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WHITE PAPER

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AI at Work: Navigating the Legal Landscape of Automated Decision-Making Tools in Employment

Federal and state regulators are increasingly focusing their attention on artificial intelligence ("AI") tools, including the use of automated decision-making tools in employment. This White Paper explores current uses of AI in the workplace, focusing on the use of automated decision-making tools by employers during the recruiting and hiring process; examines the legal and regulatory risks associated with increased use of AI in employment; discusses employment policy considerations associated with employee use of AI-powered chatbots; and offers tangible solutions for employers seeking to reduce litigation risk and stay one step ahead while remaining in compliance with existing laws and emerging legislation.

The growing use of AI to make employment decisions has drawn the attention of lawmakers and regulators, who are concerned about privacy, the possibility of algorithmic bias, and the impacts of automation. On October 28, 2021, the Equal Employment Opportunity Commission ("EEOC") announced the launch of a new initiative to "ensure that [AI] and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws that the agency enforces."[1] In May 2022, the DOJ Civil Rights Division and the EEOC each issued a technical assistance document regarding AI and the potential for disability discrimination in the employment context.[2]

In April of this year, officials from the EEOC and other agencies that enforce employment, fair lending, and fair housing laws issued a joint statement pledging "to use [their] enforcement authorities to ensure AI does not become a high-tech pathway to discrimination." On May 18 of this year, the EEOC released a technical assistance document that explains the EEOC's views about the application of Title VII of the Civil Rights Act ("Title VII") to an employer's use of automated systems, including those that incorporate AI.[3] Several proposals for comprehensive AI-related legislation, including the Algorithmic Accountability Act, have been proposed in Congress.[4] And some lawmakers have called for the creation of an expert federal agency focused on regulating the development and use of AI.[5]

Federal officials are not alone in voicing concerns regarding AI. On July 5, 2023, New York City began enforcing a law that governs employers' use of AI to make hiring and promotion decisions. In California, a new agency—the California Privacy Protection Agency—is preparing to write new rules to address the uses and abuses caused by automated decision-making technology. Other states and localities are considering similar legislation and regulations. The New York City law, as well as proposed state laws, require employers to disclose how they are using AI and identify any disparate impacts on race, gender, and other protected categories. By drawing attention to the use of AI tools, these required disclosures could spur litigation asserting discrimination under Title VII, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and other employment laws.

ARTIFICIAL INTELLIGENCE IN THE WORKPLACE

Now more than ever, employers are relying upon AI. It is used in nearly every stage of the employment process, including recruiting, hiring, training, retention, promotion, compensation, and firing. In December 2021, EEOC Chair Charlotte Burrows reported that "83% of employers" and "90% of Fortune 500 companies" rely on AI during hiring.[6] Within hiring and recruiting, employers use AI tools to target job postings to specific groups, screen applicants to move forward in the hiring process, administer automated interviews, and analyze candidate responses.

Two common types of AI are predictive algorithms (which can use labeled datasets to train algorithms to classify data or predict outcomes) and natural language processing (which helps machines process and understand human language). Both technologies may be used in a single AI tool. For example, an AI tool that screens applicant resumes may use natural language processing to scan the resume for key words and use predictive algorithms to select candidates for interviews. Such a tool might be "trained" using resumes from current employees who are high performers so that the tool, without human intervention, can decide what factors predict an applicant's success at the company. The AI tool's output is a shortlist of prescreened resumes that, in theory, reflects candidates who have similar attributes to successful employees. In short, the tool is making decisions that would previously have been made by humans.

In addition to screening resumes, employers are using AI tools to evaluate candidates through video interviews. Live or recorded video interviews can be run through software utilizing a combination of machine learning, computer vision, and natural language processing to evaluate candidates based on their facial expressions and speech patterns, and then provide a score or assessment of the applicants' attributes or fitness for a job. Other applications evaluate applicants' personalities, aptitudes, cognitive skills, or "cultural fit."

The efficiencies obtained by application of AI to human resources functions can be profound. By one measure, 85% of HR professionals reported that AI tools save them time and/or increase their efficiency.[7] Nearly 50% said that such tools

improve their ability to identify top candidates.[8] By streamlining repetitive tasks like screening resumes, recruiters have more time to provide a personalized experience to candidates and increase their competitive edge.

LEGAL RISKS OF USING ARTIFICIAL INTELLIGENCE IN HIRING AND RECRUITMENT

AI vendors often promise that their products will reduce or eliminate unconscious bias in recruiting and hiring decisions. However, critics express concern that AI tools perpetuate and can even exacerbate biases that are embedded in the training data. An often-cited example is Amazon's attempt to build an AI recruitment tool, which was abandoned in 2018 when engineers found that the algorithm discriminated against female candidates.[9] The company's AI-driven model reportedly downgraded resumes containing the word "women's" and filtered out resumes with terms related to women, including candidates who had attended women-only colleges. This reportedly occurred because the tool was trained primarily on resumes submitted to the company over the past 10 years, the majority of which were from male candidates.

