



*International Personnel Assessment Counsel Conference*

# Artificial Intelligence: The Evolving Legal Landscape

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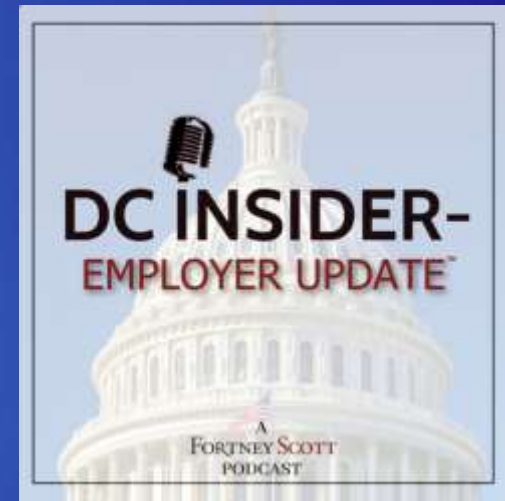


# FortneyScott

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FortneyScott is a woman-owned, Washington, DC law firm representing clients on workplace matters. In particular, we frequently represent employers before federal enforcement agencies, including the U.S. Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), and the National Labor Relations Board (NLRB), and state enforcement agencies.

Our attorneys have significant experience counseling clients on domestic and international workplace-related matters, including OFCCP compliance, EEOC matters, equal employment and nondiscrimination obligations, pay equity, diversity and inclusion, wage and hour and prevailing wages, health and safety, and investigations of workplace claims and complaints.



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# Important Legal Notice

These materials are not intended to provide legal advice. Employers and federal contractors should consult either with their in-house counsel or, as directed, with an experienced employment law attorney for legal advice about whether, based on their specific facts and circumstances, their company complies with the applicable federal and state laws.

# Agenda

- Federal & State Employment Law
  - Legal Overview
  - Enforcement Positions
  - Compliance Guidance
  - AI-Based Litigation
- Expanding Legal Landscape
  - Federal Trade Commission
  - Cross Agency Action
  - White House Activity



# “Artificial Intelligence”

- No Single/Universal Definition
  - 2020 National AI Initiative Act: “Machine based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments”
  - Various definitions in state/local laws
- Uses in Employment
  - Resume Skill Matching
  - Interviews with Scoring
  - Job Skill Assessments
  - Employee monitoring

# Federal & State Employment Law

# Federal Laws

- *Currently...* no federal law specific to AI in employment decisions
- Federal Non-Discrimination Employment Laws
  - Title VII of the Civil Rights Act
  - Executive Order 11246
  - Americans with Disabilities Act (ADA)
  - Section 503 of the Rehabilitation Act
  - Age Discrimination in Employment Act (ADEA)
  - The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)
  - Uniform Guidelines on Employee Selection Procedures (UGESP)

# Types of Discrimination Claims

- Disparate Treatment
  - Intentional discrimination
  - Lack of knowledge is a defense
    - AI tools may disclose protected categories that would otherwise be unknown
- Disparate Impact
  - Facially neutral selection process that has an adverse impact against a protected group
  - Claims often based on statistical analyses
  - Concerns regarding AI
    - Measuring based on protected categories
    - Not measuring based on job-related characteristics/skills



# Uniform Guidelines on Employee Selection Procedures (UGESP)

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- Procedures for validating that (1) selection tools are job-related and consistent with business necessity and (2) a less discriminatory alternative is not available
  - Regulatory requirement under EO 11246
  - Guidelines under Title VII
- Concerns regarding AI
  - What data is being used to “train” the tool
  - Lack of transparency
  - Inability to explain selection decision
- *Full discussion of UGESP during the later legal session*

# Federal Enforcement

- Office of Federal Contract Compliance Programs (OFCCP)
  - EO 11246, Section 503, and VEVRAA
  - Compliance Evaluation or Complaint driven enforcement
- Equal Employment Opportunity Commission (EEOC)
  - Title VII, ADA, and ADEA (and other)
  - Compliant driven enforcement
    - Individual Charge
    - Commissioner Charge
    - Directed Investigations

# OFCCP Enforcement Position

- Obtain detailed information on selection tools during compliance evaluations
- FAQs
  - “Irrespective of the level of technical sophistication involved, OFCCP analyzes all selection devices for adverse impact. **If OFCCP discovers that a contractor’s use of an AI-based selection procedure is having an adverse impact at a contractor’s establishment, the contractor will be required to validate the selection procedure using an appropriate validation strategy....”**
- Nov 2022: Proposed changes to its scheduling letter and itemized listing
  - “Documentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms, **including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.**”

