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## The Promise and The Peril: Artificial Intelligence and Employment Discrimination

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## ARTICLES

# The Promise and The Peril: Artificial Intelligence and Employment Discrimination

KEITH E. SONDERLING, BRADFORD J. KELLEY & LANCE CASIMIR\*

*Artificial intelligence (“AI”) is undeniably transforming the workplace, though many implications remain unknown. Employers increasingly rely on algorithms to determine who gets interviewed, hired, promoted, developed, disciplined, or fired. If appropriately designed and applied, AI promises to help workers find their most rewarding jobs, match companies with their most valuable and productive employees, and advance diversity, inclusion, and accessibility in the workplace. Notwithstanding its positive impacts, however, AI poses new perils for employment discrimination, especially when designed or used improperly.*

*This Article examines the interaction between AI and federal employment antidiscrimination law. This Article explores the legal landscape including responses taken at the federal level, as well as state, local, and global legislation. Next, this*

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*Article examines a few legislative proposals designed to further regulate AI as well as several non-legislative proposals. In the absence of a comprehensive federal framework, this Article outlines and advances a deregulatory approach to using AI in the context of employment antidiscrimination that will maintain and spur further innovation. Against the backdrop of the deregulatory approach, this Article concludes by discussing best practices to guide employers in using AI for employment decisions.*

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## INTRODUCTION

Companies have become increasingly reliant on artificial intelligence (“AI”) in the workplace at virtually all stages of the employment lifecycle, including recruitment, hiring, training, discipline, evaluations, compensation, and even terminations.<sup>1</sup> The use of AI in the workplace is rapidly expanding and is being used in a wide variety of tasks in the human resources (“HR”) arena, including scanning and filtering resumes, chat bots that answer applicant questions and schedule interviews, monitoring and reporting on productivity and safety, automated video interviews to assess candidates, and even algorithms that analyze employee data to predict an applicant’s future success.<sup>2</sup> According to recent studies, 83% of large employers

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<sup>1</sup> See Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 860 (2017) (discussing the widespread uses of AI throughout the employment lifecycle).

<sup>2</sup> See *id.*; see also Alexia Elejalde-Ruiz, *The End of the Resume? Hiring is in the Midst of a Technological Revolution with Algorithms, Chatbots*, CHI. TRIB.

surveyed in some form rely on AI in employment decision-making, and 86% of employers that use AI claim that AI is becoming a mainstream technology at their company.<sup>3</sup> AI, which operates through learning algorithms and models, holds great promise for improved employment decisions.

The potential uses and benefits of AI in the workplace are legion. Advocates argue that AI speeds up the hiring process and eliminates human bias and subjectivity.<sup>4</sup> If AI is well designed and properly deployed, it can help workers find their most rewarding jobs and match companies with their most valuable and productive employees.<sup>5</sup> Proponents further argue that AI systems can be more efficient and thorough than human recruiters. Moreover, AI can enrich companies' values and culture by eliminating unlawful discrimination and thereby advancing diversity, equality of opportunity, accessibility, and inclusion in the workplace.<sup>6</sup> Research has consistently shown that AI tools used for employment decision-making often result in a greater diversity of hires, unbiased promotion decisions, and better retention of employees through early detection of job dissatisfaction.<sup>7</sup> Wearable technologies such as exoskeleton suits and robotic arms have been able to mitigate the effects of disabilities, thereby broadening employment opportunities for disabled workers

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(July 19, 2018, 6:00 AM), <https://www.chicagotribune.com/business/ct-biz-artificial-intelligence-hiring-20180719-story.html> (noting the widespread use of web crawlers that analyze a substantial amount of data to identify candidates who are not actively job hunting).

<sup>3</sup> Keith E. Sonderling, *Do Robots Care About Your Civil Rights?*, CHI. TRIB., [https://digitaledition.chicagotribune.com/infinity/article\\_share.aspx?guid=285d3467-3dbe-49b1-810e-014ae1a3e](https://digitaledition.chicagotribune.com/infinity/article_share.aspx?guid=285d3467-3dbe-49b1-810e-014ae1a3e) (last visited Sept. 1, 2022); see also Joe McKendrick, *AI Adoption Skyrocketed Over the Last 18 Months*, HARV. BUS. REV. (Sept. 27, 2021), <https://hbr.org/2021/09/ai-adoption-skyrocketed-over-the-last-18-months>.

<sup>4</sup> See Elejalde-Ruiz, *supra* note 2 (explaining that AI can reduce or eliminate bias by masking names and other information).

<sup>5</sup> Keith E. Sonderling, *How People Analytics Can Prevent Algorithmic Bias*, INT'L ASS'N FOR HUM. RES. INFO. MGMT., <https://www.ihrim.org/2021/12/how-people-analytics-can-prevent-algorithmic-bias-by-commissioner-keith-e-sonderling/> (last visited Sept. 1, 2022).

<sup>6</sup> See Kimberly A. Houser, *Can AI Solve the Diversity Problem in the Tech Industry? Mitigating Noise and Bias in Employment Decision-Making*, 22 STAN. TECH. L. REV. 290, 351 (2019).

<sup>7</sup> *Id.*

while simultaneously preventing work-related accidents and improving productivity by reducing absences due to disability and illness.<sup>8</sup> Notably, the use of these HR technologies dramatically accelerated during the COVID-19 pandemic, and many companies are significantly investing in AI.<sup>9</sup>

At the same time, using AI in employment decision-making triggers foreseeable risks concerning discrimination throughout the employment lifecycle. Employment discrimination may occur if a nefarious actor intentionally feeds the machine bad data that leads to discrimination.<sup>10</sup> Critics of AI in employment decisions routinely point out that the systems relying on and controlled by human inputs are only as good as those who “feed the machine.”<sup>11</sup> Employment discrimination can also arise if the unlawful biases or predilections of the company’s hiring professionals are inherited or learned by the AI tool.<sup>12</sup> As a consequence, without proper vetting and analysis, AI tools can possibly inject subjective bias into what is otherwise supposed to be an unbiased and objective process, and thereby expose employers to liability.<sup>13</sup>

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<sup>8</sup> See Ifeoma Ajunwa, *Algorithms at Work: Productivity Monitoring Applications and Wearable Technology as the New Data-Centric Research Agenda for Employment and Labor Law*, 63 ST. LOUIS U. L.J. 21, 40–41 (2018) [hereinafter *Algorithms at Work*] (explaining that exoskeletons are especially well-suited to help those who move with restricted mobility because of paralysis or weakened limbs by allowing people to move in a more sustained way or walk despite spinal injuries).

<sup>9</sup> See McKendrick, *supra* note 3 (noting surveys showing that up to 55% of companies accelerated their AI adoption plans because of the COVID-19 pandemic and that 67% of companies expect to further accelerate their AI implementation strategy moving forward).

<sup>10</sup> See William Magnuson, *Artificial Financial Intelligence*, 10 HARV. BUS. L. REV. 337, 354 (2020) (outlining an example of a firm or a rogue employee who constructs a machine learning algorithm that appears unbiased but in fact encoded certain biases to refrain from doing business with individuals of certain religions or races).

<sup>11</sup> *Id.* (noting that software engineers are the ones who have to make the hard decisions about what data to use, how to structure the data, and how to interpret it).

<sup>12</sup> See *id.*

<sup>13</sup> See Gary D. Friedman & Thomas McCarthy, *A.I. in Hiring: Potential Pitfalls for Employers*, WEIL (Oct. 20, 2020), <https://www.weil.com/articles/ai-in-hiring-potential-pitfalls-for-employers>.

Significantly, the use of AI in employment decisions might run afoul of federal employment antidiscrimination laws that prohibit discrimination against individuals based on certain protected categories.<sup>14</sup> Notably, the use of AI in employment decision-making implicates Title VII of the Civil Rights Act of 1964 (“Title VII”), a federal law that protects employees and applicants against discrimination based on race, color, sex, national origin, and religion.<sup>15</sup> AI tools, like tests and other selection tools or procedures, may violate federal antidiscrimination laws like Title VII if they disproportionately screen out individuals in a protected class and if the employer is unable to justify the exclusion as sufficiently job-related and consistent with business necessity.<sup>16</sup> For example, an algorithm trained to prefer employees within a certain commuting distance might result in applicants from certain areas being disadvantaged or excluded.<sup>17</sup> If the result has a statistically significant disparate impact on certain races or those from a particular national origin, and the employer fails to demonstrate its geographic restriction is job-related and a business necessity, the employer will likely be liable under Title VII.<sup>18</sup> Another illustration is a chatbot that screens out applicants with gaps in their employment history, which may disparately impact women who took time away from the workplace for caregiving responsibilities.<sup>19</sup>

Moreover, the use of AI could also implicate the Americans with Disabilities Act (“ADA”), which prohibits employers from discriminating in employment against certain persons with mental and

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<sup>14</sup> See Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 523–24 (2018).

<sup>15</sup> 42 U.S.C. § 2000e-2(a).

<sup>16</sup> See 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also Jenny R. Yang, *Adapting Our Anti-Discrimination Laws to Protect Workers’ Rights in the Age of Algorithmic Employment Assessments and Evolving Workplace Technology*, 35 A.B.A. J. LAB. & EMP. L. 207, 220–21 (2021).

<sup>17</sup> See Yang, *supra* note 16, at 218.

<sup>18</sup> See *id.* at 220–21.

<sup>19</sup> See Caitlin Mullen, *AI Use in Hiring Means Women with Employment Gaps Get Overlooked*, BIZWOMEN (Sept. 23, 2021, 7:00 AM), <https://www.bizjournals.com/bizwomen/news/latest-news/2021/09/ai-hiring-women-employment-gaps.html?page=all> (citing a Harvard Business School report showing that almost half of companies automatically reject candidates with resumes indicating an employment gap, typically of six months or more).

physical disabilities.<sup>20</sup> As an initial matter, some AI tools that require applicants to participate in a game-based assessment or take personality tests may not be accessible to individuals with a disability, especially those with visual, auditory, or other impairments.<sup>21</sup> Similarly, employers may violate the ADA if AI tools exclude or result in lower scores or assessment results for individuals with disabilities. For instance, video software that excludes someone with a vision disability because they did not make good eye contact may violate the ADA.<sup>22</sup> On a related note, an AI tool that screens out an applicant who states that they cannot stand for thirty minutes, without allowing the applicant the opportunity to request a reasonable accommodation also raises legal concerns.<sup>23</sup> Further, an algorithm might trigger the ADA if it discerns an applicant's physical disability, mental health, or clinical diagnosis that is not otherwise obvious or apparent.<sup>24</sup> For example, an employer's review of data indicating a tremor could be considered a disability-related inquiry because a tremor could reveal certain neurological afflictions such as cerebral palsy or a stroke.<sup>25</sup>

Perhaps not surprisingly, the use of AI for employment purposes has drawn the attention of federal regulators such as the U.S. Equal Employment Opportunity Commission ("EEOC"), the federal

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<sup>20</sup> See 42 U.S.C. §§ 12101-213.

<sup>21</sup> See generally Judy Greenwald, *Regulators Target Disability Bias Risks in AI Tools*, BUS. INS. (May 24, 2022), <https://www.businessinsurance.com/article/20220524/NEWS06/912350088/Regulators-target-disability-bias-risks-in-AI-tools>.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.14(a) (2021); Gary D. Friedman & Thomas McCarthy, *Employment Law Red Flags in the Use of Artificial Intelligence in Hiring*, WEIL EMP. UPDATE 4 (Sept. 2020), [https://www.weil.com/~media/mailings/2020/q3/employer-update\\_september-2020.pdf](https://www.weil.com/~media/mailings/2020/q3/employer-update_september-2020.pdf) (discussing the ADA concerns related to the use of AI in employment decision-making).

<sup>25</sup> See Garry Mathiason et al., *The Transformation of the Workplace Through Robotics, Artificial Intelligence, and Automation: Employment and Labor Law Issues, Solutions, and the Legislative and Regulatory Response*, LITTLER REPS. 16 (Jan. 2016), [https://www.littler.com/files/2016\\_wp\\_transformation\\_of\\_the\\_workplace\\_through\\_robotics\\_ai\\_and\\_automation\\_2.pdf](https://www.littler.com/files/2016_wp_transformation_of_the_workplace_through_robotics_ai_and_automation_2.pdf).



agency responsible for enforcing federal workplace antidiscrimination laws.<sup>26</sup> In October of 2021, the EEOC launched an initiative to ensure that the use of AI and other technology-driven tools utilized in hiring and other employment decisions complies with federal antidiscrimination laws.<sup>27</sup>

The ability of AI to lead to discriminatory outcomes, especially in ways that are not apparent or easily discernible, with related known and unknown consequences, has led to responses across the globe to implement greater oversight to prevent the misuse of AI in employment.<sup>28</sup> Overall, the United States has adopted a more decentralized approach to regulating AI in employment decisions, but recent developments in state and local laws may portend further regulation of AI on a more localized level.<sup>29</sup> For instance, Illinois and Maryland have enacted laws that impose requirements regarding how employers may use AI, including facial recognition technologies, during the hiring process.<sup>30</sup> Other countries and entities have regulated AI with a heavier hand. For instance, the European Union's General Data Protection Regulation includes non-discrimination requirements for algorithmic profiling and a right to obtain an explanation of automated decisions that significantly affect users.<sup>31</sup>

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<sup>26</sup> See Paige Smith, *Artificial Intelligence Bias Needs EEOC Oversight, Official Says*, BLOOMBERG L. (Sept. 1, 2021, 12:18 PM), <https://news.bloomberglaw.com/daily-labor-report/artificial-intelligence-bias-needs-eeoc-oversight-official-says>.

<sup>27</sup> *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 28, 2021), <https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness>.

<sup>28</sup> See Scott J. Shackelford & Rachel Dockery, *Governing AI*, 30 CORNELL J.L. & PUB. POL'Y 279, 308–14 (2020).

<sup>29</sup> See Brandon W. Jackson, *Artificial Intelligence and the Fog of Innovation: A Deep-Dive on Governance and the Liability of Autonomous Systems*, 35 SANTA CLARA HIGH TECH. L.J. 35, 42–43 (2019) (explaining that “[f]rom a regulatory perspective, the United States has assessed that any broad regulation of AI is inappropriate in the current stage of AI and machine learning.”).

<sup>30</sup> See Danielle Moss et al., *Medley Of State AI Laws Pose Employer Compliance Hurdles*, LAW360 (Mar. 30, 2022, 3:16 PM), <https://www.law360.com/employment-authority/articles/1477833/medley-of-state-ai-laws-pose-employer-compliance-hurdles> (discussing Illinois and Maryland laws as well as other AI proposals).

<sup>31</sup> See Shackelford & Dockery, *supra* note 28, at 308–09.

Even though the legal and regulatory landscape is still in its infancy, many private initiatives have embraced self-regulation to foster responsible AI development and deployment and to help prevent AI tools from delivering biased results that could perpetuate or even worsen unlawful employment discrimination.<sup>32</sup> Indeed, it has become a common practice for major companies such as Google and Microsoft to develop and publish their own AI principles or guidelines.<sup>33</sup> Similarly, an increasing number of major corporate entities, including Deloitte, Humana, and Walmart, have partnered to study and identify best practices on AI technologies.<sup>34</sup> Critically, these companies have established their own principles governing the development and use of AI that purport to commit members of these partnerships to actively engage with stakeholders to protect the privacy, security, and other human rights of individuals.<sup>35</sup>

The rapid development and steady implementation of AI has also led to a growing number of proposals for increased oversight, including measures regulating the use of AI in the employment context.<sup>36</sup> For example, in 2022, the California Fair Employment and Housing Council proposed sweeping modifications to the state's employment antidiscrimination laws that would significantly expand potential liability for employers and third-party vendors that use, sell, or administer AI tools in connection with employment decision-making.<sup>37</sup> Similar measures are being considered on the global stage. Most notably, in 2021, the European Commission unveiled a far-reaching AI proposal that would cover providers and

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<sup>32</sup> *Id.* (explaining that these private initiatives involve the private sector, academia, civil society, and partnerships between these various components); *see also* Kristen E. Egger, *Artificial Intelligence in the Workplace: Exploring Liability Under the Americans with Disabilities Act and Regulatory Solutions*, 60 WASHBURN L.J. 527, 556–57 (2021).

<sup>33</sup> *See* Egger, *supra* note 32, at 556–57.

<sup>34</sup> *See* Steve Lohr, *Group Backed by Top Companies Moves to Combat A.I. Bias in Hiring*, N.Y. TIMES (Dec. 8, 2021).

<sup>35</sup> *See id.*

<sup>36</sup> *See* Danielle Ochs et al., *California's Draft Regulations Spotlight Artificial Intelligence Tools' Potential to Lead to Discrimination Claims*, OGLETREE DEAKINS (May 13, 2022), <https://ogletree.com/insights/californias-draft-regulations-spotlight-artificial-intelligence-tools-potential-to-lead-to-discrimination-claims/>.

<sup>37</sup> *See id.*

vendors of AI systems, imposing new legal obligations and establishing a regime to monitor and enforce compliance, with authority to adjudicate violations and impose substantial penalties on violators.<sup>38</sup> Meanwhile, some commentators have focused on innovative and forward-thinking non-legislative proposals. For instance, some have argued that companies should look to the model risk management framework that corporations in the financial sector have successfully implemented for over a decade.<sup>39</sup> Proponents of this framework contend that companies and developers can effectively manage the risks associated with AI by using established processes derived from lessons learned in the financial industry and that have endured testing and time.<sup>40</sup>

Even if the United States were to implement an overarching legislative and regulatory framework, which is unlikely, it should be structured to not only allow but also encourage and incentivize innovation that will further advance the capabilities of AI and related technologies. At the same time, any such framework must confront and help eliminate associated risks. Unless and until an AI-focused regime is in place, however, AI remains subject to existing laws, most of which were enacted decades ago when such programs were mere science fiction. For example, the federal antidiscrimination statutes that the EEOC administers and enforces apply with equal force to decisions made by algorithms as they do to decisions made by individuals, and several—such as Title VII—were enacted more than half a century ago.<sup>41</sup>

Within this framework, federal agencies must do more. First, federal agencies should fully utilize the tools they already have at their disposal. For instance, the EEOC should consider using Commissioner charges and directed investigations to address AI-related employment discrimination that would allow EEOC leadership to initiate focused bias probes.<sup>42</sup> Second, federal agencies such as the

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<sup>38</sup> See Heather Sussman et al., *The New EU Approach to the Regulation of Artificial Intelligence*, ORRICK (May 7, 2021) <https://www.orrick.com/en/Insights/2021/05/The-New-EU-Approach-to-the-Regulation-of-Artificial-Intelligence> (describing the European Commission's proposal).

<sup>39</sup> See David M. Skanderson, *Managing Discrimination Risk of Machine Learning and AI Models*, 35 ABA J. LAB. & EMP. L. 339, 345 (2021).

<sup>40</sup> *Id.* at 356, 358–59.

<sup>41</sup> See Sonderling, *supra* note 5; see also 29 U.S.C. §§ 621–634.

<sup>42</sup> See Smith, *supra* note 26.

EEOC should encourage and incentivize companies to create voluntary compliance programs so that employers can reliably determine and ensure they comply with legal and ethical obligations. Third, federal agencies, such as the EEOC, should provide frequent and consistent guidance to clarify the law and help encourage technology vendors and employers to be proactive in preventing discriminatory effects. Equally important, more comprehensive, reasonable, and stable guidance has the potential to reduce uncertainty, protect workers and applicants, and direct employers—all without stifling innovation.<sup>43</sup>

The current lack of comprehensive and consistent AI regulation makes developing and adopting best practices even more important to boost public confidence in AI technologies while supporting the widespread use of AI in the workplace. Fortunately, practitioners and industry experts have already begun this work, having identified ways for employers to better comply with federal antidiscrimination law and mitigate AI-related risks.<sup>44</sup> For instance, companies must understand both the substance and origin of data used to train and operate AI used for employment decision-making.<sup>45</sup> Furthermore, companies should be transparent and clearly explain how they use AI, which will foster trust, credibility, and, as a result, a greater appreciation of the merits of AI systems.<sup>46</sup> Even when using AI properly, the absence of transparency, accountability, and understandability will likely undermine the benefits of its use. Moreover, employers should monitor and audit AI uses and processes to pro-

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<sup>43</sup> See *Fresh SHRM Research Explores Use of Automation and AI in HR*, SHRM (Apr. 13, 2022), <https://www.shrm.org/about-shrm/press-room/press-releases/pages/fresh-shrm-research-explores-use-of-automation-and-ai-in-hr.aspx> (discussing study finding that nearly 9 out of 10 employers using AI tools are seeking guidance on the use and lawful implementation of AI in various applications). The consistent application of legal principles is another vital feature for guidance.

<sup>44</sup> See Moss et al., *supra* note 30.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

actively identify intentional misuse or potential discriminatory outcomes.<sup>47</sup> Finally, and some argue more critically, employers must discern the point at which humans must be involved in the employment decision-making process. Other considerations for employers to consider as well as understand are vendor liability and continued situational awareness of AI legislation and litigation.<sup>48</sup>

This Article examines the interaction between the use of AI technologies in employment decision-making and federal employment antidiscrimination law. Part I of this Article explores how employers use AI in employment decision-making, including its significant and widespread benefits. Next, Part II examines the discrimination-related pitfalls of AI with respect to applicable federal employment antidiscrimination laws and related regulatory and subregulatory guidance. Against this backdrop, Part III explores the responses to the rise of AI in the workplace, with a particular focus on the steady growth of AI laws at the state and local levels and responses on the global stage. Part III also examines the increasingly vital role that self-regulation must play within the private sector. Part IV discusses a number of regulatory proposals that have been considered in recent years, including international proposals that are illustrative examples of how the United States may proceed. Part V outlines and advocates for a deregulatory approach to using AI in the context of equal employment opportunity laws that accounts for technology's benefits, related risks, and potential barriers to innovation. More specifically, this Part contends that existing laws are an invaluable tool that can be used to combat unlawful discrimination in their current form. This Part also argues that voluntary compliance should be encouraged and incentivized, and that it is imperative for federal agencies to issue more guidance. Finally, as part of the deregulatory approach, Part VI then provides best practices that employers should consider for mitigating AI-related risks.

