



**South Carolina Bar**

Continuing Legal Education Division

**2024 SC BAR CONVENTION**

**Employment & Labor Law Section**

“Navigating the Evolving Landscape of  
Employment Law: Insights and Innova-  
tions”

**Friday, January 19**

*SC Supreme Court Commission on CLE Course No. 240023*

**SC Bar-CLE publications and oral programs are intended to provide current and accurate information about the subject matter covered and are designed to help attorneys maintain their professional competence. Publications are distributed and oral programs presented with the understanding that the SC Bar-CLE does not render any legal, accounting or other professional service. Attorneys using SC Bar-CLE publications or orally conveyed information in dealing with a specific client's or their own legal matters should also research original sources of authority.**

**©2024 by the South Carolina Bar-Continuing Legal Education Division. All Rights Reserved**

**THIS MATERIAL MAY NOT BE REPRODUCED IN WHOLE OR IN PART WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE CLE DIVISION OF THE SC BAR.**

**TAPING, RECORDING, OR PHOTOGRAPHING OF SC BAR-CLE SEMINARS OR OTHER LIVE, BROADCAST, OR PRE-RECORDED PRESENTATIONS IS PROHIBITED WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE SC BAR - CLE DIVISION.**



**South Carolina Bar**

Continuing Legal Education Division

**2024 SC BAR CONVENTION**

**Employment & Labor Law Section**

**Friday, January 19**

Tips and Tricks to Maximize Success when  
Mediating Employment Law Matters

*Amy Gaffney*  
*Angus H. Macaulay*  
*Steve Dunn*

No Materials Available





**South Carolina Bar**

Continuing Legal Education Division

**2024 SC BAR CONVENTION**

**Employment & Labor Law Section**

**Friday, January 19**

**The Impact of AI in the Workplace**

*Sheila Abron*

**The Impact of AI in the  
Workplace**  
Presentation Materials  
Sheila Abron  
sabron@fisherphillips.com  
803-255-0000



U.S. Equal Employment Opportunity Commission

# Visual Disabilities in the Workplace and the Americans with Disabilities Act

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

**OLC Control Number:** EEOC-NVTA-2023-3

**Concise Display Name:** Visual Disabilities in the Workplace and the Americans with Disabilities Act

**Issue Date:** 07-26-2023

**General Topics:** ADA/GINA

**Summary:** This document provides information on how the ADA applies to job applicants and employees with vision impairments.

**Citation:** ADA, Rehabilitation Act, 29 CFR Part 1630

**Document Applicant:** Employees, Employers, Applicants, HR Practitioners

**Previous Revision:** Yes. This document revises and renames “Blindness and Vision Impairments in the Workplace and the ADA,” originally issued 05-07-2014 (EEOC-NVTA-2014-2).

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

## INTRODUCTION

This document, which is one of a series of question-and-answer documents addressing particular disabilities in the workplace,<sup>[1]</sup> explains how the Americans with Disabilities Act (ADA) applies to job applicants and employees with visual disabilities. In particular, this document addresses:

- when an employer may ask an applicant or employee questions about a vision impairment and how an employer should treat voluntary disclosures;
- what types of reasonable accommodations applicants or employees with visual disabilities may need;
- how an employer should handle safety concerns about applicants and employees with visual disabilities; and
- how an employer can ensure that no employee is harassed because of a visual disability.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces and provides leadership and guidance on the employment provisions of the ADA, a federal law that prohibits discrimination against qualified individuals with disabilities. Under the ADA, individuals with disabilities include those who have “a physical or mental impairment that substantially limits one or more major life activities . . . ,” have a record (or history) of such an impairment, or are subject to an adverse action “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”<sup>[2]</sup> This document uses the term “visual disabilities” to refer to any disabilities related to an individual’s vision. It also uses the phrase “vision impairments” to refer to various vision-related conditions, including blindness and low vision, as well as limited visual fields, photosensitivity, color vision deficiencies, or night blindness.<sup>[3]</sup> A

vision impairment constitutes a visual disability if it meets one of the three definitions of disability (“actual,” “record of,” or “regarded as”).

Title I, the employment provision of the ADA, covers employment by private employers with 15 or more employees, as well as state and local government employers. Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act) provides similar protections to federal applicants and employees. In addition, most states have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and may provide protections in addition to those available under the ADA.<sup>[4]</sup>

## GENERAL INFORMATION ABOUT VISION IMPAIRMENTS

In 2022, the U.S. Centers for Disease Control and Prevention (CDC), National Health Interview Survey, found that approximately 18.4% of all U.S. adults are blind or have “some” or “a lot” of difficulty seeing, even when wearing corrective lenses.<sup>[5]</sup>

Many different factors can affect an individual’s vision, including the physiology of the eye and differences in how the brain interprets messages from the eye. Vision impairments can start or occur at any time in life. Some major causes of blindness and low vision in U.S. adults are eye diseases, including: diabetic retinopathy; macular degeneration; cataracts; and glaucoma.<sup>[6]</sup> Other common eye conditions in the United States include amblyopia (the brain favoring one eye over the other) and strabismus (differences in alignment of the eyes), although many other conditions exist.<sup>[7]</sup> Some individuals experience eye injury, burns, or surgical complications.<sup>[8]</sup> Also, many individuals have monocular vision—good vision in one eye, but little or no vision in the other.

Many individuals with vision impairments can successfully and safely perform their jobs, with or without reasonable accommodation. Under the ADA, these individuals should not be denied employment opportunities for which they are qualified based on stereotypes or incorrect assumptions that they may cause safety hazards, may increase employment costs (whether related to provision of reasonable accommodation or for other reasons), or may have difficulty performing certain job duties.



## **1. Who is protected under the ADA?**

The ADA definition of “disability” is a three-prong definition: it lists three ways in which an individual can have a disability under the ADA. The definition should be interpreted broadly in favor of expansive coverage.<sup>[9]</sup>

### ***“Actual” Disability or a History or “Record Of” Disability***

Under the first prong of the ADA’s definition of disability, an individual with a vision impairment who is substantially limited in seeing or in the major bodily function of using special sense organs (here, the eyes), has an “actual disability.”<sup>[10]</sup> Under the second prong of the ADA’s definition of disability, an individual with a history of an impairment that substantially limits a major life activity—even if the impairment no longer exists—is considered to have a “record of” a disability.<sup>[11]</sup> An applicant or employee may have a “record of” a disability, for example, when the individual’s substantially limiting vision impairment has been corrected surgically.

Whether an impairment “substantially limits” a major life activity is not meant to be a demanding standard.<sup>[12]</sup> A vision impairment does not need to “prevent, or significantly or severely restrict,” an individual’s ability to see in order to be a disability, as long as the individual’s vision is substantially limited when compared to the vision of most people in the general population.<sup>[13]</sup> Further, a determination of disability must ignore the positive effects of mitigating measures (other than “ordinary eyeglasses or contact lenses”) that an individual uses.<sup>[14]</sup> For example, mitigating measures may include the use of low-vision devices that magnify, enhance, or otherwise augment a visual image.<sup>[15]</sup> An individual with a vision impairment who uses low-vision devices will be substantially limited in seeing compared to most people in the general population who can see without the use of such devices. Another type of mitigating measure is the use of learned behavioral modifications (for example, an individual with monocular vision may turn their head from side to side to compensate for the lack of peripheral vision).<sup>[16]</sup> An individual with monocular vision, regardless of such compensating behaviors, will be substantially limited in seeing compared to most people in the general population. An individual who is blind should easily be found to have an “actual disability” under the ADA, because they are substantially limited in the major life activity of seeing.<sup>[17]</sup>

### ***“Regarded as”***

Under the third prong of the ADA's definition of disability—the “regarded as”<sup>[18]</sup> prong—an individual is covered if an employer takes an action prohibited by the ADA (for example, refuses to hire or terminates the individual) either because of the individual's vision impairment or because of a mistaken belief that the individual has a vision impairment.<sup>[19]</sup> However, there is no “regarded as” coverage if the employer can show that the vision impairment at issue is both transitory (meaning lasting or expected to last six months or less) and minor.<sup>[20]</sup>

Coverage under any of the three prongs of the definition of disability does not mean an employer has violated the ADA; it only signifies that the individual has satisfied the definition of disability.<sup>[21]</sup> Any potential violation of the law will require additional information. Also, while some individuals who meet the definition of having an “actual” or “record of” disability may be entitled to reasonable accommodation under the ADA, an individual who is only covered under the ADA's “regarded as” prong is not entitled to reasonable accommodation under the ADA.<sup>[22]</sup>

## **2. Is everyone who wears glasses an individual with a disability?**

No, not everyone who wears glasses is an individual with a disability under the ADA.

When deciding if an individual with a vision impairment who uses (or used, in the case of a past impairment) “ordinary eyeglasses or contact lenses” is an individual with an “actual” or “record of” a disability, the ADA directs that their impairment should be assessed *as it is corrected by the lenses*.<sup>[23]</sup> The term “ordinary eyeglasses or contact lenses” means “lenses that are intended to fully correct visual acuity or eliminate refractive error.”<sup>[24]</sup> If using ordinary lenses results in no substantial limitation to a major life activity, then the individual's vision impairment does not constitute a disability under the ADA's definitions of “actual” or “record of” a disability.<sup>[25]</sup>

In contrast, for mitigating measures other than “ordinary eyeglasses or contact lenses,” the ADA directs that an individual's vision should be assessed without considering the positive effects of mitigating measures (other than “ordinary eyeglasses or contact lenses”) that may improve vision.<sup>[26]</sup> For example, an individual with low vision should be assessed without considering the positive effects of low-vision devices that enhance, magnify, or otherwise augment a visual image.

An individual who uses ordinary eyeglasses or contact lenses that are intended to fully correct their vision typically will not be covered under the ADA as an individual with an “actual” or a “record of” a visual disability.

The ADA’s rules about disability-related inquiries and medical examinations apply to all applicants and employees regardless of whether they have an ADA disability.<sup>[27]</sup>

An employer cannot require an individual to take a vision test with uncorrected vision or meet a vision standard with uncorrected vision unless that test or standard, as used by this employer, is shown to be job-related and consistent with business necessity.<sup>[28]</sup>

## OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

The ADA limits an employer’s ability to ask questions related to disabilities (including visual disabilities) and to conduct medical examinations. Different rules apply for these inquiries and exams at three distinct stages: pre-offer, post-offer, and during employment.

### Job Applicants

#### *Before an Offer of Employment Is Made*

#### **3. May an employer ask whether a job applicant has or had a vision impairment, or treatment related to any vision impairment, before making a job offer?**

No. An employer may not ask questions about an applicant’s medical condition<sup>[29]</sup> or require an applicant to have a medical examination before it makes a conditional job offer. This means that an employer *cannot* ask an applicant such questions as:

- whether the applicant has ever had any medical procedures related to their vision (for example, whether the applicant ever had eye surgery);
- whether the applicant uses any prescription medications, including medications for conditions related to the eye; or



- whether the applicant has a condition that affects the applicant's vision or that may have caused a vision impairment (for example, whether the applicant has diabetes).

An employer may ask questions pertaining to the applicant's ability to perform job functions, *with or without reasonable accommodation*,<sup>[30]</sup> such as:

- whether the applicant can read labels on packages that need to be stocked;
- whether the applicant can work the night shift; or
- whether the applicant can inspect small electronic components to determine if they have been damaged.

#### **4. Does the ADA require applicants to disclose a current or past visual disability before accepting a job offer?**

No. The ADA does not require applicants to disclose that they have or had any type of vision impairment or visual disability *unless* they are seeking a reasonable accommodation to assist with some aspect of the application process (for example, if written application materials need to be printed in a larger font or braille). As discussed in Question 1, only individuals with an "actual" or "record of" a disability are entitled to reasonable accommodations.

Some individuals with a visual disability, however, choose to disclose or discuss their condition to dispel myths about it or to ensure that employers do not assume that the disability means they are unable to do the job safely and effectively. Sometimes, the decision to disclose depends on whether an individual will need a reasonable accommodation to perform the job (for example, specialized equipment to perform a job function, removal of a marginal function, or another type of job restructuring).

An individual, however, may request an accommodation at any point during their employment, including after becoming an employee or after changing jobs, even if they did not do so when applying for the job or after receiving the job offer.

#### **5. May an employer ask questions about an obvious vision impairment or, if an applicant discloses a nonobvious vision impairment, ask disability-related questions?**

Generally, no. An employer may not ask an applicant to discuss their obvious impairments, including vision impairments. Nor may an employer ask an applicant who has voluntarily disclosed a vision impairment any questions about its nature or severity, when it began, whether and how it will progress, or how the individual manages the impairment.

However, if an applicant has an obvious impairment or voluntarily discloses the existence of a vision impairment, and based on this information, the employer reasonably believes that the applicant will require an accommodation to perform the job, the employer may ask whether the applicant will need an accommodation and, if so, what type.<sup>[31]</sup> The employer must keep any information the applicant discloses about a medical condition confidential, even if it does not relate to a disability. “**Keeping Medical Information Confidential**” (Question 8) discusses confidentiality.

**Example A:** Jo uses a white cane to navigate when entering a room for a job interview to be a school principal. The position requires significant reading. Because Jo’s vision impairment is obvious, the employer may ask if Jo will need an accommodation to perform functions that involve reading and, if so, what type of accommodation.

### ***After an Offer of Employment Is Made***

After making a job offer, an employer may ask questions about the applicant’s health (including questions about the applicant’s disability, such as whether the applicant has a disability and the nature or severity of the disability) and may require a medical examination, if all applicants for the same type of job are treated equally (that is, all applicants are asked the same questions and are required to take the same examination).<sup>[32]</sup>

After an employer has obtained basic medical information from all individuals who have received job offers, it may ask specific individuals for more medical information if the request is medically related to the previously obtained medical information. For example, if an employer asks all applicants post-offer about their general physical and mental health, it can ask individuals who disclose a particular illness, disease, or impairment to provide medical information or require them to have a medical examination related to the condition they disclosed.<sup>[33]</sup>

## 6. What may an employer do when it learns that an applicant has or had a vision impairment after offering the applicant a job but before the applicant starts work?

Under the ADA, the period after offering an applicant a job but before the individual starts working is called the “post-offer period” and the job offer may be subject to an applicant’s responses to medical questions and/or passing a medical exam. This means, when an applicant discloses *after receiving a conditional job offer but before starting work* that the applicant has or had a vision impairment, the employer may ask the applicant additional questions, such as:

- how long the applicant has had the vision impairment;
- what, if any, vision the applicant has;
- what specific visual limitations the applicant experiences; and
- what, if any, reasonable accommodations the applicant may need to perform the job.

After obtaining basic medical information from all applicants, an employer may follow up with an individual who has disclosed a vision impairment, or the extent of a vision impairment, to seek additional information, if additional questions or a requested medical examination is medically related to the information already received. An employer may ask this individual to answer questions specifically designed to assess the applicant’s ability to perform the job’s functions safely.<sup>[34]</sup>

An employer may not withdraw an offer from an applicant with a vision impairment if the individual is able to perform the essential functions of the job, with or without reasonable accommodation. If the employer has concerns that the applicant’s vision impairment may create a safety risk in the workplace, the employer may conduct an individualized assessment to evaluate whether the individual’s impairment poses a **direct threat** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(r\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(r))) (that is, a significant risk of substantial harm to the health or safety of the applicant or others that cannot be eliminated or reduced through reasonable accommodation).<sup>[35]</sup> “Accommodating Applicants and Employees” (**Questions 10-15**) and “Concerns About Safety” (**Questions 17-18**).



**Example B:** Rosa, a county sheriff with monocular vision and significant relevant experience, applied for a position with the state police as a criminal investigator. The state police department conditionally offered Rosa a position, pending qualification under the department's medical criteria for criminal investigators. The doctor who conducted the medical examination determined that because of Rosa's monocular vision, she did not meet the department's safety standards, and the department withdrew the conditional offer of employment. The state police department did not violate the ADA by requiring the medical exam. However, the department's withdrawal of the job offer is not compliant with the ADA unless it can show, based on an individualized assessment, that Rosa was unable to do the essential functions of the criminal investigator position, with or without a reasonable accommodation, or that she would have posed a direct threat in doing so (a significant risk of substantial harm that could not be reduced or eliminated by a reasonable accommodation) if she had been hired.

### *Employees*

The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require the employee to have a medical examination. Once an employee is on the job, actual performance is the best measure of ability to do the job.<sup>[36]</sup>

### **7. When may an employer ask an employee if a vision impairment may be causing an employee's performance problems?**

Generally, an employer may ask disability-related questions and/or require an employee to have a medical examination when it has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition, or that an employee will pose a direct threat at work due to a medical condition.<sup>[37]</sup>

Sometimes, an employer already knows about a particular employee's vision impairment, observes performance problems, and reasonably believes that the problems are related to the vision impairment. At other times, an employer may ask for medical information when it observed symptoms, such as difficulties visually focusing, or received reliable information from someone else (for example, a family member or coworker) indicating that the employee may have a vision impairment. If an employer's concerns about an employee's job performance involve health or safety, it may ask an employee about their vision or send the employee for a

medical examination when it reasonably believes the employee may pose a significant risk of substantial harm because of an impairment. “**Concerns About Safety**” contains a discussion of “direct threat.”

Poor job performance may be unrelated to a medical condition and generally should be handled in accordance with an employer’s existing policies concerning performance.<sup>[38]</sup>

**Example C:** Abdul, a data entry clerk, has recently started making numerous errors when entering information into the employer’s database. For example, he seems to be confusing the numbers 1, 7, and 9. Abdul’s supervisor also has recently begun to see Abdul rubbing his eyes frequently and looking more closely at both his computer screen and printed materials. Based on these observations, the employer has a reasonable belief based on objective evidence that Abdul’s performance problems are related to an eye condition and, therefore, may ask for medical information.

**Example D:** Charlie, a receptionist, who has early-stage cataracts, has not been answering the calls that come into the office in their usual, friendly manner. The employer may counsel Charlie about how they answer the phone but may not ask questions about Charlie’s eye condition, unless there is evidence that it may be the reason for their changed demeanor when answering the phone.

## **8. Are there any other instances when an employer may ask an employee about the employee’s vision?**

Yes. An employer also may ask an employee about a vision impairment to the extent the information is necessary:

- to support the employee’s request for a reasonable accommodation needed because of a vision impairment;
- to enable the employee to participate in a voluntary wellness program;<sup>[39]</sup>
- to comply with federal safety statutes or regulations. “**Concerns About Safety**” (**Question 20**) discusses federal safety requirements;<sup>[40]</sup> or
- to verify the employee’s use of sick leave related to a vision impairment, if the employer requires all employees to provide such information (for instance, doctors’ notes) to justify their use of sick leave. However, the employer may not

require more burdensome verification for individuals with disabilities than it requires of others.

An employer also may ask an employee for periodic updates on the employee's condition if the employee has taken leave and has not provided an exact or estimated date of return or has requested leave in addition to that already granted. <sup>[41]</sup> Of course, an employer also may call employees on extended leave to check on their progress or to express concern for their health without violating the ADA. <sup>[42]</sup>

**Example E:** An employer's leave policy requires all employees who are absent because of a medical appointment to submit a note from their doctor verifying the appointment. Jack, an employee, uses sick leave for an ophthalmological examination, an annual appointment he has due to a family history of a disease that can cause vision loss. In accordance with its policy, the employer can require Jack to submit a doctor's note for the absence; however, it may not require the note to include any information (such as detailed results of the examination or a statement about the employee's diagnosis or any treatment) beyond that which is needed to verify that he used sick leave properly.

## KEEPING MEDICAL INFORMATION CONFIDENTIAL

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. Under the following circumstances, however, an employer may disclose that an employee has a vision impairment:

- to supervisors and managers, if necessary to provide a reasonable accommodation or meet an employee's work restrictions;
- to first aid and safety personnel, if an employee may need emergency treatment or require some other assistance at work;
- to individuals investigating compliance with the ADA and similar state and local laws; and
- when needed for workers' compensation or insurance purposes (for example, to process a claim). <sup>[43]</sup>



**9. May an employer tell employees who ask why their coworker is allowed to do something that generally is not permitted (such as working at home full-time or working a modified schedule) that the coworker is receiving a reasonable accommodation?**

No. Telling coworkers that an employee is receiving an ADA reasonable accommodation amounts to a prohibited disclosure that the employee has a disability. However, rather than disclosing that the employee is receiving a reasonable accommodation, the employer may respond to coworker inquiries by stating that many of the workplace issues encountered by employees are personal, and that, in these circumstances, it is the employer's policy to respect employee privacy.<sup>[44]</sup> An employer may be able to make this point effectively by reassuring the employees asking the question that their privacy would similarly be respected if they obtained a workplace change for personal reasons. An employer's attempt to indirectly advise an employee's colleagues that the employee is receiving a reasonable accommodation (by, for example, telling an employee's colleagues that the ADA requires the employer to make changes for that employee) may amount to an unlawful disclosure that the employee has a disability.

Employers also may be able to avoid many of these kinds of questions by training all employees on the requirements of equal employment laws, including the ADA, and by providing information about reasonable accommodation to all of their employees. Education on reasonable accommodation may be done in a number of ways, such as through written reasonable accommodation procedures, employee handbooks, staff meetings, and periodic online or in-person training. This kind of proactive approach may lead to fewer questions from employees who misperceive coworker accommodations as "special treatment."

**Example F:** Most of the paralegals in a large law firm have relatively small computer monitors. Gage, a paralegal who is on medication for macular degeneration, which causes central vision loss and issues seeing finer details, requests and is given a larger monitor with a high contrast display that allows him to see the screen better. If the other paralegals ask why Gage has a new monitor but they do not, the employer may not divulge any information about his impairment, including the fact that the monitor is a reasonable accommodation.

