EPSTEIN BECKER GREEN

AI Advancements in the Workplace: Navigating Legal Frontiers

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I. INTRODUCTION

Over the past several years, almost every facet of life has adopted machine learning and artificial intelligence ("AI") technologies. The workplace is no exception, as employers are implementing AI technologies for recruitment, hiring, promotion, and overall workforce management. AI technology has made these tasks less time-consuming and more cost effective and has reshaped how companies source and hire candidates, evaluate, and promote employees, and even comply with diversity, equity, and inclusion initiatives. Notwithstanding its positive impacts, these technologies have the potential to result in bias and other problematic issues. As companies continue to adopt AI technology, state and local governments have already started passing laws regulating its use. For organizations to understand the potential liabilities and risk associated with AI technology, they must be familiar with the developing laws around AI, as well as the technology itself.

At the outset, this paper defines some of the key terms and phrases used with respect to these technologies, sets forth some of the current trends, and identifies some of the more well-known vendors in this space. Next, the paper examines some of the legal issues that organizations should consider before or during the process of implementing workplace AI. Then, the paper explains legislative developments regulating the use of AI in workplace applications. Finally, the paper provides several recommended steps to mitigate potential legal risk attendant with using these technologies, as well as a sample checklist of considerations when deciding which solution makes the most sense for a given organization and its needs.

II. DEFINITIONS, TRENDS, AND VENDORS

A. Definitions

As the workplace AI industry continues to evolve, terms used to describe the functions and services provided by vendors in this space are not always uniform. Often, individuals use similar, but technically different, words interchangeably (e.g., "artificial intelligence" and "machine learning"). The intent of the following definitions is to give readers a simplified foundation for understanding workplace AI.

Term	Definition(s)
Algorithm	A sequence of unambiguous instructions, typically used to solve a class of specific problems or to perform a computation.
Analytics	The systematic computational analysis of data or statistics used for discovery, interpretation, and communication of meaningful patterns in data.
Applicant Tracking System ("ATS")	Software application that enables the electronic handling of recruitment and hiring needs.

Term	Definition(s)
Artificial General Intelligence ("AGI")	A representation of generalized human cognitive abilities in a software so that when faced with an unfamiliar task, it can find a solution. It is needed for effective social chatbots or human-robot interaction.
Artificial Intelligence ("AI")	Intelligence demonstrated by machines; any system that perceives its environment and takes actions that maximize its chance of achieving its goals. Machine mimicking "cognitive" functions that humans associate with other human minds, such as "learning" and "problem solving."
Autonomous Systems	Ability to independently plan and decide sequences of steps to achieve a specified goal without micro-management.
Big Data	The study and analysis of data sets that are too large or complex to be dealt with by traditional data-processing application software. Use of predictive analytics, user behavior analytics, or certain other advanced data analytics methods that extract value from data, but seldom to a particular size of data set.
Bossware	Software tools that are used for the purpose of employee monitoring.
Candidate Relationship Management ("CRM")	Method for managing and improving relationships with current and potential future job candidates. Used to automate the communication process with candidates, encourage engagement, and improve the candidate experience.
Chatbots (a.k.a. "talkbot," "chatterbot," "Bot," "IM bot," "interactive agent," or "Artificial Conversational Entity")	A software application used to conduct an on-line chat conversation via text or text-to-speak, in lieu of providing direct contact with a live human agent. Application that runs highly repeated series of automated scripts with observable answers.
Data Mining	Process of searching, extracting, and analyzing large data sets, which involves methods at the intersection of machine learning, statistics, and database systems.

Term	Definition(s)
Deep Learning	Use of large multi-layer (artificial) neural networks that compute with continuous (real number) representations, a little like the hierarchically organized neurons in human brains. It is currently the most successful machine learning approach.
Generative Pre-trained Transformers ("GPT")	A family of neural network models that uses the transformer architecture, are pre-trained on large data sets, and are able to generate novel human-like content. Used to power generative AI applications such as ChatGPT.
Human Capital Management ("HCM")	Comprehensive set of practices related to developing and optimizing an organization's hiring and management of employees.
Machine Learning ("ML")	The study of computer algorithms that can improve automatically through experience and by the use of data. Process by which machines learn to become intelligent for themselves.
Narrow AI	Intelligent systems for one particular thing (e.g., speech or facial recognition.)
Natural Language Processing	Area of computer science, linguistics, and AI concerned with the interactions between computers and human (natural) languages, in particular, how to program computers to process and analyze large amounts of natural language data.
People Analytics (a.k.a. "talent analytics" or "HR analytics")	The use of behavioral data to understand how people work and help organizations make decisions about their workforce.
Predictive Analytics	Variety of statistical techniques from data mining, predictive modelling, and machine learning that analyze current and historical facts to make predictions about future or otherwise unknown events. Provides a predictive score (probability) for each individual (e.g., candidate or employee) in order to determine, inform, or influence organizational processes that pertain across large numbers of individuals.

Term	Definition(s)
Recruitment Marketing	Strategies and tactics an organization uses to find, attract, engage, and nurture talent before they apply for a job, also called the pre-applicant phase of talent acquisition.
Robotic Process Automation	A form of business process automation technology based on metaphorical software robots or on artificial intelligence. Readily available script writing technologies that allow users to link events in a process based on "if/then" statements.

B. Workplace AI Trends

Performing a simple search on one's favorite Internet browser quickly reveals that AI has been one of the hottest workplace trends for the past several years.[1] Gartner's 2019 Artificial Intelligence Survey predicted that "seventeen percent of organizations use AI-based solutions in their HR function and another 30% will do so [in] 2022."[2] That survey also indicated that, as of the date of this survey (May 13, 2020), AI showed proven results for early adopters of AI, i.e., 62% of those that have deployed AI improved data-based decision making.[3]

Businesses across industries are continuing to adopt and invest in AI, both for recruitment and hiring as well in other workplace functions. According to a May 2022 IBM study, 35% of businesses worldwide used AI in 2022, up from 31% in 2021.[4] In a 2022 Gartner survey of over

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[1] *See, e.g., How AI Is Transforming Recruitment And Hiring, available at https://www.linkedin.com/pulse/how-ai-transforming-recruitment-hiring-dimuthu-d-silva/* (last visited on July 10, 2023); *Leverage Artificial Intelligence in HR Processes Where it Matters Most, available at https://www.gartner.com/smarterwithgartner/leverage-artificial-intelligence-in-hr-processes-where-it-matters-most* (last visited on July 10, 2023) *4 AI Trends that will Transform Recruiting in 2019, available at* https://www.brazen.com/resources/4-ai-trends-that-will-transform-recruiting-in-2019 (last visited on July 10, 2023); *3 Predictions for AI and Recruiting in 2019, available at* https://ideal.com/ai-recruiting-predictions/ (last visited on July 10, 2023); and *Recruitment Trends in Tech for 2019: Machine Learning, AI and Predictive Analytics, available at* https://www.information-age.com/recruitment-trends-in-tech-123477013/ (last visited on July 11, 2023).

[2] *AI Shows Value and Gains Traction in HR*, https://www.gartner.com/smarterwithgartner/ai-shows-value-and-gains-traction-in-hr (last visited on July 2, 2023).

[3] *Id.*

[4] "IBM Global AI Adoption Index 2022," IBM (May 2022) *available at* https://www.ibm.com/downloads/cas/GVAGA3JP (last visited on July 2, 2023).

400 CEOs and senior executives, AI was cited as the top disruptive technology impacting industries.[5]

Employers are also adopting workplace AI. A February 2022 survey from the Society of Human Resource Management found that 79% of employers use AI and automation for recruitment and hiring.[6] This follows the trends over the past several years. According to Deloitte's 2019 Global Human Capital Trends survey, which polled nearly 10,000 respondents in 119 countries, 26% of respondents were using robotics, 22% were using cognitive technologies, and 22% were using AI. A majority (81%) of respondents predicted growth in AI.[7] Finally, in 2019, 62% of respondents used automation to eliminate transactional work and replace repetitive tasks, 47% also augmented existing work practices to improve productivity, and 36% "reimagin[ed] work."[8]

Deloitte's findings also support the inference that AI will not replace human labor—including human HR departments and recruiters—in performing routine work, rather it will require humans to adopt new combinations of skills and capabilities.[9] More recently, Deloitte's 2021 Global Human Capital Trends survey revealed that employers are increasingly using AI to supplement and enhance productivity in the workforce, rather than to replace or automate manual labor. Respondents to Deloitte's 2021 survey "recognized that the use of technology and people is not an "either-or" choice but a 'both-and' partnership."[10]

Likewise, in its "2018 Global Recruiting Trends" report, LinkedIn surveyed over 9,000 global talent leader and hiring managers and identified four trends shaping the future of recruiting and hiring: (i) diversity, (ii) new interviewing tools, (iii) data, and (iv) AI.[11] While AI was not separately identified in LinkedIn's 2020 report, the authors noted the importance of skills in

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[5] "Gartner Survey Finds CEOs Cite AI as the Top Disruptive Technology Impacting Industries" https://www.gartner.com/en/newsroom/press-releases/2023-05-17-gartner-survey-finds-ceos-cite-ai-as-the-top-disruptive-technolgy-impacting-industries (last visited on June 27, 2023).

[6] "Automation & AI in HR" SHRM (Feb. 2022), *available at* https://advocacy.shrm.org/SHRM-2022-Automation-AI-Research.pdf?_ga=2.112869508.1029738808.1666019592-61357574.1655121608 (last visited on July 2, 2023)

[7] DELOITTE INSIGHTS, LEADING THE SOCIAL ENTERPRISE: REINVENT WITH A HUMAN FOCUS: 2019 DELOITTE GLOBAL HUMAN CAPITAL TRENDS 30 (2019), *available at* https://www2.deloitte.com/content/dam/insights/us/articles/5136_HC-Trends-2019/DI_HC-Trends-2019.pdf (last visited on July 2, 2023).

[8] *Id*. at 30-31.

[9] *Id*. at 31.

[10] Deloitte Insights, Diving Deeper, Five Workforce Trends to Watch in 2021, *available at* https://www2.deloitte.com/content/dam/Deloitte/cn/Documents/human-capital/deloitte-cn-hc-trend-2020-en-200519.pdf (last visited on July 2, 2023).

[11] *The 4 Trends Changing How You Hire in 2018 and Beyond*, *available at* https://business.linkedin.com/talent-solutions/blog/trends-and-research/2018/4-trends-shaping-the-future-of-hiring (last visited on July 5, 2023) ("LinkedIn 2018 Report").

emerging areas, such as "data science, artificial intelligence, augmented reality, and automation" because there will be an "enormous need for employees" with skills in these areas.[12]

With respect to "new interviewing tools," in LinkedIn's "2018 Global Recruiting Trends" report, 56% of talent professionals and hiring managers reported to LinkedIn that new interview tools are the top trend affecting how they hire. New tools include online soft skills assessments that measure traits like teamwork and curiosity and give a more holistic picture of candidates earlier in the process. Employers are also using virtual reality to immerse candidates in simulated three-dimensional environments to test their skills in standardized ways. Video interviews—live or recorded—are also popular, because employers believe they help tap a broader talent pool in far less time.[13] LinkedIn's 2018 finding that employers are using data to inform their decisions is not new. What is new is the *volume* of data available and the *speed* with which computers can analyze it, as well as the way that computers use data to *predict* hiring outcomes, not just track them.

There is still uncertainty surrounding the use of AI among recruiting professionals, and many employers are taking a "wait and see" approach to the adoption of automated solutions. According to the National Association of Colleges and Employers' Spring Quick Poll on AI,[14] only 25% of employer respondents reported using AI in the workplace over the past year. Among those who did use AI in their recruitment efforts, most reported doing so to write emails to candidates and to create interview questions. Of those who have not used AI over the past year, 61% reported that they are not sure how they would use it. When asked about their concerns surrounding AI, more than 70% of respondents noted the risk of plagiarism, unethical use, sharing misinformation, and cheating on tests and assessments. However, more than 80% of employer respondents saw the benefits of AI, including the benefits of automating repetitive tasks and improving efficiency.[15]

In recent years, business have expanded the use of AI beyond hiring and recruiting. According to the Society of Human Resource Management's January 2023 study, one in four

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[12] *4 Trends Changing How You Attract and Retain Talent, available at* https://business.linkedin.com/content/dam/me/business/en-us/talent-solutions/resources/pdfs/linkedin-2020-global-talent-trends-report.pdf (last visited on July 2, 2023) ("LinkedIn 2020 Report").

[13] *See* LinkedIn 2018 Report, *supra* n. 11.

[14] NACE conducted its Quick Poll on AI in May 2023 to see if and how its members are using AI, as well as their thoughts on the growth of AI in the future. A total of 53 employer members and 293 college members participated. *See* https://www.naceweb.org/talent-acquisition/trends-and-predictions/spring-quick-poll-on-ai/ (last visited on June 27, 2023); *see also* https://www.naceweb.org/talent-acquisition/trends-and-predictions/nace-quick-poll-employers-cautious-about-using-ai-in-recruiting-efforts/ (last visited on June 27, 2023).