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<sup>47</sup> See Houser, *supra* note 6, at 344 (“[A] responsible AI program to reduce bias in employment decisions will start with the careful consideration of the design of the algorithms, the ongoing monitoring and correcting of data, and the auditing of outcomes for potential discriminatory results.”).

<sup>48</sup> *Id.*

## I. OVERVIEW OF AI AND ITS BENEFITS

This Part provides a brief overview of AI, including how it is defined and most frequently used at various stages of the employment lifecycle. Next, this Part briefly discusses the important role that AI vendors play. This Part also explores the many benefits of AI in the workplace. Finally, this Part examines the widespread impact of the COVID-19 pandemic on employment-related AI.

### A. *AI Defined and its Uses*

Although the precise definition of AI is fluid and inexact, AI can be best understood as a set of techniques aimed at approximating some aspect of human or animal cognition using machines.<sup>49</sup> Generally speaking, AI refers to systems that use data and computational techniques either to make decisions or to assist people in making them.<sup>50</sup> AI tools use large amounts of data to detect patterns, and then use those patterns to predict outcomes in new situations.<sup>51</sup>

There are many different forms of AI but the two most relevant to the use of AI in employment decision-making are machine learning and natural language processing.<sup>52</sup> Machine learning is a subset of AI that involves AI systems that show improved performance as they are provided with more data and as they predict more outcomes.<sup>53</sup> In other words, these systems become increasingly intelligent over a given period and through more extensive use. Natural language processing is the branch of AI concerned with giving computers the ability to understand text and spoken words in much of the same way humans can.<sup>54</sup>

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<sup>49</sup> *Id.* at 294.

<sup>50</sup> See Pauline T. Kim & Matthew T. Bodie, *Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy*, 35 A.B.A J. LAB. & EMP. L. 289, 290 (2021) (explaining that AI “loosely refer[s] to systems that leverage data-rich inputs and computational techniques to make predictions that either aid or replace human decision-making”).

<sup>51</sup> *Id.*

<sup>52</sup> Paul Bergeron, *How to Avoid Discrimination When Using AI*, SHRM (Sept. 21, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/how-to-avoid-discrimination-when-using-ai.aspx>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

AI technologies generally exist within several relatively distinct stages of the recruitment and hiring process: job descriptions, sourcing, screening, interviewing, and selection.<sup>55</sup> During the recruiting stage, employers seek candidates to apply for jobs through general and targeted advertisements, job postings, and engagement.<sup>56</sup> Next, in the screening stage, the employer assesses candidates by analyzing their skills, experience, and personality attributes as described on resumes and applications.<sup>57</sup> Some systems use AI to screen and rank candidates while others use online games. Then, during the interviewing stage, employers conduct video interviews of applicants and apply AI to analyze and assess them.<sup>58</sup> These video tools often have the capability of analyzing factors such as facial expression, eye contact, and word choice in its machine learning. Finally, in the selection stage, AI sometimes makes final hiring and, even, compensation decisions.<sup>59</sup> The selection stage also involves the use of AI in areas like pre-employment background checks.<sup>60</sup>

The use of AI in the employment arena is rapidly expanding past traditional HR functions, including scanning and filtering resumes, analyzing job candidates' social media presence, evaluating candidates' skills to identify top candidates, scheduling interviews, and

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<sup>55</sup> See Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, UPTURN 13, 55 n.89 (Dec. 2018), <https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20--%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms,%20Equity%20and%20Bias.pdf> (explaining that these stages “are not universally defined, but reflect common usage and practice within the talent acquisition industry and common perceptions of the hiring process among job seekers”).

<sup>56</sup> See *id.* at 13. For example, ZipRecruiter operates within this sourcing stage by filtering jobs based on previous applications and on-site activity by the applicant. See *id.* at 21. Similarly, LinkedIn returns a list of individuals ranked by their “likelihood to be hired” based on an individual’s current job status, pages followed, and how likely the individual will respond to a recruiter’s message. See *id.* at 24.

<sup>57</sup> *Id.* at 13.

<sup>58</sup> See *id.* at 36.

<sup>59</sup> See *id.* at 39.

<sup>60</sup> *Id.* Pre-employment background checks are commonly used to determine if an applicant has a criminal history or is authorized to work. *Id.*

answering candidates' questions via chatbots.<sup>61</sup> Some companies have applicants play neuroscience computer games, which are then analyzed to predict candidates' cognitive and personality traits.<sup>62</sup> One technology company, for instance, has used voice and facial recognition and analysis software to examine a candidate's body language, tone, and other factors during recorded interviews to determine whether the candidate exhibits preferred traits.<sup>63</sup>

In addition, employers are increasingly using AI to manage performance. Employers are using AI systems to track both on-site and remote workers by following employee log-in times, overall computer usage, and online activities to evaluate their employees' performance and efficiency.<sup>64</sup> AI tools can also monitor whether employees are paying attention to their computer screens using webcams and eye-tracking software while surveilling websites and applications that employees use.<sup>65</sup> Employees who do not meet specified performance metrics may also be subject to formal discipline, including termination, based on the recommendation of AI algorithms.<sup>66</sup>

### B. *The Role of Vendors*

In most situations, employers engage third-party vendors that offer AI-powered algorithms to perform HR tasks.<sup>67</sup> In brief, vendors

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<sup>61</sup> Elizabeth McLean, *How to Use AI Responsibly in Hiring*, RECRUITING DAILY (Mar. 17, 2022), <https://recruitingdaily.com/how-to-use-ai-responsibly-in-hiring/>.

<sup>62</sup> Friedman & McCarthy, *supra* note 24.

<sup>63</sup> *Id.*

<sup>64</sup> See Michelle Capezza, *Artificial Intelligence in the Workplace and The Future of Employer-Provided Employee Benefits*, NYU REV. OF EMP. BENEFITS AND EXEC. COMP. (Sept. 30, 2021), <https://www.mintz.com/sites/default/files/media/documents/2021-10-01/Artificial%20Intelligence%20in%20the%20Workplace%20and%20The%20Future%20of%20Employer-Provided%20Employee%20Benefits.pdf>.

<sup>65</sup> *Id.*

<sup>66</sup> Joseph C. O'Keefe et al., *Artificial Intelligence: Employment Law Risks and Considerations*, in GLOBAL LEGAL INSIGHTS AI, MACHINE LEARNING & BIG DATA 35, 36 (Matt Berkowitz & Emma Maconick eds., 3rd ed., 2021).

<sup>67</sup> Adam S. Forman & Nathaniel M. Glasser, *Hiring by Algorithm: Legal Issues Presented by the Use of Artificial Intelligence in Sourcing and Selection*, EPSTEIN BECKER & GREEN: WORKFORCE BULLETIN (Mar. 17, 2021),



are the entities that develop AI systems and place them in the market or that develop the system and put it to use for themselves.<sup>68</sup> Under the current legal framework in the United States, employers—not vendors—are generally liable for employment discrimination.<sup>69</sup> Experts have explained that the law protects AI developers from liability so long as the vendor can demonstrate that it was “designed for a particular purpose and was reasonably accurate and effective in accomplishing that purpose.”<sup>70</sup> One practitioner has explained that, regardless of the AI tool, because the employer makes the hiring decision, the employer cannot credibly argue that its software company is responsible for the employer’s actions.<sup>71</sup> Delegating employment decisions to AI will no more insulate an employer from a discriminatory or otherwise unlawful employment decision than assigning the task to supervisors or other management employees.<sup>72</sup> In both cases, the employer is liable.

### C. *The Benefits of AI*

Despite its Orwellian overtones, the benefits of using AI in the workplace are vast. AI tools help recruiters and HR departments quickly sift through significant numbers of applications and more efficiently identify qualified candidates at the start of the hiring process.<sup>73</sup> After all, manually screening resumes from a large applicant

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<https://www.workforcebulletin.com/2021/03/17/hiring-by-algorithm-legal-issues-presented-by-the-use-of-artificial-intelligence-in-sourcing-and-selection/>.

<sup>68</sup> *See id.*

<sup>69</sup> *See* Yavar Bathaee, *Artificial Intelligence Opinion Liability*, 35 BERKELEY TECH. L.J. 113, 148–49 (2020) [hereinafter *AI Opinion Liability*] (explaining that AI that discriminates based on gender because of biases in the data used to train it will likely not result in liability for the company that created the AI, mainly because there is no evidence of scienter or even negligence).

<sup>70</sup> *See id.*; *see also* Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. 889, 919 (2018).

<sup>71</sup> *See* Anne Cullen, *5 Tips For Curbing Bias Risk When Using AI For Hiring*, LAW360 (Jan. 20, 2021, 7:51 PM), <https://www.law360.com/employment-authority/articles/1346883/5-tips-for-curbing-bias-risk-when-using-ai-for-hiring>.

<sup>72</sup> *Id.*

<sup>73</sup> *See* Skanderson, *supra* note 39, at 345.

pool is a very time-consuming process.<sup>74</sup> For example, in 2021, Amazon hosted a recruiting event and one million people applied for job openings.<sup>75</sup> AI can help HR professionals identify the strongest candidates for a job.<sup>76</sup> Research confirms that AI tools in the area of employment decision-making result in a greater diversity of hires, fairer promotion decisions, and better retention of employees through early detection of unhappiness.<sup>77</sup>

Research has shown that AI can remove bias in employment decisions, and therefore help ensure more equality in recruitment and hiring.<sup>78</sup> Some companies that have used AI in recruitment have confirmed greater success in increasing the diversity of their candidates.<sup>79</sup> AI can also analyze the success of job advertisements and help provide a better first impression of a company.<sup>80</sup> Through data analysis, employers can learn how to better draft language for job advertisements that is more likely to attract a diverse applicant pool.<sup>81</sup>

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<sup>74</sup> See Kelly Trindel et al., *Fairness in Algorithmic Employment Selection: How to Comply with Title VII*, 35 A.B.A. J. LAB. & EMP. L. 241, 241 (2021).

<sup>75</sup> See Aimee Picchi, *Amazon Says 1 Million Workers Applied for Jobs this Week*, CBS NEWS (Sept. 17, 2021, 2:20 PM), <https://www.cbsnews.com/news/amazon-job-applications-1-million/>.

<sup>76</sup> Trindel et al., *supra* note 74, at 241–43 (stating that AI can help employers hire the best and brightest candidates to increase their organization’s productivity and competitive advantage while also complying with antidiscrimination laws).

<sup>77</sup> Houser, *supra* note 6, at 351.

<sup>78</sup> See Kimberly A. Houser, *Artificial Intelligence and the Struggle Between Good and Evil*, 60 WASHBURN L.J. 475, 486 (2021).

<sup>79</sup> *Id.* The author explains that AI has been shown to successfully increase the demographic diversity of candidate pools by displaying biographical information only after the candidates have passed a skills test. *See id.* at 487. In addition, several recruiting platforms are able to anonymize candidates by removing all indication of gender or race from applications. *Id.* AI can assist with creating uniform hiring and promotion criteria, reducing the “likelihood of bias creeping into the selection process.” *Id.*

<sup>80</sup> Alex Tebbs, *How AI Can Benefit the Employee Experience*, HRZONE (Sept. 10, 2019), <https://www.hrzone.com/lead/future/how-ai-can-benefit-the-employee-experience>.

<sup>81</sup> See Kim, *supra* note 1, at 872 (noting an example of a job posting using military analogies like “mission critical” that might reduce the number of women who apply).

From a business efficiency and employee experience perspective, AI can be especially beneficial during the onboarding process. Onboarding is a critical period for new employees because it is during this time that they form their initial opinions about the company's culture and their colleagues—opinions that frequently are cemented in a short period of time and thereafter are difficult to change.<sup>82</sup> Even more important, during the onboarding period, the employees will assess and reach conclusions regarding their future with the company.<sup>83</sup> AI can help automate manual tasks by overseeing the completion of paperwork, identifying relevant resources, and answering basic questions that are common for new employees.<sup>84</sup>

Furthermore, AI can generate insights into applicants and employees that human beings have greater difficulty recognizing.<sup>85</sup> Regarding the ongoing training of employees, AI can shed light on when, where, and how groups of, or even individual, employees learn and develop the most, allowing employers to tailor trainings, programs, and other offerings to best achieve their objectives.<sup>86</sup> After employees complete a training program, AI can identify areas of success and target aspects in need of improvement.<sup>87</sup> AI can also help employers ensure that they are not overlooking employees who should be rewarded with greater roles and responsibilities, thus helping employees' career growth and development.<sup>88</sup> In addition to individual feedback, AI can perform these evaluations on a department or company-wide level.<sup>89</sup>

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<sup>82</sup> See Tebbs, *supra* note 80.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Kim & Bodie, *supra* note 50, at 290.

<sup>86</sup> Tebbs, *supra* note 80 (“Using machine learning, AI can give you insights on when, where, and how your employees learn and develop the most.”).

<sup>87</sup> *Id.*

<sup>88</sup> See Lin Gensing-Pophal, *The Role of AI in Retaining Top Talent*, SHRM (July 4, 2022), <https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/the-role-of-ai-in-retaining-top-talent.aspx> (explaining how employees are usually more loyal to their companies when they are given opportunities for career growth).

<sup>89</sup> Tebbs, *supra* note 80.

Moreover, AI has a promising role to play in the retention of employees and other workers. Data analysis can help employers recognize which employees are more likely to leave the company and when.<sup>90</sup> Relevant factors may include the amount of time an employee interacts with colleagues, meeting attendance, and the waiver of benefits coverage.<sup>91</sup> By analyzing this data, employers can focus more on employee engagement and make strides in improving retention.<sup>92</sup> In a similar vein, AI technologies that allocate work effectively and efficiently have been shown to minimize the potential of employee burnout.<sup>93</sup>

In addition, workplace technologies and tools could provide remarkable opportunities for individuals with disabilities. Title I of the ADA prohibits covered employers from discriminating in employment against qualified persons with physical and mental disabilities.<sup>94</sup> Robotic arms, exoskeleton suits, and other wearable technologies have been shown to supplement mobility and muscle function and potentially mitigate certain disabilities.<sup>95</sup> These technologies expand employment opportunities for disabled workers by broadening the universe of positions for which disabled individuals are qualified.<sup>96</sup> Equally impressive, these AI technologies simultaneously reduce the number of work-related ailments and absences due to illness and disability, thus also improving productivity.<sup>97</sup>

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<sup>90</sup> Kim & Bodie, *supra* note 50, at 292.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Gensing-Pophal, *supra* note 88 (noting that AI software can identify burnout among key employees before it reaches a breaking point).

<sup>94</sup> 42 U.S.C. § 12112(a). Title I of the ADA is enforced by the EEOC and prohibits employers with fifteen or more employees from discriminating against a qualified individual with a disability. *Id.* An individual with a disability is defined as someone who has a physical or mental impairment that substantially limits a major life activity, has a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. § 12102(1).

<sup>95</sup> See *Algorithms at Work*, *supra* note 8, at 40–41 (explaining that exoskeletons are especially well-suited to help those who have restricted mobility because of paralysis or weakened limbs by allowing people to move in a more sustained way or walk despite spinal injuries).

<sup>96</sup> Mathiason et al., *supra* note 25, at 12.

<sup>97</sup> See *Algorithms at Work*, *supra* note 8, at 40–41.

AI tools could also highly benefit disabled workers by allowing greater reasonable accommodation opportunities. The ADA requires covered employers to make reasonable accommodations to the needs of qualified disabled applicants and employees, as long as the accommodation does not result in undue hardship to the employer's operations.<sup>98</sup> For example, advanced sensory technology could increase meaningful opportunities for deaf and blind applicants.<sup>99</sup> Some new technologies such as Honda's Asimo, can assist an individual confined to a bed or a wheelchair perform critical manual operations such as turning on a light switch and opening doors.<sup>100</sup>

#### D. *The Impact of the COVID-19 Pandemic on AI*

AI's benefits have become even more apparent during the COVID-19 pandemic and have demonstrated that companies can transform their workplaces by introducing AI faster than previously anticipated.<sup>101</sup> The COVID-19 pandemic impacted not only how people work but also how companies hire.<sup>102</sup> To a great degree, COVID-19 accelerated the nationwide movement toward work-from-home arrangements, which, in turn, hastened the adoption of AI tools in the hiring process.<sup>103</sup> For example, in 2018, 60% of companies used video interviews; this percentage sharply increased in 2020 as a result of global shutdowns and closures induced by the COVID-19 pandemic.<sup>104</sup> Not surprisingly, a 2020 survey found that 86% of respondents used virtual interview technology to enhance remote hiring.<sup>105</sup>

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<sup>98</sup> See 42 U.S.C. § 12112(b)(5)(A).

<sup>99</sup> Mathiason et al., *supra* note 25, at 9.

<sup>100</sup> *Id.*

<sup>101</sup> See Capezza, *supra* note 64, at 7-2.

<sup>102</sup> Keith E. Sonderling, *Is Artificial Intelligence Ready for the Great Rehir-*  
*ing?*, WORLD ECON. F. (July 29, 2021), <https://www.weforum.org/agenda/2021/07/is-ai-ready-for-the-great-rehiring/>.

<sup>103</sup> *See id.*

<sup>104</sup> Ifeoma Ajunwa, *Automated Video Interviewing as the New Phrenology*, 36 BERKELEY TECH. L.J. 101, 108 (2022) [hereinafter *Automated Video Interviewing*].

<sup>105</sup> *Gartner HR Survey Shows 86% of Organizations Are Conducting Virtual Interviews to Hire Candidates During Coronavirus Pandemic*, GARTNER (Apr.

COVID-19 also caused a significant number of employers to use workplace AI tools to help with recruiting, hiring, and remote working so they could continue maintaining social distancing.<sup>106</sup> Furthermore, the pandemic has significantly increased the prevalence of AI used for video interviews, online candidate assessments, and decision-making.<sup>107</sup> One commentator noted that AI-based solutions helped employers manage furloughs and layoffs during the pandemic.<sup>108</sup> AI has also been instrumental in alleviating the skills shortages in the workforce, especially for industries hit hard by government responses to the COVID-19 pandemic.<sup>109</sup> Ultimately, AI-enabled employment decision programs, especially pertaining to hiring, have the potential to be a valuable part of the global recovery from COVID.

## II. THE LEGAL PERILS OF AI WITH EMPLOYMENT DECISIONS

Despite the widespread benefits of AI in the workplace, employers necessarily take on certain risks when they apply these technologies. This Part provides a brief overview of some of the most significant legal risks associated with applying AI in employment decision-making. Fully exploring every legal risk and applicable law

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30, 2020), <https://www.gartner.com/en/newsroom/press-release/2020-04-30-gartner-hr-survey-shows-86--of-organizations-are-cond>.

<sup>106</sup> Adam S. Forman et al., *Insight: Covid-19 May Push More Companies to Use AI as Hiring Tool*, BLOOMBERG L. (May 1, 2020, 4:00 AM), <https://news.bloomberglaw.com/daily-labor-report/insight-covid-19-may-push-more-companies-to-use-ai-as-hiring-tool>.

<sup>107</sup> *Id.*

<sup>108</sup> Tom Starner, *How AI is Transforming Talent Acquisition During COVID*, HUM. RES. EXEC. (Aug. 4, 2020), <https://hrexecutive.com/how-ai-is-transforming-talent-acquisition-during-covid/>.

<sup>109</sup> See McKendrick, *supra* note 3. See also Cortnie Abercrombie, *Automation. Big Brother. Drones. Terminator. Why do Businesses Want AI so Much? What are they using it for? The Answer Might Surprise you.*, MEDIUM (Feb. 17, 2019), <https://medium.datadriveninvestor.com/big-brother-drones-terminator-what-are-businesses-using-ai-for-the-answer-might-surprise-you-a87b21fa5685> (arguing that the talent shortage in the hiring pipeline and the simultaneous mass retirements of experienced employees have been the key reasons more businesses are adopting AI).

or regulation is beyond the scope of this Article, but a general discussion and some key examples are both illustrative and illuminating.

### A. *The Perils in a Nutshell*

The principal risk of incorporating AI in employment decision-making is the potential for discriminatory outcomes.<sup>110</sup> One scholar pointed out that “[a]ddressing algorithmic bias can present a ‘whack-a-mole’ problem, where the new algorithm—re-engineered to have less negative impact on members of one protected group—now has an increased adverse impact on another protected group.”<sup>111</sup> Critics of AI in recruiting point out that the systems are only as good as those who “feed the machine.”<sup>112</sup> Put another way, the reliability and lawfulness of the AI’s output is only as good as the inputs, designs, and users. For instance, some critics contend that if an AI tool evaluates the resumes of previously selected candidates, the tool could simply learn and repeat a company’s past discriminatory biases and preferences.<sup>113</sup>

Another criticism that legal commentators frequently raise when discussing algorithmic selection tools is the “black box” problem, which results from the difficulty, or impossibility, of explaining why AI tools produced a particular outcome.<sup>114</sup> This problem stems from the concern that if AI outcomes cannot be explained, there might be unknown biases underlying the outcomes.<sup>115</sup>

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<sup>110</sup> Houser, *supra* note 6, at 333.

<sup>111</sup> Kelly Cahill Timmons, *Pre-Employment Personality Tests, Algorithmic Bias, and the Americans with Disabilities Act*, 125 PENN ST. L. REV. 389, 445 (2021).

<sup>112</sup> See Magnuson, *supra* note 10, at 354.

<sup>113</sup> Friedman & McCarthy, *supra* note 24.

<sup>114</sup> See Matthew U. Scherer et al., *Applying Old Rules to New Tools: Employment Discrimination Law in the Age of Algorithms*, 71 S.C. L. REV. 449, 492 (2019).

<sup>115</sup> See Houser, *supra* note 6, at 340.

