

Implicit Bias In The Workplace: What Are The Risks, And How Can Companies Mitigate Them?

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Presented by



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Today's Presenters h



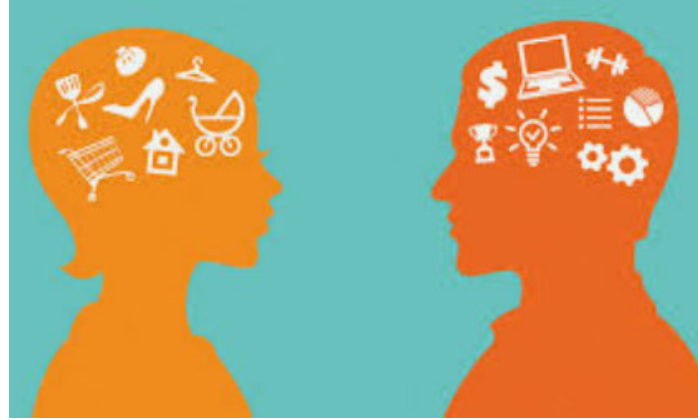
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CA State Bar's New MCLE Requirements

- Rule 2.72 of the Rules of the State Bar of California was amended effective September 24, 2020 to incorporate a new implicit bias education requirement. As such, on and after January 1, 2022, the total hours of required MCLE must now include no less than seven hours as follows:
 - At least four hours of legal ethics.
 - At least two hours dealing with the elimination of bias. *Of the two hours, at least one hour must focus on implicit bias and the promotion of bias-reducing strategies.*
 - At least one hour of education addressing competence issues.



What is Unconscious Bias?

What is Unconscious Bias?

- Our brains receive and process 11 million bits of information per second, but we can only consciously process 40 bits
- Two levels of thinking:
 - Level 1 – Thoughtful and Deliberate
 - Level 2 – Unthinking and Automatic
- Level 2 dominates much of daily life, making as much as 90% of your daily decisions



Level 2 – Unthinking and Automatic



- **Automatic** decision-making hard wired into everyone (e.g. fight or flight).
 - Used to assess whether an object, animal, or person is dangerous. Not a negative trait. It is a necessary one.
- **Bias** is a subjective, predetermined preference toward a viewpoint about roles, behaviors, or individuals
- **Unconscious** perceptions influence many of the most important decisions we make (hiring, mentoring, promoting, etc.)
- **Social stereotypes** about groups of people that impact our interactions, perceptions, and beliefs about others that are outside of our consciousness.

Unconscious Biases

- **Unconscious biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control.**
- **A Few Key Characteristics of Unconscious Biases:**
 - **Unconscious biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.**
 - **The unconscious associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.**
 - **We generally tend to hold unconscious biases that favor our own ingroup, though research has shown that we can still hold unconscious biases against our ingroup.**
 - **Unconscious biases are malleable. Our brains are incredibly complex, and the unconscious associations that we have formed can be gradually unlearned through a variety of debiasing techniques.**

Adapted from the Kirwan Institute

The Impact of Unconscious Bias on the Workplace

Unconscious Bias in the Workplace

- **The potential influence of bias in the workplace is wide-ranging.**
- **Unconscious bias affects how we evaluate talent, performance, assignments, and promotions.**

