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## **AI and the Future of Work: Legal Perspectives on Disability Accommodation and Employment Equity**

WILLIAM D. GOREN, ESQ., J.D., LL.M.\*

This article will explore the issue of artificial intelligence and persons with disabilities regarding employment. As a person with a disability, deaf but functioning entirely in the hearing world with advanced hearing aids, lip reading, and Bluetooth technology as well and for other reasons, the author is also a user of voice dictation technology. Because of my disability, I know that persons with disabilities benefit tremendously from advances in technology. However, I also know as a voice dictation user in particular, that persons with disabilities are frequently left behind as technology advances because the concerns of persons with disabilities are not factored into how the systems are designed. That creates a problem for the integration of people

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with disabilities into society after the systems are designed, concerning both employment, as well as accessing non-federal governmental entities, and places of public accommodations. This article will explore several issues, including: (1) key Americans with Disabilities Act (“ADA”) definitions, (2) essential functions of the job (3) undue hardship, (4) telecommuting, (5) do’s and don’ts of the interactive process, (6) artificial intelligence (“AI”) use in employment and its risks, (7) AI regulatory developments at the federal level, (8) AI regulatory developments in California and Pennsylvania, and (9) AI regulatory developments in the European Union. The regulatory developments are moving at lightning speed, so this article is not meant to be a comprehensive overview of those regulatory developments in those areas.

### I. KEY ADA DEFINITIONAL TERMS

The definition of disability under the ADA is far broader than what people might think. The ADA defines a disability as, “a person with a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having a physical or mental impairment regardless of whether a substantial limitation on a major life activity exists.”<sup>1</sup> The amendments to the ADA put into the statute what major life activities are.<sup>2</sup> Major life activities include but are not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working” and “the operation of a major bodily function, including but not limited to: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>3</sup> Substantial limitation refers to whether a person is substantially limited in a major life activity as compared to most people in the general population.<sup>4</sup> Having a disability is not enough to be protected under Title I of the ADA, a person also has to be “qualified.”<sup>5</sup> A “qualified” person with a disability for purposes of Title I, the employment provisions of the ADA, otherwise “qualified” is the term for the Rehabilitation Act, is a person satisfying the “requisite skill, experience, and education requirements of the position and can, with or without reasonable accommodation, perform the essential functions of the job.”<sup>6</sup> The ADA applies to employers with

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1. 42 U.S.C. § 12102(1)(A-B).  
 2. 42 U.S.C. § 12102(2)(A-B).  
 3. 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(i) (2024).  
 4. 29 C.F.R. § 1630.2(j)(1)(ii) (2024).  
 5. 29 C.F.R. § 1630.2(m) (2024).  
 6. *Id.*

fifteen or more employees.<sup>7</sup> Most states have disability discrimination laws. However, that is not true for all states. For example, Alabama has no such laws and Georgia only has a very limited law, other states have disability discrimination laws as well. Finally, the federal government is not subject to the ADA at all, rather federal employees are subject to § 501 of the Rehabilitation Act, which tracks Title I of the ADA.<sup>8</sup>

## II. WEBSITE ACCESSIBILITY FOR PERSONS WITH DISABILITIES HAVING TO USE THE WEB AS PART OF THEIR JOB

There is a large amount of litigation over whether a website has to be meaningfully accessible to persons with disabilities.<sup>9</sup> However, the majority of litigation involves stand-alone businesses operating on the Internet and perhaps in physical spaces as well, but not always, with respect to customers they serve or may serve.<sup>10</sup> It is a different world concerning website accessibility and persons with disabilities in employment in several respects. The issue is where an employee has to use the Internet as part of their job. You will also see the problem when an employee is using software as a service products. The issues this author has come across during the course of his practice arise due to inaccessibility to a screen reader, inaccessibility to a voice dictation user, or inaccessibility for a member of the hearing loss community (Deaf, deaf, or hard of hearing).<sup>11</sup>

First, website accessibility with respect to a qualified employee with a disability is governed by the Equal Employment Opportunity Commission (“EEOC”) and not by Department of Justice (“DOJ”) regulations.<sup>12</sup> The EEOC has made web accessibility a part of its strategic enforcement plan for 2024 to 2028.<sup>13</sup> Second, an employer must make reasonable accommodations unless it can show an undue hardship.<sup>14</sup> The regulations define an undue hardship as looking to several different factors, including:

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7. 42 U.S.C. § 12111(5).

8. 29 U.S.C. § 791(f).

9. *See generally* Winegard v. *Newsday*, 556 F.Supp. 3d 173 (E.D.N.Y. 2021).

10. *Id.*

11. Deaf, deaf, and hard of hearing have very distinct meanings when used by this author. A Deaf person is a culturally deaf individual. By that, it is meant a person: 1) sign language if their first language; 2) they attended a state school for the deaf; and 3) they are severely to profoundly hard of hearing (65-120 db). A deaf individual is a person that is just severely to profoundly hard of hearing. A hard of hearing individual is anyone with a hearing loss. *The Difference Between d/Deaf and Hard-of-Hearing*, AI MEDIA, <https://www.ai-media.tv/knowledge-hub/insights/difference-deaf-hard-of-hearing/> (last visited Aug., 27, 2024).

12. *See generally* 29 C.F.R. § 1630.2(a) (2024).

13. *Strategic Enforcement Plan Fiscal Years 2024-2028*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028> (last visited Aug. 1, 2024).

14. 42 U.S.C. § 12112(b)(5)(A); *See also* 29 C.F.R. § 1630.15(d) (2024).

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources; (iii) the overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type, and location of its facilities; (iv) the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or physical relationship of the facility or facilities in question to the covered entities; and (v) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.<sup>15</sup>

There is a simpler way to think of all this. Think of undue hardship as being of either two varieties. First, financial undue hardship. Since financial undue hardship means looking at the entire resources of the entity involved and most accommodations either cost nothing or very little, financial undue hardship is extremely difficult to show. In fact, this author in all his readings over the years is not aware of more than half a dozen cases where a court has found a financial undue hardship. Second, logistical undue hardship can be thought of in terms of the Title II and Title III concepts of fundamental alteration.<sup>16</sup> In a fundamental alteration situation, you are essentially looking at whether the accommodation would turn the operations of the business upside down in terms of how it operates.<sup>17</sup>

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15. 29 C.F.R. § 1630.2(p)(2)(i-v) (2024).

