Session 401 | Our Robot (HR) Overlords – Better than Mankind or Just as Biased?

Over the past decade, artificial intelligence has gone from trusty sci-fi gimmick to trusted everyday tool. From diagnosis engines to traffic predictors, spam filters to face recognition, chatbots to smart homes, AI pervades modern life. Now, AI and its machine-learning techniques are being applied to the employment process. Candidate sourcing, diversity recruiting, résumé screening, video interviewing, skill assessment, engagement tracking, risk assessment, emotional analysis, performance projections … the list of ways to use AI in improving workforce outcomes goes on.

But does this guarantee a reduction in discriminatory bias? After all, an AI system that recommends songs is designed to detect and adapt to the listener’s preferences, giving the listener more of what they favor and less of what they hate – will an AI that recommends employees be any different, or will it just more efficiently learn, and cater to, its human user’s biases? Will AI inevitably entrench systemic discrimination behind a wall of inscrutable code, or can it blaze a virtuous trail forward? And are yesterday’s laws sufficient to police AI, protect employees, and support employers as they adopt these tools of tomorrow? Listen in as a diverse panel of stakeholders - in-house counsel, defense counsel, regulator, and corporate HR strategist – discuss ways to assess AI-driven risk, mitigate bias, and prepare for the myriad emerging regulations aimed at AI in HR.

Moderator:
None

Speakers:
Nicole Elemen, Associate General Counsel - Employment, Roku
Jennifer Kirkwood, Partner - HR Technology, Talent, Data & Automation, IBM
Niloy Ray, Shareholder, Littler Mendelson
Rachel See, Senior Counsel for AI and Algorithmic Bias, Office of EEOC Commissioner Keith Sonderling
The materials submitted for this session include the following five items (each with attachments):

1. *Do Robots Care About Your Civil Rights?* – written by Commissioner Keith Sonderling of the EEOC, provided by his Senior Counsel for AI, panelist Rachel See  
   - attachment: *AI Risk Management Framework*, National Institute of Standards and Technology

2. *New York City Enacts Law that Hinders Use of Automated Tools in Hiring and Promotion Decisions* – co-authored by panelist Niloy Ray  
   - attachment: text of NYC Law 144

3. *California Fair Employment & Housing Council Proposes Sweeping Regulation of Automated Decision-making and Artificial Intelligence in Employment* – co-authored by panelist Niloy Ray  
   - attachment: prior proposed draft of California’s AI regulations

   - attachment: current proposed draft of California’s AI regulations

5. *EEOC Issues Guidance on Artificial Intelligence and Americans with Disabilities Act Considerations* – co-authored by panelist Niloy Ray  
   - attachments: EEOC’s published guidance on AI and the ADA; EEOC’s Tips for Workers re AI and the ADA; and the DOJ’s related AI guidance

This set of materials was compiled specifically for this CLE program. As a whole, these materials are sufficient in substance and citation to serve as a stand-alone instruction tool and general resource on aspects of the issue of AI bias in the hiring process and the application of existing and emerging regulations in that context.

- Commissioner Sonderling’s article succinctly lays out the concerns (both public and regulatory) of the burgeoning use and ubiquity of AI tools within US HR functions.
- The article on NYC Law 144 thoroughly explains this first-in-the-nation law aimed at preventing bias in the use of AI in hiring, and details the law’s requirements, its deficiencies, and the practical next steps corporations should take.
- The article on California’s proposed revisions to the employment discrimination subchapter of the state’s Fair Employment and Housing code similarly breaks down and summarizes these significant revisions, which would regulate AI use in candidate screening and evaluation, and which would extend new forms of liability to employers in our nation’s largest state.
- The follow-up article on California’s proposed AI regulations covers two responsive outcomes to the original proposed revisions. In part, it explains the impact of the Ninth Circuit’s decision in *Raines v. U.S. Healthworks Medical Group* on the breadth of liability envisioned by the proposed AI regulations.
- Finally, the article on the EEOC’s AI-ADA guidance expands the scope of the discourse beyond selection bias, to access-driven discrimination. It also details the EEOC’s recommended best practices when adopting AI tools, which recommendations are a key source of practical guidance right now (in the absence of clarifying case-law and other interpretations of the NYC law and the CA proposal).

Collectively, these five items, and their attachments, supply a wide range of knowledge on emerging AI regulations; summarize two perspectives on practical ways to adopt AI-driven HR tools; create awareness of the numerous likely legal challenges to the use of AI tools; and provide a deep working knowledge of the NYC AI law that goes into effect in January 2023.
New York City Enacts Law that Hinders Use of Automated Tools in Hiring and Promotion Decisions

By Eli Z. Freedberg, Niloy Ray, and Jim Paretti on December 28, 2021

New York City marked the end of 2021 by enacting a law that will make it challenging, if not infeasible, to use a broad swath of algorithmic, computerized tools to review, select, rank or eliminate candidates for employment or promotion. Local Law Int. No. 1894-A, which takes effect on January 1, 2023, regulates the use of "automated employment decision tools" in hiring and promotion decisions within the city. The law, which applies to employers and employment agencies alike, requires that:

- any such tool undergo an annual, independent "bias audit," with a publicly available summary;
- employers provide each candidate (internal or external) with 10 business days’ notice prior to being subject to the tool;
- the notice list the “job qualifications and characteristics” used by the tool to make its assessment;
- the sources and types of data used by the tool, as well as the applicable data-retention policy, be made available publicly (or upon written request from the candidate); and
- candidates be able to opt out and request an alternative selection process or accommodation.

The law establishes civil penalties of $500 to $1,500 for each violation of any of these requirements. It empowers New York City’s corporation counsel (or its designee) to enforce the provisions of this law by allowing it to file suit in any court of competent jurisdiction. In addition, claims can be filed with the Office of Administrative Trials and Hearings (and other authorized agencies) to seek the recovery of these civil penalties. In addition, the law provides applicants and employees a private right of action to enforce its provisions.

What is an automated employment decision tool?

The law applies only to employers that use “automated employment decision tools” in screening candidates for hiring or promotion. The scope of this term is broad and encompasses any process that uses “machine learning, statistical modeling, data analytics, or artificial intelligence” to generate a “score, classification or recommendation” that is used to at least substantially assist (if not replace) human discretion in screening candidates for employment or promotion within New York City. This likely covers any computerized tool or algorithm-based software program used to identify, select, evaluate, or recruit candidates for any employment...
position. It may thus include any data-driven tools used to review résumés, conduct skills testing, rank applicants, “chat” with applicants, conduct behavioral analysis of prospective hires, assess employee performance and productivity, monitor field-based or remote employees, or determine compensation and promotions. Tools that are used to identify employees for termination or reductions in force, however, are not explicitly within the defined scope.

**What is a “bias audit”?**

In order to make use of an “automated employment decision tool” employers must retain an “independent auditor” to assess whether the tool’s selection criteria result in disparate impact based on race, ethnicity or sex. The law provides no details on what this “bias audit” is supposed to examine, how it is expected to account for all potential jobs and job classes for which an organization might hire in the upcoming year, how its findings are to be utilized, or whether the tool must “pass” such an audit (and if so, what the passing criteria are). The only requirement is that such an audit be conducted annually by a third party and a summary of its results be published on the employer’s or employment agency’s website along with the “distribution date” of the tool. It is also unclear whether employers that use third parties to screen candidates will be required to post those contractors’ “bias audits” on the employer’s own website.

**Who must receive notice?**

The law requires that each resident of New York City “who has applied” for a position receive notice if their application will be subject to an automated tool as part of the decision-making process. It is unclear whether this excludes passively identified candidates who have taken no volitional step to be considered for a specific position; if not, this would be especially thorny for organizations that engage in identifying potential candidates from publicly available information (or based on an individual’s prior application for a different position).

It appears that non-residents of New York City are not required to receive this notice even when applying to a city-based position. Organizations will therefore need to ensure that they are capturing adequate information on the residence of each applicant, while ensuring that their attempt to seek this information is not itself perceived as leading to discriminatory outcomes.

**When must notice issue?**

Local Law Int. 1894-A requires that notice be issued on an individual basis at least 10 business days before the use of a tool. It is unclear whether this means notice must be issued before each use of an automated tool with respect to an individual’s application, whether the use of multiple automated tools requires a separate notice process with respect to each tool, or what counts as effective service of notice (including whether an acknowledgement of receipt is necessary to set the 10-day clock ticking).

**What notice must be provided?**

In addition to informing recipients that their application will be subject to an automated tool, the notice must identify the specific job qualifications and characteristics that the tool will use in making its assessment. This component is troublesome because the sophisticated computerized programs and other tools in this space,
particularly those using machine learning and other forms of artificial intelligence, are by design constantly evolving, making it impractical to know what criteria the tool is using at any given point in time to assess a candidate. Given the complexity of this continuous “learning” process, these programs typically do not retain a snapshot or other record of each step in its evolution. Nor can their programmers fill the gap, because these tools are designed to evolve in a self-determined manner without the need for human intervention.

The notice must also inform candidates of their right to request an alternative selection process or accommodation. The law is silent, however, on key aspects of this requirement: whether each opt-out request must be granted or whether organizations have any discretion in the matter; what suffices as an alternative selection process or accommodation; who selects the alternative process or accommodation to be used; when or how quickly the alternative process is provided; what consideration may be given to business or job-related necessity for the use of specific computerized tools such as testing tools; and how disputes with respect to the opt-out process will be resolved. Note also that this requirement will likely slow down the hiring process, as each opt-out request is addressed and completed, and the impact on operational efficiency, often the chief driver of the adoption and use of these computerized tools, could be significant.

Finally, the law requires that employers (and employment agencies) retain “information about the type of data collected” for the tool, the source of that data, and the organization’s “data retention policy.” The law requires employers to either disclose this information on the organization’s website or provide the information to applicants within 30 days of a written request. (Employers do not need to disclose this information if disclosure would violate a local, state, or federal law or interfere with a law enforcement investigation.)

What are the penalties for non-compliance?

Any “person” who violates this law is “liable for a civil penalty” of “not more than $500 for a first violation and each additional violation occurring on the first day of the first violation.” Each subsequent violation occurring after the first day will result in a civil penalty of “at least $500 and not more than $1,500.” Each failure to meet applicant notice requirements constitutes a separate violation. Failure to meet the “bias audit” requirements results in separate, daily violations. While it is unclear from the text of the law, we expect that “person” is strictly limited to organizational entities as opposed to natural persons.

Who has standing to enforce this law?

As noted above, the city’s corporation counsel has the power to enforce the law by filing a claim in court. Moreover, since the provision amends the New York City Human Rights Law, it appears that the New York City Division of Human Rights (even though it is not mentioned in the body of the law) has the power to file claims before the city’s Office of Administrative Trials and Hearings to seek the recovery of these civil penalties. In addition, applicants and employees can bring suit themselves in any court of competent jurisdiction.

Next Steps
It is likely that the New York City Division of Human Rights will promulgate regulations to provide clarification on employers’ obligations under this law. It is not clear when those regulations will be published, however, nor is it clear how long covered employers and employment agencies will have to provide comments to those regulations. In the meanwhile, organizations may consider developing a taxonomy of AI-driven tools used for hiring and promotion decisions, and working with their vendors and technology stakeholders to develop means for independent audits that are sufficiently tied to the jobs and job classes for which the organization anticipates hiring. Talent acquisition functions may seek to prioritize development of a notice mechanism and opt-out protocol and prepare for the drag that this additional process layer will create on the hiring flow. To avoid complications relating to the residency requirement, organizations should consider issuing notice to all applicants for New York City openings and promotions. Finally, organizations may want to update their data-retention policies to account for the additional retention requirements and transparency expectation built into Local Law Int. 1894-A.

Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.
A LOCAL LAW

To amend the administrative code of the city of New York, in relation to automated employment decision tools

Be it enacted by the Council as follows:

Section 1. Chapter 5 of title 20 of the administrative code of the city of New York is amended by adding a new subchapter 25 to read as follows:

Subchapter 25

Automated Employment Decision Tools

§ 20-870 Definitions. For the purposes of this subchapter, the following terms have the following meanings:

Automated employment decision tool. The term “automated employment decision tool” means any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons. The term “automated employment decision tool” does not include a tool that does not automate, support, substantially assist or replace discretionary decision-making processes and that does not materially impact natural
persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

Bias audit. The term “bias audit” means an impartial evaluation by an independent auditor. Such bias audit shall include but not be limited to the testing of an automated employment decision tool to assess the tool’s disparate impact on persons of any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code as specified in part 1602.7 of title 29 of the code of federal regulations.

Employment decision. The term “employment decision” means to screen candidates for employment or employees for promotion within the city.

§ 20-871 Requirements for automated employment decision tools. a. In the city, it shall be unlawful for an employer or an employment agency to use an automated employment decision tool to screen a candidate or employee for an employment decision unless:

1. Such tool has been the subject of a bias audit conducted no more than one year prior to the use of such tool; and

2. A summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies has been made publicly available on the website of the employer or employment agency prior to the use of such tool.

b. Notices required. In the city, any employer or employment agency that uses an automated employment decision tool to screen an employee or a candidate who has applied for a position for an employment decision shall notify each such employee or candidate who resides in the city of the following:
1. That an automated employment decision tool will be used in connection with the assessment or evaluation of such employee or candidate that resides in the city. Such notice shall be made no less than ten business days before such use and allow a candidate to request an alternative selection process or accommodation;

2. The job qualifications and characteristics that such automated employment decision tool will use in the assessment of such candidate or employee. Such notice shall be made no less than 10 business days before such use; and

3. If not disclosed on the employer or employment agency’s website, information about the type of data collected for the automated employment decision tool, the source of such data and the employer or employment agency’s data retention policy shall be available upon written request by a candidate or employee. Such information shall be provided within 30 days of the written request. Information pursuant to this section shall not be disclosed where such disclosure would violate local, state, or federal law, or interfere with a law enforcement investigation.

§ 20-872 Penalties. a. Any person that violates any provision of this subchapter or any rule promulgated pursuant to this subchapter is liable for a civil penalty of not more than $500 for a first violation and each additional violation occurring on the same day as the first violation, and not less than $500 nor more than $1,500 for each subsequent violation.

b. Each day on which an automated employment decision tool is used in violation of this section shall give rise to a separate violation of subdivision a of section 20-871.

c. Failure to provide any notice to a candidate or an employee in violation of paragraphs 1, 2 or 3 of subdivision b of section 20-871 shall constitute a separate violation.
d. A proceeding to recover any civil penalty authorized by this subchapter is returnable to any tribunal established within the office of administrative trials and hearings or within any agency of the city designated to conduct such proceedings.

§ 20-873 Enforcement. The corporation counsel or such other persons designated by the corporation counsel on behalf of the department may initiate in any court of competent jurisdiction any action or proceeding that may be appropriate or necessary for correction of any violation issued pursuant this subchapter, including mandating compliance with the provisions of this chapter or such other relief as may be appropriate.

§ 20-874 Construction. The provisions of this subchapter shall not be construed to limit any right of any candidate or employee for an employment decision to bring a civil action in any court of competent jurisdiction, or to limit the authority of the commission on human rights to enforce the provisions of title 8, in accordance with law.

§ 2. This local law takes effect on January 1, 2023.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, s.s.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on November 10, 2021 and returned unsigned by the Mayor on December 13, 2021.

MICHAEL M. McSWEENEY, City Clerk, Clerk of the Council.

CERTIFICATION OF CORPORATION COUNSEL

I hereby certify that the form of the enclosed local law (Local Law No. 144 of 2021, Council Int. No. 1894-A of 2020) to be filed with the Secretary of State contains the correct text of the local law passed by the New York City Council, presented to the Mayor and neither approved nor disapproved within thirty days thereafter.

STEPHEN LOUIS, Acting Corporation Counsel.
California Fair Employment & Housing Council Proposes Sweeping Regulation of Automated Decision-making and Artificial Intelligence in Employment

By Jim Paretti, Niloy Ray, Allan King, and Alice Wang on March 17, 2022

On March 15, 2022, the California Fair Employment & Housing Council released draft revisions to the state’s employment non-discrimination laws that would dramatically expand the liability exposure and obligations of employers and third-party vendors that use, sell, or administer employment-screening tools or services that embody artificial intelligence, machine learning, or other data-driven statistical processes to automate decision-making.

As proposed, the regulations would define an “automated-decision system,” or ADS, in extremely broad terms: any “computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants.” This includes, without limitation:

- algorithms that screen resumes for particular terms or patterns;
- algorithms that employ face and/or voice recognition to analyze facial expressions, word choices, and voices;
- algorithms that employ gamified testing that include questions, puzzles, or other challenges used to make predictive assessments about an employee or applicant, or to measure characteristics including but not limited to dexterity, reaction time, or other physical or mental abilities or characteristics; and
- algorithms that employ online tests meant to measure personality traits, aptitudes, cognitive abilities, and/or cultural fit.

The proposal goes on to specify that the use of ADS in a manner that is intentionally discriminatory, or that is facially neutral but nonetheless results in discriminatory impact, is unlawful under state law.
The draft regulations provide that liability extends to third parties that act on behalf of an employer by providing services relating to various facets of employment, including recruiting, applicant screening, hiring, payroll, benefit administration, etc., if they adversely affect the terms or conditions of employment. These third parties would be considered “agents” of the employer (and thereby, “also an employer” of the aggrieved party) and would thus be directly liable for claims of discrimination. The regulations likewise expand the definition of “employment agency” to include any person who provides ADS or ADS-related services—essentially making the vendors and administrators of employment-screening tools subject to the non-discrimination law. The proposed regulation would also create “aiding and abetting” liability for anyone engaged in “the advertisement, sale, provision, or use” of an ADS if the end use of that ADS results in unlawful discrimination.

Finally, the regulations would expand recordkeeping requirements under current law from two years to four years, and would require the retention, by the employer and all other covered third-party entities, of all data used in the process of developing or applying machine-learning algorithms that are utilized as part of an ADS. This would include datasets used to train the algorithm; data provided by individual applicants or employees; data about individual applicants and employees that have been analyzed by the algorithm; and data produced from the application of an ADS operation. The revisions would also require all third parties engaged in “the advertisement, sale, provision, or use” of ADS tools to preserve “the assessment criteria used by the [ADS] for each such employer or covered entity to whom the [ADS] is provided.”

The Council is slated to discuss these proposed regulations in a public (virtual) meeting scheduled for 3:00 p.m. (PDT) on Friday, March 25, 2022. If approved, they will be open for public comment. Ultimately, the Council may approve the draft as proposed, or presumably make modifications to the proposal based on comments received. What is clear, however, is that the Golden State is poised to regulate the use of artificial intelligence and machine learning in employment decision-making aggressively, and to extend liability to vendors and those who provide products or services to assist employers in doing so.

Littler’s Workplace Policy Institute will continue to monitor and keep readers apprised of developments.

**Update:** There have been two noteworthy developments since the California Fair Employment & Housing Council released these draft revisions to the state’s employment non-discrimination laws. Click [here](#) for more information on this topic.

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Two Developments Could Impact California’s Proposed Regulations Governing AI and Automated Decision-making

By Alice Wang, Niloy Ray, Allan King, and Jim Paretti on April 4, 2022

Two noteworthy developments have occurred since the California Fair Employment & Housing Council released draft revisions to the state’s employment non-discrimination laws on March 15, 2022 that relate to the nascent law surrounding the use of artificial intelligence, machine learning, and other data-driven statistical processes to automate decision-making in the employment context.

First, on March 16, 2022, in Raines v. U.S. Healthworks Medical Group, the United States Court of Appeals for the Ninth Circuit certified to the Supreme Court of California the following question: Does California’s Fair Employment and Housing Act, which defines employer to include “any person acting as an agent of an employer,” permit a business entity acting as an agent of an employer to be held directly liable for employment discrimination?

The plaintiffs in Raines consist of a class of current and former job applicants who seek to hold defendants, who were providers of pre-employment medical screenings, liable for asking allegedly invasive and impermissible questions during medical screening exams. “The crucial question of state law is whether the Fair Employment and Housing Act (FEHA) allows employees to hold a business entity directly liable for unlawful conduct when the business entity acted only as the agent of an employer, rather than as an employer itself.”

The district court ruled that plaintiffs had adequately alleged that defendants were the agents of prospective employers, but that FEHA does not impose direct liability on agents.

As the Ninth Circuit aptly explained, “Whether FEHA’s definition of the term ‘employer’ includes a business entity acting as an employer’s agent is an unresolved question of law with significant public policy implications. California has millions of employees who could be impacted by a decision defining the scope of liability for business entities acting as agents of their employers.” In sum, the outcome of this appeal could bear directly upon the sweep of liability for third-party agents utilizing automated-decision systems to assist employers in decision-making processes.
Second, on March 25, 2022, the Fair Employment and Housing Council conducted a remote public workshop and review session, which included the working draft of employment regulations regarding automated-decision systems. The Council indicated during the session that the purpose of the draft regulations is to address the demonstrated potential of artificial intelligence, including algorithms, to unlawfully discriminate in at least the housing and employment contexts. Among other highlights, the Council made clear that it intends to encompass claims that could be brought under intentional discrimination and disparate impact theories within the ambit of the regulations. The Council also indicated that standard defenses to any allegation of employment discrimination, such as business necessity, would still apply to any revised regulations, but the Council is uncertain at this early juncture whether any new defenses would apply. Finally, the Council declined to set forth a timeframe for adopting the draft regulations, but rather emphasized that they are part of a pre-rulemaking “brainstorming” effort, and that they are not fully formed, nor is their implementation imminent.

Thus, while California largely remains in a “wait and see” position pending the outcome in Raines and as the Council finalizes its proposed regulations, what is clear is that it is simply a matter of time before employers need to prepare for heightened regulations regarding their use of artificial intelligence and machine learning—and potentially the engagement of vendors who deploy them—in their employment decision-making processes.

1 Raines v. U.S. Healthworks Medical Group, No. 21-55229 (9th Cir. Mar. 16, 2022).

2 Cal. Gov’t Code § 12926(d).

3 Raines, slip op. at 5.

4 Id. at 8.

5 Id.

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Civil Rights Council
Proposed Modifications to Employment Regulations
Regarding Automated-Decision Systems

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment

TEXT

Text proposed to be added for the 45-day comment period is displayed in underline type.
Text proposed to be deleted for the 45-day comment period is displayed in strikethrough type.

Article 1. General Matters

§ 11008. Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

(a) “Agent.” Any person acting on behalf of an employer, directly or indirectly, including but not limited to a third party that provides services related to making hiring or employment decisions, including but not limited to decisions regarding recruiting, applicant screening, hiring, payroll, benefit administration, evaluations and/or decision-making regarding requests for workplace leaves of absence or accommodations, or the administration of automated-decision systems for an employer’s use in making hiring or employment decisions that could result in the denial of employment or otherwise adversely affect the terms, conditions, benefits, or privileges of employment.

(b) “Applicant.” Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, “Applicant” is also an individual who can prove that he or she has been deterred from applying for a job by an employer’s or other covered entity’s alleged discriminatory practice. “Applicant” does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

(c) “Apprenticeship Training Program.” Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(d) “Automated-Decision System.” A computational process, including one derived from machine-learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants.

(1) Employers may use Automated-Decision Systems to perform tasks including, but not limited to, the following:

(A) Directing job advertisements or other recruiting materials to targeted groups;

(B) Screening resumes for particular terms or patterns;

(C) Analyzing facial expressions, word choices, and voices in online interviews;
(D) Through the use of computer-based tests that include questions, puzzles, games, or other challenges, making predictive assessments about an employee or applicant, or measuring skills, abilities, and/or other characteristics including but not limited to dexterity, reaction-time, or other physical or mental abilities or characteristics; and/or

(E) Through the use of tests or questionnaires measuring personality traits, aptitudes, cognitive abilities, and/or cultural fit.

(2) “Algorithm” means a process or set of rules or instructions, typically used by a computer, to make a calculation, solve a problem, or render a decision.

(A) In the employment context, human resources software and applications use algorithms to allow employers process data to evaluate, rate, and make other decisions about job applicants and employees.

(B) Software or applications that include algorithmic decision-making tools may be used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

(i) “Software” means information technology programs or procedures that provide instructions to a computer on how to perform a given task or function.

(ii) “Application” means a type of software designed to perform or to help the user perform a specific task or tasks.

(3) “Artificial Intelligence” means a machine learning system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence may include machine learning.

(A) Using artificial intelligence in the employment context has typically meant that the developer relies partly on the computer’s own analysis of data to determine which criteria to use when making employment decisions.

(4) “Automated-Decision System Data” means all data used in the process of developing and/or applying machine-learning, algorithms, and/or artificial intelligence that is utilized as part of an automated-decision system, including but not limited to the following:

(A) Datasets used to train a machine-learning algorithm utilized as part of an automated-decision system;

(B) Data provided by individual applicants or employees, or that includes information about individual applicants or employees that has been analyzed by an automated-decision system;

(C) Data produced from the application of an automated-decision system operation.

(5) “Machine Learning” means an application of Artificial Intelligence that is characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed.

(c)(e) “Employee.” Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) “Employee” does not include an independent contractor as defined in Labor Code section 3353.

(2) “Employee” does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.
(3) “Employee” does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

(d)(f) “Employer.” Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) “Regularly employing” means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing five or more employees on a regular basis.

(A) “Regular basis” refers to the nature of a business that is recurring, rather than constant. For example, in an industry that typically has a three-month season during a calendar year, an employer that employs five or more employees during that season “regularly employs” the requisite number of employees. Thus, to be covered by the Act, an employer need not have five or more employees working every day throughout the year or have five or more employees at the time of the allegedly unlawful conduct, so long as at least five employees are regularly on its payroll during the season.

(B) Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. For example, for counting purposes, an employer has five employees when three work every day and two work alternate days to fill one position, and there are no more than four employees working on any working day. Employees on paid or unpaid leave, including California Family Rights Act (CFRA), parenting leave, pregnancy leave, leave of absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.

(C) Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.

(2) The means for counting five employees described in this subsection also applies to counting employees for purposes of establishing coverage under Government Code sections 12945.2, 12945.6, and 12950.1.

(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) “Employer” includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) “Employer” includes any non-profit corporation or non-profit association other than that defined in subsection (5).
“Employer or Other Covered Entity.” Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

“Employment Agency.” Any person undertaking for compensation services including identifying, screening, and/or procuring job applicants, employees or opportunities to work. Employment Agency includes, but is not limited to, any person that provides automated-decision systems to an employer, provides services involving the administration or use of those systems on an employer’s behalf, or otherwise acts on the employer’s behalf using automated-decision systems.

“Employment Benefit.” Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment” or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, “employment benefit” includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) “Employment benefit” also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) “Provision of a discrimination-free workplace” is a provision of a workplace free of harassment, as defined in section 11019(b).

“Employment Practice.” Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual’s employment benefits or consideration for an employment benefit.

“Labor Organization.” Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

“Person performing services pursuant to a contract.” A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer’s work.

“Proxy.” A facially-neutral characteristic that is correlated with having one or more characteristics protected by the Act.

“Unpaid interns and volunteers.” For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.


(a) Unlawful Practices and Individual Relief. In allegations of employment discrimination, a finding that an employer or other covered entity has engaged in an unlawful employment practice is not dependent upon a showing of individual back pay or other compensable liability. Upon a finding that an employer or other covered entity has engaged in an unlawful employment practice and on order of appropriate relief, a separable and separate showing may be made that the complainant, complainants or class of complainants is entitled to individual or personal relief including, but not limited to, hiring, reinstatement or upgrading, back pay, restoration to membership in a labor organization, or other relief in furtherance of the purpose of the Act.

(b) Liability of Employers. In view of the common law theory of respondeat superior and its codification in California Civil Code section 2338, an employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the employer or other covered entity or, as defined in section 11019(b), for the discriminatory actions of its employees where it is demonstrated that, as a result of any such discriminatory action, an applicant or employee has suffered a loss of or has been denied an employment benefit.

(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply to other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2. A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

(d) An applicant or employee who is a victim of human trafficking, as that term is used in Civil Code section 52.5 and Penal Code section 236.1, may have a separate right of action under the Fair Employment and Housing Act if he or she alleges discrimination on a basis protected by the Act. Nothing in this regulation shall limit any claims an individual may have under other California laws prohibiting human trafficking.

(e) It is unlawful for anyone to discriminate against a person who serves in an unpaid internship or any other limited-duration program to provide unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any basis protected by the Act.

(f) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of one or more characteristics protected by the Act, unless the qualification standards, employment tests, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


§ 11013. Recordkeeping.

Employers and other covered entities are required to maintain certain relevant records of personnel actions. Each employer or other covered entity subject to this section shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent California Employer Information Report (CEIR) or appropriate substitute and applicant identification records for each such unit and shall make them available upon request to any officer, agent, or employee of the Council or Department.
(a) California Employer Information Report. All employers regularly employing one hundred or more employees, apprenticeship programs with five or more apprentices and at least one sponsoring employer with 25 or more employees and at least one sponsoring union, which operates a hiring hall or has 25 or more members, and labor organizations with 100 or more members shall prepare an annual CEIR in conformity with guidelines on reporting issued by the Department.

(1) Substituting Federal Reports. An employer or other covered entity may utilize an appropriate federal report in lieu of the CEIR. Appropriate federal reports include the EEOC’s EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports and appropriate reports filed with the Office of Federal Contract Compliance Programs (OFCCP).

(2) Sample Forms and Guidelines. Appropriate copies of sample forms and applicable guidelines shall be available to any employer or other covered entity from the Department of Fair Employment and Housing.

(3) Special Reporting. If an employer or other covered entity is engaged in activities for which the standard reporting criteria are not appropriate, special reporting procedures may be required. In such case, the employer or other covered entity should so advise the Department and submit a specific proposal for an alternative reporting system prior to the date on which the report should be prepared. If it is claimed that the preparation of the report would create undue hardship, an employer may apply to the Department for an exemption from the requirements of this section.

(4) Remedy for Failure to Prepare or Make Reports Available. Upon application by the FEHC or DFEH for judicial relief, any employer failing or refusing to prepare or to make available reports as required under this section may be compelled to do so by a Superior Court of California.

