
EPSTEIN BECKER GREEN

Artificial Intelligence, Machine Learning, and Bias: Prospects, Pitfalls, and Penalties

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I. INTRODUCTION

Over the past several years, machine learning and artificial intelligence (“AI”) technologies have been adopted in almost every facet of life. Indeed, AI technologies are becoming increasingly widespread in the workplace in connection with recruitment, hiring and workforce management. AI technology has made recruitment and employee selection, for example, less time-consuming and more cost effective and reshaped how companies think and go about sourcing and hiring candidates. Notwithstanding its positive impacts, this technology has the potential to result in bias, and, as companies continue to adopt AI technology, state and local governments have already started passing laws regulating its use. In order for organizations to understand the potential liabilities and risk for bias 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 in recruitment, 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 recruitment and selection technologies. 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 digitally driven recruitment and selection 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 the reader a simplified foundation for understanding the new recruitment and selection technologies.

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.
Artificial Intelligence (“AI”)	<p>Intelligence demonstrated by machines; any system that perceives its environment and takes actions that maximize its chance of achieving its goals.</p> <p>Machine mimicking “cognitive” functions that humans associate with other human minds, such as “learning” and “problem solving.”</p>
Big Data	<p>The study and analysis of data sets that are too large or complex to be dealt with by traditional data-processing application software.</p> <p>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.</p>
Candidate Relationship Management (“CRM”)	<p>Method for managing and improving relationships with current and potential future job candidates.</p> <p>Used to automate the communication process with candidates, encourage engagement, and improve the candidate experience.</p>

Term	Definition(s)
<p>Chatbots (a.k.a. “talkbot,” “chatterbot,” “Bot,” “IM bot,” “interactive agent,” or “Artificial Conversational Entity”)</p>	<p>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.</p> <p>Application that runs highly repeated series of automated scripts with observable answers.</p>
<p>Data Mining</p>	<p>Process of searching, extracting , and analyzing large data sets, which involves methods at the intersection of machine learning, statistics, and database systems.</p>
<p>Human Capital Management (“HCM”)</p>	<p>Comprehensive set of practices related to developing and optimizing an organization’s hiring and management of employees.</p>
<p>Machine Learning</p>	<p>The study of computer algorithms that can improve automatically through experience and by the use of data.</p> <p>Process by which machines learn to become intelligent for themselves.</p>
<p>Natural Language Processing</p>	<p>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.</p>
<p>People Analytics (a.k.a. “talent analytics” or “HR analytics”)</p>	<p>The use of behavioral data to understand how people work and help organizations make decisions about their workforce.</p>
<p>Predictive Analytics</p>	<p>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.</p> <p>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.</p>
<p>Recruitment Marketing</p>	<p>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.</p>
<p>Robotic Process Automation</p>	<p>A form of business process automation technology based on metaphorical software robots or on artificial intelligence.</p> <p>Readily available script writing technologies that allow users to link events in a process based on “if/then” statements.</p>

B. Recruiting and Hiring Trends

Performing a simple search on one’s favorite Internet browser quickly reveals that AI has been one of the hottest trends in recruitment for the past several years.¹

According to the International Data Corporation (IDC), “worldwide revenues for the artificial intelligence (AI) market, including software, hardware, and services, is estimated to grow 15.2% year over year in 2021.”² According to the Gartner 2019 Artificial Intelligence Survey, “seventeen percent of organizations use AI-based solutions in their HR function and another 30% will do so [in] 2022.”³ That survey also indicates that early adopters of AI have shown proven results, including 62% of those that have deployed AI to improve data-based decision making.⁴

These results follow the trends over the past several years. According to the 2019 Deloitte Global Human Capital Trends report, which polled nearly 10,000 respondents in 119 countries, 26 percent of its respondents are using robotics, 22 percent are using AI, and 22 percent are using cognitive technologies as well. Sixty-four percent saw growth ahead in robotics, 80 percent predicted growth in cognitive technologies, and 81 percent predicted growth in AI.⁵ Finally, while 62 percent of respondents are using automation to eliminate transactional work and replace repetitive tasks, 47 percent are also augmenting existing work practices to improve productivity, and 36 percent are “reimagining work.”⁶ These findings demonstrate that, while automation technologies replace humans in doing routine work, jobs are also evolving to require new combinations of human skills and capabilities.⁷ More recently, Deloitte’s 2021 Global Human

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 March 6, 2022); *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 March 6, 2022); *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 March 1, 2022); *3 Predictions for AI and Recruiting in 2019*, available at <https://ideal.com/ai-recruiting-predictions/> (last visited on June 14, 2019); 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 March 1, 2022).

