

# Artificial Intelligence and Employment Discrimination Law

**Anthony May** 

Partner
Brown Goldstein & Levy

# Roadmap

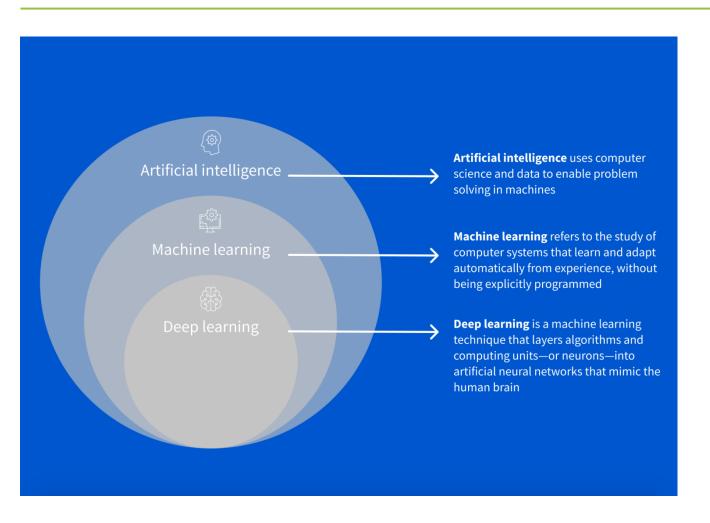
- > Defining AI in the Workplace
- > How AI Discriminates
- > Efforts to Curb Discrimination
- ➤ Best Practices for Employees & Employers



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# Defining AI in the Workplace





- AI is a broadly applied term that simply encompasses a computer science that studies algorithms to solve problems that usually require human intelligence.
- ➤ Machine Learning (ML) is one subset, which trains algorithms to learn and act upon data provided to it. Requires more human intervention to correct and learn.
  - ➤ E.g., Spotify Learns your music preferences and recommends new music.
- ➤ Deep learning uses artificial neural networks to mimic the learning process in human brains.
  - Learns from a deep pool of datasets to act on its own.

### **Congressional Definition for AI**

"[A] machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments."

#### 1164

#### SEC. 4701. DEPARTMENT OF ENERGY NATIONAL SECURITY PROGRAMS (In Thousands of Dollars)

Program	FY 2021 Request	Conference Authorized
Prior year balances credited	-109,000	-109,000
Total, Defense Environmental Cleanup	4,983,608	5,815,767
Other Defense Activities		
Environment, health, safety and security		
Environment, health, safety and security	134,320	134,320
Program direction	75,368	75,368
Total, Environment, Health, safety and security	209,688	209,688
Independent enterprise assessments		
Independent enterprise assessments	26.949	26.949
Program direction	54,635	54,635
Total, Independent enterprise assessments	81,584	81,584
Specialized security activities	258,411	258,411
Office of Legacy Management		
Legacy management	293,873	140,194
Rejection of proposed transfer		[-153,679]
Program direction	23,120	23,120
Total, Office of Legacy Management	316,993	163,314
Defense related administrative support	183,789	183,789
Office of hearings and appeals	4,262	4,262
Subtotal, Other defense activities	1,054,727	901,048
Total, Other Defense Activities	1,054,727	901,048

#### DIVISION E—NATIONAL ARTIFICIAL INTELLIGENCE INITIATIVE ACT OF 2020

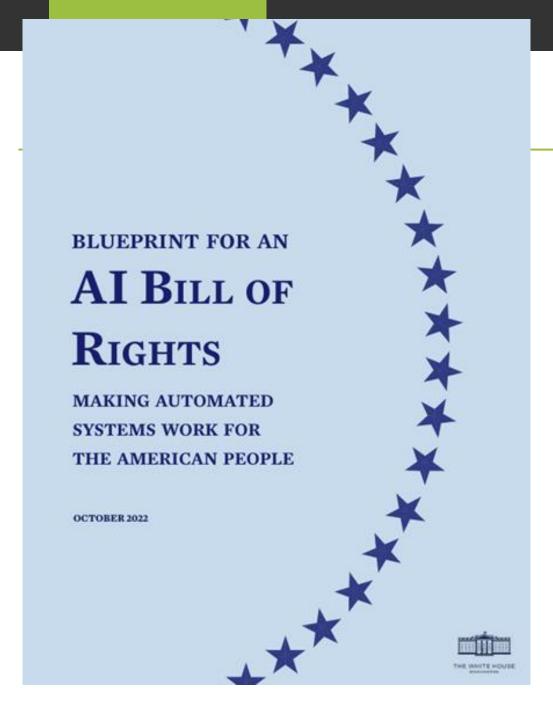
#### SEC. 5001. SHORT TITLE.

This division may be cited as the "National Artificial Intelligence Initiative Act of 2020".