[15] *Id.*

organizations will use AI or automation in HR-related activities.[16] 79% of organizations will use AI or automation for recruitment, 38% will use them to monitor employee performance and management, 18% will use them in productivity monitoring, and 4% will use them in promotion decisions. [17] Following the 2022 trend, employees have continued to rely on AI in the workplace. Thus, it should come as no supervise that a January 2023 Survey by NewVantage Partners found that nearly 88% of executives said their organizations were increasing investments in data and AI systems from their 2022 investments.[18] 89% of executives use or plan to use AI-based data tools in recruiting, 87% use them or plan to use them in employee performance and monitoring, and 86% use or plan to use them for diversity, equity, and inclusion.[19] But, less than 40% of executives believe their organizations have well-established policies and practices to monitor AI ethics.[20]

"Generative AI" is the next hot-button issue with which organizations must grapple. "Generative AI" refers to an AI system that can generatetext, images, and other media in response to prompts. It uses generative models, such as large language models, to statistically sample new data based on the training data set used to create them. ChatGPT and its latest version GPT-4 are perhaps the most famous examples of generative AI. A May 2023 survey of 2,500 executives from Gartner found that most companies are struggling to manage the use of ChatGPT but 68% of executives say the benefits of generative AI outweigh its risks.[21] The same survey revealed that customer experience/retention (38%) and revenue growth (26%) are the top two primary areas for generative AI investments.[22] Nearly half of the executives surveyed (45%) claimed that the publicity of ChatGPT spurred further generative AI investments.[23] A May 2023 LinkedIn study found that 40% of employees surveyed have used ChatGPT or generative AI at work and 68% of these individuals use them without their employers' consent.[24]

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[16] Society of Human Resource Management, "Using Artificial Intelligence for Employment Purposes," (January 2023), *available at* https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/artificial-intelligence-employment-purposes.aspx (last visited on July 11, 2023).

[17] *Id.*

[18] NewVantage Partners, "Data and Analytics Leadership Annual Executive Survey 2023," (January 2023), *available at* https://www.wavestone.us/wp-content/uploads/2022/12/Design-2023-Data-Analytics-Survey-Report.pdf (last visited July 11, 2023).

[19] *Id.*

[20] *Id.*

[21] Gartner, "Gartner Poll Finds 45% of Executives Say ChatGPT Has Prompted an Increase in AI Investment," (May 3, 2023), *available at* https://www.gartner.com/en/newsroom/press-releases/2023-05-03-gartner-poll-finds-45-percent-of-executives-say-chatgpt-has-prompted-an-increase-in-ai-investment (last visited on July 11, 2023).

[22] *Id.*

[23] *Id.*

[24] LinkedIn, "Your Employees Are Already Using Generative AI: Here are the Guidelines to Help Them Use it Responsibly," (May 4, 2023), *available at* https://www.linkedin.com/business/talent/blog/talent-acquisition/guidelines-for-using-gai-

AI will likely continue to play a prominent role in candidate sourcing and hiring and other workplace functions like productivity, promotions, and monitoring. AI's efficiencies in the workplace are compelling from a business perspective. While there are concerns of bias, data breaches, and other legal risks, there is little doubt that most organizations see AI, including workplace AI, as the next frontier.

C. Sample Vendors

Dozens of vendors have entered (and quickly exited) the digital recruitment and selection space. Vendors offer services that seek to replicate the roles that humans play in sourcing employees. While each vendor's "secret sauce" may differ, each uses some form of a proprietary computer algorithm to accomplish a task that was done by a human. The following is a non-exhaustive list of vendors and a summary of their primary focus, demonstrating the broad range of services offered in this space.

Company/Website	Description of Service(s)
Amazon Code Whisperer aws.amazon.com/codewhisperer/	Generates code suggestions in real time based on your comments and existing code. Bypasses time-consuming coding tasks and accelerate building with unfamiliar APIs. Enhances code security by detecting vulnerabilities. Flags or filters code suggestions that resemble open-source training data. Selects from 15 programming languages.
Aquent Scout aquentscout.com	Data-driven way to connect employers and searches firms to fill jobs with great talent.
Cappfinity cappfinity.com	Strength-based assessments analyze capability, fit, and potential. Offers unique data insights within great technology help organizations hire and develop the best-aligned talent.
Ceridian ceridian.com	Flight risk assessment based on time-keeping data, embedded client performance.
ChatGPT openai.com	A type of "geneative AI." With broad general knowledge and domain expertise, GPT-4 can follow complex instructions in natural language and solve difficult problems with accuracy. GPT-4 is OpenAI's most advanced system, producing safer and more useful responses
CommSafe AI Commsafe.ai	Helps uncover bullying, sexual harassment, discrimination and intellectual property theft in company communications

responsibly#:~:text=A%20recent%20survey%20found%20that,it%20without%20their%20boss's%20knowledge (last visited on July 11, 2023).

Company/Website	Description of Service(s)
Cornerstone OnDemand cornerstoneondemand.com	Talent management system providing recruitment, training, management, and collaboration solutions.
Effy effy.ai	The fastest way of running employee reviews. Friendly software with ready-to-use templates, review statistics, and AI-generated reports.
Enaible Enable.io	A type of "bossware." Measures the time employees take to complete tasks, suggest ways they can speed up, and assigns productivity scores
Entelo entelo.com	Searches for candidates based on how well they fit the employer's job description. Has access to over 200 million active and passive candidates and uses AI-powered technology to make recruiting easy. Conducts studies to prove that the vendor can successfully predict when employees are unhappy and likely to quit.
Fetcher fetcher.ai	Curated batches of talented candidates delivered straight to your inbox
Glint glintinc.com	Real-time employee surveys with predictive capacity. People success platform built on a new approach that helps organizations increase employee engagement, develop their people, and improve business results.
Google Bard Bard.google.com	A type of "generative AI" that offers a blank text box and asks the user to ask questions about any topic. It is incorporated into Google Workplaces.
HireVue hirevue.com	Several products in the recruitment space, including on-demand video interviewing for asynchronous recorded interviews, recorded live video interviews, predictive assessments, and real-time self-scheduling for candidates and event management.
Humanyze humanyze.com	People analytics platform that analyzes corporate communication data to understand how people work and benchmarks behaviors against organizational outcomes.
IBM Watson Recruitment ibm.com/products/watson-orchestrate/recruiting	AI-powered cognitive talent management solution that increases recruiter efficiency to allow HR to improve and accelerate people's impact on the business. Automatically predicts best-suited candidates who are most likely to succeed in an organization.
Intel Bleep Bleepbeta.com	An AI application that recognizes and redacts "hate speech" in real-time

Company/Website	Description of Service(s)
Interguard Interguardsoftware.com	A type of "bossware." An app on computer that creates a continuous profile of how much time is spent in productive or unproductive modes. Can also take snapshots of an employee's screen every 5 secs and send reports if they appear to be search for jobs elsewhere.
Lightcast lightcast.io	Skills-based approach uses "big data" techniques to help managers find applicants most likely to succeed. Also helps employers develop internal talent, allowing career advancement by showing employees their necessary skills.
LinkedIn Recruiter https://business.linkedin.com/talent-solutions	Automates candidate searches to find quickly prospects matching an organization's criteria.
Modern Hire modernhire.com	Personalized data-driven hiring, combining interview technology and predictive assessment
MS 365 Copilot MS365Copilot.com	A type of "generative AI" capable of generating text, images, or other media in response to prompts.
MS Dynamics 365 dynamics.microsoft.com	Leverages the power of Office 365 and LinkedIn to quickly find and onboard the right people.
MS Editor Microsofteditor.com	A spellchecker features in MS office tools that allows users to use more "inclusive" language by identifying words or phrases that may offend others.
PhenomPeople phenom.com	Combines personalized career site experience to attract top talent with tools to make recruiters more efficient and provide talent leaders actionable insights into the recruiting funnel.
Prodoscore Prodoscore.com	A type of "bossware." Scores daily productivity of each worker, compares them w/colleagues, and issues alerts for "high-risk" employees
Pymetrics pymetrics.ai	Applies behavioral data and industrial organizational science to reinvent the way companies attract, select, and retain talent.
Sanas AI Sanas.ai	In real-time, converts the individual's accent, ostensibly to make it easier for customers to understand them.
Sapia.ai sapia.ai	Inclusive and intelligent automated talent solutions. Provides talent insights to recruiters and personalized insights to candidates. Builds smart data infrastructure used to track quality of talent, efficiency, and bias in hiring.

Company/Website	Description of Service(s)
SmartRecruiters smartrecruiters.com	Recruiting solution using pattern detection for improved recruiting decisions.
SpringRole springrole.com	Owns and operates a blockchain technology-based crowd-sourced recruiting marketplace. Provides a blockchain professional network that allows companies to post a job and source suitable candidates through referrals.
StaffCop Staffcop.com	A type of "bossware." Can log keystrokes, watch screens, take over computers remotely, see user's location, record audio
TalVista talvista.com	Optimizes job descriptions, conducts redacted resume reviews, and follows structured interview process. Enables team or company to be aware of and manage unconscious bias.
Talla Talla.com	AI and automation platform that is transforming the way businesses deliver customer and employee support. Integrates with your existing systems and workflows to build machine learning models of routine tasks, answer common questions, and make every rep more productive.
Textio textio.com	Augmented writing fueled by massive quantities of data, contributed by companies across industries and around the world. Predictive engine uses this data to uncover meaningful patterns in language, guiding employer to prepare more effective job ads.
Time Doctor Timedoctor.com	A type of "bossware." Uses webcams to shoot videos and pictures of users' screens at period intervals to check whether user are at their computers.
Traitify traitify.com	Patented assessment, collecting personality data using human interaction with images and validating against Big Five and Holland Interest models to provide assessments quicker than traditional assessments.
UKG Ukg.com	Cloud provider of HCM solutions for HR, payroll, talent, compensation, and time and labor management that seamlessly connect people with information and resources needed to work more effectively.
Valilly Valilly.com	Cloud offering built to provide information for hiring decisions to create the optimal candidates for each search undertaken by HR.

Company/Website	Description of Service(s)
Veritone Veritone.com	As creators of the world's first AI Operating System, Veritone is augmenting the human workforce by transforming use-case concepts into tangible, industry-leading applications, and solutions.
Wade & Wendy, Inc. wadeandwendy.ai	A software for employers that screens applicants on a career website and makes recommendations. Developed Wade, a software for applicants that uses AI to record the data and find jobs.
WebHR web.hr	Automates all of your company's HR processes such as Recruitment, Onboarding, Payroll, Time & Attendance, Leaves & PTO, Performance, and more.
Workable workable.com	The world's leading recruiting software: source and attract top talent, deliver a modern candidate experience, and collaborate with hiring managers.
Workfolio Workfolio.com	A type of "bossware." Scores daily productivity of each worker, including by monitoring the employees working patterns and generating productivity reports.

III. LEGAL ISSUES

As set forth above, there is likely no putting the genie back into the bottle when it comes to the use of workplace AI. Technologies offered by the vendors identified above offer significant advantages, like increasing diversity in applicants and monitoring employee productivity. Organizations, however, should note that there are also significant legal risks associated with the use of these technologies in the workplace. The below section on agency guidance, federal, state, and local laws provides guidance for organizations implementing workplace AI.

A. Agency Guidance

In addition to the promised benefits, there are significant legal risks in using workplace AI. In 2016, the Federal Trade Commission ("FTC") issued a report, entitled "Big Data: A Tool for Inclusion or Exclusion, Understanding the Issues" which noted the "potential for incorporating errors and biases at every stage—from choosing the data set used to make predictions, to defining the problem to be addressed through big data, and to making decisions based on the results of big data analysis . . . ."[25]

[25] FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES, 25 (2016), *available at* https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf (last visited on June 27, 2023).

In October 2021, the Equal Employment Opportunity Commission ("EEOC") launched the "Artificial Intelligence and Algorithmic Fairness Initiative."[26] Its goal is to ensure that AI used throughout the employment cycle complies with federal anti-discrimination laws.[27] The EEOC also issued guidance in May 2022 on the Americans with Disabilities Act's ("ADA") application to the use of AI systems in employment decisions and recruitment efforts.[28] That same month, the EEOC also filed its first lawsuit against an employer for allegedly discriminating in its use of AI during the hiring process.[29]

On October 4, 2022, the White House Office of Science and Technology Policy ("OSTP") released the "Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People" (the "Blueprint") and its Technical Companion.[30] The Blueprint and the Technical Companion describe five principles "to help guide the design, use, and deployment of automated systems."[31] The five principles are: (1) Safe and Effective Systems; (2) Algorithmic Discrimination Protections; (3) Data Privacy; (4) Notice and Explanation; and (5) Human Alternatives, Consideration, and Fallback.[32] While the Blueprint and Technical Companion are non-binding, they represent a significant effort by the White House to provide state and local governments a framework for future legislation regulating automated systems.

Shortly after the Blueprint and its Technical Companion were released, on October 31, 2022, the National Labor Relations Board's ("NLRB") Office of General Counsel, issued Memorandum GC 23-02 seeking to limit employers' use of artificial intelligence in the workplace.[33] The Memorandum urges the NLRB to adopt a new legal framework to find electronic monitoring and automated or algorithmic management practices illegal if such monitoring or management practices interfere with protected activities under Section 7 of the National Labor

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[26]Artificial Intelligence and Algorithmic Fairness Initiative, EEOC, *available at* https://www.eeoc.gov/ai (last on visited June 29, 2023).

[27] *EEOC Prepares to Tackle Artificial Intelligence and Algorithmic Bias*, https://www.jdsupra.com/legalnews/eeoc-prepares-to-tackle-artificial-4373087/ (last visited on July 2, 2023); *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness* https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness (last visited on July 2, 2023).

[28] "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees," EEOC-NVTA-2022-2, https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence (last visited on July 2, 2023).

[29] *See EEOC v. iTutorGroup, Inc., et al.*, No. 1:22-cv-02565 (E.D.N.Y. May 5, 2022).

