
SMITH
ANDERSON
Using AI in HR 2.0 and ChatGPT Too!
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EXPECT EXCELLENCE®

AI Defined

A form of technology where the software:

- "learns" from the data it analyzes or tasks it performs and
- adapts its "behavior" based on what it learns from the data to improve its performance of certain tasks over time

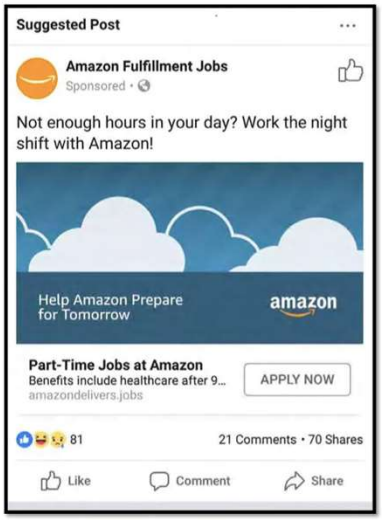
How does AI work?

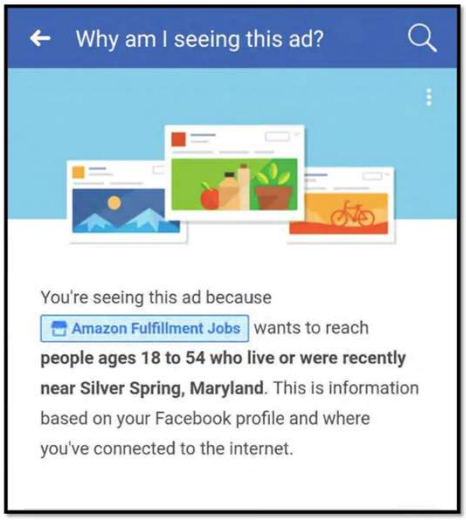
Two key elements	Computer software programmed to execute algorithms over a data set to, among other things:
• Data set • Algorithm: sets of code with instructions to perform specific tasks over a data set	• Recognize patterns • Reach conclusions • Make informed judgments • Optimize practices • Predict future behavior • Automate repetitive functions

Simply put

AI is technology that mimics human intelligence to perform tasks ordinarily performed by humans

Remember HAL?
2001: A Space Odyssey (1968)





Evidence submitted in age discrimination civil action filed in United States District Court for the Northern District of California, Bradley et al. v. T-Mobile et al., Civil Action 5:17-cv-07232

AI in Recruiting and Hiring

Sourcing and Screening Candidates

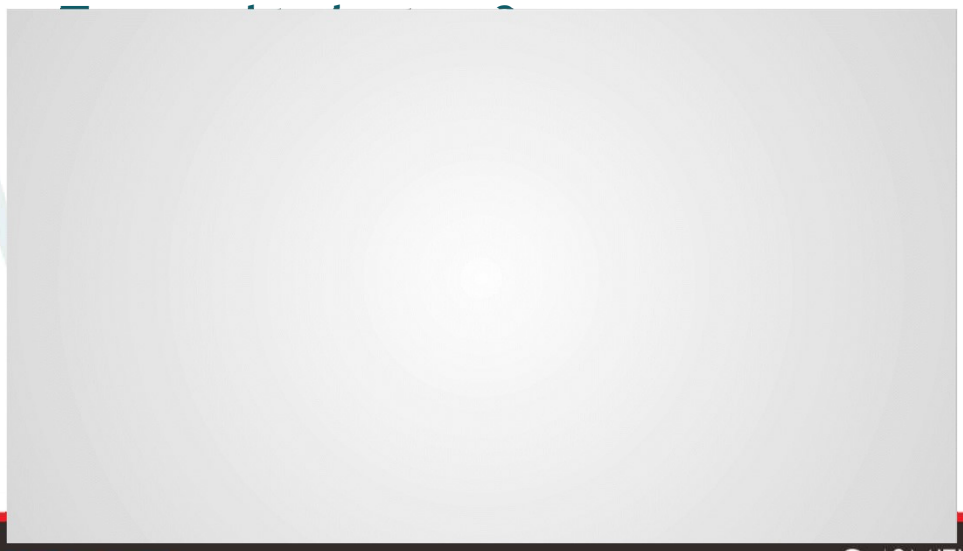
- Show job ads to targeted groups
- Scan resumes and prioritize using keywords
- Score resumes
- Use chat bot to ask questions about preliminary qualifications, desired salary

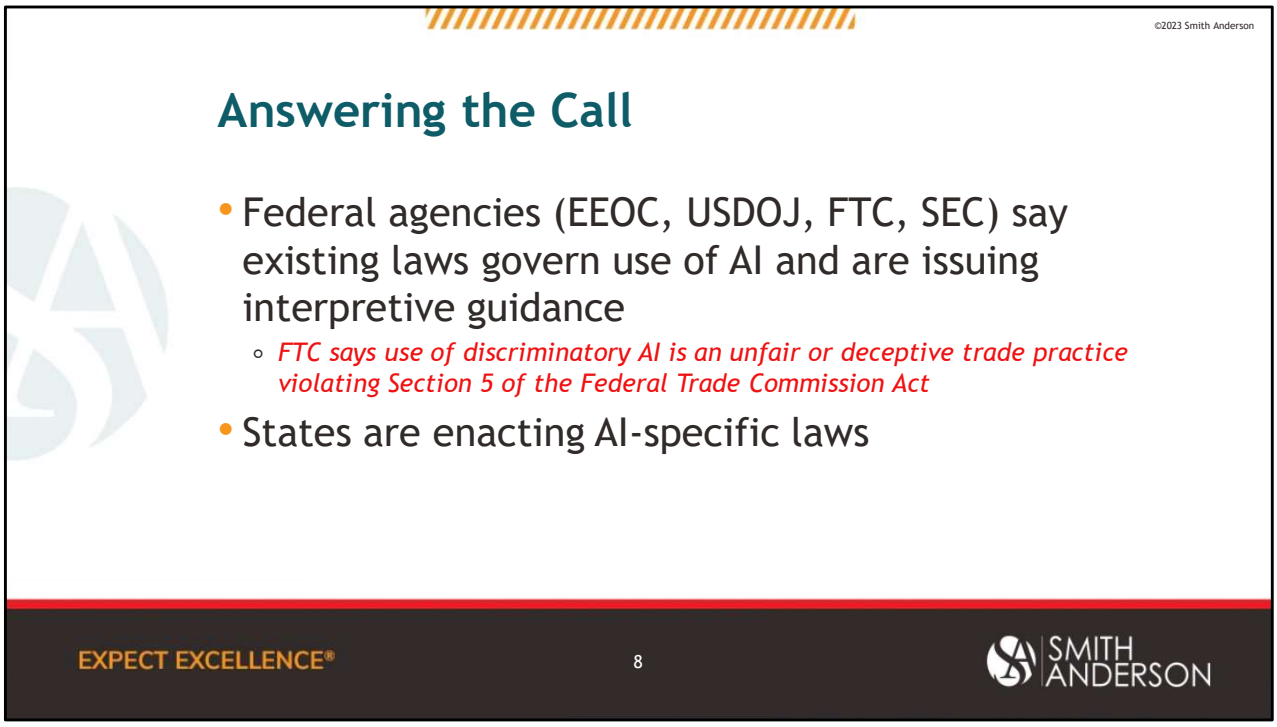
Online Testing

- "Job fit" scores on:
  - personalities
  - aptitudes
  - cognitive skills
  - perceived "cultural fit"