# ACCOMMODATING APPLICANTS AND EMPLOYEES

The ADA requires employers to provide reasonable accommodations in three aspects of employment: (1) ensuring equal opportunity in the application process; (2) enabling a qualified individual with a disability to perform the essential functions of their job; and (3) making it possible for an employee with a disability to enjoy equal terms, conditions, benefits, and privileges of employment.<sup>[45]</sup>

Accommodations vary depending on the needs of the individual with a disability and the situation in which accommodation is needed. Not all applicants or employees with a visual disability will need an accommodation to perform their essential functions or will require the same accommodations to perform the same functions.<sup>[46]</sup>

## **10. What are examples of reasonable accommodations that some applicants or employees with visual disabilities may need?**

There is a wide range of possible changes in the application process, or in the way an employee performs the work, that can serve as reasonable accommodations for individuals with vision impairments. These can include, for example: assistive technology (such as text-to-speech software); accessible materials (such as braille or large print); modification of workplace/employer policies or procedures (such as allowing the use of guide dogs in the work area), testing (such as allowing alternative testing), or training; ambient adjustments (such as brighter office lights); sighted assistance or services (such as a qualified reader);<sup>[47]</sup> or other modifications or adjustments that allow a qualified applicant or employee with an ADA disability to enjoy equal employment opportunities.

Additional examples of the types of accommodations commonly requested by applicants and employees with visual disabilities appear immediately below, but the list is not exhaustive; individuals may need different changes or adjustments than those listed here. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the **Job Accommodation Network (<http://askjan.org>)** (JAN) is a free, federally funded, confidential service that provides information about many types of accommodations for applicants and employees with disabilities based on the needs of a given individual and the industry in which accommodation is needed.<sup>[48]</sup>



The following are examples of accommodations applicants or employees with visual disabilities may need:

## **Assistive or accessible technology or materials, including:**

- Screen readers (or text-to-speech software). Software applications that can convert written text on a computer screen into spoken words or a braille display. These tools can allow individuals to quickly review written text.
- Optical character recognition (OCR) technology that can create documents in screen-readable electronic form from printed ones, including an optical scanner (desktop, handheld, or wearable), and OCR software.
- Systems with audible, tactile, or vibrating feedback, such as proximity detectors, which can alert individuals if they are too close to an object or another person.
- Website modifications for accessibility. Taking steps to ensure that job applicants and employees can access and timely complete job applications, online tests, or other screening tools.
- Written materials in more accessible or alternate formats, such as in large print, sans serif fonts, braille, a recorded format, or an accessible shared document format, including those provided via QR code.

**Example G:** Ezra, a blind salesperson who has worked in retail for 15 years in positions of increasing responsibility, applies for a job at a newly opened clothing store. As part of the onboarding process, Ezra requests braille copies of all new employee documents, such as handbooks and forms. The store must grant this accommodation if it would not result in undue hardship.<sup>[49]</sup>

- Low-vision optical devices, which include magnifying devices, such as telescopes, prism lenses, and optical magnifiers, that can help with a variety of tasks, such as reading fine print, maps, street signs, and distant objects.
- Digital apps or recorders, including those with transcription capability.
- Smartphone and tablet apps with built-in accessibility features, such as those for screen reading/text-to-speech, magnification, OCR, braille display, color identification, wayfinding, and sighted assistance. There are also braille

keyboards for computers, and braille printers (embossers), and braille translation software.

- An interactive, tactile, graphical display.
- A desktop, handheld, or wearable video magnifier, or a closed-circuit television system (CCTV), for reading printed materials.
- Computer screen magnification tools, such as an external computer screen magnifier, a larger monitor with a high contrast theme and adjustable settings, or screen magnification software.
- Adjustable computer operating system settings, such as those that make information on screens easier to see or that allow users to listen to information.
- Prescription versions of workplace equipment, such as safety goggles.
- Wayfinding tools or tracking devices.
- Anti-glare shields, light filters, or wearable absorptive filters.
- Large print or high-contrast keyboards.
- Talking products, such as talking calculators.
- Color identification technology.
- Accessible maps for navigation and evacuation.

### **Modification of employer policies or procedures, testing, or training, including:**

- Workplace etiquette modifications, such as requesting that each speaker say their name and provide a brief description of themselves at a meeting.
- Policy modifications to allow use of personal use items, such as those needed for wayfinding.
- Dress code modifications (for example, to allow sunglasses, absorptive filters, and hats).
- Allowing use of an assistance animal, such as a guide dog, in or to access the workplace.<sup>[50]</sup>

**Example H:** A car dealership has a policy that animals are not allowed on the showroom floor because they might make some clients uncomfortable. Amari is qualified and applies for a position as a finance consultant. Finance consultants must occasionally meet with clients on the sales floor. Amari is blind due to diabetic retinopathy and requests a waiver of the no-animals policy to be able to bring a guide dog to work. The dealership must grant this accommodation if it would not result in undue hardship.

- Modifying work schedules,<sup>[51]</sup> including for the purpose of facilitating use of public transportation or transportation options offered by vocational rehabilitation.

**Example I:** Quon, who is deafblind due to Usher Syndrome, does not have easy access to public transportation and must rely on paratransit service to get to work most mornings. Quon requests a modified schedule on days when the paratransit service arrives after the employer's usual 8:30 a.m. start time, to be allowed to work later in the evening to make up the time rather than being required to take annual leave or face discipline for tardiness. The employer must grant this accommodation if it would not otherwise result in undue hardship.

- Making telework/remote work/work from home (part-time or full-time) available beyond the established policies for the position.<sup>[52]</sup>

**Example J:** Juliane, a software engineer who is blind due to albinism, is highly sensitive to sunlight and experiences significant discomfort and risk of eye injury when exposed to bright light. Juliane's employer recently transferred all employees to a bright, modern building with large windows and open concept workspaces. The new work environment cannot be sufficiently shaded to protect Juliane from discomfort and risk of injury. Juliane can perform all essential job functions from home and requests to be able to telework full-time. The employer must grant this accommodation if it would not result in undue hardship.

- Time off, in the form of accrued paid leave or unpaid leave, if paid leave has been exhausted or is unavailable.<sup>[53]</sup>

**Example K:** An employer provides a total of three weeks of paid time off (sick and annual) per employee each year. Dylan, an employee with glaucoma, has, over time, lost most vision and has decided to start using a guide dog. Training the guide dog will require Dylan to attend a six-week residential program. The needed six weeks of

time off exceeds the amount of paid leave provided to each employee, but the employer must provide additional unpaid leave as a reasonable accommodation if it would not result in undue hardship. The same analysis would apply if the employee needed time off for treatment related to a visual disability.

- Altering an employee's marginal (that is, nonessential) job functions.

**Example L:** Bay, a host at a restaurant, is primarily responsible for taking reservations, greeting patrons, showing patrons to their tables, and performing other duties as needed. Recently, one of the restaurant's delivery drivers was on vacation, and the restaurant staff were asked to assist with delivering takeout orders. Due to low vision, including peripheral vision loss, Bay is unable to drive and asks to be excused from driving to deliver orders. Since making deliveries is not an essential function of the host's job, the employer should accommodate the requested change in job duties, absent undue hardship. Alternatively, the restaurant may arrange for transportation so that Bay may deliver the orders.

- Reassignment to a vacant position.<sup>[54]</sup>

**Example M:** Cao, a city police officer, is shot and becomes blind as a result of a wound to the head. He is no longer able to perform the job of a patrol officer but is qualified for a vacant, nonemergency dispatcher position and requests to be reassigned. The job pays less than a patrol officer, but it is the closest vacant position in terms of pay, status, and benefits for which Cao is qualified, with one or more reasonable accommodations. The city must reassign him to this nonemergency dispatcher position as a reasonable accommodation if it would not result in undue hardship.

- Modifying an employment test (for example, providing the test in a more accessible format, providing a qualified reader, allowing a test to be conducted in a more accessible setting or by a vocational rehabilitation specialist who can provide documentation of the test, or allowing more time for completion).<sup>[55]</sup>

**Example N:** A consulting company decides to require all applicants for its consulting program to take and pass a timed reading comprehension and logic test on an algorithm-driven software platform. Kai, an applicant who has low vision, attempts to take the test but cannot complete it in time because the software does not support conversion of the written text on the screen into spoken words or a braille display. Kai recalls that the company initially provided contact information



for any applicants needing a reasonable accommodation. Kai emails the contact, submitting a request for an accommodation of an alternative way to take the reading and logic test. The company responds within 24 hours and engages Kai in a discussion (also known as an interactive process) to determine how the company can provide an effective accommodation. The company should provide Kai with a screen-readable version of the test so that Kai is able to complete it, if doing so would not result in undue hardship.

- Modifying employee trainings.<sup>[56]</sup>

**Example O:** An employer has decided to upgrade its computer software and train its staff about how to use it. In five “hands-on” classes, a trainer will show groups of employees how to execute various functions and then test them on carrying out those functions. Most of the demonstrations and exercises will involve use of a computer mouse to execute functions. Dakota, who is blind, uses assistive technology and will require individualized instruction that will enable her to learn how to perform necessary functions using keyboard commands. The employer must grant this accommodation if it would not result in undue hardship.

- Providing accessible training on use of assistive technologies.<sup>[57]</sup>

### **Work area adjustments,<sup>[58]</sup> including:**

- A workspace with brighter or lower lights.
- Audible or tactile signs and warning surfaces.

**Example P:** A call center facility with low-level lighting has many cubicles on different floors. Sage, a new employee who has low vision, including trouble seeing small details, due to a macular pucker, finds it difficult to navigate through the space safely. Sage requests a tactile map of evacuation and common routes through the facility, detectable warning surfaces on the floors where Sage must go, and brighter lights in his immediate work area, to help navigate the workplace safely and work effectively. The employer must grant these accommodations if they would not result in undue hardship.

### **Sighted assistance or services, including:**

- Sighted, virtual assistance via screen-sharing technology.

- A person (qualified reader) to: read printed materials (digital and hard copy); access and download materials from inaccessible databases or case management systems; complete data entry tasks (such as inputting information into inaccessible databases and case management systems); convert inaccessible files into Word or other accessible formats; and proofread/format documents.
- Sighted guides and sighted assistance for visual description and navigation.
- Worksite visits by orientation, mobility, or assistive technology professionals.
- Noise-cancelling or other types of telephone headsets to allow an employee to listen to screen-reading software and complete assignments without noise interference.
- Braille labeler and labels to enable the individual to read product labels.

## **Other modifications or adjustments that allow an applicant or employee with a visual disability to enjoy equal employment opportunities.**

**Example Q:** An employer holds a retirement party for a long-time employee, Carrie. The event includes a dinner and various presentations by Carrie's coworkers and company management. A printed program is prepared for the event, and Darby, an employee who has difficulty reading due to macular degeneration, requests a copy of the program in large print. The employer must provide this accommodation, absent undue hardship.

**Example R:** All finalist applicants for a university position are invited to an informal meet-and-greet session with department personnel. Miyoko is blind as a result of being born without eyes (anophthalmia) and requests sighted assistance during the event to help her navigate around the room. The employer must provide this accommodation, absent undue hardship.

### **11. How does an applicant or employee request a reasonable accommodation?**

There are no "magic words" that an individual must use when requesting a reasonable accommodation. An individual simply must tell the employer that the individual needs an adjustment or change at work because of an impairment. A request for reasonable accommodation also can come from a family member,

friend, health professional (such as a rehabilitation counselor), or other representative on behalf of an individual with a disability. If an employer requires more information about the disability and why an accommodation is needed, it should engage in an “interactive process”—a dialogue with the applicant or employee—to obtain information that will help the employer in appropriately handling the request.<sup>[59]</sup>

While individuals may request accommodations at any time, employees who become aware that a disability may affect their work may wish to inform an employer as soon as they realize they need accommodations to assist them in performing their jobs. Applicants and employees also may find it helpful to discuss any necessary accommodations with the employer prior to starting a new position or assuming new job duties, even if an accommodation was provided during the job application process or in a previous position. Employers may, as a best practice, inform all new hires post-offer that they may request any needed accommodation in advance of their start date or once on the job.

**Example S:** Addie, who is blind, attempts to complete a job application on a company website portal. The job application is not compatible with Addie’s screen-reading software. Addie requests an alternative way to complete the application, because of her vision impairment. This is a request for a reasonable accommodation.

**Example T:** While Zuri has been out on extended medical leave for diabetes, their visual disability has worsened. When Zuri returns to work, they present a note from a doctor stating that they will need “some assistance” in order to perform the essential functions of the job. This is a request for a reasonable accommodation. The employer should initiate the interactive process to obtain any additional information needed.

## **12. May an employer request documentation when an applicant or employee requests a reasonable accommodation?**

Yes, but only under certain circumstances. When an individual’s visual disability and/or need for accommodation is not obvious or already known, the employer may ask the individual to provide reasonable documentation about how the condition limits the function of the eyes, seeing, or other major life activities (that is, whether the individual has a disability) and why a reasonable accommodation is needed. An employer, however, is entitled only to documentation sufficient to



establish that the individual has a visual disability and to explain why an accommodation is needed. A request for an individual's entire medical record, for example, would be inappropriate, as it likely would include information about unrelated conditions and may include unnecessary details about the individual's visual disability (such as treatment received while the individual was a child).<sup>[60]</sup>

**Example U:** Sasha, a customer service representative who developed diabetes later in life and was recently diagnosed with diabetic retinopathy, a nonobvious vision impairment, requests a larger computer monitor. Sasha's ophthalmologist provides a letter describing the impairment and limitations. The letter explains that Sasha can read standard-sized print but only very slowly, for short periods of time, and with considerable effort. The ophthalmologist concludes that providing some kind of magnification device for the computer or a larger monitor would be helpful. Sasha has provided sufficient documentation that the eye condition is an ADA disability and that a reasonable accommodation is needed. The employer may not request further documentation, such as the results of all the tests conducted to diagnose the condition.

### **13. Does an employer have to grant every request for a reasonable accommodation?**

No. An employer does not have to provide an accommodation if doing so would be an undue hardship.<sup>[61]</sup> Undue hardship means that providing the reasonable accommodation will result in significant difficulty or expense.<sup>[62]</sup> An employer also does not have to provide employees with personal use items, such as eyeglasses or other devices that are used both on and off the job.<sup>[63]</sup> Nor does an employer have to eliminate an essential function of a job as a reasonable accommodation, tolerate performance that does not meet its standards, or excuse violations of conduct rules that are job-related and consistent with business necessity and that the employer applies consistently to all employees (such as rules prohibiting violence, threatening behavior, theft, or destruction of property).<sup>[64]</sup> However, an employer may not justify an adverse action by claiming that an employee has performed poorly, when the poor performance is caused by an unlawful failure to accommodate.<sup>[65]</sup>

If more than one accommodation would be effective, the individual's preference should be given primary consideration, although the employer is not required to provide the individual's choice of reasonable accommodation.<sup>[66]</sup> The employer



may choose between accommodations if the accommodations are effective in meeting the individual's needs.<sup>[67]</sup>

**Example V:** Ngozi, an editor for a publishing company, has a corneal dystrophy (a condition in which deposits form on the cornea, the clear layer covering the front of the eye, affecting its shape or transparency). She needs magnification to read text. Ngozi asks the company to hire a full-time reader. The employer is able to purchase a computer program that will magnify text on the screen and speak the words to Ngozi. If the employer determines that the software would allow Ngozi to do the work effectively and does not pose an undue hardship, then the employer may choose to provide the software as a reasonable accommodation rather than hire a full-time reader.

**Example W:** Rachel, a blind job applicant, requests to be allowed to use an optically scanned version of a written employment test. The employer, instead, requires Rachel to take the test in braille, although she has told the employer she is not proficient in braille. In this situation, because providing the test in braille is not an effective accommodation, the employer must provide Rachel the optically scanned version, unless to do so would be an undue hardship.

#### **14. May an employer be required to provide more than one accommodation for the same applicant or employee with a visual disability?**

Yes. The duty to provide a reasonable accommodation is an ongoing one. Although some applicants or employees with visual disabilities may require only one reasonable accommodation, others may need more than one. An employer must consider each request for a reasonable accommodation and determine whether it (or an alternative accommodation) would be effective and whether providing it would pose an undue hardship.

**Example X:** Jamie, who was born blind, uses assistive technology to access the employer's network and to send and receive email messages easily. When the employer adopts new instant messaging and collaboration software for all employees, it must provide new or updated assistive technology, as necessary, so that Jamie will be able to use the new software, absent undue hardship.

**Example Y:** Jelani is an employee with retinitis pigmentosa, a degenerative eye condition that results in total or near total blindness over time. Jelani has been able to read printed materials related to his job with a magnifier and some adjustments

to work area lighting. When Jelani is no longer able to do this, he asks for a reader. Absent undue hardship, the employer must provide a reader.

**15. Does an employer have to provide a reasonable accommodation to an applicant with a disability during the application process, even if it believes that it will be unable to provide this individual with a reasonable accommodation on the job?**

Yes. An employer must provide a reasonable accommodation to a qualified applicant with a disability that will enable the individual to have an equal opportunity to participate in the application process and to be considered for a job (unless the employer can show undue hardship).

Individuals with disabilities should not be excluded from the application process because the employer speculates, based on a request for reasonable accommodation to apply for the job, that the individual will need reasonable accommodation to perform the job. In many instances, employers will be unable to determine whether an individual needs reasonable accommodation to perform a job based solely on a request for accommodation during the application process. And even if an individual will need reasonable accommodation to perform the job, it may not be the same type or degree of accommodation that is needed for the application process. An employer should assess the need for accommodations for the application process separately from those that may be needed to perform the job.<sup>[68]</sup>

**Example Z:** An employer is impressed with Natoya's resume and asks her to come in for an interview and skills assessment. Natoya, who has low vision due to glaucoma, requests to bring a guide dog to the interview and test because the building in which they are taking place is unfamiliar. The employer cancels the interview and refuses to consider Natoya's application further. The employer has violated the ADA. The employer should have proceeded with the interview, absent a determination based on specific facts that permitting entry to the guide dog for the interview and testing will cause undue hardship. If the employer had provided the reasonable accommodation and interviewed Natoya, accompanied by her guide dog, the employer could have inquired at the interview whether Natoya would need a reasonable accommodation to perform the functions of the job and if so, what kind.

In some cases, an employer may allow a requested accommodation to enable an applicant with a vision impairment to fully participate in the application process,

but the applicant will still fail a required test that is part of the application process. In such cases, if the poor performance is unrelated to the vision impairment, the employer does not have to provide any further reasonable accommodations for this individual, because the individual is no longer qualified to continue with the application process.<sup>[69]</sup>

**16. Does an employer have an obligation to make reasonable accommodations to applicants or employees with visual disabilities who request them in connection with the employer’s use of software that uses algorithms or artificial intelligence (AI) as decision-making tools?**

Yes. Algorithmic or AI decision-making tools might intentionally or unintentionally “screen out” individuals with disabilities in the application process and when employees are on the job, even though such individuals are able to do jobs with or without reasonable accommodation.<sup>[70]</sup> For example, an applicant or employee may have a visual disability that reduces the accuracy of an AI assessment used to evaluate the applicant or employee. In such cases, the employer has an obligation to provide a reasonable accommodation, such as an alternative testing format, that would provide a more accurate assessment of the applicant’s or employee’s ability to perform the position, absent undue hardship.

**17. What steps can employers take to help ensure algorithmic or AI decision-making tools do not “screen out” or otherwise unfairly disadvantage applicants or employees with disabilities?**

Employers may, as a promising practice, take steps to provide information about how the technology evaluates applicants or employees (thus alerting those with visual disabilities that the technology might not accurately assess their qualifications) and provide instructions for how to seek a reasonable accommodation. Employers should appropriately respond to requests for reasonable accommodations related to the employer’s use of algorithms or AI as decision-making tools.<sup>[71]</sup>

**Example AA:** An agency has decided to use an algorithm to evaluate employees’ productivity. The algorithm takes into account the employee’s average number of keystrokes per minute. If the employer does not inform its employees that it is using this algorithm, an employee who is blind or has a vision impairment and who uses voice recognition software instead of a keyboard may be rated poorly and lose out on a promotion or other job opportunity as a result. If the employer informs its



employees that they will be assessed partly on the basis of keyboard usage, however, that same employee would know to request an alternative means of measuring productivity—perhaps one that considers the use of voice recognition software rather than keystrokes—as a reasonable accommodation.

### **18. What kinds of reasonable accommodations are related to the terms, conditions, and privileges of employment?**

Reasonable accommodations related to the terms, conditions, and privileges of employment are not limited to those relating to performing the job. Such possible accommodations include a wide range of policy modifications or other adjustments that are needed to accommodate individuals with disabilities. Such accommodations include but are not limited to accommodations for access to work or the workplace itself, services, facilities, or portions of facilities to which all employees are granted access (for example, employee break rooms, gyms, and cafeterias, and employee assistance programs); access to information communicated in the workplace; and the opportunity to participate in employer-sponsored training and social events.<sup>[72]</sup>

**Example BB:** An employer offers employees opportunities to attend trainings, which are considered valuable opportunities that can lead to employee advancement. Harris, an employee with age-related macular degeneration, who has worked successfully in his current position with slight modifications to computer equipment, asks to attend a training that involves a review of significant handwritten materials that cannot be scanned for optical character recognition. To ensure he has an equal opportunity to take the training and advance, Harris asks that a part-time reader be provided. The employer may not deny Harris access to the training because of the need to make a reasonable accommodation and must provide a reader or another effective accommodation that would not result in undue hardship.

**Example CC:** An employer routinely posts job openings on an employee break room bulletin board, where employees are encouraged to share information. Daryon, an employee with blurriness and blind spots in his vision, requests electronic notice of all the postings via email so that he will have timely notice of the postings. The employer must provide electronic notice or another effective accommodation that would not result in undue hardship.

An employer will not be excused from providing an employee with a disability with a necessary accommodation because the employer has contracted with another entity to conduct the event.

