

# Chicago

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# The 2026 Employer Litigation Outlook: What's Coming Next

# SPEAKERS



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# What Employers Need to Prepare For in 2026

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- **Federal enforcement and litigation trends**
- **AI and emerging employer liability**
- **Accommodation and leave risk in 2026**
- **Remote work disputes**
- **Immigration enforcement & workplace risk**
- **Litigation scenario walkthrough**

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# Federal Legislative and Case Law Update

# Trump Administration Initiatives

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- **DEI Opposition at the EEOC**
  - Commissioner Lucas has made it clear that affirmative action-type diversity measures are on shaky ground after UNC/Harvard
  - Employers must ensure inclusion goals do not translate into unlawful preferences.
  - EEOC emphasizing “opportunity-based” vs. “quota-based” DEI frameworks.
  - Emerging litigation targeting hiring and promotion policies tied to race or gender expressly.
  - More “reverse discrimination” charges and lawsuits, and targeting national origin
  - More religious freedom charges and lawsuits
  - Evolving protections under Title VII – sex/gender

# Trump Administration Initiatives

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- **On March 19, 2025, the EEOC released technical assistance documents to provide clarity for employers. Key takeaways:**
  - Reminder on the scope of Title VII protections
    - Prohibits employment discrimination based on protected characteristics
    - “[A]pply equally to all racial, ethnic, and national origin groups, as well as both sexes.”
  - “Reverse” discrimination
    - Title VII protections apply equally to minority and majority groups
    - The US Supreme Court affirmed that majority group not required to meet higher showing of proof for so-called “reverse” discrimination claims.

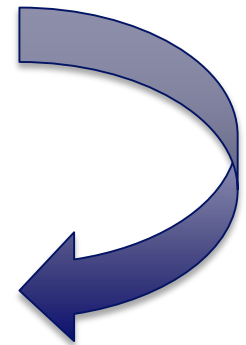
# Unlawful DEI Practices

- Quotas and other “balancing” practices based on race, sex, or other protected characteristics.
- Disparate treatment based (in whole or in part) by a protected characteristic.
- Limiting, segregating, and classifying employees based on protected characteristics if it affects their status or deprives them of employment opportunities.
  - Ex: affinity groups that exclude employees, separating employees for trainings even if content is the same.
- Harassment during DEI training
- Retaliation for objecting to or opposing employment discrimination related to DEI, participating in employer or EEOC investigations, or filing an EEOC charge.



# Reverse Discrimination

- Recently the US Supreme Court ruled that members of a majority group alleging employment discrimination under Title VII do not need to meet a heightened evidentiary standard.
  - *Ames v. Ohio Department of Youth Services* (June 5, 2025)
- Previously courts had required plaintiffs to show “background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority.”
- This is a focus of the EEOC and this administration



# Gender Identity



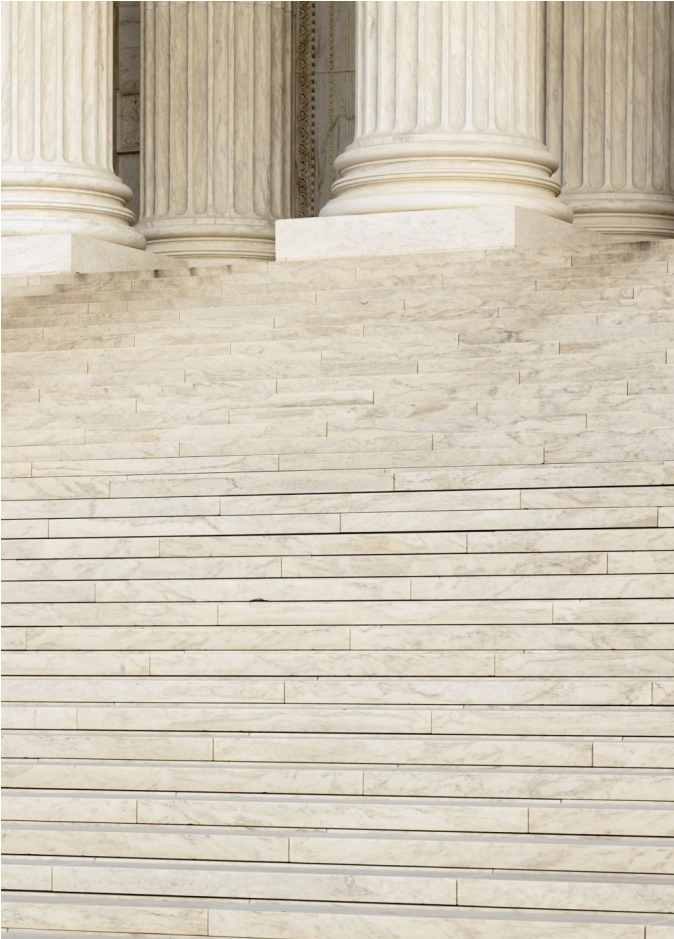
- Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government Executive Order, 1/20/2025
  - “As of today, it will henceforth be the official policy of the United States government that there are only two genders: male and female.” – President Trump
  - Declares it is the policy of the US to recognize two sexes – male and female
  - Instructs federal agencies to enforce laws in this manner
  - Directs civil rights agencies like DOL and EEOC to recognize only two sexes when enforcing anti-discrimination law
  - Will likely require EEOC to amend previous guidance
  - Sets up conflict with SCOTUS *Bostock* ruling, which explicitly determined that “sex” under Title VII includes “gender identity”

