

## ARTIFICIAL INTELLIGENCE IN THE WORKPLACE, HELPFUL TOOL OR RECIPE FOR DISASTER?

Presented by:

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### PRACTICE AREAS:

[Labor & Employment](#)

[Municipal Law & Governance](#)

[Regulated Substances](#)

[Artificial Intelligence, Robotics,  
and Autonomous Transportation  
Systems](#)

[Appellate](#)

### STATE ADMISSIONS:

Pennsylvania

### COURT ADMISSIONS:

U.S. District Court for the Eastern  
District of Pennsylvania

U.S. District Court for the Middle  
District of Pennsylvania

U.S. District Court for the Western  
District of Pennsylvania

U.S. Court of Appeals for the Third  
Circuit

U.S. Court of Appeals for the  
Fourth Circuit

U.S. Court of Appeals for the  
District of Columbia Circuit

### EDUCATION:

J.D., Duquesne University School  
of Law, 1996

M.P.I.A. University of Pittsburgh,  
Graduate School of Public and  
International Affairs, 1991

B.A., University of Pittsburgh,  
1989

# Michael McAuliffe Miller

## MEMBER-IN-CHARGE BOARD OF DIRECTORS

Michael Miller concentrates his practice exclusively on management-side employment and labor law, including employment and labor-related litigation before a variety of state and federal courts.

## REPRESENTATIVE MATTERS

- Successfully defended a petition in the Bucks County Court of Common Pleas filed by the Pennridge Citizens for Direct Representation which sought the establishment of a new representation plan for the Pennridge District School Board. Following an evidentiary hearing, Judge Wallace Bateman, Jr., issued an opinion consistent with the District's position throughout the litigation, concluding that the current at-large plan was constitutional and better serves the Pennridge School District than the Petitioners' proposed three region plan because under the current at-large plan all electors get a vote on all school board seats. In Re: Pennridge Citizens for Direct Representation for the Establishment of a New Representation Plan, CP-09-MD-1641-2022.
- In a case testing the proposition of whether the Federal Educational Records Privacy Act (FERPA) prohibits school districts from being compelled to release video recordings of students under the Right to Know Law, Mr. Miller secured an order from the Supreme Court of Pennsylvania which vacated an earlier Commonwealth Court opinion granting access to such recordings and directed to the Commonwealth Court to reconsider its opinion. *Central Dauphin School District v. Valerie Hawkins, Fox43 and the Commonwealth of Pennsylvania, Office of Open Records*, 16 MAL 2019, Pa Supreme Court (2020).
- Arguing in front of the United States District Court of Appeals for the District of Columbia, Mr. Miller obtained a decision vacating an order of the National Labor Relations Board imposing a significant back pay remedy stemming from an enforcement proceeding brought by the NLRB's General Counsel. *Pennsylvania State Corrections Officers Association v. National Labor Relations Board*, Case No 16-1328 (D.C. Cir. July 6, 2018).
- While representing a Pennsylvania school district as Special Counsel, successfully advocated for Pa. Supreme Court to overturn Commonwealth Court and, while so doing, to conclusively re-affirm the doctrine of constructive discharge in

Pa. and determine the due process owed public school superintendents under Section 1080 of the School Code. *Kegerise v. Delgrande, et. al*, \_\_\_\_ S.Ct. \_\_\_\_ (2018).

- Secured the dismissal of a request for an injunction made by a disappointed bidder who sought to block the City of Lebanon Authority from awarding a \$37-million contract for the reconstruction of its Waste Water Treatment Plant.
- Served as Chief Labor Counsel for a New Jersey for-profit corporation that purchased the Meadowlands Health Center from a nonprofit health system. Negotiated successor labor agreements with four unions and transitioned 400+ employees to new employment avoiding litigation and disruptions to closing.
- Served as Special Labor Counsel for privatization of Dauphin County's Youth Detention Center and nursing homes previously operated by Schuylkill and Washington counties.
- Successfully defended a New Jersey Acute Care Hospital in unionization drive and secured dismissal of representation petition without a union election.
- Served as General Counsel of a Pennsylvania college for 10+ years.
- Selected as Special Labor Counsel for Eastern Pennsylvania by the Society of County Human Resources Professionals of Pennsylvania.
- Selected as Special Labor Counsel for the Pennsylvania State Association of Boroughs.
- Represented national and regional employers in the manufacturing, construction, trucking, public utility, insurance, food, education, and health care industries.
- Litigated to verdict various employment-related litigation, including claims of race, age, disability, and gender discrimination; sexual harassment; wrongful discharge; and breach of contract, and sustained these results on appeal to federal and state appellate courts.
- Developed effective and efficient strategies to resolve matters before federal and state administrative agencies, including the National Labor Relations Board, Equal Employment Opportunity Commission, and Pennsylvania Human Relations Commission.
- Regularly negotiates labor agreements with the Fraternal Order of Police, International Association of Fire Fighters, AFSCME, SEIU, IBEW, the Teamsters, the Steelworkers, and the Building Trades, among other unions.
- Served (in the public sector) as special labor counsel to a number of municipal employers at the state, county, city, borough, and township level and represented those entities in collective bargaining negotiations, contract interpretation claims, discipline matters, interest arbitrations, grievance arbitrations, unfair labor practice charges, and employment-related litigation.

## PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association Ethics, Headquarters, and Nomination Committees, Former Member
- Pennsylvania Bar Association House of Delegates, Former Member

## COMMUNITY INVOLVEMENT

- The Wildcat Foundation, Board Member
- Vice Chancellor and Member of Council of Trustees, Ex Officio, Episcopal Diocese of Central Pennsylvania
- Member, Discernment Committee for Reunification of Central Pennsylvania and Bethlehem Episcopal Dioceses

## AWARDS AND RECOGNITION

Selected for inclusion in:

- Best Lawyers in America 2024 for Litigation – Labor and Employment
- City & State Magazine's PA's Law Power 100 List
- Pennsylvania Super Lawyers – Rising Star
- Law and Politics Magazine's Top 40 PA Lawyers Under 40

## NEWS AND INSIGHTS

### PUBLICATIONS

- ["In Re: Melamed – Right to Know Law Commonwealth Court Interpretation,"](#) co-authored, Eckert Seamans' Labor & Employment and Municipal Law & Governance Alert, January 2023.
- ["Pennsylvania Department of Labor and Industry Submits Its Final Overtime Rule for Approval,"](#) Eckert Seamans' Labor & Employment Alert October 2019.
- ["All Pennsylvania Borough Police Have Civil Service Rights,"](#) Eckert Seamans' Labor & Employment Update July 2019.
- "Act 44: Improving School Safety," co-authored for the Pennsylvania Borough News, November 2018.
- ["Sexual harassment isn't my problem \(until it is\),"](#) Eckert Seamans' Construction Law Update, Spring 2018.
- ["Sexual harassment isn't my problem \(until it is\): Guest view,"](#) Central Penn Business Journal, January 2018.
- ["What Pennsylvania employers need to know about medical marijuana,"](#) Eckert Seamans' Construction Law Update, Fall 2017.
- ["Getting it Right the First Time: Holding Unions Accountable to Contractual and Statutory Time Limits,"](#) SCHRPP Quarterly, April 2013.
- ["Did the Commonwealth Court Sweep Away the Ability to Bargain Over Changes to Post-Retirement Health Benefits?"](#) SCHRPP Quarterly, June 2012.
- ["The Facebook Firing Case,"](#) SCHRPP Quarterly, January 2011.
- "A New Frontier for 1620 Rights?" SCHRPP Quarterly, October 2010.

## MEDIA COVERAGE

- ["A Friend of the Court: PSATS' Legal Defense Partnership Represents Townships on a Host of Issues Before the Courts,"](#) PA Township News, November 2020.
- "Ask the Lawyer: Live Online Chat with Michael McAuliffe Miller," The Central Penn Business Journal, 2014.
- "Companies Fight Against Texting and Driving," Risk and Insurance Online, 2012.
- "New Year, New Policy Challenges," SHRM Online, 2011.
- "Rethink social media policies in light of NLBR complaint, lawyers say," American Medical News, 2010.
- "Chilling Worker Speech on Facebook," Human Resource Executive Online, 2010.
- "Hospitals Responsible for Physicians' Bad Behavior," Health Leaders Media, 2010.