# EEOC Enforcement Position

- *Artificial Intelligence and Algorithmic Fairness Initiative*
  - Launched in 2021
  - “While the technology may be evolving, anti-discrimination laws still apply.”
- *Draft Strategic Enforcement Plan for 2023-2027*
  - Issued Jan 2023
  - Enforcement focuses will include
    - Automated systems, including AI, as a barrier in recruitment and hiring
    - Technology-related employment discrimination

# EEOC Guidance – AI and the ADA

- 3 Ways AI May Violate the ADA
  - Failing to Provide Reasonable Accommodation
  - Screening Out Qualified Individuals with a Disability
  - “Disability-related questions” or “medical examination” questions pre-offer

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees  
(May 12, 2022)



# EEOC Guidance – ADA

## AI & Reasonable Accommodations

- Challenges to providing reasonable accommodations
  - Ensure applicants are provided notice on how to request a reasonable accommodation
  - Request/response process when assessment is facilitated by a vendor
  - Determining whether a request is reasonable
  - Ensuring equal consideration of applicants receiving an accommodation
- Examples
  - Alternate version that is compatible with accessibility technology
  - Not requiring use of keyboard, trackpad, or other manual input device
  - Providing additional time to complete the assessment
  - Provide an alternate assessment

*The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022)*

# EEOC Guidance – ADA AI & Screen Out Process

- Unlawful to screen out a candidate who is able to preform the essential functions of the job with a reasonable accommodation
- Examples
  - Chatbot screens out candidates with gaps in employment
  - Video interviews the screen based on speech patterns
  - Not considering ability to perform the job with a reasonable accommodation
- Be wary of “Bias-free” statements from vendors
- Inquire if tool was developed with IWDs in mind

*The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022)*

# EEOC Guidance – ADA Disability-Related Inquiries

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- ADA prohibits pre-offer medical tests
  - Designed to reveal an impairment or physical or mental health
  - Measures performance of a task or measures physiological responses to performing a task
- Prohibited questions
  - Directly asks whether an applicant has a disability
  - Likely to elicit information about a disability
    - Ex. Are you generally optimistic? Possibly elicits information on mental state

*The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022)*

# EEOC Guidance – ADA

## Promising Practices for Employers

- Train staff to recognize/process reasonable accommodation requests promptly & develop alternate evaluation processes
- Use algorithmic decision-making tools that have been designed to be accessible to individuals with different kinds of disabilities
- Provide notice and explanation of assessment tool to applicants
- Ensure only measure factors that are truly necessary for the job including on-the-job reasonable accommodations

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees  
(May 12, 2022)

# EEOC Guidance – Adverse Impact in Software

- Algorithmic decision-making tools that have adverse impact are in violation of Title VII unless job related and consistent with business necessity
- Employers can be liable for assessment administered by outside vendors
  - Inquire about steps to evaluate selection rates on protected characteristics
- Employers are encouraged to conduct self-analyses and take corrective action

*Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures under Title VII of the Civil Rights Act of 1964 (May 18, 2023)*



# Current State/Local Laws

- Maryland House Bill 1202 (Oct 1, 2020)
  - Requires written consent to use facial recognition technology during employment interviews
- Illinois Artificial Intelligence Video Interview Act (Jan 1, 2020)
  - Requires notice and consent to use AI to analyze video recorded interviews;
  - Must provide information on how the AI works and the types of characteristics used to evaluate candidates
- NYC Automated Employment Decision Tools (AEDT) Law (Jan 1, 2023)
  - Notice
  - Bias Audits

# Litigation

- *EEOC v. iTutorGroup, Inc., et al.*, Civil Action No. 1:22-cv-02565 (E.D.N.Y., filed May 5, 2022)
  - Alleges that English-language tutoring company violated the ADEA by using software that solicited birthdates and automatically rejected qualified older applicants
- *DOJ v. Meta* (June 21, 2022)
  - First DOJ case challenging use of an allegedly discriminatory algorithm
  - Among allegations: Meta “allowed” a machine-learning algorithm “to consider Federal Housing Act protected characteristics—including race, religion, and sex – in finding Facebook users who ‘look like’ the advertiser’s source audience and are thus eligible to receive housing ads”

# Litigation (cont.)

- *Real Women in Trucking v. Meta Platforms*
  - EEOC (2022) Charge alleging “systemic gender and age discrimination” in regard to job advertisements
    - “When an algorithm steers an ad or posting for a good job away from people of color, women, and/or older people, those individuals may not learn about the job, and they will lose out on the opportunity to get hired”
    - “In some cases, even when employers directed Facebook to send their job ads to people of all genders and ages, Facebook delivered the ads to Facebook users who are over 99% male and 99% younger than 55 years old.”