16. At a continuing legal education meeting this author attended many years ago, former EEOC Commissioner Chai Feldblum explained logistical undue hardship as being essentially the fundamental alteration concept of title II and title III of the ADA. It has always made sense to this author to think of it that way. Chai Feldblum, EEOC Commissioner.

17. For example of how to think about fundamental alteration, see the title III case of *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663 (4th Cir. 2019).

### III. ESSENTIAL FUNCTIONS OF THE JOB AND TELECOMMUTING? ATTENDANCE AS AN ESSENTIAL FUNCTION OF THE JOB

There are two ways to determine essential functions of the job, a complicated and a much simpler approach.<sup>18</sup> This author's preference is to start with the simple approach and then use the complicated approach to build out the situation to figure out what functions are at issue. The complicated approach is set out by the EEOC.<sup>19</sup> It begins with looking at seven factors for figuring out what are the essential functions of the job.<sup>20</sup> Those factors are:

- (i) The employer's judgment as to which functions are essential; (ii) written job descriptions prepared before advertising or interviewing applicants for the job; (iii) the amount of time spent on the job performing that particular function; (iv) the consequences of not requiring the incumbent to perform the function; (v) the terms of a collective bargaining agreement; (vi) the work experience of past incumbents in the job; and (vii) the current work experience of incumbents in similar jobs.<sup>21</sup>

As if that is not enough, the EEOC goes on to posit three different situations expanding on the seven-factor test, and the situations are summarized as: (1) the job exists specifically to perform the function; (2) the small size of the workforce requires all employees to be able to perform the function, or (3) the employee is hired for their expertise in performing the highly specialized function.<sup>22</sup>

The simple way to look at essential functions of the job is to determine whether any element of the job is fundamental to achieving the job's purpose.<sup>23</sup> When coming up with essential functions of the job, keep in mind the following: (1) do not confuse tasks or major life activities with essential functions, (2) the employer's job description is not conclusive evidence, (3) the critical question is whether a person with a disability can perform the essential functions of the job with or without reasonable accommodations.<sup>24</sup> That is, do not forget about factoring in "with reasonable accommodations,"

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18. See generally 29 C.F.R. § 1630.2(n)(3) (2024); See generally *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [hereinafter *ADA Enforcement Guidance*].

19. 29 C.F.R. § 1630.2(n)(3)(i-vii) (2024).

20. *Id.*

21. *Id.*

22. 29 C.F.R. § 1630.2(n)(2)(i-iii) (2024).

23. *Considine v. Willimansett*, 213 F. Supp. 3d 253, 261 (D. Mass. 2016) (referencing *Jones v. Nationwide Ins Co.*, 696 F.3d 78, 88 (1st Cir. 2012)).

24. *Turner v. Hershey Chocolate*, 440 F.3d 604, 612-13 (3rd Cir. 2006).

into the analysis. Lastly, consider that performance quality and probationary status of the employee is irrelevant to whether the person with a disability is a qualified individual per the ADA.<sup>25</sup>

Finally, the pandemic upended the question of whether telecommunicating is an essential function of the job. Before the pandemic, the cases were rather uniform in finding that attendance would virtually always be an essential function of the job.<sup>26</sup> The pandemic completely upended those assumptions. How do you go about deciding whether attendance is an essential function of the job? This author likes the case of *Samper v. Providence St. Vincent Med. Ctr.*<sup>27</sup> In this case, a nurse claimed that she was able to do her job remotely.<sup>28</sup> The hospital disagreed.<sup>29</sup> In deciding for the hospital, the Court addressed three factors to see if attendance was a central function of the job.<sup>30</sup> Those factors being: (1) whether the employee has to work as part of a team, (2) whether the job requires face-to-face interaction with clients and other employees, and (3) whether the job requires the employee to work with items and equipment that are on site.<sup>31</sup> Now with the pandemic, preventive law demands that the first two *Samper* factors be rephrased as follows: (1) whether the employee has to work in person as part of a team, and (2) whether the job requires face-to-face interaction in person with clients and other employees. The third factor can remain the same even after the pandemic. The reason is that lots and lots of employees are able to work as part of the team and engage in face-to-face interaction remotely with all the technology that currently exists, such as Zoom, Google Meets, Teams, Slack, and other applications. Keep in mind, that the pandemic opened up the world for people with disabilities because of the ability to work remotely, and people with disabilities are not likely to forget that. So, if a person with a disability who had done their work well remotely during the pandemic is being ordered back to work in person, the employer should think seriously about the data it needs to back up the in-

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25. *ADA Enforcement Guidance*, *supra* note 18.

26. *Jovanovic v. In-Sink-Erator*, 201 F.3d 894, 899-900 (7th Cir. 2000).

27. *See generally Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2012).

28. *Id.* at 1235.

29. *Id.*

30. *Id.* at 1237.

31. *Id.*

person requirement.<sup>32</sup> Also, at least one court has held that telecommuting as a reasonable accommodation is a question of fact.<sup>33</sup>

#### IV. THE INTERACTIVE PROCESS

Title I of the ADA and its implementing regulations demand an interactive process between the employee and the employer to figure out what reasonable accommodations will work.<sup>34</sup> The idea is that through the interactive process, a give-and-take between the employer and the employee, both parties can reach a win-win solution.<sup>35</sup> The way the interactive process works is as follows.

