

## Why employers must use AI carefully

By Dan Eaton

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Almost 25% of employers use artificial intelligence (AI), such as automated-decision systems, to make employment-related decisions, according to a Society for Human Resource Management survey last year.

Draft regulations of the California Civil Rights Council define “automated-decision system” as “[a] computational process that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts applicants or employees.”

Employers using or considering using AI should note these recent developments.



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### EEOC recently settled AI-related discrimination claim for \$365,000

On August 9, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) filed a consent decree in New York federal court settling the EEOC’s age discrimination claims against iTutorGroup, Inc. and two affiliated companies, providers of English-language tutoring services to students in China.

The EEOC alleged iTutor companies violated the federal Age Discrimination in Employment Act when they “programmed their application software to automatically reject female applicants over the age of 55 and male applicants over the age of 60.” The suit was brought on behalf of over 200 U.S.-based applicants. Without admitting liability, the iTutor companies agreed to pay the claimants \$365,000.

This was the first recovery the EEOC has obtained in a case alleging unlawful discriminatory use of AI. It won’t be the last or the largest.

### EEOC’s draft multi-year strategic enforcement plan prioritizes employer use of AI

Months before the iTutor settlement, the EEOC published its draft 2023-2027 strategic enforcement plan (SEP) identifying enforcement priorities.

The SEP recognizes employers’ increasing use of AI, especially in targeting job advertisements and recruiting and hiring employees. To combat “technology-related employment discrimination,” the EEOC says it will focus on how employers’ use of technology contributes to unlawful employment discrimination.

### EEOC issues recent guidance on avoiding discriminatory use of AI

On May 18, the EEOC issued technical guidance on how to use AI without adverse impact on applicants or employees based on their race, gender, age, or other protected categories, particularly in hiring, promotion, and firing decisions. Employers using AI risk getting a resulting selection of individuals within a particular protected group to hire, fire, or promote that is “substantially” less than the selection rate for individuals in another group.”

An employer may be liable even if it uses an algorithm designed by a software vendor, according to the EEOC. “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,” the federal employment anti-discrimination law.

Employers that discover, in developing a selection algorithm, that using the tool would have an adverse impact on a protected group should make adjustments. The EEOC noted the process of developing an algorithmic tool typically produces 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.”

### **California AI regulations on the horizon**

The California Civil Rights Council’s proposed rules would prohibit employers from using automated-decision systems to evaluate applicant or employee skills, target job advertisements, or measure aptitude, attitude or cultural fit if using the tool would have an adverse impact on a protected class.

An employer may defend its use of an automated-decision system by showing using the automated-decision system “is job-related for the position in question and consistent with business necessity and there is no less discriminatory policy or practice” that would accomplish the employer’s goals.

The Council has set no timetable for final adoption of the regulations.

AI may make employment decision-making more efficient, from hiring through termination. Like other workplace tools, however, its careless use may lead to employer liability.

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