

The Fight for Talent: Recruiting Talented Employees in the New Normal

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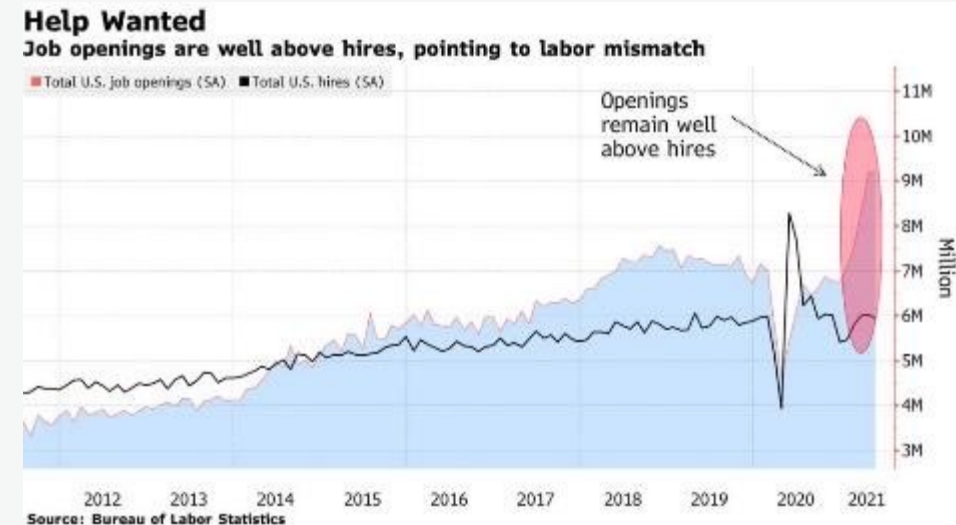
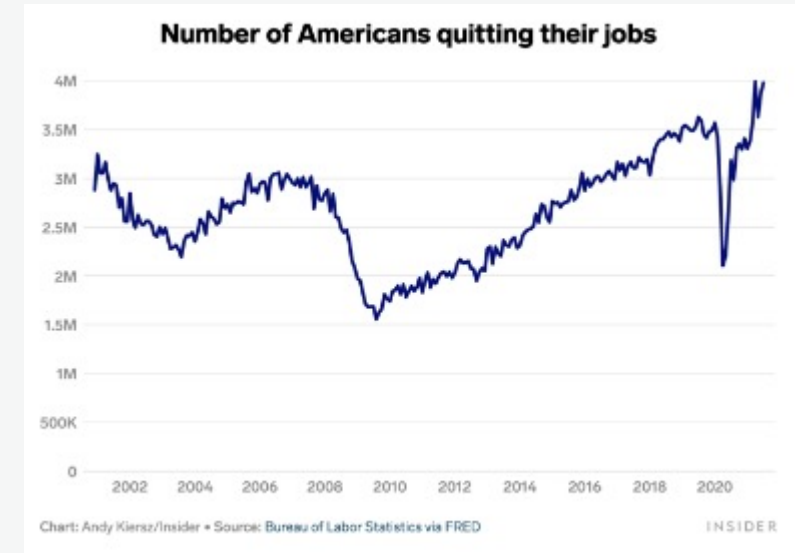
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Employers Face Unprecedented Difficulties in Hiring in the Late Pandemic

- Job openings, employee resignations, and the “hiring gap” are at all time highs, while the unemployment rate is near lows.
- The war for talent is in full swing and, with inflation, is pushing wages higher.
- This surge in hiring comes as the legal requirements surrounding hiring are rapidly changing.



Key Legal Focuses in Hiring

- Background Checks
- Pay Equity
- Fostering a Diverse, Equitable, and Inclusive Workplace
- Artificial Intelligence
- Restrictive Covenants
- Remote Work and the New Normal



The background of the slide is a dense, repeating pattern of three-dimensional cubes in a deep red color. The cubes are arranged in a way that creates a sense of depth and texture, with some cubes appearing more prominent than others.

