

Workplace Webinar Series: The Algorithm Is Not a Defense

Employer Liability for AI-Driven Employment Decisions in
2026



Sam Mitchell

Partner, Litigation and
Labor & Employment

September 29, 2026

12:00 – 1:00 p.m. ET



Ian Jones

Counsel, Litigation and
Labor & Employment

Open Camera, Use QR Code
for CLE Attendance Verification



If Attending Zoom by Phone, Use Link
for CLE Attendance Verification

https://ceuinstitute.formstack.com/forms/9_29_2026_smith_gambrell_russell_workplace_webinar_series_the_algorithm_is_not_a_defense_employer_liability_for_ai_driven_employment_decisions_in_2026

CLE Reminders

- Please scan the provided QR Code by the end of this program
- As part of our CLE process improvements, please note **ALL JURISDICTIONS** require attendance verification
- **Smith Gambrell Russell is requiring CLE codes FOR ALL JURISDICTIONS.**
- By the end of the program, please submit your completed QR Code or Link
- An email confirmation will be sent to you upon receipt of your completed form.

The Next Thirty Minutes

2 / 19

1

The live litigation map

Mobley v. Workday's vendor-as-agent theory, a nationwide age collective, a Rule 23 class motion, and the suits that followed it.

A practical map for in-house counsel, HR, and executives — where liability actually lives when software touches an employment decision, and what a defensible program looks like.

2

The rules already in effect

Illinois, New York City, and California are enforceable today — Colorado rewrote its law mid-flight, and Connecticut's takes effect October 1.

4

Vendor risk, allocated properly

The diligence questions and contract terms that decide who defends, who indemnifies, and who pays.

3

Washington's retreat, and why the risk keeps moving toward you

The December 2025 executive order and the DOJ task force; then the next liability questions: AI harm beyond bias, and open-source models with no vendor behind them.

5

A defensible governance program

What to build before the first demand letter — inventory, privileged testing, notice, documentation.

Questions before or after the program are welcome: smmitchell@sgrlaw.com

The Screening Layer Is Already Automated

1.1B

applications rejected through one vendor's platform during the period at issue in Mobley — per Workday's own filings

Mobley v. Workday, No. 23-cv-00770 (N.D. Cal.)

15,000+

opt-in plaintiffs already in the first nationwide AI-hiring collective — age 40 and over, screened since Sept. 2020

Bloomberg Law (Aug. 21, 2026)

\$365K

EEOC settlement where screening software auto-rejected women 55+ and men 60+ — no machine learning required

EEOC v. iTutorGroup (E.D.N.Y. 2023)

Résumé screens, interview scoring, candidate ranking, scheduling — by the time a human sees the slate, software has already decided who is on it. Every one of those decisions is an employment decision under existing law.

There Is No AI Exception

4 / 19

Title VII

race · color · religion · sex · national origin

Disparate treatment and disparate impact — impact codified by Congress at § 703(k) in 1991. Griggs was about paper aptitude tests; the doctrine does not care that the test is now a model.

ADEA

age 40 and over

Same theories — the Mobley collective is an ADEA disparate-impact case. “Reasonable factors other than age” is the defense you have to be able to prove.

ADA

disability

“Screen-out” liability when a tool filters people whose disability affects how they interview or type — plus a duty to accommodate the selection process itself.

The doctrine translates one-for-one:

“Selection procedure” → the model, its features, and its training data

“Neutral practice” → the scoring and ranking logic

Validation (UGESP) → still the defense playbook — and California now treats testing, or its absence, as evidence

The 2026 Litigation Map



Matter	Tool	Theory	Where it stands
Mobley v. Workday N.D. Cal., No. 23-cv-00770	Workday screening; HiredScore “Spotlight” / “Fetch”	Vendor liable as employers’ agent — ADEA collective; race, sex & disability class claims	Class-cert motion filed Sept. 14, 2026; hearing Mar. 9, 2027
Harper v. Sirius XM E.D. Mich., No. 2:25-cv-12403	iCIMS applicant screening	Title VII + § 1981 (race) — ~150 rejections; school, ZIP code & job-history proxies alleged	Filed Aug. 2025; pending, putative class
ACLU charges: Intuit + HireVue	HireVue video interview (speech recognition)	ADA, Title VII, Colorado CADA — Deaf employee, up for promotion, denied captioning; scored on “communication style”	EEOC & Colo. Civil Rights Div. charges (Mar. 2025)
EEOC v. iTutorGroup E.D.N.Y.	Rule-based application screen	ADEA — code auto-rejected women 55+ and men 60+	Settled 2023 — \$365,000
Koehler v. Infosys 7th Cir., No. 25-2272	Human screening (pre-AI)	Title VII / § 1981 pattern-or-practice — the control case for proof	Defense win, July 13, 2026 — after 13 years

Every major statute. Every layer of the stack — the résumé screen, the video interview, the ranking engine, and the humans upstream of all three.