(5) Penalties for False Statements. The willful making of false statements on a CEIR or other required record is a violation of California Government Code section 12976, and is punishable by fine or imprisonment as set forth therein.

(b) Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or non-discrimination plan.

(1) For recordkeeping purposes only, “applicant” means any individual who files a formal application or, where an employer or other covered entity does not provide application forms, any individual who otherwise indicates to the employer or other covered entity a specific desire to be considered for employment. An individual who simply appears to make an informal inquiry or who files an unsolicited resume upon which no employment action is taken is not an applicant.

(2) An employer or other covered entity shall either retain the original documents used to identify applicants, or keep statistical summaries of the collected information.

(3) Applicant records shall be preserved for the time period set forth in subdivisions (c)(1) and (2) below.

(c) Preservation of Records. Any personnel or other employment records made or kept by any employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee (including all applications, personnel, membership or employment referral records or files and machine-learning data) shall be preserved by the employer or other covered entity for a period of two (2) years from the date of the making of the record or the date of the personnel action involved, whichever occurs later. However, the State Personnel Board shall maintain such records and files for a period of one year.
(1) California Employment Information Report. Every employer subject to subsection (a) above shall
preserve for a period of two years from the date of preparation of the CEIR such records as were necessary
for completion of the CEIR.

(2) Applicant Identification Records. Every employer subject to subsection (b) above shall preserve
applicant identification information for a period of two years from the date it was received.

(3) Separate Records on Sex, Race, and National Origin. Records as to the sex, race, or national origin of
any individual accepted for employment shall be kept separately from the employee’s main personnel file
or other records available to those responsible for personnel decisions. For example, such records could be
kept as part of an automatic data processing system in the payroll department.

(4) After Filing of Complaint. Upon notice of or knowledge that a complaint has been filed against it under
the Act, any respondent, including the State Personnel Board, shall maintain and preserve any and all
relevant records and files until such complaint is fully and finally disposed of and all appeals from related
proceedings have concluded.

(A) For purposes of this subsection, “related proceedings” shall include any action brought in Superior
Court pursuant to section 12965 of the Government Code.

(B) The term “records and files relevant to the complaint” shall include, but is not limited to, personnel or
employment records relating to the complaining party and to all other employees holding similar positions
to that held or sought by the complainant at the facility or other relevant subdivision where the
discriminatory practice allegedly occurred. The term also includes machine-learning data as well as
applications, forms or test papers completed by the complainant and by all other candidates for the same
position at that facility or other relevant subdivision where the employment practice occurred. All relevant
records made or kept pursuant to subsections (a) and (b) above shall also be preserved.

(C) The term “fully and finally disposed of and all appeals from related proceedings have concluded” refers
to the expiration of the statutory period within which a complainant or respondent may bring an action in
Superior Court, or an agreement has been reached by the parties whereby no further judicial review is
available to any of the parties, or a final order has been entered by a body of judicial review for which the
time for filing a notice of appeal has expired.

(5) Any person who engages in the advertisement, sale, provision, or use of a selection tool, including but
not limited to an automated-decision system, to an employer or other covered entity must maintain records
of the assessment criteria used by the automated-decision system for each such employer or other covered
entity to whom the automated-decision system is provided. The assessment criteria must be maintained for
at least four years following the last date on which the automated-decision system was used by an employer
or covered entity.

(d) Posting of Act. Every employer or other covered entity shall post in a conspicuous place or places on its
premises a notice to be prepared and distributed by the Department, which sets forth excerpts of the Act and such
relevant information the Department deems necessary to explain the Act. Such employers employing significant
numbers, no less than 10% of their work force, of non-English-speaking persons (e.g., Chinese or Spanish speaking)
at any facility or establishment must also post in the appropriate foreign language at each such facility or
establishment. Such notices may be obtained from the Department.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12946, Government
Code.
Article 2. Particular Employment Practices

§ 11015. Definitions.

(a) “Recruitment.” The practice of any employer or other covered entity that has the purpose or effect of informing any individual about an employment opportunity, or assisting an individual to apply for employment, an activity leading to employment, membership in a labor organization, acceptance in an apprenticeship training program, or referral by an employment agency.

(b) “Date of Determination to Hire.” The time at which an employer or other covered entity has made an offer of employment to the individual.

(c) “Pre-employment Inquiry.” Any oral or written request made by an employer or other covered entity for information concerning the qualifications of an applicant for employment or for entry into an activity leading to employment.

(d) “Application.” Except for recordkeeping purposes, any writing or other device, including but not limited to an automated-decision system, used by an employer or other covered entity to make a pre-employment inquiry or submitted to an employer or other covered entity for the purpose of seeking consideration for employment.

(e) “Placement.” Any status, category, rank, level, location, department, division, program, duty or group of duties, or any other similar classification or position for which an employee can be selected or to which an employee can be assigned by any employment practice. Employment practices that can determine placement in this way include, but are not limited to: hiring, discharge, promotion, transfer, callback, or other change of classification or position; inclusion in membership in any group or organization; any referral assignment to any place, unit, division, status or type of work.


§ 11016. Pre-Employment Practices

(a) Recruitment.

(1) Duty Not to Discriminate. Any employer or other covered entity engaged in recruitment activity shall recruit in a non-discriminatory manner. However, nothing in these regulations shall preclude affirmative efforts to utilize recruitment practices to attract an individual who is a member of an underrepresented protected class covered by the Act.

(2) Prohibited Recruitment Practices. An employer or other covered entity shall not, unless pursuant to a permissible defense, engage in any recruitment activity, including but not limited to practices accomplished through the use of an automated-decision system, that:

(A) Restricts, excludes, or classifies individuals on a basis enumerated in the Act;

(B) Expresses a preference for individuals on a basis enumerated in the Act; or

(C) Communicates or uses advertising methods to communicate the availability of employment benefits in a manner intended to discriminate on a basis enumerated in the Act.

(b) Pre-employment Inquiries.

(1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries that do not discriminate on a basis enumerated in the Act. Inquiries, including but not limited to
inquiries made through the use of an automated-decision system, that directly or indirectly identify an individual on a basis enumerated in the Act are unlawful unless made pursuant to a permissible defense.

(A) An employer may make, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if the inquiry or request for information complies with the provisions of sections 11067, 11070 and 11071 of these regulations.

(B) Pre-employment inquiries regarding an applicant’s availability for work on certain days and times shall not be used to ascertain the applicant’s religious creed, disability, or medical condition. Such inquiries must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds, in language such as: “Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?” or “Other than time off for reasons related to your religion, a disability, or a medical condition, are you available to work the proposed schedule?”

(2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant-flow and other recordkeeping data for statistical purposes as provided in section 11013(b) of these regulations or in other provisions of state and federal law.

(c) Applications.

(1) Application Forms. When employers or other covered entities provide, accept, and consider application forms in the normal course of business, in so doing they shall not discriminate on a basis enumerated in the Act.

(2) Photographs. Photographs shall not be required as part of an application unless pursuant to a permissible defense.

(3) Schedule Information. An application’s request for information related to schedule and availability for work shall not be used to ascertain the applicant’s religious creed, disability, or medical condition. Such requests must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds in language such as: “Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?” or “Other than time off for reasons related to your religion, a disability, or a medical condition, are you available to work the proposed schedule?”

(A) The use of online application technology that limits or screens out applicants based on their schedule may have a disparate impact on applicants based on their religious creed, disability, or medical condition. Such a practice is unlawful unless job-related and consistent with business necessity and the online application technology includes a mechanism for the applicant to request an accommodation.

(4) Separation or Coding. Application forms shall not be separated or coded, manually or electronically, or otherwise treated so as to identify individuals on a basis enumerated in the Act unless pursuant to a permissible defense or for recordkeeping or statistical purposes.

(5) Automated-Decision Systems. The use of and reliance upon automated-decision systems that limit or screen out, or tend to limit or screen out, applicants based on one or more characteristics protected by the Act, or proxies for one or more characteristics protected by the Act, may constitute unlawful disparate treatment or disparate impact. For instance, an automated-decision system that measures an applicant’s reaction time may unlawfully screen out individuals with certain disabilities. Unless an affirmative defense applies (e.g., an employer demonstrates that a quick reaction time while using an electronic device is job-related and consistent with business necessity), actions that are based on decisions made or facilitated by automated-decision systems may constitute unlawful discrimination under the Act.
(d) **Interviews or Other Screening of Applicants.** Personal interviews or other screening of applicants shall be free of discrimination. Notwithstanding any internal safeguards taken to secure a discrimination-free atmosphere in interviews or other screening of applicants, the entire interview or other screening process is subject to review for adverse impact on individuals on a basis enumerated in the Act.

1. **Automated-Decision Systems.** The use of and reliance upon automated-decision systems that limit or screen out, or tend to limit or screen out, applicants based on one or more characteristics protected by the Act or proxies for one or more characteristics protected by the Act, may constitute unlawful disparate treatment or disparate impact. For instance, an automated-decision system that analyzes an applicant's tone of voice, facial expressions or other physical characteristics or behavior may unlawfully screen out individuals based on race, national origin, gender, or a number of other protected characteristics. Unless an affirmative defense applies, actions that are based on decisions made or facilitated by automated-decision systems may constitute unlawful discrimination under the Act.


§ 11017. Employee Selection.

(a) **Selection and Testing.** Any policy or practice of an employer or other covered entity that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)). The Council herein adopts the Uniform Guidelines on Employee Selection Procedures promulgated by various federal agencies, including the EEOC and Department of Labor. [29 C.F.R. 1607 (1978)].

(b) **Placement.** Placements that are less desirable in terms of location, hours or other working conditions are unlawful where such assignments segregate, or otherwise discriminate against individuals on a basis enumerated in the Act, unless otherwise made pursuant to a permissible defense to employment discrimination. An assignment labeled or otherwise deemed to be “protective” of a category of persons on a basis enumerated in the Act is unlawful unless made pursuant to a permissible defense. (See also section 11041 regarding permissible transfers on account of pregnancy by employees not covered under Title VII of the federal Civil Rights Act of 1964.)

(c) **Promotion and Transfer.** An employer or other covered entity shall not restrict information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the Act.

1. **Requests for Transfer or Promotion.** An employer or other covered entity who considers bids or other requests for promotion or transfer shall do so in a manner that does not discriminate against individuals on a basis enumerated in the Act, unless pursuant to a permissible defense.

2. **Training.** Where training that may make an employee eligible for promotion and/or transfer is made available, it shall be made available in a manner that does not discriminate against individuals on a basis enumerated in the Act.

3. **No-Transfer Policies.** Where an employment practice has operated in the past to segregate employees on a basis enumerated in the Act, a no-transfer policy or other practice that has the effect of maintaining a continued segregated pattern is unlawful.

(d) **Specific Practices.**

1. **Criminal Records.** See Section 11017.1.
(2) Height Standards. Height standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(3) Weight Standards. Weight standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(e) Permissible Selection Devices. A testing device, automated-decision system, or other means of selection that is facially neutral, but that has an adverse impact (as defined in the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)).


(a) Except in the circumstances addressed in subdivisions (a)(1) - (4) below, employers and other covered entities (“employers” for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check, or internet searches, or through the use of an automated-decision system, directed at discovering criminal history, until after a conditional employment offer has been made to the applicant. Employers who violate the prohibition on inquiring about criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee’s pre-conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions, including denial of the position conditionally offered. The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subdivisions (c) and (e) - (i) of this regulation):

1. If the position is one for which a state or local agency is otherwise required by law to conduct a conviction history background check;

2. If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

3. If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or

4. If the position is one that an employer or an employer’s agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Security Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).

(b) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

1. A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker’s inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker’s criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the
extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(2) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subdivision (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.

(3) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subdivisions (a) through (d), unless the specific position is exempted pursuant to subdivisions (a)(1)- (4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subdivisions (a)(1) - (4).

(4) For purposes of section 11017.1 of these regulations only:

(A) “Applicant” includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment during the period of time the employer undertakes a post-conditional offer review and consideration of criminal history. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an “applicant” by working before undertaking a post-conditional offer review of the individual’s criminal history.

(B) “Employer” includes a labor contractor and a client employer.

(C) “Client employer” means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(D) “Labor contractor” means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer’s usual course of business. This definition is not intended to include Farm Labor Contractors.

(E) “Hiring hall” means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.

(F) “Pool or availability list” means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.

(c) Consideration of Criminal History after a Conditional Offer of Employment Has Been Made. Employers in California are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history both after a conditional offer has been made and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on his or
her own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 (for hiring decisions));

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952);

(A) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, it is permissible to consider these programs as evidence of rehabilitation or mitigating circumstances after a conditional offer has been made if offered by the applicant as evidence of rehabilitation or mitigating circumstances.

(B) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, until a pretrial or post-trial diversion program is completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, employers may still consider the conviction or pending charges themselves after a conditional offer is made.

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id.);

(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) In addition to the limitations provided in subdivisions (c)(1)-(5), employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).

(7) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(d) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant’s Conviction History.

(1) If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant’s conviction history, the employer must first make an individualized assessment of whether the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subdivision (g) of this section that is used to determine whether the criminal conviction history is job-related and consistent with business necessity. The individualized assessment needs to include, at a minimum, consideration of the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) If, after conducting an individualized assessment, the employer makes a preliminary decision that the applicant’s conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the
applicant may, but is not required to, justify or explain the employer’s reasoning for making the decision. However, the notice to the applicant must include all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;

(B) A copy of the conviction history report utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports, credit reports, public records, results of internet searches, news articles, or any other writing containing information related to the conviction history that was utilized or relied upon by the employer); and

(C) If an employer’s preliminary decision to withdraw the job conditionally offered involved the use of an automated-decision system, a copy or description of any report or information from the operation of the automated-decision system, related data, and assessment criteria used as part of an automated-decision system; and

(D) An explanation of the applicant’s right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final and the deadline by which to respond (which can be no less than five business days from the date of receipt of the notice). If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both. The types of evidence that may demonstrate rehabilitation or mitigating circumstances may include, but are not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; whether the individual is bonded under a federal, state, or local bonding program; successful completion, or compliance with the terms and conditions, of probation or parole; and rehabilitation efforts such as education or training. If, within five business days of receipt of the notice (or any later deadline set by the employer), the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant’s assertion, then the applicant shall be permitted no less than five additional business days to respond to the notice before the employer’s decision to rescind the employment offer becomes final.

(3) The employer shall consider any information submitted by the applicant before making a final decision regarding whether to rescind the conditional offer of employment. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant’s conviction history, the employer shall notify the applicant in a writing that includes the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer’s reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and

(C) The right to contest the decision by filing a complaint with the Department of Fair Employment and Housing.

(4) The use of an automated-decision system, in the absence of additional processes or actions, does not constitute an individualized assessment.
(e) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis enumerated in the Act.

(f) Consideration of Other Criminal Convictions and the Potential Adverse Impact. In addition to the types of criminal history addressed in subdivision (c) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, consideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin. An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis enumerated in the Act. For purposes of such a determination, adverse impact is defined at Sections 11017 and 11010 and the Uniform Guidelines on Employee Selection and Procedures (29 C.F.R. 1607 (1978)) incorporated by reference in Section 11017(a) and (e). The applicant(s) or employee(s) bears the burden of proving an adverse impact. An adverse impact may be established through the use of conviction statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

(g) Establishing “Job-Related and Consistent with Business Necessity.”

(1) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis enumerated in the Act, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person’s fitness for the specific position(s), not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by subdivision (h) below). An individualized assessment must involve notice to the adversely impacted employee (before any adverse action is taken) that they have been screened out because of a criminal conviction; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employee is not job related and consistent with business necessity.

(3) Before an employer may take an adverse action such as discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence
that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that record cannot be considered in the employment decision.

(h) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code sections 432.7). Examples include, but are not limited to, government agencies employing individuals as peace officers, employers employing individuals at health facilities where they will have regular access to patients, and employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances. Some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

(i) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer’s goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.


§ 11020. Aiding and Abetting.

(a) Prohibited Practices.

(1) It is unlawful to assist any person or individual in doing any act known to constitute unlawful employment discrimination. Unlawful assistance under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of a person or individual for an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on one or more characteristics protected by the Act.

(2) It is unlawful to solicit or encourage any person or individual to violate the Act, whether or not the Act is in fact violated. Unlawful solicitation or encouragement under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of a person or individual for an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on one or more characteristics protected by the Act.

(3) It is unlawful to coerce any person or individual to commit unlawful employment discrimination with offers of cash, other consideration, or an employment benefit, or to impose or threaten to impose any penalty, including denial of an employment benefit.

(4) It is unlawful to conceal or destroy evidence relevant to investigations initiated by the Department or its staff.

(5) It is unlawful to advertise for employment on a basis prohibited in the Act. Unlawful advertisement under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of such person or individual for
an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on one or more characteristics protected by the Act.

(b) Permissible Practices.

(1) It shall not be unlawful, without more, to have been present during the commission of acts amounting to unlawful discrimination or to fail to prevent or report such acts, unless it is the normal business duty of the person or individual to prevent or report such acts.

(2) It shall not be unlawful to maintain good faith lawful defenses or privileges to charges of discrimination.


§ 11028. Specific Employment Practices.

(a) Language Restrictions.

(1) It is an unlawful employment practice for an employer or other covered entity to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, including, but not limited to, an English-only rule, unless:

(A) The language restriction is justified by business necessity;

(B) The language restriction is narrowly tailored; and

(C) The employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

(2) For purposes of this subsection, “business necessity” means an overriding legitimate business purpose, such that:

(A) The language restriction is necessary to the safe and efficient operation of the business;

(B) The language restriction effectively fulfills the business purpose it is supposed to serve; and

(C) There is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

(3) It is not sufficient that the employer’s language restriction merely promotes business convenience or is due to customer or co-worker preference.

(4) English-only rules violate the Act unless the employer can prove the elements listed in section 11028, subdivisions (a)(1)(A)-(C). English-only rules are never lawful during an employee’s non-work time, e.g., breaks, lunch, unpaid employer-sponsored events, etc.

(b) Employment discrimination based on an applicant’s or employee’s accent is unlawful unless the employer proves that the individual’s accent interferes materially with the applicant’s or employee’s ability to perform the job in question.
(1) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their accent, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(c) Discrimination based on an applicant’s or employee’s English proficiency is unlawful unless the English proficiency requirement at issue is justified by business necessity (i.e., the level of proficiency required by the employer is necessary to effectively fulfill the job duties of the position.) In determining business necessity in this context, relevant factors include, but are not limited to, the type of proficiency required (e.g., spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position.

(d) It is not unlawful for an employer to request from an applicant or employee information regarding his or her ability to speak, read, write, or understand any language, including languages other than English, if justified by business necessity.

(e) Retaliation. It is an unlawful employment practice for an employer or other covered entity to retaliate against any individual because the individual has opposed discrimination or harassment on the basis of national origin, has participated in the filing of a complaint, or has testified, assisted, or participated in any other manner in a proceeding in which national origin discrimination or harassment has been alleged. Retaliation may include, but is not limited to:

(1) threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member (e.g., spouse, domestic partner, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, great-grandparent, grandchild, or great-grandchild, by blood, adoption, marriage, or domestic partnership) of the employee, former employee, or applicant; or

(2) taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

(f) Immigration-related Practices.

(1) All provisions of the Act and these regulations apply to undocumented applicants and employees to the same extent that they apply to any other applicant or employee. An employee’s or applicant’s immigration status is irrelevant during the liability phase of any proceeding brought to enforce the Act.

(2) Discovery or other inquiry into an applicant’s or employee’s immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law.

(3) It is an unlawful practice for an employer or other covered entity to discriminate against an employee because of the employee’s or applicant’s immigration status, unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law.

(4) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact
on or constitute disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their immigration status, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(4)(5) It is an unlawful practice for an employer or other covered entity to retaliate, as described in subdivision (e), against an employee for engaging in activity protected by the Act.

(g) It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver’s license issued under section 12801.9 of the Vehicle Code.

(1) An employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

(A) Possession of a driver’s license is required by state or federal law; or

(B) Possession of a driver’s license is required by the employer or other covered entity and is otherwise permitted by law. An employer’s or other covered entity’s policy requiring applicants or employees to present or hold a driver’s license may be evidence of a violation of the Act if the policy is not uniformly applied or is inconsistent with legitimate business reasons (i.e., possessing a driver’s license is not needed in order to perform an essential function of the job).

(2) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees because the applicant(s) or employee(s) hold or presents a driver’s license issued under section 12801.9 of the Vehicle Code, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(2)(3) Nothing in this subsection shall limit or expand an employer’s authority to require an applicant or employee to possess a driver’s license.

(3)(4) Nothing in this subsection shall alter an employer’s or other covered entity’s rights or obligations under federal immigration law.

(h) Citizenship requirements. Citizenship requirements that are a pretext for discrimination or have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful, unless pursuant to a permissible defense.

(1) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their citizenship, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(i) Human Trafficking. It is an unlawful employment practice for an employer or other covered entity to use force, fraud, or coercion to compel the employment of, or subject to adverse treatment, applicants or employees on the basis of national origin.

(j) Harassment. It is unlawful for an employer or other covered entity to harass an applicant or employee on the basis of national origin. (See generally section 11019(b).) The use of epithets, derogatory comments, slurs, or non-verbal conduct based on national origin, including, but not limited to, threats of deportation, derogatory comments about immigration status, or mockery of an accent or a language or its speakers may constitute harassment if the actions are severe or pervasive such that they alter the conditions of the employee’s employment and create an abusive
working environment. A single unwelcome act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. (See generally section 11034(f)(2)(A).)

(k) Height and/or weight requirements. Such requirements may have the effect of creating a disparate impact on the basis of national origin. Where an adverse impact is established, such requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity. Where such a requirement is job related and justified by business necessity, it is still unlawful if the applicant or employee can prove that the purpose of the requirement can be achieved as effectively through less discriminatory means.

(1) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their height or weight, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(l) Recruitment and job segregation. It is an unlawful employment practice for an employer or other covered entity to seek, request, or refer applicants or employees based on national origin or to assign positions, facilities, or geographical areas of employment based on national origin, unless pursuant to a permissible defense.

(m) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their national origin or those characteristics which, when considered, may disparately impact applicants or employees on the basis of national origin, or any of the characteristics set forth in subsections (b) through (f) and (i) of this section, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


Article 5. Sex Discrimination

§ 11032. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers or other covered entities engaged in recruiting activity (see section 11015(a)) shall recruit individuals of both sexes for all jobs unless pursuant to a permissible defense.

(2) It is unlawful for any publication or other media to separate listings of job openings into male and female classifications.

(b) Pre-Employment Inquiries and Applications.

(1) For all employers or other covered entities who provide, accept and consider applications, it shall be unlawful to refuse to provide, accept and consider applications from individuals of one sex unless pursuant to a permissible defense.

(2) It is unlawful for an employer or other covered entity to ask the sex of the applicant on an application form or pre-employment questionnaire, unless the question is asked pursuant to a permissible defense or for recordkeeping purposes. After an individual is hired, the employer or other covered entity may record the employee’s sex for non-discriminatory personnel purposes.
(3) It is unlawful for an employer or other covered entity to ask questions regarding childbearing, pregnancy, birth control, or familial responsibilities unless the questions are related to specific and relevant working conditions of the job in question.

(4) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of sex, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


§ 11033. Employee Selection.

(a) Tests of Physical Agility or Strength. A test of physical agility or strength shall not be used unless the test is administered pursuant to a permissible defense. No applicant or employee shall be refused the opportunity to demonstrate that he or she has the requisite strength or agility to perform the job in question.

(b) Height and Weight Standards.

(1) Use of height or weight standards that discriminate against one sex or the other is unlawful unless pursuant to a permissible defense.

(2) Use of separate height and/or separate weight standards for males and females is unlawful unless pursuant to a permissible defense.

(c) Hiring Applicants of Childbearing Age. It is unlawful to refuse to hire a female applicant because she is of childbearing age.

(d) Prior Work Experience. If an employer or other covered entity considers prior work experience in the selection or assignment of an employee, the employer or other covered entity shall also consider prior unpaid or volunteer work experience.

(e) Sex Stereotypes. Use of any criterion that is based exclusively or in part on a sex stereotype is unlawful unless pursuant to a permissible defense.

(f) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of their sex or any of the characteristics set forth in (a) through (e) of this section, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

Article 6. Pregnancy, Childbirth or Related Medical Conditions

§ 11038. Responsibilities of Covered Entities Other than Employers.

(a) Unless a permissible defense applies, discrimination because of pregnancy or perceived pregnancy by any covered entity other than employers constitutes discrimination because of sex under Government Code sections 12926, 12940, 12943 and 12944.

(b) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of pregnancy or perceived pregnancy, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


§ 11039. Responsibilities of Employers.

(a) Employer Obligations

(1) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;

(B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(C) refuse to promote an employee because of pregnancy or perceived pregnancy;

(D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(E) discriminate against an applicant or employee in terms, conditions or privileges of employment because of pregnancy or perceived pregnancy;

(F) harass an applicant or employee because of pregnancy or perceived pregnancy, as set forth in section 11036;

(G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section 11041(c). Nothing in this section prevents an employer from transferring an employee for the employer’s legitimate operational needs unrelated to the employee’s pregnancy or perceived pregnancy;

(H) require an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested leave;

(I) retaliate, discharge, or otherwise discriminate against an applicant or employee because she has opposed employment practices forbidden under the FEHA or because she has filed a complaint, testified, or assisted in any proceeding under the FEHA;

(J) use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of pregnancy or perceived pregnancy, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other
selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity; or

(H) otherwise discriminate against an applicant or employee because of pregnancy or perceived pregnancy by any practice that is prohibited on the basis of sex.

(2) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to provide employee benefits for pregnancy as set forth at section 11044, if the employer provides such benefits for other temporary disabilities;

(B) refuse to maintain and to pay for coverage under a group health plan for an eligible employee who takes pregnancy disability leave, as set forth at section 11044, under the same terms and conditions that would have been provided if the employee had not taken leave;

(C) refuse to provide reasonable accommodation for an employee or applicant affected by pregnancy as set forth at section 11040;

(D) refuse to transfer an employee affected by pregnancy as set forth at section 11041;

(E) refuse to grant an employee disabled by pregnancy a pregnancy disability leave, as set forth at section 11042; or

(F) deny, interfere with, or restrain an employee’s rights to reasonable accommodation, to transfer or to take pregnancy disability leave under Government Code section 12945, including retaliating against the employee because she has exercised her right to reasonable accommodation, to transfer or to take pregnancy disability leave.

(b) Permissible defenses, as defined at section 11010, include a bona fide occupational qualification, business necessity or where the practice is otherwise required by law.


Article 7. Marital Status Discrimination

§ 11056. Pre-Employment Practices.

(a) Impermissible Inquiries. It is unlawful to ask an applicant to disclose his or her marital status as part of a pre-employment inquiry, including an inquiry made through the use of an automated-decision system, unless pursuant to a permissible defense.

(b) Request for Names. For business reasons other than ascertaining marital status, an applicant may be asked whether he or she has ever used another name, e.g., to enable an employer or other covered entity to check the applicant’s past work record.

(c) Employment of Spouse. It is lawful to ask an applicant to state whether he or she has a spouse who is presently employed by the employer, but this information may not be used as a basis for an employment decision except as stated below.

Article 8. Religious Creed Discrimination
§ 11063. Pre-Employment Practices.

(a) Pre-employment inquiries regarding an applicant’s availability for work on weekends or evenings shall not be used to ascertain their religious creed, nor shall such inquiry be used to evade the requirement of reasonable accommodation. However, inquiries as to the availability for work on weekends or evenings are permissible where reasonably related to the normal business requirements of the job in question and in compliance with section 11016 of these regulations.

(b) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria if such use has a disparate impact on or constitutes disparate treatment of an applicant or employee or a class of applicants or employees on the basis of religion, unless the qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


Article 9. Disability Discrimination
§ 11070. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize, including but not limited to through the use of an automated-decision system, an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form, automated-decision system, or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:

(A) “Do you have any particular disabilities?”

(B) “Have you ever been treated for any of the following diseases or conditions?”

(C) “Are you now receiving or have you ever received workers’ compensation?”

(D) “What prescription medications are you taking?”

(E) “Have you ever had a job-related injury or medical condition?”

(F) Have you ever left a job because of any physical or mental limitations?
(G) “Have you ever been hospitalized?”

(H) “Have you ever taken medical leave?”

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, nothing in Government Code Section 12940(d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

(c) Interviews. An employer or other covered entity shall make reasonable accommodation to the needs of applicants with disabilities in interviewing situations, e.g., providing interpreters for the hearing-impaired, or scheduling the interview in a room accessible to wheelchairs.


§ 11071. Medical and Psychological Examinations and Inquiries.

(a) Pre-offer. It is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant. A medical or psychological examination includes a procedure or test that seeks information about an individual’s physical or mental conditions or health but does not include testing for current illegal drug use. These procedures or tests include, but are not limited to, those employed through the use of an automated-decision system.

   (1) Personality-based questions, including but not limited to such questions included in an automated-decision system, may constitute a medical or psychological examination or inquiry. Personality-based questions include, but are not limited to, tests or questions that measure any of the following:

      (A) optimism and/or positive attitudes;

      (B) personal or emotional stability;

      (C) extroversion or introversion; and/or

      (D) intensity.

   (2) Puzzles, games, or other challenges used in the hiring process that evaluate physical or mental abilities, including but not limited to gamified screens included in an automated-decision system, may constitute a medical or physical examination or inquiry.

(b) Post-Offer. An employer or other covered entity may condition a bona fide offer of employment on the results of a medical or psychological examination or inquiries conducted prior to the employee’s entrance on duty in order to determine fitness for the job in question. For a job offer to be bona fide, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

   (1) All entering employees in similar positions are subjected to such an examination.