Video interview Analysis

- Analyze:
  - candidate responses
  - facial expressions
  - speech patterns





Equal Employment Opportunity Commission, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, *available at* https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence (last accessed Oct. 22, 2023)

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*, *available at* https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used (last accessed Oct. 22, 2023)

Federal Trade Commission, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI*, *available at* https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai (last accessed Oct. 23, 2023)

Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems, *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf (last accessed Oct. 22, 2023)

NIST, *AI Risk Management Framework*, *available at* https://www.nist.gov/itl/ai-risk-management-framework (last accessed Oct. 22, 2023)

The White House*, Blueprint for an AI Bill of Rights*, *available at* https://www.whitehouse.gov/ostp/ai-bill-of-rights/ (last accessed Oct. 22, 2023) The AI Bill of Rights provides:

- AI-powered tools should be designed and used in an equitable way such that an individual should not face discrimination.

- AI-powered tools should have built-in protections against abusive data practices and allow individuals to have agency over how their data is used.

- Individuals should know that AI is being used on them and how it impacts them.

- Individuals should be able to opt out of having AI-powered tools used on them and should be able to access a person who can remedy any problems they encounter with AI-powered tools.

- Individuals should be protected from AI-powered tools that are ineffective or unsafe.

The Risks

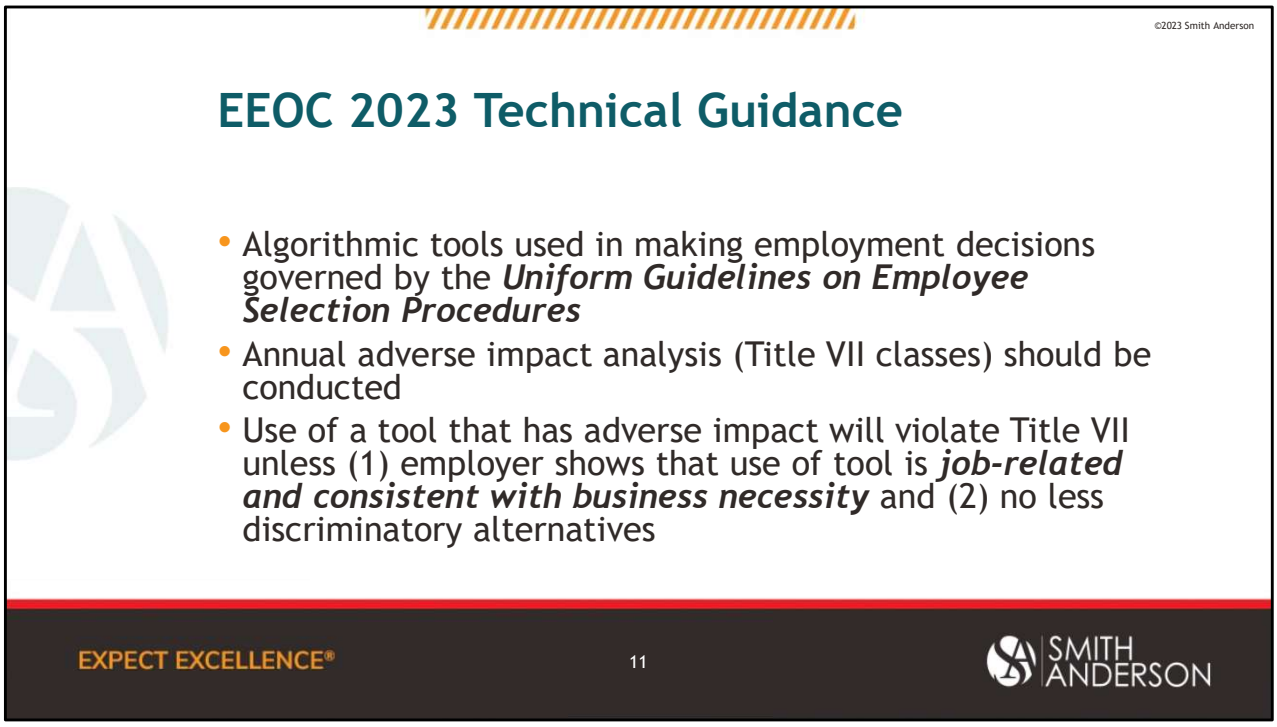
- Systemic discrimination
- Unknown “black box” of algorithms
- Disability accessibility and accommodation challenges
- Unlawful inquiries or screening criteria
- Vendor violation liability
- Patchwork of state laws

Systemic Discrimination

Depending on the available data set and the algorithms used,

AI recruiting tools may duplicate and proliferate past discriminatory practices in:

- Identifying who gets the job ad
- Identifying and evaluating candidates



See EEOC 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 | U.S. Equal Employment Opportunity Commission (eeoc.gov) May 18, 2023:

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. 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.
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.

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. 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. 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. 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%).

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. 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, or where an employer's actions have discouraged individuals from applying disproportionately on grounds of a Title VII-protected characteristic. 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.

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. 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. (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/.)

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.

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.

Uniform Guidelines on Employee Selection Procedures (UGESP)

ESTABLISHING JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY

Conduct adverse impact analysis *(under legal privilege)*	
No adverse impact	Adverse impact
=> no further action required	=> "validate" by conducting validation study in accordance with UGESP
	• Validation study should include investigation of alternatives with less discriminatory impact
	VALIDATION + NO LESS DISCRIMINATORY ALTERNATIVES = JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY
Retain adverse impact analysis and validation study (if applicable)	

Algorithm "Black Box"

- Lack of transparency in the algorithmic process may render it impossible to determine how or why an AI tool reached a decision or made a prediction

Why is this a problem?

- Employers unable to satisfy legal obligation to articulate a "legitimate nondiscriminatory" reason for a decision because they do not know how or why the AI tool did what it did

Disability Accessibility

When using online recruiting tools for

- interviews
- initial screening
- testing

…ensure that the platform is accessible to individuals who are hearing, sight or manually impaired

