

**Jackson Lewis P.C.**

# Legal Update: Trump 2.0 & Illinois Laws

Monica H. Khetarpal

Jackson Lewis P.C.

Monica.Khetarpal@jacksonlewis.com

312.803.2529

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Where we started

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## It starts with *SFFA*

- No reliance on race in admissions decisions.
- Title VI and 14<sup>th</sup> Amendment only.
- But...mention of similarity between Title VI and VII in concurrence.
- And also *Muldrow*
- Increase in reverse discrimination lawsuits in all areas.
  - Hiring, promotions, training, mentoring, ERGs, vendors, etc.
  - Individual plaintiffs
  - Class actions
  - Special interest groups

- ***Fukawa v. Univ. of Tex. MD Cancer Center*** (Pending) Plaintiff alleges Title VII and state law discrimination claims regarding her demotion as part of a "witch-hunt . . . driven by misguided politics" and "racial

# The Executive Orders

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EO: Ending Illegal  
Discrimination and Restoring  
Merit-Based Opportunity

# The Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- “[i]t is the policy of the United States to protect the civil rights of all Americans and to promote individual initiative, excellence, and hard work.”
- Directs federal agencies to “terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements.”
- Signals increased enforcement measures across multiple executive agencies: investigations and litigation
- Orders all agencies to enforce “our long-standing civil-rights [sic] laws and to combat illegal private sector DEI preferences, mandates, policies, programs, and activities.”
- Also speaks to federal contractor AAPs – note that this program is focused on DEI initiatives and not an overview on the AAP aspects of the EO, but the principles discussed today generally apply to all employers – the risk assessment, however, is different for federal contractors, recipients of federal funding

# The Ending Illegal Discrimination and Restoring Merit-Based Opportunity: Messages to ALL Employers (not just Federal Contractors)

- Directs federal agencies, in coordination with the Attorney General to take action to implement the principles of the EO
- Requires the Attorney General in consultation with the agency heads to **submit a report within 120 days** that identifies:
  - **“key sectors of concern,” “egregious and discriminatory practitioners,” and a plan to deter illegal DEI programs**
  - **“up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of \$500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars”**
  - **“other strategies” to encourage the private sector to end illegal DEI discrimination and preferences, including appropriate potential litigation for the administration to pursue.**
- Ending “discriminatory” DEI programs a priority for new EEOC

# The Ending Illegal Discrimination and Restoring Merit-Based Opportunity: For Federal Contractors

- Eliminates federal contractor AA plan obligations regarding race and gender (as had been required by EO 11246) and enforcement activity by the OFCCP regarding race or gender affirmative action plans. Contractors should review any currently pending OFCCP audit requests to determine whether the information requested stems from Executive Order 11246.
- Does not impact obligations under VEVRAA or Section 503. Contractors should continue to prepare VEVRAA and Section 503 Affirmative Action plans.
- Calls for a new contract term in federal contracts requiring contractors to agree that “compliance in all respects with all applicable Federal anti-discrimination laws is material to the government’s payment decisions...”
- The EO requires contractors to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.

# What Is “Illegal DEI?”

- The EO does not define the term “Illegal DEI”
- Instead, the EO describes “illegal DEI” as policies, activities, programs, etc. that violate Civil Rights laws.
- Therefore, actions that comply with Civil Rights laws should not be considered “illegal DEI,” whether or not the actions have been described as “DEI”

# Examples of “Illegal DEI”

- Practices prohibited by Civil Rights laws:
- Making employment decisions based on “protected classes,” such as race, sex, color, religion, or national origin (Title VII; Section 1981 for race), disability (ADA), age (40+) (ADEA).
  - For purposes of federal law, for now, “sex” includes gender, gender identity, and sexual orientation
- Establishing preferences or quotas based on a protected characteristic
- So-called “reverse discrimination” – discrimination against individuals in “majority” groups (e.g., men, White individuals, heterosexuals is equally prohibited as discrimination against women, other races, members of the LGBTQ+ community)
- *Muldrow* – “some harm”
- Section 1981 – making and enforcing contracts, including whether to enter them

