Bloomberg Law

2025

Predictions That Cut Through the Commotion

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Introduction

Bloomberg Law 2025: Predictions That Cut Through the Commotion

The law and how it's practiced are dominating public discussion more now than perhaps any other time in recent memory. From landmark Supreme Court decisions to unprecedented political shifts, and from thorny constitutional challenges to massive technological advances, and from thorny ethical dilemmas to massive technological advances, changes in the legal landscape have drawn attention and generated commentary to a degree that can be almost overwhelming for attorneys who are trying to make sense of it all.

It's in this noisy arena that Bloomberg Law has tasked its legal analysts with cutting through the commotion, identifying key developments and data points, and following those themes into the future to highlight the trends that lawyers should be watching closely in the year ahead.

This report, based on the latest installment of Bloomberg Law's annual outlook series, features more than 20 articles that look ahead to what 2025 has in store for legal professionals and the legal industry.

This year's iteration features deep dives into trends across five broad topic areas: Litigation, Transactions & Contracts, Regulatory & Compliance, Artificial Intelligence, and the Practice of Law.

Our **Litigation** analysts explore major changes in case law in 2024 and what they portend for 2025. Topics include Chevron deference, fair use, antitrust, and litigation financing. The articles in the Litigation section cover:

- Why the death of Chevron deference won't mean the death of corporate liability
- How Meta's decision to release an open source LLM might tip the scales in fair use lawsuits
- Why the "arbitrary and capricious" standard will be the next court battle over agency power
- The trends to watch for in antitrust litigation in the upcoming year
- Why a new FTC lawsuit could spell danger for pharmacy benefit managers
- Where the new growth areas are for the litigation financing trend
- What makes the NLRB uniquely insulated from courts' clawbacks of agency power

Our **Transactions & Contracts** analysts explore the forces shaping key markets of interest in both commercial and corporate transactions. These include M&A innovations, supply chain management challenges, and contract technology. The articles in the Transactions & Contracts section will cover:

- How much of an impact 2025's antitrust enforcement efforts will have on merger activity
- The challenges to watch for in commercial transactions, from AI regulation to de-dollarization
- Why supply chains will face new risks at home and abroad, and how businesses will respond
- What attorneys see as the likeliest SEC targets in 2025—and whether they're right
- Whether the recent popularity of going-private transactions represents a new dealmaking trend

Our **Regulatory & Compliance** analysts delve into important areas of corporate risk, from ESG to privacy and from fair practices to DEI, to determine what legal compliance in these areas will look like in 2025. The articles in the Regulatory & Compliance section will cover:

- Why this year's breakout of new state privacy laws is only the beginning
- Why companies' climate goals will be subjected to new scrutiny by investors
- How anti-DEI challenges against corporations may fare in 2025
- How a rush of state laws curtailing drugmaker discount policies will impact big pharma

- What the closing of a loophole in cannabis law would mean for the DEA, FDA, and state regulators
- The job-posting changes for federal contractors that will have everyone, especially their employees, talking
- Whether regulators' focus on banks is opening the door for fintech in nonbanks

On the topic of **Artificial Intelligence**, our analysts examine the most compelling issues that have accompanied the dramatic rise of generative AI in 2024 and project how those issues will impact legal organizations and professionals in 2025. The articles in the Artificial Intelligence section will cover:

- What the post-election era holds for purveyors of deepfakes and misinformation
- Why growing concern about AI's environmental toll will have tech firms hedging their climate claims
- Three reasons why the SEC won't stop pursuing "AI washing" claims against investment advisers
- Whether law firms wanting to train early-career transactional lawyers on AI will have to train them in basic contract drafting skills first
- What law schools have planned to meet the demand for more AI-experienced new attorneys
- Whether AI oversight efforts will follow privacy's path through state laws or cybersecurity's path through voluntary frameworks

Finally, the current state of the **Practice of Law** features analyses that explore the individual and interpersonal issues that legal practitioners will contend with as they navigate the year ahead, including DEI, technology, remote work, and attorney well-being. The articles in the Practice of Law section will cover:

- How law firms are deflecting anti-DEI lawsuits without changing their programs—and how corporations can do the same
- The ratio of RTO and work-from-home that's just right for peak billable-hour efficiency
- What lawyers' survey responses reveal about the future of legal well-being programs
- Where high-tech project management software is gaining traction in an industry where email still rules
- Whether knowledge management is falling out of favor with in-house lawyers as a legal ops priority
- How lawyers' potential lack of awareness about the ethical issues of AI could have negative consequences

Join Bloomberg Law's analysts as they preview the themes and trends that they will be keeping an eye on in 2025.

Litigation

Agency Power on Life Support in 2025

Michael Maugans
Senior Legal Analyst

In June, the US Supreme Court ended one longstanding **doctrine** of agency deference in ***Loper Bright Enterprises v. Raimondo***. In ***Ohio v. EPA***, decided a day before Loper, the high court signaled an interest in severely diluting **another**.

After a blockbuster year for administrative law, 2025 is likely to see a further weakening of agency power under the Administrative Procedure Act (APA). The Supreme Court is already slated to hear arguments on the viability of the famous "arbitrary and capricious" standard of review, which has historically afforded agencies extreme deference with respect to their own findings and conclusions of fact.

In 2025, conservative courts, taking their cue from *Ohio*, will begin to chip away at this traditional deference standard, and the volume of decisions deeming agency actions arbitrary and capricious will escalate.

Ohio v. EPA Sets the Stage

A five-justice majority in *Ohio* granted **emergency stay request** from several states, industry groups, and companies, holding that the Environmental Protection Agency's so-called "good neighbor" rule to reduce ozone pollution failed to "reasonably explain" how the plan would be implemented. In his opinion for the majority, Justice Neil Gorsuch wrote that the challengers were likely to prevail on a claim that the agency rule was "arbitrary and capricious."

Subsection 706(2)(A) of the APA is perhaps the most **well-known standard** for judicial review pertaining to agency actions. This section instructs federal courts to set aside agency actions, findings, and conclusions that the court finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

In *Loper*, the high court made clear that it is the role of the reviewing court, not the agency, to best determine the reading of a statute. The *Loper* court also held that, for now, the APA's standards are the only ones to be used by courts in reviewing challenges to agency actions.

While at first glance this might seem like a rapprochement with agencies, the contemporaneous *Ohio* decision portends that the APA standards for judicial review aren't necessarily immune from judicial interpretive overhaul.

Extreme Deference to Agency Expertise

Historically, courts have accorded agencies' determinations about scientific and technical data within their expertise an "**extreme degree of deference**." This is particularly true for modeling and statistical analysis. The obvious rationale for this level of deference is that judicial forays into areas requiring high levels technical expertise should be limited.

Under the APA and the arbitrary and capricious standard, the court is ostensibly prohibited from questioning the agency's data, testing methodologies, and other factual determinations that factor into the agency action. Rather, the agency is simply **required** to provide a rational connection between the facts and the decision made by the agency and to give a reasonable, satisfactory explanation for its actions.

In contrast to this precedent of extreme deference accorded to agencies on matters of technical and scientific expertise, the court in *Ohio* appeared receptive to allowing greater scrutiny of the administrative record and of internal agency decisions when applying the arbitrary and capricious standard of review. When taken in context with the other agency-diminishing decisions issued in 2024 (***Corner Post, Inc. v. Board of governors of the Federal Reserve System***, ***SEC v. Jarkesy***, et al.), all signs point to an acceleration of judicial oversight of those actions.

FDA v. Wages and Lion Investments

The strength of the APA's judicial review standards will be tested next year when the Supreme Court hears arguments in ***Food and Drug Administration v. Wages and White Lion Investments, L.L.C***. The court will review a **decision** by the US Court of Appeals for the Fifth Circuit holding that the FDA's denial of an application to market new e-cigarette products was arbitrary and capricious.

Notably, there's now a circuit split on whether the FDA acted arbitrarily and capriciously in denying pre-market tobacco applications like the one at issue in *White Lion*. While the Fifth and Eleventh Circuit Court of Appeals have set aside the agency action, five other circuit courts have upheld the FDA's rules on marketing e-cigarette products.

White Lion may potentially shed light on whether the arbitrary and capricious standard will face a similar fate as the now-defunct *Chevron* doctrine and whether agency power will be further boxed in.

What Deference Will Be Left?

Beyond broadening what agency actions can be considered arbitrary and capricious, it's also foreseeable that the Supreme Court will create carveouts to the deferential standards of the APA—much like it did with the **major questions doctrine** as a legal end-run around *Chevron*.

While *Ohio* and *White Lion* won't radically change the degree of deference owed to agency actions under the APA overnight, they could kick-start a larger sea change—one where yet another agency deference standard meets the same fate as *Chevron*.

FTC to Expand Drug Middlemen Price Hike Fight in 2025

Laura Travis
Legal Content Specialist

On Sept. 20, the Federal Trade Commission filed an **administrative complaint** against the three largest pharmacy benefit managers (PBMs) in the US. The FTC alleged that Caremark Rx, Express Scripts, and Zinc Health Services employ anticompetitive rebating practices that have hiked the price of insulin for consumers.

Developments in this suit and a possible resolution in the coming year could be a big step forward to breaking down PBM domination over prescription drug pricing and bringing back business to smaller pharmacies. It's also safe to assume that the FTC will take additional action against entities involved in drug pricing in 2025.

Exploitative Cost-Sharing Allegations

The FTC's complaint alleges that the PBMs violate the **FTC Act** by unfairly competing through rebate pricing, excluding low wholesale acquisition cost (WAC) insulin products from formularies, and exploitative cost sharing.

In order to gain the upper hand against drug manufacturers and to raise their profits, the PBMs began to threaten drug manufacturers in 2012 with excluding prescription drugs from their formularies, the FTC alleges. To ensure placement on their formularies, manufacturers began offering higher rebates to the PBMs for widely used drugs like insulin. (Formularies are lists of prescription drugs covered by a prescription drug plan.)

To offset the higher rebates, manufacturers began raising drug list prices for consumers, leading to cost-sharing between consumers and manufacturers based on the rebate. Consumers often end up paying more than the net price for their prescription drugs.

Manufacturers began marketing lower WAC unbranded insulin options to cut consumer cost while allowing their higher WAC branded options to remain on formularies, according to the FTC. Although they had a similar net price, the PBMs "methodically disfavored the low WAC insulin products on their flagship commercial formularies, preferring only the high WAC versions, with high rebates and fees," the FTC alleges.

Breaking Down PBM Power

The PBMs have developed control over insulin pricing through formulary exclusion to drive profits, according to the FTC. Because drug manufacturers also want to make a profit, they're willing to offer PBMs high rebates to be listed on formularies.

If the FTC is successful, enforcement action would force PBMs to introduce more competitive and inclusive drug pricing practices, such as collecting rebates in a fairer way and including lower list-price drugs on formularies. The suit will nevertheless have an impact on drug pricing regardless of the outcome.

The FTC's complaint is the culmination of years of increasing scrutiny of rising drug prices and PBMs. States have been passing **laws** to address PBM power; Congress has held **hearings** with PBM executives; and last year, Medicare Part D enrollee insulin costs were **capped** at $35 a month.

The FTC's action stands out because it marks the strongest step yet that the federal government has taken against PBMs, and they demonstrate the agency's willingness to act. For many years, players in the prescription drug industry have abided by the PBMs' system because of the great financial power and leverage PBMs held, and the system became the status quo. However, the FTC's action serves as a warning to PBMs and to players that further action is coming beyond just insulin costs.

Congress has long sought to pass legislation curbing PBM power. Because this is largely a bipartisan issue, the switch from the Biden to Trump administrations will not necessarily impede its progress—although other new legislation under the new leadership might take priority in 2025.

Additionally, the FTC complaint will put other industry players on alert for their role in high drug prices and may motivate them to lower their prices.

Action Against Other Players

The FTC's **press release** announcing the insulin suit said that the agency may sue drug manufacturers in future enforcement actions and that "all drug manufacturers should be on notice" regarding their role in drug price fixing.

The FTC's complaint alleges that manufacturers have made efforts to bring down insulin cost but that they ultimately give in to PBMs' demands to stay on exclusionary formularies. The threat of FTC action, particularly for a widely used drug like insulin, will factor into how drug manufacturers work with PBMs and possibly reverse their complacency for the alleged practices hiking up drug costs.

However, it's not unlikely that 2025 could bring action against drug manufacturers even if practices change.

Bringing Back Business to Small Pharmacies

Changes in PBM drug pricing practices resulting from the FTC's suit will bring change to smaller pharmacies. Before announcing their suit, the FTC released a **report** discussing the alleged drug cost inflation and the PBM market domination that came at the expense of smaller pharmacies.

Large PBMs commonly concentrate different parts of the drug supply chain through vertical integration where one entity owns the PBM and other contributors to the drug supply chain. PBMs allegedly steer consumers to their own affiliated pharmacies and disadvantage smaller pharmacies via contracted payment amounts. Because of the FTC suit, smaller pharmacies will find a market with more equal and fair opportunities to compete for business with larger PBM-affiliated pharmacies.

There are a couple reasons why it's likely that the FTC will target anticompetitive practices harming smaller pharmacies in 2025: (1) the agency has published findings about this phenomenon and (2) several states have **passed laws** this year to prohibit PBMs from unfair pricing practices toward unaffiliated pharmacies and to curb preferential treatment.

The FTC has focused on large PBM market dominance, so it follows it would try to break down their control and to create a more competitive market. With state laws and potential FTC action championing smaller pharmacies, Congress may also look to pass federal legislation prohibiting practices that help concentrate business for PBMs.

FTC Suit Success and Impact

PBMs will likely argue that the FTC lacks authority under the FTC Act to bring enforcement actions against them. They may borrow a page from Express Scripts' September **suit** against the FTC, which asserts issues such as the **non-delegation** doctrine and **Article II** executive vesting power. However, these arguments have little chance of success because they're used infrequently and are outdated.

The FTC has historically had enforcement power to curtail anticompetitive and unfair practices under Section 5(a) of the FTC Act and will likely prevail over the defenses raised. The agency's lawsuit will be a major part of a larger trend of government actors acting to combat PBMs' role in rising drug prices in 2025. The suit against PBMs for insulin price hiking is very specific and targeted but will have a broad impact.

Even if the FTC fails or faces significant obstacles, it has alerted PBMs, industry players, the government, and the public to the role that PBMs could be playing in the high cost of drugs. This will lead to a larger push for further action and change.

Litigation Finance to Seek Broader Adoption in 2025

Robert Dillard
Principal Legal Analyst

Litigation funding next year will continue its push to become more mainstream as a source of capital for litigants and as an alternative to traditional contingency fee arrangements. The industry's broader adoption, including among the **largest US law firms**, will be complemented by growth in areas like insurance industry participation and emerging secondary markets for funders.

The laws governing the industry are likely to remain fragmented, however, as states continue to adopt their own rules in the absence of nationwide standards.

Litigation Funders Are Still Attracting New Clients

New client demand for funding remained steady in 2024. Bloomberg Law survey data indicates that in 2024—as in 2023—most of funders' clients were new clients.

Bloomberg Law surveyed 23 litigation funders in its 2024 Litigation Finance Survey regarding their use of litigation finance. Of the 22 funders who answered a question regarding first-time clients, the respondents reported that an average of 66% of their clients are using their services for the first time. In 2023, 18 respondents reported that an average of 71% of clients were new clients.

Majority of Litigation Funders' Clients Are First-Time Clients
'What percentage of your litigation finance clients are first-time vs. repeat clients?'

Source: Sources: Bloomberg Law Litigation Finance 2024 Survey, conducted from Aug. 27, 2024 to Sept. 16, 2024. Bloomberg Law Litigation Finance 2023 Survey, conducted from Sept. 20, 2023 to Oct. 6, 2023. Percentages were rounded to the nearest whole number.

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The data suggest that funders are continuing to attract new clients in search of capital to support their matters rather than working with a more limited pool of repeat clients.

Insurance Will Present Broader Options for Clients

Firms and their clients must consider a number of **criteria** when determining how best to secure litigation funding. As the industry matures, **insurance** will play a larger role in reducing some of the downside risk associated with these transactions by providing additional options to control the costs associated with traditional, non-recourse funding.

Insurance brokers have long provided **judgment preservation insurance** to help clients guarantee at least a portion of an award pending appeal. But brokers also **provide products** that can serve as complements or alternatives to traditional funding deals, which can help reduce the cost to clients.

Secondary Markets Will Provide a Source of Liquidity

Another feature of the industry reflective of its normalization is the **growth of the secondary market** for investments. Secondary investments, where a party acquires an interest in the case from an original investor, can be in the form of an investment in a single case or an entire portfolio. These secondary transactions can provide an **opportunity for funders** to gain liquidity by selling a portion of their existing portfolios at various stages of the litigation timeline.

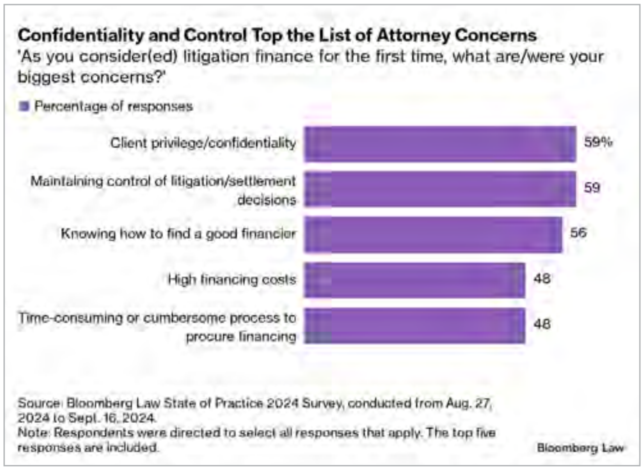
From the perspective of litigants and their attorneys, a growing secondary market is a sign that additional capital is finding its way toward litigation finance and, ideally, encouraging more competition among funders offering more attractive pricing.

Potential Headwinds

For litigation finance to continue attracting wider adoption, the industry will have to contend with clients' largest reservations: costs; the often lengthy process to procure funding; and questions about maintaining control over settlement decisions.

Over two-thirds of the 22 funders who responded to Bloomberg Law's 2024 State of Practice 2 Survey said that their clients were concerned about the "time consuming or cumbersome process to procure financing," while 54% reported that clients were concerned about high financing costs.

Cost and process weren't the largest concerns among lawyers responding to the State of Practice survey, however, but they were still a significant issue behind issues like maintaining control of the litigation (59%) and client confidentiality (59%).



New Regulation of Litigation Funding

Emerging state legislation this year reflects a top attorney concern with litigation funding: control. Three laws seek to restrict litigation funders from exercising any control over litigation:

- **Indiana:** The governor signed a bill into law in March that requires that the contents of financing agreements be subject to discovery and mandates the disclosure of litigation funding if the agreement was financed by a foreign person or entity. It also prevents a funder from making any decisions or having any influence over the civil proceedings.
- **Louisiana:** Effective Aug. 1, Louisiana's law places restrictions on foreign third-party litigation funding. The law also restricts all funders' ability to control the litigation.
- **West Virginia:** The West Virginia legislature in March expanded the scope of an existing consumer protection law to include restrictions against funders controlling the litigation or providing legal advice to the consumer.

At the national level, Rep. Darrell Issa (R-Ca.) in October introduced the Litigation Transparency Act of 2024, which seeks to codify rules mandating the disclosure of the identity of the litigation funders and their agreements to all the parties in the litigation.

The proposal represents a significant step toward trying to address fears regarding foreign involvement in domestic civil litigation. Yet, even after control of Congress and the Presidency passes to the Republican party next year, political polarization in the federal government makes it difficult to expect that such a nationwide set of rules will be passed into law in 2025.

Post-Loper, Tort Litigation May Eat Regulatory Savings

Erin Webb
Principal Legal Analyst

The death of ***Chevron* deference** this year is expected to change the corporate approach to regulation. The US Supreme Court's **new decree** in ***Loper Bright v. Raimondo***—that courts must **now** find the "best" interpretation of a statute themselves—has been described as a **boon for business**.

Compliance with regulations is **expensive**, after all. Most corporations now have entire internal compliance **programs**. Less regulation, **advocates** say, **decreases that expense**.

But this view skips over two important considerations. First, the process itself of challenging regulations in court will be **unpredictable**—which is expensive for companies. Business favors predictability, and even burdensome regulations were at least precise.

Second, and more important over the long term, federal agency regulations aren't the only way businesses are regulated. State regulations and tort litigation loom as potential fires that could burn hotter than the frying pan of federal regulation under *Chevron*.

Areas like **social media**, **artificial intelligence**, or **per- and polyfluoroalkyl substances (PFAS)**, which have seen few sweeping regulations to date, could prove to be tort litigation hotbeds next year and beyond. This trend will be hastened by the death of *Chevron*—especially given **court challenges** to the EPA's recent PFAS rule.

Undoing Regulations Promises a Bumpy Ride

The impact of post-*Loper* litigation challenging existing regulations is already **uncertain**. As each regulation is disputed, there may be differing court orders, including **preliminary injunctions**, that make regulations enforceable in **some places** but **not others**.

Expect multi-jurisdictional compliance to become exponentially more complicated as regulatory challenges become a more **tantalizing prospect** for litigants.

Fifty-One Different Flavors of Regulation?

Pressure from *Loper* will likely chill federal agency regulation. The result will be to drive states to take a more active part in regulating, as they do now in areas like **data privacy** and **most** insurance **issues**.

But regulation at the state level sacrifices uniformity. Each state (and the District of Columbia) will come to its own policy conclusion on each issue, making compliance more expensive for companies.

In addition, state court deference to state agencies **varies**, and *Loper* doesn't control at the state level. Some state courts still defer to their agencies, using rules similar to *Chevron*. Others follow a *Loper*-style rule, and still others fall somewhere in between.

The variety inherent in state jurisprudence adds yet more layers of complexity, unpredictability, and cost to regulatory compliance.

Tort Litigation Can Regulate Too—At a Price

When regulation is absent or insufficient—especially in industry areas that can affect consumers—tort litigation will often fill in the gap. Tort litigation can even be described as **a form of regulation**. But for companies, defending against tort litigation brought by consumers is expensive.

Regulations Often Evidence a Desire Not to Repeat Harm

National crises or critical events often push statutes and regulation. For **example**, the 1911 **Triangle Shirtwaist Factory fire** was one of the most serious workplace accidents in US history. The ensuing publicity ultimately **drove** several **labor laws and regulations** to protect workers.

Similarly, the 1929 stock market crash and resulting Great Depression prompted the creation of the **Securities and Exchange Commission** in 1934, which **regulates** many **aspects** of public companies.

Later, Ralph Nader's 1965 book Unsafe at Any Speed described the grave dangers of General Motors' Corvair, and helped lead to the creation of the National Highway Traffic Safety Administration, which now enforces numerous regulations.

During the same time period, Rachel Carson's 1962 book, Silent Spring, helped launch the Clean Water Act and various regulations protecting waterways.

Tort Litigation Will Fill a Regulatory Void

But when existing laws aren't enough, tort litigation can follow. Some of the biggest mass tort litigation events in history occurred in a space that wasn't regulated, or not regulated in such a way that avoided public harm.

- **Asbestos.** For the past 80 years, physical injuries to people exposed to asbestos have been the basis of massive amounts of tort litigation. The cost of defending these suits bankrupted dozens of asbestos manufacturers, and drove special bankruptcy procedures to compensate plaintiffs. After a 1991 court decision struck down the EPA's attempt to regulate asbestos, in 2022 the agency finally promulgated a sweeping rule banning remaining uses. That ban, too, is currently being challenged in court. While there are contentions that the ban will be costly, the trail of bankruptcies behind asbestos tort litigation is also extremely costly.
- **Tobacco.** Starting in the 1940s, the tobacco industry faced decades of tort lawsuits on behalf of individuals, as well as public nuisance suits brought by states. But the Supreme Court held in 2001 that the Food & Drug Administration lacked the authority to regulate tobacco products. The 2009 Family Smoking Prevention and Tobacco Control Act placed tobacco products squarely—and unquestionably—within the FDA's jurisdiction. US smoking rates began to fall in the 1960s and continue to do so.
- **Earplugs**. Injured service members brought one of the largest mass tort actions ever against 3M, alleging injuries based on their use of 3M's earplugs. The complaint alleged violations of an EPA regulation governing quality standards, but the standard used was decades old. The FDA declined to exercise its enforcement discretion over hearing protection, and the Occupational Health & Safety Act didn't apply, because the setting was military. One result of this white space between agencies ended up being a $6 billion settlement.

It's possible that these scenarios won't come to pass. Maybe *Loper* will limit deregulation, too. But given the increasing number of agency challenges in the courts, companies should consider shifting focus—and maybe funds—away from federal regulatory compliance, and toward litigation in 2025 and beyond.

Does Open Source Have a Fair Use Problem?

Golriz Chrostowski
Principal Legal Analyst

Meta Platforms Inc. **announced** in July that it would release Llama 3.1, the "first frontier-level open source AI model" and one of the world's largest publicly available pre-trained large language models (LLM).

The release of a pre-trained open source model creates a curious dynamic in the question of fair use: Is copyright infringement more defensible under the fair use doctrine when considering an open source model or a closed source model? And did that play a role in Meta's decision to make its LLM source code publicly available?