## SPEAKING ENGAGEMENTS

Michael is a regular speaker at Continuing Legal Education programs and professional conferences for numerous organizations, including the Pennsylvania State Association of Township Supervisors, Pennsylvania State Association of Boroughs, County Commissioners Association of Pennsylvania, Pennsylvania Chiefs of Police Association, Society of County Human Resource Professionals of Pennsylvania, and Human Resources and Labor Management Institute. His presentation topics have included:

- [New Rules and New Strategies: Accommodating Employees in a Post Pandemic Workplace](#)
- You're Wrong: Problems in the County Workplace and How to Solve Them
- Just Exactly Where Are We Now? A Review of Municipal Labor and Employment Law in 2021
- [Summer School is in Session: What Pennsylvania School Districts Need to Know About ESSER Relief Funds](#)
- Reviewing the American Rescue Plan Act
- Grievance Handling and Arbitration
- Reviewing the American Rescue Plan Act
- Vaccines and Employment Issues During COVID
- The Unthinkable – Coronavirus and Employees
- Pennsylvania's New Medical Marijuana Law: What Employers Need to Know Now
- Trends in Higher Education Bargaining (co-presented with Dr. Ken Mash at Joint Statewide Conference for Pennsylvania Bureau of Mediation & Pennsylvania Labor Relations Board)
- Police Liability and Body Cameras
- Winning at Mediation and Arbitration
- The Difficult Employee: Attendance and Performance
- The Monster Under Our Beds: Bad Language in CBAs
- Developing and Updating Comprehensive, Legal Employee Handbooks and Job Descriptions
- The Right Way to Hire and Fire Your Employees

- How the NLRB is Remaking Labor Relations in America
- Social Media in the Post-Quon World
- Five (Not So) Easy Pieces: Bad Employment Law Situations for County Solicitors
- Conducting a Workplace Audit
- Alphabet Soup: FMLA, ADA and Workers Compensation
- When Did I Start Working For The Style Channel? Dress Codes, the Public Sector, and the Law


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**PRACTICE AREAS:**

[Labor & Employment](#)

[Litigation](#)

[Health Care](#)

[Appellate](#)

**STATE ADMISSIONS:**

Pennsylvania

New Jersey

**COURT ADMISSIONS:**

U.S. District Court for the Middle  
District of Pennsylvania

**EDUCATION:**

J.D., summa cum laude, Widener  
University Commonwealth Law  
School, 2013; *Law Review*;  
President, Moot Court Honor  
Society; Distinguished Service  
Award

D.P.T., summa cum laude,  
Shenandoah University, 2005

B.S. and B.A., cum laude, Lebanon  
Valley College, 2003

## Tricia S. Springer

### MEMBER

Tricia Springer concentrates her practice in labor and employment matters, administrative law, and civil litigation.

Tricia represents both public and private sector employers in labor and employment issues, including hiring, termination, and employee discipline; contract negotiations; interest arbitrations; grievance arbitrations; and employment-related litigation. Tricia also conducts and counsels employers on workplace investigations, including allegations of employee misconduct.

Tricia has an extensive practice representing governmental agencies and private parties in connection with the Pennsylvania Right to Know Law and educational institutions in connection with the Federal Educational Rights and Privacy Act. Tricia has processed hundreds of RTKL requests on behalf of School Districts and municipal clients and appeared before the Office of Open Records in support of local agencies more than a hundred times. She delivers practical and cost-effective solutions to public entities in handling RTKL requests with the goal of effectively and efficiently handling requests to decrease the associated costs for public agencies.

Tricia also has spent a substantial portion of her practice representing hospitals, physicians, and other health care professionals in the administrative arena and at both the trial and appellate levels.

Before obtaining her law degree, Tricia practiced as a physical therapist for several years, facilitating the rehabilitation of patients in both inpatient and outpatient settings. While attending law school, Tricia was a law clerk for the Honorable J. Michael Eakin of the Supreme Court of Pennsylvania. She also served as a law clerk for the Honorable P. Kevin Brobson of the Commonwealth Court of Pennsylvania and as a legal intern in the Governor's Office of General Counsel for the Pennsylvania Department of Health.

Tricia was the Valedictorian of her law school class. She also served on the *Law Review*, was President of the Moot Court Honor Society, received the Health Law Certificate, earned 17 Certificates of Achievement, and was awarded the Distinguished Service Award.

### REPRESENTATIVE MATTERS

- Represented municipalities, school districts, and private parties in open records appeals.
- Secured an order from the Supreme Court of Pennsylvania which vacated an earlier Commonwealth Court opinion granting access to FERPA protected records under the RTKL.



