FEBUARY MENTAL HEALTH AND DE&I UPDATE

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Mental Health at Work

Key facts

- Decent work is good for mental health.
- Poor working environments – including discrimination and inequality, excessive workloads, low job control and job insecurity – pose a risk to mental health.
- 15% of working-age adults were estimated to have a mental disorder in 2019.
- Globally, an estimated 12 billion working days are lost every year to depression and anxiety at a cost of US$ 1 trillion per year in lost productivity.
- There are effective actions to prevent mental health risks at work, protect and promote mental health at work, and support workers with mental health conditions.

Work can protect mental health

Almost 60% of the world population is in work (1). All workers have the right to a safe and healthy environment at work. Decent work supports good mental health by providing:

- a livelihood;
- a sense of confidence, purpose and achievement;
- an opportunity for positive relationships and inclusion in a community; and
- a platform for structured routines, among many other benefits.

For people with mental health conditions, decent work can contribute to recovery and inclusion, improve confidence and social functioning.

Safe and healthy working environments are not only a fundamental right but are also more likely to minimize tension and conflicts at work and improve staff retention, work performance and productivity. Conversely, a lack of effective structures and support at work, especially for those living with mental health conditions, can affect a person's ability to enjoy their work and

do their job well; it can undermine people's attendance at work and even stop people getting a job in the first place.

Risks to mental health at work

At work, risks to mental health, also called psychosocial risks, may be related to job content or work schedule, specific characteristics of the workplace or opportunities for career development among other things.

Risks to mental health at work can include:

- under-use of skills or being under-skilled for work;
- excessive workloads or work pace, understaffing;
- long, unsocial or inflexible hours;
- lack of control over job design or workload;
- unsafe or poor physical working conditions;
- organizational culture that enables negative behaviors;
- limited support from colleagues or authoritarian supervision;
- violence, harassment or bullying;
- discrimination and exclusion;
- unclear job role;
- under- or over-promotion;
- job insecurity, inadequate pay, or poor investment in career development; and
- conflicting home/work demands.

More than half the global workforce works in the informal economy (2), where there is no regulatory protection for health and safety. These workers often operate in unsafe working environments, work long hours, have little or no access to social or financial protections and face discrimination, all of which can undermine mental health.

Although psychosocial risks can be found in all sectors, some workers are more likely to be exposed to them than others, because of what they do or where and how they work. Health, humanitarian or emergency workers often have jobs that carry an elevated risk of exposure to adverse events, which can negatively impact mental health.

Economic recessions or humanitarian and public health emergencies elicit risks such as job loss, financial instability, reduced employment opportunities or increased unemployment.

Work can be a setting which amplifies wider issues that negatively affect mental health, including discrimination and inequality based on factors such as, race, sex, gender identity, sexual orientation, disability, social origin, migrant status, religion or age.

People with severe mental health conditions are more likely to be excluded from employment, and when in employment, they are more likely to experience inequality at work. Being out of work also poses a risk to mental health. Unemployment, job and financial insecurity, and recent job loss are risk factors for suicide attempts.

Action for mental health at work

Government, employers, the organizations which represent workers and employers, and other stakeholders responsible for workers' health and safety can help to improve mental health at work through action to:

- prevent work-related mental health conditions by preventing the risks to mental health at work;
- protect and promote mental health at work;
- support workers with mental health conditions to participate and thrive in work; and
- create an enabling environment for change.

Action to address mental health at work should be done with the meaningful involvement of workers and their representatives, and persons with lived experience of mental health conditions.

Prevent work-related mental health conditions

Preventing mental health conditions at work is about managing psychosocial risks in the workplace. WHO recommends employers do this by implementing organizational interventions that directly target working conditions and environments. Organizational interventions are those that assess, and then mitigate, modify or remove workplace risks to mental health. Organizational interventions include, for example, providing flexible working arrangements, or implementing frameworks to deal with violence and harassment at work.

Protect and promote mental health at work

Protecting and promoting mental health at work is about strengthening capacities to recognize and act on mental health conditions at work, particularly for persons responsible for the supervision of others, such as managers.

To protect mental health, WHO recommends:

- **manager training for mental health**, which helps managers recognize and respond to supervisees experiencing emotional distress; builds interpersonal skills like open communication and active listening; and fosters better understanding of how job stressors affect mental health and can be managed;
- **training for workers** in mental health literacy and awareness, to improve knowledge of mental health and reduce stigma against mental health conditions at work; and
- **interventions for individuals** to build skills to manage stress and reduce mental health symptoms, including psychosocial interventions and opportunities for leisure-based physical activity.

Support people with mental health conditions to participate in and thrive at work

People living with mental health conditions have a right to participate in work fully and fairly. The UN Convention on the Rights of Persons with Disabilities provides an international agreement for promoting the rights of people with disabilities (including psychosocial disabilities), including at work. WHO recommends three interventions to support people with mental health conditions gain, sustain and participate in work:

- **Reasonable accommodations** at work adapt working environments to the capacities, needs and preferences of a worker with a mental health condition. They may include giving individual workers flexible working hours, extra time to complete tasks, modified assignments to reduce stress, time off for health appointments or regular supportive meetings with supervisors.

- **Return-to-work programmes** combine work-directed care (like reasonable accommodations or phased re-entry to work) with ongoing clinical care to support workers in meaningfully returning to work after an absence associated with mental health conditions, while also reducing mental health symptoms.
- **Supported employment initiatives** help people with severe mental health conditions to get into paid work and maintain their time on work through continue to provide mental health and vocational support.

Create an enabling environment for change

Both governments and employers, in consultation with key stakeholders, can help improve mental health at work by creating an enabling environment for change. In practice this means strengthening:

- **Leadership** and commitment to mental health at work, for example by integrating mental health at work into relevant policies.

- **Investment** of sufficient funds and resources, for example by establishing dedicated budgets for actions to improve mental health at work and making mental health and employment services available to lower-resourced enterprises.
- **Rights** to participate in work, for example by aligning employment laws and regulations with international human rights instruments and implementing non-discrimination policies at work.
- **Integration** of mental health at work across sectors, for example by embedding mental health into existing systems for occupational safety and health.
- **Participation** of workers in decision-making, for example by holding meaningful and timely consultations with workers, their representatives and people with lived experience of mental health conditions.
- **Evidence** on psychosocial risks and effectiveness of interventions, for example by ensuring that all guidance and action on mental health at work is based on the latest evidence.
- **Compliance** with laws, regulations and recommendations, for example by integrating mental health into the responsibilities of national labour inspectorates and other compliance mechanisms.

https://www.who.int/news-room/fact-sheets/detail/mental-health-at-work

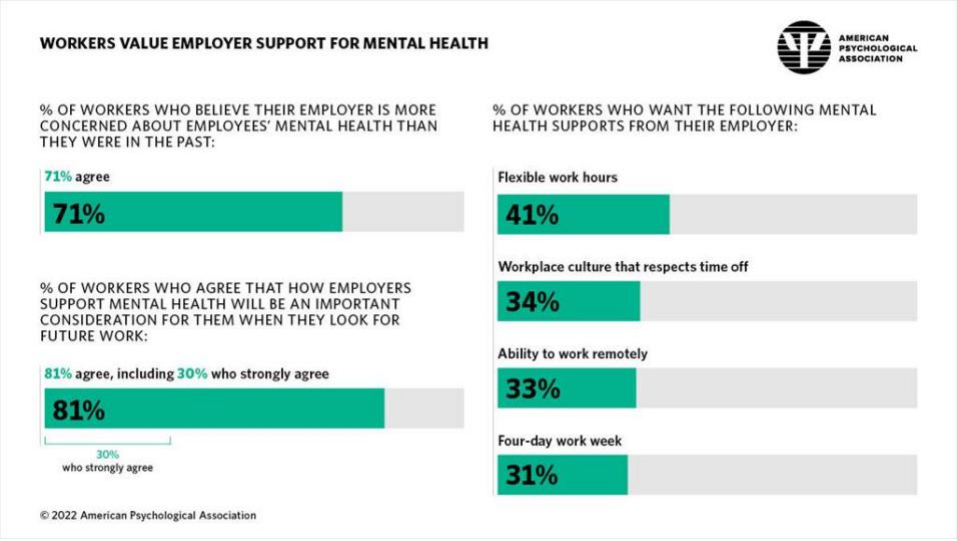
Workers appreciate and seek mental health support in the workplace

APA's 2022 Work and Well-being Survey results

More than two years into the covid-19 pandemic, the workplace looks very different than it did before many businesses were forced to shut down or adjust their practices. Facing the stress of isolation, fears of the virus, and an overwhelming news cycle, it appears many workplace leaders have realized the need to address mental health concerns among their staff.

The results of APA's 2022 Work and Well-being Survey reveal that seven in 10 workers (71%) believe their employer is more concerned about the mental health of employees now than in

the past. This new focus is highly valued by employees. In fact, 81% of individuals said they will be looking for workplaces that support mental health when they seek future job opportunities.



There is, however, a need for improvement. The data reveals that mental health problems are associated with a number of workplace issues, such as compensation failing to keep up with inflation, electronic monitoring of employees, certain groups experiencing discrimination and feeling a lack of acceptance, and some employees even experiencing toxic or abusive workplaces.

Further, those who work in manual labor and customer service are not having the same experience as those doing office work. Employers, therefore, should look for opportunities to make improvements and listen to feedback from workers.

APA commissioned The Harris Poll to conduct the survey to look at workplace experiences and how they have changed (or not changed) in light of the pandemic; measure employee stress related to work; and capture what employees are looking for from their employers regarding their mental health in the context of the pandemic and changing priorities.

This survey builds upon prior APA Work and Well-being surveys that explored Americans' attitudes toward the workplace.

Why—and how—employers should support their workers' mental health
A majority (81%) of survey respondents said that employers' support for mental health will be an important consideration when they look for work in the future—including 30% of workers who strongly agreed that employer support for mental health will factor into their future job decisions. Given this insight, employers should consider mental health initiatives as a way to recruit and retain talent.

Employers can offer mental health support to their employees in different ways. When asked to select from a list of a dozen possible supports that they would like to see employers offer, flexible work hours was the most commonly chosen support (41% of workers), followed by a

workplace culture that respects time off (34%), the ability to work remotely (33%), and a four-day work week (31%).

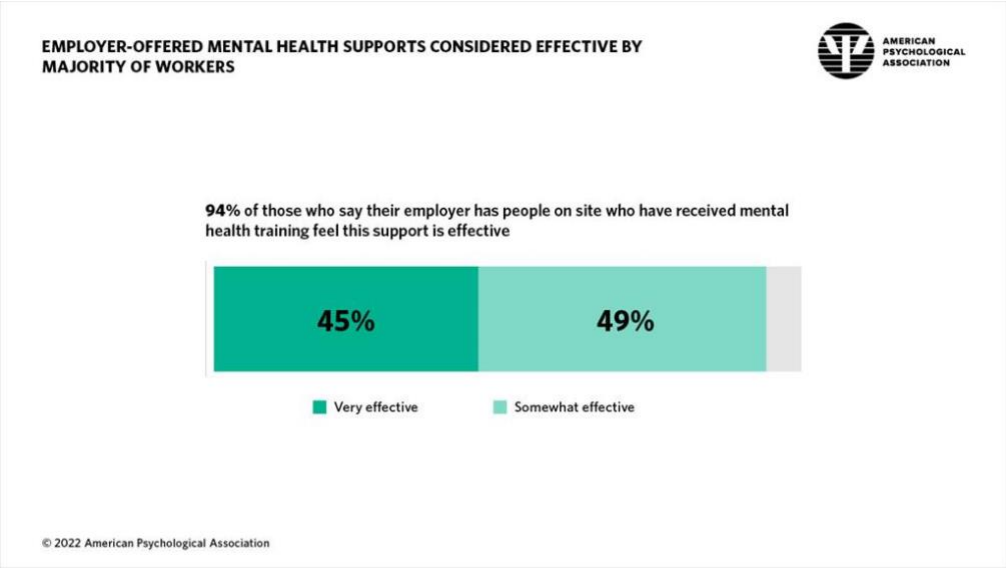
Many employees reported that their employers already offer some of these supports, such as flexible work schedules (46%) and remote work options (37%).