**Example DD:** An employer offers its employees a training course on organization and time management provided by a local company with which the employer has contracted. Harlow, an employee who is blind due to cataracts, wants to take the course and asks that the materials be made available in braille. The employer claims that the company conducting the training is responsible for providing what Harlow needs, but the company responds that the responsibility is the employer's. Even if the company conducting the training has an obligation, under Title III of the ADA,<sup>[73]</sup> to provide "auxiliary aids and services," which would include providing written materials in braille, the employer is still obligated to provide Harlow with a reasonable accommodation for the training. While both the employer and the training company each remain obligated to ensure that individual receives the reasonable accommodation, to help avoid confusion and to ensure compliance, they can designate in a contract whether the employer or the training company will be providing necessary accommodations to individuals with disabilities.<sup>[74]</sup>

Failure by the local company to fulfill its obligations under another part of the ADA (such as Title III) does not excuse the employer's refusal to provide reasonable accommodation that enables Harlow to take the course.

## CONCERNS ABOUT SAFETY

When it comes to safety concerns, an employer should be careful not to act on the basis of myths, fears, or stereotypes about vision impairments. Instead, the employer should evaluate an individual on their skills, knowledge, and experience, and, if any, their disability-related limitations. If the employer has a reasonable belief based on objective evidence that an individual's visual disability may pose safety issues, then it should follow the ADA's "direct threat" analysis, which involves both assessing potential risk and discerning the possibility that reasonable accommodations might reduce or eliminate any such risk.

However, if an employer imposes a vision-related requirement that is necessary to comply with a federal safety law or regulation, the "conflict with other federal laws"

defense will apply, and the employer's safety-based qualification standard will be a permissible business necessity under the ADA.<sup>[75]</sup>

**19. When may an employer, because of safety concerns, refuse to hire, terminate, or temporarily restrict the duties of an individual who has or had a vision impairment?**

An employer may exclude an individual with a vision impairment from a job for safety reasons only when the individual poses a direct threat. A "direct threat" is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced through reasonable accommodation.<sup>[76]</sup> To determine if there is a direct threat, first, an employer should conduct an individualized assessment of an individual's ability to safely perform the essential functions of the job.<sup>[77]</sup> This determination must be based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

The employer should evaluate whether there is a significant risk of substantial harm by considering:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm.<sup>[78]</sup>

The risk of harm must be serious and likely to occur, not remote or speculative.

Second, if the employer determines there is a significant risk of substantial harm, then the employer must determine whether any reasonable accommodation would reduce or eliminate the risk.<sup>[79]</sup>

**Example EE:** Ali, an assembly line worker, has lost most vision, but because she has held the job for more than ten years, she can effectively perform the job's functions using a combination of low vision and touch. The employer's normal practice is to flash an alarm light when there is an assembly line malfunction that could cause injuries to workers. Rather than discharging Ali, who is no longer able to see the flashing light and therefore could be in harm's way, the employer should consider whether installing an audio alarm, or other reasonable accommodation, would be



effective in reducing the threat to an acceptable level. If it would not impose an undue hardship, then the employer must provide the accommodation.

**Example FF:** Paul, a blind sous-chef who began working as a line cook and has worked in restaurants for 15 years in positions of increasing levels of responsibility, applies for a job at a newly opened restaurant. Although it initially takes him slightly more time than other workers to learn the layout of the kitchen, once he does so he is able to move about easily and safely. The combination of his experience, his use of touch to perform some tasks that other workers perform visually, and a few accommodations, such as braille labels on oven controls, enables him to use the kitchen equipment and to supervise kitchen staff. The restaurant may not refuse to hire this chef on the ground that he cannot work safely in a busy kitchen.

**Example GG:** Michal, a line cook, develops a visual disability and has difficulty adjusting to the vision loss. As a result, she has problems navigating in the kitchen and barely avoids bumping into three different coworkers, two of whom were carrying trays of food just removed from the oven and one of whom was carrying a pot of boiling water. She also was warned twice about placing her hands too close to open flames and fryers filled with hot oil.

Based on objective evidence of Michal's vision impairment, the employer can seek medical information and an individualized assessment of Michal's ability to safely perform the essential functions of the line cook job, along with advice on any reasonable accommodations that could enable safe performance. If it is determined that Michal, working in the line cook position, poses a significant risk of substantial harm to the health or safety of herself or others, the employer should explore if there are any reasonable accommodations that could reduce or eliminate that risk.

If the employer's individualized assessment determines that Michal, working as a line cook, poses a significant risk of substantial harm to the health or safety of herself or others and no reasonable accommodation can eliminate or reduce the risk to a safe level, then Michal poses a direct threat. In that instance, she may be removed from the line cook position. The employer must still offer her a reasonable accommodation of reassignment to a vacant position for which she is qualified, if such a position exists and doing so would not pose an undue hardship.

## **20. What should an employer do when another federal law prohibits it from hiring individuals with vision impairments for particular positions?**

If a federal law prohibits an employer from hiring or retaining an individual with a vision impairment for a particular position, the employer would not be liable under the ADA. The employer should be certain, however, the prohibition actually applies. The employer also should be sure that the law does not contain any exceptions or waivers that apply to the individual with the vision impairment.

**Example HH:** Prakash has monocular vision and applies for a position with a courier service to drive a commercial motor vehicle. This position is subject to vision requirements and other standards enforced by the U.S. Department of Transportation (DOT), and Prakash has not been certified under DOT's **alternative vision standard (<https://www.fmcsa.dot.gov/regulations/medical/vision-evaluation-report-form-mcsa-5871>)**. The employer may rely on DOT's vision requirement in denying Prakash employment driving commercial motor vehicles to which the requirements apply. However, the employer may not rely on a DOT vision requirement that does not apply in a certain context to exclude Prakash from a position, such as driving small trucks. If the employer denied Prakash a position driving smaller trucks to which the DOT requirements do not apply, because of his visual disability, the employer would have to establish that Prakash would pose a direct threat, within the meaning of the ADA.

## HARASSMENT

The ADA prohibits harassment, or offensive conduct, based on disability just as other federal laws prohibit harassment based on race, sex, color, national origin, religion, age (40 and over), genetic information, and pregnancy, childbirth, or related medical conditions. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive music or other sounds, and interference with work performance. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

**Example II:** Nate, a grocery store cashier with a visual disability, is frequently taunted by coworkers. They regularly ask Nate how many fingers they are holding up and take away Nate's white cane and hide it. Nate complains to a supervisor in



accordance with the employer's anti-harassment policy. The employer must promptly investigate and address the harassing behavior.

## **21. What should employers do to prevent and correct harassment?**

Employers should make clear that they will not tolerate harassment based on disability or on any other protected basis. This can be done in a number of ways, such as through a written policy, employee handbooks, staff meetings, and periodic training. The employer should emphasize that harassment is prohibited and that employees should promptly report such conduct to a manager. Finally, the employer should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action. For more information on the standards governing harassment under all of the equal employment opportunity laws, see EEOC's **Harassment** (<https://www.eeoc.gov/harassment>) webpage.

# **RETALIATION AND INTERFERENCE**

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation related to a charge of employment discrimination. It is also unlawful for an employer to retaliate against someone for requesting a reasonable accommodation or to **interfere with the exercise of ADA rights** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#III.ADA>). Individuals who believe that they have been retaliated against or subjected to ADA interference may file a charge as described below.

# HOW TO FILE A CHARGE OF EMPLOYMENT DISCRIMINATION

## Against Private Employers and State/Local Governments

If you believe that your employment-related ADA rights may have been violated, the EEOC can help you decide what to do next. For example, if the employer refuses to consider your request for a reasonable accommodation to complete an application process or perform your job, and if you think you would be able to do the job with a reasonable accommodation, you might consider filing a charge of discrimination with the EEOC. A discrimination charge is an applicant's or employee's statement alleging that an employer engaged in employment discrimination and asking the EEOC to investigate.

If you **file a charge of discrimination (<https://www.eeoc.gov/how-file-charge-employment-discrimination>)**, the EEOC will conduct an investigation. Mediation, which is an informal and confidential way for people to resolve disputes with the help of a neutral mediator, may also be available. Because you must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is covered by a state or local employment discrimination law), it is best to begin the process early. It is unlawful for an employer to retaliate against you for contacting the EEOC or filing a charge.

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

## Against the Federal Government

If you are a federal employee or job applicant and you believe that a federal agency has discriminated against you, you have a right to file a complaint. Each agency is required to post information about how to contact the agency's EEO Office. You can contact an EEO Counselor by contacting the office responsible for the agency's EEO complaints program. Generally, you must contact the EEO Counselor within 45

calendar days from the day the discrimination occurred. In most cases the EEO Counselor will give you the choice of participating either in EEO counseling or in an alternative dispute resolution (ADR) program, such as a mediation program.

If you do not settle the dispute during counseling or through ADR, you can file a formal discrimination complaint against the agency with the agency's EEO Office. You must file within 15 calendar days from the day you receive notice from your EEO Counselor about how to file.

Once you have filed a formal complaint, the agency will review the complaint and decide whether or not the case should be dismissed for a procedural reason (for example, your claim was filed too late). If the agency does not dismiss the complaint, it will conduct an investigation. The agency has 180 days from the last amendment to your complaint to finish the investigation or up to 360 days after the filing of the original complaint, whichever is earlier. When the investigation is finished, the agency will issue a notice giving you two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether the discrimination occurred. A **[detailed description of the federal sector EEO process \(https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process\)](https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process)**, is available on our website.

If you require assistance (such as sighted assistance or assistive technology) to file a complaint, participate in an EEO investigation, or as part of an EEOC hearing process, you should submit a request to your agency's EEO Office for assistance. It will then be the responsibility of your agency to respond to your request.<sup>[80]</sup>

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

[1] See **[EEOC Disability-Related Resources \(http://www.eeoc.gov/laws/types/disability.cfm\)](http://www.eeoc.gov/laws/types/disability.cfm)** and **[People with Certain Types of Health Conditions/Disabilities \(https://www.eeoc.gov/eeoc-disability-related-resources/people-certain-types-health-conditionsdisabilities\)](https://www.eeoc.gov/eeoc-disability-related-resources/people-certain-types-health-conditionsdisabilities)**.



**[2] 42 U.S.C. § 12102(1) and (3) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.2(g) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(g\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(g))).**

**[3] See, e.g., National Institutes of Health, *Eye Conditions and Diseases* (<https://www.nei.nih.gov/learn-about-eye-health/eye-conditions-and-diseases>) (last visited July 24, 2023).**

**[4] For example, disability laws in California, Pennsylvania, New Jersey, New York, and a number of other states, apply to employers with fewer than 15 employees.**

**[5] National Center for Health Statistics, *Percentage of Any Difficulty Seeing for Adults Aged 18 and Over, United States* ([https://wwwn.cdc.gov/NHISDataQueryTool/SHS\\_adult/index.html](https://wwwn.cdc.gov/NHISDataQueryTool/SHS_adult/index.html)), National Health Interview Survey (2022) (generated interactively on July 24, 2023). According to the U.S. Census Bureau, more than 8 million people of all ages (approximately 2.5% of the population) in the United States are blind or have serious difficulty seeing, even when wearing glasses. U.S. Census Bureau, *American Community Survey, 1-Year Estimates Subject Tables [Table S1810, Disability Characteristics]* (<https://data.census.gov/table?q=Disability&g=010XX00US&tid=ACSST1Y2021.S1810>) (2021) (last visited July 24, 2023). See also U.S. Centers for Disease Control, Vision and Eye Health Surveillance System (VEHSS), *Composite Prevalence Estimates* (<https://www.cdc.gov/visionhealth/vehss/estimates/index.html>) (last visited July 24, 2023).**

**[6] U.S. Centers for Disease Control and Prevention, Vision Health Initiative, *Common Eye Disorders and Diseases* (<https://www.cdc.gov/visionhealth/basics/ced/index.html>), (last visited July 24, 2023). According to the CDC, diabetic retinopathy is the leading cause of blindness among U.S. working-aged adults aged 20–74 years, with an estimated 4.1 million and 899,000 individuals in the United States affected by retinopathy and vision-threatening retinopathy, respectively. *Id.* Macular degeneration affects an estimated 1.8 million individuals in the United States, aged 40 years and older, and an additional 7.3 million with large drusen (deposits under the retina) are at substantial risk of developing macular degeneration. *Id.* An estimated 20.5 million (17.2%) individuals in the United States aged 40 years and older have cataract in one or both eyes, and 6.1 million (5.1%) have had their lens removed operatively. *Id.***



Glaucoma, a group of eye diseases that can cause low vision and blindness by damaging the optic nerve, is sometimes treated with surgery; however, surgery for glaucoma carries some risks, including risk of cataract or vision loss. U.S. National Institutes of Health, National Eye Institute, ***Glaucoma Surgery*** (<https://www.nei.nih.gov/learn-about-eye-health/eye-conditions-and-diseases/glaucoma/glaucoma-surgery>) (last updated Jan. 3, 2022; last visited July 24, 2023). Similarly, other surgeries used to treat vision impairments, such as LASIK, carry the risk of side effects, including permanent vision impairment. See, e.g., U.S. National Institutes of Health, National Eye Institute, ***Surgery for Refractive Errors*** (<https://www.nei.nih.gov/learn-about-eye-health/eye-conditions-and-diseases/refractive-errors/surgery-refractive-errors>) (last updated June 26, 2019; last visited July 24, 2023). See also National Eye Institute, National Institutes of Health, ***Low Vision*** (<https://www.nei.nih.gov/learn-about-eye-health/eye-conditions-and-diseases/low-vision>) (last visited July 24, 2023).

[7] See U.S. Centers for Disease Control and Prevention, Vision Health Initiative, ***Common Eye Disorders and Diseases*** (<https://www.cdc.gov/visionhealth/basics/ced/index.html>) (last visited July 24, 2023). See also U.S. Centers for Disease Control, ***Vision and Eye Health Surveillance System (VEHSS)*** (<https://www.cdc.gov/visionhealth/vehss/index.html>) (last visited July 24, 2023).

[8] See U.S. Centers for Disease Control, ***Vision and Eye Health Surveillance System (VEHSS)*** (<https://www.cdc.gov/visionhealth/vehss/index.html>) (last visited July 24, 2023).

[9] The question of whether an individual has a “disability” under the ADA should not demand extensive analysis. Instead, the primary focus in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. **42 U.S.C. § 12102(4)(A)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); **29 C.F.R. § 1630.1(c)(4)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.1\(c\)\(4\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.1(c)(4))).

[10] See **42 U.S.C. § 12102(1)(A)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); **29 C.F.R. § 1630.2(i)(1)(ii)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(i\)\(1\)\(ii\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(i)(1)(ii))).

**[11] 42 U.S.C. § 12102(1)(B) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.2(k)(1) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(k\)\(1\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(k)(1))).**

**[12] 42 U.S.C. § 12102(4) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. §§ 1630.1(c)(4) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.1\(c\)\(4\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.1(c)(4))), 1630.2(j)(1) ([https://www.ecfr.gov/current/title-29/part-1630#p-1630.2\(j\)\(1\)](https://www.ecfr.gov/current/title-29/part-1630#p-1630.2(j)(1))).**

**[13] 29 C.F.R. § 1630.2(j)(1)(i) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(1\)\(i\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(1)(i))), (ii) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(1\)\(ii\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(1)(ii))).**

**[14] 42 U.S.C. § 12102(4)(E)(i)-(ii) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.2(j)(1)(vi) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(j\)\(1\)\(vi\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(j)(1)(vi))).**

**[15] 42 U.S.C. § 12102(4)(E)(iii)(II) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.2(j)(5)(i) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(5\)\(i\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(5)(i))).**

**[16] 42 U.S.C. § 12102(4)(E)(i)(IV) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.2(j)(5)(iv) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(5\)\(iv\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(5)(iv))).**

**[17] 29 C.F.R. § 1630.2(j)(3)(iii) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(3\)\(iii\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(3)(iii))).**

**[18] 42 U.S.C. § 12102(1)(C) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>), (3) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.2(g)(1)(iii) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(g\)\(1\)\(iii\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(g)(1)(iii))), (I)**

**([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(l\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(l)))**.

**[19]** *Id.*

**[20]** **42 U.S.C. § 12102(3)(B)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**); **29 C.F.R. § 1630.2(g)(1)(iii)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(g\)\(1\)\(iii\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(g)(1)(iii))**).

**[21]** **42 U.S.C. § 12102(1)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**), **(3)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**); **29 C.F.R. § 1630.2(l)(3)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(l\)\(3\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(l)(3))**).

**[22]** **42 U.S.C. § 12201(h)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**); **29 C.F.R. § 1630.2(o)(4)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(o\)\(4\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(o)(4))**).

**[23]** **42 U.S.C. § 12102(4)(E)(ii)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**), **(iii)(I)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**); **29 C.F.R. § 1630.2(j)(1)(vi)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(1\)\(vi\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(1)(vi))**).

**[24]** **42 U.S.C. § 12102(4)(E)(iii)(I)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**); **29 C.F.R. § 1630.2(j)(6)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(j\)\(6\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(j)(6))**).

**[25]** Someone who uses ordinary eyeglasses or contact lenses is not automatically considered to be outside the ADA's protection, however. Such an individual may demonstrate that their vision, even with the use of ordinary eyeglasses or contact lenses, is still substantially limited when compared to most people. See **Appendix to Part 1630, Title 29** (**<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>**) at Section 1630.2(j)(1)(vi), "Mitigating Measures."



**[26] 42 U.S.C. § 12102(4)(E)(i) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. §§ 1630.2(j)(1)(vi) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(1\)\(vi\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(1)(vi))), (5) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(j\)\(5\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(j)(5))).**

**[27] 42 U.S.C. §12112(d)(4)(A) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.13 (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.13>).**

**[28] 42 U.S.C. § 12113(c) (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); 29 C.F.R. § 1630.10(b) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.10\(b\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.10(b))).**

**[29] Federal contractors are required under [41 C.F.R. § 60-741.42\(a\)](https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-741/subpart-C/section-60-741.42) (<https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-741/subpart-C/section-60-741.42>), a regulation issued by the Office of Federal Contract Compliance Programs (OFCCP), to invite applicants to voluntarily self-identify as individuals with disabilities for affirmative action purposes. The ADA prohibition on asking applicants about medical conditions at the pre-offer stage does not prevent federal contractors from complying with the OFCCP's regulation. See [Letter from Peggy R. Mastroianni, EEOC Legal Counsel to Patricia A. Shiu, Director of OFCCP](#) ([https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/sec503/Self\\_ID\\_Forms/OLC\\_letter\\_to\\_OFCCP\\_8-8-2013\\_508c.pdf](https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/sec503/Self_ID_Forms/OLC_letter_to_OFCCP_8-8-2013_508c.pdf)) (Aug. 8, 2013) (last visited July 24, 2023).**

**[30] *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>), at The Pre-Offer Stage/What is a Disability Related Question?**

**[31] *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA* (<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>), at General Principles/Background, note 6.**



[32] See **42 U.S.C. § 12112(d)(3)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); **29 C.F.R. § 1630.14(b)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14\(b\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14(b))). See also ***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*** (<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>), at General Principles/Background. See also *id.* at note 7.

[33] See ***Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>), at The Post-Offer Stage.

[34] See **42 U.S.C. § 12112(d)(4)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); **29 C.F.R. § 1630.14(c)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14\(b\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14(b))). See also ***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*** (<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>), at Questions 1 and 12.

[35] See **42 U.S.C. §§ 12111(3), 12111(8), 12112(d)(3)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>), **12113(a)-(b)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); **29 C.F.R. §§ 1630.14(b)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14\(b\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14(b))), **1630.2** (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2>) **(q)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(q\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(q)))-(r) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(r\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(r))); **Appendix to Part 1630, Title 29** (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>), at Section 1630.14(b), “Employment Entrance Examination.” See also ***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*** (<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>), at General Principles/Background and at Question 5.

[36] See **[Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA](http://www.eeoc.gov/policy/docs/guidance-inquiries.html)** (<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>), at Job-Related and Consistent with Business Necessity. See also *id.* at Section D. Periodic Testing and Monitoring.

[37] *Id.* at Question 5.

[38] See **[Applying Performance and Conduct Standards to Employees with Disabilities](https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities#application)** (<https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities#application>), at Application of ADA Legal Requirements to Performance and Conduct Standards/Performance Standards. An employer also may ask an employee about the employee's vision or send the employee for a medical examination when it reasonably believes the employee may pose a direct threat because of an impairment. See "**Concerns About Safety**," *supra*.

[39] The ADA allows employers to conduct voluntary medical examinations and activities, including obtaining voluntary medical histories, which are part of a voluntary employee wellness program (such as a smoking cessation program), if any medical records (including, for example, the results of any diagnostic tests) acquired as part of the program are kept confidential. A wellness program is "voluntary" if an employer neither requires participation nor penalizes employees who do not participate. See **[Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA](http://www.eeoc.gov/policy/docs/guidance-inquiries.html)** (<http://www.eeoc.gov/policy/docs/guidance-inquiries.html>), at Question 22.

[40] **[Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA](https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees)** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>), at Question 21.

[41] **[Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act](https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada)** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>), at Question 44.

[42] **[Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA](http://www.eeoc.gov/policy/docs/guidance-inquiries.html)**

**(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>)**, at Question 16.

**[43]** See **42 U.S.C. §§ 12112(d)(3)(B), 12112(d)(4)(C), 12201** (**(<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>)**); 29 C.F.R. §§ **1630.14(b)(1)** (**([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14\(b\)\(1\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14(b)(1)))**), **1630.14(c)(1)** (**([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14\(c\)\(1\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14(c)(1)))**), **1630.14(d)(4)(i)** (**([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14\(d\)\(4\)\(i\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.14(d)(4)(i)))**). See also **Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations** (**(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>)**).

**[44]** **Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act** (**(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>)**), at Question 42.

**[45]** **42 U.S.C. § 12111(9)** (**(<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>)**); **42 U.S.C. § 12112(a), (b)(5)** (**(<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>)**); 29 C.F.R. § **1630.2(o)(1)** (**([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(o\)\(1\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(o)(1)))**). See also **Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act** (**(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>)**).

