

EEOC Updates Guidance on Employer Use of Assessment Software, Algorithms and AI

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On May 12, 2022, the Equal Employment Opportunity Commission (EEOC) issued new guidance on how computer-based tools used to assist companies in hiring applicants, monitoring work performance, determining pay or promotions, and establishing terms and conditions of employment may violate the Americans with Disabilities Act ("ADA").

Titled "[The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees](#)," the guidance addresses how these tools may disadvantage disabled applicants and employees and risk violations of the ADA.

"Software" means information technology programs or procedures that provide instructions to a computer on how to perform a given task or function which can include resume screening software, hiring software, chatbot software, video interviewing software, analytics software, and software used for employee monitoring and worker management.

"Algorithm" means 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.

"Artificial intelligence" or "AI" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Many types of software incorporate algorithms and AI to score applicants or rate current employees.

The guidance highlights three areas where an employer's use of this technology may violate the ADA:

- A disabled job applicant or employee is not rated fairly and accurately by an algorithm because the algorithm does not consider that a reasonable accommodation could allow the applicant or employee to perform the job.
- The algorithm unintentionally screens out disabled individuals when that individual is capable of performing the job with reasonable accommodation.
- The use of an algorithm can violate the ADA's restrictions on disability-related inquiries and medical examinations.

The guidance is clear that even if the employer is relying on software or other algorithmic decision-making tools designed and/or administered by an outside vendor, the employer is still responsible for ADA discrimination especially if the employer has given the vendor authority to act on the employer's behalf.

While this seems like a potential minefield, the EEOC guidance recommends several ways that employers can reduce their chances of violating the ADA through the use of software, algorithms, and AI tools. Some of these "promising practices" include:

- Training staff to recognize and process requests for reasonable accommodation for testing;
- Training staff to develop other means of rating job applicants and employees if the current tools are inaccessible for unfairly disadvantage someone;
- If a third-party vendor administers the decision-making tools, require them to forward all accommodation requests to the employer to process in accordance with ADA requirements;
- Use tools that are designed to be accessible to individuals with disabilities;
- Inform applicants and employees that reasonable accommodations are available and provide instructions on how to request such accommodations; and
- Only measure abilities or qualifications that are truly necessary for the job.

If you have any questions regarding the EEOC's recent updated guidance, please contact [Jill Sebest Welch](#), [Susanna Fultz](#), or [any member of the Barley Snyder Employment Practice Group](#).

DISCLAIMER: The information in this alert should not be construed as legal advice to be relied upon nor to create an attorney/client relationship. Please note that the reader's or an industry's specific situation or circumstances will vary and, thus, for example, an approach that is advisable in one industry may not be appropriate in another industry. If you have questions about your situation or about how to apply information contained in this alert to your situation or industry, you should reach out to an attorney.

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