Fewer reported that their employers already offer a culture where time off is respected (28%) or four-day work weeks (14%). Interestingly, less than a third (30%) reported that their employer offers health insurance with coverage for mental health and substance use disorders. However, of those who reported that their employer does offer such insurance, 93% reported that such insurance is an effective mental health support.

When such supports are offered, many employees consider them beneficial. For example, among those whose employers offer flexible work hours and the opportunity to work remotely, 95% reported that these are effective supports.

Only 11% reported that their employer has people on-site who have received mental health training. But of those who reported their employer does offer this support, 94% considered this support effective, including 45% who said the support is very effective.

Similarly, although only 28% reported that their employer offers a culture where time off is respected, 96% of those whose employers respect time off said that it is effective, and 63% called it very effective.



Overall, employer-provided support for mental health has increased; 71% reported believing their employer is more concerned about the mental health of employees now than they were in the past. When asked specifically whether mental health and safety initiatives have gotten better compared with before the covid-19 pandemic, one-third (31%) said they had. The experience appears to be different depending on work context.

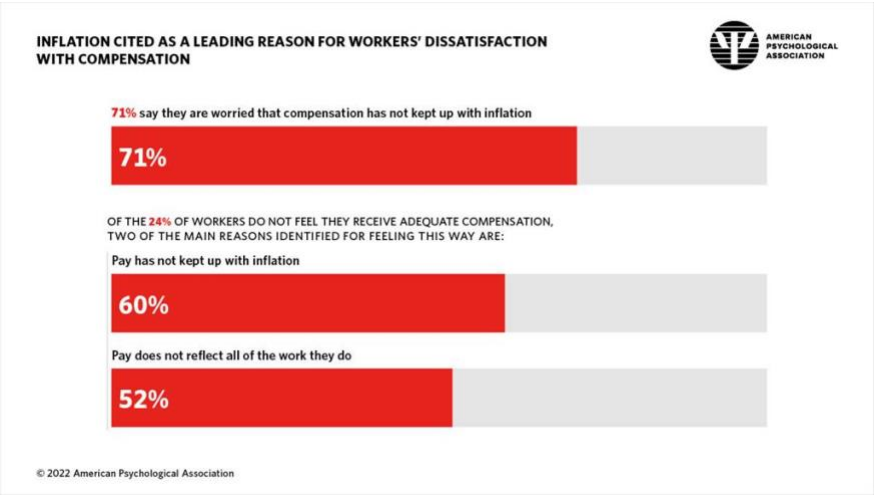
About one-third of both office workers (34%) and customer service/client/patient services workers (32%) said it has gotten better compared with before the covid-19 pandemic, but only one-quarter of manual laborers (25%) reported the same.

Further, those in customer service/client/patient services roles were more likely to say that mental health and safety initiatives have gotten worse (10%), compared with office workers (6%) and manual laborers (5%).

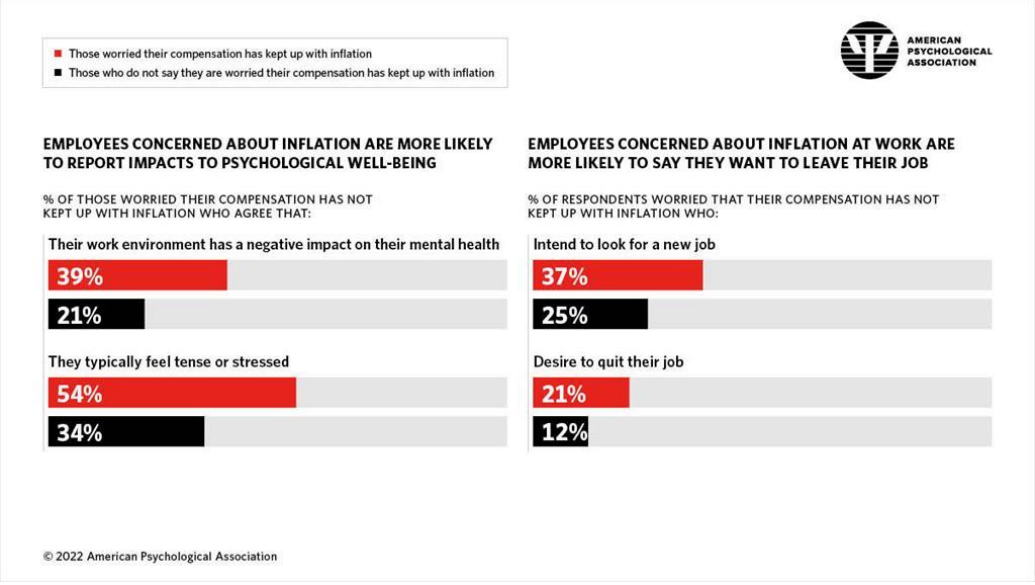
With the array of challenges and stresses that employees face at work, employers should look at opportunities to improve well-being and health—including the suggestions their own workers offer. Concerns about compensation failing to keep up with inflation may be related to workers' well-being.

A majority of employees (71%) said they are worried that their compensation has not kept up with inflation. Further, nearly one-quarter (24%) reported that they do not feel they receive adequate compensation. The workers who do not feel they receive adequate compensation cited two main factors for feeling this way: Pay has not kept up with inflation (60%) and does not reflect all of the work they do (52%).

Those who are worried that their compensation has not kept up with inflation were also significantly more likely to report negative impacts of work on their psychological well-being than their counterparts. Nearly two in five of those worried their compensation has not kept up with inflation (39%) said their work environment has had a negative impact on their mental health compared with 21% of those who were not worried about compensation, and more than half of those who were worried about inflation's impact on their compensation (54%) typically felt tense or stressed compared with 34% of those who were not worried.



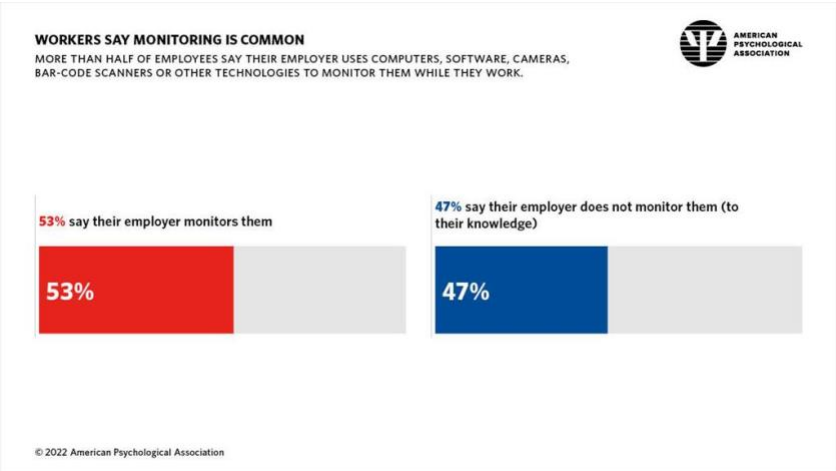
Employees who worried about their compensation not keeping pace with inflation not only were more likely to express work as having negative impacts on their mental health but also indicated openness to other opportunities. Around two in five of these workers said they intend to look for a new job (37% compared with 25% who were not worried) and were nearly twice as likely to say they have a desire to quit their job (21% vs. 12%).



Compensation has long been a key driver for attracting and retaining talent. However, these results suggest that it may be more important now than ever for employers to keep a careful eye on compensation given our current environment of surging inflation.

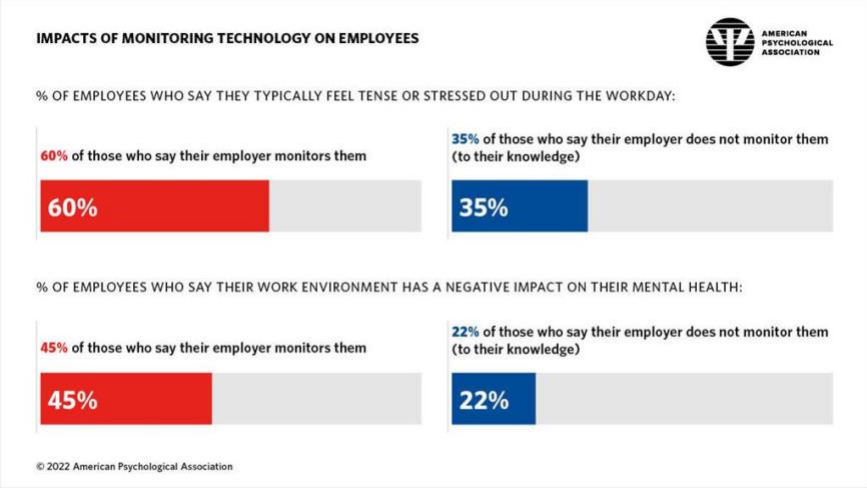
Workplace monitoring is common—and sometimes harmful

More than half of employees (53%) said their employer uses computers, software, cameras, bar-code scanners, or other technologies to monitor them while they work, while 47% said that their employer does not monitor them (to their knowledge). Of those who reported knowing that they are monitored, about half (51%) said they felt uncomfortable with the way their employer uses technology to track them.



Working in environments with electronic monitoring was also associated with a variety of mental health concerns. Employees who said they are monitored at work were more likely to report problems with emotional or psychological well-being at work. Six in 10 (60%) of those

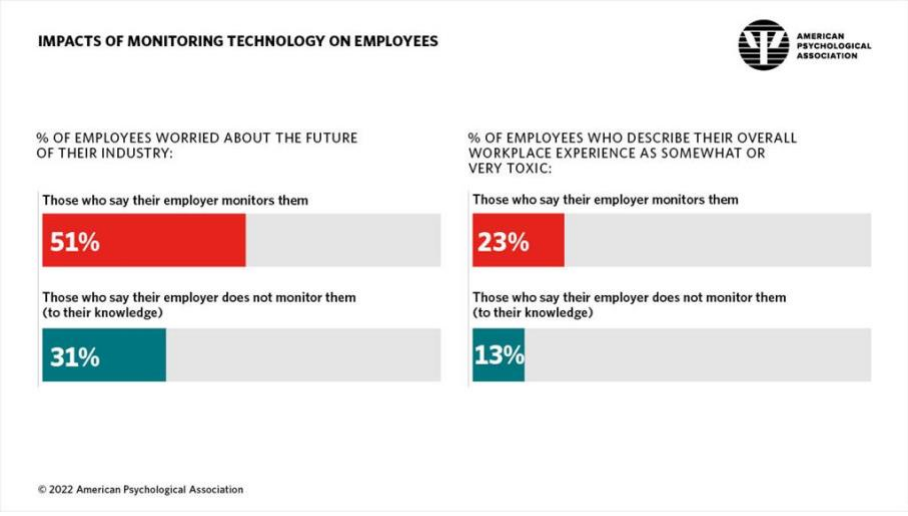
who said their employer monitors them also said that they typically feel tense or stressed during the workday, in comparison with fewer than four in 10 (35%) of those who said they are not, to their knowledge, monitored at work. Employees who said they are monitored at work were also more likely to report that their work environment has a negative impact on their mental health (45% vs. 22% of those who are not monitored).



In addition, nearly one-quarter (23%) of those who said their employer monitors them consider their workplace experience somewhat or very toxic, compared with 13% of those who said their employer does not monitor them.

The use of monitoring technologies is not only associated with employees' negative feelings about the workplace but also how they view their industry. More than half of employees who are monitored at work reported worrying about the future of their industry (51%). In contrast, less than one-third (31%) of those who said they are not monitored expressed concern for the future of their industry.

The data does not indicate whether such concerns and worries are due to monitoring or whether monitoring happens to be more prevalent in work environments where workers are more likely to express such concerns. Nonetheless, this data raises questions for employers who are electronically monitoring employees or considering doing so.