**[46]** See **Appendix to Part 1630, Title 29** (**(<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>)**), at “Process of Determining the Appropriate Reasonable Accommodation.”

**[47]** A qualified reader is one of the “auxiliary aids and services” identified by the ADA as “effective methods of making visually delivered materials available to individuals with visual impairments.” **42 U.S.C. § 12103(1)(B)** (**(<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>)**).



[48] For more information on specific accommodation ideas for different types of disabilities, see the Job Accommodation Network's **Searchable Online Accommodation Resource** (<https://askjan.org/soar.cfm>) (SOAR) (last visited July 24, 2023). JAN can also be reached at 800-526-7234 (Voice) or 877-781-9403 (TTY).

[49] Several examples throughout this document describe scenarios where an employer must grant an accommodation absent undue hardship. In situations in which more than one accommodation will be effective, an employer may provide an alternative effective accommodation. The preference of the individual with a disability should be given primary consideration, although the employer providing the accommodation has the ultimate discretion to choose between effective accommodations. See **42 U.S.C. § 12111(9); 42 U.S.C. § 12112(b)(5)(A)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); **29 C.F.R. § 1630.2(o)(1)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(o\)\(1\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(o)(1))); **Appendix to Part 1630, Title 29** (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>), at Section 1630.9, "Process of Determining the Appropriate Reasonable Accommodation." See also Question 13, *supra*.

[50] See **Appendix to Part 1630, Title 29** (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>), at Section 1630.2(o), "Reasonable Accommodation."

[51] See **29 C.F.R. § 1630.2(o)(2)(ii)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(o\)\(2\)\(ii\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(o)(2)(ii))).

[52] For more information regarding an employer's responsibility to provide telework for covered individuals, see **Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>), at Question 34; **Work at Home/Telework as a Reasonable Accommodation** (<https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>).

[53] For more information regarding an employer's responsibility to provide leave for covered individuals, see **Appendix to Part 1630, Title 29**



<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>), at Section 1630.2(o), “Reasonable Accommodation”; ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>), at Questions 17-21; ***Employer-Provided Leave and the Americans with Disabilities Act*** (<https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act>).

[54] 29 C.F.R. § 1630.2(o)(2)(ii) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(o\)\(2\)\(ii\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(o)(2)(ii))). For more information regarding reassignment to a vacant position as a form of reasonable accommodation, see the discussion of “Reassignment” in ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>).

[55] 29 C.F.R. § 1630.2(o)(2)(ii). For more information regarding modification of tests, training materials, or policies as a form of reasonable accommodation, see generally ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>).

[56] *Id.*

[57] For more information regarding an employer’s responsibility to provide training and accessible technology for covered individuals, see generally ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>).

[58] 29 C.F.R. § 1630.2(o)(2)(i) ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(o\)\(2\)\(i\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(o)(2)(i))). For more information regarding work area adjustments as a form of reasonable accommodation, see generally ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act***

**(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>)**.

<sup>[59]</sup> **29 C.F.R. § 1630.2(o)(3)** (**[https://www.ecfr.gov/current/title-29/part-1630#p-1630.2\(o\)\(3\)](https://www.ecfr.gov/current/title-29/part-1630#p-1630.2(o)(3))**). For more information regarding the interactive process, see ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (**<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>**), at Question 1 and Questions 5-10.

<sup>[60]</sup> See ***Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*** (**<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>**), at Question 10. Requests for documentation to support a request for accommodation may violate Title II of the Genetic Information Nondiscrimination Act (GINA) when they are likely to result in the acquisition of genetic information, including family medical history. **29 C.F.R. § 1635.8(a)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1635/section-1635.8#p-1635.8\(a\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1635/section-1635.8#p-1635.8(a))**). For this reason, employers may want to include a warning in the request for documentation that the employee or the employee's doctor should not provide genetic information. *Id.* **§ 1635.8(b)(1)(i)(B)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1635#p-1635.8\(b\)\(1\)\(i\)\(B\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1635#p-1635.8(b)(1)(i)(B))**).

<sup>[61]</sup> **42 U.S.C. § 12112(b)(5)(A)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**); **29 C.F.R. § 1630.9(a)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.9#p-1630.9\(a\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.9#p-1630.9(a))**).

<sup>[62]</sup> **42 U.S.C. § 12111(10)** (**<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>**); **29 C.F.R. § 1630.2(p)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2\(p\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/section-1630.2#p-1630.2(p))**).

<sup>[63]</sup> See ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (**<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general>**), at General

Principles/Reasonable Accommodation; **Appendix to Part 1630, Title 29** (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>), at Section 1630.9, “Not Making Reasonable Accommodation.”

[64] See ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>), at Questions 35 and note 103; ***Applying Performance and Conduct Standards to Employees with Disabilities*** (<https://www.eeoc.gov/laws/guidance/applying-performance-and-conduct-standards-employees-disabilities>).

[65] See **42 U.S.C. § 12112(b)(5)(B)** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>); **29 C.F.R. § 1630.9(b)** ([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.9\(b\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.9(b))).

[66] **Appendix to Part 1630, Title 29** (<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>), at Section 1630.9, “Process of Determining the Appropriate Reasonable Accommodation.”

[67] *Id.*

[68] ***Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*** (<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>), at Question 13.

[69] *Id.* at Question 13, Example B.

[70] For more information on the ADA and artificial intelligence and algorithms to assess job applicants and employees, see ***The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*** (<https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>) and ***Tips for Workers: The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence*** (<https://www.eeoc.gov/tips-workers->

**americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence).**

**[71]** *Id.*

**[72]** The Architectural Barriers Act (ABA) applies to facilities that are designed, built, altered, or leased with federal funds. For more information on the accessibility requirements of the ABA, visit the website for the **U.S. Access Board** (**<https://www.access-board.gov/aba/>**).

**[73]** For more information on the requirements of Title III of the ADA, visit the website for the **U.S. Department of Justice, Civil Rights Division, Disability Rights Section** (**<http://www.justice.gov/crt/about/drs/>**) or **www.ADA.gov** (**<http://www.ADA.gov>**).

**[74]** An employer should include, as part of any contract with an entity that conducts training, provisions that allocate responsibility for providing reasonable accommodations. This can help to avoid conflicts or confusion that could arise and result in an employee being denied a training opportunity. An employer should also remember, however, that it remains responsible for providing a reasonable accommodation that an employee needs to take advantage of a training opportunity, regardless of how that responsibility has been allocated in the contract.

**[75]** **29 C.F.R. § 1630.15(e)** (**[https://www.ecfr.gov/current/title-29/part-1630#p-1630.15\(e\)](https://www.ecfr.gov/current/title-29/part-1630#p-1630.15(e))**).

**[76]** **29 C.F.R. § 1630.2(r)** (**[https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2\(r\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(r))**). See also **Appendix to Part 1630, Title 29** (**<https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1630/appendix-Appendix%20to%20Part%201630>**) at Section 1630.2(r), “Direct Threat.”

**[77]** *Id.*

**[78]** *Id.*

**[79]** *Id.*

**[80]** See **29 U.S.C. § 791** (**<https://www.eeoc.gov/statutes/rehabilitation-act-1973>**) (Section 501 of the Rehabilitation Act); **29 U.S.C. § 794**



**(<https://www.govinfo.gov/content/pkg/USCODE-2021-title29/pdf/USCODE-2021-title29-chap16-subchapV-sec794.pdf>)** (Section 504 of the Rehabilitation Act); **29 U.S.C. § 794d(a)(1)** (**(<https://www.govinfo.gov/content/pkg/USCODE-2021-title29/pdf/USCODE-2021-title29-chap16-subchapV-sec794d.pdf>)** (Section 508 of the Rehabilitation Act); **29 C.F.R. § 1614.203(d)(4)** (**([https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1614#p-1614.203\(d\)\(4\)](https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1614#p-1614.203(d)(4)))**).



U.S. Equal Employment Opportunity Commission

# 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

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

**OLC Control** EEOC-NVTA-2023-2

**Number:**

**Concise Display Name:** Title VII and AI: Assessing Adverse Impact

**Issue Date:** 05-18-2023

**General Topics:** Title VII, Adverse Impact, Employment Selection Procedures, Technology

**Summary:** This technical assistance document discusses how existing Title VII requirements may apply to assessment of

adverse impact in employment selection tools that use artificial intelligence (AI).

**Citation:** Title VII, 29 CFR Part 1607

**Document Applicant:** Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

**Previous Revision:** No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Employers now have a wide variety of algorithmic decision-making tools available to assist them in making employment decisions, including recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, dismissal, and referral. Employers increasingly utilize these tools in an attempt to save time and effort, increase objectivity, optimize employee performance, or decrease bias.

Many employers routinely monitor their more traditional decision-making procedures to determine whether these procedures cause disproportionately large negative effects on the basis of race, color, religion, sex, or national origin under Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>[1]</sup> Employers may have questions about whether and how to monitor the newer algorithmic decision-making tools. The Questions and Answers in this document address this and several closely related issues.

Title VII applies to all employment practices of covered employers, including recruitment, monitoring, transfer, and evaluation of employees, among others. However, the scope of this document is limited to the assessment of whether an employer’s “selection procedures”—the procedures it uses to make employment decisions such as hiring, promotion, and firing—have a disproportionately large negative effect on a basis that is prohibited by Title VII. As discussed below, this is often referred to as “disparate impact” or “adverse impact” under Title VII. This document does not address other stages of the Title VII disparate impact analysis, such as whether a tool is a valid measure of important job-related traits or

characteristics. The document also does not address Title VII’s prohibitions against intentional discrimination (called “disparate treatment”) or the protections against discrimination afforded by other federal employment discrimination statutes.

The Equal Employment Opportunity Commission (“EEOC” or “Commission”) enforces and provides leadership and guidance on the federal equal employment opportunity (“EEO”) laws prohibiting discrimination on the basis of race, color, national origin, religion, and sex (including pregnancy, sexual orientation, and gender identity), disability, age (40 or older) and genetic information. This publication is part of the EEOC’s ongoing effort to help ensure that the use of new technologies complies with federal EEO law by educating employers, employees, and other stakeholders about the application of these laws to the use of software and automated systems in employment decisions.<sup>[2]</sup> For related content regarding the Americans with Disabilities Act, see **[The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.](https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence)** (<https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>)

## Background

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

### Central Terms Regarding Automated Systems and AI

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

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



- **Algorithm:** Generally, an “algorithm” is a set of instructions that can be followed by a computer to accomplish some end. Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and employees. Software or applications that include algorithmic decision-making tools are used at various stages of employment, including hiring, performance evaluation, promotion, and termination.
- **Artificial Intelligence (“AI”):** Some employers and software vendors use AI when developing algorithms that help employers evaluate, rate, and make other decisions about job applicants and employees. While the public usage of this term is evolving, Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.” **National Artificial Intelligence Initiative Act of 2020 at section 5002(3)** (<https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210>). In the employment context, using AI has typically meant that the developer relies partly on the computer’s own analysis of data to determine which criteria to use when making decisions. AI may include machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems. For a general discussion of AI, which includes machine learning, see National Institute of Standards and Technology Special Publication 1270, \_\_\_\_\_  

---

**(https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf)**.

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

remainder of this document, we use the term “algorithmic decision-making tool” broadly to refer to all these kinds of systems.

## Title VII

Title VII generally prohibits employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), or national origin.

- Title VII generally prohibits intentional discrimination, or “disparate treatment” in employment, including employment tests that are “designed, intended or used to discriminate because of race, color, religion, sex or national origin.”<sup>[3]</sup> Disparate treatment is not the focus of this technical assistance.
- Title VII also generally prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, if the tests or selection procedures are not “job related for the position in question and consistent with business necessity.”<sup>[4]</sup> This is called “**disparate impact**” or “**adverse impact**” discrimination. Disparate impact cases typically involve the following questions:<sup>[5]</sup>
  - Does the employer use a particular employment practice that has a disparate impact on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? **This issue is the focus of this technical assistance.**
  - If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection procedure is job-related and consistent with business necessity? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The selection procedure should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants’ or employees’ skills, the selection procedure must evaluate an individual’s skills as related to the particular job in question.
  - If the employer shows that the selection procedure is job-related and consistent with business necessity, is there a less discriminatory

alternative available? For example, is another test available that would be comparably as effective in predicting job performance but would not disproportionately exclude people on the basis of their race, color, religion, sex, or national origin?

- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures (“*Guidelines*”) under Title VII.<sup>[6]</sup> These *Guidelines* provide guidance from the EEOC for employers about how to determine if their tests and selection procedures are lawful for purposes of Title VII disparate impact analysis.<sup>[7]</sup>

## Questions and Answers

### 1. Could an employer’s use of an algorithmic decision-making tool be a “selection procedure”?

Under the *Guidelines*, a “selection procedure” is any “measure, combination of measures, or procedure” if it is used as a basis for an employment decision.<sup>[8]</sup> As a result, the *Guidelines* would apply to algorithmic decision-making tools when they are used to make or inform decisions about whether to hire, promote, terminate, or take similar actions toward applicants or current employees.

### 2. Can employers assess their use of an algorithmic decision-making tool for adverse impact in the same way that they assess more traditional selection procedures for adverse impact?

As the *Guidelines* explain, employers can assess whether a selection procedure has an adverse impact on a particular protected group by checking whether use of the procedure causes a selection rate for individuals in the group that is “substantially” less than the selection rate for individuals in another group.<sup>[9]</sup>

If use of an algorithmic decision-making tool has an adverse impact on individuals of a particular race, color, religion, sex, or national origin, or on individuals with a particular combination of such characteristics (e.g., a combination of race and sex, such as for applicants who are Asian women), then use of the tool will violate Title VII unless the employer can show that such use is “job related and consistent with business necessity” pursuant to Title VII.<sup>[10]</sup>



### **3. Is an employer responsible under Title VII for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?**

In many cases, yes. For example, if an employer administers a selection procedure, it may be responsible under Title VII if the procedure discriminates on a basis prohibited by Title VII, even if the test was developed by an outside vendor. In addition, employers may be held responsible for the actions of their agents, which may include entities such as software vendors, if the employer has given them authority to act on the employer's behalf.<sup>[11]</sup> This may include situations where an employer relies on the results of a selection procedure that an agent administers on its behalf.

Therefore, employers that are deciding whether to rely on a software vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor, at a minimum, whether steps have been taken to evaluate whether use of the tool causes a substantially lower selection rate for individuals with a characteristic protected by Title VII. If the vendor states that the tool should be expected to result in a substantially lower selection rate for individuals of a particular race, color, religion, sex, or national origin, then the employer should consider whether use of the tool is job related and consistent with business necessity and whether there are alternatives that may meet the employer's needs and have less of a disparate impact. (See Question 7 for more information.) Further, if the vendor is incorrect about its own assessment and the tool does result in either disparate impact discrimination or disparate treatment discrimination, the employer could still be liable.

### **4. What is a "selection rate"?**

"Selection rate" refers to the proportion of applicants or candidates who are hired, promoted, or otherwise selected.<sup>[12]</sup> The selection rate for a group of applicants or candidates is calculated by dividing the number of persons hired, promoted, or otherwise selected from the group by the total number of candidates in that group.<sup>[13]</sup> For example, suppose that 80 White individuals and 40 Black individuals take a personality test that is scored using an algorithm as part of a job application, and 48 of the White applicants and 12 of the Black applicants advance to the next round of the selection process. Based on these results, the selection rate for Whites is 48/80 (equivalent to 60%), and the selection rate for Blacks is 12/40 (equivalent to 30%).



## 5. What is the “four-fifths rule”?

The four-fifths rule, referenced in the *Guidelines*, is a general rule of thumb for determining whether the selection rate for one group is “substantially” different than the selection rate of another group. The rule states that one rate is substantially different than another if their ratio is less than four-fifths (or 80%).<sup>[14]</sup>

In the example above involving a personality test scored by an algorithm, the selection rate for Black applicants was 30% and the selection rate for White applicants was 60%. The ratio of the two rates is thus 30/60 (or 50%). Because 30/60 (or 50%) is lower than 4/5 (or 80%), the four-fifths rule says that the selection rate for Black applicants is substantially different than the selection rate for White applicants in this example, which could be evidence of discrimination against Black applicants.

## 6. Does compliance with the four-fifths rule guarantee that a particular employment procedure does not have an adverse impact for purposes of Title VII?

The four-fifths rule is merely a rule of thumb.<sup>[15]</sup> As noted in the *Guidelines* themselves, the four-fifths rule may be inappropriate under certain circumstances. For example, smaller differences in selection rates may indicate adverse impact where a procedure is used to make a large number of selections,<sup>[16]</sup> or where an employer’s actions have discouraged individuals from applying disproportionately on grounds of a Title VII-protected characteristic.<sup>[17]</sup> The four-fifths rule is a “practical and easy-to-administer” test that may be used to draw an initial inference that the selection rates for two groups may be substantially different, and to prompt employers to acquire additional information about the procedure in question.<sup>[18]</sup>

Courts have agreed that use of the four-fifths rule is not always appropriate, especially where it is not a reasonable substitute for a test of statistical significance.<sup>[19]</sup> As a result, the EEOC might not consider compliance with the rule sufficient to show that a particular selection procedure is lawful under Title VII when the procedure is challenged in a charge of discrimination.<sup>[20]</sup> (A “charge of discrimination” is a signed statement asserting that an employer, union, or labor organization is engaged in employment discrimination. It requests EEOC to take remedial action. For more information about filing charges of discrimination with

the EEOC, visit the EEOC's website (<https://www.eeoc.gov/> (<https://www.eeoc.gov/>).

For these reasons, employers that are deciding whether to rely on a vendor to develop or administer an algorithmic decision-making tool may want to ask the vendor specifically whether it relied on the four-fifths rule of thumb when determining whether use of the tool might have an adverse impact on the basis of a characteristic protected by Title VII, or whether it relied on a standard such as statistical significance that is often used by courts.

**7. If an employer discovers that the use of an algorithmic decision-making tool would have an adverse impact, may it adjust the tool, or decide to use a different tool, in order to reduce or eliminate that impact?**

Generally, if an employer is in the process of developing a selection tool and discovers that use of the tool would have an adverse impact on individuals of a particular sex, race, or other group protected by Title VII, it can take steps to reduce the impact or select a different tool in order to avoid engaging in a practice that violates Title VII. One advantage of algorithmic decision-making tools is that the process of developing the tool may itself produce a variety of comparably effective alternative algorithms. Failure to adopt a less discriminatory algorithm that was considered during the development process therefore may give rise to liability.<sup>[21]</sup>

The EEOC encourages employers to conduct self-analyses on an ongoing basis to determine whether their employment practices have a disproportionately large negative effect on a basis prohibited under Title VII or treat protected groups differently. Generally, employers can proactively change the practice going forward.<sup>[22]</sup>

Individuals who believe that they have been discriminated against at work because of their race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information may file a **Charge of Discrimination** (<https://www.eeoc.gov/filing-charge-discrimination>) with the EEOC.

There are strict time limits for filing a charge; to learn more about those see: **Time Limits For Filing A Charge** (<https://www.eeoc.gov/time-limits-filing-charge>).

Charges may be filed through EEOC's Online Public Portal at <https://publicportal.eeoc.gov> (<https://publicportal.eeoc.gov>). For additional information on charge filing, visit the EEOC's website (<https://www.eeoc.gov> (<https://www.eeoc.gov>)) or a local EEOC office (see <https://www.eeoc.gov/field-office> (<https://www.eeoc.gov/field-office>) for contact information), or contact the EEOC by phone at 1-800-669-4000 (voice), 1-800-669-6820 (TTY), or 1-844-234-5122 (ASL Video Phone).

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

---

<sup>[1]</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(1). Title VII is found at §§ 2000e–2000e-17.

<sup>[2]</sup> The EEOC website provides additional resources and information on this subject. See generally *Artificial Intelligence and Algorithmic Fairness Initiative*, Equal Emp't Opportunity Comm'n, <https://www.eeoc.gov/ai> (<https://www.eeoc.gov/ai>) (last visited April 13, 2023); see also *Meeting of January 31, 2023—Navigating Employment Discrimination In AI and Automated Systems: A New Civil Rights Frontier*, Equal Emp't Opportunity Comm'n, <https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new> (<https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new>) (last visited April 13, 2023). The Commission invited written comments from the public for 15 days after the meeting. The comments were made available to members of the Commission and to Commission staff working on the matters discussed at the meeting, including comments from industry groups, vendors, and civil rights groups, among others.



[3] 42 U.S.C. § 2000e-2(h) (discussing professionally developed tests); see *also* §2000e-2(a) (generally prohibiting discrimination on the basis of race, color, national origin, sex or religion by covered employers), (c) (same, with respect to labor organizations), (d) (same, with respect to training programs).

[4] *Id.* at § 2000e-2(a)(2), (k).

[5] See 42 U.S.C. § 2000e-2(k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[6] See 29 C.F.R. part 1607. The Guidelines were adopted simultaneously by other federal agencies under their authorities. See Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290 (Aug. 25, 1978) (adopted by the Office of Federal Contract Compliance Programs at 41 C.F.R. part 60-3, by the Civil Service Commission at 5 C.F.R. § 300.103(c), and by the Department of Justice at 28 C.F.R. § 50.14).

[7] The *Guidelines* use the term “adverse impact”; other sources use “disparate impact.” This document uses the terms “adverse impact” and “disparate impact” interchangeably.

[8] See 29 C.F.R. § 1607.16(Q).

[9] 29 C.F.R. § 1607.16(B).

[10] 42 U.S.C. § 2000e-2(k)(1); 29 C.F.R. § 1607.3(A).

[11] EEOC, Compliance Manual Section 2 Threshold Issues § 2-III.B.2 (May 12, 2000), <https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2> (<https://www.eeoc.gov/laws/guidance/section-2-threshold-issues#2-III-B-2>).