[30] White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, https://www.whitehouse.gov/ostp/ai-bill-of-rights/?utm_source=link (last visited on July 10, 2023).

[31] *Id.*

[32] *Id.*

[33] The National Labor Relations Board, *Memorandum GC 23-02*, https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and (last visited on July 10, 2023).

Relations Act.[34] Under the General Counsel's proposed framework, an employer can avoid a violation of Section 7 if it can demonstrate that its business needs require the electronic monitoring and management practices and the needs "outweigh" employees' Section 7 rights.[35] Not only must the employer be able to make this showing, it must also demonstrate that it provided the employees advance notice of the technology used, the reason for its use, and how it uses the information obtained.[36] An employer is relieved of this obligation, according to the General Counsel, only if it can show "special circumstances" justifying "covert use" of the technology.[37]

On January 10, 2023, the EEOC issued its Draft Strategic Enforcement Plan ("SEP") for 2023-2027,[38] establishing AI-related employment discrimination as a top agency priority. In SEP, the EEOC stated that it would focus on discriminatory recruiting and hiring practices, including "the use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups."[39] The EEOC has also demonstrated a focus on the use of AI tools across the employment lifecycle through its recent AI-centric expert panels. In April 2023, the EEOC, the Consumer Financial Protection Bureau ("CFPB"), the Department of Justice ("DOJ"), and the Federal Trade Commission ("FTC") also released a joint statement on enforcement efforts against discrimination and bias in automated systems that acknowledged AI was used beyond than just in recruiting and hiring decisions.[40]

In light of the continued scrutiny from federal and state governments, employers and/or their legal counsel should consider the legal and ethical issues before implementing workplace AI. Of course, these technologies are developing more rapidly than the law. Consequently, the following are just some of the main issues ripe for consideration. Other legal issues will continue to evolve as the technologies become more widespread, are tested in the courts, and/or examined by federal and state administrative agencies and legislatures.

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] EEOC, *Draft Strategic Enforcement Plan*, https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan (last visited on June 28, 2023).

[39] *Id.*

[40] Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems, EEOC, https://www.eeoc.gov/joint-statement-enforcement-efforts-against-discrimination-and-bias-automated-systems (last visited on June 29, 2023).

B. Disparate Treatment

Title VII of the Civil Rights Act of 1964 ("Title VII") forbids employers from discriminating in any term or condition of employment on the basis of race, color, national origin, religion, or sex.[41] Among other things, Title VII specifically prohibits an employer from failing or refusing to hire any individual based on protected characteristics.[42] While disparate impact can occur in many different contexts, it is perhaps best illustrated by workplace AI used during recruiting and hiring. The recruitment and selection technologies, by design, provide decision-makers with notice of protected characteristics about which they otherwise would not have been aware. Indeed, for years, enforcement agencies, such as the EEOC, have encouraged employers to remove questions from their job applications that ask applicants to identify the years that they attended and/or graduated from high school or college. Such questions do not directly violate the Age Discrimination in Employment Act ("ADEA"),[43] but an applicant could interpret them discriminating against applicants based on age.[44] Most prudent employers comply with the EEOC's position and do not affirmatively ask applicants questions that would provide them with information regarding the applicant's protected characteristics, however, the use of technological solutions to recruit and select employees has arguably called into question those efforts.[45] Job seekers frequently share information online—in their professional profiles, social media sites, and other online activities—that they would never voluntarily share with a prospective employer and which the prospective employer would never request.

Consider, for example, the vendors that offer video interviews at the first phase of the interview process to pare down the pool of applicants who will receive in-person interviews. A human decision-maker may learn not only the individual's gender and race but also the individual's relative age, religion (e.g., by the garments worn), and mental or physical impairment (e.g., speech impediment). Applicants not hired may claim that the employer subjected them to disparate treatment based on their protected categories. Concededly, the risk of a disparate treatment claim for a hiring decision made using a video-based platform is similar to the risk inherent in any in-person interview. The primary difference appears to be the scope of potential claims: an in-person interview typically does not take place until after the hiring manager reviews

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[41] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

[42] *Id.* at § 2000e-2.

[43] 29 U.S.C. § 621, *et seq.* *See also* 29 C.F.R. § 1625.5 ("A request on the part of an employer for information such as Date of Birth or age on an employment application form is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act.").

[44] *See, e.g.*, EEOC, ALL STATUTES: PRE-EMPLOYMENT INQUIRIES (2004), *available at* https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-116 (last visited on June 27, 2023).

[45] *See, e.g.*, *Neiman v. Grange Mut. Cas. Co.*, No. 11-3404, 2012 U.S. Dist. LEXIS 59180 (C.D. Ill., Apr. 27, 2012) (applicant put the employer on notice that he was subject to protection of the ADEA where information on his LinkedIn account—which the employer requested—contained his college graduation year).

candidate resumes or applications and narrows the pool of interviewees. But with a video-based service, the hiring manager receives all of this information at the same time.

As another example, in November 2019, the Electronic Privacy Information Center ("EPIC") filed an official complaint with the FTC requesting an investigation into HireVue. EPIC claimed that the company's use of AI-driven assessments constituted unfair and deceptive trade practices.[46] In addition to allowing employers to video record candidate interviews, HireVue also offers a service that analyzes hundreds of thousands of data points related to a person's speaking voice, word selection, and facial movements. It then forecasts the candidate's skills and behaviors, including their "willingness to learn" and "personal stability."[47] EPIC alleged, among other things, that the AI-driven assessments produce results that are "biased, unprovable and not replicable," which could lead to unlawfully discriminatory hiring decisions.[48] For relief, EPIC asked the FTC to halt HireVue's automatic scoring of job candidates and make public the algorithms and criteria used in analyzing people's behavior. Subsequently, in January 2021, HireVue announced that it had revised its use of AI for facial recognition analysis of job candidates, but that it would continue to analyze biometric data from job applicants including speech, intonation, and behavior.[49]

In addition, a candidate may be more likely to raise a disparate treatment claim if he or she suspects that the algorithm used by the employer incorporates intentionally discriminatory factors. One such example is vendor algorithms that purportedly analyze an organization's own past performance and hiring data to predict the candidate(s) who will be the "best fit" for the position. Where the employer provides the vendor with biased data—either explicitly or implicitly—the outcome from the vendor will likely similarly be suspect. As they say, "Garbage in, garbage out." Another example is vendor algorithms that account—either positively or negatively—for linguistic or behavioral differences that might implicate one's age, sex, national original, race, regional dialect, or mental or physical impairment. Similarly, algorithms that purport to correct job advertisements so that they are more attractive to members of one protected category, rather than others, are also potentially problematic. Efforts to increase the diversity of one's candidate pool may be legitimate and lawful, but intentionally crafting a job advertisement so that it attracts more women, for instance, could be unlawful disparate treatment. Arguably, such job advertisements are analogous to the "micro-targeting" which were at issue in litigation alleging that companies unlawfully limited the audience for their employment ads on Facebook.[50] Similarly, if the

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[46] *See* https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf (last visited on June 27, 2023).

[47] *Id.*

[48] *Id.*

[49] *See* https://www.hirevue.com/press-release/hirevue-leads-the-industry-with-commitment-to-transparent-and-ethical-use-of-ai-in-hiring (last visited on June 23, 2023); and https://epic.org/hirevue-facing-ftc-complaint-from-epic-halts-use-of-facial-recognition/ (last visited on June 23, 2023).

[50] *See Bradley v. T-Mobile US, Inc.* 2020 WL 1233924 (N.D. Cal. March 13, 2020). In *Bradley*, plaintiffs sued T-Mobile and Amazon.com, alleging that defendants "routinely exclude older individuals from viewing the employment ads they post on Facebook." The plaintiffs noted that Facebook's "why am I seeing this" function permitted users to

algorithm uses linguistic differences as a proxy for race or national origin, for instance, the employer may face a disparate treatment claim.

Employers should also watch out for the "black box" of AI.[51] One criticism of AI as applied is that it can be difficult for human decision-makers to understand how an algorithm works. Consequently, they cannot understand and articulate why and how the AI tool reached a decision, such as why it preferred one candidate over another. This unknown "black box" can pose a challenge for both employees in establishing their discrimination claim as well as for employers in defending their claims; while plaintiff employees may have difficulty proving intentional discrimination because they cannot prove the AI system's intent to discriminate, defendant employers may have their own difficulty in proving a legitimate and nondiscriminatory reason for the adverse employment action.

C. Disparate Impact

As seen in the prior section on disparate treatment, disparate impact can best be demonstrated with workplace AI tools used during recruitment and selection. While many companies are motivated to utilize recruitment and selection technologies to diminish subjectivity

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see, for example, that "T-Mobile wants to reach people ages 18 to 38 who live or were recently in the United States." Although the Court dismissed plaintiffs' claims based on, *inter alia*, lack of standing, commenters have noted that the *Bradley* decision provides a potential roadmap for individuals raising claims based on targeted advertising. *See* "Amazon, T-Mobile Targeted Job-Ads Ruling Could Affect Bias Cases" Bloomberg Law, https://news.bloomberglaw.com/daily-labor-report/amazon-t-mobile-targeted-job-ads-ruling-could-affect-bias-cases (last visited on June 23, 2023).

In separate matters, Facebook's targeted advertising program came under scrutiny. In July 2018, Facebook entered into an agreement with Washington State pursuant to which it agreed to "remov[e] the ability of third-party advertisers to exclude ethnic and religious minorities, immigrants, LGBTQ individuals and other protected groups from seeing their ads." Washington State Office of the Attorney General, *AG Ferguson Investigation Leads to Facebook Making Nationwide Changes to Prohibit Discriminatory Advertisements on its Platform* (July 24, 2018), *available at* https://www.atg.wa.gov/news/news-releases/ag-ferguson-investigation-leads-facebook-making-nationwide-changes-prohibit (last visited on June 23, 2023). In August 2018, Facebook announced that it would eliminate 5,000 customization options related to "sensitive personal attributes" enabling advertisers on its platform to limit their recipient audiences. *See* https://www.facebook.com/business/news/keeping-advertising-safe-and-civil (last visited on July 9, 2023).

On September 18, 2018, the American Civil Liberties Union ("ACLU") filed a charge with the EEOC alleging that Facebook discriminated against older women and gender-nonbinary jobseekers by allowing employers to use its services to target job advertisements to younger men. *See* https://www.aclu.org/legal-document/facebook-eeoc-complaint-charge-discrimination (last visited on July 9, 2023). On March 19, 2019, Facebook entered into a first-of-its-kind settlement agreement with the ACLU that resulted in major changes to Facebook's advertising platform, including the creation of a separate place on its platform for advertisers to develop ads for jobs, housing, and credit. Facebook also eliminated age- and gender-based targeting as well as options for targeting associated with protected characteristics or groups. *See* https://www.aclu.org/other/summary-settlements-between-civil-rights-advocates-and-facebook (last visited on July 9, 2023).

[51] *See* Lou Blouin, *"AI's mysterious 'black box' problem, explained"* U. MICH., (Mar. 6, 2023), https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained (last visited on July 1, 2023).

in the process, thereby reducing the risk of disparate treatment claims, companies must be aware of the risks of potential disparate impact claims.[52] In addition to prohibiting employers from disparately treating individuals based on their protected characteristics, Title VII, the ADEA, and the Americans with Disabilities Act ("ADA") also prohibit the use of facially neutral procedures that have a disparate impact or that disproportionately exclude people in a protected group, under certain circumstances.[53] Recruitment and selection technologies can raise particular issues in disparate impact discrimination challenges due to the large number of potential applicants and the statistical power of large populations and sample sizes.[54] In addition, these technologies often incorporate information far removed from the workplace, instead finding significance in the correlation—as opposed to causation—between non-worked-related data and various measures of job performance. Thus, an algorithm developed based on "successful" incumbents may incorporate neutral and non-discriminatory characteristics common to that population of employees, but those that are not necessarily important to job performance. Likewise, those programming the algorithms can embed their biases and values into the software's instructions.[55]

To establish a disparate impact claim under Title VII, for instance, a plaintiff must first (i) identify with particularity the facially neutral practice being challenged, (ii) demonstrate that the practice adversely impacts members of the protected group in question, and (iii) show that the practice caused the plaintiff to suffer an adverse employment action. The fact that a selection procedure has a disparate impact on a protected class does not automatically create liability for an

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[52] *See Mobley v. Workday, Inc.*, N.D. Cal., No. 23-cv-00770 (complaint filed Feb. 21, 2023) (putative class action alleging that Workday's AI systems and screening tools disqualify applicants who are black, disabled, or over the age of 40 at a disproportionate rate).

[53] Title VII, 42 U.S.C. § 2000e-2(k); ADA, 42 U.S.C. § 12112(b)(6); and ADEA, 29 U.S.C. § 624(a)(2)**.** *See also Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Smith v. City of Jackson, Miss.* 544 U.S.C. 228 (2005). Note that claims of disparate impact against persons with disabilities are less likely, because that group is often diverse in the mental or physical impairment that substantially limits one or more of their major life activities.