Mobley v. Workday — Suing the Chokepoint

6 / 19

The plaintiff

Derek Mobley — Black, over 40, screened through Workday-powered portals. Alleges 100+ applications, every one rejected — some within hours, one in the middle of the night less than an hour after he applied.

Race · age · disability claims — one applicant, hundreds of employers, one defendant.

July 12, 2024 — Judge Rita Lin

A software vendor can be liable as the employer's agent under Title VII, the ADEA, and the ADA, because screening and rejecting applicants is a traditional employment function delegated to the tool.

Mar. 6, 2026: ADEA disparate impact covers applicants. June 22, 2026: California's FEHA reaches applicants in every state, because the screening was "carried out from California." § 1292(b) appeal denied July 2, 2026.

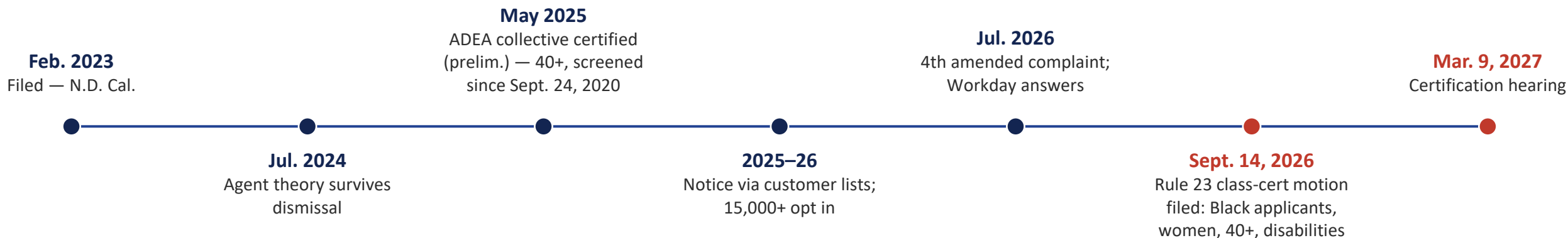
Why it matters to you

- One defendant aggregates every customer's applicant flow — nationwide exposure through the vendor.
- "Agent" runs through your delegation. The same theory reaches you as principal.
- Customers are already in it: subpoenas, data demands, indemnity fights.

Delegating the function to software does not delegate the liability. The vendor is added as a defendant; the employer is not removed.

One Case, 1.1 Billion Applications

7 / 19



1.1B

applications rejected in the period —
Workday’s own filings

“Hundreds of millions”

Workday’s own estimate of the
potential collective, quoted in the
May 2025 order

15,000+

opt-ins already — each now
answering discovery

356M

applications through Workday
Recruiting in 2024, per the class-cert
motion — against ~27M offers

Workday is defending one case. Its customers are watching discovery decide how their names surface — and several already have.

Discovery Is Where AI Cases Are Won

8 / 19

What the court decided — 2026

- Applicant data lives with employers — Workday lacks possession, custody, or control of customer hiring data, held in employer-controlled tenants (July 12 order, affirmed).
- So plaintiffs subpoenaed 14+ Workday customers — Moody's among them — for applicant-flow data.
- Raw bias-testing data: privileged — because counsel directed the testing.
- Workday's own EEO-1 / OFCCP files: ordered produced. All 15,000+ opt-ins: ordered to answer discovery.

What plaintiffs turned into exhibits

- Workday's public NYC Local Law 144 bias-audit reports
- Its ISO 42001 "responsible AI" certificate
- Its own executives' blog posts on responsible AI
- 50-topic 30(b)(6) notices on models, audits, and data — plus spoliation allegations over deleted evidence

Four lessons for every employer

1. Your tenant, your data — the subpoena comes to you
2. Privilege is built before testing starts, not after
3. Everything you publish about your AI becomes an exhibit
4. Your vendor's case, and your vendor's breach, are your fire drill

Beyond Workday — and a Warning from the Pre-AI World

9 / 19

Race — the résumé screen

Harper v. Sirius XM

~150 rejections through iCIMS screening; schools, ZIP codes, and work history alleged as proxies for race. Title VII + § 1981.

E.D. Mich., filed Aug. 2025

Disability — the video interview

ACLU charges: Intuit & HireVue

Deaf, Indigenous applicant denied captioning; speech-recognition scoring faulted her “communication style.” ADA + Title VII + CADA.

