Justice Department and EEOC Caution the Use of Artificial Intelligence to Make Employment Decisions

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Employers should be aware that AI and other software tools may result in unlawful discrimination against people with disabilities in violation of the American with Disabilities Act

On May 12, 2022, the U.S. Department of Justice ("DOJ") issued a press release cautioning employers that the use of artificial intelligence ("AI") to assist with hiring, performance monitoring, promotions, and other employment decisions may run afoul of the American with Disabilities Act ("ADA"), often without the employer even knowing. To assist employers, the DOJ and Equal Employment Opportunity Commission ("EEOC") released technical assistance documents on how employers can mitigate the risk of unlawful disability discrimination when relying on AI.

Although AI programs can streamline employment decisions, there may be certain limits to the technology that may result in unintentional discrimination against individuals with disabilities. A summary document released by the EEOC contains several examples:

- A job application requiring a timed math test may discriminate against an applicant with arthritis who is unable to type quickly, notwithstanding that typing quickly is not necessary for the job.
- A promotion process requiring a computerized memory test may discriminate against an applicant who is blind, notwithstanding that the applicant's memory may be sufficient for the promotion.
- A chatbot that interviews job applicants for a cashier position may discriminate against a person who uses a wheelchair by terminating the interview if the applicant answers "no" to a question on whether the applicant can stand for three hours straight, notwithstanding that the applicant can perform this job if able to sit at the register.
- A computer program that tests an employee's "problem-solving ability" by analyzing speech patterns for purposes of a promotion may discriminate against an employee that stutters, notwithstanding that the employee meets the requirements for the promotion.

The EEOC's technical assistance document contains guidance for employers to reduce the likelihood of unintentional disability discrimination. Employers should ensure that employees and job applicants interfacing with AI programs are aware that reasonable accommodations are available upon request. It is important to note that employers may be held liable under the ADA for the actions of third-party entities, such as software vendors who provide the employer with an AI program, if the employee or job applicant is denied a reasonable accommodation from the third-party, unbeknownst to the employer. Ensuring that there is a process by which employers

are made aware of reasonable accommodation requests with respect to AI programs is an important step to ensure compliance with the ADA.

Some best practices that employers using AI technologies may utilize to ensure compliance with the ADA are set forth in the DOJ's guidance document and include:

- Telling employees and job applicants the type of technology being used and the method of evaluation.
- Providing enough information to enable employees and applicants to make a decision as to whether to seek a reasonable accommodation.
- Providing and implementing clear procedures for applicants to request reasonable accommodations and ensuring that making such requests does not adversely affect the employee's promotion or the applicant's chances of getting the job.

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If you have any questions concerning the ADA, or any other federal or state employment laws, please feel free to contact Vincent C. Cirilli or Jennine DiSomma of Saiber LLC's Employment and Labor Law practice.