### B. *Disparate Treatment and Disparate Impact*

Federal law recognizes two theories to allege employment discrimination—disparate treatment and disparate impact—and AI implicates both.<sup>116</sup> When an employer fails to hire, discharges, or otherwise discriminates with respect to an individual’s compensation, terms, conditions, or privileges of employment “because of” a protected characteristic, the employer engages in unlawful disparate treatment, or intentional discrimination.<sup>117</sup> Disparate treatment can also arise with respect to AI when automated systems “learn” from biased training data to recognize and discriminate against protected characteristics without being explicitly programmed to do so.<sup>118</sup> One of the greatest legal risks for employers using AI for employment decisions is that the AI technologies, by their very design, provide decision-makers with notice of protected characteristics that otherwise would not have been known to the employer.<sup>119</sup> This, in turn, increases the likelihood that employers will make employment decisions because of, or even simply motivated by, those protected characteristics—or, at a minimum, opens the door to credible allegations of discrimination.<sup>120</sup>

Even if an employer’s use of an algorithm is not intentionally discriminatory, the employer may be liable.<sup>121</sup> Under the disparate impact theory of discrimination, plaintiffs may prove discrimination without proving intent to discriminate if an employment policy or practice disproportionately affects a protected group.<sup>122</sup> In disparate

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<sup>116</sup> See Thomas B. Nachbar, *Algorithmic Fairness, Algorithmic Discrimination*, 48 FLA. ST. U. L. REV. 509, 530 (2021).

<sup>117</sup> 42 U.S.C. § 2000e-2(a).

<sup>118</sup> Matt Scherer & Ridhi Shetty, *NY City Council Rams Through Once-Promising but Deeply Flawed Bill on AI Hiring Tools*, CTR. FOR DEMOCRACY & TECH. (Nov. 12, 2021), <https://cdt.org/insights/ny-city-council-rams-through-once-promising-but-deeply-flawed-bill-on-ai-hiring-tools/>.

<sup>119</sup> See Lauren Daming, *Employers Must Heed Range of Legal Issues Posed by AI*, LAW360 (May 31, 2022, 2:26 PM), <https://www.law360.com/employment-authority/articles/1497920/employers-must-heed-range-of-legal-issues-posed-by-ai>.

<sup>120</sup> See *id.*

<sup>121</sup> See 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also Nachbar, *supra* note 116, at 514.

<sup>122</sup> See 42 U.S.C. § 2000e-2(k) (setting out the burden of proof in disparate impact cases under Title VII).



impact cases, once a plaintiff demonstrates that a policy or practice has a disproportionately harmful effect on a protected class, the employer must show both that the policy or practice is “job related for the position in question and consistent with business necessity.”<sup>123</sup> Employers have long “faced considerable uncertainty in navigating the legality of employment selection procedures in the context of the disparate impact provisions of Title VII.”<sup>124</sup>

The risk of disparate impact claims is magnified when using AI tools. In analyzing a large quantity of data, an algorithm might identify a statistical correlation between a specific characteristic of a job applicant and future job success that nevertheless lacks a causal relationship.<sup>125</sup> Furthermore, employees and applicants also may have an easier path alleging class-wide discrimination claims if the employer uses the same AI tool or algorithm to assess an entire pool of candidates. Put differently, if an algorithm is applied across a group—or several groups—of applicants, the algorithm may easily provide the common questions of law or fact necessary to certify a class under Rule 23 of the Federal Rules of Civil Procedure.<sup>126</sup>

### C. Talent Acquisition Risks

A host of legal issues often arise during the sourcing and talent acquisition stage, the period when employers actively seek or solicit candidates. Employers frequently use AI in job descriptions, advertising, matching, and individual outreach during this period.<sup>127</sup>

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<sup>123</sup> 42 U.S.C. § 2000e-2(k)(1)(A). Disparate impact is also available under the ADA, 42 U.S.C. § 12112(b)(6), and Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 624(a)(1)–(2). The plaintiff’s claims are usually supported by statistical comparison, which the defendant employer can challenge.

<sup>124</sup> Trindel et al., *supra* note 74, at 285.

<sup>125</sup> Kim, *supra* note 1, at 874–75 (discussing how statistical correlations may be “entirely coincidental”). As a result, the employer may be unable to demonstrate that a practice with a disparate impact on a protected class of individuals is sufficiently “job related or consistent with business necessity” as is required to defend a claim under Title VII. 42 U.S.C. § 2000e-2(k)(1)(A).

<sup>126</sup> See FED. R. CIV. P. 23(a)(2); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011).

<sup>127</sup> See Bogen & Rieke, *supra* note 55, at 13.

## 1. JOB ADVERTISING

Sourcing often triggers Title VII concerns. Many third-party companies enable employers to target specific audiences with advertising, using both criteria the advertiser has established and the platform's algorithms to determine who sees specific advertisements.<sup>128</sup> However, Title VII specifically prohibits limiting, segregating, or classifying employees according to any protected characteristic when the action would deprive them of employment opportunities or otherwise adversely affect their employment.<sup>129</sup> Moreover, Title VII prohibits employers from categorizing job applicants using discriminatory criteria, including in job advertisements.<sup>130</sup> It precludes employers from publishing job advertisements that indicate a "preference, limitation, specification, or discrimination" based on a protected characteristic.<sup>131</sup>

ADA concerns are also implicated when AI sourcing is used in the hiring process.<sup>132</sup> The ADA specifically bans preemployment assessments, including qualification standards and employment tests, that tend to screen out an individual with a disability or class of individuals with disabilities unless the test is shown to be job-related and consistent with business necessity.<sup>133</sup> The ADA prohibits employers from inquiring into an applicant's disability during pre-employment procedures. Accordingly, AI used during the hiring process will likely violate the ADA if an algorithm unnecessarily discerns an applicant's physical disability, mental disability, or clinical diagnosis; all of which are forbidden inquiries in pre-employment

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<sup>128</sup> See *id.* at 17–18.

<sup>129</sup> 42 U.S.C. § 2000e-2(a)(2).

<sup>130</sup> See 42 U.S.C. § 2000e-3(b).

<sup>131</sup> *Id.* However, Title VII does state that employer notices or advertisements "may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment." *Id.*

<sup>132</sup> See Friedman & McCarthy, *supra* note 24, at 4. See generally 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(g)(2). Major life activities may include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A).

<sup>133</sup> 42 U.S.C. § 12112(b)(6).

candidate assessments.<sup>134</sup> Importantly, the ADA was amended in 2008 and the statutory definition of “disability” was significantly expanded; this amendment increased the coverage of individuals the ADA protects.<sup>135</sup> Similarly, the EEOC has issued guidance qualifying the expanded list of personality disorders identified in the psychiatric literature as protected mental impairments.<sup>136</sup> Consequently, the ADA may therefore protect applicants who have significant concentration or communication challenges, both of which AI technology may identify as a disqualifying characteristic for employment.

Vendors of personality tests admittedly recognize the potential for algorithmic bias.<sup>137</sup> They claim to address this potential for bias based on Title VII’s protected traits by auditing and correcting their own algorithms.<sup>138</sup> Unfortunately, these assurances do not apply to disabilities under the ADA.<sup>139</sup> Some commentators have warned that personality tests used during the hiring process could be seen as a covert method for violating the ADA.<sup>140</sup> One scholar noted that “[d]etermining [a] company’s preferred personality traits based on those possessed by its top performers—given the research correlating personality traits with certain mental impairments—may perpetuate the exclusion of applicants with mental disabilities.”<sup>141</sup> For example, in a class action lawsuit, a college student with a near-perfect SAT score and who had been diagnosed with bipolar disorder, was repeatedly rejected from minimum wage jobs at supermarkets and retail stores.<sup>142</sup> These stores all used a personality test that had been modeled on the “Five Factor Model” test used to diagnose mental

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<sup>134</sup> *Id.*

<sup>135</sup> *See id.*; 42 U.S.C. § 12102(4)(A).

<sup>136</sup> Friedman & McCarthy, *supra* note 24, at 4.

<sup>137</sup> *See* Timmons, *supra* note 111, at 444.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1702 (2020) [hereinafter *Paradox of Automation*].

<sup>141</sup> Timmons, *supra* note 111, at 443.

<sup>142</sup> *Paradox of Automation*, *supra* note 140, at 1702.

illness.<sup>143</sup> The student's experience shows how AI-powered screening tools can, intentionally or not, exclude even well-qualified candidates along discriminatory lines.

The use of AI during the hiring process at the talent acquisition stage also implicates age discrimination concerns.<sup>144</sup> The Age Discrimination in Employment Act ("ADEA") is the federal law that prohibits employers and employment agencies from age discrimination in job advertising, recruiting, hiring, and other employment opportunities.<sup>145</sup> The ADEA also expressly prohibits employment advertisements that discriminate or indicate a preference or limitation based on age.<sup>146</sup> However, age discrimination claims are increasingly common in recent years.<sup>147</sup> For instance, an employer was found to have violated the ADEA by advertising on Facebook for a position within its company and "limiting the audience for their advertisement to younger applicants."<sup>148</sup> Similarly, the Attorney General of Illinois launched an investigation revealing that several online automated hiring platforms had design features that discouraged older applicants, violating the ADEA.<sup>149</sup>

Unintentional discrimination could also seep into AI systems in less direct ways. An algorithm trained to prefer employees within a certain commuting distance might result in applicants from poorer areas being disadvantaged.<sup>150</sup> In 2019, Facebook reached a settle-

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<sup>143</sup> *Id.*

<sup>144</sup> See Friedman & McCarthy, *supra* note 24, at 3. See generally 29 U.S.C. §§ 621–634 (prohibiting age-based discrimination against applicants or employees age forty or over and between two individuals within the protected age group in hiring, discharge, promotion, and other terms or conditions of employment).

<sup>145</sup> See 29 U.S.C. §§ 621–634.

<sup>146</sup> See 29 U.S.C. § 623(e).

<sup>147</sup> See Ifeoma Ajunwa, *Age Discrimination by Platforms*, 40 BERKELEY J. EMP. & LAB. L. 1, 4 (2019) [hereinafter *Age Discrimination*] (arguing the prevalence of age discrimination with AI and noting that there is a widespread suspicion that online job ads may be excluding older workers).

<sup>148</sup> Friedman & McCarthy, *supra* note 24, at 4.

<sup>149</sup> Ifeoma Ajunwa, *Protecting Workers' Civil Rights in the Digital Age*, 21 N.C. J.L. & TECH. 1, 9 (2020) [hereinafter *Workers' Civil Rights*].

<sup>150</sup> See Yang, *supra* note 16, at 218.

ment in a case where five civil rights groups alleged that its algorithms discriminated against women and older job seekers.<sup>151</sup> As part of the settlement, Facebook agreed to no longer allow advertisers to target job seekers based on gender, age, or zip code, and that it would no longer give advertisers detailed targeting options based on protected classes.<sup>152</sup>

## 2. EVALUATING CANDIDATE RISKS

In evaluating candidates, an AI tool can create bias when the data it uses reflects gender or race disparities. For example, an Amazon hiring initiative allegedly used a tool that rated the resumes of applicants for tech jobs on a scale skewed to favor men.<sup>153</sup> This was because the criteria for the ratings were based on the resumes submitted by applicants in the previous ten years, and most of those applicants were male.<sup>154</sup> The tool gave lower ratings to resumes containing the word “women’s” or that listed degrees from women’s colleges. After discovering this flaw, Amazon discarded the algorithm and stated that it “was never used by Amazon recruiters to evaluate candidates.”<sup>155</sup>

The use of gamified assessments when screening applications also raises unique antidiscrimination issues. Some companies use video games to measure an applicant’s attention span and ability to remember numbers.<sup>156</sup> Such tools may violate federal antidiscrimi-

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<sup>151</sup> See Tracy Jan & Elizabeth Dwoskin, *Facebook Agrees to Overhaul Targeted Advertising System for Job, Housing and Loan Ads After Discrimination Complaints*, WASH. POST (Mar. 19, 2019, 2:02 PM), [https://www.washingtonpost.com/business/economy/facebook-agrees-to-dismantle-targeted-advertising-system-for-job-housing-and-loan-ads-after-discrimination-complaints/2019/03/19/7dc9b5fa-4983-11e9-b79a-961983b7e0cd\\_story.html](https://www.washingtonpost.com/business/economy/facebook-agrees-to-dismantle-targeted-advertising-system-for-job-housing-and-loan-ads-after-discrimination-complaints/2019/03/19/7dc9b5fa-4983-11e9-b79a-961983b7e0cd_story.html).

<sup>152</sup> *Id.*

<sup>153</sup> JOSEPH O’KEEFE ET AL., BLOOMBERG L., *AI REGULATION AND RISKS TO EMPLOYERS 2* (2019), <https://prfirmppwwcdn0001.azureedge.net/prfirmstgac-ctppwwcdncont0001/uploads/3562d2b44291641560ccfaec272fdc50.pdf>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See J. Edward Moreno, *Disability Bias Should Be Addressed in AI Rules, Advocates Say*, BLOOMBERG L. (May 6, 2022, 5:45 AM) [https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X9OTPGVO000000?bna\\_news\\_filter=daily-labor-report](https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X9OTPGVO000000?bna_news_filter=daily-labor-report).

nation laws. For instance, using a gamified assessment to screen applications may disadvantage older applicants because, as a group, older applicants do not perform as well on the games as younger applicants do, thereby raising ADEA concerns.<sup>157</sup> Similarly, a gamified assessment that requires an applicant to identify the emotions of someone in an image could be more difficult for a person on the autism spectrum, thus triggering ADA concerns.<sup>158</sup>

#### D. Interviewing Stage Risks

Other problems arise when employers rely on AI tools such as facial and voice recognition and analysis to evaluate candidates. Certain tools allow employers to assess video interviews of applicants by comparing answers to those given by high-performing employees.<sup>159</sup> These tools analyze factors such as facial expression, eye contact, speech patterns, and word choice in its machine learning processes.<sup>160</sup> But assessments of some facial recognition methods reveal that they often analyze emotions differently in ways that are, for example, based on race.<sup>161</sup> Civil rights groups have argued that these systems might unfairly score candidates based on differences correlated to their race or sex.<sup>162</sup>

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<sup>157</sup> Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 25 (2020).

<sup>158</sup> See Moreno, *supra* note 156. See also Sheridan Wall & Hilke Schellmann, *Disability Rights Advocates Are Worried About Discrimination in AI Hiring Tools*, MIT TECH. REV., (July 21, 2021) <https://www.technologyreview.com/2021/07/21/1029860/disability-rights-employment-discrimination-ai-hiring/>.

<sup>159</sup> See Bogen & Rieke, *supra* note 55, at 36.

<sup>160</sup> *Id.* See also Stephen J. Malone, *The Opportunities and Legal Dangers of Using Artificial Intelligence to Recruit and Hire Employees*, 5 PLI CURRENT: J. PLI PRESS (2021).

<sup>161</sup> See Dave Zielinski, *Addressing Artificial Intelligence-Based Hiring Concerns*, SHRM (May 22, 2020), <https://www.shrm.org/hr-today/news/hr-magazine/summer2020/pages/artificial-intelligence-based-hiring-concerns.aspx>; see also Ifeoma Ajunwa, *An Auditing Imperative for Automated Hiring Systems*, 34 HARV. J.L. & TECH. 621, 637 (2021) [hereinafter *Auditing Imperative*] (noting that facial analysis systems can struggle to read the faces of women with darker skin).

<sup>162</sup> See Zielinski, *supra* note 161.

Differences in speech patterns and vocabulary that correlate with race or ethnicity can complicate automated voice analysis.<sup>163</sup> Automated video interviews involve the video capture of word choices, speech patterns, and facial expressions of job applicants, which AI tools evaluate to predict an applicant's fit for jobs and compatibility with the culture of the organization.<sup>164</sup> However, speech recognition software may be vulnerable to significant differences in performance between certain groups of people if the algorithms have not been tailored to adjust for differences relating to those specific groups.<sup>165</sup> For example, technology that operates by voice commands could present challenges for individuals who do not speak English as their first language or for those that speak with a speech impediment or have a hearing impairment, thus triggering national origin and disability discrimination concerns.<sup>166</sup> Automated video interviews may also be deemed a form of assessment; thus, they might implicate the ADA if they are found to screen out applicants on the basis of their disability.<sup>167</sup> For instance, people who are blind could score lower and be screened out if they fail to make eye contact with the camera.

The use of AI involving cameras, video and audio recording devices, and other sensors, raises the risk that the employer or the AI tools will collect information in a way that could violate the ADA's specific limitations on the use of medical examinations.<sup>168</sup> The ADA prohibits any medical examination or inquiry to determine an applicant's medical condition or disability unless it is job-related and consistent with business necessity.<sup>169</sup> The EEOC has interpreted this prohibition to encompass inquiries that, while not ostensibly medical examinations, are nevertheless reasonably likely to elicit information about a disability.<sup>170</sup> As a result, certain video interview algorithms, especially those that measure certain personality traits,

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<sup>163</sup> Friedman & McCarthy, *supra* note 24, at 2.

<sup>164</sup> See *Auditing Imperative*, *supra* note 161, at 637.

<sup>165</sup> *Id.*

<sup>166</sup> *Automated Video Interviewing*, *supra* note 104, at 103.

<sup>167</sup> *Id.* at 129.

<sup>168</sup> *Id.*

<sup>169</sup> 42 U.S.C. §§ 12112(d)(2)(B), (d)(4)(A); 29 C.F.R. § 1630.14(a).

<sup>170</sup> *Questions and Answers: Enforcement Guidance on Disability Related Inquiries and Medical Examinations Under the Americans with Disabilities Act*,

may run afoul of the ADA.<sup>171</sup> For example, an employer's review of data indicating fidgeting, muscle spasms, or involuntary movements could be considered a disability-related inquiry because these could indicate certain neurodegenerative diseases such as Parkinson's disease or Lou Gehrig's disease.<sup>172</sup> Importantly, there is no consent exception to the ADA's general prohibition on disability-related inquiries, and the ADA also prohibits employers from making employment decisions based on disabilities unrelated to the essential functions of an individual's job.<sup>173</sup> As a consequence, even reviewing seemingly innocuous information that might not be considered a disability-related inquiry for purposes of the ADA, such as data indicating low muscle strength, could increase risk to the employer.<sup>174</sup> If the employer discharged the employee after reviewing the report, even if the information failed to play a role, the employee may have grounds to credibly allege that the employer terminated the employee because of a disability or perceived disability, even if the employer, in fact, terminated the employee for a lawful legitimate reason.<sup>175</sup>

#### E. *Background Check Risks*

The use of facial recognition technology in background checks raises the risk of disparate impact discrimination.<sup>176</sup> Specifically, the technology has been criticized for providing a disproportionately higher percentage of false indications of a criminal background for

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U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 27, 2000), <https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-disability-related-inquiries-and-medical>. Regardless of job-relatedness, the ADA forbids an employer from requiring any medical examinations before a conditional employment offer is made. *Id.*

<sup>171</sup> *Automated Video Interviewing*, *supra* note 104, at 132–33.

<sup>172</sup> *See* Mathiason et al., *supra* note 25.

<sup>173</sup> *See* 42 U.S.C. § 12112.

<sup>174</sup> *See* Jim Paretti et al., *EEOC Issues Guidance on Artificial Intelligence and Americans with Disabilities Act Considerations*, LITTLER (May 18, 2022), <https://www.littler.com/publication-press/publication/eec-issues-guidance-artificial-intelligence-and-americans>.

<sup>175</sup> *See id.*

<sup>176</sup> *See* Kerri A. Thompson, *Countenancing Employment Discrimination: Facial Recognition in Background Checks*, 8 TEX. A&M L. REV. 63, 78 (2020).



African Americans compared to other racial and ethnic groups.<sup>177</sup> As one commentator explained, “[i]f the algorithm tends to provide false positives, and if there are more photos of African Americans in the databases, the target’s likelihood of being falsely matched to someone with a ‘criminal’ background will skyrocket.”<sup>178</sup> Consequently, this commentator has urged the EEOC to issue guidance alerting employers that using facial recognition technology in background checks may subject employers to lawsuits under Title VII.<sup>179</sup>

Some employers also conduct social media background checks to determine whether applicants’ social media presence cautions against extending a job offer.<sup>180</sup> According to some scholars, “emerging AI applications that can engage in wide, perpetual sweeps of social media will change the frequency and penetration of employer social media eavesdropping.”<sup>181</sup> Unless they are performed carefully, social media background checks are fraught with issues for several reasons. Notably, such checks could collect information regarding an applicant’s race, sex, sexual identity, disability, pregnancy, or health, which employers cannot lawfully consider during the hiring process.<sup>182</sup>

#### F. *Job Offer Risks*

Finally, as the last step of the hiring process, employers may extend offers to applicants via AI-powered technologies.<sup>183</sup> There are software programs that predict the probability that certain types of candidates will accept given job offers and programs that help employers increase their chances of attracting desirable candidates.<sup>184</sup> These software programs allow the employer to adjust salary, bonus, stock options, and other benefits to see in real time the prediction of the resulting changes.<sup>185</sup> Despite the benefits associated with such

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 67.

<sup>179</sup> *Id.* at 84.

<sup>180</sup> Bales & Stone, *supra* note 157, at 20–21.

<sup>181</sup> *Id.* at 21.

<sup>182</sup> *Paradox of Automation*, *supra* note 140, at 1703–04.

<sup>183</sup> *Id.* at 1704 (discussing the use of AI hiring systems used during the offer process).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

programs, the use of these might magnify pay gaps for women and racial minorities because the data often includes proxies for a worker's socioeconomic and racial status that might be reflected in salary requirement predictions.<sup>186</sup> Moreover, they might also undermine ever-growing state and local laws that bar employers from considering candidates' salary histories.<sup>187</sup>

### G. *Employee Performance, Promotion, and Pay Risks*

Using algorithms to assist with performance management, promotions, and compensation also raises serious legal concerns. After an employer uses AI to hire an employee, it may use AI to track performance, determine pay, and make decisions about promotions and terminations.<sup>188</sup> There are several notable antidiscrimination risks with employee performance tracking. For example, UPS uses AI to monitor and report on driver safety and productivity and to track drivers' movements.<sup>189</sup> But such productivity tracking may run afoul of federal antidiscrimination laws if the failure to achieve productivity standards is attributable to a disability.<sup>190</sup> Others fear that unscrupulous employers will abuse the technology to monitor by targeting populations of a certain sex, race, or age disproportionately.<sup>191</sup> A former EEOC Chair contends that aggressive productivity targets also might operate disproportionately to exclude individuals based on protected characteristics such as age, disability, and religion.<sup>192</sup> Further, employee monitoring may conflict with the Genetic Information Nondiscrimination Act ("GINA") if companies made

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<sup>186</sup> *Id.*

<sup>187</sup> See Alia Abdi & Courtney Blanchard, *Does Your State Prohibit Asking Salary History?*, JD SUPRA (Sept. 9, 2021), <https://www.jdsupra.com/legal-news/does-your-state-prohibit-asking-salary-9668197/> (discussing the growing number of state and local laws prohibiting employers from requesting salary history from applicants).