# Examples: What To Look At

- Diversity Statements, Communications
- The Numbers: Goals, Data Collection
- Admissions, Hiring Practices
- Diverse Slate Policies
- Development Programs/Professional Conferences/Scholarships/Fellowships
- ERGs
- Supplier Diversity
- Board Diversity

## Examples: What To Look At (con't)

- DEI office landing pages across campus
- “Spaces” available for particular racial/ethnic/etc. groups
- Academic-adjacent spaces (e.g. libraries)
- Student organizations including the Greek system
- Research implicating diversity-related issues
- Immigration/DACA
- Gender identity related policies and procedures – bathrooms, locker rooms, pronouns, names



EO: Defending Women from  
Gender Ideology Extremism  
and Restoring Biological  
Truth to the Federal  
Government

# Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

- It is the “policy of the United States to recognize two sexes, male and female”
- Directs federal agencies and employees acting in an official federal capacity use the term “sex” and not “gender”
- Directs agencies to act to ensure intimate spaces are designated for single-sex use based on sex as defined in the order, and not by gender identity
- Rescinds the EEOC’s “Enforcement Guidance on Harassment in the Workplace” (April 29, 2024),
- Directs the Attorney General, the Secretary of Labor, the General Counsel and Chair of the EEOC, and every other agency head with enforcement responsibilities under the Civil Rights Act to “prioritize investigations and litigation to enforce the rights and freedoms identified.”
- Directs the attorney general to issue guidance to ensure the “freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964”

# Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

- The EO applies to federal agencies, but it is likely that future directives and restrictions will be applied, through agency action, to federal contractors and recipients of federal funding.
- Certain state and local anti-discrimination statutes (including Illinois) include gender identity as a protected class and require that individuals be able to use the designated “intimate space” that comports with their gender identity. A more specific analysis is needed for these jurisdictions.
- Employers generally should anticipate more requests for religious accommodations and complaints from employees and others that the employer’s DEI programs are unlawful, and an increase in retaliation/whistleblower claims emanating from such accommodation requests and complaints.
- Employers generally should anticipate the EEOC and other agencies to take enforcement action based on this EO.

Additional Measures to Combat Anti-Semitism, EO  
14188

# Additional Measures to Combat Anti-Semitism, EO 14188

Attorney General to provide the President with an inventory and an analysis of all court cases against or involving institutions of higher education alleging civil-rights violations related to or arising from post-October 7, 2023, campus anti-Semitism and indicate whether the Attorney General intends to or has taken any action with respect to such matters, including filing statements of interest or intervention.

Secretary of Education to provide an inventory and an analysis of all Title VI complaints and administrative actions, including in K-12 education, related to anti-Semitism — pending or resolved after October 7, 2023 — within the Department’s Office for Civil Rights.”

(e) Secretary of State, the Secretary of Education, and the Secretary of Homeland Security... “shall include in their reports recommendations for familiarizing institutions of higher education with the grounds for inadmissibility under 8 U.S.C. 1182(a)(3) so that such institutions may monitor for and report activities by alien students and staff relevant to those grounds and for ensuring that such reports about aliens lead, as appropriate and consistent with applicable law, to investigations and, if warranted, actions to remove such aliens.”

More Litigation

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# 2/21/25 National Injunction (Contractors, Grant Recipients, and Private Entities)

## Nationally Enjoined:

- Executive agencies terminating equity-related grants or contracts (Termination Provision)
- Executive agencies including in every contract or grant award a certification, enforceable through the False Claims Act, that the contractor and grantee does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws (Certification Provision)
- The Attorney General taking appropriate measures to encourage the private sector to end “illegal discrimination and preferences,” including DEI, and to identify potential civil compliance investigations to accomplish deterrence (Enforcement Threat Provision)

## Permissible Activities: Investigations and Reports

Status: Appeal pending, but...

