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EEOC Draft Strategic Enforcement Plan Reflects Focus on Employers' Use of Artificial Intelligence

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On January 10, 2023, the Equal Employment Opportunity Commission ("EEOC") published a [draft Strategic Enforcement Plan](#) ("SEP") in the Federal Register. In it, the EEOC outlines the enforcement priorities that will guide its work, "including outreach, public education, technical assistance, enforcement and litigation." Among the priorities identified is scrutiny of employers' "use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence; use of automated recruitment, selection, or production and performance management tools; or other existing or emerging technological tools used in employment decisions" (collectively "AI"). This is another reminder for employers to be deliberate and cautious when employing new technologies to assist with decision-making.

What are the EEOC's concerns with AI?

According to the SEP, eliminating barriers in recruitment and hiring is one of the EEOC's priorities. The use of AI, in the EEOC's view, may result in discrimination in recruitment and hiring in three specific ways.

- First, the potential that AI is used unlawfully to "target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups." In one example, the EEOC identifies its suit against iTutorGroup for age discrimination, [alleging](#) the company group "programmed their tutor application software to automatically reject female applicants age 55 or older and male applicants age 60 or older."
- Second, the potential that use of AI results in "restrictive application processes or systems, including online systems that are difficult for individuals with disabilities or other protected groups to access." Last year, [we wrote](#) about the EEOC's "technical assistance" document drafted to help private employers comply with the Americans with Disabilities Act ("ADA") when using AI. There, we detailed the EEOC's "promising practices" for avoiding ADA liability, which the EEOC claims can arise in three cases: (i) the employer fails to provide a reasonable accommodation necessary for an individual to be rated fairly and accurately by the tool, (ii) the tool screens out an individual with a disability even though the individual can do the job with a reasonable accommodation, or (iii) the tool violates the ADA's restrictions on disability-related inquiries and medical examinations.
- Third, the risk that use of AI tools "disproportionately impact workers based on their protected status." Title VII of the Civil Rights Act of 1964 (as amended in 1991), the Age Discrimination

in Employment Act, and the ADA have long proscribed selection procedures such as pre-employment tests, interviews, and promotion tests that disparately impact workers based on their protected status. The SEP makes clear that the Agency intends to prioritize its scrutiny of selection tools that use AI.

What are the practical implications of the SEP?

Demand for the EEOC's services, the SEP states, "far exceeds the agency's resources." So when it comes to charge processing, the Agency will prioritize certain charges, which in this context means cases that relate to an employer's use of AI in hiring or recruiting.

The EEOC further intends to "prioritize meritorious cases that raise SEP priorities"—such as AI cases—in its litigation program, "a critical tool in the agency's efforts to prevent and remedy unlawful employment discrimination and enforce civil rights in the workplace." To that end, the EEOC will also consider its SEP priorities "in selecting cases for amicus curiae participation" in order to ensure courts interpret the law in ways the EEOC deems favorable, including with respect to employers' use of AI tools.

Finally, the EEOC "will use the SEP priorities to guide the types of systemic investigations and cases to be pursued by the Commission at the national and local levels." The EEOC will give "precedence" to "meritorious systemic charges and cases that raise SEP priorities" in order "to maximize the EEOC's strategic impact."

What's next?

The SEP is currently in a public-comment period until February 9, 2023 and is subject to a final vote by the EEOC's commissioners. In the meantime, the EEOC will hold a livestreamed [hearing](#) entitled "Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier" on January 31, 2023, at 10:00 a.m. ET at the EEOC Headquarters in Washington, DC.

One final important reminder: the SEP is not law. However, it is a clear statement about the Agency's enforcement priorities, and as such, employers should be aware of and manage risks associated with the use of AI for employee recruitment and selection in light of the inevitable enforcement actions coming down the pike.



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