<sup>188</sup> Bales & Stone, *supra* note 157, at 14.

<sup>189</sup> See Sonderling, *supra* note 3.

<sup>190</sup> See *Algorithms at Work*, *supra* note 8, at 45.

<sup>191</sup> *Id.*

<sup>192</sup> See Yang, *supra* note 16, at 234.

AI-driven employment decisions based on employees' visits to certain websites such as a disease support group.<sup>193</sup>

The very use of AI in the workplace may expose employers to liability under the ADEA if older workers are unfamiliar with the AI technologies.<sup>194</sup> If workers over forty years old are generally less proficient at working with AI tools than younger employees, employment decisions based on this criterion will likely impact them either directly or disproportionately on the basis of their age.<sup>195</sup> If those 40 or older are adversely impacted by an employer's use of AI tools or systems, then the employer may face disparate impact claims under the ADEA.<sup>196</sup> Moreover, latent biases and perceptions that younger workers are more technologically advanced or adaptive could spawn disparate treatment claims.<sup>197</sup> As with age discrimination, hidden biases and stereotypes that women and minorities are less technologically or mathematically adept may expose employers to disparate treatment claims under Title VII.

#### H. Reasonable Accommodation Risks

There are also thorny legal issues involving reasonable accommodations under Title VII and the ADA when it comes to AI in the workplace. The ADA in particular poses unique challenges for AI. Unlike other antidiscrimination laws that merely prohibit certain conduct, the ADA imposes affirmative obligations on employers.<sup>198</sup> The ADA includes a reasonable accommodation provision which requires covered employers to make reasonable accommodations to

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<sup>193</sup> See Jason Downs & Sarah Auchterlonie, *Proxy Problems—Solving for Discrimination in Algorithms*, BROWNSTEIN (Feb. 2, 2022), <https://www.bhfs.com/insights/alerts-articles/2022/proxy-problems-solving-for-discrimination-in-algorithms>.

<sup>194</sup> Mathiason et al., *supra* note 25, at 8; see also *Age Discrimination*, *supra* note 147, at 11–15.

<sup>195</sup> Mathiason et al., *supra* note 25, at 8.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*; see also Ron Brown, *Robots, New Technology, and Industry 4.0 in Changing Workplaces. Impacts on Labor and Employment Laws*, 7 AM. U. BUS. L. REV. 349, 372 (2018) (noting that, in such cases, “the integrity and lawfulness of the performance evaluation would be compromised and invalidated.”).

<sup>198</sup> See Allan G. King & Marko J. Mrkonich, “Big Data” and the Risk of Employment Discrimination, 68 OKLA. L. REV. 555, 581 (2016).

the known physical or mental limitations of an otherwise qualified applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business.<sup>199</sup>

The affirmative obligation is what makes the ADA unique among federal antidiscrimination statutes.<sup>200</sup> Once an employee requests an accommodation, the employer must engage in an interactive process to identify a reasonable accommodation that allows the employee to perform the essential functions of his or her job effectively.<sup>201</sup> Generally, these accommodations are granted through an interactive process between the employer and employee; for present purposes, between two humans.<sup>202</sup> This is also true under Title VII, which specifies that if an employee has a religious belief or practice that conflicts with a job requirement, the employer must accommodate the employee unless doing so would be an undue burden for the

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<sup>199</sup> Generally, undue hardship to the employer means “the accommodation would be too difficult or too expensive to provide, in light of the employer’s size, financial resources, and the needs of the business.” *Disability Discrimination and Employment Decisions*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/disability-discrimination-and-employment-decisions> (last visited Sep. 12, 2022).

<sup>200</sup> *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 25, 2011), <https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008#:~:text=The%20final%20regulations%20provide%20a,concentrating%2C%20thinking%2C%20communicating%2C%20interacting>. To be eligible for a reasonable accommodation, an individual must satisfy either the “actual” or “record of” definitions of a disability. An individual is not entitled to a reasonable accommodation if the individual satisfies the “regarded as” definition of a disability.

<sup>201</sup> *O’Donnell v. Univ. Hosps. Cleveland Med. Ctr.*, 833 F. App’x 605, 617 (6th Cir. 2020). During the interactive process, the employer and employee are required to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome these limitations. The ADA requires the parties to act in good faith. Although mandatory, failure to engage in the interactive process is only an independent violation of the ADA if the plaintiff establishes a prima facie showing that he or she proposed a reasonable accommodation. *Rorrer v. City of Stow*, 743 F.3d 1025, 1041 (6th Cir. 2014).

<sup>202</sup> See *Sonderling*, *supra* note 3.

employer.<sup>203</sup> When deciding whether to make a reasonable accommodation for an employee's religious beliefs or practices, employers are generally allowed to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and that the belief or practice gives rise to the need for the accommodation.<sup>204</sup> Whether AI technologies can handle such an inquiry into oft-complicated theological matters remains uncertain, but the risk of liability remains.

Other workplace technologies raise reasonable accommodation concerns as well. While the overwhelming effect of wearable enhancing devices generally improves employees' physical capabilities, wearable technology also carries the potential to make apparent disabilities that previously did not affect employees' abilities to work and were, therefore, unknown to coworkers.<sup>205</sup> Therefore, when incorporating wearable technologies, employers must be aware of the possibility that certain workers may be limited in their abilities to use the new technology. For example, workers may be sensitive to the materials in the wearable devices or may have preexisting disabilities that interfere with the fit and movement of the technology or that the technology would exacerbate.<sup>206</sup> These limitations themselves may qualify as disabilities under the ADA, potentially requiring a separate reasonable accommodation.<sup>207</sup>

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<sup>203</sup> 42 U.S.C. § 2000e(j).

<sup>204</sup> *Section 12: Religious Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 15, 2021), [https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h\\_79076346735821610749860135](https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_79076346735821610749860135). The guidance also notes that employees should cooperate with an employer's requests for reasonable information. *Id.* For instance, "if an employee requested a schedule change to accommodate daily prayers, the employer might need to ask for information about the religious observance, such as the time and duration of the daily prayers, in order to determine if accommodation can be granted without posing an undue hardship on the operation of the employer's business." *Id.* If a reasonable alternative accommodation is provided by the employer, "the employee must cooperate by attempting to meet his religious needs through the employer's proposed accommodation if possible. Whether an employer has a reasonable basis for seeking to verify the employee's stated beliefs will depend on the facts of a particular case." *Id.*

<sup>205</sup> Mathiason et al., *supra* note 25, at 12.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

These illustrations present only a high-level survey of the key issues implicated by the most common uses of AI in the workplace. Ultimately, the legal issues associated with the use of AI in employment decisions will continue to evolve as the technologies become more sophisticated and widespread. This legal landscape will continue to evolve as the legal challenges are brought in federal and state courts, administrative agencies, and legislatures.

### III. LEGISLATIVE AND REGULATORY RESPONSES TO AI

As with all potentially discriminatory employment decisions that affect individuals' livelihood, the use of AI in the workplace has elicited a variety of government responses. Governments at all levels, from local legislators to international regulators, are experiencing the challenge of broadly governing AI technologies.<sup>208</sup> Legislation is particularly challenging because AI develops rapidly and can be instantly scaled across industries.<sup>209</sup> Overall, efforts to develop a harmonized regulatory framework for AI are still in the early stages on the federal, state, and international levels. This Part first explores the responses to AI at the federal level, including executive orders and guidance issued by federal agencies. Next, this Part reviews legislative and regulatory responses to AI at the state and local levels. It is important to note that many states and localities have analogous antidiscrimination laws that may provide greater protections to employees and applicants than federal law. Still, this Article will focus on specific AI-related legislative responses. Then, the Part shifts to examine AI responses on the international level before finally discussing industry self-regulation.

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<sup>208</sup> See Jackson, *supra* note 29, at 49.

<sup>209</sup> *Id.* (explaining that much of the uncertainty among legislative bodies stems from the question of how AI systems will likely interact with the other complex systems and the economic impact this may have on the development of AI, and how machine learning systems complicates the question of how to regulate AI).

### A. Federal Action

Generally, the United States has taken a less-centralized approach to AI regulation that aims to account for the possible obstacles to innovation.<sup>210</sup> In 2019, President Trump issued an executive order calling for the creation of a coordinated federal strategy, known as the American AI Initiative, to be developed through the National Science and Technology Council.<sup>211</sup> Although the executive order was aspirational to a significant degree, it signaled that the United States government was interested in prioritizing AI development.<sup>212</sup> Among the American AI Initiative's guiding principles are the need to train current and future generations of American workers in the skills needed to develop and apply AI technologies lawfully and effectively; the need to foster public trust and confidence in AI technologies; and the obligation to develop and apply AI in a manner consistent with civil liberties, privacy, and widely-held American values.<sup>213</sup>

In November 2020, the Office of Management and Budget issued a memorandum which guides federal agencies regarding the development of regulatory and non-regulatory approaches to using AI in the private sector.<sup>214</sup> This guidance attempts to ensure public engagement in the regulatory process to foster a legally compliant

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<sup>210</sup> See *id.* at 42–43.

<sup>211</sup> See generally Exec. Order No. 13,859, 84 Fed. Reg. 3967 (Feb. 14, 2019). The Executive Order tasked federal agencies with prioritizing AI in terms of research, development, and issuing grants and identified federal datasets suitable for public access that will facilitate AI research and development by the private sector. Aram A. Gavoor, *The Impending Judicial Regulation of Artificial Intelligence in the Administrative State*, 97 NOTRE DAME L. REV. REFLECTION 197, 198 (2022) (describing Executive Orders regarding AI issued during both the Obama and Trump administrations).

<sup>212</sup> Michael A. Chichester Jr. & Jaelyn R. Giffen, *Recruiting in the Robot Age: Examining Potential EEO Implications in Optimizing Recruiting Through the Use of Artificial Intelligence*, 98 MICH. BAR J. 34, 34 (2019).

<sup>213</sup> See Aram A. Gavoor & Raffi Teperdjian, *A Structural Solution to Mitigating Artificial Intelligence Bias in Administrative Agencies*, 89 GEO. WASH. L. REV. ARGUENDO 71, 90 (2021).

<sup>214</sup> Memorandum from Russell T. Vought, Dir., Off. of Mgmt. and Budget, on Guidance for Regul. of A.I. Applications to the Heads of Exec. Dep'ts and Agencies. 1 (Nov. 17, 2020). This guidance was issued in response to a directive contained in the 2019 Executive Order. *Id.*

deployment of AI based on trust, fairness, equality, transparency, safety, reliability, and scientific integrity.<sup>215</sup> The guidance emphasizes that “[f]ederal agencies must avoid regulatory or non-regulatory actions that needlessly hamper AI innovation and growth.”<sup>216</sup>

In December of 2020, the Trump Administration issued a second executive order that enumerated principles for guiding the use of AI in government and established a common policy for implementing these principles.<sup>217</sup> The Executive Order stated that AI should be used to improve government operations in a manner that remains consistent with all applicable laws, including those related to privacy, civil rights, and civil liberties.<sup>218</sup> Among the other principles to guide the federal government in its use of AI are accuracy, reliability, security, responsibility, traceability, transparency, and accountability.<sup>219</sup> The Executive Order also directed all federal agencies to prepare an inventory of AI use cases.<sup>220</sup>

In January of 2021, President Trump signed the National Defense Authorization Act for 2021 into law, which included the National Artificial Intelligence Initiative Act (“NAIIA”) of 2020.<sup>221</sup> The NAIIA established a critical framework for coordinating AI research and policy across the federal government and created a roadmap to position the United States as a global leader in developing and adopting trustworthy AI in the public and private sectors.<sup>222</sup> The NAIIA’s goals include preparing the federal workforce for AI, conducting and funding AI research, and identifying and mitigating

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<sup>215</sup> *Id.* at 2.

<sup>216</sup> *Id.*

<sup>217</sup> *See* Exec. Order No. 13,960, 85 Fed. Reg. 78,939 (Dec. 8, 2020); *see also* Gavoor & Teperdjian, *supra* note 262, at 90.

<sup>218</sup> *See* Exec. Order No. 13,960, 85 Fed. Reg. 78,939.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* Furthermore, the Executive Order directed the General Services Administration to create an AI track within the Presidential Innovation Fellows program to draw in industry experts to work within federal agencies on AI development tasks. *Id.*

<sup>221</sup> *See generally* William M. (Mac) Thornberry Nat’l Def. Authorization Act for Fiscal Year 2021, 15 U.S.C. §§ 9401–9462.

<sup>222</sup> *See* Michelle Capezza et al., *U.S. Advances AI Innovation with NAIIA*, EPSTEIN BECKER GREEN (Feb. 8, 2021), <https://www.healthlawadvisor.com/2021/02/08/u-s-advances-ai-innovation-with-naia/>.



against AI risks.<sup>223</sup> Practitioners have explained that “the NAIIA does not set forth merely lofty goals, but rather, legislates concrete matters of critical importance for economic and national security.”<sup>224</sup> To accomplish its goals, the NAIIA established several new governance bodies with interlocking missions to help advance the law’s objectives.<sup>225</sup>

The National Defense Authorization Act for 2021 also directed the U.S. Department of Commerce’s National Institute of Standards and Technology (“NIST”) to develop “a voluntary risk management framework for trustworthy AI systems.”<sup>226</sup> In 2022, NIST released a draft of its AI Risk Management Framework that addresses risks in the design, development, use, and evaluation of AI systems.<sup>227</sup> NIST simultaneously released guidance for trustworthy and responsible development and use of AI, notably including suggested governance processes to address bias.<sup>228</sup>

In October 2021, the Office of Science and Technology Policy (“OSTP”), began a series of listening sessions and related events to form the groundwork for an AI “Bill of Rights” allegedly “to guard against the powerful technologies we have created.”<sup>229</sup> The original

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* (explaining that the NAAIA (1) established the National AI Initiative Office; (2) mandates creation of the Interagency Committee and subcommittees; (3) requires the Secretary of Commerce, among others, to establish a National Artificial Intelligence Advisory Committee to advise on the AI Initiative; and (4) makes the Director of the National Science Foundation establish the National AI Research Resource Task Force).

<sup>226</sup> See Heather Sussman et al., *U.S. Artificial Intelligence Regulation Takes Shape*, ORRICK (Nov. 18, 2021), <https://www.orrick.com/en/Insights/2021/11/US-Artificial-Intelligence-Regulation-Takes-Shape>.

<sup>227</sup> See NAT’L INST. OF STANDARDS AND TECH., AI RISK MANAGEMENT FRAMEWORK: INITIAL DRAFT i (Mar. 17, 2022), <https://www.nist.gov/system/files/documents/2022/03/17/AI-RMF-1stdraft.pdf>; see also Christine Chong et al., *Artificial Intelligence: NIST Risk Management Framework and Guidance Addressing Bias in AI*, ARENTFOX SCHIFF (Mar. 24, 2022), <https://www.afslaw.com/perspectives/alerts/artificial-intelligence-nist-risk-management-framework-and-guidance-addressing>.

<sup>228</sup> See Chong et al., *supra* note 227.

<sup>229</sup> See, e.g., Eric Lander & Alondra Nelson, *ICYMI: WIRED (Opinion): Americans Need a Bill of Rights for an AI-Powered World*, THE WHITE HOUSE

premise for the document was the apparent belief by OSTP that basic civil rights protections do not exist when it comes to AI. Many advocacy groups in the technology space supported this effort and lobbied for its release.<sup>230</sup> The document's release was delayed due to significant turnover within OSTP and other issues until October 2022 when, under new leadership, OSTP released a "Blueprint for an AI Bill of Rights."<sup>231</sup> Instead of the anticipated "Bill of Rights" the "Blueprint" simply reiterated basic principles of privacy, transparency, and protections from discrimination.<sup>232</sup> As the "Blueprint" was not the actual "Bill of Rights" advocacy groups were promised, it has largely been criticized as "toothless" and "insufficient."<sup>233</sup> Regardless, it remains unclear why existing rights are insufficient and why citizens deserve narrowly-tailored rights for AI rather than broad-based rights that cover all their activities and interactions. In addition, some of the goals included in an AI "Blueprint" would likely necessitate the government to take aggressive steps to regulate AI to ensure adequate enforcement; and, as a consequence, hamper innovation and lead to increased regulatory adventurism.

In more recent years, independent federal agencies have begun to assume the challenge of regulating AI in their respective domains. For instance, the EEOC has shown increased intermittent interest in AI-related employment discrimination. In 2016, the EEOC held a public meeting on the equal employment opportunity implications

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(Oct. 22, 2021), <https://www.whitehouse.gov/ostp/news-updates/2021/10/22/icymi-wired-opinion-americans-need-a-bill-of-rights-for-an-ai-powered-world/>.

<sup>230</sup> See Marc Rotenberg & Sneha Revanur, *Time To Act Now on The AI Bill of Rights*, THE HILL (July, 19, 2022 6:00 PM) <https://thehill.com/opinion/technology/3566180-time-to-act-now-on-ai-bill-of-rights/>. See also Alex Thompson, *Biden's Top Science Adviser, Eric Lander, Resigns Amid Reports of Bullying*, POLITICO (Feb. 7, 2022, 8:57 PM), <https://www.politico.com/news/2022/02/07/eric-lander-resigns-00006545>.

<sup>231</sup> *Id.* See also Lance Eliot, *US Releases an AI Bill of Rights That, Though Encouraging, Won't Yet Move the Needle*, JURIST (Oct. 5, 2022, 9:48 AM), <https://www.jurist.org/commentary/2022/10/u-s-releases-an-ai-bill-of-rights-that-though-encouraging-wont-yet-move-the-needle/>.

<sup>232</sup> *Id.*

<sup>233</sup> Khari Johnson, *Biden's AI Bill of Rights Is Toothless Against Big Tech*, WIRED (Oct. 4, 2022, 7:00 AM), <https://www.wired.com/story/bidens-ai-bill-of-rights-is-toothless-against-big-tech/>.

of big data in the workplace.<sup>234</sup> However, it did not release a report or issue public guidance to share any lessons or outcomes of the meeting. In October of 2021, the EEOC launched an initiative to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws that the agency enforces.<sup>235</sup> In the announcement, the EEOC noted that AI “tools may mask and perpetuate bias or create new discriminatory barriers to jobs.”<sup>236</sup>

A few months later, the EEOC and U.S. Department of Justice each released a technical assistance document about disability discrimination when employers use AI and other software tools to make employment decisions.<sup>237</sup> It is worth emphasizing the EEOC’s guidance is limited to only disability discrimination, was not voted on by the full Commission, and did not go through the administrative law process involving notice and comment.<sup>238</sup> This is particularly troubling since this means that the guidance does not reflect stakeholder input. Practitioners explained that “[t]he EEOC’s guidance appears to raise more questions than it answers, in an area of

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<sup>234</sup> See Darrell S. Gay & Abigail M. Kagan, *Big Data and Employment Law: What Employers and Their Legal Counsel Need to Know*, 33 ABA J. LAB. & EMP. L. 191, 207 (2018).

<sup>235</sup> *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, *supra* note 27.

<sup>236</sup> *Id.*

<sup>237</sup> Press Release, U.S. Equal Emp. Opportunity Comm’n, U.S. EEOC and U.S. Department of Justice Warn Against Disability Discrimination (May 12, 2022), <https://www.eeoc.gov/newsroom/us-eeoc-and-us-department-justice-warn-against-disability-discrimination>.

<sup>238</sup> *Id.* This guidance should have been voted on by the full EEOC. See 29 C.F.R. § 1695.4(d) (“If the guidance document sets forth the Commission’s position on a legal principle for the first time or changes the Commission’s legal position on any issue, the Commission must approve the guidance document by majority vote.”); see also Vin Gurrieri, *Republican AGs Get Feds’ Bostock Guidance Put on Ice*, LAW360 (July 17, 2022, 2:02 PM), <https://www.law360.com/employment-authority/articles/1512315/republican-ags-get-feds-bostock-guidance-put-on-ice> (discussing EEOC guidance enjoined by a federal court because it was “unilaterally” issued by the EEOC’s chair without ever being put to a vote by the full Commission). See also *Texas v. Equal Emp. Opportunity Comm’n*, No. 2:21-CV-194-Z, 2022 WL 4835346, at \*14 (N.D. Tex. Oct. 1, 2022) (stressing the importance of a Commission vote).

law that is changing rapidly and already poses compliance challenges for employers.”<sup>239</sup>

During the Trump Administration, DOL’s Office of Federal Contract Compliance Program’s (“OFCCP”) issued guidance stating that the use of screening devices like games, challenges, and video submissions that use AI algorithms to assess qualifications may trigger obligations under the Uniform Guidelines on Employee Selection Procedures.<sup>240</sup> OFCCP’s guidance explains if an employer’s use of an AI-based selection procedure results in an adverse impact on a particular racial, sex, or ethnic group, the procedure may trigger OFCCP scrutiny.<sup>241</sup>

Other federal agencies have issued AI guidance related to employment. Notably, in 2020, the Federal Trade Commission (“FTC”) issued guidance outlining recommended best practices, and emphasizing AI tools’ transparency, explainability, and fair use.<sup>242</sup> This guidance stresses that AI tools should be transparent, explainable, fair, empirically sound, and that employers should hold themselves accountable for compliance, ethics, fairness, and nondiscrimination.<sup>243</sup> The FTC issued further AI guidance in 2021 warning

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<sup>239</sup> See Paretti et al., *supra* note 174 (explaining that in many instances, 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).