# Litigation (cont.)

- *Mobley v. Workday, Inc.*, No. 4:23-cv-00770 (N.D. Cal., filed February 21, 2023)
  - Lawsuit against Workday alleging its AI systems and screening tools discriminate against individuals based on age, race, and disability.
  - Alleges that Workday is an “employment agency” under Title VII.
  - Seeks class action certification on behalf of all African American, disabled, and applicants over the age of 40 who “have not been referred and/or permanently hired for employment as a result of the challenged discriminatory screening process”

# Expanding Legal Landscape

What is on the horizon?



# Federal Trade Commission

- FTC Act, Section 5
  - Prohibits unfair and deceptive practices – including the sale or use of biased algorithms
- Fair Credit Reporting Act
  - Applies if the algorithm is used to deny employment
- Equal Credit Opportunity Act
  - Illegal to use a biased algorithm that results in credit discrimination

# FTC – Compliance Guidance

- Using Artificial Intelligence and Algorithms (Apr 8, 2020)
  1. Be transparent
  2. Explain your decision to the consumer
  3. Ensure that your decisions are fair
  4. Ensure that your data and models are robust and empirically sound
  5. Hold yourself accountable for compliance, ethics, fairness and nondiscrimination

# FTC – Compliance Guidance

- Keep Your AI Claims in Check Blog Post (Feb 27, 2023)
  - “Marketers should know that — for FTC enforcement purposes — false or unsubstantiated claims about a product’s efficacy are our bread and butter”
  - Performance claims are deceptive if they lack scientific support or apply to only certain types of users
  - Adequate proof is required to support comparative claims
  - Saying that the technology is a “black box” does not relieve liability
  - FTC will “look under the hood” during an investigation

# FTC – Rule Making

- Trade Regulation Rule on Commercial Surveillance and Data Security
  - Advanced Notice of Proposed Rulemaking (ANPR) (Aug 22, 2022)
  - Requesting public comment on the prevalence of commercial surveillance and data security practices that harm consumers
- Question in ANPR
  - Should the Commission consider new rules on **algorithmic discrimination** in areas where Congress has already explicitly legislated, such as housing, **employment, labor**, and consumer finance? Or should the Commission consider such rules addressing all sectors
    - FTC traditionally protects individuals as “consumers” not “workers”.

# FTC – ChatGPT Investigation

- Launched in July 2023
- Focus: ChatGPT’s “capacity to generate statements about real individuals that are false, misleading, or disparaging”
  - Concerns regarding handling of personal data
  - Potential harm from inaccurate information
  - Risks of harm to consumers included reputational harm
- Issued expansive request for data and records



# Cross Agency Action

- Joint Statement on Enforcement Efforts against Discrimination and Bias in Automated Systems
  - Consumer Financial Protection Bureau Dep't of Justice, Civil Rights Division
  - EEOC
  - Federal Trade Commission
- Although [AI] tools offer the promise of advancement, their use also has the potential to perpetuate unlawful bias, automate unlawful discrimination, and produce other harmful outcomes
  - Data and Datasets
  - Model Opacity and Access
  - Design and Use

# Blueprint for an AI Bill of Rights

- Issued by the White House in Oct 2022
- Five principles for the use, design and deployment of AI
  - Safe and effective systems
  - Algorithmic discrimination protections
  - Data privacy
  - Notice and explanation
  - Human alternatives, considerations, and fallback

## Elizabeth B. Bradley

Elizabeth B. Bradley has over fifteen years of experience representing employers and federal contractors in litigation and mediation matters before state and federal agencies and courts.

In addition, Ms. Bradley has extensive knowledge and experience in counseling federal contractors in matters relating to OFCCP. She has represented U.S. corporations in successfully defending against OFCCP's review of the contractor's utilization rates and compensation practices. Ms.

Bradley also has experience in advising employers on wage and hour compliance under federal and state laws; litigating discrimination and retaliation claims advanced under Title VII, ADA, ADEA, and comparable state and local statutes; conducting internal investigations involving discrimination complaints; performing wage and hour compliance reviews; and drafting and negotiating employment agreements including non-compete and non-solicitation provisions.



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