First, once an employer is aware of an accommodation request, the employer must engage in the interactive process and magic words are not required to start the process.<sup>36</sup> This author likes to think of magic words as being a situation arising where the employee has provided the employer with enough information so that the employer can be fairly said to know about the disability and the desire for an accommodation.<sup>37</sup> Second, Family Medical Leave Act (“FMLA”) notice by itself may or may not be sufficient.<sup>38</sup> Third, sick leave notice by itself may or may not be sufficient.<sup>39</sup> Fourth, keep in mind that reasonable accommodation obligations can extend beyond just the job.<sup>40</sup> Fifth, liability gets imposed, and whoever breaks down the interactive process.<sup>41</sup> Sixth, the employer has the right to obtain a reasonable amount of documentation justifying the accommodation request.<sup>42</sup>

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32. A study revealed that corporations actually do better when they have at least a hybrid situation. Jena McGregor, *Companies With Flexible Remote Work Policies Outperform On Revenue Growth: Report*, FORBES, <https://www.forbes.com/sites/jenamcgregor/2023/11/14/companies-with-flexible-remote-work-policies-outperform-on-revenue-growth-report/> (last updated Nov. 14, 2023); Also, Allstate reports that hiring people remotely has tremendous advantages. Paige McGlaufflin & Joseph Abrams, *Allstate cut half its office space after adopting flexible work*, YAHOO! FINANCE (Nov. 13, 2023), <https://finance.yahoo.com/news/allstate-cut-half-office-space-133644213.html>.

33. *Teetor v. Rock-Tenn Servs., Inc.*, No. 4:15CV1002 HEA, 2017 WL 4357379, at \*15 (E.D. Mo. Oct. 2, 2017).

34. *See supra* note 18.

35. *Id.*

36. *EEOC v. Crain Auto. Holdings*, 372 F. Supp. 3d 751, 757 (E.D. Ark., Apr. 11, 2019); *Kowitz v. Trinity Health*, 839 F.3d 742, 747 (8th Cir. 2016).

37. *Crain Auto. Holdings*, 372 F. Supp. at 757; *Kowitz*, 839 F.3d at 746 (Courts on this question of how much notice is sufficient can be a bit all over the place, but most use something like this formulation); *See also* *Forman v. Middleton*, 20-cv-516-jdp, 2021 WL 5038752, at \*9 (W.D. Wis. Oct. 29, 2021).

38. *Jackson v. Sprint/United Mgmt.*, 599 F. Supp. 3d 314, 330 (D. Md. 2022).

39. *Shaffstall v. Old Dominion Freight Line*, 612 F. Supp. 3d 1186, 1202 (W.D. Wash. 2020).

40. *Wilson v. Sec’y of Veterans Affairs*, No. 20-10799, 2022 WL 1907863, at \*3-4, \*22-23 (11th Cir. June 3, 2022).

41. *Zivkovic v. S. Cal. Edison*, 302 F.3d 1080, 1089 (9th Cir. 2002) (citing *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1137 (7th Cir. 1996)).

42. *See Owens v. Georgia*, 52 F.4th 1327, 1335 (11th Cir. 2022).



Much of dealing with the ADA is understanding the mindset of a person with a disability. So, the interactive process can go wrong if the mindset of a person with a disability is not understood. Here are some dos and don'ts of the interactive process. This list is a product of my own experience as well as from reading the tremendous amount of case law in the area over the years. With respect to my own experience, it comes from attending and speaking at continuing legal education seminars. It also comes from the times where a hotel that I am staying at while attending or speaking at those continuing legal education dimensions, does not understand Deaf, deaf, and hard of hearing accessibility. Starting with the don'ts, they include: (1) failing to act on a reasonable accommodation request unless it is explicit, for example requiring magic words, (2) immediately calling a vendor or other third-party once a reasonable accommodation request comes in rather than talking to the individual with a disability themselves, (3) making it clear to the person with the disability that you do not want to accommodate them but you have to, (4) making clear that the process will be adversarial and not collaborative, (5) ignoring suggestions from the person with the disability about what works and where, making it clear that you do not care what works, (6) assuming that one knows more about the ADA than the person making the request for reasonable accommodation, that may or may not be true, (7) pitying or feeling sorry for the individual with the disability.

The do's of the interactive process include: (1) valuing the person with a disability as an individual, (2) making clear and demonstrating that one is interested in a collaborative and not an adversarial process, (3) when getting stuck about what might work, call a job accommodation network, (4) empathizing and listening, (5) involving the person with a disability in the process immediately and keeping them posted, (6) remembering one will have to make accommodations unless undue hardship is shown, and (7) knowing what a reasonable accommodation is, which is anything that does not constitute an undue hardship as discussed above.

#### V. AI USES AND RISKS

The uses for AI are expanding every minute. Current uses of AI in numerous literature include: legal research, contract drafting, document generation, document review, such as the discovery, legal writing, workflow management, automation of time-consuming tasks, enhancing the functionality of existing software, predictive analytics, pricing decisions, figuring out reasonable accommodations or modifications, review of outside counsel attorney bills by in-house counsel, getting into the minds of prospective jurors, screening candidates resumes and automating benefits, answering questions about benefits, developing policy, job descriptions, and

development plans, claims evaluation, redacting personally identifiable information or protected health information, scoring exams, management of workers, and employment decisions.<sup>43</sup> The list is certainly not exclusive and is expanding every day.

AI is not without its risks and those risks include: accuracy and reliability questions, ethical considerations, data security, not engaging in continuing education on AI, AI not being designed so that it is meaningfully accessible to persons with disabilities, antitrust lawsuit, using AI to figure out reasonable accommodations or modifications, screening out persons with disabilities, and the unauthorized practice of law.<sup>44</sup> The list is most certainly not exclusive.