<sup>240</sup> See Off. of Fed. Cont. Compliance Programs, *Validation of Employee Selection Procedures*, U.S. DEP’T. OF LAB (2019), <https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures#Q6>. In short, the Uniform Guidelines on Employee Selection Procedures articulates standards for compliance with certain requirements under Title VII. See 29 C.F.R. §§ 1607.5–9.

<sup>241</sup> See Nathaniel M. Glasser et al., *Are Your AI Selection Tools Validated? OFCCP Provides Guidance for Validation of AI-Based Algorithms*, NAT’L L. REV. (July 31, 2019), <https://www.natlawreview.com/article/are-your-ai-selection-tools-validated-ofccp-provides-guidance-validation-ai-based>.

<sup>242</sup> See Andrew Smith, *Using Artificial Intelligence and Algorithms*, FED. TRADE COMM’N (Apr. 8, 2020), <https://www.ftc.gov/news-events/blogs/business-blog/2020/04/using-artificial-intelligence-algorithms>; see also Sharona Hoffman & Andy Podgurski, *Artificial Intelligence and Discrimination in Health Care*, 19 YALE J. HEALTH POL’Y, L. & ETHICS 1, 45 (2020).

<sup>243</sup> Smith, *supra* note 242.

companies against biased, discriminatory, deceptive, or unfair practices in AI algorithms.<sup>244</sup> FTC's guidance concluded by stressing: "Hold yourself accountable – or be ready for the FTC to do it for you."<sup>245</sup>

In November of 2021, the Consumer Financial Protection Bureau ("CFPB") issued an advisory opinion affirming that consumer reporting companies, including employment screening companies, are violating the law if they engage in careless name-matching procedures.<sup>246</sup> In this advisory opinion, the CFPB expressed concern with the screening practice of assigning a false identity to applicants for jobs and housing due to error-ridden background screening reports that the agency believed may disproportionately impact minority applicants.<sup>247</sup> The advisory opinion reaffirms the obligations and requirements of consumer reporting companies to use reasonable procedures to ensure the maximum possible accuracy.

### B. State Laws

In recent years, states have increasingly sought to fill the federal void by enacting their own AI legislation.<sup>248</sup> Several of these statutes are crafted in ways that portend further regulation. On one hand, the accelerating pace at which states have created their own regimes

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<sup>244</sup> See Elisa Jillson, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, FED. TRADE COMM'N: BUS. BLOG (Apr. 19, 2021), <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai> (warning companies to ensure that their AI does not reflect racial or gender bias, and indicated that failure to do so may result in "deception, discrimination - and an FTC law enforcement action").

<sup>245</sup> *Id.* (illustrating this point by explaining that if an algorithm results in credit discrimination against a protected class, this could trigger an FTC complaint).

<sup>246</sup> *CFPB Takes Action to Stop False Identification by Background Screeners*, CFPB (Nov. 4, 2021), [https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-stop-false-identification-by-background-screeners/?\\_sm\\_au\\_=iHVFR9tfrf49TNNMFcVTvKQkcK8MG](https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-stop-false-identification-by-background-screeners/?_sm_au_=iHVFR9tfrf49TNNMFcVTvKQkcK8MG) ("[T]he CFPB affirmed that the practice of matching consumer records solely through the matching of names is illegal under the Fair Credit Reporting Act.").

<sup>247</sup> *Id.*

<sup>248</sup> See Shackelford & Dockery, *supra* note 28, at 302–03 (explaining that states are increasingly wading into the AI arena because "the market is unlikely to fill a consumer or societal need").

presents an opportunity to evaluate the benefits and pitfalls of various approaches to regulating AI.<sup>249</sup> On the other hand, the patchwork of laws across the nation presents compliance challenges, particularly for employers operating in multiple states.

The Illinois Artificial Intelligence Video Interview Act is one of the first state laws designed to regulate AI.<sup>250</sup> The law requires employers to provide advance notice to applicants that the employer will use video interview technology, and to explain to the applicant how the AI works and what general characteristics the technology will use to evaluate applicants.<sup>251</sup> The notice must inform applicants that “artificial intelligence analysis” may be used to evaluate their application.<sup>252</sup> Moreover, candidates are given some control over what happens to the video after their assessment.<sup>253</sup> Employers are required to destroy the video, including all backup copies, within 30 days of an applicant’s request.<sup>254</sup>

The Illinois law has some major flaws that may generate more issues for employers than it resolves. Most critically, the law lacks the most basic, elemental component: it fails to define AI, AI analysis, and several other operative terms that the statute purports to regulate.<sup>255</sup> This injects facial ambiguity that undercuts the efficacy of the statute and other benefits, just like any law that aims to regulate a subject it does not define. For example, this ambiguity means that common applications of AI may not even be covered.<sup>256</sup> Mean-

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<sup>249</sup> See *id.* at 303.

<sup>250</sup> Artificial Intelligence Video Interview Act, 820 ILL. COMP. STAT. ANN. 42/1-20 (LEXIS through 2022 Legis. Sess.); see *Automated Video Interviewing*, *supra* note 104, at 138.

<sup>251</sup> Artificial Intelligence Video Interview Act §§ 1–20 (LEXIS).

<sup>252</sup> *Id.*

<sup>253</sup> See *id.*

<sup>254</sup> *Id.*

<sup>255</sup> See Kwabena A. Appenteng et al., *Implementing Illinois’ AI Video Interview Act: Five Steps Employers Can Take to Address Hidden Questions and Integrate Policies with Existing Employment Laws*, LITTLER (Sept. 17, 2019), <https://www.littler.com/publication-press/publication/implementing-illinois-ai-video-interview-act-five-steps-employers-can>.

<sup>256</sup> See *Automated Video Interviewing*, *supra* note 104, at 138 (citing “track[ing] data about its candidates” as an example of an employer use of AI that would not be covered under the law).

while, the notice requirement merely gives a highly generalized description of the mandatory content for the notice.<sup>257</sup> Perhaps even more important, the AI Interview Act is silent about penalties, enforcement, and a private right of action, which could raise potential hurdles to effective enforcement.<sup>258</sup> In addition, the law claims to protect applicants “based in Illinois,” but it does not specifically state whether it purports to regulate out-of-state employers, particularly when they are hiring for a position located outside of Illinois.<sup>259</sup> Finally, the law is silent about whether employers may refuse to consider applicants who decline consent.<sup>260</sup>

In 2020, Maryland enacted a law prohibiting employers from using facial recognition technology during pre-employment job interviews unless the applicant consents by signing a specified waiver.<sup>261</sup> Under the law, to use facial recognition services in interviewing applicants, an employer must obtain an applicant’s written consent and a waiver that states the applicant’s name, the date of the interview, that the applicant consents to the use of facial recognition during the interview, and that the applicant has read the waiver.<sup>262</sup> Practitioners have noted many of the same difficulties plaguing the Illinois law. For while the law defines terms such as “facial template” and “facial recognition services,” the terms provide little guidance and leave broad gaps for interpretation that complicate compliance and potentially undermine enforcement.<sup>263</sup>

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<sup>257</sup> See Appenteng et al., *supra* note 255.

<sup>258</sup> See *Auditing Imperative*, *supra* note 161, at 644–45 (highlighting how silence on enforcement may raise questions as to whether applicants can recover statutory damages for violations).

<sup>259</sup> Artificial Intelligence Video Interview Act §§ 1–20 (LEXIS); see Matthew Jedreski et al., *Illinois Becomes First State to Regulate Employers’ Use of Artificial Intelligence to Evaluate Video Interviews*, DAVIS WRIGHT TREMAINE LLP (Sept. 3, 2019), <https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2019/09/illinois-becomes-first-state-to-regulate-employers>.

<sup>260</sup> Artificial Intelligence Video Interview Act §§ 1–20 (LEXIS); see Jedreski et al., *supra* note 259.

<sup>261</sup> MD. CODE ANN. LAB. & EMPL. § 3-717 (LEXIS through 2022 legislation).

<sup>262</sup> *Id.*

<sup>263</sup> See Adam Forman & Nathaniel Glasser, *New Maryland Law Requires Applicant Consent Prior to Using Facial Recognition Technology in Job Interviews*, JD SUPRA (July 10, 2020), <https://www.jdsupra.com/legalnews/new-maryland-law-requires-applicant-50746/>.

Several recent state privacy and biometric laws in states including California, Illinois, Virginia, and Colorado also implicate AI governance issues. Many of these comprehensive state privacy laws include additional disclosure, notice, destruction of data, and similar requirements.<sup>264</sup>

### C. Local Laws

There has also been increased interest in regulating AI at the local level. Most notably, in 2021, New York City passed what purports to be the broadest AI employment law in the United States that will severely regulate employers' use of AI tools for hiring and promotion decisions in New York City.<sup>265</sup> Effective in 2023, the law applies to employers that use "automated employment decision tools" which is broadly defined as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence," which scores, classifies, or otherwise makes a recommendation that is used to substantially assist or replace the decision-making process from that of an individual.<sup>266</sup> The law prohibits the use of such tools to screen either an applicant or employee for any employment decision, unless the tool or tools have been subject to a "bias audit" and certified as "unbiased" according to an unspecified standard.<sup>267</sup> A "bias audit" is defined as an impartial evaluation by an independent auditor that tests, at minimum, the tool's disparate impact upon individuals based on their race, ethnicity, and sex.<sup>268</sup> The City's law also includes three disclosure obligations, including a requirement for employers to notify employees or candidates who reside in the city that the tool will be used and of the

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<sup>264</sup> *Automated Video Interviewing*, *supra* note 104, at 140–41; *see also* Chong et al., *supra* note 227.

<sup>265</sup> 2021 N.Y.C. Local Law No. 144, N.Y.C. Admin. Code §§ 20-870, 20-872, 20-873. The law's bias audit requirement includes race, ethnicity, and sex, but does not include disability and age discrimination.

<sup>266</sup> N.Y.C. Admin. Code §§ 20-870, 20-872, 20-873.

<sup>267</sup> *Id.*; *see* Allan G. King & Michael J. Lotito, *In New York City, Subjectivity Trumps Data Analytics*, N.Y. L.J. (Mar. 11, 2022, 10:00 AM), <https://www.law.com/newyorklawjournal/2022/03/11/in-new-york-city-subjectivity-trumps-data-analytics/>.

<sup>268</sup> N.Y.C. Admin. Code §§ 20-870, 20-872, 20-873. *See* Scherer & Shetty, *supra* note 118.



“characteristics” the tool will analyze to assess.<sup>269</sup> Specifically, the law requires employers to notify candidates ten business days prior to using the AI tool with respect to them.<sup>270</sup> Practically, this may not be realistic for many employers because they recruit and hire so quickly.<sup>271</sup> Employers may find this requirement burdensome for extending their hiring process, especially when they are competing for the best available applicants.<sup>272</sup> Also, the law is unclear whether non-residents of the city are required to receive notice even when applying to a city-based position and the level of detail required in disclosing the “summary” of the audit.<sup>273</sup>

Despite the law’s pro-employee intentions, a large number of civil rights groups, including the National Employment Law Project, the New York Civil Liberties Union, and the NAACP Legal Defense and Education Fund, condemned the law as vague and ineffective, contending that it will actually “rubber-stamp” the very discrimination it seeks to prevent.<sup>274</sup> Other groups likewise contend that the ordinance’s key provisions were “introduced and rammed through in a rushed process that excluded workers, civil rights groups, and other stakeholders from providing any input.”<sup>275</sup> On a practical level, practitioners criticize the law because it leaves too many unanswered questions regarding the nature of the required audit, the AI tools, or processes that fall under (or outside of) the law’s mandate, as well as basic coverage.<sup>276</sup> Practitioners contend that “[t]he

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<sup>269</sup> N.Y.C. Admin. Code §§ 20-870, 20-872, 20-873.

<sup>270</sup> *Id.*

<sup>271</sup> See Eli Z. Freedberg et al., *New York City Enacts Law that Hinders Use of Automated Tools in Hiring and Promotion Decisions*, LITTLER (Dec. 28, 2021), <https://www.littler.com/publication-press/publication/new-york-city-enacts-law-hinders-use-automated-tools-hiring-and>.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See Erin Mulvaney, *Artificial Intelligence Hiring Bias Spurs Scrutiny and New Regs*, BLOOMBERG L. (Dec. 29, 2021, 5:30 AM), <https://news.bloomberglaw.com/daily-labor-report/artificial-intelligence-hiring-bias-spurs-scrutiny-and-new-regs> (noting that these groups have argued that the “weak projections will backfire, enabling more biased AI software”).

<sup>275</sup> Scherer & Shetty, *supra* note 118.

<sup>276</sup> See Matthew Jedreski et al., *New York City’s Groundbreaking New Law Will Require Audits of AI and Algorithmic Systems That Drive Employment Deci-*

law's poor construction creates an HR nightmare for employers seeking to staff up."<sup>277</sup> Ultimately, the New York City law could have been a model for jurisdictions around the country to follow, but instead it typifies a missed opportunity and leaves important forms of discrimination unaddressed.

#### D. *International Laws*

In contrast to the United States, many nations have taken a more heavy-handed approach regulating AI. As such, it is important briefly to review certain international AI efforts related to employment matters. One prominent example is the European Union's General Data Protection Regulation ("GDPR"). In addition to broad privacy protections, the GDPR also protects from algorithmic profiling and contains a right to obtain an explanation of any automated decisions that significantly affect users.<sup>278</sup> For instance, one provision effectively prevents companies from engaging in automated decision-making without human intervention that affects an individual's legal rights or that significantly affects an individual, such as entirely automated recruiting.<sup>279</sup>

Even beyond the GDPR, Europe has moved toward comprehensive legislation limiting AI's uses across various industries.<sup>280</sup> In 2021, the European Commission published a landmark AI proposed

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sions, DAVIS WRIGHT TREMAINE (Dec. 13, 2021), <https://www.dwt.com/blogs/artificial-intelligence-law-advisor/2021/12/nyc-employment-ai-bias-audit-law> (noting that the new law does not define who or what constitutes an adequate independent auditor).

<sup>277</sup> King & Lotito, *supra* note 267.

<sup>278</sup> O'KEEFE ET AL., *supra* note 153, at 4–5.

<sup>279</sup> Specifically, Article 22 states that an individual "shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her." O'KEEFE ET AL., *supra* note 153, at 4–5. Commentators explain that pursuant to Article 22, companies can only engage in fully automated decision-making affecting legal or significant rights if required for entering or performing a contract between an organization and an individual, if authorized by law, or if the individual provides explicit consent. *Id.* See also Brandon W. Jackson, *Cybersecurity, Privacy, and Artificial Intelligence: An Examination of Legal Issues Surrounding the European Union General Data Protection Regulation and Autonomous Network Defense*, 21 MINN. J.L. SCI. & TECH. 169, 194–95 (2020).

<sup>280</sup> See O'KEEFE ET AL., *supra* note 153, at 5.

regulation creating the first ever global legal framework focused solely on AI.<sup>281</sup> The European Commission's AI regulation will significantly impact many entities who use, sell, or develop AI systems and introduce a new set of legal obligations as well as a monitoring and enforcement regime that includes substantial non-compliance penalties.<sup>282</sup>

Individual countries have developed policies on AI or have taken steps towards the regulation of AI. On the European front, France, Germany, Austria, and other nations have made significant efforts to encourage the responsible use of AI to prioritize human rights and consumer control.<sup>283</sup> In the United Kingdom, regulators have created a data-protection focused model that may provide clarity in employment matters involving AI.<sup>284</sup> Singapore's Model Governance Framework is illustrative in that it has focused on providing an accountability-based model framework to use AI responsibly.<sup>285</sup> In establishing this framework, the government of Singapore worked closely with industry associations to jointly develop industry standards.<sup>286</sup> Singapore's approach to AI governance has benefitted by adapting or amending already existing laws instead of creating new legislation.<sup>287</sup>

### E. Industry Self-Regulation

Even without national or international regulation, AI's increasing ubiquity and expanding commercial potential has led some com-

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<sup>281</sup> See Sussman et al., *supra* note 38.

<sup>282</sup> *Id.*

<sup>283</sup> See Angelica Salvi del Pero et al., *Using Artificial Intelligence in the Workplace: What are the Main Ethical Risks?* (OECD Social, Employment and Migration Working Papers, Paper No. 273, 2022), <https://www.oecd-ilibrary.org/docserver/840a2d9f-en.pdf?expires=1658773094&id=id&ac-cname=guest&checksum=D5F73A1DB801C415B4538835FF343E3F> (discussing wide range of responses in individual countries).

<sup>284</sup> See Salvi del Pero et al., *supra* note 283, at 46 (discussing the United Kingdom National AI Strategy).

<sup>285</sup> See Shackelford & Dockery, *supra* note 28, at 311.

<sup>286</sup> See *Singapore's Approach to AI Governance*, PERS. DATA PROT. COMM'N, <https://www.pdpc.gov.sg/help-and-resources/2020/01/model-ai-governance-framework>.

<sup>287</sup> See Shackelford & Dockery, *supra* note 28, at 311.

panies to turn to self-regulation. In recent years, it has become common for technology companies, directly or through trade associations, to develop and publish their own AI principles and guidelines, including companies such as Google, Microsoft, Intel, and IBM.<sup>288</sup> Many companies have also formed partnerships to foster responsible AI development and deployment. One of the most prominent examples is the Partnership on AI, which brings together companies such as Amazon and Microsoft with “research institutions, civic societies, and other non-profits under basic tenets to ‘study and formulate best practices on AI technologies.’”<sup>289</sup> The Partnership on AI has developed a series of tenets for the development of AI that commits its members to ongoing engagement with stakeholders to protect the privacy, security, and other rights of individuals.<sup>290</sup> Several leading academic institutions and premier civil rights groups have also developed their own best practices and ethical guidelines.<sup>291</sup> In addition, the World Economic Forum, an international non-governmental organization, published a toolkit that was developed in collaboration with over fifty global HR, legal, and ethics experts to promote the responsible use of AI-based tools for HR purposes.<sup>292</sup> This and other self-regulatory efforts, especially if they are thorough and

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<sup>288</sup> *Id.* at 305–06 (discussing the role that universities around the world have played in developing and publishing ethical guidelines around AI development and deployment).

<sup>289</sup> *See id.*

<sup>290</sup> *See* Michael Guihot et al., *Nudging Robots: Innovative Solutions to Regulate Artificial Intelligence*, 20 VAND. J. ENT. & TECH. L. 385, 433 (2017). Similarly, the Business Roundtable has released a “Roadmap for Responsible AI” that lists 10 core principles that businesses should consider to help ensure the responsible use of AI. *See Business Roundtable Roadmap for Responsible Artificial Intelligence*, BUS. ROUNDTABLE (Jan. 26, 2022), [https://s3.amazonaws.com/brt.org/Business\\_Roundtable\\_Artificial\\_Intelligence\\_Roadmap\\_Jan2022\\_1.pdf](https://s3.amazonaws.com/brt.org/Business_Roundtable_Artificial_Intelligence_Roadmap_Jan2022_1.pdf).

<sup>291</sup> *See* Shackelford & Dockery, *supra* note 28, at 311 (listing academic universities and civil rights organizations); CTR. FOR DEMOCRACY AND TECH., ALGORITHM-DRIVEN HIRING TOOLS: INNOVATIVE RECRUITMENT OR EXPEDITED DISABILITY DISCRIMINATION? 15 (2020), <https://cdt.org/wp-content/uploads/2020/12/Full-Text-Algorithm-driven-Hiring-Tools-Innovative-Recruitment-or-Expedited-Disability-Discrimination.pdf>.

<sup>292</sup> *See Human-Centred Artificial Intelligence for Human Resources*, WORLD ECON. F., <https://www.weforum.org/projects/human-centred-artificial-intelligence-for-human-resources> (last visited Oct. 23, 2022).

successful, will potentially deter more heavy-handed governmental obligations.<sup>293</sup>

Individual companies are also spearheading efforts to combat AI bias in other ways. For instance, IBM has developed an AI Fairness 360 toolkit.<sup>294</sup> This software toolkit checks for and mitigates unwanted bias in datasets, machine learning models, and state-of-the-art algorithms.<sup>295</sup> The toolkit is also an open-source project, allowing outside contributors to share their metrics and algorithms.<sup>296</sup>

Other prominent self-regulatory associations have emerged in recent years. In late 2021, employers across various industries, including CVS Health, Deloitte, General Motors, Humana, Mastercard, Nike, and Walmart formed the Data & Trust Alliance.<sup>297</sup> The group seeks to adopt criteria to mitigate data and algorithmic bias in HR and workforce decisions, including recruiting, compensation, and employee development.<sup>298</sup> To date, the group has developed a comprehensive evaluation and scoring system for AI software.<sup>299</sup>

Many commentators have argued that self-regulation within the private sector is imperative for addressing AI employment-related problems since the industry has the expertise that is incomparable to any other entity involved in the regulatory process.<sup>300</sup>

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<sup>293</sup> See Guihot et al., *supra* note 290, at 433.

<sup>294</sup> Kush R. Varshney, *Introducing AI Fairness 360*, IBM: RESEARCH BLOGS (Sept. 19, 2018), <https://www.ibm.com/blogs/research/2018/09/ai-fairness-360/>. See also Egger, *supra* note 32, at 556–57.

<sup>295</sup> See Varshney, *supra* note 294.

<sup>296</sup> See *id.*

<sup>297</sup> See Lohr, *supra* note 34.

<sup>298</sup> See *id.*

<sup>299</sup> See *id.* (More specifically, the Data & Trust Alliance has created a fifty-five question evaluation, which covers thirteen topics, and a scoring system to evaluate AI use.)

<sup>300</sup> See, e.g., Egger, *supra* note 32, at 556; Magnuson, *supra* note 10, at 373 (contending that “it is likely that self-regulation will be significantly more effective at cabining artificial intelligence’s risks than regulatory enforcement actions could ever be. Regulators are, by their very nature, outsiders. They do not know the inner workings of financial institutions nearly as well as insiders do, and they do not have the levels of expertise in machine learning that are available to the private sector.”); see also Guihot et al., *supra* note 290, at 455 (explaining that public regulators lack the requisite knowledge to understand the problem that needs regulating).

