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Artificial Intelligence in the Workplace

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Agenda

- » Uses of AI/ADEA by Employers
- » Status of AI Regulation: Federal Level
- » EEOC Guidance on AI
- » Status of AI Regulation: State and Local Levels
- » Courts on AI

What is AI?

Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.”

Use of Artificial Intelligence in Employment: Automated Employment Decision Tools (“AEDTs”)

- Computer-based tools that use machine learning, statistical modeling, data analytics, or artificial intelligence.
- Help employers and employment agencies make employment decisions.
- Substantially assist or replace discretionary decision-making.

Advantages of Using AEDTs:

Human Resources saves time and money with automated resume sorting.

HR professionals search applicants' backgrounds, quickly evaluate resumes for key terms, and utilize “knockout” questions to filter applicant pools.

Applicants gain the ability to apply to jobs at anytime, anywhere.



Rise in Use of AEDTs

Where barriers to applying for jobs are lowered, employers and employment agencies significantly more applications.

By the early 2010s, the average job yielded almost 120 applicants, and that number continues to rise. Today, it is estimated that one corporate job opening will yield 250 resumes in response, yet only four to six will receive an interview.

The burden shifts to HR departments, which are tasked with sorting through hundreds, if not thousands, of resumes. Inevitably, these HR departments have been forced to rely on AI to sort applicants.



What types of tools in the employment processes *could* be using AI methods?

Source Applicants

Job ads

Passive recruiting

Evaluate Resumes

Review or screen resumes

Score resume to job “match”

Assess Applicants via “Games” or Work Samples

Cognitive ability

Soft skills

Personality characteristics

Score Interviews

Video

Text-transcribed

Communicate with Applicants

Automated notifications

Chat-bots

Applicant Tracking System

Status of AI Regulation: Federal Level



Status of AI Regulation: Federal Level

Currently, there are no federal laws with regulations specifically governing AI. However, employers must ensure AI use complies with existing laws, such as:

- Title VII anti-discrimination laws
- Americans with Disabilities Act
- Federal Labor Standards Act
- Family Medical Leave Act

Status of AI Regulation: Federal Level

- ❖ Trump's Administration promptly rescinded the Biden Administration's executive order on AI, which directed federal agencies to enact and enforce regulations regarding the safe, private, and non-discriminatory use of AI.
- ❖ Deeming the Biden Administration's approach to AI regulation as overly restrictive and harmful to innovation, Trump enacted Executive Order 14179, entitled "Removing Barriers to American Leadership in Artificial Intelligence," in January 2025.
- ❖ Executive Order 14179 established a policy to "sustain and enhance American's global AI dominance in order to promote human flourishing, economic competitiveness, and national security."

Status of AI Regulation: Federal Level

- ❖ Trump appointed existing EEOC Commissioner Andrea Lucas as the Commission's acting chair. Following Lucas' appointment, the EEOC removed documents from its website providing guidance on AI use by employers.
- ❖ EEOC guidance documents are not binding and do not have the force of law. They are intended only to provide clarity to the public regarding *already existing* requirements under the law.
- ❖ Despite recent changes under Trump's administration, employers should be aware that the EEOC's Strategic Enforcement Plan for Fiscal years 2024-2028 remains in effect. This plan prioritizes the agency's regulation of employers' use of technology such as AI.
- ❖ As a result, the EEOC's guidance on AI remains useful for employers in monitoring their use of AI and compliance with existing laws.