More recently, Workday's AI-powered screening tools are being challenged in a class action lawsuit filed in a California federal court in February 2023. The plaintiff alleges that these AI tools disqualify Black, over-forty, and disabled applicants.[10] The plaintiff alleges he has been rejected from 80–100 positions that purportedly use Workday as a screening tool for applicants. Workday's AI-dependent tools, he argues, "allow its customers to use discriminatory and subjective judgements in reviewing and evaluating employees for hire" and "caused disparate impact and disparate treatment" against African-Americans, individuals with disability, and individuals over the age of 40 in violation of Title VII, the ADA, and ADEA.

This section considers legal risks tied to AI adoption, including potential claims under discrimination laws, privacy laws, and newly adopted state and local legislation.

Disparate Treatment and Disparate Impact Claims

While AI technology is relatively new, the use of selection procedures or tools in making employment decisions is not. Well before the AI-era, employers used a variety of selection tools and procedures, including written aptitude tests, strength tests, and personality assessments. Those types of selection procedures have been repeatedly challenged in court under Title VII and other antidiscrimination laws. As early as 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures (the "Guidelines"), which provide guidance on how to assess bias in selection procedures. More recently, the EEOC has stated that these Guidelines apply squarely to AI tools that are used to make employment decisions.[11]

Selection tools are typically challenged through a disparate impact theory of discrimination. Unlike disparate treatment claims, disparate impact claims do not require proof of intentional discrimination. Rather, they require proof that a facially neutral employment policy or practice caused a disparate impact on a protected group without relevant justification. Employers who use biased AI tools could have liability under this theory without knowing or intending that the tool disadvantage a protected group. To demonstrate how this might occur, we first explain how courts analyze disparate impact claims, and then compare how this analysis typically applies outside the context of AI to how it might apply to an AI-powered selection tool.

Disparate impact claims arising under Title VII generally proceed in three parts.[12] First, the plaintiff must identify a facially neutral employment practice or policy that caused a disparate impact on the basis of race, color, religion, sex, national origin, age, disability, or other protected category.[13] Second, the employer can defend against a showing of disparate impact by demonstrating that the practice or policy is both "job-related and consistent with a business necessity."[14] And third, the plaintiff can rebut the employer's "job-relatedness" defense by establishing that the employer failed to adopt a less discriminatory practice that would have equally met the employer's legitimate need.[15]

Statistical analysis plays an important role in litigating Title VII disparate impact claims. One statistical approach is to compare the selection rates of a particular protected group (e.g., White, Black, Latino, Asian, Native Hawaiian or Pacific Islander, Native American or Alaska Native) to the selection rate of another protected group. Because differences in selection rates can be caused by chance, it is important to measure whether the difference is significant enough to rule out chance. In the Guidelines, the EEOC uses a "four-fifths' rule" as a rule of thumb for screening out matters it is less likely to pursue. This

metric measures whether the selection rate for one protected group is less than 80% of the selection rate for the protected group with the highest selection rate.[16]

Courts have expressed skepticism toward the four-fifths rule, however, noting that it is inherently unreliable, especially when analyzing small sample sizes.[17] Even the EEOC has noted that "the four-fifths rule may be inappropriate under certain circumstances."[18] Another approach, articulated by the U.S. Supreme Court in *Hazelwood School District v. United States*,[19] utilizes standard deviations. There, the Supreme Court noted that a disparity of more than two or three standard deviations "would undercut the hypothesis that decisions were being made randomly with respect to [the protected group]." Given the specialized nature of these inquiries, it is important that statistical analyses be supported by relevant and reliable expert analyses.

A proper statistical analysis must first identify the pool from which to assess adverse impact—in other words, the denominator of the selection rate formula. The pool should be aligned to the challenged employment decision. For example, if a plaintiff alleges that a written exam administered to applicants had a disparate impact on women, the pool of similarly situated applicants consists of all applicants who took that examination during the relevant time frame. If the pool is too broad—for example, if it includes applicants who took a different test or were screened out based on some other criteria at a different stage of the hiring process, the analysis will not be meaningful.

Determining the proper pool becomes difficult with certain AI tools. Take, for example, an AI tool that administers an AI-based pre-employment examination that changes based on *dynamic* data sets. These algorithms utilize machine learning to "learn" or "improve" over time. Thus, in our example, the AI-based examination an employer deploys in Week 1 may be different from the examination administered in Week 4, as the tool "learns" that certain questions are less likely to produce a desired result. It may be difficult to produce a meaningful statistical analysis without knowing how the AI tool works, e.g., how frequently the algorithm changes or whether the algorithm is different for different applicant pools. For similar reasons, in cases involving AI tools, it may be difficult to establish the causation prong—i.e., that the employment practice "caused" a disparate impact.

Certain AI tools could present challenges for employers to formulate and advance their "job-relatedness" defense. As noted above, an employer can defend against a disparate impact claim by showing that the selection criteria used by the AI tool is "job-related for the position in question and consistent with business necessity,"[20] but the employer may not have complete visibility into the selection criteria used by the AI tool. Employers may be able to strengthen a job-relatedness defense with proof that the algorithm is programmed to utilize job-related criteria and by demonstrating how the algorithm applies that criteria.