² See *IDC Forecasts Companies to Spend Almost \$342 Billion on AI Solutions in 2021* <https://www.idc.com/getdoc.jsp?containerId=prUS48127321> (last visited March 6, 2022).

³ *AI Shows Value and Gains Traction in HR*, <https://www.gartner.com/smarterwithgartner/ai-shows-value-and-gains-traction-in-hr> (last visited March 6, 2022).

⁴ *Id.*

⁵ 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 March 1, 2022).

⁶ *Id.* at 30-31.

⁷ *Id.* at 31.

Capital Trends survey revealed that the trend is increasingly favoring use of AI to supplement and enhance productivity in the workforce, rather than using it as a way to replace or automate manual labor. Respondents to the 2021 Deloitte Global Human Capital Trends survey “recognized that the use of technology and people is not an “either-or” choice but a ‘both-and’ partnership.”⁸

Likewise, in its “2018 Global Recruiting Trends” report, LinkedIn surveyed over 9,000 global talent leader and hiring managers and identified the following four trends shaping the future of recruiting and hiring: (i) diversity, (ii) new interviewing tools, (iii) data, and (iv) AI.⁹ While AI was not separately identified in LinkedIn’s 2020 report, the authors noted the importance of skills in 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.¹⁰

With respect to “new interviewing tools,” 56 percent of talent professionals and hiring managers reported to LinkedIn that new interview tools are the top trend affecting how they hire. The new tools most frequently cited were 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 by immersing candidates in simulated three-dimensional environments to test their skills in standardized ways. Video interviews—live or recorded—are also very popular, because employers believe they help in tapping a broader talent pool in far less time.¹¹

That LinkedIn found that employers are using data to inform their decisions, in and of itself, is not new. What is new, however, 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. Perhaps that is why 50 percent of those surveyed said that data is the top trend influencing how they hire. According to LinkedIn, top uses for data in talent acquisition include to (i) increase retention (56 percent), (ii) evaluate skills gaps (50 percent), (iii) build better offers (50 percent), (iv) understand candidate wants (46 percent), (v) do workforce planning (41 percent), (vi) predict candidate success (39 percent), (vii) assess talent supply and demand (38 percent),

⁸ 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 Oct. 12, 2020).

⁹ *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 March 1, 2022) (“LinkedIn 2018 Report”).

¹⁰ *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 March 1, 2022) (“LinkedIn 2020 Report”).

¹¹ See LinkedIn 2018 Report, *supra* n. 6.

(viii) compare talent metrics to competitors’ (31 percent), and (ix) forecast hiring demands (29 percent).¹²

Over a third—35 percent—of talent professional and hiring managers reported to LinkedIn that AI was the top trend affecting how they hire. Use cases, however, were less clear amongst respondents, as AI’s utility appeared to decrease as the complexity of the recruiter-related task increased. For instance, whereas 58 percent of those surveyed stated that they used AI for sourcing candidates, only 6 percent reported using AI for interviewing candidates. Rounding out the remaining top uses for AI in recruitment were (i) screening candidates (56 percent), (ii) nurturing candidates (55 percent), (iii) scheduling candidates (42 percent), and (iv) engaging candidates (24 percent). Building relationships with candidates, seeing candidate potential beyond credentials, judging “culture fit,” gauging candidate interpersonal skills, and convincing candidates to accept offers were the skills least likely replaced by AI, according to respondents.¹³ These findings reinforce the notion that “[AI] technologies are most effective when they complement humans, not replace them.”¹⁴

Even though talent professional and hiring managers are not reportedly flocking to AI for their recruiting and selection needs, there is little doubt that AI will continue to play a prominent role in candidate sourcing and hiring going forward. AI’s efficiencies in the hiring process are compelling from a business perspective. Pre-screening large volumes of resumes with algorithms that match skills listed on the resumes with those required of the job will save decision-makers valuable time. Chatbots can also streamline the initial communication process by scheduling interviews with those candidates who pass the initial screening process. Where appropriate and lawful, AI can even perform certain background checks on candidates, including review of their social media activities. Theoretically, offloading these types of tasks will free up the human decision-maker(s) to spend more time with a shortlist of qualified candidates deserving of thoughtful consideration. Still up for debate is whether these technologies will ever eliminate the need for the personal touch, which is often critical to building relationships with potential recruits and to attracting other quality candidates.