[12] 29 C.F.R. § 1607.16(R).

[13] See EEOC, Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, Q&A 12 (Mar. 1, 1979) [hereinafter Questions and Answers], <https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines> (<https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines>).



[14] 29 C.F.R. §§ 1607.4(D), 1607.16(B).

[15] See 29 C.F.R. § 1607.4(D); see also Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,291 (Aug. 25, 1978) (referring to the four-fifths rule as a “rule of thumb”); *id.* at 38,291 (explaining why the four-fifths rule was adopted as a “rule of thumb”); Questions and Answers, *supra* note 13, at Q&A 20 (answering the question of why the four-fifths rule is called a “rule of thumb”).

[16] Questions and Answers, *supra* note 13, at Q&A 22; see also 29 C.F.R. § 1607.4(D).

[17] 29 C.F.R. § 1607.4(D); see also Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38,291 (“[A]n employer’s reputation may have discouraged or ‘chilled’ applicants of particular groups from applying because they believed application would be futile. The application of the ‘4/5ths’ rule in that situation would allow an employer to evade scrutiny because of its own discrimination.”)

[18] Questions and Answers, *supra* note 13, at Q&A 19, 24; see also Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. at 38,291 (“[The four-fifths rule] is not a legal definition of discrimination.”).

[19] See, e.g., *Isabel v. City of Memphis*, 404 F.3d 404, 412 (6th Cir. 2005) (rejecting the argument that “a test’s compliance with the four fifths rule definitively establishes the absence of adverse impact.”); *Jones v. City of Boston*, 752 F.3d 38, 46–54 (1st Cir. 2014) (rejecting the use of the four-fifths rule to evaluate a test with a large sample size); *Howe v. City of Akron*, 801 F.3d 718, 743 (6th Cir. 2015) (“[The Sixth Circuit] ha[s] used the four-fifths rule as the starting point to determine whether plaintiffs alleging disparate impact have met their prima facie burden, although we have used other statistical tests as well.”); Questions and Answers, *supra* note 13, at Q&A 20, 22.

[20] Although the *Guidelines* state that federal agencies will consider whether a selection procedure meets the four-fifths rule when determining whether to take an “enforcement action,” the *Guidelines* specifically exempt findings of reasonable cause, conciliation processes, and the issuance of right to sue letters from the definition of “enforcement action,” where such findings, conciliation processes, and issuances are based on individual charges of discrimination filed under Title VII. 29 C.F.R. § 1607.16(I). The *Guidelines* thus do not require the Commission to base a determination of discrimination on the four-fifths rule when resolving a charge.

[21] See 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[22] See EEOC, Employment Tests and Selection Procedures (Dec. 1, 2007), <https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures> (<https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures>); EEOC, Compliance Manual Section 15 Race and Color Discrimination § IX (Apr. 19, 2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination> (<https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination>). Employers should also be aware of how the disparate impact and disparate treatment portions of Title VII may interact. See *Ricci v. DeStefano*, 557 U.S. 577 (2009).



U.S. Equal Employment Opportunity Commission

# The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees

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

**OLC Control Number:** EEOC-NVTA-2022-2

**Concise Display Name:** The ADA and AI: Applicants and Employees

**Issue Date:** 05-12-2022

**General Topics:** Disability, Essential Functions, Hiring, Monitoring, Reasonable Accommodation, Screen Out, Technology

**Summary:** This technical assistance document discusses how existing ADA requirements may apply to the use of artificial intelligence (AI) in employment-related decision making and offers promising practices for employers to

help with ADA compliance when using AI decision making tools.

**Citation:** ADA, 29 CFR Part 1630 & app.

**Document Applicant:** Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

**Previous Revision:** No.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias. However, the use of these tools may disadvantage job applicants and employees with disabilities. When this occurs, employers may risk violating federal Equal Employment Opportunity (“EEO”) laws that protect individuals with disabilities.

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

The Equal Employment Opportunity Commission (“EEOC” or “the Commission”) enforces, and provides leadership and guidance on, the federal EEO laws prohibiting employment discrimination on the basis of race, color, national origin, religion, and sex (including pregnancy, sexual orientation, and gender identity), disability, age (over 40) and genetic information. This publication is part of an ongoing effort by the EEOC to educate employers, employees, and other



stakeholders about the application of EEO laws when employers use employment software and applications, some of which incorporate algorithmic decision-making.

## **Background**

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

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

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

- **Algorithms:** Generally, an “algorithm” is a set of instructions that can be followed by a computer to accomplish some end. Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and employees. Software or applications that include algorithmic decision-making tools may be used at various stages of employment, including hiring, performance evaluation, promotion, and termination.
- **Artificial Intelligence (“AI”):** Some employers and software vendors use AI when developing algorithms that help employers evaluate, rate, and make other decisions about job applicants and employees. In the **National Artificial Intelligence Initiative Act of 2020 at section 5002(3)** (<https://www.congress.gov/116/crpt/hrpt617/CRPT-116hrpt617.pdf#page=1210>), Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make

predictions, recommendations or decisions influencing real or virtual environments.” In the employment context, using AI has typically meant that the developer relies partly on the computer’s own analysis of data to determine which criteria to use when making employment decisions. AI may include machine learning, computer vision, natural language processing and understanding, intelligent decision support systems, and autonomous systems. For a general discussion of AI, which includes machine learning, see National Institute of Standards and Technology Special Publication 1270, \_\_\_\_\_

---

**(<https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf>).**

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

## **ADA Basics**

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

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

The ADA has a very specific definition of a current “disability.” A physical or mental impairment meets the ADA’s definition of a current “disability” if it would, when left untreated, “substantially limit” one or more “major life activities.” Major life activities include, for example, seeing, reaching, communicating, speaking,

concentrating, or the operation of major bodily functions, such as brain or neurological functions. (There are two other definitions of “disability” that are not the subject of this discussion. For more information on the definition of “disability” under the ADA, see **EEOC’s Questions and Answers on the ADA Amendments Act** (<https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008>).

A condition does not need to be permanent or severe, or cause a high degree of functional limitation, to be “substantially limiting.” It may qualify as substantially limiting, for example, by making activities more difficult, painful, or time-consuming to perform as compared to the way that most people perform them. In addition, if the symptoms of the condition come and go, the condition still will qualify as a disability if it substantially limits a major life activity when active. Many common and ordinary medical conditions will qualify.

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

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

- The employer does not provide a “**reasonable accommodation**” that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm. (See **Questions 4–7** below.)
- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally “**screens out**” an individual with a disability, even though that individual is able to do the job with a reasonable accommodation. “Screen out” occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. A disability could have this effect by, for example, reducing the accuracy of the assessment, creating special circumstances that have not been taken into account, or preventing the individual from participating in the assessment altogether. (See **Questions 8–12** below.)
- The employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA’s restrictions on **disability-related inquiries and medical examinations**. (See **Question 13** below.)



An employer's use of an algorithmic decision-making tool may be unlawful for one of the above reasons, or for several such reasons.

**3. Is an employer responsible under the ADA for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?**

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

## **Algorithmic Decision-Making Tools and Reasonable Accommodation**

**4. What is a reasonable accommodation?**

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

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

Yes. An employer may tell applicants or employees what steps an evaluation process includes and may ask them whether they will need reasonable accommodations to complete it. For example, if a hiring process includes a video



interview, the employer or software vendor may tell applicants that the job application process will involve a video interview and provide a way to request a reasonable accommodation. Doing so is a “**promising practice**” to avoid violating the ADA.

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

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

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

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

Other examples of reasonable accommodations that may be effective for some individuals with disabilities include extended time or an alternative version of the

test, including one that is compatible with accessible technology (like a screen-reader) if the applicant or employee uses such technology. Employers must give individuals receiving reasonable accommodation equal consideration with other applicants or employees not receiving reasonable accommodations.

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

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

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

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

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

Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is *able to perform the essential functions of the job* with a reasonable accommodation if one is legally required.<sup>[1]</sup>

**Questions 9 and 10** explain the meaning of “screen out” and **Question 11** provides examples of when a person who is screened out due to a disability nevertheless can do the job with a reasonable accommodation.

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

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

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

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

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

When employers (or entities acting on their behalf such as software vendors) say that they have designed an algorithmic decision-making tool to be “bias-free,” it typically means that they have taken steps to prevent a type of discrimination known as “adverse impact” or “disparate impact” discrimination under Title VII,



based on race, sex, national origin, color, or religion. This type of Title VII discrimination involves an employment policy or practice that has a disproportionately negative effect on a group of individuals who share one of these characteristics, like a particular race or sex.[2]

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

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

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

In some cases, yes. For example, some employers rely on “gamified” tests, which use video games to measure abilities, personality traits, and other qualities, to assess applicants and employees. If a business requires a 90 percent score on a gamified assessment of memory, an applicant who is blind and therefore cannot play these particular games would not be able to score 90 percent on the assessment and would be rejected. But the applicant still might have a very good memory and be perfectly able to perform the essential functions of a job that requires a good memory.



Even an algorithmic decision-making tool that has been “validated” for some purposes might screen out an individual who is able to perform well on the job. To say that a decision-making tool has been “validated”<sup>[4]</sup> means that there is evidence meeting certain professional standards showing that the tool accurately measures or predicts a trait or characteristic that is important for a specific job. Algorithmic decision-making tools may be validated in this sense, and still be inaccurate when applied to particular individuals with disabilities. For example, the gamified assessment of memory may be validated because it has been shown to be an accurate measure of memory for most people in the general population, yet still screen out particular individuals who have good memories but are blind, and who therefore cannot see the computer screen to play the games.

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

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

**12. What could an employer do to reduce the chances that algorithmic decision-making tools will screen out someone because of a disability, even though that individual is able to perform the essential functions of the job (with a reasonable accommodation if one is legally required)?**

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

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

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

Second, regardless of whether the employer or another entity is developing an algorithmic decision-making tool, the employer may be able to take additional steps during implementation and deployment to reduce the chances that the tool

will screen out someone because of a disability, either intentionally or unintentionally. Such steps include:

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

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

Another way for employers to avoid ADA discrimination when using algorithmic decision-making tools is to try to ensure that no one is screened out unless they are unable to do the job, even when provided with reasonable accommodations. A promising practice is to only develop and select tools that measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation. For example, an employer who is hiring cashiers might want to ensure that the chatbot software it is using does not reject applicants who are unable to stand for long periods. Otherwise, a chatbot might reject an applicant who uses a wheelchair and may be entitled to a lowered cash register as a reasonable accommodation.



As a further measure, employers may wish to avoid using algorithmic decision-making tools that do not directly measure necessary abilities and qualifications for performing a job, but instead make inferences about those abilities and qualifications based on characteristics that are correlated with them. For example, if an open position requires the ability to write reports, the employer may wish to avoid algorithmic decision-making tools that rate this ability by measuring the similarity between an applicant's personality and the typical personality for currently successful report writers. By doing so, the employer lessens the likelihood of rejecting someone who is good at writing reports, but whose personality, because of a disability, is uncommon among successful report writers.

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

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

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

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

An algorithmic decision-making tool that could be used to identify an applicant's medical conditions would violate these restrictions if it were administered prior to a conditional offer of employment. Not all algorithmic decision-making tools that ask for health-related information are "disability-related inquiries or medical examinations," however. For example, a personality test is not posing "disability-related inquiries" because it asks whether the individual is "described by friends as



being ‘generally optimistic,’” even if being described by friends as generally optimistic might somehow be related to some kinds of mental health diagnoses.

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

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

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

---

<https://www.eeoc.gov/pre-employment-inquiries-and-medical-questions-examinations>), and

---

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>).

## **Promising Practices for Employers**

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

- As discussed in **Questions 4–7** above, employers must provide reasonable accommodations when legally required. Promising practices that may help employers to meet this requirement include:
  - Training staff to recognize and process requests for reasonable accommodation as quickly as possible, including requests to retake a test in an alternative format, or to be assessed in an alternative way, after the individual has already received poor results.

- Training staff to develop or obtain alternative means of rating job applicants and employees when the current evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation because of a disability.
- If the algorithmic decision-making tool is administered by an entity with authority to act on the employer's behalf, such as a testing company, asking the entity to forward all requests for accommodation promptly to be processed by the employer in accordance with ADA requirements. Alternatively, the employer could seek to enter into an agreement with the third party requiring it to provide reasonable accommodations on the employer's behalf, in accordance with the employer's obligations under the ADA.
- Employers should minimize the chances that algorithmic decision-making tools will disadvantage individuals with disabilities, either intentionally or unintentionally. Promising practices include:
  - Using algorithmic decision-making tools that have been designed to be accessible to individuals with as many different kinds of disabilities as possible, thereby minimizing the chances that individuals with different kinds of disabilities will be unfairly disadvantaged in the assessments. User testing is a promising practice.
  - Informing all job applicants and employees who are being rated that reasonable accommodations are available for individuals with disabilities, and providing clear and accessible instructions for requesting such accommodations.
  - Describing, in plain language and in accessible formats, the traits that the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating.
- Employers may also seek to minimize the chances that algorithmic decision-making tools will assign poor ratings to individuals who are able to perform the essential functions of the job, with a reasonable accommodation if one is legally required. Promising practices include:
  - Ensuring that the algorithmic decision-making tools only measure abilities or qualifications that are truly necessary for the job—even for people who are entitled to an on-the-job reasonable accommodation.

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

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

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

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

For example, if an employer's hiring process includes a test, you may wish to ask for an accessible format or an alternative test that measures your ability to do the job in a way that is not affected by your disability. To request a reasonable accommodation, you need to notify an employer representative or official (for example, someone in Human Resources) or, if the employer is contracting with a software vendor, the vendor's representative or the employer, that you have a



medical condition, and that you need something changed because of the medical condition to ensure that your abilities are evaluated accurately.

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

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>

(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>).

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

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

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

If you believe that your employment-related ADA rights may have been violated, the EEOC can help you decide what to do next. For example, if the employer or software vendor refuses to consider your request for a reasonable accommodation to take or re-take a test, and if you think that you would be able to do the job with a reasonable accommodation, you might consider filing a charge of discrimination with the EEOC. A discrimination charge is an applicant's or employee's statement alleging that an employer engaged in employment discrimination and asking the EEOC to help find a remedy under the EEO laws.



If you **file a charge of discrimination (<https://www.eeoc.gov/how-file-charge-employment-discrimination>)**, the EEOC will conduct an investigation. Mediation, which is an informal and confidential way for people to resolve disputes with the help of a neutral mediator, may also be available. Because you must file an EEOC charge within 180 days of the alleged violation in order to take further legal action (or 300 days if the employer is also covered by a state or local employment discrimination law), it is best to begin the process early. It is unlawful for an employer to retaliate against you for contacting the EEOC or filing a charge.

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

For general information, visit the EEOC's website (<https://www.eeoc.gov> (<https://www.eeoc.gov/>)).

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

---

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

selection criterion screens out or tends to screen out an individual with a disability or a class of individuals with disabilities is available when the challenged selection criterion is safety-based. See 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

**[2]** 42 U.S.C. § 2000e-2(a)(2), (k).

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

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

**[5]** Note, however, that the ADA permits employers to request reasonable medical documentation in support of a request for reasonable accommodation, when necessary. This may be done prior to a conditional offer of employment if the request is for a reasonable accommodation that is needed to help the individual complete the job application process.



# White House Issues Sweeping AI Executive Order: 10 Things Employers Need to Know

Insights  
10.30.23

The executive order on artificial intelligence issued by the White House today is the federal government's most ambitious attempt to date to corral this burgeoning technology – and contains numerous items of interest for employers. Here are the 10 things about the “Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence” that all employers need to know.

## 1. It Doesn't Create New Law – But Directs Federal Agencies to Take Action

The executive order covers areas well beyond employment and will help shape the government's approach to the way AI is used in just about every aspect of our daily lives. But it doesn't create any new law impacting the private sector. Instead, it pushes federal agencies to take action over the next year – some as soon as within the next 30 days.

It does so by creating a slew of new government offices and task forces, requiring each federal agency to appoint a Chief AI Officer and help staff a new White House AI Council. These new positions will coordinate the government's AI activities.

**Employer Tip:** Sign up for [FP Insights on Artificial Intelligence](#) to stay up to speed on expected agency action.

## 2. Employers Put on Notice Regarding AI Job Disruption

An increasing number of workers around the country are coming down with FOMO – a fear of becoming obsolete – and the executive order addresses this existential sense of dread. It sends strong signals to the private sector that they must take employee and labor rights into account as they introduce AI into the workplace, knowing that regulatory and enforcement action is right around the corner.

Under the executive order, the Department of Labor is tasked with coming up with a plan for how federal agencies can prevent unnecessary job elimination or displacement and assist workers whose jobs end up being eliminated or disrupted by AI. Further, the Council of Economic Advisors (an executive agency) must report to the White House within 180 days how it believes AI will impact

the labor market – and no doubt this report will lead to further measures.

**Employer Tip: Want suggestions for introducing AI to your workplace without conflict? [Read more here](#). Want suggestions for upskilling your workforce for the AI era? [Read more here](#).**

### **3. Job Discrimination a Key Focus**

The order also requires federal agencies to take steps to prevent employment discrimination spurred by artificial intelligence tools. Specifically, the order requires the following:

- The DOL will need to create formal guidance aimed at employers to reinforce that AI cannot be used to illegally track workers or their productivity in violation of existing civil rights laws. The order specifically notes that the technology should not be used for unwarranted surveillance of workforces.
- Meanwhile, the Department of Justice must create an AI-focused plan for federal officials whose job it is to investigate and take action against employers for alleged civil rights violations.
- Investigators at the DOL, DOJ, and other federal agencies will also receive special focused training on how to properly examine alleged AI-related civil rights violations.
- The OFCCP will be required to draft guidance on how federal contractors can avoid job discrimination when using AI for employment-related purposes.

**Employer Tip: Follow [the 10-step playbook we provided after a Congressman on the House AI Caucus offered a roadmap for employers](#) at FP's recent AI Conference.**

### **4. Data Privacy Remains a Focus**

Whenever you think of AI in the employment context, you must always think about data privacy. That's because any AI technology needs access to an immense amount of information in order to do its job well, and that information needs to be stored, transferred, and used in a secure manner. The executive order takes on this dynamic head-on:

- It calls for federal support to develop data-preserving techniques that will allow AI models to train and learn without exploiting private data and cryptographic tools that preserve privacy.
- It pushes all federal agencies to take steps to adopt more robust privacy protections for individuals.
- The order calls for the federal government itself to lead this effort, reexamining all the ways it purchases personally identifiable information and creating new guidelines to safeguard such data.

**Employer Tip: Make sure your company follows [these best practices](#) for minimizing data privacy concerns when using AI in your workplace.**



## 5. Immigration Reform to Fuel AI Revolution

One of the more ambitious aims of the executive order is to transform the immigration system to invite foreign national workers with technical expertise to the U.S. and incentivize them to remain in the country to study and work.

This would be accomplished by updating the system for issuing visas for high-tech workers. We would see a streamlined pathway for foreign nationals to obtain green cards and other approvals to work in the U.S. The order directs officials at the State Department and the Department of Homeland Security to take quick action to accomplish these goals.

Meanwhile, the order requires the DOL to gather information from private employers about where they could use expertise from foreign national workers so that immigration officials can properly adjust their methodology for approving workers to join and remain in the American workforce.

**Employer Tip: Stay up to speed on the [sweeping changes proposed to the H-1B process here](#), and sign up for our [FP Insights on immigration here](#).**

## 6. Copyrighted Materials to Get Additional Protection

One of the [AI nightmares](#) we often hear from employers is the worry about employees inadvertently using copyrighted information culled from generative AI products. For example, a text-generating platform like ChatGPT could provide content that was copied word-for-word from a previously published media source, or an image-generating platform like Dall-E could create a new piece of creative work that “borrows” heavily from existing artwork. An employer reproducing these protected materials could get caught in legal hot water or suffer reputational damage

The order calls on Copyright Office leaders to step up and provide recommendations to the White House on how to protect the source material and prevent such issues from occurring. The order also asks government officials to develop guidelines on how tech companies can responsibly and legally train their AI models without violating copyright protections. It also calls on officials to create a new set of standards on “watermarking,” which is the process by which companies can label content that is created by AI and offer a layer of transparency that will help hold interested parties accountable.

**Employer Tip: Adopt and enforce a policy on the use of generative AI in the workplace to prevent such dangers. [You can download a complimentary sample policy on the acceptable use of generative AI tools here](#).**

## 7. Manufacturing Sector to Get Boost

Recognizing that high-tech manufacturers will play a key role in developing the components that will power the AI revolution, the executive order provides a boost to the semiconductor

manufacturing industry. The Commerce Department will be required to ensure that small businesses receive their fair share of the government subsidies to be paid out under the CHIPS and Science Act so that chip manufacturing is not consolidated among just a few large companies.

These smaller companies will also be in line to receive mentoring through formal government programs, access to workforce development programs, funding for physical expansion where necessary, and a direct line to vast amounts of datasets to help them remain competitive.

## **8. Financial Services Businesses Will Get Additional Protections**

Given the sensitive nature of their business, one of the industries most concerned about potential cybercrimes and data security in the AI era is the financial services sector. The executive order requires the Treasury Department to report on ways that the financial services sector can best manage cybersecurity now that artificial intelligence presents new and broad risks. Look for that report by the end of March 2024.

## **9. Big Tech Gets Its Wish – Regulation is Coming**

Last month, Senator Chuck Schumer asked 20 of the nation's AI industry leaders at the first Senate AI Forum whether government needs to play a role in regulating AI, it was reported that every single person raised their hands. And now, those leaders are starting to see their wish fulfilled. Under today's executive order, Big Tech companies will soon be required to follow a series of protocols in order to be held accountable in the use of AI.

