

Keeping Your Eyes on AI: What Legal and Business Professionals Should Know About Using Automated Tools to Facilitate Employment Decisions

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Increasingly, employers are incorporating, or consider leveraging, automated tools to facilitate the selection of candidates for employment or promotion. On the one hand, automated tools can assist employers to review a large number of candidates and identify the applicants whose credentials and experience most closely fit open positions. Pre-employment tests may provide a mechanism for ranking applicants' skills or compiling information to tailor interview questions. In addition, screening programs arguably remove potential bias that human decision makers bring to the process.

Notwithstanding the potential efficiency gains and other benefits of automation, legal and business professionals should be aware of the implications of relying on technology to assist in making employment decisions. Among the developments that bear upon use of these tools are the following:

Algorithmic decision-making tools can be subject to the 1978 Selection Guidelines. On May 18, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) issued **new guidance** on employer use of artificial intelligence (AI) and automated decision-making tools. Among other things, the EEOC emphasized that any algorithmic decision-making tool “used to make or inform decisions about whether to hire, promote, terminate, or take similar actions toward applicants or current employees” may be subject to the 1978 Uniform Guidelines on Employee Selection Procedures, which provide information to assess whether selection procedures present an adverse impact on members of any race, sex, or ethnic group. The EEOC also cautioned that the “four-fifths rule,” which states that “one rate is substantially different than another if their ratio is less than four-fifths” (or 80 percent), is not always an appropriate test and that smaller differences in selection rates may indicate adverse impact.

Individuals With Disabilities May Require Reasonable Accommodations. On May 12, 2022, the EEOC and the U.S. Department of Justice (DOJ) issued technical assistance providing examples of when use of algorithmic decision tools or AI might constitute unlawful discrimination under the Americans With Disabilities Act. The technical assistance guidance also outlined “promising practices” that employers could consider, including “ensuring that the algorithmic tool only measures abilities or qualifications that are truly necessary for the job, even for people who are entitled to on-the-job reasonable accommodations” and providing a way for individuals to request reasonable accommodations.

Consider Potential Labor Implications. On October 31, 2022, NLRB General Counsel Jennifer Abruzzo issued a memorandum in which she flagged concerns about certain activities, such as the use of technology to obtain information about union activity and instituting new technologies in response to Section 7 activity.

State and Local Laws May Create Additional Obligations. A growing number of state and local jurisdictions, including **Illinois** and **New York City**, have begun to regulate certain types of AI and algorithmic decision-making tools in employment decisions. Effective July 5, 2023, New

York City's AEDT law took effect. According to the final rules, the law applies to employers and employment agencies that use such tools to "substantially assist or replace discretionary decision making" with respect to hiring or promotions when "the job is located in New York City, at least part time," or "the job is fully remote but associated with an office located in New York City" or "the employment agency is located in New York City, or if not, then one of the other criteria is true." If a tool is used in such a manner, the tool must be subjected to "a bias audit conducted no more than one year prior to the use of such tool." The audit must be conducted by an "independent auditor." At least 10 business days before use of an AEDT, notice must be provided to candidates via the website, or in a job posting or by email, and employers and employment agencies must publicly disclose the date of the most recent audit of the AEDT and a summary of the results on their website.

Legislation regulating the use of AI by employers also has been introduced in New Jersey and Washington, D.C., and it is foreseeable that other states or localities may enact laws in the coming years.

Key Takeaways: Several themes emerge from these various federal and state initiatives. Foremost, the trend is place responsibility for compliance on employers and not on vendors. Second, employers can anticipate increased pressure for transparency concerning the precise tools used during the process. Third, employers should be prepared to provide reasonable accommodations to individuals with disabilities. Fourth, employers may wish to proactively conduct privileged audits to assess whether any tools have an adverse impact on any groups of applicants, and in consultation with counsel, evaluate whether to modify or discontinue the use of such tools to minimize potential legal exposure.