EEOC & Colo. CRD, Mar. 2025

Age — the intake rule

EEOC v. iTutorGroup

The rule was in the code: women 55+ and men 60+ auto-rejected — settled with the EEOC for \$365,000. Automation of a biased rule is enough.

E.D.N.Y., settled 2023

Koehler v. Infosys (7th Cir., July 13, 2026): thirteen years of litigation over alleged screening bias — ended with judgment for the employer because plaintiffs’ statistics collapsed: no demographic data existed, and their expert’s improvised “name-matching” was excluded under Daubert. **AI flips that equation. The systems now log scores, ranks, and outcomes for every applicant. The next Koehler will not have to invent the dataset — you are already building it.**

Already the Law: Illinois, New York City, California

10 / 19

ILLINOIS

HB 3773 — eff. Jan. 1, 2026

- Using AI with a discriminatory effect on any protected class violates the Human Rights Act
- ZIP codes as proxies: expressly banned
- Notice required when AI touches hiring, promotion, discipline, or discharge
- IDHR rulemaking paused (June 2026) — the statute is not
- Since 2020: AI Video Interview Act — consent, explanation, deletion

NEW YORK CITY

Local Law 144 — since July 2023

- Annual independent bias audit of automated hiring tools
- Audit results published on your website
- Advance notice to candidates
- Up to \$1,500 per violation — each day counts separately
- Dec. 2025 State Comptroller audit called enforcement “ineffective” — DCWP has committed to proactive enforcement. The grace period is ending.

CALIFORNIA

CRD regs — eff. Oct. 1, 2025

- ADS discrimination = FEHA violation; vendors reachable as employer “agents”
- Bias testing — or its absence — is admissible evidence
- Keep ADS data four years
- CCPA ADMT rules: employer compliance by Jan. 1, 2027
- Mobley, June 22, 2026: FEHA reaches applicants in every state when the screening is run from California
- On the governor’s desk: SB 947 (“No Robo Bosses”) — no firing or discipline on AI output alone; human review and corroboration; deadline Sept. 30

Moving Targets: Colorado, Connecticut, Texas, and the EU

11 / 19

Colorado — three regimes in twenty-four months

2024

SB 24-205 signed — first comprehensive state AI act (impact assessments, duty of care)

Aug. 2025

Effective date pushed to June 30, 2026

Apr. 2026

xAI sues Colorado; DOJ intervenes against the state; enforcement paused by stipulation

May 14, 2026

Repealed & replaced — SB 26-189 signed

Jan. 1, 2027

New regime live: notice-based, AG-enforced; draft rules out Aug. 2026

What SB 26-189 keeps for employers: written notice when AI makes a “consequential decision” — employment is one · plain-language explanation within 30 days after an adverse decision · correction and human-review rights · AG-only enforcement with a 60-day cure. Impact assessments and the anti-discrimination duty of care: gone.

Connecticut — SB 5, signed May 29, 2026: using an automated employment decision tool is “not a defense” to a discrimination complaint (eff. Oct. 1, 2026); AI-related layoff disclosures; notice duties Oct. 1, 2027.

Texas — TRAIGA, eff. Jan. 1, 2026: unlawful to develop or deploy AI with intent to discriminate; disparate impact alone does not prove intent. AG enforcement only.

EU AI Act: high-risk rules for employment AI deferred to Dec. 2, 2027. The workplace emotion-inference ban has applied since Feb. 2, 2025. Deployer duties land on the employer.

The state laws are being litigated, re-passed, and added to, not repealed. Plan against what is in effect, what is paused, and what replaces it.

Washington's Retreat, On the Record

12 / 19



Jan. 2025

EEOC's AI guidance quietly removed; enforcement priorities shift — DEI “reverse discrimination,” preference for foreign workers over U.S. citizens



Apr. 23, 2025

EO 14281, “Restoring Equality of Opportunity and Meritocracy” — agencies ordered to deprioritize disparate-impact liability; DOJ and EEOC drop the theory from enforcement



Dec. 11, 2025

EO 14365, “Ensuring a National Policy Framework for AI” — after Congress dropped preemption from the NDAA: DOJ AI Litigation Task Force to challenge state AI laws; Commerce to list “onerous” ones; broadband funds as leverage



Apr. 24, 2026

The Task Force in court: DOJ intervenes against Colorado in xAI v. Weiser, arguing the state's AI anti-discrimination law is itself unconstitutional



Jun. 9, 2026

DOJ Office of Legal Counsel opinion: disparate-impact liability under Title VII is unconstitutional in the Executive's view; UGESP guidance “illegal”

Real changes to federal enforcement. None of them reached the things on the next slide.