[54] While employees may assert disparate impact claims under the ADEA, whether older *applicants* may do so remains an open question. In *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016), the Eleventh Circuit held that the ADEA does not permit a job applicant to sue an employer for using a practice that has a disparate impact on older workers. The Eleventh Circuit concluded that the ADEA's statutory language allows only *employees* to bring adverse impact claims; because applicants are not employees, they cannot assert disparate impact claims. *Id.* at 964. The District of Kansas followed the Eleventh Circuit's reasoning in *Vallareal* and concluded that job applicants cannot bring disparate impact claims under the ADEA. *See Raymond v. Spirit Aerosystems Holdings, Inc.*, 406 F. Supp. 3d 996, 1000 (D. Kan. 2019). In the Seventh Circuit, a three-judge panel held that the ADEA does protect outside job applicants. *Kleber v. CareFusion Corp.*, 888 F.3d 868 (7th Cir. 2018). However, the Seventh Circuit has since vacated that decision and will consider the issue *en banc*. *Kleber v. CareFusion Corp.*, No. 17-1206, 2018 U.S. App. LEXIS 17148 (7th Cir. June 22, 2018). There are, however, federal district court decisions that have held that applicants may proceed with age discrimination claims under a disparate impact theory. *See, e.g., Rabin v. PricewaterhouseCoopers LLP*, No. 16-cv-2276, 2017 U.S. Dist. LEXIS 23224 (N.D. Cal., Feb. 17, 2017).

[55] *See generally* Solon Barocas & Andrew D. Selbst, "*Big Data's Disparate Impact*," 104 CALF. L. REV. 671 (2016); Danielle Keats Citron & Frank A. Paxquale, "*The Scored Society: Due Process for Automated Predictions*," 89 WASH L. REV. 1 (2014).

employer. Pursuant to Title VII, it is not "an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate."[56] Once the plaintiff meets the initial burden of establishing a *prima facie* case, the employer may defend against a claim of disparate impact discrimination by demonstrating that the practice in question is job-related and consistent with business necessity.[57]

Whether a test or selection method that produces an adverse impact is lawful under Title VII is often decided with reference to the Uniform Guidelines on Employee Section Procedures ("Uniform Guidelines"),[58] which have been jointly adopted and issued by the EEOC, the Civil Service Commission, the U.S. Department of Labor ("DOL"), and the U.S. Department of Justice. The EEOC applies the Uniform Guidelines in the enforcement of Title VII, and the DOL and the Office of Federal Contract Compliance Programs ("OFCCP") apply the Uniform Guidelines with respect to federal contractors in the enforcement of Executive Order 11246. The Uniform Guidelines provide employers with guidance about how to determine if their tests and selection procedures are lawful under Title VII and nondiscrimination theories.

The Uniform Guidelines consider discriminatory any selection procedure used as a basis for making employment decisions, including hiring decisions that have an adverse impact on members of any racial, gender, or ethnic group, unless it has been validated in accordance with the Uniform Guidelines.[59] Validation requires a showing that (i) the content of the procedure is representative of important aspects of job performance ("content validity"); (ii) the procedure measures the degree to which candidates have identifiable characteristics that have been determined to be important for successful job performance ("construct validity"); or (iii) the procedure is predictive of, or significantly correlated with, important elements of work behavior ("criterion-related validity").[60]

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[56] 42 U.S.C. § 2000e-2(k). *See also Griggs*, 401 U.S. at 436 (holding that employment selection instruments are non-discriminatory, provided that the employer demonstrates that they are "demonstrably a reasonable measure of job performance").

[57] 42 U.S.C. § 2000e-2(k).

[58] 29 C.F.R. Part 1607, *available at* http://www.gpo.gov/fdsys/pkg/CFR-2014-title29-vol4/xml/CFR-2014-title29-vol4-part1607.xml (last visited on July 2, 2023).

[59] 29 C.F.R. § 1607.3(A). The Uniform Guidelines, however, do not apply to discrimination based on age under the ADEA or based on disability under the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, or the ADA, 42 U.S.C. § 12112. 29 C.F.R. § 1607.2(D).

[60] *See generally* 29 C.F.R. § 1607.5 (identifying criterion, content, and construct as the three types of validation evidence that may be used to prove the validity of selection procedures). Unlike in a disparate impact case under Title VII, in a disparate impact case under the ADEA, the employer need only prove that its practice is a "reasonable factor other than age," not "business necessity." 29 U.S.C. § 623(f)(1); *see also Smith v. City of Jackson*, 544 U.S. 228 (2005). Accordingly, to avoid liability once an ADEA plaintiff has proved a *prima facie* case, the employer must establish the reasonableness of its reliance on other neutral criteria.

Demographic information must be solicited from all applicants for which a pre-employment skills assessment is utilized. But in the context of selection procedures, there is a tension between the definitions of "applicant" utilized by the EEOC and the OFCCP. Initially, the four agencies that issued the Uniform Guidelines agreed that an "applicant" was a person who indicated an interest in being considered for hiring, promotion, or other employment opportunities, and who had not voluntarily withdrawn themselves from consideration.[61] The EEOC has continued to adhere to this broad view of the term "applicant."[62] The OFCCP, however, has adopted the Internet Applicant Rule, under which an "internet applicant" is defined as someone who satisfies all four of the following criteria:

(1) The individual submitted an expression of interest in employment through the Internet or related electronic data technologies;

(2) The contractor considered the individual for employment in a particular position;

(3) The individual's expression of interest indicated that the individual possesses the basic qualifications for the position; and

(4) The individual, at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removed himself or herself from further consideration or otherwise indicated that he/she was no longer interested in the position.[63]

In other words, under the EEOC's definition, an "applicant" includes any person who has expressed interest in a position, whereas the OFCCP's definition excludes individuals who do not meet the "basic qualifications" of the position. Employers must be cognizant of these different definitions when performing an adverse impact analysis and/or conducting a validation study.[64]

Even when the employer establishes the "validity" of the test or selection procedure, a Title VII plaintiff may still prevail by proving there is a less discriminatory alternative that similarly

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[61] Adoption of Questions and Answer to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11996, 11998 (Mar. 2, 1979), *available at* http://www.eeoc.gov/policy/docs/qanda_clarify_procedures.html (last visited on March 1, 2022) (no longer available).

[62] *Id.*

[63] 41 C.F.R. § 60-1.3 (Feb. 6, 2006).

[64] Moreover, federal contractors using artificial-based tools for selection must ensure that the tools are validated like other selection tools. *See* OFCCP Validation of Employee Selection Procedures Frequently Asked Questions (July 2019) (containing section expressly stating that artificial intelligence-based tools must be validated like other selection tools if they disparately impact workers), *available at* https://www.dol.gov/ofccp/regs/compliance/faqs/ValidationEmployeeSelectionFAQs.htm (last visited on July 2, 2023).

serves the employer's needs, but which the employer refuses to adopt.[65] Likewise, the Uniform Guidelines also require an employer to consider whether there are less discriminatory alternatives to any selection procedure.[66]

The practical concern with the use of predictive analytics in selection procedures is that they may increase the risk of class certification for any claims of disparate impact. Because a single algorithm is applied across a large number of "applicants"—no matter how that term is defined—the algorithm may provide the "common questions of law or fact" necessary for a class to be certified under Federal Rule of Civil Procedure 23.[67] Importantly, employers cannot escape liability for such claims by outsourcing the technologies to external vendors, as employers are responsible for actions taken by external vendors on their behalf.

These issues will continue to grow in importance as the EEOC persists in pursuing a program to address systemic discrimination, which includes efforts to bring claims challenging the use of uniform policies, tests, or other employee selection procedures including those related to discriminatory hiring policies or practices.[68] Additionally, the EEOC's priorities outlined in its draft 2023-26 Strategic Enforcement Plan indicate it will continue to aggressively pursue systemic claims, including pattern or practice cases.[69]

D. Persons with Disabilities

Much like disparate impact challenges, the ADA also poses special challenges for employers considering using workplace AI, because that statute imposes affirmative obligations

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[65] 42 U.S.C. § 2000e-2(k).

[66] 29 C.F.R. § 1607.3(B). Title VII, on the other hand, assigns this burden of proof to the plaintiff. *Compare Ricci v. DeStefano*, 557 U.S. 557, 632 n.11 (2009) ("Under the [Uniform Guidelines], employer must conduct 'an investigation of suitable alternative selection procedures.' 29 C.F.R. § 1607.3(B)"), *with* 42 U.S.C. § 2000e-2(k). *See Ricci*, 557 U.S. at 578 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii) and (C)) ("[A] plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.").

[67] *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011) (recognizing the need for some "glue" that holds together class members' claims for relief and produces a common answer to a single question).

[68] *See* EEOC, ADVANCING OPPORTUNITY: A REVIEW OF THE SYSTEMIC PROGRAM OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 7, 2016), *available at* https://www.eeoc.gov/eeoc/systemic/review/index.cfm (last visited on July 2, 2023); EEOC, CSX Transportation to Pay $3.2 Million to Settle EEOC Disparate Impact Sex Discrimination Case (June 13, 2018), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-13-18.cfm (last visited on July 2, 2023); EEOC, Amsted Rail to Pay $4.4 Million After Court Ruled It Used Discriminatory Hiring Practices (June 12, 2018), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-12-18.cfm (last visited on July 2, 2023).

[69] *Id.*; EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN, FISCAL YEARS 2023-2026, https://www.eeoc.gov/newsroom/eeoc-seeks-public-input-fy-2022-2026-strategic-plan (last visited on July 10, 2023).

on employers with respect to the screening and hiring process.[70] In addition, the ADA requires employers to provide reasonable accommodations to qualified applicants with known physical or mental limitations, unless doing so would cause the employer an undue hardship.[71]

From an ADA perspective, one issue with respect to recruitment and selection technologies is that they frequently analyze an individual's voluntary activities. Such activities may not be related to any work requirements, and applicants may not be aware that those activities are being considered for a given job. Consider an algorithm that creates a positive correlation between individuals belonging to a gym and successful employees. A person with a disability may not belong to a gym, but that criterion may have absolutely nothing to do with his or her ability to perform the essential functions of the job, with or without a reasonable accommodation. Yet, the question might exclude such a candidate in the initial screening. Stated simply, an applicant who is disabled who is subject to a recruitment or selection technology may have no reason—of which he or she knows—to request a reasonable accommodation. Compounding the problem is that the prospective employer may have no notice that the applicant has an impairment requiring an accommodation.

Another issue is that several of the vendors offer algorithms that perform personality tests[72] to help better predict the best-qualified candidates for the job. Under the ADA, if the personality test constitutes a "disability-related inquiry" or a "medical examination," it may take place only *after* the employer gives a conditional job offer to the applicant.[73] According to the EEOC, a

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[70] 29 C.F.R. § 1630.11 (It is unlawful for employers "to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant. . . .").

[71] 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9(a) ("It is unlawful for a covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business."); *see* Perkins v. City of New York, No. 22-196, 2023 WL 370906 (2d Cir., Jan. 2023) (employee who requested monitor or computer to make video calls and access to video remote interpreting ("VRI") through her phone or tablet for field visits plausibly alleged that city was deliberately indifferent to her need for accommodation, where city waited two months after request to provide videophone, which it knew would not work without a wireless router).

[72] A personality test is one of the several types of psychological tests identified by the American Psychological Association. *See Testing Issues*, American Psychological Association, http://www.apa.org/topics/testing (last visited on July 2, 2023) ("Testing issues include the development, creation, administration, scoring and interpretation of psychological tests. These tests can evaluate ability, such as intelligence, aptitudes, skills, and achievement; personality characteristics, such as traits, attitudes, interests and values; and mental health, such as psychological functioning or signs of psychological or neurological disorders. When tests are standardized, psychologists can compare results from one individual with those of others.").

[73] 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.14(a); EEOC Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (http://www.eeoc.gov/policy/docs/qanda-inquiries.html) (last visited on July 2, 2023).

"disability-related inquiry" is a "question or series of questions that is likely to elicit information about a disability."[74] The EEOC defines a "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health."[75] A test may be a considered a medical examination if it (i) is administered by a health care professional, (ii) is interpreted by a health care professional, (iii) is designed to reveal an impairment or physical or mental health, (iv) is invasive, (v) measures an employee's performance of a task or measures his or her physiological responses to performing the task, (vi) normally is given in a medical setting, and/or (vii) uses medical equipment.[76]

Although all seven factors are important, the first three can often show whether the selection tool is an unlawful pre-employment medical screen. As to the first factor, most of the AI selection tools require candidates to use a computer or mobile device and, in most cases, the candidates use the tool independently without the supervision or involvement of any healthcare professional. Absent administration by a healthcare professional or person trained by a healthcare professional, the tool probably does not violate the first factor. The second factor, however, will depend on who is interpreting the candidate's results. If it is a healthcare professional or someone trained by a healthcare professional, then the tool might be a prohibited pre-employment medical screen. Finally, as to the third factor, most AI vendors argue that their tool is not designed to reveal one's physical or mental health impairment. Indeed, many argue that their tool is not even capable of revealing an impairment, as the tool lacks the specificity and sensitivity required for such a diagnosis. Often, these tools are designed to capture and document a specific trait profile which the employer has identified as one that exemplifies success in a particular role. Ultimately, employers considering using a recruitment or selection technology that includes a personality test should ensure that the test, including all questions and components, does not constitute an unlawful medical inquiry. They should also ensure that the test and its components are job-related and consistent with business necessity.

Lesser known, but equally compelling, is the ADA's obligation for employers to ensure that their application process is accessible to people with disabilities or, alternatively, provides a "reasonable accommodation" to allow consideration for a job opening.[77] This obligation arguably extends to tools used by employers for recruitment and selection purposes.[78] Accordingly, if the

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[74] *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, available at* https://www.eeoc.gov/policy/docs/preemp.html (last visited on July 2, 2023); and *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employee Under the Americans with Disabilities Act, available at* https://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_6_ (last visited on July 2, 2023).

[75] *Id.*

[76] *Id.*

[77] 42 U.S.C. § 12112(b)(5).