Impermissible Reliance on Regulated Data Sources

Employers' reliance on AI tools also implicates state privacy laws. Many AI tools derive their efficacy and efficiency, in part, by relying on extremely large data sets. Generally speaking, the larger the data set, the more accurate an AI tool's predictions and/or recommendations will be. However, not all data is fair game for employers to use in connection with AI tools. Some data—such as criminal history, salary history, and biometric data—are subject to regulation in certain jurisdictions when used in the employment context. Further, employers who rely on certain data about candidates as part of the hiring process must comply with federal and state background checks laws.

AI Tools and Protected Data Sets. While antidiscrimination laws forbid employers from hiring employees based upon their race, sex, age, and other categories, employers also must be cautious when considering other types of protected data, including criminal history, salary history, and/or biometric data in the hiring process. Various jurisdictions restrict employers from using such data outright, while others require that employers abide by specific disclosure and other requirements before doing so.

Criminal and Salary History. Federal law does not ban employers from considering an applicant's criminal history, although EEOC guidance asserts that excluding all applicants with an arrest record will run afoul of Title VII if doing so results in discrimination based on race or another protected characteristic.[21] Many state and local laws, however, explicitly restrict employers from considering applicants' or current employees' criminal history, either completely or unless certain conditions are met. For example, laws in California and New York limit the types of criminal records that may be considered and prohibit

inquiry into an applicant's criminal history until after a conditional offer has been made.

Similarly, employers should be cautious when considering an applicant's salary history in the hiring process. The EEOC and some federal courts have determined that an applicant's prior salary cannot, by itself, justify a compensation disparity.[22] Additionally, in an effort to close the wage gap, numerous states and localities prohibit employers from seeking out or relying upon salary history information in determining whether to hire an applicant or at what salary.[23] Employers in these jurisdictions should ensure that any AI products they are relying upon are not considering an applicant's criminal or salary history.

Biometric Data. A few states—Illinois, Texas, Washington, and Maryland—regulate employers' use of biometric information. The Illinois Biometric Information Privacy Act ("BIPA") has garnered the most attention as it is the only state law that provides a private right of action, and offers actual damages, statutory damages, attorneys' fees, and injunctive relief, which has brought an onslaught of litigation and sizeable settlements.[24] Under BIPA, prior to obtaining an applicant's or employee's biometric identifiers or information, an employer must: (i) notify the individual of the specific reason for collecting the information and how long the employer will use or retain it; (ii) receive a written release from the individual to use the information; and (iii) develop a publicly available written policy including a retention policy and guidelines for permanently destroying the information.

Some AI tools may scan an individual's facial geometry or produce a voiceprint of an individual's voice, which are "biometric identifiers" under BIPA. Further, as discussed below, the Illinois Artificial Intelligence Video Interview Act places certain obligations and restrictions on employers who use AI to analyze applicant-submitted videos. Accordingly, an employer in Illinois who utilizes an AI tool that analyzes video interviews and/or captures the unique biological characteristics of an employee or applicant must be cautious to comply with Illinois law or risk severe penalties.

AI Tools and Background Checks. Background check companies that scan social media platforms and produce reports of compiled information to employers are considered consumer reporting agencies ("CRA") and thus are governed by the Fair Credit Reporting Act ("FCRA") and analogous state laws.[25] When employers obtain a consumer report through a CRA to make employment decisions, they likewise must comply with the FCRA. A "consumer report" is broadly defined as any written, oral, or other communication of any information by a CRA bearing on an individual's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the individual's eligibility for employment purposes.[26]

The FCRA typically requires that employers: (i) first obtain consent from an applicant to conduct a background check through a third party using a form with statutorily mandated disclosures; (ii) notify the consumer when adverse action is taken on the basis of that background check; and (iii) identify the CRA that provided the background check.[27]

Passed and Emerging Legislation Regulating AI in Employment

Federal agencies have issued regulatory guidance explaining how employers should comply with *existing* federal civil rights laws in connection with their use of AI.[28] States and localities have gone even further and passed *new* laws that impose new requirements—such as notice and disclosure obligations—on the use of AI in employment decisions.

Federal Efforts to Regulate AI. In recent years, federal regulators have increasingly focused their attention on AI. On January 1, 2021, Congress passed the National Artificial Intelligence Initiative Act of 2020 ("NAIIA"), which established, among other things, several new federal offices to oversee and implement a national AI strategy. Pursuant to the NAIIA, President Biden formed the National Artificial Intelligence Advisory Committee, led by the Secretary of Commerce, within the White House Office of Science and Technology Policy ("OSTP").