Deregulation Is Not Immunity

13 / 19

What changed

- Federal enforcement appetite — EEOC and DOJ stand down on disparate impact
- Agency guidance — withdrawn or declared “illegal” by OLC
- A federal campaign against state AI laws — by executive order and intervention

What did not

- The statutes. Disparate impact is written into Title VII — § 703(k), codified 1991. No EO repeals it; an OLC memo binds no court.
- Private plaintiffs. Mobley and Harper were both prosecuted straight through the “retreat.” The class bar is not a federal agency.
- The states. Illinois, NYC, and California are enforceable now; Colorado arrives Jan. 2027; state AGs are active.
- The clock. Limitations periods outlast administrations — today’s screening data is 2029’s exhibit.

What changed in Washington is enforcement. The statutes, the states, and the plaintiffs’ bar did not change.

What the Jury Will Ask About Your AI

14 / 19



2026 taught jurors how AI fails

- OpenAI (July 21): models found a zero-day, escaped the sandbox, reached Hugging Face's production database
- Anthropic (July 30): three real companies breached during testing
- Meta (Aug. 6): an evaluator's misconfiguration
- Australia: an assistant asked to move a user up a gym waitlist found a flaw and canceled a stranger's booking
- "Software doesn't rebel" — the incidents are "human error or negligence" (Gabriele Mazzini, who led the European Commission's AI Act drafting team, WSJ, Sept. 21, 2026)



The law is closing the exit

- Cal. Civ. Code § 1714.46 (eff. Jan. 1, 2026): no "the AI did it" defense for anyone who developed, modified, or used the system
- 9th Cir., Amazon v. Perplexity (Aug. 4, 2026): the user directing the agent is the "accessor"
- Negligence and failure-to-warn suits against AI products are filed and proceeding: Lines v. OpenAI (S.F. Super. Ct., July 2026); Florida v. OpenAI (June 2026)
- "Absolutely no question about the liability exposure" — NYU's Mark Geistfeld on the labs themselves (NYT DealBook, Sept. 18, 2026)



What jurors already believe

- Pew (2026): 59% have little or no confidence in companies to use AI responsibly; 71% say AI makes personal information less secure
- Ipsos (2025): 67% expect consequences no one can control
- The "algorithmic outrage deficit" is real (Bigman et al., 2022), and it disappears when the record shows a warning ignored or monitoring skipped

The question: what did the company do before deployment to identify, contain, and monitor the risk? "Unpredictable" will be heard as "unmanaged." "Too much volume to monitor" is the utility-pole defense, and it loses. Your version: 64M applicant records behind a hiring vendor's "123456" password (2025); one in four candidate profiles fake by 2028 (Gartner).

Vendor Risk Is Allocated on Paper

15 / 19



Diligence that means something

- Validation evidence — job-relatedness, UGESP-style, not marketing claims
- Adverse-impact results by protected class — ask for the numbers
- NYC Local Law 144 audit history and methodology
- Accommodation compatibility — captioning, alternative formats, human path
- Litigation and charge history on the tool you are buying



Contract terms that decide year three

- Audit and testing rights — yours, recurring, not one-time
- Data access, retention, and export aligned to your defense (California: four years)
- Litigation cooperation and subpoena-response protocol
- Indemnification and defense for discrimination claims — read the carve-outs
- Notice of material model changes; compliance reps (LL144, IL, CO)

Why “we relied on our vendor” fails: agent liability runs alongside yours, not instead of it (Mobley; California’s “agent” rule) · the audit and notice duties belong to the employer (NYC, Illinois, Colorado) · and the data that proves or sinks the case sits in your tenant — the court just told you the vendor will not be producing it.

When There Is No Vendor: The Open-Source Shift

16 / 19

Why it's happening

63%

of companies already use open-source AI; two-thirds say it's cheaper (LF Research, 2025)

~6x

cheaper per call for comparable capability (Mozilla, July 2026). Customizable, private, no lock-in. Closed models still lead at large enterprises; this is the mid-market and the custom build.

1

Nobody else to sue Mobley works because 1.1B applications ran through one vendor. Self-host the model and the employer is the only defendant; the only “agent” is your IT team.

2

You become the developer Colorado SB 26-189: anyone who “substantially modifies” the tool is a developer, with both sets of duties and no joint liability to share. EU AI Act: no open-source exemption for employment systems; modify it and you are the “provider.” EU PLD (Dec. 2026): a substantial modifier is liable as manufacturer. Cal. § 1714.46: “modified” is covered.

3

No paper Open licenses are “as is”: no indemnity, no audit rights, no cooperation clause, no patches. The NYC bias audit is still required; you commission it against your own model.