Background Checks

Background Checks



- Around 2014-2017 – “Ban the Box” laws passed in 15 states and 22 cities and counties, covering ~80% of the U.S. population.
- 2022 – Ban the Box goes nationwide to federal contractors.
- 2021 – Second wave of Ban the Box at the local level intensifying limitations on the use of criminal history.
- FCRA requirements are still applicable for background checks in all states.

Summary of State Ban the Box Laws

State	Expressly Prohibits Inquiry on Application	Expressly Prohibits Inquiry until Conditional Offer	Requires Individual Assessment	Heightened Standard for Adverse Actions Based on History
CA	×	×	×	×
CO	×			
CT	×			
DC	×	×	×	×
HI	×	×	×	×
IL	×	If there is no interview.	×	×
LA	Limited to arrest records or charges without convictions.		×	×
MD	×			
ME	×			

State	Expressly Prohibits Inquiry on Application	Expressly Prohibits Inquiry until Conditional Offer	Requires Individual Assessment	Heightened Standard for Adverse Actions Based on History
MA	×	No inquiry at any time limited to certain minor offenses.		
MN	×	×		
NJ	×			
NM	×			
NY	×		×	×
OR	×	If there is no interview.		
RI	×			
VT	×			×
VA	Limited to marijuana possession.	No inquiry at any time limited to marijuana possession.		
WA	×			

Ban the Box Comes to Federal Contracting

- Fair Chance to Compete for Jobs Act of 2019 – went into effect in December 2021.
- Proposed rule has not been published, expected April 2022 (though this date may change).
- Applies to positions “related to work under” a federal contract.
 - Likely to apply only to prime contracts, but this will be confirmed in forthcoming regulations.
- Does not apply to positions involving classified information, sensitive law enforcement, or national security duties.
- Cannot ask about criminal history information until after a conditional offer of employment is made.

Second Wave “Ban the Box” Laws

The “Ban the Box” wave continues as more jurisdictions enact limitations on background checks and some, including Illinois, Hawaii, NYC, and Philadelphia revisit their laws.

First wave of “Ban the Box” laws focused on the timing of background checks, like the federal Fair Chance Act.

The second wave adds requirements such as:

- Limiting when criminal history can justify revoking an offer;
- Extending protections to current employees and independent contractors; and
- Limits on what convictions can be considered.




New York City: Local Expansion of Ban the Box Protections – General Protections

- Effective October 18, 2021, New York City amended the Fair Chance Act to expand protections to current employees in addition to applicants.
- Employers may not request or review criminal background reports until after a conditional offer of employment is made. Non-criminal background reports may be requested prior to conditional offers.
- Prior to taking an adverse action against an applicant or employee after a conditional offer of employment, employers must consider “fair chance factors” which include:
 - Public policy considerations (e.g., overcoming the exclusion of individuals with convictions from employment);
 - The relationship between the conviction and the duties/responsibilities of the job position;
 - Whether the individual was 25 years old or younger at the time of conviction;
 - The seriousness of the offense;
 - The employer’s interest in protecting its property and the safety of individuals/the general public; and
 - Any evidence of the individual’s rehabilitation.
- Employers must also provide a copy of the proposed adverse action and the criminal background check. Applicants/employees then have three (3) business days to respond.

New York City: Local Expansion of Ban the Box Protections – Expanded Definitions

- New York City's definition of "conditional employment offer" now includes:
 - Offers of initial employment (for new-hires);
 - Promotion offers (for current employees); and
 - Transfer offers (for current employees).
- Conditional offers of employment may only be revoked after the results of a criminal background check, medical information, or the employer learning other information that the employer could not have known prior to making the offer.
- Independent contractors and freelancers are also included in the expanded definition of "employee" and now have rights under the law.
- Fair Chance Act protections were also expanded to pending arrests and criminal accusations.

