



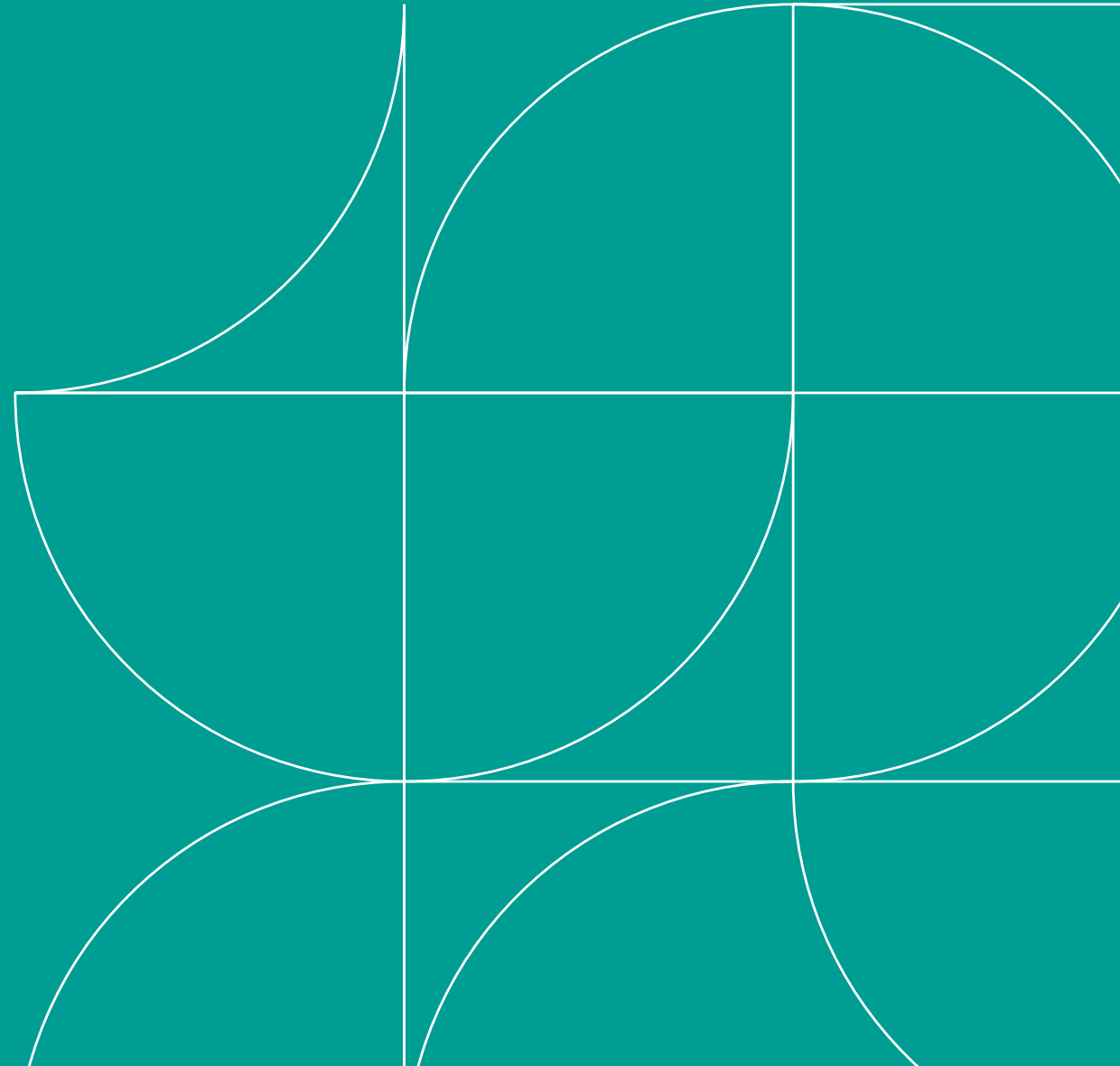
Trending Legal Topics for Staffing Industry in 2023

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Scroggins, Annette Tyman, and
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Seyfarth Shaw LLP

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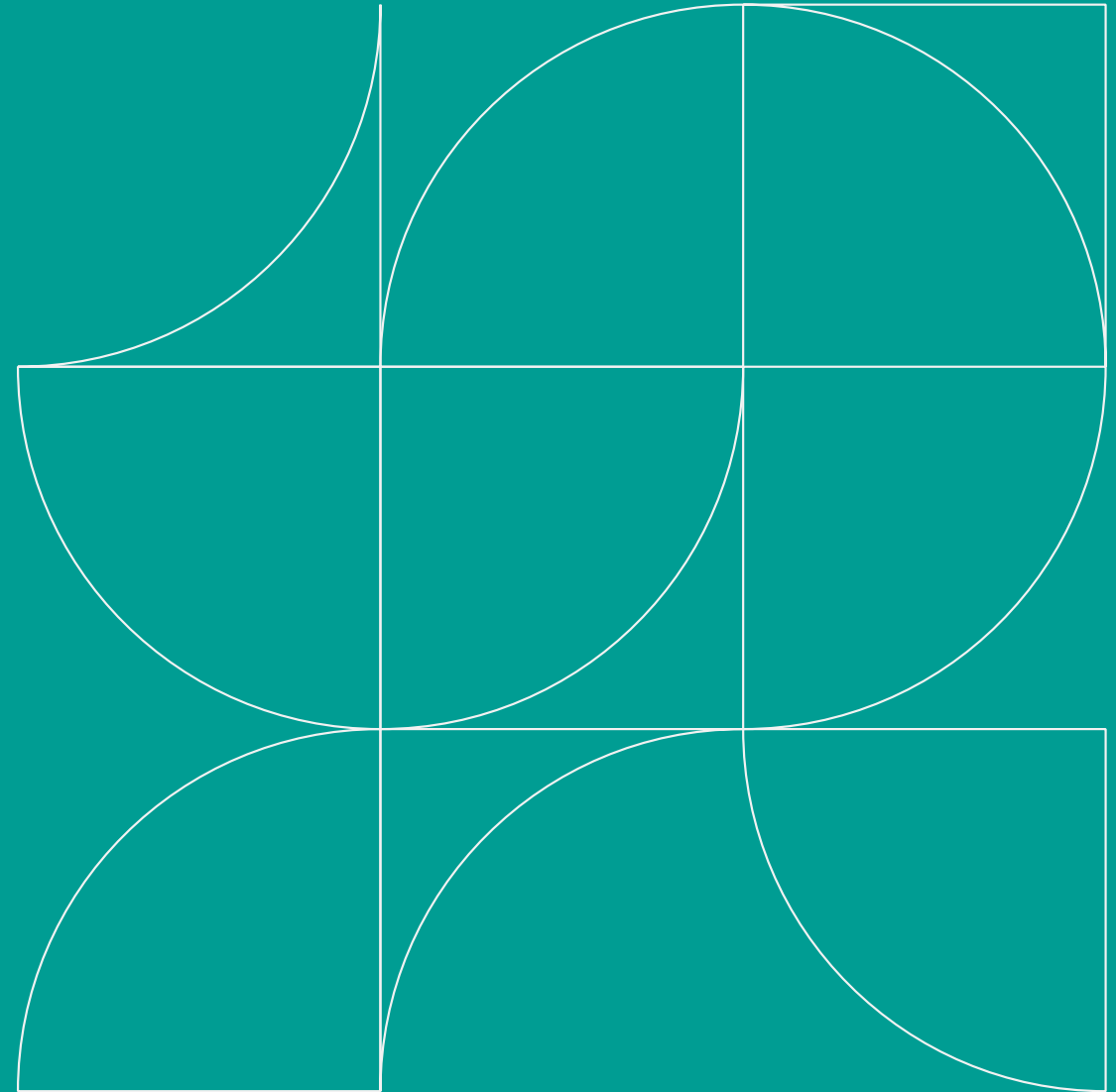
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Agenda