[78] *See, e.g., Reyazuddin v. Montgomery County*,789 F.3d 407 (4th Cir. 2015) (court allowed the case to proceed where the blind plaintiff alleged that the employer's call center violated the ADA in failing to accommodate the plaintiff by making software accessible or transferring the plaintiff to a new call center); *see also Leskovisek by next friend Stanley*

vendor's platform is not accessible—e.g., it is coded in such a way to allow a person using a screen reader or other assistive technology to use it, compelling that person to ask for an accommodation—the employer may be requiring candidates who are disabled to disclose information about their medical status prematurely. Indeed, even where the employer offers alternative ways to record interviews, such as via handheld smartphones and tablets, it is not unreasonable to conclude that a candidate with a disability who is not hired could allege that the employer had knowledge of his or her disability because of the fact that he or she was required to use alternative means of participating in interviews and, accordingly, could state a claim for disability discrimination. Depending on the steps that the vendor has taken to make its products and services compliant with the Web Content Accessibility Guidelines ("WCAG") 2.1[79] at Levels A and AA, there may also be a risk of increased exposure to disability accessibility claims.

E. Accommodating Sincerely Held Religious Beliefs

Another factor to consider is whether an employer must accommodate an applicant who objects to participating in a technology-based interview process, such as a video-recorded interview, on religious grounds. Title VII prohibits discrimination based on an applicant's religion and requires an employer to accommodate an applicant's sincerely held religious belief, provided that doing so does not cause the employer an undue hardship.[80] For instance, if an applicant indicates that she is concerned the device recording her interview is capturing her soul and depriving her from going to heaven, an employer might be required to accommodate her sincerely held religious belief by providing an alternative, non-technical interview method.[81]

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v. Illinois Dep't of Transportation, No. 17-CV-3251, 2020 WL 7323840 (C.D. Ill. Dec. 11, 2020) (denying defendants' motion for summary judgment where plaintiffs alleged that defendants "failed to accommodate their disabilities to allow meaningful access to the job application process"); and *Martinez v. Alorica, Inc.*, 30-2018-987988 (Cal. Super. Ct. Apr. 24, 2018) (blind plaintiff applicant brought a claim under California law alleging employer's failure to accommodate and to engage in an interactive process and that she was unable to apply for a job because the online application was not accessible).

[79] Web Content Accessibility Guidelines (WCAG) 2.1, *available at* https://www.w3.org/TR/WCAG21/ (last visited on July 10, 2023). WCAG 2.2 is due to be implemented in 2023, draft *available at* https://www.w3.org/TR/WCAG22/ (last visited on July 10, 2023).

[80] 42 U.S.C. § 2000e(j).

[81] *See, e.g.*, *EEOC v. Consol. Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017) (employee objected to using the employer's hand-scanner timekeeping system based on a sincerely held belief that the scanner would associate him with the "Mark of the Beast," allowing the Antichrist to identify and manipulate him, ultimately subjecting him to everlasting punishment. In affirming a jury verdict for the employee, the court held that Title VII required the employer to accommodate the employee's sincerely held belief and could have provided him with an alternative timekeeping solution at no additional cost).

F. Privacy

a. In General

The use of workplace AI also raises a host of privacy-related issues, particularly where the technology collects, or "over-collects," an individual's personal information. Although there is no comprehensive federal privacy law, federal laws that regulate spheres of privacy – such as the Fair Credit Reporting Act ("FCRA") or the Health Insurance Portability and Accountability Act ("HIPAA") – as well as state and local privacy laws, may be applicable to employees or applicants. In addition, common law privacy torts may be available to employees and applicants, although jurisdictions differ on whether an individual must demonstrate "actual harm" to have a cognizable cause of action.[82]

In addition, some states prohibit recording communications without the consent of all parties to the communication in circumstances where an individual reasonably believes that he or she will not be recorded.[83] An applicant who records her interview with a mobile audio or video recording device in a public location likely consented to the recording. The same is not necessarily true for the individuals in the background, who likely do not even know that the interviewing technology is recording their communications.

b. Biometric Data

Workplace AI that collects biometric information, such as facial or retina scans, pose additional risks for employers. Several states have enacted legislation creating protections for biometric information, regulating what may be collected and how it must be stored and disposed of, and imposing stiff penalties for employers who break the rules.[84] Biometric data, or the unique,

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[82] *Compare Doe v. Henry Ford Health System*, 308 Mich. App. 592, 865 N.W.2d 915 (2014), *lv. app den'd*, 498 Mich. 879, 868 N.W.2d 912 (2015) (dismissing the plaintiff's invasion of privacy, negligence, and breach of contract claims after her defendant's contractor inadvertently placed her personal health information on an unsecured server, because the plaintiff could not demonstrate "actual injury") and *Santana v. Take-Two Interactive Software*, No. 17-303, 2017 U.S. App. LEXIS 23446 (2d Cir., Nov. 21, 2017) (finding no Article III standing where the plaintiff willingly submitted information to the employer), *with Dixon v. Washington & Jane Smith Cmty.*, No. 17-cv-8033, 2018 U.S. Dist. LEXIS 90344 (N.D. Ill., May 31, 2018) (finding Article III standing where the plaintiff alleged that the employer disclosed her fingerprint information to a vendor without informing her, because "alleged violation of the right to privacy in and control over one's biometric data, despite being an intangible injury, is sufficiently concrete to constitute an injury in fact that supports Article III standing."); *see also TransUnion LLC v. Ramirez*, --- U.S. ----, 141 S. Ct. 2190 (2021) (holding that consumers whose credit reports had not been disclosed to third party businesses did not have Article III standing under FCRA).

[83] *See, e.g.*, Cal. Penal Code § 632. California's eavesdropping law criminalizes the listening to or recording of private communications. California is a "two-party" or "all party" consent state, meaning both parties to a conversation must consent to record it. *Compare with* 18 U.S.C. § 2511 (requiring only one party's consent to record a communication under federal law.)

[84] *See* Illinois, 740 ILCS 14/1; Texas, Tex. Bus. & Com. Code Ann. § 503.001; Washington Biometric Identifiers, RCW 19.375.010 to 19.375.900. Additional legislation has been proposed or is pending, or the state's existing data

measurable human biological or behavioral characteristics that can be used for identification, may include fingerprints, voiceprint, retina or iris scans, and scans of hand or face geometry.[85] Enacted in 2008, Illinois' Biometric Information Privacy Act ("BIPA") is the most comprehensive of the state biometric privacy laws.[86] Pursuant to BIPA, before an employer collects, captures, or obtains biometric identifiers or biometric information, it must supply a written notice informing the information provider that his or her biometric data is being collected and stored, explaining the purpose for collecting, storing, and using the data, and qualifying the length of time for which it will retain the data.[87] The employer must also procure the provider's written consent and must only use the data as described in the notice, pursuant to the provider's consent agreement.[88] Accordingly, using applicants' video-recorded answers to interview questions to evaluate fitness for a particular position may expose Illinois employers to liability under BIPA.[89]

Effective July 2021, New York City enacted the Biometric Identifier Information Ordinance regulating the notification and sale of biometric information by certain commercial establishments.[90] The Ordinance requires certain commercial establishments with physical locations within New York City to notify customers about their use of biometric technology by

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privacy laws cover biometric data in Alaska, House Bill No. 72, An Act Relating to Biometric Information (Jan. 20, 2017), https://www.akleg.gov/basis/Bill/Text/30?Hsid=HB0072A (last visited on July 2, 2023) ; Connecticut, Public Act No. 15-142, An Act Improving Data Security and Effectiveness (July 1, 2015), https://www.cga.ct.gov/2015/ACT/PA/2015PA-00142-R00SB-00949-PA.htm (last visited on July 2, 2023); Massachusetts, Proposed House Bill No. 225, An Act Updating Chapter 93H Data Security Protections To Include Biometric Information (Jan. 2015), https://malegislature.gov/Bills/189/House/H225 (last visited on July 2, 2023); Montana, Proposed House Bill 518, Act Establishing the Montana Biometric Information Privacy Act (2017), https://leg.mt.gov/bills/2017/BillPdf/HB0518.pdf (last visited on July 2, 2023); New Hampshire, Proposed House Bill 523, An Act Relative to Limitations on the Use of Biometric Information (2017), https://legiscan.com/NH/text/HB523/id/1456913/New_Hampshire-2017-HB523-Introduced.html (last visited on July 2, 2023); and Wisconsin, Wis. Stat. § 134.98 (2017), https://docs.legis.wisconsin.gov/statutes/statutes/134/98 (last visited on July 2, 2023).

[85] *See, e.g.*, 740 ILCS 14/10. *See also* Lauren A. Daming, *How to Stay Within the Law* Title *When Using Biometric Information*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT (Apr. 3, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/stay-within-the-law-biometric-information.aspx (last visited on July 2, 2023).

[86] Illinois, 740 ILCS 14/1. Employer liability risks under BIPA are high. *See Latrina Cothron v. White Castle System Inc.*, No. 128004 (Ill. Feb. 17, 2023) (holding that BIPA violations accrue each time a company collects or scans an individual's biometric data without complying with notice and consent requirements, and that "per scan" damages are available to employees.

[87] *Id.*

[88] *Id.*

[89] *See Rivera v. Google Inc.*, 238 F. Supp. 3d 1088, 1100 (N.D. Ill. 2017); *Monroy v. Shutterfly, Inc.*, No. 16C10984, 2017 U.S. Dist. LEXIS 149604, *14 (N.D. Ill., Sept. 15, 2017) (BIPA may apply to technology that scans facial photographs because the resulting facial geometry measurements constitute "biometric identifiers," as defined by BIPA). For Texas employers, it may also trigger the Texas Biometric Privacy Act, which covers voiceprints.

[90] *See* NYC Admin. Code §§ 22-1201 – 1205.

posting signage near all customer entrances if the commercial establishments collect, share, or maintain biometric identifying information.[91] Although the Ordinance does not require covered businesses to obtain advanced written consent before collecting biometric identifying information (in comparison to BIPA), it does broadly prohibit covered businesses from any selling, trading, leasing, or sharing "in exchange for anything of value" or otherwise profiting from transacting the information collected.[92] New York City employers are covered under this law if they fall within the definition of a "commercial establishment."[93]

c. California Data Protection Regulation

States are starting to consider legislation to protect an individual's personal data. California passed the "Consumer Privacy Act of 2018" ("CCPA") which took effect in January 2020. The law gives "consumers" – defined as natural persons who are California residents – four basic rights in relation to their personal information: (1) the right to know, through a general privacy policy and with more specifics available upon request, what personal information a business has collected about them, where it was sourced from, what it is being used for, whether it is being disclosed or sold, and to whom it is being disclosed or sold; (2) the right to "opt out" of allowing a business to sell their personal information to third parties (or, for consumers who are under 16 years old, the right not to have their personal information sold absent their, or their parent's, opt-in); (3) the right to have a business delete their personal information, with some exceptions; and (4) the right to receive equal service and pricing from a business, even if they exercise their privacy rights under the law.[94]

This California law implicates companies that either have: (a) annual gross revenues of $25 million, (b) collection for commercial purposes of the personal information of 50,000 or more California residents, households, or devices annually, or (c) 50% or more annual revenue from selling California residents' personal information.[95] This also applies to parent companies, even if they themselves to not meet one of those three thresholds.[96] A data breach of such information

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See, e.g.*, California Consumer Privacy Act of 2018, CAL. CIV. CODE §§1798.100-1798.198, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375 (last visited on July 2, 2023).

[95] *Id.*

[96] Cal. Civ. Code § 1798.140(c).

could result in fines, a lawsuit from employees or action from the attorney general.[97] California is one of many states to enact such a data privacy law, with many others following suit.[98]

G. Data Storage and Security

Organizations entering into agreements with workplace AI vendors need to understand where the vendor is hosting and storing the data that it is being collected. If the vendor is hosting the data on another company's cloud-based server (e.g., Amazon Web Services) and using another company's services to store it (e.g., Amazon Simple Storage Service), the employer will be twice removed from the party (e.g., Amazon) that will be hosting the confidential information obtained from applicants. Given the prevalence of data breaches via Internet hacking, there is a risk that the vendor's data security measures (through Amazon) are insufficiently robust to protect the company in the event of a data breach.

Similarly, before entering into an agreement with workplace AI vendors, employers need to understand what rights, if any, the vendor has to access the data, how the vendor is safeguarding the data, and when they can access the data. It is also important to understand what happens to the data when or if there is a change in the corporate structure of the employer or the vendor, through a sale, merger, or closure.

H. Applicable State Laws and Their Interaction with Federal Regulations

In addition to federal laws governing employers' responsibilities with respect to automation technologies, employers should be aware of additional obligations and potential liability that may be imposed by state or local laws governing workplace AI, or technology that could be used in the workplace.

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[97] Cal. Civ. Code § 1798.150(a)(1)(A); *compare with* Illinois, 740 ILCS 14/1. While CCPA covers the protection of biometric data, it only provides a private right of action where the information was involved in an unauthorized exposure as a result of the business' failure to maintain reasonable security procedures and failure to take certain steps after receiving a consumer request.

[98] *See e.g.*, Colorado HB 18-1128 (Effective Sept. 1, 2018); codified at COLO. REV. STAT. § 6-1-713;24-73-101. See also *Curry v. Schletter Inc.*, No. 1:17-cv-0001-MR-DLH, 2018 U.S. Dist. LEXIS 49442, at *16 (W.D.N.C. Mar. 26, 2018) (holding response to a phishing email could be an "intentional disclosure" under the North Carolina Identity Theft Protection Act). The CCPA presently exempts HR and employment-related data, such as data collected by businesses about job applicants, employees, or independent contractors. Cal. Civ. Code § 1798.145(m)(1) (excluding "Personal information that is collected by a business about a natural person in the course of the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or independent contractor of, that business to the extent that the natural person's personal information is collected and used by the business solely within the context of the natural person's role or former role as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or an independent contractor of, that business."). Pending any subsequent rulemaking or legislation, however, this exemption is set to expire on January 1, 2023. *Id.* at 1798(m)(4).

