

OFCCP: Latest Developments and Looking Ahead

Craig Leen, Partner, K&L Gates

Kathleen Parker, Partner, K&L Gates

Leann Walsh, Partner, K&L Gates

Welcome and Introduction

K&L Gates Presenters

- Labor, Employment, & Workplace Safety Practice Area
- OFCCP & Affirmative Action Compliance Area of Focus
 - Craig Leen, Partner, Washington DC
 - Kathleen Parker, Partner, Boston
 - Leann Walsh, Partner, Raleigh

Agenda

Upcoming Scheduling List

OFCCP Directive 2024-01: Expedited Conciliation

NILG Conference – Notes on OFCCP

EEOC Promising Practices on Preventing Harassment in the Construction Industry

EEOC Enforcement Guidance on Harassment

NILG Conference – Notes on Pay Equity

NILG Conference – Notes on AI

The image features a central white horizontal band containing the text 'UPCOMING SCHEDULING LIST'. The background is a vibrant blue with abstract, overlapping geometric shapes and gradients, creating a modern and dynamic feel.

UPCOMING SCHEDULING LIST

Upcoming Scheduling List

- OFCCP released its FY 2024 CSAL Scheduling List - Release 1 and Methodology with 500 establishments on June 7, 2024.
 - OFCCP limited the amount of establishments per company on the list.
 - OFCCP also had a 500 employee threshold for establishments.
- OFCCP is looking to increase its finding percentage through auditing a larger amount of contractors (with less establishments per contractor included).
- OFCCP has been indicating publicly that another scheduling list is coming this year. It could be as early as this month.
- OFCCP will accept challenges to scheduling if company can show that it should not have been scheduled under the methodology

DIRECTIVE 2024-01

Directive 2024-01 – Expedited Conciliation

- In 2019, OFCCP adopted early resolution procedures for the first time in Directive 2019-02
- In the PDN Rule, OFCCP included expedited conciliation in the regulations as well
- Expedited conciliation allows a settlement without a PDN or NOV
- Directive 2024-01 supersedes Directive 2019-02, providing the ability to reach early resolutions with a corresponding three-year exemption from scheduling
- Resolutions can involve disparity/discrimination settlements or technical settlements

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**NILG CONFERENCE –
NOTES ON OFCCP**

NILG Conference – Notes on OFCCP

OFCCP continues to support affirmative action in employment

Compensation/pay equity continues to be the most popular of the NILG sessions

Access cases continue to be the priority for enforcement

OFCCP will be looking at artificial intelligence in audits

Mega Construction Projects and construction audits will remain a significant focus

Contractor Portal has been successful in increasing registrations and certifications

Expedited conciliation remains of great interest to the agency

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**EEOC PROMISING PRACTICES ON
PREVENTING HARASSMENT IN
THE CONSTRUCTION INDUSTRY**

EEOC Promising Practices for Preventing Harassment in the Construction Industry

Supports the EEOC's Strategic Enforcement Plan for FY24-28

- Importance of leadership
- Includes risk factors that risk factors that increase the likelihood of harassment

Unique structure of construction jobs leaves workers vulnerable

EEOC Promising Practices For Preventing Harassment In The Construction Industry

Unique Structure of Construction Jobs

- Harassment is a workplace safety issue and civil rights issue
- Safety and trust are inherently connected
- Work can be isolated, involve many employers, and temporary in nature

Risk Factors

- Workers do not know where or how to report
- Word-of-mouth recruiting
- Predominately white male workforces

Leadership and Accountability in Construction

- Treating Harassment Prevention Holistically
- Including Anti-Harassment Measures in Contract Bids
- General Contractors Serving in a Coordinating Role
- Evaluating Policies and Seeking Feedback

Comprehensive and Clear Harassment Policies

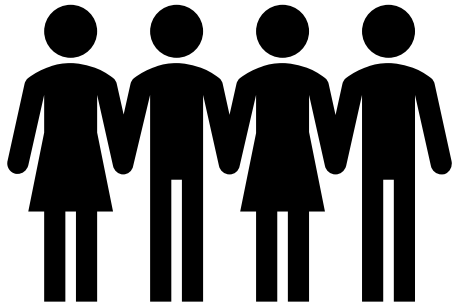
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Effective and Accessible Harassment Complaint System

Effective Harassment Training

EEOC Guidance on Harassment in the Workplace

EEOC Guidance on Harassment in the Workplace



Harassment due to an individual's pigmentation, complexion, or skin shade or tone is independently actionable

Religious harassment encompasses coercing employees to engage in religious practices at work

Sex-discrimination includes the denial of access to a bathroom or other sex-segregated facility consistent with an individual's gender identity