Courts handling copyright infringement lawsuits against the developers of LLMs will consider these questions and more in 2025, as they weigh fair use on a case-by-case basis.

Open Source Versus Closed Source

Open source and closed source LLMs differ largely in how they're accessed and controlled lability.

An open source LLM can be downloaded by anyone for free without a licensing fee. Users can access, modify, and apply the source code to their specific needs.

Open source access "will ensure that more people around the world have access to the benefits and opportunities of AI, that power isn't concentrated in the hands of a small number of companies, and that the technology can be deployed more evenly and safely across society," said Meta Chairman and CEO **Mark Zuckerberg** in the Llama 3.1 announcement.

A "key difference" between Meta and closed model providers, Zuckerberg said, is that the business model isn't based on selling access to AI models.

A closed source LLM, like OpenAI's ChatGPT or Google's Bard or Gemini, on the other hand, isn't publicly available and requires a licensing fee for use. There's a direct commercial value to them. The source code can't be seen or modified by the general public. The ability to use and modify these LLMs is highly dependent on the licensing agreements, which are often very expensive.

Setting aside their differences, these open and closed source LLMs were **allegedly trained** on pirated copyright materials, among other public content, and face **several lawsuits** for direct copyright infringement. The developers of the LLMs are relying on the fair use defense to absolve them of liability.

Fair Use Factors

In the face of a copyright infringement claim, a defendant can rely on the **fair use doctrine** to excuse their infringement of copyrighted material.

The affirmative defense is evaluated on **four factors**:

- the purpose and character of the use, including to what extent the new work is **transformative**, and whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount of the portion of the copyrighted work used and how substantial it is; and
- the effect of the use on the potential market for, or value of, the copyrighted work.

With respect to the first factor, it's a **balancing act**. The more transformative the new work is, the less the other factors, including commercialism, matter. The less transformative the new work is, the more its commercialism will weigh against a finding of fair use.

Large Language Models' Fair Use Defense

Undoubtedly, the developers of LLMs will use several arguments to show that their use of copyrighted works was transformative. Training their models on copyrighted works and allowing them to digest the works in their entirety serves a new and different purpose than the original work. The use of the copyrighted work by LLMs goes beyond just regurgitating sentences or paragraphs of a particular book or providing a summary of the plot.

The LLM uses the text to better understand the **human language**, tracking and learning the statistical relationships between words in a sentence and storing that information as sequential data.

Consequently, the developers are likely to argue that their use expands the utility of copyrighted work, contributing further to public knowledge.

Right now, Llama provides a user with an excerpt of a copyrighted book, if prompted. However, if the user asks it to provide more than a paragraph, it says that it is unable to because the specific book is copyrighted material. It then suggests that the user try Amazon or Google Books to preview more, or borrow or purchase a copy from the library or bookstore. This, arguably, protects the rights of copyright holders while maintaining a transformative database of content, akin to the non-infringing fair use found in ***Authors Guild v. Google, Inc***.

Is Open Source More Excusable Under the Fair Use Doctrine?

Even if a court were to question the extent of transformation, Meta tipped the scale of fair use further in its favor and set itself apart from the other developers by making their LLM open source. With an LLM that's free and available to the public, Meta can now argue that their use was primarily for **public benefit**, even if Meta and its partners derive some commercial benefits. It's for the greater good, they'll likely claim.

Yet there's something unsettling about an open source LLM that was trained on copyrighted material, free for everyone's consumption. While users don't have access to the specific copyrighted content through the LLM, the LLM itself was trained on a dataset which included enormous amounts of such copyrighted material.

Users can download, modify, and employ the LLM like any other developer. According to **Meta**, as of August 2024, there were more than 60,000 Llama-derived models. Put another way, that's 60,000 developers that didn't license the use of copyrighted content when developing their use-specific LLM.

The argument could be made that at least with a closed source LLM, the licensing and use is restricted. In addition, many media companies are choosing to forge partnerships with OpenAI, rather than pursue litigation for copyright infringement.

OpenAI has signed multi-year partnerships with companies that include **Hearst**, **Conde Nast**, **TIME** magazine, **the Financial Times**, Associated Press, The Atlantic, and Vox Media, giving the AI research organization access to large archives of text owned by the publishers and giving the publishers fair value for their content.

These are only some of the complex, cutting-edge issues that judges will have to consider in 2025 and beyond, when deciding the copyright cases brought against the developers of LLMs. A ruling against the developers will lead to a host of issues about whether and how much the LLM developments can be undone.

Antitrust in Interesting Times—A Curse for 2025

Eleanor Tyler
Principal Legal Analyst

For years, the antitrust landscape has been shifting, and the practice and policies of antitrust have been becoming more politically charged. It feels like that trend may be coming to a head in 2025.

Between the increasingly **heated rhetoric** around antitrust, **multi-pronged** attacks on the tech giants, and **existential threats** to the Federal Trade Commission—the issues have a slightly apocalyptic flavor.

The key issues to watch for in 2025 include whether the FTC survives the next few years, the sticky question of remedies for alleged antitrust violations in tech markets, and the next steps in the ongoing legal battles around antitrust. All of that is occurring against a backdrop of increased polarization and uncertainty in court and in society.

And Then There Was One?

There's a real possibility that, in 2025, the FTC will find itself either declared unconstitutional or will be stymied each time it tries to act—leaving the Justice Department alone in Federal antitrust enforcement.

Companies and individuals facing enforcement by the FTC—apparently smelling blood in the water—are filing **lawsuits** seeking to declare the agency or its enforcement mechanisms unconstitutional. Sure, the agency's been around for 100-odd years, but there are a few judges who think we should undo the New Deal expansion of the federal administrative state. **Some of them** may constitute a majority of the US Supreme Court.

As a result, it's possible that 2025 is the year that any of a grab-bag of formerly dormant doctrines are used to fundamentally undermine the FTC. There are several candidates to play that role in its demise, but the chief threats today are the **nondelegation** doctrine and an **end to the doctrine** of **Humphreys Executor**, which permits independent agency leadership at the FTC and at other federal agencies.

It's increasingly clear that any enforcement action by the FTC will lead to a suit against its fundamental constitutionality (likely in some corner of the Fifth Circuit), and the plaintiffs bringing these suits seems to see no downside to this tactic. But although there may not be an immediate impact on the functioning of the agency, this can't continue for long without undermining the FTC. Even if this strategy is unsuccessful, it's costly, time-consuming, and a distraction from the FTC's mission.

Those impacts are entirely separate from any problems for the rulemaking authority of the FTC from the Supreme Court's ***Loper Bright*** decision this summer. ***Loper*** should have little impact on enforcement by the FTC, but makes any rulemaking inherently costly and fraught. As the agency has been promulgating **new rules** lately, it winds up playing whack-a-mole with **lawsuits** seeking to stay and overturn those rules.

These threats to the FTC have massive implications. The FTC has an important pro-consumer mandate, for starters, but hamstringing the FTC would also change the entire character of federal antitrust enforcement in the US. States would be forced to step in. I don't believe the net result is reduced uncertainty for business, or easier compliance. And ordinary consumers have a great deal to lose in this game.

What's the Fix?

Antitrust enforcers globally have expressed concerns about the market power wielded by tech titans like **Apple**, **Alphabet (Google)**, **Meta**, **Amazon**, and **Microsoft**. As enforcement actions and investigations against these companies mature, and as **new laws** in the EU and elsewhere impact tech conduct, we face the next big question in antitrust: What remedies would open tech markets to real competition?

Crafting effective remedies has always been a challenge. But remedies in tech markets are especially **tricky**: Some of these markets have been controlled by a dominant player almost since their inception, some of them evolve rapidly, and many are "tipping" markets that naturally favor a single winner. In these markets, therefore, enforcers may be trying to achieve a competitive state that's never existed in a market that is naturally inclined to "winner take all."

There are a number of cases to watch, and a **bunch** of them involve **Alphabet (Google)**. The **$2 trillion** question is whether an enforcer somewhere in the world will impose "structural remedies" that force divestiture of some part of the Google universe. A breakup of Google, while much **discussed**, would be ambitious. And demonstrating to a **court** that no other remedy will effectively free the markets Google currently dominates would be an uphill battle.

If the Google cases continue past the change in administration, it's likely that courts will impose lesser remedies. And then litigants will probably face a long battle to enforce whatever remedies a court finally imposes.

Twists in the Arms Race

The arms race between businesses and enforcers continues—but with some twists. For example, where the EU had essentially jettisoned its **merger** thresholds to grapple with low-revenue mergers, the courts have **reined in** that strategy. The Competition Commission, armed with the **Digital Markets Act** and under new **leadership**, will have to shift course.

In the US, the enforcers continue to press new theories of harm, including market impacts, up and down supply (and input) chains. In particular, antitrust **cases** alleging algorithmic price fixing or price fixing through a computer program are on the rise in the US. And enforcers worldwide are **rushing** to get their arms around the AI revolution before those markets harden like many other tech sectors.

What's changed most in the US, however, is the tone. There's **anger** and **allegations** in official acts these days that feels different. It's yet unclear what a second Trump administration forebodes for antitrust policy and enforcement, aside from an abandonment of any policy President Joe Biden explicitly championed. But, policy aside, the sharper rhetoric around antitrust doesn't seem likely to recede. Strap in for a bumpier ride in 2025.

Past, Precedent Appear to Favor NLRB's Future

William Welkowitz
Content Specialist

There is good reason to believe that the National Labor Relations Board is in a strong position to maintain the authority it has exercised over federal labor law for the last 90 years. Despite recent U.S. Supreme Court rulings that have dramatically altered how administrative agencies can function and affect policy, a U.S. federal district court issued a ruling in September that provides a thorough and detailed legal roadmap for defending the NLRB's structure and power.

With a mix of both long-standing precedent and more recent decisions playing significant roles, the board's functions and legality appear to have multiple layers of legal shielding that will be difficult to break down.

Jarkesy Limits Remedial Powers of Federal Agencies

In the last few years, multiple cases involving major corporations have been filed in federal court that challenge the constitutionality of the board's powers and existence. Particularly given the perception of the current Supreme Court as hostile to the administrative state, there has been speculation about whether the NLRB would be able to continue to function as it has.

In June, the Supreme Court issued a decision that, on its face, could have a significant impact on how broadly the board may use its enforcement mechanisms when it comes to remedies. While the case didn't involve the NLRB, the majority opinion in ***SEC v. Jarkesy*** did rule that a defendant had the right to a federal jury trial if a federal agency were seeking financial penalties. However, this Seventh Amendment right attaches only when legal (or punitive) remedies are sought, which are designed to punish—as opposed to equitable remedies, which are designed to restore the status quo.

The NLRB's remedial power is limited to the **ordering of equitable remedies** for violations of the National Labor Relations Act by either the employer or the union. (The vast majority of violations are committed by employers.) These remedies include cease-and-desist orders for the guilty party to stop committing unfair labor practices, as well as more practical remedies—such as back pay and reinstatement for affected employees—in order to restore the overall work situation to what it was before the violations were committed. Multiple federal court cases over several decades have all ruled that these remedies are equitable in nature. As a result, these traditional NLRB remedies remain theoretically lawful under *Jarkesy*.

Consequential Remedies: Equitable or Punitive?

Recently, the NLRB began including certain costs incurred by employees—such as medical expenses incurred after losing the employer's health insurance, credit card late fees and penalties, and loss of a car or home—in its calculations of the back pay owed to an employee affected by an employer's unfair labor practice. Multiple employers have claimed that this is beyond the scope of the board's powers, calling it an attempt to provide "private relief" to these employees in violation of the employer's Seventh Amendment rights.

However, the board has justified this perceived expansion of its own powers as a clarification of what the term "make whole remedies" is meant to include.

Its December 2022 **Thryv, Inc.** decision expanded the types of employee financial losses that the board could include in its remedial orders going forward, generally known as consequential remedies. The board has described these as remedies for "direct and foreseeable" consequences and expenses incurred by the affected employees as a result of the unfair labor practice. By including these consequential remedies in their back pay orders, the board argues that it is restoring the affected employees to the professional and financial status they were in before the unfair labor practice occurred.

In September, in the first federal case litigating the issue of consequential remedies since *Jarkesy*, the Eastern District of Michigan ruled in ***Yapp USA Auto. Sys. v. NLRB*** that the consequential remedies described in *Thryv* are equitable in nature, and therefore don't fall under the prohibition outlined in *Jarkesy*. The district court agreed with the NLRB's interpretation that these remedies are merely a different category of equitable remedies meant to make the aggrieved worker whole for losses suffered as a result of an unfair labor practice.

In the opinion, the district court distinguished the remedies being sought in this case from the remedies being sought in *Jarkesy*. Specifically, the court ruled that the equitable remedies prescribed by the NLRA fall under the public rights doctrine described in ***NLRB v. Jones & Laughlin Steel Corp.*** and reaffirmed in *Jarkesy*.

Past and Precedent Appear to Favor the NLRB's Future

The other significant questions the district court addressed in *Yapp USA* were whether Congress intended the NLRB to have jurisdiction for this sort of case, as well as whether that grant would be a hinderance to any meaningful judicial review.

In answering these questions, the court determined the legality of the NLRB remedial process through an analysis of Supreme Court and federal circuit court precedents issued during the Biden Administration. These precedents address the issue of the overall legality of a general agency's remedial process.

According to the district court's opinion, the **federal appeals courts** are able to provide meaningful review of the board's actions. In addition, the determination of appropriate remedies by the NLRB is part of both its statutorily stated function and its expertise. As a result, the court said, the board's remedial process passes the multi-factor test provided by the Supreme Court's 2023 decision in ***Axon Enterprise, Inc. v. FTC***, and is therefore lawful.

The district court further stated that Congress provided clear intent for the **NLRB to have jurisdiction** over the matter being challenged by Yapp. Additionally, as NLRB proceedings have consistently been held to lack roots in the common law, the district court also ruled that it wouldn't necessarily have original jurisdiction in this case otherwise. Therefore, the two step-inquiry laid out by the Fifth Circuit's 2021 decision in ***Cochran v. SEC*** is met as well.

The district court also relied significantly on the Supreme Court's 1937 decision in *Jones & Laughlin Steel*, which upheld the constitutionality of the NLRA, including the function and structure of the NLRB. Since that time, the Supreme Court has issued multiple other decisions that have solidified the legality and powers of the board—decisions that have been upheld for several decades.

While the current Supreme Court has developed a reputation for not being bound by long-standing precedent, the district court in *Yapp USA* was able to use recent precedent—set by the current court and all of its current members—to analyze the case and determine that the NLRB's remedial process for unfair labor practice cases is lawful.

Furthermore, as the first decision issued since *Jarkesy* was handed down, this case serves as a guide to how the board's remedial power will be argued and defended through the federal court system in 2025 and beyond.

Transactions & Contracts

Court Cases, Election to Restrict 2025 SEC Rulemaking

Preston Brewer
Principal Legal Analyst

In the upcoming year, SEC rulemaking will need to adjust to new legal and political realities. Recent US Supreme Court decisions have recalibrated the authority of federal agencies, not the least the SEC, to write and interpret the rules they are charged by Congress with implementing.

A new presidential administration will now set the Securities and Exchange Commission's policy direction and approach to rulemaking, while future court decisions on legal challenges to the SEC's authority and its legal interpretations will likely further constrain the agency's actions.

Supreme Court Decisions Upend Agency Deference

The anticipated change to the SEC's rulemaking approach is necessitated by two seminal Supreme Court decisions this year that created jurisdictional earthquakes for federal agencies, destabilizing long-settled legal ground regarding their power to regulate.

Loper Bright Enterprises v. Raimondo ended **Chevron** deference. Courts will no longer defer to the SEC (or any other federal agency) and its experts when there's ambiguity about whether the agency has acted within the authority granted to it by Congress. This decision effectively returns interpretive power to federal judges, as was the case before the 1984 *Chevron* decision.

Corner Post Inc. v. Board of Governors ruled against the government's interpretation about when the clock starts running for challenges to federal agency actions under the **Administrative Procedure Act**. In *Corner Post*, the Supreme Court held that under the APA, the statute of limitations clock starts when an agency's action injures a plaintiff, rather then after an agency acts. This decision greatly expands the time to challenge an agency's action.

Taken together, the actions of federal agencies like the SEC are now much more vulnerable to legal attack, making a more guarded rulemaking process something to be expected.

Expect More Deliberation, Fewer New SEC Rules

Bloomberg Law's most recent State of Practice Survey asked practitioners how they expect the demise of the **Chevron Doctrine** will affect future SEC rulemaking. Of the securities attorneys who responded, 40% think there will be less rulemaking, and 14% said that there will be more.

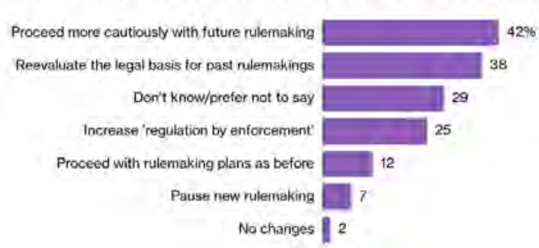
Attorneys Foresee Fewer SEC Rulemakings with Chevron Gone
'How do you think the recent overturning of the Chevron doctrine will affect future SEC rulemaking?'

Source: Bloomberg Law, State of Practice Survey, conducted from Aug. 27 to Sept. 16, 2024. Respondents were asked to select one option. Percentages rounded to the nearest whole number.
Bloomberg Law

One-third of the respondents said that they were unsure, while another 14% said that there will be no change.

A second survey question asked those same attorneys what they anticipate will be the SEC's response to *Loper Bright*. The responses make clear that lawyers expect that the SEC—already known as a cautious agency—will decide it needs to be even more circumspect with its future rulemaking.

More Caution and Rulemaking by Enforcement, Survey Says
'How do you expect the SEC will respond to the Loper Bright decision?'



Source: Bloomberg Law, State of Practice Survey, conducted from Aug. 27 to Sept. 16, 2024. Respondents were asked to select all that apply. Percentages rounded to the nearest whole number.
Bloomberg Law

To that end, the SEC 1) will need to be more mindful of its legal authority to make new rules; 2) will need to reevaluate the legal basis for any past rule that gets challenged; and 3) may increase "regulation by enforcement." For example, in instances where the SEC's legal authority is under particular scrutiny—such as with cryptocurrency regulation—the agency uses its enforcement authority to regulate business behavior without formal adoption (or even proposal) of any new rules.

That said, some types of rulemaking—rules aimed at deregulation and instituting new rules favorable to certain business interests—should grow during the second Trump administration. While most changes to rules will likely be toward deregulation, the deregulatory-leaning Commission under Trump appointee Jay Clayton made new rules in 2020 to **restrict** certain business activities.

The SEC **passed** rules restricting what proxy advisory firms could do to assist institutional investors in deciding how to vote in company annual meetings. The rulemaking was a win for some corporate interests and a loss for activist investors. Those proxy advisory rules have **faced** legal challenges since, as have the 2022 amendments adopted by the Gensler Commission that reversed some of the 2020 rulemaking.

Trump White House Will Set New SEC Direction

The SEC is composed of five commissioners: two Democrats, two Republicans, and a chair appointed by the US president. The commissioners serve staggered terms of five years, although it's not uncommon for commissioners to leave their position before the end of their term. The SEC chair greatly impacts the policy direction of the Commission during their term.

Gary Gensler was appointed chair in 2021, and his term officially ends in 2026. However, it now appears unlikely that Gensler will stay on as chair, regardless of the election outcome. Gensler joined the SEC with an ambitious rulemaking agenda, particularly for ESG issues such as climate change, board diversity, workforce management, and anti-greenwashing.

Those priorities have often been fiercely **opposed**, and even when rules have been adopted, they often have faced legal challenges. There has been a backlash against Gensler's agenda that includes opposition to the agency's claimed legal authority. There's now a growing expectation that Gensler will bow out once a new chair can be appointed by the new president and confirmed by the Senate.

Trump to Fire Gensler, Could Cripple SEC

We should expect a much different approach to the SEC in Donald Trump's second term.

As a candidate, Trump **promised** to fire Gensler and make the agency more pro-business and pro-cryptocurrency. Gensler could resist his removal as a member of the Commission before his term expires (Trump would need to show cause under **Article II, Section 4** of the US Constitution), but he will not be able to stop losing his position leading the agency.

As president, Trump will have the power to replace Gensler as SEC chair but any removals or appointments to the Commission will need to maintain the current 3-to-2 party balance. A more likely scenario than his firing would have Gensler resign prior to the new president taking office, in the same way that Gensler's predecessor Jay Clayton **resigned** before Biden's inauguration.

Trump's pro-crypto stance will likely require the agency to set out some clear rules for the industry to follow. Yet in a post-*Loper Bright* landscape, the rules will now get interpreted by federal judges rather than the SEC, an agency under the president's purview, possibly complicating their effectiveness.

An April Reuters **review** of public documents and interviews with Trump-allied people concluded that a second Trump presidency "would seek to sharply reduce the power of US financial regulators." Late in Trump's first term, he signed an executive order that would have **reclassified** thousands of federal employees as "Schedule F," meaning they could be terminated at will.

Trump seems likely to continue his attempts to make federal agencies more partisan, to restrict their mandate, to remove federal employees seen as not in step with his agenda, and to reduce the federal agency workforce. Efforts such as these could essentially cripple an already understaffed SEC.

The incoming administration will also very likely change the agency's legal stances in court challenges. The SEC will probably **soften or drop** its defense in cases such as **challenges** to its climate disclosure rule.

Trump's Next Leader of the SEC

Trump's SEC chair was Jay Clayton, a Wall Street insider **described** as a "cautious corporate lawyer" and a political independent. Although the SEC pursued a deregulatory agenda during his term, Clayton didn't run the commission in an aggressively partisan way. Clayton generally avoided partisanship and cultivated a moderate financial regulator persona.

After Trump left office in 2020, Trump made statements indicating that he intends to take a substantially different approach to the SEC and to federal agencies generally.

Many names have been bandied about for whom Trump might nominate to replace Gensler. Current SEC commissioner Hester Peirce, affectionately **known** by the cryptocurrency crowd as "Crypto Mom," a constituency whose support Trump has sought to enlist, is sure to get consideration.

Politico **reports** that former SEC commissioner and current **Robinhood** chief legal officer Dan Gallagher would also be a top choice. Other names mentioned include chairman of the Commodity Futures Trading Commission Chris Giancarlo and former SEC general counsel Robert Stebbins.

Commercial Outlook 2025: Tech, Geopolitics Will Rule

Denis Demblowski
Principal Legal Analyst

The new year promises a number of challenges and opportunities for global commercial operations. Challenges include geopolitical risks, increased regulation, and cybersecurity threats, as well as the impact of climate change and deepening environmental and social concerns of stakeholders.

Despite these hurdles, breakthrough developments in technology fields in 2025 will drive gains in commercial efficiency, productivity, and innovation. A resurgence in business activity fueled by moderating inflation will boost consumer and business confidence.

Technology Outlook

Perplexing issues of data ownership, privacy, and security will be forefront in 2025, but practical solutions will prevail to enable technology and artificial intelligence to become increasingly integrated into everyday work activities.

Ownership: Can Copyright Law and AI Co-Exist?

Whether existing copyright law limits or prevents AI providers' use of authored works in their large language models (LLMs) is a major question that requires resolution and clear guidance for the technology to advance. A national legislative solution is called for, but Congress is unlikely to take up this topic anytime soon.

The European Union is leading the way in **AI regulation**, and its initiatives will almost certainly influence legislative efforts elsewhere in 2025. In the US, absent federal legislative action, state laws and case-by-case judicial interpretations may shed some light on fair allocations of use protections—including compensation—and use permissions under existing law.

The information industry itself may develop its own practical solutions to address the licensing of copyrighted works for LLM use similar to those in the music and entertainment industries.

Privacy and Data Security

Privacy and data security concerns will continue to temper the acceptance and implementation of technology developments in 2025. While cybersecurity advancements will address some of these concerns, they won't eliminate them, and protecting sensitive data with updated security programs and protocols will be indispensable to maintain customer and supplier trust.

Applications

Businesses need to further embrace technological solutions in 2025 or risk falling behind their peers. Automation of routine tasks, better data-driven decision making, and facilitated communication and collaboration capabilities among individuals operating in globally dispersed teams will drive automation, logistics optimization, and more efficient and resilient commercial activity.

Supply Chain Challenges and Responses

Next year's supply chain challenges look all too familiar: geopolitical and climate risks, new trade barriers, and regulatory compliance. A partial counterbalance to these challenges are today's more diverse and resilient supply networks that are based on better planning and increased transparency, and an improving financial environment.

Global Tensions

Regional conflicts in Ukraine and the Middle East will continue to strain global commercial relations in 2025. New trade barriers, including new or substantially increased US tariffs under President-elect Donald Trump, will escalate tensions and the likelihood of **retaliatory actions** by major trading partners, with long-term **negative effects** on the US economy. Both US presidential candidates **proposed tariff increases** during their campaigns, particularly on products imported from China, to protect US businesses and raise additional revenues.

Sanctions will impede commercial activity between the West and Russian-bloc countries as long as the war in Ukraine rages on. Tensions in the Middle East are not likely to subside anytime soon. US relations with China, meanwhile, are likely to continue to deteriorate economically and politically as China's alliances with Russia grow stronger.