- 01** Indemnification Issues
- 02** Changes at the EEOC
- 03** Pay Transparency Trends
- 04** Artificial Intelligence and the Hiring Process
- 05** OSHA's Emphasis on Compliance Issues

Indemnification Issues

Rebecca Woods



Indemnity Provisions: Current State of Play



- Unsung heroes – provide for risk-shifting and free “insurance”
- But boilerplate, lack of negotiation, and lack of understanding erodes value
- Governed on a state-by-state basis via common law and (sometimes) statutory law
- State law varies, significantly
 - “Defend,” “indemnify,” and “hold harmless” can mean different things
 - Indemnity for indemnitee’s own negligence
 - “Defense” can be treated the same in commercial contracts as it is in insurance policies

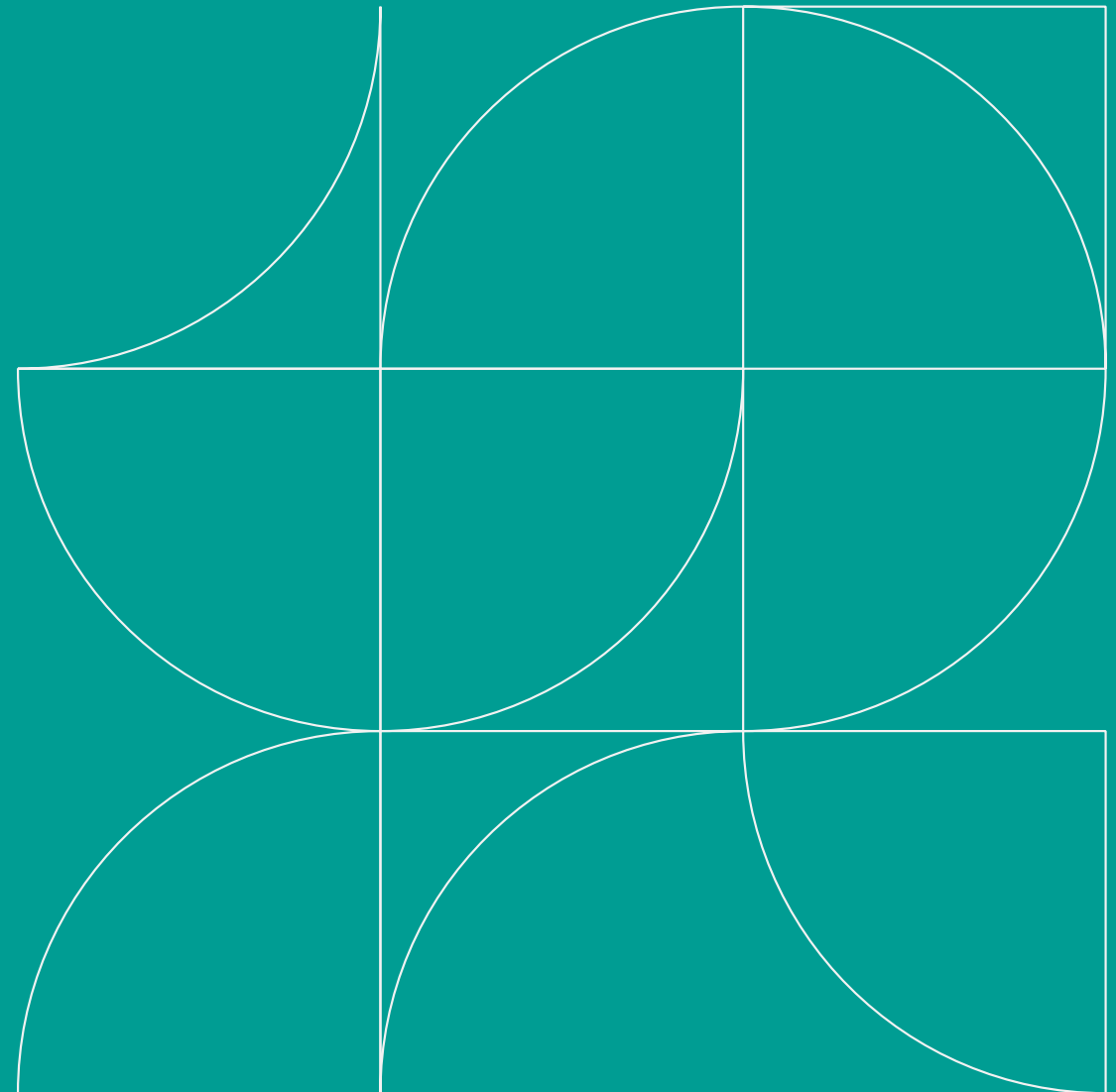
- Comply with applicable jurisdiction (or go with lowest-common denominator)
- Address mechanics: notice, tender, timing of duty to defend, scope and control of defense
- Address inclusions and exclusions carefully; watch nexus phrases
- Clarify limitations, liability basket or cap, materiality qualifiers
- Assess relationship with insurance program
- Consider survival period or claim deadline

Indemnity Provisions: Better Practices



Changes at the EEOC

Andy Scroggins



Staffing Remains Under Scrutiny By The EEOC

- Strategic Enforcement Plans (SEP) describe EEOC areas of focus for a 5-year period.
- FY2017-2021 SEP set its sights on staffing.
- Proposed FY2023-2027 SEP shifts focus, but keeps staffing arrangements in mind.
- The EEOC has pursued enforcement, including litigation, related to staffing arrangements.
- Conditions favor an increase in EEOC enforcement activity, including litigation.

Evolving Strategic Enforcement Priorities



- EEOC’s FY2017-2021 SEP prioritized enforcement around staffing relationships as an “Emerging and Developing” issue:
 - “The Commission adds a new priority to address issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.”
- EEOC’s proposed FY2023-2027 SEP:
 - No longer an “Emerging and Developing” Issue
 - Expanded efforts related to “the vulnerable and underserved workers” – those who may be unaware of their rights under equal employment opportunity laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections” – including “temporary workers.”

Evolving Strategic Enforcement Priorities (cont.)