Harassment includes conduct based on stereotypes, even if not motivated by animus

Title VII covers intersectional harassment

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**NILG CONFERENCE –
NOTES ON DEIA**

NILG CONFERENCE – NOTES ON DEIA

Focus on encouraging employees to self-identify

Proactively address wage compression

Continue to train workforce to ensure no confusion regarding lawfulness of affirmative action

Don't overlook underutilized metrics in your AAP

Be mindful of risk areas in DEIA initiatives

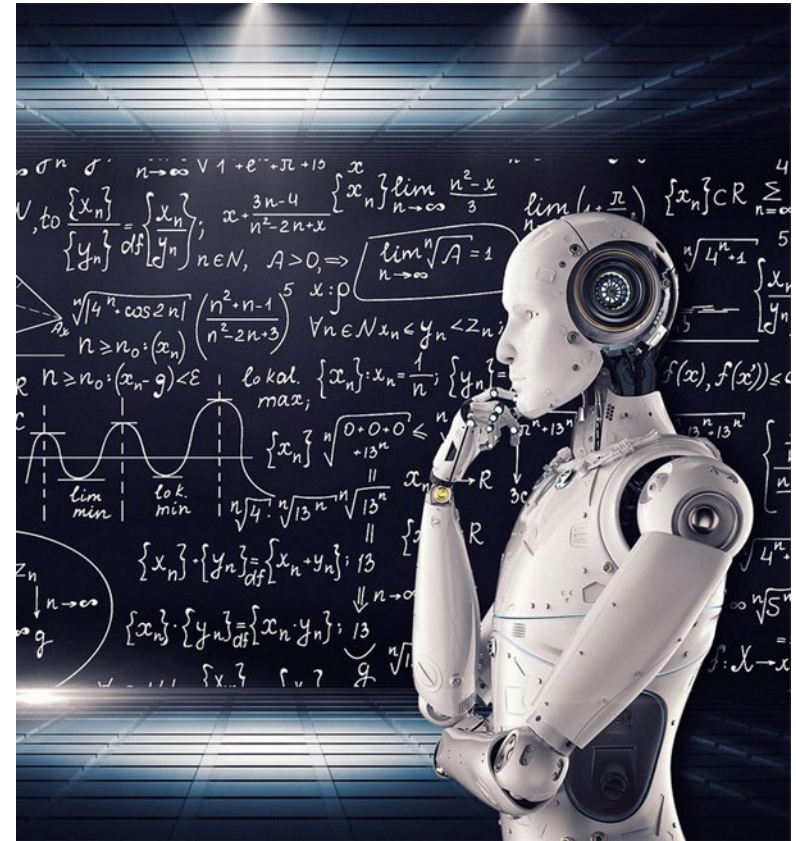
Harassment as a second-generation DEIA problem

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**NILG CONFERENCE –
NOTES ON AI**

NILG CONFERENCE – NOTES ON AI

- AI was a popular topic at the 2024 NILG Conference
- Topics included:
 - Discussing different AI tools and assessing their risks
 - Assessing the legal landscape - OFCCP, the EEOC and other agencies' focus on AI and existing employment laws/guidance that apply to AI
 - Providing recommendations and best practices



NILG CONFERENCE – NOTES ON AI (CONT)

DIFFERENT TOOLS AND RISK LEVELS

High Risk

- AI makes the decision
- Examples:
 - Resume screening tools
 - Gamified assessments
 - AI-scored interviews

Medium Risk

- AI suggests the decision
- Examples:
 - AI analyzes workforce/applicants and pushes forward “good” candidates
 - Algorithm only pushes job postings to certain people

Lower Risk

- AI creates content
- Examples:
 - Job postings
 - Policies
 - Text summaries of meetings

NILG CONFERENCE – NOTES ON AI (CONT)

DIFFERENT TOOLS AND RISK LEVELS

Non-AI EEO Laws

- Title VII
- ADA
- ADEA

EEOC

- *AI and Algorithmic Fairness Initiative* (Oct. 2021)
- *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 2022)
- *Assessing Adverse Impact in Software, Algorithms, and AI Used in Employment Selection Procedures Under Title VII* (May 2023)

OFCCP

- Uniform Guidelines on Employee Selection Procedures (UGESP) (1978)
- *May 2022 Scheduling Letter – Item 21*
- *Validation of Employee Selection Procedures FAQs* (July 2019)
- *AI and EEO for Federal Contractors* (Apr. 2024)

Case Law

- *Griggs v. Duke Power*
- *Mobley v. Workday*

State/Local AI Laws

- 5 states have enacted AI legislation – Delaware, New Hampshire, Montana, Oregon, Tennessee

