tracking
 - iii. Measuring milestones

D. Statistics – SHRM Automation / AI Survey²⁰ conducted in March and April of 2025, with a final sample size of 20,262 U.S. workers, reported the following AI trends in the workplace.

1. 7.8% of U.S. employment - at least 50% of job performed by using generative AI
2. Top occupational groups most exposed to generative AI
 - a. Computer and mathematics
 - b. Business and financial operations
 - c. Architecture and engineering
 - d. Management

²⁰ SHRM article: Automation, Generative AI, and Job Displacement Risk in the U.S. Employment

- e. Life, physical, and social science
- 3. Occupational groups less exposed to generative AI
 - a. Food preparation and serving
 - b. Health care support
 - c. Education and library
 - d. Health care practitioners
- E. Legal Challenges
 - 1. State / Federal Cases
 - a. Cases recognizing AI discrimination liability.
 - i. *Mobley v Workday, Inc.*, 740 F.Supp.3d 796 (2024). - Derek Mobley, an African American male over 40 with disabilities, was rejected from over 100 jobs by employers using Workday’s AI-powered applicant screening tools. The court denied Workday’s motion to dismiss the disparate impact claims, holding that Workday could be treated as an “employer” under an agency theory because its clients delegated traditional hiring functions—screening and rejecting applicants—to Workday’s AI. This case establishes that AI hiring-tool vendors can face liability under Title VII, the ADEA, and the ADA, and that outsourcing hiring decisions to AI does not insulate employers or vendors from discrimination claims.
 - ii. *Baker v CVS Health Corporation, et al*, 717 F.Supp.3d 188 (2024). - Brendan Baker applied to CVS for a supply chain position, which used HireVue’s AI video-interview technology to analyze applicants’ facial expressions, voice intonation, and inflection to generate “employability scores.” The court denied CVS’s motion to dismiss and found CVS failed to provide notice required under the Massachusetts Lie Detector Statute. This case signals that AI-driven interview tools analyzing behavioral cues may trigger state lie-detector statutes, requiring employers to provide applicants with specific statutory notices.
 - b. Cases rejecting AI discrimination liability.
 - i. *Welcome v. Mabus*, 634 Fed.Appx. 256 (11th Cir. 2015): James Welcome, an African American Navy employee, applied to 33 positions through the Navy’s automated Resumix keyword-matching system and was excluded from consideration. The Eleventh Circuit affirmed summary judgment for the Navy,

finding that Resumix applied facially neutral criteria and Welcome failed to show pretext. The court noted that white applicants who were considered had affirmatively contacted HR to request manual review, which Welcome had not done. This case illustrates that automated systems applying neutral criteria will generally withstand discrimination claims absent evidence of pretext or bias in the system's design.

- ii. *Gladden v. Bolden*, 802 F.Supp.2d 209 (D.D.C. 2011): Warren Gladden, a 53-year-old African American, challenged NASA's use of the RESUMIX system, which scored and ranked applicants based on skills-based criteria without considering race or age. The court granted NASA's motion to dismiss, finding the system "blindly scored resumes" using race- and age-neutral criteria and that Gladden failed to demonstrate pretext. The court cited a consistent line of cases rejecting discrimination claims involving RESUMIX. This case reinforces that facially neutral, skills-based automated screening systems are unlikely to support discrimination claims absent affirmative evidence of bias.
 - iii. *Farver v. McCarthy*, 931 F.3d 808 (8th Cir. 2019): Tyron Farver, an African American Army employee, received a high score from the Army's Resumix software but was passed over after the selecting official manually reviewed and discounted his experience. The Eighth Circuit affirmed summary judgment for the Army, holding that "there is no requirement the hiring be done solely on the basis of the computer rankings" and that the software's purpose is primarily to screen out unqualified candidates. Farver failed to show the selecting official's independent judgment was pretextual. This case confirms that employers retain discretion to override AI screening results and are not bound by automated rankings.
 - iv. *Saas v. Major, Lindsey & Africa, LLC*, 2024 WL 2113654 (D. Md. 2024): Heidi Saas alleged that MLA, a legal recruiting firm, used algorithmic tools that discriminated against her based on sex and age by penalizing a "motherhood gap" in her resume. The court dismissed the claim as "entirely speculative," noting that Saas's allegation of AI use was based solely on her assumption that large businesses must use such tools, while MLA asserted it did not use AI. The court held that plaintiffs must identify a specific AI-based employment practice with factual support—mere speculation is insufficient. This case underscores that employers maintaining clear records about their technology use can effectively defend against speculative AI bias claims.
- c. Active litigation.
- i. *Harper v Sirius XM Radio*, U.S. District Court of Eastern Michigan, Case No. 25-cv-12403. In November 2023, Plaintiff applied for approximately 150

positions with Sirius XM, based on his education and prior experience, for which he was either minimally qualified or over-qualified. Plaintiff was rejected for all but one position. He participated in a 30-minute interview for an IT Desktop Support role in late 2023. Plaintiff's allegations include racial discrimination claims under Title VII of the Civil Rights Act and Section 1981. Plaintiff is seeking to expand this litigation into a class action for other similarly situated applicants.

- d. Discovery implications.
 - i. FRCP Rule 26 – includes “all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”
 - (A) ESI would include AI search histories, communications, and chat logs.

2. Title VII Discrimination.

- a. Gaps in employment history (ADA / sex discrimination).
- b. Employment history (age discrimination).

3. Background checks and FCRA Issues - How does the FCRA affect hiring?

- a. When employers run background checks through a company in the business of compiling, they must comply with the Fair Credit Reporting Act (FCRA).
- b. What is “background information?”
 - i. Credit reports.
 - ii. Criminal record checks.
 - iii. “Consumer report.”
- c. FCRA Best Practices: All applicants must sign a background check authorization form.
 - i. Do not seek background information from references or prior employers prior to obtaining this authorization.
 - ii. Place information in personnel file, except if name of person making the reference would be disclosed.
- d. State-Level FCRA Issues.

- i. In recent years, states have enacted laws that add requirements greater than FCRA policies.
 - (A) Arizona, Georgia, California, Maine, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, and Washington.
 - ii. Some states, such as Minnesota and Oklahoma, require an employer to provide the subject of the check an opportunity to check a box to receive any report provided by an FCRA.
 - (A) You must be aware of any state-level FCRA requirements before requesting or acting on a background report.
- e. Notice requirements.
- i. Employers must notify a job candidate before and after adverse action is taken based on information received from a consumer report.
 - (A) Pre-Adverse Action Report.
 - (B) Adverse Action Report.
- f. FCRA Damages.
- i. Consumers may seek their actual damages arising from an FCRA violation.
 - ii. Consumers alleging a willful failure to comply with an FCRA requirement may seek actual, statutory, and punitive damages.
 - iii. May recover costs and reasonable attorneys' fees.