   (2) Where the results of such medical or psychological examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.
(3) The results are to be maintained on separate forms and shall be accorded confidentiality as medical records.

c) Withdrawal of Offer. An employer or other covered entity may withdraw an offer of employment based on the results of a medical or psychological examination or inquiries only if it is determined that the applicant is unable to perform the essential duties of the job with or without reasonable accommodation, or that the applicant with or without reasonable accommodation would endanger the health or safety of the applicant or of others.

(d) Medical and Psychological Examinations and Disability-Related Inquiries during Employment.

(1) An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees so long as the inquiries are both job-related and consistent with business necessity.

(2) Drug or Alcohol Testing. An employer or other covered entity may maintain and enforce rules prohibiting employees from being under the influence of alcohol or drugs in the workplace and may conduct alcohol or drug testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol or drugs at work.

(A) Current Drug Use. An applicant or employee who currently engages in the use of illegal drugs or uses medical marijuana is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related inquiries.

(B) Past Addiction. Questions about past addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using illegal drugs are protected under the FEHA from discrimination because of their disability.

(3) Other Acceptable Disability-Related Inquiries and Medical Examinations of Employees

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about any physical or mental condition(s) the employee may have if the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; (3) has no power to affect employment decisions; and (4) discloses these provisions to the employee.

(B) Compliance with another Federal or State Law or Regulation. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by other federal and/or state laws or regulations, such as medical examinations required at least once every two years under federal safety regulations for interstate bus and truck drivers or medical requirements for airline pilots.

(C) Voluntary Wellness Program. As part of a voluntary wellness program, employers may conduct voluntary medical examinations and activities, including taking voluntary medical histories, without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.

(4) Maintenance of Medical Files. Employers shall keep information obtained regarding the medical or psychological condition or history of the employee confidential, as set forth at section 11069(g).
§ 11072. Employee Selection.

(a) Prospective Need for Reasonable Accommodation. An employer or other covered entity shall not deny an employment benefit because of the prospective need to make reasonable accommodation to an applicant or employee with a disability.

(b) Qualification standards, tests, and other selection criteria.

(1) In general. It is unlawful for an employer or other covered entity to use qualification standards, employment tests, automated-decision systems, proxies, or other selection criteria that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities, on the basis of disability, unless the qualification standards, tests, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity. Statistical comparisons between persons with disabilities and persons who are not disabled are not required to show that an individual with a disability or a class of individuals with disabilities is screened out by selection criteria.

(2) Qualification Standards and Tests Related to Uncorrected Vision or Uncorrected Hearing. An employer or other covered entity shall not use qualification standards, employment tests, questions, automated-decision systems, proxies, or other selection criteria based on an applicant’s or employee’s uncorrected vision or uncorrected hearing unless the qualification standards, tests, questions, automated-decision systems, proxies, or other selection criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(3) An employer or other covered entity shall not make use of any testing criterion, including but not limited to through the use of an automated-decision system, that discriminates against applicants or employees with disabilities, unless:

(A) the test score or other selection criterion used is shown to be job-related for the position in question; and

(B) an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.

(4) Tests of physical agility or strength shall not be used as a basis for selection or retention of employment unless the physical agility or strength measured by such test is job-related. Such tests include but are not limited to those administered as part of an automated-decision system.

(5) An employer or other covered entity shall select and administer tests concerning employment so as to ensure that, when administered to any applicant or employee, including an applicant or employee with a disability, the test results accurately reflect the applicant’s or employee’s job skills, aptitude, or whatever other criteria the test purports to measure rather than reflecting the applicant’s or employee’s disability, except when those skills affected by disability are the criteria that the tests purport to measure. Tests concerning employment include, but are not limited to, those administered as part of an automated-decision system. To accomplish this end, reasonable accommodation shall be made in testing conditions. For example:

(A) The test site must be accessible to applicants and employees with a disability.

(B) For applicants and employees who are blind or visually impaired, an employer or other covered entity may translate written tests into Braille or provide or allow enlarged print, real time captioning, digital
format, the use of a human reader or a screen reader, the use of other computer technology, or oral presentation of the test.

(C) For applicants or employees who are quadriplegic or have spinal cord injuries, an employer or other covered entity may provide or allow someone to write for the applicant or employee, or provide or allow voice recognition software or other computer technology, or allow oral responses to written test questions.

(D) For applicants and employees who are hearing impaired, an employer or other covered entity may provide or allow the services of an interpreter.

(E) For applicants and employees whose disabilities interfere with their ability to read, process information, communicate, an employer or other covered entity may allow additional time to complete the examination.

(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent expert advice may be sought before attempting such modification since the validity of the test may be affected. The use of an automated-decision system, in the absence of additional process or actions, does not constitute an individualized assessment.

(G) Where reasonable accommodation is appropriate, an employer or other covered entity may permit the use of readers, interpreters, or similar supportive persons or instruments.

c) No testing for genetic information. It is unlawful for an employer or other covered entity to conduct a medical examination to test for the presence of a genetic characteristic, or to acquire genetic information, unless such testing or acquisition is authorized by federal law under the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff-1(b).


Article 10. Age Discrimination

§ 11076. Establishing Age Discrimination.

(a) Employers. Discrimination on the basis of age may be established by showing that a job applicant’s or employee’s age of 40 or older was considered in the denial of employment or an employment benefit. There is a presumption of discrimination whenever a facially neutral practice, including but not limited to the use of an automated-decision system, has an adverse impact on an applicant(s) or employee(s) age 40 or older, unless the practice is job-related and consistent with business necessity as defined in section 11010(b). In the context of layoffs or salary reduction efforts that have an adverse impact on an employee(s) age 40 or older, an employer’s preference to retain a lower paid worker(s), alone, is insufficient to negate the presumption. The practice may still be impermissible, even where it is job-related and consistent with business necessity, where it is shown that an alternative practice could accomplish the business purpose equally well with a lesser discriminatory impact.

(b) Employment Agencies, Labor Organizations, and Apprenticeship Training Programs in Which the State Participates. Discrimination on the basis of age may be established against employment agencies, labor organizations, and apprenticeship training programs in which the state participates upon a showing that they have engaged in recruitment, screening, advertising, training, job referral, placement or similar activities that discriminate against an individual(s) age 40 or older.

§ 11079. Advertisements, Pre-employment Inquiries, Interviews and Applications.

(a) Advertisements. Unless age is a bona fide occupational qualification for the position at issue, advertisements for employment that a reasonable person would interpret as deterring or limiting employment of people age 40 and older are unlawful. (See section 11010(a) for the definition of bona fide occupational qualification.) Where there is no bona fide occupational qualification, examples of prohibited advertisements include those that designate a preferred applicant age range or that include terms such as young, college student, recent college graduate, boy, girl, or other terms that imply a preference for employees under the age of 40.

(b) Pre-employment Inquiries. Unless age is a bona fide occupational qualification for the position at issue, pre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age, including, but not limited to, inquiries made through the use of an automated-decision system, are unlawful. Examples of prohibited inquiries are requests for age, date of birth, or graduation dates, except where age is a bona fide occupational qualification. This provision applies to oral and written inquiries and interviews. (See section 11016(b), which is applicable and incorporated by reference herein.) Pre-employment inquiries that result in the identification of persons on the basis of age shall not be unlawful when made for purposes of applicable reporting requirements or to maintain applicant flow data provided that the inquiries are made in a manner consistent with Section 11013 (and particularly subsection (b)) of Article 1.

(c) Applications. Unless age is a bona fide occupational qualification for the position at issue, it is discrimination on the basis of age for an employer or other covered entity to reject or refuse to provide equal consideration of the application form, pre-employment questionnaire, oral application, or the oral or written inquiry of an individual because the individual is age 40 or older. (See section 11016(c), which is applicable and incorporated by reference herein.)

(1) Subsection (c) prohibits the use of online job applications that require entry of age in order to access or complete an application, or the use of drop-down menus that contain age-based cut-off dates or utilize automated selection criteria or algorithms that have the effect of screening out applicants age 40 and older. Use of online application technology or an automated-decision system that limits or screens out older applicants is discriminatory unless age is a bona fide occupational qualification. (See section 11010(a).)

Fair Employment & Housing Council
Draft Modifications to Employment Regulations Regarding
Automated-Decision Systems

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment

TEXT

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Text proposed to be deleted for the 45-day comment period is displayed in strikethrough type.

Article 1. General Matters
§ 11008. Definitions.

As used in this chapter, the following definitions shall apply unless the context otherwise requires:

(a) “Agent.” Any person acting on behalf of an employer, including but not limited to a third party that provides services related to recruiting, applicant screening, hiring, payroll, benefit administration, evaluations and/or decision-making regarding requests for workplace leaves of absence or accommodations, or the administration of automated-decision systems for an employer’s use in recruitment, hiring, performance evaluation, or other assessments that could result in the denial of employment or otherwise adversely affect the terms, conditions, benefits, or privileges of employment.

(b) “Algorithm.” A process or set of rules or instructions, typically used by a computer, to make a calculation, solve a problem, or render a decision.

(c) “Applicant.” Any individual who files a written application or, where an employer or other covered entity does not provide an application form, any individual who otherwise indicates a specific desire to an employer or other covered entity to be considered for employment. Except for recordkeeping purposes, “Applicant” is also an individual who can prove that he or she has been deterred from applying for a job by an employer’s or other covered entity’s alleged discriminatory practice. “Applicant” does not include an individual who without coercion or intimidation willingly withdraws his or her application prior to being interviewed, tested or hired.

(d) “Apprenticeship Training Program.” Any apprenticeship program, including local or state joint apprenticeship committees, subject to the provision of Chapter 4 of Division 3 of the California Labor Code, section 3070 et seq.

(e) “Automated-Decision System.” A computational process, including one derived from machine-learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants. An “Automated-Decision System” includes, but is not limited to, the following:

(1) Algorithms that screen resumes for particular terms or patterns;

(2) Algorithms that employ face and/or voice recognition to analyze facial expressions, word choices, and voices;
(3) Algorithms that employ gamified testing that include questions, puzzles, or other challenges used to make predictive assessments about an employee or applicant, or to measure characteristics including but not limited to dexterity, reaction-time, or other physical or mental abilities or characteristics;

(4) Algorithms that employ online tests meant to measure personality traits, aptitudes, cognitive abilities, and/or cultural fit.

(e)(f) “Employee.” Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.

(1) “Employee” does not include an independent contractor as defined in Labor Code section 3353.

(2) “Employee” does not include any individual employed by his or her parents, by his or her spouse, or by his or her child.

(3) “Employee” does not include any individual employed under special license in a non-profit sheltered workshop or rehabilitation facility.

(4) An employment agency is not an employee of the person or individual for whom it procures employees.

(5) An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency is an employee of that employer for such terms, conditions and privileges of employment under the control of that employer. Such an individual also is an employee of the temporary service agency with regard to such terms, conditions and privileges of employment under the control of the temporary service agency.

(d)(g) “Employer.” Any person or individual engaged in any business or enterprise regularly employing five or more individuals, including individuals performing any service under any appointment, contract of hire or apprenticeship, express or implied, oral or written.

(1) “Regularly employing” means employing five or more individuals for any part of the day on which the unlawful conduct allegedly occurred, or employing five or more employees on a regular basis.

(A) “Regular basis” refers to the nature of a business that is recurring, rather than constant. For example, in an industry that typically has a three-month season during a calendar year, an employer that employs five or more employees during that season “regularly employs” the requisite number of employees. Thus, to be covered by the Act, an employer need not have five or more employees working every day throughout the year or have five or more employees at the time of the allegedly unlawful conduct, so long as at least five employees are regularly on its payroll during the season.

(B) Part-time employees, including those who work partial days and fewer than each day of the work week, will be counted the same as full-time employees. For example, for counting purposes, an employer has five employees when three work every day and two work alternate days to fill one position, and there are no more than four employees working on any working day. Employees on paid or unpaid leave, including California Family Rights Act (CFRA), parenting leave, pregnancy leave, leave of absence, disciplinary suspension, or any other employer-approved leave of absence, are counted.

(C) Employees located inside and outside of California are counted in determining whether employers are covered under the Act. However, employees located outside of California are not themselves covered by the protections of the Act if the allegedly unlawful conduct did not occur in California, or the allegedly unlawful conduct was not ratified by decision makers or participants in unlawful conduct located in California.

(2) The means for counting five employees described in this subsection also applies to counting employees for purposes of establishing coverage under Government Code sections 12945.2, 12945.6, and 12950.1.
(3) Any person or individual acting as an agent of an employer, directly or indirectly, is also an employer.

(4) “Employer” includes the State of California, any political or civil subdivision thereof, counties, cities, city and county, local agencies, or special districts, irrespective of whether that entity employs five or more individuals.

(5) A religious association or religious corporation not organized for private profit is not an employer under the meaning of this Act; any non-profit religious organization exempt from federal and state income tax as a non-profit religious organization is presumed not to be an employer under this Act. Notwithstanding such status, any portion of such tax exempt religious association or religious corporation subject to state or federal income taxes as an unrelated business and regularly employing five or more individuals is an employer.

(6) “Employer” includes any non-profit corporation or non-profit association other than that defined in subsection (5).

(e)(h) “Employer or Other Covered Entity.” Any employer, employment agency, labor organization or apprenticeship training program as defined herein and subject to the provisions of the Act.

(f)(i) “Employment Agency.” Any person undertaking for compensation to identify, screen, and/or procure job applicants, employees or opportunities to work. “Employment Agency” includes, but is not limited to, any person that provides automated-decision-making systems or services involving the administration or use of those systems on an employer’s behalf.

(g)(j) “Employment Benefit.” Except as otherwise provided in the Act, any benefit of employment covered by the Act, including hiring, employment, promotion, selection for training programs leading to employment or promotions, freedom from disbarment or discharge from employment or a training program, compensation, provision of a discrimination-free workplace, and any other favorable term, condition or privilege of employment.

(1) For a labor organization, “employment benefit” includes all rights and privileges of membership, including freedom from exclusion, expulsion or restriction of membership, second class or segregated membership, discrimination in the election of officers or selection of staff, or any other action against a member or any employee or person employed by an employer.

(2) “Employment benefit” also includes the selection or training of any person for, or freedom from termination from, an unpaid internship or another limited duration program to provide unpaid work experience for that person in any apprenticeship training program or any other training program leading to employment or promotion.

(3) “Provision of a discrimination-free workplace” is a provision of a workplace free of harassment, as defined in section 11019(b).

(h)(k) “Employment Practice.” Any act, omission, policy or decision of an employer or other covered entity affecting any of an individual’s employment benefits or consideration for an employment benefit.

(j) “Machine Learning Algorithms.” Algorithms that identify patterns in existing datasets and use those patterns to analyze and assess new information, and revise the algorithms themselves based upon their operations.

(m) “Machine-Learning Data.” All data used in the process of developing and/or applying machine-learning algorithms that are utilized as part of an automated-decision system, including but not limited to the following:

(1) Datasets used to train a machine-learning algorithm utilized as part of an automated-decision system;

(2) Data provided by individual applicants or employees, or that includes information about individual applicants and employees that has been analyzed by an automated decision system;
(3) Data produced from the application of an automated-decision system operation.

(i)(n) “Labor Organization.” Any organization that exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers regarding grievances, terms or conditions of employment, or of providing other mutual aid or protection.

(j)(o) “Person performing services pursuant to a contract.” A person who meets all of the following criteria: 1) has the right to control the performance of the contract for services and discretion as to the manner of performance; 2) is customarily engaged in an independently established business; and 3) has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer’s work.

(k)(p) “Unpaid interns and volunteers.” For purposes of the Act, any individual (often a student or trainee) who works without pay for an employer or other covered entity, in any unpaid internship or another limited duration program to provide unpaid work experience, or as a volunteer. Unpaid interns and volunteers may or may not be employees.


(a) Unlawful Practices and Individual Relief. In allegations of employment discrimination, a finding that an employer or other covered entity has engaged in an unlawful employment practice is not dependent upon a showing of individual back pay or other compensable liability. Upon a finding that an employer or other covered entity has engaged in an unlawful employment practice and on order of appropriate relief, a severable and separate showing may be made that the complainant, complainants or class of complainants is entitled to individual or personal relief including, but not limited to, hiring, reinstatement or upgrading, back pay, restoration to membership in a labor organization, or other relief in furtherance of the purpose of the Act.

(b) Liability of Employers. In view of the common law theory of respondeat superior and its codification in California Civil Code section 2338, an employer or other covered entity shall be liable for the discriminatory actions of its supervisors, managers or agents committed within the scope of their employment or relationship with the covered entity or, as defined in section 11019(b), for the discriminatory actions of its employees where it is demonstrated that, as a result of any such discriminatory action, the applicant or employee has suffered a loss of or has been denied an employment benefit.

(c) Discrimination is established if a preponderance of the evidence demonstrates that an enumerated basis was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense. This standard applies only to claims of discrimination on a basis enumerated in Government Code section 12940, subdivision (a), and to claims of retaliation under Government Code section 12940, subdivision (h). This standard does not apply to other practices made unlawful by the Fair Employment and Housing Act, including, but not limited to, harassment, denial of reasonable accommodation, failure to engage in the interactive process, and failure to provide leaves under Government Code sections 12945 and 12945.2. A substantial factor motivating the denial of the employment benefit is a factor that a reasonable person would consider to have contributed to the denial. It must be more than a remote or trivial factor. It does not have to be the only cause of the denial.

(d) An applicant or employee who is a victim of human trafficking, as that term is used in Civil Code section 52.5 and Penal Code section 236.1, may have a separate right of action under the Fair Employment and Housing Act if he or she alleges discrimination on a basis protected by the Act. Nothing in this regulation shall limit any claims an individual may have under other California laws prohibiting human trafficking.
(e) It is unlawful for anyone to discriminate against a person who serves in an unpaid internship or any other limited-duration program to provide unpaid work experience in the selection, termination, training, or other terms and treatment of that person on any basis protected by the Act.

(f) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of applicants or employees on the basis of a characteristic protected by this Act, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


§ 11013. Recordkeeping.

Employers and other covered entities are required to maintain certain relevant records of personnel actions. Each employer or other covered entity subject to this section shall retain at all times at each reporting unit, or at company or divisional headquarters, a copy of the most recent California Employer Information Report (CEIR) or appropriate substitute and applicant identification records for each such unit and shall make them available upon request to any officer, agent, or employee of the Council or Department.

(a) California Employer Information Report. All employers regularly employing one hundred or more employees, apprenticeship programs with five or more apprentices and at least one sponsoring employer with 25 or more employees and at least one sponsoring union, which operates a hiring hall or has 25 or more members, and labor organizations with 100 or more members shall prepare an annual CEIR in conformity with guidelines on reporting issued by the Department.

(1) Substituting Federal Reports. An employer or other covered entity may utilize an appropriate federal report in lieu of the CEIR. Appropriate federal reports include the EEOC’s EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports and appropriate reports filed with the Office of Federal Contract Compliance Programs (OFCCP).

(2) Sample Forms and Guidelines. Appropriate copies of sample forms and applicable guidelines shall be available to any employer or other covered entity from the Department of Fair Employment and Housing.

(3) Special Reporting. If an employer or other covered entity is engaged in activities for which the standard reporting criteria are not appropriate, special reporting procedures may be required. In such case, the employer or other covered entity should so advise the Department and submit a specific proposal for an alternative reporting system prior to the date on which the report should be prepared. If it is claimed that the preparation of the report would create undue hardship, an employer may apply to the Department for an exemption from the requirements of this section.

(4) Remedy for Failure to Prepare or Make Reports Available. Upon application by the FEHC or DFEH for judicial relief, any employer failing or refusing to prepare or to make available reports as required under this section may be compelled to do so by a Superior Court of California.

(5) Penalties for False Statements. The willful making of false statements on a CEIR or other required record is a violation of California Government Code section 12976, and is punishable by fine or imprisonment as set forth therein.

(b) Applicant Identification Records. Unless otherwise prohibited by law and for recordkeeping purposes only, every employer or other covered entity shall maintain data regarding the race, sex, and national origin of each applicant and for the job for which he or she applied. If such data is to be provided on an identification form, this form shall be separate or detachable from the application form itself. Employment decisions shall not be based on whether an applicant has provided this information, nor shall the applicant identification information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or non-discrimination plan.
(1) For recordkeeping purposes only, “applicant” means any individual who files a formal application or, where an employer or other covered entity does not provide application forms, any individual who otherwise indicates to the employer or other covered entity a specific desire to be considered for employment. An individual who simply appears to make an informal inquiry or who files an unsolicited resume upon which no employment action is taken is not an applicant.

(2) An employer or other covered entity shall either retain the original documents used to identify applicants, or keep statistical summaries of the collected information.

(3) Applicant records shall be preserved for the time period set forth in subdivisions (c)(1) and (2) below.

(c) Preservation of Records. Any personnel or other employment records made or kept by any employer or other covered entity dealing with any employment practice and affecting any employment benefit of any applicant or employee (including all applications, personnel, membership or employment referral records or files and all machine-learning data) shall be preserved by the employer or other covered entity for a period of two years from the date of the making of the record or the date of the personnel action involved, whichever occurs later. However, the State Personnel Board shall maintain such records and files for a period of one year.

(1) California Employment Information Report. Every employer subject to subsection (a) above shall preserve for a period of two years from the date of preparation of the CEIR such records as were necessary for completion of the CEIR.

(2) Applicant Identification Records. Every employer subject to subsection (b) above shall preserve applicant identification information for a period of two years from the date it was received.

(3) Separate Records on Sex, Race, and National Origin. Records as to the sex, race, or national origin of any individual accepted for employment shall be kept separately from the employee’s main personnel file or other records available to those responsible for personnel decisions. For example, such records could be kept as part of an automatic data processing system in the payroll department.

(4) After Filing of Complaint. Upon notice of or knowledge that a complaint has been filed against it under the Act, any respondent, including the State Personnel Board, shall maintain and preserve any and all relevant records and files until such complaint is fully and finally disposed of and all appeals from related proceedings have concluded.

(A) For purposes of this subsection, “related proceedings” shall include any action brought in Superior Court pursuant to section 12965 of the Government Code.

(B) The term “records and files relevant to the complaint” shall include, but is not limited to, personnel or employment records relating to the complaining party and to all other employees holding similar positions to that held or sought by the complainant at the facility or other relevant subdivision where the discriminatory practice allegedly occurred. The term also includes machine-learning data as well as applications, forms or test papers completed by the complainant and by all other candidates for the same position at that facility or other relevant subdivision where the employment practice occurred. All relevant records made or kept pursuant to subsections (a) and (b) above shall also be preserved.

(C) The term “fully and finally disposed of and all appeals from related proceedings have concluded” refers to the expiration of the statutory period within which a complainant or respondent may bring an action in Superior Court, or an agreement has been reached by the parties whereby no further judicial review is available to any of the parties, or a final order has been entered by a body of judicial review for which the time for filing a notice of appeal has expired.

(5) Any person who engages the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, to an employer or other covered entity must maintain records of
the assessment criteria used by the automated-decision system for each such employer or covered entity to whom the automated-decision system is provided.

(d) Posting of Act. Every employer or other covered entity shall post in a conspicuous place or places on its premises a notice to be prepared and distributed by the Department, which sets forth excerpts of the Act and such relevant information the Department deems necessary to explain the Act. Such employers employing significant numbers, no less than 10% of their work force, of non-English-speaking persons (e.g., Chinese or Spanish speaking) at any facility or establishment must also post in the appropriate foreign language at each such facility or establishment. Such notices may be obtained from the Department.


Article 2. Particular Employment Practices

§ 11015. Definitions.

(a) “Recruitment.” The practice of any employer or other covered entity that has the purpose or effect of informing any individual about an employment opportunity, or assisting an individual to apply for employment, an activity leading to employment, membership in a labor organization, acceptance in an apprenticeship training program, or referral by an employment agency.

(b) “Date of Determination to Hire.” The time at which an employer or other covered entity has made an offer of employment to the individual.

(c) “Pre-employment Inquiry.” Any oral or written request made by an employer or other covered entity for information concerning the qualifications of an applicant for employment or for entry into an activity leading to employment.

(d) “Application.” Except for recordkeeping purposes, any writing or other device, including but not limited to an automated-decision system and/or machine-learning data, used by an employer or other covered entity to make a pre-employment inquiry or submitted to an employer or other covered entity for the purpose of seeking consideration for employment.

(e) “Placement.” Any status, category, rank, level, location, department, division, program, duty or group of duties, or any other similar classification or position for which an employee can be selected or to which an employee can be assigned by any employment practice. Employment practices that can determine placement in this way include, but are not limited to: hiring, discharge, promotion, transfer, callback, or other change of classification or position; inclusion in membership in any group or organization; any referral assignment to any place, unit, division, status or type of work.


§ 11016. Pre-Employment Practices

(a) Recruitment.

(1) Duty Not to Discriminate. Any employer or other covered entity engaged in recruitment activity shall recruit in a non-discriminatory manner. However, nothing in these regulations shall preclude affirmative efforts to utilize recruitment practices to attract an individual who is a member of an underrepresented protected class covered by the Act.

(2) Prohibited Recruitment Practices. An employer or other covered entity shall not, unless pursuant to a permissible defense, engage in any recruitment activity, including but not limited to practices accomplished through the use of an automated-decision system, that:
(A) Restricts, excludes, or classifies individuals on a basis enumerated in the Act;

(B) Expresses a preference for individuals on a basis enumerated in the Act; or

(C) Communicates or uses advertising methods to communicate the availability of employment benefits in a manner intended to discriminate on a basis enumerated in the Act.

(b) Pre-employment Inquiries.

(1) Limited Permissible Inquiries. An employer or other covered entity may make any pre-employment inquiries that do not discriminate on a basis enumerated in the Act. Inquiries, including but not limited to inquiries made through the use of an automated-decision system, that directly or indirectly identify an individual on a basis enumerated in the Act are unlawful unless made pursuant to a permissible defense.

(A) An employer may make, in connection with prospective employment, an inquiry as to, or a request for information regarding, the physical fitness, medical condition, physical condition, or medical history of applicants if the inquiry or request for information complies with the provisions of sections 11067, 11070 and 11071 of these regulations.

(B) Pre-employment inquiries regarding an applicant’s availability for work on certain days and times shall not be used to ascertain the applicant’s religious creed, disability, or medical condition. Such inquiries must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds, in language such as: “Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?” or “Other than time off for reasons related to your religion, a disability, or a medical condition, are you available to work the proposed schedule?”

(2) Applicant Flow and Other Statistical Recordkeeping. Notwithstanding any prohibition in these regulations on pre-employment inquiries, it is not unlawful for an employer or other covered entity to collect applicant-flow and other recordkeeping data for statistical purposes as provided in section 11013(b) of these regulations or in other provisions of state and federal law.

(c) Applications.

(1) Application Forms. When employers or other covered entities provide, accept, and consider application forms in the normal course of business, in so doing they shall not discriminate on a basis enumerated in the Act.

(2) Photographs. Photographs shall not be required as part of an application unless pursuant to a permissible defense.

(3) Schedule Information. An application’s request for information related to schedule and availability for work shall not be used to ascertain the applicant’s religious creed, disability, or medical condition. Such requests must clearly communicate that an employee need not disclose any scheduling restrictions based on legally protected grounds in language such as: “Other than time off for reasons related to your religion, a disability, or a medical condition, are there any days or times when you are unavailable to work?” or “Other than time off for reasons related to your religion, a disability, or a medical condition, are you available to work the proposed schedule?”

(A) The use of online application technology that limits or screens out applicants based on their schedule may have a disparate impact on applicants based on their religious creed, disability, or medical condition. Such a practice is unlawful unless job-related and consistent with business necessity and the online application technology includes a mechanism for the applicant to request an accommodation.
Separation or Coding. Application forms shall not be separated or coded, manually or electronically, or otherwise treated so as to identify individuals on a basis enumerated in the Act unless pursuant to a permissible defense or for recordkeeping or statistical purposes.

(5) Automated-Decision Systems. The use of and reliance upon automated-decision systems that limit or screen out, or tend to limit or screen out, applicants based on protected characteristic(s) set forth in this Act may constitute unlawful disparate treatment or disparate impact. For instance, an automated-decision system that measures an applicant’s reaction time may unlawfully screen out individuals with certain disabilities. Unless an affirmative defense applies (e.g., an employer demonstrates that a quick reaction time while using an electronic device is job-related and consistent with business necessity), actions that are based on decisions made or facilitated by automated-decision systems may constitute unlawful discrimination under the Act.

Interviews. Personal interviews shall be free of discrimination. Notwithstanding any internal safeguards taken to secure a discrimination-free atmosphere in interviews, the entire interview process is subject to review for adverse impact on individuals on a basis enumerated in the Act.

(1) Automated-Decision Systems. The use of and reliance upon automated-decision systems that limit or screen out, or tend to limit or screen out, applicants based on protected characteristic(s) set forth in this Act may constitute unlawful disparate treatment or disparate impact. For instance, an automated-decision system that analyzes an applicant’s tone or facial expressions during a video-recorded interview may unlawfully screen out individuals based on race, national origin, gender, or a number of other protected characteristics. Unless an affirmative defense applies, actions that are based on decisions made or facilitated by automated-decision systems may constitute unlawful discrimination under the Act.


§ 11017. Employee Selection.

(a) Selection and Testing. Any policy or practice of an employer or other covered entity that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)). The Council herein adopts the Uniform Guidelines on Employee Selection Procedures promulgated by various federal agencies, including the EEOC and Department of Labor. [29 C.F.R. 1607 (1978)].

(b) Placement. Placements that are less desirable in terms of location, hours or other working conditions are unlawful where such assignments segregate, or otherwise discriminate against individuals on a basis enumerated in the Act, unless otherwise made pursuant to a permissible defense to employment discrimination. An assignment labeled or otherwise deemed to be “protective” of a category of persons on a basis enumerated in the Act is unlawful unless made pursuant to a permissible defense. (See also section 11041 regarding permissible transfers on account of pregnancy by employees not covered under Title VII of the federal Civil Rights Act of 1964.)

(c) Promotion and Transfer. An employer or other covered entity shall not restrict information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the Act.

(1) Requests for Transfer or Promotion. An employer or other covered entity who considers bids or other requests for promotion or transfer shall do so in a manner that does not discriminate against individuals on a basis enumerated in the Act, unless pursuant to a permissible defense.