Unconscious Bias in the Workplace

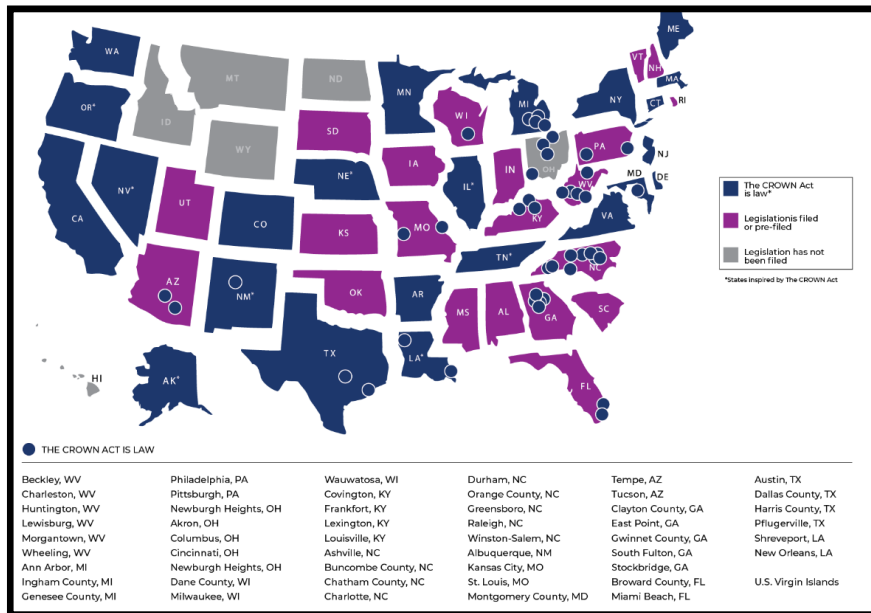
- **Center for Talent Innovation's report, Disrupt Bias, Drive Value, there are three major costs that companies experience when employees perceive bias:**
 - **Burn outs – Increased sense of alienation, reduced sharing of ideas, reduced sense of pride in work.**
 - **Bust outs – Attrition.**
 - **Blow ups – Increased expression of negative views of employer, intentional failure to follow through on important tasks, refusal to refer people to employer.**

Hair Discrimination

- Discrimination based on hair texture and style may be a form of race or national origin discrimination.
- Harvard Business review reported on a 2023 study of 2,990 female-identifying respondents between the ages of 25 and 64 who identified as Black, Hispanic, white, or multiracial/ multiethnic. According to the study:
 - Black women's hair was two-and-a-half times more likely to be perceived as unprofessional.
 - More than half of the Black women surveyed felt like they had to wear their hair straight in a job interview to be successful. Two-thirds reported that they had changed their hair for a job interview.
 - One-fifth of the Black women surveyed between the ages of 25 and 34 had been sent home from work because of their hair.
 - A quarter of the Black women surveyed believe they were denied a job because of their hair.
- Many states have laws in effect which ready protect workers based on natural hair and hairstyle, including hairstyles in which hair is tightly coiled or tightly curled, or worn in locs, cornrows, twists, braids, Bantu knots or Afros.



More States Passing CROWN Act



TEXAS –

On May 27, 2023, Texas Governor Greg Abbott signed into law the CROWN Act, making Texas the 21st state to ban racial discrimination based on hair texture or hairstyle in schools, employment, and housing. The law goes into effect on September 1, 2023.

MINNESOTA –

On February 1, 2023, Minnesota Governor Tim Walz signed into law the CROWN Act, effective immediately.

Height/Weight as a Protected Class

- Height/weight are not protected classes under Title VII
- In 2019, the Washington State Supreme Court held that obesity is a protected class under the state's anti-discrimination law.
 - State and local laws that consider weight a protected class (e.g., Michigan, NYC) would include "obesity" as a protected category.

- EEOC Guidance on the Americans with Disabilities Act:

The term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height or weight, or muscle tone that are within the "normal range" and are not the result of a physiological disorder.

However, this guidance has not stopped the EEOC from taking the position in court that obesity in and of itself is an impairment even if the employee can't show an underlying physiological condition that caused the obesity.

Four circuit courts (the 2nd, 6th, 7th and 8th) have addressed the issue and all four have held that even severe obesity is not a standalone disability unless the individual has an underlying physiological disorder.



Height, Weight and Appearance as Protected Characteristics

- **San Francisco:** height and weight have been protected classes since 2000
- **Michigan** is the only state that currently bans body size discrimination.
- **New York City:** effective Nov. 22, 2023
 - **Amended the New York City Human Rights Law to add “height” and “weight” to list of protected classes. Two exceptions:**
 - (1) when a person’s height or weight could prevent them from performing the essential functions of a job and there is no alternative action that employers could reasonably take to allow such persons to perform the essential functions; or
 - (2) the employer’s decision based on height or weight is reasonably necessary for the execution of the normal operations of such employer.
- **Several additional local laws ban discrimination against an individual’s physical appearance and/or characteristics (Binghamton, NY, Madison, WI, Miami, FL, Santa Cruz, CA, Urbana, IL, Washington D.C.)**
 - **Physical appearance means the outward appearance of any person, including weight and height.**
 - **May also extend to hairstyles, skin color, or to the manner or style of dress and grooming.**



Affirmative Action and DEI Initiatives



Students for Fair Admissions, Inc. v. President & Fellows of Harvard College: What Does This Mean for Workplace DEI Initiatives?