(1) Illinois

For instance, the Illinois Legislature enacted the Illinois Artificial Intelligence Video Interview Act ("AIVIA"). Effective January 1, 2020, AIVIA creates disclosure requirements for companies that utilize video interview technology dependent upon AI.[99] Specifically, AIVIA requires an employer seeking to use AI-enabled video interviewing technology to do the following before hiring for an Illinois-based position: (i) notify each applicant before the interview that AI may be used to analyze their video interview, and to consider their fitness for the position; (ii) provide each applicant with information before the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and (iii) obtain prior consent from the applicant to be evaluated by the AI program.[100] AIVIA also requires employers to take steps to protect applicants' privacy; video interview recordings could only be shared "with persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position."[101] In addition, upon request from the applicant, employers are required to destroy all copies of the videos (including backups), no later than 30 days after the applicant requests the company do so.[102] Notably, AIVIA does not actually define the term "artificial intelligence," nor does it specify enforcement mechanisms.

On January 1, 2022, AIVIA was amended to add reporting requirements for employers who elect to use video-recorded interviews.[103] Employers who rely solely on AI analysis of video interviews to determine whether an applicant will receive an in-person interview must collect and report certain demographic data: (i) the race and ethnicity of applicants who are and are not selected for in-person interview, and (ii) the race and ethnicity of applicants who are hired.[104] Employers must report this data to the Illinois Department of Commerce and Economic Opportunity ("DCEO") by December 31 of each year.[105] The DCEO will then analyze the reported data and report by July 1 of each subsequent year as to whether the data evidence racial bias in the use of AI.[106]

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[99] Artificial Intelligence Video Interview Act, HB2557,(2020), *available at* https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=108&GA=101&DocTypeId=HB&DocNum=2557&GAID=15&LegID=&SpecSess=&Session (last visited on July 2, 2023).

[100] *Id*.

[101] *Id*.

[102] *Id*.

[103] Artificial Intelligence Video Interview Act, (820 ILCS 42/), (2022), *available at* https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=4015&ChapterID=68 (last visited on June 26, 2023).

[104] *Id*.

[105] *Id*.

[106] *Id*.

Employers should closely monitor developments with respect to enforcement of AIVIA, given Illinois' history with employee-privacy laws.[107] Like AIVIA, BIPA was one of the first acts to require notification and consent in collecting employee biometric data. While BIPA was an often-ignored statute for almost a decade, recently, there has been a slew of litigation involving the statute. AIVIA could result in a similar wave of lawsuits, although it is unclear whether, as written, it provides for a private right of action.

AIVIA may also conflict with other legal, statutory, and/or regulatory obligations, particularly with its requirement to delete all copies of videos within 30 days of an applicant's request. For instance, on January 11, 2011, the EEOC Office of Legal Counsel stated in an informal discussion letter that, pursuant to the EEOC's record-keeping regulations, "*any* personnel or employment record made or kept by an employer shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later."[108] The informal EEOC guidance, which does not constitute an official EEOC opinion, appears to be in direct conflict with AIVIA; employers might inadvertently violate the federal guidance by complying with an applicant's request to destroy all copies of his or her videos, including backups (assuming that the deletion must be completed before the one-year window has expired).[109]

To add to the confusion created by the tension between federal regulations and state law, employers' recordkeeping requirements are made even more unclear due to the inconsistency between two federal agencies and their respective definitions of the term "applicant." As mentioned above, the EEOC broadly defines the term "applicant" as a person who indicated an interest in being considered for hiring, promotion, or other employment opportunities, and who had not voluntarily withdrawn himself or herself from consideration.[110] The OFCCP, however,

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[107] *See e.g.*, Biometric Information Privacy Act, 740 ILCS 14 (2008), *available at* https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57 (last visited on July 2, 2023).

[108] EEOC, *EEOC Informal Discussion Letter: Record keeping: Records kept by contractor/third party*, *available at* https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-233 (last visited on July 2, 2023) (emphasis added).

[109] The tension between existing federal regulations and the newly enacted state law raises the question of whether, under the Supremacy Clause of the U.S. Constitution, the federal agency's authority displaces the state action. In *LA. Public Serv. Com. v. FCC*, 476 U.S. 355, 374 (1986), the Supreme Court of the United States concluded that "a federal agency may preempt state law only when and if it is acting *within the scope of its congressionally delegated authority*, … [for] an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, *unless and until Congress confers power upon it.*" In other words, the question in the instant case is whether Congress has given the EEOC the power to act as it has. *See Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 527 (1989) (relying, in part, on *LA Public Serv. Com. v. FCC* to hold that, "in the absence of explicit statutory language signaling an intent to preempt, [the Court] infer[s] such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.") (internal citations omitted).

[110] *Supra*, n. 108.

has adopted the Internet Applicant Rule, under which an "internet applicant" is defined as someone who, in addition to expressing interest in employment through the Internet or related technology, possesses the basic qualifications necessary for the position applied for.[111] Thus, under the OFCCP's definition, individuals who do not meet the "basic qualifications" of the position do not constitute "applicants" as that term is used in its regulations. For certain Illinois employers, this means that those individuals do not trigger the recordkeeping and deletion obligations created under both state and federal law. Of course, such employers are not absolved from potential liability for a digital hiring system that exhibits other legal deficiencies. As such, employers must be cognizant of these different definitions when utilizing AI and related technology in the hiring and selection process.

The Illinois Legislature is currently considering amending the Illinois Human Rights Act and the Illinois Consumer Fraud and Deceptive Business Practices Act to monitor the use of predictive data analytics. Under the amendment to the Illinois Human Rights Act, Illinois employers that use predictive data analytics in their employment decisions, may not consider the applicant's race or zip code as a basis for rejecting the applicant for hiring, promotion, discharge, and other conditions of employment.[112] Similarly, under the amendment to the Consumer Fraud and Deceptive Business Practices Act, if an organization fully or partially relies on predictive data analytics to determine a consumer's creditworthiness, the consumer's race or zip code may not be considered as a risk factor.[113] Violations of these provisions are deemed a violation of the respective law.[114]

(2) Maryland

While Illinois may be an "early adopter" of these laws, its AI and privacy laws are not outliers. Several jurisdictions have followed suit. In May 2020, Maryland enacted a law prohibiting the use of facial recognition technologies during pre-employment interviews without the applicant's consent.[115] The Maryland law, which took effect in October 2020, applies only to AI tools that employ facial recognition services, i.e., "technology that analyzes facial features and is used for recognition or persistent tracking of individuals or video images."[116] The measure prohibits employers from using facial recognition services in interviewing without an applicant's written consent and signed waiver that states (1) the applicant's name, (2) the date of the interview, (3) that the applicant consents to the use of facial recognition during the interview, and (4) that the

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[111] *Id*.

[112] IL HB 3773 (2023-2024), *available at* https://legiscan.com/IL/bill/HB3773/2023 (last visited on July 11, 2023).

[113] *Id.*

[114] *Id.*

[115] *See* HR 1202 (2020), *available at* https://legiscan.com/MD/text/HB1202/id/2169556/Maryland-2020-HB1202-Engrossed.pdf (last visited at on July 2, 2023); Use of Facial Recognition Services, H.B. 1202 (2020), *available at* https://legiscan.com/MD/text/HB1202/id/2169556 (last visited on July 2, 2023)

[116] *Id*.

applicant has read the waiver.[117] Like the Illinois's AIVIA, the Maryland law does not include a specific penalty or fine.

(3) New York City

More recently, in November 2021, the New York City Council passed Local Law 144, Automated Employment Decision Tools ("AEDT").[118] The Act was passed to regulate employers' use of "automated employment decision tools" with the aim of curbing bias in hiring and promotions. AEDT took effect on January 1, 2023 and New York City's Department of Consumer and Worker Protection began enforcing the law on July 5, 2023.[119]

AEDT defines "automated employment decision tool" as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence," which scores, classifies, or otherwise makes a recommendation, that is used to substantially assist or replace the decision-making process from that of an individual.[120] AEDT exempts automated tools that do not materially impact individuals, such as a junk email filter, firewall, calculator, spreadsheet, database, data set, or other compilation of data. Passive recruitment tools, such as LinkedIn's suggested jobs, do not appear to be covered under AEDT. Moreover, AEDT applies only to decisions to screen candidates for employment or employees for promotion within New York City and does not apply to other employment-related decisions.[121]

Employers have several requirements under AEDT. First, AEDT prohibits employers or employment agencies from using the automated decision tools to screen candidates or employees for employment decisions unless: (1) the tool has undergone an independent bias audit no more than one year prior to its use; and (2) a summary of the results from the audit as well as the distribution date of the tool to which the audit applies has been made publicly available on the employer's or employment agencies' website.[122] AEDT defines an acceptable "bias audit" as an impartial evaluation by an independent auditor that includes the testing of the tool to assess its disparate impact on persons of any federal EEO-1 "component 1 category," i.e., whether the tool

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[117] *Id*.

[118] Automated Employment Decision Tools, Int. No. 1894-A, *available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=Advanced&Search (last visited on July 2, 2023).

[119] The New York City Department of Consumer and Worker Protection ("DCWP") issued proposed rules interpreting the AEDT law and held two public hearings seeking comment on the proposed rules. DCWP finalized the rules in April, 2023. *See* NYC DCWP, *Proposed Rule Amendments*, https://rules.cityofnewyork.us/wp-content/uploads/2022/12/DCWP-NOH-AEDTs-1.pdf (last visited on July 2, 2023).

[120] "Notice of Adoption of Final Rule" available at https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf (last visited on June 26, 2022).

[121] *Id.*

[122] *Id.*

would have a disparate impact based on race, ethnicity, or sex.[123] The bias audit must be updated at least annually.[124]

Second, New York City employers using automated employment decision tools must notify each employee or candidate who resides in New York City of the following:

- at least ten business days before such use, that the tool will be used in assessing or evaluating the individual and allow a candidate to request an alternative process or accommodation;
- at least ten business days before such use, the job qualifications and characteristics that the tool will use in assessing or evaluating the individual; and
- if not posted on the employer's website, and within thirty days of a written request by a candidate or employee, information about the type of data collected for the tool and the source of such data.[125]

Although AEDT allows candidates to request an "alternative process or accommodation," it is silent as to what obligations, if any, an employer must take upon receiving a request. Employers or employment agencies that fail to comply with any of the requirements of the law may be subject to a fine of up to $500 for a first violation by the New York City's Corporation Counsel or by the Department of Consumer Affairs. Employers may be penalized by fines from $500 to $1,500 for each subsequent violation.[126]

(4) District of Columbia

In December 2021, Washington, D.C.'s State Legislature introduced the Stop Discrimination by Algorithms Act, which would govern the use of automated decision-making tools.[127] The proposal was reintroduced to the Office of the Secretary in February 2023.[128] Among the proposal's requirements are prohibitions on companies' use of algorithms that produce biased and unfair results; an audit requirement for algorithms for discriminatory patterns, and increased

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] "AG Racine Introduces Legislation to Stop Discrimination In Automated Decision-Making Tools That Impact Individuals' Daily Lives" *available at* https://oag.dc.gov/release/ag-racine-introduces-legislation-stop (last visited on July 2, 2023).

[128] "B25-0114 - Stop Discrimination by Algorithms Act of 2023" *available at* https://lims.dccouncil.gov/Legislation/B25-0114 (last visited on June 26, 2022).

transparency for consumers.[129] Under the proposal, civil penalties of up to $10,000 could be awarded for each violation.

(5) California

California has also considered legislation restricting the sale and use of employment-related AI. In February 2020, the California Senate proposed the Talent Equity for Competitive Hiring ("TECH") Act, which would have applied to all AI technology used in selection procedures.[130] The bill, aimed at addressing discrimination concerns, would have created a presumption that an employer's decision relating to hiring or promotion based on, among other things, use of "assessment technology," would not be discriminatory, if it met specified criteria. Specifically, AI would be considered compliant with anti-discrimination rules if: (1) prior to deployment, it is tested and found not likely to have an adverse impact on the basis of gender, race, or ethnicity; (2) the outcomes are reviewed annually and show no adverse impact or an increase in diversity at the workplace; and (3) the use is discontinued if a post-deployment review indicates an adverse impact.[131] This bill, however, did not progress out of committee.

Nonetheless, the California Department of Fair Employment and Housing ("DFEH") has taken steps to expressly regulate "automated-decision systems." On February 10, 2023, the DFEH issued proposed modifications to existing employment regulations that would ensure the currently DFEH framework covers the use of "automated-decision systems" in employment decision-making.[132] Under the proposed modifications, the use or reliance on automated-decision systems during the application or interview process that limit or tend to limit applicants based on protected characteristics may constitute unlawful disparate impact unless an affirmative defense applies.[133] In order to use automated-decision systems that screen out or tend to screen out individuals based on a protected characteristic, the systems must be shown to be (a) job-related for the position at issue and (b) consistent with business necessity.[134]

(6) New Jersey

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[129] *Id.*

[130] *See* Cal. SB 1241, *available at* http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1241 (last visited on July 2, 2023).

[131] *Id.*

[132] Cal. DFEH, *Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems* (ver. 2/10/2023), https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/02/Attachment-C-Proposed-Modifications-to-Employment-Regulations-Regarding-Automated-Decision-Systems.pdf (last visited on June 27, 2023).