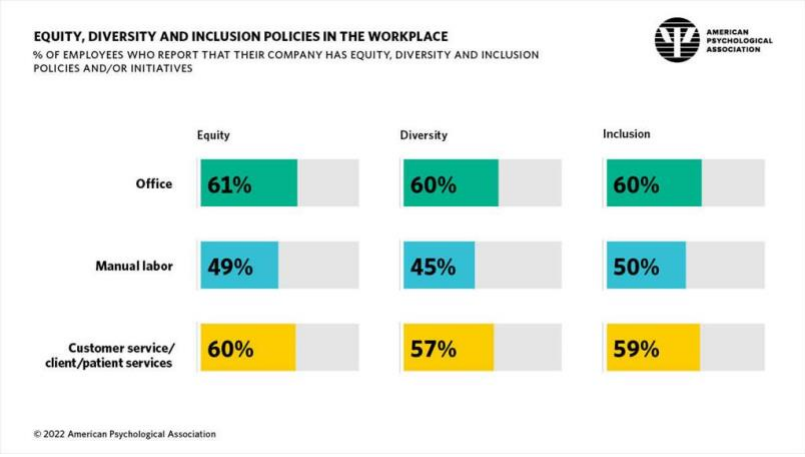


Diverse leadership at companies associated with equity, diversity, and inclusion policies

With recent heightened attention to issues related to race, sexual harassment, and gender, some employers have tried to cultivate more welcoming and inclusive workplaces. Based on the findings in this survey, companies with women, people of color, and LGBTQ+ individuals in senior leadership roles were more likely to have equity, diversity, and inclusion (EDI) policies, though whether an organization has such policies varied depending on the type of workplace. Valuing equity helps diverse populations succeed and thrive. Diversity initiatives involve the representation or composition of various social identity groups in the workplace. Inclusion policies help ensure an environment that offers affirmation, celebration, and appreciation of different approaches, perspectives, and experiences.

Nearly two-thirds of workers at organizations with women (65%), racial and ethnic diversity (64%), or LGBTQ+ representation (66%) in senior leadership reported that their organization has diversity policies in place. These numbers were similar with regard to equity policies, which were reported by 67% of workers at organizations with women or racial and ethnic diversity in senior leadership, as well as 65% of those working for employers with LGBTQ+ representation in leadership positions. Comparable percentages of workers said their organizations have inclusion policies, with 65% of those whose employers have women or racial and ethnic diversity in senior leadership and 66% of those working for employers with LGBTQ+ representation reporting the presence of these policies in their workplace.

EDI policies are more commonly found in office settings than in manual labor workplaces. Compared with manual laborers, office workers were more likely to report their company has equity policies (61%) compared with manual laborers (49%), as well as diversity policies (60%) to (45%) and inclusion policies (60%) to (50%).



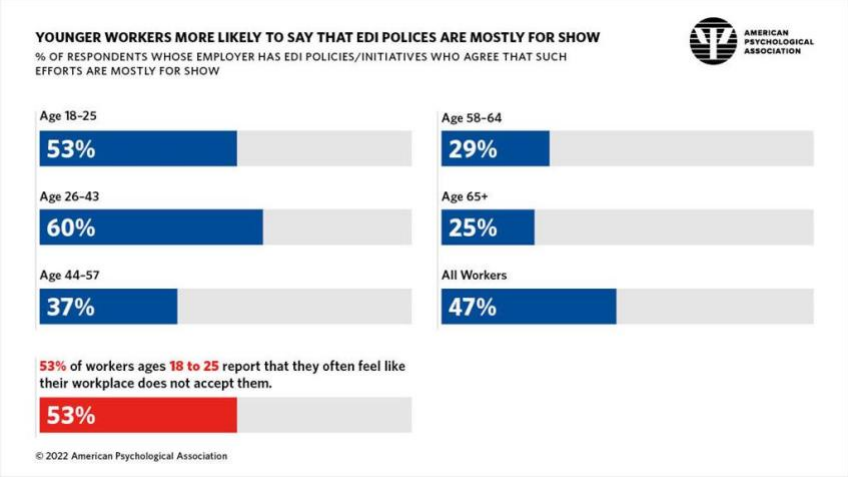
Younger workers more likely to view EDI policies as "mostly for show"

Even when an office has EDI initiatives, workers questioned whether they make a difference in the workplace culture. Among those who reported that their company has EDI initiatives, nearly half (47%) felt the efforts are mostly for show.

This view of EDI policies was most common for employees between ages 26 and 43; three-fifths (60%) of workers in this age group said the efforts are mostly for show. More than half of 18- to

25-year-olds (53%) also said they think the efforts are mostly for show, with much smaller percentages of older groups feeling the same.

The percentage dropped to 37% among workers between ages 44 and 57, dropped to 29% among those 58 to 64, and to 25% of those 65 and older.



Overall, this data suggests that employers need to ensure that their EDI policies are meaningful, lead to measurable results, and are not merely "for show."

https://www.apa.org/pubs/reports/work-well-being/2022-mental-health-support

Statement from President Joe Biden on the 14th Anniversary of the Lilly Ledbetter Fair Pay Act

Fourteen years ago, the Lilly Ledbetter Fair Pay Act became the law of the land as the first bill signed during the Obama-Biden Administration. This law creates important protections against pay discrimination and has helped close persistent gender and racial wage gaps that disadvantage women, particularly women of color, in the workplace.

But fourteen years after the Lilly Ledbetter Fair Pay Act and nearly fifty years after the landmark Equal Pay Act of 1963, we still have work to do to achieve equal pay. Women workers, who perform essential work for our economy and families, are still paid, on average, 84 cents for every dollar paid to men. For women of color, the gap is even greater.

Vice President Harris and I remain committed to strengthening equal pay protections for workers so we can continue to grow our economy, strengthen our communities, and live up to our Nation's core values of equality and fairness. Last year, I signed an Executive Order to advance pay equity for the Federal workforce and to promote efforts to achieve pay equity

for job applicants and employees of Federal contractors, and I'm proud to have signed legislation to provide new protections for pregnant and nursing workers. My Administration continues to call on Congress to pass the Paycheck Fairness Act, commonsense legislation that would increase pay transparency and give workers more tools to fight sex-based pay discrimination.

Workers on the factory floor, on the soccer field, and in workplaces across the country deserve to be paid fairly for their work. But more is needed to ensure all people have a fair shot in this country. Advancing the economic security of women and their families also strengthens our economy overall, and my Administration remains committed to eliminating pay discrimination and unfair pay practices.

https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/29/statement-from-president-joe-biden-on-the-14th-anniversary-of-the-lilly-ledbetter-fair-pay-act/

Racial discrimination in hiring remains a persistent problem

Despite new laws and changing attitudes, little has changed in 25 years

EVANSTON, Ill. --- Decades after hiring discrimination was made illegal in many Western countries, experts predicted it would gradually disappear. But according to a major new meta-analysis from Northwestern University, discrimination in hiring has remained a persistent problem.

In fact, with few exceptions, rates of hiring discrimination have changed little since the 1990s, according to a new paper published Jan. 31 in the Proceedings of the National Academy of Sciences. Lincoln Quillian — a professor of sociology — and former student John J. Lee, a recent graduate of Northwestern's doctoral program in sociology, co-authored the work.

Quillian and Lee analyzed 90 studies involving 174,000 total job applications from Canada, France, Germany, Great Britain, the Netherlands and the United States to study trends in hiring discrimination among four racial-ethnic origin groups: African or Black, Middle Eastern or North African, Latin or Hispanic, and Asian. The oldest study in the analysis was a British study from 1969, and the most recent was a U.S. study from 2019.

"The biggest takeaway was that on average, there has been no change in hiring discrimination when aggregating all six countries together," Quillian said, despite laws passed in the European Union during the study period that aimed to reduce hiring discrimination.

In four of the six countries and for three of the four racial-ethnic groups examined, discrimination roughly held stable. The researchers did find a few significant trends, however, that were both positive and negative.

France was the only country with a significant decline in discrimination, from very high levels in the 2000s to what are still high levels today, but in line with those of peer nations. There was a slight trend toward higher discrimination rates in all other countries except Canada, though the upward trend was only statistically significant in the Netherlands.

“Several countries had a slight upward trend, so it was not unique to the Netherlands. It’s possible that more broadly, this increase is tied to things like the growth of right-wing politics and anti-immigrant sentiment,” Quillian said.

Among the racial-ethnic origin groups studied, most saw a constant rate of discrimination, except for Middle Eastern/North African job applicants. That group saw an uptick in hiring discrimination in the 2000s and 2010s as compared to the 1990s, which the researchers said may be attributable to rising bias against this group after terrorist attacks such as 9/11, which occurred during this period.

Other groups for which hiring trends were analyzed included African/Black, Asian and Latin American/Hispanic applicants. Relative to white applicants, applicants of color from all backgrounds in the study had to submit about 50% more applications per callback on average, Quillian said, with some variation between countries and groups. Callbacks are defined as employers expressing interest in interviewing candidates.

This means that if a white applicant must apply to 20 jobs on average to get a callback, an applicant of color would need to apply to 30. Further discrimination can occur later in the hiring process, but was not studied in this case, according to Quillian.

The 90 studies in the analysis were conducted in a similar manner, with minor differences. In most cases, researchers submitted fake application materials to real job openings, tweaking the materials slightly to include racial indicators along with otherwise similar credentials to ensure that differences in callback rates could be attributed to discrimination, rather than candidate qualifications.

Most studies analyzed (about 75%) were conducted since the 1990s, though trends extend back to the 1970s in France, Great Britain and the Netherlands.

Overall, Quillian said, it’s disappointing to see little progress despite anti-discrimination legislation, changing attitudes against open discrimination since the 1970s, and corporate and government policies that have sought to improve workforce diversity.

According to the authors, further efforts are needed to have a real impact on hiring discrimination. Quillian believes that progress is possible if anti-discrimination policies are enforced, employers are held accountable, and mentorship programs support employees of color who are seeking promotion and advancement in particular fields.

“Policies that require employers to keep track of and make publicly available the race or ethnicity of the people they're hiring make a lot of sense,” Quillian said. Such policies, he noted, can also encourage companies to take a second look at their own numbers. If their hiring patterns show a preference for white candidates, there is a risk of both bad publicity and discrimination lawsuits.

Though there has been generational change over the last 50 years, with younger generations reporting less conservative racial attitudes than older ones, that change hasn’t been reflected in reduced hiring discrimination, Quillian said.

“To make hiring discrimination a thing of the past, we need to be thoughtful and committed to enforcing the law and making changes in hiring practices to promote diversity,” he said.

https://news.northwestern.edu/stories/2023/01/racial-discrimination-in-hiring-remains-a-persistent-problem-northwestern-study/?fj=1

United States: Understanding Hearing Disabilities In The Workplace And The Americans With Disabilities Act

The Equal Employment Opportunity Commission (EEOC) has recently released a new resource document for employers, providing valuable guidance on how to navigate the Americans with Disabilities Act (ADA) in relation to job applicants and employees with hearing disabilities. The document explains the legal responsibilities of employers to provide fair workplaces for all employees and job applicants who need reasonable accommodations.

When it comes to asking applicants or employees disability-related questions, the guidance from the EEOC is clear. Before an offer is made, employers cannot ask questions about an applicant's hearing disability. If an applicant has an obvious hearing impairment or has voluntarily disclosed the existence of one, employers can ask if an accommodation will be needed - but only if they reasonably believe an accommodation will be needed to complete the application process or do the job. After a job offer is made, employers can ask disability-related questions, but only if they do so for all applicants for the same type of job.

Current employees can be subjected to medical inquiries when the employer reasonably believes that performance issues are disability-related. Employers can also ask employees about their hearing if they reasonably believe they will be unable to perform the job's essential functions safely.

The EEOC resource document provides a non-exhaustive list of potential accommodations that vary widely, from sign-language interpreters to assistive technology, note-taking assistance and work-area adjustments.

It's important for employers to understand their obligations under the ADA and to take steps to ensure that their workplace is inclusive and accommodating for individuals with hearing disabilities.
https://www.mondaq.com/unitedstates/employee-rights-labour-relations/1276488/understanding-hearing-disabilities-in-the-workplace-and-the-americans-with-disabilities-act

Experts Seek Clarity From EEOC on Handling AI Bias in HR Processes

As more companies rely on AI for hiring than ever before, observers warn that without proper guidance on how the technology deals with discrimination, organizations could face growing civil rights lawsuits.