(2) Training. Where training that may make an employee eligible for promotion and/or transfer is made available, it shall be made available in a manner that does not discriminate against individuals on a basis enumerated in the Act.
(3) No-Transfer Policies. Where an employment practice has operated in the past to segregate employees on a basis enumerated in the Act, a no-transfer policy or other practice that has the effect of maintaining a continued segregated pattern is unlawful.

(d) Specific Practices.

(1) Criminal Records. See Section 11017.1.

(2) Height Standards. Height standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(3) Weight Standards. Weight standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(e) Permissible Selection Devices. A testing device, automated-decision system, or other means of selection that is facially neutral, but that has an adverse impact (as defined in the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is job-related and consistent with business necessity (business necessity is defined in section 11010(b)).


(a) Except in the circumstances addressed in subdivisions (a)(1) - (4) below, employers and other covered entities (“employers” for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check, or internet searches, or through the use of an automated-decision system or machine-learning data, directed at discovering criminal history, until after a conditional employment offer has been made to the applicant. Employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee’s pre-conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions, including denial of the position conditionally offered. The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subdivisions (c) and (e) - (i) of this regulation):

(1) If the position is one for which a state or local agency is otherwise required by law to conduct a conviction history background check;

(2) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

(3) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or

(4) If the position is one that an employer or an employer’s agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Security Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).
(b) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(1) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker’s inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker’s criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(2) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subdivision (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.

(3) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subdivisions (a) through (d), unless the specific position is exempted pursuant to subdivisions (a)(1)- (4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subdivisions (a)(1) - (4).

(4) For purposes of section 11017.1 of these regulations only:

(A) “Applicant” includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment during the period of time the employer undertakes a post-conditional offer review and consideration of criminal history. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an “applicant” by working before undertaking a post-conditional offer review of the individual’s criminal history.

(B) “Employer” includes a labor contractor and a client employer.

(C) “Client employer” means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(D) “Labor contractor” means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer’s usual course of business. This definition is not intended to include Farm Labor Contractors.

(E) “Hiring hall” means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.

(F) “Pool or availability list” means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.
(c) Consideration of Criminal History after a Conditional Offer of Employment Has Been Made. Employers in California are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history both after a conditional offer has been made and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 (for hiring decisions));

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952);

(A) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, it is permissible to consider these programs as evidence of rehabilitation or mitigating circumstances after a conditional offer has been made if offered by the applicant as evidence of rehabilitation or mitigating circumstances.

(B) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, until a pretrial or post-trial diversion program is completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, employers may still consider the conviction or pending charges themselves after a conditional offer is made.

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id);

(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) In addition to the limitations provided in subdivisions (c)(1)-(5), employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).

(7) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(d) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant’s Conviction History.

(1) If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant’s conviction history, the employer must first make an individualized assessment of whether the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subdivision (g) of this section that is used to determine whether the criminal conviction history is job-related and consistent with business necessity. The individualized assessment needs to include, at a minimum, consideration of the following factors:

(A) The nature and gravity of the offense or conduct;
(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) If, after conducting an individualized assessment, the employer makes a preliminary decision that the applicant’s conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the applicant may, but is not required to, justify or explain the employer’s reasoning for making the decision. However, the notice to the applicant must include all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;

(B) A copy of the conviction history report utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports, credit reports, public records, results of internet searches, news articles, or any other writing containing information related to the conviction history that was utilized or relied upon by the employer); and

(C) If an employer’s preliminary decision to withdraw the job conditionally offered involved the use of an automated-decision system, a copy or description of any report or information from the operation of the automated-decision system, related data, and assessment criteria used as part of an automated-decision system; and

(C)(D) An explanation of the applicant’s right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final and the deadline by which to respond (which can be no less than five business days from the date of receipt of the notice). If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both. The types of evidence that may demonstrate rehabilitation or mitigating circumstances may include, but are not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; whether the individual is bonded under a federal, state, or local bonding program; successful completion, or compliance with the terms and conditions, of probation or parole; and rehabilitation efforts such as education or training. If, within five business days of receipt of the notice (or any later deadline set by the employer), the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant’s assertion, then the applicant shall be permitted no less than five additional business days to respond to the notice before the employer’s decision to rescind the employment offer becomes final.

(3) The employer shall consider any information submitted by the applicant before making a final decision regarding whether to rescind the conditional offer of employment. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant’s conviction history, the employer shall notify the applicant in a writing that includes the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer’s reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and
(C) The right to contest the decision by filing a complaint with the Department of Fair Employment and Housing.

(4) The use of an automated-decision system, without more, does not constitute an individualized assessment.

c) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis enumerated in the Act.

(f) Consideration of Other Criminal Convictions and the Potential Adverse Impact. In addition to the types of criminal history addressed in subdivision (c) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, consideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin. An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis enumerated in the Act. For purposes of such a determination, adverse impact is defined at Sections 11017 and 11010 and the Uniform Guidelines on Employee Selection and Procedures (29 C.F.R. 1607 (1978)) incorporated by reference in Section 11017(a) and (e). The applicant(s) or employee(s) bears the burden of proving an adverse impact. An adverse impact may be established through the use of conviction statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

(g) Establishing “Job-Related and Consistent with Business Necessity.”

(1) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis enumerated in the Act, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person’s fitness for the specific position(s), not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by subdivision (h) below). An individualized assessment must involve notice to the adversely impacted employee (before any adverse action is taken) that they have been screened out because of a criminal conviction; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employee is not job related and consistent with business necessity.
(3) Before an employer may take an adverse action such as discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that record cannot be considered in the employment decision.

(h) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(c)(1)(G); Labor Code sections 432.7). Examples include, but are not limited to, government agencies employing individuals as peace officers, employers employing individuals at health facilities where they will have regular access to patients, and employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances. Some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

(i) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer’s goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.


§ 11020. Aiding and Abetting.

(a) Prohibited Practices.

(1) It is unlawful to assist any person or individual in doing any act known to constitute unlawful employment discrimination. Unlawful assistance under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of a person or individual for an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on characteristics protected under this Act.

(2) It is unlawful to solicit or encourage any person or individual to violate the Act, whether or not the Act is in fact violated. Unlawful solicitation or encouragement under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of a person or individual for an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on characteristics protected under this Act.

(3) It is unlawful to coerce any person or individual to commit unlawful employment discrimination with offers of cash, other consideration, or an employment benefit, or to impose or threaten to impose any penalty, including denial of an employment benefit.

(4) It is unlawful to conceal or destroy evidence relevant to investigations initiated by the Department or its staff.
(5) It is unlawful to advertise for employment on a basis prohibited in the Act. Unlawful advertisement under this paragraph includes, but is not limited to, the advertisement, sale, provision, or use of a selection tool, including but not limited to an automated-decision system, on behalf of such person or individual for an unlawful purpose, such as limiting, screening out, or otherwise unlawfully discriminating against applicants or employees based on characteristics protected under this Act.

(b) Permissible Practices.

(1) It shall not be unlawful, without more, to have been present during the commission of acts amounting to unlawful discrimination or to fail to prevent or report such acts, unless it is the normal business duty of the person or individual to prevent or report such acts.

(2) It shall not be unlawful to maintain good faith lawful defenses or privileges to charges of discrimination.


§ 11028. Specific Employment Practices.

(a) Language Restrictions.

(1) It is an unlawful employment practice for an employer or other covered entity to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, including, but not limited to, an English-only rule, unless:

(A) The language restriction is justified by business necessity;

(B) The language restriction is narrowly tailored; and

(C) The employer has effectively notified its employees of the circumstances and time when the language restriction is required to be observed and of the consequence for violating the language restriction.

(2) For purposes of this subsection, “business necessity” means an overriding legitimate business purpose, such that:

(A) The language restriction is necessary to the safe and efficient operation of the business;

(B) The language restriction effectively fulfills the business purpose it is supposed to serve; and

(C) There is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

(3) It is not sufficient that the employer’s language restriction merely promotes business convenience or is due to customer or co-worker preference.

(4) English-only rules violate the Act unless the employer can prove the elements listed in section 11028, subdivisions (a)(1)(A)-(C). English-only rules are never lawful during an employee’s non-work time, e.g., breaks, lunch, unpaid employer-sponsored events, etc.
(b) Employment discrimination based on an applicant’s or employee’s accent is unlawful unless the employer proves that the individual’s accent interferes materially with the applicant’s or employee’s ability to perform the job in question.

(1) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of applicants or employees on the basis of their accent, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(c) Discrimination based on an applicant’s or employee’s English proficiency is unlawful unless the English proficiency requirement at issue is justified by business necessity (i.e., the level of proficiency required by the employer is necessary to effectively fulfill the job duties of the position.) In determining business necessity in this context, relevant factors include, but are not limited to, the type of proficiency required (e.g., spoken, written, aural, and/or reading comprehension), the degree of proficiency required, and the nature and job duties of the position.

(1) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of individuals with on the basis of English proficiency, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(d) It is not unlawful for an employer to request from an applicant or employee information regarding his or her ability to speak, read, write, or understand any language, including languages other than English, if justified by business necessity.

(e) Retaliation. It is an unlawful employment practice for an employer or other covered entity to retaliate against any individual because the individual has opposed discrimination or harassment on the basis of national origin, has participated in the filing of a complaint, or has testified, assisted, or participated in any other manner in a proceeding in which national origin discrimination or harassment has been alleged. Retaliation may include, but is not limited to:

(1) threatening to contact or contacting immigration authorities or a law enforcement agency about the immigration status of the employee, former employee, applicant, or a family member (e.g., spouse, domestic partner, parent, sibling, child, uncle, aunt, niece, nephew, cousin, grandparent, great-grandparent, grandchild, or great-grandchild, by blood, adoption, marriage, or domestic partnership) of the employee, former employee, or applicant; or

(2) taking adverse action against an employee because the employee updates or attempts to update personal information based on a change of name, social security number, or government-issued employment documents.

(f) Immigration-related Practices.

(1) All provisions of the Act and these regulations apply to undocumented applicants and employees to the same extent that they apply to any other applicant or employee. An employee’s or applicant’s immigration status is irrelevant during the liability phase of any proceeding brought to enforce the Act.

(2) Discovery or other inquiry into an applicant’s or employee’s immigration status shall not be permitted unless the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such inquiry is necessary to comply with federal immigration law.

(3) It is an unlawful practice for an employer or other covered entity to discriminate against an employee because of the employee’s or applicant’s immigration status, unless the employer has shown by clear and convincing evidence that it is required to do so in order to comply with federal immigration law.
(4) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of applicants or employees on the basis of their immigration status, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(4)(5) It is an unlawful practice for an employer or other covered entity to retaliate, as described in subdivision (e), against an employee for engaging in activity protected by the Act.

(g) It is unlawful for an employer or other covered entity to discriminate against an applicant or employee because he or she holds or presents a driver’s license issued under section 12801.9 of the Vehicle Code.

(1) An employer or other covered entity may require an applicant or employee to hold or present a license issued under the Vehicle Code only if:

(A) Possession of a driver’s license is required by state or federal law; or

(B) Possession of a driver’s license is required by the employer or other covered entity and is otherwise permitted by law. An employer’s or other covered entity’s policy requiring applicants or employees to present or hold a driver’s license may be evidence of a violation of the Act if the policy is not uniformly applied or is inconsistent with legitimate business reasons (i.e., possessing a driver’s license is not needed in order to perform an essential function of the job).

(2) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of applicants or employees on because the applicant(s) or employee(s) hold or presents a driver’s licenses issued under section 12801.9 of the Vehicle Code.

(2)(3) Nothing in this subsection shall limit or expand an employer’s authority to require an applicant or employee to possess a driver’s license.

(2)(4) Nothing in this subsection shall alter an employer’s or other covered entity’s rights or obligations under federal immigration law.

(h) Citizenship requirements. Citizenship requirements that are a pretext for discrimination or have the purpose or effect of discriminating against applicants or employees on the basis of national origin or ancestry are unlawful, unless pursuant to a permissible defense.

(1) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of applicants or employees on the basis of their citizenship, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(i) Human Trafficking. It is an unlawful employment practice for an employer or other covered entity to use force, fraud, or coercion to compel the employment of, or subject to adverse treatment, applicants or employees on the basis of national origin.

(j) Harassment. It is unlawful for an employer or other covered entity to harass an applicant or employee on the basis of national origin. (See generally section 11019(b).) The use of epithets, derogatory comments, slurs, or non-verbal conduct based on national origin, including, but not limited to, threats of deportation, derogatory comments about immigration status, or mockery of an accent or a language or its speakers may constitute harassment if the actions are severe or pervasive such that they alter the conditions of the employee’s employment and create an abusive working environment. A single unwelcome act of harassment may be sufficiently severe so as to create an unlawful hostile work environment. (See generally section 11034(f)(2)(A).)
(k) Height and/or weight requirements. Such requirements may have the effect of creating a disparate impact on the basis of national origin. Where an adverse impact is established, such requirements are unlawful, unless the employer can demonstrate that they are job related and justified by business necessity. Where such a requirement is job related and justified by business necessity, it is still unlawful if the applicant or employee can prove that the purpose of the requirement can be achieved as effectively through less discriminatory means.

(1) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of applicants or employees on the basis of their height or weight, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(l) Recruitment and job segregation. It is an unlawful employment practice for an employer or other covered entity to seek, request, or refer applicants or employees based on national origin or to assign positions, facilities, or geographical areas of employment based on national origin, unless pursuant to a permissible defense.

(m) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of applicants or employees on the basis of their national origin or those characteristics which, when considered, may disparately impact applicants or employees on the basis of national origin, or any characteristics set forth in subsections (b) through (f) and (i) of this section, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


Article 5. Sex Discrimination

§ 11032. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers or other covered entities engaged in recruiting activity (see section 11015(a)) shall recruit individuals of both sexes for all jobs unless pursuant to a permissible defense.

(2) It is unlawful for any publication or other media to separate listings of job openings into male and female classifications.

(b) Pre-Employment Inquiries and Applications.

(1) For all employers or other covered entities who provide, accept and consider applications, it shall be unlawful to refuse to provide, accept and consider applications from individuals of one sex unless pursuant to a permissible defense.

(2) It is unlawful for an employer or other covered entity to ask the sex of the applicant on an application form or pre-employment questionnaire, unless the question is asked pursuant to a permissible defense or for recordkeeping purposes. After an individual is hired, the employer or other covered entity may record the employee’s sex for non-discriminatory personnel purposes.

(3) It is unlawful for an employer or other covered entity to ask questions regarding childbearing, pregnancy, birth control, or familial responsibilities unless the questions are related to specific and relevant working conditions of the job in question.

(4) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an
applicant or employee or a class of individuals on the basis of sex, unless the standards, questions, tests,
automated-decision systems, or other selection criteria, as used by the covered entity, are shown to be job-
related for the position in question and are consistent with business necessity.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and
12945, Government Code.

§ 11033. Employee Selection.

(a) Tests of Physical Agility or Strength. A test of physical agility or strength shall not be used unless the test is
administered pursuant to a permissible defense. No applicant or employee shall be refused the opportunity to
demonstrate that he or she has the requisite strength or agility to perform the job in question.

(b) Height and Weight Standards.

(1) Use of height or weight standards that discriminate against one sex or the other is unlawful unless
pursuant to a permissible defense.

(2) Use of separate height and/or separate weight standards for males and females is unlawful unless
pursuant to a permissible defense.

(c) Hiring Applicants of Childbearing Age. It is unlawful to refuse to hire a female applicant because she is of
childbearing age.

(d) Prior Work Experience. If an employer or other covered entity considers prior work experience in the selection
or assignment of an employee, the employer or other covered entity shall also consider prior unpaid or volunteer
work experience.

(e) Sex Stereotypes. Use of any criterion that is based exclusively or in part on a sex stereotype is unlawful unless
pursuant to a permissible defense.

(f) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions,
automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee
or a class of applicants or employees on the basis of their sex or any of the characteristics set forth in (a) through (e)
of this section, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be
job-related for the position in question and are consistent with business necessity.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12943 and
12945, Government Code.

Article 6. Pregnancy, Childbirth or Related Medical Conditions

§ 11038. Responsibilities of Covered Entities Other than Employers.

(a) Unless a permissible defense applies, discrimination because of pregnancy or perceived pregnancy by any
covered entity other than employers constitutes discrimination because of sex under Government Code sections
12926, 12940, 12943 and 12944.

(b) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions,
automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or
employer or a class of individuals on the basis of pregnancy or perceived pregnancy, unless the standards, tests, or
other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are
consistent with business necessity.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12926, 12940, 12943, 12944 and
12945, Government Code.
§ 11039. Responsibilities of Employers.

(a) Employer Obligations

(1) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to hire or employ an applicant because of pregnancy or perceived pregnancy;

(B) refuse to select an applicant or employee for a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(C) refuse to promote an employee because of pregnancy or perceived pregnancy;

(D) bar or to discharge an applicant or employee from employment or from a training program leading to employment or promotion because of pregnancy or perceived pregnancy;

(E) discriminate against an applicant or employee in terms, conditions or privileges of employment because of pregnancy or perceived pregnancy;

(F) harass an applicant or employee because of pregnancy or perceived pregnancy, as set forth in section 11036;

(G) transfer an employee affected by pregnancy over her objections to another position, except as provided in section 11041(c). Nothing in this section prevents an employer from transferring an employee for the employer’s legitimate operational needs unrelated to the employee’s pregnancy or perceived pregnancy;

(H) require an employee to take a leave of absence because of pregnancy or perceived pregnancy when the employee has not requested leave;

(I) retaliate, discharge, or otherwise discriminate against an applicant or employee because she has opposed employment practices forbidden under the FEHA or because she has filed a complaint, testified, or assisted in any proceeding under the FEHA;

(J) use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of individuals on the basis of pregnancy or perceived pregnancy, unless the standards, tests, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity; or

(K) otherwise discriminate against an applicant or employee because of pregnancy or perceived pregnancy by any practice that is prohibited on the basis of sex.

(2) Except as excused by a permissible defense, it is unlawful for any employer to:

(A) refuse to provide employee benefits for pregnancy as set forth at section 11044, if the employer provides such benefits for other temporary disabilities;

(B) refuse to maintain and to pay for coverage under a group health plan for an eligible employee who takes pregnancy disability leave, as set forth at section 11044, under the same terms and conditions that would have been provided if the employee had not taken leave;

(C) refuse to provide reasonable accommodation for an employee or applicant affected by pregnancy as set forth at section 11040;

(D) refuse to transfer an employee affected by pregnancy as set forth at section 11041;
(E) refuse to grant an employee disabled by pregnancy a pregnancy disability leave, as set forth at section 11042; or

(F) deny, interfere with, or restrain an employee’s rights to reasonable accommodation, to transfer or to take pregnancy disability leave under Government Code section 12945, including retaliating against the employee because she has exercised her right to reasonable accommodation, to transfer or to take pregnancy disability leave.

(b) Permissible defenses, as defined at section 11010, include a bona fide occupational qualification, business necessity or where the practice is otherwise required by law.


Article 7. Marital Status Discrimination

§ 11056. Pre-Employment Practices.

(a) Impermissible Inquiries. It is unlawful to ask an applicant to disclose his or her marital status as part of a pre-employment inquiry, including an inquiry made through the use of an automated-decision system, unless pursuant to a permissible defense.

(b) Request for Names. For business reasons other than ascertaining marital status, an applicant may be asked whether he or she has ever used another name, e.g., to enable an employer or other covered entity to check the applicant’s past work record.

(c) Employment of Spouse. It is lawful to ask an applicant to state whether he or she has a spouse who is presently employed by the employer, but this information may not be used as a basis for an employment decision except as stated below.


Article 8. Religious Creed Discrimination

§ 11063. Pre-Employment Practices.

(a) Pre-employment inquiries regarding an applicant’s availability for work on weekends or evenings shall not be used to ascertain their religious creed, nor shall such inquiry be used to evade the requirement of reasonable accommodation. However, inquiries as to the availability for work on weekends or evenings are permissible where reasonably related to the normal business requirements of the job in question and in compliance with section 11016 of these regulations.

(b) It is unlawful for an employer or a covered entity to use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee or a class of individuals on the basis of religion, unless the standards, tests, automated-decision systems, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity.


Article 9. Disability Discrimination
§ 11070. Pre-Employment Practices.

(a) Recruitment and Advertising.

(1) Employers and other covered entities engaged in recruiting activities shall consider applicants with or without disabilities or perceived disabilities on an equal basis for all jobs, unless pursuant to a permissible defense.

(2) It is unlawful to advertise or publicize, including but not limited to through the use of an automated-decision system, an employment benefit in any way that discourages or is designed to discourage applicants with disabilities from applying to a greater extent than individuals without disabilities.

(b) Applications and disability-related inquiries.

(1) An employer or other covered entity must consider and accept applications from applicants with or without disabilities equally.

(2) Prohibited Inquiries. It is unlawful to ask general questions on disability or questions likely to elicit information about a disability in an application form, automated-decision system, or pre-employment questionnaire or at any time before a job offer is made. Examples of prohibited inquiries are:

(A) “Do you have any particular disabilities?”

(B) “Have you ever been treated for any of the following diseases or conditions?”

(C) “Are you now receiving or have you ever received workers’ compensation?”

(D) “What prescription medications are you taking?”

(E) “Have you ever had a job-related injury or medical condition?”

(F) Have you ever left a job because of any physical or mental limitations?

(G) “Have you ever been hospitalized?”

(H) “Have you ever taken medical leave?”

(3) Permissible Job-Related Inquiry. Except as provided in the ADA, as amended by the ADA Amendments Act of 2008 and the regulations adopted pursuant thereto, nothing in Government Code Section 12940(d), or in this subdivision, shall prohibit any employer or other covered entity, in connection with prospective employment, from inquiring whether the applicant can perform the essential functions of the job. When an applicant requests reasonable accommodation, or when an applicant has an obvious disability, and the employer or other covered entity has a reasonable belief that the applicant needs a reasonable accommodation, an employer or other covered entity may make limited inquiries regarding such reasonable accommodation.

(c) Interviews. An employer or other covered entity shall make reasonable accommodation to the needs of applicants with disabilities in interviewing situations, e.g., providing interpreters for the hearing-impaired, or scheduling the interview in a room accessible to wheelchairs.


§ 11071. Medical and Psychological Examinations and Inquiries.
(a) Pre-offer. It is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant. A medical or psychological examination includes a procedure or test that seeks information about an individual’s physical or mental conditions or health but does not include testing for current illegal drug use. These procedures or tests include, but are not limited to, those employed through the use of an automated decision system.

(1) Personality-based questions, including but not limited to such questions included in an automated-decision system, may constitute a medical or psychological examination or inquiry. Personality-based questions include, but are not limited to, tests or questions that measure any of the following:

(A) optimism and/or positive attitudes;

(B) personal or emotional stability;

(C) extroversion or introversion; and/or

(D) intensity.

(2) Gamified components used in the hiring process that evaluate physical or mental abilities, including but not limited to gamified screens included in an automated-decision system, may constitute a medical or physical examination or inquiry.

(b) Post-Offer. An employer or other covered entity may condition a bona fide offer of employment on the results of a medical or psychological examination or inquiries conducted prior to the employee’s entrance on duty in order to determine fitness for the job in question. For a job offer to be bona fide, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

(1) All entering employees in similar positions are subjected to such an examination.

(2) Where the results of such medical or psychological examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before a final determination on disqualification is made.

(3) The results are to be maintained on separate forms and shall be accorded confidentiality as medical records.

(c) Withdrawal of Offer. An employer or other covered entity may withdraw an offer of employment based on the results of a medical or psychological examination or inquiries conducted prior to the employee’s entrance on duty in order to determine fitness for the job in question. For a job offer to be bona fide, an employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer, provided that:

(1) An employer or other covered entity may make disability-related inquiries, including fitness for duty exams, and require medical examinations of employees so long as the inquiries are both job-related and consistent with business necessity.

(2) Drug or Alcohol Testing. An employer or other covered entity may maintain and enforce rules prohibiting employees from being under the influence of alcohol or drugs in the workplace and may conduct alcohol or drug testing for this purpose if they have a reasonable belief that an employee may be under the influence of alcohol or drugs at work.

(A) Current Drug Use. An applicant or employee who currently engages in the use of illegal drugs or uses medical marijuana is not protected as a qualified individual under the FEHA when the employer acts on the basis of such use, and questions about current illegal drug use are not disability-related inquiries.
(B) Past Addiction. Questions about past addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program are disability-related because past drug addiction generally is a disability. Individuals who were addicted to drugs, but are not currently using illegal drugs are protected under the FEHA from discrimination because of their disability.

(3) Other Acceptable Disability-Related Inquiries and Medical Examinations of Employees

(A) Employee Assistance Program. An Employee Assistance Program (EAP) counselor may ask an employee seeking help for personal problems about any physical or mental condition(s) the employee may have if the counselor: (1) does not act for or on behalf of the employer; (2) is obligated to shield any information the employee reveals from decision makers; (3) has no power to affect employment decisions; and (4) discloses these provisions to the employee.

(B) Compliance with another Federal or State Law or Regulation. An employer may make disability-related inquiries and require employees to submit to medical examinations that are mandated or necessitated by other federal and/or state laws or regulations, such as medical examinations required at least once every two years under federal safety regulations for interstate bus and truck drivers or medical requirements for airline pilots.

(C) Voluntary Wellness Program. As part of a voluntary wellness program, employers may conduct voluntary medical examinations and activities, including taking voluntary medical histories, without having to show that they are job-related and consistent with business necessity, as long as any medical records acquired as part of the wellness program are kept confidential and separate from personnel records. These programs often include blood pressure screening, cholesterol testing, glaucoma testing, and cancer detection screening. Employees may be asked disability-related questions and may be given medical examinations pursuant to such voluntary wellness programs. A wellness program is voluntary as long as an employer neither requires participation nor penalizes employees who do not participate.

(4) Maintenance of Medical Files. Employers shall keep information obtained regarding the medical or psychological condition or history of the employee confidential, as set forth at section 11069(g).


§ 11072. Employee Selection.

(a) Prospective Need for Reasonable Accommodation. An employer or other covered entity shall not deny an employment benefit because of the prospective need to make reasonable accommodation to an applicant or employee with a disability.

(b) Qualification standards, tests, and other selection criteria.

(1) In general. It is unlawful for an employer or a covered entity to use qualification standards, employment tests, automated-decision systems or other selection criteria that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities, on the basis of disability, unless the standards, tests, automated decision systems, or other selection criteria, as used by the covered entity, are shown to be job-related for the position in question and are consistent with business necessity. Statistical comparisons between persons with disabilities and persons who are not disabled are not required to show that an individual with a disability or a class of individuals with disabilities is screened out by selection criteria.

(2) Qualification Standards and Tests Related to Uncorrected Vision or Uncorrected Hearing. An employer or other covered entity shall not use qualification standards, employment tests, questions, automated-decision systems, or other selection criteria based on an applicant’s or employee’s uncorrected vision or uncorrected hearing unless the standards, tests, questions, automated-decision systems, or other selection
criteria, as used by the employer or other covered entity, are shown to be job-related for the position in question and are consistent with business necessity.

(3) An employer or other covered entity shall not make use of any testing criterion, including but not limited to through the use of an automated-decision system, that discriminates against applicants or employees with disabilities, unless:

(A) the test score or other selection criterion used is shown to be job-related for the position in question; and

(B) an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.

(4) Tests of physical agility or strength shall not be used as a basis for selection or retention of employment unless the physical agility or strength measured by such test is job-related. Such tests include but are not limited to those administered as part of an automated-decision system.

(5) An employer or other covered entity shall select and administer tests concerning employment so as to ensure that, when administered to any applicant or employee, including an applicant or employee with a disability, the test results accurately reflect the applicant’s or employee’s job skills, aptitude, or whatever other criteria the test purports to measure rather than reflecting the applicant’s or employee’s disability, except when those skills affected by disability are the criteria that the tests purport to measure. Tests concerning employment include, but are not limited to, those administered as part of an automated-decision system. To accomplish this end, reasonable accommodation shall be made in testing conditions. For example:

(A) The test site must be accessible to applicants and employees with a disability.

(B) For applicants and employees who are blind or visually impaired, an employer or other covered entity may translate written tests into Braille or provide or allow enlarged print, real time captioning, digital format, the use of a human reader or a screen reader, the use of other computer technology, or oral presentation of the test.

(C) For applicants or employees who are quadriplegic or have spinal cord injuries, an employer or other covered entity may provide or allow someone to write for the applicant or employee, or provide or allow voice recognition software or other computer technology, or allow oral responses to written test questions.

(D) For applicants and employees who are hearing impaired, an employer or other covered entity may provide or allow the services of an interpreter.

(E) For applicants and employees whose disabilities interfere with their ability to read, process information, communicate, an employer or other covered entity may allow additional time to complete the examination.

(F) Alternate tests or individualized assessments may be necessary where test modification is inappropriate. Competent expert advice may be sought before attempting such modification since the validity of the test may be affected. The use of an automated-decision system, without more, does not constitute an individualized assessment.

(G) Where reasonable accommodation is appropriate, an employer or other covered entity may permit the use of readers, interpreters, or similar supportive persons or instruments.

(c) No testing for genetic information. It is unlawful for an employer or other covered entity to conduct a medical examination to test for the presence of a genetic characteristic, or to acquire genetic information, unless such testing or acquisition is authorized by federal law under the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff-1(b).
Article 10. Age Discrimination

§ 11076. Establishing Age Discrimination.

(a) Employers. Discrimination on the basis of age may be established by showing that a job applicant’s or employee’s age of 40 or older was considered in the denial of employment or an employment benefit. There is a presumption of discrimination whenever a facially neutral practice, including but not limited to the use of an automated-decision system, has an adverse impact on an applicant(s) or employee(s) age 40 or older, unless the practice is job-related and consistent with business necessity as defined in section 11010(b). In the context of layoffs or salary reduction efforts that have an adverse impact on an employee(s) age 40 or older, an employer’s preference to retain a lower paid worker(s), alone, is insufficient to negate the presumption. The practice may still be impermissible, even where it is job-related and consistent with business necessity, where it is shown that an alternative practice could accomplish the business purpose equally well with a lesser discriminatory impact.