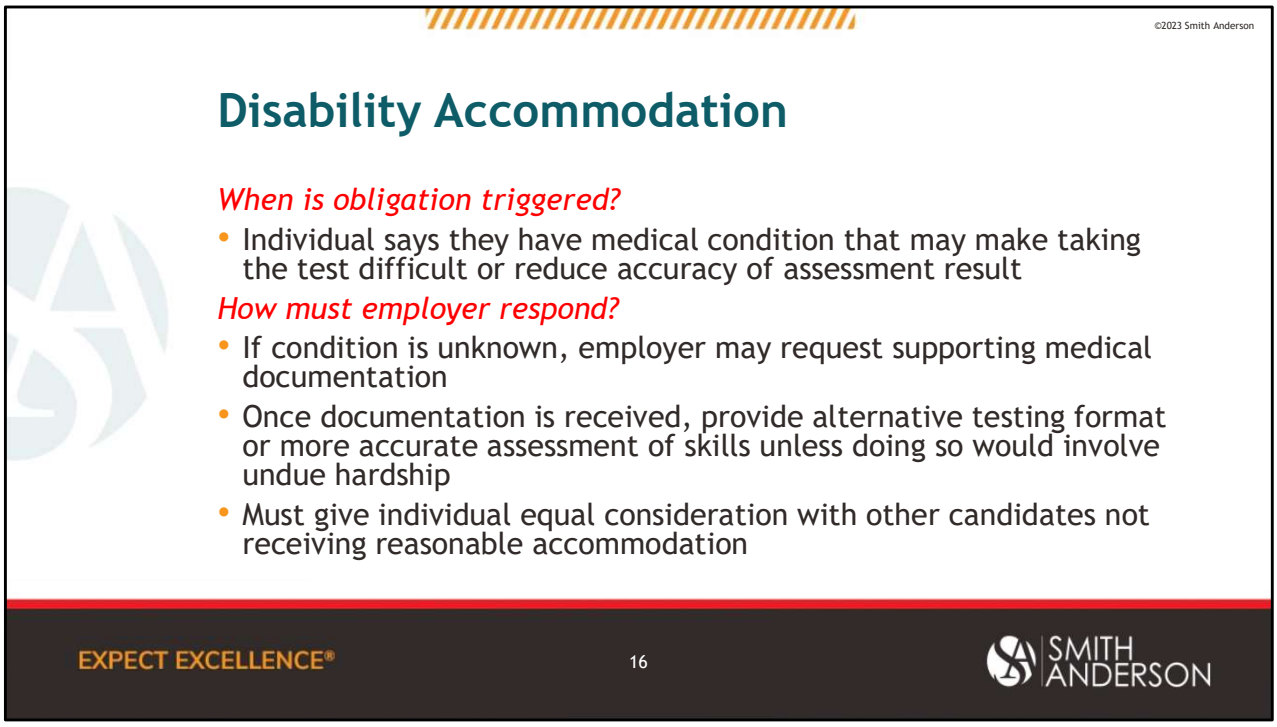
Web site features must be accessible. *See Web Content Accessibility Guidelines (WCAG) and Section 508 Standards.*

EEOC May 2022 Technical Guidance

Three ways AI tools can violate the ADA:

- Fail to provide a reasonable accommodation needed for the algorithm to rate the individual accurately
- Use a tool that "screens out" a disabled individual who is otherwise qualified to do the job, with or without a reasonable accommodation
- Use a tool that makes impermissible disability-related inquiries and medical examinations

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, U.S. Equal Employment Opportunity Commission, Technical Assistance Guidance (May 12, 2022) https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence ("EEOC Technical Guidance")



EEOC Technical Guidance:

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.

Online Assessments

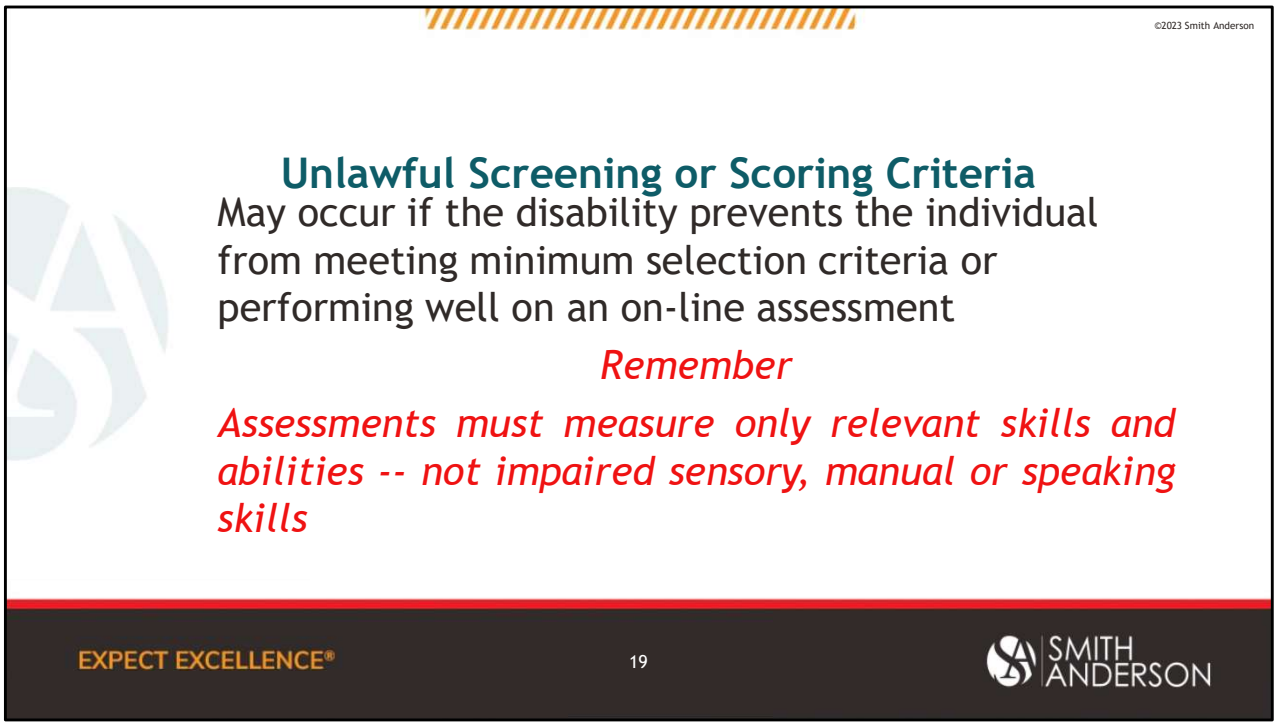
Remember things that may improperly screen out individuals with disabilities

- *Assessment FORMAT*
- *Assessment SCORING*

Disability Accommodation *(cont'd)*

FORMAT examples

- Limited manual dexterity impacting use of keyboard, track pad or other manual input device => *allow oral responses or extended response time*
- Visual impairment => *screen reader compatibility*



EEOC Technical Guidance

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. 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.

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.

