The Year Ahead 2024: Technology: AI

By Michelle L. Duncan

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Meet the Authors

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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

Teri Wood:

Thank you all on Happy New Year. We're very pleased that you're joining us here today for this very special episode of We get work™, for the Year Ahead 2024 report.

Teri Wood:

So today we're going to be talking about AI, artificial intelligence, and how it affects employment and issues that we deal with each day. So I'm delighted to be here today with Michelle Duncan from Denver. And the two of us have come to work a bit on AI matters and I'm in New York, Teri Wood, and Michelle is in Denver, and it's worked out quite well. We've got some interesting things to share with you.

Teri Wood:

So why don't we go ahead and get started, Michelle, and maybe talk a little bit about some of the pressure to regulate that we're seeing.

Michelle Duncan:

Absolutely. Happy New Year to you, Teri. I love this east meets west team that we have going on here.

Michelle Duncan:

Yeah, certainly one theme for 2024 is more regulation. And it's interesting because I felt like in years past we've been sort of drinking from a fire hose with respect to

all of the proposed state and local regulation around the use of AI. And I think that is only going to continue. Just to kind of frame this, even though we've had over 200 laws proposed in various states and localities, there's only been three that have passed that relate to the use of AI in employment. And that's in Illinois, and that was a while back, back in 2019, 2020, Maryland, and then New York City. So there are other states and localities that have proposed legislation or proposed changes to existing regulations, but none of those have come to fruition in terms of specifically giving guidance or obligations to employers and vendors in this area. So I know we're watching California, Washington State, Vermont, New Jersey, the State of New York, and also Washington DC but there are many other possible areas where we will see states and localities moving this forward in an attempt to really regulate the use of AI by employers.

Michelle Duncan:

I also think it's interesting that I think there's pressure on the federal level as well. There's no federal AI law. Instead, the enforcement agencies, both EEOC and OFCCP have taken the position that we don't need a federal AI law necessarily to find violations involving the use of these tools. Instead, we're going to use the existing legal framework under Title VII, under the ADA, under the ADEA. Existing law allows the enforcement agencies to bring violations when employers use artificial intelligence in their selection process, and that results in a disparate impact on a protected group.

Michelle Duncan:

So we saw a lot of guidance in 2023 from EEOC under the ADA and Title VII, we saw OFCCP revise its scheduling letter in a way that will bring the use of AI enabled tools to the forefront of every OFCCP audit. So they've taken some steps that will lead up to additional enforcement. But we do expect to see, perhaps, some changes to the Q&A's, to the uniform guidelines, perhaps some additional guidance, most likely sub-regulatory, from OFCCP in terms of giving guidance around the use of AI.

Michelle Duncan:

And then more recently, again, on the federal level, we had Biden issue an executive order on the safe, secure, trustworthy development and use of AI. Very broad. And this provides a framework for the federal government to get up to speed to figure out how they're going to evaluate the use of AI and ultimately regulate and enforce laws related to the use of AI. It's incredibly broad. It's not prescriptive to employers in terms of laying out any standards or obligations that employers have to follow. It's more of a guidebook for the federal agencies to get their ducks in a row to be able to enforce and regulate the use of AI.

Michelle Duncan:

And Teri, I know you've been following what's going on in the European Union. Do you think what's happening there with our friends across the pond is creating any additional pressure here in the US?

Teri Wood:

I do. I do Michelle, and it's been really quite something to watch the development of what's going on in the EU. Now, clearly this is a global issue. So we have countries, jurisdictions around the world adopting regulatory schemes, Latin America, Asia, Pacific, and the EU has been right out in front. They've been working on this for several years. And we learned that in December, just a few weeks ago, the European Parliament, the Union, the Council, all agreed and signed an act. Now they'll need to continue with an additional step before it becomes actual law. But this has been worked on for a while, we know what the terms will generally be, and this will apply to anyone, any use of AI in the EU. Which is a very broad standard, and it'll be very risk-based, meaning that there will be an assessment about what bucket this AI falls into and that will end up dictating what the requirements are that are going to be imposed on developers, individuals, people who use AI, and it'll be all dependent upon what that is.

Teri Wood:

So that is something that we are watching very closely. And yes, the US, so certainly we're seeing folks reminiscent of the GDPR and how that ended up rolling out and affecting all of us around the globe, kind of the same thing here. And from a formal basis, yes, our government officials and industry leaders are also engaging with the EU on this matter. So watch for that. That is going to be a really important thing that there'll be another step in the process in the coming months, and then there'll be a date for this to roll out. So, that is definitely something to look forward to.

Michelle Duncan:

Yeah, that is going to be interesting, and I think that there are some really big themes that are hard to ignore that have come out of not only the EU, but also some of the proposed and enacted legislation around the use of AI. I know Teri, you and I have talked many times about the importance of ethics and trust. That's certainly something that the Biden executive order has doubled down on. What are your thoughts about some of the themes that we should watch for in 2024?