#### SEC. 5002. DEFINITIONS.

#### In this division:

- ADVISORY COMMITTEE.—The term "Advisory Committee" means the National Artificial Intelligence Advisory Committee established under section 5104(a).
- (2) AGENCY HEAD.—The term "agency head" means the head of any Executive agency (as defined in section 105 of title 5, United States Code).
- (3) ARTIFICIAL INTELLIGENCE.—The term "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to—
  - (A) perceive real and virtual environments:
  - (B) abstract such perceptions into models through analysis in an automated manner; and
  - (C) use model inference to formulate options for information or action.
- (4) COMMUNITY COLLEGE.—The term "community college" means a public institution of higher education at which the



#### **White House Definition:**

#### **Algorithmic Discrimination**

Occurs when AI "contribute[s] to the unjustified different treatment or impacts disfavoring people based on their race, color, ethnicity, sex (including pregnancy, childbirth, and related medical conditions, gender identity, intersex status, and sexual orientation), religion, age, national origin, disability, veteran status, genetic information, or any other classification protected by law."

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### **EEOC Definition – AI in Employment**

"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."

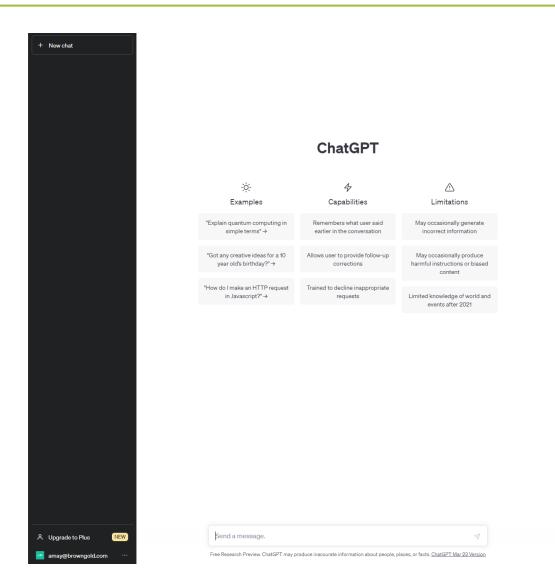


- > 79% Recruitment and hiring
- > 41% Learning and development
- > 38% Performance management
- > 18% Productivity monitoring
- > 8% Succession planning
- > 4% Promotion decisions\*



Three-quarters of all resumes submitted for jobs in the US are read by algorithms.

- Create job postings
- > Scan resumes for keywords and phrases
- Monitor employees' productivity
- > Rate employee performance
- Video interviews to evaluate facial expressions & speech patterns
- > Aptitude tests





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# How AI Can Discriminate

Title VII of the Civil Rights Act of 1964 (Title VII)

Americans with Disabilities Act (ADA)

Age Discrimination in Employment Act (ADEA)

- ➤ Title VII
- ➤ "[F]ail or refuse to hire or discharge," "deprive any individual of employment opportunities" or "adversely affect status of employment" because of: . . .



- ➤Title VII
  - **≻**Race
  - >Color
  - **≻**Religion
  - ➤ Sex (including sexual orientation)
  - ➤ National origin



- >ADA
- ➤ Title I Employment
- ➤ "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."



- > ADEA
- ➤ Unlawful for employer to:
  - ➤"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . .

- > ADEA
- ➤ Unlawful for employer to:
  - ➤ (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or



. . .

- > ADEA
- ➤ Unlawful for employer to:
  - ➤ 3) to reduce the wage rate of any employee in order to comply with this chapter."



# **EEOC Technical Guidance**



- ➤ Overview of ADA
- ➤ How it applies in AI context
- ➤ ERs are responsible even if administered by a vendor
- Duty to provide reasonable accommodations
- > Examples of discrimination

### When Al Discriminates

#### **Black Box Problem**

Harvard Journal of Law & Technology Volume 31, Number 2 Spring 2018

THE ARTIFICIAL INTELLIGENCE BLACK BOX AND THE FAILURE OF INTENT AND CAUSATION

Yavar Bathaee\*

"Black-box AI, however, may function in a manner well outside of what the program's creators could foresee. To be sure, we may be able to tell what the AI's overarching goal was, but blackbox AI may do things in ways the creators of the AI may not understand or be able to predict."

# When Al Discriminates

#### Black Box Problem



# When Al Discriminates



Elon Musk and other tech leaders call for pause in 'out of control' Al race







# When AI Discriminates



RETAIL OCTOBER 10, 2018 / 7:04 PM / UPDATED 5 YEARS AGO



# Amazon scraps secret Al recruiting tool that showed bias against women

By Jeffrey Dastin 8 MIN READ **f** 

# **When AI Discriminates**



# Al for People with Disabilities at Work

➤8 of 10 largest private U.S. employers use AI to track productivity metrics of individual workers

- ➤ Millions of people interaction with screen and cameras due to disability may see unfair assessments
- ➤ Barrier to accessible accommodations, technology does not permit accommodations, difficult request process, stigmatizing request process

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# Efforts to Curb Discrimination

# What and Where?

- > Global
- > Federal
- > State and Local
- > Litigation

## Global



**The European Union AI Act** 

Brussels, 21.4.2021 COM(2021) 206 final

2021/0106 (COD)

