

Employment Law

Julie A. Bruch

IFMK, Ltd., Northbrook

EEOC Issues Guidance on Use of Artificial Intelligence in Employment Decisions

Increasingly, employers are using artificial intelligence (“AI”) as a first step in the hiring process to determine which candidates are best suited for open positions or to increase objectivity in the evaluation of employee performance. On May 18, 2023, the Equal Employment Opportunity Commission (“EEOC”) released a technical assistance document entitled, “Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964,” focusing on preventing discrimination against job seekers and workers when AI is used. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM., *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, available at <https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used> (last visited July 18, 2023) (“EEOC Technical Assistance”).

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits discrimination by employers on the basis of race, color, religion, sex, or national origin. Under Title VII, employers cannot use neutral tests or selection procedures that disproportionately exclude persons based on race, color, religion, sex, or national origin, if the tests or selection procedures are not “job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(a)(2), (k). Thus, employers face liability for using algorithmic decision-making tools that cause disproportionately large negative effects on the basis of a protected class. Such cases are known as “disparate impact” or “adverse impact” discrimination.

When employers use AI decision-making tools, to make or inform decisions about whether to hire, promote, terminate, or take similar actions towards applicants or current employees, deemed by the EEOC to be “selection procedures” they may run afoul of Title VII. *See* EEOC Technical Assistance Questions and Answers #1. When the use of AI causes a selection rate for individuals in a protected group that is “substantially” less than the selection rate for individuals in another group, the employer faces potential liability unless it can show that such use is “job related and consistent with business necessity” pursuant to Title VII. *Id.* at Questions and Answers #2. Employers face potential exposure for the use of AI that adversely impacts a protected group under Title VII even when the tools are designed or administered by another entity, such as a software vendor. *Id.* Questions and Answers #3. The EEOC recommends that employers ask third-party AI software vendors “whether steps have been taken to evaluate whether use of the tool causes a substantially lower selection rate for individuals with a characteristic protected by Title VII.” *Id.* If the vendor responds that the AI tool may result in a substantially lower selected rate for those in a protected group, the employer should consider whether use of AI is truly “job related and consistent with business necessity and whether there are alternatives that may meet the employer’s needs and have less of a disparate impact.” *Id.*

The “selection rate” is defined by the EEOC as “the proportion of applicants or candidates who are hired, promoted, or otherwise selected.” *Id.* Questions and Answers #4. The selection rate is calculated by dividing the number of persons hired, promoted, or otherwise selected from person in a protected classification from the total number of candidates in

that same protected group. *Id.* For example, if an employer requires candidates to take a personality test in which 48 of 80 white applicants and 12 of 40 African American applicants move on, the selection rate for whites is 48/80 or 60% while the selection rate for African Americans is 12/40 or 30%. *Id.* The EEOC Guidelines contain a general rule of thumb for determining whether a selection rate for one group is “substantially” different than another group. This is known as the four-fifths rule, which provides that one rate is substantially different from another if their ratio is less than four-fifths, or 80%. *Id.* Questions and Answers #5. Using the above example, the ratio of the two rates is 30/60 or 50%. Because 50% is lower than 80%, the four-fifths rule says the selection rate for African Americans is substantially different from the selection rate for whites, which could be evidence of discrimination against African American applicants. *Id.*

Use of the four-fifths rule is not always appropriate, especially when it is not a reasonable substitute for a test of statistical significance. *Id.* Questions and Answers #6. Thus, the EEOC recommends that employers ask vendors whether they relied on the four-fifths rule of thumb when determining whether use of AI might adversely impact a protected group under Title VII, or whether it relied on a statistical significance standard. *Id.* If it turns out that the AI tool causes and adverse impact on a protected group, the employer can take steps to reduce the impact or select a different tool to avoid a Title VII violation. *Id.* Questions and Answers #7. The process of developing an AI tool in the first place may produce a variety of comparably effective alternative algorithms. *Id.* An employer’s “failure to adopt a less discriminatory algorithm that was considered during the development process therefore may give rise to liability.” *Id.*

While the use of AI in the workplace saves employers time and money, it is not without risk. Employers should be alert to the AI tool’s potential to adversely impact those who are in the class of persons protected under Title VII. The best practice would be to apply the four-fifths rule to determine whether the AI tool is rejecting a larger percentage of persons protected by Title VII. If that is happening, the employer must either be able to show that the rejection of these candidates based on the AI tool is job related and consistent with business necessity, use a different AI tool, or eliminate the use of AI altogether. Certainly, the risk in continuing to use AI that causes a disparate impact in violation of Title VII, is that the employer may face a large class action lawsuit on behalf of all of the rejected candidates in the protected class.

About the Author

Julie A. Bruch is a partner with *IFMK Law, Ltd.* Her practice concentrates on the defense of governmental entities in civil rights and employment discrimination claims.

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