## But that's not all...

- On March 14, 2025, a three judge panel of the 4<sup>th</sup> Circuit granted the administration's motion to stay enforcement of the February 21, 2025 injunction pending appeal.
- Ruling without explanation, but each judge penned a concurrence
- It called the EO's application limited in scope: "The Executive Orders do not purport to establish the illegality of all efforts to advance diversity, equity or inclusion, and they should not be so understood. Instead, the so-called 'Certification' and 'Enforcement Threat' provisions apply only to conduct that violates existing federal anti-discrimination law."
- The judges repeatedly commented that all DEI is not illegal nor should it be villainized.

# The Department of Education

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# 2/14/25 DOE Dear Colleague Letter

## **Enforcement effective 3/1/25.**

- “As the Court explained in *SFFA*, ‘an individual’s race may never be used against him’ and ‘may not operate as a stereotype’ in governmental decision-making.”
- “Although some programs may appear neutral on their face, a closer look reveals that they are, in fact, motivated by racial considerations.”
- “Race-based decision-making, no matter the form, remains impermissible. For example, a school may not use students’ personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student’s race and favoring or disfavoring such students.”

# 2/14/25 DOE Dear Colleague Letter

Race may not be considered in:

- Admissions
- Hiring
- Promotion
- Compensation
- Financial aid
- Scholarships
- Prizes
- Administrative support
- Discipline
- Housing
- Graduation ceremonies
- All other aspects of student, academic, and campus life.

# February 28, 2025 FAQs

- Mostly focused on student-facing Title VI issues
- Emphasis on fact-specific nature of each inquiry.
- Speech issues are a prominent concern
- Dept Ed will attempt resolution when they find a violation
- Multiple high risk practices noted:
  - “Segregation”
  - Essays
  - Curriculum
  - Protests
  - Statistics

# Cuts and investigations

- **Funding Cuts:** On March 7<sup>th</sup> DOJ, HHS, Dept Ed, and GSA announced initial cancellation of grants and contracts to Columbia University worth \$400 million
- Dept of Education **Investigations:**
  - On March 10<sup>th</sup> they sent letters to 60 colleges and universities warning them of potential enforcement action if they do not fulfill their obligations under Title VI to protect Jewish students. The letters went to all U.S. universities presently under investigation for Title VI violations relating to antisemitic harassment and discrimination.
  - On March 14<sup>th</sup> they announced it is launching investigations into 52 colleges and universities for Title VI violations, focusing on racial preferences in education programs related to The PhD Project (45 schools), and awarding impermissible race based scholarships.
- **Reduction in Force:** As of March 10<sup>th</sup> the Dept of Education has eliminated about 1950 positions, about half of its workforce (including voluntary resignation/retirement packages)

# It's not just the Department of Education

**EEOC:** On March 5<sup>th</sup> the EEOC announced prior to investigations into workplace discrimination and harassment related to the war in Gaza

## **Department of Justice:**

- **Bondi Memo 1:**
  - All Department materials that encouraged or permitted race- or sex-based preferences as a method of compliance with federal civil rights laws are rescinded and will be replaced with new guidance affirming that equal treatment under the law means avoiding identity-based considerations in employment, procurement, contracting, or other Department decisions.
  - Reports from each unit due by March 15<sup>th</sup> confirming compliance and recommending actions. .
- **Bondi Memo 2:**
  - By March 1<sup>st</sup> a report recommending enforcement actions to end “illegal discrimination” including specific steps “including proposals for criminal investigations” and for up to nine civil compliance investigations.
  - Identify most egregious practitioners in each sector
  - Specific reference to schools that receive federal funds.



What Should Schools Do  
Now?

# What To Do Now: Audit and Assess

1

Take Stock of Your Risk Profile

2

Take Stock of Your DEI-Related Practices

3

Take Proactive Steps to Align Practices with Risk Profile, Prepare for Scrutiny

4

Communicate!