Holding:

U.S. Supreme Court struck down Harvard's and UNC's use of race as a plus factor in **the college** admissions process, finding the practice violated the Equal Protection Clause of the Fourteenth Amendment.

NOTE:

- 1.** The decision does not directly impact the affirmative action obligations of federal contractors and subcontractors, as they must make decisions without regard to race.
- 2.** According to EEOC Commissioner Charlotte Burrows: "It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

Employment Implications:

- **The Supreme Court did not interpret Title VII, which governs the employment practices of private employers.**
 - The Equal Protection Clause applies only to federal and state actors, and the protections from discrimination under Title VI apply only to recipients of federal funding.
- **Attorneys General of 13 states sent a letter to Fortune 100 CEO's directing executives to avoid the use of racial preferences in corporate hiring.**
 - **Warning executives that they will be held accountable if they discriminate based on skin color**
- **21 Attorneys General respond.**
 - “ . . . Corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.”
- **Bottom line:**
 - **Legal impact:** Employers are already prohibited from using protected classes as a factor.
 - **Practical impact:** The Court's decision turns a spotlight on employer DEI&A programs.



Implicit Bias in Artificial Intelligence

Potential for Bias and Discrimination

- **AI systems can inherit biases from the data they are trained on, leading to discriminatory outcomes. This bias can perpetuate existing societal inequalities if not properly addressed and mitigated. It is crucial to ensure diverse and representative data and ongoing monitoring of AI systems for fairness.**



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What is AI Bias?

- Artificial Intelligence (AI) bias refers to the tendency of algorithms to reflect human biases. In today's climate of increasing representation and diversity, this becomes even more problematic because algorithms could be reinforcing biases, and it's difficult to know about them until they've been programmed into the software.
- What are the types of AI Bias?
 - Cognitive biases: These are unconscious errors in thinking that affects individuals' judgements and decisions. These biases arise from the brain's attempt to simplify processing information about the world. Cognitive biases could seep into machine learning algorithms via either:
 - designers unknowingly introducing them to the model
 - a training data set which includes those biases.
 - Lack of complete data: If data is not complete, it may not be representative and therefore it may include bias. For example, most psychology research studies include results from undergraduate students which are a specific group and do not represent the whole population.

Real-Life Examples of Implicit Bias in AI

- In 2018, Amazon reportedly scrapped an AI and machine learning-based recruitment program after it was found that the algorithm was biased against women. Amazon's AI model was programmed to vet candidates by observing patterns in resumes submitted to the company over a 10-year period. The majority of those candidates had been men, which led the system to deduce that male candidates were preferred over female candidates.
- In 2019, researchers found that an algorithm used in US hospitals to predict which patients will require additional medical care favored white patients over black patients by a considerable margin. Because the expense of healthcare emphasizes an individual's healthcare needs, the algorithm considered the patients' past healthcare expenditures.
- According to a 2015 study, only 11 percent of the individuals who appeared in a Google pictures search for the term "CEO" were women. Research revealed that Google's online advertising system displayed high-paying positions to males much more often than women.

Employer Uses of Artificial Intelligence

- **Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias.**
- **Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test.**
- **Employers must take care that their AI does not run afoul of federal, state, or local employment laws.**

EEOC Guidance and Recommendations

On May 12, 2022, the Equal Employment Opportunity Commission (“EEOC”) and the Department of Justice released technical guidance entitled **The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.**

Recommendations:

- **Employment technology should provide clear instructions for requesting accommodations**
- **Employment technology should ensure that requesting a reasonable accommodation does not diminish the applicant’s opportunities**
- **Provide staff training**
- **Ensure the vendor complies with applicable regulations**



Best Practices for Employers



- ❑ Train your personnel.
- ❑ Consider implementing policies or modifying existing policies that apply.
- ❑ Employers must take care to ensure that they are using proper parameters for any AI-powered decisions, but importantly, it is recommended that human resources professionals monitor AI results consistently.
- ❑ Keep in mind that the human user is ultimately responsible for their work product using AI.
- ❑ Potential legal issues to be aware of:
 - The employer does not provide a “reasonable accommodation” when using AI in the workplace.
 - The employer relies on an algorithmic decision-making tool that intentionally or unintentionally “screens out” an individual with a disability, even though that individual is able to do the job with a reasonable accommodation.
 - The employer adopts an algorithmic decision-making tool that violates the ADA’s restrictions on disability-related inquiries and medical examinations.
 - AI tools could potentially disparately impact individuals based on race, color, religion, sex, or national origin.