In October 2022, OSTP published "Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People" with the stated purpose of protecting the public from harmful outcomes or harmful use of technologies that implement AI.[29] The Blueprint is a nonbinding white paper laying out

five principles to guide the design, development, and deployment of AI and other automated technologies, including practical guidance for developers.[30]

On October 28, 2021, the EEOC announced the launch of a new initiative on AI and algorithmic fairness to "ensure that [AI] and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws that the agency enforces."[31]

On May 18, 2023, the EEOC published a technical assistance document that states the EEOC's views about the application of Title VII to an employer's use of automated systems, including those that incorporate artificial intelligence.[32] In part, the EEOC's technical assistance document asserts that if an employer's "use of an algorithmic decision-making tool has an adverse impact on individuals of a particular race, color, religion, sex, or national origin, or on individuals with a particular combination of such characteristics (e.g., a combination of race and sex, such as for applicants who are Asian women), then use of the tool will violate Title VII unless the employer can show that such use is 'job related and consistent with business necessity' pursuant to Title VII."[33] The EEOC's document does not address "other stages of the Title VII disparate impact analysis, such as whether a tool is a valid measure of important job-related traits or characteristics. The document also does not address Title VII's prohibitions against intentional discrimination (called "disparate treatment") or the protections against discrimination afforded by other federal employment discrimination statutes."[34]

Other federal agencies have also taken action about the use of AI. For example, in May 2022, the DOJ Civil Rights Division and EEOC issued technical assistance documents regarding AI and the potential for disability discrimination in the employment context.[35] One month later, in June 2022, the Civil Rights Division announced the settlement of its Fair Housing Act lawsuit that alleged unlawful algorithmic discrimination in advertising.[36] Then, on January 9, 2023, the Civil Rights Division and the U.S. Department of Housing and Urban Development also filed a statement of interest in support of allegations of unlawful discrimination by an algorithm-based tenant screening system.[37]

Federal Trade Commission ("FTC") guidance issued in April 2021 explained how the agency would enforce transparency and fairness in algorithmic decision-making by bringing enforcement actions under section 5 of the FTC Act, the Fair Credit Reporting Act, and the Equal Credit Opportunity Act.

Federal agencies have been involved in challenges to employers' use of AI-powered employment tools. For example, in November 2019, the Electronic Privacy Information Center ("EPIC") filed a complaint with the FTC against HireVue, a startup that initially used AI-driven facial recognition software to assess a candidate's effectiveness.[38] EPIC alleged that HireVue's AI tools—which the company claimed could measure the "cognitive ability," "psychological traits," "emotional intelligence," and "social aptitudes" of job candidates—were unproven, invasive, and prone to bias. EPIC also challenged HireVue's allegedly deceptive claim that it did not use facial recognition in its assessments. Fourteen months later, HireVue removed its facial recognition tools from its hiring assessment software.

In May 2022, the EEOC filed its first algorithmic discrimination case against an English-language tutoring service company. In the class action, the EEOC alleges that the employer "intentionally discriminated against older applicants because of their age by programing their software to automatically reject female applicants aged 55 or older and male applicants aged 60 or older" in violation of the Age Discrimination in Employment Act.[39] As of May 2023, the case remains pending in federal court.

New York City. On January 1, 2023, New York City's law regulating the use of AI tools in hiring and promotion became effective,[40] but soon thereafter the City postponed enforcement until April 15, 2023, due to the high volume of public comments in response to the Proposed Rules.[41] On April 6, 2023, the City released its Final Rules and further delayed enforcement until July 5, 2023.[42]

New York City's law is the first of its kind to regulate the use of automated employment decision tools ("AEDT"), which the law defines as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision-making" in employment decisions. It excludes tools that do not "automate, support, or substantially assist or replace discretionary decision-making

processes" such as junk email filters, calculators, databases, or data sets.

The Final Rules provide much-needed clarification on the scope of AEDT. The regulations clarify that the law covers only AEDTs that: "(1) generate a prediction, meaning an expected outcome for an observation, such as an assessment of a candidate's fit or likelihood of success, or that generate a classification, meaning an assignment of an observation to a group, such as categorizations based on skill sets or aptitude; and (2) for which a computer at least in part identifies the inputs, the relative importance placed on those inputs, and, if applicable, other parameters for the models in order to improve the accuracy of the prediction or classification."[43]

An employer must comply with the law's substantive requirements if it uses an AEDT to make a hiring and/or promotional decision and relies upon the tool's "simplified output": (i) solely with no other factors considered; (ii) more than any other criterion; or (iii) to overrule conclusions derived from other factors, including human decision-making. "Simplified output" means "a prediction or classification," which can take the form of a score, (e.g., rating a candidate's estimated technical skills), tag or categorization (e.g., categorizing a candidate's resume based on key words, assigning a skill or trait to a candidate), recommendation (e.g., whether a candidate should be given an interview), or ranking (e.g., arranging a list of candidates based on how well their cover letters match the job description).

When an employer uses an AEDT in hiring or promotions, the employer must: (i) conduct a bias audit on the tool; (ii) publish a summary of the results of the most recent bias audit on the employer's website before using the tool; and (iii) provide applicants notice of the employer's use of the tool.[44] A "bias audit" is an impartial evaluation by an independent auditor that must assess the tool's disparate impact on persons in the EEO categories of race, ethnicity, and sex, as well as intersectional categories. An "independent auditor" means a person or group that is not involved in using or developing the AI tool and is not an employee of the employer or the vendor who developed the tool.