## VI. UNITED STATES REGULATORY ENVIRONMENT ON AI

### A. Department of Justice

The Department of Justice is pursuing AI in a couple of different ways.<sup>45</sup> First, the deputy director for the Department of Justice has made it clear that AI needs to be incorporated into corporate compliance programs and that the DOJ is watching.<sup>46</sup> Second, the DOJ has issued guidance on AI in hiring.<sup>47</sup> One thing that is not well known is that the DOJ enforces disability discrimination laws concerning state and local government employers.<sup>48</sup> When one thinks of employment discrimination and persons with disabilities, invariably the EEOC comes up. However, the EEOC only has authority over private entities and not non-federal governmental entities.<sup>49</sup> So, the DOJ does have the authority to prosecute Title I of the ADA claims in certain circumstances.<sup>50</sup> Even so, it is still a good idea when representing non-federal governmental employees to exhaust the EEOC administrative processes first. In the guidance, the DOJ says that they will look seriously at whether the AI

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43. *See generally AI: How Lawyers Are Using It And The Challenges Ahead*, LAW360, <https://www.law360.com/ai> (last visited Aug. 27, 2024).

44. *Id.*

45. *Deputy Attorney General Lisa Monaco Delivers Keynote Remarks at the American Bar Association's 39th National Institute on White Collar Crime*, U.S. DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (March 7, 2024), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations>.

46. *Id.*

47. *See generally Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION (May 12, 2022), <https://www.ada.gov/resources/ai-guidance/> [hereinafter *Algorithms*].

48. *See Your Employment Rights as an Individual with a Disability*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/guidance/your-employment-rights-individual-disability> (last visited Aug. 21, 2024).

49. *Id.*

50. *Disability Rights Section*, U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION, <https://www.justice.gov/crt/disability-rights-section> (last visited Aug. 21, 2024).

tools screen out persons with disabilities.<sup>51</sup> Also, employers must use accessible tests measuring the applicant's job skills and not the disability, or the employers must make other adjustments to the hiring process so that a qualified person is not eliminated because of the disability.<sup>52</sup>

### *B. Equal Employment Opportunity Commission*

The EEOC has also issued guidance on artificial intelligence in hiring with respect to persons with disabilities.<sup>53</sup> For anyone dealing with employment law and wondering about how AI might impact that universe, the guidance is worth reading.<sup>54</sup> This particular section of the article will highlight various provisions of the EEOC guidance on AI in hiring. First, the guidance defines software, algorithms, and artificial intelligence.<sup>55</sup>

Second, there is a misplaced focus on, "current disability."<sup>56</sup> The ADA does not work that way.<sup>57</sup> To be covered under the ADA as a person with a disability, a person must have any of the following: a physical or mental impairment that substantially limits a major life activity; a record of such an impairment; or is regarded as having such an impairment.<sup>58</sup> For the regarded as prong, the only question is whether the party taking adverse action regarding the person has a physical or mental impairment regardless of whether a substantial limitation on a major life activity was perceived.<sup>59</sup> Third, the EEOC makes clear that ADA compliance is a nondelegable duty.<sup>60</sup> Fourth, the disability-related inquiries and medical examinations scheme, for example a person does not have to be a person with a disability to pursue violations of the medical examination or disability-related inquiries scheme, of the ADA must be kept in mind, including the need to stay away from excessive documentation requests.<sup>61</sup> Fifth, an employer cannot use AI to screen out people with disabilities.<sup>62</sup> Sixth, the EEOC mentioned that employers need to be aware of the reasonable accommodation obligations<sup>63</sup>

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51. *Algorithms*, *supra* note 47.

52. *Id.*

53. *See generally* *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employee*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (May 12, 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence> [hereinafter *AI Applicants*].

54. *Id.* at 1-3.

55. *Id.* at 3-4.

56. *Id.* at 4.

57. *See generally* 42 U.S.C. § 12102(1)(A-C).

58. *Id.*

59. 42 U.S.C. § 12102(3)(A).

60. *AI Applicants*, *supra* note 53, at 6.

61. *Id.* at 5.

62. *Id.*

63. *Id.*

and that magic words are not required to activate the interactive process.<sup>64</sup> Seventh, transparency is very important.<sup>65</sup> Eighth, the EEOC says to be aware of the risk of using Chatbots.<sup>66</sup> For example, chatbots may unduly focus on gaps in employment or speech patterns of the applicant.<sup>67</sup> Either of these would screen out people with disabilities.<sup>68</sup> Ninth, bias-free for purposes of Title VII does not equal free from disability discrimination.<sup>69</sup> Tenth, the EEOC mentions that one always has to remember the essential functions of the job and that an individualized analysis is critical.<sup>70</sup> It should be pointed out that one of the things that may arise here is the question of whether it is the disability being accommodated or whether it is the essential functions of the job being accommodated. The answer to that question can largely affect how a situation is handled. Courts are going both ways but to this author's mind, the better approach is accommodating the disability rather than the essential functions of the job.<sup>71</sup> Finally, an employer needs to pay for the cost of any accommodations.<sup>72</sup>

*C. EEOC, DOJ, CFPB, and FTC Joint Statement on AI Discrimination and Bias*

The EEOC, DOJ, Consumer Financial Protection Bureau (“CFPB”), and the Federal Trade Commission (“FTC”) have issued a joint statement on AI discrimination and bias.<sup>73</sup> Concerning this statement, there are three things to keep in mind. First, data and data sets. That is, automated system outcomes can be distorted by unrepresentative or unbalanced data sets that incorporate age-old biases or other errors.<sup>74</sup> Automated systems can also discriminate against protected classes. Second, model opacity and access.<sup>75</sup> That is, internal workings are sometimes not clear to most people and even, at times, to the tool's developer,<sup>76</sup> which makes it difficult for developers,

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64. *Id.* at 7.

65. *AI Applicants*, *supra* note 53, at 12-13.

66. *Id.* at 9.

67. *Id.*

68. *Id.*

69. *Id.* at 9-10.

70. *AI Applicants*, *supra* note 53, at 12-13.

71. *See generally Wilson*, 2022 WL 1907863, at \*22-23; *See generally Felix v. N.Y.C. Transit Auth.*, 324 F.3d 102 (2d Cir. 2003).

72. *EEOC v. BNSF Ry. Co.*, 902 F.3d 916, 926 (9th Cir. 2018).