FCRA Requirements for Background Checks

- Background checks are consumer reports under the Fair Credit Reporting Act (FCRA) if performed by a third party.
- FCRA requires a specific, multistep procedure for background checks.
- Prior to Background Check – written disclosure and consent from employee/applicant.
 - New 9th Circuit trend– disclosure form must consist “solely” of the FCRA disclosure.
-  Liability waiver/release
 - State law disclosure requirements
- Prior to Adverse Action – provide copy of relevant background report, summary of rights under FCRA, notice of intent to take action.
 - Reasonable time before action = 5 business days is a rule of thumb.
- Adverse Action Letter – notice of right to dispute report, FCRA rights (again).

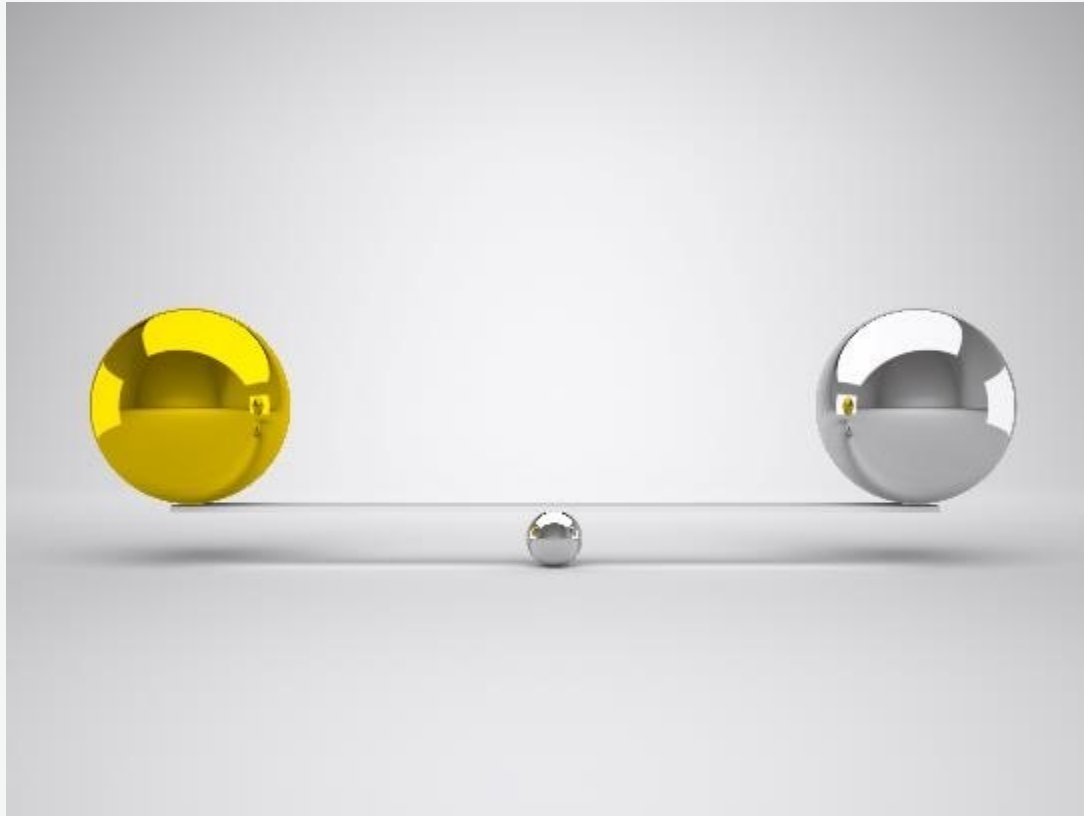
Best Practices

- Eliminate application questions that refer to criminal convictions.
- Eliminate any extraneous language from FCRA disclosure forms.
- Provide guidance and training to hiring managers regarding when inquiries into criminal history may occur.
- Provide guidance and training to hiring managers regarding individualized assessments when taking adverse actions based on criminal history.
 - Ensure this analysis is documented.
- Ensure job descriptions for positions support categorical exclusions.
- Utilize a staged background check process per FCRA and NYC requirements (if applicable).

The background of the image is a dense, overlapping field of three-dimensional cubes. All cubes are a uniform shade of red, with varying shades of darker red on their faces to create a sense of depth and perspective. The cubes are scattered across the entire frame, some appearing closer and larger, others further away and smaller.