- Obtained a favorable ruling from the Commonwealth Court of Pennsylvania which upheld the trial court's reversal of an Open Records Office Final Determination on an issue of first impression.
- Represented employers in grievance arbitrations and employment discrimination lawsuits.
- Represented employers in defending against claims of discrimination in front of the Equal Employment Opportunity Commission and the Pennsylvania Human Relations Commission.
- Provided counsel on employment policies and handbooks.
- Investigated workplace harassment complaints.
- Represented health care professionals in licensing disputes.
- Defended physicians and hospitals in medical professional liability actions at trial and appellate levels.
- Advised clients on release of medical records and compliance with HIPAA as well as state laws.
- Advised client on how to minimize and manage medical professional liability risk.

## PROFESSIONAL AFFILIATIONS

- Pennsylvania Defense Institute, Member of the Board of Directors
- American Health Lawyers Association
- American Bar Association
- Pennsylvania Bar Association
- Dauphin County Bar Association
- James S. Bowman American Inn of Court
- William W. Lipsitt American Inn of Court
- Widener University Commonwealth Law School Alumni Association, Board Member

## AWARDS AND RECOGNITION

- Selected for inclusion in Pennsylvania Super Lawyers – *Rising Stars*, 2022-2023
- Received a 2023 Best Lawyers: Ones To Watch recognition for Administrative / Regulatory Law
- Received a 2022 Best Lawyers: Ones To Watch recognition for Administrative / Regulatory Law
- Received a 2021 Best Lawyers: Ones To Watch recognition for Commercial Litigation

## NEWS AND INSIGHTS

### PUBLICATIONS

- ["In Re: Melamed – Right to Know Law Commonwealth Court Interpretation,"](#) co-authored, Eckert Seamans' Labor & Employment and Municipal Law & Governance Alert, January 2023.



## SPEAKING ENGAGEMENTS

- ["Pennsylvania's Medical Marijuana Program: From Seed to Sale and Beyond,"](#) co-presenter, Eckert Seamans' Legal Primer Virtual CLE (Part 3), December 7, 2021.
- "What is Confidential under the RTKL," presenter, Pennsylvania State Association of Township Supervisors, November 2021.
- "What Did This Guy Do? Employee Background Checks," co-presenter, Pennsylvania State Association of Township Supervisors, November 2021.
- "Between The Lines: A Brief on the Unwritten Rules of Practicing Law," panel presenter, New England Law, April 2021.
- ["ADA Accommodations and COVID-19 Vaccines: What Employers Need to Know"](#), co-presenter, Eckert Seamans Zoom Webinar, January 21, 2021.

# Artificial Intelligence in the Workplace, Helpful Tool or Recipe for Disaster?

Michael McAuliffe Miller

Tricia S. Springer

| August 24, 2023

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## Objectives / Roadmap

- What is AI?
- Is it Being Used in the Workplace?
- How is it Used in the Workplace?
- What are the Positives and Negatives of AI in the Workplace?
- How is AI Regulated?
- Litigation over AI in the Workplace?
- Mitigation of Risk with AI in the Workplace?

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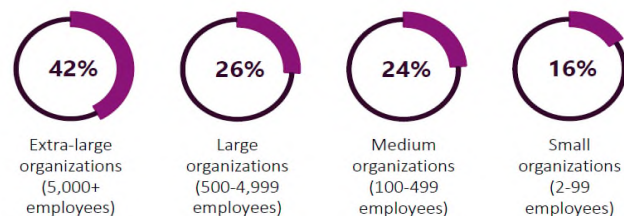
## What Is Artificial Intelligence (AI)?

- Software / Application Software
  - Provide instructions to a computer on how to perform a given task or function
  - To help the user perform a specific task
- Algorithms
  - Set of instructions that can be followed by a computer to accomplish some end
- Artificial Intelligence
  - Machine based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments

## Is AI Used In The Workplace?

**Nearly 1 in 4**  
organizations use  
automation and/or AI  
to support HR-related  
activities.

The largest organizations are more to be utilizing automation and/or AI to support HR-related activities



