

Expert Q&A on EEOC Guidance on Artificial Intelligence (AI)

by Practical Law Labor & Employment

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An Expert Q&A with Richard Warren of Miller, Canfield, Paddock, and Stone, PLC on the Equal Employment Opportunity Commission's guidance on employer use of artificial intelligence.

Why is the EEOC interested in Artificial Intelligence?

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What are employer best practices to use AI in the workplace?

There seems to be no hotter topic today than **artificial intelligence** (AI). From intellectual property implications to cybersecurity, AI questions touch on a vast collection of legal issues. Many employers see the value of AI in their practices and protocols, but given the newness of the technology and the speed with which it is developing, they have less visibility into the risks. One particularly significant risk factor is vulnerability to discrimination claims stemming from the use of AI and its unintended outcomes. Employers are already utilizing forms of AI to assist in the hiring and recruitment process, posing legal implications in the labor and employment space. The **Equal Employment Opportunity Commission** (EEOC) has weighed in on this issue several times. Practical Law Labor & Employment reached out to Richard Warren to learn more.

Richard is a Senior Principal in the Employment and Labor Group of Miller, Canfield, Paddock, and Stone, PLC and one of its Deputy Group Leaders. Richard represents management in labor relations and employment litigation, and in training, counseling, and advising human resource departments and corporate management.

Why is the EEOC interested in Artificial Intelligence?

The EEOC enforces and provides guidance on federal laws that prohibit discrimination on the basis of certain protected characteristics. Part of the EEOC's mandate is to consider whether the use of new technologies facilitates and causes discrimination and to help curb those risks with guidance to all stakeholders.

In October 2021, the EEOC launched the [Artificial Intelligence and Algorithmic Fairness Initiative](#). Its stated goal is to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws. In the EEOC's view, AI could potentially be used by employers to engage in discrimination or could result in that outcome regardless of intent.

AI presents a particular risk of "disparate impact," one kind of discrimination prohibited under [Title VII of the Civil Rights Act of 1964 \(Title VII\)](#). Under a disparate impact theory, a practice or policy seems to be entirely neutral but has a discriminatory effect on one or more protected classes. While using AI in the hiring process may seem like a neutral practice, the practical application of AI in hiring could result in discriminatory results if it tends to exclude members of a protected class in greater numbers than would be statistically expected.

For example, in 2018, Amazon abandoned an AI hiring tool that resulted in unforeseen discriminatory results. The AI was trained and instructed to observe patterns over a ten-year period in resume submissions and was excluding applications from female applicants because during that time, many more applications were submitted by males, and female resumes did not fit the pattern displayed by resumes submitted by males. Further, the AI program tended to downgrade applications that included degrees from all-female colleges because those did not fit the pattern established by male applications. It is this type of accidental discrimination that the EEOC seeks to combat.

What guidance has the EEOC provided to employers to avoid the risk of discrimination?

Given that the [Artificial Intelligence and Algorithmic Fairness Initiative](#) was just established in 2021 and is – like all of us – attempting to keep pace with rapidly changing technology, it did not provide practical guidance on its initial release. However, the Initiative sent a powerful signal to employers as to what behavior the EEOC will seek to regulate and curb. The Initiative's goals are to:

- 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.
- Gather information about the adoption, design, and impact of hiring and other employment-related technologies.

In support of those goals, the EEOC has been issuing guidance on topics of law relevant to its overall mandate, including:

- May 18, 2023: [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 12, 2022: [The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees](#).

This guidance, along with the [Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems](#) issued by the EEOC with the Consumer Financial Protection Bureau, the Justice Department's Civil Rights Division, and the Federal Trade Commission, forms the backbone of the EEOC's position on AI in employment.

Why should employers care about the most recent guidance from the EEOC on AI?

Employers should pay close attention to this guidance because it establishes the AI use that the EEOC and courts will scrutinize and attempt to hold employers accountable for where it causes discrimination against protected classes. The May 18, 2023 technical assistance document analyzes whether particular employment practices have a disparate impact with respect to race, color, religion, sex, or national origin. It defines essential terms in the AI arena, reminds employers about key obligations of Title VII, and most importantly, helps employers understand potential pitfalls of using this new technology in substantive employment decisions. For example, the guidance answers the following questions:

- **Can using AI to make employment decisions violate Title VII?**
 - **Yes, if it results in an adverse impact, even where the employer did not intend to discriminate.** If an AI-enabled tool creates an adverse impact on the basis of race, color, religion, sex, or national origin, the use of that tool is a Title VII violation absent the employer's showing that the use is "job related and consistent with business necessity," as defined under Title VII. The EEOC makes clear that the discriminatory impact of AI in employment decisions can run afoul of the Uniform Guidelines on Employee Selection Procedures ([29 C.F.R. § 1607.14](#)), guidance dating back to 1978.
- **Can an employer be liable for a Title VII violation through the use of third-party AI tools even if the tool is designed or administered by another entity?**
 - **Yes, in many cases.** Employers may be liable if they administer the selection procedure or if they have given the vendor authority to act on their behalf. Under the EEOC's view, if an AI tool developed by a vendor but implemented by an employer has the impact of excluding protected classes, the employer has violated Title VII. The guidance suggests that employers inquire about possible discriminatory effects of using the AI tool and notes that if the vendor is wrong in providing assurances of no discrimination, the employer could be held liable nonetheless.
- **How can an employer know if an AI-enabled tool has created a disparate impact?**
 - **One approach is to use the four-fifths rule.** Under the four-fifths rule, an employer can evaluate whether an AI-enabled tool is making substantially different distinctions along racial or other lines by looking at the numbers. The rule requires employers to look at the rates of selection across groups to ensure that the results do not vary more than 4/5 (or 80%). For example, if a test gave a passing grade to only 30% of Black applicants but 60% of White applicants, you would have a 30/60 (or 50%) ratio of Black to White passing grades. This 50% number falls below the required 80%, so would fail the four-fifths rule and suggest a discriminatory impact. Note that the four-fifths rule is not appropriate in all settings, and the EEOC provides an explanation of those circumstances in the guidance. This guidance gives employers the opportunity to both conduct periodic checks of AI-enabled tools and, if those checks show compliance, to document that

fact. Those documents will be very valuable if and when an employer has to defend against either a charge or lawsuit. The EEOC cautions that the four-fifths rule functions only as a guidepost, not a complete solution.

What kinds of technology may be implicated by the new EEOC's AI guidance?

Employers use many different kinds of technology in the hiring and promotional process, so it may be easy to overlook certain tools. Although not an exhaustive list, the EEOC reminds employers of the kinds of technology resources to consider when reviewing compliance in light of this guidance:

- Resume scanners that prioritize certain keywords.
- Monitoring software that rates employees on, for example, keystrokes.
- Virtual assistants or chatbots that reject candidates for employment along pre-defined parameters.
- Video interviewing technology that evaluates candidates based on facial expressions or speech patterns.
- Testing software that provides a score for "job fit" according to personality, aptitudes, cognitive skills, or perceived "cultural fit" based on games or tests.

What are employer best practices to use AI in the workplace?

Given the newness of the technology that powers AI tools, the EEOC's attempts to regulate it, and the distinct lack of legal precedent to fall back on, employers should adopt and use AI tools with caution. The following are best practices:

- Carefully negotiate contractual agreements with AI vendors, making sure that the agreements:
 - obligate the vendor to assume and ensure compliance with Title VII and all other applicable laws in the workplace;
 - detail the steps the AI vendor has taken, or will take, to make sure that its product does not engage in discrimination; and
 - contain indemnification and hold harmless provisions in favor of the company, so if the company is sued by the EEOC or an employee, the vendor must pay any judgment and/or provide a defense.
- As the EEOC suggests, ask any AI vendor that you consider using whether their product has been tested using the four-fifths rule.

- Avoid relying solely on the assumption that the AI tool is bound to be compliant with Title VII if it is for sale on the market. Instead, the company should conduct its own periodic testing to make sure that, in practice, the AI tool does not violate the four-fifths rule.
- Periodic testing should be conducted multiple times during the course of a year. Further, employers may want to go beyond simply calculating the four-fifths rule and use other measures to determine whether a given AI tool is screening out applicants or employees on the basis of age, gender, or any other category protected by Title VII.
- Avoid providing any AI tools, or large language models, with access to the company's confidential, proprietary, and trade secret information. This may give rise to an argument that that information no longer warrants protection under the law.
- If a company conducts testing and detects a disparate impact, immediately inform the vendor (or internal IT) and strongly consider discontinuing use of the tool until the impact is eliminated.

For more information on legal issues raised by AI on the job and beyond, see [Artificial Intelligence Toolkit](#) and [Practice Note, Artificial Intelligence \(AI\) in the Workplace](#).