(b) Employment Agencies, Labor Organizations, and Apprenticeship Training Programs in Which the State Participates. Discrimination on the basis of age may be established against employment agencies, labor organizations, and apprenticeship training programs in which the state participates upon a showing that they have engaged in recruitment, screening, advertising, training, job referral, placement or similar activities that discriminate against an individual(s) age 40 or older.


§ 11079. Advertisements, Pre-employment Inquiries, Interviews and Applications.

(a) Advertisements. Unless age is a bona fide occupational qualification for the position at issue, advertisements for employment that a reasonable person would interpret as deterring or limiting employment of people age 40 and older are unlawful. (See section 11010(a) for the definition of bona fide occupational qualification.) Where there is no bona fide occupational qualification, examples of prohibited advertisements include those that designate a preferred applicant age range or that include terms such as young, college student, recent college graduate, boy, girl, or other terms that imply a preference for employees under the age of 40.

(b) Pre-employment Inquiries. Unless age is a bona fide occupational qualification for the position at issue, pre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age, including, but not limited to, inquiries made through the use of an automated-decision system, are unlawful. Examples of prohibited inquiries are requests for age, date of birth, or graduation dates, except where age is a bona fide occupational qualification. This provision applies to oral and written inquiries and interviews. (See section 11016(b), which is applicable and incorporated by reference herein.) Pre-employment inquiries that result in the identification of persons on the basis of age shall not be unlawful when made for purposes of applicable reporting requirements or to maintain applicant flow data provided that the inquiries are made in a manner consistent with Section 11013 (and particularly subsection (b)) of Article 1.

(c) Applications. Unless age is a bona fide occupational qualification for the position at issue, it is discrimination on the basis of age for an employer or other covered entity to reject or refuse to provide equal consideration of the application form, pre-employment questionnaire, oral application, or the oral or written inquiry of an individual because the individual is age 40 or older. (See section 11016(c), which is applicable and incorporated by reference herein.)

(1) Subsection (c) prohibits the use of online job applications that require entry of age in order to access or complete an application, or the use of drop-down menus that contain age-based cut-off dates or utilize automated selection criteria or algorithms that have the effect of screening out applicants age 40 and older. Use of online application technology or an automated-decision system that limits or screens out older applicants is discriminatory unless age is a bona fide occupational qualification. (See section 11010(a).)
EEOC Issues Guidance on Artificial Intelligence and Americans with Disabilities Act Considerations

By Jim Paretti, Niloy Ray, and Marko Mrkonich on May 18, 2022

On May 12, 2022, the U.S. Equal Employment Opportunity Commission (EEOC) issued a “Technical Assistance” (TA) document addressing compliance with ADA requirements and agency policy when using AI and other software to hire and assess employees. The agency also published a short “Tips for Workers” summary of this guidance. Neither of these documents has the force or effect of law, nor are they binding on employers; as the accompanying press release notes, this guidance is meant to be educational, “so that people with disabilities know their rights and employers can take action to avoid discrimination.” Nevertheless, we see several take-aways regarding the Commission’s likely expectations and areas of focus when regulating the use of such tools in hiring or assessing employees:

- **Accessibility:** Employers should account for the fact that on-line/interactive tools may not be easily accessed or used by those with visual, auditory or other impairment.
- **Accommodation:** Barring undue hardship, employers should provide alternatives to the use or application of these tools if an individual’s disability renders the use of the tool more difficult or the accuracy of the tool’s assessment less reliable.
- **Accommodation, II:** Beyond providing reasonable accommodations in accessing/using these tools, employers should ensure that the tools assess an individual in the context of any reasonable accommodation they are likely to be given when performing their job.
- **ADA vs. Title VII:** The EEOC stresses that disability bias requires different design and testing criteria than does Title VII discrimination, such as access considerations and the potential for inadvertent disability-related inquiries or medical examinations.
- **Promising Practices:** Noting that employers are responsible for ADA-violating outcomes even when a software tool is created or used by a third-party vendor or agent, the Commission provides examples of so-called “Promising Practices” that employers can engage in to demonstrate good-faith efforts to meet ADA requirements.
Throughout, the TA document uses various illustrative examples of the tools the EEOC aims to regulate. These range from résumé scanners and virtual assistants/chatbots to video-interviewing software and software that tests an individual’s personality, aptitude, skills, and “perceived ‘cultural fit.’” Employers using any of these tools in their recruiting, hiring, and review of applicants and employees (which, by some estimates, is up to 83% of employers) should take careful note of the EEOC’s position as to where these tools may run afoul of the ADA.

The TA document focuses broadly on three themes, specifically, how the use of algorithmic decision-making may violate the ADA with respect to: (1) reasonable accommodation for applicants and employees; (2) where AI decision-making tools may “screen out” individuals with disabilities; and (3) where an AI-based tool may violate ADA restrictions on disability-related inquiries. Key take-aways from each are discussed below.

**Reasonable Accommodation.** Foremost, the EEOC stresses that where an employer uses AI or other algorithmic decision-making software, it is required to provide reasonable accommodation to employees whose disability may make it difficult to be assessed by the tool, or where a disability may cause a lower result than it would for a non-disabled employee. The EEOC takes the unequivocal position that where a disability might make a test more difficult to take or reduce the accuracy of an assessment, an employer must provide an alternative testing format or a more accurate assessment of the individual’s skills, unless doing so would entail “undue hardship” (defined as “significant difficulty or expense,” and generally a very high bar for an employer to meet under the ADA). By way of example, the EEOC offers that an employer that uses a test requiring use of a keyboard or trackpad to measure employee knowledge may need to provide an accessible version of the test to an employee with limited manual dexterity (or, where it is not possible to provide an accessible version of the test, to provide an alternative testing format). Similarly, in its discussion of “screening out” applicants (detailed below), the agency cites tools that measure speech patterns or facial recognition, and the potential negative effect these may have on individuals with certain disabilities. In line with its prior example, presumably the agency would take the position that an employer must provide such individuals with alternative testing methods, where it can do so without undue hardship. Finally, the guidance makes clear that where an employer uses a third party, such as a software vendor, to administer and score pre-employment tests, the failure of the vendor to provide a reasonable accommodation required by the ADA would likely result in an employer being liable, even if the employer was unaware that the applicant reported the need for an accommodation to the vendor.

**“Screening Out.”** The bulk of the EEOC’s guidance focuses on the use of AI or other algorithmic tools that act to “screen out” individuals with disabilities, where such tool causes an individual to receive a lower score or assessment and the individual loses a job opportunity as a result. The guidance provides several examples, including a chatbot that screens out applicants with gaps in their employment history, the use of which may violate the ADA if the employment gap was due to a disability or the need to undergo treatment (EEOC appears to ignore the fact that many if not most gaps in employment history are unlikely to be occasioned by a disability). Perhaps a more common scenario is contemplated in the example of video software that analyzes speech patterns, and which may screen out individuals with speech impediments.
The guidance also explains in some length that while the typical steps an employer using AI may take to ensure its use is non-discriminatory (such as testing a tool for disparate impact on the basis of race or sex, and modifying the tool to eliminate any such impact if found), these efforts may be insufficient to eliminate discrimination on the basis of disability, insofar as “[e]ach disability is unique,” and the fact that some individuals with disabilities may fare well on the test does not mean that a particular individual with a disability may not be unlawfully screened out. It goes on to state that while a decision-making tool may be “validated” (meaning that there is evidence that the tool accurately measures or predicts a trait or characteristic relevant to a specific job), such “validation” may not be sufficient with respect to individuals with disabilities. EEOC cites, for example, a visual “memory test,” which may be an accurate measure of memory for most individuals in the workforce, but may still unlawfully screen out an individual who has a good memory, but a visual impairment that reduces their ability to perform successfully on the test.

The guidance also raises the concern that an algorithm may screen out an individual with a disability who can perform the essential functions of the job with reasonable accommodation because the algorithm is programmed to predict whether applicants under “typical working conditions” can do the job, and does not account for the possibility that an individual with a disability might be entitled to an accommodation such that they are not performing under “typical” working conditions. By way of example, it offers an individual with PTSD, who might be rated poorly on a test that measures the ability to ignore workplace distractions without regard to the fact that such an individual may be entitled to an accommodation that would mitigate the effect of their disability (such as a quiet workstation or permission to use noise-cancelling headphones).

**Disability-Related Inquiries.** Finally, the TA notes that the use of AI tools may violate the ADA where software poses “disability-related inquiries,” meaning questions that are likely to elicit information about a disability (directly or indirectly). While it is unlikely that most screening tools will include such questions (such as asking about an applicant’s workers’ compensation history), the EEOC warns that some seemingly innocuous questions may still run afoul of the ADA’s pre-offer limitation on medical inquiries, or act to “screen out” applicants or employees unlawfully. The guidance notes that a personality test is not making a “disability-related inquiry” simply because it asks whether an individual is “described by friends as being generally optimistic,” even if being described in such a way may be related to a mental health diagnosis. What the EEOC giveth with one hand, however, it appears to take away with the other: as the agency explains, even if a question about “optimism” does not violate the ADA itself, if an individual with major depressive disorder answers negatively and loses an employment opportunity because of that answer, this may be an unlawful “screening out” if the negative answer is a result of the individual’s mental health diagnosis. Similarly, the EEOC provides no guidance with respect to the “resume gap” it flags as a screening issue. As mentioned above, the guidance notes that a chatbot or similar AI tool’s disqualifying an individual because of a gap in employment history may violate the ADA if the employment gap is due to a disability; left unclear is whether an invitation from the chatbot to an applicant to explain any gap in employment history is a prohibited “disability-related inquiry.” There are many reasons an applicant may have taken time away from the workforce, such that a broad inquiry should not be seen as a disability-related inquiry; that said, the EEOC declined to provide any indication of its view on the question.
**Practical Application.** The EEOC provides guidance and “promising practices” to employers seeking to use algorithmic tools, whether developed on their own, or provided by way of a third-party vendor, to minimize the risk of violating the ADA. These include examining:

- If the tool requires applicants or employees to engage a user interface, is the interface accessible to persons with disabilities?
- Are materials presented in alternative formats?
- Has the algorithm been assessed to determine whether it disadvantages individuals with disabilities?
- Does the tool clearly indicate that reasonable accommodation, including alternative formats, are available to persons with disabilities?
- Are there clear instructions for requesting accommodation?
- Does the tool explain to applicants and employees what metrics the tool measures, how they are measured, and whether any disability might lower an assessment, such that a user with a disability would know to ask for a reasonable accommodation?

The EEOC’s guidance appears to raise more questions than it answers, in an area of law that is changing rapidly and already poses compliance challenges for employers. Indeed, in many instances, it suggests that the ADA’s requirements with respect to accommodation and prohibition on unlawful screening may render the use of AI tools vastly more complicated and legally fraught. This comes at a time where the use of such tools is increasing exponentially.

As the EEOC continues its AI initiative, we expect that the agency will provide further guidance to employers as to its view of how artificial intelligence and algorithmic decision-making interact with federal civil rights laws. Moreover, as the composition of the Commission is likely to shift from a Republican majority to a Democratic majority no later than the end of the year, we expect the agency to ramp up its efforts to regulate in this space. Littler’s [Workplace Policy Institute](https://www.littler.com/services/employment/litigation-and-compliance) will continue to keep readers apprised of relevant developments.

**Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.**
The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

**OLC Control Number:**

EEOC-NVTA-2022-2

**Concise Display Name:**

The ADA and AI: Applicants and Employees

**Issue Date:**

05-12-2022

**General Topics:**

Disability, Essential Functions, Hiring, Monitoring, Reasonable Accommodation, Screen Out, Technology

**Summary:**

This technical assistance document discusses how existing ADA requirements may apply to the use of artificial intelligence (AI) in employment-related decision making and offers promising practices for employers to help with ADA compliance when using AI decision making tools.
Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias. However, the use of these tools may disadvantage job applicants and employees with disabilities. When this occurs, employers may risk violating federal Equal Employment Opportunity (“EEO”) laws that protect individuals with disabilities.

The Questions and Answers in this document explain how employers’ use of software that relies on algorithmic decision-making may violate existing requirements under Title I of the Americans with Disabilities Act (“ADA”). This technical assistance also provides practical tips to employers on how to comply with the ADA, and to job applicants and employees who think that their rights may have been violated.

The Equal Employment Opportunity Commission (“EEOC” or “the Commission”) enforces, and provides leadership and guidance on, the federal EEO laws prohibiting employment discrimination on the basis of race, color, national origin, religion, and sex (including pregnancy, sexual orientation, and gender identity), disability, age (over 40) and genetic information. This publication is part of an ongoing effort by the EEOC to educate employers, employees, and other stakeholders about the application of EEO laws when employers use employment software and applications, some of which incorporate algorithmic decision-making.
Background

As a starting point, this section explains the meaning of three, central terms used in this document—software, algorithms, and artificial intelligence (“AI”) —and how, when used in a workplace, they relate to each other.

- **Software**: Broadly, “software ([https://www.access-board.gov/ict/#E103-definitions](https://www.access-board.gov/ict/#E103-definitions))” refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function. “Application software ([https://www.access-board.gov/ict/#E103-definitions](https://www.access-board.gov/ict/#E103-definitions))” (also known as an “application” or “app”) is a type of software designed to perform or to help the user perform a specific task or tasks. The United States Access Board is the source of these definitions.

  There are many different types of software and applications used in employment, including: automatic resume-screening software, hiring software, chatbot software for hiring and workflow, video interviewing software, analytics software, employee monitoring software, and worker management software.

- **Algorithms**: Generally, an “algorithm” is a set of instructions that can be followed by a computer to accomplish some end. Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and employees. Software or applications that include algorithmic decision-making tools may be used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

- **Artificial Intelligence (“AI”)**: Some employers and software vendors use AI when developing algorithms that help employers evaluate, rate, and make other decisions about job applicants and employees. In the [National Artificial Intelligence Initiative Act of 2020 at section 5002(3)](https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210), Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.” In the employment context, using AI has typically meant that the developer relies partly on the computer’s own analysis of data to determine which criteria to use when making employment decisions. AI may include
machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems. For a general discussion of AI, which includes machine learning, see National Institute of Standards and Technology Special Publication 1270, [here](https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf).

Employers may rely on different types of software that incorporate algorithmic decision-making at a number of stages of the employment process. Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test. Each of these types of software may include AI.

**ADA Basics**

1. **What is the ADA and how does it define “disability”?**

The ADA is a federal civil rights law. Title I of the ADA prohibits employers, employment agencies, labor organizations, and joint labor-management committees with 15 or more employees from discriminating on the basis of disability. Other parts of the ADA, not discussed here, ensure that people with disabilities have full access to public and private services and facilities.

The ADA has a very specific definition of a current “disability.” A physical or mental impairment meets the ADA’s definition of a current “disability” if it would, when left untreated, “substantially limit” one or more “major life activities.” Major life activities include, for example, seeing, reaching, communicating, speaking, concentrating, or the operation of major bodily functions, such as brain or neurological functions. (There are two other definitions of “disability” that are not the subject of this discussion. For more information on the definition of “disability” under the ADA, see [EEOC’s Questions and Answers on the ADA Amendments Act](https://www.eeoc.gov/laws/types/disability.cfm).)
A condition does not need to be permanent or severe, or cause a high degree of functional limitation, to be “substantially limiting.” It may qualify as substantially limiting, for example, by making activities more difficult, painful, or time-consuming to perform as compared to the way that most people perform them. In addition, if the symptoms of the condition come and go, the condition still will qualify as a disability if it substantially limits a major life activity when active. Many common and ordinary medical conditions will qualify.

2. How could an employer’s use of algorithmic decision-making tools violate the ADA?

The most common ways that an employer’s use of algorithmic decision-making tools could violate the ADA are:

- The employer does not provide a “reasonable accommodation” that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm. (See Questions 4–7 below.)

- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally “screens out” an individual with a disability, even though that individual is able to do the job with a reasonable accommodation. “Screen out” occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. A disability could have this effect by, for example, reducing the accuracy of the assessment, creating special circumstances that have not been taken into account, or preventing the individual from participating in the assessment altogether. (See Questions 8–12 below.)

- The employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA’s restrictions on disability-related inquiries and medical examinations. (See Question 13 below.)

An employer’s use of an algorithmic decision-making tool may be unlawful for one of the above reasons, or for several such reasons.
3. Is an employer responsible under the ADA for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

In many cases, yes. For example, if an employer administers a pre-employment test, it may be responsible for ADA discrimination if the test discriminates against individuals with disabilities, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer’s behalf.

Algorithmic Decision-Making Tools and Reasonable Accommodation

4. What is a reasonable accommodation?

A reasonable accommodation is a change in the way things are done that helps a job applicant or employee with a disability apply for a job, do a job, or enjoy equal benefits and privileges of employment. Examples of reasonable accommodations may include specialized equipment, alternative tests or testing formats, permission to work in a quiet setting, and exceptions to workplace policies. These are just examples—almost any change can be a reasonable accommodation—even though an employer never has to lower production or performance standards or eliminate an essential job function as a reasonable accommodation.

5. May an employer announce generally (or use software that announces generally) that reasonable accommodations are available to job applicants and employees who are asked to use or be evaluated by an algorithmic decision-making tool, and invite them to request reasonable accommodations when needed?

Yes. An employer may tell applicants or employees what steps an evaluation process includes and may ask them whether they will need reasonable accommodations to complete it. For example, if a hiring process includes a video interview, the employer or software vendor may tell applicants that the job application process will involve a video interview and provide a way to request a
reasonable accommodation. Doing so is a “promising practice” to avoid violating the ADA.

6. When an employer uses algorithmic decision-making tools to assess job applicants or employees, does the ADA require the employer to provide reasonable accommodations?

If an applicant or employee tells the employer that a medical condition may make it difficult to take a test, or that it may cause an assessment result that is less acceptable to the employer, the applicant or employee has requested a reasonable accommodation. To request an accommodation, it is not necessary to mention the ADA or use the phrase “reasonable accommodation.”

Under the ADA, employers need to respond promptly to requests for reasonable accommodation. If it is not obvious or already known whether the requesting applicant or employee has an ADA disability and needs a reasonable accommodation because of it, the employer may request supporting medical documentation. When the documentation shows that a disability might make a test more difficult to take or that it might reduce the accuracy of an assessment, the employer must provide an alternative testing format or a more accurate assessment of the applicant’s or employee’s skills as a reasonable accommodation, unless doing so would involve significant difficulty or expense (also called “undue hardship”).

For example, a job applicant who has limited manual dexterity because of a disability may report that they would have difficulty taking a knowledge test that requires the use of a keyboard, trackpad, or other manual input device. Especially if the responses are timed, this kind of test will not accurately measure this particular applicant’s knowledge. In this situation, the employer would need to provide an accessible version of the test (for example, one in which the applicant is able to provide responses orally, rather than manually) as a reasonable accommodation, unless doing so would cause undue hardship. If it is not possible to make the test accessible, the ADA requires the employer to consider providing an alternative test of the applicant’s knowledge as a reasonable accommodation, barring undue hardship.

Other examples of reasonable accommodations that may be effective for some individuals with disabilities include extended time or an alternative version of the test, including one that is compatible with accessible technology (like a screen-reader) if the applicant or employee uses such technology. Employers must give
individuals receiving reasonable accommodation equal consideration with other applicants or employees not receiving reasonable accommodations.

The ADA requires employers to keep all medical information obtained in connection with a request for reasonable accommodation confidential and must store all such information separately from the applicant's or employee's personnel file.

7. Is an employer responsible for providing reasonable accommodations related to the use of algorithmic decision-making tools, even if the software or application is developed or administered by another entity?

In many cases, yes. As explained in Question 3 above, an employer may be held responsible for the actions of other entities, such as software vendors, that the employer has authorized to act on its behalf. For example, if an employer were to contract with a software vendor to administer and score on its behalf a pre-employment test, the employer likely would be held responsible for actions that the vendor performed—or did not perform—on its behalf. Thus, if an applicant were to tell the vendor that a medical condition was making it difficult to take the test (which qualifies as a request for reasonable accommodation), and the vendor did not provide an accommodation that was required under the ADA, the employer likely would be responsible even if it was unaware that the applicant reported a problem to the vendor.

Algorithmic Decision-Making Tools That Screen Out Qualified Individuals with Disabilities

8. When is an individual “screened out” because of a disability, and when is screen out potentially unlawful?

Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is able to perform the essential functions of the job with a reasonable accommodation if one is legally required.[1] Questions 9 and 10 explain the meaning of “screen out” and Question 11 provides
examples of when a person who is screened out due to a disability nevertheless can do the job with a reasonable accommodation.

9. **Could algorithmic decision-making tools screen out an individual because of a disability? What are some examples?**

Yes, an algorithmic decision-making tool could screen out an individual because of a disability if the disability causes that individual to receive a lower score or an assessment result that is less acceptable to the employer, and the individual loses a job opportunity as a result.

An example of screen out might involve a chatbot, which is software designed to engage in communications online and through texts and emails. A chatbot might be programmed with a simple algorithm that rejects all applicants who, during the course of their “conversation” with the chatbot, indicate that they have significant gaps in their employment history. If a particular applicant had a gap in employment, and if the gap had been caused by a disability (for example, if the individual needed to stop working to undergo treatment), then the chatbot may function to screen out that person because of the disability.

Another kind of screen out may occur if a person’s disability prevents the algorithmic decision-making tool from measuring what it is intended to measure. For example, video interviewing software that analyzes applicants’ speech patterns in order to reach conclusions about their ability to solve problems is not likely to score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns. If such an applicant is rejected because the applicant’s speech impediment resulted in a low or unacceptable rating, the applicant may effectively have been screened out because of the speech impediment.

10. **Some algorithmic decision-making tools may say that they are “bias-free.” If a particular tool makes this claim, does that mean that the tool will not screen out individuals with disabilities?**

When employers (or entities acting on their behalf such as software vendors) say that they have designed an algorithmic decision-making tool to be “bias-free,” it typically means that they have taken steps to prevent a type of discrimination known as “adverse impact” or “disparate impact” discrimination under Title VII, based on race, sex, national origin, color, or religion. This type of Title VII
discrimination involves an employment policy or practice that has a disproportionately negative effect on a group of individuals who share one of these characteristics, like a particular race or sex.[2]

To reduce the chances that the use of an algorithmic decision-making tool results in disparate impact discrimination on bases like race and sex, employers and vendors sometimes use the tool to assess subjects in different demographic groups, and then compare the average results for each group. If the average results for one demographic group are less favorable than those of another (for example, if the average results for individuals of a particular race are less favorable than the average results for individuals of a different race), the tool may be modified to reduce or eliminate the difference.

The steps taken to avoid that kind of Title VII discrimination are typically distinct from the steps needed to address the problem of disability bias.[3] If an employer or vendor were to try to reduce disability bias in the way described above, doing so would not mean that the algorithmic decision-making tool could never screen out an individual with a disability. Each disability is unique. An individual may fare poorly on an assessment because of a disability, and be screened out as a result, regardless of how well other individuals with disabilities fare on the assessment. Therefore, to avoid screen out, employers may need to take different steps beyond the steps taken to address other forms of discrimination. (See Question 12.)

11. Screen out because of a disability is unlawful if the individual who is screened out is able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. If an individual is screened out by an algorithmic decision-making tool, is it still possible that the individual is able to perform the essential functions of the job?

In some cases, yes. For example, some employers rely on “gamified” tests, which use video games to measure abilities, personality traits, and other qualities, to assess applicants and employees. If a business requires a 90 percent score on a gamified assessment of memory, an applicant who is blind and therefore cannot play these particular games would not be able to score 90 percent on the assessment and would be rejected. But the applicant still might have a very good memory and be perfectly able to perform the essential functions of a job that requires a good memory.
Even an algorithmic decision-making tool that has been “validated” for some purposes might screen out an individual who is able to perform well on the job. To say that a decision-making tool has been “validated” means that there is evidence meeting certain professional standards showing that the tool accurately measures or predicts a trait or characteristic that is important for a specific job. Algorithmic decision-making tools may be validated in this sense, and still be inaccurate when applied to particular individuals with disabilities. For example, the gamified assessment of memory may be validated because it has been shown to be an accurate measure of memory for most people in the general population, yet still screen out particular individuals who have good memories but are blind, and who therefore cannot see the computer screen to play the games.

An algorithmic decision-making tool also may sometimes screen out individuals with disabilities who could do the job because the tool does not take into account the possibility that such individuals are entitled to reasonable accommodations on the job. Algorithmic decision-making tools are often designed to predict whether applicants can do a job under typical working conditions. But people with disabilities do not always work under typical conditions if they are entitled to on-the-job reasonable accommodations.

For example, some pre-employment personality tests are designed to look for candidates who are similar to the employer’s most successful employees—employees who most likely work under conditions that are typical for that employer. Someone who has Posttraumatic Stress Disorder (“PTSD”) might be rated poorly by one of these tests if the test measures a trait that may be affected by that particular individual’s PTSD, such as the ability to ignore distractions. Even if the test is generally valid and accurately predicts that this individual would have difficulty handling distractions under typical working conditions, it might not accurately predict whether the individual still would experience those same difficulties under modified working conditions—specifically, conditions in which the employer provides required on-the-job reasonable accommodations such as a quiet workstation or permission to use noise-cancelling headphones. If such a person were to apply for the job and be screened out because of a low score on the distraction test, the screen out may be unlawful under the ADA. Some individuals who may test poorly in certain areas due to a medical condition may not even need a reasonable accommodation to perform a job successfully.
12. What could an employer do to reduce the chances that algorithmic decision-making tools will screen out someone because of a disability, even though that individual is able to perform the essential functions of the job (with a reasonable accommodation if one is legally required)?

First, if an employer is deciding whether to rely on an algorithmic decision-making tool developed by a software vendor, it may want to ask the vendor whether the tool was developed with individuals with disabilities in mind. Some possible inquiries about the development of the tool that an employer might consider include, but are not limited to:

- If the tool requires applicants or employees to engage a user interface, did the vendor make the interface accessible to as many individuals with disabilities as possible?
- Are the materials presented to job applicants or employees in alternative formats? If so, which formats? Are there any kinds of disabilities for which the vendor will not be able to provide accessible formats, in which case the employer may have to provide them (absent undue hardship)?
- Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?

If an employer is developing its own algorithmic decision-making tool, it could reduce the chances of unintentional screen out by taking the same considerations into account during its development process. Depending on the type of tool in question, reliance on experts on various types of disabilities throughout the development process may be effective. For example, if an employer is developing pre-employment tests that measure personality, cognitive, or neurocognitive traits, it may be helpful to employ psychologists, including neurocognitive psychologists, throughout the development process in order to spot ways in which the test may screen out people with autism or cognitive, intellectual, or mental health-related disabilities.

Second, regardless of whether the employer or another entity is developing an algorithmic decision-making tool, the employer may be able to take additional steps during implementation and deployment to reduce the chances that the tool
will screen out someone because of a disability, either intentionally or unintentionally. Such steps include:

- clearly indicating that reasonable accommodations, including alternative formats and alternative tests, are available to people with disabilities;
- providing clear instructions for requesting reasonable accommodations; and
- in advance of the assessment, providing all job applicants and employees who are undergoing assessment by the algorithmic decision-making tool with as much information about the tool as possible, including information about which traits or characteristics the tool is designed to measure, the methods by which those traits or characteristics are to be measured, and the disabilities, if any, that might potentially lower the assessment results or cause screen out.

Taking these steps will provide individuals with disabilities an opportunity to decide whether a reasonable accommodation may be necessary. For example, suppose that an employer uses an algorithm to evaluate its employees’ productivity, and the algorithm takes into account the employee’s average number of keystrokes per minute. If the employer does not inform its employees that it is using this algorithm, an employee who is blind or has a visual impairment and who uses voice recognition software instead of a keyboard may be rated poorly and lose out on a promotion or other job opportunity as a result. If the employer informs its employees that they will be assessed partly on the basis of keyboard usage, however, that same employee would know to request an alternative means of measuring productivity—perhaps one that takes into account the use of voice recognition software rather than keystrokes—as a reasonable accommodation.

Another way for employers to avoid ADA discrimination when using algorithmic decision-making tools is to try to ensure that no one is screened out unless they are unable to do the job, even when provided with reasonable accommodations. A promising practice is to only develop and select tools that measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation. For example, an employer who is hiring cashiers might want to ensure that the chatbot software it is using does not reject applicants who are unable to stand for long periods. Otherwise, a chatbot might reject an applicant who uses a wheelchair and may be entitled to a lowered cash register as a reasonable accommodation.
As a further measure, employers may wish to avoid using algorithmic decision-making tools that do not directly measure necessary abilities and qualifications for performing a job, but instead make inferences about those abilities and qualifications based on characteristics that are correlated with them. For example, if an open position requires the ability to write reports, the employer may wish to avoid algorithmic decision-making tools that rate this ability by measuring the similarity between an applicant’s personality and the typical personality for currently successful report writers. By doing so, the employer lessens the likelihood of rejecting someone who is good at writing reports, but whose personality, because of a disability, is uncommon among successful report writers.

Algorithmic Decision-Making Tools and Disability-Related Inquiries and Medical Examinations

13. How could an employer’s use of algorithmic decision-making tools violate ADA restrictions on disability-related inquiries and medical examinations?

An employer might violate the ADA if it uses an algorithmic decision-making tool that poses “disability-related inquiries” or seeks information that qualifies as a “medical examination” before giving the candidate a conditional offer of employment.[5] This type of violation may occur even if the individual does not have a disability.

An assessment includes “disability-related inquiries” if it asks job applicants or employees questions that are likely to elicit information about a disability or directly asks whether an applicant or employee is an individual with disability. It qualifies as a “medical examination” if it seeks information about an individual’s physical or mental impairments or health.