The expanded **BRICS** (Brazil, Russia, India, China, South Africa) coalition's de-dollarization agenda may put additional pressure on the financial underpinnings and stability of global economies, but any significant negative effects are likely years down the line.

The pandemic exposed the fragility of extended supply lines and their vulnerability to geopolitical and climate-change disruptions. Shortening supply chains through strategic "nearshoring"—relocating raw material or manufacturing sites closer to consuming markets—is yielding results in terms of agility, resilience, shorter lead times, and cost efficiency and should continue to do so in 2025.

Regulation

The EU's **Directive on Corporate Sustainability Due Diligence** (CS3D) aims to ensure that companies identify, prevent, and remediate adverse human rights and environmental impacts throughout their entire supply networks. When fully effective in the latter part of this decade, this directive will complement the EU's **Corporate Sustainability Reporting Directive** (CSRD) on required social and environmental reporting.

In the US, existing federal legislation—such as the **Uyghur Forced Labor Prevention Act**—and increasingly detailed sustainability reporting, including California's **value-chain emissions** and climate-related **financial risk disclosure** laws, place growing importance on compliant supply chain operations and add to the complexity of the reporting landscape.

Commercial Lawyer Opportunities

Lawyers can assist their business clients to address 2025 commercial challenges through careful drafting, creative problem solving, proactive counseling, and close attention to regulatory and global developments.

For technology and AI-related transactions, contract drafters must clearly identify data input and output ownership, use, liabilities, and indemnities. Likewise, technology customers need contractual assurances regarding their confidential information and protection against security breaches.

For other commercial transactions, flexibility—including the ability to diversify supply sources and to modify levels of contract quantities in response to evolving regional conditions or supply/demand imbalances—will enable supply partners to adapt to ever-changing market conditions.

In the performance of these services, leading legal teams will become more adept at understanding their own technology needs and implementing technology developments in their practices.

Future Unknowns

There is some cause for optimism that commercial activity will gradually improve next year, supported by further integration of AI and other technologies into the way business works, together with increasing fiscal stability. Of course, as-yet unidentified causes, as well as worsening climate and geopolitical factors, could significantly alter this projection.

More Supply Chain Risks Require More Resiliency

Louann Troutman
Senior Legal Analyst

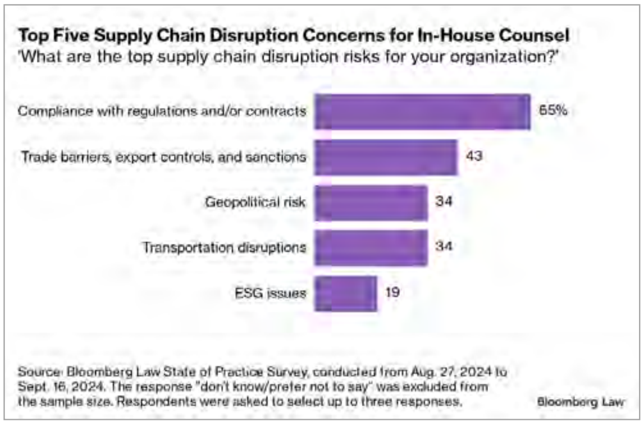
Supply chain disruptions are now a regular feature of doing business. This year alone has seen labor strikes, bridge collapses, terrorist attacks, and geopolitical tensions—in addition to the now-routine cyber threats, natural disasters, and supply shortages.

These events have led a shift of supply chains from being driven largely by "just-in-time" inventory, pricing, and value, to a broader view that incorporates resiliency, ESG matters, and flexibility in response to unprecedented global changes.

Next year will bring even more uncertainty and disruptions. New governments across the globe will bring new regulations, increasing the compliance burden. Geopolitical tensions will mount and supply disruptions are all but inevitable, requiring businesses to maintain flexibility. Building a resilient supply chain is now more complicated and more important than ever, and lawyers play a key role in developing and maintaining the chain.

Risks Old and New

The two biggest supply chain risks in-house counsel face said they face are compliance with regulations and contracts and trade barriers, export controls, and sanctions, according to responses to Bloomberg Law's most recent State of Practice Survey.



Geopolitical risks and transportation disruptions concern about one-third of respondents. Roughly one in five respondents included ESG matters in their top three concerns.

USMCA Up for First Review

A new layer of uncertainty for businesses facing compliance issues will be the first review of the **US-Mexico-Canada Agreement** (USMCA) in 2026. This unprecedented review requirement (neither the USMCA's predecessor NAFTA, nor other US free trade agreements, have had such a provision) may complicate nearshoring efforts, as it will test each country's commitment to the agreement.

Elections for head of state of each member country will have occurred by the end of 2025, so the degree of governmental support for the agreement is uncertain. Both US presidential candidates have expressed reservations about the USMCA, with Harris voting against it as a senator in 2019, and Trump saying he will invoke the renegotiation provisions.

However, Harris didn't support the agreement because it lacked worker protections, and Trump now wants to increase tariffs. Newly elected Mexican President Claudia Sheinbaum **has stated** her desire "to keep the deal with few changes." Canada has already begun public consultations on the review.

All three countries must confirm in writing their desire to continue the agreement. If any one party doesn't confirm, the USMCA will be subject to annual reviews. These reviews could upset what has been a relatively stable trade environment for US businesses by reviving trade barriers—or even tariffs—that had faded since the adoption of the North American Free Trade Agreement.

ESG Laws

The European Union has been particularly active in adopting ESG-related laws, with the **EU Corporate Sustainability Due Diligence Directive**; the **Non-Financial Reporting Directive**; and the **Deforestation Regulation** all being adopted or implemented. While the scope of these laws varies, their impact will extend beyond the EU due to supply chain traceability requirements. In the US, enforcement of the **Uyghur Forced Labor Prevention Act** (UFLPA) is likely to ramp up (regardless of who wins the US elections).

Furthermore, businesses can expect that supply chain due diligence will be a key requirement of the global legal landscape.

Bipartisan Consensus on Key Issues

Two areas of bipartisan agreement in Congress are forced labor and low-value imports..

Forced Labor

Congress passed UFLPA with near-unanimous support in 2021. The law establishes a presumption that any product made in the Xinjiang Uyghur Autonomous Region of China is made with forced labor and thus can't be imported into the US.

Customs and Border Protection (CBP) will almost certainly continue to prioritize UFLPA enforcement in 2025. **CBP data** shows the value of shipments impacted by UFLPA year to date—$1.65 billion—has already exceeded 2023's total value of $1.42 billion.

Of the 4,245 shipments impacted by UFLPA year to date, almost 30% have been detained and about 22% are listed as pending final review.

Congress has also shown bipartisan support for expansion of UFLPA. Sens. Jeff Merkley (D-Or.) and Marco Rubio (R-Fla.), and Reps. Chris Smith (R-NJ) and James McGovern (D-Mass.) sent **a letter** to US Trade Representative Katherine Tai, Canadian Minister of Export Promotion Mary Ng, and the Mexican Secretary of Economy Raquel Buenrostro, encouraging Canada and Mexico to adopt similar legislation and inviting all parties to consider forced labor as part of the USMCA review process.

De Minimis Import Shipments

The so-called "**de minimis exemption**" to US customs clearance allows shipments of under $800 to enter the US with lower information requirements and without payment of duties and taxes. The de minimis exemption has been credited with a massive burst of e-commerce imports, but has also been blamed for an increase in shipments that are unsafe or are illegal.

Virtually all of Customs and Border Protection's **seizures** of narcotics (97%) and almost three-quarters of health and safety seizures of prohibited items have been found in low-value shipments.

Four bills addressing de minimis reform have been introduced in 2023 and 2024, three of which have both a Republican and a Democrat as co-sponsors. The Biden Administration also announced that it's **taking steps** to rein in the inappropriate use of de minimis rules.

Businesses Respond to Supply Chain Risks

Given the variety of challenges businesses face, businesses need a mix of strategies to minimize the risk posed by supply chain disruptions.

Unsurprisingly, the most common tactic for risk mitigation is to expand and to diversify supply chains, according to responses to Bloomberg Law's State of Practice Survey. More than three-quarters of in-house counsel surveyed listed expansion and diversification as a key strategy. Flexibility is now (almost) as important as cost for businesses.

Bigger Supplier Network Is Corporate Counsels' Key Tactic
'Which of the following steps is your business taking to build supply chain resilience?'

Strategies	Percentage
Expanding/diversifying network of suppliers	77
Renegotiating supply contracts to enhance flexibility.	54
Nearshoring/friend shoring	25
Adopting supply chain tracing/mapping technology, including AI	13
Other	5

Source: Bloomberg Law State of Practice Survey, conducted from Aug. 27, 2024 to Sept. 16, 2024. The response "don't know/prefer not to say" was excluded from sample size. Respondents were asked to select all that apply.
Bloomberg Law

An expanded, diverse supply chain adds complexity when dealing with new suppliers, more complicated transportation logistics, and differing contract terms and regulations. However, more sources mean fewer points of failure, as a disruption impacting one supplier is less likely to disrupt the entire chain.

Only 13% of those surveyed included adoption of supply chain tracing and mapping technology as a strategy. This indicates that many businesses may not be prepared to implement traceability, which is not only important for legal and contractual compliance, but also aids in risk management, auditing, efficiency, and product management.

Businesses will have to be proactive to protect their supply chains in 2025. Effective in-house counsel will negotiate supply contracts with an eye towards flexibility, develop risk management policies, and ensure compliance with ever-changing laws to allow their businesses to respond to disruptions.

More Companies Will Go Public-to-Private in M&A Market

Emily Rouleau
Senior Legal Analyst

In what has been a **lackluster year** for the M&A market thus far, transactions where a public target becomes private after closing have done surprisingly well: Deal volumes for these transactions surpassed last year's total by the end of Q3 and could come close to 2021 and 2022 figures for certain types of deals.

Public-to-private M&A deals—including going-privates and take-privates—made **headlines** in 2024, and this momentum will propel more public companies to go private in 2025.

There are a number of ways in which a public company can become private through a merger or acquisition, including when:

- A private acquirer purchases at least a controlling stake of a public company;
- A private equity fund purchases at least a controlling stake of a public company;
- The management team of a public company purchases at least a controlling stake of their company; or
- An individual or a private company issues a tender offer to take over a public company, which may be friendly or hostile.

Private Acquirers, Public Targets

A Bloomberg data search of certain deal attributes for mergers and acquisitions involving a private acquirer and a public target (e.g., going private, PE buyout, company takeover) shows that these deals beat their 2023 year-end totals by the end of Q3 2024 and may be the way to go in 2025.

Through Q3, this year's M&A deal volumes for deals in which a private acquirer purchased a controlling-stake interest in a public target has already surpassed the annual deal volume for 2023 ($278.3 billion).

This $288.2 billion figure in the first three quarters of the year places 2024 in the top five for public-to-private deals over the last decade. Two years in this time frame, however, were outliers in terms of deal volume: 2021 was a blockbuster year for both **M&A deals** and **IPOs**, and 2022's public-to-private deal volumes were remarkable because they seemed unaffected by the dramatic drops seen elsewhere in the M&A market that year.

If the **traditional Q4 boost** in deal volumes materializes, this type of transaction in 2024 could have one of the three highest year-end deal volumes of the last decade. (An early look at Q4 deal volumes indicates that this is indeed what's happening: As of Oct. 29, public-to-private M&A deal volumes stood at $329.7 billion for the year. Since 2014, only 2021 and 2022 were higher.)

Bloomberg data for M&A deals with a private buyer, public target, and the deal attribute "**going private**" (i.e., transactions in which the acquirer is made up of an affiliated party of the target company, and a publicly traded company will convert to a private company) have already clearly beaten 2023's end-of-year mark ($166.8 billion), raking in $238 billion by the end of Q3.

These going-private deals also have the third-highest annual total since 2014—bested only by 2021 and 2022—and there are nearly two months left in the year.

There's also reason for optimism regarding **private equity buyouts**—transactions with a private equity acquirer when the deal is a 100% company takeover. Deal volumes year to date ($156.8 billion) hold the third-highest total—again, only 2021 and 2022 were higher—in the last 10 years.

Company takeovers—deals where target companies are fully acquired, either through (1) a 100% purchase of the company by the acquirer, or (2) the purchase of the remainder of the company, which brings the acquirer's ownership to 100% of the target—have also had a solid 2024 thus far. Deals with this attribute have the fourth-highest total in the last decade.

Onwards and Upwards

For companies looking to make a deal next year, going private (as a target company) or buying a public company (as a private buyer) may be an attractive option. The numbers this year signal that conditions are right for public-to-private transactions to continue to flourish.

Going private isn't a decision to be taken lightly. Private companies don't have the same reporting requirements as public companies, for example. But public companies may have an easier time raising capital. Some points to keep in mind when considering going private:

Liquid assets. Private equity companies continue to have significant amounts of dry powder available. As the data for PE buyouts suggest, one of the ways in which private equity can use this money is to buy a controlling interest (if not 100%) in a public company, focus on making that company more profitable, and then determining its exit strategy.

Stock prices. Some companies that went public via initial public offering and whose stock prices have dropped below the initial opening price may need to decide what their strategy will be. Should the company wait to see if stock prices rebound? Should the company find a way to go private and delist its shares? Companies with these decisions to make are likely to find willing private acquirers, whether in the form of private equity or another type of buyer.

The activity for public-to-private transactions have bucked the wider trends in the M&A market this year, and these types of deals will likely remain popular in 2025.

Will Antitrust Squeeze Dealmaking in 2025?

Emily Rouleau
Senior Legal Analyst

Eleanor Tyler
Principal Legal Analyst

There's been a lot of talk this year about increased merger scrutiny. To be fair, much of it comes from the regulators (the Federal Trade Commission and Justice Department) themselves, who emphasize that they're taking market concentration seriously and are skeptical of deals that prior administrations waved through.

The number of Hart-Scott-Rodino Act-reported deals is down from record highs in 2021 and 2022, and HSR statistics show a possible impact of antitrust efforts on M&A. Yet the numbers of withdrawn and terminated M&A deals, when compared to the numbers of HSR-reported deals, show no antitrust impact on the number of M&A transactions. As a result, the whole picture is not entirely clear.

Reported Deals Are Down

The number of HSR-reported deals next year will likely align with the broader trend over the past decade, remaining below their 2021–22 levels and well above the relative lows in 2020 and 2023.

It's **difficult** to say whether any drop in HSR-reported deal numbers is due to macroeconomic conditions, policy changes, or some other factor. What one can say from the past 12 years of data is that the count of HSR-reported deals has fallen back into line with the number reported every year *but* 2021 and 2022, which appear to be outliers.

Withdrawn Deals Up Slightly in FY 2024

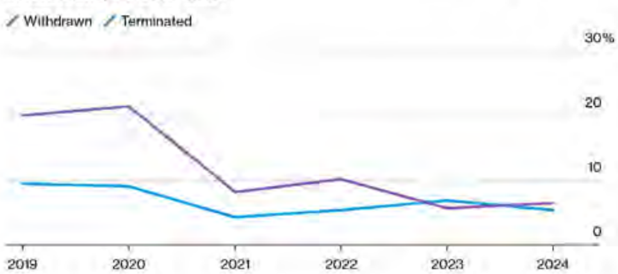
When a merger or acquisition meets the criteria under the **HSR Act**, the parties must notify the FTC and DOJ of the transaction. But what happens after parties make a premerger notification? What's the impact on the fate of those reported deals? Are parties scrapping more deals in the face of regulatory pressure?

A Bloomberg data search over the last five years for global M&A transactions valued at or above the applicable HSR filing threshold shows that the number of withdrawn deals has increased in 2024 from last fiscal year. Withdrawn deals are those deals where the parties had proposed a transaction but had not yet signed an agreement, and the deal fell through without ever reaching a definitive agreement.

Yet the number of terminated deals has, so far, continued its drop since FY 2022. Terminated deals are those transactions where the parties had a signed deal agreement, and then the transaction was terminated and did not close.

When viewed as a percentage of reported deals, withdrawn and terminated deals decreased by 13.2% and 4.8%, respectively, from 2020 to 2021 (the start of the Biden administration) and haven't rebounded.

Where's the Beef?
Percent of withdrawn, terminated deals out of reported HSR merger transactions, FY 2019–2024



Source: Bloomberg as of Oct. 31, 2024.
Note: The data include withdrawn and terminated deals at or above the applicable HSR filing threshold with completion dates between Oct. 1, 2018 and Aug. 31, 2024. The number of withdrawn and terminated deals were divided by the number of HSR merger transactions reported per the HSR Annual Reports, FY 2022, FY 2023, and FY 2024. FY 2024 data for the numbers of Hart-Scott-Rodino Act-reported transactions, withdrawn deals, and terminated deals through Aug. 31, 2024 only.

Bloomberg Law

So while the FTC's and DOJ's **enthusiastic scrutiny** of M&A deals since 2021 has been well-documented, the number of withdrawn and terminated deals in the same timespan—but particularly in 2023 and 2024—suggests that the agencies' actions have not dissuaded as many deals as might have been expected. If they had, the number of withdrawn and terminated deals likely would have been higher.

Regulatory Headwinds Are Real

This is not to say that tighter merger review, major revisions to the agencies' **merger guidelines** in 2023, and the pending publication of the **HSR final rule** have no impact. Rather, antitrust enforcement's pressure on dealmaking may well be reflected in other ways as opposed to being shown in the number of withdrawn and terminated deals.

For example, the agencies' reviews of M&A deals adds costs to transactions (e.g., time, attorneys' fees, risks of not closing). Those **costs will increase** if the HSR final rules go into effect early next year and may dissuade parties from pursuing marginal deals, but the deals that are most accretive will likely not be deterred. And while parties may use language in their deal agreements to account for a potentially lengthy antitrust review process, the true impact of antitrust enforcement practices may not be reflected in deal counts.

But perhaps terminations and withdrawals are the wrong way to look at regulatory impact altogether—there's also "abandonment." According to Dechert LLP's merger enforcement tracker, **DAMITT**, those deals that are subject to a significant merger investigation are now far more likely than in the past to end after the parties call off the deal.

According to Dechert, 60% of US significant merger investigations concluded in the first three quarters of 2024 ended in an agency-announced abandoned transaction. For comparison, Dechert reports that abandonments in the face of significant investigation have never topped 15% in any prior year this decade.

The bottom line is that, while a growing number of inked HSR-reportable deals make it to closing, those that face any significant headwinds at the US antitrust agencies are overwhelmingly less likely to close than they were even a year ago.

That's likely due to the agencies' reluctance to agree to permit deals with enforced terms. Consent orders ended most significant antitrust merger investigations until 2022, according to **Dechert**. During that year, 22 merger investigations ended in a consent order. Last year, the agencies ended only one investigation with a consent decree, and so far in 2024, only three have been entered.

It's unclear how much that particular policy could change in a new administration. A return to using settlements as a resolution to merger investigations would likely change the calculus for many parties that face agency scrutiny.

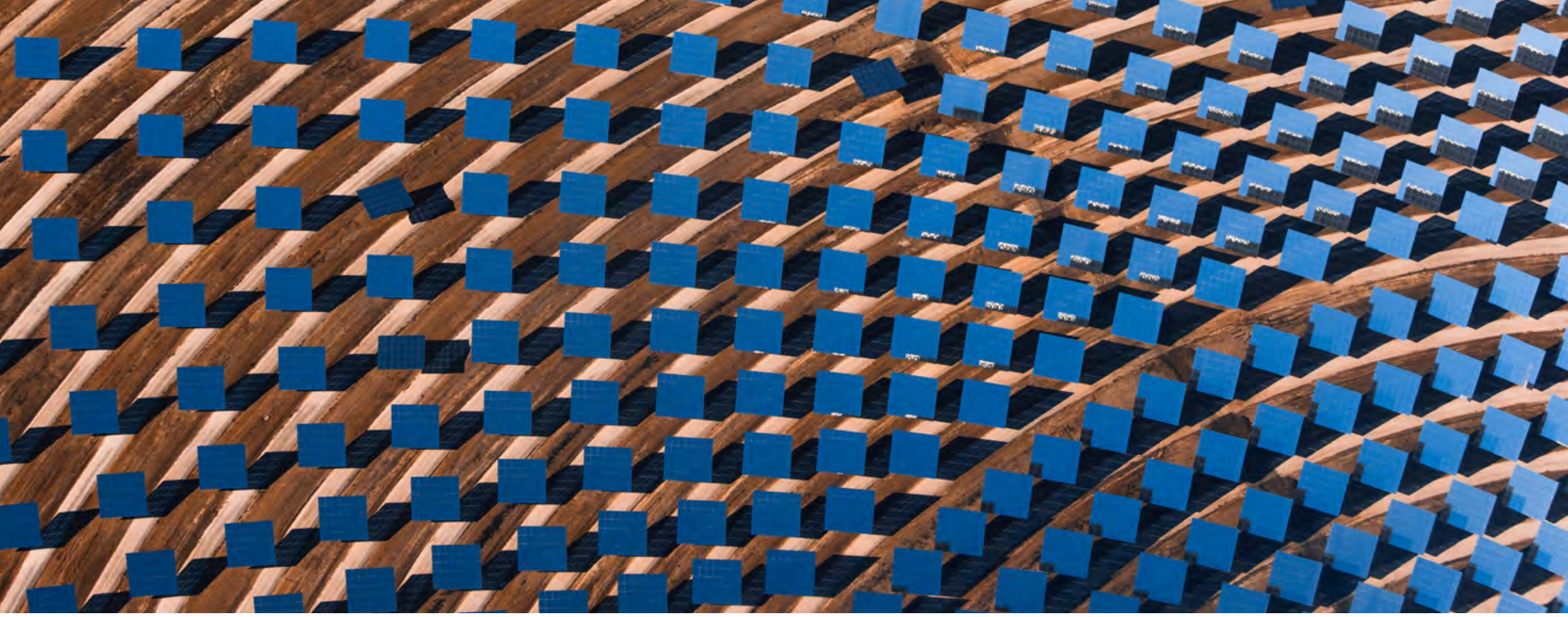
Practical Implications for 2025

Overall, a modest increase from 2024 in the number of HSR-reported deals is the most likely outcome for M&A in 2025. Any uptick in 2025 will likely be in line with the trend over the past decade rather than a boom.

The elephant in the room is how the new administration will change antitrust policy and enforcement. In the past, antitrust enforcement had bipartisan appeal—but no one is sure what a second Trump administration really holds.

The fundamentals, however, don't suggest a big shift in dealmaking. Stock markets at new highs mean merger targets are relatively expensive. Macroeconomic conditions are strong. And though the likely impact of new **HSR filing rules**, potentially coming into effect early in the new year, is still fuzzy, the new rules do represent a modest drag on dealmaking in the form of added cost and delay. All of those factors combine to counsel optimism about dealmaking in 2025, but not wild abandon.

Regulatory & Compliance



Climate Goal Rules Loom and Investors Are Watching

Abigail Gampher Takacs
Legal Analyst

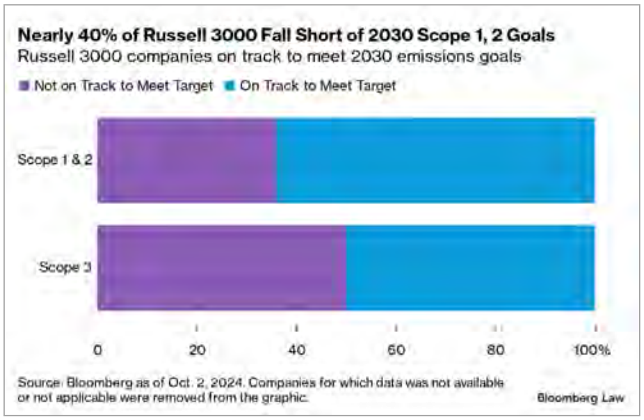
Many companies have opted to set climate goals with target years that until now weren't explicitly subject to mandatory disclosure.

In 2025, more companies will choose to set climate goals that will likely be subject to greater scrutiny by investors. They will monitor whether company climate goal disclosures are accurate, consistent across reporting locations, and on track to meet quickly approaching 2030 goals.

Climate Goals Have Mixed Results

For now, setting corporate climate goals is entirely optional in the US—and that's not likely to change anytime soon. Companies currently have the flexibility to determine whether to disclose their climate goals and their progress in meeting them.

Emissions reduction, waste management, energy efficiency, or biodiversity preservation efforts at some date in the future (generally considered to be "forward-looking statements") are some of the climate goals companies disclose under the current voluntary system. The most common climate-related goal is to reduce Scope 1 and Scope 2 emissions by 2030.



Most companies in the Russell 3000 Index are on track to meet their 2030 goals, but a substantial portion are currently projected to fall short (38% for Scope 1 and 2 emissions and 50% for Scope 3).

Forthcoming mandatory disclosure requirements could motivate companies to try harder to meet these goals. The threat of legal action for not meeting stated goals, however, could cause companies to pull back on setting goals.

What's Ahead for Disclosures

The federal government, several states, and the EU have passed laws and finalized regulations mandating that companies disclose information on their climate goals. It's highly likely that at least some of these laws and regulations will survive pending challenges and bring new information to stakeholders on climate goals.