- Automation & AI in HR Survey, Society for Human Resources, February 2022

## Is AI Used In The Workplace?

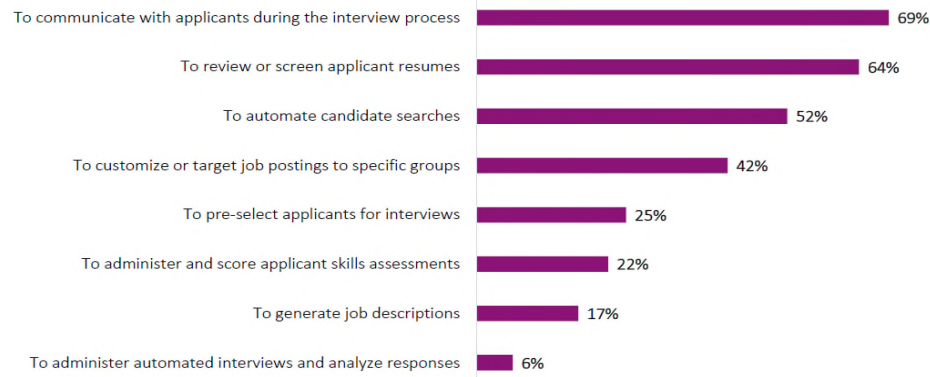
- EEOC Chair Charlotte Burrows (January 31, 2023)
  - 83% of employers now use some form of automated tool to screen or rank candidates for hire
    - Up to 99% of Fortune 500 companies

## How Is AI Used In The Workplace?



- *Automation & AI in HR Survey, Society for Human Resources, February 2022*

## How Is AI Used To Support Recruiting And Hiring?



- *Automation & AI in HR Survey, Society for Human Resources, February 2022*

## How Is AI Used In The Workplace Post-Hire?

- Performance Management
  - Interaction with customers/clients
- Productivity Monitoring
  - Computer habits
    - Time spent at desk
  - Movement
    - Time at desk
    - Driving behavior

## Positives Of AI In The Workplace

- Improves decision-making
- Improves communication
- Improves consistency
- Reduces human error and bias
- Increases accuracy
- Increases efficiency
- Decrease costs
- Enhances customer/client experience

## Negatives Of AI In The Workplace

- |                            |                             |
|----------------------------|-----------------------------|
| • Job displacement         | • Ethical concerns          |
| • Skill mismatch           | • Cybersecurity risks       |
| • Bias and discrimination  | • Lost of human interaction |
| — Unintended “screen out”  | • Uneven access             |
| — Intentional “screen out” | • Technology is not         |
| — Microtargeting           | flawless                    |

## Regulation Of AI

- No federal laws
- State/local laws emerging
  - Illinois – Artificial Intelligence Video Interview Act
  - Maryland – Facial Recognition
  - New York City – Bias Audits

## Non-Binding EEOC Technical Guidance - AI

- *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (issued May 12, 2022)
- *Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964* (issued May 18, 2023)



## EEOC's ADA AI Technical Guidance

**How could use of algorithmic decision-making tools violate the ADA?**

- Failure to provide a reasonable accommodation
  - Necessary to be rated fairly and accurately
- Screens Out
  - Intentionally or unintentionally
- Disability-related inquiries and medical examinations



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## Employer's Responsible?

Even if use of algorithmic decision-making tools are designed or administered by another entity?

**IN MANY CASES, YES.**



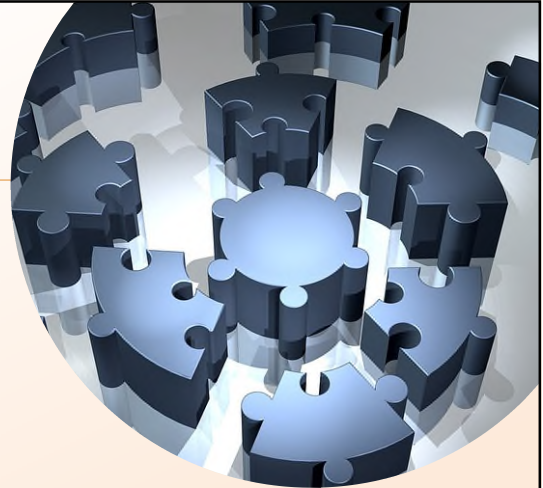
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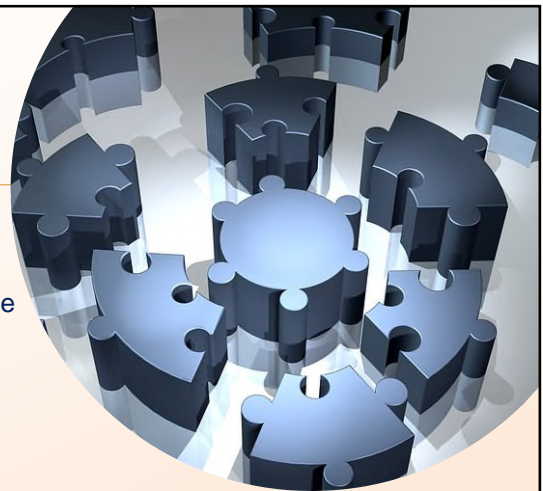
## Promising Practices