- The Commerce Department will create a set of rules to force those companies creating largescale and powerful AI platforms to regularly report to the federal government on the steps they are taking to protect their technology from foreign enemies and other bad actors.
- If foreign actors seek to use American-based technology to help train their AI models, the companies would need to report this to the government so federal officials can keep track.
- Big Tech will need to “red team” – essentially implement critical safety tests – before rolling out new AI products. And they'll also need to inform government officials ahead of time.
- Meanwhile, the Federal Trade Commission will be tasked with coming up with a set of rules to ensure that antitrust concerns do not raise their head in the AI space, requiring federal officials to examine and eradicate anti-competitive behavior in the marketplace. The ultimate goal of such rules would be to not only protect smaller businesses but the consumer as well.

## **10. What's Next?**

This executive order is just the next step in the Biden administration's larger plan for tackling the problems – and opportunities – raised by this new era of AI. And again, it can't create any new laws for private sector businesses on its own. It needs federal agencies to implement rules to carry out its aims. Look for them to begin dropping as soon as next month and throughout most of 2024.

The executive order calls on Congress to act as well. The order specifically asks federal lawmakers to pass bipartisan data privacy legislation – which has been a goal for several years now without any imminent progress. While we might see Congress continue its push towards AI legislation, you shouldn't expect to see anything dramatic from Capitol Hill anytime soon.

## **Conclusion**

If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Artificial Intelligence Practice Group](#) or on our [Government Relations Team](#). If you have specific questions about [Immigration](#), [Manufacturing](#), or [Financial Services](#), reach out to our team members as well. Make sure you subscribe to [Fisher Phillips' Insight System](#) to gather the most up-to-date information on AI and the workplace.

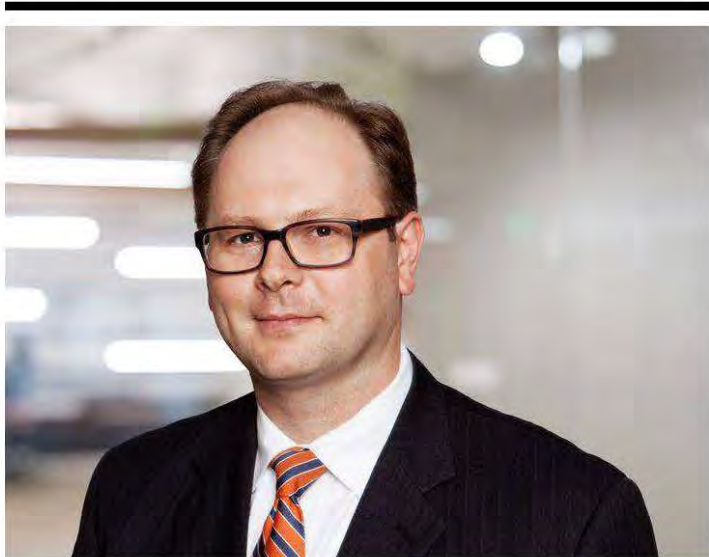
## ***Related People***



**Benjamin M. Ebbink**  
Partner  
916.210.0400  
[Email](#)



**Wendy Hughes**  
Partner  
610.230.6104  
Email



**David S. Jones**  
Regional Managing Partner  
901.526.0431  
Email



**Richard R. Meneghello**  
Chief Content Officer  
503.205.8044  
Email





**David J. Walton, CIPP/US**  
Partner  
610.230.6105  
Email

### ***Service Focus***

Artificial Intelligence  
Government Relations  
Immigration

### ***Industry Focus***

Financial Services  
Manufacturing



# EEOC Breaks New Ground by Settling First-Ever AI Discrimination Lawsuit: 10 Pointers to Avoid Robot Bias

Insights

8.14.23

We've reached another milestone in the AI revolution: the federal agency charged with enforcing anti-bias laws just recorded its first-ever settlement in a case involving AI discrimination in the workplace. The Equal Employment Opportunity Commission's (EEOC's) August 9 legal filing in a New York federal court revealed that a tutoring company agreed to pay \$365,000 to resolve charges that its AI-powered hiring selection tool automatically rejected women applicants over 55 and men over 60. What are the 10 steps you can take to ensure your organization doesn't befall the same fate as you adopt new AI technologies? *[To learn more about this issue, [register today for the AI Strategies @ Work Conference](#) where we'll discuss this and many other issues impacting the modern business environment.]*

## What Happened?

An applicant rejected from a position at iTutorGroup thought something was fishy when they allegedly submitted their same resume again but this time included a younger birthdate – and this time secured an interview. They took their complaint to the EEOC, which filed a lawsuit against the employer on behalf of more than 200 applicants alleging age and gender discrimination. The lawsuit alleged that the company illegally screened out women applicants over 55 and men over 60.

iTutor denied the allegations and continues to deny any wrongdoing despite entering into a voluntary Consent Decree settlement with the EEOC last week. Besides paying out \$365,000 to the group of over 200 rejected applicants, iTutor agreed to adopt anti-discrimination policies and conduct trainings to ensure compliance with equal employment opportunity laws. The company must also consider anew all applicants that were purportedly rejected because of their age.

## Why is This Such A Big Deal?

There are two reasons why this settlement is significant in nature:

- **This is a first-of-its-kind settlement.** The EEOC has launched a broader initiative to ensure AI workplace tools comply with anti-discrimination laws, and this settlement is a groundbreaking achievement for the agency as it begins this new push. It is certainly not the last one we'll see over the coming months and years.

- **We expect to see more legal actions and more settlements** because the use of AI in employment settings is exploding. Approximately 79% to 85% of employers now use some form of AI in recruiting and hiring – and that number will surely increase. Given this exponential rise, employers are bound to have questions about compliance best practices.

## **10 Pointers to Ensure Fair AI Use and Avoid Discrimination Claims**

In order to ensure you don't go down the same path as the company that recently settled its EEOC discrimination claim, here are 10 points you should consider adopting.

### **1. Conduct Diverse Testing**

Before fully implementing any AI tools in the HR arena, you should rigorously test them using diverse data sets. Such a practice ensures that the software won't inadvertently discriminate against certain groups.

### **2. Regularly Review Your AI-Powered HR Tools**

In addition to evaluating any AI tools you intend to use for HR purposes before you implement them to ensure they don't end up resulting in discriminatory behavior, you should continue to periodically review them to make sure things stay compliant. Ensuring that no inherent biases exist in the software is a crucial step in upholding your company's commitment to diversity. As the EEOC has clearly stated, you can't pass the buck and blame your software vendor if their AI product ends up committing discriminatory or biased acts with your applicants or employees.

### **3. Conduct Bias Audits**

New York City recently became the first jurisdiction to require employers using AI in the employment context to conduct AI bias audits – and it won't be the last. Even if your organization isn't subject to the NYC law (or any of the soon-to-be-adopted laws to follow), conducting an AI bias audit (with the help of your legal counsel) could be an invaluable tool in rooting out unintentional discrimination at your workplace.

### **4. Train Your HR Teams**

Your human resources department should get a crash course on the use of AI in human capital management so they can be your front line when it comes to ensuring fairness. Make sure they have the knowledge and skills to utilize whatever AI tools you adopt without inadvertently perpetuating biases. Besides your regular anti-discrimination training, you should ensure they receive support related to the application and interpretation of AI in all HR functions.

### **5. Establish Clear Workplace Policies**

How can you harness the power of AI in a responsible way? A critical step is developing a thorough workplace GenAI policy. [This Insight provides a list of 10 things](#) you should include in any AI policy (and provides a link so you can obtain your own complimentary template policy).

An explicit and well-communicated policy can act as a foundation for fair HR practices.

## **6. Open Communication**

You should foster an environment where applicants and employees are aware of the use of AI in the HR environment, and they feel comfortable voicing concerns about perceived biases. [A guidance document issued by the EEOC earlier this month](#) highlights how an applicant's or employee's knowledge of the use of AI in the disability law context could create a pathway to ensure that you provide necessary reasonable accommodations.

## **7. Don't Eliminate All the Humans**

Your HR professionals should play a vital role in workplace decision-making. We're being somewhat facetious by even suggesting you can remove all human interaction and replace them with robots. But to the extent that you are incorporating AI technology to supplement and support your HR efforts, you need to make sure you retain a healthy dose of human judgment in your workplace decision-making.

## **8. Incorporate Feedback Loops**

No matter how advanced your predictive analytics, it's hard to predict the real-world dynamics that can arise once you deploy your AI systems. So try to encourage feedback from internal stakeholders – and external candidates and other third parties – regarding their experiences with your AI-driven processes. This will allow you to identify and rectify potential biases or other issues that might arise.

## **9. Seek Out Expertise**

Given the complexities of AI and its intersection with workplace law, you should partner with legal counsel who understands the many issues that need to be considered – data privacy, confidentiality, trade secrets, bias audits, copyright law, labor law, and overall best practices, just to name a few. Whether you educate existing in-house counsel, recruit new talent, or retain outside lawyers with a focus in AI, you should take steps to have experienced counsel at your side.

## **10. Stay Up to Speed**

The world is changing at a frenetic pace, especially when it comes to the intersection of AI and human capital management. We recommend you subscribe to [Fisher Phillips' Insight System](#) to gather the most up-to-date information on AI, as we will continue to monitor further developments and provide updates on this and other workplace law issues.



## **Join Us in Person!**

Register today for the AI Strategies @ Work Conference taking place this September 27-28 in Washington, D.C., where we'll discuss the intersection of artificial intelligence and the modern business environment. We'll meet just steps from where lawmakers and regulators are debating AI to discuss how impending regulation will impact businesses and human capital management. We'll also explore AI's transformative impact across various industries by providing practical use case scenarios, highlighting how to seize competitive advantages, and showing how you can position yourself as a leader in the era of AI.

## **Conclusion**

If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Artificial Intelligence Practice Group.

## ***Related People***



**Raeann Burgo**  
Of Counsel  
412.822.6630  
Email



**Wendy Hughes**  
Partner  
610.230.6104  
Email

### ***Service Focus***

**Artificial Intelligence**

**Employment Discrimination and Harassment**

**Litigation and Trials**



# How is HR Using AI? An Employer's List of Tools and Potential Pitfalls

Insights

8.11.23

As various forms of artificial intelligence capture the imagination of the broader public, human resources professionals may feel like they are caught in a bit of a whirlwind. While predictive analytics (data-driven approaches to predicting outcomes) have been used in the HR sector for over a decade, we are experiencing rapid development of AI-powered tools for human resources that are changing the entire field at a dizzying rate. While you should be excited about the innovation and development now available at your fingertips, you should also be aware of potential pitfalls in using these tools. Here is a rundown of some of the more popular types of AI-fueled tools available for HR professionals – and some risks to take into account while deploying them. *[To learn more about this issue, [register today for the AI Strategies @ Work Conference](#) where we'll discuss this and many other issues impacting the modern business environment.]*

## How is HR Using AI-Powered Tools?

Modern forms of artificial intelligence are particularly useful in human resources contexts when used to do two things in particular: managing and leveraging human analytics, and automating certain processes to increase efficiency and reduce the probability of human error. The specific ways that AI is being used by HR include:

### ***Recruiting***

HR can deploy AI tools when applicants are first introduced to the organization. Chatbots can assist job seekers through the application process and assist them in matching their skills with open positions. Larger employers may receive more than 1,000 applicants every day. AI-powered screening programs can take the load of human recruiters by sifting through large numbers of applications and resumes searching for keywords, experience, skills, and other criteria in order to identify qualified candidates that should be given closer consideration. These tools can communicate automatically with candidates about their status in the application process and even direct them towards other job opportunities. AI tools can even help HR leaders identify which candidates are most likely to succeed at an organization using predictive analytics.

### ***Interviewing***



Some tools use AI-powered facial scanning during remote interviews to evaluate the applicant by analyzing speech patterns, facial expressions, and eye movements in order to determine whether the candidate would be a good fit for the position. One of the goals in using these tools is to avoid the subjective influences that can impact a hiring decision, including pre-existing biases and prejudices.

### ***Onboarding***

A variety of tools are available to ease the process of onboarding new employees – whether being hired individually or as part of a larger scale orientation. You can deploy AI-powered chatbots or other platforms to assist new employees navigate their first days and weeks at your organization, including necessary training exercises.

### ***Performance Management***

Employers are using AI-powered analytics to assist with the process of evaluating employees.

- Though **performance reviews** are intended to appraise employee contributions throughout a particular period of time (e.g., a year), those same reviews should provide insight into both the employee's current contributions and their potential contributions in the future (for example, evaluating employees for leadership or other advancement potential). As a result, AI-based tools have been developed that can assist companies in capturing all performance related data for each employee and analyzing that data in a manner that provides the company with useful conclusions concerning each employee's effectiveness and productivity.
- Some other AI tools can assist in analyzing **employee engagement** on a more continual basis. They can scrape data from employee output, emails, and other digital communications, while also proactively engaging in chats or surveys with employees at various intervals, to gauge employee sentiment.
- AI can aid employers when it comes to **learning and development** goals by developing personalized learning plans for workers and providing the necessary tools and follow-up to ensure they remain in a continual growth mindset.
- And of course, the entire field of **performance analytics** is perfectly suited for AI. By reviewing work patterns, supervisor feedback, and a whole host of other available data, some tools can offer the organization insights into an employee's strengths and areas of improvement.

Again, the goal in utilizing these tools is to remove human subjectivity to the extent possible while simultaneously considering a broader array of performance data in an effort to create a more accurate, meaningful, and fair system of performance management.

### ***Retention***



AI tools are also being used to evaluate existing employee engagement in an effort to improve retention (as differentiated from the recruitment-based methods of improving retention described above). These AI applications work in a variety of ways, but more often than not they automate the process of collecting engagement-related survey data from employees, supervisors, and other stakeholders to determine the likelihood or risk that those employees might resign ([read more here](#)). Such applications do not necessarily require human monitoring, can be programmed to collect and analyze the data, and can likewise alert HR personnel whenever certain risk factors are identified for certain employees or for employee populations.

These tools can also assist with identifying employees who would be better served by being redeployed on other projects, or who feel as though they are languishing in certain roles and are looking to improve their skillset or reskill entirely (and potentially what skills they would be apt to develop), depending on the circumstances.

### ***Automation***

In addition to the AI tools be used to manage, track, and analyze company data, there are also AI tools that have the ability to automate certain HR functions in an effort to improve employee access to the necessary information while simultaneously reducing the number of human resources personnel required to support and assist employees when an HR issue arises.

For example, some companies have also explored using AI-based chat bots in order to assist employees when they have basic questions about their employment or benefits. Providing such tools to employees can also increase efficiency, as HR functionaries can focus their efforts on strategic thinking and more impactful pursuits rather than getting bogged down with repetitive and relatively simple tasks. AI chat bots may be sufficiently advanced to handle inquiries such as benefits, pay, paid time off, and how to initiate processes related to leave or disability accommodation. That said, any decision-making should be left to human resources personnel who have experience in managing such matters.

One quick internet search will reveal the growth of Generative AI tools designed to assist HR professionals with some of the more tedious tasks, including creating job descriptions, employment policies and even employee handbooks. While these tools may provide a foundation, HR professionals must be wary of relying on them to produce a final product. As noted, any document produced by a Generative AI tool should be carefully reviewed, analyzed, and edited by an experienced HR professional.

### **Potential Pitfalls as You Consider Using AI-Powered Tools in Your Workplace**

While there is a lot to gain from use of AI-powered tools in HR, employers should review the tools they are considering implementing with a critical eye. Danger can lurk in many possible areas at the intersection of AI and human capital management.

AI tools can be a helpful resource for employers, but they are not infallible. AI-powered systems are built by humans and use a system of judgment that generally reflects human characteristics. For AI that is “trained” on existing datasets in order to predict outcomes or generate content (e.g., ChatGPT), those datasets necessarily reflect past human decision-making. For example, if a company is seeking to hire individuals who reflect the characteristics of the company’s already-successful employees and is trained using those employees’ data, the existing demographics of that company may impact any results provided by an AI-analytics tool.

### ***Possible Bias in the System***

Many of these tools may fall prey to known shortcomings in the technology that can result in disparate impacts on certain racial groups. For example, a recent [Scientific American article](#) reported that facial recognition software used by police departments can have difficulty distinguishing people of color from one another, resulting in improper arrests of innocent individuals. These same types of facial recognition errors in the employment context could give rise to liability in the HR content as well. For example, if facial recognition software used in the hiring process is less capable of reading facial expressions from individuals with darker skin, these individuals may be adversely impacted on the basis of race or skin color in violation of state or federal law. And just this week, the EEOC secured a settlement in a first-of-its-kind lawsuit involving an employer’s use of an AI recruitment tool that allegedly automatically rejected female candidates over 55 and male candidates over 60. Similar lawsuits are sure to follow.

### ***Unknown Ghosts in the Machine***

Employers who utilize third-party AI-based tools provided by vendors will have little insight into what “powers” the tool. For example, if the model is a “learning” model, what data has it been trained on? Which factors are weighed more heavily? Which are weighed less heavily? Does the system have ways to compensate for or mitigate potential impacts caused by age, disability, or other protected characteristics?

Many providers of AI-based tools will consider answers to questions like these valuable trade secrets and may be unwilling to reveal the “secret ingredients” in their products. But this reticence can ultimately put the employer at a disadvantage in the event of allegations of discrimination, as the employer may be unable to explain why certain decisions were made without a full understanding of the technology. Moreover, it may not always be clear if the tools have been tested or validated to ensure that they are in fact analyzing the factors of import and are doing so without creating a disparate impact on the basis of a protected characteristic, further muddying the waters.

### ***Privacy Concerns***

Whenever AI-powered tools are utilized in the employment context, potential privacy concerns can arise. Just because the employer has the ability to collect or purchase data (even if available for sale from third parties) does not mean they should. And obviously, employees can be sensitive

toward being surveilled – and poorly implemented monitoring processes can lead to public relations and employee relations nightmares.

Employee privacy is protected by a patchwork of state, federal, and international privacy laws, some of which come with significant consequences for noncompliance. In fact, the California Attorney General recently announced a sweeping investigation specifically into **employer** compliance with the California Consumer Privacy Act (CCPA). As a result, employers need to ensure they comply with the CCPA and other data privacy laws when utilizing AI-powered tools that rely on capture of employee-provided data

### ***Who is the Decision-Maker?***

Finally, any time an employer utilizes AI-based technology to assist in its decision-making, the employer must understand that they must be the final decision-maker – not the AI-powered tool. While these tools and related analytics are powerful and can assist with accurate, bias-free assessments, these tools cannot replace independent judgment or common sense.

### **Conclusion**

Put simply, the AI-revolution is here. And tools harnessing the power of AI will only become more and more commonly available and more commonly used in the employment context. Approaching these tools with the right mindset – and the right expectations – allows employers to maximize their efficiency while mitigating the potential risks that can result.

### **Join Us in Person!**

Register today for the AI Strategies @ Work Conference taking place this September 27-28 in Washington, D.C., where we'll discuss the intersection of artificial intelligence and the modern business environment. We'll meet just steps from where lawmakers and regulators are debating AI to discuss how impending regulation will impact businesses and human capital management. We'll also explore AI's transformative impact across various industries by providing practical use case scenarios, highlighting how to seize competitive advantages, and showing how you can position yourself as a leader in the era of AI.

### **Conclusion**

We recommend you subscribe to Fisher Phillips' Insight System to gather the most up-to-date information on AI, as we will continue to monitor further developments and provide updates on this and other workplace law issues. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Artificial Intelligence Practice Group.

### ***Related People***





**Keia James Atkinson**  
Associate  
858.597.9621  
Email



**Anne Hanson**  
Associate  
702.862.3803  
Email





**Aymara Ledezma**  
**Associate**  
**213.330.4470**  
**Email**

### ***Service Focus***

**Artificial Intelligence**  
**Counseling and Advice**



# AI Era Leads to New ADA Advice: 7 Things Employers Need to Know About New EEOC Guidance on Vision Impairments

Insights

8.08.23

Federal workplace officials recently clarified the responsibilities that employers using artificial intelligence have when it comes to applicants and workers with vision impairments, further adjusting existing legal guidelines to this new era of AI technology. The Equal Employment Opportunity Commission (EEOC) issued a new technical assistance document on July 26 laying out the reasonable accommodation obligations employers have when using AI to screen candidates or assess worker performance to ensure they don't run afoul of the Americans with Disabilities Act (ADA). What are the seven things you need to know about this most recent release? *[To learn more about this issue, [register today for the AI Strategies @ Work Conference](#) where we'll discuss this and many other issues impacting the modern business environment.]*

## Understanding the Basics

Before we dive in, you should make sure you understand the basics of the ADA so you can put the new guidance document into context. The ADA not only prohibits employers from discriminating against applicants and workers with disabilities, but it also mandates that employers offer reasonable accommodations to ensure applicants have equal opportunity during the hiring process and to ensure qualified employees can perform the essential functions of their position. The EEOC's most recent guidance focuses on the obligations arising when applicants or employees have vision impairments that require accommodation.

There is a wide range of possible changes to the application process or to the day-to-day workplace that may aid those with vision impairments. For example, assistive technology such as text-to-speech software or accessible materials such as braille or large print could serve to satisfy the law's requirements. The EEOC provides [a detailed list of possible accommodations](#) that can be considered in such situations that employers can review as needed.

## The 7 Things You Need to Know

We've reviewed [the entire technical assistance document](#) and identified the key points that all employers need to know. Here are the seven most significant items you'll want to digest:

1. **You may need to make a new kind of reasonable accommodation.**

The new technical assistance document emphasizes the fact that employers may have an obligation to make reasonable accommodations for applicants and employees with visual disabilities when you use decision-making tools involving AI or algorithms. While this might seem like an obvious point to employers well-versed on their legal compliance obligations, it is an increasingly common issue given the rise of AI tech being deployed by employers – and thus one that the EEOC considered worthy of a special and particular mention.

