ALERTS

EEOC Guidance on Artificial Intelligence in Hiring and Disability Discrimination

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The Equal Employment Opportunity Commission ("EEOC") recently issued a technical assistance document regarding the use of artificial intelligence ("AI") tools in employment decisions with a focus on disability discrimination claims that may arise as a result.[1] AI in the employment context typically means that the employer (including the software vendor) "relies partly on the computer's own analysis of data to determine which criteria to use when making employment decisions." The technical assistance document provides examples of AI tools, including "resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; 'virtual assistants' or 'chatbots' that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides 'job fit' scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived 'cultural fit' based on their performance on a game or on a more traditional test."

The EEOC identified three common ways an employer's use of AI could violate the Americans with Disabilities Act ("ADA"): (i) by not providing reasonable accommodations, (ii) relying on AI tools that improperly "screen out" individuals with disabilities and (iii) adopting AI tools that pose disability-related inquiries or seek information that qualify as a medical exam. The EEOC noted that an employer is responsible for its use of AI tools, including AI tools designed and administered by another entity, such as a software vendor.[2]

If an applicant or employee communicates that a medical condition may make it difficult for them to take a test or may cause an assessment result that is less acceptable to the employer, the employer must respond promptly and provide an alternative testing format unless doing so would create an undue hardship for the employer. Employers must keep medical information obtained in connection with a reasonable accommodation request confidential and separate from the applicant's or employee's personnel file.

An AI tool may unlawfully screen out applicants with disabilities if the disability causes the applicant to receive a lower score or an assessment result that is less acceptable to the employer, and the applicant loses a job opportunity as a result despite being able to perform the job with reasonable accommodations. For example, an AI tool that analyzes an applicant's speech patterns may improperly screen out applicants with speech impediments. Even an AI tool that has been "validated" to predict whether applicants can perform a job under typical working conditions may unlawfully screen out applicants with disabilities who could also perform the job with reasonable accommodations. An AI tool is validated when there is evidence that it meets certain professional standards showing that the tool accurately measures or predicts a trait or characteristic that is important for a specific job.

The EEOC cautioned that employers should not rely on claims that AI tools are "bias-free" if those tools have been designed to reduce Title VII discrimination based on race, sex, national origin, color and religion, and are not tailored to address the unique nature of disabilities. Employers can reduce the chances of improper "screen outs" by (i) inquiring if and how a tool was developed with applicants with disabilities in mind, and (ii) in implementing the AI tool, clearly indicating to applicants that alternative test formats are available, and providing clear instructions on requesting reasonable accommodations and information about the AI tool, including the traits or characteristics the tool is designed to measure.

An employer may violate the ADA if it uses an AI tool that poses disability-related inquiries or seeks information that qualifies as a medical exam before giving an applicant a conditional offer of employment, regardless of whether the applicant has a disability. Disability-related inquiries are ones that are likely to elicit information about a disability or that directly ask if an applicant has disabilities. An assessment qualifies as a medical exam if it seeks information about the individual's physical or mental impairments or health.[3]

New York City employers should be aware of a new law going into effect Jan. 1, 2023, previously discussed here, that prohibits New York City employers from using automated employment decision tools to promote or screen job candidates, unless certain criteria have been met.

Conclusion

Employers should be cognizant of how their usage of AI in hiring may be interpreted as disability discrimination and respond promptly to any discrimination related issues or claims.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] The Department of Justice ("DOJ") simultaneously released guidance on this issue as well, which is applicable to government employers. The guidance provides an overview of how algorithms and AI can lead to disability discrimination in hiring.

[2] An employer may be responsible for the actions of the software vendor that designed or administered its AI tool, even if an applicant with disabilities had communicated an issue to the vendor and not the employer.

[3] While personality tests would generally not fall into a disability-related inquiry or medical exam, employers should ensure the test does not unlawfully screen out individuals with disabilities.

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