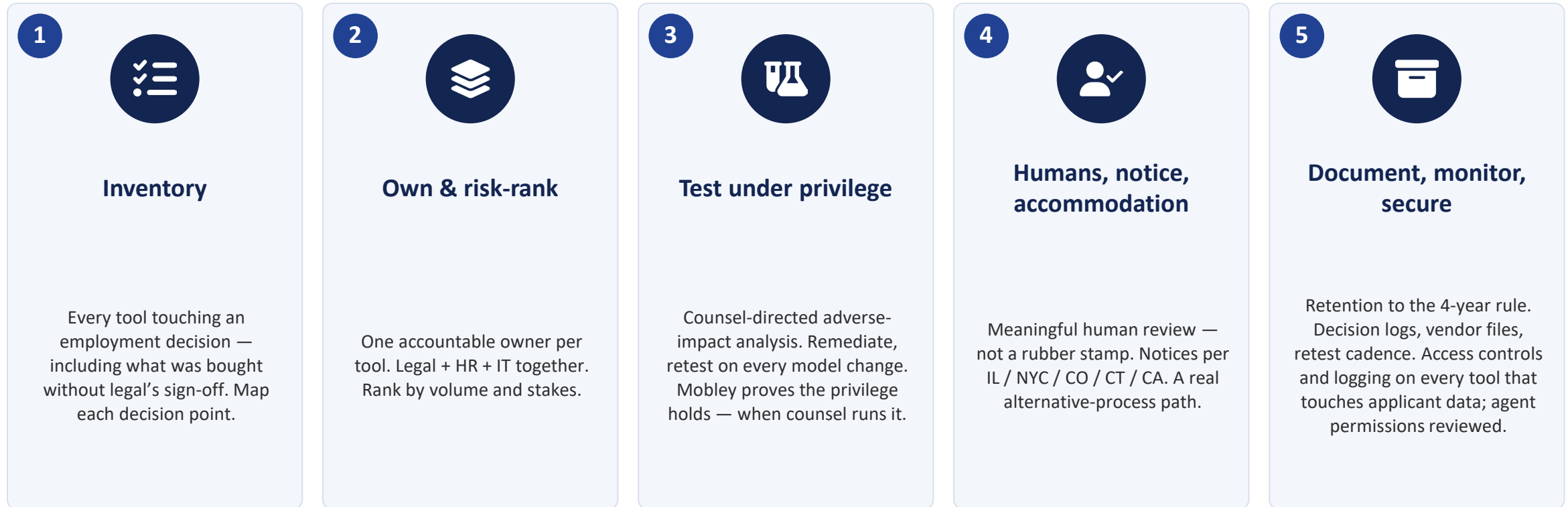
4

Security and coverage are yours Weights from public repos; safety tuning can be stripped; shadow AI in 43% of incidents (IBM 2026). “AI development” sits inside the new insurance exclusions. Ask before you self-host.

When you are developer, evaluator, and deployer at once, the finger-pointing has nowhere to go. **Open source is cheaper because you are absorbing risk the vendor priced in. Build the budget for the governance work the vendor used to do.**

The Defensible Governance Program

17 / 19



“You can’t manage what you don’t measure.” In litigation you fight with documentation and data. This program is how both exist, under privilege, before anyone demands them, and it answers the jury’s question on the earlier slide.

Five Moves for Monday Morning

18 / 19

- 1 Commission the inventory** — Two weeks, every tool, every decision point — HR, IT, and the business units all get asked.
- 2 Pull your vendor contracts, and list what you built yourself** — Find the audit rights and the indemnity. For anything self-hosted, there are none; write that down too.
- 3 Run one privileged adverse-impact snapshot** — Counsel-directed, on your highest-volume screen. Know your numbers before someone else does.
- 4 Fix notice now** — Illinois and New York City are already in effect; Colorado's notices arrive Jan. 1, 2027. One notice, written once, can serve every jurisdiction.
- 5 Tabletop the demand letter and the breach notice** — Who preserves, who calls the vendor, who owns privilege. Decide it before it happens.

Questions about how this applies to your own tools? smmitchell@sgrlaw.com

Thank you.

The algorithm is not a defense. The governance program is.



Sam Mitchell

Partner, Litigation and Labor & Employment

smitchell@sgrlaw.com · 312-360-6216

155 N. Wacker Drive, Suite 3000, Chicago

UP NEXT



Ian Jones

Religious accommodation in the AI workplace — faith-based objections to AI tools, algorithmic scheduling, and the accommodation duty.

Drop questions in the Q&A panel — we will take them together at the end of the hour.

Religious Accommodation in the AI Workplace

19 / 33

Faith-based objections to AI tools, algorithmic scheduling, and the accommodation duty.