# Evolving Protections Under Title VII

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- *Bostock v. Clayton County* firmly extended Title VII to include gender identity
  - Potential implications of cases pending before Supreme Court
- EEOC anticipated to issue further guidance on pronoun, attire, and restroom policies
- Harassment prevention programs now must include virtual and hybrid conduct scenarios
- Employers expected to integrate inclusive policies across in-person and digital environments

# Religious Accommodation Standard is Higher

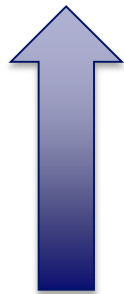


- *Groff v. Dejoy* (S. Ct. 2023)
  - Employers must provide religious accommodations under Title VII unless doing so imposes an undue hardship.
  - Prior standard was “more than a de minimis cost.”
- *Kluge v. Brownsburg Community School Corp.* (7th Cir. 2025)
  - Teacher objected based on religion to policy requiring use of transgender students’ names. Accommodated by allowing use of last names.
  - When that became controversial, the school withdrew the accommodation and the teacher resigned.
  - Lower court ruled in favor of school under the “more than de minimis standard”
  - 7th Cir applied new standard and remanded

# Discrimination, Harassment & Retaliation Claims

## What Still Drives Most Claims

- Retaliation allegations (almost every case)
- Restructuring decisions
- Accommodation disputes
- Liability rarely arises from the initial decision; it arises from how it was handled.



## What actually reduces claims

- Centralized review of adverse actions
- Documentation discipline at executive levels
- Manager training focused on post-complaint conduct



# Trivia!

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**Which of the following fact patterns resulted in the highest verdict?**

- a) Two former Southern California Edison employees who reported repeated racial and sexual harassment, then alleged they were forced out and retaliated against**
- b) A single UPS driver who alleged race discrimination and retaliation after years of harassment and termination.**
- c) A Walmart employee with Down syndrome fired after the company refused to adjust her long-standing schedule.**
- d) A group of intellectually disabled workers at an Iowa turkey-processing plant who endured decades of abuse.**

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# Emerging Technology & Resulting Employer Liability

# What is “AI” in the Employment Context

**Most employers already use AI tools, often without realizing it**

**Common tools employers are already using:**

- Resume screening
- Candidate ranking
- Automated interviews (video, voice, facial analysis)
- Predictive analytics (performance, retention, promotion)
- Algorithmic scheduling
- Productivity and monitoring software
- HR chatbots and automated decision tools



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# Core Liability Framework: Where Employers Get Hit

## Discrimination & Bias

- Disparate impact without intent
- Biased or incomplete training data
- Proxy discrimination
  - Ex. AI flags “communication style” in performance reviews, penalizes non-native English speakers



## Disability Discrimination

- AI often assumes a “standard worker”
- Automated testing can disadvantage neurodivergent candidates
- Inflexible tools that lack override mechanisms create liability
- Ex. Timed online assessments screen out candidates with anxiety disorders

# Where Hiring Algorithms Fail

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- Resume screening
- Automated interviews
- Candidate ranking
- Examples:
  - Video interview tool scores facial expressions— disadvantages candidates with disabilities
  - Resume screener penalizes employment gaps tied to caregiving or military service