# Protests

- Expect them and prepare accordingly
  - Multiple mentions in FAQs + President Trump social media posts
- Review policies
  - Risks: First Amendment, Academic Freedom, Contract
- Time, place, manner
- Content neutral
- Harassment claims
  - Review polices/procedures for processing them.
  - OCR was looking at this pre-January 20<sup>th</sup>. They will continue to do so but perhaps through a different lens

# Communications

- Do not forget the importance of maintaining privilege.
- Educate HR, DEI offices, and Managers on how to communicate about these issues
- Develop a communication plan in advance, not when you are in crisis
  - What type of situations can you anticipate?
  - Can you create advance drafts?
  - Who is the final decision-maker?
  - Who is the communicator?
  - Who is within the circle of privilege?

# Illinois Updates and Reminders for 2025

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# Pay Transparency: Basics

- Effective January 1, 2025
- Applies to all employers with 15+ employees. (Global employees.)
- Purpose, per the IDOL:
  - “When an employer is determining what pay and benefits to offer when hiring for a particular position, the employer often has access to information that the applicant does not; this information disparity tends to invisibly allow unequal pay for men and women doing the same work to continue. The IL EPA attempts to level the playing field a bit by requiring mid-size and large employers to tell applicants at the time a specific job opportunity is published what compensation and benefits the employer will offer for the position (‘pay transparency’ or ‘salary transparency’).”



# Pay Transparency: Requirements

- Must include “pay scale and benefits” in every job posting.
- “Pay scale” = the wage or salary, or the wage or salary range. What the employer “reasonably expects in good faith to offer.” No guidance on how big the “range” can be.
  - Cannot use terms like “starting at \$40,000,” “up to \$80,000,” etc. Two numbers.
  - What about tips and commissions? Mention, but no need to estimate.
- Can be set by reference to:
  - Applicable pay scale; or
  - Previously determined range for position; or
  - Actual range of others holding equivalent positions; or
  - Budgeted amount for position.

# Pay Transparency: Requirements

- “Benefits” = “general description of benefits and other compensation.” Specifically includes bonuses, stock options, or other incentives.
  - What’s a “general description”? We don’t know yet. We suggest a sentence or two about each benefit. Specific dollar amounts are not necessary.
- Some problems:
  - Describing complex health plans
  - Describing complex bonuses
  - Describing simple, discretionary bonuses
- Note: job posting can link to a general description of benefits somewhere else, such as your website

# Pay Transparency: When Does It Apply?

- Applies to postings for jobs that:
  - Will be physically performed in IL, at least in part; or
  - Will be physically performed outside IL, but will report to a supervisor, office, or site in IL.
- Does not apply to jobs that occasionally visit IL.
  - What about remote positions that could sit anywhere? Ask what is reasonably foreseeable.
- If using third party to publish job posting, employer must give pay scale and benefits (or hyperlink) to third party.
  - Third party is liable for failure to include them, unless it can show that employer failed to provide.
- No requirement to make job posting.
  - But: if there is no posting, and if the applicant requests it, employer (or its agency) must disclose pay scale and benefits prior to any offer or discussion of compensation.



## Pay Transparency: Enforcement & Misc.

- If employer makes an external job posting, it must make the opportunity known to “all current employees” within 14 calendar days thereafter.
- Recordkeeping requirements: keep pay scale, benefits, job posting for 5 years.
- No private lawsuits; enforced by the IDOL only.
  - Fines ranging from \$500-\$10,000.
  - Cure periods for first and second offenses.