- EEOC’s proposed FY2023-2027 SEP:
 - Continued priority of “Eliminating Barriers in Recruitment and Hiring,” but with “refinements” relevant to staffing:
 - limiting employees exclusively to temporary work when qualified for available permanent positions;
 - limiting access to temp-to-hire positions, or other job training or advancement opportunities;
 - channeling, steering or segregation of individuals into specific jobs or job duties by protected group;
 - use of automated systems to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups;
 - job advertisements that exclude or discourage certain demographic groups from applying;
 - restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access;
 - screening tools or requirements that disproportionately impact workers based on protected status, including those using AI/automated systems, pre-employment tests, and background checks

Filings Related to Staffing Arrangements



- In FY 2022, EEOC filed 10 suits related to staffing arrangements.
- Some filings allege improper requests were honored:
 - Requests for “good solid dudes,” or “If you have 1-2 labor guys could you please let us know” turned into placing only men into roles.
 - Use of euphemisms: “heavies “ and “lights” (male or female), “bilingual” (preference for Hispanic over Black workers)
- Some filings allege the staffing agency acted on its own.
- Some complaints named both the agency and its client as defendants
- Other complaints identified the client, though did not name it as a defendant
- Recent settlements:
\$180,000 (1/2023) \$77,500 (10/2022) \$175,000 (10/2022) \$550,000 (10/2022)

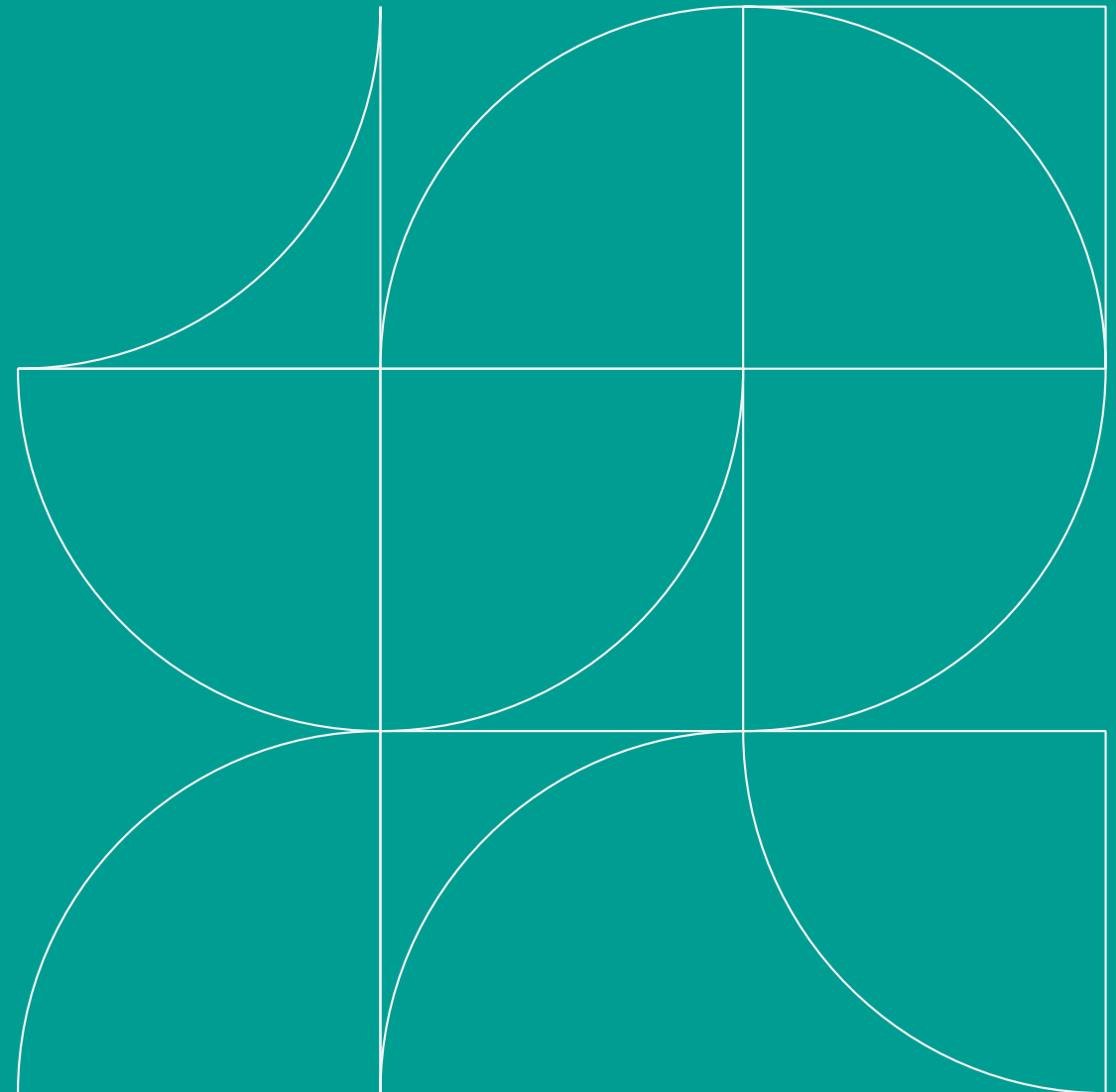
Signs Point To More Filings In FY2023



- Biden Admin calls for “whole-of-government approach to addressing systemic discrimination and advancing equal opportunity.”
- EEOC requested \$464M for FY 2023, a \$60M increase
- Democrats poised to take control of the EEOC
 - Biden Admin named Gwendolyn Reams as GC on March 12, 2021, after unprecedented termination of Trump-appointed GC
 - Control of the Commission lags behind change in administration
 - Democratic appointees Charlotte Burrows and Jocelyn Samuels have been designated as the Chair and Vice Chair, respectfully
 - Republican appointees held the three remaining seats until late 2022 and could veto requests to file new litigation
 - New Democratic nominee Kalpana Kotagal is expected to be confirmed by new Senate
- Backlog of cases waiting to be approved and filed?