73. Rohit Chopra et al., *JOINT STATEMENT ON ENFORCEMENT EFFORTS AGAINST DISCRIMINATION AND BIAS IN AUTOMATED SYSTEMS*, FTC, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf) (last visited Aug. 21, 2024).

74. *Id.* at 3.

75. *Id.*

76. *Id.*

businesses, and individuals to know whether the automated system is fair.<sup>77</sup> Finally, design and use.<sup>78</sup> That is, developers do not understand or account for how private or public entities use their automated systems.<sup>79</sup> Developers may design the AI tool using flawed assumptions about its users, “relevant contacts, or the underlying practices or procedures” it replaces.<sup>80</sup> This author knows this one firsthand as he has used voice dictation technology for quite a long time. It always amazes him as to how sites are designed without keeping in mind persons with disabilities, such as voice dictation users.

*D. Joint Statement of the Office of Federal Contract Compliance Programs (“OFCCP”), Department Of Labor’s Civil Rights Center, the Department Of Justice, the Department Of Education, the Department Of Health And Human Services, the Department Of Homeland Security, the Department Of Housing And Urban Development, the Department of the Consumer Financial Protection Bureau; the EEOC, and the FTC*

On April 4, 2024, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs signed a joint statement committing to protect the public from unlawful bias and automated systems, including AI.<sup>81</sup> In the joint statement, OFCCP noted that an automated system may contribute to unlawful discrimination and otherwise violate federal law.<sup>82</sup> Therefore, OFCCP is committed to monitoring the development and use of automated systems.<sup>83</sup> It will also take its responsibility seriously to ensure that the rapidly evolving systems are developed and used in a manner consistent with the agency’s legal authorities, which include: Executive Order 11246, § 503 of the Rehabilitation Act, and the Vietnam Era veterans readjustment assistant act.<sup>84</sup> The OFCCP guidance also pledges to vigorously use the legal authorities it has in order to protect workers rights.<sup>85</sup> The agency has a frequently asked questions document explaining how it will review a federal contractor’s use of automated systems.<sup>86</sup> Also, OFCCP has updated its compliance review processes so as to require documentation for systems used

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77. *Id.*

78. Chopra, *supra* note 73, at 3.

79. *Id.*

80. *Id.*

81. Rohit Chopra et al., *JOINT STATEMENT ON ENFORCEMENT OF CIVIL RIGHTS, FAIR COMPETITION, CONSUMER PROTECTION, AND EQUAL OPPORTUNITY LAWS IN AUTOMATED SYSTEMS*, DOL, 2 (Apr. 4, 2024) <https://www.dol.gov/sites/dolgov/files/OFCCP/pdf/Joint-Statement-on-AI.pdf> [hereinafter *Automated Systems Statement*].

82. *Id.*

83. *Id.* at 5.

84. *Id.* at 3.

85. *Id.* at 5.

86. *Automated Systems Statement*, *supra* note 81, at 5.

to recruit, screen, and hire.<sup>87</sup> Such systems include AI algorithms, automated systems, or other technology-based selection procedures.<sup>88</sup>

*E. Office of Management and Budget (“OMB”) Memorandum Implementing AI Executive Order*

On March 28, 2024, the OMB put out a memorandum for the heads of executive departments and agencies implementing President Biden’s AI Executive Order.<sup>89</sup> There are several highlights worth noting. First, each agency had to designate a chief AI officer by May 27, 2024.<sup>90</sup> That officer has wide-ranging responsibility over AI within that agency.<sup>91</sup> One does wonder how the federal government will possibly have enough money to pay such individuals considering how AI is exploding.

Second, the OMB memorandum focuses on the risk of AI and relying on AI where the AI informs, influences, decides, or executes agency decisions that might “undermine the efficacy, safety, equitableness, fairness, transparency, accountability, appropriateness, or lawfulness of such decisions or actions.”<sup>92</sup>

Third, the OMB memorandum scope of coverage applies to any part of the executive branch of the government, including the Executive Office of the President. It also applies to any independent regulatory agency with the exceptions of the Government Accountability Office, the FTC, the governments of D.C., U.S. territories and possessions and their various subdivisions, and government-owned contractor-operated facilities, such as laboratories engaged in national defense research and production activities.<sup>93</sup>

Fourth, the requirements of the memorandum and its recommendations apply to system functionality implementing or relying on AI, rather than to the entirety of an information system that incorporates AI.<sup>94</sup>

Fifth, the memorandum specifically talks about what steps need to be taken to remove barriers to the responsible use of AI and they include steps relating to: (1) IT infrastructure, (2) data agencies need to develop adequate infrastructure and capacity to sufficiently share, curate, and govern agency data for use in training, testing, and operating AI, (3) cybersecurity agencies

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87. *Id.*

88. *Id.*

89. Shalanda D. Young, *Memorandum for the Heads of Executive Departments*, WHITEHOUSE.GOV (March 28, 2024), <https://www.whitehouse.gov/wp-content/uploads/2024/03/M-24-10-Advancing-Governance-Innovation-and-Risk-Management-for-Agency-Use-of-Artificial-Intelligence.pdf>.

90. *Id.* at 1, 4.

91. *Id.* at 5-7.

92. *Id.* at 2.

93. *Id.* at 3.