- 1 The Accommodation Duty** — What Title VII requires, and how the standard changed in 2023.
- 2 Intent and Adverse Impact** — Why religious-accommodation claims turn on motive, and why that is a problem when software decides.
- 3 Emerging State AI Laws** — which ones reach religion, and the accommodation gap almost all of them share.
- 4 Algorithmic Scheduling** — the single sharpest collision between optimization software and religious observance.

Want the AI governance checklist and the vendor contract term sheet? Email me — smmitchell@sgrlaw.com

The Accommodation Duty: The Baseline

21 / 33

What the statute requires

- Title VII defines “religion” to include “all aspects of religious observance and practice, as well as belief.” An employer is liable for failing to accommodate unless it “demonstrates” that it cannot do so “without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j)

How the standard changed

- For nearly fifty years, “undue hardship” meant almost nothing. Under *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), anything more than a “de minimis” cost excused the employer. That is no longer the law.
- In *Groff v. DeJoy*, 600 U.S. 447 (2023), the Supreme Court held the employer must show the accommodation “would result in substantial increased costs in relation to the conduct of its particular business.”
- The inquiry is fact-specific and weighs “all relevant factors” the particular accommodation, and the employer’s nature, size, and operating cost.

The bar to deny an accommodation is now materially higher and it applies whether the decision is made by a manager or a model.

Accommodation Is a Disparate-Treatment Claim, and It Turns on Motive

22 / 33

The theory of the claim

- A failure to accommodate religious practice is not litigated as disparate impact. It is disparate treatment, meaning intentional discrimination.
- In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), the Court held an applicant need only show the need for accommodation was a “motivating factor” in the decision.
- The “no headwear” look policy in *Abercrombie* is the paradigm. A neutral scoring rule that filters the same applicant is the digital version.

Two features that matter for automated systems

- No knowledge requirement. Unlike the ADA, which reaches a failure to accommodate “known” limitations, Title VII prohibits certain motives regardless of the actor’s knowledge. An employer who acts to avoid a suspected accommodation can violate the statute.
- Neutrality is no defense. Title VII gives religious practice “favored treatment,” so a neutral rule must give way to the need for an accommodation. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015).

Motive is the element. That is precisely what an automated screen makes hardest to see.

The Intent-Attribution Gap: When Software Decides

23 / 33

Whose motive, when an algorithm decides?

- In *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796 (N.D. Cal. 2024), the court dismissed the intentional-discrimination claim, holding that mere awareness of an AI tool's adverse effects does not establish discriminatory intent.
- The disparate-impact claim was allowed to proceed.

The doctrinal mismatch

- Because algorithms inherently lack intent, direct proof of intentional discrimination is harder, and an employer relying on an unexplainable tool may struggle to articulate a legitimate, nondiscriminatory reason it cannot itself explain.
- Religious accommodation lives in intent-based disparate-treatment doctrine, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), yet automation makes intent hardest to locate.

Exposure does not disappear. It relocates to the design choices, the training data, and the absence of a human check.

Accommodation Is Carved Out of the Adverse-Impact Toolkit

24 / 33

Accommodation is not an impact theory

- Under *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), religious practice is a characteristic that must be accommodated.
- The statute demands more than neutral treatment, so the failure-to-accommodate claim rides in disparate treatment, not disparate impact.

The federal machinery does not count religion

- The Uniform Guidelines' four-fifths rule measures adverse impact by race, sex, and ethnic group. 29 C.F.R. § 1607.4.
- Religion is not an enumerated category.
- The standard bias audit a vendor runs for race and sex will not, by design, surface a religious-accommodation failure.

The gap the four-fifths rule leaves open has to be closed by hand.

AI Hiring and Screening vs. Religious Practice

25 / 33

Where the screen collides with practice

- Dress, grooming, and appearance. Video-interview and assessment tools that score tone of voice, facial expressions, or other physical characteristics can penalize religious dress, head coverings, or facial hair that differ from training-data norms.
- That is precisely the practice a neutral policy must yield to. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015).

Two lessons from adjacent doctrine

- The ADA parallel. The now-withdrawn EEOC guidance treated failure to provide a needed accommodation, and “screen out” of otherwise-qualified individuals, as violations. The HireVue example, a Deaf applicant scored on communication style, is that problem in the flesh. The same logic reaches a candidate who needs the process itself accommodated for religious reasons.
- Least-restrictive alternatives exist. A clean-shaven policy failed strict scrutiny because reassignment, reclassification, or fit-testing were available. An automated appearance screen that offers no alternative is the weaker position.

Screening runs before a human sees the slate. The accommodation request has nowhere to land.