Industry self-regulatory approaches are a highly effective mechanism to manage risk because of the rapidly changing nature of the underlying technology.<sup>301</sup> Not surprisingly, in the absence of a federal standard, a growing number of companies have adopted policies and procedures designed to prevent AI tools from delivering biased results that could perpetuate or even worsen employment discrimination.<sup>302</sup>

#### IV. PROPOSED SOLUTIONS

The rapid growth of AI has led to a growing number of both legislative and non-regulatory proposals. At the outset, scholars and other commentators have stressed the need to be cautious when considering laws and regulations related to AI due to the uncertainty surrounding the technology.<sup>303</sup> Indeed, because AI lacks a consistent and established definition or manifestation, legislators and regulators have faced challenges developing a clear AI policy infrastructure.<sup>304</sup>

A growing number of legislative proposals have focused on alternatives to the direct regulation of AI systems by creating centralized agencies or commissions for AI technologies.<sup>305</sup> Any such body would likely be responsible for identifying principles to govern the development and application of AI, as well as enforcing any promulgated standards. On the other hand, different proposals have focused more on assigning and quantifying liability for actions taken or influenced by AI systems.<sup>306</sup> On the international front, some organizations and nations have proposed regulations that aim to cover

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<sup>301</sup> Guihot et al., *supra* note 290, at 432.

<sup>302</sup> Lohr, *supra* note 34.

<sup>303</sup> See Jaclyn Diaz, *Congress Plays Catch-Up on Artificial Intelligence at Work*, BLOOMBERG L. (Aug. 27, 2019, 6:05 AM) <https://news.bloomberglaw.com/daily-labor-report/congress-plays-catch-up-on-artificial-intelligence-at-work>.

<sup>304</sup> See Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 407 (2017).

<sup>305</sup> See Jackson, *supra* note 29, at 50.

<sup>306</sup> See *id.* at 55–57.

providers and vendors of AI systems, meaning the entities that develop the system and place it on the market or that develop the system and use it for themselves.<sup>307</sup>

Meanwhile, a growing number of experts, scholars, and industry executives have focused on innovative and forward-thinking non-legislative proposals. Specifically, some have highlighted the model risk management framework implemented in the financial sector.<sup>308</sup> Since the financial sector has applied this framework for over a decade, companies using AI can pay attention to lessons learned over the years to best manage risks associated with AI and other emerging technologies.<sup>309</sup> The crux of such a framework is that companies must audit their AI tools to verify objectively that they are operating as advertised and free from unlawful bias.<sup>310</sup>

This Part explores a few legislative and other proposals advanced by practitioners and scholars in recent years. Because global proposals are illuminating as potential guideposts for United States AI policy, this Part will also examine international proposals, such as the European Union's Artificial Intelligence Act.

#### A. U.S. Legislative Proposals

In recent years, Congress has expressed interest in regulating AI. In 2022, Democratic members of Congress reintroduced the Algorithmic Accountability Act, which would grant the FTC authority to promulgate regulations mandating that large companies assess their AI tools for potential unlawful bias.<sup>311</sup> Specifically, the bill would require all large companies to perform a so-called bias impact assessment of any automated system that makes critical decisions in a variety of sectors, including employment, financial services, healthcare, housing, and legal services.<sup>312</sup> The bill has been strongly

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<sup>307</sup> See *id.* at 50.

<sup>308</sup> See Skanderson, *supra* note 39, at 356.

<sup>309</sup> *Id.* at 358–59.

<sup>310</sup> *Id.* at 356–57.

<sup>311</sup> See generally Algorithmic Accountability Act of 2022, H.R. 6580, 117th Cong. § 1 (2022).

<sup>312</sup> *Id.* The proposal's scope is far reaching as it defines "automated decision system" to include "any system, software, or process (including one derived from

criticized for its perceived overreach, lack of definitional clarity, insufficient direction to the agency, and several other shortcomings and is unlikely ever to become law.<sup>313</sup>

Other legislative proposals advocate for the creation of new agencies and certifying entities. One proposal would create a new agency with the authority to block certain misuses of technology, funded by a four percent AI tax.<sup>314</sup> Critics of the overall proposal largely focus on this tax because there would be a lack of support in the business community.<sup>315</sup> Another legislative proposal would create a certifying agency with broad powers to ban products it believes to be unsafe, and creates a liability system that distinguishes between certified and uncertified AI programs.<sup>316</sup> The proposal's architect contends that a properly structured approval process might help ensure that data mining models are not statistically biased and that the social costs of using such models do not exceed the benefits.<sup>317</sup> A somewhat related proposal has been advanced in which external third-party audits specific to automated hiring systems would be completed either through a governmental agency or a non-

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machine learning, statistics, or other data processing or artificial intelligence techniques and excluding passive computing infrastructure) that uses computation, the result of which serves as a basis for a decision or judgment." *Id.*

<sup>313</sup> See Hoffman & Podgurski, *supra* note 242, at 36. The other shortcomings the authors list are that the bill: (1) applies only to large or high-revenue companies; (2) relies only on the FTC for enforcement; (3) does not conduct impact assessment by relying on diverse stockholder input; and (4) does not give the public access to impact assessment outcomes. *Id.*

<sup>314</sup> H.R. 6090; Diaz, *supra* note 303. Specifically, this legislation would establish the Artificial Intelligence Board to regulate and resolve matters arising from the creation, development, and deployment of AI. *Id.*

<sup>315</sup> Diaz, *supra* note 303 (citing a practitioner contending that the proposed tax would "create panic" among companies and stressed that any proposal to monitor AI should leave room for the innovation of companies and employers).

<sup>316</sup> See Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 HARV. J.L. & TECH. 353, 393 (2016) (explaining that instead of giving the new agency broad powers to ban products it believes to be unsafe, the proposal would "create a liability system under which the designers, manufacturers, and sellers of agency-certified AI programs would be subject to limited tort liability, while uncertified programs that are offered for commercial sale or use would be subject to strict joint and several liability").

<sup>317</sup> See generally *id.* at 393–97.



governmental certifying agency.<sup>318</sup> Under this proposal, the third-party certification entity would be a multi-disciplinary team of auditors consisting of lawyers, software engineers, or data scientists.<sup>319</sup>

There are far more aggressive proposals at the state level. Most notably, in 2022, the California Fair Employment and Housing Council proposed sweeping modifications to the state's employment antidiscrimination laws that would significantly expand liability exposure for employers and third-party vendors that use, sell, or administer AI tools in connection with employment decision-making.<sup>320</sup> The draft regulations seek to make unlawful the use of automated-decision systems that "screen out or tend to screen out" applicants or employees (or classes of applicants or employees) on the basis of a characteristic protected by state law, unless shown to be job-related and consistent with business necessity.<sup>321</sup> These requirements would apply to employer and third-party decision-making throughout the employment lifecycle.<sup>322</sup> Importantly, the proposed regulations apply not only to employers but also to "employment agencies," which could include vendors and administrators of AI tools used for making employment decisions, if they are unlawfully discriminatory.<sup>323</sup> In other words, vendors that develop and sell AI tools would be explicitly and directly liable if their automated-decision system screens out, or tends to screen out, an applicant or employee based on a protected characteristic.<sup>324</sup> Moreover, California's

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<sup>318</sup> See *Workers' Civil Rights*, *supra* note 149, at 17.

<sup>319</sup> *Id.* at 18 (explaining that "[s]uch a certification system could serve as a feedback mechanism to enable the better design of automated hiring systems").

<sup>320</sup> See Jim Paretti et al., *California Fair Employment & Housing Council Proposes Sweeping Regulation of Automated Decision-making and Artificial Intelligence in Employment*, LITTLER (Mar. 17, 2022) <https://www.littler.com/publication-press/publication/california-fair-employment-housing-council-proposes-sweeping>.

<sup>321</sup> See *id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> See Brent Hamilton & Jeffrey S. Bosley, *California FEHC Proposes Sweeping Regulations Regarding Use of Artificial Intelligence and Machine Learning in Connection With Employment Decision-Making*, DAVIS WRIGHT TREMAINE (Apr. 5, 2022) <https://www.dwt.com/blogs/employment-labor-and-benefits/2022/04/california-ai-employment-laws>.

proposed regulations would create private causes of action for aiding and abetting when a third-party provides unlawful assistance, unlawful solicitation or encouragement, or unlawful advertising when that third-party advertises, sells, provides, or uses an automated-decision system that may result in unlawful discrimination.<sup>325</sup> Finally, the draft regulations would expand recordkeeping requirements from two years to four years, which practitioners have described as excessively burdensome.<sup>326</sup>

### B. *Model Risk Management and AI*

A growing number of experts have been pushing a model risk management (“MRM”) framework for AI based on model governance derived from lessons learned from the financial services sector.<sup>327</sup> An MRM framework essentially uses internal audits to ensure that the application of AI in employment decisions complies with an employer’s duty to comply with applicable antidiscrimination laws.<sup>328</sup> Experts argue that the process of these self-audits is so well developed in the financial sector that non-financial industries and businesses can look to the financial services approach for guidance regarding appropriate regulatory standards and industry practices that facilitate the lawful use of AI in employment decisions.<sup>329</sup> Financial sector MRM regulatory guidance has been developed jointly by the various federal financial regulators and international organizations concerned with financial stability.<sup>330</sup> In other words, employers may look to the standards and best practices in the financial

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<sup>325</sup> *Id.* It is beyond the scope of this Article to address potential conflicts between these proposed California regulations and the federal Communications Decent Act section 230 immunity for third-party platforms who might publish advertisements for AI tools ultimately deemed to be discriminatory towards protected groups.

<sup>326</sup> *Id.* (“Given the nature of algorithms and machine learning, that definition of machine-learning data could require an employer or vendor to preserve data provided to an algorithm not just four years looking backward, but to preserve all data (including training datasets) ever provided to an algorithm and extending for a period of four years after that algorithm’s last use.”).

<sup>327</sup> See Skanderson, *supra* note 39, at 356.

<sup>328</sup> *Workers’ Civil Rights*, *supra* note 149, at 16.

<sup>329</sup> Skanderson, *supra* note 39, at 356.

<sup>330</sup> *Id.*

sector as a successful framework for developing their own effective internal auditing processes.

Applying MRM concepts to AI employment technology provides a well-tread framework in an innovative application for managing the unique challenges that employers face when integrating AI into their employment processes. As such, non-financial companies that use predictive models with potential for discrimination risk can use the financial sector's MRM principles and processes to guide their own management of model risk, even though they are not subject to the same regulatory requirements as financial institutions.<sup>331</sup> Experts have emphasized that the processes to do so do not need to be as elaborate as those required of financial institutions, but the same principles may be applied effectively in the narrower context of controlling discrimination and other legal concerns.<sup>332</sup>

Scholars have noted that similar self-auditing is regularly used and recommended in other industries, including the manufacturing sector, because, if executed correctly, it helps companies comply with the relevant legal requirements.<sup>333</sup> One noteworthy example is the self-audits used by the Occupational Safety and Health Administration ("OSHA"), whereby such self-audits are used to assess workplace hazards, controls, and programs to help ensure that companies and their employees are complying with OSHA regulations.<sup>334</sup> OSHA also allows businesses to hire a consultant to perform self-audits if OSHA is not able to do an inspection immediately.<sup>335</sup> Another comparable self-audit program was DOL's former Payroll Audit Independent Determination ("PAID") Program, which encouraged employers to self-audit their compensation practices for compliance with the Fair Labor Standards Act.<sup>336</sup> PAID

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<sup>331</sup> *Id.* at 358–59.

<sup>332</sup> *Id.*

<sup>333</sup> *Age Discrimination*, *supra* note 147, at 17.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> See Yvette Gatling et al., *DOL Ends Payroll Audit Independent Determination (PAID) Program for Employers*, LITTLER (Feb. 1, 2021), <https://www.littler.com/publication-press/publication/dol-ends-payroll-audit-independent-determination-paid-program>.

was intended to resolve wage and hour disputes with greater expediency and lower costs for employers.<sup>337</sup> To do so, PAID incentivized employers to self-report overtime and minimum wage violations of the Fair Labor Standards Act by not only mitigating the threat of penalties and extended statute of limitations, but also foreclosing affected workers from taking any private action based on the identified violations.<sup>338</sup> In exchange, the DOL would supervise settlements, approve agreements, and ensure full payment of back wages.<sup>339</sup>

Currently, the federal government has moved toward a risk management framework. In the National Defense Authorization Act for 2021, Congress directed the Department of Commerce's National Institute of Standards and Technology to develop "a voluntary risk management framework for trustworthy AI systems."<sup>340</sup> Later in 2021, the National Institute of Standards and Technology issued a Request for Information seeking input to inform the development of the AI Risk Management Framework.<sup>341</sup> Practitioners have explained that this framework "may greatly influence how companies and organizations approach AI-related risks, including avoiding bias and promoting accuracy, privacy, and security."<sup>342</sup>

While equipping MRM tools to AI will certainly require thoughtful policy considerations such as what to include in a model inventory, as well as determining risk tolerance, risk levels, and roles and responsibilities, area experts note that existing frameworks can serve as a useful starting point in this endeavor.<sup>343</sup> Companies developing and using machine learning and other predictive models can design an effective system for MRM by ensuring that there is an

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<sup>337</sup> *See id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* (noting that under the Biden Administration, DOL abruptly ended the PAID program in 2021 even though the program was highly successful).

<sup>340</sup> *See* Sussman et al., *supra* note 226.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *See* Bernhard Babel et al., *Derisking Machine Learning and Artificial Intelligence*, MCKINSEY & CO. (Feb. 19, 2019), <https://www.mckinsey.com/business-functions/risk-and-resilience/our-insights/derisking-machine-learning-and-artificial-intelligence>.

appropriate level of model governance structure that provides mechanisms for identifying, evaluating, and eliminating any statistically significant discrimination associated with the models.<sup>344</sup>

For these reasons, civil rights advocates, regulators, AI developers, and other stakeholders should look at the financial industry's MRM framework and identify concepts that can and should be applied more broadly. Employers and developers implementing AI will be well-served by learning from the decade-old experience of the financial industry and adopting the lessons learned from this experience.

### C. Collection Efforts

Some commentators have pushed for increased collection of data concerning ratings and employment outcomes among different groups of workers as an important step to identify discrepancies based on protected characteristics.<sup>345</sup> Specifically, this would involve publishing data broken down by specific demographic categories to determine whether certain people are at a greater risk of receiving low ratings from consumers or other negative performance feedback in an algorithm because of protected bases.<sup>346</sup> But data collection efforts are usually unhelpful and not useful. Collecting data just for the sake of collecting data is simply not advantageous. Ultimately, raw data without proper context undermines any proposal to increase collection efforts.<sup>347</sup>

Practitioners have strongly criticized the efficacy of data collection in preventing and remedying employment discrimination. Several studies commissioned by OFCCP have determined that “the predictive ability of the data gathering to identify gender discrimination was ‘only slightly better than chance,’ resulting [in] both false positives and false negatives.”<sup>348</sup> Investigating these false pos-

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<sup>344</sup> *Id.*

<sup>345</sup> Yang, *supra* note 16, at 237; see Moreno, *supra* note 156.

<sup>346</sup> Yang, *supra* note 16, at 237.

<sup>347</sup> See Richard Meneghello, *Fisher Phillips Offers Comments on EEOC's Proposed Pay Data Collection Rules*, JD SUPRA (Apr. 7, 2016), <https://www.jdsupra.com/legalnews/fisher-phillips-offers-comments-on-eeoc-58578/>.

<sup>348</sup> *Id.*

itives and false negatives will surely waste valuable EEOC and employer resources that should instead be spent on more targeted and meaningful efforts. The EEOC's own work study group tasked with examining the concept of collecting pay data concluded that past proposals were "quite burdensome," "unbelievable," and "scary."<sup>349</sup>

In addition, the aggregated nature of the data collected renders it difficult, if not impossible, in measuring, quantifying, and proving discrimination claims.<sup>350</sup> Practitioners have stressed the presence of numerous factors that may impact employment decisions and for which data collection cannot properly address.<sup>351</sup>

#### D. *European Union's Artificial Intelligence Act*

The European Union's legislative proposal may also impact the regulatory direction of the United States. American policymakers at both the federal and state levels have shown a particular interest in the proposed European Union's Artificial Intelligence Act ("EU AI Act").<sup>352</sup> The proposal's risk-based approach to the regulation of AI seeks to build trust in the technology by protecting fundamental rights, ensuring public safety, and fostering innovation.<sup>353</sup> To that end, the proposal creates a four-level taxonomy of risk in AI: unacceptable, high, limited, and minimal to no risk.<sup>354</sup> AI used in employment, management of workers, and access to self-employment, such as resume-sorting software utilized in recruitment procedures, are classified as high-risk.<sup>355</sup> The high-risk classification subjects the AI systems to strict safeguards before they can be used by the

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<sup>349</sup> *Id.*

<sup>350</sup> See Gary Siniscalco et al., *The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act*, 29 A.B.A. J. LAB. & EMP. L. 395, 405 (2014) (arguing that the data may have little meaning since numerous factors go into pay decisions that may account for pay differences).

<sup>351</sup> See, e.g., Sussman et al., *supra* note 38.

<sup>352</sup> See *id.*

<sup>353</sup> See *id.*

<sup>354</sup> *Id.*

<sup>355</sup> See *id.* (noting that other AI systems classified as "high risk" include systems used for biometric identification, critical infrastructure, and the dispatch of emergency services); see also Salvi del Pero et al., *supra* note 283, at 36, 47.

public, including robust reporting, disclosure, validation, and accuracy requirements.<sup>356</sup> Still, some critics of the European Union proposal contend that the requirement of certifying high-risk AI before it is placed in the market might only result in high administrative costs and may harm a company's ability to innovate and improve.<sup>357</sup> Other critics go even further and argue that compliance with the law will impose onerous barriers for AI innovation in many sectors, deter investors and talent, create a very difficult environment for startups to develop innovative AI services, and could push small and medium-sized businesses out of the market.<sup>358</sup>

But perhaps most notable is that the proposed regulation would primarily cover providers and vendors of AI systems—the entities that develop the system and place it on the market or that develop the system and put it to use for themselves.<sup>359</sup> This is distinguishable from the current legal framework in the United States, where generally employers—not vendors—are usually solely liable for employment discrimination.<sup>360</sup> This movement toward increased focus on vendor liability is important, especially in light of the European

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<sup>356</sup> See Sussman et al., *supra* note 38; see also *Regulatory Framework Proposal on Artificial Intelligence*, EUR. COMM'N, <https://digital-strategy.ec.europa.eu/en/node/9745/printable/pdf> (last visited Sept. 21, 2022) (explaining that obligations include “adequate risk assessment and mitigation systems; high quality of the datasets feeding the system to minimise [sic] risks and discriminatory outcomes . . . [and] appropriate human oversight measures . . .” among other requirements).

<sup>357</sup> Stefan Heiss, *Towards Optimal Liability for Artificial Intelligence: Lessons from the European Union's Proposals of 2020*, 12 HASTINGS SCI. & TECH. L.J. 186, 216 (2021).

<sup>358</sup> See Adam Thierer, *Why is the US Following the EU's Lead on Artificial Intelligence Regulation?*, THE HILL (July 21, 2022, 4:30 PM), <https://thehill.com/opinion/technology/3569151-why-is-the-us-following-the-eus-lead-on-artificial-intelligence-regulation/>.

<sup>359</sup> See Sussman et al., *supra* note 38.

<sup>360</sup> See *Artificial Intelligence Opinion Liability*, *supra* note 69, at 148–49 (explaining that “AI that discriminates based on gender because of biases in the data used to train it will likely not result in liability for the company that created the AI (because there is no evidence of scienter or even negligence)”; see also Bathaee, *supra* note 70, at 919 (contending that “the law will insulate the creator of the AI from liability so long as he can demonstrate that it was designed for a particular purpose and was reasonably accurate and effective in accomplishing that purpose.”)).

Commission's Expert Group on Liability and New Technologies' report *Liability for Artificial Intelligence*, that concluded that "inadequacies in a system of liability might 'compromise the expected benefits' of such a technology."<sup>361</sup> Regardless, if the EU AI Act is adopted, it will undoubtedly have a significant impact on companies doing business in the European Union that rely on AI in any aspect of their business.

#### V. A DEREGULATORY APPROACH TO AI

In the absence of an overarching federal legislative or regulatory solution, a deregulatory approach can, and indeed should, be utilized. This deregulatory approach must account for the benefits of the technology, the related risks, and possible barriers to innovation. Fundamentally, the current law is sufficient to support effective enforcement on AI systems when necessary. A recent comprehensive study suggests that policymakers can address most of AI's "legal and societal challenges by adapting regulations already in the books."<sup>362</sup> This systematic study concluded that "despite AI's incredible capabilities, major changes to policy paradigms are not required" to address the risks.<sup>363</sup>

Even if a legislative proposal were adopted, the EEOC and other agencies' work would not end there. Relatedly, any regulatory proposal would take time to implement, so the existing framework is an important consideration. Likewise, the legislative process is often described as notoriously tedious and reactionary which makes it difficult for legislation to keep pace with emerging technologies.<sup>364</sup> For these reasons, this Part examines the legal mechanisms that can help reduce the risks associated with AI, reduce uncertainty, and protect employees without inhibiting innovation.

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<sup>361</sup> See Benny Chan, *Applying a Common Enterprise Theory of Liability to Clinical AI Systems*, 47 AM. J.L. & MED. 351, 358 (2021).

<sup>362</sup> Carlos Ignacio Gutierrez, *Can Existing Laws Cope with the AI Revolution?*, TECH STREAM (July 8, 2020), <https://www.brookings.edu/techstream/can-existing-laws-cope-with-the-ai-revolution/>.

<sup>363</sup> *Id.*

<sup>364</sup> Jackson, *supra* note 29, at 51.