The Trend Towards Pay Transparency

Annette Tyman

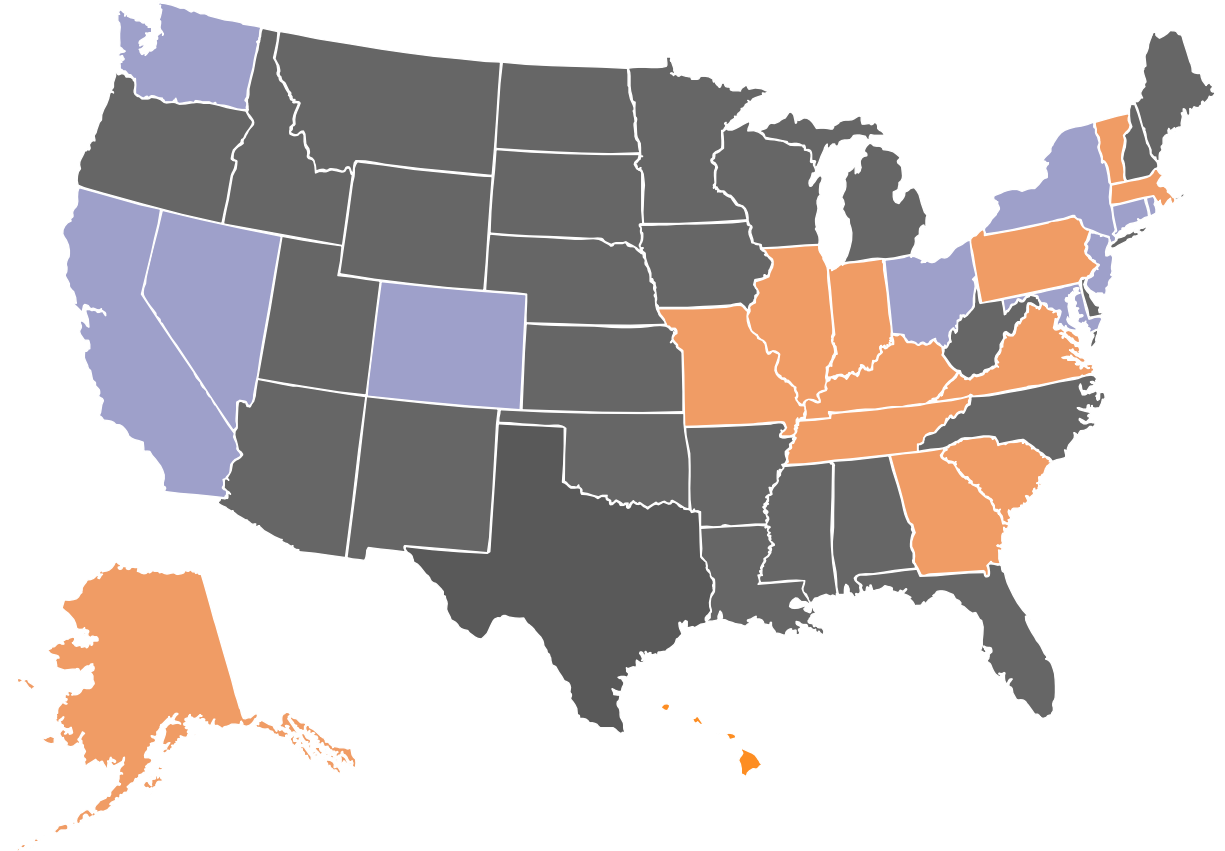


The Trend Towards Pay Transparency & Reporting Continues

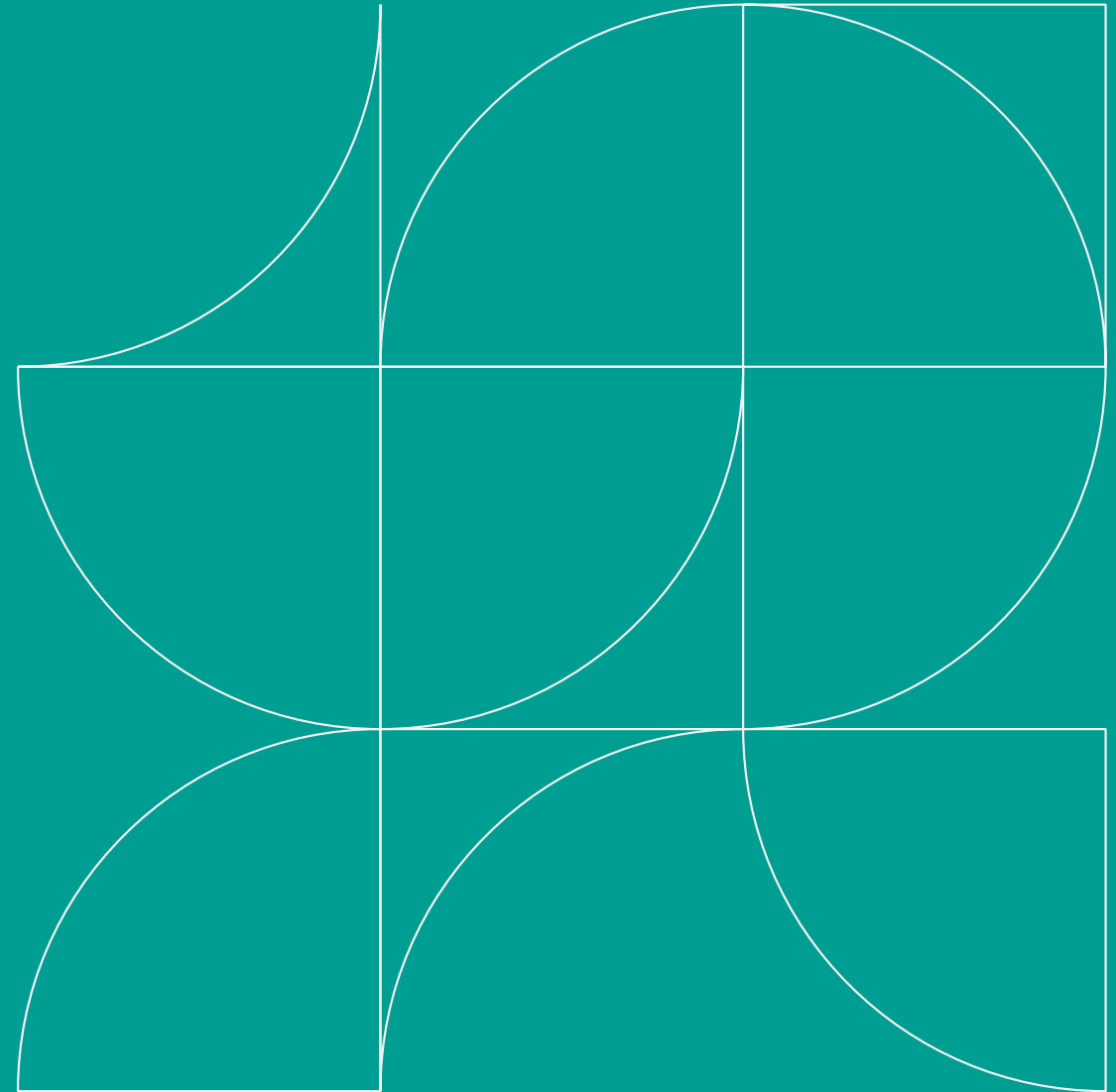
Jurisdictions That Recently Introduced Pay Transparency Bills:

- Alaska
- Connecticut
- Georgia
- Chicago
- Hawaii
- Indiana
- Kentucky
- Massachusetts
- Missouri
- New Jersey
- New York State
- Pennsylvania
- South Carolina
- Tennessee
- Vermont
- Virginia
- Washington D.C.

- Wage range disclosure requirements in 15 jurisdictions
 - Pending legislation in ~17 jurisdictions
- California and Illinois have adopted pay reporting requirements



Pay Data Reporting Requirements



California Pay data reporting requirements?

