

ALL EYES ON AI: MORE GUIDANCE FOR U.S. EMPLOYERS ON THE USE AND RISKS OF AI IN HIRING DECISIONS

On May 24, 2023, the U.S. Equal Opportunity Employment Commission ("EEOC") issued a paper, ["Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964,"](#) with the aim of continuing to provide further guidance to employers on the uses and potential misuses of algorithmic decision-making tools ("**AI Paper**"). The AI Paper is not a new regulation or binding but is reflective of a continued trend of several government agencies providing guidance to employers given the risks that artificial intelligence can unwittingly create in the employment context. The AI Paper reminds employers that Title VII of the Civil Rights Act of 1964 ("**Title VII**"), which prohibits intentional discrimination, or "disparate treatment" based on race, color, religion, sex or national origin applies in the recruitment, monitoring, transfer, and evaluation of employees. The AI Paper is focused on recruitment (suggesting that more papers with more guidance for employers may follow) and incorporates the [EEOC's Uniform Guidelines on Employee Selection Procedures under Title VII](#) ("**EEOC Guidance**"), issued in 1978, as the standard for assessing whether the AI tool selected is lawful for purposes of Title VII as well as more recent 2007 [guidance](#). An employer who seeks to deploy an AI tool should first confirm that its selection and use meets the requirements of the EEOC Guidance, or risk enforcement action. In fact, in its proposed [Strategic Enforcement Plan](#), the EEOC has specifically highlighted as one of its priorities for 2023 and going forward is enforcement around employers' use of AI. While there have only been a handful of cases so far, given the announced priority of the EEOC and the noticeable increase in the use of AI tools by employers, we can expect an upward trend.

We last explored changes in this space in the United States in [2021](#), where a number of federal and state-level developments seemed to indicate that new federal regulations were on the horizon. Those regulations; however, have yet to materialize and the most recent efforts with the introduction of the Algorithmic Accountability Act of 2022, appear to have stalled in the House of Representatives Subcommittee on Consumer Protection and Commerce. Nonetheless, the guidance continues, including with the April 25, 2023, "[Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems](#)" ("**Joint Statement**"). The Joint Statement, likely in an effort to clarify and bridge the gap in terms of specific federal regulations for AI, underscored that the relevant U.S. agencies (i.e., Consumer Financial Protection Bureau, U.S.

Department of Justice's Civil Rights Division, EEOC, and Federal Trade Commission) will rely on their existing legal authority to investigate and punish those who use AI tools in ways that result in legal harm to individuals, including where such tools result in discriminatory or unfair practices in the employment setting.

In the employment context specifically, the AI Paper is a continuation of the key messages reflected in the EEOC's technical assistance document, issued in May 2022, "[The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees](#)" ("**ADA AI Paper**"). The ADA AI Paper provides practical guidance to employers and reminds employers that while AI is "new" its applications and use its risks are "old" and must not be used in ways that infringe on the rights of those with disabilities which are protected in the ADA.

While we continue to monitor for any developments in the United States, which at this point seem focused on providing practical guidance and enforcement, instead of creating new regulations at least when it comes to AI's use in employment, our teams in Europe are watching developments in the EU, where new [AI regulations](#) could have an impact for U.S. employers with a global workforce.

The continued coordinated focus on AI in the workplace should come as a timely reminder for employers that the benefits of AI need to come with careful consideration of the risks.

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