The Final Rules prescribe the minimum requirements for the bias audit, including: (i) how to calculate the selection rate, impact rate, or scoring rate; (ii) the types of data—historical or test data—used to conduct the audit; and (iii) the criteria for selecting an independent auditor. Multiple employers using the same AEDT may rely on the same bias audit if they provide historical data for the audit.

The New York City Department of Consumer and Worker Protection began enforcing the law on July 5, 2023. The Department can issue fines between $500 and $1,500 per violation, per day. Specifically, "each day on which an [employer uses an] automated employment decision tool" or each time an employer fails to provide the required notice to a candidate or employee will constitute a separate violation.

Although the law does not expressly provide a private right of action, the law will require disclosures that could prompt private litigants to challenge AEDTs under other laws, such as federal and state antidiscrimination laws.[45]

Illinois and Maryland. In 2019, Illinois became the first state to pass legislation addressing the use of AI in the hiring process, specifically the use of AI in evaluating job interview videos.[46] The Artificial Intelligence Video Interview Act, which took effect in January 2020, requires employers who use AI to analyze applicant-submitted videos to: (i) notify each applicant that AI may be used to analyze the applicant's video interview; (ii) provide each applicant with information before the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and (iii) obtain, before the interview, consent from the applicant to be evaluated by the AI program. Under the law, employers cannot use AI to evaluate applicants who have not consented to its use and cannot share applicant videos, except with those whose expertise is necessary to evaluate the applicant's fitness. Additionally, employers must delete an applicant's video interview, including all copies and backups, within 30 days of receiving a request to delete.

Effective January 1, 2022, the Illinois Legislature amended the Artificial Intelligence Video Interview Act to require employers who rely solely upon an AI analysis of a video interview to determine whether an applicant will be selected for an in-person interview to collect and report demographic data to the Department of Commerce and Economic Opportunity. The report must include both: (i) the race and ethnicity of applicants who are and are not afforded the opportunity for an in-person interview after the AI analysis; and (ii) the race and

ethnicity of applicants who are hired. The burden of analyzing the data for racial bias falls to the Department, which must prepare an annual report for the Governor and General Assembly disclosing its findings.

In May 2020, Maryland passed a related law, which prohibits employers from using a "facial recognition service" for the purpose of creating a "facial template" during an applicant's interview unless the applicant consents by signing a waiver.[47] The law defines "facial recognition service" as "technology that analyzes facial features and is used for recognition or persistent tracking of individuals in still or video images." A "facial template" means "the machine-interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service." Although the law does not explicitly address AI, AI tools may utilize facial recognition technology.

Neither the Illinois nor Maryland laws provide a private right of action, enforcement mechanism, or penalties for noncompliance. Even without these features, employers should anticipate that states may amend these laws to give them more teeth in coming years.

California Draft Regulations. On March 15, 2022, California's Civil Rights Department ("CRD") (formerly the California Department of Fair Employment and Housing) issued proposed regulations regarding the use of AI in employment decisions.[48] Unlike state laws that focus on notice, consent, and bias reporting, California's proposed regulations make clear that employers and other companies that use, administer, or create AI tools that impact applicants or employees can face liability under the Fair Employment and Housing Act ("FEHA"), the state's antidiscrimination law.

In July 2022, the CRD proposed additional modifications to its proposed regulations, which make it unlawful for an employer or other covered entity to use "qualification standards, employment tests, automated-decision systems, proxies or other selection criteria if such criteria have a disparate impact on or constitute disparate treatment of an applicant, employee, or class of applicants or employees, on the basis of protected characteristics unless the criteria are shown to be both (1) job related for the position and (2) consistent with business necessity."[49]

Under the proposed regulations, an "automated-decision system" means "a computational process, including one derived from machine-learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision-making that impacts employees or applicants." Examples of "automated-decision systems" include directing job advertisements to targeted groups; screening resumes for particular terms or patterns; analyzing facial expressions, word choices, and voices in online interviews; and measuring aptitude, cognitive capabilities, or cultural fit through tests, questionnaires, games, puzzles, or other challenges.

The draft regulations provide an illustrative example as to how an employer's use of AI tools may violate FEHA. "An automated-decision system that measures an applicant's reaction time may unlawfully screen out individuals with certain disabilities. Unless an affirmative defense applies (e.g., an employer demonstrates that a quick reaction time while using an electronic device is job-related and consistent with business necessity), an employer's decisions made or facilitated by automated-decision systems may constitute unlawful discrimination."[50] Interestingly, under the proposed regulations, companies that sell AI tools may be liable under an aiding-and-abetting theory for advertising, selling, or promoting their automated-decision system if the system unlawfully limits, screens out, or discriminates against applicants or employees based on protected characteristics.[51]

Separately, the California Legislature introduced SB 313 on February 6, 2023, to create an "Office of Artificial Intelligence" within the state's Department of Technology that would, among other things, guide the design, use, or deployment of automated systems by a state agency to ensure such AI tools are used in compliance with state and federal laws.

