



AI and the EEOC

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Agenda

- Join us the second Thursday of every month for a Compliance Webinar – and next year many seminars!
- Legislative Update
- AI and the EEOC
- The EEOC's Role
- ADA Issues – Reasonable Accommodations and Screen Outs
- Title VII Issues

Legislative Update

The Courts have squashed:

- FTC noncompete ban
- Tipped Worker 80/20/30 rule
 - What does this mean for PA that has its own 80/20 rule?



AI and the EEOC

- Not new – initiative announced by EEOC in 2021 – Artificial Intelligence and Algorithmic Fairness Initiative.
- But it keeps gaining traction as AI becomes more and more prevalent and the uses morph into new territory;
- Agency wide priority (hot button).



The EEOC's Role:

- Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions;
- Identify promising practices;
- Hold listening sessions with key stakeholders about algorithmic tools and their employment ramifications; and
- Gather information about the adoption, design, and impact of hiring and other employment-related technologies.



ADA Issues:

The most common ways that an employer's use of algorithmic decision-making tools could violate the ADA are:

- The employer does not provide a **“reasonable accommodation”** that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm.
- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally **“screens out”** an individual with a disability, even though that individual is able to do the job with a reasonable accommodation. “Screen out” occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. A disability could have this effect by, for example, reducing the accuracy of the assessment, creating special circumstances that have not been taken into account, or preventing the individual from participating in the assessment altogether.
- The employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA's restrictions on **disability-related inquiries and medical examinations**.



What if you use a third party for software or testing or whatever?

EEOC position: “[E]mployers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer’s behalf.”

- Posting a Job on a third-party website
- Using third-party software to screen applicants
- Using third-party software for testing
- Using third-party software for performance reviews, discipline or other employment decisions.
- Be wary of third-parties that advertise compliance.

Reasonable Accommodations with AI:

When an employer uses algorithmic decision-making tools to assess job applicants or employees, does the ADA require the employer to provide reasonable accommodations?


Yes. “Examples of reasonable accommodations may include specialized equipment, alternative tests or testing formats, permission to work in a quiet setting, and exceptions to workplace policies. These are just examples—almost any change can be a reasonable accommodation.”



For example, a job applicant who has limited manual dexterity because of a disability may report that they would have difficulty taking a knowledge test that requires the use of a keyboard, trackpad, or other manual input device. Especially if the responses are timed, this kind of test will not accurately measure this particular applicant's knowledge. In this situation, the employer would need to provide an accessible version of the test (for example, one in which the applicant is able to provide responses orally, rather than manually) as a reasonable accommodation, unless doing so would cause undue hardship. If it is not possible to make the test accessible, the ADA requires the employer to consider providing an alternative test of the applicant's knowledge as a reasonable accommodation, barring undue hardship.

Other examples of reasonable accommodations that may be effective for some individuals with disabilities include extended time or an alternative version of the test, including one that is compatible with accessible technology (like a screen-reader) if the applicant or employee uses such technology. Employers must give individuals receiving reasonable accommodation equal consideration with other applicants or employees not receiving reasonable accommodations.

The ADA requires employers to keep all medical information obtained in connection with a request for reasonable accommodation confidential and must store all such information separately from the applicant's or employee's personnel file.




May an employer announce generally (or use software that announces generally) that reasonable accommodations are available to job applicants and employees who are asked to use or be evaluated by an algorithmic decision-making tool, and invite them to request reasonable accommodations when needed?

Yes. An employer may tell applicants or employees what steps an evaluation process includes and may ask them whether they will need reasonable accommodations to complete it. For example, if a hiring process includes a video interview, the employer or software vendor may tell applicants that the job application process will involve a video interview and provide a way to request a reasonable accommodation. Doing so is a “[promising practice](#)” to avoid violating the ADA.