An algorithmic decision-making tool that could be used to identify an applicant’s medical conditions would violate these restrictions if it were administered prior to a conditional offer of employment. Not all algorithmic decision-making tools that ask for health-related information are “disability-related inquiries or medical examinations,” however. For example, a personality test is not posing “disability-related inquiries” because it asks whether the individual is “described by friends as
being ‘generally optimistic,’” even if being described by friends as generally optimistic might somehow be related to some kinds of mental health diagnoses.

Note, however, that even if a request for health-related information does not violate the ADA's restrictions on disability-related inquiries and medical examinations, it still might violate other parts of the ADA. For example, if a personality test asks questions about optimism, and if someone with Major Depressive Disorder (“MDD”) answers those questions negatively and loses an employment opportunity as a result, the test may “screen out” the applicant because of MDD. As explained in Questions 8–11 above, such screen out may be unlawful if the individual who is screened out can perform the essential functions of the job, with or without reasonable accommodation.

Once employment has begun, disability-related inquiries may be made and medical examinations may be required only if they are legally justified under the ADA.

For more information on disability-related inquiries and medical examinations, see 


Promising Practices for Employers

14. What can employers do to comply with the ADA when using algorithmic decision-making tools?

- As discussed in Questions 4–7 above, employers must provide reasonable accommodations when legally required. Promising practices that may help employers to meet this requirement include:
  - Training staff to recognize and process requests for reasonable accommodation as quickly as possible, including requests to retake a test in an alternative format, or to be assessed in an alternative way, after the individual has already received poor results.
Training staff to develop or obtain alternative means of rating job applicants and employees when the current evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation because of a disability.

If the algorithmic decision-making tool is administered by an entity with authority to act on the employer’s behalf, such as a testing company, asking the entity to forward all requests for accommodation promptly to be processed by the employer in accordance with ADA requirements. Alternatively, the employer could seek to enter into an agreement with the third party requiring it to provide reasonable accommodations on the employer’s behalf, in accordance with the employer’s obligations under the ADA.

Employers should minimize the chances that algorithmic decision-making tools will disadvantage individuals with disabilities, either intentionally or unintentionally. Promising practices include:

- Using algorithmic decision-making tools that have been designed to be accessible to individuals with as many different kinds of disabilities as possible, thereby minimizing the chances that individuals with different kinds of disabilities will be unfairly disadvantaged in the assessments. User testing is a promising practice.

- Informing all job applicants and employees who are being rated that reasonable accommodations are available for individuals with disabilities, and providing clear and accessible instructions for requesting such accommodations.

- Describing, in plain language and in accessible formats, the traits that the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating.

Employers may also seek to minimize the chances that algorithmic decision-making tools will assign poor ratings to individuals who are able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. Promising practices include:

- Ensuring that the algorithmic decision-making tools only measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation.
Ensuring that necessary abilities or qualifications are measured directly, rather than by way of characteristics or scores that are correlated with those abilities or qualifications.

- Before purchasing an algorithmic decision-making tool, an employer should ask the vendor to confirm that the tool does not ask job applicants or employees questions that are likely to elicit information about a disability or seek information about an individual’s physical or mental impairments or health, unless such inquiries are related to a request for reasonable accommodation. (The ADA permits an employer to request reasonable medical documentation in support of a request for reasonable accommodation that is received prior to a conditional offer of employment, when necessary, if the requested accommodation is needed to help the individual complete the job application process.)

**Promising Practices for Job Applicants and Employees Who Are Being Assessed by Algorithmic Decision-Making Tools**

**15. What should I do to ensure that I am being assessed fairly by algorithmic decision-making tools?**

If you have a medical condition that you think might qualify as an ADA disability and that could negatively affect the results of an evaluation performed by algorithmic decision-making tools, you may want to begin by asking for details about the employer’s use of such tools to determine if it might pose any problems related to your disability. If so, you may want to ask for a reasonable accommodation that allows you to compete on equal footing with other applicants or employees.

For example, if an employer’s hiring process includes a test, you may wish to ask for an accessible format or an alternative test that measures your ability to do the job in a way that is not affected by your disability. To request a reasonable accommodation, you need to notify an employer representative or official (for example, someone in Human Resources) or, if the employer is contracting with a software vendor, the vendor’s representative or the employer, that you have a
medical condition, and that you need something changed because of the medical condition to ensure that your abilities are evaluated accurately.

Note that if your disability and need for accommodation are not obvious or already known, you may be asked to submit some medical documentation in support of your request for accommodation. To find out more about asking for reasonable accommodations, see Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, available at


If you only discover that an algorithmic decision-making tool poses a problem due to your disability after the evaluation process is underway, you should notify the employer or software vendor as soon as you are aware of the problem and ask to be evaluated in a way that accurately reflects your ability to do the job, with a reasonable accommodation if one is legally required.

If you have already received a poor rating generated by an employer’s use of an algorithmic decision-making tool, you should think about whether your health condition might have prevented you from achieving a higher rating. For example, might a disability have negatively affected the results of an assessment, or made it impossible for you to complete an assessment? If so, you could contact the employer or software vendor immediately, explain the disability-related problem, and ask to be reassessed using a different format or test, or to explain how you could perform at a high level despite your performance on the test.

16. What do I do if I think my rights have been violated?

If you believe that your employment-related ADA rights may have been violated, the EEOC can help you decide what to do next. For example, if the employer or software vendor refuses to consider your request for a reasonable accommodation to take or re-take a test, and if you think that you would be able to do the job with a reasonable accommodation, you might consider filing a charge of discrimination with the EEOC. A discrimination charge is an applicant’s or employee’s statement alleging that an employer engaged in employment discrimination and asking the EEOC to help find a remedy under the EEO laws.
If you file a charge of discrimination (https://www.eeoc.gov/how-file-charge-employment-discrimination), the EEOC will conduct an investigation. Mediation, which is an informal and confidential way for people to resolve disputes with the help of a neutral mediator, may also be available. Because you must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. It is unlawful for an employer to retaliate against you for contacting the EEOC or filing a charge.

If you would like to begin the process of filing a charge, go to our Online Public Portal at [https://publicportal.eeoc.gov](https://publicportal.eeoc.gov), visit your local EEOC office (see [https://www.eeoc.gov/field-office](https://www.eeoc.gov/field-office) for contact information), or contact us by phone at 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

For general information, visit the EEOC’s website ([https://www.eeoc.gov](https://www.eeoc.gov)).

This information is not new policy; rather, this document applies principles already established in the ADA’s statutory and regulatory provisions as well as previously issued guidance. The contents of this publication do not have the force and effect of law and are not meant to bind the public in any way. This publication is intended only to provide clarity to the public regarding existing requirements under the law. As with any charge of discrimination filed with the EEOC, the Commission will evaluate alleged ADA violations involving the use of software, algorithms, and artificial intelligence based on all of the facts and circumstances of the particular matter and applicable legal principles.

[1] To establish a screen out claim, the individual alleging discrimination must show that the challenged selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities. See 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10(a). To establish a defense, the employer must demonstrate that the challenged application of the criterion is “job related and consistent with business necessity,” as that term is understood under the ADA, and that “such performance cannot be accomplished by reasonable accommodation.” 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. §§ 1630.10(a), 1630.15(b); 29 C.F.R. pt. 1630 app. §§ 1630.10, 1630.15 (b) and (c). A different defense to a claim that a
selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities is available when the challenged selection criterion is safety-based. See 2 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).


[3] When applying the tool to current employees or other subjects, there will generally be no way to know who has a disability and who does not.

[4] When employers or vendors claims that a tool designed to help employers decide which job applicants to hire has been “validated,” or that such a tool is a “valid predictor” of job performance, they may mean that there is evidence that the tool measures a trait or characteristic that is important for the job, and that the evidence meets the standards articulated in the Uniform Guidelines on Employee Selection Procedures (“UGESP”), 29 C.F.R. §§ 1607.5–9. UGESP articulates standards for compliance with certain requirements under Title VII. UGESP does not apply to disability discrimination. 29 C.F.R. pt. 1630 app. § 1630.10 (a) (“The Uniform Guidelines on Employee Selection Procedures . . . do not apply to the Rehabilitation Act and are similarly inapplicable to this part.”).

[5] Note, however, that the ADA permits employers to request reasonable medical documentation in support of a request for reasonable accommodation, when necessary. This may be done prior to a conditional offer of employment if the request is for a reasonable accommodation that is needed to help the individual complete the job application process.
Many businesses use technology to make decisions about hiring, promotions, and firing workers. That technology can make it harder for people with disabilities to get or do well at a job.

The Americans with Disabilities Act (ADA) protects applicants and workers with disabilities from discrimination. Because of the ADA, an employer may have to give applicants or workers with disabilities a reasonable accommodation so they can apply for or do the job.

It is important to know that the ADA has specific definitions of “employer” “employee” “disability” and “reasonable accommodation.” You can learn more about the law at the EEOC’s Disability Discrimination page and from The ADA: Your Employment Rights as an Individual with a Disability.
The format of the employment test can screen out people with disabilities.

Some employers screen employees and applicants using computer programs. The requirements of the program may screen out people with disabilities. For example:

- A job application requires a timed math test using a keyboard. Angela has severe arthritis and cannot type quickly. Typing quickly is not necessary for the job. Angela will fail the test if she takes it without a reasonable accommodation. The reasonable accommodation could be speaking the answers or having more time for the test.

- Amir is seeking a promotion. The promotion process includes a memory test. The test is a computerized game using visual memory. Amir is blind and cannot score well on the test, which will damage Amir’s chances for the promotion. Amir’s memory is good enough to do the job. If Amir receives a reasonable accommodation, such as a different type of memory test, the promotion process will more accurately judge Amir’s abilities.

*If your disability makes it hard or impossible for you to take the computerized test for a job, here are some things you can do:*

1. Reach out to the employer’s human resources department. Explain that you are trying to take the test. Explain why the format is hard for you to use.

2. You may have to describe your disability. The employer may ask for proof or additional information. Learn what the employer can ask and how your privacy is protected at [The ADA: Your Employment Rights as an Individual With a Disability](https://www.eeoc.gov/publications/ada-your-employment-rights-individual-disability).

3. Ask to be evaluated in a way that shows your ability to do the job. You can use the legal words and ask for a “reasonable accommodation,” but you do not have to.

4. If the employer says no:
The scoring of the test can screen out people with disabilities.

Some employers use technology to score applications or tests. The technology relies on algorithms. Algorithms are what the computer is programmed to look for. How the algorithm is set up may screen out people with disabilities. For example:

- An employer uses a chatbot to interview workers for a cashier job. The chatbot asks the applicant, “Can you stand for three hours straight?” The chatbot stops the interview if the answer is, “No.” Omar, who uses a wheelchair, answers, “No.” The chatbot ends the session. Omar could do the cashier job if he could sit at the cash register.

- An employer uses a computer program to test “problem-solving ability” based on speech patterns for a promotion. Sasha meets the requirements for the promotion. Sasha stutters so their speech patterns do not match what the computer program expects. Sasha scores poorly on the test and is not promoted.

If you think you are being screened out of a job because of your disability, here are some things you can do:

1. If you can, before you take a test, ask the employer what skills it is testing for.

2. If you are qualified for the job and you do not pass the test or hear back from the employer, reach out to the employer’s human resources department. Ask what skills the test was looking for. Explain that your disability may have made you score lower on the test.

3. You may have to describe your disability. The employer may ask for proof or additional information. Learn what the employer can ask and how your privacy...

4. Ask to be evaluated in a way that shows your ability to do the job. It may help to use the legal words and ask for a “reasonable accommodation,” but you do not have to.

5. If the employer says no:

- You can reach out to the EEOC (https://www.eeoc.gov/contact-eeoc). The EEOC can help you decide on next steps.

The ADA prohibits retaliation.

An employer is not allowed to retaliate against you for complaining about discrimination, asking for a reasonable accommodation, or talking to the EEOC. If you think an employer retaliated against you, you can reach out to the EEOC.

How to reach the EEOC

You can call the EEOC on our toll-free number, at: 1-800-669-4000. You can reach us using a TTY line at: 1-800-669-6820 or you can use our ASL Video Phone at: 1-844-234-5122.

You also can reach us by email at: info@eeoc.gov
Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring

This guidance explains how algorithms and artificial intelligence can lead to disability discrimination in hiring.

The Department of Justice enforces disability discrimination laws with respect to state and local government employers. The Equal Employment Opportunity Commission (EEOC) enforces disability discrimination laws with respect to employers in the private sector and the federal government. The obligation to avoid disability discrimination in employment applies to both public and private employers.

How employers use algorithms and artificial intelligence

Employers, including state and local government employers, increasingly use hiring technologies to help them select new employees.

For example, employers might use technology:

- to show job advertisements to targeted groups;
- to decide if an applicant meets job qualifications;
- to hold online video interviews of applicants;
- to use computer-based tests to measure an applicant’s skills or abilities; and
- to score applicants’ resumes.

Many hiring technologies are software programs that use algorithms or artificial intelligence. An algorithm is a set of steps for a computer to accomplish a task—for example, searching for certain words in a group of resumes. Artificial intelligence generally means that a computer is completing a task that is usually done by a person—for example, recognizing facial expressions during a video interview.

While these technologies may be useful tools for some employers, they may also result in unlawful discrimination against certain groups of applicants, including people with disabilities.
How the ADA protects against disability discrimination in hiring

The Americans with Disabilities Act (ADA) is a federal law that seeks to remove barriers for people with disabilities in everyday activities, including employment.

The ADA applies to all parts of employment, including how an employer selects, tests, or promotes employees. An employer who chooses to use a hiring technology must ensure that its use does not cause unlawful discrimination on the basis of disability.1

The ADA bars discrimination against people with many different types of disabilities. Some examples of conditions that may be disabilities include: diabetes, cerebral palsy, deafness, blindness, epilepsy, mobility disabilities, intellectual disabilities, autism, and mental health disabilities. A disability will affect each person differently.

When designing or choosing hiring technologies, employers must consider how their tools could impact different disabilities.

For example, a state transportation agency that designs its hiring technology to avoid discriminating against blind applicants may still violate the ADA if its technology discriminates against applicants with autism or epilepsy.

When employers’ use of hiring technologies may violate the ADA

Employers must avoid using hiring technologies in ways that discriminate against people with disabilities. This includes when an employer uses another company’s discriminatory hiring technologies.2

Even where an employer does not mean to discriminate, its use of a hiring technology may still lead to unlawful discrimination. For example, some hiring technologies try to predict who will be a good employee by comparing applicants to current successful

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1 See 42 U.S.C. § 12112; 29 C.F.R. § 1630.4.
employees. Because people with disabilities have historically been excluded from many jobs and may not be a part of the employer’s current staff, this may result in discrimination. Employers must carefully evaluate the information used to build their hiring technologies.

**Screening Out People with Disabilities**

Employers also violate the ADA if their hiring technologies unfairly screen out a qualified individual with a disability. Employers can use qualification standards that are job-related and consistent with business necessity. But employers must provide requested reasonable accommodations that will allow applicants or employees with disabilities to meet those standards, unless doing so would be an undue hardship. When designing or choosing hiring technologies to assess whether applicants or employees have required skills, employers must evaluate whether those technologies unlawfully screen out individuals with disabilities.³

Employers should examine hiring technologies before use, and regularly when in use, to assess whether they screen out individuals with disabilities who can perform the essential functions of the job with or without required reasonable accommodations.

For example, if a county government uses facial and voice analysis technologies to evaluate applicants’ skills and abilities, people with disabilities like autism or speech impairments may be screened out, even if they are qualified for the job.

Some employers try to evaluate their hiring technologies to see how they impact certain groups, like racial minorities. Employers seeking to do the same with respect to people with disabilities must keep in mind that there are many types of disabilities and hiring technologies may impact each in a different way.

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³ See 42 U.S.C. § 12112(a), (b)(2), (b)(5), (b)(6); 29 C.F.R. §§ 1630.4, 1630.6, 1630.9, 1630.10.
How to avoid disability discrimination when using hiring technologies

**Testing technologies must evaluate job skills, not disabilities.**

Some hiring technologies require an applicant to take a test that includes an algorithm, such as an online interactive game or personality assessment. Under the ADA, employers must ensure that any such tests or games measure only the relevant skills and abilities of an applicant, rather than reflecting the applicant’s impaired sensory, manual, or speaking skills that the tests do not seek to measure.

For example, an applicant to a school district with a vision impairment may get passed over for a staff assistant job because they do poorly on a computer-based test that requires them to see, even though that applicant is able to do the job.

If a test or technology eliminates someone because of disability when that person can actually do the job, an employer must instead use an accessible test that measures the applicant’s job skills, not their disability, or make other adjustments to the hiring process so that a qualified person is not eliminated because of a disability. 4

In addition, employers must ensure that they do not unlawfully seek medical or disability-related information or conduct medical exams through their use of hiring technologies.5 For more information about this, see the EEOC’s Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.

**Reasonable accommodations for applicants with disabilities.**

The ADA requires that employers provide reasonable accommodations to individuals with disabilities, including during the hiring process, unless doing so would create an undue hardship for the employer.6

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4 See 42 U.S.C. § 12112(b)(5), (b)(7); 29 C.F.R. §§ 1630.9, 1630.11.
6 See 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.
A **reasonable accommodation** is a change in the way things are usually done to give equal opportunities to a person with a disability in applying for a job, performing a job, or accessing the benefits and privileges of employment.

Examples of accommodations include allowing use of assistive equipment, modifying policies, or making other changes to the way the hiring process or job is performed.

For example, if a city government uses an online interview program that does not work with a blind applicant’s computer screen-reader program, the government must provide a reasonable accommodation for the interview, such as an accessible version of the program, unless it would create an undue hardship for the city government.

Some examples of practices that employers using hiring technologies may need to implement to ensure that applicants receive needed reasonable accommodations include:

- telling applicants about the type of technology being used and how the applicants will be evaluated;
- providing enough information to applicants so that they may decide whether to seek a reasonable accommodation; and
- providing and implementing clear procedures for requesting reasonable accommodations and making sure that asking for one does not hurt the applicant’s chance of getting the job.

**What to do if your rights have been violated or you want to find out more**

If you believe your employment rights have been violated because of a disability and you want to make a claim of employment discrimination, you can file a "charge of discrimination" with the EEOC. A discrimination charge is a signed statement asserting

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7 Existing technical standards provide helpful guidance concerning how to ensure the accessibility of website features. These include the Web Content Accessibility Guidelines (WCAG) and the Section 508 Standards, which the federal government uses for its own websites. [More information is in this guidance document](#). The employer and the individual with a disability should engage in an informal process to clarify the applicant's needs and to identify a reasonable accommodation.
that an organization engaged in employment discrimination. Information on the EEOC charge process is available here.

If you believe that you or someone else was discriminated against based on a disability because of a state or local government employer’s use of a hiring technology, you can also file a complaint with the Department of Justice. Information on the DOJ complaint process is available here.

For more detail on the topics addressed here and the impact of software, algorithms, and artificial intelligence on employees, please see the EEOC’s technical assistance document, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees. Anyone with questions about the impact of software, algorithms, and artificial intelligence on employees can reach the EEOC at 1-202-921-3191 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

In addition, anyone can call the ADA Information Line at 1-800-514-0301 (voice) or 1-800-514-0383 (TTY) with questions about their rights or responsibilities under the ADA. ADA Specialists are available to answer questions on Monday, Tuesday, Wednesday, and Friday from 9:30 a.m. to 12:00 p.m. and 3:00 p.m. to 5:30 p.m. (Eastern Time). On Thursday, the Information Line is staffed from 2:30 p.m. to 5:30 p.m. (Eastern Time).
Do robots care about your civil rights?

By Keith E. Sonderling

With 86% of major U.S. corporations predicting that artificial intelligence will become a “mainstream technology” at their company this year, management-by-algorithm is no longer the stuff of science fiction.

AI has already transformed the way workers are recruited, hired, trained, evaluated and even fired. One recent study found that 83% of human resources leaders rely in some form on technology in employment decision-making.

For example, at UPS, AI monitors and reports on driver safety and productivity, tracking drivers’ every movement from the time they buckle their seat belts to the frequency with which they put their trucks in reverse. At IBM, AI identifies employee trends and makes recommendations that help managers make decisions on hiring, salary raises, professional development and employee retention. Even NFL teams are using AI to assess player skills and make injury risk assessments during the recruiting process.

Amazon, a pioneer in the use of AI, has gone all in by integrating the technology throughout its entire company, especially in human resources. Just a few months ago, contract employees for Amazon claimed that they were being summarily fired by automated emails for failing to meet preprogrammed productivity benchmarks.

In fact, Amazon’s use of an electronic tracking system made headline news for the way it monitored worker productivity and, allegedly, automatically fired employees it deemed were underperforming.
According to a 2018 letter written by attorneys for Amazon, if an employee spent too much time off task, the system “automatically generate(d) … warnings or terminations regarding quality or productivity without input from supervisors.” An Amazon spokesperson subsequently clarified, “It is absolutely not true that employees are terminated through an automatic system. We would never dismiss an employee without first ensuring that they had received our fullest support, including dedicated coaching to help them improve and additional training.”

These reports highlight the need for employers to find the right division of labor between artificial intelligence and human resources personnel — between using AI to improve human decision-making and delegating decision-making entirely to algorithms.

Using AI to make decisions ordinarily made by HR professionals can have significant legal ramifications, so employers should exercise caution when deciding when — and whether — to hand such matters over to algorithms. There may be cases in which compliance with federal anti-discrimination law requires human intervention. This is frequently the case when it comes to workplace accommodations for pregnant, disabled and religious employees.

The Americans with Disabilities Act requires covered employers to provide reasonable accommodations for individuals with disabilities. Similarly, under Title VII of the Civil Rights Act of 1964, employers cannot discriminate on the basis of pregnancy and religious practices of employees. Generally, these accommodations are granted through an interactive process between employer and employee: two humans.

Most of the time an employee initiates the interactive process by notifying the employer of the need for a reasonable accommodation — a conversation that can be sensitive, personal and even difficult for employees. If an employee’s primary interface with his employer is an app or an algorithm, initiating that process may be daunting and employees may not be willing to disclose some of their most personal and protected issues to a chatbot. For that matter, it may not even be clear to the employee who the appropriate point of contact is.

It may come as a surprise that there are some instances in which an employer may be expected to initiate the interactive process without being asked — for example, if the employer knows that the employee is experiencing workplace problems because of a disability. Under those circumstances, the process often starts when a supervisor senses, with their own eyes or judgment, that an employee needs intervention.

Accordingly, employees and civil rights advocates have voiced concerns about whether the use of AI in employment decision-making allows for a process that is so heavily dependent on personal interactions. An algorithm, no matter how sophisticated, may not be capable of the sort of sensitivity and responsiveness needed to meet the needs of employees in need of accommodations.

Whether employers rely on algorithms, human HR professionals, or both, they must develop and implement policies to handle various, more nuanced employee situations. If an employer uses AI for reviewing performance and tracking productivity, the employer should ensure that their AI system allows for — and accounts for — reasonable accommodations related to disability, pregnancy and religious observance.

Above all, employers must inform their employees that the requirement to engage in an interactive process for an accommodation under the ADA and Title VII still applies when the employer uses AI to track productivity.

While AI is becoming mainstream technology in the workplace, discrimination-by-algorithm must not.

Keith E. Sonderling is a commissioner on the U.S. Equal Employment Opportunity Commission. The views here are the author’s own and should not be attributed to the EEOC or any other member of the Commission.
Notes for Reviewers: Call for comments and contributions

The AI Risk Management Framework

This second draft of the NIST Artificial Intelligence Risk Management Framework (AI RMF, or Framework) builds on the initial March 2022 version and the December 2021 concept paper. It reflects and incorporates the constructive feedback received.

The AI RMF is intended for voluntary use to address risks in the design, development, use, and evaluation of AI products, services, and systems. AI research and development, as well as the standards landscape, is evolving rapidly. For that reason, the AI RMF and its companion documents will evolve over time and reflect new knowledge, awareness, and practices. NIST intends to continue its engagement with stakeholders to keep the Framework up to date with AI trends and reflect experience based on the use of the AI RMF. Ultimately, the AI RMF will be offered in multiple formats, including online versions, to provide maximum flexibility.

Part 1 of the AI RMF draft explains the motivation for developing and using the Framework, its audience, and the framing of AI risk and trustworthiness.

Part 2 includes the AI RMF Core and a description of Profiles and their use.

NIST welcomes feedback on this draft to inform further development of the AI RMF. Please send comments via email to AIframework@nist.gov by September 29, 2022. All comments received by NIST will be made publicly available, so personal or sensitive information should not be included. Feedback will also be welcomed during discussions at a third AI RMF workshop on October 18-19, 2022. NIST plans to publish AI RMF 1.0 in January 2023.
The AI Risk Management Framework (AI RMF) Playbook

In concert with the release of the AI RMF second draft, NIST seeks comments on a draft companion AI RMF Playbook. The Playbook provides actions Framework users could take to implement the AI RMF by incorporating trustworthiness considerations in the design, development, use, and evaluation of AI systems. The draft Playbook is based on this second draft of the AI RMF. It includes example actions, references, and supplementary guidance for “Govern” and “Map” – two of the four proposed functions. Draft material for the “Measure” and “Manage” functions will be released at a later date.

Like the AI RMF, the Playbook is intended for voluntary use. Organizations can utilize this information according to their needs and interests. NIST encourages feedback and contributions on this draft. The Playbook is an online resource, and is hosted temporarily on GitHub Pages.

The initial AI RMF Playbook will be published in January 2023. It is intended to be an evolving resource, and interested parties can submit feedback and suggested additions for adjudication on a rolling basis.

Individuals are encouraged to comment on:

1. Its relative usefulness as a complementary resource to the AI RMF.
2. Whether the guidance is actionable to meet each of the AI RMF functions, especially as related to organization size.
3. Suggested presentation alternatives for the forthcoming first online version to improve usability and effectiveness.

Feedback may be provided either as comments or as specific line-edit additions or modifications. NIST welcomes suggestions about including references to existing resources or new resources to help users of the AI RMF. Comments can be suggested for the Playbook at any time and will be reviewed and integrated on a semi-annual basis. NIST is requesting a first round of comments via email to AIframework@nist.gov by September 29, 2022. Comments also will be welcomed during discussions at a third AI RMF workshop on October 18-19, 2022, and beyond.
The NIST Trustworthy and Responsible AI Resource Center

The NIST Trustworthy and Responsible AI Resource Center will host the AI RMF, the Playbook, and related resources to provide guidance to implement the AI RMF as well as advance trustworthy AI more broadly. Contributions of additional guidance – which will constitute the bulk of the Resource Center content – are welcome at any time. Contributions may include AI RMF profiles, explanatory papers, document templates, approaches to measurement and evaluation, toolkits, datasets, policies, or a proposed AI RMF crosswalk with other resources – including standards and frameworks. Eventually, contributions could include AI RMF case studies, reviews of Framework adoption and effectiveness, educational materials, additional technical forms of technical guidance related to the management of trustworthy AI, and other implementation resources. The AI Resource Center is expected to include a standards hub and a metrics hub, along with a terminology knowledge base and relevant technical and policy documents.

Contributed guidance may address issues including but not limited to:
- how an industry or sector may utilize the Framework
- how smaller organizations can use the Framework
- how stakeholder engagement elements of the Framework can be put in place (including practices for involving external stakeholder communities for assessing risk, and advancing diversity, equity, and inclusiveness considerations within organizational teams that produce AI)
- how the AI RMF can be used for procurement or acquisition activities
- approaches for integrating teams across one or more parts of the AI lifecycle
- how the Framework can be used with other AI risk management guidance
- how the Framework can help address security concerns, including guarding against adversarial attacks on AI systems
- socio-technical approaches for evaluating AI system risks
- techniques for enhancing human oversight of AI system risks

Criteria for Inclusion of Contributions in the AI RMF Playbook and NIST Trustworthy and Responsible AI Resource Center

In order to be considered by NIST for inclusion in the Playbook or the NIST Trustworthy and Responsible AI Resource Center, a resource must be publicly available on the Internet. NIST welcomes free resources from for-profit entities. Pay-for resources from non-profit entities also meet the basic criteria for inclusion. If a resource meets these criteria, a description of the resource should be sent to AIframework@nist.gov.

NIST may include commercial entities, equipment, or materials in its guidance or in the NIST Trustworthy and Responsible AI Resource Center in order to support Framework understanding and use. Such identification does not imply recommendation or endorsement by NIST, nor that the entities, materials, or equipment are necessarily the best available for the purpose.
Update Schedule: The AI RMF will employ a two-number versioning system to track and identify major changes and key decisions that are made throughout its development. The first number will represent the generation of the AI RMF and all of its companion documents. The AI RMF generation will be incremented upon a major revision being made to the Framework. The most up-to-date version of all AI RMF documents will have the same generation identifier. Minor revisions will be tracked using “.n” after the generation number. The minor revision identifier will be incremented upon any edit to the document. It is possible that AI RMF resources will have different minor revision identifiers. At a high level, all changes will be tracked using a Version Control Table which identifies the history, including version number, date of change, and description of change.
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AI Risk Management Framework
Part 1: Motivation

1. Overview

1.1. Trustworthy and Responsible AI

Remarkable surges in artificial intelligence (AI) capabilities have led to a wide range of innovations with the potential to benefit nearly all aspects of our society and economy – from commerce and healthcare to transportation and cybersecurity. AI technologies are often used to achieve a beneficial impact by informing, advising, or simplifying tasks.

Managing AI risk is not unlike managing risk for other types of technology. Risks to any software or information-based system apply to AI, including concerns related to cybersecurity, privacy, safety, and infrastructure. Like those areas, effects from AI systems can be characterized as long- or short-term, high- or low-probability, systemic or localized, and high- or low-impact. However, AI systems bring a set of risks that require specific consideration and approaches. AI systems can amplify, perpetuate, or exacerbate inequitable outcomes. AI systems may exhibit emergent properties or lead to unintended consequences for individuals and communities. A useful mathematical representation of the data interactions that drive the AI system’s behavior is not fully known, which makes current methods for measuring risks and navigating the risk-benefits tradeoff inadequate. AI risks may arise from the data used to train the AI system, the AI system itself, the use of the AI system, or interaction of people with the AI system.