If there is one piece of technology dominating the conversation right now, it's artificial intelligence. Not only is it underpinning tools like ChatGPT, but it's also upsetting industries like digital art and pushing copyright law to reevaluate its parameters.

On Tuesday, the Equal Employment Opportunity Commission met to discuss the real-time effects of the powerful technology on an area that's been at the forefront of adoption—human resources.

Indeed, 42% of organizations with more than 5000 employees relied on AI to support employment, according to a Feb. 2022 survey from the Society for Human Resource Management. Among those, 79% used it for recruitment and hiring. Another report from the Harvard Business Review found that 99% of Fortune 500 companies in the U.S. use AI for hiring—often touting its efficiency and ability to bolster diversity and inclusion.

But in a session titled "Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier," the EEOC invited expert panelists from the legal industry, tech, and academia to discuss their opinions on whether AI is working the way it should in HR processes. While the technology might be rapidly adopted, panelists were less certain about its ability to discern the right candidates without violating anti-discrimination laws.

In fact, they stressed that since most machine learning systems are trained using data sets compiled by systems rooted in institutional biases based on race, gender, and sexual orientation—such as eviction histories, credit reports, pronouns, and criminal proceedings—they are just as likely to violate Title VII of the civil rights act as any human being.

"The employer doesn't have to explicitly state a discriminatory preference. The software might simply learn those preferences by observing its past hiring decisions," said Pauline Kim, Daniel Noyes Kirby professor of Law at Washington University School of Law in St. Louis. "Even employers who have no discriminatory intent could inadvertently rely on an AI tool that is

systematically biased. So these automated systems truly do represent a new frontier in civil rights."

For example, one of the first cases Kim worked on as a new lawyer centered around a temp agency receiving requests to match its workers with certain required skills. However, one of these requests entailed a demand for white workers, and in fulfilling it, the company engaged in a discriminatory practice.

Kim added: "So Title VII clearly prohibits the blatantly discriminatory acts of the temp agency years ago and it undoubtedly applies to new forms of discrimination that are emerging today. However, the doctrine that is developed with human decision-makers in mind may need to be clarified to address the risks that are posed by automated systems."

At the same time—a blanket prohibition of such protected characteristics is not helpful either, since it's necessary for audits to diagnose discriminatory behaviors.

Therefore, Kim stressed the need for better clarifications on how the law functions where AI in HR processes is concerned, and offered advice on how the EEOC could move forward.

"First, the agency could make clear that AI tools that cause discriminatory effects cannot be defended solely on the basis of statistical correlations," and that they should focus on the "substantive validity" of selection tools. Meaning, a check on whether the AI tool is actually measuring job-related skills and attributes rather than simply relying on correlations. Then, the EEOC could offer guidance on the duty of employers to explore less biased alternatives when it comes to choosing AI tools, she noted.

Several panelists noted their approval of the EEOC's draft Strategic Enforcement Plan, which the commission released last month. The document focuses on strategies to crack down on discriminatory practices stemming from the use of AI in recruitment, screening, and hiring. Additionally, they suggested that the EEOC also take guidance from the Americans with Disabilities Act as it continues its efforts.

Suresh Venkatasubramanian, the deputy director of the data science initiative and professor of computer science at Brown University, said the need for an AI Bill of Rights is vital to provide "guardrails" for what he considers to be a fast-evolving technology. He added that the guidelines provided by the ADA and National Institutes of Standards and Technology (NIST) are also an important basis for AI training in hiring.

"[The guidelines] say that claims that a piece of hiring tech is safe and effective, should be verified. They say the claims that tech mitigates disparate impact shouldn't be verified. They say that this verification should continue after deployment on an ongoing basis," he said. "Because after all, the key advantage of machine learning is that it learns and adapts to social verification."

https://www.law.com/legaltechnews/2023/01/31/experts-seek-clarity-from-eeoc-on-handling-ai-bias-in-hr-processes/?slreturn=20230102121827

Media Portrayals of the Americans with Disabilities Act

After the passage of the ADA, much of the media coverage focused on litigation and whether or not certain disabled people "deserved" accommodations.

The Americans with Disabilities Act (ADA) was signed into law in 1990. In the following decade, depictions and discussions of how people used the groundbreaking act proliferated the airwaves. Attorney Cary LaCheen examined more than eighty news or "news magazine" programs that aired on television and radio in 1998 to determine what the coverage revealed "about media and public assumptions about disability rights and the ADA."

LaCheen explains that many of the broadcasts focused on lawsuits targeting entities that may have been in violation of the ADA. She argues that this emphasis on litigation "is a problem for the disability rights community and contributes to backlash against the ADA because it sends a message that all the disability community does is sue." She notes that many of the lawsuits were brought by private attorneys, "and thus the disability rights community doesn't choose the parties, legal theories, venue, or decisions to appeal and seek certiorari in these cases." People with some types of disabilities were portrayed—in both news coverage and fictional representations—as being particularly "undeserving" of access.

She identifies other problems with the way the ADA was handled by mass media that year as well, noting that people with some types of disabilities were portrayed—in both news coverage and fictional representations—as being particularly "undeserving" of access. As she explains, In the mind of the public and the media, there are "legitimate" and "worthy" disabilities, usually those visible to the naked eye, such as mobility impairments and blindness. At the other end of the spectrum, there are the "undeserving disabled," people who are thought to be to blame for their conditions.

Overweight people, those living with alcoholism and substance abuse issues, psychiatric disabilities, multiple chemical sensitivities, learning disabilities, and those who have myalgic encephalomyelitis/chronic fatigue syndrome were styled as such. (The ADA protects people with mental illnesses).

LaCheen offers several examples of negative depictions of an "undeserving disabled" person in popular television programs. For instance, in "King-Size Homer," an episode from the seventh season of The Simpsons, Homer attempts to gain a significant amount of weight so that his employer would allow him to work from home. Much of the humor of the episode depends on Homer's reading of a book called Am I Disabled? for inspiration. The episode also promotes the

meritless claim that some disabled people "evade personal responsibility for their own conduct."

LaCheen uses portrayals of obesity to address the myth that if a condition is common, it can't be a disability. "The more widespread a physical or mental condition, the more difficult it is for the media and the public to view it as a disability," she notes. The public and media skepticism about ADA cases related to obesity case occur not just because our society blames people with obesity for their condition, but also because obesity is so common in the United States that it is fast becoming the rule rather than the exception. […] The corollary of this phenomenon is that the more widespread a treatment for a condition, the more difficult it is for the media and the public to view it as an accommodation for a disability.

These assumptions partially explained the media's limited understanding of the ADA cases on which they did report, including Sutton v. United Airlines (acute visual myopia), Murphy v. United Parcel Service (high blood pressure), and Albertsons Inc v. Kirkingburg (vision problems of any degree), all of which reached the Supreme Court.

"All three cases raised the question of whether the plaintiffs were individuals protected by the ADA," LaCheen explains. "The media often ignored the legal relevance of this question, which was whether the plaintiffs, who were denied or fired from their jobs because of their physical conditions, had the right to sue to challenge these employment actions."

She recommends a number of media strategies for the disability community to help improve the portrayal of both the ADA and disabled people in the media. For example, the community could try to shift media attention to the problems and effects of discriminatory treatment, minimizing discussions of whether particular plaintiffs "deserve" legal protections. Describing how a building's lack of access affects a group of people may get more empathy from the public, especially if they're made aware of specific issues before an ADA lawsuit is filed.

https://daily.jstor.org/media-portrayals-of-the-americans-with-disabilities-act/

What it's like to face 'benevolent sexism' in the workplace

When Catherine Lockinger landed a job at IBM in 2018, it felt like she was watching her future career unfold before her. After a five-year stint in the art world, Lockinger had pivoted to product management and found her stride in consulting roles before being recruited by IBM.

This job would give Lockinger the opportunity to build her own team and tackle a compelling business problem. But that wasn't the only appeal. "I was really excited about going into a company that's not consulting because I wouldn't be traveling so much," she says. "And they have an excellent parental leave policy."

Working at IBM exceeded even her high expectations, and Lockinger thrived in her role. “I love working—period, full stop, for better or worse,” she says. In May 2020, she gave birth to twins, and worked up until the night before her delivery. As she started maternity leave, Lockinger received a special equity award—a recognition that she was a high performer. “Honestly [I was] looking forward to a long time at IBM,” she says. “My colleagues from Deloitte went off to Amazon and these other companies, and I remember saying to them, ‘Amazon wishes they were IBM. They’ve been around [for] 100 years; you hope to be this company.’ And there’s a lot of opportunities [at] a 400,000-person company. There’s anywhere you could go in your career there if you do well.”

All that seemed to change five months later, as she was gearing up to return to work. Lockinger had been informed that her boss was leaving IBM, but she was assured that her job was safe and that she would be moved under a different manager. Then, one week before she was slated to return to work, Lockinger learned that her position had been filled—and that her replacement would remain in the job even after her leave was over. The explanation (which Lockinger says is “seared onto [her] brain”) was that the business couldn’t wait for her. “You can imagine how devastating that was to someone who loved working,” she says, noting that her leave was at the height of the pandemic. “I felt trapped in my apartment with babies for five months. [I was] ready to go back.”

When Lockinger returned to work, she was repeatedly told that the company would find a place for her, with her new boss even suggesting that she could work part-time or take things slower to focus on her kids. (Other colleagues echoed those sentiments, she says, urging her to spend time with her kids or making assumptions that her career was now less of a priority.) Before long, Lockinger had lost several direct reports, and her responsibilities had been scaled back. She was also moved under a more junior manager and—to add insult to injury—was asked to train the person who had taken over her role. (IBM did not respond to a request for comment.)

Lockinger describes much of this experience as “benevolent discrimination,” a more insidious form of workplace discrimination that is all too common, particularly as it relates to pregnancy or motherhood. (The term is cited in research that focuses on sexism and gender-based discrimination but also appears as a criticism of diversity initiatives.) In these cases—which often manifest as gender-based discrimination but can also fuel ageism or ableism in the workplace—an employer might think they’re doing what’s right for their employee. “The concept is very established,” says employment lawyer Brian Heller, who is representing Lockinger in a discrimination lawsuit against IBM. “Discrimination can start out with the person doing it as kindness, and that’s where it’s benevolent. The action is detrimental to the employee and harmful, but the person who’s doing the discrimination acts like it’s a favor, and may even believe that.”

The rationale for benevolent discrimination often differs from that of more overt workplace discrimination. “There are different motivations for discrimination,” Heller says. “Sometimes it could be hostility towards people in that protected category. Or it could be a genuine belief

that this type of person is not capable of doing this job, and that it's not good for them to do it. It could be a belief that I'm protecting this person from themselves—that this new mother is taking on too much responsibility, so I'm going to protect her from overextending herself." When it comes to gender-based discrimination, even employers that claim to care about equity and inclusion may find they inadvertently enable benevolent sexism. After surveying more than 7,000 men across 13 countries, Catalyst—a nonprofit research organization focused on workplace equity—found that a majority of men who said they were committed to fighting workplace sexism were likely to make comments like "I would ask my colleague to be more protective of women," or "I would comment that women are easier to deal with than men." In fact, many of them reported that they would likely make those remarks in an effort to interrupt or respond to hostile, overt sexism from colleagues. Catalyst's findings also indicated that men who were more senior in their organization were actually more likely to engage in benevolent sexism.

"It can be difficult to explain to folks why this is a bad thing," says Sarah DiMuccio, a director of research for Catalyst's Men Advocating Real Change initiative. "It's almost like trying to explain why chivalry is outdated." One reason for that is that it's more socially acceptable to make those remarks, since the gender norms and cultural expectations underpinning them are so deeply embedded in society.

"I think we're just now starting to see the insidiousness of the benevolent type [of sexism]," DiMuccio says. "And [it] can be harmful to men as well, especially men who want to take off more time to be with their kids or feel like they're pressured into taking more dangerous or difficult roles because that's what is expected of men." While Lockinger was struggling to find her place at IBM after maternity leave, a male peer who was also a new parent received a promotion. When she told him about her situation, he explained that he hadn't taken all of his parental leave to ensure he would be promoted. "I remember hearing that and thinking, 'well, that's a choice you have,'" Lockinger says. "I had a C section. I was breastfeeding twins. I did not have the choice."