# Performance Management, Discipline & Termination

- Algorithmic performance scoring
  - Ex. Employee terminated after productivity score drops during pregnancy-related leave.
- Automated discipline triggers
- Reduction-in-force analytics
- Litigation reality – discovery requests increasingly seek:
  - Algorithms and logic
  - Training data
  - Vendor communications



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# Mobley v. Workday – AI and Employer Liability

- First major federal case squarely challenging AI-driven hiring tools
- Plaintiff alleged race, age, and disability discrimination
- Claims based on automated resume screening and rejection decisions
- Court allowed Title VII, ADEA, and ADA claims to proceed
- Employers cannot outsource discrimination to algorithms or vendors
- Signals heightened scrutiny of AI in employment decisions
- Vendors do not shield employers from liability



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# Privacy & Surveillance



- Employee data is now protected as consumer data in some states
- Employers must disclose what is collected, why, and how it is used
- Biometric data is especially sensitive
  - Ex. Facial recognition used in video interviews without adequate disclosure
- Disclosure failures are becoming class actions

# *Trivia!*

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**What is the biggest BIPA verdict in Illinois?**

- (a) \$2.8 million**
- (b) \$28 million**
- (c) \$228 million**
- (d) \$2.8 billion**

# Trivia!

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~~(a) \$2.8 million~~

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~~(d) \$2.8 billion~~

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# ADA/Employer Leave

# ADA Leave Risk is Increasing

- Accommodation disputes are rising
- Mental health leave requests increasing
- Many disputes begin after FMLA ends
- Employers often assume obligations have ended
- Key point: ADA analysis often begins at that point



# Key Principle in ADA Leave Cases

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- Exhausting FMLA does not end ADA obligations
- Employers must evaluate additional leave as possible accommodation
- Courts focus on whether the employer engaged in interactive process
- Many ADA lawsuits begin when this step is skipped or not completed

# Why ADA Leave Cases Become Complicated

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- Employers may be covered by multiple leave laws at the same time
- FMLA may expire before the accommodation obligation ends
- State leave laws and employer policies may also apply
- The ADA often requires separate accommodation analysis
- Example: Employee exhausts 12 weeks of FMLA but doctor requests 4 more weeks of leave

# When Additional Leave May be Reasonable?

**Courts often expect employers to consider additional leave when:**

- **The leave is finite**
- **A return date is identified**
- **Medical documentation supports recovery**
- **Employee can perform essential job functions upon return**



# When Leave Becomes Unreasonable

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## **Courts are less likely to require leave when:**

- No anticipated return date
- Medical notes state “unknown” or “undetermined”
- Repeated extensions continue with no end point
- Operational disruption becomes significant

# Evaluating Extended Leave Requests

## When evaluating extended leave requests:

- Identify functional limitations (not just the diagnosis)
- Confirm expected duration of restrictions
- Define essential job functions before evaluating accommodations
- Consider alternative accommodations where possible
- Document each step of the interactive process



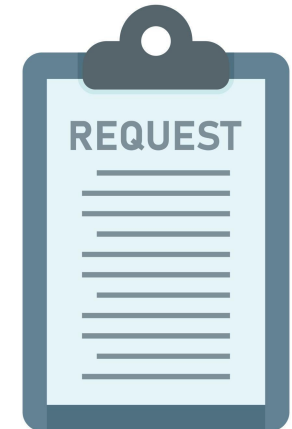
# The 4 –Week Extension Request

Employee takes 12 weeks of FMLA leave

Doctor releases employee with 4 additional weeks of recovery

Employer response options:

- Terminate employment because FMLA expired
- Automatically grant additional leave
- Engage in ADA interactive process and evaluate request



Key issue courts examine: Did the employer examine whether additional leave was reasonable?

# Where Employers Get Into Trouble

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## **Common Triggers for ADA leave litigation:**

- Treating FMLA exhaustion as the end of the analysis
- Terminating employment while the employee is still on leave
- Delayed interactive process
- Managers making accommodation decisions without HR involvement
- Poor documentation of the interactive process

## **Key takeaway**

- Many ADA cases turn on whether the employer engaged in a good faith interactive process before making the decision

# Quick Scenario Check

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## Question:

An employer exhausts FMLA and provides a doctor's note requesting **4 additional weeks of leave.**

What is the employer's *best* next step?