¹² *Id.*

¹³ *Id.* See also, *Sierra-Cedar 2019-2020 HR Systems Survey*, available https://cdn.ymaws.com/www.clevelandshrm.com/resource/collection/09E0F41E-BD60-41C0-A2FD-AAD4D5A44B59/The_Future_of_HR_Technology_Virtual_Learning_-_February_2020_.pdf (last visited on March 1, 2022) (finding that fewer than 9 percent of surveyed companies have explicitly adopted machine learning, with fewer than 21 percent evaluating the technology for future use in HR).

¹⁴ *AI, robotics, and automation: Put humans in the loop*, DELOITTE INSIGHTS, available at <https://www2.deloitte.com/insights/us/en/focus/human-capital-trends/2018/ai-robotics-intelligent-machines.html> (last visited March 1, 2022).

C. Sample Vendors

Dozens of vendors have entered (and quickly exited) the digital recruitment and selection space, offering services that, in whole or in part, 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 gain insight into prospective candidates and job applicants and to predict the best talent based on criteria that the technology is programmed to analyze. 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)
Aquent Scout goscoutgo.com	Data-driven way to connect employers and search firms to fill jobs with great talent.
Burning Glass burning-glass.com	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.
Cappfinity cappfinity.com	Strength-based assessment, analyzing capability, fit, and potential
Ceridian ceridian.com	Flight risk assessment based on time-keeping data, embedded client performance.
Cornerstone OnDemand cornerstoneondemand.com	Talent management system providing recruitment, training, management, and collaboration solutions.
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. Conducted studies to prove that the vendor can successfully predict when employees are unhappy and likely to quit.
Glint glintinc.com	Real-time employee surveys with predictive capacity.
hiQ Labs hiqlabs.com	Develops a cloud-based platform for employee selection, development, and retention. The company’s solutions include Keeper, a human capital management tool that provides predictive attrition insights about an organization’s employees using public data, and Skill Mapper, a solution for talent acquisition and management that provides employee engagement.
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.
Hiring Solved hiringsolved.com	Uses AI to provide a human-like conversational interface through which recruiters can conduct their talent hunt.
Humanyze humanyze.com	People analytics platform that analyzes corporate communication data to understand how people work and benchmarks behaviors against organizational outcomes.

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Company/Website	Description of Service(s)
IBM Watson Recruitment ibm.com	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.
LinkedIn Recruiter business.linkedin.com/talen-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 Dynamics 365 dynamics.microsoft.com	Leverages the power of Office 365 and LinkedIn to quickly find and onboard the right people.
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.
PredictiveHire Predictivehire.com	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.
pymetrics pymetrics.ai	Applies behavioral data and industrial organizational science to reinvent the way companies attract, select, and retain talent.
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.
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.
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.
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.
Ultimate Software ultimatesoftware.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)
Wade & Wendy, Inc. wadeandwendy.ai	Developed Wendy, 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.

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 automation technology in recruitment and selection. To be sure, technologies offered by the vendors identified above offer significant advantages. Data-based hiring promises to help organizations efficiently sort through massive numbers of applicants, increase diversity, and more accurately and effectively identify top talent and reduce attrition. Vendors also advertise the reduction in time and cost associated with the hiring process.

In practice, by reducing decision-making subjectivity, employers can cut back on the “affinity bias” that can steer managers to hire candidates like themselves.¹⁵ This, in turn, will allow them to consider nontraditional candidates whom they might otherwise have overlooked or ruled out.

There are, however, many significant legal risks attendant to using recruitment and selection technologies. In 2016, the 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”¹⁶

What started in 2016 as an attempt to understand the potential for bias in AI has evolved to full federal initiatives. In 2021, the Biden administration launched the National Artificial Intelligence Research Task Force as directed by Congress in the “National AI Initiative Act of 2020.”¹⁷ The task force will be responsible for establishing the National AI Research Resource, which will address, among other things, “security, privacy, civil rights, and civil liberties.”¹⁸

¹⁵ EXEC. OFFICE OF THE PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS 14 (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf (last visited March 1, 2022).

¹⁶ 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 March 1, 2022).

¹⁷ *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 March 6, 2022).