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SLIGHT DETOUR

OFCCP GUIDANCE – AI AND EEO FOR FEDERAL CONTRACTORS

Issue Date:

- April 29, 2024

Overview:

- Response to President Biden’s October 2023 EO on *Safe, Secure, and Trustworthy Development and Use of AI (EO 14110)* which gave the secretary of labor one year to “publish guidance for Federal contractors regarding nondiscrimination in hiring involving AI and other technology-based hiring systems.”
- Nonbinding guidance on how federal contractors and subcontractors should use AI to ensure compliance with existing EEO obligations under federal law
- Overarching goal of promoting the responsible and compliant use of AI while combatting potential AI-related bias or adverse impact in employment-related decisions.

OFCCP GUIDANCE – AI AND EEO FOR FEDERAL CONTRACTORS (CONT)

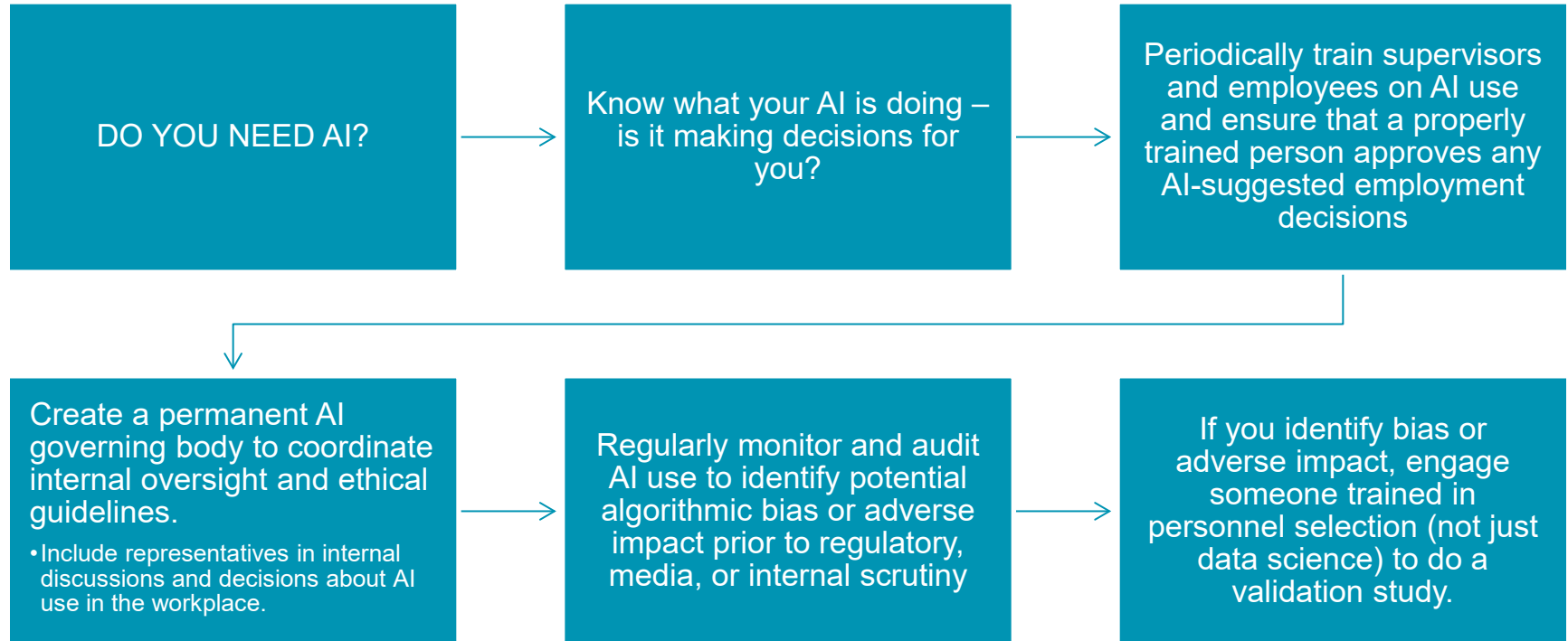
Guidelines:

- Federal contractors/subcontractors, not AI vendors, are liable for complying with OFCCP's nondiscrimination and affirmative-action requirements -- tension with EEOC's position in *Workday* amicus.
- Can't delegate compliance obligations.
- Must routinely monitor whether AI/automated systems have a disparate impact or adverse impact on protected groups and must do something to reduce those impacts or use different tools if they identify issues.
- OFCCP will continue to use the UGESP when analyzing whether federal contract AI use may cause adverse impact on a protected group of job applicants or current employees.
- Must keep extensive records about their use of AI so OFCCP can effectively execute compliance evaluations and complaint investigations.
- Must ensure that vendor contracts allow them to provide OFCCP with all AI-related records and cannot use a third-party vendors' unwillingness or inability to provide such records as a defense.