Federal Disclosures

The SEC's **climate rule** requires registrants to disclose information on their climate impacts that materially affects their company business, results of operations, or financial condition (including information on climate goals). The registrants also have to disclose information on the projected costs to achieve their climate goals (purchasing carbon offsets and renewable energy credits) and financial estimates impacted by disclosed goals.

The **climate rule** is currently being litigated and is unlikely to go into effect at all under the incoming Trump administration. However, the current SEC hasn't pushed back the implementation timeline—which begins with some filers reporting 2025 data.

State Disclosures

A handful of states want to mandate corporate disclose of climate-related information. **Illinois**, **New York**, and **Washington** all have pending bills; California has passed legislation with reporting requirements set to begin in 2026.

The **California Corporate Data Accountability Act** (SB 253) and **Climate-Related Financial Risk Act** (SB 261) apply to US companies doing business in California with total annual revenues over a certain threshold (over $1 billion for SB 253 and $500 million for SB 261). The rules will require these companies to report certain climate-related information, including Scope 1, 2, and 3 emissions as well as climate-related financial risks.

The California Air Resources Board has until July 2025 to issue a rule under the **climate statutes**, but because they're currently subject to litigation, the effective date could be pushed back.

International Disclosures

Some international jurisdictions will require US companies to report sustainability information if they meet certain criteria and thresholds. For example, the European Union's **Corporate Sustainability Reporting Directive** (CSRD) requires companies to disclose a broad range of sustainability particulars, including their sustainability targets, transition plans, and climate-related information.

The CSRD applies to EU-based companies and **non-EU parent companies** that meet certain thresholds. The first reports under the CSRD are expected to be published in 2025, non-EU parent reporting begins in 2029.

Investor Challenges to Climate Goals

In 2025, mandatory reporting to states, the SEC, or the EU would grant stakeholders access to information on company progress toward climate goals.

Section 10(b), Rule 10b-5 Claims

This information, together with the existing information found in voluntary reports and company marketing and promotional materials, might just be enough for investors to bring claims under Section 10(b) and Rule 10b-5 for companies that don't appear to be on track with their 2030 goals.

Section 10(b) of the Securities Exchange Act of 1934 and implementing regulation **Rule 10b-5** prohibit companies from making material misrepresentations and misleading omissions in connection with the purchase or sale of securities. Section 10(b) and Rule 10b-5 don't explicitly provide a private right of action, but one is **implied** and often **leveraged** by plaintiffs.

Safe Harbor from Claims

The Private Securities Litigation Reform Act (PSLRA) prohibits private causes of action under Section 10(b) or Rule 10b-5 for **forward-looking statements**. If a company uses "**meaningful cautionary language**" or makes them **without actual knowledge** that they're false or misleading, the PSLRA provides a safe harbor for the company.

The SEC's climate rule confirms that these safe harbor provisions apply to forward-looking statements. However, private causes of action are still possible for material misrepresentations and misleading omissions about historical statements and financial statements.

Investors to Review All Company Climate Disclosures

Despite these safe harbor provisions, 2025 company disclosures might still give investors enough information to challenge climate goals and companies' progress toward them.

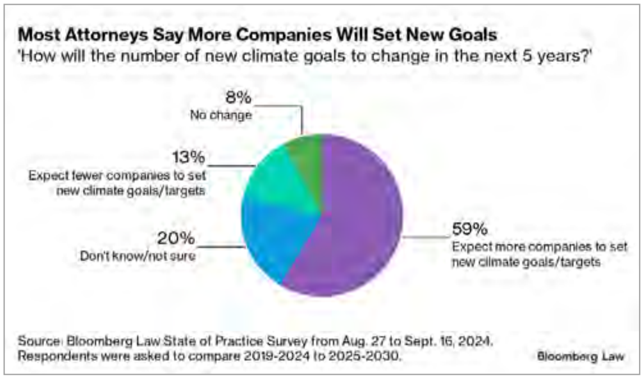
Historical and factual information is exempt from the safe harbor provisions, and is the likeliest route for investors to take when challenging company climate goals as misleading.

In fact, stakeholders are **already alleging** that the purchase of carbon offsets to achieve emissions-related goals is deceptive—and this may again be a sticking point for some investors.

Will Goal-Setting Activity Cool Off?

Bloomberg Law's State of Practice Survey asked 75 in-house and law firm attorneys who advise on climate-related goals or targets about how they think corporate climate goals will change.

Surprisingly, despite these looming legal challenges, most lawyers don't think that climate goal-setting will slow down.



When asked if they anticipate the number of companies setting new climate-related goals changing in the next five years (2025–2030) compared to the last five (2019–2024), almost 60% said that they expected more companies to set new goals.

Companies appear largely undeterred by the upcoming climate goal changes, including the litigation that could accompany them in 2025 and beyond.

States to Forge Ahead With Groundbreaking Privacy Laws

Mary Ashley Salvino
Senior Legal Content Specialist

This was an unprecedented year for **state privacy legislation**, with important developments in **comprehensive consumer privacy**, **child privacy and online safety**, **artificial intelligence (AI)**, and **neural data privacy** laws. With the continuing dearth of a national federal standard in these areas, 2025 could be another breakout year for state privacy efforts.

Furthermore, states continued to take their cue from European Union privacy legislation, which often serves as a framework for state laws. It's likely that this pattern will continue in 2025, yet some states are carving their own path.

And while the state laws may overlap to some extent with one another, the devil will be in the details—or rather the variations. Businesses should prepare to comply with new privacy mandates in order to avoid regulatory scrutiny for engaging in data security practices that contravene these new state laws.

Comprehensive Consumer Privacy Patchwork Grows

In the absence of a **national federal privacy standard**, the proliferation of **comprehensive consumer privacy state laws** began in earnest in 2023, with eight states passing privacy statutes. In 2024, seven new states—**Kentucky**, **Maryland**, **Minnesota**, **Nebraska**, **New Hampshire**, **New Jersey**, and **Rhode Island**—enacted such legislation for a total of 20.

Unsurprisingly, it was California that enacted the inaugural US state comprehensive privacy law, the **California Consumer Privacy Act**, in 2018. Many aspects of the law—and subsequent state privacy laws—are modeled after the European Union's 2016 General Data Protection Regulation (**GDPR**), a lodestar for privacy laws.

Given the number of state privacy laws that have recently been passed and the increasing importance consumer privacy regulation plays, it's quite possible that as many as 10 states could enact similar comprehensive privacy statutes in 2025. Furthermore, it's highly likely that several states next year will amend existing comprehensive privacy statutes—as Virginia, Colorado, California, and New Hampshire did this year—to add new business obligations for additional consumer protections.

This year's amendments largely added compliance mandates in the area of health privacy and child online privacy (e.g., expanding the definition of "sensitive data" to include a broader array of protected characteristics such as sexual identity or neural data).

Businesses should become familiar with any new or existing comprehensive laws. Numerous state attorneys general, including in **Texas** and **Connecticut**, have made it clear that they will enforce them under their privacy authority.

Child Online Privacy Landscape Faces Challenges

States have also recently made inroads with the regulation of child online privacy. The intent behind the laws is twofold: (1) to solidify state privacy enforcement authority; and (2) to act as a bulwark against **federal coverage gaps**. These gaps come in the form of an outdated **Children's Online Privacy Protection Act** (COPPA), delays by the FTC in **updating its rulemaking**, and Congress' **failure** to advance or pass federal social media and child online safety legislation.

State child privacy and online safety enactments suddenly appeared on the scene in 2022, with **California's Age-Appropriate Design Code Act**, which is at least **partly modeled** upon the UK's **Age Appropriate Design Code**.

Remarkably, despite judicial preliminary injunctions and fierce tech industry opposition, 14 states have successfully enacted child privacy and online safety laws in the past three years. Like the comprehensive consumer privacy laws, this number will most likely also **grow in 2025**.

Successful legislation will focus on design data protection provisions (rather than content prohibitions) in order to withstand judicial scrutiny. **New York**'s and **Maryland**'s recent enactments target unlawful or deceptive design features such as addictive algorithms on social platforms, which help to alleviate First Amendment concerns.

States Begin Efforts to Conquer AI Regulation

This year proved to be a turning point for AI state regulation. Similar to state dominance in consumer privacy and child online privacy areas, states are **seizing the lead** in carving out regulatory enforcement authority for **AI privacy matters**.

Colorado was the **first state to enact** comprehensive **AI legislation**. Colorado's law regulates the use and development of AI systems by private-sector businesses, mandates AI impact assessments, and aims to target algorithmic discrimination. **Both** Colorado's and the **EU's AI legislation** were passed in May 2024.

The EU's Artificial Intelligence Act (**EU AI Act**) governs the development and use of artificial intelligence technology. While encompassing a broad array of AI data provisions and AI technology obligations, the EU Act notably defines and restricts "high-risk" AI tech uses (such as facial recognition, biometrics, and AI) in the context of employment and education. It could very well serve as a model for future state AI privacy legislation.

Several states enacted laws this year that include AI provisions:

- **Connecticut** has language founding an AI working group and AI bill of rights;
- **Illinois** bans discriminatory AI algorithmic discrimination in the employment context;
- **Utah** regulates private sector generative AI use; and
- **Tennessee** protects musicians from AI deepfakes

California has also been busy with AI legislation despite a September **veto** by Governor Gavin Newsom of a proposed comprehensive AI safety bill. The state enacted close to 20 AI-adjacent patchwork bills this year, spanning **generative AI transparency**, **AI-generated deepfakes**, **state agencies' accountable use of generative AI**, and **anti-deepfake political protections**.

In 2025, state policymakers will pursue AI regulation with an eye toward data protection even in the face of **challenges from tech companies and lobbying groups**.

State Neural Laws Forecast Visionary Privacy Future

States are only beginning to grapple with the futuristic notion of neural data and how to regulate it. Neural data includes data produced by an individual's brain, spinal cord, or nervous system that may be stored in implantable computer chips. State neural privacy laws seek to protect consumer neural data under the protected category of "sensitive data" and limit how businesses may collect, sell, or use such data.

Colorado again showed itself to be a pioneer in the privacy arena by passing the **first neural privacy statute** in April. California **amended** its comprehensive privacy law in September by broadening its definition of "sensitive information" **to include brain waves** and neural data of consumers.

Privacy rights for an individual's neural data is an area where the US may be one step ahead of the EU, which doesn't explicitly protect it under the GDPR or any other legislation.

Next year promises to be another groundbreaking and exciting year for state privacy legislative efforts. Practitioners should take note of how developments affect their areas of expertise.

Contractors Brace for Job-Posting Pay Disclosure Rule

Lydell Bridgeford
Senior Content Specialist

A new rule scheduled for release at year's end will require employers with federal contracts to announce salary ranges for the job openings they post. The incoming Trump administration may or may not block the rule. Either way, many states have similar requirements in place and more are coming. Pay disclosure in job postings will be a boon not just for applicants, but for current employees as well, who will be able to see—and discuss—what has been a fiercely guarded secret.

The Federal Acquisition Regulatory Council **issued** the proposed rule to require most federal government contractors to disclose compensation ranges in their job postings and prohibit seeking and using applicants' pay history when hiring for specific positions. The rule aims to address gender and racial wage disparities in the federal contracting workforce.

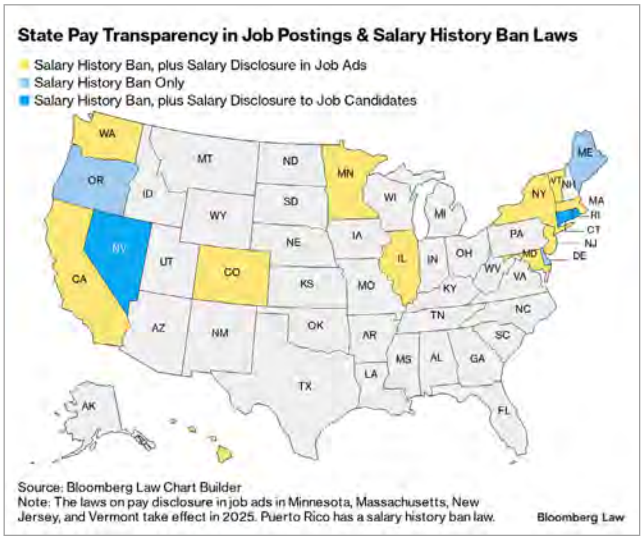
Key Focus on Pay Practices

Employees and federal compliance auditors will have greater visibility into contractors' compensation practices and information as a consequence of the **pay transparency rule**. Mandatory pay disclosure in employment postings will crack open the door for wage discrimination claims against federal contractors who might be in the dark about the specific factors used to determine their employee salary ranges.

Entering 2025, federal contractor employers will feel the pressure to reevaluate employee pay scales and maybe job titles to reduce the legal and compliance risks caused by the new pay transparency requirements. They also will be put to the test to figure out how seeing salary details in job postings might impact on employees who feel their wages are affected by discrimination.

Rule May Be in Limbo as State Laws Gain Traction

It's difficult to predict the exact action of a second Trump presidency on the scheduled release of the rule, which is set for one month before the new administration takes office. The administration could use the **Congressional Review Act** to block the rule or propose an alternative rule that is more favorable to federal contractors, altering coverage and requirements. That said, they may keep the current rule and extend the release date. Regardless, federal government contractors should remain cautious as pay transparency laws continue to gain traction in states. Indeed, the rule's key mandates resemble **the state laws**.



Twelve states and the District of Columbia have implemented salary range disclosure laws that complement their salary history rules, which prohibit employers from asking applicants about their salary history. States are more inclined to pass these salary range disclosure laws if they have **salary history bans** in place.

Combing the Old With the New

The FAR Council's proposed rule will introduce new pay transparency requirements for all federal government contractors, while also expanding on the existing requirements for contractors overseen by the Labor Department's Office of Federal Contract Compliance Programs, which monitors government contractors' affirmative action and equal employment compliance.

Employers under OFCCP oversight are already forbidden from maintaining **pay secrecy policies** that ban their workers from talking about or disclosing their wages or the wages of others, and from discriminating against workers and applicants who talk or inquire about salary details. These pay secrecy bans align with pay transparency requirements, which generally involve disclosing and sharing employee salary or compensation information.

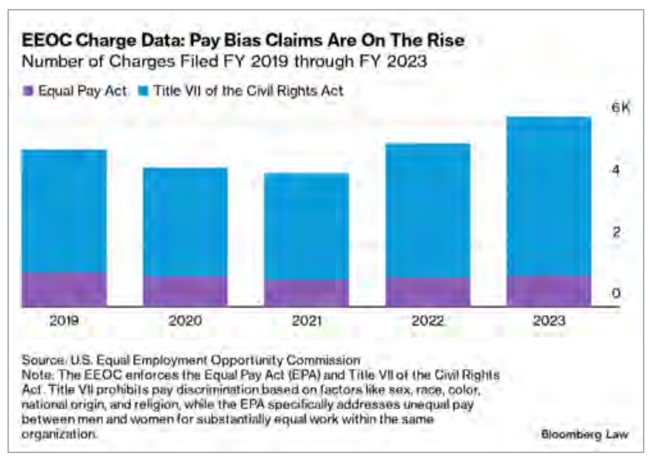
What's at Stake for Contractors

The FAR Council's pay transparency mandate raises the stakes for government contractors to ensure equitable and fair wages for their employees, or else face a hike in pay discrimination allegations.

Pay disclosure in job ads enlightens more than just applicants. The public airing of salary information will provide current workers with insight into the employer's pay practices and help them identify wage disparities in their own workforce. Federal government contractors' employees currently have the right to openly discuss their pay with managers, co-workers, and others without fear of employer retaliation.

Of course, employees who perceive their wages as discriminatory due to race, gender, or other protected group status might use salary details from job postings to negotiate for higher wages. If unsuccessful, they may be motivated to pursue a pay discrimination charge.

Recent **data** from the Equal Employment Opportunity Commission shows workers are already showing a growing willingness to file pay discrimination charges with the agency.



In 2023, the agency received 1,012 Equal Pay Act charges, an increase from 955 in 2022 and 855 in 2021. Wage discrimination charges brought under Title VII of the Civil Rights Act rose to 5,115 in 2023, up from 4,388 in 2022 and 3,414 in 2021. If the FAR Council's rules get finalized as is, we can expect even greater increases in these figures, as employees glean salary information from their employers' job postings.

One takeaway from the data for federal contractors is that they should not overlook the repercussions that posting salary details in job ads could have on employees who feel unfairly compensated due to their protected group status.

Requiring salary information in job ads may also cause federal compliance auditors to scrutinize job ads more closely. If other compensation details submitted by the contractor during an OFCCP compliance audit raise concerns about compensation parity based on race and gender, additional requests for examination may occur.

Salary Ranges Reevaluated

The new pay transparency requirements will prompt federal contractors to proactively monitor, analyze, and—if necessary—adjust **job salary ranges** to head off salary discrimination accusations, since the information may be published in job postings anyway. The FAR Council's goal is to ensure that employees working on government contracts earn salaries based on legitimate and nondiscriminatory factors.

Other ripple effects of the rule will include contractors thoroughly documenting the reasons for their compensation decisions, and retaining pay practice records longer to help refute claims of discriminatory gender and racial pay differences over time.

Legal Challenges May Face Uphill Battle

Given the Supreme Court's *Loper Bright v. Raimondo* **decision**, which earlier this year reversed the Chevron standard, a challenge to the forthcoming rule would not be a surprise. However, the FAR Council is enacting the pay transparency rule under the authority of an executive order rather than through congressional action. Additionally, the **executive order** explicitly empowers the FAR Council to create regulations supporting its goals, potentially shielding the rule from successful challenges under the *Loper Bright* standard.

Federal contract employers may be reluctant to pursue legal action over the rule, especially if they already adhere to state pay transparency and salary history ban laws. Then again, employers with federal contracts might appreciate the government's effort to streamline pay transparency compliance, offering a unified approach instead of navigating differing state laws.

Furthermore, companies that rely mainly on **federal contracts for revenue** traditionally refrain from legally contesting EEO government requirements for contractors as a way to sidestep potential problems and negative public perception of opposing nondiscrimination principles in the workplace.

In essence, employers doing business with the federal government will face more pay transparency laws and requirements next year, necessitating the allocation of more time and resources to prepare for and counteract pay bias charges.

Is the Future of Financial AI Nonbank?

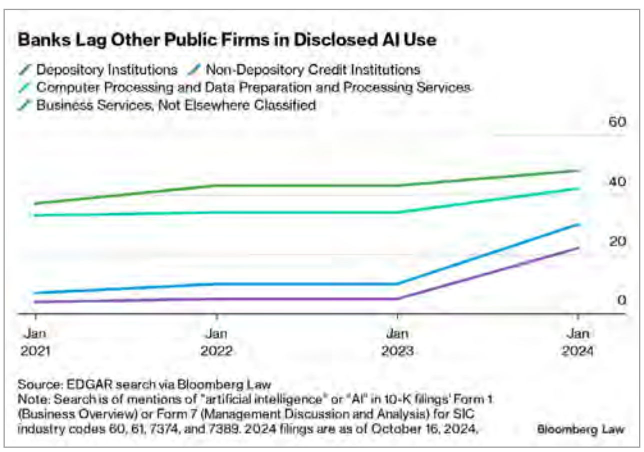
Benjamin Cooper
Principal Legal Analyst

2025 will be a year of artificial intelligence in finance, except in one sector: community and regional banks. Regulatory pressure on banks, sometimes for the purpose of solving issues originating in nonbank fintechs, creates disincentives for smaller banks to develop their own AI capacity. Expect to see most financial AI next year coming from big banks or nonbanks.

Most Banks See Risk, Not Opportunity

In June, **Citigroup Inc.** presented a **report** predicting that artificial intelligence will displace more jobs across banking than any other sector. And certainly **Bank of America** has **increased** its portfolio of artificial intelligence patents and **JPMorgan Chase & Co.** has had **success** with an AI-based cashflow management tool.

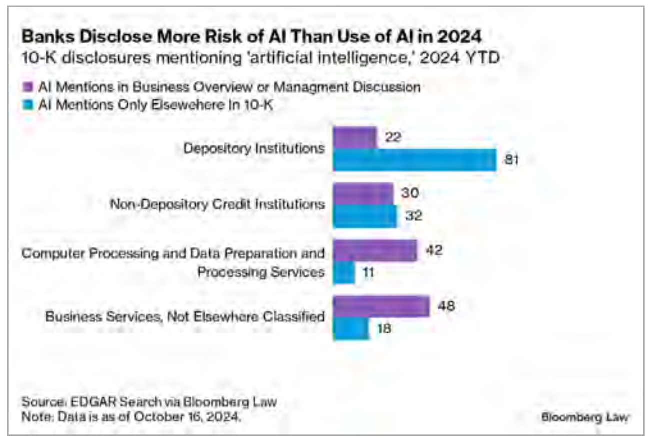
Yet even with a general industry trend of increased use of AI, banks generally trail other public companies in AI use, according to 10-K filings.



Banks—"depository institutions" on 10-K filings—come last after the industry categories for:

- **Non-depository credit institutions:** mortgage and auto lenders, including AI-touting consumer lender **Upstart Holdings, Inc.**;
- **Computer processing services:** including **Fiserv Inc.** a fintech firm involved in global payments; and
- **SIC business services catchall category:** including credit card issuer **Mastercard Inc.**, which (along with non-depository credit institution **Visa Inc.**) is **spurring** generative AI adoption by payment companies according to Bloomberg Intelligence.

A closer look at 2024 filings, however, shows that depository institutions *are* considering the ramifications of AI this year—but not in the parts of their 10-Ks that discuss the what the company does. Instead, they appear elsewhere, usually in business risk or cybersecurity risk disclosures.



There's no reason to believe the trend of bank skittishness towards AI adoption is any different for the privately-held banks that do not need to file 10-Ks among the 4,539 depository institutions regulated by the Federal Deposit Insurance Corporation (FDIC) as of its last **quarterly report**.

Is Federal Bank Regulation Creating the Issue?

In its report, Citigroup said that US regulators are taking their time in determining how to regulate AI. The slow pace of regulation isn't the only reason for the bank versus nonbank disparity in AI adoption, however. A more likely explanation is the way banks are regulated relative to most other financial firms.

Under federal law, the safety and soundness requirement mandates that federal banking agencies prescribe standards on "internal controls, information systems, and internal audit systems."

Nonbanks—other financial firms providing bank-like services like auto loans, money transmission, and mortgages—also have statutory safety and soundness directives, but the directives are silent on how they apply to technology. For example, money transmitters are the most regulated of any non-securities nonbanks, but their law isn't technology-directed like it is for federal bank regulators.

There's no national prudential regulator for money transmitters. The Conference of State Bank Supervisors' Money Transmission Modernization Act, enacted in 25 states, prohibits "unsafe and unsound practices" by money transmitters but doesn't define these practices except by reference to "the magnitude of the loss" and "the gravity of the violation" of the act. These descriptions imply reactive policing, and don't directly implicate the use of technology.

Not Just the Regulation, but How Feds Enforce It

The Office of the Comptroller of the Currency (OCC) and the FDIC haven't directly enforced against the use of artificial intelligence yet, even though in January 2024 the FDIC Chair Martin Gruenberg warned that banks would be held responsible for the misuse of AI by third-party vendors. However, they have been more active than the states in policing technology use they deem unsafe and unsound.

For the past four years, the OCC and FDIC have regularly issued orders against banks for information technology violations that reference safety and soundness. There have been 24 enforcement orders regarding IT violations other than information technology sufficiency for money laundering compliance.

The New York Department of Financial Services has been active regarding its Cybersecurity Regulation, with 10 actions in the same period. Illinois joined two FDIC information technology actions against Illinois banks during this timeframe. No other states have similar safety and soundness enforcement actions, according to Bloomberg Law data.

Trade groups have complained that federal enforcement targets technology-using banks. The American Fintech Council, a trade association representing the financial technology companies, has claimed disproportionate enforcement for technology-adopting banks relative to banks generally.

The Consumer Bankers of America, a trade association focused on retail banking, **wrote** in a comment in response to a Department of the Treasury request for information on financial AI that, "while comprehensive and robust risk management frameworks exist for governing the activities of banking organizations, such frameworks only indirectly and occasionally apply to non-banks."

Regardless of the merits of the actions, the industry perception is that bank status incentivizes banks—especially smaller banks with less institutional capability to litigate compliance against federal regulators—to steer clear of new and potentially regulatorily risky technologies.

The Synapse Response Increases the Asymmetry

Synapse Financial Technologies, a nonbank financial technology middleware provider, declared **bankruptcy** in April. The company's failure left customers of downstream fintechs unable to access hundreds of millions of dollars of their money, and as a result, the FDIC **proposed** rules to further regulate banks' relationships with nonbank fintechs.

The FDIC proposal is directed at the particular issue at Synapse, where Synapse and its partner bank, **Evolve Bank & Trust**, couldn't reconcile their transactions. But it further centralizes enterprise risk in the bank, not in the partner fintech.

However, as the force of regulation continues to be primarily against banks, the FDIC allows the trend to continue where financial technology innovation is centered in nonbanks because bank regulations disincentivize the institutions from adopting new technologies.

As a result, some large regulated entities that can afford compliance costs will adopt AI, and nonbank AI fintechs that are significantly less regulated partner either with the large regulated banks, or whomever they can find, which may not be the safest or soundest partner. This trend is likely to continue—and possibly gather momentum—in the near future.