- A. Terminate because protected leave is exhausted
- B. Automatically deny because leave is indefinite
- C. Engage in interactive process and assess feasibility of additional leave
- D. Require employee to return or resign

# How This Becomes a Lawsuit

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- Employer treats FMLA exhaustion as the end of the obligations
- No individual assessment of additional leave
- No documented interactive process
- Assumption that extended leave = undue hardship
- Termination decision made without exploring alternatives

## **Bottom line:**

Courts focus on whether the employer engaged in a good faith interactive process, not whether the employee ultimately returned

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# Remote Work/Hybrid Work

# Why Remote Work is Now an ADA Issue

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- **Workplace expectations have changed significantly**
- **Employees increasingly frame remote work as a disability accommodation under the ADA**
- **Request often involve mental health conditions, immune conditions, or pregnancy related limitations**
- **Employers must evaluate requests through the ADA interactive process**
- **A policy requiring in-office work alone may not end analysis**

# Managing Hybrid Work Policies

As employers increase in-office expectations, several issues commonly arise.

- employees resisting return-to-office policies
- inconsistent approval of remote work arrangements
- productivity or supervision concerns
- employee morale and retention concerns
- Managers granting remote work informally outside formal policy

Risk for employers:

- Inconsistent remote work decisions can create discrimination or retaliation claims



# Real Case Example – Remote Work



Courts increasingly evaluate whether remote work was feasible.

Key questions courts ask:

- Could essential job duties be performed remotely?
- Did the employee previously perform the job remotely?
- What are the employee's medical limitations?
- Would remote work create undue hardship?

Document each step of the analysis

# Employer Decision Framework

**When evaluating remote work as an ADA accommodation ask:**

1. What are the essential job functions?
2. Can those functions be performed remotely?
3. What are the employee's medical limitations?
4. Would remote work create undue hardship?

**Document each step of the analysis.**



# Legal Issues Created by Remote Work

## Common legal considerations

- multi-state wage and hour laws
- payroll tax obligations
- differing state leave laws
- employee monitoring and privacy concerns



Employees working remotely from different states can create tax, wage-hour, and venue issues in litigation

# The Risk of Inconsistent Remote Work Decisions

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**Typical issues arise from inconsistently reviewing remote work as an accommodation:**

- Retaliation: remote work revoked after employee complains or engages in protected activity
- Discrimination: he is permitted to work remotely, she is not
- Interactive process failure: employer rejects remote work without evaluating it as possible accommodation

**Remote work is not a right, but inconsistent decisions create liability**

# Reality Check

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**Question:**

**Which of the following is most likely to create liability?**

- A. Denying remote work because policy requires in-office work.**
- B. Denying remote work where job requires physical presence.**
- C. Denying remote work after allowing others in similar roles to work remotely.**
- D. Denying remote work where performance issues exist.**

# What Wins Cases

- **Courts rarely second-guess the business decision**
- **Litigation usually focuses on process failures**
- **Define essential job functions in advance**
- **Engage in the interactive process**
- **Apply policies consistently**
- **Document process**



# Reminders No Matter the Stage

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- **Start the interactive process early**
- **Focus on employee restrictions, not the medical diagnosis**
- **Clearly articulate why physical presence maybe essential to the role**
- **Train managers to escalate accommodation issues to HR**
- **Consistency and documentation reduce litigation risk**

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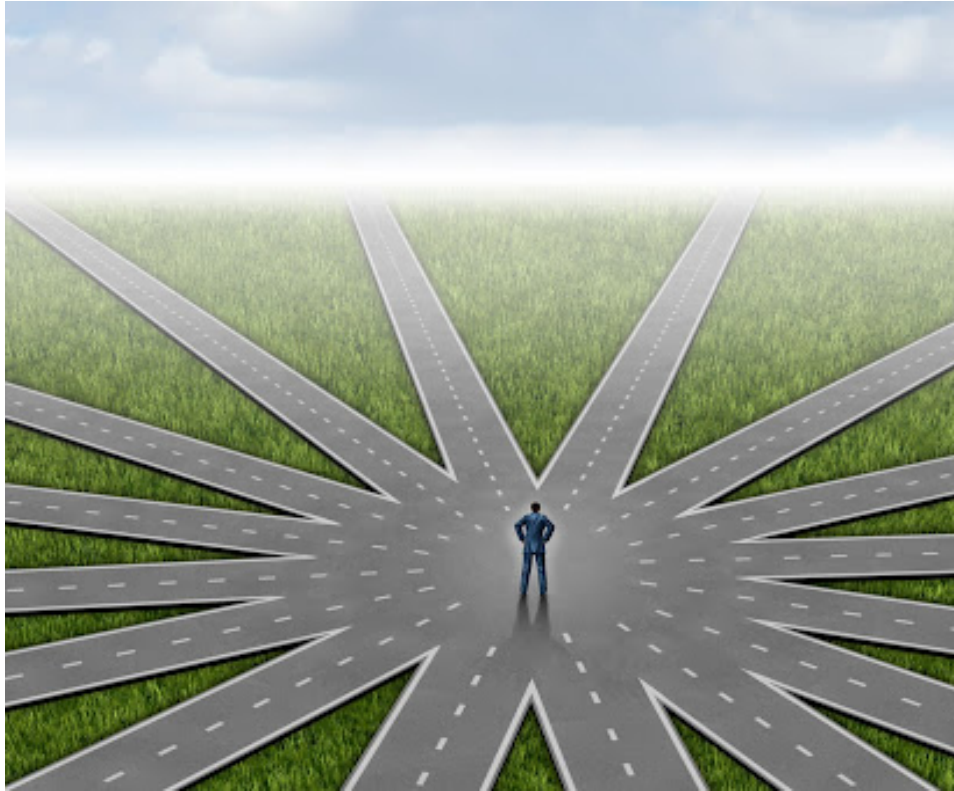
# **Immigration Enforcement & Workplace Risk**