Gov. Code 12999 (a)(2);
as amended by SB 1162



- California Pay Data requirements were implemented in 2020. First filing was due March 2021.
 - SB 1162 introduced February 17, 2022; Signed into law September 27, 2022
- Employers must submit their reports covering reporting year 2022 by May 10, 2023.
- Private employers with 100 or more U.S. employees (and at least one employee in California) must annually submit data on the pay, hours worked, and demographics of their employees to the California Civil Rights Department (CRD).
- In addition to payroll employees, SB 1162 requires employers who have employed 100 or more workers through “labor contractors” to submit data annually on the pay, hours worked, names of labor contractors used and demographics of their contracted employees to CRD.
- FAQs were released on ~ January 20th
- Technical User Guide released ~ January 29th (Version 5.1 released on February 1st)
- Excel Template materials – expected February 1st

Key Changes to Pay Data Reporting Under CA SB 1162

New Timing

- Second Wednesday in May
- In 2023, the deadline is May 10th

New Scope

- Applies even if employer does not have an EEO-1 filing requirement
- Covers employees & “labor contractor” workers

New Pay Data

- Median hourly rate
- Mean hourly rate

New Report

- In addition to changes to the Payroll Employee Report, there is a new “Labor Contractor” report

California Now Requires Two Pay Data Reports

- *Payroll Employee Report*
 - *covers the W-2 workers employed during the selected Snapshot Period*
- *Labor Contractor Report*
 - *covers the W-2 “labor contractor” workers that performed work for a “client employer” within the client employer’s “usual course of business” during the selected Snapshot Period*
- *Require significant collaboration and exchange of information and data between Labor Contractor partners and Client Employers!*

Threshold Question: Who Must File?

Payroll Employee Report

Private Employers with:

1. 100 or more **employees** employed during the Snapshot Period or “regularly employed” 100 or more employees during reporting year, **and**
2. at least one **employee** working within California or assigned to a California establishment
 - For purposes of the threshold question only, the employee count includes employees outside of CA
 - Includes part-time and temp employees on payroll

Labor Contractor Employee Report

Client Employers with:

1. 100 or more **labor contractor employees** across all labor contractors during the Snapshot Period or “regularly employed” 100 or more during the reporting year **and**
2. at least one **labor contractor employee** working within California or assigned to a California establishment
 - For purposes of the threshold question only, the Labor Contractor Employee count includes LCEs outside of CA

“Regularly employed” applies to certain industries that have recurring, rather than constant operations

Illinois: Overview of the Law



- Illinois joins California to become only the second state to require the collection and production of workforce pay data from private employers.
- The Illinois law goes even further by requiring that employers **proactively verify compliance** with certain state and federal laws and by collecting **employee-level** pay data.
- Under the law, a covered “business” must:
 - Obtain an equal pay registration certificate (EPRC) from the Illinois Department of Labor
 - Recertify compliance every two years thereafter

Equal Pay Compliance Statement

- **Statutory Compliance**
 - No non-appealable adverse judgements (anti-discrimination laws).
- **Lack of Wage Disparity**
 - Average compensation for female and minority employees is not below the average compensation of the business' male and non-minority employees in the same EEO-1 report.
- **No Sex-Based Personnel Decisions**
 - Business does not restrict employees of one sex to certain job classifications and makes retention decisions without regard to sex.
- **Wage Disparities Addressed**
- **Frequency of Wage Determinations**
 - How often wages and benefits are evaluated to ensure compliance with laws
- **Analysis of Wage Determinations**
 - Information regarding the approach the business takes to determining appropriate wages for its employees.

******IDOL has developed a template document for use by employers.***

Wage Data



Employee Wage Data A listing providing **employee-level data** for all Illinois-based employees separated by:

- Name
- Last 4 of SSN
- Gender
- Race and ethnicity
- Total wages rounded to the nearest \$100 (*Box 5 of W-2)
- Hours worked (new requirement)
- Hire date (training materials refer to job start date);
- Termination date (training materials refer to job end date)
- Job Classification (EEO-1 Category)
- Job Title
- County where employee works

Pay Range Disclosure Requirements

- States and localities have adopted laws that require providing applicants and/or employees the salary/wage range (or other compensation/benefits) for a role: **1) on job postings**; **2) at some point in time during the application/employment relationship**; or **3) upon reasonable request**

Impacted Jurisdictions

- California
- Colorado
- Connecticut
- Maryland
- Nevada
- New Jersey (Jersey City)
- ****New York**
 - (Ithaca; NYC; Westchester County; Albany County (eff. 3/9/23); New York State (eff. 9/17/23))
- Ohio (Toledo and Cincinnati)
- Rhode Island
- Washington State

#1: Affirmative Disclosure - On Job Posting

	Timing	What Must be Provided
California	<p><u>Job Posting</u>: In each posting for each job opening.</p> <p>For applicants upon reasonable request for position for which applying.</p> <p>For employees upon request but <i>only for current job</i>.</p>	<p>“Pay scale,” which means a salary or hourly wage range that the employer reasonably expects to pay for the position.</p>
Colorado	<p>On job posting.</p> <p>Notice of a promotional opportunity must be made to all employees for whom it may be a promotion, on the same calendar day; and sufficiently in advance of the hiring or promotion decision that employees receiving notice may apply. There is an exception where an employer continuously -- at least once per month -- either (1) hires for a specific position that would qualify as a promotional opportunity for any current employees, or (2) automatically promotes employees in an in-line job progression upon completing set requirements (e.g., a certification or number of service hours): Such an employer may provide a single notice of such promotional opportunities, rather than a notice for each individual promotion.</p>	<p><u>Compensation Information Posting Requirement</u>: For roles that will be CO based, and for remote roles that could be performed in CO, employers must include: (1) the hourly rate or salary compensation (or a range thereof) that the employer is offering for the position; (2) a general description of any bonuses, commissions, or other forms of compensation that are being offered for the job; and (3) a general description of all employment benefits the employer is offering for the position.</p> <p><u>Promotional Opportunity Notice Requirement</u>: Employers must post or otherwise notify CO employees of all job vacancies whether such vacancies exist in CO or elsewhere, and whether or not any CO employee is qualified for the job. The notice must be in writing and can be made by any method(s) reaching all employees. The definition of promotion is broad, applies to any opportunity that could be a promotion for any employee within the organization (including potentially world-wide roles), and includes in-line, career progression promotions. There are some exceptions to this requirement for confidential searches, certain automatic promotions, and temporary, acting, or interim roles.</p> <p><u>Record Retention Requirement</u>: Employers must keep records of job descriptions and wage rate history for each employee for the duration of the employment plus two years after the end of employment.</p>

#1: Affirmative Disclosure - On Job Posting (Continued)

	Timing	What Must be Provided
New Jersey (Jersey City)	On a posting or advertisement that provides notice of employment opportunities, transfers, or promotions.	Minimum and maximum annual salary or hourly wage. In stating the minimum and maximum annual salary or hourly wage for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity.
New York State (eff. 9/17/23)	In an advertisement for a job, promotion, or transfer opportunity that can or will be performed, at least in part, in the state of New York.	<p>Must disclose: (1) the compensation or a range of compensation for such job, promotion, or transfer opportunity; and (2) the job description for such job, promotion, or transfer opportunity, if such description exists. For jobs, promotions, or transfer opportunities paid solely on commission, must disclose in writing in a general statement that compensation shall be based on commission.</p> <p><u>Recordkeeping Requirement:</u> Must keep and maintain necessary records to comply with the requirements of this section including, but not limited to, the history of compensation ranges for each job, promotion, or transfer opportunity and the job descriptions for such positions, if such descriptions exist.</p>
New York (Albany County, Ithaca, NYC, Westchester County)	On advertisement for a job, promotion or transfer opportunity	Minimum and maximum salary or hourly wage. In stating the minimum and maximum salary/wage for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity.