Employers have grown more aware of this type of gender bias in recent years, and even more so as the pandemic exposed the disproportionate burden women often shoulder as caregivers. It's also true that there has been a increase in the number of pregnancy discrimination claims filed with the EEOC and, according to Bloomberg, an uptick in lawsuits alleging pregnancy bias in the workplace. The nature of this discrimination, however, has remained fairly consistent, according to Heller: A new mother may get passed over for a promotion or pulled off of more high-profile projects. "Catherine's case is emblematic of what's going on. It's not an outlier," he says. "I've been doing this for over 20 years, and I would say that this type of discrimination has not changed throughout that time, and that it's remained pretty consistent."

It's also possible that the very awareness that might push a company to introduce caregiver benefits or flexible working hours could, in some instances, engender benevolent sexism. "There's this perception out there that pregnancy discrimination doesn't happen much anymore, because people are more educated about it, and people are more open and

accepting of women taking pregnancy leave," Heller says. "And that's really where the benevolent discrimination comes into play." But there's a fine line between offering support to parents and making assumptions about what they might need, largely on the basis of gender.

Companies often think they're doing the right thing when they engage in benevolent discrimination, Heller points out. But more often than not, what begins as more subtle discrimination snowballs into explicit retaliation or more serious repercussions that ultimately cause harm to workers like Lockinger. In early 2021, after eight months of pleading her case to HR and trying to find another role within IBM, Lockinger had to acknowledge that the future she had imagined for herself was no longer viable. She had been repeatedly told that her managers would find an appropriate place for her in the organization, to no avail. When she pressed the issue and put her concerns into writing, Lockinger claims she was penalized in her year-end performance review and told that she should have "created" a role for herself. By May 2021, she decided it was time to resign.

"There's no denying that my career has taken a blow," she says. "I have zero doubt that had I not had babies, I would be a director, if not a VP, and it's going to take me a minute to get back to that. I'm hoping that I can do that at a company that truly values humans—more so than the business that couldn't wait."

https://www.fastcompany.com/90838745/what-face-benevolent-sexism-workplace

Can bots discriminate? It's a big question as companies use AI for hiring

The EEOC is turning its attention to the use of AI and other advanced technologies in hiring. AI may be the hiring tool of the future, but it could come with the old relics of discrimination.

With almost all big employers in the United States now using artificial intelligence and automation in their hiring processes, the agency that enforces federal anti-discrimination laws is considering some urgent questions:

How can you prevent discrimination in hiring when the discrimination is being perpetuated by a machine? What kind of guardrails might help?

Some 83% of employers, including 99% of Fortune 500 companies, now use some form of automated tool as part of their hiring process, said the Equal Employment Opportunity Commission's chair Charlotte Burrows at a hearing on Tuesday titled "Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier," part of a larger agency initiative examining how technology is used to recruit and hire people.

Everyone needs speak up on the debate over these technologies, she said.

"The stakes are simply too high to leave this topic just to the experts," Burrows said. Resume scanners, chatbots and video interviews may introduce bias.

Last year, the EEOC issued some guidance around the use of cutting-edge hiring tools, noting many of their shortcomings.

Resume scanners that prioritize keywords, "virtual assistants" or "chatbots" that sort candidates based on a set of pre-defined requirements, and programs that evaluate a candidate's facial expressions and speech patterns in video interviews can perpetuate bias or create discrimination, the agency found.

Take, for example, a video interview that analyzes an applicant's speech patterns in order to determine their ability to solve problems. A person with a speech impediment might score low and automatically be screened out.

Or, a chatbot programmed to reject job applicants with gaps in their resume. The bot may automatically turn down a qualified candidate who had to stop working because of treatment for a disability or because they took time off for the birth of a child.

Older workers may be disadvantaged by AI-based tools in multiple ways, AARP senior advisor Heather Tinsley-Fix said in her testimony during the hearing.

Companies that use algorithms to scrape data from social media and professional digital profiles in searching for "ideal candidates" may overlook those who have smaller digital footprints.

Also, there's machine learning, which could create a feedback loop that then hurts future applicants, she said.

"If an older candidate makes it past the resume screening process but gets confused by or interacts poorly with the chatbot, that data could teach the algorithm that candidates with similar profiles should be ranked lower," she said.

Knowing you've been discriminated against may be hard. The problem will be for the EEOC to root out discrimination - or stop it from taking place - when it may be buried deep inside an algorithm. Those who have been denied employment may not connect the dots to discrimination based on their age, race or disability status.

In a lawsuit filed by the EEOC, a woman who applied for a job with a tutoring company only realized the company had set an age cutoff after she re-applied for the same job, and supplied a different birth date.

The EEOC is considering the most appropriate ways to handle the problem.

Tuesday's panelists, a group that included computer scientists, civil rights advocates, and employment attorneys, agreed that audits are necessary to ensure that the software used by companies avoids intentional or unintentional biases. But who would conduct those audits — the government, the companies themselves, or a third party — is a thornier question.

Each option presents risks, Burrows pointed out. A third-party may be coopted into treating their clients leniently, while a government-led audit could potentially stifle innovation.

Setting standards for vendors and requiring companies to disclose what hiring tools they're using were also discussed. What those would look like in practice remains to be seen.
In previous remarks, Burrows has noted the great potential that AI and algorithmic decision-making tools have to improve the lives of Americans, when used properly.

"We must work to ensure that these new technologies do not become a high-tech pathway to discrimination," she said.

https://www.wxxinews.org/npr-news/npr-news/2023-01-31/can-bots-discriminate-its-a-big-question-as-companies-use-ai-for-hiring

EEOC Hearing Explores Potential Benefits and Harms of Artificial Intelligence and other Automated Systems in Employment Decisions

Panelists Highlight the Civil Rights Implications of Automated Technologies on the American Workforce

WASHINGTON - Today, the U.S. Equal Employment Opportunity Commission (EEOC) held a public hearing to examine the use of automated systems, including artificial intelligence (AI), in employment decisions. Increasingly, employers are using automated systems to make employment decisions, including the recruitment, hiring, monitoring, and firing of workers. During the hearing, titled “Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier,” the Commission heard from witnesses ranging from computer scientists, civil rights advocates, legal experts, industrial-organizational psychologist, and employer representatives.

“The use and complexity of technology in employment decisions is increasing over time,” said EEOC Chair Charlotte A. Burrows. “The goals of this hearing were to both educate a broader audience about the civil rights implications of the use of these technologies and to identify next steps that the Commission can take to prevent and eliminate unlawful bias in employers’ use of these automated technologies. We will continue to educate employers, workers and other

stakeholders on the potential for unlawful bias so that these systems do not become high-tech pathways to discrimination."

The witnesses discussed how discrimination may occur when employers use automated systems. The discussion also included ways in which AI and automated systems in the workplace might support or hinder diversity, equity, inclusion, and accessibility (DEIA) efforts, This hearing continues the work of the EEOC's AI and Algorithmic Fairness Initiative, an agency-wide initiative to ensure that the use of software, including AI and other emerging technologies used in hiring and other employment decisions, comply with the federal civil rights laws that the EEOC enforces.

As a part of this initiative, the EEOC published a technical assistance document titled The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees. The Commission's last hearing on this subject was in 2016, when the agency explored the implications of big data in the workplace. Today's hearing focused on ensuring that the agency responds to the latest developments in the use of automated technology in employment.

https://www.eeoc.gov/newsroom/eeoc-hearing-explores-potential-benefits-and-harms-artificial-intelligence-and-other

United States: EEOC's Draft Enforcement Plan Prioritizes Technology-Related Employment Discrimination

Bias—especially pernicious bias against historically disadvantaged groups—is among the major risks posed by the widespread adoption of artificial intelligence (AI). Indeed, algorithmic discrimination has attracted substantial attention from US federal, state, and local policymakers, and regulators are beginning to crack down.

On January 10, the US Equal Employment Opportunity Commission (EEOC) published for public comment a draft Strategic Enforcement Plan (SEP) for 2023–2027. The SEP aims to "focus and coordinate the agency's work" over a multi-year period to produce "a sustained impact in advancing equal employment opportunity." The draft SEP is the EEOC's first to address the use of automated systems for hiring, such as artificial intelligence and machine learning, and proposes to focus on how those systems may be used to "intentionally exclude or adversely impact protected groups."

As we explained in Avoiding ADA Violations When Using AI Employment Technology, many companies use AI-powered technologies in hiring, promotion, and other employment decisions. Examples include tools that screen applications or resumes; video-interviewing software that

evaluates facial expressions and speech patterns; and software that scores "job fit" based on personalities, aptitudes, or skills.

The SEP recognizes that these tools and technologies can have adverse effects on members of protected groups, as well as on "particularly vulnerable workers" outside of traditionally protected classes who may be unaware of their rights or reluctant to enforce them. Examples of "particularly vulnerable workers" identified in the SEP include immigrants and migrant workers, individuals with intellectual and developmental disabilities, individuals with arrest or conviction records, LGBTQI+ individuals, older workers, and persons with limited literacy or English proficiency.

In addition to many non-technology related priorities, the EEOC seeks to eliminate technological barriers that can lead to disparate impacts in recruitment, hiring, and promotion, such as: the use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups;
restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access; and
screening or performance-evaluation tools that disproportionately impact workers based on their protected status, including those facilitated by artificial intelligence or other automated systems.

The draft SEP incorporates feedback from three listening sessions that occurred in 2022. The public is encouraged to submit comments on the draft SEP through the Federal rulemaking Portal by February 9, 2023, after which the EEOC will adopt a final version.

However, the SEP may be revised, employers and vendors of employment technology should expect much greater scrutiny of automated employment decision technology and tools in the years to come. Auditing current systems (and new ones before deployment) will be increasingly important to keep both regulators and the plaintiffs' bar at bay.

https://www.mondaq.com/unitedstates/employee-rights-labour-relations/1274170/eeocs-draft-enforcement-plan-prioritizes-technology-related-employment-discrimination-

12 To-Dos To Assess And Address Workplace Ageism (And Other Isms)

Four out of ten hiring managers openly admit to age bias preventing them from considering younger ...

In an online survey of 800 hiring managers, 38% admitted to viewing resumes with age bias. One can only imagine what that percentage would be if everyone openly admitted discriminatory actions. While age bias, stereotypes and discrimination most often impact older applicants, ageist attitudes also hurt younger employees.

- Hiring managers cited typical age stereotypes for automatically dismissing employees under age 25.
- They're unreliable.
- They'll just leave.
- They don't have any/enough experience.
- Tiresome rhetoric was also cited for dismissing older candidates.
- Older workers lack experience with technology.
- They'll probably retire soon.
- They're too set in their ways.
-

Surveys like this help to raise awareness, but more is needed to create workplace change. Shaping a diverse, age-inclusive workplace requires employer action.

First and foremost is educating employees on the many ways age bias, stereotyping and discrimination show up in the workplace. Then it's time to devise a strategic action plan to eliminate ageism–and all the other isms standing in the way of a cohesive and productive workplace culture.

Include age in bias training and mandate training for all employees. Make training a prerequisite before assuming a role encompassing hiring and management responsibilities. With appropriate training, hiring managers will consciously cast a wider net for attracting and hiring talent. Moreover, inclusive talent management increases employee retention.

Proactively create a diverse, age-inclusive work culture beginning with employee orientation and onboarding. Use that critical time to educate new employees on workplace policies, train them on all aspects of inclusive behaviors and set expectations for a zero-tolerance to any form of bias, stereotyping or discrimination.

Understand what contributes to employee belonging and address behaviors that create exclusion and disengagement. For example, generational labels, i.e., Boomer, GenX, Millennial and GenZ, represent stereotypes. This trivial assignment of characteristics is misleading and can lead to generation-bashing and finger-pointing, creating mistrust, disengagement and talent loss. Current culture has been duped into thinking these labels have real meaning.

Conduct a complete age equity audit reviewing internal and external policies, processes and messaging. Is age included in the company's anti-discrimination and harassment policy? Does your diversity recruiting strategy include age as a dimension of diversity? Does your Equal Employment statement include age?