# Why Immigration Enforcement Is a Business Risk Again

- **Renewed federal focus on worksite enforcement**
- **Increased Form I-9 audits nationwide**
- **Publicized enforcement actions creating reputational exposure**
- **Intersection with DEI, discrimination, and retaliation risks**



# The Legal Framework Employers Must Navigate



- **Immigration Reform and Control Act (IRCA)**
- **Form I-9 verification and retention requirements**
- **Prohibition on knowingly hiring or continuing to employ unauthorized workers**
- **Anti-discrimination provisions (DOJ Immigrant & Employee Rights Section)**
- **State and local “sanctuary” or cooperation laws**

# Trivia

**A company required lawful permanent residents to present a green card (and rejected other valid documents). What happened?**

- A. No violation — employer can choose documents**
- B. Technical paperwork violation only**
- C. Document abuse discrimination violation**
- D. Criminal liability**



# Trivia

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# Types of ICE Workplace Actions

- **Notice of Inspection (NOI) – I-9 audit**
- **Administrative subpoenas**
- **Judicial search warrants**
- **Arrest warrants for specific individuals**
- **Each requires a different response protocol**



# Form 1-9 Audit (Notice of Inspection)

- **Employer typically has 3 business days to produce I-9 records**
- **May request payroll records and supporting documentation**
- **Results may include fines, technical violation notices, or suspect document letters**
- **Increasing follow-up audits**



## I-9 Audits

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**Which employer agreed to pay one of the largest recent immigration-related fines after hiring unauthorized workers?**

- A. Walmart**
- B. Asplundh Tree Experts**
- C. Amazon**
- D. Tyson Foods**

# I-9 Audits

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**B. Asplundh Tree Experts**

C. Amazon

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# ICE Response Protocol

1. **Front-Line Response and Chain of Command** – who is authorized to interact with government agents.
2. **Verification of Authority and Scope** - the protocol should require the company to review and copy any documentation presented by ICE (such as a subpoena, Notice of Inspection, or judicial warrant), confirm whether it is signed by a judge, and understand precisely what ICE is authorized to do.
3. **Controlled Access to the Facility** - absent a judicial warrant, ICE generally does not have the right to access non-public areas of a facility. The protocol should address how to manage access requests lawfully, without obstructing agents or voluntarily expanding the scope of access beyond what is required.



# ICE Response Protocol

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- **4. Document Requests and I-9 Audits** - the plan should outline how document requests are handled, including timing, method of production, and legal review before documents are provided.
- **5. Employee Communications** - clear internal messaging is important. The protocol should include guidance on how managers communicate with employees during and after an ICE visit, emphasizing professionalism, non-retaliation, and the company's commitment to complying with the law while respecting employee rights.
- **6. Coordination with Counsel** - the protocol should require immediate notification of legal counsel so that the company can respond consistently, protect its rights, and minimize operational and legal risk.