Other States and Localities. Other states and localities throughout the United States are also seeking to regulate AI, facial recognition software, and algorithms in the employment context. For example, in late 2021, the District of Columbia introduced Bill 24-558, the "Stop Discrimination by Algorithms Act of 2021," which seeks to prohibit employers from using algorithms that make decisions based on protected categories (i.e., race, sex, ethnicity, etc.).[52] Others states, including

Colorado,[53] Illinois,[54] Massachusetts,[55] New Jersey,[56] New York,[57] Pennsylvania,[58] Vermont,[59] and Washington,[60] have proposed or created tasks forces or committees to research and advise on the use of AI in employment and other industries. Task forces are just the beginning, and employers should expect more states to regulate in this area in years to come.

AI CHATBOTS AT WORK

Generative AI systems create text and/or photos in response to human input, such as a question posed to a chatbot. In recent months, the widespread availability of generative AI with user-friendly interfaces has spurred what some are calling an "AI race."[61]

Employers' response to generative AI has been mixed. Some employers are encouraging employees to utilize such generative AI to produce content, perform research, and respond to customer inquiries. Others have taken a different approach, banning employees from using generative AI at work, citing privacy and confidentiality concerns. Going forward, employers should consider both the accuracy of generative AI outputs, the potential for plagiarism, and the potential for generative AI to compromise company confidential information and trade secrets if such information is disclosed in the query posed to the AI chatbot.[62]

Generative AI is impressive, but not infallible. Put simply, its output is only as accurate as its source material, which itself may be inaccurate. Sometimes, generative AI produces responses with errors, factually incorrect information, or plagiarized content.[63] OpenAI acknowledges the limitations of its generative AI tool, ChatGPT, which "can occasionally produce incorrect answers" and "may also occasionally produce harmful instructions or biased content."[64] Indeed, ChatGPT was trained on data sets available through 2021, so there are gaps in its knowledge base.[65] At work, problems and risks may arise if employees rely on outputs without fact-checking the output or determining whether it appears plagiarized. Aware of this concern, a federal judge's standing order requires all attorneys appearing before the court to file a certificate attesting either that no portion of their filing was drafted by generative AI or that any language drafted by generative AI was checked for accuracy by a human being.[66] Where employees use AI chatbots at work, they should be required to closely review chatbot outputs before incorporating the result into work product.

Protecting confidential trade secrets and other proprietary information is another area of concern for employers. Employers may worry that employees may enter confidential or proprietary information into the chatbot. Assessing this risk is difficult. On the one hand, depending on the nature of the applicable end-user license agreement, conversations may be reviewed by AI trainers and the chatbot may "learn" and refine its answers based on user input, which could compromise confidential information.[67] But on the other hand, an employee disclosure into a chatbot is arguably not a disclosure to a "person" or the public. Employers who allow employees to utilize AI chatbots should consider updating their employee handbooks and/or proprietary information protection policies to address the possibility of employees entering trade secret or confidential information into online chatbots.

PRACTICAL SOLUTIONS

Traditional legal frameworks are notoriously slow at adapting to new technology. And employers may feel hamstrung between the need to adopt AI technologies to stay competitive and the potential for legal risks. But no employer wants to be the test subject in a case applying employment laws to their use of this developing technology. There are several tangible solutions and best practices employers might consider adopting to mitigate legal risks associated with using AI in hiring and recruiting.

Identify and Vet AI Tools

As a threshold matter, employers would be wise to identify what products currently in use rely on AI and adopt a uniform policy for registering and tracking the workforce's utilization of AI tools. Employers should not limit this inquiry to whether and how they use AI in the hiring process; instead, they may wish to examine if they use these tools "to monitor and track employees and track performance" for purposes such as promotions, demotions, or other potential actionable employment decisions.[68] Employers may want to form an AI committee that develops policies and vets risks associated with the company's use of AI tools.

Know the AI Product

The contract law of *caveat emptor*, or "buyer beware," is a fitting maxim for employers to abide by when purchasing an AI tool from a third-party vendor or using an AI tool developed in-house. Before implementing the tool, employers should take steps to understand both *what* the AI tool relies upon to make its assessment and *how* it makes the assessment.

As a starting point, with respect to employment-law issues, employers can ask third-party vendors or in-house engineers some or all of the following questions when evaluating the AI tool:

- Did you attempt to determine whether use of the algorithm disadvantages individuals based on protected categories such as race, gender, age, disability, etc.? For example, did you assess whether any of the traits or characteristics that the tool relies upon for its output are highly correlated with a particular race, gender, age, disability, etc.? Was that assessment conducted under legal privilege?
- What data was the tool "trained" on?
- What data does the tool use to evaluate its subjects? For example, does the tool rely upon criminal records, salary history, or other restricted data in the employment context?
- How does the tool reach its recommendations and/or conclusions?
- Is the tool's interface accessible to as many individuals with disabilities as possible? Are the materials presented to job applicants or employees in alternative formats? If so, which formats? Are there any kinds of disabilities for which there will not be accessible formats?
- Are there mechanisms for ongoing monitoring and evaluation of the AI tool's performance such as impact on HR processes and employee experiences to identify any issues or areas for improvement? How does the tool adjust or adapt in response to identified issues?
- Is the tool subject to any state or local laws that impose disclosure or notice obligations, and what work has been done to prepare for those requirements? To the extent state or local law requires a bias audit, who will shoulder the costs (e.g., as between the employer and the vendor)? Prior to conducting an audit, what assurances are there that the results will not create legal liability for use of the tool? Has a prior audit been conducted under privilege that provides reassurance that the tool is not biased?