### A. *Use Existing Legal Framework*

Even though some of the laws the EEOC enforces are over half a century old, by their terms, they “apply with equal force to decisions made by algorithms as they do to decisions made by individuals.”<sup>365</sup> The EEOC is readily adapting to the massive growth of AI and its intersection with employment discrimination law. For example, in 2021, the EEOC’s systemic investigators received training on using AI in employment practices.<sup>366</sup>

In addition, legal scholars have emphasized that “employment antidiscrimination law imposes an affirmative duty of care on employers to ensure that they are avoiding practices that would constrain equal opportunity in employment.”<sup>367</sup> This affirmative duty could extend to an auditing imperative for certain AI tools such as video interviews. Scholars have noted that Title VII, in particular, “could be read to directly prohibit classification bias when algorithms operate to systematically disadvantage protected groups.”<sup>368</sup>

Fully exploring specific solutions to each phase of AI and each type of technology is beyond the scope of this Article, but a few examples are illustrative. An algorithm that discerns an applicant’s physical or mental disability may violate the ADA’s prohibition against medical inquiries or exams in pre-employment assessments.<sup>369</sup> Likewise, AI technology that is operated by voice recognition and analysis that screens out an individual with a speech impediment or an individual with a hearing impairment would likely violate the ADA.<sup>370</sup> AI technology that operates by voice commands or voice analysis that screens out individuals who do not speak English as their first language may contravene Title VII’s prohibition

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<sup>365</sup> Sonderling, *supra* note 5.

<sup>366</sup> *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, *supra* note 27.

<sup>367</sup> *Automated Video Interviewing*, *supra* note 104, at 125 (collecting scholarly articles advancing this contention).

<sup>368</sup> Kim, *supra* note 1, at 916.

<sup>369</sup> See 42 U.S.C. § 12112(d)(2)(A); Friedman & McCarthy, *supra* note 24, at 4.

<sup>370</sup> See *Automated Video Interviewing*, *supra* note 104, at 131 (citing past EEOC positions and case law in concluding that “video algorithms which consider speaking patterns in making an employment decision may directly violate the ADA”).

against national origin discrimination.<sup>371</sup> Advertisements for positions within its company that limit the audience for their advertisement to younger applicants would likely run afoul of the ADEA, a statute that expressly prohibits job advertisements that indicate an age preference.<sup>372</sup> Likewise, online automated hiring platforms that include design features that discourage older applicants would also contravene the ADEA. These are only a few of the examples of the potential discriminatory impact of AI applications in employee hiring.

Courts are well-equipped to deal with the complexities of reconciling new AI technology with long-established legal principles. ADA Title III website and mobile app accessibility litigation is instructive and demonstrates that courts can account for changes in technology in discrimination suits.<sup>373</sup> The ADA was passed in 1990, well before the modern internet became ubiquitous, and few ever considered how it might need to be interpreted to account for the explosive growth of digital content.<sup>374</sup> But over the past decade, courts have increasingly adjudicated lawsuits filed by individuals with disabilities claiming that businesses' websites and mobile apps were not accessible to them, and the courts have applied the longstanding antidiscrimination law to resolve these modern disputes.<sup>375</sup> For instance, one federal district court explained that excluding certain online retailers and their commercial websites from the reach of Title III "would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."<sup>376</sup> In addition, the courts have significant expertise with the

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<sup>371</sup> *Id.* at 127 (noting the Title VII case law suggests that accent discrimination is actionable).

<sup>372</sup> *See* 29 U.S.C. § 623(e).

<sup>373</sup> *See generally* Minh Vu et al., *The Law on Website and Mobile Accessibility Continues to Grow at a Glacial Pace Even as Lawsuit Numbers Reach All-Time Highs*, 48 L. PRAC. 44, 47–49 (2022) (demonstrating how courts can account for changes in technology in discrimination suits).

<sup>374</sup> *See id.*

<sup>375</sup> *Id.* at 44–46.

<sup>376</sup> *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

bedrock principles of contract, tort, product liability, and other areas of the law requiring the allocation of responsibility and fault.

While multiple entities are engaged in the development and implementation of AI products that may cause discriminatory harm, the courts are fully capable of allocating liability among several potential defendants.<sup>377</sup> As in many other contexts unrelated to technological advances, the judicial system will serve an important role in providing an indirect form of regulation through the development of legal standards, a body of case law, and subsequent deterrence.

However, the chief problem with relying on the existing legal framework is that the protection provided by the courts is remedial, not preventative. To that end, courts assess liability and damages for activity that has already transpired based on prior legal precedent. Accordingly, proactive measures, such as more guidance and other agency-available resources, must also be considered in order to prevent discrimination from occurring in the first place.

#### B. *EEOC Commissioner Charges and Directed Investigations*

Going forward, the EEOC should consider using Commissioner charges and directed investigations to address AI-related employment discrimination. Both tools are rarely used by the Commission, even though they facilitate and may expedite the initiation of targeted bias probes.<sup>378</sup> Congress granted the EEOC authority to investigate possible discrimination under Title VII, the ADA, and GINA using Commissioner charges.<sup>379</sup> Congress also authorized the EEOC to investigate possible age discrimination under the ADEA and possible pay discrimination under the Equal Pay Act through

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<sup>377</sup> See Jackson, *supra* note 29, at 51.

<sup>378</sup> See *Commissioner Charges and Directed Investigations*, EEOC, <https://www.eeoc.gov/commissioner-charges-and-directed-investigations> [hereinafter *Commissioner Charges*].

<sup>379</sup> See *id.*; see also 42 U.S.C. § 2000e-5(b) (referring to charges “filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission” (emphasis added)).

“directed investigations.”<sup>380</sup> Directed investigations are unique, because the EEOC can initiate these investigations without an underlying charge from an identifiable victim.<sup>381</sup>

An EEOC Commissioner charge or directed investigation most often arises in one of three ways. The first way is when a field office learns about possible discrimination in a workplace in the absence of a charge through “direct observation, from local community leaders, advocacy groups, and [state level] partners, or through the sharing of information between the EEOC and [DOJ], Labor, and other federal agencies.”<sup>382</sup> The second way is when a field office learns about “new allegations of discrimination while investigating an existing charge and is not able to expand the existing charge to address the new allegation(s).”<sup>383</sup> The third way is when a Commissioner learns about discrimination in a workplace and executes a charge, which a field office then investigates.<sup>384</sup>

Commissioner charges are useful for identifying and remedying possible systemic or pattern-or-practice discrimination rather than single plaintiff discrimination because they are initiated from a broader enforcement perspective than that possessed or can as readily be remedied by the allegations of a single party.<sup>385</sup> Furthermore, new HR technologies raise special concerns of systemic discrimination, particularly when these new technologies are implemented at all stages of the hiring process. Some AI groups have argued that because the EEOC has not acted upon a single complaint involving the use of new hiring technologies, a more proactive approach involving the use of Commissioner charges is necessary.<sup>386</sup>

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<sup>380</sup> 29 U.S.C. § 626(a) (2018) (stating that the EEOC “shall have the power to make investigations”); 29 U.S.C. § 211(a) (2018) (specifying that EEOC “may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter”).

<sup>381</sup> See *Commissioner Charges*, *supra* note 378.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Guess What? The EEOC Doesn't Always Need an Individual Charge to Investigate Possible Discrimination at Your Workplace*, CARLTON FIELDS (June 9, 2020), <https://www.carltonfields.com/insights/publications/2020/guess-what-the-eeoc-doesn-t-always-need-an-individ>.

<sup>386</sup> See *id.*

Commissioner charges often increase the scope and complexity of an investigation for those responding to and defending against them while raising the financial stake.<sup>387</sup> For the EEOC, Commissioner charges that reach the litigation stage “may involve a major expenditure of agency resources, including staffing and staff time, and/or expenses associated with extensive discovery or expert witnesses.”<sup>388</sup> Practitioners have explained that “given their public interest and class-based nature, [C]ommissioner charges are the very kind that the EEOC may be inclined to pursue in litigation if after an investigation reasonable cause is found and a settlement ‘acceptable to the commission’ cannot be reached.”<sup>389</sup> Not surprisingly, some EEOC Commissioners have shown interest in investigating AI employment discrimination via Commissioner charges.<sup>390</sup>

Notably, filing charges can oftentimes be difficult for job applicants because they usually lack basic information about any discriminatory hiring policy or practice.<sup>391</sup> When AI is involved in the hiring process, Commissioner charges could be especially helpful, because the victims of employment discrimination are oftentimes unaware that they have been discriminated against. For instance, targeted online job advertisements are often opaque and the targeting is usually not fully explainable.<sup>392</sup> Those in the excluded group likely will never see the job advertisement at all and therefore will be unable to ask why they are not seeing the particular job posting.<sup>393</sup> Although they do not know of the existence of the advertisement, they arguably have suffered a tangible harm by being denied information about job opportunities.<sup>394</sup> An EEOC Commissioner charge or directed investigation could potentially uncover and root out

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<sup>387</sup> *See id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *See Smith, supra* note 26.

<sup>391</sup> *See* Memorandum from Harlan Yu et al. to the U.S. EEOC et al. 5 (July 13, 2021), <https://www.upturn.org/static/files/letter-to-ostp-on-hiring-technologies-20210713.pdf>.

<sup>392</sup> *See* Pauline T. Kim, *Big Data and Artificial Intelligence: New Challenges for Workplace Equality*, 57 U. LOUISVILLE L. REV. 313, 324 (2019).

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

these discriminatory actions. The EEOC's then-Chair, Janet Dhillon, commented that "Commissioner charges and directed investigations are important tools in the Commission's arsenal to fight employment discrimination, and it is vital that the public knows how we use them."<sup>395</sup>

### C. *Federal Agencies Should Promote Voluntary Compliance Programs*

Federal agencies such as the EEOC should encourage and incentivize companies to create voluntary compliance programs. A voluntary compliance program would allow employers to ensure—on their own—that they comply with their legal and ethical obligations, provided the Commission clearly established methods, levels, and results that, in its view, complied with legal requirements. Employers should be strongly encouraged to audit their algorithms by refining or discarding biased models to mitigate discriminatory effects.<sup>396</sup> If an algorithm is one aspect of a selection process, federal agencies should incentivize employers to ensure their selection processes are unbiased, even though it may be unclear which factors in the algorithm may cause a disparate impact.<sup>397</sup> To achieve this end, employers should be given a degree of protection if they act in good faith to evaluate their HR processes for potential bias and take steps to remove that bias or error.<sup>398</sup> One scholar advocating for such an approach explains that "[a]nti-discrimination law will not achieve its purposes if it gives employers an incentive to bury their heads in the sand and avoid finding out the effects of their practices."<sup>399</sup>

At the end of the day, government efforts to help employers voluntarily comply with these obligations will help prevent unlawful discrimination and is undoubtedly part of the EEOC's statutory mission.<sup>400</sup> Moreover, Title VII, which created the EEOC, specifically

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<sup>395</sup> Press Release, EEOC, *supra* note 237.

<sup>396</sup> See Kim, *supra* note 392, at 327.

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (noting that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities

emphasizes pre-suit voluntary compliance.<sup>401</sup> After receiving a complaint, Title VII provides that the EEOC “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”<sup>402</sup> In 2020, the EEOC introduced two mediation pilot programs dedicated to increasing voluntary resolutions, thereby demonstrating that the EEOC’s appetite for voluntary compliance remains high.<sup>403</sup>

Moreover, the voluntary compliance remains a critical component of federal antidiscrimination law.<sup>404</sup> Indeed, the Supreme Court has repeatedly emphasized that employer compliance, including by non-litigation means, is “the preferred means of achieving the objectives of Title VII” and “essential to the statutory scheme.”<sup>405</sup> The Supreme Court has strongly cautioned that unless employers can act to avoid practices that have a disparate impact, the voluntary compliance efforts that Title VII calls for would come “to a near standstill.”<sup>406</sup>

#### D. Federal Agencies Should Provide More Guidance

Federal agencies, especially the EEOC, should prioritize issuing more AI guidance to the public. Guidance that better clarifies how to tailor and test AI platforms and workplace technologies is especially important for employers and vendors to ensure that they comply with federal antidiscrimination laws and, conversely, understand failures and circumstances that are likely to lead to liability. This is especially important because the current legal landscape does not provide employers with clear answers in the form of regulations or guidance.<sup>407</sup> Indeed, practitioners regularly claim that government agencies have provided little direction regarding ways that they may ensure compliance with federal law, compelling employers to guess

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and remove barriers that have operated in the past to favor an identifiable group” of employees).

<sup>401</sup> Trindel et al., *supra* note 74, at 244–45.

<sup>402</sup> *Id.* at 245 (quoting 42 U.S.C. § 2000e-5).

<sup>403</sup> *Id.*

<sup>404</sup> See Kim, *supra* note 1, at 931.

<sup>405</sup> *Id.*; Ricci v. DeStefano, 557 U.S. 557, 581 (2009) (quoting Firefighters v. Cleveland, 478 U.S. 501, 515 (1986)).

<sup>406</sup> Ricci, 557 U.S. at 581.

<sup>407</sup> See Scherer et al., *supra* note 114, at 451.

regarding ways in which courts will apply longstanding principles in new or novel settings.<sup>408</sup> In most cases, the employer would much prefer to tailor technology to align with the law, thus avoiding not only the uncertainty and risk of liability, but also the potentially greater cost of litigation.<sup>409</sup> Government-led enforcement actions or litigation against those who are using AI technologies, while the federal agencies responsible for administering the laws have said nothing, is wrong and short-sighted.<sup>410</sup>

One EEOC Commissioner has stressed that the Commission needs to make it a “priority to clarify how federal antidiscrimination law applies to technologies that are transforming not only the way we work but the way we manage workers.”<sup>411</sup> He noted that “preventing employment discrimination from occurring in the first place is preferable to remedying the consequences of discrimination” and “that most employers want to do the right thing” but “they just need the tools to comply” which is especially true with the use of AI in employment decision-making.<sup>412</sup>

The administrative law process, particularly through the submission of public comments, can surely help improve the guidance by providing outside parties the opportunity to provide meaningful feedback, including pivotal responses from industry experts. Consistent application of legal principles is an essential feature for effective guidance. Given the relative infancy of these issues, it is axiomatic that guidance is most effective when employees and employers may rely on it. Rules and other subregulatory guidance that oscillates from one presidential administration or Congress to the next is of minimal utility in this context. Ultimately, clear, comprehensive, and reasonable guidance that is enforced predictably and consistently will help encourage technology vendors and employers

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<sup>408</sup> See Gay & Kagan, *supra* note 234, at 207 (contending that many employers and their attorneys have to rely on outdated case law and blindly hope their predictions prove accurate).

<sup>409</sup> See *id.* at 205–06.

<sup>410</sup> Smith, *supra* note 26.

<sup>411</sup> See Sonderling, *supra* note 5.

<sup>412</sup> *Id.*



to proactively prevent discriminatory effects. Likewise, such guidance will reduce uncertainty and protect workers, employees, applicants, and others without inhibiting innovation.

One way the EEOC may proceed is by issuing opinion letters tailored to questions and issues confronting employees and employers. In brief, an opinion letter is an official written opinion from an agency on how a statute, its implementing regulations, and related case law apply to a specific situation presented by the person or entity requesting the opinion.<sup>413</sup> For more than seventy years, opinion letters have proven to be a valuable resource for courts, employers, employees, unions, trade groups, practitioners, advocacy groups, and the general public.<sup>414</sup> The Department of Labor's Wage and Hour Division ("WHD") is probably the most well-known agency for issuing opinion letters, but other federal agencies also issue opinion letters, including the EEOC and OFCCP.<sup>415</sup> Opinion letters could be particularly useful in the AI arena. Just as WHD has long used opinion letters to clarify the application of depression-era wage requirements to modern economic situations, so too the EEOC may do the same with federal antidiscrimination law. Indeed, some of WHD's opinion letters have specifically addressed workplace technology in recent years, including one on a virtual marketplace company and another regarding an employer's use of rounding software.<sup>416</sup>

Employers, vendors, employees, applicants, and others could submit opinion letter requests to the EEOC seeking answers to a wide variety of critical AI questions. In particular, opinion letters could be used to clarify the law relating to each type of AI technol-

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<sup>413</sup> See Keith Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. LAW REV. 1171, 1175–76 (2022).

<sup>414</sup> *Id.* at 1175–76 (describing the history of opinion letters and their benefits).

<sup>415</sup> *Id.* The EEOC began issuing opinion letters very shortly after the agency was created in 1965 and the agency has issued five in recent years. *Id.* OFCCP had not issued opinion letters historically but started to do so in 2018 after recognizing that other DOL agencies had long issued opinion letters. OFCCP issued five opinion letters between 2017 and 2021. *Id.* at 1188–89.

<sup>416</sup> *Id.* (arguing that "[o]pinion letters provide an invaluable way to account for important changes in the modern economy and workforce such as employee use of mobile technology to work remotely and the rise of the gig economy[']").

ogy being used in employment decisions, including voice recognition, facial recognition, and resume screening. For example, an opinion letter request could seek clarity regarding undue hardship under the ADA if AI is being used in a video interview platform. By examining relevant factors such as how the AI is being used, the complexity of the AI, and alternative options available, the EEOC can provide specific examples of acceptable reasonable accommodations, ranging from modified technology use to interviewing in person.

Because of the expected increase of AI laws at the state level, state labor and employment agencies should also consider issuing opinion letters to answer critical questions about the use of AI under these state laws.<sup>417</sup> This resource would be particularly important with vague AI state and local laws such as the Illinois Artificial Intelligence Video Interview Act and New York City's AI law. In summary, opinion letters could provide an avenue for meaningful guidance without creating entirely new laws.

## VI. BEST PRACTICES

With the rapid funding, development, and implementation of AI in the workplace, employers can expect the wave of workplace AI tools to continue. Now is a critical time for employers to take proactive mitigation measures to avoid harmful practices that automate discriminatory practices, resulting in front-page news stories.<sup>418</sup> To protect themselves against government enforcement actions and litigation, employers and their HR professionals must now adopt best practices for using AI in hiring and employment decisions.

Even in the absence of an AI-specific regulatory framework, this Part discusses some of the most important best practices to guide employers in implementing and maintaining effective AI tools that fully comply with federal employment antidiscrimination laws. A

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<sup>417</sup> See Bradford J. Kelley, *For Whom the Leave Tolls: Short-Term Paid Military Leave and USERRA*, 127 PENN ST. L. REV. 57, 109 (2022) (discussing the widespread value of opinion letters by state agencies).

<sup>418</sup> See Robert G. Eccles & Miriam Vogel, *Board Responsibility for Artificial Intelligence Oversight*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 5, 2022), <https://corpgov.law.harvard.edu/2022/01/05/board-responsibility-for-artificial-intelligence-oversight/>.

substantive discussion of state, local, and international requirements is beyond this Part's scope. Whether employers rely on algorithms, human HR professionals, or both, it is imperative that they develop and implement policies and corporate oversight designed to identify and address more nuanced employment decisions. These best practices are designed to be a starting point for companies to prevent AI bias in practice. Companies that develop and use AI should be forward-thinking as they evaluate and address potential AI risks.

*A. Determine Whether AI is Being Used for Employment Purposes*

As a threshold matter, employers should assess whether AI is already being used in employment decision-making.<sup>419</sup> Although this task may seem elemental, for many employers it is deceptively complex. Indeed, many employers are unaware that some of their basic employment tools constitute, or rely upon, AI technology.<sup>420</sup> Employers may be inclined to focus on whether they use AI during the hiring process. However, they should carefully assess whether they use AI for additional purposes and decisions throughout the employment cycle.<sup>421</sup> For example, employers may use an AI tool to monitor employees and track performance.<sup>422</sup> The data collected during this process may contribute to employment decisions concerning promotions, demotions, bonuses, termination, and related areas.<sup>423</sup> If an AI tool is used in this manner, it would likely be considered as making an actionable employment decision under the law.<sup>424</sup> Recognizing whether AI is used for employment purposes is important as a threshold issue because of the increasing number of laws governing the use of AI. Employers with multi-state operations must keep apprised of differences between state and local laws that

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<sup>419</sup> See Moss et al., *supra* note 30.

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> See Bales & Stone, *supra* note 157, at 14.

<sup>423</sup> *Id.*

<sup>424</sup> See *id.* at 23, 30; see also Moss et al., *supra* note 30.

may define and regulate AI tools as well as employment decisions differently.<sup>425</sup>

### B. *Companies Should Know their Data*

Employment-related predictions are only as accurate as the data being analyzed.<sup>426</sup> Thus, it is imperative that companies be vigilant about developing, applying, and modifying the data that is utilized to train and run the recruiting programs and algorithms used to screen and evaluate potential candidates and applicants.<sup>427</sup> This is because data that is incomplete, has errors, or has biases will negatively impact the AI tool's machine learning as well as the correlating data-driven decision-making outcomes.<sup>428</sup> As a result, the data should be as complete as possible with no missing or unreliable factors, fit the questions needing answers, and be voluminous enough to provide statistically relevant results.<sup>429</sup> Additionally, those using AI for employment decision-making should avoid potentially biased data from sources such as social media and from data brokers because it could be potentially error-prone and biased.<sup>430</sup>

A useful way to ensure that employers know their data is to ask their vendors about the technology being used. One practitioner emphasizes that helpful questions could include asking about the types of data that are collected; whether any types of data collected are irrelevant to the purpose of the software; whether the data is securely

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<sup>425</sup> Moss et al., *supra* note 30. For instance, New York City's AI law broadly defines "automated employment decision tools" to include "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." *Id.*

<sup>426</sup> See Chichester & Giffen, *supra* note 212, at 36.

<sup>427</sup> Friedman & McCarthy, *supra* note 24, at 5.

<sup>428</sup> See Michelle Capezza, *Developing a Strategic Plan for AI in the Workplace: Where to Start*, BENEFITSPRO (Apr. 22, 2021), <https://www.benefitspro.com/2021/04/22/developing-a-strategic-plan-for-ai-in-the-workplace-where-to-start/>.

<sup>429</sup> Chichester & Giffen, *supra* note 212, at 36.