# Some Practical Issues

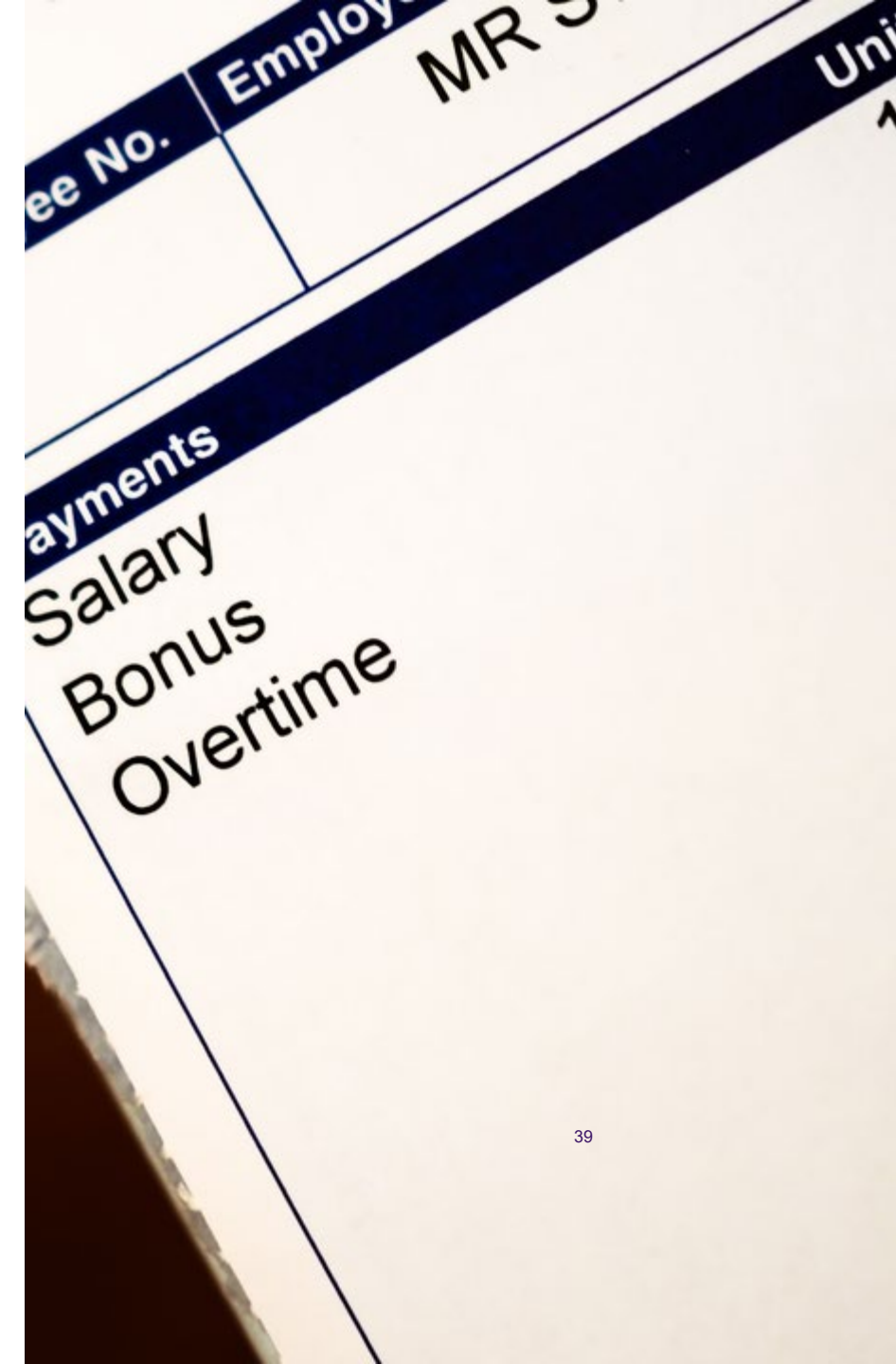
- Reduces employer leverage in pay negotiations (which is the point)
- Be prepared to handle inquiries from current employees who learn they make less than the top of the range
- Considerations with competitors seeing your salary ranges and you seeing theirs (which may also be part of the point)

# Illinois Human Rights Act: Protected Classes & Statute of Limitations

- Effective January 1, 2025, the IHRA adds protections for “family responsibilities” and “reproductive health decisions.”
  - “Family responsibilities” = “an employee’s actual or perceived provision of personal care to a family member.”
    - But: does not require accommodations or modifications to any “reasonable” policy, including leave, scheduling, productivity, attendance, timeliness, work performance, etc.
  - “Reproductive health decisions” = “a person’s decisions regarding the person’s use of: contraception; fertility or sterilization care; assisted reproductive technologies; miscarriage management care; healthcare related to the continuation or termination of pregnancy; or prenatal, intranatal, or postnatal care.” (Litigation pending about this.)
- Beginning January 1, 2025, complainants will have **two years** after the date of any alleged violation of the Act to file a charge of discrimination with the State of Illinois. (Extended from 300 days.)