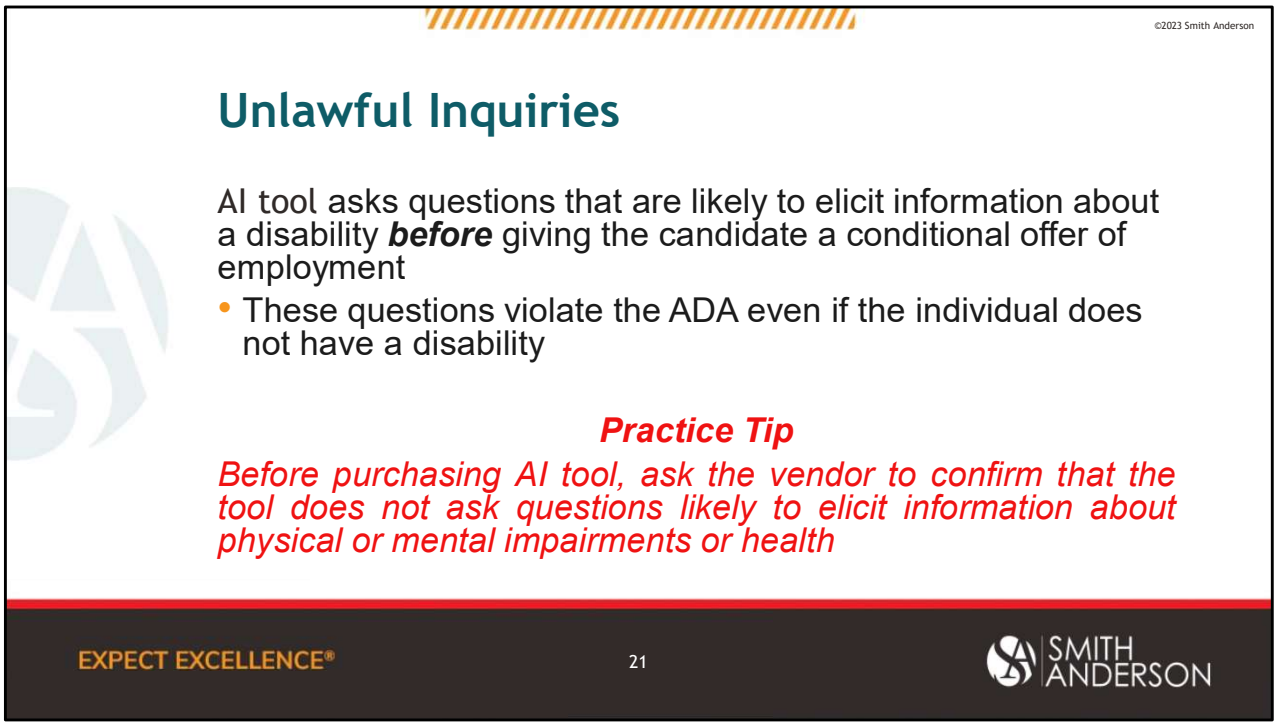
Even an algorithmic decision-making tool that has been "validated" for some purposes might screen out an individual who is able to perform well on the job. To say that a decision-making tool has been "validated" means that there is evidence meeting certain professional standards showing that the tool 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.

Screening or Scoring Criteria May Be Unlawful When…

Examples	Issue
Screens out candidates with employment gaps	Gap may be due to medical condition (or pregnancy, child or family care)
Analyzes and evaluates speech patterns to evaluate problem-solving skill	Speech impediment may result in lower rating not reflective of problem-solving skill
Analyzes ability to ignore distractions	AI may use "typical" working conditions and not take into account performance with an accommodation (e.g., noise cancelling head phones)
Chat bot asks whether individual can stand for 3 hours and stops the screening when the answer is No	Candidates using a wheelchair who could perform the essential functions seated (as an accommodation) are excluded from consideration without accommodation consideration



EEOC Technical Guidance:

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. 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 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

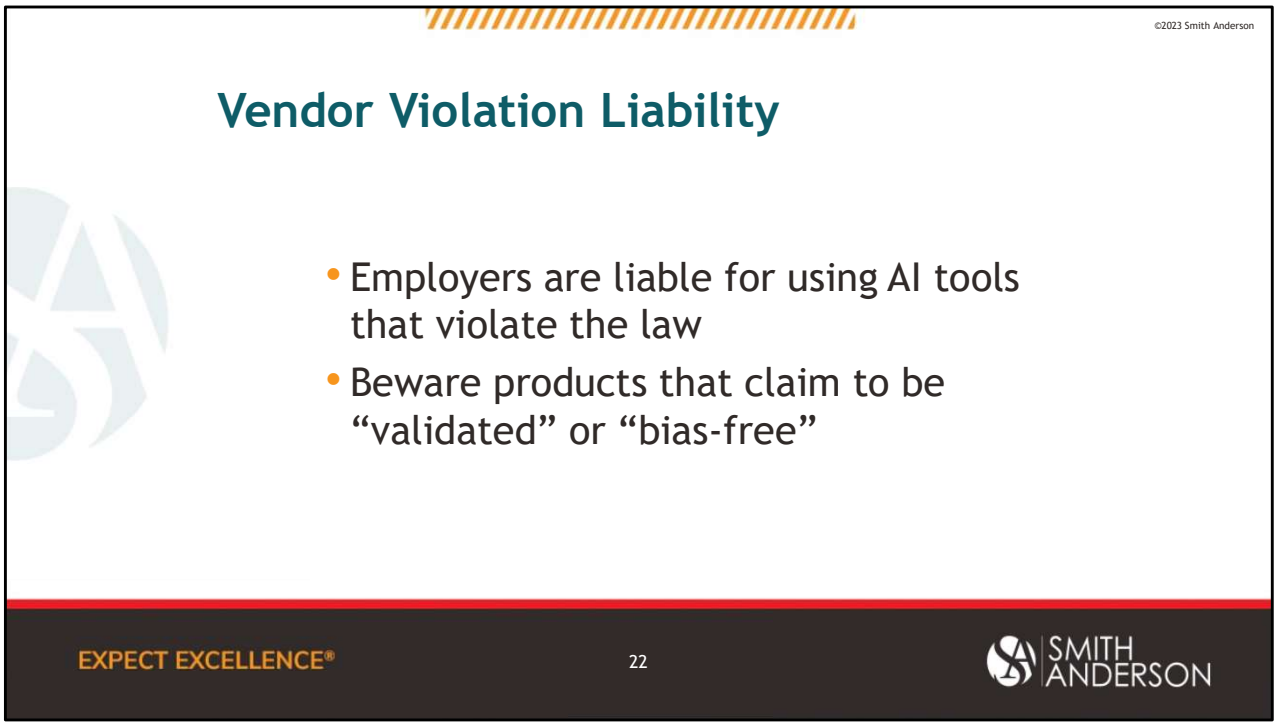
the ADA. For example, if a personality test asks questions about optimism, and if someone with Major Depressive Disorder ("MDD") answers those questions negatively and loses an employment opportunity as a result, the test may "screen out" the applicant because of MDD. As explained in Questions 8–11 above, 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 *Pre-Employment Inquiries and Medical Questions & Examinations*, and *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*.

EEOC Promising Practices:

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.)



EEOC Technical Guidance:

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.

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.