¹⁸ *Id.*

Similarly, the EEOC, on October 28, 2021, announced that it was launching an initiative to ensure that AI used throughout the employment cycle comply with federal anti-discrimination laws.¹⁹

In light of the continued scrutiny from federal and state governments, employers and/or their legal counsel should consider several legal and ethical issues before implementing a new recruitment or selection technology. Of course, these technologies are developing more rapidly than the law. Consequently, the following are just some of the main issues that are 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.

A. 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.²⁰ Among other things, Title VII specifically prohibits an employer from failing or refusing to hire any individual because of the individual’s protected characteristics.²¹ Perhaps the single greatest legal risk to employers using recruitment and selection technologies is that the technologies, by their very 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 Equal Employment Opportunity Commission (“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”),²² but, rather, an applicant could interpret them as a method of discriminating against applicants based on age.²³ Whereas 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, the use of technological solutions to recruit and select employees has arguably called into question those

¹⁹ *EEOC Prepares to Tackle Artificial Intelligence and Algorithmic Bias*, <https://www.jdsupra.com/legalnews/eec-prepares-to-tackle-artificial-4373087/> (last visited March 6, 2022); *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness* <https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness> (last visited March 6, 2022).

²⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

²¹ *Id.* at § 2000e-2.

²² 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.”).

²³ See, e.g., EEOC, ALL STATUTES: PRE-EMPLOYMENT INQUIRIES (2004), available at <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-116> (last visited March 1, 2022).

efforts.²⁴ 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 individuals who will receive in-person interviews. A 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. Whereas an in-person interview typically does not take place until after the hiring manager reviews candidate resumes or applications and narrows the pool of interviewees, 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 Federal Trade Commission ("FTC") requesting an investigation into HireVue, claiming that the company's use of AI-driven assessments constitutes unfair and deceptive trade practices.²⁵ 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." EPIC alleges, 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. 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 will continue to analyze biometric data from job applicants including speech, intonation, and behavior.²⁶

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.

²⁴ 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).

²⁵ See https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf (last visited March 8, 2022).

²⁶ See <https://www.hirevue.com/press-release/hirevue-leads-the-industry-with-commitment-to-transparent-and-ethical-use-of-ai-in-hiring> (last visited Feb. 28, 2022); and <https://epic.org/hirevue-facing-ftc-complaint-from-epic-halts-use-of-facial-recognition/> (last visited Feb. 28, 2022)).

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 origin, 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.²⁷ Similarly, if the algorithm uses linguistic differences as a proxy for race or national origin, for instance, the employer may face a disparate treatment claim.

²⁷See *Bradley v. T-Mobile US, Inc.* 2020 WL 1233924 (N.D. Cal. March 13, 2020). In *Bradley*, the Communications Workers of America and several named 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 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* decisions 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 March 16, 2020).

In separate matters, Facebook’s targeted advertising program came under scrutiny by the Washington State Attorney General and the ACLU. First, on July 2018, Facebook entered into an agreement with Washington State pursuant to which it agreed to “make significant changes to its advertising platform by removing 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 March 1, 2022). Subsequently, 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>.

Second, 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 job-seekers by allowing employers to use its services to target job advertisements to younger men. See <https://www.aclu.org/legal-document/facebook-eec-complaint-charge-discrimination> (last visited on March 1, 2022). 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, as well as other notable changes. See <https://www.aclu.org/other/summary-settlements-between-civil-rights-advocates-and-facebook> (last visited on March 1, 2022).

B. Disparate Impact

While many companies are motivated, at least in part, to utilize recruitment and selection technologies in order to diminish subjectivity in the process, and thereby reduce the risk of disparate treatment claims, companies must be aware of the risks of potential disparate impact claims.²⁸ 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.²⁹ 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.³⁰ 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.³¹

²⁸ At the time of writing, the authors could not locate any state or federal court decisions addressing disparate impact based on an employer’s AI.

²⁹ 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, however, that claims of disparate impact against persons with disabilities are less likely, inasmuch as that group is often diverse in the mental or physical impairment that substantially limits one or more of their major life activities.

³⁰ 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), a full panel of the U.S. Court of Appeals for 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. Parsing the language of the ADEA, the Eleventh Circuit concluded that the statutory language allows only *employees* to bring adverse impact claims; because applicants are not employees, they cannot assert disparate impact claims. *Id.* at 964. More recently, the District of Kansas followed the reasoning of the Eleventh Circuit 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), but the court 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).