[133] *Id.*

[134] *Id.*

In December 2022, New Jersey introduced legislation that would regulate the sale and use of "automated employment decision tools."[135] The bill defines "automated employment decision tools" to include any AI-powered tool "which automatically filters candidates or prospective candidates for hire or for any term, condition or privilege of employment in a way that establishes a preferred candidate or candidates."[136] In other words, the bill would apply to tools used not just in the hiring or promotion context, but any tool used for employment decision-making. Like New York City's AEDT, the New Jersey bill would require a "bias audit . . . to assess its predicted compliance with" New Jersey's Law Against Discrimination.[137] The bill would make unlawful the sale of automatic employment decision tools, unless (1) the tool is the subject of a bias audit conducted in the past year; (2) the sale includes, at no additional cost, an annual bias audit service that provides the results of the audit to the purchaser; and (3) the tool is sold with a notice stating that the tool is subject to the bill's provisions.[138] Any entity using a covered tool would have to provide notice to candidates within 30 days of the use of the tool.[139] The entity would need to notify "each candidate" that the tool was "used in connection with the candidate's application for employment" and that the entity "assessed the job qualifications or characteristics of the candidate."[140]

(7) New York State

In January 2023, the New York State Assembly introduced A00567, which would add a new section to the Labor Law that purports to establish criteria for the use of "automated employment decision tools."[141] Modeled after New York City's AEDT, the New York State bill would cover AI-powered tools used in the hiring process, including "personality tests, cognitive ability tests, resume scoring systems and any system whose function is governed by statistical theory, or whose parameters are defined by such systems . . .."[142]

Under A00567, vendors would be required to conduct an annual "disparate impact analysis" to assess the "the actual impact of any automated employment decision tool used by any employer to select candidates for jobs within the state."[143] The vendor would be required to provide the analysis to any employer seeking to use the tool, but vendors would not have to

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[135] N.J. A4904 (2022-23), https://legiscan.com/NJ/text/A4909/2022 (last visited on July 10, 2023).

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] N.Y. A00567 (2022-23), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00567&term=2023&Summary=Y&Actions=Y&Text=Y (last visited on July 2, 2023).

[142] *Id.*

[143] *Id.*

publicly file the analysis.[144] Employers seeking to use an automated employment decision tool would be required to conduct an annual disparate impact analysis of the tool, make publicly available a summary of that analysis, and provide a copy of the most recent analysis to the New York Department of Labor.[145]

(8) Massachusetts

In 2021, legislation was introduced in Massachusetts to regulate AI. The proposed law seeks to require "data aggregators" using automated technology to perform: (i) continuous and automated testing for bias on the basis of a protected class, and (ii) continuous and automated testing for disparate impact on the basis of a protected class.[146] It is still awaiting passage as of the date of this paper.

(9) Texas

Some states, including Texas, are working to create councils to oversee new AI regulations. If passed, a Texas bill would establish the Artificial Intelligence Advisory Council to monitor the use of AI systems by Texas state agencies. The Committee Report discussing the proposed bill notes that, in 2020, the Texas Workforce Commission was able to help clear its backlog of unemployment claims by using a chatbot.[147]

(10) Federal Legislation

What started in 2016 as an attempt to understand the potential for bias in AI has evolved to full federal initiatives. In addition to state legislation, for the past several years, the federal government has also introduced legislation concerning workplace AI. However, thus far, those bills have not seen a lot of activity.

The National Artificial Intelligence Act of 2020 was enacted on January 1, 2021 and established the National Artificial Intelligence Initiative (the "Initiative").[148] The Initiative's purpose was to ensure continued US leadership in AI research and development, develop trustworthy AI systems, prepare the US workforce for the integration of AI systems, and coordinate AI activities across federal agencies. As directed by Congress in the Initiative, in 2021,

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[144] *Id.*

[145] *Id.*

[146] Bill H.136, "An Act Relative to Data Privacy," *available at* https://malegislature.gov/Bills/192/H136 (last visited on June 26, 2023).

[147] C.S.H.B. 2060 Committee Report (Substituted version) https://capitol.texas.gov/tlodocs/88R/analysis/html/HB02060H.htm#:~:text=2060%20establishes%20the%20Artificial%20Intelligence,certain%20state%20agencies%20in%20Texas (last visited on June 23, 2023).

[148] The Initiative was enacted as part of the National Defense Authorization Act for Fiscal Year 2021. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Conference Report, H.R. 6395 https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210 (last visited on June 26, 2023).

the Biden administration launched the "National Artificial Intelligence Research Task Force."[149] The task force is responsible for establishing the National AI Research Resource, which will address, among other things, "security, privacy, civil rights, and civil liberties."[150]

The Initiative also builds upon deliverables resulting from the 2019 Executive Order 13859, "Maintaining American Leadership in AI."[151] The Executive Order includes directives to increase AI research and development investments, the establishment of the first of seven National AI Research Institutes, AI technical standards, Office of Management and Budget ("OMB") guidance on the regulation of AI, and discussion of international AI alliances.

The AI in Government Act of 2020[152] codifies into law the GSA AI Center of Excellence, which was launched in 2019.[153] It also calls on the OMB to provide guidance for agency use of AI and for the Office of Personnel Management ("OPM") to update the occupational series for AI for federal employees. Executive Order 13960, "Promoting the Use of Trustworthy AI in the Federal Government", also called on the GSA and OPM to enhance AI implementation expertise across agencies, and established principles for the use of AI by the federal government.[154]

On February 3, 2022, U.S. Senator Ron Wyden, D-Ore., with Senator Cory Booker, D-N.J., and Representative Yvette Clarke, D-N.Y., introduced another workplace AI billed entitled the "Algorithmic Accountability Act of 2022."[155] As explained in a press release from Senator

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[149] *The Biden administration launches the National Artificial Intelligence Research Resource Task Force* https://www.nsf.gov/news/news_summ.jsp?cntn_id=302882&org=NSF#:~:text=As%20directed%20by%20Congress%20in,all%20scientific%20disciplines%20with%20access (last visited on July 2, 2023).

[150] *Id.*

[151] "Maintaining American Leadership in Artificial Intelligence," Executive Order 13859 (Feb, 11, 2019) https://www.federalregister.gov/documents/2019/02/14/2019-02544/maintaining-american-leadership-in-artificial-intelligence (last visited on June 27, 2023).

[152] "AI in Government Act of 2020", H.R. 133 (Jan. 3, 2020), https://www.congress.gov/116/bills/hr133/BILLS-116hr133enr.pdf#page=1105 (last visited on June 27, 2023).

[153] As part of the U.S. General Services Administration's ("GSA") Technology Transformation Services, the Centers of Excellence ("CoE") initiative accelerates IT modernization at federal agencies. *See* https://coe.gsa.gov/about/mission-values.html (last visited on June 27, 2023).

[154] Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, Executive Order 13960, Dec. 3, 2020, https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal-government (last visited on June 27, 2023).

[155] *See* "Wyden, Booker and Clarke Introduce Algorithmic Accountability Act of 2022 To Require New Transparency And Accountability For Automated Decision Systems," *available at* https://www.wyden.senate.gov/news/press-releases/wyden-booker-and-clarke-introduce-algorithmic-accountability-act-of-2022-to-require-new-transparency-and-accountability-for-automated-decision-systems (last visited on July 2, 2023); H.R. 6580, "The Algorithmic Accountability Act of 2022," https://www.congress.gov/bill/117th-congress/house-bill/6580/text (last visited on July 10, 2023).

Wyden, the bill would "bring new transparency and oversight of software, algorithms and other automated systems that are used to make critical decisions about nearly every aspect of Americans' lives."[156] The law also would require algorithmic impact assessments and would give the FTC rulemaking authority and resources to enforce the law.

There has been a significant increase in proposed AI and privacy bills at both the state and federal level, specifically those seeking to govern automated decision-making in employment. Employers using or considering using AI and other automation technology should consider how to provide notice to, and obtain consent from, their applicants and employees. Employers are advised to consult with counsel to ensure compliance with upcoming state and federal law, EEOC guidance, and regulatory scrutiny, before implementing any type of

(11) International Laws

Governments around the world are recognizing the need for legislation relevant to the use of AI at work. An AI Index analysis of the legislative records of 127 countries shows that the number of bills containing the term "artificial intelligence" that were passed into law grew from just one bill in 2016 to 37 bills in 2022.[157] Likewise, an analysis of the parliamentary records in 81 countries shows that mentions of AI in global legislative proceedings were nearly 6.5 times more frequent in 2022 than in 2016.[158] Legislation has been proposed or passed in regions including Canada and the European Union.

a. Canada

In June 2022, the Government of Canada introduced the Artificial Intelligence and Data Act (the "AIDA") as part of Bill C-27, the Digital Charter Implementation Act, 2022.[159] The Government also published a companion paper[160] that outlines the Government's plans and processes that will ultimately lead to the legislation taking effect, no sooner than 2025. The AIDA is Canada's first attempt at regulating AI. Recognizing that AI systems are poised to greatly impact the lives of Canadians and the operation of Canadian businesses, the AIDA's goal is to regulate international and interprovincial commerce in AI systems by establishing common requirements for AI systems across Canada. The Canadian Government specifically recognized "screening

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[156] *Id.*

[157] "AI Index Annual Report: Measuring trends in Artificial Intelligence," Stanford University Human-Centered Artificial Intelligence, https://aiindex.stanford.edu/report/ (last visited on June 27, 2023).

[158] *Id.*

[159] BILL C-27, House of Commons of Canada, First Reading, June 16, 2022, https://www.parl.ca/DocumentViewer/en/44-1/bill/C-27/first-reading (last visited on June 22, 2023).

[160] The Artificial Intelligence and Data Act (AIDA) – Companion Document, https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act-aida-companion-document (last visited on June 22, 2023).

systems impacting access to services or employment" as an AI system of interest.[161] The AIDA also states that business conducting regulated activities are responsible for ensuring that employees address AI risks with regards to harm, bias, and usage limitations.[162] For AI systems where there is no practical ability for end users to monitor or manage them, individual employees are not expected to be responsible for risk mitigation.

b. The EU

(i) GDPR

In an effort to harmonize data privacy laws across Europe, the EU General Data Protection Regulation (the "GDPR") took effect in May 2018.[163] The GDPR governs how an individual's, including an employee's, personal data may be processed and transferred in the EU. In June 2020, the European Parliamentary Research Service published a study on the impact of GDPR on AI.[164] The Study found that the GDPR can be interpreted and applied in such a way that it does not hinder beneficial application of AI to personal data, and that AI can be deployed in a way that is consistent with the GDPR.[165] However, the Study also found that the GDPR does not provide sufficient guidance for controllers nor adequate safeguards for the use of AI and automated decision-making.[166]

There are also special considerations for U.S.-based companies subject to the GDPR. Wherever an organization is based—even outside the EU—if it is processing the "personal data" of EU residents, it must comply with the GDPR. U.S.-based companies can be subject to the GDPR if they offer goods and services to EU residents or if they obtain data related to the monitoring of behavior that takes places within the EU.[167] "Personal data" is any information that relates to an identified or identifiable living individual.[168] Examples of "personal data" covered

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[161] *Id.*

[162] *Id.*

[163] General Data Protection Regulation, Regulation (EU) 2016/679, https://gdpr-info.eu/ (last visited on June 22, 2023).

[164] The impact of the General Data Protection Regulation (GDPR) on artificial intelligence, Panel for the Future of Science and Technology, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf (last visited on June 22, 2023).

[165] *Id.*

[166] *Id.*

[167] *Id.* at Art. 4, ¶ 2(b).

[168] *See* "What is personal data?", *available at* https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en (last visited on July 2, 2023). Different pieces of information, which collected together can lead to the identification of a particular person, also constitute personal data. Personal data that has been de-identified, encrypted, or pseudonymized but can be used to re-identify a person remains personal data and falls within the scope

by the GDPR include (i) name and surname; (ii) home or email address; (iii) location data (e.g., the location data function on a mobile phone); (iv) an Internet Protocol (IP) address, (v) a cookie ID; and (vi) advertising identifier of one's phone.[169] Workplace AI collect much, if not all, of this information.

U.S.-based companies that enter into contracts with AI vendors that mine data from EU residents must comply with the GDPR. Frequently, but not always, the employer is the "controller," because it is the entity requesting the data, whereas the vendor is the "processor," because it is collecting, storing, and reporting the data to the employer. The GDPR requires that the "controller" company have a formal contract with the recruitment and selection vendor that ensures the vendor is compliant with the other provisions of the GDPR.[170] Other requirements include (i) requiring a lawful basis or the consent of subjects for data processing;[171] (ii) providing data breach notifications to regulators in the EU, and potentially to individuals;[172] and (iii) safely handling the transfer of data across borders.[173] The vendor ("processor") faces additional requirements from the regulations, including (i) data security requirements,[174] (ii) data breach notification,[175] (iii) record-keeping obligations,[176] and (iv) appointment of a data protection officer.[177]

In practice, the GDPR should have a large impact on U.S.-based companies' use of AI vendors for EU-based talent. Companies should consider steps towards compliance, especially where the potential exists for the vendor to deploy its technology to the EU actively or passively, as the consequences of not complying could be significant. The GDPR gives EU member states enforcement authority over the regulations. Maximum fines for violations might be as high as the

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of the law. *Id.* Truly anonymized personal data is excluded from the law but only if the anonymization is irreversible. *Id.* Importantly, the law protects personal data regardless of the technology used for processing that data—it is technology-neutral and applies to both automated and manual processing, provided the data is organized in accordance with pre-defined criteria (e.g., alphabetical order). *Id.* It also does not matter how the data is stored—in an IT system, through video surveillance, or on paper; in all cases, personal data is subject to the protection requirements set out in the GDPR. *Id.*

[169] *Id.*

[170] Art. 28, ¶ 3 (a)–(h), GDPR.

