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Top 10 Employer Resolutions For 2024

By **Allegra Lawrence-Hardy and Lisa Haldar** (January 1, 2024, 8:02 AM EST)


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The landscape for employers remains transformed by the changes of the past few years. As employers have grappled with what "business as usual" looks like going forward, emerging changes in law and technology demand swift and agile responses.

This past year, generative artificial intelligence took the world by storm. The U.S. Supreme Court upended the practice of affirmative action in college admissions. Courts, legislatures and agencies have developed new laws and guidance concerning religious accommodations, in-person workplace accommodations, contract provisions and concerted activity. Even climate change is necessitating a dialogue in the workplace.

Below are our top 10 employer resolutions for 2024.

1. Develop a policy governing the use of AI.

Machine-learning tools like predictive analytics have been used in business applications for years. Now, increased usage, combined with the expansion of public access to generative AI tools, is spurring conversations over new ways to use it, new dangers to avoid and new rules to implement.

AI can assist in analyzing a group's skill distribution and comparing it to predictions of future needs. AI can identify suitable candidates for retraining or reassignment. AI can even serve as a check against human bias by providing objective employee performance measurements or analyzing potential adverse impacts of employment decisions.

These tools have limitations, however. AI can deliver skewed or biased results if the underlying data does not account for underrepresented groups or existing historical bias.[1]

New York City adopted a local law requiring any AI tool used by an employer to have been audited for bias within one year of its use, with certain information about its use made available to the public and the affected employees or job candidates.[2] Illinois requires employers to disclose, and obtain consent for, the use of AI to analyze video interviews and report information to the state to analyze potential racial bias.[3]

Other jurisdictions are preparing to follow suit.[4]

At the federal level, the Algorithmic Accountability Act of 2023 was introduced in the legislature to require employers to evaluate their algorithmic tools for bias and discriminatory effects.[5] The U.S. Equal Employment Opportunity Commission has issued guidance for employers to account for the Americans with Disabilities Act and Title VII when using AI tools.[6]

Generative AI — tools that can create text, images and sounds — can also create liabilities if the content is defamatory, misleading or infringes on intellectual property rights.[7] According to a survey from McKinsey & Co. in April 2023, only 21% of responding organizations that use AI had established policies governing employees' use of generative AI in their work.[8]

What should employers do? For now, develop a policy governing the use of AI that maximizes the transparency of when and how it is used. Have AI tools, and contracted services providing those tools, regularly audited for potential bias or discriminatory effect in the algorithms used, the data used for training or analysis, and the final analysis. And remember that all AI tools, including generative AI tools, should be subject to human oversight.

2. Review hiring and promotion policies in light of changes to affirmative action.

In 2023, the Supreme Court issued its landmark decision in Students for Fair Admissions Inc.,[9] striking down the race-conscious admissions processes used by Harvard and the University of North Carolina.

Businesses are not insulated from the aftershocks. Less than one month after the Supreme Court's decision, the U.S. District Court for the Eastern District of Tennessee issued a decision in Ultima Services Corp. v. U.S. Department of Agriculture,[10] prompting the U.S. Small Business Administration to revise its 8(a) Business Development program to eliminate a presumption of social disadvantage based on race.[11]

Increasing scrutiny of diversity programs in multiple states signals that the Supreme Court's decision will be a guidepost for future cases claiming reverse discrimination.

Employers should protect their diversity and inclusion initiatives by tailoring policies to meet measurable goals that have been shown to benefit from workplace diversity, such as employee morale and retention, productivity and product outcomes, and client service.

Take proactive measures to protect the diversity of the organization's talent pool by strengthening pipeline partnerships that promote mentorship and training for diverse candidates.

Last, evaluate the work environment and culture to ensure that employees from diverse backgrounds have the necessary support and flexibility to succeed.

3. Evaluate current procedures to accommodate employees' religious beliefs.

In 2023, in Groff v. DeJoy, the Supreme Court clarified the extent to which an employer must accommodate an employee's religious beliefs.[12] Previous case law, building on the court's 1977 decision in Trans World Airlines Inc. v. Hardison, spanned a broad spectrum in determining what constitutes an "undue hardship" on an employer.[13]

Many lower courts understood the standard in Hardison to state that the employer should not bear more than a "de minimis" cost; in its Groff decision, however, the Supreme Court clarified the

interpretation of undue hardship to mean "substantial in the context of an employer's business."

