

California Regulators Adopt New Discrimination Rules For Automated-Decision Systems: 3 Steps for Employers Using AI in the Workplace

A Practical Guidance® Article by Benjamin M. Ebbink, Usama Kahf, and Anne Yarovoy Khan, Fisher & Phillips LLP



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California regulators recently adopted regulations regarding automated-decision systems (ADS) in the workplace, aiming to protect against employment discrimination given the dramatic rise in artificial intelligence use in employment. On March 21, the California Civil Council of the Civil Rights Department (CRD) voted to approve the rules, which now must be cleared by the Office of Administrative Law (OAL) and published by the Secretary of State. If they pass these final hurdles, they will likely become effective on July 1. Read on for key takeaways from the updated regulations and three steps you should take to stay compliant.

Brief Background

Employers are increasingly using AI tools during the employee lifecycle. They bring obvious advantages, such as saving time, processing efficiencies, and providing insightful data on people analytics. On the flipside, they can lead to potential discriminatory practices without proper oversight and governance.

California leads the way in proposed legislation aimed at establishing safeguards and accountability around the deployment of AI tools, and the modifications to these employment regulations are no exception. *For more information on pending AI-related bills in California, see our [March 3](#) and [March 10](#) Insights on several proposals in the works.*

Summary of New Rules

The new rules will do the following:

- Clearly define “automated-decision” systems
- Prohibit ADS discrimination
- Expand the liability for agents developing ADS technology
- Increase recordkeeping requirements

Defining “Automated-Decision Systems”

Employers that want to comply with AI-related regulations in the state face some difficult challenges given that key terminology is defined in various ways depending on the regulating organization or specific publication—including inconsistent drafts from one state agency to another. The new employment regulations include an entirely new subsection to provide a consistent ADS definition:

A computational process that makes a decision or facilitates human decision making regarding an employment benefit, as defined in section 11008(i) of these regulations. An Automated-Decision System may be derived from and/or use artificial intelligence, machine-learning, algorithms, statistics, and/or other data processing techniques.

- To clarify what's in scope, the regulations outline exclusions such as word processing software, data storage, and calculators, and define other technology related terms like "algorithm," "machine learning," and "Automated-Decision System Data."
- To illustrate the types of tasks an ADS performs, the new regulations provide a non-exhaustive list of examples such as resume screening, using computer-based assessments or tests to make predictive assessments about applicants or employees, and analyzing applicant or employee data from third parties. The list of examples reflects common uses of AI tools in HR.

Banning ADS-Related Discrimination

One of the biggest concerns in using an AI tool is resultant bias and discrimination, and we have seen the use of this technology lead to litigation. *You can review a summary of pending AI litigation [in our recent Insight here](#).*

These regulations specifically codify that it is unlawful for an employer or covered entity to use an ADS that discriminates against an applicant, employee, or class of applicants or employees on a protected basis. The regulations go on to state that evidence, or the lack thereof, of anti-bias testing or other proactive effort to avoid any unlawful discrimination is relevant to any claim or defense. While this may have been evident before based on other guidance, it is now clear that any due diligence conducted to test, audit, review, and/or address any potential unlawful discrimination resulting from use of the AI tool, or the failure to conduct any such review, can be considered in any such claim or defense.

Expanding Scope of Agent Liability

One of the issues at the forefront of the recent AI push is whether to hold third parties liable for claims based on the use of that third-party tool (vendor, developer, or otherwise). When using a third-party's system there are several issues to consider, including whether the vendor provides information on the training data used, whether the vendor has rights to the data relied upon, on what cadence is testing done to mitigate bias and other risks, and what is the process for training the system. Some of this information may or may not be shared by the third party or evident from their materials.

To address the above and other concerns, the new regulations broadly define "agent" to include "any person

acting on behalf of an employer, directly or indirectly, to exercise a function traditionally exercised by the employer or any other FEHA-regulated activity...." The definition references services that are often provided by a third party including, but not limited to, applicant recruiting and screening, hiring, or decisions regarding benefits and leave. This broad definition may present new issues (and liability) for both users and deployers of AI software and you may find yourself renegotiating contracts.

Increasing Recordkeeping Requirements

Under the updated regulations, employers and covered entities must now preserve personnel and other employment records for a period of four years instead of two. This also applies to ADS data—defined as any data used in or resulting from an ADS and/or any data used to develop or customize an ADS for use by an employer or covered entity.

Unanswered Questions

While the rules are helpful to clear up certain ambiguities, there are still unanswered questions that could trouble employers unless soon clarified.