#1: Affirmative Disclosure - On Job Posting (Continued)

	Timing	What Must be Provided
Washington State	<p>In each posting for each job opening.</p> <p><u>Employees:</u> Upon request after offer of internal transfer to a new position or promotion.</p>	<p><u>In Posting:</u> Wage scale or salary range, and a general description of all of the benefits and other compensation to be offered to the hired applicant.</p> <p><u>Employees:</u> Wage scale or salary range for the employee's new position.</p>

#2: Affirmative Disclosure Requirements - Other

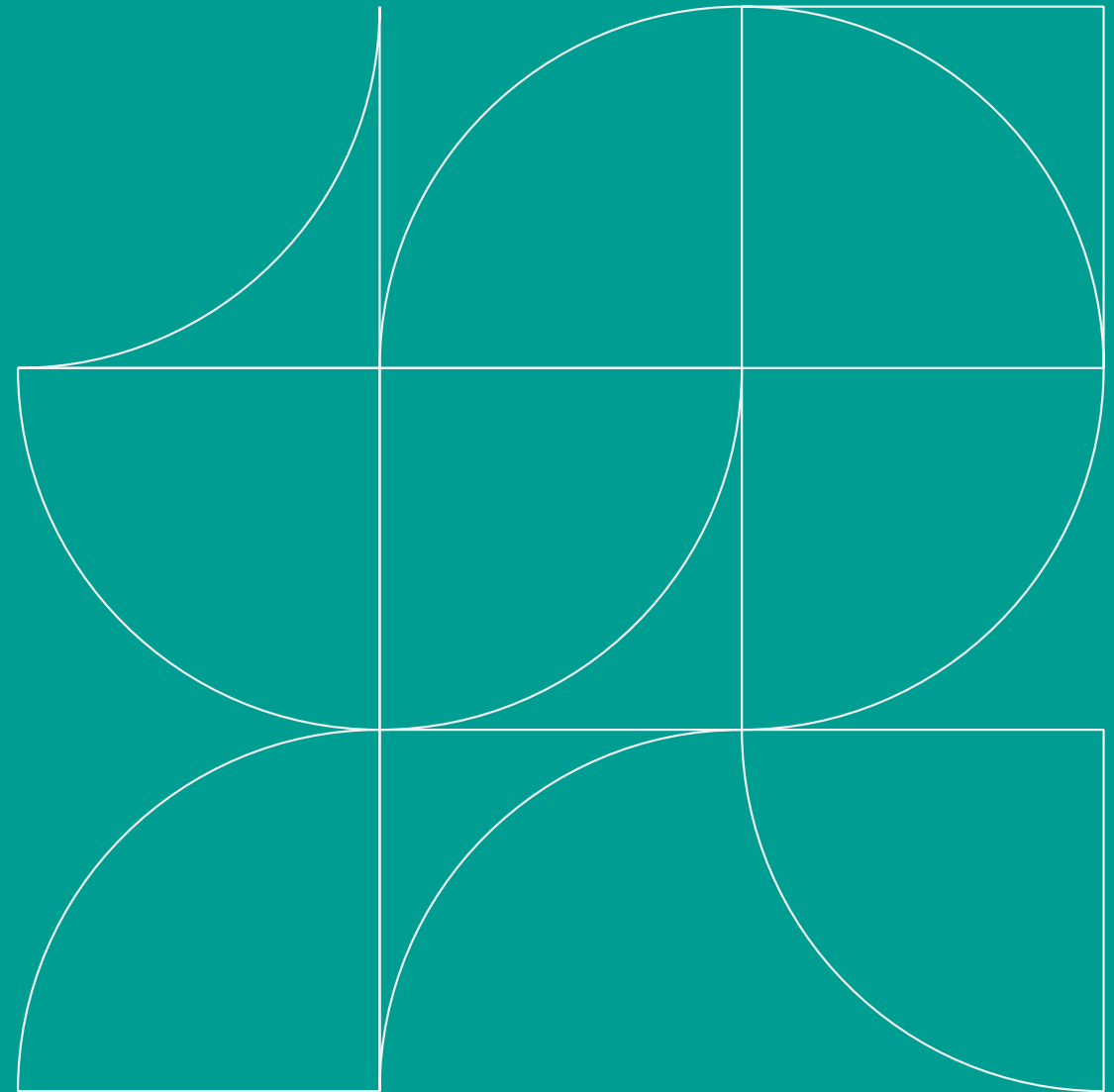
	Timing	What Must be Provided
Connecticut	<p><u>Applicants:</u> Upon earliest of (1) applicant's request; or (2) prior to or at the time of an offer of compensation.</p> <p><u>Employees:</u> Upon (1) hire; (2) change in employee's position; or (3) employee's first request.</p>	<p>Wage range, which means the range of wages the employer anticipates relying on when setting wages for a position and may include reference to: (1) any applicable pay scale; (2) previously determined range of wages for the position; (3) actual range of wages for those employees currently holding comparable positions; or (4) the employer's budgeted amount for the position.</p>
Nevada	<p><u>Applicants:</u> Upon completion of an interview for a position.</p> <p><u>Employees:</u> For promotion or transfer to a new position if the employee has (1) applied for the promotion or transfer; (2) completed an interview for the promotion or transfer or been offered the promotion or transfer; <u>and</u> (3) requested the wage or salary range or rate for the promotion or transfer.</p>	<p>Wage or salary range or rate.</p>
Rhode Island	<p><u>Applicants:</u> Upon request. Employer <i>should</i> provide the wage range prior to discussing compensation.</p> <p><u>Employees:</u> Upon (1) hire; (2) when employee moves into a new position; or (3) employee's request.</p>	<p>Wage range, which means:</p> <p><u>Applicants:</u> The wage range the employer anticipates relying on in setting wages for the position and may include reference to any applicable pay scale, previously determined range of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, as applicable.</p> <p><u>Employees:</u> May include reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for incumbents in equivalent positions, as applicable.</p>

#3: Upon Request (Applicant and/or Employee)

	Timing	What Must be Provided
Maryland	Upon request.	Wage range (undefined).
Ohio (Cincinnati & Toledo)	Upon reasonable request, after a conditional offer of employment.	Pay scale (undefined).

Artificial Intelligence

Annette Tyman



Increased Focus by Agencies

EEOC

- On October 28, 2021, EEOC announced an initiative to ensure that the use of AI complies with federal non-discrimination laws.
- Issued its first technical assistance under the initiative on May 12, 2022 discussing how the American with Disabilities Act (ADA) requirements may apply to the use of AI in employment related decision making.
- Additional Technical Assistance Guidance Expected
- EEOC Listening Sessions
 - Disability Focused Listening session: February 2022
 - Decoded: Can Technology Advance Equitable Recruiting and Hiring: September 2022
 - EEOC Hearing Held January 31, 2023

OFCCP

- OFCCP's FAQs address AI-based technologies used to make any employment decision.
 - “Irrespective of the level of technical sophistication involved, OFCCP analyzes all selection devices for adverse impact. If OFCCP discovers that a contractor’s use of an AI-based selection procedure is having an adverse impact at a contractor’s establishment, the contractor will be required to validate the selection procedure using an appropriate validation strategy...”
- Proposed Revisions to Scheduling letter would require that contractors proactively submit documentation regarding policies and practices that involve AI, algorithms, “automated systems or other technology-based selection procedures.”