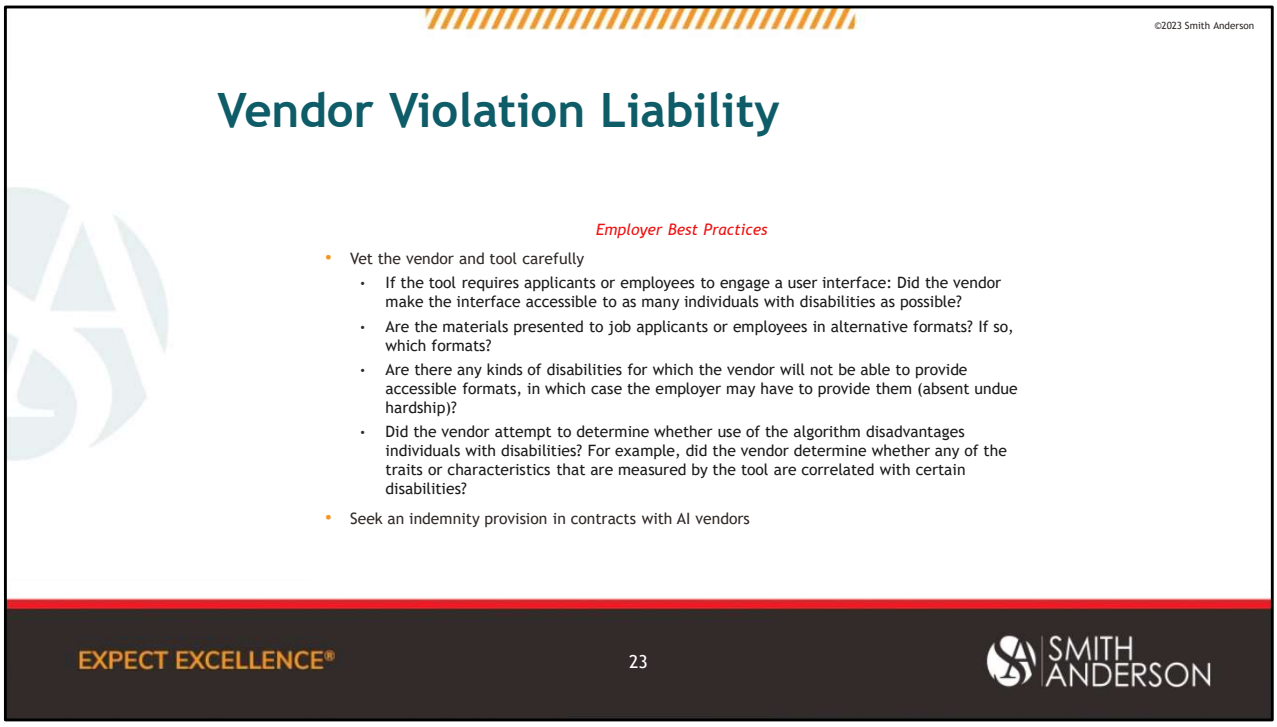
Thus, if an applicant were to tell the vendor that a medical condition was making it difficult to take the test (which qualifies as a request for reasonable accommodation), and the vendor did not provide an accommodation that was required under the ADA, the employer likely would be responsible even if it was unaware that the applicant reported a problem to the vendor.

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.

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. 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.)



EEOC Technical Guidance:

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)?

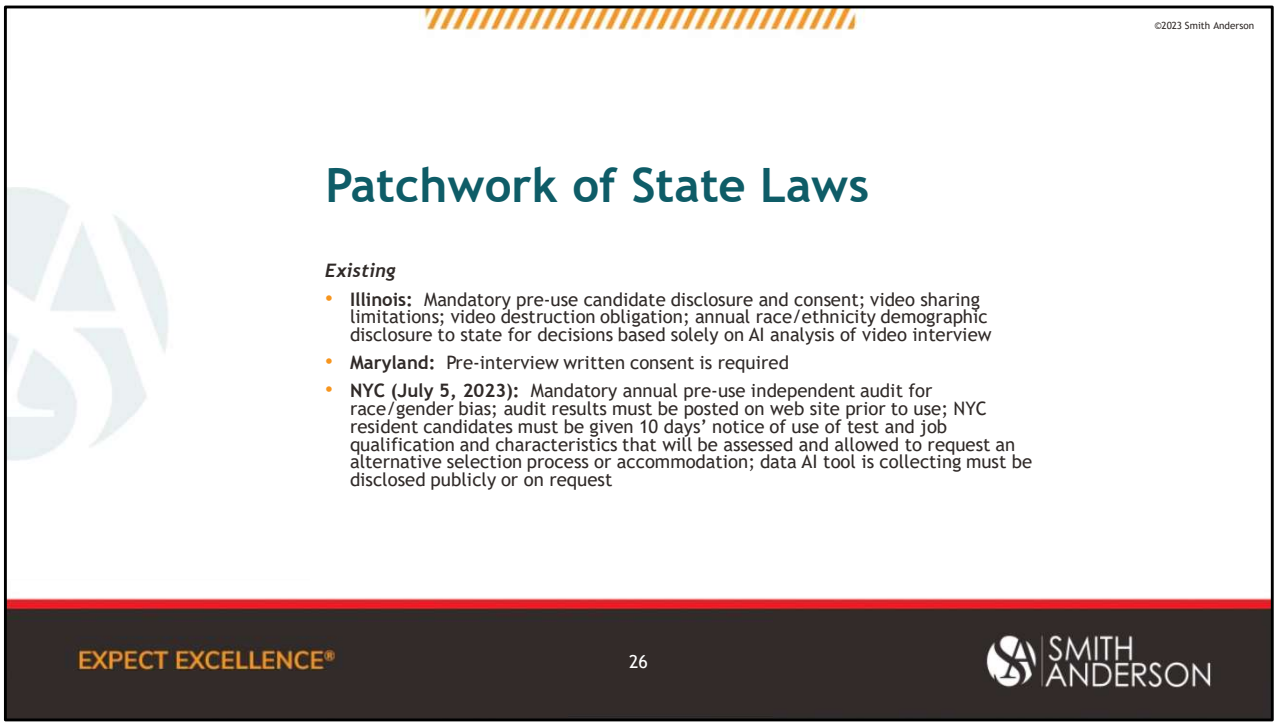
•Did the vendor attempt to determine whether use of the algorithm disadvantages individuals with disabilities? For example, did the vendor determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?

What EEOC is Telling Job Seekers

- Ask employer about its use of AI tools and what it is testing for to determine if they might impose problem related to your disability
- If so, notify the employer that you have a medical condition and need an accommodation to ensure you are evaluated accurately
- If you discover the AI poses a problem after the process is underway, notify the employer asap and request an accommodation
- If you have received a poor decision based on AI, think about whether your condition may have prevented you from getting a better result and ask to be reassessed with an accommodation
- If the employer says No, tell them about the EEOC Technical Guidance or contact EEOC to assist in “next steps”

EEOC "Promising Practices"

AI Selection	Candidate Notification	Processing Requests
Confirm AI tool does not seek health information	Inform individuals that disability accommodations are available along with process for requesting them	Train staff to recognize and promptly process accommodation requests
Ensure AI measures abilities or qualifications for the position's essential functions directly, and not by mere correlation	Clearly explain in an accessible format: -the traits the algorithm assesses; -how it assesses those traits; and -what factors may affect the rating	Train staff to use alternative means of rating individuals when the evaluation process is inaccessible or otherwise unfairly disadvantages someone who has requested a reasonable accommodation
Use tools designed to be accessible to as many different disabilities as possible and that engage in user testing		Ensure third party test administrators either: -promptly forward all accommodation requests to the employer; or -contractually agree to provide reasonable accommodations on the employer's behalf



Illinois: Artificial Intelligence Video Interview Act

Sec. 5. *Disclosure of the use of artificial intelligence analysis.* An employer that asks applicants to record video interviews and uses an artificial intelligence analysis of the applicant-submitted videos shall do all of the following when considering applicants for positions based in Illinois before asking applicants to submit video interviews:

(1) Notify each applicant before the interview that artificial intelligence may be used to analyze the applicant's video interview and consider the applicant's fitness for the position.