Review Contracts with AI Vendors

According to a 2022 study from the Society for Human Resource Management, 92% of employers who use AI to support human resources functions source some or all of these tools directly from a third-party vendor.[69] Employers who use AI tools provided by third-party vendors should carefully review their contracts and consider how they allocate liability for employment claims based upon use of the product.

Conduct Bias Audits

Given the current environment, with states and localities passing new laws, and governmental and private litigants pursuing enforcement actions under existing laws, employers should consider conducting a bias audit of AI tools if it has not been done. If the audit identifies problems, the employer will then have time to correct the problems in an orderly fashion, without the time pressure created by impending enforcement or litigation-related deadlines.

Conducting a proactive bias audit can be particularly beneficial given how long it can take to bring AI tools into compliance. Employers subject to the New York City Automated Employment Decision Tools law are finding that coming into compliance can take months of preparation and coordination with various stakeholders. As an initial matter, it can be difficult to identify all tools that rely on AI unless the employer has already developed a centralized method to track such tools. Even once the tools are identified, understanding how the tools work and whether they are covered by these new laws takes effort, particularly given the need to coordinate with vendors who may have better knowledge of how the tools operate.

Once these hurdles are cleared, the employer will want to coordinate with legal counsel before conducting a bias audit. Employers may want to conduct these audits under privilege to promote candid, objective assessments of whether the tool might create a risk of discrimination findings. Involving counsel will also help the employer understand how to design the bias audit. Employment lawyers who are familiar with court decisions and agency guidance on disparate impact analyses can ensure that the audit is structured in a way that tracks the applicable legal requirements.

CONCLUSION

Artificial intelligence is here to stay, and its uses will only continue to expand. AI has already and will continue to revolutionize the way organizations hire and recruit employees, among many other employment functions. Every revolution brings with it new challenges for employers and employees alike. By keeping abreast of the latest developments and implementing best practices, employers can implement these emerging technologies while mitigating legal risk.

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ENDNOTES

1 EEOC Press Release, "EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness" (Oct. 28, 2021).

2 DOJ Civil Rights Division, *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring* (May 12, 2022); EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022). At least one EEOC Commissioner has publicly voiced concern that the EEOC's May 12, 2022, technical assistance document "was not voted on by the full Commission, and did not go through the administrative law process involving noticed and comment." Keith E. Sonderling, Bradford J. Kelly, and Lance Casimar, *The Promise and The Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Mia. L. Rev. 1, 42 (2022).

3 EEOC Press Release, "EEOC Releases New Resource on Artificial Intelligence and Title VII" (May 18, 2023); EEOC, *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964* (May 18, 2023).

4 Keith E. Sonderling & Bradford J. Kelley, *Filling the Void: Artificial Intelligence and Private Initiatives*, North Carolina Journal of Law & Technology (Vol. 24, Issue 4: May 2023).

5 Digital Platform Commission Act, S. 1671, 118th Congress (2023).

6 Workforce Matters, *EEOC working to stop artificial intelligence from perpetuating bias in hiring* (Dec. 5, 2021).

7 Society for Human Resource Management, *Fresh SHRM Research Explores Use of Automation and AI in HR* (April 13, 2022).

8 *Id.*

9 Jeffrey Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women*, Reuters (Oct. 10, 2018).

10 *Mobley v. Workday*, Inc., No. 3:23-CV-00770 (N.D. Cal. Feb. 21, 2023).

11 EEOC, Select Issues, *supra* note 3.

12 The disparate impact proof structure under Title VII, in part due to congressional amendments of that statute in 1991, differs in important ways from the proof structure under other federal antidiscrimination provisions that codify disparate impact.

13 42 U.S.C. § 2000e-2(k)(1)(A).

14 *Id.*

15 *Id.* § 2000e-2(k)(1)(A)(ii).

16 EEOC's Uniform Guidelines on Employee Selection Procedures, codified at 29 C.F.R. §§ 1607.1, 1607.4(D).

17 *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 (1988) (noting that the rule "has been criticized on technical grounds … and has not provided more than a rule of thumb for courts"); *Stagi v. Nat'l R.R. Passenger Corp.*, 391 Fed.Appx. 133, 138 (3d Cir. 2010) (unpublished) ("[T]he 'four-fifths rule' has come under substantial criticism, and has not been particularly persuasive.").

18 *See* EEOC, Select Issues, *supra* note 3.