Increased Focus by State Legislatures

California

- The California Fair Employment And Housing Council published draft modifications in March 2022 to impose liability on companies and third-party agencies administering artificial intelligence tools that have a discriminatory impact.
- The draft regulations would make it unlawful for an employer or covered entity to “use ... automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee ... on the basis” of a protected characteristic, unless the “selection criteria” used “are shown to be job-related for the position in question and are consistent with business necessity.”
- Regulations are not yet finalized.
- Employers and companies administering the technology could face liability under state anti-discrimination laws, **regardless of discriminatory intent.**

New York City

- NYC employers are prohibited from using tools which substantially assist or replace discretionary decision-making processes unless the tool (1) underwent a “bias audit” within a year before its use, and (2) provides notice & an alternative method to candidates.
- Bias Audit Requirements:
 - Independent auditor;
 - Test for disparate impact before use;
 - Publish the results on website;
 - Conduct tests annually.
- Notice must be provided 10 days before the AEDT is used; and instructions must be provided for candidates who request an alternative process or accommodation.
- Enforcement has been delayed until April 15, 2023.

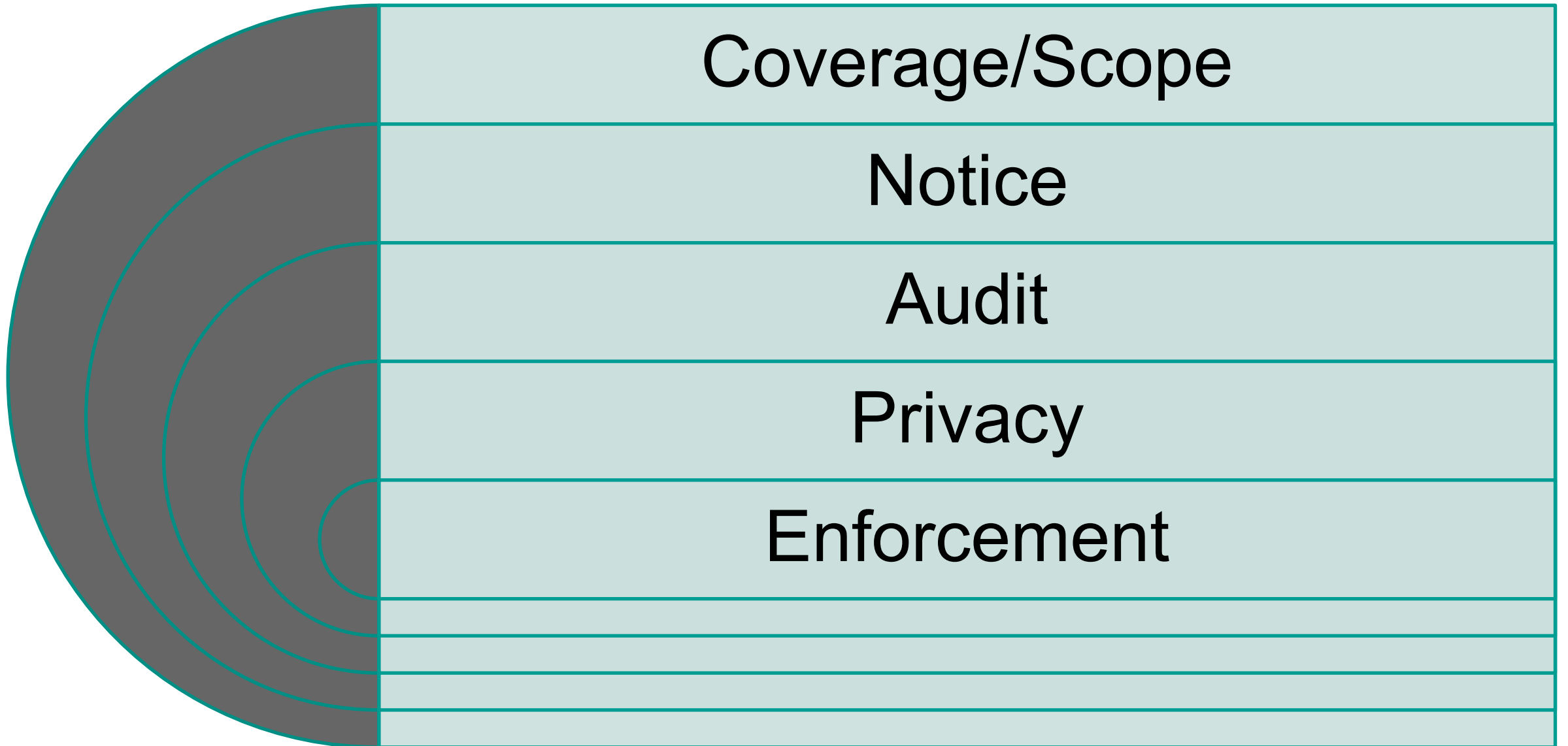
Washington, DC

- The Stop Discrimination by Algorithms Act of 2021 was introduced; it is expected to be reintroduced in 2023.
- Due to timing considerations, on November 17, 2022, Councilmember Robert White announced that the Act would not move forward in 2022 but announced a commitment to “advancing the bill in the first quarter of 2023.”
- Would make it illegal for businesses and organizations to use discriminatory algorithms in four key areas of life opportunities: education, employment, housing, and public accommodations and services including credit, health care, and insurance.