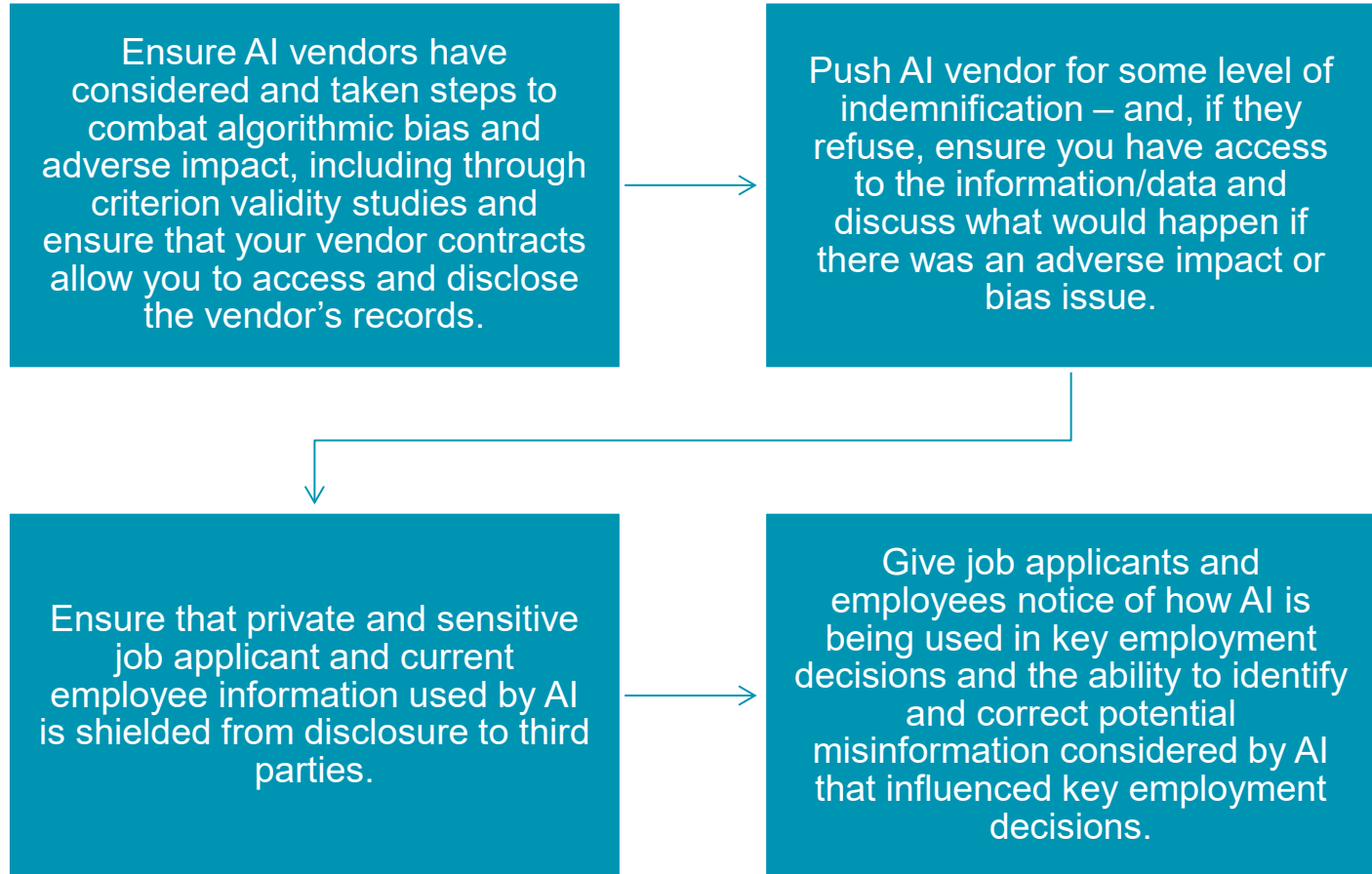
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BACK TO NILG CONFERENCE – NOTES ON AI

RECOMMENDATIONS



RECOMMENDATIONS (CONT)



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Q&A

Contacts



Craig Leen

Partner

Washington DC

+1.202.778.9232

Craig.Leen@klgates.com



Kathleen Parker

Partner

Boston

+1.617.951.9281

Kathleen.Parker@klgates.com



Leann Walsh

Partner

Raleigh

+1.919.743.7319

Leann.Walsh@klgates.com

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