Report age demographics and don't lump older employees into a 40+ category. There are a lot of working years after 40. Make space for all-aged employees. Be transparent and include the results in annual reporting along with gender and race and ethnicity. Prospective employees, customers and stakeholders across that age spectrum will thank you (and respect you more). Plus, you'll be miles ahead if the EEOC mandates reporting by age group.

Conduct anonymous employee surveys to measure employee beliefs about inclusion in your workplace. Cultural change requires awareness building. You can't root out age-based threats or any other bias without giving employees a safe way to report exclusive behavior.

Most importantly, use the survey results to craft strategies to address gaps and strengthen the culture. Retention is key. That means asking employees to reveal the blindspots and ask for input on how best to move forward.

Actively create and measure the innovation and productivity of age-equitable teams.

The Global Report on Ageism reports that one of the most effective ways to change perceptions and behavior of age differences is by assembling teams across a wide-ranging age spectrum. Mixed-age interaction reduces prejudice and stereotypes toward both younger and older populations.

Sponsor an Age Equity employee resource group to provide a safe place to discuss age-related beliefs, question the validity and create opportunities to disrupt the bias through mutual mentoring and teamwork. Partner with leaders in the organization who can investigate and address these concerns. Is there a pattern of passing up older workers for promotions? Are younger employees dismissed for challenging development assignments or given an unfair share of tedious work?

It's a given that leaders should lead by example, and age equity is no exception. But even leaders don't know what they don't know. It's up to HR and DEI professionals to make sure they understand the urgency of demographic shifts and how that impacts the employee base and product or service demands.

Metrics matter. No measures, no results. Set achievable and stretch goals around creating a diverse, age-equitable work culture. When reporting age, refer to specific age ranges or default to 10-year brackets.

Is HR too overloaded to take on one more thing? Move workplace strategy under the Chief Strategy Officer or, better yet, create a Chief Longevity Officer. People are living longer, and a longevity mindset can increase the recruitment and retention of all-aged employees. A longevity mindset offers a new approach to employee attraction, development and retention. It also takes a longer view of the benefits needed to support an aging employee base, including

financial planning, continual training, retaining and education and ongoing health and wellness in mind, body and spirit.

https://www.forbes.com/sites/sheilacallaham/2023/01/29/12-to-dos-to-assess-and-address-workplace-ageism-and-other-isms/?sh=25ec154210c5

Why DEI Matters More Than Ever

U.S. workers, particularly millennials and Gen Z, are calling out — and calling it quits on — toxic workplace cultures

The economic and existential crises wrought by COVID-19 had a profound effect on the nation's workforce: According to the U.S. Bureau of Labor Statistics, more than 47 million Americans voluntarily left their jobs in 2021, an unprecedented exodus now known as the "Great Resignation."

While workers quit for a variety of reasons, there's no denying that COVID-imposed disruptions encouraged employees to think more critically about what they want and need in a work environment.

According to a 2022 Pew Research Center survey, the top three reasons workers cited for leaving their jobs were low pay (63%), lack of opportunities for advancement (63%) and feeling disrespected at work (57%).

Dr. Mateo Cruz, an assistant professor of Management and organizational psychologist with more than 20 years' experience researching and teaching about diversity, equity and inclusion (DEI) in corporate environments, isn't surprised to hear these grievances — particularly the last one. "Unlike their parents and grandparents, today's workers have more opportunities to challenge toxic workplace cultures," he explains. "They can now actively seek out companies working to eliminate bias and discrimination and cultivate an environment where all employees feel valued and included."

This is particularly true of younger workers, categorized as millennials (born between 1981 and 1996) and Gen Z (born between 1997 and 2012). Indeed, according to the recent Bentley University – Gallup Force for Good Survey, 84% of Americans ages 18-29 believe it's important for business to promote DEI, compared with just 71% of workers ages 50-59. "Millennials and Gen Z are more likely to expect companies to address social inequalities in the workplace and their external environment than previous generations," Cruz explains. "They're more likely to

express an equity mindset, so it's easier for them to identify — and call out — injustice when they see it."

Young Americans' commitment to social justice is a direct reflection of the nation's changing demographics. U.S. Census results from 1960 identified 88.6% of the nation's population as white. Sixty years later, the 2020 U.S. Census revealed a population with significantly more racial and ethnic diversity: 60% white, 18% Hispanic, 12% Black or African American, 6% Asian, 0.6% Native American or Alaska Native, 0.2% Native Hawaiian or Pacific Islander, 3.3% two or more races and 0.5% other. And this diversification trend will continue: By 2045, according to official U.S. Census projections, the nation will be "minority white," with whites accounting for just 49.7% of the total population.

This change is significant, Cruz says, because the dominant group in any society is the one empowered to establish cultural norms. Historically, American culture has prioritized whiteness, masculinity and heterosexuality, conferring power and privileges to those who possess these characteristics and limiting the influence and opportunities of those who don't. American businesses subsequently codified these values — both explicitly and implicitly — within their organizational cultures, creating long-standing structural inequities for people of color, women and nonbinary individuals, and those who identify as LGBTQ+.

The landmark 1964 Civil Rights Act outlawed explicit bias in the workplace, making it illegal for employers to discriminate against workers "based on race, color, religion, sex and national origin," but implicit bias remains. As Cruz notes, "Discrimination today is more subtly and insidiously expressed in interpersonal interactions," such as complimenting an accented speaker on their English fluency or misgendering a trans or nonbinary colleague. "But the cumulative effect of these subtle behaviors remains significant, taking a huge psychological toll on employees from systemically marginalized groups."

Unlike their parents and grandparents, today's workers can actively seek out companies working to eliminate bias and discrimination.

Recent and widespread social justice movements like #MeToo, Black Lives Matter and Stop AAPI Hate, which have called out systemic sexism and racism in American culture, have made businesses realize they need to do more to eliminate structural inequities within their organizational cultures. Yet, while many companies have since expanded or intensified their DEI initiatives — according to global consulting firm McKinsey, businesses worldwide spent $7.5 billion on DEI in 2020, an amount that's expected to double to $15.4 billion by 2026 — those efforts have only marginally moved the needle: Among Fortune 500 companies in 2020, 90% of CEOs and more than 60% of board members were white men.

That's not because companies don't care about creating equitable and inclusive work environments, Cruz stresses. Indeed, research has shown that DEI is good for businesses' bottom lines, suggesting that companies with more gender, racial and ethnic diversity among their leadership teams are more innovative and profitable than their less-diverse competitors.

Business leaders also know that a more engaged workforce is a more productive workforce, he notes, and that "the key to fostering employee engagement is creating a truly inclusive culture, where everyone has an opportunity to contribute and succeed."

So why are corporate DEI efforts failing to live up to expectations? As Cruz sees it, many companies are guilty of "checkbox diversity," rushing to implement sweeping and ambitious workplace programs without first identifying their unique organizational needs. "DEI initiatives need to be intentional and data-driven," he explains. "This requires companies to diagnose from a systems perspective, illuminating the DEI challenges and opportunities specific to their own workplace cultures."

It's something Cruz knows from personal experience. Through his research and in the classroom, he's encouraged countless companies to "discuss the undiscussables" and identify where inequities exist in their workforce. He says clients are often surprised by what they discover. For example, one company thought diversifying their talent pool was their primary challenge; however, after Cruz and Bentley students conducted a DEI diagnosis, they found it was geographic tensions between their rural and metropolitan offices that were creating barriers to cohesion. That's why Cruz tells clients, "You have to address the problems you have now in the culture of your organization," instead of making assumptions about the DEI outcomes you hope to achieve.

Cruz acknowledges that working to change organizational culture can often feel like a Herculean task: "There are no easy answers when it comes to DEI." But the increasing and irrepressible diversification of the U.S. (and global) workforce demands that companies invest the time and effort to intentionally cultivate environments that celebrate, rather than censure, differences and make employees feel respected, valued and supported. As the Great Resignation has made clear, fostering inclusivity in the workplace has never been more critical; after all, Cruz says, "People don't stay in places where they feel they don't belong."

https://www.bentley.edu/news/why-dei-matters-more-ever

Employers Laying Off Workers May Miss Red Flags for Bias Suits

An increasing number of companies have announced mass layoffs in recent weeks as a predicted recession looms, raising the threat of costly bias lawsuits where workers allege these employment decisions disproportionately hurt members of protected groups.

The cuts so far have been focused on tech companies including Google and Microsoft Corp., which recently announced layoffs of about 12,000 and 10,000 respectively. The layoff pain has also spread to finance and big banks like Bank of New York Mellon Corp. and is likely to also

make its way into other industries in 2023, as economists peg the chances of a recession at as high as 70%.

In the year following the 2008 financial crisis, the number of charges of discrimination filed with the US Equal Employment Opportunity Commission increased by 15%, and later reached an all-time high in fiscal year 2011.

History may repeat itself if employers rushing to cut costs don't take measures to ensure reductions in force aren't biased against protected groups.

Twitter Inc., for one, is already facing two separate lawsuits from women and disabled workers who say they were disproportionately impacted by the company's mass layoff late last year.

Workers may bring discrimination claims if they're part of a protected class that experienced a disparate impact due to layoffs or if they feel they were targeted for engaging in protected behavior, according to plaintiff attorney Douglas Wigdor of Wigdor Law.

"Savvy employers when they're laying off hundreds or thousands of people oftentimes include someone, they wanted to terminate but knew that if they did during prosperous times, they would have a difficult time proving it was a legitimate termination," Wigdor said.

'Recessionary Discrimination'

Wigdor coined the term "recessionary discrimination" after the 2008 financial crisis and subsequent layoffs led plaintiffs to raise bias suits.

In 2010 he represented six former female employees who sued Citigroup Inc. in a high-profile proposed class action alleging the bank terminated thousands of women while retaining less qualified male colleagues in violation of Title VII of the Civil Rights Act and New York state law. That case was settled in 2013.

That was one of several lawsuits with multiple plaintiffs that stemmed from layoffs spurred by the Great Recession and alleged that a company's practices had a disparate impact on employees based on race, gender, age, and other protected characteristics.

Wigdor, whose firm has also brought discrimination lawsuits around layoffs against companies like Equinox Holdings Inc. and Ernst & Young LLP, said it can be an uphill battle proving discrimination in a layoff context because the plaintiff has to prove they were terminated for a reason other than budget constraints.

"That's another hurdle plaintiff lawyers need to get through," Wigdor said.

One way plaintiff attorneys do this is by pointing to a statistically significant disparity among the class that believes they were discriminated against. In the complaint against Citigroup, the women pointed to the fact that they made up a smaller percentage of total employees at the firm but a nearly equal percentage of the people terminated compared to men.

Gender based discrimination claims crop up frequently when companies carry out reductions in force, but claims of ageism are also common.

Last month, a 49-year-old woman working at Esbenshade Farms sued the egg producer for allegedly targeting her during a round of layoffs caused by an Avian Flu outbreak. According to her complaint in federal court, the Pennsylvania-based company "used this as the pretextual basis" to get rid of non-Hispanic and older employees.

In any separation of employment, telling the employee exactly why they were let go can go a long way, according to Eric Meyer, a partner at FisherBroyles. Without that, it may be easier for a plaintiff to draw a connection between their termination and their being part of a protected class or taking part in a protected activity.

"The capstone of the termination of employment is telling employees why their employment is ending and being honest with them," Meyer said. "When you start changing your rationale for terminating somebody's employment that's when things rise to jury trials."

Objective Criteria

Employers concerned about employees citing discrimination in claims should establish an objective and neutral criterion for which roles they're eliminating, like productivity or being part of a specific unit or location, according to Stefanie Camfield, a human resources consultant at Engage PEO.

"If you move forward without specific written criteria a court is more likely to consider arguments of discrimination as being the reason for the reduction in force," Camfield said.

After deciding that criteria, management-side attorneys say companies should run the numbers and check if there are any disparate impacts. If, for example, an employer chose to eliminate senior roles, it's possible older workers may be affected disproportionately, even if that was not the employer's intention.