Illinois

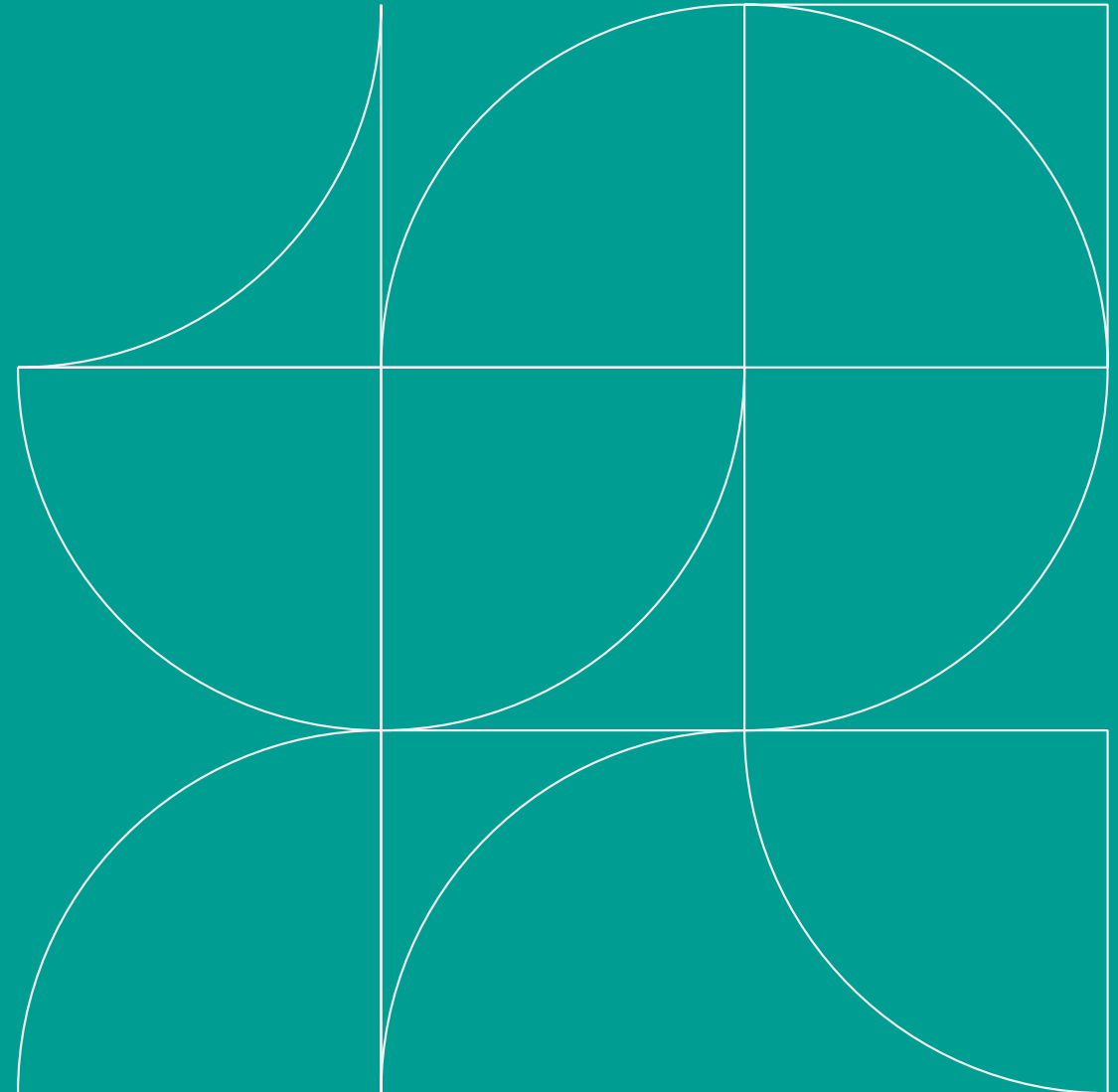
- Artificial Intelligence Video Interview Act covers use of AI in recorded video interviews
- Requires notice to and consent from applicants if employer is using AI analysis of recorded video interviews
- Employers relying solely upon AI to determine whether an applicant will qualify for an in-person interview must gather and report demographic information to the Department of Commerce and Economic Opportunity.
- The Department is required to analyze the data and report to the Governor and General Assembly whether the data discloses a racial bias in the use of AI.
- Employers cannot distribute videos/data to third parties, except as necessary to obtain expert assistance with evaluating a candidate's fitness for a position, and they must destroy all copies within 30 days of applicant's request.

Artificial Intelligence: Key Considerations in Road Ahead



OSHA's Emphasis on Compliance Issues

Ben Briggs & Scott Hecker



OSHA Temporary Worker Initiatives and Enforcement

- In April 2013, OSHA launched the Temporary Worker Initiative
- Concerted initiative to ensure temporary workers are protected from workplace hazards:
 - Enforcement
 - Outreach
 - Training
- State agencies, e.g., Cal/OSHA, have instituted similar programs. Cal/OSHA requires employers to:
 - Take reasonable steps to evaluate conditions at the host employer's worksite by doing periodic inspections.
 - Ensure their employees are covered by an IIPP and other safety programs required by the assigned work, and ensure they are properly trained and provided necessary PPE.
 - Inform the employees that if they are assigned work they reasonably believe to be dangerous, they may refuse to do that work and may return to the primary employer for reassignment to other work without penalty.

- **Why did OSHA and State Analogues Launch these Initiatives?**

- Increase in use of temporary workers
- Temporary workers at increased risk of work-related injury and illness; some do not receive adequate training
- Temporary workers often assigned to more hazardous jobs
- Nature of temporary work is that temporary workers may be “new” to a job site many times per year
- OSHA believes that some employers use temporary workers to avoid compliance obligations and/or do not want to invest in training for temporary workers
- Communication gap between staffing agencies and their clients (host employers)

- **Shared Control = Shared Responsibility**

- Host employers need to treat temporary workers as they treat existing employees. Temporary staffing agencies and host employers share control over the employee and are therefore jointly responsible for temporary employees’ safety and health. It is essential that both employers comply with all relevant OSHA requirements.
- A key concept is that each employer should consider the hazards it is in a position to *prevent and correct*, and in a position to *comply* with OSHA standards.

Temporary Worker Initiatives and Enforcement (cont’d)

Industry-Specific Challenges

Insufficient
Communication
About Roles

Changes in
Job Duties

Verification of
Site-Specific
Training

Safety/Health
Expertise

Exclusion of
Temporary Workers
from Site-Specific
Training

Lack of Feedback
from Temporary
Workers about
Conditions/Changes
in Duties

Limited Knowledge
about Site

Recommended Practices



- Due Diligence
 - Contractually define responsibilities – make sure it reflects reality
 - Review/assess worksite, safety programs, injury/illness logs **before** assigning workers to site
 - Allow/Conduct periodic reassessments – identify changed conditions
 - Communicate and understand duties temporary workers will perform, related hazards, and how host employer addresses those hazards
 - Staffing agencies are not required to be an expert on client operations, but . . .
 - Beware of and place limitations around hazardous duties

Recommended Practices (cont'd)



Staffing agencies and host employers should coordinate training and specify obligations in contracts.

- Staffing agencies provide their employees with basic or “generic” safety and health training.
 - Overview of hazards, engineering controls, PPE, HAZCOM, etc.
 - Limitations on duties and reporting of unsafe conditions or changes in job duties
 - Verify that host employers provide appropriate site-specific training
- Host employers should perform site-specific safety training for temporary workers that is substantively identical or equivalent to that given to the host employers’ own employees performing the same or similar work.

Recommended Practices (cont'd)



- Reassessment of ongoing compliance
 - Staffing agencies and host employers should discuss safety issues, closing the loop and documenting any actions taken.
 - This collaborative approach allows the parties to execute their responsibilities, e.g., the staffing agency can exercise reasonable diligence to ensure the safety of its employees placed with the host, and the host can maintain a safe and healthy work environment.
 - Staffing agencies and host employers should remind workers to identify potential safety and health hazards, changes in duties or conditions (consider incentives).
 - The parties should engage about temporary employees' changes in job duties.
 - Enforce safety rules through appropriate discipline when violations come to light.

Questions?

thank
you

contact information

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