19 433 U.S. 299 (1977)

20 42 U.S.C. § 2000e-2(k)(1)(A). See also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

21 EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act* (April 25, 2021).

22 EEOC Compliance Manual, Compensation Discrimination, No. 915.003, at § 10-IV(F)(2)(G) (Dec. 5, 2000) (collecting cases); *Rizo v. Yovino*, 950 F.3d 1217, 1219 (9th Cir. 2020) ("[P]rior rate of pay is not a 'factor other than sex' that allows an employer pay a female employee less than male employees who perform the same work." (quoting 29 U.S.C. § 206(d)(1)(iv)). *But see Boyer v. United States*, 159 Fed. Cl. 387, 402 (2022) (explaining that courts are divided about whether prior pay alone is a legitimate "factor other than sex" for purposes of the Equal Pay Act); *Wernsing v. Dep't of Hum. Servs., State of Ill.*, 427 F.3d 466, 468 (7th Cir. 2005) ("Wages at one's prior employer are a 'factor other than sex' and so . . . an employer may use them to set pay consistently with the Act."); *Spencer v. Va. State Univ.*, 919 F.3d 199, 206 (4th Cir. 2019) (denying Equal Pay Act claim in which "the wage difference at issue resulted from the University setting [claimant's and comparator's] pay at 75% of their previous salaries as administrators").

23 *See, e.g.*, Cal. Lab. Code § 432.3(a).

24 Biometric privacy bills have been introduced in various states (i.e., Arizona, Hawaii, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, Tennessee, Vermont, and Washington) since the start of the 2023 legislative session. Most are modeled after Illinois's BIPA.

25 Letter to FTC, 2011 WL 2110608 (May 9, 2011).

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27 *See* 15 U.S.C. § 1681b.

28 *See, e.g.*, EEOC, Select Issues, *supra* note 3.

29 The White House, *Blueprint for an AI Bill of Rights*.

30 *Id.*

31 EEOC, Press Release, *supra* note 1.

32 EEOC, Press Release, *supra* note 3; EEOC, Select Issues, *supra* note 3.

33 EEOC, Select Issues, *supra* note 3.

34 *Id.*

35 *Id.*

36 U.S. Department of Justice, Press Release, "Justice Department Secures Groundbreaking Settlement Agreement with Meta Platforms, Formerly Known as Facebook, to Resolve Allegations of Discriminatory Advertising" (June 21, 2022).

37 Statement of Interest of the United States, *Louis v. Saferent Solutions, LLC*, Case 1:22-cv-10800-AK (D. Mass. Jan. 9, 2023).

38 Electronic Privacy Information Center, *Consumer Cases, In re HireVue*.

39 *EEOC v. iTutorGroup, Inc.*, et al., Case No. 1:22-cv-02565 (E.D.N.Y.)

40 N.Y.C. Admin. Code § 20-870, *et seq.*

41 New Laws and Rules, Automated Employment Decision Tools, December Update, NYC Consumer and Worker Protection.

42 New York City Department of Consumer and Worker Protection, *Notice of Adoption of Final Rule*.

43 Rules of the City of New York § 5-300, Definitions (Proposed).

44 N.Y.C. Admin. Code § 20-871(a).

45 *See, e.g.*, New York City Human Rights Law, NYC Administrative Code 8-101, *et seq*. (the NYCHRL protects employees, applicants, and unpaid interns from discrimination on the basis of actual or perceived race, gender, disability, and other protected characteristics).

46 Public Act 101-0260.

47 H.B. 1202.

48 Fair Employment & Housing Counsel Draft Modifications to Employment Regulations Regarding Automated-Decision Systems (March 15, 2022).

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50 Cal. Code Regs. § 11008(d) (Proposed).

51 Cal. Code Reg. § 11020(a)(1)-(2) (Proposed).

52 B24-0058.

53 CO S.B. 113.

54 IL H.B. 0645.

55 MA H.B. 4512 (Proposed)

56 NJ A.B. 168 (Proposed)

57 NY A.B. 2414 (Proposed)

58 PA H.B. 1338 (Proposed).

59 VT H.B. 410.

60 WA S.B. 5092.

61 Associated Press, *Tech leaders urge a pause in the 'out-of-control' artificial intelligence race*, NPR (March 29, 2023).

62 *See e.g.*, Siladitya Ray, *Samsung Bans ChatGPT Among Employees After Sensitive Code Leak*, Forbes (May 2, 2023); Julia Horowitz, *JPMorgan restricts employee use of ChatGPT*, CNN (Feb. 22, 2023).

63 Danielle Abril, Can ChatGPT help me at the office? We put the AI Chatbot to the test., Wash. Post (Feb. 2, 2023).

64 OpenAI, ChatGPT General FAQ.

65 *Id.*

66 Judge Brantley Starr, Judge Specific Requirements—Mandatory Certification Regarding Generative Artificial Intelligence.

67 *See* OpenAI, *supra* note 63.

68 Keith E. Sonderling, Bradford J. Kelly, and Lance Casimar, *The Promise and The Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Mia. L. Rev. 1, 74 (2022).

69 Society for Human Resource Management, *supra* note 7.

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