³¹ *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).

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 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.”³² 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.³³

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 Selection Procedures (“Uniform Guidelines”),³⁴ 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.³⁵ 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

³² 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”).

³³ 42 U.S.C. § 2000e-2(k).

³⁴ 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 March 1, 2022).

³⁵ 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).

procedure is predictive of, or significantly correlated with, important elements of work behavior (“criterion-related validity”).³⁶

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.³⁷ The EEOC has continued to adhere to this broad view of the term “applicant.”³⁸ 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.³⁹

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.⁴⁰

³⁶ 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.

³⁷ 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 March 1, 2022).

³⁸ *Id.*

³⁹ 41 C.F.R. § 60-1.3 (Feb. 6, 2006).

⁴⁰ 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

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 serves the employer’s needs, but which the employer refuses to adopt.⁴¹ Likewise, the Uniform Guidelines also require an employer to consider whether there are less discriminatory alternatives to any selection procedure.⁴²

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 23.⁴³ 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.⁴⁴ Additionally, the EEOC’s priorities outlined in its

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 March 1, 2022).

⁴¹ 42 U.S.C. § 2000e-2(k).

⁴² 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.”).

⁴³ *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).

⁴⁴ *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 March 1, 2022); 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 March 1, 2022); 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 March 1, 2022).

2017-21 Strategic Enforcement Plan and 2018-2022 Strategic Plan⁴⁵ indicate it will continue to aggressively pursue systemic claims, including pattern or practice cases.⁴⁶

C. Persons with Disabilities

Much like disparate impact challenges, the ADA also poses special challenges for employers considering using recruitment and selection technologies, because that statute imposes affirmative obligations on employers with respect to the screening and hiring process.⁴⁷ In addition, the ADA requires employers to provide reasonable accommodations to qualified applicants with known physical or mental limitations, unless doing so would cause an undue hardship to the employer.⁴⁸

From an ADA perspective, one issue with recruitment and selection technologies is that they frequently analyze an individual's voluntary activities, which may not be related to any work requirements, and because applicants may not necessarily 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, in and of itself, 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.

⁴⁵ EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN, FISCAL YEARS 2018-2023, <https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-strategic-plan-fiscal-years-2018-2022#:~:text=The%20Strategic%20Plan%20for%20Fiscal,the%20Commission's%20vision%20of%20%22Respectful>

⁴⁶ *Id.*; EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN, FISCAL YEARS 2017-2022, <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm> (last visited March 1, 2022); EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN, FISCAL YEARS 2018-2022, https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm (last visited March 1, 2022).

⁴⁷ 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. . . .”).

⁴⁸ 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.”).

Another issue is that several of the vendors offer algorithms that perform personality tests⁴⁹ 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.⁵⁰ According to the EEOC, a “disability-related inquiry” is a “question or series of questions that is likely to elicit information about a disability.”⁵¹ The EEOC defines a “medical examination” as “a procedure or test that seeks information about an individual’s physical or mental impairments or health.”⁵² A test may be 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.⁵³ Whereas all of these factors are important, the first three often can 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 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,

⁴⁹ 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 March 1, 2022) (“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.”).

⁵⁰ 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 March 1, 2022).

⁵¹ *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, available at <https://www.eeoc.gov/policy/docs/preemp.html> (last visited on March 1, 2022); 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 March 1, 2022).

⁵² *Id.*

⁵³ *Id.*

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 an employee to be considered for a job opening.⁵⁴ This obligation arguably extends to tools used by employers for recruitment and selection purposes.⁵⁵ Accordingly, if the 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") 2.1⁵⁶ at Levels A and AA, there may also be a risk of increased exposure to disability accessibility claims.

D. 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 an undue hardship to the employer.⁵⁷ For instance, if an applicant indicates that she is concerned that the device recording her interview is capturing her soul and depriving her from going to heaven, an employer might be required to accommodate the

⁵⁴ 42 U.S.C. § 12112(b)(5).

⁵⁵ 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 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).

⁵⁶ Web Content Accessibility Guidelines (WCAG) 2.1, available at <https://www.w3.org/TR/WCAG21/> (last visited on March 1, 2022).