EEOC on AI



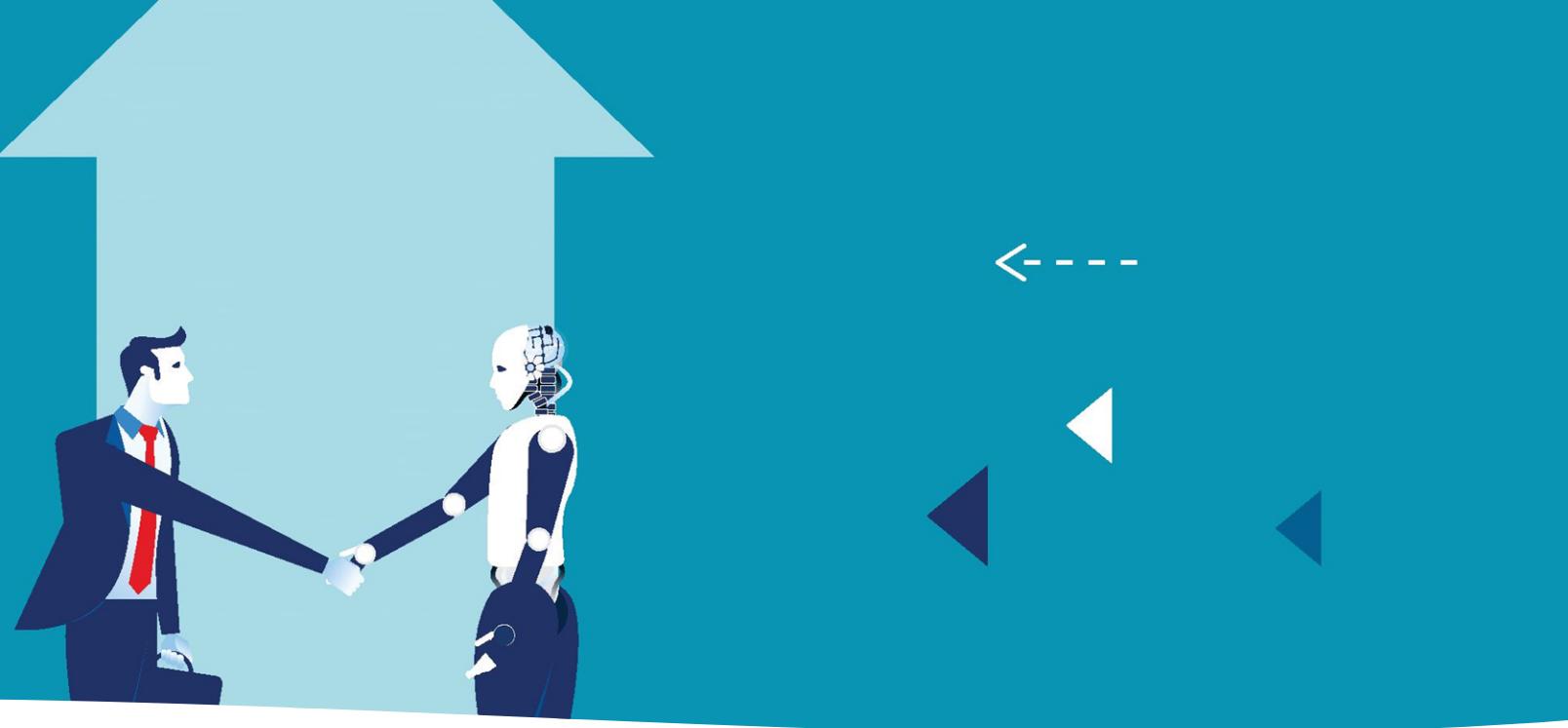
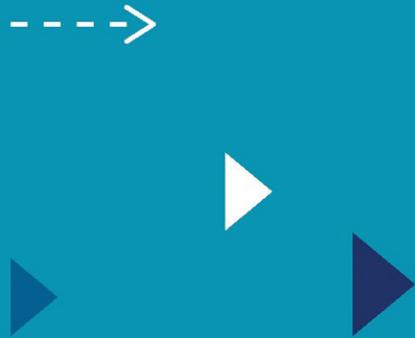
EEOC Guidance on AI Use

In its 2023 guidance on AI, the EEOC was clear that an improper application of AI could violate Title VII and other anti-discrimination laws.

EEOC Guidance on AI Use

- » Addresses AI in “selection procedures” for applicant screening, hiring, promotions, terminations
 - » **resume scanners** that prioritize applications using keywords
 - » **employee monitoring software** that rates employees
 - » **virtual assistants or chatbots** that ask candidates about qualifications and reject those who do not meet certain requirements
 - » **video interviewing software** that evaluates candidates based on facial expressions and speech patterns
 - » **testing software** that provides job fit scores for applicant or employee personalities, aptitudes, cognitive skills, or cultural fit based on test or game performance

How can AI tools have an adverse impact?