While we may see some short-term uncertainty as lower courts recalibrate to apply this standard, the court observed that EEOC guidance and decisions may be helpful in applying the clarified standard.

Employers should adjust policies, procedures and written materials concerning employee requests for religious accommodation to ensure the appropriate standard is in place. Employers should also ensure that appropriate personnel are familiar with the type of evidence and documentation needed to support the denial of religious accommodation requests.

4. Update workplace policies as more workers return to the office.

With many employers encouraging or requiring employees to return to the company's offices, now is a good time to boost employee buy-in by supporting the features of in-person work that benefit them most — in-person collaboration and conversation and more robust mentorship opportunities for newer employees.

Look for opportunities to support workers who may be affected more than others by the shift[14] — opportunities that happen to coincide with two new laws that took effect in 2023. The Pregnant Workers Fairness Act[15] secures the right of pregnant and postpartum employees to receive reasonable accommodations for known limitations related to pregnancy, childbirth or related medical conditions. The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act[16] expands workplace protections for employees with nursing children.

5. Review arbitration agreements for compliance at both federal and state levels.

Employers with business in California may once again condition employment on an agreement to arbitrate labor and employment claims without worrying about criminal misdemeanor charges and fines. On Feb. 15, 2023, the U.S. Court of Appeals for the Ninth Circuit held that the Federal Arbitration Act preempts California's criminalization of mandatory arbitration agreements in employment contracts.[17]

Nationwide, the Ending Forced Arbitration of Sexual Assault Act[18] went into effect in 2023. Early cases indicate that an important issue to consider at the outset of litigation is whether joined claims bear sufficient relation to the sexual assault or harassment claim to avoid arbitration.[19]

Employers should review arbitration agreements with an eye toward maximizing the claims to which they can apply and work with counsel to confirm agreement enforceability in each jurisdiction where the employer conducts business.

6. Reduce reliance on noncompete agreements.

Employer noncompete clauses are already facing growing restrictions or even outright bans in various states. Congress introduced the Workforce Mobility Act of 2023, which would prohibit the formation or enforcement of noncompete agreements except in the sale of a business or when a partner leaves a partnership enterprise.[20]

Two federal agencies have joined the movement.

On Jan. 5, 2023, the Federal Trade Commission announced a proposed rule to prohibit employers from entering into or maintaining noncompete agreements with workers.[21] And on May 30, 2023, the National Labor Relations Board's General Counsel issued a memorandum signaling that employers may violate the National Labor Relations Act by proffering or maintaining noncompete agreements with employees subject to Section 7 of the NLRA.[22]

For now, at least in most states, employer noncompete agreements are safe. But given the potential shift in enforcement, employers should start considering alternative tools, such as agreements to protect the confidentiality of trade secrets or sensitive business information — these should be narrowly tailored given the NLRB's ruling in McLaren Macomb last year (see resolution No. 8).

Also, consider company policies designed to encourage maintaining key client relationships among multiple employees to reduce the risk of losing clients when one employee separates.

7. Prepare for changes in response to the labor market.

After the disruption of the Great Resignation, most industries are now seeing employee quit rates comparable to 2019.[23] The shift may be influenced by employees finding contentment after making a significant move or by employees' concern about economic instability or downturn.

The outlook differs for chief executives; 2023 has seen a sharp rise in CEOs stepping down, whether moving on to new opportunities or retiring.[24] Leadership changes create opportunities to reevaluate and update policies. Of course, these changes can also create risk where gaps in institutional knowledge result.

These trends point to potential shifts in company policies and nonaccrued employee benefits. Employers should review written policies and procedures to reduce knowledge gaps that often result when key personnel separate. Evaluate whether the benefit changes continue to comply with applicable laws and consider whether the changes implicate a disparate impact on the workforce.