**2. Your AI tool might be unintentionally creating problems.**

The EEOC stressed that AI decision-making tools might unintentionally screen out qualified individuals with disabilities in the application process and could negatively impact qualified employees on the job – which could be ADA violations. For example, an applicant or employee may have a visual disability that reduces the accuracy of an AI assessment used to evaluate them.

**3. There are options available to employers.**

If you determine that your AI product could be causing such problems and you need to make accommodations, the EEOC identified alternative testing formats as a potential solution given that it could provide a more accurate assessment of the applicant's or employee's ability to perform the position (unless, of course, the alternative creates an undue hardship).

**4. The EEOC has provided a helpful example to explain how employers' obligations may arise.**

The agency's guidance provided the following illustrative example to explain how these situations may arise. An employer begins using an AI-fueled algorithm that takes into account the employee's average number of keystrokes per minute to evaluate productivity. An employee with a vision impairment who uses voice recognition software instead of a keyboard may be rated poorly by the algorithm and thus lose out on a promotion or other job opportunity as a result. And this, according to the EEOC, could be an ADA violation.

**5. You should take proactive measures to reduce your chances of committing an ADA violation.**

The EEOC recommends employers take the "promising practice" of providing information about how the AI tool evaluates applicants or employees on a proactive basis. This would then alert those with visual disabilities that the technology might not accurately assess their qualifications. In combination with such disclosure, the agency recommends that employers provide instructions on how the applicant or employee could seek a reasonable accommodation if one is needed.

Using the illustrative example above, imagine if the employer had informed its employees ahead of time that they would be assessed partly on the basis of keyboard usage. The employee with a vision impairment would have known to request an alternative means of measuring productivity as a reasonable accommodation. Perhaps, for example, the company could have deployed an alternative method that took voice recognition software into account when assessing productivity rather than just keystrokes.



**6. While not carrying the force of law, the new EEOC release is a key signal to how the agency will act.**

Technical assistance documents like the one recently released do not carry the force of the law. They aren't statutes or fully formalized regulations that have undergone the rigorous review-and-comment process. However, they can – and will – be cited by agency investigators and lawyers in administrative and civil actions, and no doubt will also be weaponized by plaintiffs' attorneys who believe their clients have been wronged. And while courts are not obligated to follow the guidance as if it were ironclad law, you can be sure that judges will carefully consider the information contained in this document when weighing decisions before them.

**7. This guidance is part of a bigger trend.**

Finally, employers should realize that this guidance does not exist in a vacuum. It was not the first time that the EEOC has provided guidance about the ways that employers need to adjust existing workplace policies in the age of AI – and won't be the last. Earlier this summer, the agency warned employers deploying AI to assist with hiring or employment-related actions that it will apply long-standing legal principles to today's evolving environment in an effort to find possible Title VII violations.

This followed EEOC Chair Burrows teaming up with leaders from the Department of Justice, the Federal Trade Commission and the Consumer Financial Protection Bureau to announce that they would be scrutinizing potential employment-related biases that can arise from using AI and algorithms in the workplace. And within the past year, the EEOC teamed up with the DOJ to release a pair of guidance documents warning that relying on AI to make staffing decisions might unintentionally lead to discriminatory employment practices, including disability bias, followed by the White House releasing its "Blueprint for an AI Bill of Rights" that aims to protect civil rights in the building, deployment, and governance of automated systems.

In other words, you'll want to stay up to speed on the way that the EEOC wants to apply existing legal principles to AI-related actions, as there will no doubt be further guidance issued in the coming months and years.

**Join Us in Person!**

Register today for the AI Strategies @ Work Conference taking place this September 27-28 in Washington, D.C., where we'll discuss the intersection of artificial intelligence and the modern business environment. We'll meet just steps from where lawmakers and regulators are debating AI to discuss how impending regulation will impact businesses and human capital management. We'll also explore AI's transformative impact across various industries by providing practical use case scenarios, highlighting how to seize competitive advantages, and showing how you can position yourself as a leader in the era of AI.

**Conclusion**



We recommend you subscribe to [Fisher Phillips' Insight System](#) to gather the most up-to-date information on AI, as we will continue to monitor further developments and provide updates on this and other workplace law issues. If you have questions, contact your Fisher Phillips attorney, the author(s) of this Insight, or any attorney on our [Artificial Intelligence Practice Group](#).

### ***Related People***

---



**Benjamin M. Ebbink**  
Partner  
916.210.0400  
[Email](#)



**Ivy Waisbord**  
Associate  
610.230.6108  
[Email](#)

### ***Service Focus***

**Artificial Intelligence**

**Employee Leaves and Accommodations**

## Employment Discrimination and Harassment



# Are You Compliant with NYC's New Rules for Using AI in the Workplace? Answers to Your Top 7 Questions

Insights

7.27.23

Businesses that use artificial intelligence tools to hire and promote employees in the Big Apple are navigating uncharted waters as they grapple with significant compliance obligations. New York City's first-of-its-kind law aims to prevent bias when using AI and requires employers to take several critical steps, such as arranging for an independent bias audit and complying with notice requirements. You should note that the details of NYC's Local Law 144 changed several times from when we first started writing about this development to when the rules were finalized and enforcement began on July 5. So, it's a good idea to carefully review your plan again for compliance with the most up-to-date information. Here are the answers to your top seven compliance questions, including five steps you should consider taking immediately. *[To learn more about this issue, [register today for the AI Strategies @ Work Conference](#) where we'll discuss this and many other issues impacting the modern business environment.]*

## 1. What Does the Law Require?

Employers that use software to screen candidates or employees in New York City must comply with [Local Law 144 of 2021](#), which regulates the use of automated employment decision tools (AEDTs). What exactly is an AEDT? The law defines it as a computer-based tool that:

- Uses machine learning, statistical modeling, data analytics, or artificial intelligence;
- Helps employers and employment agencies make employment decisions; and
- Substantially assists or replaces discretionary decision-making.

Specifically, the local law requires employers to take the following actions when using these tools to screen candidates for employment or employees for promotion:

- Select an independent auditor to perform an annual, independent bias audit of your AEDTs used during the hiring or promotion process to assess disparate impact based on race, ethnicity, and sex;
- Publish the audit results; and
- Provide notice about your use of AEDTs to candidates or employees that reside in NYC.

The bias audit of an AEDT must be performed before the system is used and cannot be relied on for more than one year. You must publish results of the bias audit for 10 business days prior to using it.

## 2. Who Must Comply with the Law?

The local law impacts most businesses in New York City. All employers – regardless of size – must be audited if they use AEDTs to hire or promote employees **in the city**.

But what does “**in the city**” mean?

- The New York City Department of Worker and Consumer Protection (DCWP) — the agency tasked with enforcing the law and creating related rules — has said that the local law applies only if the position is located in NYC. This means coverage is not based on the employee’s residence, and the rules do not apply unless the employer is physically located in NYC. For example, the law does not apply if a job candidate lives in NYC and is applying for a position outside of the city. The law does apply, however, if the employee works full-time, part-time, or in a hybrid position in NYC.
- What about full-time remote work? If the job is **fully remote**, the law applies when the role is associated with a NYC office of a multi-location employer, or the employer has offices only in NYC.
- An **employment agency** that uses AEDTs is covered if the agency is located in NYC, or the job (whether remote or in-person) is attached to an NYC office. An employment agency is broadly defined. It includes all people who, for a fee, provide vocational guidance and help applicants obtain employment, arrange interviews, make contacts with prospective employers to help applicants find a job, and have knowledge of job openings not available to the general public.

Notably, the law applies only when using AEDTs to assess job candidates and employees who apply for a specific position. It does not apply when AEDTs are used for general outreach to invite job candidates to apply for jobs or to scan a resume bank.

## 3. What Are the Key Components of a Bias Audit?

While a vendor can conduct a bias audit on the tools it creates, the employer or employment agency bears responsibility for following the local law and making sure they do not use an AEDT for screening job candidates and employees without first conducting a bias audit.

**Bias audits must be conducted by an independent auditor** no more than one year before the AEDT’s use, and the results must be published. The rules detail minimum calculations the bias audit must make depending on the AEDT’s evaluative use.

- Employers using an AEDT to select individuals to move forward in the hiring process or classify individuals into groups must calculate the selection rate and impact ratio for each



category (i.e., race/ethnicity and sex). If the AEDT is used to classify individuals into groups, the audit must also calculate the selection rate and impact ratio for each classification.

- Employers using an AEDT to score applicants or candidates must calculate the average score for individuals in each category and the impact ratio.

While employers should understand bias audit requirements to ensure the independent auditor is compliant with the law and proposed rules, the procured auditor will likely handle the technical details. Employers will, however, have to make sure they are collecting and then providing the independent auditor with the required demographic information so that the auditor can effectuate the audit. The independent auditor may use historical data it has collected from employers that use the tool to complete the audit. Accordingly, the audit results, which will be open to the public, will be wholly dependent on the good (or bad) data employers provide.

**You will be required to publicly share** the date of the most recent bias audit, a summary of the results with specific information included, and the date you began using the AEDT. This information must be posted in a clear and conspicuous manner on your website or through a hyperlink to a website with the relevant information.

#### **4. What Are the Notice and Recordkeeping Requirements?**

The local law creates several requirements for employers and employment agencies to provide notice about their use of AEDTs, as follows:

- **Notice to resident of NYC.** You must notify job candidates and employees who are NYC residents about the use of an AEDT and the qualifications and characteristics that will be accessed through the system. The notice must include instructions on how an individual can request an alternative selection process or reasonable accommodation under other laws. According to DCWP's rules, you are not required to provide an alternative selection process. The notice may be distributed in the following ways:
  - **Notice to candidates for employment** can be provided on the employment section of your website in a clear and conspicuous manner, in a job posting, or mailed/mailed directly to candidates at least 10 business days before use of the AEDT.
  - **Notice to employees** can be provided in a written policy or procedure given to employees at least 10 business days before use of the AEDT or provided in a job posting or mailed or emailed directly to the employee at least 10 business days before use of the AEDT.

If you post notice to candidates on your website or to employees in a written policy, it does not have to be position specific.

- **Required disclosures.** Be prepared to share information about your AEDT retention policy, the type of data collected for the AEDT, and the source of such data. You have the following compliance options:

- Post the information in a clear and conspicuous manner on your website;
- Inform candidates or employees about how they can make a written request for the information. Written requests must be responded to within 30 days of receipt;
- If such information cannot be disclosed, you should provide an explanation why disclosure would violate local, state, or federal law or interfere with a law enforcement investigation.

You'll also want to ensure compliance with the local law's recordkeeping rules. DCWP advises employers to keep records of all electronic tools used to assist in hiring or promotion, how electronic tools were used, other methods used to evaluate candidate or employee, and all notices and methods used to provide notice in accordance with the local law.

## **5. What Are the Penalties for Non-Compliance?**

Employers who violate local law will be assessed a civil penalty of not more than \$500 for the first violation. Subsequent violations can reach up to \$1,500. Each day the automated employment decision tool is used in violation of the law counts as a separate violation. The same penalties apply to notice violations. And a failure to provide notice is treated as a separate violation.

There is no cap on civil penalties, which means employers can rack up significant fines if they fail to abide by the provisions of this law. NYC's Office of Administrative Trials and Hearings or another designated agency will oversee the recovery of civil penalties, while the City's Corporation Counsel (or a designee) has enforcement power.

## **6. What If the Audit Discovers Bias?**

You should note the NYC's law does not require employers stop using a biased AEDT, but audit results may run afoul of other laws or open employers up to liability. Indeed, employers can be liable under Title VII for using biased AEDTs. For example, the U.S. Equal Employment Opportunity Commission (EEOC) released a technical assistance document in May of this year. Through this guidance, the EEOC makes it clear that the EEOC will use the 80% or 4/5 rule for analyzing whether an AEDT potentially violates Title VII. NYC's law does not impose or mandate compliance with the 80% rule. Under the NYC law, employers can still use the AEDT even if the tool violates the 80% rule. But the use of an AEDT that violates the 80% rule can run afoul of Title VII. You can read more about this EEOC guidance, the 80% rule, and its potential impact on AEDTs [here](#).

## **7. What Steps Should Employers Take Now?**

Now that enforcement of NYC's AI anti-bias law has begun, and we have some clarity on your obligations, here are five steps to consider taking in order to put yourself in the best compliance position:

1. According to some estimates, more than 80% of HR departments are using some form of an AEDT. Employers must conduct internal assessments to see what tools they are using that may

qualify as an AEDT under the NYC law. This is critical not only for complying with the NYC law, but also for complying with Title VII and other employment laws.

2. If your business plans to use these tools to evaluate and assess candidates, you must vet and/or retain an independent auditor to conduct the bias audit.
3. Since the auditor will need demographic and selection/evaluative information to conduct the audit, you will also need to develop policies and procedures to collect and preserve this information.
4. You will need to train any employees responsible for the collection and preservation of this information.
5. Finally, since the bias audit is not a one-time requirement, be prepared for annual review of the AEDT and periodic updates to your website.

### **Join Us in Person!**

Register today for the AI Strategies @ Work Conference taking place this September 27-28 in Washington, D.C., where we'll discuss the intersection of artificial intelligence and the modern business environment. We'll meet just steps from where lawmakers and regulators are debating AI to discuss how impending regulation will impact businesses and human capital management. We'll also explore AI's transformative impact across various industries by providing practical use case scenarios, highlighting how to seize competitive advantages, and showing how you can position yourself as a leader in the era of AI.

### **Conclusion**

We will continue to monitor AI developments, as well as updates to NYC's legislation, and provide updates as appropriate, so make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Artificial Intelligence Practice Group or New York City office.

### **Related People**



**Amanda M. Blair**  
**Associate**  
**212.899.9989**  
**Email**



**David J. Walton, CIPP/US**  
**Partner**  
**610.230.6105**  
**Email**

### ***Service Focus***

**Artificial Intelligence**  
**Counseling and Advice**

### ***Related Offices***

**New York**



# The Impact of AI in the Workplace

Sheila M. Abron

Fisher Phillips, LLP

[sabron@fisherphillips.com](mailto:sabron@fisherphillips.com)

803-255-0000

# AI- Major Element of The Fourth Industrial Revolution (4IR)

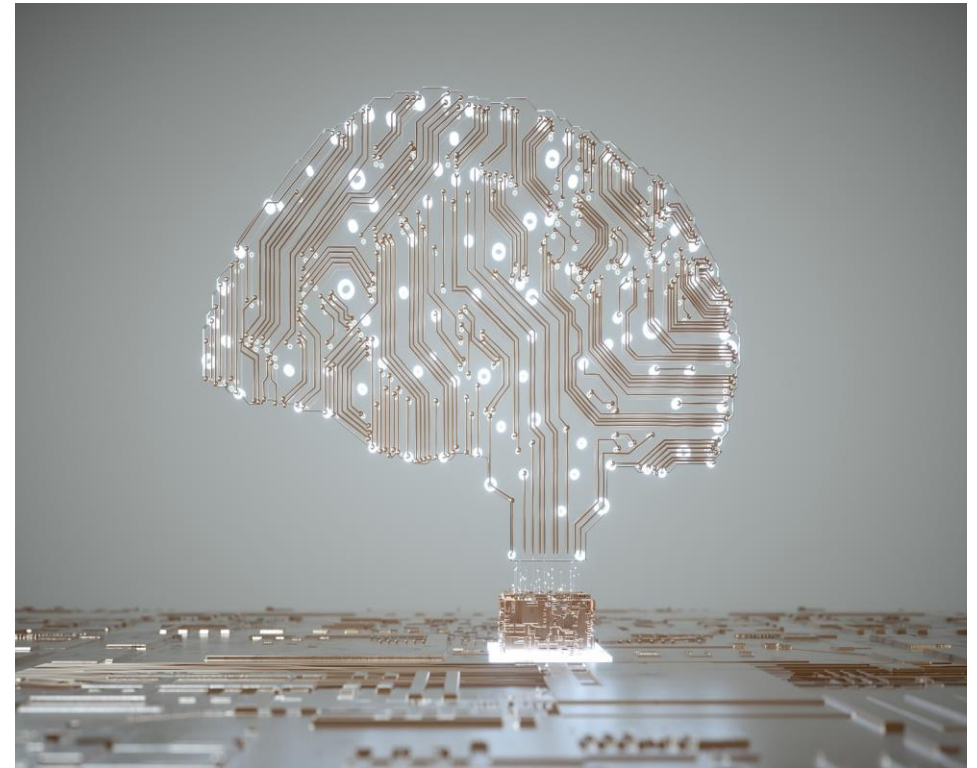
- “The AI revolution, will lead to . . . no more need to perform routine, limited value, jobs. The workforce and the underlying employment models, will move from *long-term, full-time employment agreements*, to flexible, selective premium services offerings.”
- “A robot and an intelligent algorithm cannot become ill, have children or go on strike and is not entitled to annual leave . . . and works reliably and constantly in danger zones and during the night.”
- 65% of Americans expect that, within 50 years, a robot or intelligent algorithm will be doing their work.

George Krasadakis, *AI: The Impact on Employment and the Workforce*, MEDIUM (Jan. 17, 2018), <https://medium.com/innovation-machine/artificial-intelligence-3c6d80072416>.

# Artificial Intelligence...

---

- 1. What it is + how it works**
- 2. What it can do**
- 3. Why you should care**
- 4. Why it matters, risks, employer use**
- 5. Legal issues**







## What it is

- Simulation of human intelligence in machines, allowing them to perform tasks that typically require human intelligence





# How it works

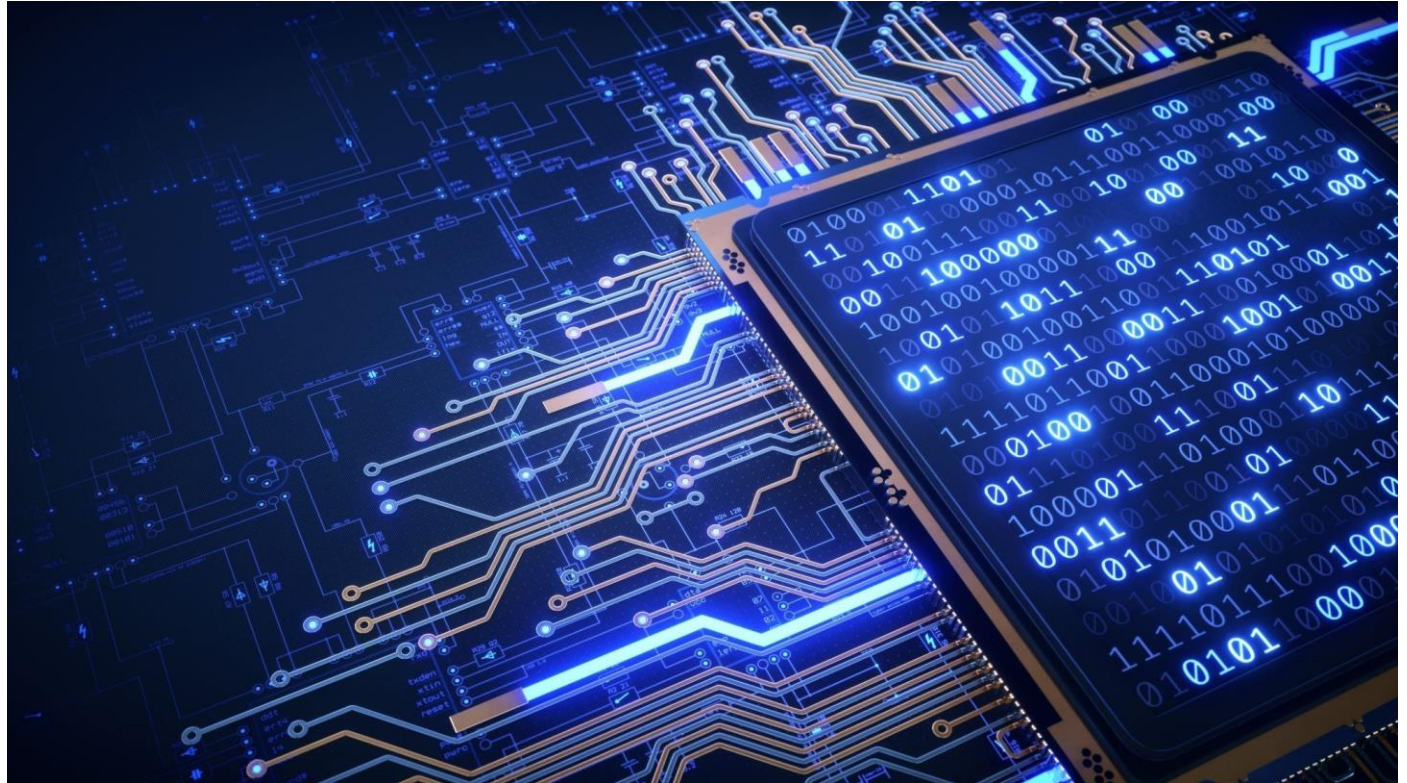
---

1. Collects Data (images, speech, sound, etc.)

2. It processes that data based on patterns it was “trained” to recognize

3. Output

1. It learns\*



# What it can do



---

## **Natural Language Processing (NLP):**

NLP is a field of AI that deals with the interaction between computers and human language. It's used in chatbots, language translation, sentiment analysis, and more.

## **Computer Vision:**

Computer vision enables AI systems to understand and interpret visual information from images and videos. This is used in applications like facial recognition and autonomous vehicles.

## **Robotics and Control:**

AI can be applied in robotics to control robots' movements and tasks. It's vital in areas like industrial automation and autonomous drones.

## **Optimization and Search:**

AI algorithms are used for optimization problems, like finding the best route for delivery trucks or optimizing supply chain logistics.



# What it can do (cont.)





# AI Workplace Legal Insights

December 3, 2023

## Anonymous

Create a presentation deck that is extremely detailed and includes talking and teaching notes. The presentation is on the topic of the Impact of Artificial Intelligence in the Workplace. This presentation will be presented by an employment lawyer to a group of attorneys at a conference. This presentation should take approximately 45 minutes to present.