ADA Screen Out Issues:


An example of screen out might involve a chatbot, which is software designed to engage in communications online and through texts and emails. A chatbot might be programmed with a simple algorithm that rejects all applicants who, during the course of their “conversation” with the chatbot, indicate that they have significant gaps in their employment history. If a particular applicant had a gap in employment, and if the gap had been caused by a disability (for example, if the individual needed to stop working to undergo treatment), then the chatbot may function to screen out that person because of the disability.

Another kind of screen out may occur if a person’s disability prevents the algorithmic decision-making tool from measuring what it is intended to measure. For example, video interviewing software that analyzes applicants’ speech patterns in order to reach conclusions about their ability to solve problems is not likely to score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns. If such an applicant is rejected because the applicant’s speech impediment resulted in a low or unacceptable rating, the applicant may effectively have been screened out because of the speech impediment.






Some employers rely on “gamified” tests, which use video games to measure abilities, personality traits, and other qualities, to assess applicants and employees. If a business requires a 90 percent score on a gamified assessment of memory, an applicant who is blind and therefore cannot play these particular games would not be able to score 90 percent on the assessment and would be rejected. But the applicant still might have a very good memory and be perfectly able to perform the essential functions of a job that requires a good memory.

Some pre-employment personality tests are designed to look for candidates who are similar to the employer’s most successful employees—employees who most likely work under conditions that are typical for that employer. Someone who has Posttraumatic Stress Disorder (“PTSD”) might be rated poorly by one of these tests if the test measures a trait that may be affected by that particular individual’s PTSD, such as the ability to ignore distractions. Even if the test is generally valid and accurately predicts that this individual would have difficulty handling distractions under typical working conditions, it might not accurately predict whether the individual still would experience those same difficulties under modified working conditions—specifically, conditions in which the employer provides required on-the-job reasonable accommodations such as a quiet workstation or permission to use noise-cancelling headphones. If such a person were to apply for the job and be screened out because of a low score on the distraction test, the screen out may be unlawful under the ADA.



What could an employer do to reduce the chances that algorithmic decision-making tools will screen out someone because of a disability, even though that individual is able to perform the essential functions of the job (with a reasonable accommodation if one is legally required)?

- If the tool requires applicants or employees to engage a user interface, did the vendor make the 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 the vendor will not be able to provide accessible formats, in which case the employer may have to provide them (absent undue hardship)?
 - Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?
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- Clearly indicating that reasonable accommodations, including alternative formats and alternative tests, are available to people with disabilities;
 - Providing clear instructions for requesting reasonable accommodations; and
 - In advance of the assessment, providing all job applicants and employees who are undergoing assessment by the algorithmic decision-making tool with as much information about the tool as possible, including information about which traits or characteristics the tool is designed to measure, the methods by which those traits or characteristics are to be measured, and the disabilities, if any, that might potentially lower the assessment results or cause screen out.
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Title VII Issues:

- Significant concern regarding disparate impact discrimination!!!! (See last month's webinar.) 😊
- Assumption that there is not direct discrimination (not overtly asking age, race, ethnicity, gender or other protected classes.)
- Concern that AI “learns” from and incorporates historical information that contains biases inherent in historical documents/content.

Looking at “Selection Rates”:

“Selection rate” refers to the proportion of applicants or candidates who are hired, promoted, or otherwise selected. The selection rate for a group of applicants or candidates is calculated by dividing the number of persons hired, promoted, or otherwise selected from the group by the total number of candidates in that group. For example, suppose that 80 White individuals and 40 Black individuals take a personality test that is scored using an algorithm as part of a job application, and 48 of the White applicants and 12 of the Black applicants advance to the next round of the selection process. Based on these results, the selection rate for Whites is $48/80$ (equivalent to 60%), and the selection rate for Blacks is $12/40$ (equivalent to 30%).

Particularly relevant for Federal Contractors.




Promising Practices:

Training staff to recognize AI problems;

Ensuring that AI tools only measure abilities or qualifications that are truly necessary for the job; and

Confirming, before purchase, with AI vendors that the AI tool does not ask individuals questions likely to elicit inappropriate information.



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Thank You