(2) Provide each applicant with information before the interview explaining how the artificial intelligence works and what general types of characteristics it uses to evaluate applicants.

(3) Obtain, before the interview, consent from the applicant to be evaluated by the artificial intelligence program as described in the information provided.

An employer may not use artificial intelligence to evaluate applicants who have not consented to the use of artificial intelligence analysis.

Sec. 10. *Sharing videos limited.* An employer may not share applicant videos, except with persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position.

Sec. 15. *Destruction of videos.* Upon request from the applicant, employers, within 30 days after receipt of the request, must delete an applicant's interviews and instruct any other persons who received copies of the applicant video interviews to also delete the videos, including all electronically generated backup copies. Any other such person shall comply with the employer's instructions.

Sec. 20. *Report of demographic data.*

(a) An employer that relies solely upon an artificial intelligence analysis of a video interview to

determine whether an applicant will be selected for an in-person interview must collect and report the following demographic data:

(1) the race and ethnicity of applicants who are and are not afforded the opportunity for an in-person interview after the use of artificial intelligence analysis; and

(2) the race and ethnicity of applicants who are hired.

(b) The demographic data collected under subsection (a) must be reported to the Department of Commerce and Economic Opportunity annually by December 31. The report shall include the data collected in the 12-month period ending on November 30 preceding the filing of the report.

(c) The Department must analyze the data reported and report to the Governor and General Assembly by July 1 of each year whether the data discloses a racial bias in the use of artificial intelligence.

Maryland: Labor and Employment – Use of Facial Recognition Services – Prohibition

3–717.

(A)

(1) In this section the following words have the meanings indicated.

(2) "Facial recognition service" means technology that analyzes facial features and is used for recognition or persistent tracking of individuals in still or video images.

(3) "Facial template" means the machine–interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service.

(B) An employer may not use a facial recognition service for the purpose of creating a facial template during an applicant's interview for employment unless an applicant consents under subsection (c) of this section.

(C) (1) An applicant may consent to the use of facial recognition service technology during an interview by signing a waiver.

(2) The waiver signed under paragraph (1) of this subsection shall state in plain language:

(I) The applicant's name;

(II) The date of the interview;

(III) That the applicant consents to the use of facial recognition during the interview; and

(IV) Whether the applicant read the consent waiver.

New York City: Subchapter 25: Automated Employment Decision Tools

§ 20-870 Definitions.
For the purposes of this subchapter, the following terms have the following meanings:

Automated employment decision tool. The term "automated employment decision tool" means any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons. The term "automated employment decision tool" does not include a tool that does not automate, support, substantially assist or replace discretionary decision-making processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

Bias audit. The term "bias audit" means an impartial evaluation by an independent auditor. Such bias audit shall include but not be limited to the testing of an automated employment decision tool to assess the tool's disparate impact on persons of any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code as specified in part 1602.7 of title 29 of the code of federal regulations.

Employment decision. The term "employment decision" means to screen candidates for employment or employees for promotion within the city.

§ 20-871 Requirements for automated employment decision tools.
a. In the city, it shall be unlawful for an employer or an employment agency to use an automated employment decision tool to screen a candidate or employee for an employment decision unless:

1. Such tool has been the subject of a bias audit conducted no more than one year prior to the use of such tool; and

2. A summary of the results of the most recent bias audit of such tool as well as the distribution date of the tool to which such audit applies has been made publicly available on the website of the employer or employment agency prior to the use of such tool.

b. *Notices required.* In the city, any employer or employment agency that uses an automated employment decision tool to screen an employee or a candidate who has applied for a position for an employment decision shall notify each such employee or candidate who resides in the city of the following:

1. That an automated employment decision tool will be used in connection with the assessment or evaluation of such employee or candidate that resides in the city. Such notice shall be made no less than ten business days before such use and allow a candidate to request an alternative selection process or accommodation;

2. The job qualifications and characteristics that such automated employment decision tool will use in the assessment of such candidate or employee. Such notice shall be made no less than 10 business days before such use; and

3. If not disclosed on the employer or employment agency's website, information about the type of data collected for the automated employment decision tool, the source of such data and the employer or employment agency's data retention policy shall be available upon written request by a candidate or

employee. Such information shall be provided within 30 days of the written request. Information pursuant to this section shall not be disclosed where such disclosure would violate local, state, or federal law, or interfere with a law enforcement investigation.

§ 20-872 Penalties.

a. Any person that violates any provision of this subchapter or any rule promulgated pursuant to this subchapter is liable for a civil penalty of not more than $500 for a first violation and each additional violation occurring on the same day as the first violation, and not less than $500 nor more than $1,500 for each subsequent violation.

b. Each day on which an automated employment decision tool is used in violation of this section shall give rise to a separate violation of subdivision a of section 20-871.

c. Failure to provide any notice to a candidate or an employee in violation of paragraphs 1, 2 or 3 of subdivision b of section 20-871 shall constitute a separate violation.

d. A proceeding to recover any civil penalty authorized by this subchapter is returnable to any tribunal established within the office of administrative trials and hearings or within any agency of the city designated to conduct such proceedings.

§ 20-873 Enforcement.