While views about what makes an AI technology trustworthy differ, there are certain key characteristics of trustworthy systems. Trustworthy AI is valid and reliable, safe, fair and bias is managed, secure and resilient, accountable and transparent, explainable and interpretable, and privacy-enhanced.

AI systems are socio-technical in nature, meaning they are a product of the complex human, organizational, and technical factors involved in their design, development, and use. Many of the trustworthy AI characteristics – such as bias, fairness, interpretability, and privacy – are directly connected to societal dynamics and human behavior. AI risks – and benefits – can emerge from the interplay of technical aspects combined with socio-technical factors related to how a system...
is used, its interactions with other AI systems, who operates it, and the social context into which it is deployed.

Responsible use and practice of AI systems is a counterpart to AI system trustworthiness. AI systems are not inherently bad or risky, and it is often the contextual environment that determines whether or not negative impact will occur. The AI Risk Management Framework (AI RMF) can help organizations enhance their understanding of how the contexts in which the AI systems they build and deploy may interact with and affect individuals, groups, and communities. Responsible AI use and practice can:

- assist AI designers, developers, deployers, evaluators, and users to think more critically about context and potential or unexpected negative and positive impacts;
- be leveraged to design, develop, evaluate, and use AI systems with impact in mind; and
- prevent, preempt, detect, mitigate, and manage AI risks.

1.2. Purpose of the AI RMF

Cultivating trust by understanding and managing the risks of AI systems will help preserve civil liberties and rights, and enhance safety while creating opportunities for innovation and realizing the full potential of this technology. The AI RMF is intended to address challenges unique to AI systems and encourage and equip different AI stakeholders to manage AI risks proactively and purposefully. The Framework describes a process for managing AI risks across a wide spectrum of types, applications, and maturity – regardless of sector, size, or level of familiarity with a specific type of technology. Rather than repeat information in other guidance, the AI RMF aims to fill gaps specific to AI risks. Users of the AI RMF are encouraged to address non-AI specific issues via currently available guidance.

The AI RMF is a voluntary framework seeking to provide a flexible, structured, and measurable process to address AI risks prospectively and continuously throughout the AI lifecycle. It is intended to help organizations manage both enterprise and societal risks related to the design, development, deployment, evaluation, and use of AI systems through improved understanding, detection, and preemption. Using the AI RMF can assist organizations, industries, and society to understand and determine their acceptable levels of risk.

The AI RMF is not a checklist and it is not intended to be used in isolation. Organizations may find it valuable to incorporate the AI RMF into broader considerations of enterprise risk management.

The AI RMF is not a compliance mechanism. It is law- and regulation-agnostic, as AI policy discussions are live and evolving. While risk management practices should incorporate and align to applicable laws and regulations, this document is not intended to supersede existing regulations, laws, or other mandates.

The research community may find the AI RMF to be useful in evaluating various aspects of trustworthy and responsible AI and related impacts.
By applying recommendations in the AI RMF, organizations will be better equipped to govern, map, measure, and manage the risks of AI. Using the AI RMF may reduce the likelihood and degree of negative impacts and increase the benefits to individuals, groups, communities, organizations, and society.

Applying the Framework at the beginning of an AI system’s lifecycle should dramatically increase the likelihood that the resulting system will be more trustworthy – and that risks to individuals, groups, communities, organizations, and society will be managed more effectively. It is incumbent on Framework users to apply the AI RMF functions to AI systems on a regular basis as context, stakeholder expectations, and knowledge will evolve over time and as their AI systems are updated or expanded.

NIST’s development of the AI RMF in collaboration with the private and public sectors is directed – and consistent with its broader AI efforts called for – by the National Artificial Intelligence Initiative Act of 2020 (P.L. 116-283), the National Security Commission on Artificial Intelligence recommendations, and the Plan for Federal Engagement in Developing Technical Standards and Related Tools. Engagement with the broad AI community during this Framework’s development informs AI research and development and evaluation by NIST and others.

Part 1 of this Framework establishes the context for the AI risk management process. Part 2 provides guidance on outcomes and activities to carry out that process to maximize the benefits and minimize the risks of AI. A companion resource, the AI RMF Playbook, offers sample practices to be considered in carrying out this guidance, before, during, and after AI products, services, and systems are developed and deployed.

1.3. Where to Get More Information

The Framework and supporting resources will be updated, expanded, and improved based on evolving technology, the standards landscape around the globe, and stakeholder feedback. As the AI RMF is put into use, additional lessons will be learned to inform future updates and additional resources.

The AI RMF and the Playbook will be supported by a broader NIST Trustworthy and Responsible AI Resource Center containing documents, taxonomies, toolkits, datasets, code, and other forms of technical guidance related to the development and implementation of trustworthy AI. The Resource Center will include a knowledge base of trustworthy and responsible AI terminology and how those terms are used by different stakeholders, along with documents that provide a deeper understanding of trustworthy characteristics and their inherent challenges.

The AI RMF provides high-level guidance for managing the risks of AI systems. While practical guidance published by NIST serves as an informative reference, all such guidance remains voluntary.
Attributes of the AI RMF

The AI RMF strives to:

1. Be risk-based, resource-efficient, pro-innovation, and voluntary.
2. Be consensus-driven and developed and regularly updated through an open, transparent process. All stakeholders should have the opportunity to contribute to the AI RMF’s development.
3. Use clear and plain language that is understandable by a broad audience, including senior executives, government officials, non-governmental organization leadership, and those who are not AI professionals – while still of sufficient technical depth to be useful to practitioners. The AI RMF should allow for communication of AI risks across an organization, between organizations, with customers, and to the public at large.
4. Provide common language and understanding to manage AI risks. The AI RMF should offer taxonomy, terminology, definitions, metrics, and characterizations for AI risk.
5. Be easily usable and fit well with other aspects of risk management. Use of the Framework should be intuitive and readily adaptable as part of an organization’s broader risk management strategy and processes. It should be consistent or aligned with other approaches to managing AI risks.
6. Be useful to a wide range of perspectives, sectors, and technology domains. The AI RMF should be universally applicable to any AI technology and to context-specific use cases.
7. Be outcome-focused and non-prescriptive. The Framework should provide a catalog of outcomes and approaches rather than prescribe one-size-fits-all requirements.
8. Take advantage of and foster greater awareness of existing standards, guidelines, best practices, methodologies, and tools for managing AI risks – as well as illustrate the need for additional, improved resources.
9. Be law- and regulation-agnostic. The Framework should support organizations’ abilities to operate under applicable domestic and international legal or regulatory regimes.
10. Be a living document. The AI RMF should be readily updated as technology, understanding, and approaches to AI trustworthiness and uses of AI change and as stakeholders learn from implementing AI risk management generally and this framework in particular.

2. Audience

Identifying and managing AI risks and impacts – both positive and negative – requires a broad set of perspectives and stakeholders. The AI RMF is intended to be used by AI actors, defined by the Organisation for Economic Co-operation and Development (OECD) as “those who play an active role in the AI system lifecycle, including organizations and individuals that deploy or operate AI” [OECD (2019) Artificial Intelligence in Society | OECD iLibrary].
OECD has developed a framework for classifying AI actors and their AI lifecycle activities according to five key socio-technical dimensions, each with properties relevant for AI policy and governance, including risk management [OECD (2022) OECD Framework for the Classification of AI systems | OECD Digital Economy Papers]. For purposes of this framework, NIST has slightly modified OECD’s classification. The NIST modification (shown in Figure 1) highlights the importance of test, evaluation, verification, and validation (TEVV) throughout an AI lifecycle and generalizes the operational context of an AI system.

Figure 1: Lifecycle and Key Dimensions of an AI System. Modified from OECD (2022) OECD Framework for the Classification of AI systems | OECD Digital Economy Papers. Risk management should be continuous, timely, and performed throughout the AI system lifecycle, starting with the plan & design function in the application context.

The broad audience of the AI RMF is shown in Figure 1. It is composed of AI actors with a variety of roles described below and in Appendix A who must work together to manage the risk and achieve the goals of trustworthy and responsible AI.

The primary audience for using this framework is displayed in the Applications Context, Data & Input, AI Model, and Task & Output dimensions of Figure 1. These individuals and teams manage the design, development, deployment, and acquisition of AI systems and will be driving
AI risk management efforts. The primary audience also includes those with responsibilities to commission or fund an AI system and those who are part of the enterprise management structure governing the AI system lifecycle.

<table>
<thead>
<tr>
<th>Lifecycle</th>
<th>Activities</th>
<th>Representative Actors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plan &amp; design</td>
<td>Articulate and document the system's concept and objectives, underlying assumptions, context and requirements.</td>
<td>System operators, end-users, domain experts, AI designers, impact assessors, TEVV experts, product managers, compliance experts, auditors, governance experts, organizational management, end-users, affected individuals/communities, evaluators.</td>
</tr>
<tr>
<td>Collect &amp; process data</td>
<td>Data collection &amp; Processing: gather, validate, and clean data and document the metadata and characteristics of the dataset.</td>
<td>Data scientists, domain experts, socio-cultural analysts, human factors experts, data engineers, data providers, TEVV experts.</td>
</tr>
<tr>
<td>Build &amp; use model</td>
<td>Create or select, train models or algorithms.</td>
<td>Modelers, model engineers, data scientists, developers, and domain experts. With consultation of socio-cultural analysts familiar with the application context, TEVV experts.</td>
</tr>
<tr>
<td>Verify &amp; validate</td>
<td>Verify &amp; validate, calibrate, and interpret model output.</td>
<td>System integrators, developers, systems/software engineers, domain experts, procurement experts, third-party suppliers with consultation of human factors experts, socio-cultural analysts, and governance experts, TEVV experts, end-users.</td>
</tr>
<tr>
<td>Deploy</td>
<td>Pilot, check compatibility with legacy systems, verify regulatory compliance, manage organizational change, and evaluate user experience.</td>
<td>System operators, end-users, domain experts, AI designers, impact assessors, TEVV experts, product managers, compliance experts, auditors, governance experts, organizational management, end-users, affected individuals/communities, evaluators.</td>
</tr>
<tr>
<td>Operate &amp; monitor</td>
<td>Operate the AI system and continuously assess its recommendations and impacts (both intended and unintended) in light of objectives and ethical considerations.</td>
<td>System operators, end-users, domain experts, AI designers, impact assessors, TEVV experts, product managers, compliance experts, auditors, governance experts, organizational management, end-users, affected individuals/communities, evaluators.</td>
</tr>
<tr>
<td>Use or impacted by</td>
<td>Use system/technology; monitor &amp; assess impacts; seek mitigation of impacts, advocate for rights.</td>
<td>End-users, affected individuals/communities, general public; policy makers, standards organizations, trade associations, advocacy groups, environmental groups, civil society organizations, researchers.</td>
</tr>
</tbody>
</table>

Figure 2 lists representative AI actors across the AI lifecycle. AI actors with expertise to carry out TEVV tasks are especially likely to benefit from the Framework. AI actors with TEVV expertise are integrated throughout the AI lifecycle. TEVV tasks are foundational to risk management, providing knowledge and feedback for AI system management and governance. Performed regularly, TEVV tasks assess the system relative to technical, societal, legal, and ethical standards or norms, as well as monitor and assess risks of emergent properties. As a regular process within an AI lifecycle, TEVV allows for both mid-course remediation and post-hoc risk management and mitigation.

The People & Planet dimension of the AI lifecycle represented in Figure 1 presents an additional AI RMF audience: end-users or affected entities who play an important consultative role to the primary audiences. Their insights and input equip others to analyze context, identify, monitor and manage risks of the AI system by providing formal or quasi-formal norms or guidance. They include trade groups, standards developing organizations, advocacy groups, environmental groups, researchers, and civil society organizations. Their actions can designate boundaries for operation (technical, societal, legal, and ethical). They also promote discussion of the tradeoffs
needed to balance societal values and priorities related to civil liberties and rights, equity, and the economy.

A sense of collective responsibility among the many AI actors is essential for AI risk management to be successful.

3. Framing Risk

AI risk management is about offering a path to minimize potential negative impacts of AI systems, such as threats to civil liberties and rights, as well as pointing to opportunities to maximize positive impacts. Identifying, mitigating, and minimizing risks and potential harms associated with AI technologies are essential steps towards the development of trustworthy AI systems and their appropriate and responsible use. If a risk management framework can help to effectively address, document, and manage AI risk and negative impacts, it can lead to more trustworthy AI systems.

3.1. Understanding Risk, Impacts, and Harms

In the context of the AI RMF, “risk” refers to the composite measure of an event’s probability of occurring and the magnitude (or degree) of the consequences of the corresponding events. The impacts, or consequences, of AI systems can be positive, negative, or both and can result in opportunities or threats (Adapted from: ISO 31000:2018). When considering the negative impact of a potential event, risk is a function of 1) the negative impact, or magnitude of harm, that would arise if the circumstance or event occurs and 2) the likelihood of occurrence (Adapted from: OMB Circular A-130:2016). Negative impact or harm can be experienced by individuals, groups, communities, organizations, society, the environment, and the planet.

While risk management processes address negative impacts, this framework offers approaches to minimize anticipated negative impacts of AI systems and identify opportunities to maximize positive impacts. Additionally, the AI RMF is designed to be responsive to new risks as they emerge. This flexibility is particularly important where impacts are not easily foreseeable and applications are evolving. While some AI risks and benefits are well-known, it can be challenging to assess the degree to which a negative impact is related to actual harms. Figure 3 provides examples of potential harms that can be related to AI systems.

Risk management can drive AI developers and users to understand and account for the inherent uncertainties and inaccuracies in their models and systems, which in turn can improve their overall performance and trustworthiness.
3.2. Challenges for AI Risk Management

The AI RMF aims to help organizations address a variety of essential risk management issues, emphasizing that context is critical. Several challenges described below stand out for managing risks in pursuit of AI trustworthiness.

3.2.1. Risk Measurement

AI risks and impacts that are not well-defined or adequately understood are difficult to measure quantitatively or qualitatively.

Third-party data or systems can accelerate research and development and facilitate technology transition. They may also complicate risk measurement because the metrics or methodologies used by the organization developing the AI system may not align (or may not be transparent or documented) with the metrics or methodologies used by the organization deploying or operating the system. Risk measurement and management can further be complicated by how third-party data or systems are used or integrated into AI products or services.

Organizations will want to identify and track emergent risks and consider techniques for measuring them.
Approaches for measuring impacts on a population should consider that harms affect different groups and contexts differently. AI system impact assessments can help AI actors understand potential impacts or harms within specific contexts.

Measuring risk at an earlier stage in the AI lifecycle may yield different results than measuring risk at a later stage. Other risks may be latent at a given time but may increase as AI systems evolve.

AI risks measured in a laboratory or a controlled environment may differ from risks that emerge in operational setting or the real world.

Furthermore, inscrutable AI systems can complicate the measurement of risk. Inscrutability can be a result of the opaque quality of AI systems (lack of explainability or interpretability), lack of transparency or documentation in AI system development or deployment, or inherent uncertainties in AI systems.

### 3.2.2. Risk Tolerance

While the AI RMF can be used to prioritize risk, it does not prescribe risk tolerance. Risk tolerance refers to the organization’s or stakeholder’s readiness or appetite to bear the risk in order to achieve its objectives. Risk tolerance can be influenced by legal or regulatory requirements (Adapted from: ISO Guide 73). Risk tolerance and the level of risk that is acceptable to organizations or society are highly contextual and application and use-case specific. Risk tolerances can be influenced by policies and norms established by AI system owners, organizations, industries, communities, or policy makers. Risk tolerances are likely to change and adapt over time as AI systems, policies, and norms evolve. In addition, different organizations may have different risk tolerances due to varying organizational priorities and resource considerations. Even within a single organization there can be a balancing of priorities and tradeoffs.

Emerging knowledge and methods to better inform cost-benefit tradeoffs will continue to be developed and debated by business, governments, academia, and civil society. To the extent that challenges for specifying risk tolerances remain unresolved, there may be contexts where a risk management framework is not yet readily applicable for mitigating AI risks. In the absence of risk tolerances prescribed by existing law, regulation, or norms, the AI RMF equips organizations to define reasonable risk tolerance, manage those risks, and document their risk management process.

When applying the AI RMF, risks which the organization determines to be highest for AI systems and contexts call for the most urgent prioritization and most thorough risk management process. Doing so can mitigate risks and harms to enterprises and individuals, communities, and society. In some cases where an AI system presents the highest risk – where negative impacts are imminent, severe harms are actually occurring, or catastrophic risks are present – development
and deployment should cease in a safe manner until risks can be sufficiently mitigated. Conversely, the lowest-risk AI systems and contexts suggest lower prioritization.

3.2.3. Risk Perspectives

Attempting to eliminate risk entirely can be counterproductive in practice – because incidents and failures cannot be eliminated – and may lead to unrealistic expectations and resource allocation that may exacerbate risk and make risk triage impractical. A risk mitigation culture can help organizations recognize that not all AI risks are the same, so they can allocate resources purposefully. Risk management efforts should align to the risk-level and impact of an AI system, and policies should lay out clear guidelines for assessing each AI system an organization deploys.

3.2.4. Organizational Integration of Risk

The AI RMF is neither a checklist nor a compliance mechanism to be used in isolation. It should be integrated within the organization developing and using AI technologies and incorporated into broader risk management strategy and processes. Thereby AI will be treated along with other critical risks, yielding a more integrated outcome and resulting in organizational efficiencies.

In some scenarios the AI RMF may be utilized along with related guidance and frameworks for managing AI system risks or broader enterprise risks. Some risks related to AI systems are common across other types of software development and deployment. Overlapping risks include privacy concerns related to the use of underlying data to train AI systems, and security concerns related to the confidentiality, integrity and availability of training and output data for AI systems. Organizations need to establish and maintain the appropriate accountability mechanisms, roles and responsibilities, culture, and incentive structures for risk management to be effective. Use of the AI RMF alone will not lead to these changes or provide the appropriate incentives. Effective risk management needs organizational commitment at senior levels and may require cultural change within an organization or industry. In addition, small to medium-sized organizations may face challenges in implementing the AI RMF which can be different from those of large organizations, depending on their capabilities and resources.

4. AI Risks and Trustworthiness

Approaches which enhance AI trustworthiness can also contribute to a reduction of AI risks. This Framework articulates the following characteristics of trustworthy AI, and offers guidance for addressing them. **Trustworthy AI is: valid and reliable, safe, fair and bias is managed, secure and resilient, accountable and transparent, explainable and interpretable, and privacy-enhanced.**
These characteristics are inextricably tied to human social and organizational behavior, the datasets used by AI systems and the decisions made by those who build them, and the interactions with the humans who provide insight from and oversight of such systems. Human judgment must be employed when deciding on the specific metrics related to AI trustworthy characteristics and the precise threshold values for their related metrics.

Addressing AI trustworthy characteristics individually will not assure AI system trustworthiness, and tradeoffs are always involved. Trustworthiness is greater than the sum of its parts. Ultimately, it is a social concept, and the characteristics listed in any single guidance document will be more or less important in any given situation to establish trustworthiness.

Increasing the breadth and diversity of stakeholder input throughout the AI lifecycle can enhance opportunities for identifying AI system benefits and positive impacts, and increase the likelihood that risks arising in social contexts are managed appropriately.

Trustworthiness characteristics explained in this document are interrelated. Highly secure but unfair systems, accurate but opaque and uninterpretable systems, and inaccurate but secure, privacy-enhanced, and transparent systems are all undesirable. Trustworthy AI systems should achieve a high degree of control over risk while retaining a high level of performance quality. Achieving this difficult goal requires a comprehensive approach to risk management, with tradeoffs among the trustworthiness characteristics. It is the joint responsibility of all AI actors to determine whether AI technology is an appropriate or necessary tool for a given context or purpose, and how to use it responsibly. The decision to commission or deploy an AI system should be based on a contextual assessment of trustworthiness characteristics and the relative risks, impacts, costs, and benefits, and informed by a broad set of stakeholders.

Table 1 maps the AI RMF taxonomy to the terminology used by the OECD in their Recommendation on AI, the proposed European Union (EU) Artificial Intelligence Act, and United States Executive Order (EO) 13960.
### Table 1: Mapping of AI RMF taxonomy to AI policy documents.

<table>
<thead>
<tr>
<th>AI RMF</th>
<th>OECD AI Recommendation</th>
<th>EU AI Act (Proposed)</th>
<th>EO 13960</th>
</tr>
</thead>
<tbody>
<tr>
<td>Valid and reliable</td>
<td>Robustness</td>
<td>Technical robustness</td>
<td>Purposeful and performance driven</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Accurate, reliable, and effective</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Regularly monitored</td>
</tr>
<tr>
<td>Safe</td>
<td>Safety</td>
<td>Safety</td>
<td>Safe</td>
</tr>
<tr>
<td>Fair and bias is managed</td>
<td>Human-centered values and fairness</td>
<td>Non-discrimination Diversity and fairness Data governance</td>
<td>Lawful and respectful of our Nation’s values</td>
</tr>
<tr>
<td>Secure and resilient</td>
<td>Security</td>
<td>Security &amp; resilience</td>
<td>Secure and resilient</td>
</tr>
<tr>
<td>Transparent and accountable</td>
<td>Transparency and responsible disclosure Accountability</td>
<td>Transparency Accountability Human agency and oversight</td>
<td>Transparent Accountable Lawful and respectful of our Nation’s values</td>
</tr>
<tr>
<td>Explainable and interpretable</td>
<td>Explainability</td>
<td></td>
<td>Understandable by subject matter experts, users, and others, as appropriate</td>
</tr>
<tr>
<td>Privacy-enhanced</td>
<td>Human values; Respect for human rights</td>
<td>Privacy Data governance</td>
<td>Lawful and respectful of our Nation’s values</td>
</tr>
</tbody>
</table>

### Human Factors

Since AI systems can make sense of information more quickly and consistently than humans, they are often deployed in high-impact settings as a way to make decisions fairer and more impartial than human decision-making, and to do so more efficiently. One common strategy for managing risks in such settings is the use of a human “in-the-loop” (HITL). Unclear expectations about how the HITL can provide oversight for systems, and imprecise governance structures for their configurations are two points for consideration in AI risk management. Identifying which actor should provide which oversight task can be imprecise, with responsibility often falling on the human experts involved in AI-based decision-making tasks. In many settings such experts provide their insights about particular domain knowledge, and are not necessarily able to perform intended oversight or governance functions for AI systems they played no role in developing. It isn’t just HITLs; any AI actor, regardless of oversight role, carries their own cognitive biases into the design, development, deployment, and use of AI systems. Biases can be induced by AI actors across the AI lifecycle via assumptions, expectations, and decisions during modeling tasks. These challenges are exacerbated by AI system opacity and the resulting lack of interpretability. The degree to which humans are empowered and incentivized to challenge AI system suggestions must be understood. Data about the frequency and rationale with which humans overrule AI system suggestions in deployed systems can be useful to collect and analyze.
4.1. Valid and Reliable

Accuracy, and robustness are interdependent factors contributing to the validity and trustworthiness of AI systems. Deployment of AI systems which are inaccurate, unreliable, or non-generalizable to data beyond their training data (i.e., not robust) creates and increases AI risks and reduces trustworthiness.

Measures of accuracy – “closeness of results of observations, computations, or estimates to the true values or the values accepted as being true” (Source: ISO/IEC TS 5723:2022) – should address both computational-centric (e.g., false positive and false negative rates) and human-AI teaming aspects. Accuracy measurements should always be paired with clearly defined test sets and details about test methodology; both should be included in associated documentation.

Reliability – “ability of an item to perform as required, without failure, for a given time interval, under given conditions” (Source: ISO/IEC TS 5723:2022) is a goal for overall correctness of model operation under the conditions of expected use and over a given period of time, to include the entire lifetime of the system.

Robustness or generalizability – “ability of an AI system to maintain its level of performance under a variety of circumstances” (Source: ISO/IEC TS 5723:2022) – is a goal for appropriate system functionality in a broad set of conditions and circumstances, including uses of AI systems not initially anticipated. Robustness does not only require that the system perform exactly as it does under expected uses, but also that it should perform in ways that minimize potential harms to people if it is operating in an unexpected environment.

Validity and reliability for deployed AI systems is often assessed by ongoing audits or monitoring that confirm a system is performing as intended. Measurement of accuracy, reliability, and robustness contribute to trustworthiness and should consider that certain types of failures can cause greater harm – and risks should be managed to minimize the negative impact of those failures.

4.2. Safe

AI systems “should not, under defined conditions, cause physical or psychological harm or lead to a state in which human life, health, property, or the environment is endangered” (Source: ISO/IEC TS 5723:2022). Safe operation of AI systems requires responsible design and development practices, clear information to deployers on how to use a system appropriately, and responsible decision-making by deployers and end-users.

Employing safety considerations during planning and design can prevent failures or conditions that can render a system dangerous. Other practical approaches for AI safety often relate to rigorous simulation and in-domain testing, real-time monitoring, and the ability to shut down or modify systems that deviate from intended or expected functionality.
AI safety measures should take cues from measures of safety used in other fields, such as transportation and healthcare.

4.3. Fair – and Bias Is Managed

Fairness in AI includes concerns for equality and equity by addressing issues such as bias and discrimination. Standards of fairness can be complex and difficult to define because perceptions of fairness differ among cultures and may shift depending on application. Systems in which biases are mitigated are not necessarily fair. For example, systems in which predictions are somewhat balanced across demographic groups may still be inaccessible to individuals with disabilities or affected by the digital divide.

NIST has identified three major categories of AI bias to be considered and managed: systemic, computational, and human, all of which can occur in the absence of prejudice, partiality, or discriminatory intent. Systemic bias can be present in AI datasets, the organizational norms, practices, and processes across the AI lifecycle, and the broader society that uses AI systems. Computational bias can be present in AI datasets and algorithmic processes, and often stems from systematic errors due to non-representative samples. Human biases relate to how an individual or group perceives AI system information to make a decision or fill in missing information. Human biases are omnipresent in decision-making processes across the AI lifecycle and system use. Human biases are implicit, so increasing awareness does not assure control or improvement.

Bias exists in many forms, and can become ingrained in the automated systems that help make decisions about our lives. While bias is not always a negative phenomenon, certain biases exhibited in AI models and systems can perpetuate and amplify negative impacts on individuals, groups, communities, organizations, and society – and at a speed and scale far beyond the traditional discriminatory practices that can result from implicit human or systemic biases. Bias is tightly associated with the concepts of transparency as well as fairness in society. (See NIST Special Publication 1270, “Towards a Standard for Identifying and Managing Bias in Artificial Intelligence.”)

4.4. Secure and Resilient

AI systems that can withstand adversarial attacks, or more generally, unexpected changes in their environment or use, or to maintain their functions and structure in the face of internal and external change, and to degrade gracefully when this is necessary (Adapted from: ISO/IEC TS 5723:2022) may be said to be resilient. AI systems that can maintain confidentiality, integrity, and availability through protection mechanisms that prevent unauthorized access and use may be said to be secure.

Security and resilience are related but distinct characteristics. While resilience is the ability to return to normal function after an attack, security includes resilience but also encompasses
protocols to avoid or protect against attacks. Resilience has some relationship to robustness except that it goes beyond the provenance of the data to encompass unexpected or adversarial use of the model or data. Other common security concerns relate to data poisoning and the exfiltration of models, training data, or other intellectual property through AI system endpoints.

4.5. Transparent and Accountable

Transparency reflects the extent to which information is available to individuals about an AI system, if they are interacting – or even aware that they are interacting – with such a system. Its scope spans from design decisions and training data to model training, the structure of the model, its intended use case, and how and when deployment or end user decisions were made and by whom. Transparency is often necessary for actionable redress related to AI system outputs that are incorrect or otherwise lead to negative impacts. A transparent system is not necessarily an accurate, privacy-enhanced, or secure, or fair system. It is difficult to determine whether an opaque system possesses such characteristics and to do so over time as complex systems evolve.

Determinations of accountability in the AI context relate to expectations of the responsible party in the event that a risky outcome is realized. The shared responsibility of all AI actors should be considered when seeking to hold actors accountable for the outcomes of AI systems. The relationship between risk and accountability associated with AI and technological systems more broadly differs across cultural, legal, sectoral, and societal contexts. Grounding organizational practices and governing structures for harm reduction, like risk management, can help lead to more accountable systems.

Maintaining the provenance of training data and supporting attribution of decisions of the AI system to subsets of training data can assist with both transparency and accountability.

4.6. Explainable and Interpretable

Explainability refers to a representation of the mechanisms underlying an algorithm’s operation, whereas interpretability refers to the meaning of AI systems’ output in the context of its designed functional purpose. Together, they assist those operating or overseeing an AI system to do so effectively and responsibly. The underlying assumption is that perceptions of risk stem from a lack of ability to make sense of, or contextualize, system output appropriately.

Risk from lack of explainability may be managed by descriptions of how models work tailored to individual differences such as the user’s knowledge and skill level. Explainable systems can be more easily debugged and monitored, and they lend themselves to more thorough documentation, audit, and governance. Risks to interpretability can often be addressed by communicating a description of why an AI system made a particular prediction or recommendation. (See NISTIR 8312, “Four Principles of Explainable Artificial Intelligence” and NISTIR 8367, “Psychological Foundations of Explainability and Interpretability in Artificial Intelligence”.)
4.7. Privacy-Enhanced

Privacy refers generally to the norms and practices that help to safeguard human autonomy, identity, and dignity. These norms and practices typically address freedom from intrusion, limiting observation, or individuals’ agency to consent to disclosure or control of facets of their identities (e.g., body, data, reputation). (See The NIST Privacy Framework: A Tool for Improving Privacy through Enterprise Risk Management.)

Privacy values such as anonymity, confidentiality, and control generally should guide choices for AI system design, development, and deployment. From a policy perspective, privacy-related risks may overlap with security, bias, and transparency. Like safety and security, specific technical features of an AI system may promote or reduce privacy, and assessors can identify how the processing of data could create privacy-related problems.