# Judicial v. Administrative Warrants

## Judicial Warrant

- Signed by a judge
- Permits entry into private areas specified
- Legally enforceable

## Administrative Warrant (e.g., I-200 / I-205)

- Issued by ICE officer
- Does NOT authorize entry into private areas without consent



# Employer Do's and Don'ts During a Search

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- **Verify scope of warrant**
- **Do not obstruct agents**
- **Do not consent to expansion beyond warrant scope**
- **Designate representative to accompany agents**
- **Document actions taken**

# Most Common Self-Inflicted Violations

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- **Backdating or altering I-9s**
- **Selective reverification based on national origin**
- **Allowing untrained front desk staff to consent to entry**
- **Failing to centralize response protocol**



# Intersection with Employment Litigation

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**Enforcement often triggers lawsuits unrelated to immigration**

- **Retaliation claims**
- **National origin discrimination claims**
- **Hostile work environment allegations**
- **Whistleblower complaints**

# Executive Takeaways

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- **Immigration enforcement is compliance + litigation + reputational risk**
- **Preparation materially reduces disruption**
- **Overreaction creates discrimination exposure**
- **Protocol clarity protects both the company and its workforce**
- **Bottom Line: Employers should treat immigration compliance as an enterprise risk issue—not just an HR function.**

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# Discussion: Claims Scenario

# Claims Scenario: From Fact Pattern to Coverage Response

**A multi-state employer conducts a cost-driven RIF affecting about 12% of its workforce. Selection decisions rely in part on performance metrics generated through an AI-assisted evaluation tool. Two months before the RIF, several ultimately affected employees raised internal complaints alleging age bias and inadequate accommodation for anxiety-related conditions. After the RIF, a group of former employees files suit alleging**

- Age discrimination (disparate impact)**
- Disability discrimination and failure to accommodate**
- Retaliation for protected activity**
- Improper reliance on biased AI-driven assessments**
- The claims are brought as a proposed class action in a plaintiff-friendly jurisdiction.**

# Exposure

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**You're defending this case. What is the single most dangerous fact for the employer?**

- A. The use of AI in decision-making**
- B. The prior complaints before the RIF**
- C. The statistical disparity**
- D. The size of the RIF**



# Exposure

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**C. The statistical disparity**

**D. The size of the RIF**

# Litigation Exposure Analysis



## **Liability Exposure: High**

- Disparate impact theory supported by statistical analysis
- Retaliation claims question of fact
- AI usage introduces novel and jury-sensitive facts

## **Damages Exposure: Significant**

- Back pay, front pay, emotional distress
- Potential punitive damages
- Attorneys' fees and costs – both sides

## **Defense Posture: Resource-intensive**

- Extensive discovery into algorithms, data inputs, and decision-making process

# Settlement Driver

**What actually drives settlement value in this case?**

- A. Number of plaintiffs**
- B. Strength of liability**
- C. Cost of defense**
- D. Uncertainty around AI evidence**



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# Settlement Driver

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**C. Cost of defense**

**D. Uncertainty around AI evidence**

# Claims Impact Assessment

- **Frequency:** Low-to-moderate (fact-specific), but increasingly common pattern
- **Severity: High**
  - Aggregated claims
  - Defense costs escalate early
  - Settlement pressure increases due to uncertainty around AI evidence



# EPL Coverage Response

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**Trigger: Single or related employment practices depending on policy wording**

**Defense: Duty to defend likely triggered; rapid erosion of limits**

**Key Coverage Issues:**

- Allocation between covered discrimination/retaliation claims and potentially excluded AI-related conduct
- Related-claims provisions aggregating losses
- Timeliness of notice given pre-RIF complaints

**Insurer Considerations:**

- Reservation of rights likely
- Early mediation encouraged to control defense spend

# Proactive Steps

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**Which step would have most reduced liability here?**

- A. Better AI vendor contract**
- B. Adverse impact analysis before RIF**
- C. More documentation after the RIF**
- D. Larger HR team**

# Proactive Steps

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# What Employers Should Do Before RIF

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## **For Employers**

- Conduct adverse impact analysis before RIFs
- Document human oversight of AI-assisted decisions
- Centralize review of employment actions following protected activity

## **For Insurers & Brokers**

- Underwriting diligence around AI governance and RIF planning
- Clear communication on notice obligations
- Early engagement with experienced EPL defense counsel

# Executive & Insurer Takeaways

- Claim **severity**, not frequency, is the defining risk of 2026
- Retaliation and restructuring claims drive the largest losses
- AI introduces systemic risk requiring governance, not just insurance
- EPL insurance is a critical backstop—but proactive compliance remains the primary control
- **Bottom Line:** The safest employers are not the ones with perfect decisions. They are the ones with defensible processes.



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