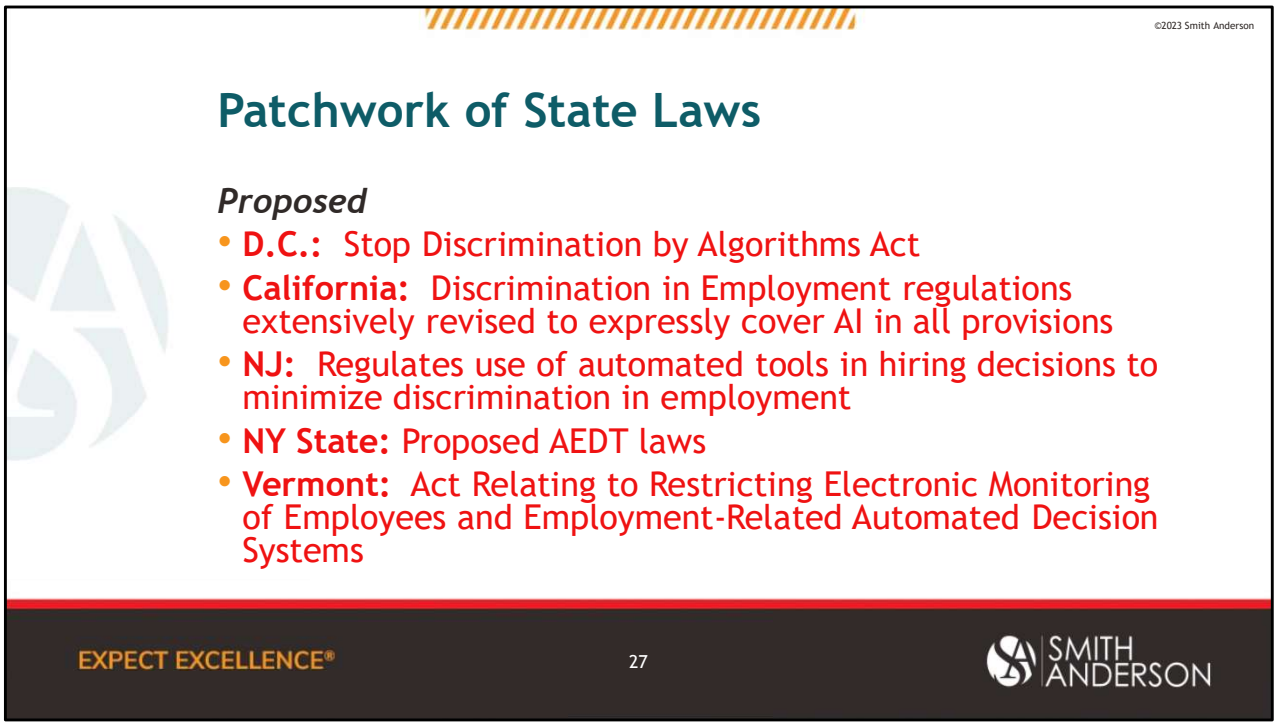
The corporation counsel or such other persons designated by the corporation counsel on behalf of the department may initiate in any court of competent jurisdiction any action or proceeding that may be appropriate or necessary for correction of any violation issued pursuant this subchapter, including mandating compliance with the provisions of this chapter or such other relief as may be appropriate.

§ 20-874 Construction.

The provisions of this subchapter shall not be construed to limit any right of any candidate or employee for an employment decision to bring a civil action in any court of competent jurisdiction, or to limit the authority of the commission on human rights to enforce the provisions of Title 8, in accordance with law.

New York City Council, *Automated Employment Decision Tools*, *available at* https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9

New York City Department of Consumer and Worker Protection, *Notice of Adoption of Final Rule*, *available at* https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf (last accessed Aug. 16, 2023); Council of the District of Columbia, *B24-0558 – Stop Discrimination by Algorithms Act of 2021*, *available at* https://lims.dccouncil.gov/Legislation/B24-0558 (last accessed Aug. 16, 2023).



D.C.: Stop Discrimination by Algorithms Act

- Prohibits algorithm using a range of personal characteristics
- Requires notice to candidates with adverse AI results, including the factors used to reach the determination and the opportunity for the candidate to submit corrective information
- Requires annual bias audit and report to the Office of the Attorney General, including algorithm performance metrics, the reason for using the algorithm, and disclosure of any algorithmic determination complaints received

California: Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems (ERRADS):

- Covers employers and covered entities: Any employer that employs any individual who resides in California; any vendor or person acting on behalf of any such employer that provides services related to recruiting, applicant screening, hiring, or the administration of automated-decision systems for an employer's use in recruitment, hiring, and other actions; an employment agency, labor organization, or apprenticeship program; or a non-religion-based nonprofit organization.

- Defines "automated-decision systems" as any "computational process that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts applicants or employees." An automated-decision system may be derived from and/or use

ML, algorithms, statistics, and/or "other data processing or artificial intelligence techniques." ERRADS deems the following tasks actions by an automated-decision system:

(A) using computer-based tests, such as questions, puzzles, games, or other challenges to:

(i) make predictive assessments about an applicant or employee;

(ii) measure an applicant's or employee's skills, dexterity, reaction-time, and/or other abilities or characteristics; and/or

(iii) measure an applicant's or employee's personality trait, aptitude, attitude, and/or cultural fit;

(B) directing job advertisements or other recruiting materials to targeted groups;

(C) screening resumes for particular terms or patterns; and/or

(D) analyzing facial expression, word choice, and/or voice in online interviews.

Providing that:

- AI measuring an individual's reaction time may unlawfully screen out individuals with certain disabilities
- AI analyzing an individual's tone or facial expressions during a video-recorded interview may unlawfully screen out individuals based on race, national origin, gender, or a number of other protected characteristics
- Personality-based questions, including those asked using an automated-decision system, may constitute a medical or psychological examination or inquiry. Personality-based questions include, but are not limited to, tests or questions that measure: optimism and/or positive attitudes; personal or emotional stability; extroversion or introversion; and/or intensity

California also has introduced proposed legislation similar to the New York City AEDT law (A.B. 331). The bill would:

•Require employers to conduct an impact assessment.
•Impose notice requirements.
•Require AEDT deployers or developers to create a governance program.
•Prohibit using AEDT tools with a discriminatory impact.

New Jersey Proposed AEDT Law

New Jersey introduced A.B. 4909 and S.B. 1926, both bills would make it unlawful to sell or offer for sale an AEDT unless the tool has been subject to a bias audit within a year of the sale or offer; includes, at no additional cost, an annual bias audit service providing the purchaser with the audit results; and includes a notice stating that the tool is subject to the provisions of the AEDT law.

Employers using an AEDT to screen employment candidates must notify each candidate within 30 days of using the tool that an automated employment decision tool, which is subject to an audit for bias, was used in connection with the candidate's application for employment and the tool assessed the job qualifications or characteristics of the candidate.

New York State Proposed AEDT Laws

New York state introduced NY A00567. This bill would make it unlawful for employers to use AEDT to screen applicants for employment unless:
•A disparate impact analysis is conducted at least annually to assess the actual impact of any AEDT used by any employer to select candidates for jobs within New York and provided to the employer.
•Before using the AEDT, the employer makes publicly available on its website a summary of the most recent disparate impact analysis of the AEDT tool and the tool's distribution date.
•The employer provides to the NYS DOL a summary of the most recent disparate impact analysis provided to the employer at least annually.

New York state also has introduced S. 7623. The bill would amend the N.Y. Labor Law to restrict the use by an employer or an employment agency of electronic monitoring or an automated employment decision tool to screen a candidate or employee for an employment decision unless such tool has been the subject of a bias audit within the last year and the results of such audit have been made public and; require notice to employment candidates of the use of such tools. The proposed law imposes broader requirements than the NYC AEDT law, including: unlawful to "discipline or terminate the employment of an employee solely on the basis of their refusal to comply to the collection of their data by an electronic monitoring tool;" "[a]n employer shall not require employees or candidates that apply for a position of employment to consent to the use of automated employment decision tools in an employment decision, nor shall an employer discipline or disadvantage an employee or candidate for employment solely as a result of their request for accommodation."

Vermont Proposed H.114, entitled "**An Act Relating to Restricting Electronic Monitoring of Employees and Employment-Related Automated Decision Systems."**
H.114 would limit the use of automated decision systems for employment-related decisions related to hiring or affecting an employee's compensation, benefits, or terms and conditions of employment, decisions relating to the discipline, evaluation, promotion, or termination of an employee.