⁵⁷ 42 U.S.C. § 2000e(j).

applicant's sincerely held religious belief by providing her with an alternative, non-technical method of interviewing.⁵⁸

E. Privacy

a. In General

The use of some of these recruitment and selection technologies also raises a host of privacy-related issues, particularly where the technology collects, or “over-collects,” personal information regarding an individual. 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.⁵⁹

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 would not be recorded.⁶⁰ 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.

⁵⁸ 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).

⁵⁹ 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).

⁶⁰ See, e.g., Cal. Penal Code § 632.

b. Biometric Data

Recruitment and selection technologies that collect 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.⁶¹ Biometric data, or the unique, 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.⁶² Enacted in 2008, Illinois' Biometric Information Privacy Act ("BIPA") is the most comprehensive of the state biometric privacy laws. Pursuant to BIPA, before an employer collects, captures, or obtains biometric identifiers or biometric information, it must first 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. 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. Accordingly, using applicants' video-recorded answers to interview questions to evaluate fitness for a particular position may open an Illinois employer up to liability under BIPA.⁶³

Notably, New York City recently passed the Biometric Identifier Information Ordinance regulating the notification and sale of biometric information by certain commercial

⁶¹ 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 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 March 1, 2022); 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 March 1, 2022); 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 March 1, 2022); 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 March 1, 2022); 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 March 1, 2022); and Wisconsin, Wis. Stat. § 134.98 (2017), <https://docs.legis.wisconsin.gov/statutes/statutes/134/98> (last visited March 1, 2022).

⁶² 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 March 1, 2022).

⁶³ 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.

establishments.⁶⁴ Effective as of July 9, 2021, the Ordinance requires certain commercial establishments with physical locations within New York City to notify customers about their use of biometric technology by posting signage near all customer entrances if the commercial establishments collect, share, or maintain biometric identifying information. 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. New York City employers could be covered under this law if they fall within the definition of a “commercial establishment.”

c. European Union’s General Data Protection Regulations

There are also special consideration for U.S.-based companies subject to the European Union’s (“EU’s”) General Data Protection Regulations (“GDPR”).⁶⁵ Effective as of May 25, 2018, the GDPR regulates the processing by an individual, a company or an organization of “personal data” relating to individuals in the EU.⁶⁶ 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.⁶⁷

“Personal data” is any information that relates to an identified or identifiable living individual.⁶⁸ Examples of “personal data” covered 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);

⁶⁴ See NYC Admin. Code §§ 22-1201 – 1205.

⁶⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, *available at* <https://gdpr-info.eu/> (last visited March 1, 2022).

⁶⁶ See https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-does-general-data-protection-regulation-gdpr-govern_en (last visited on March 1, 2022).

⁶⁷ Rec. 24, GDPR; *see also* Art. 4, ¶ 2(b), GDPR.

⁶⁸ See https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en (last visited March 1, 2022). 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 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’s 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.*

(iv) an Internet Protocol (IP) address, (v) a cookie ID; and (vi) advertising identifier of one's phone.⁶⁹ Recruitment and selection technologies collect much, if not all, of this information.

U.S.-based companies that enter into contracts with recruitment and selection 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.⁷⁰ Other requirements include (i) requiring a lawful basis or the consent of subjects for data processing;⁷¹ (ii) providing data breach notifications to regulators in the EU, and potentially to individuals;⁷² and (iii) safely handling the transfer of data across borders.⁷³ The vendor (“processor”) faces additional requirements from the regulations, including (i) data security requirements,⁷⁴ (ii) data breach notification,⁷⁵ (iii) record-keeping obligations,⁷⁶ and (iv) appointment of a data protection officer.⁷⁷

In practice, the GDPR should have a large impact on U.S.-based companies' use of recruitment and selection vendors for EU-based talent. Companies should consider steps towards compliance, especially where the potential exists for the vendor to actively or passively recruit from the EU, 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 greater of either €20,000,000 or 4 percent of the total worldwide annual turnover from the preceding financial year.⁷⁸

⁶⁹ *Id.*

⁷⁰ Art. 28, ¶ 3 (a)–(h), GDPR.

⁷¹ Art. 6, ¶ 1, GDPR.

⁷² Art. 34, GDPR.

⁷³ Privacy Shield Framework, <https://www.privacyshield.gov/article?id=OVERVIEW> (last visited March 1, 2022).

⁷⁴ Art. 32, GDPR.

⁷⁵ Art. 33, ¶ 2, GDPR.

⁷⁶ Art. 30, ¶¶ 2–5, GDPR.

⁷⁷ Art. 37, GDPR.