94. Young, *supra* note 89, at 4.

need to update as needed, the processes for information system authorization.<sup>95</sup> They also have to have continuous monitoring to best address the needs of AI applications, and (4) generative AI agencies need to assess potential beneficial use of generative AI and its missions.<sup>96</sup> They also need to establish adequate safeguards and oversight mechanisms to allow the generative AI to be used by the particular agency without posing undue risk.<sup>97</sup>

Sixth, all AI matching the definition of safety impacting AI<sup>98</sup> or rights impacting AI<sup>99</sup> have to follow minimum practices.<sup>100</sup> With respect to minimum practices, the agencies have to look at “whether the particular AI output serves as a principal basis for a decision or action.”<sup>101</sup> AI used for one of the purposes identified in Appendix I of the memorandum and the list is pretty comprehensive, is automatically presumed to be safety-impacting or rights-impacting.<sup>102</sup> These minimum practices include: (1) completing an AI impact assessment, keeping the assessments updated, and leveraging the assessments throughout the AI’s lifecycle, and (2) testing the AI for performance in the real world.<sup>103</sup> That is, ensuring the AI and the components relying on it work as intended in the real world; (3) independently evaluate the AI, the independent evaluation is done by the chief AI officer, agency AI officer board, or other appropriate agency office with existing tests and evaluation responsibilities, in order to ensure the system works appropriately and as intended and that it’s expected benefits outweigh its potential risks, (4) conduct ongoing monitoring, (5) regularly evaluate the risks of using the AI, (6) mitigate any emerging risks to rights and safety, (7) ensure adequate human training and assessment, (8) provide adequate human oversight, intervention, and accountability when it comes to decisions or actions that could result in a significant impact on rights or safety, (9) provide public notice, and (10) any documentation needs to be in plain language.<sup>104</sup>

Finally, before initiating the use of new or existing rights impacting AI, agencies have to follow additional minimal practices and they are: (1) identify and assess AI’s impact on equity and fairness, and mitigate algorithmic discrimination when present, (2) consult and incorporate feedback from affected communities in the public, (3) conduct ongoing monitoring and mitigation for AI-enabled discrimination, (4) notify negatively affected

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95. *Id.* at 2.

96. *Id.*

97. *Id.* at 11.

98. *Id.* at 31-32.

99. Young, *supra* note 89, at 31.

100. *Id.* at 21.

101. *Id.* at 15.

102. *Id.* at 31-32.

103. *Id.* at 17-18.

104. Young, *supra* note 89, at 18-20.

individuals, (5) maintain human consideration and remedy processes, and (6) maintain an option to opt-out for AI-enabled decisions.<sup>105</sup> The memorandum is quite comprehensive, what is discussed here is not all-inclusive, and reading it is encouraged.<sup>106</sup>

*F. Financial Industry Regulatory Authority (“FINRA”) and AI*

FINRA, the securities regulator, has also signaled that it will be looking at AI closely.<sup>107</sup> In particular, using current processes and possible future rules, FINRA will be looking at:

1. Communications with customers, including use of virtual assistance to enhance the customer experience and customizable outreach targeting to identify key potential customers;
2. [i]nvestment processes, such as brokerage account management models that can develop complex ballistic customer profiles or perform customized research, and portfolio management and trading applications that can map price ship patterns and add predictive value to investment decisions or optimize trading function; and
3. [o]perational functions, including deployment of so-called RegTech to help member firms develop more effective, efficient, and risk-based compliance programs.<sup>108</sup>

Future FINRA regulations on AI “will likely require firms to develop comprehensive systems for evaluating and monitoring data imports for quality, bias, privacy, and security.”<sup>109</sup> They are also likely to place additional restrictions on third-party vendor selection and supervision protocols.<sup>110</sup>

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105. *Id.* at 21-23.

106. *Id.* at 31.

107. Meredith Leary, et al., *The FINRA Reports That May Foreshadow New AI Rules*, LAW 360 (Feb. 6, 2024), <https://www.law360.com/articles/1791219/the-finra-reports-that-may-foreshadow-new-ai-rules>.

108. *Id.*

109. *Id.*

110. *Id.*



## VII. STATE DEVELOPMENTS

*A. State of California's Generative AI Guidelines for Public Sector and Procurement, Uses and Training*

On March 2024, the State of California issued a document called “GenAI Guidelines for Public Sector Procurement, Uses and Training.”<sup>111</sup> The document defines generated artificial intelligence and then breaks down obligations in terms of whether incidental GenAI purchases are involved or whether intentional GenAI purchases are involved.<sup>112</sup> It defines GenAI as “[p]re-trained AI models that can generate images, videos, audio, text, and derived synthetic content” from “analyzing the structure and characteristics of the input data in order to generate new synthetic content similar to the original.”<sup>113</sup> “Decision support, machine learning, natural language processing/translation services, computer vision and chatbot technologies or activities support may be related to GenAI, but are not GenAI on their own.”<sup>114</sup>

Incidental GenAI purchase can be any of: (1) a purchase for which a state entity identifies the use of GenAI tools as part of the overall purchase for any type of procurement,<sup>115</sup> (2) a request to primarily purchase a good or service, when the state or vendor identifies a subcomponent of the purchase in using GenAI tools to assist with the delivery of the solution, (3) a purchase for which a state entity identifies an AI product or solution in order to meet a business need for any type of procurement, or (4) a request to purchase a specific GenAI product or solution at the onset of a procurement.<sup>116</sup>

If an incidental purchase is involved, the following steps have to happen: (1) assign a member of the executive team, generally the state entity’s chief information officer, with the responsibility of continually monitoring and evaluating the GenAI, (2) conduct mandatory executive and procurement team GenAI trainings, and (3) “review annual employee training and policies to ensure staff understand and acknowledge the acceptable use of GenAI tools.”<sup>117</sup>

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111. *State of California's GenAI Guidelines for Public Sector Procurement, Uses and Training*, GOVOPS (Mar. 2024), <https://www.govops.ca.gov/wp-content/uploads/sites/11/2024/03/3.a-GenAI-Guidelines.pdf> [hereinafter *AI Public Sector*].

112. *Id.* at 6.

113. *Id.*

114. *Id.*

115. *Id.*

116. *AI Public Sector*, *supra* note 111.

117. *Id.* at 9.