8. Pay attention to changes relating to union activity.

Strikes and work stoppages have risen in news feeds over the past few years, and unions are enjoying historically high approval ratings.[25]

In 2023, multiple states have passed or introduced prohibitions on captive audience meetings — mandatory meetings in which employers express positions on supporting or joining a labor organization.[26] The NLRB's General Counsel has also announced an intent to urge the NLRB to reverse its long-standing position that captive audience meetings are permissible.[27]

The NLRB also issued several noteworthy rulings.

On Feb. 21, 2023, the NLRB held in McLaren Macomb that proffering a severance agreement may violate the NLRA if it contains nondisparagement or nondisclosure provisions that have a "reasonable tendency to interfere with, restrain, or coerce the exercise of" Section 7 rights.[28] This ruling applies to both union and nonunion workers and is not limited to severance agreements.

On Aug. 25, 2023, the NLRB issued Miller Plastic Products Inc., relaxing the standard to show an employee intends to induce group action: the totality of the record evidence.[29] Under this test, an

individual employee who initiated a group complaint at an all-hands meeting and followed up with other employees was found to have participated in protected concerted activity.

Additionally, the Supreme Court delivered a win for employers last year in Glacier Northwest Inc. v. International Brotherhood of Teamsters Local Union No. 174.[30] The court held that the NLRA does not insulate union workers from state tort claims when they fail to take reasonable precautions to avoid property damage during a strike.

The key takeaways: Look at all employee agreements and evaluate whether they contain provisions that may run afoul of the NLRA. When occasion arises for employees to raise complaints, be aware of circumstances that may give rise to a finding of "concerted activity." And if striking workers go too far to hit where it hurts, keep good records of the damages — they may be helpful in court.

9. Prepare for layoffs before the need arises.

Word travels fast and critics are just as fast to juxtapose layoff decisions against previous public statements, increases in executive pay, record profits and stock buybacks. In some cases, layoffs or reductions in force may be avoided or delayed using employee furloughs or executive pay reductions. But when a layoff or reduction in force cannot be avoided, complications can follow if the proper groundwork has not been laid in advance.

Ensure familiarity with federal and state requirements under the Worker Adjustment and Retraining Notification Act. Employers should also take this year to ensure policies are consistent across the employee handbook, collective bargaining agreements, severance agreements, employment agreements and offer letters. Appropriate personnel should have access to all documentation that might reveal the potential for a retaliation claim, e.g., recent complaints, protected leave, etc. Consider AI to reduce bias and disparate impact in the layoff selection process (see resolution No. 1).

10. Design policies with climate change in mind.

On Nov. 14, 2023, the U.S. Global Change Research Program released its Fifth National Climate Assessment.[31] According to the report, the country now experiences a billion-dollar weather and climate disaster every three weeks.

Property damage is increasing. Supply chains and utilities are disrupted. Healthcare risks and costs are rising. Heat waves last longer — an impact felt particularly by employees who do not work in air-conditioned spaces. Higher temperatures can also worsen heat stress, workplace accidents and productivity.[32]

Regulators are responding. In 2023, the state of Washington adopted new rules to protect workers exposed to outdoor heat by requiring shade, rest and acclimatization.[33] The rule also lowers the temperature threshold to trigger other protective measures. And, in 2022, joining California and Oregon, Washington implemented an emergency rule to protect workers exposed to wildfire smoke.[34]

At the federal level, President Joe Biden instructed the U.S. Department of Labor to ramp up enforcement of heat-safety violations and develop a national standard for workplace heat-safety rules.[35]

As extreme weather events increase in frequency, severity and duration, employers should evaluate the

impact on employees and operations. Develop robust policies for emergency weather events and keep an open dialogue with employees to find ways to minimize the effects of extreme conditions.

Conclusion

From technological leaps to sea changes in labor policy to literal sea changes, 2024 provides opportunities for employers to face big-picture questions that will shape their business for years to come.

Enact these resolutions with close attention given to compliance matters, but do not neglect the broader vision that accounts for the impact of new technology, the importance of improving workplace diversity and the growing movements for worker protections.

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[12] 600 U.S. 447 (2023).

[13] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

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[17] Chamber of Com. v. Bonta, 62 F.4th 473 (9th Cir. 2023).

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[34] Wash. Admin. Code §§ 296-62-085 et seq. (2022).

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