<sup>430</sup> See Houser, *supra* note 6, at 349.

stored and how long it is stored.<sup>431</sup> Other helpful inquiries could include asking about how the algorithms accomplish their purposes and whether they are reliable; whether the algorithms have been audited for potential biases; whether the companies are transparent about how their technologies work; and whether the technology has been designed with the needs of various users in mind.<sup>432</sup>

Understanding the substance and origin of data used to train and operate the AI will remain of paramount importance in the years ahead. Government agencies and plaintiffs will increasingly attempt to argue that AI technology produced discriminatory disparate results, relying on potentially complicated statistical analysis.<sup>433</sup> Government enforcers and attorneys will also seek to discredit the data sets used to fuel the algorithms, where they appear incomplete or otherwise deficient.<sup>434</sup> As a result, employers will need to exercise vigilance in determining whether the data genuinely supports the decisions made on the basis of the algorithms.<sup>435</sup> Employers cannot adopt a “set-it-and-forget-it” approach to HR technologies because inaccurate, incomplete, or unrepresentative data tends to amplify, rather than minimize, bias in decision-making. Employers will likely be called on to explain the connection and path between the data and the challenged decision or outcome. If employers do not understand their data, they will not be able to defend the decision, including when demonstrating job-relatedness and business necessity.

Another important component of managing AI is ensuring the responsible collection, organization, handling, and storage of data. Because AI tools may collect information about legally protected characteristics, companies must ensure it is stored securely, maintained only as long as necessary, and destroyed when appropriate.<sup>436</sup>

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<sup>431</sup> See Daming, *supra* note 119.

<sup>432</sup> *Id.* See also Glen Cathey & Arun Prabhakar, *Ethical AI: A New Strategic Imperative for Recruiting and Staffing*, MIT SLOAN MGMT REV. (Sept. 13, 2021) <https://sloanreview.mit.edu/sponsors-content/ethical-ai-a-new-strategic-imperative-for-recruiting-and-staffing/>.

<sup>433</sup> See Houser, *supra* note 6, at 345–46.

<sup>434</sup> See *id.* at 349 (noting that “[t]he most important aspect to reducing algorithmic bias is making a significant investment in clean data”).

<sup>435</sup> See Friedman & McCarthy, *supra* note 24, at 5.

<sup>436</sup> See Daming, *supra* note 119.

Practitioners advise that access to this information should be limited to only those employees with a need to know, and that the information should not be shared with third-parties without a valid reason or employee consent.<sup>437</sup>

### C. Transparency and Explainability

Transparency and explainability are two very important concepts that foster algorithmic reliability, trust, credibility, and a general understanding of AI systems.<sup>438</sup> Transparency promotes the visibility of processes, the accessibility of systems, and the reporting of meaningful information.<sup>439</sup> Explainability fosters trust in the process.<sup>440</sup> Neither is possible, though, if the user of the AI does not first understand the data on which it relies. And a lack of either or both can result in algorithmic systems that are difficult to control, monitor, correct, and defend.<sup>441</sup> This is the commonly cited “black box” issue.<sup>442</sup> In a similar vein, the absence of transparency, accountability, and understandability threatens to undermine any benefits offered by AI and machine learning technologies.

Employers should explore efforts to promote transparency and explainability surrounding their use of AI in employment decisions as the fruits of the technology and the underlying problems posed by innovation continue to develop.<sup>443</sup> To do so, they should aim to

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<sup>437</sup> *Id.*

<sup>438</sup> See Reid Blackman & Beena Ammanath, *Building Transparency into AI Projects*, HARV. BUS. REV. (June 20, 2022), <https://hbr.org/2022/06/building-transparency-into-ai-projects> (concluding that “both explainability and transparency are essential to build trust” within the AI context); see also Alexander Gillis, *Responsible AI*, TECHTARGET (Jan. 2021), <https://www.techtargget.com/search-enterpriseai/definition/responsible-AI>.

<sup>439</sup> See Blackman & Ammanath, *supra* note 438.

<sup>440</sup> See *id.*

<sup>441</sup> See *id.*

<sup>442</sup> See Jeffrey M. Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889, 943 (2020) (contending that increased transparency could help mitigate the “black box” perception problem by providing more details about why the algorithm is making its choices).

<sup>443</sup> Gillis, *supra* note 438.

provide meaningful information appropriate to the context. Specifically, employers should inform applicants about what data is used and how it is used in the hiring process.<sup>444</sup>

Transparency and explainability also empower those affected by an AI system to understand the outcome. They enable those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors and the logic that served as the basis for the prediction, recommendation, or decision. In the same vein, employers should define and assign roles to their HR professionals that ensures HR and management understand their responsibilities in relation to the company's use of AI in employment decision-making.<sup>445</sup> Actively pursuing transparent and explainable applications of AI fosters trust among employers seeking to prudently and lawfully implement this technology as well as job applicants and employees who are subject to it.<sup>446</sup>

Transparency and explainability require open, detailed, and clear communication. Employers should provide applicants and employees with robust notice that explains, at a minimum, what technologies are being used, for what purpose, how they work, the specific information that is collected, to whom it will be disclosed, how it will be used, and how long it will be retained.<sup>447</sup> Employers should also explain how access to any information collected will be controlled and any other safeguards for the information. Notices for AI technology involved with employee performance should also include these details, while also explaining anticipated benefits to the employees such as ways it will enhance their performance or make their work easier to accomplish. Ultimately, effective notice will allow candidates and employees to make informed choices about whether to participate in the activity, and whether to seek a reasonable accommodation or alternative arrangement.<sup>448</sup>

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<sup>444</sup> See Daming, *supra* note 119.

<sup>445</sup> See *id.* See also Matissa Hollister, *How to Keep the "Human" in Human Resources with AI-Based Tools*, WORLD ECON. F. (Dec. 21, 2021) <https://www.weforum.org/agenda/2021/12/how-to-keep-human-in-human-resources-with-ai-based-tools/>.

<sup>446</sup> See *id.*; see also Daming, *supra* note 119.

<sup>447</sup> See Daming, *supra* note 119.

<sup>448</sup> See Blackman & Ammanath, *supra* note 438; see also Daming, *supra* note 119.

Employers should have ample flexibility with providing notice. For example, they could put a standard notice in job advertisements or include a notice in their online application platforms. Another option would be for employers to publish a separate notice or policy which may be easier. However, the risk with a separate notice is that not all applicants will see it.

#### D. *Monitor and Audit AI Uses and Processes*

Companies must regularly study AI outcomes and do their best to monitor their AI uses and processes to detect any discriminatory outcomes over time.<sup>449</sup> Where appropriate, employers should adjust data and inputs utilized by the recruiting and hiring programs and algorithms to avoid or ameliorate improper results.<sup>450</sup> In so doing, employers may better understand which factors are actually job-related, which is a linchpin criterion under many employment laws, and to institute modifications aimed at minimizing the potential for bias.<sup>451</sup> Employers using externally developed AI need to take affirmative measures to understand the developers' mechanisms for eliminating bias and assess whether their AI has a disparate impact on any class protected by federal antidiscrimination laws.<sup>452</sup> It is not enough to rely wholesale on third-party methodology, nor to point to the third-party's reluctance to disclose its "proprietary systems" for ensuring there is no unlawful bias.<sup>453</sup> This is especially true where the vendor uses the employer's own historical data to train the algorithm.

Employers should also highly consider a more extensive audit of their AI tools on a regular basis to assess the impact that AI, automated decision-making, and other algorithmic tools have on human beings. Some experts recommend conducting an audit once a

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<sup>449</sup> See Houser, *supra* note 6, at 344 (“[A] responsible AI program to reduce bias in employment decisions will start with the careful consideration of the design of the algorithms [and] the ongoing monitoring and correcting of data . . .”).

<sup>450</sup> See Friedman & McCarthy, *supra* note 24, at 5–6.

<sup>451</sup> See *id.*

<sup>452</sup> Hoffman & Podgurski, *supra* note 242, at 46.

<sup>453</sup> See Friedman & McCarthy, *supra* note 24, at 6.



year while others emphasize that audits should be continuous.<sup>454</sup> Audits may need to be conducted more frequently when the AI tools are first deployed and thereafter. While there is no uniform approach, experts stress that the audits should be both qualitative and quantitative.<sup>455</sup> Audits are especially critical in ensuring that programs are not inadvertently “learning” the wrong lessons from the information entered into the systems.<sup>456</sup> Based on the audits, the employers can adjust the data input and decision rules to improve outcomes. Practitioners have noted that self-critical analysis of both the inputs and outputs is essential to minimize liability risk under the employment laws.<sup>457</sup> Examining inputs and outputs through an audit can be used to determine when an AI tool systematically discriminates against particular groups and is also particularly useful in detecting patterns.<sup>458</sup>

Addressing the scope of how confidentiality (including the potential application of the attorney-client privilege) might apply to these audits falls outside the scope of this Article. Nevertheless, it is clear that employers who use AI for employment-related decision-making will be seen by the courts as having at least a baseline duty to demonstrate (i.e., disclose) the measures employed to ensure that they understand, monitor, and audit their algorithms to detect potentially unlawful outcomes that disadvantage protected groups. Consequently, companies should strive to maintain a record of actions taken to mitigate potential bias and harms from AI systems which could later be critical in a lawsuit or response to a regulatory or enforcement proceeding.<sup>459</sup> Similarly, employers are encouraged to consider memorializing the results of audits in writing.<sup>460</sup> This creates documented evidence that the employer is making a good-faith

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<sup>454</sup> See McLean, *supra* note 61 (stating audits should be conducted once a year); see also Cullen *supra* note 71 (citing a practitioner stating that audits need to be continuous).

<sup>455</sup> McLean, *supra* note 61.

<sup>456</sup> Friedman & McCarthy, *supra* note 24, at 5–6.

<sup>457</sup> *Id.*

<sup>458</sup> Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, 190 (2017).

<sup>459</sup> Eccles & Vogel, *supra* note 418.

<sup>460</sup> See McLean, *supra* note 61.

effort to comply with equal employment opportunity laws, understands the impact of AI, and is continually working to improve.<sup>461</sup>

E. *Role of Human Oversight and Intervention When Necessary*

Employers using AI for employment decision-making should remember that AI is not a panacea for all employment challenges; personal human intervention must continue to play fundamental and critical roles in employment decisions.<sup>462</sup> Employers should charge a person (or team of people) with overseeing the processes and results of AI tools to ensure that they are not only performing their legitimate objectives, but also avoiding improper outcomes such as eliminating potential candidates who may require accommodation to perform essential job functions. When employers randomly manually screen at least some percentage of job applications in addition to their AI filter, their selection process will likely be more individualized, more unbiased, and reduce the risk of unwanted discrimination and litigation.<sup>463</sup> Employers should be encouraged to develop some general guidelines about what HR professionals should be doing to make the process more robust and trustworthy.

The importance of human involvement with AI tools has been evidenced by recent litigation. For example, in 2019, Facebook settled a class action lawsuit alleging that the company failed to prevent employment, housing, and credit advertising discrimination based on protected bases, including race, age, and gender.<sup>464</sup> The settlement agreement directed Facebook to establish a system of reviewing job advertisements that incorporated automated and human review.<sup>465</sup>

In addition, burgeoning reports of aggressive productivity targets underscores the need for employers to find the right division of labor between AI and HR personnel; in other words, finding the best

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<sup>461</sup> *Id.*

<sup>462</sup> See Richard Meneghello et al., *Workplace Best Practices for Using AI And Robots*, LAW360 (Dec. 20, 2017, 12:20 PM), <https://www.law360.com/articles/996088/workplace-best-practices-for-using-ai-and-robots>.

<sup>463</sup> *Id.*

<sup>464</sup> See Yang, *supra* note 16, at 216.

<sup>465</sup> *Id.*

path between using AI to improve human decision-making and delegating decision-making entirely to algorithms.<sup>466</sup> The EEOC has accentuated that when managers make employment decisions based on subjective judgment, a best practice that enables employers to avoid discriminatory decision-making is to provide training to inexperienced managers and encourage them to consult with more experienced managers or HR personnel when addressing complex or difficult issues.<sup>467</sup>

Furthermore, companies should understand that compliance with federal antidiscrimination law often requires human intervention, especially when workplace accommodations for disabled and religious employees are at issue.<sup>468</sup> Simple, as well as sophisticated, algorithms may not have the essential sensitivity to respond to employees who need reasonable accommodations. Employers that use AI for performance management, such as tracking productivity, should ensure their AI program accounts for accommodations based on disability as well as religious observance and practice.<sup>469</sup> It is especially important for employers to inform their employees that the ADA and Title VII still require an interactive process to determine the reasonable accommodations when an employer uses AI for performance management.<sup>470</sup>

The EEOC's veterans discrimination guidance issued in late 2020 underscores the important role of human intervention in the accommodation context.<sup>471</sup> In response to a question about whether an employer can ask a veteran with a disability whether a reasonable accommodation is needed if none has been requested, the EEOC explains that if an employer reasonably believes that a veteran with an

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<sup>466</sup> Sonderling, *supra* note 3.

<sup>467</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.063, SECTION 12: RELIGIOUS DISCRIMINATION DIRECTIVES TRANSMITTAL (2021), [https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h\\_96043912422321610748840445](https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_96043912422321610748840445).

<sup>468</sup> *See generally id.*; *see also* Sonderling, *supra* note 3.

<sup>469</sup> Sonderling, *supra* note 3.

<sup>470</sup> *Id.*

<sup>471</sup> *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2020-4, VETERANS AND THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR EMPLOYERS (2020), <https://www.eeoc.gov/laws/guidance/veterans-and-americans-disabilities-act-guide-employers>.

obvious service-connected disability, such as a veteran who is blind or missing a limb, “who is applying for a particular job will need a reasonable accommodation to do that job, the employer may ask whether an accommodation is needed and, if so, what type.”<sup>472</sup> The EEOC’s guidance further explains that an employer may ask a veteran with a disability whether the individual needs an accommodation once they started working when it is apparent that the veteran is facing challenges on the job because of the disability.<sup>473</sup> Importantly, the EEOC’s guidance stresses that “it may be critical for the employer to initiate a conversation with a veteran who is experiencing problems to determine an appropriate accommodation” since many veterans may not ask for a reasonable accommodation because they do not consider their service-related injuries to be disabilities, and they do not know they have a legal right to ask for an accommodation.<sup>474</sup> The EEOC’s response emphasizes that by “[w]orking together, the employer and veteran should identify what the veteran cannot do and then discuss ways to address any identified performance issue(s).”<sup>475</sup> The guidance thus underscores the essential role human intervention continues to play in the accommodation process.

Human intervention involving reasonable accommodations may be especially necessary and useful during the interview process. More employers are using AI to conduct interviews by asking applicants to electronically record their answers to questions. The AI program subsequently analyzes the recording to identify predictors of the applicant’s qualifications and anticipated success in the job.<sup>476</sup> These predictors may include “key words, the speed of speech, [and] body language.”<sup>477</sup> Since some AI programs are unable to account for reasonable accommodations, employers should be prepared to conduct in-person interviews for applicants with disabilities such as

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<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> Meneghello et al., *supra* note 462.

<sup>477</sup> *Id.*

assisting those with visual or hearing impairments.<sup>478</sup> In order to ensure this process occurs, the screening algorithms should include mechanisms designed to account for applicants who present with disabilities and “flag” such applicants for human interviews. Furthermore, practitioners have noted that employers that use computer-based tests to evaluate applicants should consider providing alternative test formats to accommodate individuals with disabilities.<sup>479</sup>

Disability and religious accommodation requests will continue to be a challenging area for employers, especially as the technology improves and becomes more affordable.<sup>480</sup> Practitioners have stressed that employers should be fully prepared to respond and appropriately engage in a cooperative dialogue about any accommodation requests.<sup>481</sup> For the foreseeable future, AI is unlikely to offer an adequate substitute for this inherently dynamic process, for which human intervention continues to be essential.

#### F. *Understand Vendor Liability*

Many companies enlist the help of outside vendors to support their HR functions, such as screening applicants and advertising to job seekers.<sup>482</sup> As an initial matter, employers should carefully review and negotiate any contracts they have with vendors providing these services.<sup>483</sup> It is especially important for companies who purchase AI hiring tools to ensure that vendors attest to the fairness and integrity of the product while negotiating the proper indemnification clauses that anticipate potential government investigation.<sup>484</sup>

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<sup>478</sup> See Daming, *supra* note 119.

<sup>479</sup> See *id.*

<sup>480</sup> See, e.g., Brown, *supra* note 197, at 381 (noting that “companies need to keep apprised of robotic assistance available to meet the demands of ADA ‘reasonable accommodation’ requests”).

<sup>481</sup> Moss et al., *supra* note 30.

<sup>482</sup> Friedman & McCarthy, *supra* note 24.

<sup>483</sup> See Bergeron, *supra* note 52.

<sup>484</sup> Bradford Newman, *Using AI to Make Hiring Decisions? Prepare for EEOC Scrutiny*, BLOOMBERG L. (Jan. 15, 2021, 6:01 PM), <https://news.bloomberglaw.com/business-and-practice/using-ai-to-make-hiring-decisions-prepare-for-eeoc-scrutiny> (noting that this review is especially important at the time the initial contract is being negotiated).

Equally important, employers should be mindful that they could be held liable if the vendors discriminate against candidates based on protected characteristics while using AI tools.<sup>485</sup> As a result, practitioners have stressed that employers should include clear language in their contracts with vendors that requires vendors to abide by all employment laws related to the screening and hiring of job candidates.<sup>486</sup>

In addition, employers should also press AI vendors for details about how they test for disparate impact discrimination. Helpful questions might include: What type of statistical analyses are performed to test for disparate impact? How were these methods chosen? Why are the chosen methods the right fit in this case? What were the results of the analyses? Does the vendor re-test for disparate impact as training data changes or grows? Attention should also be given to contractual language in forms supplied by the vendor that purport to make general representations in this regard while also including an indemnity clause that shifts all employment law risk away from the vendor and onto the employer.<sup>487</sup>

#### G. Awareness of AI Legislation

Employers should be mindful of the risks involved with using AI in employment decisions and ensure they comply with the emerging patchwork of federal, state, and local laws regulating their use. Because of the rapidly evolving legal landscape, employers should closely monitor legislative and regulatory developments addressing the use of AI for employment decisions as well as relevant decisions in the state and federal courts.<sup>488</sup> Employers that have already implemented or that may implement AI tools in the workplace should consider all applicable laws and recommended best practices

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<sup>485</sup> Friedman & McCarthy, *supra* note 24.

<sup>486</sup> *Id.*

<sup>487</sup> See Cullen, *supra* note 71 (explaining that experts recommend that “[c]ompanies should press their vendors to sign off on an indemnity clause in which they commit to funding an employer’s defense for any lawsuit they might face over an AI hiring tool.”).

<sup>488</sup> See generally Appenteng et al., *supra* note 255 (stressing need to monitor AI legislation).

to ensure compliance, which one recent survey suggests is not happening at a fast enough pace.<sup>489</sup> In addition to federal laws governing employers' responsibilities with respect to AI tools, employers should be aware of additional obligations and potential liability that may be imposed by state or local laws governing AI technologies. Indeed, state laws are particularly important because additional requirements are often mandated; for instance, a growing number of state laws trigger notice, disclosure, and informed consent considerations.<sup>490</sup> Employers should be especially mindful of compliance with state law because the list of states with laws applicable to employment decisions and AI is increasing at a rapid rate.<sup>491</sup> Employers should be aware of these changes domestically, as well as internationally, since many countries are beginning to develop new laws and regulations surrounding the implementation of AI into workplaces. The status quo mandates that employers and their compliance counsel remain especially attentive to current and developing legal authority.<sup>492</sup>

#### CONCLUSION

Ultimately, employers will be required to grapple with a multitude of challenges involving AI in the workplace, especially as AI tools become more mainstream. Because of the myriad benefits and

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<sup>489</sup> See *Risky Business: Identifying Blind Spots in Corporate Oversight of Artificial Intelligence*, BAKER MCKENZIE (Mar. 30, 2022), [https://www.bakermckenzie.com/-/media/files/aisurveyppt-finalmarch20222.pdf?sc\\_lang=en&hash=E7BCD28D19AF8D726596FC648F27C9F2](https://www.bakermckenzie.com/-/media/files/aisurveyppt-finalmarch20222.pdf?sc_lang=en&hash=E7BCD28D19AF8D726596FC648F27C9F2). This survey was based on queries from 500 U.S.-based C-level executives who self-identified as involved in the decision-making team responsible for their organization's use, management, and adoption of AI-enabled tools. Among other findings, the survey revealed that despite the significance of AI to large enterprises, only 36 percent currently have a Chief AI Officer in place; the 64 percent currently lacking Chief AI Officers do not plan to immediately hire or appoint one. Finally, the survey also found that when it comes to managing implicit bias, 40 percent of respondents said they have no oversight regarding the way AI algorithms uprank or downgrade data.

<sup>490</sup> See *Risky Business*, *supra* note 489. For instance, the Illinois Artificial Intelligence Video Interview Act creates disclosure requirements for companies that utilize video interview technology dependent upon AI.

<sup>491</sup> Bergeron, *supra* note 52.

<sup>492</sup> Gay & Kagan, *supra* note 234, at 209.

unique challenges that arise with AI, novel solutions will need to be considered to address them. In the coming years, AI and automation in employment decision-making will lead to potentially more regulatory and legislative responses to the use of AI in the workplace. It is imperative to avoid regulations that are ineffective or unduly hinder research and development. In the meantime, courts and regulatory agencies will increasingly attempt to apply well-established labor and employment laws to virtual workplaces. At the end of the day, employers that stay informed, regularly analyze their data, and monitor the use of that data will be well-positioned to avoid litigation and enforcement actions, while remaining at the forefront of innovation.

The most effective solution is a deregulatory approach that properly utilizes the existing employment discrimination framework and the resources already available to agencies. Existing legal mechanisms that can help reduce the risks associated with AI should be prioritized without stifling innovation, even in the face of AI's distinct challenges. To this end, self-regulation and self-audits should be encouraged and incentivized. The public, including legislators, must be aware that regulators lack the requisite knowledge to fully understand the problem that needs regulating.