H.114 also would require that electronic monitoring must be the least invasive means, with respect to the employee, to accomplish a purpose identified as an essential job function and be used with the smallest number of employees to collect the smallest amount of data necessary to accomplish said purpose. Employers would be required to provide a 15-day notice to employees prior to any monitoring efforts and provide the name of any person, whether within the employer or outside, who will have access to any information, how frequently the monitoring will occur, and how often the data will be destroyed.

Resources to Vet AI Tools

Data and Trust Alliance, Algorithmic Bias Safeguards for Workforce Overview, January 2022

https://dataandtrustalliance.org/Algorithmic_Bias_Safeguards_for_Workforce_Overview.pdf

World Economic Forum, Human-Centered Artificial Intelligence for Human Resources, A Toolkit for Human Resources Professionals, December 2021

https://www.weforum.org/reports/human-centred-ai-for-hr-state-of-play-and-the-path-ahead#report-nav

Data & Trust Alliance Safeguards include 4 components: Evaluation (55 questions in 13 categories for completion by the HR vendor), Education and Assessment (detailed guidance for HR teams assessing vendor response), Scorecard (to grade and compare vendors and document issues) and Implementation Guidance (for integrating the safeguards into an organization's systems).

World Economic Forum Toolkit includes a guide covering key topics and steps in the responsible use of AI-based HR tools, and two checklists - one focused on strategic planning and the other on the adoption of a specific tool.

General discussion about generative AI

"The hottest new programing language is English." – Andrej Karpathy

- Word of the Presentation: Review
- ***Word of the Slide***

Review Counter: 1

What is generative AI?

- Traditional AI
  - Specific task
  - Go fetch
- Generative AI
  - Creates new work
  - Infinite Monkey Theorem - Émile Borel
    - No
    - BUT: you get a product that may seem fine, but if you found out 1000 monkeys typed it out, I bet you would **review** the document very carefully before presenting it as usable

Word of the Slide: ***Generative AI "GAI"****: AI that has the ability to not just find existing items, but is able to create new products based on existing and available data.*

Review Counter: 2

Stages of using AI

- Person
- MAGIC
  - Stage 1: Initial Data
  - Stage 2: Training
- Result
  - BUT
    - Issue with prediction and probability
    - Trained behavior based on a fixed start and equally correct end
- Back to Person: **Review**

Word of the Slide: ***LLM***: *Large Language Model – recognizes and predicts words*

Second Word of the Slide: ***GPT***: *General Pre-trained Transformer*

Review Counter: 3

How does it work?

- How does stage 1 work?
  - Preschool, middle school and High school
  - Learn to speak and be creative and human

Word of the Slide: ***Synthetical cohesion:*** *does it sound like a person wrote this?*

- How does stage 2 work?
  - College
  - Leave the humanity, take the skills
  - Trained through **review** to be correct and to get it right

Second Word of the Slide: ***Lexical similarity****: how close was the answer to being right?*

Review Counter: 4

One AI to rule them all?

Probably Not

- Issue with training
- What is the data set?
- Who will monitor?
- What data will be used and what will happen to collected data?
- Who will **review** and ensure quality?

Word of the Slide: ***Retrieval augmented generation (RAGs):*** *what data will be taken in deciding the answer*

Review Counter: 5

What can it do?

- Is it a Magic Pill?
  - No – it is a tool
- AI is *really* good at sounding human
  - *Example: physicians use AI to generate scripts for discussing sensitive topics with families*
  - Help with smaller tasks – low risk applications
- Can I use it to replace you?
  - Drafting Legal documents – handbooks, policies etc.
    - Unlimited resources, specialized focus, retained experts – yes with couple of months to train the AI
      - What if new legislation or new policy?
    - Even so – risk is there – need to **review** with full understanding of what are the boundaries of correct and incorrect policies – likely need a lawyer
- Difference between searching:
  - Employee Severance Agreement
  - ((Employee OR Employment OR Severance OR Separation) /s Agreement OR contract) /255 "North Carolina") % ("disparagement" OR (((21 OR 45) /s days) /s consider)
- Good Applications?
  - *Industry specific tasks **reviewed** and approved by experts before use*

Word of the Slide: ***Loss Function:*** *the training of the AI by allocating points to generated answers*

Review Counter: 7

Inherent risks

- AI is being developed by companies – AI is a tool, but someone trained the AI and provided the data
- Media literacy and cautious and skeptical approach to info
  - Who created this?
  - What sources does it pull from?
  - Who was used to train the AI?
  - How did they **review** the data and the AI generated product?
  - When was it trained?
  - What if there is a change in the laws, how quickly will that be reflected?
  - Is that law clear – without any diverging interpretations?

Review Counter: 8

Inherent Risks *(cont.)*

You have a document, now what?

- First **review**
- Second **review**
- Third **review**…
- Understand the tool and its function/limitations
  - Apple Pie or Handbook
- Be proactive: act rather than react
- **Review** some more

Word of the Slide*: *Hallucination:
When AI creates a fake fact

Review Counter:
12

Who takes on the risk?

- The suspects:
  - The company that owns the AI software?
  - The company using the generated product?
  - HR?
  - The person who formulated the question?
  - The reviewer?
  - The person who trained the AI?
  - The person who provided the Data?
  - The reviewing lawyer?
  - The AI?

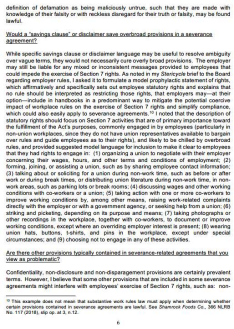
- AI use policies
- What laws do we have?
- What laws are coming?
  - Guides
  - Best Practices
  - International Predictions?
- Risk Tolerance

Word of the Slide: ***Model***
Temperature: *risk indication - how creative will the AI be allowed to be*

Review Counter:
12

Review illustration

- How many times did we mention reviewing?
- Are the following definitions the correct ones we gave as part of the Word of the Slide?
  - ***Hallucination**: When AI makes up a fake fact*
  - ***Loss Function**: The training of the AI by **reviewing** and allocating points to generated answers*
  - ***GPT**: Generic Pre-trained Transformer*
- More practical example:



definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity, may be found lawful.

Would a "savings clause" or disclaimer save overbroad provisions in a severance agreement?

While specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions. The employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights. As noted in my *Stericycle* brief to the Board regarding employer rules, I asked it to formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks in a predominant way to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance, which could also easily apply to severance agreements.[10] I noted that the description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad rules, and provided suggested model language for inclusion to make it clear to employees that they had rights to engage in: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment, or forming, joining, or assisting a union, such as by sharing employee contact information; (2) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) striking and picketing, depending on its purpose and means; (7) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

Are there other provisions typically contained in severance-related agreements that you view as problematic?

Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-

[10] This example does not mean that substantive work rules law must apply when determining whether certain provisions contained in severance agreements are lawful. See *Shamrock Foods Co.*, 366 NLRB No. 117 (2018), slip op. at 3, n.12.

6

Review Counter:
16

SMITH ANDERSON

Using AI in HR 2.0 and ChatGPT Too!

Kimberly J. Korando
Tommy Postek
November 14, 2023

EXPECT EXCELLENCE®