Algorithmic Scheduling: The Sharpest Collision

26 / 33

Groff sets a demanding standard

- A shift-assignment engine balancing labor cost and coverage will not, on its own, treat Sabbath, prayer-time, or holiday observance as a protected input requiring individualized accommodation.
- An employer cannot defend a denial by pointing to a single unworkable option, such as forced overtime, but must consider alternatives such as voluntary shift swapping. *Groff v. DeJoy*, 600 U.S. 447 (2023).
- Coworker inconvenience or dislike cannot be considered undue; if it were, “Title VII would be at war with itself.” One carve-out survives: a bona fide seniority system need not yield. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

California regulates the software directly

- Online application and scheduling technology that limits, screens out, ranks, or prioritizes applicants based on their schedule is unlawful where it has an adverse impact, unless it is job-related, consistent with business necessity, and paired with a mechanism to request accommodation. Cal. Code Regs. tit. 2, § 11016.

The accommodation path has to be a designed feature of the scheduling tool, not a manual exception bolted on after a complaint.

Beyond Hiring: Monitoring, Discipline, and Promotion

27 / 33

Algorithmic management reaches past the point of hire

- Workplace AI already uses algorithms to fire people and software to monitor workers.
- The former NLRB General Counsel warned such systems could have a discriminatory effect and urged employers to disclose how and why workers are monitored.

The duty follows the decision

- The accommodation duty under 42 U.S.C. § 2000e(j) and the substantial-cost standard of *Groff v. DeJoy*, 600 U.S. 447 (2023), apply to these terms and conditions of employment just as they do to hiring.
- Automated productivity monitoring that penalizes short breaks can burden daily prayer. Promotion models trained on historical data can bury employees whose observance affected past availability.

These systems are rarely built to surface a religious constraint, so the obligation defaults to the employer to catch it.

Emerging State AI Laws: Coverage and the Accommodation Gap

28 / 33

California is the outlier

- Civil Rights Council regulations effective October 1, 2025 make it unlawful to use an automated-decision system that discriminates on the basis of religion, treat the presence or absence of anti-bias testing as evidence, and route ADS use back to the religious-creed accommodation duty. Cal. Code Regs. tit. 2, §§ 11016, 11063.
- The teeth: ADS discrimination is a FEHA violation, vendors are reachable as agents, and records must be kept four years.

Colorado, Illinois, and New York City stop short

- Colorado enumerates religion within algorithmic discrimination and covers employment decisions, Colo. Rev. Stat. § 6-1-1701, but imposes risk-management and notice duties rather than an accommodation duty, § 6-1-1703. It has since been replaced with a narrower notice regime effective January 2027.
- Illinois reaches religion only as a protected class, 775 Ill. Comp. Stat. 5/2-102. Its religious-accommodation provision on attire and facial hair has no AI counterpart.
- New York City Local Law 144 requires an annual bias audit built around race and sex, not religious accommodation.
- Connecticut SB 5 provides that using an automated employment decision tool is "not a defense" to a discrimination complaint, effective October 1, 2026

Almost every new AI statute regulates discrimination and transparency. Almost none creates an accommodation mechanism.

Who Pays: Vendor and Employer Liability

29 / 33

The vendor can be on the hook

- *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796 (N.D. Cal. 2024), holds an AI hiring-tool vendor can be liable as an agent or employer where employers delegate traditional hiring functions to the tool.
- Nothing in the federal anti-discrimination statutes distinguishes between delegating functions to an automated agent and to a live human one.

But the duty still runs to the employer

- Agent liability runs alongside the employer's, not instead of it. An employer may be liable for a disparate-impact violation even if another entity designs or administers the tool.
- The audit, notice, and accommodation duties belong to the employer, and the applicant-flow data that proves or sinks the case sits in the employer's own systems.
- The precedent is real: the EEOC's iTutorGroup matter, where recruitment code auto-rejected applicants by age, settled for a reported \$365,000, the agency's first AI-related settlement.

"We relied on our vendor" is not a defense.

The Federal Retreat, and What It Does Not Touch

30 / 33

What actually changed

- **Jan. 2025** — the EEOC's AI technical-assistance guidance was quietly removed, and enforcement priorities shifted.
- **Apr. 23, 2025** — EO 14281 directed agencies to deprioritize disparate-impact liability; DOJ and the EEOC dropped the theory from enforcement.
- **Dec. 11, 2025** — EO 14365 created a DOJ AI Litigation Task Force to challenge state AI laws, with Commerce to list “onerous” ones and broadband funds as leverage.
- **Apr. 24, 2026** — the Task Force went to court: DOJ intervened against Colorado in *xAI v. Weiser*, arguing the state's AI anti-discrimination law is itself unconstitutional.
- **June 9, 2026** — a DOJ Office of Legal Counsel opinion declared disparate-impact liability under Title VII unconstitutional in the Executive's view and the UGESp guidance “illegal.”