Not all bias lawsuits that arise from layoffs cite the cuts' broader impact on protected groups in the workplace. Some plaintiffs who bring these suits claim they were included in a reduction in force in retaliation for workplace discrimination problems they already raised.

Raymond J. Berti, an attorney at Akerman LLP, said he asks clients to check and see if any employees who are being impacted by the layoffs are concerns for future litigation, such as somebody with an outstanding human resources complaint.

Alliance HealthCare Services Inc. faced a lawsuit in 2021 alleging that it terminated former account executive Kristen Paltz for complaining about pay equity among other issues under the guise of a Covid-driven round of layoffs. That case, which was also handled by Wigdor's firm, was sent to arbitration in 2022.

"Of the employees who are being impacted by these layoffs, have any of them previously raised allegations of retaliation or discrimination? That might lead them to bring a claim—not unintentional disparate impact-type claim—but an actual intentional discrimination or retaliation claim premised on the theory that they are being selected for this mass layoff as pretext," Berti said.

Aside from bias concerns, employers planning cuts may trigger the federal Worker Adjustment and Retraining Notification—which requires a 30-day notice for mass layoffs—or its state analogs, which may have heightened requirements. The company may also have contractual obligations with the affected employees, like paying them out for unused vacation days. Employers may also run into trouble if they institute a "last in, first out" termination policy in which more recent hires are put on the chopping block. This type of policy could spur discrimination claims if there's been a recent effort to recruit diverse talent, a move many companies have made in the last few years, according to Camfield.

"If you recently hired a lot of nontraditional or minority workers who haven't worked for you for very long, they could be potentially disparately impacted by a last-in first-out termination policy," she said.

https://news.bloomberglaw.com/daily-labor-report/employers-laying-off-workers-may-miss-red-flags-for-bias-suits-2

Long COVID-19 Poses Compliance Risks for Employers

As the COVID-19 pandemic persists, the probability of employees developing long COVID-19 increases. Employers may face some compliance risks when that happens, particularly regarding the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Medical certification and documentation require careful thought, as there aren't standard procedures for diagnosing the condition.

Symptoms, Treatments and Prevention

The most common symptoms of long COVID are difficulty concentrating, fatigue, shortness of breath, chest pain, rapid heart rate, loss of sense of smell and taste, anxiety, and depression,

said Dr. Jeff Levin-Scherz, managing director and population health leader with WTW in Belmont, Mass.

The severity of each symptom ranges greatly, he noted. Many people see substantial resolution of their symptoms over several months, but for some, the symptoms persist longer.
Much remains unknown about long COVID. "Since the first case of COVID-19 in the U.S. was only three years ago, we don't know the longer-term implications," Levin-Scherz said. "It's possible that long COVID has multiple different causes and could be a constellation of different diseases."

However, Levin-Scherz is hopeful there will be better treatments in future years.
For now, the best way to avoid getting long COVID is to not get sick in the first place, he said, adding that vaccines remain effective at reducing the risk of infection.

In addition, the medication Paxlovid has been shown to substantially reduce the risk of long COVID in those who take it within the first five days of illness, he added.

"It behooves employers to limit COVID infections as much as possible, no matter how seemingly mild or unnoticeable it may be at the time of infection," said New-York-City based Elsie Tai, head of the Occupational Health & Safety Services practice at NFP, a global benefits consultant and property and casualty insurance broker. "While many of the most visibly devastating effects of COVID may have gone, it is still present and impacting the workforce."

Coordination of FMLA and ADA Requirements

Long COVID might qualify as a serious health condition that entitles an employee to take FMLA leave, including intermittent leave, but not necessarily, said Geri Haight, an attorney with Mintz in Boston. Under the FMLA, a serious health condition can mean an illness that typically involves inpatient care or continuing treatment by a health care provider.

The employee may be entitled to accommodations under the ADA, as well.

The federal government recognizes that long COVID may be an ADA-qualified disability. For example, an employer may be required to provide a leave of absence or other accommodation to an employee under the ADA once benefits under the FMLA are exhausted.

After discussing possible accommodations with the employee, the employer might identify a reasonable accommodation for a worker with long COVID.

Accommodations might include:

- A modified work schedule, such as part-time work.
- Removal of nonessential functions of the position.
- Remote work.
- Leave.

Employers are obligated to grant an accommodation request only if it does not impose an undue burden on them.

When employees initially request FMLA leave, an employer can require them to submit a medical certification establishing the need for leave and estimating the duration and frequency of the leave. "Because long COVID symptoms may not require inpatient or ongoing care by a medical professional, depending on the symptoms experienced by the employee, long COVID may not satisfy the FMLA's serious health condition requirements," Haight said.

Long COVID symptoms are largely self-reported, making them difficult to confirm through a medical evaluation, Haight added.

While medical certification under the FMLA and medical documentation under the ADA "may be available to employers, there is currently no test to confirm the presence of long COVID," she said. "Nor is there a standard process for diagnosing long COVID or symptoms associated with it."

Also, a doctor's note might not provide the definitive information an employer seeks, Haight noted.
Nonetheless, even someone with COVID-19 symptoms that don't last a long time may be covered by the FMLA, said Robin Shea, an attorney with Constangy, Brooks, Smith & Prophete in Winston-Salem, N.C.

One definition of a serious health condition that qualifies for FMLA leave is an impairment lasting more than three calendar days plus two or more visits to a health care provider. The appointments can happen up to 30 days after the onset of the condition.

Alternatively, a serious health condition can be defined as an impairment lasting more than three calendar days plus one visit to a health care provider and a continuing course of treatment.

An employer should also consider whether the condition qualifies as a chronic condition that occasionally incapacitates the employee and requires treatment by a health care provider at least twice a year.

If an employee with long COVID is covered by the FMLA, an employer cannot request additional medical certifications each time the employee takes time off due to symptoms, Haight said.

However, she noted that under the ADA, an employer can request medical documentation that describes:

- The nature, severity and duration of the impairment.
- The activity that the impairment limits.
- The extent to which the impairment limits the employee's ability to perform the activity.

- Why the requested accommodation is needed.
-

That said, Haight noted that the Equal Employment Opportunity Commission has clarified that long COVID can qualify as a disability, and therefore employers need to reasonably accommodate employees with the condition or risk potential claims of disability discrimination.

"Employers need to balance challenges with managing excessive leave or remote-work requests by employees reporting long COVID symptoms with the risk of employment discrimination litigation," she said.

https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/long-covid-compliance-risks.aspx

1 in 4 women subject to pregnancy discrimination in the workplace

New report reveals UK workplaces must do more to address their policies and culture with 27% of females stating pregnancy discrimination as a cause for concern.
According to the 2022 Diversity & Inclusion in the Workplace Report women are significantly less likely to state their workplace is an inclusive place to work. 75% of female employees said they believe their workplace is inclusive, compared to 88% of male employees.

Pregnancy discrimination was a key concern for female respondents, with 27% of female respondents stating this was the area of inclusion and diversity which they wanted their company to improve.

There are also clear geographical differences around which particular areas of inclusion companies need to focus on. Discrimination against pregnancy in the workplace, such as insufficient maternity/paternity allowances, was most prevalent in the East Midlands (35%).

The report was conducted by team building experts Wildgoose and surveyed employees from 133 UK workplaces. It asked if their workplace is an inclusive environment, what areas of diversity their organisation could improve upon, and whether they have experienced discrimination or inequality in the workplace.

The report also found that nearly one in five of female respondents have been subjected to discriminatory behaviour in the workplace. More worrying still, 13% said it was not dealt with by the company. This undeniably shows real flaws in the overall culture of some UK workplaces, where efforts are not being made to help women feel respected and safe whilst at work.

Unequal pay is the top cause of inequality in UK workplaces

The survey also revealed that the gender pay gap still exists. More than a quarter of employees said they are aware that they or a colleague are being paid less than someone else in the same position. 29% of female respondents have experienced pay disparity in the workplace, whereas only 25% of males said the same.

Employees in London are most likely to experience pay inequality, while those in the North East are most likely to receive 'pay parity'. Though 20% of people in the North East are still aware of instances in their company where salaries are unequal.

Ensuring pay parity for those in the same job roles is a vital part of creating an inclusive workplace, avoiding inequality, unfairness and even favouritism. Unequal pay causes employees to feel unrecognised for the work they put in.

Commenting on the findings, Wildgoose managing director Jonny Edser states:

"With a potential recession around the corner, businesses will be looking to optimise performance as much as possible. One way to do this is by making sure they're a meritocracy, where people can make the most of their abilities and rise regardless of their gender or background. By combating discrimination, they'll also be creating a more harmonious working environment and higher job satisfaction."
"With so many workplaces suffering from inclusivity issues, it's important that companies make efforts to bring their people together. We know how effective social activities can be in forming bonds between colleagues and creating a level playing field. And that has to be the aim: to make employees realize they're all equal."

https://www.businessmole.com/1-in-4-women-subject-to-pregnancy-discrimination-in-the-workplace/

United States: New Laws And Trends Affecting The Workplace In 2023

Several important laws impacting employers have already taken effect this year, and several more could be finalized soon. Below is a summary of five key laws and trends employers should look out for in 2023.

1. FEDERAL SPEAK OUT ACT PROHIBITS CERTAIN NON-DISCLOSURE AND NON-DISPARAGEMENT PROVISIONS REGARDING SEXUAL HARASSMENT AND ASSAULT CLAIMS

In line with a growing body of legislation relating to sexual harassment and assault claims, the Speak Out Act, signed into law by President Biden and already in effect as of December 7, 2022, prohibits employers from enforcing pre-dispute non-disclosure and non-disparagement clauses in cases involving sexual harassment or assault.

The law defines a non-disclosure clause as "a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement." The law defines a non-disparagement clause as a "provision in a contract or agreement that requires 1 or more parties to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case."

This law is not retroactive, and thus it does not impact the enforceability of non-disclosure or non-disparagement agreements in disputes filed prior December 7, 2022. And importantly, the law does not prohibit employers from using such provisions to protect trade secrets or other propriety information. Nor does this federal law alter the status quo in those states that have already passed similar (or more restrictive) laws allowing victims of sexual harassment and assault to publicly speak about their grievances. However, employers in states without such laws who utilize pre-dispute non-disclosure and/or non-disparagement agreements should revisit them, including by adding proper exceptions to comply with the requirements of the Speak Out Act. Moreover, while this law does not impact non-disclosure or non-disparagement clauses in separation or settlement agreements entered into after allegations of sexual harassment are made, employers should be aware that certain states also limit the use of such provisions in post-dispute agreements.

2. PREGNANT WORKERS FAIRNESS ACT ENSURES REASONABLE ACCOMMODATION FOR PREGNANT WORKERS

The Pregnant Workers Fairness Act ("PWFA"), enacted by Congress and expected to take effect on June 27, 2023, will require employers with 15 or more employees to provide temporary and reasonable accommodations to employees for conditions related to pregnancy or childbirth. The provisions of the PWFA, which are similar to the Americans with Disabilities Act, require only those accommodations that are reasonable, do not impact the essential functions of an employee's job, and do not pose an undue hardship on the employer. Furthermore, both laws require employers to engage in the interactive process.

More than half of all states already have laws requiring employers to accommodate employees with conditions resulting from pregnancy or childbirth. However, employers conducting business in states that lack such pregnancy-accommodation laws will need to make adjustments to their policies and their approaches to accommodating pregnant employees to ensure compliance with the federal PWFA, including by conducting an individualized assessment when faced with a pregnancy-related request for accommodation.

What constitutes a "reasonable accommodation" will vary depending on the circumstances, including the employee's job, the nature of the employer's business, and the employer's resources. However, reasonable accommodations may include a remote-work arrangement, permission to take frequent breaks, or limitations in physical activity. The U.S. Equal

Employment Opportunity Commission is expected to issue guidance with illustrations of the reasonable accommodations that can be provided to individuals covered by the PWFA.

3. NEW RULE FOR INDEPENDENT CONTRACTOR CLASSIFICATION?

On October 13, 2022, the U.S. Department of Labor ("DOL") announced a proposed rule (the "Proposed IC Rule") that would impact the standard used to determine whether a worker is an employee or independent contractor. The proposed rule would rescind the "Independent Contractor Status Under the Fair Labor Standards Act" ("IC 2021 Rule"), which the DOL issued on January 7, 2021. The IC 2021 Rule identifies a five-factor inquiry to guide the analysis on worker classification and assigns more weight to certain factors than others.