Even With Trump, Banks Are Still Squeezed for Now

Donald Trump's election is unlikely to bring immediate change.

For the OCC, the president has the power to appoint a new comptroller immediately (the OCC has been led by an acting comptroller since May of 2020). Given the lengthy appointments process, however, it would be several months into 2025 at the earliest to see serious policy change at the OCC.

The FDIC policy change will also be at the speed of appointments. The FDIC's board consists of five members, the fate of three of whom are in flux. Two board members are the Acting Comptroller of the OCC and the Director of the Consumer Financial Protection Bureau, both of whom can and likely will be replaced by the incoming president.

Vice-Chairman Travis Hill and Director Jonathan McKernan are Republican board members nominated by President Biden with terms continuing into the Trump Administration; while their public remarks support a more business-friendly regulatory agenda, they are not Trump's appointees.

Chair Martin J. Gruenberg, also appointed by President Biden, resigned in May pending the confirmation of his replacement, but there is a question as to whether Biden's nominee to replace the Chair will be confirmed in the lame duck session. If she is, her term would continue through the Trump Administration and like other FDIC board members, she would only be removable for cause.

There's also the possibility that fintech-friendly policies, if made by rules and not just non-enforcement, would be challenged. When the OCC attempted to register fintechs under nondepository charters in 2018, it was sued by state bank regulators, and the Biden Administration didn't continue the effort. Challenges to deregulatory rules could be stronger post ***Loper Bright*** as the agencies have less interpretive leeway regarding their powers.

Change would happen, if it does, at the speed of Congressional action.

Drug Discount Laws to Surge as Courts Back State Power

Brian Forst
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Recent court rulings that allow states to regulate drugmaker discount policies will pave the way for a surge of new state laws across the country in 2025. Big pharma companies will have to grapple with changing their practices under a federal discount program that they say is rampant with fraud and abuse.

At least five federal courts now are letting states bar drug manufacturers from refusing to supply discounted drugs to pharmacies that contract with eligible entities under the longstanding yet controversial federal **340B Drug Pricing Program**. The cases are spotlighting a debate over federal versus state power within the program.

Pending litigation over these laws could set up a circuit split in the next year as more cases reach the appellate level, potentially putting drugmakers in legal limbo. The US Supreme Court is already being asked to weigh in on a case in 2025, which could offer some clarity to the program and states' abilities to enforce it.

340B Program Boosts Contract Pharmacies

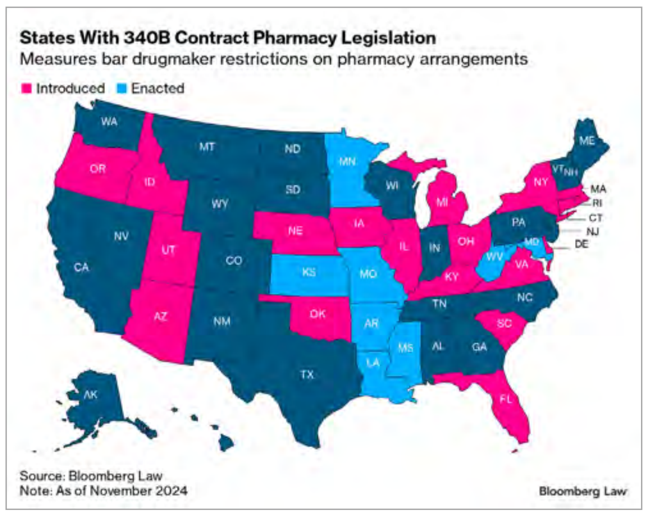
The 340B program requires drugmakers that participate in Medicaid to offer steep discounts on outpatient drugs to eligible covered entities, which include hospitals and clinics that serve low-income and uninsured patients. "340B" refers to **Section 340B of the Public Health Service Act**, the law that implemented the program.

The program was created in 1992 and has grown steadily in recent years, reaching **$66.3 billion** in drug purchases by covered entities in 2023. In 2010, the Health Resources and Services Administration (HRSA) issued **guidance** allowing covered entities that don't have their own in-house pharmacies to contract with multiple outside pharmacies to dispense 340B discounted drugs.

This practice grew significantly. In 2020, drugmakers began limiting their distribution to only one contract pharmacy, alleging that some hospitals and pharmacies are taking advantage of these arrangements for profit and hindering the goal of helping low-income patients access critical medications.

State Laws Curb Drugmakers' Restrictions

In response to the drugmaker restrictions, eight states have enacted laws prohibiting drugmakers from restricting the delivery of 340B discounted drugs to contract pharmacies. More of these laws are likely to come as district court rulings continue to side with the states.



Arkansas in 2021 became the first state to enact a law prohibiting drugmaker restrictions on 340B contract pharmacy arrangements, and Louisiana followed in 2023.

As of November 2024, over half of the 50 states have at least introduced 340B contract pharmacy legislation, with six states enacting new laws this year: Kansas, Maryland, Minnesota, Mississippi, Missouri, and West Virginia. For most of the other states that have introduced bills, the legislative session has closed for the year without further action being taken. But legislation is pending in two states—Michigan and Ohio—whose legislatures are still in session.

At least 37 manufacturers currently have policies that restrict 340B contract pharmacy arrangements, according to policies compiled by industry vendor **340B ESP**.

Hospitals that participate in the program—which purchased **86.6%** of 340B covered drugs in 2023—say that these restrictions limit patient access to medications and erode the precarious finances of providers in rural and underserved communities.

Drugmakers counter that growth in the use of contract pharmacies has led to more covered entities receiving both Medicaid drug rebates and 340B discounts for the same drugs, and allege that hospitals and commercial pharmacy chains profit by selling discounted drugs to patients who are often ineligible. They say that their program restrictions are needed to address this duplicate discounting and 340B drug diversion.

Dozens of Lawsuits Against States

Bloomberg Law data show that at least **28 lawsuits** have been filed against these state contract pharmacy arrangement protection laws, all of which have been filed by either **AbbVie Inc.**, **AstraZeneca PLC**, **Novartis AG**, or industry trade group **Pharmaceutical Research and Manufacturers of America** (PhRMA). These plaintiffs primarily argue that the federal 340B statute preempts state law.

To date, all of the courts—one at the circuit level and four at the district level—have ruled in favor of the states. All of those cases are on appeal.

The Eighth Circuit **ruled** in March that **Arkansas's law** is constitutional and not preempted by federal law. The text of 340B is "silent" about drug delivery to patients and therefore states have leeway to supplement the statute, the circuit court said in its opinion. The court also said that the practice of pharmacy traditionally has been regulated at the state level.

The Eighth Circuit's ruling affirmed the lower court's decision, allowing Arkansas to continue enforcing its law. PhRMA is **asking** the US Supreme Court to review the case.

Three other district courts have come to similar conclusions. Federal judges in **Maryland** and **Mississippi** denied drugmakers' bids for preliminary injunctions against the state laws. In the Mississippi case, the judge said that the law falls under the umbrella of a health and safety regulation and therefore triggers a presumption against preemption.

A federal judge in **Louisiana** in September denied motions for summary judgment against that state's law, citing the Eighth Circuit's opinion in his reasoning.

The four other states with contract pharmacy protection laws on the books will likely see similar district court rulings, given how states have been faring thus far. And legislation around the country will increase next year as states embrace the confidence that their bills have solid legal footing.

A Future Circuit Split?

The district court rulings appear unanimous so far. How the appeals courts will decide is an open question.

The Louisiana and Mississippi cases have been appealed to the Fifth Circuit, the Maryland case is before the Fourth Circuit, and the Supreme Court will have to decide whether to take the Arkansas case. (Arkansas's response to PhRMA's petition was due Nov. 4.)

All told, the 28 lawsuits identified by Bloomberg Law have been filed in four different circuits, so a circuit split is possible once more cases get to the appellate level. The cases against the Kansas law would head to the Tenth Circuit if appealed, while the cases against Minnesota and Missouri would head to the Eighth Circuit. The cases against the West Virginia law would go to the Fourth Circuit.

PhRMA, in its **petition** to the high court, argues that a circuit split already exists. Two other appeals courts—the D.C. and Third Circuits—held in the past couple of years that the 340B statute doesn't

bar drugmakers from imposing conditions on the delivery of discounted drugs to covered entities, nor does it require delivery to an unlimited amount of contract pharmacies.

The Eighth Circuit's decision in the Arkansas contract pharmacy case "rejects the very authority that the D.C. and Third Circuits held was preserved to manufacturers by Congress in imposing conditions," PhRMA wrote. If that decision is allowed to stand, the group argued, states would create a "dizzying array" of obligations for manufacturers.

The Supreme Court now has the chance to weigh in on the interaction between the federal and state laws, and settle the issue on a federal program that has faced controversy for decades.

Drugmakers vs. Hospitals

As more states enact 340B contract pharmacy laws and those laws survive court challenges, drugmakers will have to lift their restrictions in affected states—potentially causing a hit to their revenues. Drugmakers will face an increasing patchwork of state requirements and fewer levers to slow the growth in 340B drug discounts. Covered entity purchases of 340B drugs grew by 22% in 2022 and 23% in 2023, according to **updates** from HRSA, the federal agency that administers the program.

Advocacy groups for hospitals and health-system pharmacists—including **340B Health** and the **American Society of Health-System Pharmacists**—are hoping for the trend to continue. They released **model legislation** in August intended to help more states prohibit drugmaker restrictions on 340B contract pharmacy arrangements.

With momentum currently favoring covered entities, we can expect more states to join the complicated 340B regulatory environment in 2025.

Congress Will Recriminalize Hemp-Derived THC Next Year

Meghan Thompson
Associate Content Specialist

Near the top of Congress's to-do list in 2025 is reauthorizing the **2018 Farm Bill**, which expired at the end of September. The new version will almost certainly include an amended definition for hemp that excludes all forms of THC. This will close the loophole created by the bill that **accidentally legalized** the intoxicating cannabinoid when derived from hemp.

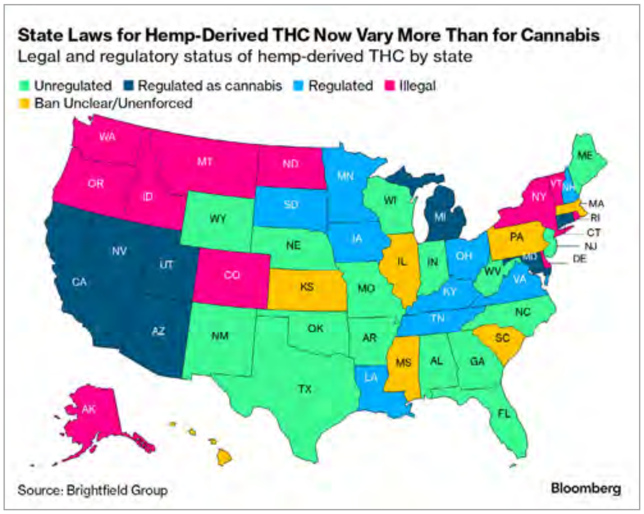
The Farm Bill's definition of hemp only prohibited one form of THC so that its enactment de facto legalized every other intoxicating cannabinoid that hemp can produce. Because Congress didn't intend to legalize these hemp products for consumers, it assigned no regulatory body for hemp-derived THC products, leaving the market to proliferate without any safety testing or age restrictions. The result is a $28 billion unregulated market for hemp-derived THC snacks, candy, and beverages that are often legal in states where cannabis is not.

The now-booming hemp industry wants Congress **to regulate** the market instead of banning its most lucrative sector. Yet several factors have recently emerged that weigh in favor of Congress rectifying its oversight in 2018, including a patchwork of state laws restricting hemp-derived THC, a **push** by 20 state attorneys' general to close the loophole, and a rising number of lawsuits stemming from confusion about the cannabinoids' legality.

States Struggle to Put Hemp Genie Back in the Bottle

States are trying to rein in the market for intoxicating THC products by banning the products outright, regulating them at the state level, or folding hemp-derived THC regulation into their legal cannabis programs.

The result is patchwork regulation at the state level that is increasingly complex and inconsistently enforced. State-by-state regulation created a legal landscape for hemp-derived THC that is almost the inverse of cannabis: States with legal cannabis are more likely to ban the products than states where cannabis is illegal because lawmakers tend to avoid addressing the issue at all.



In states where cannabis is illegal and hemp-derived THC is restricted, state regulators frequently lack the resources to enforce the laws in an already booming market, especially without the usual federal protections that ensure basic consumer safety. States with legal cannabis are typically more successful at banning or regulating hemp-derived THC because they already have the regulatory structure in place to do so.

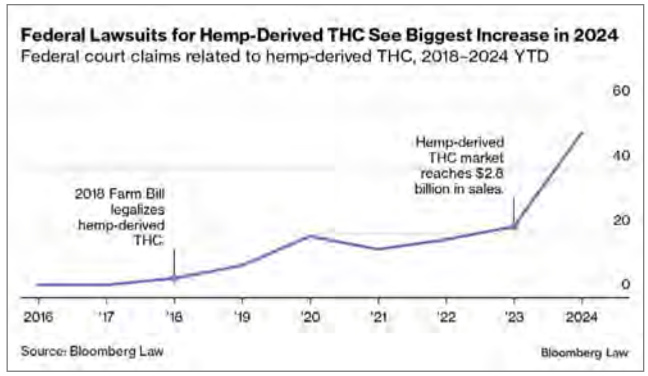
Because cannabis is illegal under federal law, Congress and the Department of Justice have permitted states to legalize cannabis and regulate it in the intrastate market. With hemp-derived THC, Congress inadvertently legalized it for federal interstate commerce, forcing states to create their own consumer protections and enforce them retroactively because of the lack of regulations.

The only way states can ensure that all legal THC products are safe and sold only to adult consumers is if Congress removes the loophole. States can then decide themselves whether to legalize hemp-derived THC or not—like they did with cannabis—and the Drug Enforcement Administration (DEA) will again have the authority to assist states with enforcement.

Federal Courts Can't Tell Legal THC from Illegal

Federal courts need clarity on how to distinguish between the THC that the 2018 Farm Bill legalized and delta-9 THC derived from cannabis that remains a Schedule I controlled substance. The best way to achieve that is for Congress to close the Farm Bill's loophole instead of regulating hemp-derived THC.

Federal lawsuits related to hemp-derived cannabinoids like delta-8 THC, delta-10 THC, and THCA have increased 750% since 2018 and saw their biggest year-over-year jump in 2024 (132%).



Many of these lawsuits challenge state statutes that attempt to restrict hemp-derived THC, citing conflicts with federal law. This leaves federal courts responsible for deciding whether state restrictions are narrow enough to justify the conflict, further complicating the products' patchwork legality.

A handful of federal challenges have been brought by employees who lost their jobs for testing positive for THC, despite using the version legalized by the farm bill instead of the illegal version (delta-9 THC). In September, the Fourth Circuit affirmed the district court's judgment in favor of the employer because the delta-8 THC the employee claimed to have used—which is federally legal—isn't distinguishable from delta-9 THC on a drug test, which remains a Schedule I substance.

This case highlights the challenges courts face in distinguishing between legal and illegal THC and underscores the need for legislative clarity. Many lawsuits at the state level involving hemp-derived THC stem from consumers being criminally charged, fired from their jobs, or otherwise penalized for using what they thought were legal substances.

Until Congress closes the loophole and clarifies that no form of THC is federally legal, regardless of its origin, consumers will continue to be penalized for

using products they thought were legal, and federal courts will be left to decide the constitutionality of state restrictions on a case-by-case basis.

Hemp Loophole Hinders Cannabis Rescheduling

Another path Congress could take would be to assign hemp-derived THC's regulation to the FDA. However, the Food and Drug Administration has already **declined** to create rules for cannabidiol (CBD) without assistance from Congress, so the legislative branch is unlikely to tackle the challenge of hemp-derived THC, which is even newer to the consumer market.

Furthermore, the Fourth Circuit's ruling demonstrates that there's no way to distinguish between federally legal THC and the Schedule I controlled substance—and that Congress will struggle to legislate hemp-derived THC differently than cannabis. For Congress, the path of least resistance is to close the loophole, put hemp-derived THC back on the controlled substances list, and wait until cannabis is rescheduled to start regulating it at a federal level.

Until cannabis is rescheduled, federal regulators won't have the information necessary to regulate THC products effectively. This will change after the drug is moved to Schedule III, which significantly loosens restrictions on research. The scientific community will then be able to generate the evidence needed for the FDA to write appropriate regulations, whether designating hemp-derived THC as a dietary supplement or a controlled substance.

The DEA will **conclude** the formal rescheduling process sometime in 2025, leaving Congress to confirm cannabis's new Schedule III status. The Farm Bill will likely be reauthorized first because it's overdue, and Congress will likely pass the House Agricultural Committee's proposed definition for hemp that bans all forms of THC, synthetic cannabinoids, or other hemp-derived intoxicants.

This clears the path for Congress to reclassify cannabis as Schedule III, with all forms of THC falling under its umbrella. By closing the loophole, Congress will realign federal law with states' efforts to regulate or ban these products and eliminate confusion for courts and consumers alike.

After that, hemp companies will either return to selling CBD products only or take their profits, cut their losses, and exit the market— turning the clock back to 2018, as if federally legal THC never existed at all.

Companies Will Voluntarily Roll DEI Back in 2025

Kate Azevedo
Senior Legal Analyst

It's been a rough year for corporate diversity programs. They've faced equal protection **challenges**, antidiscrimination complaints, and social media attacks. Some companies have succumbed to the pressure by rolling back diversity programs like the race- or gender-based fellowships.

Corporate diversity programs are sure to face continuing opposition next year, and these programs will be further splintered. But the rollback will likely come from within. Companies will voluntarily retreat from implementing more DEI programs in 2025, and may even further shrink existing programs to a greater extent than they have so far.

Corporate DEI Curtailed

Corporate diversity programs often are designed to establish eligibility—or reserve access to individuals—who are members of underrepresented racial, ethnic, or gender groups. However, since 2023's ***Students for Fair Admissions v. Harvard***, claims arguing that these programs violate the **Civil Rights Act** have more often than not been successful.

American Alliance for Equal Rights, the membership organization led by the architect of *Students for Fair Admissions*—the **case** that successfully challenged race-based affirmative action in college admissions—Edward Blum, has filed **12 legal claims** against companies since 2023. Five of these claims are ongoing, while seven have been resolved via settlement after the defendant companies removed any race- or gender-based eligibility requirements from their corporate diversity programs.

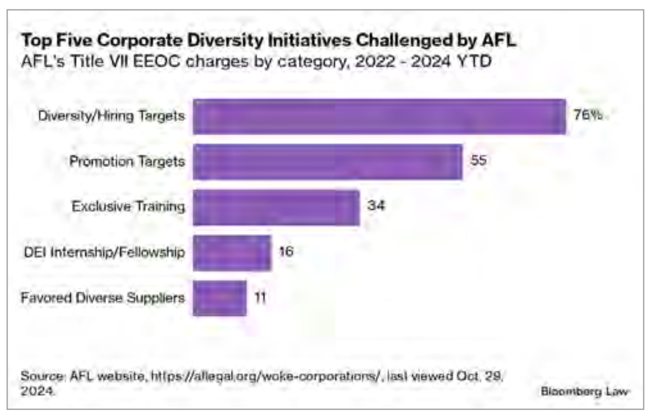
Most of the companies targeted by Blum chose to settle, demonstrating the vulnerability of these diversity initiatives, as well as the companies' lack of desire to fight back. Since 2023, many companies have decided to **alter this language** to try to circumvent legal scrutiny.

Hiring, Promotion Targets Challenged

Corporate diversity and promotion targets are disclosed on company websites and in SEC disclosures.

In the past two years, former Trump adviser Stephen Miller's America First Legal Foundation has used this readily available information to file Title VII **challenges** with the Equal Employment Opportunity Commission against 38 companies. (**Federal regulations** allow organizations to file an EEOC charge regarding systemic discrimination in a workplace.) The EEOC charges filed by AFL challenge a variety of corporate diversity initiatives by companies including **Williams Sonoma Inc.**, **Smithfield Foods Inc.**, **McDonald's Corp.**, **Nike Inc.**, **Hasbro Inc.**, **United Airlines**, **Kellogg's Co.**, and **The Hershey Co**.

More than three-fourths of the companies have hiring targets that the AFL claims are discriminatory; more than half have promotion targets that are being challenged.



McDonald's and Tyson Foods also publicly disclosed in DEI reports and SEC filings the common practice of **executive incentive bonus pay** to hit their diversity and promotion targets.

Challenges Will Fail

The EEOC hasn't yet made a determination on any of AFL's Title VII charges. Most of the challenges to the contested corporate diversity programs won't succeed, according to past Title VII EEOC charge data.

Over the last decade, the EEOC has **determined** that there was no reasonable cause to believe an employer engaged in discriminatory behavior in 60–70% of the cases. In such "no reasonable cause" cases, the EEOC won't proceed with its investigation.

Most Title VII Claims Filed Without Reasonable Cause

Title VII charges filed at EEOC, 2014 - 2023

Source: US Equal Employment Opportunity (EEOC) Enforcement and Litigation Statistics, Title VII Charges

Bloomberg Law

Only 5–6% of EEOC charges result in negotiated settlements for the company.

Even if most of the AFL's pending charges don't succeed, corporate diversity programs won't necessarily walk away unscathed. The negative publicity and potential legal headaches surrounding the diversity initiatives is proving to be a stronger force than many companies anticipated.

Voluntary DEI Rollback

While most legal claims alleging Title VII violations likely won't come to fruition, next year many companies will continue to voluntarily **roll back or alter** their diversity programs—and to a greater extent—to minimize **corporate risk and legal expenses** before any legal claim has been filed.

More often than not, the most effective anti-DEI efforts thus far have been from targeted social media campaigns such as those from **Robby Starbuck**. Prominent companies such as **Coors Beverage Co.**, **Ford Motor Co.**, **Lowe's Cos.**, and **Harley-Davidson Inc.** have voluntarily rolled back their corporate diversity programs this year in the wake of Starbuck's **anti-DEI campaigns**—and not one charge was filed against them prior to that.

Many boards may also advocate for a rollback to their corporate diversity programs due to their general **fiduciary duties** to minimize corporate risk—the anti-DEI sentiment has created growing **disruptions at their annual meetings**.

While some companies may continue to dig in their heels to **steadfastly advance** their DEI initiatives in 2025, corporate diversity will certainly have a different landscape. There will be fewer corporate DEI programs, and the change will have come from within.

Artificial Intelligence

Will AI Make Tech Companies Pivot on Climate Promises?

Matthew D. Taylor
Senior Content Specialist

In 2021, Google **reported** to the SEC that it would be running its entire business on carbon-free energy everywhere, at all times, by 2030. That same year, Microsoft **reported** that by 2030, it would not only be carbon neutral but also carbon negative.

As we head into 2025, these tech firms' ambitious pledges are being seriously challenged by the recent emergence of one new technology: artificial intelligence.

Both companies own and operate super-large, or "hyperscale," data centers that are now significantly dedicated to **housing their AI services**. This year, Google's greenhouse gas (GHG) emissions went **up by 50% due to AI**, and Microsoft announced **30% higher emissions**—again, due to AI.

Now, instead of definitive statements, the most recent 10-K disclosures filed by both companies reorient their claims toward more cautious language. **Alphabet**, Google's parent, felt it necessary to **point out** that the "path to net-zero emissions will not be easy or linear" and that some of its plans "may take years to deliver results."

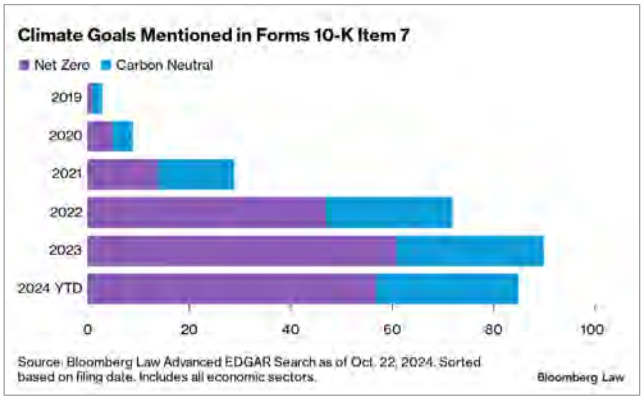
Microsoft's 10-K **acknowledged** "major changes" in the company's "understanding of what it will take to meet our climate goals." The infrastructure and energy demands of generative AI and other new technologies "create new challenges for meeting sustainability commitments across the tech sector," according to the form.

It is possible that this is a sign of things to come, as other large technology companies must decide whether they can actually meet their GHG commitments or whether they need to be honest about falling short.

For many tech companies, the decision is complicated by how GHG emission reduction pledges are made.

AI's Environmental Problem

Public companies report their GHG targets and other environmental, social, and governance commitments in their Forms 10-K and other periodic filings with the Securities and Exchange Commission. These carry weight when it comes to the SEC ensuring that investors are getting needed information.



Following the 2015 Paris Climate Agreement, many nations looked ahead to 2030 as a target for achieving significant reductions in their GHG emissions to address global climate change. Many large companies, as producers of GHG emissions and drivers of national economies, made their own emissions pledges.