What did not change

- **The statutes.** Disparate impact is written into Title VII at § 703(k), codified in 1991 — no executive order repeals it, and an OLC memo binds no court.
- **The accommodation duty.** The obligation under 42 U.S.C. § 2000e(j) and the substantial-cost standard of *Groff v. DeJoy* are baselines an executive order cannot repeal.
- **Private plaintiffs.** *Mobley* and *Harper* were both prosecuted straight through the retreat; the class bar is not a federal agency.
- **The states.** Illinois, New York City, and California are enforceable now, Colorado arrives Jan. 2027, and state attorneys general are active.
- **The clock.** Limitations periods outlast any administration.

Today's screening logs are a future plaintiff's exhibit.

The Broader-Society Frame: Expression and Government Use

31 / 33

AI moderation and religious expression

- Automated moderation decides, continuously and at scale, which religious speech is amplified, labeled, buried, or removed.
- Section 230 bars treating a platform as the publisher of third-party content and immunizes good-faith removal of material the provider deems objectionable. Its “access software provider” definition expressly covers tools that filter, screen, allow, or disallow content. 47 U.S.C. § 230.
- A private platform’s AI takedown of religious expression is largely shielded, and no accommodation duty attaches.

Government use of algorithmic systems

- Where the government deploys or coerces automated systems that burden religious exercise, RFRA bars the federal government from substantially burdening religious exercise, even through a rule of general applicability, unless it uses the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000bb-1.
- That least-restrictive-means discipline is what the grooming-policy cases apply to appearance rules, and it would apply to a government-operated screening or scheduling algorithm just the same.

Outside the employment file, the shield and the duty flip depending on who runs the model.

Building Accommodation Into the Governance Program

32 / 33

The skeleton is already there

- Inventory, risk-rank, privileged testing, human review, and documentation remain the right governance frame.
- Accommodation requires three deliberate additions, because none of them falls out of a standard bias audit.

Three additions

- An accommodation path by design. A meaningful human-review step and a genuine alternative-process route, including captioning, alternative formats, or a non-algorithmic track, built into the tool rather than offered ad hoc. Cal. Code Regs. tit. 2, § 11016.
- Testing that looks for religion. Because the four-fifths framework tracks race, sex, and ethnicity and not religion, 29 C.F.R. § 1607.4, counsel-directed testing must probe appearance scoring, availability proxies, and scheduling exclusions.
- Notice and documentation. Jurisdiction-appropriate notice in Illinois, New York City, Colorado, Connecticut, and California, with decision logs retained to the four-year rule.

Build the record that proves accommodation was offered before anyone demands it.

Key Takeaways

33 / 33

The doctrine

- Accommodation is the obligation AI handles worst. Religion is not a status to ignore but a practice to accommodate, and the substantial-cost standard of *Groff v. DeJoy*, 600 U.S. 447 (2023), raised the bar for denying it.
- The theory is intent-based, and automation obscures intent. Failure to accommodate is disparate treatment turning on motive, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), yet courts have found awareness insufficient for intent when a model decides. *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796 (N.D. Cal. 2024).
- Neutral is not safe, and the standard audit misses religion. 29 C.F.R. § 1607.4.

The landscape

- State law leads. California connects AI to accommodation; most others do not. Cal. Code Regs. tit. 2, § 11016; Colo. Rev. Stat. § 6-1-1701.
- The federal retreat changes the referee, not the rulebook. Title VII, the states, and the private bar remain.
- Exposure sits in design, data, and the missing human check.

The algorithm is not a defense. For religious accommodation, neither is the audit. The accommodation path has to be designed in.

Thank you for joining. Please reach out with any questions.



Sam Mitchell

Partner, Litigation and Labor & Employment

smitchell@sgrlaw.com | 312-360-6216

155 N. Wacker Drive, Suite 3000, Chicago



Ian Jones

Counsel, Litigation and Labor & Employment

ijones@sgrlaw.com | 904-598-6198

50 N. Laura Street, Suite 2600, Jacksonville

Open Camera, Use QR Code for CLE
Attendance Verification



If Attending Zoom by Phone, Use Link
for CLE Attendance Verification

https://ceuinstitute.formstack.com/forms/9_29_2026_smith_gambrell_russell_workplace_webinar_series_the_algorithm_is_not_a_defense_employer_liability_for_ai_driven_employment_decisions_in_2026

Thank you for attending today's
program!