Specifically, it designates the nature and degree of control and the worker's opportunity for profit or loss as "core factors." This framework deviates from longstanding judicial interpretation of the Fair Labor Standards Act ("FLSA"). Courts interpreting the FLSA have historically used the "economic realities" test when analyzing questions of worker classification, which is much more flexible than the IC 2021 Rule. It allows for the consideration of multiple factors, does not assign more weight to any factor over another, and looks to the totality of the circumstances.

The Proposed IC Rule would, among other things: (a) align the DOL's approach with judicial interpretation of the FLSA and the "economic realities" test based on the "totality of the circumstances" and (b) rescind the IC 2021 Rule used to decide employee classification.

The comment period closed on December 13, 2022, and employers should be on the lookout for the DOL's final rule. If finalized, the rule will provide more consistent guidance to employers on how to classify their workforce so as to avoid liability and will allow for more flexibility. Regardless of the ultimate formulation of the new rule, employers must still comply with state laws that provide a different or more stringent test for worker classification.

4. THE END OF NON-COMPETE AGREEMENTS?

On January 5, 2023, the Federal Trade Commission ("FTC") announced a proposed rule that would ban all non-competition agreements in employment contracts. The proposed rule applies to both employees and independent contractors in all industries. It not only prohibits employers from entering into non-competition agreements, but also requires them to rescind existing non-compete agreements and inform employees and former employees that such covenants are no longer in effect.

Non-competition agreements, while widely used by employers across various industries to protect intellectual property, are criticized for chilling competition, preventing employees from advocating for themselves, and forcing employees to accept low pay and other unfavorable work conditions. Some states, such as California, have already banned or limited the use of such agreements, while other states, like Illinois, have taken steps in recent years to curb restrictive

covenants in various ways. Even if the FTC's proposed rule is not ultimately implemented, it may inspire additional efforts by federal and state governments to limit the use of restrictive covenants.

If implemented as proposed, the rule will make it important for employers to protect intellectual property, trade secrets, and confidential information using other mechanisms, including non-solicitation agreements and confidentiality agreements.

Expectedly, the proposal has elicited strong opposition from employers, some of whom are taking the position that the FTC may not have the authority to impose such a rule. The FTC initiated a 60-day comment period (which ends on March 10, 2023), and invited members of the public to submit their thoughts on the proposal. At the close of the comment period, the FTC is expected to review the submissions and make changes in line with the feedback received.

5. TRENDING NOW: SALARY AND PAY TRANSPARENCY LAWS

In a continuing trend that began a number of years ago, several states and local jurisdictions have recently enacted or are considering enacting salary and pay transparency laws. While these laws have some variations, they generally require employers to provide job candidates and employees with position-specific salary information and pay ranges. These laws differ regarding at what point in the hiring process the employer must provide salary information, whether the candidate or employee must ask for salary information in order to be entitled to receive it, whether the law applies to independent contractors, and through what medium salary information needs to be communicated to candidates and employees. Some of these laws go beyond salary disclosure and include pay-reporting obligations, requirements to pay workers equitably, and document-retention duties.

Despite these nuances, these laws collectively demonstrate the growing legislative trend of requiring greater transparency in pay, all with an eye toward promoting pay equity. Since that publication, New York State and Rhode Island have joined the list of jurisdictions with pay transparency laws. Employers in jurisdictions with salary and pay transparency laws should consult legal counsel to develop a plan for ensuring compliance with those laws applicable to them.

https://www.mondaq.com/unitedstates/employee-rights-labour-relations/1274826/new-laws-and-trends-affecting-the-workplace-in-2023

Bias Against Bodies: Why is it still legal to fire someone for being fat?

It's past time to address weight-based discrimination in the workplace.

You read that right: There are currently no federal U.S. laws that protect people from weight-based discrimination, and only a handful of cities and states have such legislation on the books. Professor Esther Rothblum, who co-edited The Fat Studies Reader and has spent her career researching weight stigma and LGBT relationships, credits the normalization of anti-fatness with the lack of legal protections. "People really hate to admit that they're sexist or racist or ageist," Rothblum tells WBEZ's Reset. "But if you ask people about fat oppression, they will tell you they hate fat people."

This extends to hiring practices and the workplace. Rothblum has conducted studies where participants evaluate identical résumés accompanied by either a photo of a thin woman or a photo of a woman who weighed slightly more. "We had college students rate the résumé," Rothblum says. "What we found is that when students got the resume that was accompanied by the fatter woman, they rated her more negatively." They rated the slightly larger woman lower in areas such as supervisory potential, self-discipline, professional appearance, personal hygiene, and ability to do a physically strenuous job."

While there are no federal measures protecting fat people specifically from workplace discrimination, lawyer Brandie Solovay emphasizes that state and federal disability regulations may protect some fat workers. Solovay runs the Fat Legal Advocacy, Rights, & Education Project. "We never want to discourage to reach out in case they are being discriminated against based on their weight," Solovay tells Reset. "They should definitely contact a nonprofit in their area, a lawyer, or even Fat Legal Advocacy, Rights, & Education Project."

Corporate recruiter Michelle Duffie wrote about combating workplace fatphobiaon LinkedIn.

"I'm not asking for the moon and the stars, I'm asking to be treated like everybody else," Duffie tells Reset. "If companies could employ more opportunities to decrease unconscious bias—or make their recruiting teams more aware of when unconscious bias creeps in—I think fat people would have a better chance at getting opportunities at workplaces."

Rothblum agrees that, "It's really important to hire employees in a way that doesn't focus on their appearance so much." She adds that promotions based on objective criteria and body diversity in marketing materials would also help create more inclusive workplaces.

Here are some facts and figures about weight-based discrimination in the workplace:

- In the United States, only two states and a handful of cities have laws explicitly prohibiting weight-based employment discrimination.
- Fat people make less money than their thin peers.

- But it's tricky to put a number on the so-called "weight penalty" because salary goes down as weight goes up—especially for women.
- Fat people are less likely to get hired in public-facing positions, and they're more likely to get passed over for promotions or raises.
- Weight-based discrimination starts to affect women at a much lower weight than men.
- Anti-fatness permeates every level of the employee experience, including office infrastructure. For example, some corporations invest in high-end furniture that does not support or fit larger bodies.

https://www.wbez.org/stories/why-is-it-still-legal-to-fire-someone-for-being-fat/328df85b-d8b1-44eb-9e91-b93dfd3f037f

Balancing Anti-Discrimination Policies with Religious Protections

Most employers know their workforce encompasses a wide range of different religions, and sometimes that results in unintended conflicts with the company's anti-discrimination and social media policies. What should an employer do if employees say things that are offensive toward certain groups or religions?

Frequently making offensive, unwelcome remarks about a person's religious beliefs or practices is harassment if it goes beyond simple teasing, one offhand comment or an isolated incident that isn't very serious, according to the U.S. Equal Opportunity Commission.

For example, subjecting a Muslim co-worker to many disparaging jokes about terrorists would be harassment. Repeatedly using derogatory terms or mocking someone for a religious practice, like wearing a Star of David necklace or praying before eating lunch, would constitute harassment.

It's important to know that the First Amendment rights in the U.S. Constitution don't permit employees to say whatever they want. "This is a frequent misunderstanding," said Alyesha Dotson, an attorney with Littler in Seattle. "There is no right to free speech in private employment. It only stops federal or state government from interfering. It doesn't protect an employee in the private sector."

However, under the National Labor Relations Act, employees do have the right to discuss wages and the terms and conditions of employment. "The employer is not allowed to chill that discussion," Dotson said.

You can discipline or fire employees for bad-mouthing the employer or other people's religions if their comments are not related to the terms and conditions of employment, although that distinction isn't always simple. "This is not cut and dry," Dotson said.

The same legal rules generally apply to both a company's intranet and external social media. Even if it's legally permitted to, an employer still might decide to refrain from disciplining an employee for making remarks it doesn't like.

"If the employees are taking positions that are reasonably common in public discourse, there is no benefit in punishing them," said Peter Cappelli, director of the Center for Human Resources at the Wharton School of the University of Pennsylvania in Philadelphia. "It just looks petty and intolerant. That is obviously the case for political issues associated with supporting and opposing legislation. I don't think any company wants the reputation of requiring that all employees believe what their leaders believe on policy issues."

"The exception is when employees are engaged in activity that is so out of the mainstream that by association it damages the company," he added.

Disciplinary action might be warranted if a person identifies themselves as your employee or wears company logos while engaged in questionable behavior. "What I would do as an employer is state a policy going forward, giving [employees] guidance as to what is unacceptable, and I would be tolerant of anything that is in a gray area," Cappelli said.

If certain values, like diversity and inclusion, are important to a company, it might decide it's worthwhile to take on any legal risk that comes from disciplining an employee who makes comments that don't support those values.

"Sometimes employers hold their values to be so near and dear to their heart that it defines the brand," Dotson said. "An employer might make that decision with legal advice to take on that risk for brand and business reasons."

Recent Case

In a recent case, two flight attendants for Alaska Airlines sued the airline and their union for religious discrimination because they were fired in 2021 after posting comments on the company intranet. They criticized the airline's support for the Equality Act, which was proposed federal legislation that would have prohibited employment discrimination on the basis of sexual orientation and gender identity.

"Does Alaska support: endangering the Church, encouraging suppression of religious freedom, obliterating women [sic] rights and parental rights? This act will Force [sic] every American to agree with controversial government-imposed ideology on or be treated as an outlaw," one of the flight attendants wrote.

The airline deleted the comments and said they had violated the company's anti-discrimination policies.

The flight attendants said they were exemplary workers, and their comments were based on their Christian religious beliefs. The lawsuit claimed the airline's diversity trainings focused on other protected classes while staying silent or nearly silent about religious discrimination. The flight attendants also argued the union didn't defend them as vigorously as it defended others because of their religion.

On Nov. 23, 2022, the U.S. District Court for the Western District of Washington dismissed the claim against the union.
In its answer to the plaintiffs' amended complaint, Alaska Airlines denied the plaintiffs were exemplary employees. Alaska Airlines also denied it had created a work environment hostile toward religion.

It can be challenging for employers to determine which comments are based on religious beliefs, rather than personal or political beliefs. To determine whether an employee's comments represent a sincerely held religious belief, an employer has to go through a case-by-case analysis on an individual basis, Dotson said.

Tips for Employers

It's helpful to educate employees with examples of what's acceptable and unacceptable under your anti-discrimination policy and social media policy. "People say we have an anti-discrimination policy, but do we ever say what it looks like to honor it?" asked Ed Hasan, CEO of Kaizen Human Capital and an adjunct professor at Georgetown University in Washington, D.C. Employers could advise workers to follow a culture of civility, not attack others for their beliefs, and not use hate speech.

"When an organization shares their thoughts or topics come up that could be controversial, they have to proactively define the parameters in which people can have a healthy conversation," Hasan said. "They have to have a clear definition of harassment or bullying in their policy."

Applying company policies consistently with everyone will help to avoid discrimination lawsuits.

Sometimes companies want to avoid any discussion of religion in the workplace, but that's a mistake, Hasan said. "You're actually not allowing people to be their authentic self when they show up to work," he said. Suppressing religion "is going to create conflict."

Faith-based employee resource groups are one way to encourage healthy dialog around religion. About 63 percent of American adults identify as Christian, while 2 percent identify as

Jewish, and 1 percent identify as Muslim. About 29 percent consider themselves unaffiliated or having no religion, according to data from the Pew Research Center.

Employers should review their social media policy, encompassing both the company intranet and external social media, each year and update it to conform with case law. "Employers also need to train their HR folks and managers about implementation of their policies," Dotson said. "Education is really important."

Because information travels so fast on social media today, HR professionals should understand that an employee liking or commenting on a post can be considered protected activity if it's about the terms and conditions of employment. Some company's social media policies have been written too broadly and have been invalidated by the courts, Dotson said.

https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/religious-dialog-anti-discrimination-policy.aspx