## ChatGPT

I can certainly help outline the structure and key points for your presentation on the Impact of Artificial Intelligence in the Workplace. Keep in mind that due to the limitations of this platform, I won't be able to create a detailed presentation with slide and notes. However, I can provide you with a comprehensive outline. Let's break it down:

### **Title Slide:**

- Title: "Navigating the Impact of AI in the Workplace"
- Subtitle: A Legal Perspective

### **Slide 1: Introduction**

- Welcome attendees
- Brief overview of AI in the workplace
- Importance of understanding legal implications

### **Slide 2: Agenda**

- Overview of key topics to be covered

### **Slide 3: Definition of AI**

- Define artificial intelligence
- Types of AI in the workplace

### **Slide 4-7: AI Adoption Trends**

- Growth of AI in various industries
- Impact on job roles and tasks

### **Slide 8-12: Legal Framework**

- Employment laws related to AI



### Slide 13-17: Challenges and Concerns

- Job displacement and workforce changes
- Ethical considerations
- Public perception and trust issues

### Slide 18-22: Case Studies

- Highlight real-world examples of AI impact
- Legal outcomes and precedents

### Slide 23-27: Mitigation Strategies

- Best practices for employers
- Policies and guidelines
- Training programs for employees

### Slide 28-32: Future Outlook

- Emerging trends in AI
- Legal challenges on the horizon

### Slide 33-37: Q&A Session

#### Notes for Presenter:

- Use case studies to illustrate legal nuances
- Emphasize proactive measures for companies
- Encourage dialogue during the Q&A session

Remember to adapt the content based on the latest legal developments and tailor it to the presenter's style.



#### Anonymous

Provide a script for the presenter based on the previously created slide decks



#### ChatGPT

Certainly! Here's a script to accompany the presentation on the Impact of Artificial Intelligence in the Workplace:

#### Slide 1: Introduction

"Good [morning/afternoon/evening], everyone. I'm [Presenter's Name], an employment lawyer, and today we're going to delve into a critical topic: 'Navigating the Impact of AI in the Workplace: A Legal Perspective.' Thank you for joining me as we explore the



---

### **Slide 8-12: Legal Framework**

"As employment lawyers, it's vital to be well-versed in the legal framework surrounding AI. We'll explore how existing employment laws intersect with AI, address concerns related to discrimination and bias, and touch on the delicate balance of privacy and data protection."

---

### **Slide 13-17: Challenges and Concerns**

"With the growth of AI come challenges. We'll discuss the potential displacement of jobs, ethical considerations, and how public perception and trust can impact workplaces. These challenges bring forth legal questions that we must navigate."

---

### **Slide 18-22: Case Studies**

"Case studies provide a practical lens through which we can understand the legal nuances of AI impact. We'll examine real-world examples, discussing the outcomes

---

# Why you should care ?

---

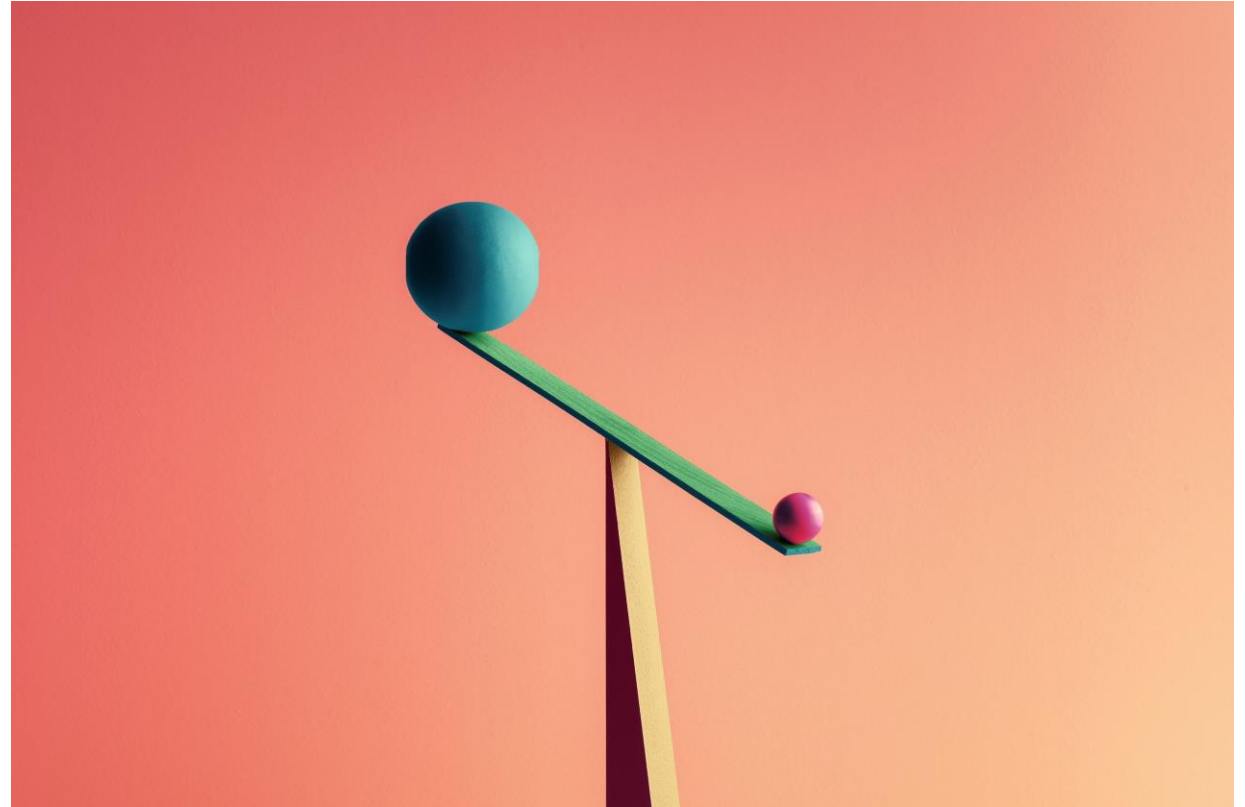
1. It's everywhere, and it's not going away anytime soon
2. There are serious risks if not used carefully
3. It impacts all of our clients and the work we do ...





# What are the risks?

- Intellectual Property and Ownership
- Attribution and Plagiarism
- Bias and Representation
- Unintended Content Generation
- User Consent and Privacy



# How Are Employers Using AI?

- Hiring
- Performance Management
- Surveys
- Training
- Retention/Flight Risks
- Health Costs
- Anything that involves data to predict human behavior



# Legal Outlook

- EEOC
- ADPPA
- Various State Laws
- Artificial Intelligence, Real Repercussions
- The White House's Blueprint, Framework, and Executive Order





# The EEOC's “New Civil Rights Frontier”

---

Announced initiative on A.I. and algorithmic fairness on October 28, 2021

“While the technology may be evolving, anti-discrimination laws still apply. The EEOC will address workplace bias that violates federal civil rights laws regardless of the form it takes, and the agency is committed to helping employers understand how to benefit from these new technologies while also complying with employment laws.”





# EEOC May 12, 2022 Guidance

---

- “The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees”
- Best Practices
- Broad Scope
- Responsibility for Vendor Technology

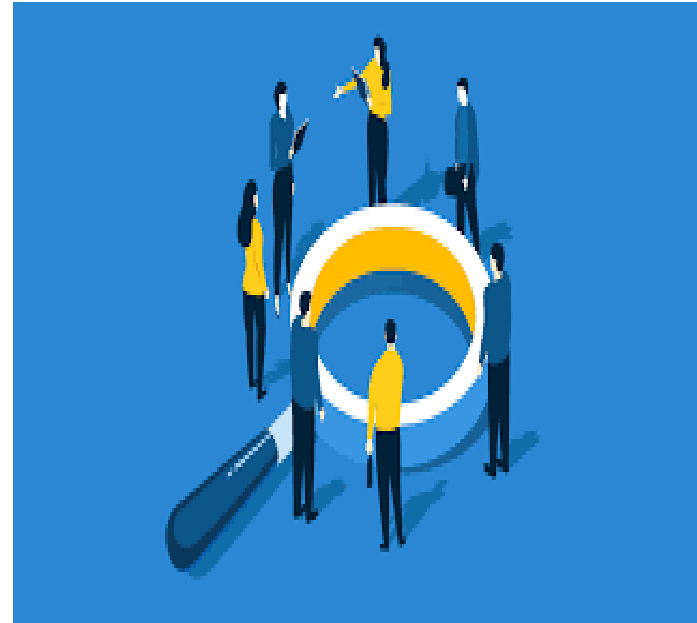
# EEOC May 12, 2022 Guidance (Cont'd)

- How employers can violate the ADA
  - Failing to provide reasonable accommodation
  - Screening Out
  - Improper Inquiries



# EEOC May 12, 2022 Guidance (Cont'd)

- Tips to Avoid Pitfalls
  - Transparency
  - Notice
  - Focus on Essential Functions
  - Confirm Vendor Compliance



# May 18, 2023 EEOC Guidance

- “Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964”







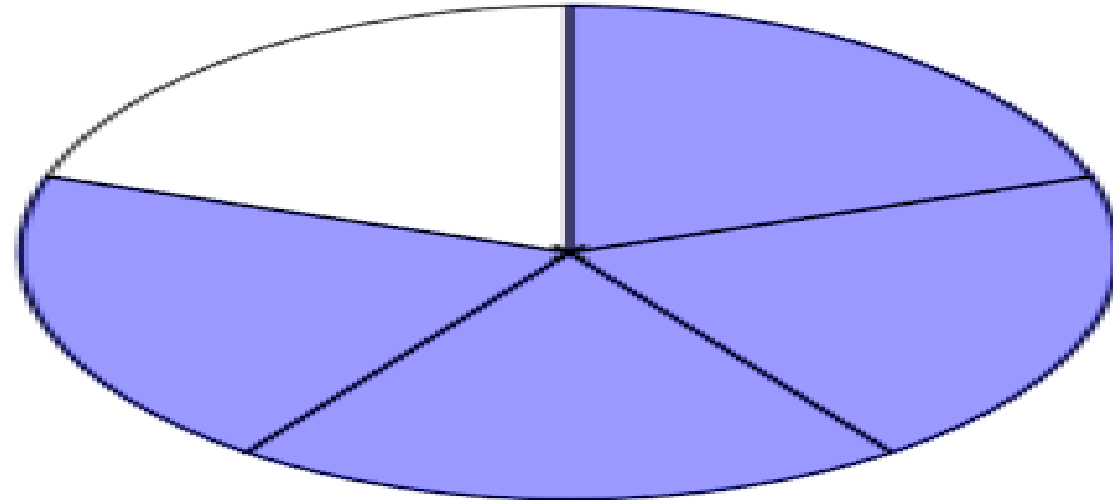
## May 18, 2023 EEOC Guidance (Cont'd)

- Could an employer's use of an algorithmic decision-making tool be a "selection procedure?"
- Can employers assess their use of an algorithmic decision-making tool for adverse impact in the same way that they assess more traditional selection procedures for adverse impact?
- Is an employer responsible under Title VII for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor?

# May 18, 2023 EEOC Guidance (Cont'd)



- What is a “selection rate”?
- What is the four-fifths rule?



# May 18, 2023 EEOC Guidance (Cont'd)



- The 4/5ths rule has been used by the EEOC for decades to determine **potential** employment discrimination based on adverse impact
- What is the 4/5ths rule?
  - the selection rate for each group is compared to the rate for the group with the highest selection rate
  - If the selection rate for a protected group falls below 80% of the rate for the group with the highest selection rate, it suggests **possible** adverse impact
  - Compliance with the 4/5ths rule does not guarantee a selection procedure is free from adverse impact under Title VII



---

## May 18, 2023 EEOC Guidance (Cont'd)

- Does compliance with the four-fifths rule guarantee that a particular employment procedure does not have an adverse impact for purposes of Title VII?
- If an employer discovers that the use of an algorithmic decision-making tool would have an adverse impact, may it adjust the tool, or decide to use or a different tool, in order to reduce or eliminate that impact?





# OFCCP FAQ – July 23, 2019

- “Irrespective of the level of sophistication involved, OFCCP analyzes all selection devices for adverse impact. If OFCCP discovered that a contractor’s use of an AI-selection procedure is having an adverse impact at a contractor’s establishment, the contractor is required to validate the selection procedure using an appropriate validation strategy . . .

<https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures#Q6>



# OFCCP's Validation Strategy

- When a selection procedure has adverse impact on a protected group, the Uniform Guidelines on Selection Procedures require evidence of validity from validity studies.
- Approaches:
  - Content Validation
  - Criterion-related Validation
  - Construct Validation



---

# Content Validation

- Data showing that the content of the selection procedure is representative of important aspects of performance on the job for which candidates are to be evaluated.



---

# Criterion-Related Validation

- Empirical data demonstrating that the selection procedure is predicative of or significantly correlated with important elements of job performance (criteria).





# Construct Validation

- Data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated.

# Proposed American Data Privacy And Protection Act (ADPPA)

- July 20, 2022 – draft legislation introduced that would govern how companies across different industries treat consumer data.
- Was approved by the Committee on Energy and Commerce but failed to advance to the House or Senate floors





# State Laws/Regulations

- **Colorado – 702-4:** prohibits insurers from using any external consumer data, or A.I. in a way that unfairly discriminates based on protected statuses
- **Illinois Artificial Intelligence Interview Act:** regulates employers who ask applicants to give video interviews
- **New York City Local Law 144:** makes it unlawful for employers to use or vendors to sell an “automated employment decision tool” that does not conduct a disparate impact analysis at least annually, with a summary made publicly available and filed with the NY Department of Labor



---

# Other Proposed State Laws/Regulations

- **California – AB 331:** proposed regulations for “automated-decision systems” that contribute to or result in algorithmic discrimination
- **D.C. – Stop Discrimination by Algorithms Act of 2023**
- **New Jersey’s Bill:** almost identical to New York City’s Local Law 144 – prohibits use of automated employment decision tool unless the tool has been subject to a bias audit, which is to be made publicly available, and notices must be provided to employees/job candidates



# Artificial Intelligence, Real Repercussions



- EEOC v. iTutorGroup, Inc., et al.
  - iTutor hired US-based tutors to provide online tutoring
  - EEOC sued iTutor for programming their tutor application software to automatically reject applicants aged 55 or older and male applicants aged 60 or over
  - iTutor settled the suit - \$365,000 to a group of over 200 rejected applicants
    - iTutor must also reconsider all improperly rejected applicants

# Blueprint For A.I. Bill Of Rights

- October 4, 2022
- non-binding; intended to support the development of policies and practices that protect civil rights and promote democratic values in the building, deployment, and governance of automated systems.
- Provides a framework to be used for automated systems having a potential to meaningfully impact the American public's rights, opportunities to critical resources or services



# Blueprint For A.I. Bill Of Rights

1. You should be protected from unsafe or ineffective systems
2. You should not face discrimination by algorithms, and systems should be used and designed in an equitable way
3. You should be protected from abusive data practices via built-in protections, and you should have agency over how data about you is used
4. You should know that an automated system is being used and understand how and why it contributes to outcomes that impact you
5. You should be able to opt out, where appropriate, and have access to a person who can quickly consider and remedy problems you encounter



# An AI Framework

1. The National Institute of Science and Technology - federal agency that promotes innovation and industrial competitiveness
2. Developed a framework for businesses that want to manage risks related to AI
3. Framework is multi-pronged and provides a variety of resources, including documents, videos, interviews, and a resource center
4. See the AI Playbook, a 210-page guide providing a comprehensive look at suggested practices for integrating AI into the workplace





# President Biden's Executive Order

1. Setting Standards for AI Safety and Security
2. Protecting Americans' Privacy
3. Advancing Equity and Civil Rights
4. Protecting Consumers, Patients, and Students
- 5. Supporting Workers**
  - Fair pay
  - Evaluation of job applicants
  - Workers' rights to bargain collectively
6. Promoting Innovation and Competition
7. Advancing American Leadership Abroad
8. Ensuring Responsible and Effective Government Use of AI



# What should be done?

1. Develop policies and practices related to AI use
2. Transparency with applicants and employees
3. Ensure AI systems are trustworthy
4. Have DEI and accessibility as core tenants of AI programs
5. Be aware of data security concerns
6. Inventory AI systems
7. Develop contingency plans
8. Periodic review of AI systems
9. Stay up-to-date with the legal and regulatory landscape



# QUESTIONS?

---



---

# Thank You!

Sheila M. Abron

Fisher & Phillips, LLP

[sabron@fisherphillips.com](mailto:sabron@fisherphillips.com)

803-255-0000





**South Carolina Bar**

Continuing Legal Education Division

**2024 SC BAR CONVENTION**

**Employment & Labor Law Section**

**Friday, January 19**

**Title VII - A 60th Anniversary Review**

*Nekki Shutt*

No Materials Available



**South Carolina Bar**

Continuing Legal Education Division

**2024 SC BAR CONVENTION**

**Employment & Labor Law Section**

**Friday, January 19**

Digital Forensics and Their Use in Employment  
Litigation

*Micah Sturgis*

# **Digital Forensics and Their Use in Employment Litigation**





# Biography

- Micah Sturgis, EnCE, CCME
- President – Sturgis Forensics, L.L.C.
  
- Over 20 years of Digital Forensic and Investigative Experience
- Developed three Forensic Labs
- Experience in Public, Private, and Corporate Sectors
- Qualified multiple times as an Expert in the field of Digital Forensics in Criminal and Civil Litigation.
- Instructor of Digital Forensics





***“These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”***

***-Chief Justice Roberts  
United State Supreme Court***

# ***What are we collecting and Why?***



- **Cell Phone Data Collection (messages, 3<sup>rd</sup> party chats, call logs, files)**
- **Computer Data (messages, 3<sup>rd</sup> party chats, emails, files, Internet search history, Last Modified, Accessed, Created dates for files and folders, etc.)**
- **Email Accounts (Outlook, Gmail, Yahoo, etc.)**
- **Slack Accounts**
- **Teams Accounts**
- **Cloud Accounts (Dropbox, Box, OneDrive, etc.)**

# ***What are we collecting and Why?***



- **Cell Phone data can show communication between parties prior to termination of employment, Deletion of Messages, Call Logs, Backups, Transfer of data pertinent to the case.**
- **Computer data can show what files have been accessed, modified or deleted. Indications of mass deletion, hidden files, Indication of transfer of files. Emails still on the computer in an OST file may show emails that have been deleted from the custodians live email account (Spoilation)**
- **Response to Subpoena, Collection of email accounts. Forensically Collecting Email Accounts.**
- **3<sup>rd</sup> Party Applications such as Slack and Teams can reveal plans in the making or transfer of files.**



# ***What are we collecting and Why?***



- **Cloud based storage such as Dropbox, Box, OneDrive, etc. can show transferred files, stored files in personal accounts that belong to the company, multiple accounts can reveal the transfer of files from a business account to a personal account.**
- **Recover Company Files that have been taken prior to or after termination.**
- **Controlled and Ordered deletion by the Digital Forensic Examiner of Company Files from Personal Accounts.**

# ***Order of Operations***



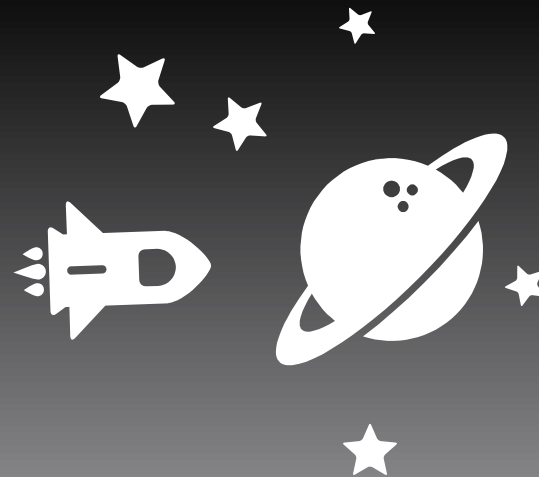
- Review of Court Orders
- Review of Subpoenas
- Following the Letter of Law
- Four Corners of the Order
- Search Terms
- Quality Control
- 1<sup>st</sup> Production
- 2<sup>nd</sup> Production

# ***Why Do You Need Us?***



- **Responding to Subpoenas/Court Orders**
- **Forensically Collecting Data v. Internally Collecting**
- **Expert Production v. Internal Production**
- **Expert Testimony**
- **eDiscovery Services**
- **Preserving/Collecting Electronic Data, DeDuping/Culling/Doc Review**

# *Taking your Cases to the next level*



- Utilizing all your evidence
- Uncovering data
- Seeing the entire picture
- Organizing all your electronic evidence



# ***Being Mindful***



- **Time Constraints**
- **Search Terms**
- **Search Perimeters**
- **Export Formats**

# *Computer Forensics*



- **User Created Files**
- **Search History**
- **LNK Files**
- **Shellbags**
- **USB Connectivity**
- **All Connected Devices**
- **Recovering Deleted files**

# ***Mobile Forensics***



- **Support for nearly all mobile devices**
- **Physical Extractions**
- **Advanced Logical Extractions**
- **Full File System Extractions**
- **Recovering Deleted Files**
- **Database Review**

# ***Social Media Collections***



- **Facebook**
- **Instagram**
- **Slack**
- **Twitter**
- **Discord**



# ***Email Collections***



- **Outlook**
- **Outlook 365**
- **Gmail**
- **Yahoo**
- **Hotmail**

# eDiscovery



- **Collection**
- **Culling and Deduplication**
- **Filtering**
- **Search Terms**
- **Export Load Files**
- **Review**
- **Hosting**



**QUESTIONS?**

# Contact



**Micah Sturgis, EnCE, CCME**

**[micah@sturgisforensics.com](mailto:micah@sturgisforensics.com)**

**[info@sturgisforensics.com](mailto:info@sturgisforensics.com)**

**(704) 476-9596**

**[www.sturgisforensics.com](http://www.sturgisforensics.com)**