If an intentional procurement is involved, then the steps for dealing with incidental purchases must be followed plus the following additional steps: (1) prior to procuring new GenAI technology, identify a business need while understanding the implications of using GenAI to solve that problem; essential to that process is assessing the problem and potential solution through market research;<sup>118</sup> (2) “[c]reate a culture of engagement and open communication with state employee end users” so as to have a collaborative and collective approach on the impact of GenAI technology;<sup>119</sup> (3) “assess the risk and potential impacts of deploying the GenAI under consideration,”<sup>120</sup> (4) before bringing a GenAI solution online, the state entity must invest the time and resources to prepare data inputs and test models adequately.<sup>121</sup> The testing phase’s purpose is to allow staff to experiment with the proposed solution, gather feedback, and correct outcomes to reduce bias and inaccurate information.<sup>122</sup> Continuing with the additional steps: (5) the evaluation of the technology must continue throughout its use by the state entity and must involve a human,<sup>123</sup> (6) “establish a GenAI-focused team responsible for continuously evaluating the potential use of GenAI and its implications for operations and program administration.”<sup>124</sup> Lastly, (7) regardless of whether an intentional or incidental GenAI is involved, all state entities have to conduct and submit an inventory of all uses of GenAI.<sup>125</sup>

*B. Pennsylvania Department of Insurance Notice on Use of Artificial Intelligence Systems by Insurers*

On April 6, 2024, the Pennsylvania Insurance Department issued a notice, “Notice 2024-04 on the Use of Artificial Intelligence System by Insurers.”<sup>126</sup> The following are worth noting in particular: (1) the document defines adverse consumer outcome, algorithm, and artificial intelligence,<sup>127</sup> (2) decisions made by insurers must be accurate, not arbitrary, not capricious, and not unfairly discriminatory,<sup>128</sup> (3) “insurers must adopt and implement controls specifically relating to the use of AI that are designed to mitigate the

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118. *Id.*

119. *Id.*

120. *Id.*

121. *AI Public Sector*, *supra* note 111, at 9.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 10.

126. Michael Humphreys, *Use of Artificial Intelligence Systems by Insurers*, PENNSYLVANIA BULLETIN (April 6, 2024), <https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol54/54-14/484.html>.

127. *Id.* at 3.

128. *Id.* at 4.

risk of adverse consumer outcomes,”<sup>129</sup> (4) insurers authorized to do business in Pennsylvania and using AI systems are “expected to develop, implement and maintain a written program for the responsible use of AI systems that make or support decisions related to regulated insurance practices.”<sup>130</sup> The written program should be designed in such a way so as to mitigate the risk of adverse consumer outcomes and to maintain compliance with the statutory and regulatory provisions set forth in the notice.<sup>131</sup> Continuing the list from the Pennsylvania Insurance Department: (5) the department “encourages the development and use of verification” and testing methods that will identify errors and bias in predictive models and AI systems, as well as identify the “potential for unfair discrimination in the decisions and outcomes resulting from the use of predictive models and AI systems,”<sup>132</sup> (6) controls and processes adopted and implemented by an insurer as part of its AI system program need to be reflective and commensurate with the insurer’s own assessment of the degree and nature of the risk posed to consumers by the AI systems it uses, and must consider the following: A) the nature of the decision being made prior to using the AI system; B) “the type and degree of potential harm to consumers resulting from the use of AI system”; C) the extent humans are “involved in the final decision-making process”; D) the transparency and explainability of outcomes impact on the consumer; and E) “the extent and scope of the insurer’s use or reliance on data, predictive models and AI systems from third parties.”<sup>133</sup>

The Pennsylvania Insurance Department also created guidelines and a best practices document for the development and use of artificial intelligence system programs, which are not binding upon insurers nor do they limit the department’s discretion to evaluate an insurer’s compliance with applicable laws and regulations.<sup>134</sup> The guidelines and best practices document is not meant to be exhaustive.<sup>135</sup> The guidelines wind up being divided into general guidelines, governance, risk management, and internal controls, and third-party AI systems and data.<sup>136</sup> If the Pennsylvania Insurance Department starts asking questions, they will not only ask questions related to the guidelines but they may seek out other kinds of information or documentation relating to the AI system governance, risk management and use protocols, and third-party AI systems and data.<sup>137</sup> While it is true that the particular state

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129. *Id.*

130. *Id.*

131. Humphreys, *supra* note 126, at 4.

132. *Id.*

133. *Id.* at 4-5.

134. *Id.* at 5.

135. *Id.*

136. Humphreys, *supra* note 126, at 5.

137. *Id.* at 8-10.

developments discussed here, are not employment per se, they will undoubtedly affect employment in indirect and direct ways.<sup>138</sup>

#### VIII. EUROPEAN UNION AI ACT:

The European Union has passed an AI Act.<sup>139</sup> The Act sets out four levels of risk for AI systems.<sup>140</sup> The first level is an unacceptable risk.<sup>141</sup> An unreasonable risk is an AI system that is considered a clear threat to the safety, livelihoods, and rights of people.<sup>142</sup> Those kinds of systems are banned entirely.<sup>143</sup> Such systems include, but are not necessarily limited to, “social scoring by government to toys using voice assistance encourages dangerous behavior”.<sup>144</sup>

The second level is the high-risk level.<sup>145</sup> The high-risk level includes many things, but for purposes of this article it includes: employment; management of workers and access to self-employment; biometric identification system; and administration of justice and democratic processes, such as using AI to search for court rulings.<sup>146</sup> AI systems in the high-risk category are subject to strict obligations before they can be put on the market.<sup>147</sup> These obligations include: (1) “adequate risk assessment and mitigation system,” (2) “high quality of the data sets using the system in order to minimize risk and discriminatory outcomes,” (3) “logging of activity to ensure traceability of results,” (4) “detailed documentation providing all information necessary on the system and its purpose in order” for authorities to assess its compliance, (5) “clear and adequate information to the deployer,”<sup>148</sup> (6) “appropriate human oversight measures to minimize risk,”<sup>149</sup> and (7) “high levels of robustness, security, and accuracy.”<sup>150</sup>

The high-level risk category also includes a regulatory process.<sup>151</sup> That regulatory process includes doing the following: (1) development of the high-risk AI system, (2) undergoing a conformity assessment and complying with AI requirements, (3) registration of stand alone AI system in the European

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138. *Shaping Europe's digital future: AI Act*, EUROPEAN COMMISSION, <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai> (last visited July 29, 2024) [hereinafter *AI Act*].