[171] Art. 6, ¶ 1, GDPR.

[172] Art. 34, GDPR.

[173] Privacy Shield Framework, https://www.privacyshield.gov/article?id=OVERVIEW (last visited on July 2, 2023).

[174] Art. 32, GDPR.

[175] Art. 33, ¶ 2, GDPR.

[176] Art. 30, ¶¶ 2–5, GDPR.

[177] Art. 37, GDPR.

greater of either €20,000,000 or 4% of the total worldwide annual turnover from the preceding financial year.[178]

(ii) The AI Act

The EU recognizes that AI can create many benefits if AI systems are used effectively. The EU also recognized the risks that AI can pose to users. In April 2021, the European Commission proposed the first EU regulatory framework for AI, known as the EU AI Act.[179] It is the world's most comprehensive AI law and the first comprehensive set of regulations for the AI industry. The Act would adopt a risk-based, horizontal regulatory approach to regulate AI. The Act classifies different AI systems based on the level of risk they pose to users. The Act identifies AI in the workplace as a high-risk area of AI, which is one level below unacceptable risk. Unacceptable risk AI systems are considered a threat and will be banned by the Act.[180]

U.S. companies that do business in the E.U. should also monitor developments concerning the EU AI Act. It defines "Artificial Intelligence System," broadly as: "software that is developed with one or more of the techniques and approaches listed in Annex I [machine learning approaches; logic- and knowledge-based approaches; and statistical approaches] and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or

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[178] *See* "A user-friendly guide to General Data Protection Regulation (GDPR)," https://www.gdpreu.org/compliance/fines-and-penalties/ (last visited on July 2, 2023). States are also starting to consider legislation to protect an individual's personal data. *See*, *e.g.*, California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100-1798.198, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375 (last visited on July 2, 2023). Effective January 1, 2020, the law gives "consumers"—defined as natural persons who are California residents—the following four basic rights in relation to their personal information: (i) the right to know, through a general privacy policy and with more specifics available upon request, what personal information a business has collected about them, where it was sourced from, what it is being used for, whether it is being disclosed or sold, and to whom it is being disclosed or sold; (ii) the right to "opt out" of allowing a business to sell their personal information to third parties (or, for consumers who are under 16 years old, the right not to have their personal information sold absent their, or their parent's, opt-in); (iii) the right to have a business delete their personal information, with some exceptions; and (iv) the right to receive equal service and pricing from a business, even if they exercise their privacy rights under the law. Companies that use recruitment and selection technologies should not wait to begin the process of determining how they will comply with these new statutory obligations.

[179] Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Brussels, 21.4.2021 COM(2021) 206 final 2021/0106(COD), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206 (last visited on June 22, 2023).

[180] Unacceptable risks include biometric identification systems (such as facial recognition), social scoring, and cognitive behavioral manipulation of people or groups. In addition to workplace AI, high-risk AI systems include those used in, education, employment, law enforcement, migration and border control, products falling under the EU product safety legislation, and the operation of critical infrastructure.

decisions influencing the environments they interact with."[181] The extensive EU AI Act proposal sets forth a three-part framework under which AI systems are be regulated: (1) unacceptable-risk AI systems, which include subliminal, manipulative, or exploitative systems; (2) high-risk AI systems, which include systems that assist with consumer creditworthiness, recruiting or managing employees, or biometric data; and (3) low or minimal risk AI systems.[182] Should the EU AI Act be adopted, it will undoubtedly have a significant impact on companies doing business in the E.U. that rely on AI in any aspect of their business.

(iii) Platform Work Directive

In December 2021, the European Commission delivered a proposal for a Platform Work Directive (the "Directive").[183] The Council of the EU accepted the proposal in June 2023. The Directive includes measures to improve the working conditions in platform work and to support the sustainable growth of digital labor platforms, in part by establishing rules for workplace AI and by increasing transparency in the use of algorithms to monitor employees. The Directive also proposes rights for platform workers regarding their employment statuses, oversight of and right to contest both human and automated decisions, protection from dismissal, and communication channels.

(iv) AI Liability Directive

In September 2022, the European Commission proposed the AI Liability Directive (the "Liability Directive").[184] The Liability Directive aims to harmonize EU liability rules and make it easier for victims of AI-related damages to receive compensation. The Liability Directive simplifies the legal process for proving damage by an AI system, as well as introducing a right of access to evidence from companies where high-risk AI (which includes workplace AI) is used.

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[181] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules On Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts, at Art. 3(1) (available at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1623335154975&uri=CELEX%3A52021PC0206) (last visited on July 2, 2023).

[182] *See id.* at 5.2; *see also* Art. 6(2); Annex III.

[183] EU rules on platform work, https://www.consilium.europa.eu/en/policies/platform-work-eu/#:~:text=The%20proposed%20directive%20was%20presented,people%20working%20for%20digital%20platforms (last visited on June 22, 2023).

[184] Liability Rules for Artificial Intelligence, European Commission, https://commission.europa.eu/business-economy-euro/doing-business-eu/contract-rules/digital-contracts/liability-rules-artificial-intelligence_en (last visited on June 22, 2023).

The Liability Directive helped create the Commission's White Paper on AI,[185] which was published in February 2020. The White Paper on AI promoted the uptake in AI, addressed the risks associated with certain uses of AI, and proposed a legal framework for AI. The Liability Directive was proposed by the Commission and is awaiting adoption by the European Parliament and the Council of the EU.

I. Litigation Risks

A frequent recommendation to address the potential exposure that an employer may face from relying on a vendor's AI technologies is to seek indemnification from the vendor.[186] If, however, a party successfully challenged a vendor under a discrimination or similar theory, it is likely that similar litigation would not be too far behind. Although subsequently sued employers would not necessarily concede liability, it will be more difficult to defend against such a claim where the employer is using the same exact product and/or algorithm already found to be unlawful. To the extent that the vendor is willing to indemnify or otherwise assist in defending the legality of its products, the value of any such indemnification or assistance will diminish as its other customers are found liable.

IV. PRACTICAL CONSIDERATIONS

A. Mitigation Recommendations

As most organizations adopt or plan to adopt workplace AI, it is prudent to understand how organizations can mitigate legal risks associated with these technologies. Avoiding the risk of bias in implementing or using workplace AI can be mitigated by organizations understanding how the workplace AI tool works and working with the tool's vendors to conduct bias assessments. Giving notice and gaining consent can also go a long way in protecting organizations from breaching data retention and data privacy laws. The sample checklist, listed below, provides a starting point for organizations considering regulating their workplace AI.

(1) Avoiding Bias

Before implementing a vendor solution, employers should carefully consider individuals within the organization to whom it will give access to the vendor's capabilities. Rather than providing open access to final decision-makers, the employer should identify a core group of individuals within its HR or analogous team who will have the ability to "remove"—to the extent

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[185] *White Paper On Artificial Intelligence - A European approach to excellence and trust*, Brussels, 19.2.2020 COM(2020) 65 final *https://commission.europa.eu/system/files/2020-02/commission-white-paper-artificial-intelligence-feb2020_en.pdf* (last visited on June 22, 2023).

[186] Another recommendation often cited for employers is to design their job-application process to produce an enforceable arbitration agreement. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Supreme Court of the United States ruled that employers can require employees to arbitrate disputes with the employer individually and waive their right to pursue or participate in class or collective actions against their employer.

possible—protected information from the view of the final decision-makers prior to their use. Appropriate security also should be in place to prevent decision-makers from improperly or accidentally accessing protected information of candidates whom they should not consider during the hiring process.

Another mitigation recommendation pertains to the assessments offered by vendors. Before completing the assessment, the vendor should conduct a thorough job analysis. Doing so will not only help ensure that the candidates responding to the job posting and being interviewed are better suited for the position but also mitigate legal risk by making the use of the algorithm job-related and consistent with business necessity. Better still is cross-validating with different samples to show that job-relatedness is present in multiple samples and ensuring that the job analyses are updated periodically and/or as necessary. Once a vendor's tool is used, the employer should conduct an adverse impact analysis, under the attorney-client privilege, to determine whether there has been a statistically significant adverse impact on any population of protected category. If the analysis identifies an adverse impact, the employer should commission a validation study, which is recommended even if an adverse impact is not found. Lastly, as identified above, it is advisable for employers to conduct a reasonable search for alternatives to the solution that they are presently using.

(2) Being Compliant with Data Retention and Data Privacy Laws

To comply with document retention obligations, employers should work with vendors to ensure that the employers can appropriately customize their current record retention defaults to comply with EEOC guidance, DOL requirements, and state regulations, and so that the retention becomes perpetual as charges or complaints are made, if applicable. Employers should also note that the period for required record retention changes once an individual's status switches from applicant to employee. To the extent that a vendor becomes the tool on which an employer stores certain other employment information (including payroll and other employee information), the period for retention may be longer. It would be prudent for an employer's data security group to work with the vendors to ensure that the data stored by each vendor is secure. Likewise, employers must be satisfied that the vendors have taken steps to prevent security breaches.

On a similar note, employers should keep in mind that vendors are sources of electronically stored information ("ESI") in future litigation. Thus, it is worthwhile to ask a vendor about the type of search terms it can apply within its operating system for purposes of ESI searches and protocols, and whether it can export information into a spreadsheet aggregating candidate information, or whether it must access each candidate's information separately. Employers may want to consider having an ESI vendor evaluate the service from an ESI expert perspective because ESI is among the most costly and onerous parts of litigation, and it is advisable to take steps upfront to mitigate potential ESI noncompliance.

As more states and localities are expected to pass legislation protecting applicant and employee biometric data, employers should identify areas where they are collecting and using such data, such as in timekeeping, customer interactions, and video interviews. Employers should

determine who needs to be notified of the data's collection and use. Employees should be provided notice prior to the collection of data and should be informed of the data's purpose and the length of time which it will be stored. Employers should also create a written, publicly available retention schedule and data destruction policy. Except where permitted by law, employers should ensure biometric law is not sold, traded, disclosed, or disseminated.

B. Sample Checklist

In addition to basic concerns, like cost and integration into existing systems and processes, organizations contemplating adopting workplace AI should consider asking a prospective vendor the following questions, where applicable:

Factors Measured

- Where the tool uses machine learning in determining both the factors and the weight of each factor, can you describe the factors and the weight each is given?
- Can you tell us what the factors are?
- Can you tell us the weight given to each factor?
- Can we make modifications to the algorithm? For example, can we remove a factor or change the weight?
- Will we have to sign a nondisclosure agreement to get that information?
- Can we have that information if a government agency asks us, or if a court of law compels us?
- How often does your algorithm change?
- Do you share with your customers the changes and the purpose of the changes?

Validation

- Have you validated or otherwise tested your algorithm to determine if the results it creates could be biased?
  - If so, when was the last time?
  - How often do you validate?
  - Who performs the validation?
  - Can you describe the validation methodology?

- How do you determine if the bias is something about which to be concerned? (Ideally, the answer should reflect the four-fifths rule[187] of the Uniform Guidelines)
- Is there a potential for false positives?

Job Analysis

- What do you do to analyze the jobs for which we are hiring?
- What resources and information do you need from us for purposes of your analysis?

Disability Accommodation

- Is your product compliant with Web Content Accessibility Guidelines ("WCAG") 2.1 and the upcoming 2.2 guidelines at Levels A and AA, and, if so, can we see documentation?
- What accommodations can your product make for applicants with disabilities?
  - Visually impaired applicants?
  - Hearing impaired applicants?

Privacy

- Does your product collect any biometric identifiers, such as voiceprints or other unique biological patterns or characteristics used to identify a specific individual?
  - If so, how does it procure consent?
  - How is the information used?
  - How is the information stored?
  - How is the information destroyed?

[187] The four-fifths rule can help employers evaluate whether an AI-enabled tool is having a discriminatory impact against a protected class. Employers must 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 gives a passing grade to 30% of Black applicants and 60% of White applicants, there is a 30/60 (or 50%) ratio of Black to White passing grades. This fails the four-fifths rule because 50% falls below the required 80%. The four-fifths rule is not appropriate in all settings and the EEOC provides guidance explaining which situations are and are not appropriate. *See* EEOC, *Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, (March 2, 1979), https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines (last visited on July 11, 2023).

Data Processing and Storage

- How and where do you store the data recorded?
- What precautions are taken to safeguard data security?
- How long is the data stored?
  - Can the retention dates be modified as individuals transfer from applicants to employees?
- Do you archive or maintain records showing when an algorithm was altered?
- Can we have access to the algorithm if we need to defend ourselves against an action, like before the EEOC, OFCCP, or state agency?
- What is the process for anonymizing individuals' information?
- If we are sued, we may be required to retrieve data from the tool.
  - Can we have access to the algorithm if we need to defend ourselves against an action?
  - What are the data-searching capabilities?
  - Can information be exported into a spreadsheet aggregating candidate information? Or, at minimum, can each candidate's information be accessed separately?

Training

- What training do you offer for users?
- Will you offer training on what the algorithm means and/or how to use it?

Lawsuits

- Has your product been subject to litigation or administrative charges?
  - If so, when, what were the claims, and what is the status of the legal action?
- What kind of assistance do you provide to defend discrimination claims or indemnify us against legal claims?