While AI tools may not intentionally screen out candidates based on a protected category, they may unintentionally screen out a disproportionate number of qualified candidates in a protected category if they are trained on data that is biased or if they are designed in a way that perpetuates stereotypes.

EEOC – AI Bias and Guidance

For Example:

- If resume screening is based on qualities of the employer's top-performing employees and if these workers are primarily from a specific demographic group, such as white males, the AI tool may be more likely to reject resumes from women or people of color.
- If your system automatically rejects candidates that live more than 20 miles from the worksite, you may be unintentionally limiting the ethnic and racial diversity of the candidates you consider, depending on the demographics of the area.

EEOC – AI Bias and Guidance

- ❖ Employers are likely liable for tools designed or administered by a vendor or third party
 - ❖ You're likely still on the hook (e.g., for disparate impact) no matter what the vendor says.
- ❖ Proactive measures are essential to identify and mitigate potential adverse impacts on protected groups.
 - ❖ Employers should self-audit the tools they use. This was highly encouraged in the EEOC's guidance.
 - ❖ If you identify potential disparate impact, consider making an adjustment.
 - ❖ Pay close attention to federal, state, and local laws when auditing.
 - ❖ Educate your team on the risks associated with using AI.

EEOC Monitoring Guidance: “Four-Fifths Rule” Can Be Applied to AI Selections

- » Employers can use the “four-fifths” rule as a general guideline to help determine whether an AI selection process has violated disparate impact standards.
- » The test checks to see if a selection process is having a disparate impact on a certain group by comparing the selection rate of that group with the most “successful” selection rate. If it’s less than four-fifths of that selection rate, then you might be subject to a disparate impact challenge.

EEOC Monitoring Guidance: “Four-Fifths Rule” Can Be Applied to AI Selections

Here is the example provided by the EEOC.

- » Assume your company is using an algorithm to grade a personality test to determine which applicants make it past a job screening process.
 - » 80 White applicants and 40 Black applicants take the personality test.
 - » 48 of the White applicants advance to the next round (equivalent to 60%).
 - » 12 of the Black applicants advance to the next round (equivalent to 30%).
- » The ratio of the two rates is thus $30/60$ (or 50%).
- » Because $30/60$ (or 50%) is lower than $4/5$ (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants – which could be evidence of discrimination against Black applicants.

EEOC – AI Bias and Guidance: Vendors

The EEOC also advised that employers can't avoid their responsibilities by using a third party to deploy AI methods and then blaming them for any discriminatory results.

What Should You Do???

- ✓ If you are considering using a vendor to develop or administer an algorithmic decision-making tool, ask the vendor whether steps have been taken to evaluate whether that tool might cause an adverse disparate impact.
- ✓ Ask the vendor whether it relied on the four-fifths rule of thumb or whether it relied on a standard such as statistical significance that is often used by courts when examining employer actions for potential Title VII violations.
- ✓ Check your vendor contracts for indemnification provisions.

EEOC – Continuous Assessment of AI Tools

- ✓ Conduct thorough assessments of AI tools before implementation.
- ✓ Scrutinize the training data and decision-making processes of AI tools.
- ✓ Monitor the performance of AI tools for protected groups.
- ✓ Promptly address any identified disparities or biases.



Status of AI Regulation: State & Local Levels



Status of AI Regulation: State & Local Levels

Recent efforts to enact federal legislation discouraging AI regulation by states have failed. As a result, state and local governments continue to fill the regulatory gap by enacting their own laws governing the use of AI.

Status of AI Regulation: State/Local Examples

- » A law in New York City went into effect Jan. 1, 2023 (with enforcement delayed until Jul. 5, 2023) requiring employers to get a “bias audit” for all automated employment decision tools. This is an impartial evaluation by an independent auditor that tests, at minimum, the tool’s disparate impact upon individuals based on their race, ethnicity, and sex. This law also contains strict notice and disclosure requirements.
- » A Colorado law taking effect June 30, 2026, requires AI developers and deployers using “high-risk” AI systems to “use reasonable care to protect consumers from any known or reasonably foreseeable risks of algorithmic discrimination in the high-risk system.” The law lists specific acts which, if taken by developers and deployers, creates a presumption that reasonable care was used.