5. Effectiveness of the AI RMF

The goal of the AI RMF is to offer a resource for improving the ability of organizations to manage AI risks to maximize benefits and to minimize AI-related harms to individuals, groups, organizations, and society. Evaluations of AI RMF effectiveness – including ways to measure bottom-line improvements in the trustworthiness of AI systems – will be part of future NIST activities, in conjunction with stakeholders.

Organizations and other users of the Framework are encouraged to periodically evaluate whether the AI RMF has improved their ability to manage AI risks, including but not limited to their policies, processes, practices, implementation plans, indicators, and expected outcomes. The Framework users are expected to benefit from:

» enhanced processes for governing, mapping, measuring, and managing AI risk, and clearly documenting outcomes;
» enhanced awareness of the relationships between and among trustworthiness characteristics, socio-technical approaches, and AI risks;
» established processes for making go/no-go system commissioning and deployment decisions;
» established policies, processes, practices, and procedures for improving organizational accountability efforts related to AI system risks;
» enhanced organizational culture which prioritizes the identification and management of AI system risks and impacts to individuals, communities, organizations, and society;
» enhanced information sharing within and across organizations about decision-making processes, responsibilities, common pitfalls, and approaches for continuous improvement;
» enhanced contextual knowledge for increased awareness of downstream risks;
» enhanced awareness of the importance and efficacy of stakeholder engagement efforts; and
» enhanced capacity for TEVV of AI systems and associated risks.
Part 2: Core and Profiles

6. AI RMF Core

The AI RMF Core provides outcomes and actions that enable dialogue, understanding, and activities to manage AI risks. As illustrated in Figure 5, the Core is composed of four functions: Map, Measure, Manage, and Govern. Each of these high-level functions is broken down into categories and subcategories. Categories and subcategories are subdivided into specific outcomes and actions. Actions do not constitute a checklist, nor are they necessarily an ordered set of steps.

Figure 5: Functions organize AI risk management activities at their highest level to govern, map, measure, and manage AI risks. Governance is a cross-cutting function that is infused throughout and informs the other functions of the process.
Framework users may apply these functions as best suits their needs for managing AI risks. Some organizations may choose to select from among the categories and subcategories; others will want and have the capacity to apply all categories and subcategories. Assuming a governance structure is in place, functions may be performed in any order across the AI lifecycle as deemed to add value by a user of the framework. After instituting the outcomes in Govern, most users of the AI RMF would start with the Map function and continue to Measure or Manage. However users integrate the functions, the process should be iterative, with cross-referencing between functions as necessary. Similarly, there are categories and subcategories with elements that apply to multiple functions, or that have to occur before certain subcategory decisions.

Risk management should be continuous, timely, and performed throughout the AI system lifecycle dimensions. AI RMF core functions should be carried out in a way that reflects diverse and multidisciplinary perspectives, potentially including the views of stakeholders from outside the organization. Having a diverse team contributes to more open sharing of ideas and assumptions about the purpose and function of the technology being designed and developed – which can create opportunities for surfacing problems and identifying existing and emergent risks.

An online companion resource to the AI RMF, referred to as the NIST AI RMF Playbook, is available to help organizations navigate the AI RMF and achieve the outcomes through suggested tactical actions they can apply within their own contexts. The Playbook is voluntary and organizations can utilize the suggestions according to their needs and interests. Playbook users can create tailored guidance from suggested material for their own use, and contribute their suggestions for inclusion to the broader Playbook community. Along with the AI RMF, the NIST Playbook will be part of the forthcoming Trustworthy and Responsible AI Resource Center.

6.1. Govern

The Govern function cultivates and implements a culture of risk management within organizations developing, deploying, or acquiring AI systems. Governance is designed to ensure risks and potential impacts are identified, measured, and managed effectively and consistently. Governance provides a structure through which AI risk management functions can align with organizational policies and strategic priorities whether or not they are related to AI systems.

Governance focuses on technical aspects of AI system design and development as well as on organizational practices and competencies that directly affect the individuals involved in training, deploying, and monitoring of such systems. Governance should address supply chains, including third-party software or hardware systems and data as well as internally developed AI systems.
Govern is a cross-cutting function that is infused throughout AI risk management and informs the other functions of the process. Aspects of Govern, especially those related to compliance or evaluation, should be integrated into each of the other functions. Attention to governance is a continual and intrinsic requirement for effective AI risk management over an AI system’s lifespan and the organization’s hierarchy.

Senior leadership sets the tone for risk management within an organization, and with it, organizational culture. The governing authorities determine the overarching policies that align with the organization’s mission, goals, values, and risk appetite as well as its culture. Management aligns the technical aspects of AI risk management to its policies and operations. Documentation should be used in transparency-enhancing and human review processes, and to bolster accountability in AI system teams.

After putting in place the structures, systems, and teams described in the Govern function, Framework users should be better equipped to carry out meaningful risk management of AI products, services, and systems. It is incumbent on Framework users to continue to execute the Govern function as cultures, stakeholder needs and expectations, and knowledge evolve over time.

Practices related to governing AI risks are described in the NIST AI RMF Playbook. Table 2 lists the Govern function’s categories and subcategories.

Table 2: Categories and subcategories for the Govern function.

<table>
<thead>
<tr>
<th>Category</th>
<th>Subcategory</th>
</tr>
</thead>
<tbody>
<tr>
<td>GOVERN 1: Policies, processes, procedures, and practices across the organization related to the mapping, measuring, and managing of AI risks are in place, transparent, and implemented effectively.</td>
<td>GOVERN 1.1: Legal and regulatory requirements involving AI are understood, managed, and documented.</td>
</tr>
<tr>
<td></td>
<td>GOVERN 1.2: The characteristics of trustworthy AI are integrated into organizational policies, processes, and procedures.</td>
</tr>
<tr>
<td></td>
<td>GOVERN 1.3: The risk management process and its outcomes are established through transparent mechanisms and all significant risks as determined are measured.</td>
</tr>
<tr>
<td></td>
<td>GOVERN 1.4: Ongoing monitoring and periodic review of the risk management process and its outcomes are planned, with organizational roles and responsibilities clearly defined.</td>
</tr>
<tr>
<td>GOVERN 2: Accountability structures are in place so that the appropriate teams and individuals are empowered, responsible, and trained for mapping, measuring, and managing AI risks.</td>
<td>GOVERN 2.1: Roles and responsibilities and lines of communication related to mapping, measuring, and managing AI risks are documented and are clear to individuals and teams throughout the organization.</td>
</tr>
<tr>
<td></td>
<td>GOVERN 2.2: The organization’s personnel and partners are provided AI risk management training to enable them to perform their duties and responsibilities consistent with related policies, procedures, and agreements.</td>
</tr>
</tbody>
</table>
### Category | Subcategory
---|---
GOVERN 2.3: Executive leadership of the organization considers decisions about risks associated with AI system development and deployment to be their responsibility. | 
GOVERN 3: Workforce diversity, equity, inclusion, and accessibility processes are prioritized in the mapping, measuring, and managing of AI risks throughout the lifecycle. | GOVERN 3.1: Decision-making related to mapping, measuring, and managing AI risks throughout the lifecycle is informed by a demographically and disciplinarily diverse team including internal and external personnel. Specifically, teams that are directly engaged with identifying design considerations and risks include a diversity of experience, expertise, and backgrounds to ensure AI systems meet requirements beyond a narrow subset of users.

GOVERN 4: Organizational teams are committed to a culture that considers and communicates risk. | GOVERN 4.1: Organizational practices are in place to foster a critical thinking and safety-first mindset in the design, development, and deployment of AI systems to minimize negative impacts.

GOVERN 4.2: Organizational teams document the risks and impacts of the technology they design, develop, or deploy and communicate about the impacts more broadly.

GOVERN 4.3: Organizational practices are in place to enable testing, identification of incidents, and information sharing.

GOVERN 5: Processes are in place for robust stakeholder engagement. | GOVERN 5.1: Organizational policies and practices are in place to collect, consider, prioritize, and integrate external stakeholder feedback regarding the potential individual and societal impacts related to AI risks.

GOVERN 5.2: Mechanisms are established to enable AI actors to regularly incorporate adjudicated stakeholder feedback into system design and implementation.

GOVERN 6: Policies and procedures are in place to address AI risks arising from third-party software and data and other supply chain issues. | GOVERN 6.1: Policies and procedures are in place that address risks associated with third-party entities.

GOVERN 6.2: Contingency processes are in place to handle failures or incidents in third-party data or AI systems deemed to be high-risk.

#### 6.2. Map

The Map function establishes the context to frame risks related to an AI system. The information gathered while carrying out this function enables risk prevention and informs decisions for processes such as model management, and an initial decision about appropriateness or the need for an AI solution. Determination of whether AI use is appropriate or warranted can be considered in comparison to the status quo per a qualitative or quantitative analysis of benefits, costs, and risks. Outcomes in the Map function are the basis for the Measure and Manage
functions. Without contextual knowledge, and awareness of risks within the identified contexts, risk management is difficult to perform.

Implementing this function necessitates a broad set of perspectives from a diverse internal team and engagement with external stakeholders. Gathering broad perspectives can help organizations proactively prevent risks and develop more trustworthy AI systems, by

» improving their capacity for understanding contexts;
» checking their assumptions about context of use;
» enabling recognition of when systems are not functional within or out of their intended context;
» identifying positive and beneficial uses of their existing AI systems, and new markets;
» improving understanding of limitations in processes such as proxy development; and
» identifying constraints in real-world applications that may lead to negative impacts.

After completing the Map function, Framework users should have sufficient contextual knowledge about AI system impacts to inform a go/no-go decision about whether to design, develop, or deploy an AI system based on an assessment of impacts. If a decision is made to proceed, organizations should utilize the Measure and Manage functions to assist in AI risk management efforts, utilizing policies and procedures put into place in the Govern function. It is incumbent on Framework users to continue applying the Map function to AI systems as context, capabilities, risks, benefits, and impacts evolve over time.

Practices related to mapping AI risks are described in the NIST AI RMF Playbook.

Table 3 lists the Map function’s categories and subcategories.

<table>
<thead>
<tr>
<th>Category</th>
<th>Subcategory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Map: Context is recognized and risks related to the context are identified</td>
<td>MAP 1: Context is established and understood.</td>
</tr>
<tr>
<td></td>
<td>MAP 1.1: Intended purpose, prospective settings in which the AI system will be deployed, the specific set or types of users along with their expectations, and impacts of system use are understood and documented. Assumptions and related limitations about AI system purpose and use are enumerated, documented, and tied to TEVV considerations and system metrics.</td>
</tr>
<tr>
<td></td>
<td>MAP 1.2: Inter-disciplinary AI actors, competencies, skills, and capacities for establishing context reflect demographic diversity and broad domain and user experience expertise, and their participation is documented. Opportunities for interdisciplinary collaboration are prioritized.</td>
</tr>
<tr>
<td></td>
<td>MAP 1.3: The business value or context of business use has been clearly defined or – in the case of assessing existing AI systems – re-evaluated.</td>
</tr>
<tr>
<td></td>
<td>MAP 1.4: The organization’s mission and relevant goals for the AI technology are understood.</td>
</tr>
<tr>
<td>Category</td>
<td>Subcategory</td>
</tr>
<tr>
<td>----------</td>
<td>-------------</td>
</tr>
<tr>
<td>MAP 1.5: Organizational risk tolerances are determined.</td>
<td></td>
</tr>
<tr>
<td>MAP 1.6: Practices and personnel for design activities enable regular engagement with stakeholders, and integrate actionable user and community feedback about unanticipated negative impacts.</td>
<td></td>
</tr>
<tr>
<td>MAP 1.7: System requirements (e.g., “the system shall respect the privacy of its users”) are elicited and understood from stakeholders. Design decisions take socio-technical implications into account to address AI risks.</td>
<td></td>
</tr>
<tr>
<td>MAP 2: Classification of the AI system is performed.</td>
<td></td>
</tr>
<tr>
<td>MAP 2.1: The specific task, and methods used to implement the task, that the AI system will support is defined (e.g., classifiers, generative models, recommenders).</td>
<td></td>
</tr>
<tr>
<td>MAP 2.2: Information is documented about the system’s knowledge limits and how output will be utilized and overseen by humans.</td>
<td></td>
</tr>
<tr>
<td>MAP 2.3: Scientific integrity and TEVV considerations are identified and documented, including those related to experimental design, data collection and selection (e.g., availability, representativeness, suitability), and construct validation.</td>
<td></td>
</tr>
<tr>
<td>MAP 3: AI capabilities, targeted usage, goals, and expected benefits and costs compared with the status quo are understood.</td>
<td></td>
</tr>
<tr>
<td>MAP 3.1: Benefits of intended system functionality and performance are examined and documented.</td>
<td></td>
</tr>
<tr>
<td>MAP 3.2: Potential costs, including non-monetary costs, which result from expected or realized errors or system performance are examined and documented.</td>
<td></td>
</tr>
<tr>
<td>MAP 3.3: Targeted application scope is specified, narrowed, and documented based on established context and AI system classification.</td>
<td></td>
</tr>
<tr>
<td>MAP 4: Risks and benefits are mapped for third-party software and data.</td>
<td></td>
</tr>
<tr>
<td>MAP 4.1: Approaches for mapping third-party technology risks are in place and documented.</td>
<td></td>
</tr>
<tr>
<td>MAP 4.2: Internal risk controls for third-party technology risks are in place and documented.</td>
<td></td>
</tr>
<tr>
<td>MAP 5: Impacts to individuals, groups, communities, organizations, and society are assessed.</td>
<td></td>
</tr>
<tr>
<td>MAP 5.1: Potential positive and negative impacts to individuals, groups, communities, organizations, and society are regularly identified and documented.</td>
<td></td>
</tr>
<tr>
<td>MAP 5.2: Likelihood and magnitude of each identified impact based on expected use, past uses of AI systems in similar contexts, public incident reports, stakeholder feedback, or other data are identified and documented.</td>
<td></td>
</tr>
<tr>
<td>MAP 5.3: Assessments of benefits versus impacts are based on analyses of impact, magnitude, and likelihood of risk.</td>
<td></td>
</tr>
</tbody>
</table>
6.3. Measure

The Measure function employs quantitative, qualitative, or mixed-method tools, techniques, and methodologies to analyze, assess, benchmark, and monitor AI risk and related impacts. It uses knowledge relevant to AI risks identified in the Map function and informs the Manage function. AI systems should be tested before their deployment and regularly while in operation.

Measuring AI risks includes tracking metrics for trustworthy characteristics, social impact, and human-AI configurations. Processes developed or adopted in the Measure function should include rigorous software testing and performance assessment methodologies that include associated measures of uncertainty, comparisons to performance benchmarks, and formalized reporting and documentation of results. Independent review improves the effectiveness of testing and can mitigate internal biases and potential conflicts of interest.

Where tradeoffs among the trustworthy characteristics arise, measurement provides a traceable basis to inform management decisions. Options may include recalibration, impact mitigation, or removal of the system from production.

After completing the Measure function, TEVV processes including metrics, methods, and methodologies are in place, followed, and documented. Framework users will enhance their capacity to comprehensively evaluate system trustworthiness, identify and track existing and emergent risks, and verify efficacy of metrics. Measurement outcomes will be utilized in the Manage function to assist risk monitoring and response efforts. It is incumbent on Framework users to continue applying the Measure function to AI systems as knowledge, methodologies, risks, and impacts evolve over time.

Practices related to measuring AI risks will be described in the NIST AI RMF Playbook.

Table 4 lists the Measure function’s categories and subcategories.

<table>
<thead>
<tr>
<th>Category</th>
<th>Subcategory</th>
</tr>
</thead>
<tbody>
<tr>
<td>MEASURE 1: Appropriate methods and metrics are identified and applied.</td>
<td>MEASURE 1.1: Approaches and metrics for quantitative or qualitative measurement of the most significant risks, identified by the outcome of the Map function, including context-relevant measures of trustworthiness are identified and selected for implementation. The risks or trustworthiness characteristics that will not be measured are properly documented.</td>
</tr>
<tr>
<td>MEASURE 1.2: Appropriateness of metrics and effectiveness of existing controls is regularly assessed and updated.</td>
<td></td>
</tr>
<tr>
<td>MEASURE 1.3: Internal experts who did not serve as front-line developers for the system and/or independent assessors are involved in regular assessments and updates. Domain experts, users, and external stakeholders and affected communities are consulted in support of assessments.</td>
<td></td>
</tr>
<tr>
<td>MEASURE 2.1: Test sets, metrics, and details about the tools used during test, evaluation, validation, and verification (TEVV) are documented.</td>
<td></td>
</tr>
<tr>
<td>Category</td>
<td>Subcategory</td>
</tr>
<tr>
<td>----------</td>
<td>-------------</td>
</tr>
<tr>
<td>MEASURE 2: Systems are evaluated for trustworthy characteristics.</td>
<td>MEASURE 2.2: Evaluations involving human subjects comply with human subject protection requirements; and human subjects or datasets are representative of the intended population.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.3: System performance or assurance criteria are measured qualitatively or quantitatively and demonstrated for conditions similar to deployment setting(s). Measures are documented.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.4: Deployed product is demonstrated to be valid and reliable. Limitations of the generalizability beyond the conditions under which the technology was developed are documented.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.5: AI system is evaluated regularly for safety. Deployed product is demonstrated to be safe and can fail safely and gracefully if it is made to operate beyond its knowledge limits. Safety metrics implicate system reliability and robustness, real-time monitoring, and response times for AI system failures.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.6: Computable bias is evaluated regularly and results are documented.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.7: AI system resilience and security is evaluated regularly and documented.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.8: AI model is explained, validated, and documented. AI system output is interpreted within its context and to inform responsible use and governance.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.9: Privacy risk of the AI system is examined regularly and documented.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 2.10: Environmental impact and sustainability of model training and management activities are assessed and documented.</td>
</tr>
<tr>
<td>MEASURE 3: Mechanisms for tracking identified risks over time are in place.</td>
<td>MEASURE 3.1: Approaches, personnel, and documentation are in place to regularly identify and track existing and emergent risks based on factors such as intended and actual performance in deployed contexts.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 3.2: Risk tracking approaches are considered for settings where risks are difficult to assess using currently available measurement techniques or are not yet available.</td>
</tr>
<tr>
<td>MEASURE 4: Feedback about efficacy of measurement is gathered and assessed.</td>
<td>MEASURE 4.1: Measurement approaches for identifying risks are connected to deployment context(s) and informed through consultation with domain experts and other end users. Approaches are documented.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 4.2: Measurement results regarding system trustworthiness in deployment context(s) are informed by domain expert and other stakeholder feedback to validate whether the system is performing consistently as intended. Results are documented.</td>
</tr>
<tr>
<td></td>
<td>MEASURE 4.3: Measurable performance improvements (e.g., participatory methods) based on stakeholder consultations are identified and documented.</td>
</tr>
</tbody>
</table>
6.4. Manage

The Manage function entails allocating risk management resources to mapped and measured risks on a regular basis and as defined by the Govern function.

Contextual information gleaned from stakeholder feedback and other expert consultation processes established in Govern and carried out in Map are also utilized in this function to decrease the likelihood of system failures and negative impacts. Systematic documentation practices established in Govern and utilized in Map and Measure bolster AI risk management efforts and increase transparency and accountability.

After completing the Manage function, plans for prioritizing risk and continuous monitoring and improvement will be in place. Framework users will have enhanced capacity to manage the risks of deployed AI systems and to allocate risk management resources based on risk measures. It is incumbent on Framework users to continue to apply the Manage function to deployed AI systems as methods, contexts, risks, and stakeholder expectations evolve over time.

Practices related to managing AI risks will be described in the NIST AI RMF Playbook.

Table 5 lists the Manage function’s categories and subcategories.

<table>
<thead>
<tr>
<th>Category</th>
<th>Subcategory</th>
</tr>
</thead>
<tbody>
<tr>
<td>MANAGE 1: AI risks based on impact assessments and other analytical output from the Map and Measure functions are prioritized, responded to, and managed.</td>
<td>MANAGE 1.1: Determination is made about whether the AI system achieves its intended purpose and stated objectives and should proceed in development or deployment.</td>
</tr>
<tr>
<td></td>
<td>MANAGE 1.2: Treatment of documented risks is prioritized based on impact, likelihood, and available resources methods.</td>
</tr>
<tr>
<td></td>
<td>MANAGE 1.3: Responses to the most significant risks, identified by the Map function, are developed, planned, and documented. Risk response options can include mitigating, transferring, sharing, avoiding, or accepting.</td>
</tr>
<tr>
<td>MANAGE 2: Strategies to maximize benefits and minimize negative impacts are planned, prepared, implemented, and documented, and informed by stakeholder input.</td>
<td>MANAGE 2.1: Resources required to manage risks are taken into account, along with viable alternative systems, approaches, or methods, and related reduction in severity of impact or likelihood of each potential action.</td>
</tr>
<tr>
<td></td>
<td>MANAGE 2.2: Mechanisms are in place and applied to sustain the value of deployed AI systems.</td>
</tr>
<tr>
<td></td>
<td>MANAGE 2.3: Mechanisms are in place and applied to supersede, disengage, or deactivate AI systems that demonstrate performance or outcomes inconsistent with intended use.</td>
</tr>
<tr>
<td>MANAGE 3: Risks from third-party entities are managed.</td>
<td>MANAGE 3.1: Risks from third-party resources are regularly monitored, and risk controls are applied and documented.</td>
</tr>
</tbody>
</table>
### 7. AI RMF Profiles

AI RMF use case profiles are instantiations of the AI RMF functions, categories, and subcategories for a certain application or use case based on the requirements, risk tolerance, and resources of the Framework user. Examples could be an AI RMF hiring profile or an AI RMF fair housing profile. Profiles may illustrate and offer insights into how risk can be managed at various stages of the AI lifecycle or in specific sector, technology, or end-use applications. A profile assists organizations in deciding how they might best manage AI risk that is well-aligned with their goals, considers legal/regulatory requirements and best practices, and reflects risk management priorities.

AI RMF temporal profiles are descriptions of either the current state or the desired, target state of specific AI risk management activities within a given sector, industry, organization, or application context. An AI RMF Current Profile indicates how AI is currently being managed and the related risks in terms of current outcomes. A Target Profile indicates the outcomes needed to achieve the desired or target AI risk management goals.

Comparing Current and Target Profiles may reveal gaps to be addressed to meet AI risk management objectives. Action plans can be developed to address these gaps to fulfill a given Category or Subcategory. Prioritizing the mitigation of gaps is driven by the user’s needs and risk management processes. This risk-based approach enables Framework users to compare their approaches and themselves with other stakeholders and to gauge the resources needed (e.g., staffing, funding) to achieve AI risk management goals in a cost-effective, prioritized manner.

This Framework does not prescribe Profile templates, allowing for flexibility in implementation.

**NOTE:** NIST welcomes contributions towards development of AI RMF use case profiles as well as current and target profiles. Submissions to be included in the NIST Trustworthy and Responsible AI Resource Center will inform NIST and the broader community about the usefulness of the AI RMF and will likely lead to improvements which can be incorporated into future versions of the framework.
Appendix A: Descriptions of AI Actor Tasks from Figure 1

**AI Design** includes AI actors who are responsible for the planning, design, and data collection and processing tasks of the AI system. Tasks include articulating and documenting the system’s concept and objectives, underlying assumptions, context, and requirements; gathering and cleaning data; and documenting the metadata and characteristics of the dataset. AI actors in this category include data scientists, domain experts, socio-cultural analysts, human factors experts, governance experts, data engineers, data providers, and evaluators.

**AI Development** includes AI actors who are responsible for model building and interpretation tasks, which involve the creation, selection, calibration, training, and/or testing of models or algorithms. Tasks involve machine learning experts, data scientists, developers, and experts with familiarity about the socio-cultural and contextual factors associated with the deployment setting.

**AI Deployment** includes AI actors who assure deployment of the system into production. Related tasks include: piloting, checking compatibility with legacy systems, ensuring regulatory compliance, managing organizational change, and evaluating user experience. AI actors in this category include system integrators, software developers, evaluators and domain experts with expertise in human factors, socio-cultural analysis, and governance.

**Operation and Monitoring** includes AI actors who are responsible for operating the AI system and working with others to continuously assess system output and impacts. Users who interpret or incorporate the output of AI systems, evaluators and auditors, and members of the research community are part of this group.

**Test, Evaluation, Verification, and Validation (TEVV)** tasks are performed by AI actors who examine the AI system or its components, or detect and remediate problems throughout the AI lifecycle. Tasks can be incorporated into a phase as early as design, where tests are planned in accordance with the design requirement.

- TEVV tasks for design, planning, and data may center on internal and external validation of assumptions for system design, data collection, and measurements, relative to the intended context of deployment or application.
- TEVV tasks for development (i.e., model building) include model validation and assessment.
- TEVV tasks for deployment include system validation and integration in production, with testing, tuning, and recalibration for systems and process integration, user experience, and compliance with existing legal, regulatory, and ethical specifications.
- TEVV tasks for operations involve ongoing monitoring for periodic updates, testing, and recalibration of models, and the detection of emergent properties and related impacts.
Human Factors tasks and activities include human-centered design practices and methodologies, promoting the active involvement of end-users and appropriate stakeholders, incorporating context-specific norms and values in system design (VSD), evaluating and adapting end-user experiences, and broad integration of humans and human dynamics in all phases of the AI lifecycle. Human factors professionals provide multidisciplinary skills and perspectives to understand context of use, engage multi-stakeholder processes, design and evaluate user experience (UI/UX), perform human-centered evaluation and testing, and inform impact assessments.

Domain Experts are multidisciplinary practitioners or scholars who provide knowledge or expertise in an industry sector, economic sector, or application area where an AI system is being used. These experts are essential contributors for AI system design and development and can provide interpretation of outputs to support the work of TEVV and AI impact assessment teams.

AI Impact Assessors are responsible for assessing and evaluating requirements for AI system accountability, combating harmful bias, examining intended and unintended impacts of AI systems, product safety, liability, and security, among others. AI Impact assessors provide technical, human factor, socio-cultural, and legal expertise.

Procurers are financial, legal, or policy management officials who acquire AI models, products, or services from a third party, developer, vendor, or contractor.

Third-party entities are providers, developers, or vendors of data, algorithms, models, and/or systems and related services to another organization or the organization’s customers or clients. Third-party entities are responsible for AI design and development tasks, in whole or in part. By definition, they are external to the design, development, or deployment team of the organization that acquires its technologies or services. The technologies acquired from third-party entities may be complex or opaque, and risk tolerances may not align with the deploying or operating organization.

Organizational Management, Senior Leadership, and the Board of Directors are among the parties responsible for AI governance.

End Users of an AI system are the individuals or groups that use the system for a specific purpose. These individuals or groups interact with an AI system in a specific context. End users can range in competency from AI experts to first-time technology end-users.

AI Operators continuously assess system recommendations and impacts (both intended and unintended) in light of the system’s objectives as well as the ethical considerations that go into its operation. Operators can often be associated with the planning and design or specification stage of the AI system lifecycle as well as post-deployment monitoring.

Affected Individuals/Communities encompass any individual, group, community, or stakeholder organization affected by AI systems or decisions based on the output of AI systems,
directly or indirectly. These individuals do not necessarily interact with the system and can be indirectly or directly affected by the deployment of an AI system or application.

Other AI actors may provide formal or quasi-formal norms or guidance for specifying and managing AI risks. They can include trade groups, standards developing organizations, advocacy groups, environmental groups, and civil society organizations.

The general public is most likely to directly experience positive and negative impacts of AI technologies. They may provide the motivation for actions taken by the other stakeholders and can include individuals, communities, and consumers in the context where an AI system is developed or deployed.
Appendix B: How AI Risks Differ from Traditional Software Risks

As with traditional software, risks from AI-based technology can be bigger than an enterprise, span organizations, and can lead to societal impacts. AI systems also bring a set of risks that are not comprehensively addressed by current risk frameworks and approaches. Some AI systems’ features that present risks can also be beneficial. For example, pre-trained models and transfer learning can advance research and increase accuracy and resilience when compared to other models and approaches. Identifying contextual factors in the Map function will assist AI actors in determining the level of risk and potential management efforts.

Compared to traditional software, AI-specific risks that are new or increased include:

» “Oracle problem” - the data used for building an AI system is considered oracle, but data may not be a true or appropriate representation of the context or intended use of the AI system. Additionally, bias and other data quality issues can affect AI system trustworthiness, which could lead to negative impacts.

» AI system dependency and reliance on data for training tasks, combined with increased volume and complexity typically associated with such data.

» Intentional or unintentional changes during training that may fundamentally alter AI system performance.

» Datasets used to train AI systems may become detached from their original and intended context, or may become stale or outdated relative to deployment context.

» AI system scale and complexity (many systems contain billions or even trillions of decision points) housed within more traditional software applications.

» Use of pre-trained models that can advance research and improve performance can also increase levels of statistical uncertainty and cause issues with bias management, scientific validity, and reproducibility.

» Higher degree of difficulty in predicting failure modes for emergent properties of large-scale pre-trained models.

» Increased opacity and concerns about reproducibility.

» Underdeveloped software testing standards.

» Computational costs for developing AI systems and their impact on the environment and planet.

Current standard privacy and security controls are not able to comprehensively address many of these AI system risks. Existing privacy, computer security, and data security frameworks and guidance are unable to:

» adequately manage the problem of bias in AI systems;

» comprehensively address security concerns related to evasion, model extraction, membership inference, or other machine learning attacks;
» address the complex attack surface of AI systems or other security abuses enabled by AI systems; and
» address risks associated with third-party AI technologies, transfer learning, and off-label use, where AI systems may be trained for decision-making outside an organization’s security controls or trained in one domain and then “fine-tuned” for another.

Perceptions about AI system capabilities can be another source of risk. One major false perception is the presumption that AI systems work – and work well – in all settings. Whether accurate or not, AI is often portrayed in public discourse as more objective than humans, and with greater capabilities than general software. Additionally, since systemic biases can be encoded in AI system training data and individual and group decision making across the AI lifecycle, many of the negative system impacts can be concentrated on historically excluded groups.