Pay Equity

Pay Equity Issues



The gender pay gap has not been eliminated, and efforts to reduce it are adding new compliance challenges to the hiring process.

Salary History Bans – New states continue to join the nationwide trend of limiting employers' ability to request or rely on an applicant's salary history.

New wave – States and cities are requiring affirmative disclosure of wage ranges, presenting risks and challenges as employers embrace remote positions and cross-jurisdictional teams.

Traditional Laws Governing Pay Equity

- **Equal Pay Act** – pay differentials employees performing equal work at same establishment must be justified by legitimate factors other than sex.
- **Title VII** – prohibits discrimination in compensation and other terms and conditions of employment.
 - Title VII vs. EPA:
 - Title VII reaches protected classes other than sex
 - Title VII does not require “equal work” or work at same establishment
 - Title VII places burden of proof on employee; EPA on employer
 - EPA has no administrative exhaustion requirement
- **Executive Order 11246** – federal government contractors

State Salary History Laws

State	Expressly Prohibits Inquiry Into Past Salary	Allows Consideration of Voluntary Disclosure	Expressly Applicable to Existing Employees	Expressly Prohibits Reliance on Past Salary
AL	Prohibits retaliation only			
CA	X	X	NO	X
CO	X			X
CT	X	X		
DE	X			
HI	X	X	NO	X
IL	X	X		X
ME	X	X		X

State	Expressly Prohibits Inquiry Into Past Salary	Allows Consideration of Voluntary Disclosure	Expressly Applicable to Existing Employees	Expressly Prohibits Reliance on Past Salary
MD	X	X		X
MA	X	X		
NV	X			X
NJ	X	X		X
NY	X	X	YES	X
ORE	X		NO	X
RI	X	X		X
VT	X	X		
WA	X	X		
NY	X	X	YES	X

New Salary Range Disclosure Laws

- States and local jurisdictions are beginning to require that employers disclose salary or wage ranges to applicants.
- Timing of Disclosure:
 - In job advertisement: Colorado, NYC
 - After interview: Nevada
 - At or before offer: Connecticut (if not requested earlier), Rhode Island (if not requested earlier)
 - Upon request: Maryland, California (request must come after interview), Washington (request must come after offer)
- Some states require wage range to also be given to existing employees upon request

Salary Range Law Ambiguities

- Application to Remote Positions
 - Remote positions posted on Internet can be viewed from anywhere
 - If employers don't want to list salary range in the posting per Colorado and NYC law, how to avoid the requirement?
 - “Applicants from Colorado will not be considered” ❌
 - “This position is expected to be remote, but may only be performed within the states of Virginia, Maryland, Pennsylvania, Delaware, and D.C.” ✅
- What payments must be included within wage ranges?
 - Typical state “wage” definition: “all compensation for employment”
- Who is an applicant?

Post-Pandemic Pay Equity Issues

- Salary range requirements provide a new avenue for employees to discover differentials.
- Are geographical differentials still valid?
- Is wage inflation creating differentials?
- Have employee responsibilities “evolved” during remote work?
- Importance of pay equity audits:
 - Look under the hood and address issues before OFCCP or private plaintiffs.
 - Affirmative defense under many state equal pay acts.
 - Conduct through counsel in a privileged manner.

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Fostering a Diverse, Equitable, and Inclusive Workplace

Diversity, Equity, and Inclusion

Many employers became acutely aware of the need to enhance diversity, equity, and inclusion in hiring and workplace culture after social justice protests in 2020.

Now, in the Great Resignation, emphasis on diversity, equity, and inclusion attracts competitive applicants who may have multiple offers and helps to retain talented existing employees.

Affirmative Action practices in hiring practices can raise legal problems for employers who are not aware of the legal limitations on these practices.



Legal Limits on Affirmative Action Initiatives



***McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976)**

- U.S. Supreme Court has stated that Title VII forbids discriminatory preference for any racial group, majority or minority.