Legal Risks of Implicit Bias

Lawsuits Based on Implicit Bias

These news anchors say their bosses are grooming younger women who look like them to take their jobs

Five veteran journalists in New York filed a lawsuit with a simple message: judge women by their accomplishments, not by their looks.

By Alexia Fernández Campbell | @AlexiaCampbell | alexia@vox.com | Jun 20, 2019, 2:20pm EDT



DIVERSE-IT

By Sharon Florentine, Senior Writer, CIO | FEB 1, 2019 2:30 AM PST

NEWS ANALYSIS

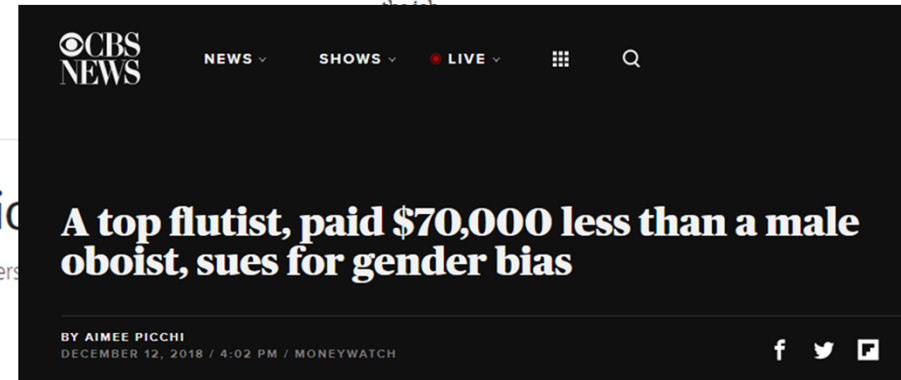
Oracle the latest to face pay discrimination

Oracle allegedly withheld \$400 million in wages from racially underrepresented workers to a U.S. Department of Labor complaint filed last week.



PwC Lawsuit Alleges Older Applicants Were Target Of Collective Discrimination In Recruiting Efforts

After a recent court ruling against PricewaterhouseCoopers (PwC), companies will want to review recruiting efforts to ensure that older candidates are not being impacted by unconscious bias and discrimination. In *Rabin, et al. v. PricewaterhouseCoopers*, the federal court ruling granted collective action to plaintiffs who allege PwC discriminated against older applicants by recruiting on college campuses and school-affiliated job sites. The collective action is now open to thousands of individuals age 40 or older who applied to be an associate, experienced associate or senior associate within PwC's tax or assurance departments and met the minimum qualifications for

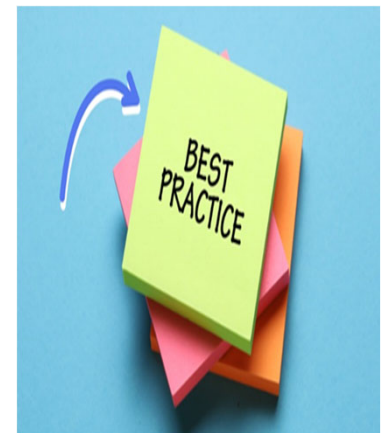


Evidence of Implicit Bias in Litigation

- Arguments are being made to courts and before juries that implicit bias can result in discrimination in even the most well-intentioned employer's workplace practices. Some courts have accepted implicit bias evidence. Some have not.
- A trend may be developing that permits judges and jurors to consider implicit bias theory and evidence as part of the overall proofs presented in employment discrimination cases.
 - **Kimble v. Wisconsin Department of Workforce Development, 690 F. Supp. 2d 765 (E.D. Wis. 2010)** - The court determined that implicit bias played a role in decision not to give plaintiff a pay raise.
 - **Samaha v. Washington State Dep't of Transp., 2012 WL 11091843 (E.D. Wash. 2012)** - The court agreed with the plaintiff that testimony about implicit bias was relevant to the proof of intentional discrimination and could be "helpful to the jury" in understanding how implicit bias functions in the employment setting.
 - **Martin v. F.E. Moran, Inc., 2017 WL 1105388 (N.D. Ill. 2017)** - A federal district court allowed expert testimony from an assistant law professor with a Ph.D. in social psychology concerning implicit bias in a race-discrimination case