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *AI Act*, *supra* note 138.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *AI Act*, *supra* note 138.

149. *Id.*

150. *Id.*

151. *Id.*

Union database, (4) a declaration of conformity is signed and the AI system should bear the CE marking, and (5) if substantial changes happen in the AI system's lifecycle, the steps have to be repeated.<sup>152</sup> A couple of points here. First, the administration of justice as being part of this category is significant. For example, there are advertisements for predictive analytics with respect to court decisions being marketed here in the United States to United States attorneys. A similar product in the European Union would seem to fall into the high risk category. Second, AI is constantly evolving and changing substantially every day.<sup>153</sup> One wonders at what point a substantial change exists in order to have to repeat the regulatory process.

The third level is the limited risk category.<sup>154</sup> This category refers to the risk associated with the lack of transparency in AI usage.<sup>155</sup> This level of risk does create specific transparency obligations in order to ensure that humans are informed when necessary so as to foster trust.<sup>156</sup> These transparency obligations include, AI systems using Chatbots should make sure that humans are aware they are interacting with the machine so they can make an informed decision to continue or step back, ensuring that AI-generated content is identifiable, and AI-generated text published with the purpose to inform the public on matters of public interest must be labeled as artificially generated.<sup>157</sup>

#### IX. PREVENTIVE STEPS FOR GETTING AI NONDISCRIMINATION RIGHT

What are preventive steps that can be taken to get AI nondiscrimination right? One good source comes from a law review article authored by former EEOC Commissioner (his term ended and he left for private practice at the end of August, 2024), Keith Sonderling along with Bradford J. Kelly and Lance Casimir.<sup>158</sup> In the article, which is an extensive discussion of the promise and the peril of AI concerning employment discrimination, the authors list out several things that an employer can do to help prevent AI discrimination claims.<sup>159</sup> First, know your data.<sup>160</sup> That is, "be vigilant about developing, applying, and modifying the data utilized to train and run the recruiting programs and algorithms used to screen and evaluate potential

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152. *Id.*

153. *AI Act, supra* note 138.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. Keith E. Sonderling et al., *The Promise and The Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIA L. REV. 1, 2 (2022).

159. *Id.* at 74.

160. *Id.* at 75.

candidates and applicants.”<sup>161</sup> “The data should be as complete as possible with no missing or unreliable factors,” but the questions needing the answers, and be transparent enough to provide statistically relevant results.<sup>162</sup> Also, if “using AI for employment decision making should avoid potentially biased data from sources such as social media and data brokers” as those can be error-prone.<sup>163</sup> Second, make sure you are transparent and explain everything.<sup>164</sup> “Transparency promotes the visibility of processes, the accessibility of systems, and the reporting of meaningful information.”<sup>165</sup> “Explainability fosters trust in the process.”<sup>166</sup> Third, monitor and audit AI uses.<sup>167</sup> That is, monitor both qualitatively and quantitatively continually and/or at least once a year, and memorialize the findings.<sup>168</sup> Fourth, supervise the process.<sup>169</sup> That is, charge a person or team of people with overseeing the processes and results of AI tools in order to ensure that the tools are not only performing legitimate objectives, but also avoiding improper outcomes.<sup>170</sup> Fifth, understand vendor liability.<sup>171</sup> “Employers need to carefully review and negotiate any contracts they have with vendors providing” the services.<sup>172</sup> It is particularly important for a company purchasing an AI hiring tool to ensure that vendors attested to fairness and integrity of the product “while negotiating the proper indemnification clauses that anticipate potential government investigation.”<sup>173</sup> Employers need to be aware that they could be “held liable if the vendors discriminate against candidates based on protected characteristics while using AI tools.”<sup>174</sup> Finally, employers need to be aware of the emerging patchwork of federal, state, local laws, rules, and regulations regulating AI use.<sup>175</sup> What is discussed in this article is only a fraction of what is to come.

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161. *Id.*

162. *Id.*

163. Sonderling, *supra* note 158, at 75.

164. *Id.* at 77.

165. *Id.*

166. *Id.*

167. *Id.* at 79.

168. Sonderling, *supra* note 158, at 80.

169. *Id.* at 81.

170. *Id.*

171. *Id.* at 84.

172. *Id.*

173. Sonderling, *supra* note 158, at 84.

174. *Id.* at 85 (In fact, as of this writing, the EEOC has filed an amicus brief involving the company Workday, saying that Workday is an employer for purposes of the antidiscrimination law).

175. *Id.*

## X. CONCLUSION

AI is exploding. It is moving ahead with lightning speed. The concern is whether people with disabilities will be left behind.<sup>176</sup> It is critical to design AI systems from the very beginning with people with disabilities in mind so that people with disabilities can meaningfully access the applicable AI. Of course, the concerns addressed in this article cannot be forgotten either. Lawyers will have to keep abreast of the technology as well as the rapidly developing regulatory framework at the federal level, state level, and even abroad. As shown in this article, those regulatory developments will affect employment both directly and indirectly. Lawyers will have to be extremely diligent to keep up with the emerging technology and the regulatory developments that will come from all kinds of different directions.<sup>177</sup>

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176. See Merrick Garland, *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government*, DEPARTMENT OF JUSTICE (Apr. 24, 2024), <https://www.federalregister.gov/documents/2024/04/24/2024-07758/nondiscrimination-on-the-basis-of-disability-accessibility-of-web-information-and-services-of-state> (DOJ recently put out a final rule on Nondiscrimination on the Basis of Disability. That rule talks about how entities subject to title II of the ADA (Americans with Disabilities Act), must comply with WCAG (Web content accessibility guidelines). 2.1 Level AA in order to have their web sites and mobile apps they use compliant with the ADA).

177. See *infra* note 175 (The regulatory developments can come from all kinds of indirect places, so lawyers cannot afford to be narrow in where they look for related regulatory developments. For example, as we saw in this article, purchasing rules and insurance rules, and even rules pertaining to the ADA).