Quotas are impermissible

- *Gratz v. Bollinger*, 539 U.S. 244 (2003): Univ. of Mich. Law Admissions could not assign admissions points based on race; applicants could not be individually assessed.
- *Grutter v. Bollinger*, 539 U.S. 306 (2003): Univ. of Mich. Undergrad Admissions could consider race as one of many factors.

Hiring “goals” are ok, but:

- (1) the plan must be designed to eliminate a conspicuous racial imbalance in traditionally segregated job categories;
- (2) the plan may not trammel the interests of the non-minority employees; and
- (3) the plan is temporary in nature, intended to eliminate a manifest imbalance and not to maintain balance.
- *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979)

Supreme Court will decide Cases Involving Affirmative Action Initiatives

- *Students for Fair Admissions, Inc. v. Harvard & Students for Fair Admissions, Inc. v. University of North Carolina*
 - Issues: (1) Whether the Supreme Court should overrule and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether Harvard College is violating of the Civil Rights Act by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race and rejecting workable race-neutral alternatives.
 - Both the 1st Cir. and the Middle District of North Carolina agreed with the universities.
 - The Supreme Court has consolidated these cases and will hear argument this year (2022). These cases will impact employers' ability to create voluntary affirmative action plans.

Benefits of Emphasizing Diversity, Equity & Inclusion in the Workplace

The data suggests diversity correlates with better financial performance.

Likelihood of financial performance above national industry median, by diversity quartile, %

Ethnic diversity



Gender diversity



Gender and ethnic diversity combined



Source: McKinsey Diversity Database

Best Practices for Maintaining a Diverse, Equitable, and Inclusive Workplace

- Use the “Inclusive Workplace” model.
 - Intentionally include all employees in critical functions at every level of the organization.
- Determine how diverse, equitable, and inclusive the leadership is.
 - Management reflects the culture of the organization.
- Encourage an environment in which everyone is heard and respected.
- Periodically survey employees regarding their experiences in the workplace.
 - Use anonymous surveys to encourage employees to be candid.
- Provide safe spaces for employees to address grievances and concerns.
- Be consistent in performance management and employee discipline.

Affirmative Action Requirements for Federal Contractors - OFCCP

- **Executive Order 11246**

- Prohibits federal contractors with \$10,000 or more in contracts with the U.S. Government from discriminating in employment based on race, color, religion, sex, sexual orientation, gender identity, or national origin. They must take affirmative action to avoid discrimination.
- Federal contractors with 50 or more employees and more than \$50,000 in contracts with the U.S. Government must prepare an annual, written Affirmative Action Program.
 - Contractors must certify, on an annual basis, that they have developed and maintained these plans through OFCCP's Contractor Portal. This year's certification period begins March 31, 2022 and ends June 30, 2022.

- **Section 503 of the Rehabilitation Act**

- Prohibits federal contractors with \$10,000 or more in contracts with the U.S. Government from discriminating in employment based on physical or mental disabilities. They must take affirmative action to advance and employ individuals with disabilities.
- Federal contractors with 50 or more employees and more than \$50,000 in contracts with the U.S. Government must prepare an annual, written Section 503 Affirmative Action Program.

- **Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA)**

- Prohibits federal contractors with \$10,000 or more in contracts with the U.S. Government from discriminating in employment against protected veterans. Contractors must take affirmative action to advance and employ protected veterans.
- Federal contractors with 50 or more employees and more than \$150,000 in contracts with the U.S. Government must prepare an annual, written VEVRAA Affirmative Action Program.