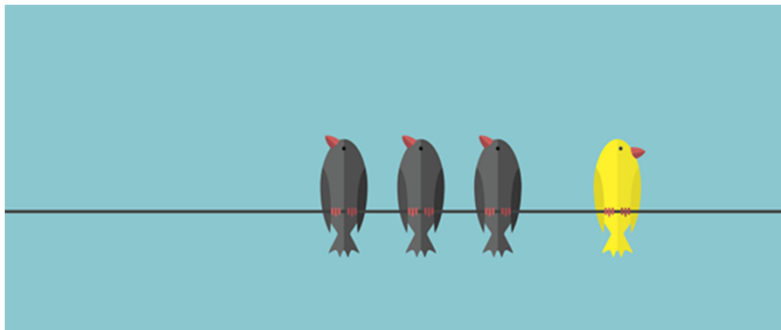
Avoiding Bias

- All requests for information should be **related to the job(s)** for which the applicant is applying
 - Employers should not request information that is **likely to elicit information about protected characteristics** -- on application forms, job interviews, or in background or reference checks
 - Employers should not ask for a **photograph** of an applicant (If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.)
- Whenever possible, ask all applicants the same questions to **standardize** the interviewing process
- If the applicant volunteers information which would be illegal to request, the employer may not use that information as a basis for rejecting the applicant
- **Liability** for discrimination exists, regardless of whether the information was unlawfully solicited or volunteered!



Best Practices for Addressing Implicit Bias in the Workplace

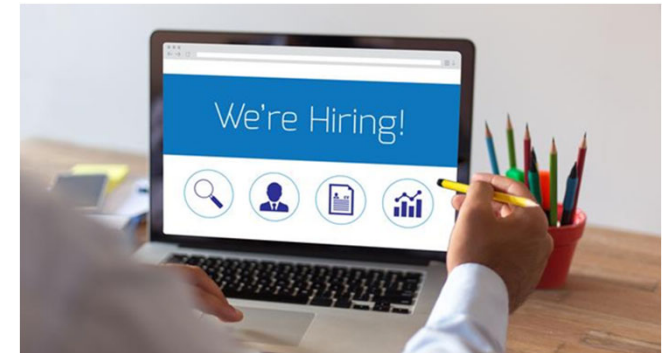
Recognizing and Addressing Implicit Bias in the Workplace



- Have a basic understanding of the cultures from which your clients/coworkers come
- Try to recognize situations that magnify stereotyping and bias
- Understand that it is a long-term endeavor
- Anonymize where possible
- Foster or create employee networks (e.g., resource/affinity groups)
- Be conscious of areas where bias can impact institutional decision-making (hiring, discipline, work assignments, promotions)

How to Tackle Implicit Bias in Recruiting & Hiring

- Job descriptions
 - Requirements job-specific
 - Avoid problematic pronouns or age-specific language
- Resumes
 - Process? Guidelines? Standardized?
 - Consider: blind review
- Setting Salary Ranges
 - Pay scales current and reflect actual practices?
 - Consider:
 - Market surveys
 - Standardized compensation bands
 - Criteria within bands i.e. 1-3 years of experience vs. 3-5 years
 - Avoid admonishments not to discuss compensation



How to Tackle Implicit Bias in Recruiting & Hiring

- **Interviews**

- **Best Practices:**

- 70/30 Rule
 - Avoid Tangents
 - Avoid: Halo, Similar-to-Me, Contract Effects
 - Allow for Silence

- **Consider:**

- Structured format
 - Interview guide/Same questions
 - Panel interviews with ratings; diversity of input



How to Tackle Implicit Bias in Recruiting & Hiring

- Interview Notes
 - Best Practices:
 - Only record what happened in the interview
 - Record objective facts, not subjective impressions
 - Use quotes deliberately
 - Choose: fast or neat. Re-write as needed before litigation
 - Preserve notes
 - Consider:
 - Panel Scoring
 - Consensus Building Towards Overall Rating
 - Consistency



Thank You

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