Teri Wood:

Yeah, I think it's really important, and it's certainly important for government regulations, but it's important for individual adoption of various types of AI. We're seeing for sure the regulators seizing upon the idea that this needs to be done in a responsible way. If we're going to have, AI has to be responsible, there needs to be transparency, there needs to be trust. In fact, there's an employer group that has banded together called the Data and Trust Alliance, and essentially they're basically saying the same thing. Lets, us, try and self-regulate a bit and get in front of this and make sure that we're not adopting anything that doesn't pass kind of the test on trust and ethics.

Teri Wood:

I thought it was very interesting that even the Vatican has signed up for an AI ethics kind of standard. So it seems to be catching on around the world. And it makes a lot of sense, they're also companies that make it part of their business model to try and help with establishing systems that are compliant with these types

of concepts.

Teri Wood:

So that's what we're saying. And what are you thinking or what are you seeing, Michelle, when it comes to some of the newer kinds of generative AI and other models where we're going to have to deal with these in the future?

Michelle Duncan:

Yeah, absolutely. As I heard you say, responsible AI, it raises a red flag for me because I've dealt with so many vendors on behalf of our clients who have said, "We have an outline of how we ensure responsible AI." But the irony is that oftentimes the folks who are developing and self-regulating the development of these tools, they don't have a great handle on employment compliance laws. And so when they say responsible AI, it's very different than looking at the uniform guidelines on employee selection procedures and saying, "Okay, we need to do an adverse impact analysis, and then if there's adverse impact, we need to validate." There's even confusion about what it means to validate, where the developers tend to focus on the efficacy of the tool and the uniform guidelines, it is a term of art in terms of validating a selection procedure. So I think that's interesting.

Michelle Duncan:

But some themes that I think we need to be on the watch out for is laws that require self-audit, like New York City with the bias audit requirement there, and what that self-audit requires. Is that an adverse impact analysis? An 80% rule analysis? Will it involve a statistical analysis of selection rates like we do under Title VII? I'm also seeing a trend towards vendor or developer liability. That's something that we should also watch that could really implicate whether we need indemnification language in our contracts, what the statement of work with the vendors will be. I think these laws are going to help us as lawyers that represent employers to ensure that the vendors do take some responsibility if their tool does not work in the way that they say it would.

Michelle Duncan:

Generative AI, we talk a lot about that because of ChatGPT and there is an employment component there. I see employers wanting to use generative AI to develop job descriptions or job postings, and I would just offer a word of caution there. These tools aren't yet perfect, and we certainly want to make sure that qualifications and descriptions of our jobs or safety hazard analyses are done in a way that would meet the standards that have always applied to those items in terms of ensuring that it's accurate and there's a thoughtful analysis of what the job requires.

Michelle Duncan:

But I think just to kind of round this out, Teri, the biggest theme I think for 2024 is going to be enforcement. EEOC and OFCCP are going to both be looking for cases to advance. We can expect follow-up requests for information and requests for data related to the use of automated tools or tools that are based on algorithms

or machine learning. And we've actually already seen New York City begin to investigate employers, at least one that we know of, for a potential violation of the New York City law.

Michelle Duncan:

So with that, Teri, do you have any thoughts on New York City, given that's where you sit?

Teri Wood:

I think we need to fasten our seat belts. Things are moving along here, and as you say, Michelle, we do know of a case where this has been submitted for a complaint, and that's something that's going to be not so unusual. So that's something we all have to look for, watch out for, and kind of keep in touch with the evolving nature of this law because there's a certain amount of interpretation that goes into it, we'd all like to know what that is.

Michelle Duncan:

Absolutely. So Teri's being modest because she's actually handling a case or a complaint in New York City under the local law 144, I'm not sure that there are many other lawyers who can say that at this point. We're really on the front end of that.

Michelle Duncan:

So bottom line, stay tuned, watch for these themes and then stay in touch with the lawyers that you work with. Teri and I are always happy to help, and we look forward to perhaps coming back again sometime later to report on whether these predictions actually play out as we expected. In the meantime, we want to just thank you for joining us today, and we encourage you to take advantage of the many podcasts that Jackson Lewis is putting together throughout the year. So thanks very much and everyone be well.

Teri Wood:

Thank you.

Alitia Faccone:

Thank you for joining us for The Year Ahead 2024 special edition podcast series. Please tune into our next episode, where we will continue to tell you not only what's legal, but what is effective. All of our Jackson Lewis podcasts are available to stream and subscribe on Apple Podcasts, Google Podcasts, Libsyn, Pandora, SoundCloud, Spotify, Stitcher, and YouTube.

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