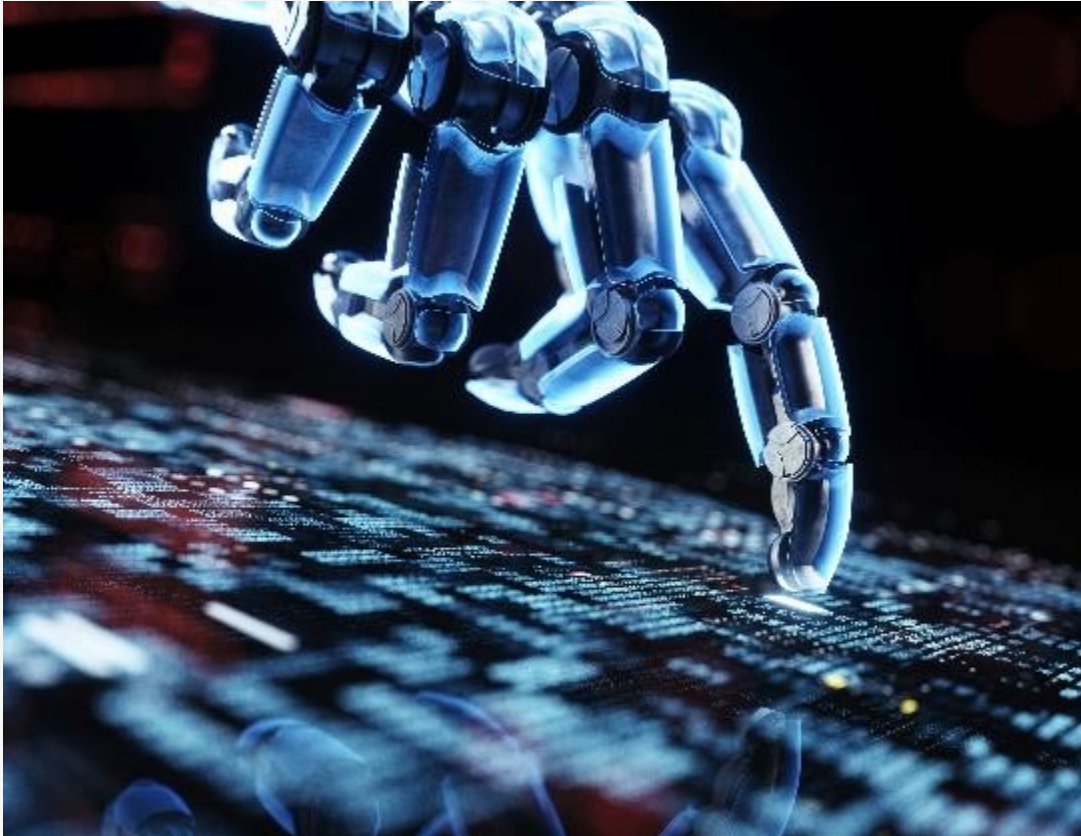
Effective Promotion of Diversity, Equity, and Inclusion in Hiring

- Quantify the problem and establish benchmarks
 - What does your workforce and selection rate look like compared to internal and external availability of underrepresented groups?
 - Benchmarks cannot operate as quotas.
 - Audit your Company's recruitment, hiring, promotion and termination history.
- Encourage and increase the number of minority applicants, especially in “feeder” positions
 - Intentionally increase outreach and recruitment efforts.
- Combat implicit or unconscious biases and obstacles in the hiring process
 - Conduct periodic implicit bias training for the entire workforce.
 - Conduct periodic pay equity analyses to ensure that there are no disparities in pay in each position.