- Reasonable accommodations
  - Train staff to recognize and process requests as soon as possible
  - Train staff to develop or obtain alternative means of rating
  - If tool administered by an entity with authority to act on the employer's behalf
    - Ask them to forward all requests for accommodations
    - Require them to provide reasonable accommodations



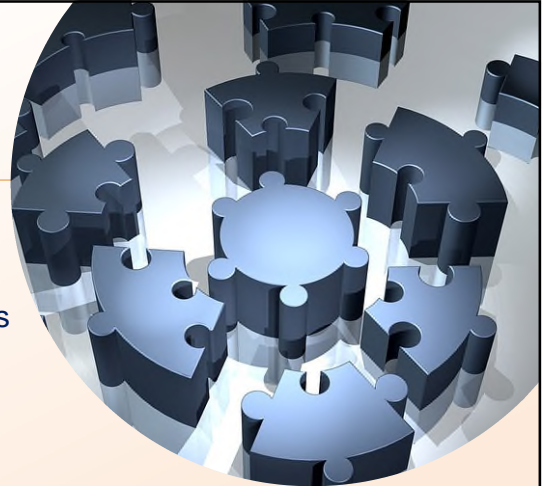
## Promising Practices

- Screen Out
  - Use tools designed to be accessible
  - Inform all applicants/employees being rated that reasonable accommodations are available
  - Describe
    - The traits assessed
    - The method by which the traits are assessed
    - Variables or factors that may affect the rating
  - Ensure tools only measure abilities or qualifications that are truly necessary for the job
  - Ensure necessary abilities or qualification are measured **directly**



## Promising Practices

- Disability-Related Inquiries / Medical Examinations
  - Confirm the tool does not ask applicants/employees questions that are likely to elicit:
    - Information about a disability
    - Seek information about an individual's physical or mental impairments or health
  - Unless:
    - Inquires are related to a request for a reasonable accommodation



## EEOC's Title VII AI Technical Guidance

- Title VII
  - Race, color, religion, sex, national origin
- Mirrors ADA guidance in a number of respects
  - Summary of AI used
  - Liability for use of AI designed/administered by third party
- Focused on *disparate impact* / *adverse impact*
  - Not disparate treatment

## Disparate Impact

- Does the employer use a particular employment practice that has a disparate impact on a protected class?
- If the selection procedure has a disparate impact on that class, can the employer show that the selection procedure is job-related and consistent with business necessity?
- If the employer shows that the selection procedure is job-related and consistent with business necessity, is there a less discriminatory alternative available?

## EEOC's Title VII AI Technical Guidance

- Uniform Guidelines of Employee Selection Procedures (UGESP)
  - AI → “selection procedure”
  - “Selection rate”
    - 4/5<sup>th</sup> (or 80%) Rule
      - Whether the selection rate for one group is “substantially” different than the selection rate of another group
    - General “rule of thumb”
    - Compliance not a guarantee



## Litigation Over AI In The Workplace

- **EEOC Complaint filed – May 2022**
  - Complaint: an English-language tutoring services company “iTutorGroup” was allegedly programming its online recruitment software to automatically reject older applicants
  - Settled: iTutorGroup to pay \$350,000 to rejected job seekers (8/9/23)
- **EEOC Charge filed – December 2022**
  - Allegations: Meta Platforms Inc. “routinely discriminates” in steering job ads to specific age and gender groups on its Facebook platform
- **EEOC Enforcement Action – March 20, 2023**
  - Settlement: Job search operator that uses AI will change its programming code to remove potentially discriminatory keywords



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## Litigation Over AI In The Workplace

- **Baker v. CVS Health Corp. (D. Mass. 2023)**
  - Complaint: Plaintiff alleges AI-assisted video interview violated Mass. Law prohibiting employers from using polygraphs or other device to “assist in or enable the detection of deception”
- **Mobley v. Workday, Inc. (N.D. Cal. 2023)**
  - Allegations: Plaintiff alleges that screening tools allow customers to use discriminatory and subjective judgments in reviewing and evaluating employees for hire which discriminates on the basis of race, age, and disability



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## Mitigation of Risk with AI in the Workplace

- Train HR and other staff
- Audit the technology
  - Ask Questions
    - What are the inputs?
    - What are the outputs?
- Communicate
  - Clearly inform applicants/employees about the type of technology used
- Weigh the risks and benefits
- Monitor changes in the law (and guidance)

# THANK YOU!