- **Is bias testing required?** While the rules don't directly impose a requirement on employers to conduct bias testing of their AI tools, the implications of the rules seemingly mandate such action. After all, the rules make the lack of testing relevant to determine liability, as well as whether the employer engaged in proactive efforts to avoid unlawful discrimination.
- **Is the CRD overstepping its bounds?** The rules indicate that an employer's use of AI tools cannot result in discrimination based on accent, English proficiency, and height and weight, which are technically not protected categories in themselves under state law—leading employers to wonder whether the CRD has the authority to essentially create new protected categories? That said, accent and English proficiency are often linked to national origin discrimination, and existing law already prohibits discrimination based on English proficiency unless such proficiency is justified by business necessity.
- **How broad will ADS be defined?** The rules define ADS to include algorithms or computer-based assessments or tests that "make predictive assessments about an applicant or employee." Some employers use predictive analytics to help determine whether an employee is likely to depart, and then take steps to try to make the employee's career more rewarding if they seem dissatisfied (checking in with the employee to see if they know about available resources, whether they're interested in upward mobility, training, or other

opportunities, etc.). Could these helpful measures be swept up if such systems are considered to be facilitating “human decision-making regarding an employment benefit”?

Next Steps: 3 Considerations for Employers Using ADS

- **First, assess all AI tools used for HR-related functions** within your organization and do a deep dive into the system itself—whether proprietary or third-party supported. Any investigation into a system should include, among other things, confirming its intended function or use, what data was/is used to fuel and train the tool (including whether your data will be used), the quality of the training data, what the intended output is, the processes for identifying and mitigating potential bias, the cadence for testing and analyzing results, and any audit rights customers may have.
- **Second, establish an AI governance policy** outlining a framework for the responsible and ethical use of AI within your organization. The policy should cover areas such as risk management, bias and fairness, transparency, oversight, and training. In addition to an AI governance policy, consider implementing other relevant AI policies such as a Gen AI Acceptable Use Policy or vendor management policy and checklist. A good place to start? [Our 10-step AI governance plan](#).
- **Third, establish guidelines for managing vendor relationships** that develop, supply, and/or support the AI technology utilized within your organization. Consider maintaining a vendor questionnaire to help guide in a

risk assessment *before* AI tools are deployed. If you are a developer of AI, consider internal discussion and analysis on any exposure given the new definition of “agent” under the regulations, and anticipate an influx of questions from customers seeking information and clarity on the system. [Here are some key questions you should consider asking your AI vendors when establishing a new relationship](#).

Conclusion

We will continue to monitor new developments and provide updates, so make sure you subscribe to [Fisher Phillips Insight System](#) to gather the most up-to-date information on AI and the workplace. Should you have any questions on the implications of these developments and how they impact your operations, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in any of our [California offices](#), or any attorney in our [AI, Data, and Analytics Practice Group](#).

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Benjamin M. Ebbink, Partner, Fisher & Phillips LLP

Benjamin M. Ebbink is a partner in the Sacramento and Washington D.C. offices, Co-Chair of the Government Relations Practice Group and Chair of the Staffing Industry Group.

With over two decades of experience in the intersection between labor and employment law and public policy, he focuses on legislation and regulations enacted at the federal, state and local levels. Benjamin assists employers with navigating evolving legislative and regulatory landscapes in a variety of areas.

Benjamin is a trusted advisor to the PEO and staffing industries, having worked on nuanced legal and regulatory issues affecting these industries for over two decades. In addition, he handles strategic initiatives aimed to provide top-shelf service to the unique needs of the firm's staffing clients. Benjamin is a frequent speaker on panels and conferences focused on issues that matter to both the PEO and staffing industries.

He is also a member of the firm's Artificial Intelligence Team, where he monitors the rapidly-developing regulation of artificial intelligence at the federal, state and local level.

For nearly 15 years, Benjamin served as Chief Consultant to the California Assembly Committee on Labor and Employment where he was the primary policy advisor on labor and employment matters for the California State Assembly. He played a key role in virtually every major labor and employment issue to come before the Legislature during his tenure, and personally drafted hundreds of legislative proposals. During his service in the Legislature, Benjamin earned a reputation for his integrity, his ability to work with diverse stakeholders on all sides, and his skill as a problem-solver.

His legislative experience and deep connections in the stakeholder community allow him to provide services to clients that have legislative or regulatory issues that benefit from his unparalleled experience and strategic guidance. Benjamin is also a registered legislative advocate and represents clients on labor and employment matters before Congress and legislatures in California and in other states.

Benjamin began his legal career as an associate with a regional law firm focusing on traditional labor law, bankruptcy law and ERISA. He received his J.D. in 2000 and his B.A. in 1997 from the University of California, Davis. He lives in Roseville, California with his wife and eight children.

Usama Kahf, CIPP/US, Partner, Fisher & Phillips LLP

Usama Kahf is a partner in Fisher Phillips' Irvine office, a Certified Information Privacy Professional (CIPP/US), and co-chair of the Privacy and Cyber Practice Group. His primary areas of practice are (1) workplace privacy and data security, (2) employee defections, unfair competition, trade secret theft, and corporate espionage, and (3) artificial intelligence.