⁷⁸ See <https://www.gdpreu.org/compliance/fines-and-penalties/> (last visited March 1, 2022). 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.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375 (last visited March 1, 2022). 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

U.S. companies that do business in the E.U. should also monitor developments concerning the E.U.’s Proposal for a Regulation on artificial intelligence (the “EU AI Act”),⁷⁹ which was proposed in April 2021, but has not yet been adopted. The proposal 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 decisions influencing the environments they interact with.”⁸⁰ The extensive EU AI Act proposal sets forth a three-part framework under which AI systems are to 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.⁸¹ 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.

d. California Data Protection Regulation

States are starting to consider legislation to protect an individual’s personal data. California, for example passed the “Consumer Privacy Act of 2018” (“CCPA”), which 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: (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

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.

⁷⁹ See Proposal for a Regulation laying down harmonised rules on artificial intelligence, available at <https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence> (last visited on March 8, 2022).

⁸⁰ 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 March 8, 2022).

⁸¹ See *id.* at 5.2; see also Art. 6(2); Annex III.

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.⁸²

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. This also applies to parent companies, even if they themselves do not meet one of those three thresholds.⁸³ A data breach of such information could result in fines, a lawsuit from employees or action from the attorney general.⁸⁴ California is one of many states to enact such a data privacy law, with many others following suit.^{85 86}

F. Data Storage and Security

Organizations entering into agreements with recruitment and selection technology vendors need to understand where the vendor is hosting and storing the data that it is collecting. 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 a recruitment and selection technology vendor, 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

⁸² See, e.g., California Consumer Privacy Act of 2018, CAL. CIV. CODE §§1798.100-1798.198, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375 (last visited March 1, 2022).

⁸³ Cal. Civ. Code § 1798.140(c).

⁸⁴ Cal. Civ. Code § 1798.150(a)(1)(A).

⁸⁵ 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).

⁸⁶ 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).

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.

G. 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 technology use in recruitment and onboarding processes. For instance, the Illinois Legislature enacted the Illinois Artificial Intelligence Video Interview Act ("AIVIA"), which, effective January 1, 2020, creates disclosure requirements for companies that utilize video interview technology dependent upon AI.⁸⁷ 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 the applicant's video interview, and consider the applicant's 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. 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."⁸⁸ 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.

Employers should closely monitor developments with respect to enforcement of AIVIA, given Illinois' history with employee-privacy laws.⁸⁹ 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 its unclear whether, as written, it provides for a private right of action.

As written, 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,

⁸⁷ 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 March 1, 2022).

⁸⁸ *Id.*

⁸⁹ *See e.g.*, Biometric Information Privacy Act, 740 ILCS 14 (2008).

whichever occurs later.”⁹⁰ The informal guidance provided by the EEOC, which does not constitute an official opinion of the Commission, appears to be in direct conflict with AIVIA, as employers might inadvertently violate the federal guidance by complying with an applicant’s request for the employer 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).⁹¹

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 tension 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.⁹² The OFCCP, however, 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.⁹³ 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.

While Illinois may be an “early adopter” of these laws, its AI and privacy laws are not outlines. Recently, several jurisdictions have followed suit. For example, in May 2020, Maryland enacted a law prohibiting the use of facial recognition technologies during pre-employment

⁹⁰ EEOC, *Record keeping: Records kept by contractor/third party*, available at <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-233> (last visited on March 1, 2022) (emphasis added).

⁹¹ 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).

⁹² *Supra* at 13.

⁹³ *Id.*

interviews without the applicant's consent.⁹⁴ 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." The measure prohibits employers from using facial recognition services in interviewing without an applicant's written consent and waiver that states the applicant's name, the date of the interview, that the applicant consents to the use of facial recognition during the interview and that the applicant has read the waiver.

More recently, in November 2021, the New York City Council approved a measure, Int. 1894-2020A, Automated Employment Decision Tools ("AEDT"),⁹⁵ to regulate employers' use of "automated employment decision tools" with the aim of curbing bias in hiring and promotions. AEDT, which is effective January 1, 2023, 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. 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. It is unclear whether passive recruitment tools, such as LinkedIn's suggested jobs, are 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.

Employers have several requirements under AEDT. First, 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. 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 would have a disparate impact based on race, ethnicity, or sex. It is, however, unclear whether and when the bias audit should be updated, or whether a new bias audit must be obtained prior to each "use" by the employer.