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Artificial Intelligence

Artificial Intelligence (AI) in Hiring



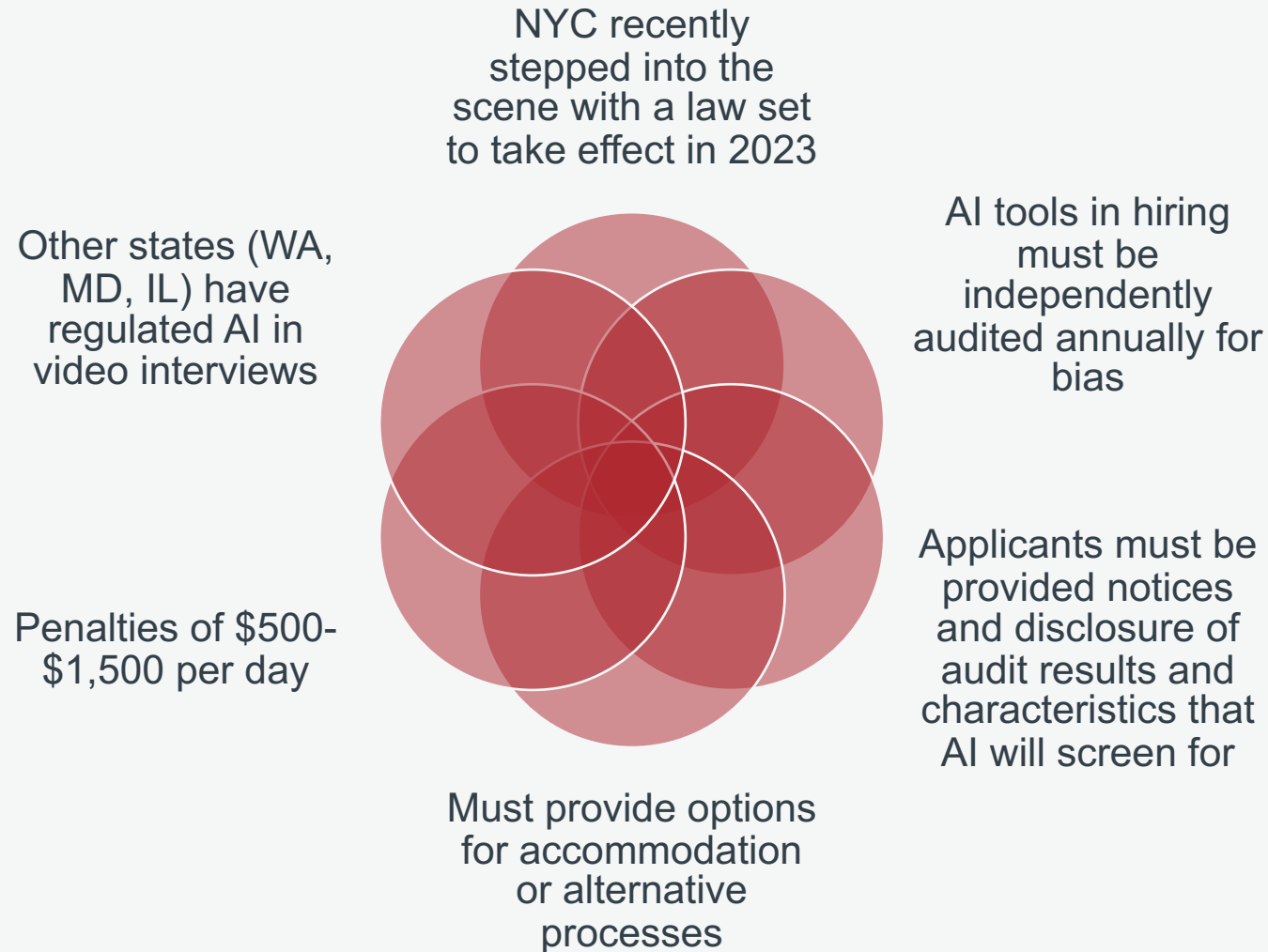
Employers struggling to fill openings have turned to AI to assist and streamline the hiring process.

- Est. 99% of the Fortune 500 uses AI in some manner

AI is used for everything from resume screening, to chat bots for applicant contact, to predictive analytics based on facial/emotional reactions.

Many fear that the algorithms used in recruiting AI tools will reflect and entrench unconscious biases based on race, gender, age, and disability status.

Forthcoming NYC Regulation of AI in Hiring



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Restrictive Covenants

Non-Compete Agreements and Restrictive Covenants

- Because the labor market is tight, we are seeing a “perfect storm” in the area of restrictive covenants:
 - Employers are more likely to consider and hire applicants despite non-compete violations.
 - Litigation reportedly on the rise because former employers more likely to enforce due to the difficulty in finding replacements.