Then ChatGPT burst onto the scene in the early months of 2023. The generative AI market is expected to approach $1 trillion by 2027.

No one wants to miss out on the opportunities that AI promises to bring. But the increasing use of AI poses a potential conflict with company disclosures regarding Scope 1 (direct) emissions and Scope 2 (indirect from purchased energy) GHG emissions.

AI and the data centers that house and power these software systems require large amounts of electricity, which raises issues of fossil fuel use. In locations such as Northern Virginia, the Chicago area, California, and elsewhere, data centers are creating a demand for energy to such an extent that they are expected to consume between 4% and 10% of all electricity in the US within the next six years.

Transitioning the world's power sources to cleaner generation such as wind and solar or even nuclear power will address this problem, but it won't happen overnight. Meanwhile, the grid in the US still relies on natural gas to produce power at an increasing rate, reaching record levels of consumption earlier this year and imperiling national goals for carbon-free power generation.

This puts publicly traded technology companies in a tough spot: how optimistically to frame GHG commitments without running afoul of disclosure requirements and investor expectations? The coming year likely will reveal the various approaches companies will take.

AI Real Estate Companies Remain Upbeat

To determine whether rethinking language about 2030 GHG targets is likely to be the route tech firms will take, it may be helpful to look at the disclosures filed by some of the other players operating in this market, especially financers and operators of hyperscale and colocation data centers (like an apartment for equipment with different owners).

For example, DigitalBridge Group, Inc. is an investment firm focused on digital infrastructure and real estate for, among other things, artificial intelligence. In its most recent Form 10-K, DigitalBridge said that "ESG principles have long informed the way we run the Company, approach investing and partner with the management teams in our portfolio companies." Its 10-K specifically mentions energy efficiency and GHG emissions as priorities.

DigitalBridge is part of a consortium of owners of the privately held Vantage Data Centers LLC, a developer of data centers in various locations in the US and globally, fueled at least in part by the growth of AI. As a private company, Vantage's goal to achieve net-zero Scope 1 and Scope 2 GHG emissions by 2030 is reflected in its most recent ESG Report. In that same report, Vantage said that "the rise of generative AI and other technology advancements are not only expanding our industry at an escalating rate but adding layers of complexity to both industry operations and ESG efforts." Using the standard of double materiality, it identifies energy as "highly material" to both ESG concerns and the company's financial performance. Notably, it still has a goal to achieve net-zero Scope 1 and Scope 2 GHG emissions by 2030.

For another example, Digital Realty Trust is a major provider of data centers worldwide. According to its most recent Form 10-K, energy and resource management considerations are integrated into its business decisions. Specifically, it has "set a global carbon reduction target that has been validated by the Science-Based Target Initiative to reduce our Scope 1 and 2 emissions 68% per square foot and Scope 3 emissions … 24% per square foot by 2030." In addition, it seeks carbon-free energy whenever possible and is a signatory to the European Climate Neutral Data Centre Pact.

In contrast to Google and Microsoft, companies such as these seem undeterred from their objectives, based on the language they have consistently been using in their annual disclosures.

Greenhouse Gases and Green Investments

In the coming year, will we see companies in the tech industry reconsider their publicly stated 2030 GHG goals? Or will we see the tech sector make large investments to accelerate development of clean energy to counterbalance AI's climate impacts? Or some combination of both?

Clean energy investments have already begun. For instance, a subsidiary of ArcLight Capital Partners LLC will pour $500 million into renewable energy projects with an eye toward meeting the AI power demand. Microsoft and BlackRock—known for supporting ESG investments—announced an investment partnership with similar goals valued at $30 billion.

And some companies remain optimistic. Vantage Data Centers, for one, received in April a $3 billion green loan that will finance continued growth aligned with its ESG principles, in keeping with its Green Finance Framework.

It's likely that 2025 will be pivotal with regard to the impact of artificial intelligence on the real world of securities disclosure, ESG investment, and the global climate.

Will Basic Contract Skills Matter When AI Takes Over?

John Hawthorne
Associate Legal Analyst

As generative artificial intelligence gains favor in transactional law, law firms and corporate legal departments will want to increase efforts to train their lawyers on using new AI tools to draft contracts. But do the attorneys most likely to be assigned such tasks have a firm enough grasp on the fundamental transactional legal skills needed to effectively validate AI results?

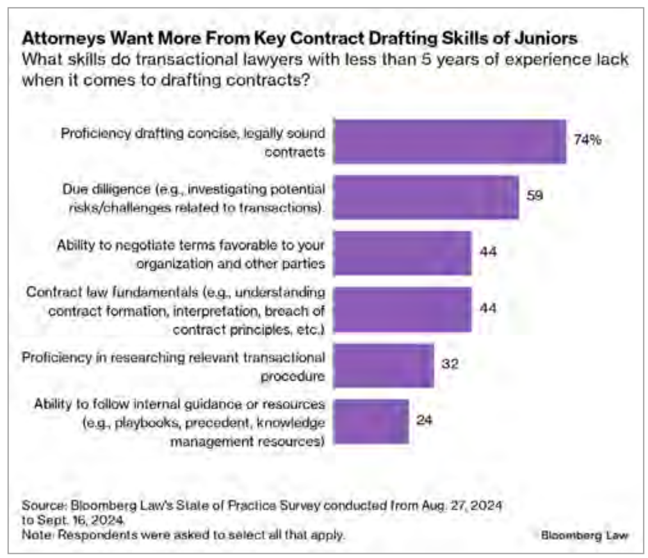
Veteran attorneys believe that their less-experienced counterparts could use some help in developing a grasp of basic contract drafting skills, according to results from a recent Bloomberg Law survey. This lack of full confidence suggests that in the coming year, legal organizations will want to place an increased emphasis on the development of early-career transactional attorneys' fundamentals if they hope to successfully integrate AI tools for contract law tasks.

Acknowledging the Skills Problem

In Bloomberg Law's most recent State of Practice survey, 138 attorneys with five years or more of transactional law experience were asked about the level of confidence they have in the ability of transactional attorneys with less than 5 years of experience to draft a contract. A majority of these respondents (65%) expressed that they are only somewhat confident about that ability.

Only one-tenth of respondents said they are very confident in the ability of junior attorneys to draft a contract. A combined one-fourth (25%) of respondents said they are either neutral or not at all confident. These responses illustrate that experienced transactional attorneys believe that more can be done to aid early-career transactional attorneys in having a firmer grasp on the fundamentals of their practice.

When the respondents were presented with a list of six specific contract drafting skills and asked to choose the skills that early-career transactional attorneys are lacking, two contract drafting skills stood out more than the rest: writing and due diligence.



Almost three-fourths of law firms and in-house respondents (74%) believe that juniors lack the ability to proficiently draft concise, legally sound contracts. More than half of the respondents (59%) found a lack of due diligence skills (e.g., investigating potential risks and challenges related to transactions). An equal percentage of respondents (44%) believe early-career transactional lawyers can do better in two additional contract drafting skills: their ability to negotiate favorable terms and their knowledge of

contract law fundamentals. Respondents were less worried about juniors' ability to research relevant transactional procedure (32%) and their ability to follow internal guidance for drafting contracts (24%).

By recognizing specific areas of concern like these, law firms and in-house legal teams can know where a training investment in the fundamental lawyering skills of their attorneys will pay off the most, especially when considering the investment they are making in AI tools.

Law Schools Can Only Do So Much

Historically, law school curriculum has focused on teaching students how to "think like a lawyer," which comes in the form of developing a strong grasp of legal research and following set guidelines to complete tasks. But due diligence and actual drafting are more client-specific; the details of the deal and the contents of the contract depend on the specific circumstances between the parties. As a result, experience in these areas has been limited—a reality that is not lost on veteran attorneys.

Even so, law schools are doing their best to **train** the next generation of transactional attorneys by developing their understanding of fundamental lawyering skills and expanding offerings into understanding generative AI.

But law schools alone cannot bridge the knowledge gap. With seasoned attorneys wanting more from early-career colleagues' ability to draft contracts, it's up to law firms and corporate law departments to focus on training programs that look to educate the next generation of lawyers.

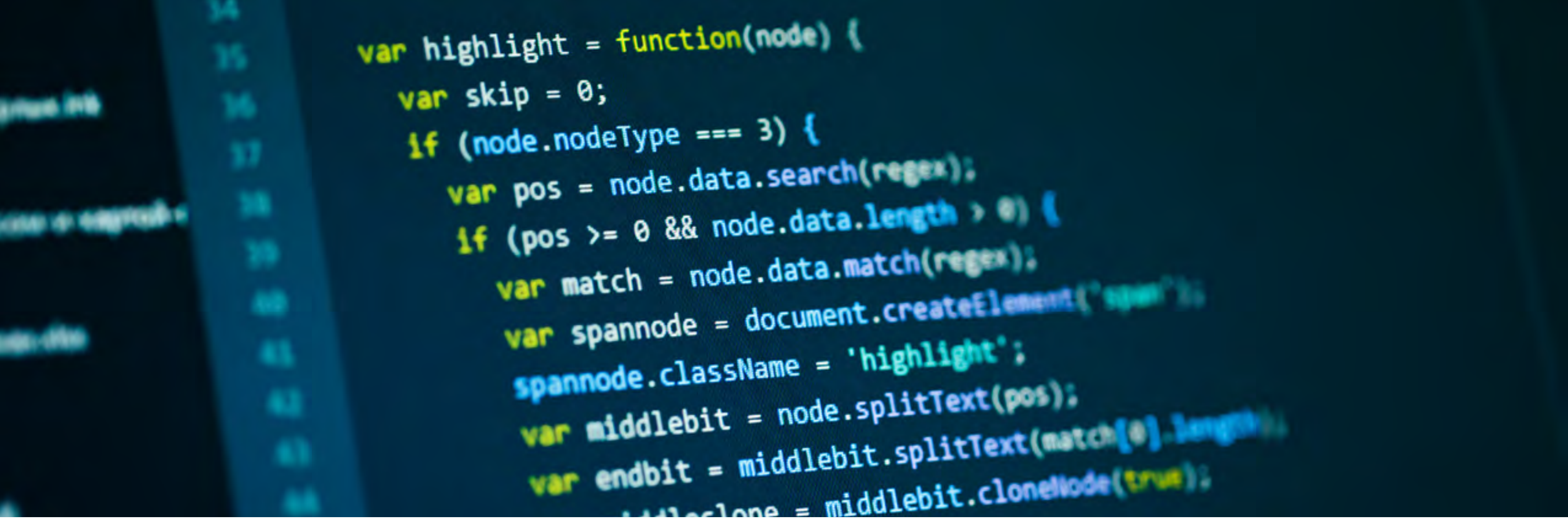
Skills to Empower, Not Replace, Junior Lawyers

There are some law firms and corporate legal departments that believe that AI tools will **transform** the entire legal industry by getting rid of a need for junior attorneys tasked with mundane tasks. However, leaders are starting to recognize that the dream of waiting for an **artificial** lawyer is not likely to become a reality. These tools cannot yet **replace** professional judgment, experience, and creativity of human lawyers.

In reality, the hype around generative AI tools mirrors the hype about red-lining tools that were thought to remove aspects of a lawyers' document review process. Instead, red-lining has aided lawyers in doing that process. The goal should be to **mix** these tools into the workflows of attorneys, so that an acceleration happens rather than a replacement of human capital.

Without these fundamentals, there's an increased likelihood of a legal organization publicly relying on a false answer provided by an AI tool. So lawyers will need to have a strong grasp of the foundational transactional skills necessary to practice contract law.

By offering more robust training programs in both areas, the legal industry will more seamlessly adopt AI tools and allow early-career attorneys the ability to develop habits that generative AI tools cannot yet replicate, sending a message that basic contract drafting skills will still matter.



Law Schools Accelerate AI to Meet Attorney Demands

Andie Hozik
Content Specialist

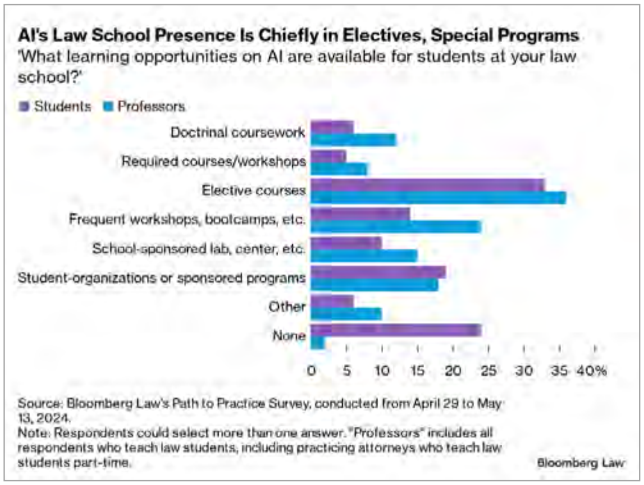
Generative artificial intelligence has blossomed in the legal industry over the last year. But how are law schools **responding**, and where will they head in 2025?

Law schools have been including AI in elective courses and other secondary programs, but will likely increase their teachings of it and incorporate it further into standard legal education next year, according to results from Bloomberg Law's latest **Path to Practice** survey. The survey also found that most attorneys expect new associates to have at least a basic knowledge of generative AI, and that many lawyers are using AI for a variety of work tasks, further underscoring the need for new attorneys to be up to speed on AI upon leaving school.

How Law Schools Are Currently Handling AI

AI hasn't fully made its way into standard legal education, according to the survey data. But it has been incorporated into electives and other more "secondary" programs.

When asked what AI-based learning opportunities are available at their **law school**, only a small number of law students (6%) and professors (12%) said that AI learning is integrated into doctrinal coursework. And just 5% of students and 8% of professors responded that it has been built into required courses or workshops.



AI's Law School Presence Is Chiefly in Electives, Special Programs
'What learning opportunities on AI are available for students at your law school?'

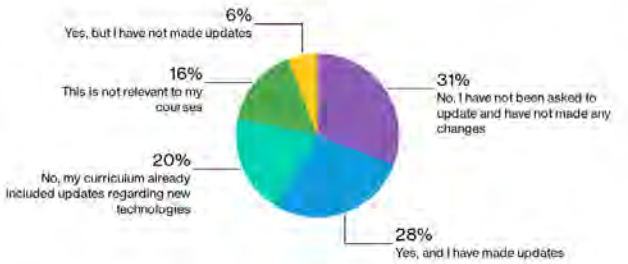
Source: Bloomberg Law's Path to Practice Survey, conducted from April 29 to May 13, 2024.
Note: Respondents could select more than one answer. "Professors" includes all respondents who teach law students, including practicing attorneys who teach law students part-time.

On the flip side, 36% of professors and 33% of law students reported that AI and legal technology have been included in elective courses, and 24% of professors and 14% of students reported that their school regularly conducts workshops and bootcamps that are focused on AI. Only 2% of professors, as compared to 24% of students, said that it hasn't been integrated at all. (Perhaps students are just not as in tune with all of the course offerings at their school, as compared to professors.)

We're also finding that a lot of professors aren't updating their courses in response to AI. More than half of professors (53%) declared that they haven't made updates to their **curriculum** in response to recent technological developments.

Most Professors Aren't Updating Their Curricula for AI

'Have you been asked or encouraged by your institution to update your curriculum in response to recent technological advancements in the legal field?'



Source: Bloomberg Law's Path to Practice Survey, conducted from April 29 to May 13, 2024.
Note: The percentages don't total 100% due to rounding. "Professors" includes all respondents who teach law students, including practicing attorneys who teach law students part-time.

Bloomberg Law

About a third (31%) said that their school has not asked or encouraged them to make updates, nor have they done so on their own. 6% of professors said that their school has asked, but they haven't made any updates. And 16% claimed that recent tech developments aren't relevant to their courses.

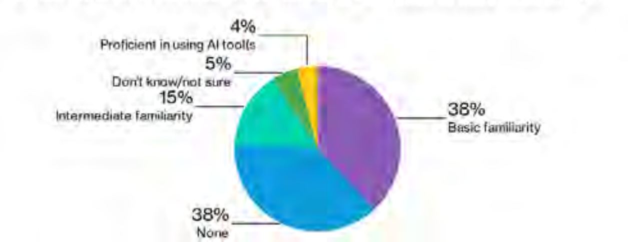
The good news is that about half (48%) said that they have made updates as requested (28%) or that their curriculum already implemented such updates. Considering these numbers, law schools have made some progress with their AI course offerings, but still have a ways to go, especially in standard law school classes, due to industry demand.

The Legal Industry's Demand for More Generative AI Curriculum

The legal industry is calling for law students to be taught how to use **AI** while in school. More than half of attorneys (57%) said that new attorneys should have at least a basic familiarity with AI.

Most Attorneys Expect Associates to Have AI Knowledge

'What level of practical experience with AI would you expect new associates or new legal professionals at your firm or organization to have upon hiring?'



Source: Bloomberg Law's Path to Practice Survey, conducted from April 29 to May 13, 2024.

Bloomberg Law

38% of attorneys said that they would expect new associates to have a basic familiarity with the concept of AI, how it can be used for work, or general implications of using it, upon hiring. Another 15% went even further, saying that incoming attorneys should have an intermediate familiarity—which could include the simple use of technology, asking questions, summarizing cases, and using it in occasional tasks and workflows. And 4% of attorneys said they should be proficient.

Attorneys are likely to expect incoming associates to have AI knowledge, in part, because they are using it for a variety of tasks in their own work. 40% of attorneys indicated that they have used generative AI for work-related projects.

Of those 40%, more than half have used generative AI for legal research, and more than a third have used it for drafting memos or correspondence. These numbers show that new attorneys are expected to have basic AI-use knowledge and that attorneys are using it in their work.

Data aside, it's clear that the industry has recognized that attorneys are using AI in their practice. Courts around the country have responded by implementing **standing orders** and other guidance for attorneys choosing to use AI in their cases. And teaching law students how to appropriately use AI in their work can prevent any misuse or ethical issues.

Will Path to AI Oversight Follow States or Standards?

Alan Huang
Senior Legal Analyst

As AI's reach expands, so does the call for regulations. Lawmakers are beginning to craft bills aiming at addressing risks like digital discrimination, data pollution, and deepfakes. While comprehensive AI laws are gaining attention, they are still at early stages, leaving a regulatory gap in managing potential risks and incentivizing innovation that may take years to fill.

Among potential pathways for future comprehensive AI oversight in the US, two recent historical developments offer informative precedents: the progression of state privacy laws and the adoption of federal cybersecurity standards. Either of them, or some combination of both, could serve as a blueprint for regulating AI.

First, the rise of state-level privacy laws demonstrates a proactive stance among states in protecting data privacy amid rapid technological advancements. Second, the National Institute of Standards and Technology **Cybersecurity Framework**, mandated for federal agencies, illustrates a model of adopting voluntary regulatory standards within federal agencies that later gain popularity across industries.

Path 1: States Poised to Follow EU's Privacy Example

The progression of US state privacy laws offers valuable insights into how future comprehensive AI laws may emerge, as increasing public and regulatory awareness of AI risks reflects earlier responses to data privacy concerns.

Currently, there is no comprehensive federal privacy law in the US, while the EU has the General Data Protection Regulation. Enacted in 2016 and effective since 2018, the GDPR reshaped the regulatory landscape with its broad scope and stringent controls over data privacy practices. It has exerted significant normative influence and has served as a model for US state privacy laws.

To remain competitive in data privacy governance, various US states have drawn from the GDPR, integrating its principles into their own comprehensive privacy laws.

California was the first state to pass a state comprehensive privacy law. The California Consumer Privacy Act, which was enacted in 2018 and went into effect in 2020, serves as an important role model and provides benchmarks to lawmakers in other states. Following California, states like Colorado, Virginia, Connecticut, and Utah have passed their own comprehensive privacy laws. To date, 20 states now have comprehensive privacy legislation in place.

There is a sign of a potentially similar pattern that could emerge in state comprehensive AI laws, following the recent trend of privacy law expansion.

The EU AI Act, implemented in August is the **first** comprehensive artificial intelligence law in the world. It has extraterritorial effect, regulating AI providers and deployers outside the EU if they offer AI service within the EU market.

States have been eagerly creating AI-related laws. In 2024 alone, more than **400 state AI-related bills** were introduced, with additional proposals likely next year—signaling a trend of heightened AI regulatory development at the state level.

California, home to AI companies like Nvidia and OpenAI, is eager to establish a comprehensive AI law and assert leadership in AI governance. However, the legislative process has faced obstacles, as Senate Bill 1047 (**SB 1047**), which aimed to create a comprehensive AI risk management law, received pushback from major AI companies and was ultimately **vetoed** by Governor Gavin Newsom.

While California continues its push for AI regulation, Colorado has taken the lead by passing the first comprehensive AI law. Colorado Senate **Bill 24-205**, known as the Colorado AI Act, was signed into law in May and is set to take effect in 2026. Having similarities with EU AI Act, Colorado AI Act also took a risk-based approach, targeting high-risk AI systems and aiming to protect consumers from digital discrimination.

As seen with the rollout of state privacy laws, other states may adopt a "wait-and-see" approach, closely monitoring how the EU's and Colorado's AI laws are enforced and how California progresses with its own AI regulations. A broader surge in state AI comprehensive laws may not occur in 2025 but could unfold over the coming years as existing AI comprehensive laws take shape.

Path 2: Federal Standards to Provide Broad Rules

Aside from state-level legislation, a federal approach to AI governance may emerge through frameworks established by agencies like the National Institute of Standards and Technology. A prominent example is the success of NIST's Cybersecurity Framework, mandated for US federal agencies under **Executive Order 13800**, which has also extended its influence on federal contractors and gained broad acceptance across industries. Many organizations have chosen to incorporate NIST CSF into their cybersecurity programs.

NIST CSF can be used for businesses to manage cyber risks and protect their new networks and data. This framework provides outlines to create cybersecurity protection measures. Cybersecurity and AI risk management share key characteristics—broad applicability, rapid evolution, and high stakes for regulatory oversight—making a federal standard an effective model for managing AI-related risks.

In the absence of comprehensive federal AI laws, the **NIST AI Risk Management Framework** may play a crucial role in shaping AI governance.

The NIST AI Risk Management Framework outlines key concepts, such as trustworthy AI, core governance principles, and profiling, to help organizations strengthen their risk management and compliance practices. Although voluntary at present, the framework has attracted considerable attention, with some members of Congress viewing it as a potential solution to the lack of comprehensive AI legislation. A proposed bill, the **Federal Artificial Intelligence Risk Management Act** of 2024, would mandate federal agencies to adopt this framework. This approach mirrors the trajectory of NIST CSF to extend its impact across various sectors.

This approach reflects a typical US method for regulating technology, favoring voluntary frameworks over immediate legislation. The NIST AI Risk Management Framework allows participants to implement AI-related risk management controls tailored to their needs and resources, facilitating gradual integration across federal agencies and industries. As Congress continues to face challenges in passing comprehensive AI legislation, such frameworks may prove essential for guiding responsible AI development and governance in the near future.

Measuring the Potential Paths

In 2025, AI development and applications are expected to continue advancing. Regarding future comprehensive AI law developments, both federal- and state-level approaches are likely. The adoption of the AI Risk Management Framework within federal agencies may encounter fewer obstacles initially, allowing time to assess its effectiveness. This framework could become mandatory not only through federal legislation but also by executive order. Given the current legislative landscapes, implementing a federal framework appears more feasible with less resistance.

However, a hybrid approach is possible: A federal standard may gain traction, while individual states could develop supplementary or even comprehensive AI laws, especially if the EU AI Act enforcement reshapes industry standards. In such a scenario, states could respond with tailored regulations to address local considerations and remain aligned with evolving international norms.

Why 'AI-Washing' Sets Tone for SEC's Adviser Oversight

Colin Caleb
Principal Legal Analyst

In 2025—and for the foreseeable future—the Securities and Exchange Commission won't be regulating how registered investment advisers use AI. The SEC's final rulemakings on the topic have been virtually non-existent, and its enforcement actions have been mainly focused on what investment advisers disclose about their AI use, instead of how they use AI itself.

Specifically, recent AI-related investment adviser enforcement actions strongly suggest that the SEC is almost exclusively targeting the practice of "AI washing," which occurs when an investment adviser misrepresents its use of AI in such a way that makes an investor inclined to engage with that adviser.

SEC's Aggressive Agenda Drastically Halted

A year ago, it seemed that the SEC was poised to regulate AI use by investment advisers after issuing a number of proposed rulemakings—six, to be exact—that either address AI directly or would create a more defined pathway for the SEC to oversee advisers' use of AI, based mainly on their fiduciary duties of loyalty and care. To date, though, only one of the six have been finalized.

The lack of progress by the SEC has little to do with this being an election year, as all of the proposals were published in 2022 and 2023 with plenty of time to clear procedural hurdles (and even to allow for partisan posturing). Backlash from industry stakeholders and the current Supreme Court makeup are the more likely culprits.

SEC Chair Gary Gensler has been outspoken about the risks that AI poses to the financial markets, and has consistently issued warnings regarding puffed-up pitches and statements about AI use across all SEC-regulated entities, including by regulated investment advisers.

Below are three reasons why the SEC will have to continue to rely on enforcement actions based on AI washing if it wants to keep investment advisers' use of the technology at bay.