As co-leader of the firm's Consumer Privacy Team, Usama advises clients on compliance with state consumer privacy laws, including the California Consumer Privacy Act (CCPA), and the California Invasion of Privacy Act. He regularly conducts trainings and publishes articles relating to consumer and employee privacy and data security.

Usama's privacy law experience includes:

- Helping clients achieve full compliance with the CCPA, both as to consumer and employee data.
- Data breach and ransomware triage and response, including advice on compliance with data breach notification laws, drafting data breach notices, and managing company's reporting to law enforcement and government agencies such as attorneys general offices.
- Providing privacy & data security training to managers.
- Defending against invasion of privacy claims, including wiretapping claims based on a website's collection and disclosure of data through cookies, pixels, and other tracking technology.
- Prosecuting litigation against individuals suspected of stealing private information of employees, clients, consumers, and patients, including seeking TRO.
- Advising clients on preventive measures, including, for example, security best practices and vendor contract negotiation/management.

In the trade secrets arena, Usama has helped employers obtain TROs and Preliminary Injunctions against former employees and competitors to prevent unauthorized use and disclosure of confidential information, secure the return of stolen intellectual property, and stop further solicitation of customers through use of trade secrets. While in most employment matters where employees file claims, employers find themselves having to spend significant resources even if they had done nothing wrong, Usama does his part to fight back against the bad apple employees who steal from the hand that feeds them. Usama's clients have been able to recover millions of dollars in damages they suffered from unfair competition and misappropriation of trade secrets. When employees cross the line and breach their legal and contractual obligations to their employer, clients count on Usama to help make them whole. He also works on drafting restrictive covenant agreements (non-disclosure, non-solicitation, non-compete, inventions assignment) for employers in all US jurisdictions and advises on implementation and enforceability of these agreements.

On the cutting edge is Usama's involvement in the cross-disciplinary field of artificial intelligence, advising clients on use of AI tools in the workplace for employment-related purposes, reviewing contracts with AI vendors, and assessing implications of the use of AI on privacy, data security, and fair employment practices.

He has also been selected for inclusion in *Southern California Super Lawyers* - "Rising Stars" from 2013 to 2023.

From January 2015 through December 2020, Usama served on the Board of Directors of The Nonprofit Partnership (TNP), a management support organization that serves the nonprofit sector in the greater Long Beach area by providing nonprofits with capacity building resources, training for board directors and officers, and consulting services. He was President of the Board of TNP for 2019-2020.

Before joining Fisher Phillips, Usama practiced employment law at the Los Angeles office of a major international law firm, where he worked with private schools and colleges, public school districts, a major airline, a large staffing company, a specialty grocery store chain, and a large privately held cosmetics company.

While in law school, Usama served as an extern for the Honorable Judge John Shepard Wiley, Jr., Los Angeles Superior Court, and as a litigation extern for the Housing Rights Center.

He also served as a note and comment editor of the *Loyola of Los Angeles Law Review* and as managing editor of the *Los Angeles Public Interest Law Journal*.

Anne Yarovoy Khan, Of Counsel, Fisher & Phillips LLP

Anne is Of Counsel in Fisher Phillips' Irvine office and a member of the firm's AI, Data, and Analytics; Privacy and Cyber; PEO; and Staffing Practice Groups. Anne's deep operational experience lends to her role as a trusted advisor and business partner to organizations across multiple industries. She takes a holistic approach to problem solving - seeking efficient, scalable solutions.

As a member of the firm's core Privacy and Cyber Practice Group and Consumer Privacy Team, Anne advises on various U.S. privacy laws and regulations, including the California Consumer Privacy Act (CCPA) and California Privacy Rights Act (CPRA). She provides privacy training, counsels on contracts and policies, authors industry articles, and speaks on multi-state data privacy matters.

Given the expanding AI field, Anne's background lends itself to working at the nexus of cognitive functionality, technology, and the application of legal principles. As a core member of the AI, Data, and Analytics Practice Group, Anne looks to build solutions for businesses incorporating AI into their organizations and researches the effects of AI in intellectual property matters.

With her prior executive experience within the PEO industry, Anne works with PEO and staffing companies of all sizes with a focus on compliance and regulatory affairs and leads multi-state licensing for the PEO practice group. Her practice also includes general corporate and employment related matters, and she is a member of the firm's R&D team.

Prior to working at Fisher Phillips, Anne was General Counsel and the Director of Compliance for a technology forward consulting and services company, and nationwide PEO. As General Counsel, Anne oversaw legal, compliance, licensing, intellectual property, and various corporate matters. Anne's area of compliance focus included health and welfare benefits, HIPAA, ERISA, the Affordable Care Act, and other federal, state, and local laws and regulations.

While in law school, Anne earned a Certificate of Specialization in International Law, with distinction.

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