# Illinois Wage Payment and Collections Act: Pay Stubs Amendment

- Effective January 1, 2025, employers must provide copies of paystubs to former and current employees, upon request, up to two times a year.
- “Pay stubs” = an itemized statement reflecting an employee’s hours worked, rate of pay, overtime pay, gross wages earned, deductions made from the employee’s wages, and the total of wages and deductions year to date.
- Employers must keep a record of pay stubs for no less than three years after the date of payment.
- Employers must also provide access to paystubs for at least one full year after separation with an employee.
- Violations includes a civil penalty of up to \$500 per violation.





# IPRRA Amendment: Expanded Definition of Personnel Records and Other Limitations

- Effective January 1, 2025, the Illinois Personnel Records Review Act (IPRRA) was amended to prohibit employers from gathering or keeping records of an employee's associations, including political activities and non-employment activities, absent special circumstances.
- Employees are now entitled to inspect:
  - All agreements between the employer and employee that are legally binding on the employee;
  - All employee handbooks for which the employee acknowledged receipt; and
  - Any written policies that the employer contends the employee was subject to.
- Employers must grant at least two requests for inspection to an employee per year.
- The IPRRA now excludes from inspection an employer's trade secrets, client lists, sales projections, and financial data.

# Worker Freedom of Speech Act

- Effective January 1, 2025, this Act prohibits employers from discharging, or otherwise penalizing (or threatening to discharge, discipline, or otherwise penalize) employees for refusing to attend mandatory meetings where the employer communicates its opinion about religious or political matters. The Act defines “political matters” to include “the decision to join or support any . . . labor organization.”
- This Act is not limited to meetings. It also prohibits employers from disciplining employees who refuse to “receive” or “listen to” communications from the employer about political or religious matters.
- Employees have a private right of action under the Act.
  - If the employee prevails, the court may award penalties including injunctive relief, backpay, and attorney’s fees.
- IDOL can also investigate and assess a civil penalty of \$1,000 for each violation.
  - Each employee who attends a meeting or receives a prohibited communication is considered a separate violation.

# Illinois Whistleblower Act: Expanded Protections

- Effective January 1, 2025, the Act was amended to include additional protections from retaliation for whistleblowers.
  - Internal reports of legal violations and threats to report legal violations now protected.
  - “Good faith” requirement has been codified.
  - Prohibited retaliatory actions expanded to expressly include “non-employment actions” that would dissuade a reasonable worker from disclosing information.
  - Damages and penalties greatly expanded. In addition to back pay and reinstatement:
    - 9% interest up to 90 days, injunctive relief, front pay, liquidated damages up to \$10,000, reasonable attorneys’ fees and costs, and \$10,000 civil penalty payable to the employee.
    - Attorney General is now authorized to investigate or intervene in civil actions to obtain appropriate relief.

# Digital Voice and Likeness Act

- This Act seeks to safeguard individuals from the unauthorized use of their “digital replicas.”
  - “Digital replica” = newly created, electronic representation of the voice, image, or likeness of an actual individual created using a computer, algorithm, software, tool, artificial intelligence, or other technology that is fixed in a sound recording or audiovisual work in which that individual did not actually perform or appear and which a reasonable person would believe is that particular individual’s voice, image, or likeness being imitated.
- A provision in an agreement is unenforceable if:
  - Allows for the creation and use of a digital replica in place of work an individual would have performed in person;
  - Does not include a reasonably specific description of the intended uses of the digital replica; and
  - The individual was not either: (1) represented by counsel, or (2) represented by a labor union.

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