AI Tech Is Hard to Regulate

Regulating AI use is hard, in large part, because most firms in the investment management industry that utilize some form of AI rely on off-the-shelf tools. The challenges are further complicated by the fact that public discourse (including Chair

Gensler's **remarks** earlier this year) doesn't always delineate the difference between classic AI—e.g., supervised machine learning—and generative AI—e.g., generative foundation models. This is important because, until **recently**, authoritative industry voluntary frameworks (like those issued by **National Institute of Standards and Technology** and the **Organisation for Economic Co-operation and Development**) defined AI broadly to include classic AI, which has been around for decades. However, the sense of urgency by policymakers that began a year ago has been more targeted toward generative AI, which is responsible for the hysteria surrounding bias and hallucinations.

Also, reactions to two of the six proposed rules highlight the scope of the challenges that the SEC is up against. One of the two proposals that specifically address AI use by investment advisers—the **Outsourcing By Investment Advisers rule**—received industry pushback due to its attempt to hold investment advisers responsible for oversight of third-party vendors that offer certain services, including AI-dependent technology. Another proposal—the **Conflict of Interest for Predictive Data Analytics rule**—is widely **criticized** by **commenters** for being extremely broad in the covered technology (which includes classic AI) by suggesting that simple deterministic computer programs utilized in the industry for decades would require oversight by investment advisers.

This leads to a question: How does the SEC expect to hold investment advisers accountable for AI technology they likely didn't develop, have been using for decades, and have interwoven into their back office and practice tools? There is no easy way.

Recent Non-AI Court Decisions Constrain the SEC

First, the Fifth Circuit **held recently** that the SEC exceeded its authority to issue rules governing private fund advisers and the funds they advise when it issued new private fund adviser rules earlier this year that are not related to AI. Private fund adviser advocacy groups opposing the Conflict of Interest rules have **pointed** to a portion of the court's opinion holding that private funds are exempt from federal regulation of internal governance structure. Several of the proposed rules related to investment advisers' AI use would fall squarely within this use case. This at least will give the SEC pause before moving forward with related AI enforcement actions for private fund advisers.

Second, and most relevant to all investment advisers, the Supreme Court's ***Loper Bright Enterprises v. Raimondo*** decision in June discontinued the SEC's privilege to interpret and issue rules where a statute was ambiguous as to the SEC's authority to act (known as the Chevron deference). Instead, federal judges now possess this interpretive power, and the supermajority of Republican judges that exists in the Supreme Court and the reversal of the decades-old Chevron doctrine has suddenly placed into question many of the SEC's interpretations of overarching obligatory statutes.

AI Washing Is Safe for the SEC

Finally, policing the practice of AI washing is a **play** from the SEC's ESG playbook, where it has initiated actions against regulated firms it has accused of "greenwashing."

These actions are generally based on violations of the **Investment Advisers Act of 1940** rules. Section **206(4)-1**, for instance, governs an investment adviser's obligations to market their products and services and investment opportunities accurately in ways that don't (for these purposes) over-inflate the role and involvement of any factor. While AI washing cases are in the early stages, it appears that the SEC is targeting cases that are **black-and-white** in order to send a signal to the industry that the commission will not merely watch idly.

Interestingly enough, while the SEC hasn't issued any final rulemakings that would directly impact how an investment adviser uses AI, it has **expressly** indicated its intent to focus on how firms are using AI during compliance examinations. Looking forward, don't be too disappointed if the SEC merely ramps up its AI washing enforcement actions—and perhaps expands the grounds for which it initiates these actions.

Elections and Obscenity Will Continue Driving AI Laws

Travis Yuille
Associate Legal Analyst

The number of states with laws regulating AI-generated election communications increased by 400% this year, and candidates across the aisle have expressed concerns regarding "misinformation" and "fake news." 2025 will see the widespread adoption of artificial intelligence regulations narrowly targeted to curb election misinformation and sexually explicit content.

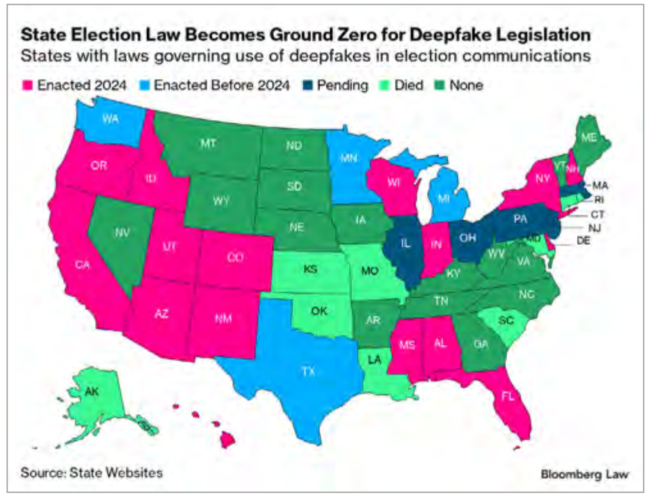
By this time next year, it's likely that 30 or more states will have some laws on the books either requiring AI users to disclose when AI is used to create media or outright banning it in certain contexts.

Litigants will challenge the constitutionality of some of these—particularly elections laws—and their success will largely depend on the statutory language. California's most recent election law is currently being challenged and will serve as a test case for future plaintiffs.

Elections Become Ground Zero for AI Regulation

Generally, states have been slow to adopt comprehensive legislation regulating the use of artificially intelligent systems. Colorado is the only state to have passed a comprehensive law imposing obligations on AI developers and deployers. Utah and California have passed transparency laws requiring certain disclosures to be included with generative AI outputs, but aren't quite as sweeping as Colorado's.

Deepfake regulations on the other hand tell a very different story. In 2019, Texas passed the first **law** regulating the use of deepfakes in election communications, and by the end of 2023 there were only three additional states that had passed similar laws. But 2024 saw an explosion in deepfake election laws, no doubt spurred by the November election. Sixteen states passed laws this year limiting the use of deepfakes in election communications, bringing the total to 20.



In addition to enacted legislation, there are pending bills in six state legislatures that pertain to election deepfakes and nine states with proposed legislation that ultimately failed. In the wake of the November election, concerns about election misinformation will be top of mind for state legislators going into their 2025 term. If only half of the pending or failed bills get reintroduced and pass, more than half of the states in the union will have similar election deepfake laws.

What Do Election Deepfake Laws Look Like?

Most deepfake laws restrict the dissemination of "synthetic media" or "materially deceptive media"—typically defined as an image, video, or audio that (1) depicts an individual engaged in conduct or speech in which they didn't engage, that was (2) published to the public without the consent of the individual, and (3) was produced in whole or in part by artificial intelligence.

About half of the deepfake election laws enacted are only applicable within a certain period of time leading up to state and national elections, usually 90 days. California is an outlier, with a wider window of 120 days.

Almost all of these laws allow for the creation and dissemination of deepfake election media, even within the applicable timeframe, provided the creator includes a visual or auditory disclaimer (depending on the media) informing the audience that the content is artificially generated. These disclaimer provisions typically take the form of either a safe harbor or an affirmative defense.

Additionally, about half of the laws explicitly exclude parody and satire, and incorporate the protections of **section 230** of the Communications Decency Act.

Constitutional Challenges Loom

If 2025 sees a continuation of the spread of deepfake election laws of 2024, then 2026 will likely be the year of constitutional challenges to these laws leading up to the midterm election. Challengers will argue that these laws unconstitutionally restrict speech under the First Amendment.

These arguments aren't without merit—the US Supreme Court has consistently been skeptical of laws restricting political speech, stating that political speech is "at the core of what the First Amendment is designed to protect." Courts will apply strict scrutiny, placing the burden on the states to show that their laws are narrowly tailored to further a compelling state interest.

California's newest election deepfake law was **challenged**, before it even passed in September, by an individual who used deepfake technology to create a parody criticizing presidential nominee Kamala Harris.

Laws passed in Minnesota, Utah, and Texas are uniquely vulnerable to being struck down on a constitutional challenge. Unlike most laws, Minnesota's doesn't have a disclaimer safe harbor, meaning it effectively bans the dissemination of deepfakes within 90 days of an election. Additionally, Minnesota's law doesn't have a carveout for parody or satire, which are historically protected by First Amendment jurisprudence.

Utah's law is unique in that it doesn't only apply to deepfakes, it applies to any communication that is substantially produced by generative artificial intelligence. This could be construed rather broadly and include videos that use AI to add vocal narration

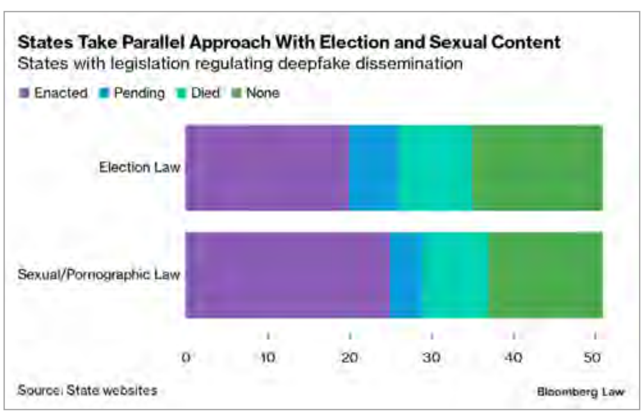
to scripted text, a common practice on platforms such as TikTok. Like Minnesota, Utah also doesn't include a carveout for parody or satire.

Texas's law was the first election deepfake law and is most likely to be challenged for being unconstitutionally vague. The law is only 181 words, doesn't include a disclaimer safe harbor or carveouts for parody or satire, and isn't as narrowly constructed as other subsequent laws.

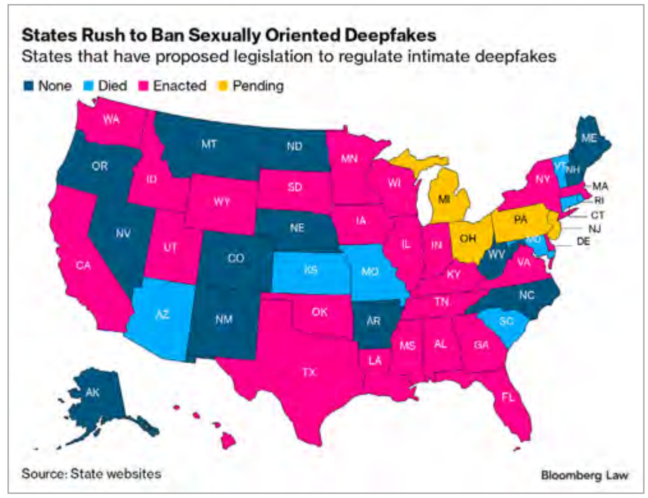
Assuming that the prevention of false information leading up to an election is a compelling state interest, challengers will likely argue that most of these laws aren't narrowly tailored to address the issue. Most laws only prevent the creation of deepfakes made without the consent of the depicted individual and exclude misleading deepfakes made with consent. This means that a candidate could create a misleading deepfake of themselves to improve their reputation and face no statutory repercussions.

States Take Aim at Sexually Oriented Deepfakes

Election communications aren't the only forms of expression that lawmakers are concerned about in the wake of deepfake technology. Sweeping legislation regulating pornographic and explicit deepfakes have spread in a near identical manner as election laws.



Currently, 25 states have amended their state codes to account for sexually oriented deepfakes, and four states have pending bills. Most of these laws outright prohibit the creation of explicit images of minors and non-consenting individuals using deepfake technology.



These laws aren't likely to face constitutional challenges to the same degree as election laws. Supreme Court precedent excludes obscenity from First Amendment protection, and lawyers and judges may be unwilling to stake their reputation by challenging laws that protect minors from abuse.

The same can be said for a handful of deepfake laws passed recently that prohibit the use of deepfake technology in furtherance of extortion, fraud, and other crimes of deceit. It's unclear exactly what behavior these laws forbid that wasn't already unlawful—common law fraud is a technology-neutral crime unconcerned with the specific means by which a lie is perpetuated.

A Piecemeal Approach to Regulating Emerging Issues

The deepfake legislation trends described above may indicate a shift in states' approach to regulating emerging issues when compared to privacy. State privacy law trends have resulted in a slow adoption of comprehensive consumer privacy laws—**20 states** have adopted comprehensive privacy laws over the last six years.

Conversely, deepfake laws have spread like wildfire over the last year, and for the most part they've been reactionary, narrow in scope, and tailored to curb the specific use cases mentioned above. The comprehensive **Colorado AI Act** may be an outlier as states shift focus to a more **voluminous and scattered** form of regulation to govern emergent issues, perhaps due to the rapid and often unpredictable nature of technological progress in the field of artificial intelligence.

Practice of Law

Anti-DEI Threats Loom, But Lawyers Aren't Flinching

Janet Chanchal
Senior Legal Analyst

Brittany L. Long
Assistant Team Lead

In the wake of the Supreme Court's 2023 decision to end affirmative action in higher education, a handful of law firms have strategically adjusted the language in their diversity, equity, and inclusion programs to placate anti-DEI litigants. But contrary to concerns about a widespread rush to abandon DEI initiatives, Bloomberg Law survey data show that law firms have largely upheld their commitment to DEI and have not modified their programs or issued new guidance on internal DEI objectives.

Similar patterns among in-house attorney respondents indicate that a cautious stance, specifically in the face of anti-DEI challenges, is also likely to be adopted by corporations that seek to preserve the integrity of their DEI programs while maintaining shareholder, client, and employee satisfaction.

Law Firms Remain Committed to DEI

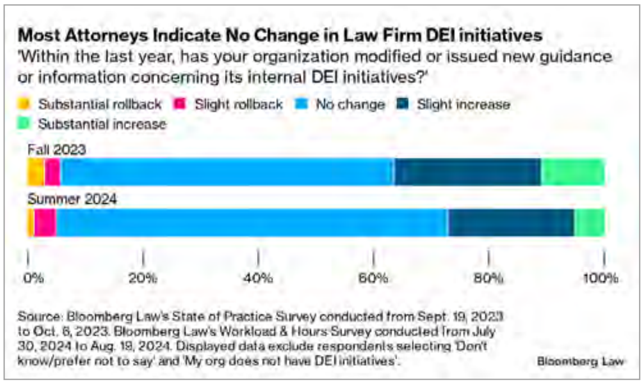
In general, law firms are facing rising concerns about potential legal ramifications from anti-DEI litigants. As DEI programs have expanded, they have come under increased scrutiny from various stakeholders, including courts, regulatory bodies, and clients.

However, survey results indicate that many law firms are not changing descriptive language in their internal DEI policies and programs. Instead, firms are continuing to uphold their DEI commitments while carefully navigating the concerns of legal professionals and law firm leadership regarding potential risks.

For instance, Edward Blum's anti-DEI group American Alliance for Equal Rights voluntarily dismissed lawsuits against well-known law firms Perkins Coie and Morrison Foerster after the firms dropped race-based language from their DEI fellowship programs. However, both firms pledge that they remain steadfast in their commitment to advancing diversity, equity, and inclusion within their firms and the legal profession. These strategic adjustments aim to balance law firms' dedication to fostering an inclusive environment with a cautious approach to potential legal challenges.

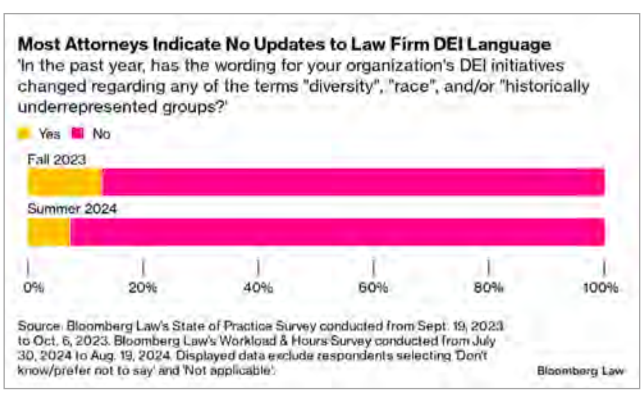
Law firms' continued recognition of the value of a diverse workforce and the benefits of an inclusive culture can be seen in the growing number of submissions to Bloomberg Law's DEI Framework each year. More directly, it can be found in results from surveys conducted by Bloomberg Law in the **fall of 2023** and **summer of 2024**.

The survey data show that by and large, firms have not changed, modified, or issued new guidance regarding their internal DEI objectives since the Supreme Court's decision in ***Students for Fair Admissions, Inc.* v. *Harvard***.



Bloomberg Law's most recent survey data, from the summer of 2024, reveal that 68% of law firm attorneys noted no change to their firm's internal DEI initiatives within the past year, while 27% actually noted an increase. Data from the fall of 2023 reveal a similar breakdown, where 59% indicated no change and 37% indicated at least a slight increase, underscoring the stability of DEI programs in law firms.

Even fewer respondents indicated any changes to how their firm uses key terms such as "diversity", "race", or "historically underrepresented groups" in their internal DEI programs. A notable 93% of respondents in summer 2024 reported no wording changes in the past year, compared to 87% in fall 2023.

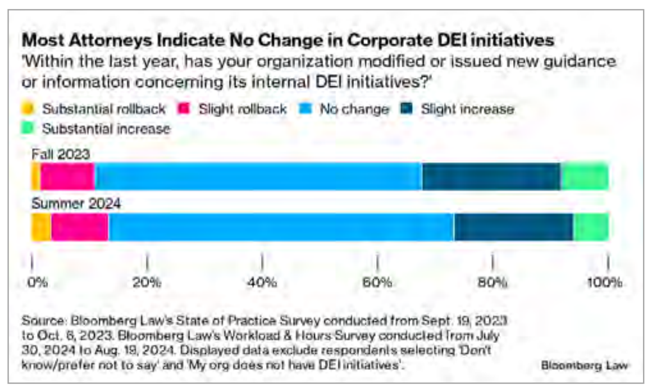


The survey data highlight the ongoing commitment not only to DEI programs in general but to the substantive language that describes what DEI is and what it means to law firms.

Are Corporations Committed to DEI?

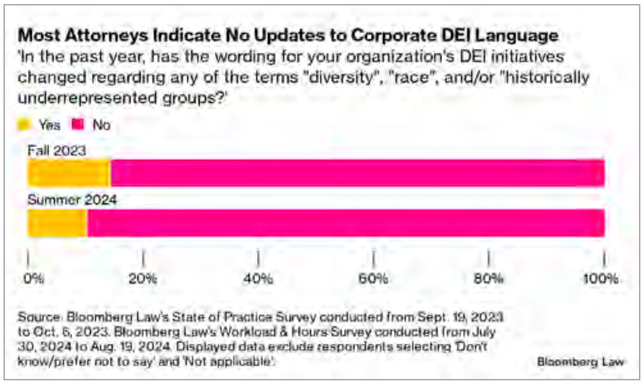
Although law firms haven't substantially changed their internal DEI programs or their DEI-related language, Edward Blum has **stalled his focus on suing firms**. Anti-DEI litigants can now see that firms are capable of building defenses against challenges and can update their policy language mid-litigation. Firms have proven that they can mitigate risks while presenting an image of stability in a complex legal landscape. As a result, Blum has been seeking easier avenues for his anti-DEI litigation efforts, and it appears that corporations have become a **bigger target**.

Big-name companies seem to be **backing away** from their commitments to DEI due to legal threats (such as **Ford Motor Co.**, **Lowe's Cos. Inc.**, **Harley-Davidson Inc.**, and **Jack Daniel's Inc.**). But despite the attacks, the survey data show that, as with law firms, **most companies aren't retreating** from their commitments altogether.



Corporate attorneys' responses corroborate this sentiment, with the majority of in-house respondents (60%) in the summer 2024 survey saying that their company's internal DEI programs have not changed in the past year. Another 27% indicated at least a slight increase, while 13% said there was a slight or substantial rollback. In fall 2023, 57% indicated no change in the past year, with 32% indicating an increase and 11% indicating a decrease.

Additionally, like their law firm counterparts, in-house attorney respondents said the wording of key terms in internal DEI initiatives is not changing in their corporations, with 90% reporting no changes in summer 2024 and 86% reporting no changes in fall 2023.



This relative inactivity raises an important question: Should corporations prioritize proactively mitigating the risk of lawsuits, or do they have less to worry about in comparison to law firms? If litigants like Blum increasingly decide to sue corporations (such as the current lawsuit his group raised against Merck & Co. Inc.), will corporations rely on their in-house attorneys to update their DEI language mid-litigation—such as removing references to "race" or "ethnicity"—to persuade litigants to withdraw lawsuits while preserving the integrity of their programs?

Considering that the few law firms who were targeted by Blum have been able to successfully update their language and mitigate the risk of anti-DEI litigants continuing to pursue lawsuits filed against them, there is no reason to believe that corporations can't do the same. If they are unable to pivot with language changes, they risk facing severe public backlash if they publicly scale back on their DEI commitments on a larger scale.

The prediction for the future is clear: DEI programs are here to stay. While the language around these initiatives will continue to adapt as necessary, organizations' underlying commitment to DEI will persist. Law firms will continue to refine their DEI language and will likely remove "race-conscious" requirements from internal policies and programs, but only when threatened—and corporations will follow suit.

While the drafters of future DEI programs may yet back away from using words like "race" in their terminology, this should not be seen as a sign of DEI's decline but rather as its strategic adaptation. The enduring presence of DEI programs underscores the legal profession's recognition of the importance of diversity, equity, and inclusion in shaping a more equitable and profitable workplace.

In-House Lawyers Are Legal Tech's Reluctant Innovators

Jason Wilson
Analysis Team Lead

Over this past year, generative artificial intelligence has dominated discussions, overshadowing many other topics. With some attorneys facing scrutiny for utilizing AI and judges issuing **standing orders** mandating disclosure of AI use, many law firm attorneys and in-house counsel who have remained cautious about adopting technological changes—even those that could enhance efficiency—may be even less inclined than ever to change their ways.

This cautiousness is undoubtedly rooted in attorneys' and counsels' prioritization of reliability and accuracy over technological advancements. But it might be causing them to miss out on some of the clear benefits of technology, such as reducing risk, improving efficiency, or saving time on matters.

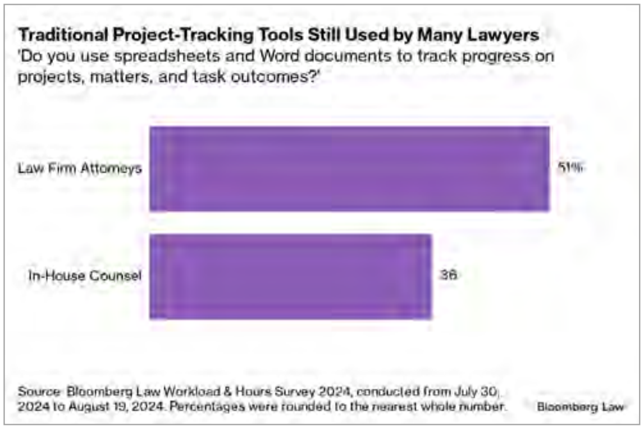
Nowhere is this more evident than in the realm of project management, something both law firms and corporate legal departments have slow-rolled or ignored altogether in favor of more familiar programs, despite significant software advancements that have been developed over the last several years.

Bloomberg Law's latest **Workload and Hours Survey** reveals a divide between law firm attorneys and in-house counsel and sheds light on which group is more likely to adopt legal-oriented project management software soon. Although this is the first year that Bloomberg Law has asked this question of lawyers, the results suggest that in-house counsel are more likely to adopt project management solutions than law firm attorneys, perhaps because they seem more **inclined** to look to technology to improve productivity and workflows.

Trends in Use of Project Management Tools

Attorneys are trained to operate within established systems (e.g., Windows, O365, Google Workspace), and introducing new technology into their workflow often feels like an unneeded departure from methods that, while hardly optimal, have worked for years. But in-house counsel seem **more open** to moving away from traditional tools and toward technology that improves productivity and manages workflows.

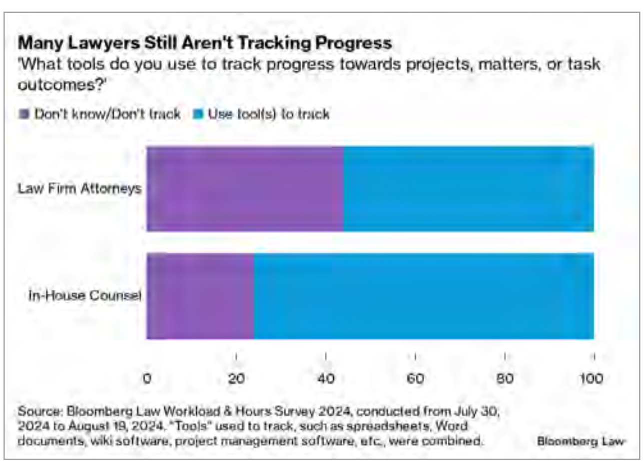
For example, according to survey results, while a majority of law firm attorneys (51%) said they rely on traditional tools such as spreadsheets and Word documents to track their progress on project matters and task outcomes, only about a third of in-house counsel (36%) said they do so, which suggests that in-house counsel are utilizing technology that's more suited to the tasks.



Relying on familiar and easy-to-use tools for project management often leads to fragmented and inefficient processes. For instance, attorneys often find themselves manually updating progress in Word or Excel, a practice that opens the door to errors, incomplete data, and challenges in coordinating with colleagues, both internally and externally.