Status of AI Regulation: State/Local Examples

- An amendment taking effect in 2026 amends Illinois' Human Rights Act to prohibit employers' use of AI tools in a way that results in discrimination. Illinois also has a current law requiring employers to disclose the use of AI analysis of applicant-submitted interviews.
- Maryland enacted a law requiring employee consent to AI-based facial recognition technology in hiring.
- Effective January 1, 2026, a Texas law specifically prohibits employers from developing or using AI systems to intentionally discriminate against protected classes in violation of federal laws.
- We anticipate that many other states and cities will adopt similar laws.

Courts on AI



Courts on AI: *EEOC v. iTutorGroup Inc.*

- » 2022, Eastern District of New York.
- » EEOC filed suit against iTutorGroup, an online tutoring company, alleging its use of AI discriminated against older job applicants.
- » This was the first lawsuit filed by the EEOC alleging that an employer used AI to discriminate against job applicants.
- » The EEOC's investigation found that iTutorGroup's hiring software used an algorithm that considered applicants' age, along with other factors, to predict their likelihood of success as tutors.

Courts on AI: *EEOC v. iTutorGroup Inc.*

- » On September 8, 2023, EDNY approved a consent decree after the parties reached a settlement.
- » The Settlement Agreement included:
 - » \$365,000 in monetary relief to a class of affected applicants;
 - » Allowance for reapplication; and
 - » Implementation of new hiring practices to prevent future discrimination.

Courts on AI: *Mobley v. Workday Inc.*

- » 2023, Northern District of California.
- » The five plaintiffs, each over the age of 40, applied for and were denied hundreds of jobs, nearly all without ever receiving an interview. The plaintiffs sued alleging, amongst other claims, that Workday's AI screening software discriminated against applicants based on age.
- » The Court denied Workday's motion to dismiss, finding Workday, through the use of its AI software, acted as an "agent" of employers by performing screening functions which the employer would have normally carried out themselves.
- » This ruling expands potential liability for both AI vendors and employers using AI powered hiring tools.

Courts on AI: *Mobley v. Workday Inc.*

- » In May 2025, the Court certified the case as a collective action. Even though members of the class applied to different positions with different employers, the Court held that Workday's AI software was an active participant in the hiring process and constituted a unified policy that was applicable to all members of the collective.
- » This was the first AI-based discrimination suit to receive class certification.

Courts on AI: *Baker v. CVS Health Corporation*

- » The lawsuit was based on a Massachusetts law that requires job applicants be notified and given the option to opt out of lie detector tests for the purpose of job interviews.
- » CVS used video-interview technology developed by the vendor “HireVue Interview” that recorded job applicants while answering questions. HireVue then uploaded the interview recordings to an AI program that would assess candidates’ responses/performance by analyzing facial expressions, vocal intonation, eye contact, and other behaviors.

Courts on AI: *Baker v. CVS Health Corporation*

- » The plaintiff argued he was essentially subjected to a lie detector test without a warning or the opportunity to opt out.
- » Before the case settled in July 2024, the Court denied the defendant's motion to dismiss after finding the plaintiff did have standing to sue based on potential harm from his participation in the interview without being aware that it could constitute an unlawful lie detector test.
- » The case could prompt federal courts to decide whether work-based AI lie detectors are covered by the state law—as well as the federal Employee Polygraph Protection Act, which bars private employers from using lie detectors at the time of hire as well as during employment.

American Civil Liberties Union of Colorado Complaint

- » HireView's AI tool is also the subject of a recently filed complaint with the EEOC and the Colorado Civil Rights Division.
- » The complaint was filed against Intuit, Inc. and HireView (Intuit's AI vendor) on behalf of a deaf applicant. HireView's AI tool analyzed and scored the applicant's interview recording. Following the interview, the applicant was rejected for the position and provided feedback that she needed to "practice active listening."
- » Amongst other claims, the complaint alleged HireView's AI tool was inaccessible to deaf applicants in violation of the ADA and Colorado's Anti-Discrimination Act.

Tennessee Law on the Horizon?



The background of the slide is a photograph of several business professionals in a meeting. A woman in the center is looking down at a document, while others are visible in the background, some looking towards the camera. The scene is lit with a warm, professional atmosphere.

QUESTIONS?