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:

⁹⁴ See HR 1202 (2020), available at <https://legiscan.com/MD/text/HB1202/id/2169556/Maryland-2020-HB1202-Engrossed.pdf> (last visited at March 1, 2022); Use of Facial Recognition Services, H.B. 1202 (2020), available at <https://legiscan.com/MD/text/HB1202/id/2169556> (last visited March 1, 2022)

⁹⁵ 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 March 1, 2022).

- 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.

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 Bill 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. In December 2021, Washington, D.C. introduced the Stop Discrimination by Algorithms Act, which would governing the use of automated decision-making tools.⁹⁶ 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 transparency for consumers.⁹⁷ Under the proposal, civil penalties of up to \$10,000 could be awarded for each violation.

California is also considering legislation restricting the sale and use of employment-related AI. California’s proposed law, the Talent Equity for Competitive Hiring (“TECH”) Act,⁹⁸ is more extensive and if enacted would apply to all AI technology used in selection procedures. The bill, which is aimed at addressing discrimination concerns, would create a presumption that an employer’s decision relating to hiring or promotion based on, among other things, use of “assessment technology,” is not discriminatory, if it meets 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. The bill is currently in committee process.

⁹⁶ “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 March 8, 2022).

⁹⁷ *Id.*

⁹⁸ See SB 1241, available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1241 (last visited on March 1, 2022).

For the past several years, the federal government has also introduced legislation concerning workplace AI, but thus far, those bills have not seen a lot of activity. 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 bill entitled the “Algorithmic Accountability Act of 2022.”⁹⁹ As explained in a press release from Senator 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.”¹⁰⁰ The law also would require algorithmic impact assessments and further and would give the FTC rulemaking authority and resources to enforce the law.

With AI and privacy bills increasing across the states, employers using AI and other automation technology should, at a minimum, begin considering how to provide notice to, and obtain consent from, their applicants before conducting video interviews. Employers are advised to consult with counsel before implementing any type of digital hiring platform.

H. Litigation Risks

No published decision from a court addressing the legal issues identified in this paper could be located. A frequent recommendation to address the potential exposure that an employer may face from relying on a vendor’s recruitment and selection technologies is to seek indemnification from the vendor.¹⁰¹ If, however, a party successfully challenged a recruitment and selection 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.

⁹⁹ 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 March 8, 2022).

¹⁰⁰ *Id.*

¹⁰¹ 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.

IV. PRACTICAL CONSIDERATIONS

A. Mitigation Recommendations

One of the primary ways that employers can potentially mitigate any legal risks associated with using AI solutions in recruiting is to ask questions upfront before committing to a contract with a specific vendor. The answers to those questions may alleviate many, if not most, of the legal concerns described below and avoid necessitating additional mitigation measures.

As set forth above, initial video interviews of a candidate may place an employer on notice of the candidate's protected characteristics. To mitigate potential risk, employers should use the same level of care and caution when preparing structured interview questions for the vendor to use as it would for its existing hiring process. If the employer does not presently use structured interview questions, the employer should consider the option, if provided by the vendor, of inputting structured interview questions into the system to permit consistency of questions across all candidates. In addition, after each interview, the interviewer should fill out a candidate survey form, which will be stored with the candidate's application materials. The form will contain the reasons why the interviewer chose to recommend or not recommend the candidate for the next phase of the hiring process. Documenting these reasons will help mitigate the risk that comes with identifying protected characteristics by more people earlier in the process.

Before implementing a vendor solution, employers should think carefully about the 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 organization who will have the ability to "remove"—to the extent 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.

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.

Employers should assess their ability to delete interviews/materials and job ads at any time during their engagement with a vendor. To prevent unauthorized users from deleting interviews/materials and job ads that should be maintained, employers should work with their vendors to prepare a form documenting (i) the reasons for the deletion, (ii) the person who made the request to delete, (iii) the date on which the deletion was requested, and (iv) the date on which the deletion occurred. Employers should also ensure that the vendors do not delete interviews/materials and job ads unless the designated representative of the employer approves.

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.

Finally, 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.

B. Sample Checklist

In addition to basic concerns, like cost and integration into existing systems and processes, organizations that are contemplating adopting recruitment and selection technologies 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 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?
- When was the last time?
- How often do you validate?
- By whom?
- 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 4/5ths rule of the Uniform Guidelines)

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 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?

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?