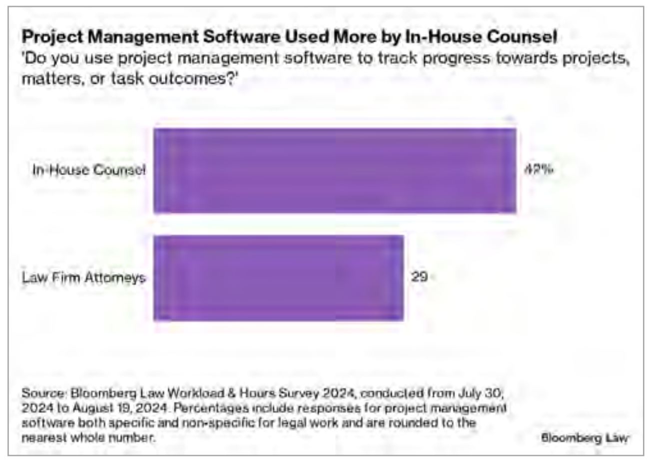
This resistance to change is often compounded by the time investment required to learn new software, time that they usually feel they cannot spare. Recent survey data has suggested that attorneys' familiarity with currently available technologies is actually **declining** rather than growing, which should be a worrying sign to both firms and platform developers.

As a result, many attorneys shun project-tracking tools altogether. Alarmingly, results from the Workload & Hours survey show that nearly 45% of law firm attorneys and around 25% of in-house counsel admit they are either not tracking progress at all or are unsure if they are.



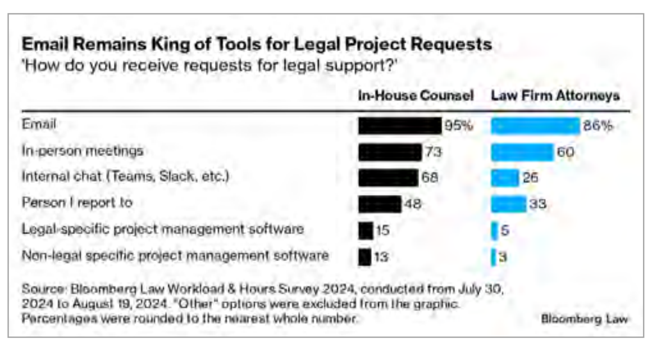
Tracking progress manually, or not at all, can lead to missed deadlines, miscommunication, and other inefficiencies, ultimately increasing the likelihood of errors and potentially affecting the case outcome.

All of this suggests that a significant portion of the legal industry is ripe for greater adoption of project management software, especially those suited for each group's legal workflow. And in-house attorneys appear to have a head start. According to the survey, in-house counsel respondents were more likely to say they use project management software (42%) than law firm attorneys were (29%).



Even for simple processes, such as taking work requests, results from the Workload & Hours survey show that low-tech email and no-tech in-person meetings remain the most predominately used platform for both groups.

But the survey results show a split here as well: In-house attorneys use new internal chat tools, such as Teams and Slack, at over double the rate of private practice attorneys (68% to 26%).



What's more, the responses also reflect that 15% of in-house counsel said they receive requests through project management software designed specifically for the legal industry, and 13% said they receive requests through more general project management software. While still relatively low, these percentages are both at least triple the rate for law firm lawyers.

The Future of Project Management Software for Lawyers

Ultimately, the question of whether private practice attorneys or in-house counsel will be more likely to adopt project management software in the next year depends on the specific pressures they face. Although the **Workload and Hours Survey** indicates that most of both groups are engaged in some kind of project-matter tracking, in-house counsel seems to be leading the charge.

Law firm attorneys, particularly those in larger firms, may be slower to adopt new tools, which require investing in training that will disrupt billable hours and finding ways to utilize a standardized framework to meet attorneys' individual work styles. But as client expectations for transparency and efficiency grow, firms and those dealing with complex or high-volume matters may find themselves increasingly needing to adopt project management software to remain competitive.

In-house counsel, though, driven by the need to demonstrate value and manage a greater diversity of risk, seems to be on the forefront of adopting legal-specific project management tools to streamline workflows and reduce risk, and should lead the way in defining the scope of those tools.

The pressures to become more efficient, reduce risk, and meet client demands will likely push both groups toward greater adoption of project management software. However, the rate at which this happens will depend largely on whether attorneys can overcome their resistance to change and recognize the long-term benefits of these tools.

Legal Well-Being Programs Will Grow in 2025

Jessica R. Blaemire
Senior Legal Analyst

Well-being programs at legal organizations will expand next year as employers seek to find ways to improve the ongoing issues with **poor well-being** in law. Legal employers are on track to increase existing programs and continue hiring staff dedicated to well-being, according to data from **Bloomberg Law**.

Organizations will also take steps to improve the work environment overall—as opposed to programs that focus on what individuals can do for their well-being—with initiatives like leaders as **well-being champions** and by implementing **outside counsel well-being guidelines**.

Part of this growth may come as some law firms take a step back from DEI initiatives. The **shift away** from "diversity" and "equity" and towards "inclusion" and "belonging" may mean that some DEI programs will be recast as well-being programs, based on Bloomberg Law data.

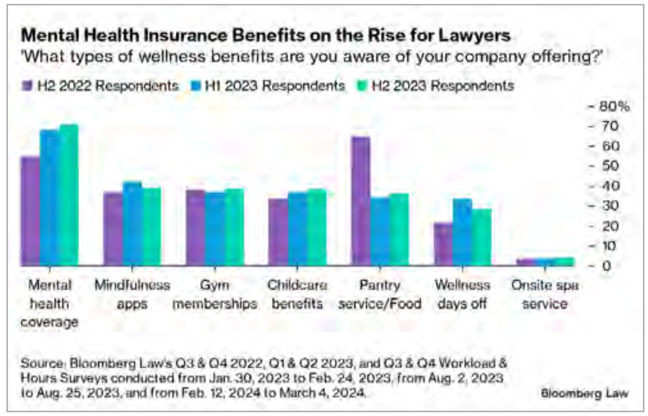
The growth of well-being programs in 2025 could reduce the disconnect between how important attorneys currently say well-being is and how "well" attorneys say they are, as well as reduce the **risks** that poor attorney well-being currently poses to the legal profession.

Growth in Benefits That Matter

Data from Bloomberg Law's biannual Workload & Hours Survey, featured in Bloomberg Law's **2024 Well-Being Report**, provides insights on how well-being resources are growing at legal organizations.

Providing Mental Health Support

In 2022, Bloomberg Law began asking attorneys what well-being benefits and programs their organizations offer to employees. The data indicate that every benefit—except for pantry service—has increased or stayed the same compared with 2022.



Mental health coverage was the **top wellness perk** offered by legal employers in H1 2023, and this remained true in H2 2023, with 71% of respondents saying that their organizations offer this benefit. This was a 16-percentage-point increase over H2 2022—the largest for all the benefits. The next-largest increases were wellness days off (6%) and childcare benefits (5%).

Most of this growth appears to come from law firms catching up to corporations that were already offering mental health coverage. In H2 2022, 75% of in-house counsel reported having this benefit compared to 51% of law firm attorneys. This gap shrunk dramatically in H2 2023, when 79% of in-house attorneys and 68% of law firm attorneys said that they have mental health coverage.

Giving Direction to Well-Being Programs

Almost 30% of lawyers reported that their organizations have staff dedicated to employee well-being.

The respondents to the Q3 &Q4 2023 Workload & Hours Survey didn't provide details about the well-being staff—whether it's comprised of a team, committee, or a director. These details help speak to the importance the organization accords

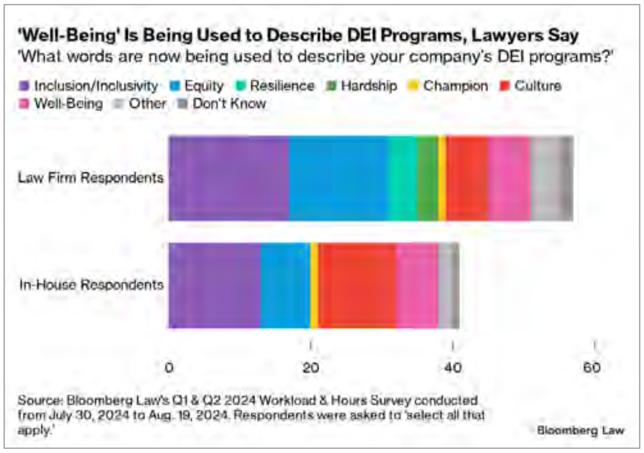
to well-being. For example, if the staff are legal professionals who dedicate only a portion of their time planning well-being activities on a committee, it could mean that the employer prefers not to place as high a priority on well-being as one that hires a director.

Anecdotally, however, multiple law firms have hired well-being directors who focus full-time on leading their organizations' well-being programs.

Well-Being Instead of DEI?

Well-being staff at some companies may be facing changes in the near future. Data from the most recent Workload & Hours Survey indicate that a few DEI programs have transitioned to "well-being" programs.

Of the 23 law firm respondents who said their organizations altered the wording of their DEI initiatives in the last year, about 25% said that "well-being" was now being used to describe their program. Over one-third of the 16 corporate counsel respondents reported changed DEI language. Further, many of the new words being used to describe DEI programs are also used in well-being programs—such as "inclusion," "resiliency," and "culture." This shift of DEI programming into well-being could funnel additional resources into the expansion of well-being programs.



Although the numbers are low, of these respondents who said the program description was changing, the new words that are being used indicate that some DEI programs are merging with or changing into well-being programs.

The American Bar Association announced in September at its annual conference for lawyer assistance programs that it will be conducting a new industry-wide study on attorney mental health and addiction in 2026. As legal employers expand their well-being programs, meaningful improvement in attorney well-being may be reflected in the new data.

Law Firms Going Full RTO May Miss Out on Peak Efficiency

Rachel DuFault
Senior Content Specialist

Lawyers are getting more billable hours out of their workweek when they spend one or two days working remotely, according to recent survey results. Law firms that enact full-time return-to-office policies in 2025 might not see a corresponding rise in lawyer efficiency.

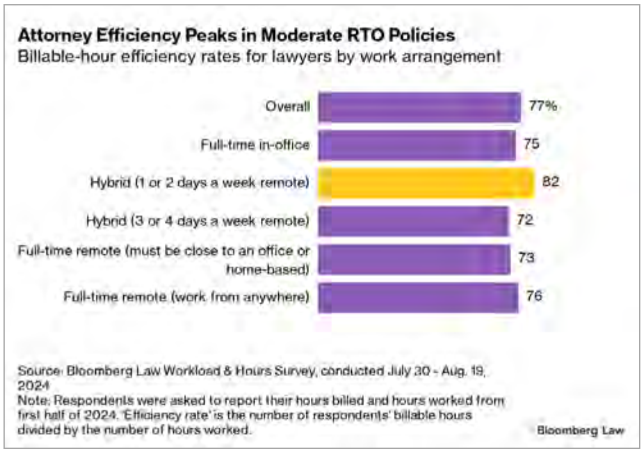
Many law firms implemented **hybrid work environments** after the Covid-19 pandemic began to ease, allowing employees to split their work time between home and the office. Today, more and more industries and corporate offices are calling for a **full return to the office**.

Law firms, however, might not want to be so quick to roll back hybrid work environments completely. Bloomberg Law survey results show that lawyers who spend only three or four days per week in the office have the best billable-hour efficiency, which can be a catalyst for firmwide financial growth.

Law Firm Work Environments and Billable-Hour Efficiency Rates

Bloomberg Law's latest **Workload & Hours Survey** revealed that efficiency rates are higher for attorneys when they work in a hybrid work environment that allows one to two days of remote work, compared to those working under full-time RTO policies or to those whose firms have more lenient work-from-home arrangements.

The "efficiency rate" is calculated by taking the average number of hours per week that respondents said they are billing and dividing that by the average number of hours per week that they said they are working. Bloomberg Law received responses from more than 500 billable-hour attorneys in its **Attorney Workload & Hours Survey**.



Hybrid Work Environment of One to Two Days of Remote Work

Attorneys who work in a hybrid work environment that allows one to two days of remote work reported working 47 hours per week on average. Billable-hour attorneys with this work arrangement said they bill an average of 38.5 hours per week, which gives them an 82% efficiency rate for billable hours. This is the highest efficiency rate for billable hours among the attorneys surveyed and is higher than the overall billable hours efficiency rate of 77% for all work arrangement types combined.

Full-Time In-Office and Other WFH Arrangements

The billable hours efficiency rate drops to 75% for lawyers who work full-time in-office. These attorneys reported working more hours on average (49.7 hours per week) than lawyers in hybrid work environments of one to days of remote work, but full-time in-office attorneys recorded a lower billable hours average (37.2 billable hours per week), which results in their lower efficiency rate.

Deviating from attorneys who work remotely one to two days a week in a hybrid work environment, attorneys with more generous WFH arrangements have efficiency rates for billable hours that are similar to the 75% efficiency rate of those who work full-time in-office. Survey results show that billable-hour efficiency rates are slightly lower for attorneys who work three to four days remotely (32.9 hours billed divided by 45.4 hours worked, for a rate of 72%). As for those who work remotely full-time, the efficiency rate was 73% for those are close to an office or home-based (35.5 hours billed and 48.6 hours worked), and the rate for those fully remote attorneys who are permitted to work from anywhere had a higher billable-hour efficiency rate at 76% (35.2 hours billed and 46.1 hours worked).

Benefits of Law Firm Hybrid Work Environments

With a higher rate of efficiency for billable hours among lawyers in a hybrid work environment of one to two days of remote work compared to full-time in-office, law firms in 2025 that have such work arrangements in place may realize more benefits than law firms that have a full-week in-office policy.

Among the benefits, when considering law firm financial health, having such hybrid work environments in place could lead to lawyers getting more billable hours, which could be a factor leading to overall improvement of firmwide growth.

Despite calls for a full return to the office, law firms that realize higher attorney billable hour efficiency with hybrid work environments may not be ready to end these WFH arrangements.

Knowledge Management's In-House Perception Problem

Robert Brown
Content Specialist

Many in-house lawyers are in the early stages of developing the knowledge management infrastructure at their respective corporations. In the past year, however, KM appears to have fallen out of favor on the legal operations landscape in a blunt and largely unanticipated fashion, according to results from Bloomberg Law's **Legal Ops & Tech** survey.

In 2022 and 2023, in-house lawyers prioritized KM as a top legal operations goal at their corporations. However, in the 2024 version of the survey, knowledge management experienced a precipitous drop—from 5th place to 15th place—among in-house lawyers' list of priorities.

Knowledge Management's Abrupt Corporate Demotion in Legal Ops?
'What are your organization's top legal operations goals or priorities for the year?'

	2022	2023	2024
1	Increased efficiency	Increased efficiency	Increased efficiency
2	Reduced costs	Reduced costs	Process automation
3	Technology implementation	Process automation	Reduced costs
4	Contract management	Budget management	Contract management
5	**Knowledge management**	**Knowledge management**	**Technology implementation**
6	Budget management	Contract management	Budget management
7	Innovation	Technology implementation	Outside counsel management
8	Modernization	Records management	Innovation
9	Increased profitability	Innovation	Procure generative AI tools
10	Diversity & inclusion	Increased profitability	Modernization
11	Vendor management	Increased revenue	Records management
12	We do not have any goals for this year	Diversity & inclusion	Improve understanding of emerging technologies
13	Business development	Business development	Other (please specify):
14	Increased revenue	Modernization	We do not have any goals for this year
15	**Records management**	**We do not have any goals for this year**	**Knowledge management**
16	Other (please specify):	Vendor management	Increased profitability
17		Other (please specify):	Increased revenue
18			Build generative AI tools
19			Diversity & inclusion
20			Business development
21			Vendor management

Source: Bloomberg Law's Legal Operations & Technology surveys.
Note: Respondents were given a list of 16 to 21 legal operations goals/priorities for the year and were asked to select up to three. Table displays in-house counsel respondents' rankings for each year.
Bloomberg Law

Five priorities that had placed below KM in 2023 surpassed KM on the list in 2024:

- Contract management (rising from 6th to 4th place),
- Innovation (from 9th to 8th place),
- Technology implementation (from 7th to 5th place),
- Modernization (from 14th to 10th place), and
- Records management (dropping from 8th to 11th place, but still higher than KM's 15th place).

Further, there were two new options for respondents to choose from in the 2024 survey that also rated as a higher priority than knowledge management: outside counsel management (7th place) and procuring generative AI tools (9th place).

Why do these seven goals currently possess a higher value proposition in the eyes of in-house counsel, relegating KM to 15th place on the legal operations hierarchy?

Making Way for the 'Shiny Objects'

First, it's important to bear in mind that corporate attorneys haven't overtly denied the value of KM. Knowledge management—the creation, retention, classification and sharing of information, intelligence and expertise among members of an organization—plays a significant role in facilitating team members' access to valuable data and instruction to provide zealous representation, which ultimately helps to advance the company's business objectives.

Indeed, knowledge management, as a vehicle to promote greater efficiency not only in corporate legal departments but across the company altogether, has never been more critical. Acknowledging this, it begs the question—why have in-house counsel de-prioritized KM as a legal ops goal?

The primary impetus for de-prioritization may appear elusive. One reason, while not necessarily dispositive, could simply be timing. When the 2024 Bloomberg Law Legal Ops & Tech survey was distributed to respondents earlier in the year, topics such as innovation and artificial intelligence were (and still are) "shiny objects" that could have triggered a displacement effect.

KM Supports Other Legal Ops Objectives

The more likely explanation is that it's a downgrade based on perception more than on actual goal-setting: a temporary recalibration of the legal operations' ecosystem, considering that KM is such a key driver of the other seven goals that superseded it.

For example, taxonomy—a vital component of knowledge management—streamlines an organization's central repository of vital intelligence, data, and legal templates (such as leases and shareholder agreements) to enhance efficient contract and records management. KM helps in-house counsel assess the collective proficiencies that are already on-premises, granting them the latitude to make better decisions regarding the scope of assistance they'll need from law firms which can abate redundant expertise and reduce costs, thus improving outside counsel management.

KM can assist with integrating a corporate law department's operational components, such as e-discovery and compliance, contributing to the modernization of these functional silos to align seamlessly with each other. It can aggregate and organize lessons learned from new software adopted that either did or didn't perform as expected, enhancing tech implementation and innovation. Finally, KM can help in-house lawyers decipher which automation functions would improve through the procurement of generative AI.

AI's and KM's Fortunes Intertwined

Speaking of AI, it's evident that it will play an integral role in the development of effective knowledge management as a key legal operations goal, as in-house counsel actively query how generative AI can enhance knowledge management capabilities.

While still in early development stages, generative AI can help to build taxonomies from existing corporate documents to facilitate the design of a basic knowledge management framework to build upon.

AI algorithms can perform tasks like media files classification and quicker key information searches which can contribute to a robust document management protocol. The algorithms also make it possible for task automation and data assessment in collaboration tools to spot key themes and trends in conversations among legal department staff.

Appreciation for KM Is Due

As generative AI-powered technology advances and in-house lawyers become more proficient at connecting the dots between knowledge management and other legal operations goals, respondents to future surveys will likely return KM to its rightful position as an indispensable component in the practice of law. By supporting corporate legal departments' other goals, KM's own intrinsic value will become more transparent, consequential, and accepted.

(Special thanks to Madeline Cohen, Library Relations Director at Bloomberg Law who shared their ideas with me on this subject.)

Lawyers Have New Assistant to Supervise in 2025—Gen AI

Mary Shields
Senior Content Specialist

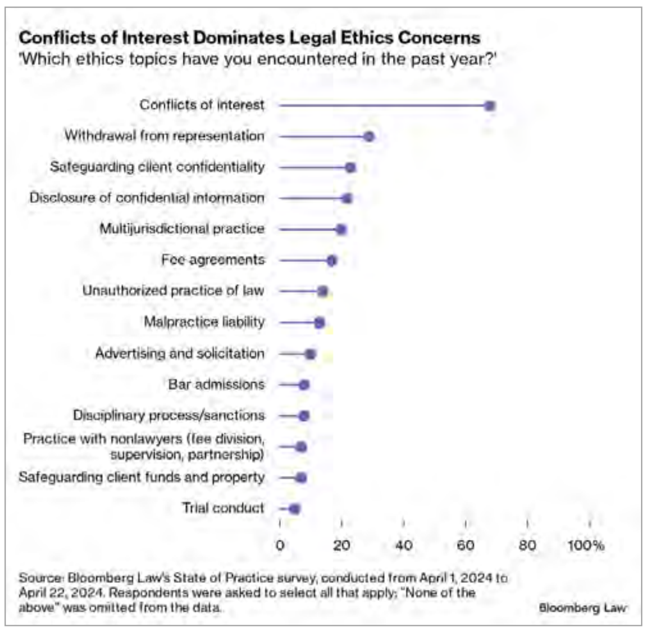
Generative AI isn't the new kid on the block in law anymore. Forty-five percent of the respondents to a recent Bloomberg Law survey question about how their employer is using generative AI said that they're working with the technology in some capacity.

Meanwhile, state and local lawyer ethics authorities have been steadily issuing opinions clarifying the professional conduct rules that apply to lawyers' use of generative AI, including the obligation under American Bar Association **Model Rule 5.3** for lawyers to supervise nonlawyer assistants. As more attorneys use generative AI, and ethics authorities continue to issue guidance for using it, there will be a noticeable uptick next year in disciplinary actions aimed at lawyers failing to properly supervise AI output.

Nonlawyer Supervision

Model Rule 5.3 supervisory duties have traditionally applied to paralegals, interns, and other law firm staff. In 2019, the ABA House of Delegates **made a point** of noting that the title of Model Rule 5.3 was amended in 2012 from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance," indicating that the scope of the rule encompasses both human and technological assistance. It's only a matter of time until the rule gets amended to explicitly include AI as nonlawyer assistance.

Nonlawyer assistance isn't a top ethics concern for most lawyers according to a recent Bloomberg Law survey—it placed in the bottom three of the categories asked about—but that may change as generative AI gets further embedded in legal practice.



The reason supervisory duties ranked so low may be because the rule has remained largely unchanged over the past several years. But recent ethics authority developments indicate that as lawyers assign more tasks to generative AI, they should be thinking more about how those Rule 5.3 supervisory duties apply to their AI "assistants."

AI Guidance

From late 2023 onward, there's been a steady stream of **opinions and guidance** for lawyers on using generative AI in legal practice.

Source: ABA/Bloomberg Law Lawyers' Manual on Professional Conduct Comparison Table as of Nov. 1, 2024
Note: Ethics opinions not included in image: ABA, New York City, Washington, DC.

All nine of the ethics opinions issued so far discuss lawyers' supervisory duties related to generative AI use. While all the opinions reference the more obvious obligation under Model Rule 5.3 for supervisory attorneys to oversee nonlawyer staff's use of generative AI to ensure compliance with the ethics rules, several of the opinions also discuss supervisory duties related to generative AI itself.

For instance, **Florida Ethics Op. 24-1** advises lawyers to think of the standards that apply to nonlawyer assistants in order to ensure proper oversight when using generative AI in legal practice. These standards include (1) reviewing the work product of generative AI tools similarly to how a supervising attorney would review legal drafting or research conducted by a paralegal and (2) ensuring that work delegated to generative AI doesn't ethically require the personal judgment of a lawyer, such as negotiating claims.

Ethics opinions from **Kentucky**, **Missouri**, **New York City**, and **Pennsylvania** reflect similar advice for lawyers to apply Model Rule 5.3 standards to generative AI.

A California State Bar committee **recommendation** on the use of AI included studying how to supervise non-human, nonlawyer assistance "if the assistance allows for autonomous decision-making by generative AI."

Other states have formed AI working groups and issued AI guidance. There are 16 states that have addressed or are planning on addressing AI and legal ethics. Many more are likely to follow as AI use increases. Clearly, states would be remiss if they omitted a discussion of AI oversight.

Discipline Will Come

As courts and lawyer regulatory bodies adapt Rule 5.3's supervisory duties to generative AI, there will be an increase in disciplinary actions based on lawyers' failure to supervise AI.

There are several notorious cases concerning lawyers' (mis)use of generative AI, such as ***United States v. Cohen*** and ***Mata v. Avianca, Inc.*** The cases have tended to arise in the context of court sanctions during litigation—rather than state bar disciplinary actions—so there's little information to indicate how courts will apply professional conduct rules to AI use.

Nevertheless, given that several ethics opinions have made the link between Model Rule 5.3 supervisory duties and AI assistance, it seems likely that bar prosecutors pursuing disciplinary actions—and the courts ruling on those actions—will follow suit.

Violations of Rule 5.3 can be especially damaging because they rarely come alone. Since lawyers are ultimately responsible for the legal work produced by those they supervise, any ethical violations associated with the underlying work product, such as **lack of candor to the tribunal**, **filing of frivolous claims**, or **disclosure of confidential information**, may be attributed to the lawyer as well.

As generative AI use becomes pervasive in the legal profession, more jurisdictions will require lawyers to "supervise" it. In 2025, there will be greater attention paid by regulatory bodies and courts as to how lawyers meet this duty.

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