New Restrictions on Non-Compete Agreements

- July 9, 2021 Executive Order – encourages FTC to limit non-competes
 - No tangible action yet by FTC
- Non-competes are prohibited in: CA, DC, OK
- Civil and criminal penalties for unenforceable non-competes: CO, NV
- Prohibitions for “low wage” employees in many states

Wage Thresholds for Non-Competes

State	Threshold
District of Columbia	\$250,000 for medical specialists
Illinois	\$75,000
Maine	\$49,960
Maryland	\$31,200
Massachusetts	FLSA Non-Exempt
Nevada	Paid on Hourly Basis
New Hampshire	\$14.50/hour
Oregon	\$100,533
Rhode Island	\$31,225
Virginia	\$52,000
Washington	\$100,000

Navigating Candidate Non-Competes

- Require candidates to provide any restrictive covenant agreement (or as much information as possible) and certify they have done so.
- Assess enforceability and potential non-competitive areas of business in order to carefully structure a position that will test the non-compete's enforceability.
- Instruct and obtain the candidate's agreement (documented in writing) not to take or use confidential information or solicit employees or customers.

Navigating Departing Employee Non-Competes

- Remind employees of obligations at the exit interview.
- Evaluate the existence of any “bad acts” before sending a cease and desist letter.
- Determine in advance specific asks for limitations on employee’s conduct.
 - Consider limited demands (i.e., non-solicitation only) if enforceability is questionable or low priority.
- Check whether enforcement is prohibited or limited by state laws.

No Poach Agreements

- Increasing area of civil and criminal enforcement for the DOJ – esp. in the healthcare space
 - For example, DOJ recently filed a statement of interest in a Nevada non-compete case involving anesthesiologists, suggesting that when employees are potential competitors of the employer, requiring non-compete agreements may be per-se illegal horizontal agreements among competitors.
- DOJ/FTC 2016 *Antitrust Guidance for HR Professionals*
 - Per se violation of antitrust law to:
 - Agree with competitor about employee compensation.
 - Agree with a competitor to refuse to hire or solicit each other's employees.
 - Focus on “naked” agreements – not tied to legitimate collaboration
 - Any agreement should be tied to joint venture, staffing arrangement, etc...
 - Enforcement can be based on “inference” – *discussions + parallel behavior*
 - Focus on exchanges of information – even if informal.
 - Manager/HR training on these issues is critical.

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Remote Work and the New Normal

Remote Work and the New Normal



During COVID, remote work spiked from 5-10% of the US workforce to 75-80%.

- 25% or more of the workforce is expected to be remote long term.

Benefits of Remote Work in Hiring

- Draw from a wider geographic talent base.
- Higher demand for remote positions than in-person.
- Ability to work remotely is a perk that may be valuable to many applicants.

Remote Work Considerations

Under the ADA, Teleworking can be a reasonable accommodation for qualified employees.

- The interactive process is still required.

Employers who want to allow their employees to work remotely must consider:

- **Compliance with Wage and Hour Laws (State and FLSA)**- non-exempt employees must be paid for all hours worked and applicable overtime. In addition, employers must comply with applicable meal and rest break laws.
- **Reimbursement for work-related expenses**- (e.g. Calif. Lab. Code § 2802(a))
- **Safe Remote Workspace**- Employers must emphasize safety in home workspaces. Injuries that occur in the designated home workspace could be compensable under workers' compensation laws.

Remote Work Considerations

- **Exempt Employees-** employers need to ensure that exempt employees only perform exempt duties while working from home.
- **Non-exempt-** employers need to ensure that non-exempt employees working remotely are not working off schedule or working unauthorized overtime. Employers also need to ensure that non-exempt employees are taking legally required meal and rest breaks.
- **Use of the employer's equipment at home-** employees need to understand that teleworking does not create a right to privacy in the use of the employer's equipment. (e.g. laptops, cell phones).
- **Applicable State Leave Laws-** If the employer has employees who live in different jurisdictions, the employer must be aware of the leave laws in those jurisdictions to ensure compliance.
 - Paid Sick Leave, COVID Leave, Parental Leave, Family Leave, etc.
 - Many leave laws apply based on the employee's work location.
- **Employers must train managers on effective management of teleworking employees' performance.**



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