Proposal for a

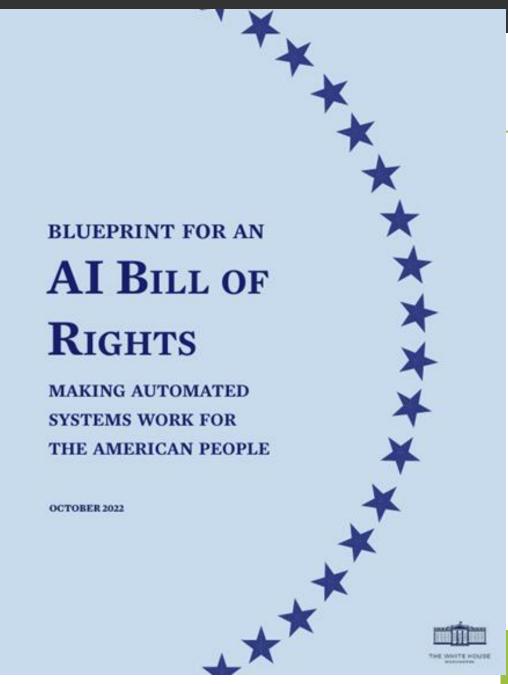
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

LAYING DOWN HARMONISED RULES ON ARTIFICIAL INTELLIGENCE (ARTIFICIAL INTELLIGENCE ACT) AND AMENDING CERTAIN UNION LEGISLATIVE ACTS

{SEC(2021) 167 final} - {SWD(2021) 84 final} - {SWD(2021) 85 final}



White House Blueprint





# **U.S. Equal Employment Opportunity Commission**

- > EEOC
  - > The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees
  - > The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence
  - > EEOC Chair Burrows Joins DOJ, CFPB, and FTC Officials to Release Joint Statement on Artificial Intelligence (AI) and **Automated Systems**

#### National Labor Relations Board (NLRB)

#### OFFICE OF THE GENERAL COUNSEL

#### **MEMORANDUM GC 23-02**

October 31, 2022

TO: All Regional Directors, Officers-in-Charge,

and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Electronic Monitoring and Algorithmic Management of Employees

Interfering with the Exercise of Section 7 Rights

Recent technological advances have dramatically expanded employers' ability to monitor and manage employees within the workplace and beyond. As more and more employers take advantage of those new capabilities, their practices raise a number of issues under the Act. An issue of particular concern to me is the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees' ability to engage in protected activity and keep that activity confidential from their employer, if they so choose. Thus, I plan to urge the Board to apply the Act to protect employees, to the greatest extent possible, from intrusive or abusive electronic monitoring and automated management practices that would have a tendency to interfere with Section 7 rights. I will do so both by vigorously enforcing extant law and by urging the Board to apply settled labor-law principles in new ways, as described below.



#### National Labor Relations Board (NLRB)



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union representation.<sup>18</sup> And employers violate Section 8(a)(1) if they dismantle or preclude employee conversations or isolate union supporters or discontented employees to prevent Section 7 activity.<sup>19</sup>

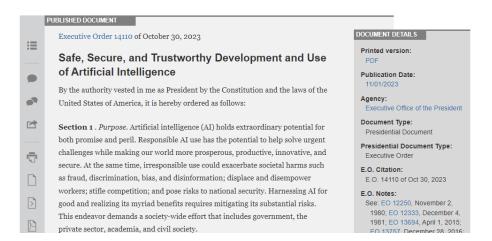
Further, if employers rely on artificial intelligence to screen job applicants or issue discipline, the employer—as well as a third-party software provider—may violate Section 8(a)(3) if the underlying algorithm is making decisions based on employees' protected activity.<sup>20</sup> Employers also violate Section 8(a)(3) by discriminatorily applying production quotas or efficiency standards to rid themselves of union supporters.<sup>21</sup> Finally, where employees have union representation, employers violate Section 8(a)(5) if they fail to provide information about, and bargain over, the implementation of tracking technologies and their use of the data they accumulate.<sup>22</sup>

#### President Biden's Executive Order 14110 (Nov. 1, 2023)



#### Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

A Presidential Document by the Executive Office of the President on 11/01/2023



- ➤ Calls Federal Government-wide approach to the responsible implementation and use of AI
- ➤ Requires developers of most powerful AI systems to share their safety test results and other critical information with U.S. government
- Incorporates by reference the National Institute of Standards and Technology's (NIST) Artificial Intelligence Risk Framework (AI RMF 1.0) to set standards, tools, and tests to ensure AI systems are safe before public release
- ➤ Provides clear guidance for landlords, Federal benefits programs, and federal contractors to ensure AI is not used to exacerbate discrimination

New York City

#### **Automated Employment Decision Tools (Updated)**

mrules.cityofnewyork.us/rule/automated-employment-decision-tools-updated/



#### New York City Hiring AI Regulation

- ➤ New York City passed Local Law 144 in 2021
- > First global legislation to establish and set safeguards over the use of AI and AEDTs in the workplace
- > Automated Employment Decision Tools (AEDTs) are algorithmic systems
- ➤ Law requires employers to use AEDTs to audit tools for race and gender bias, publish results on electronic platforms, and notify employees and job candidates that tools are being used.
- ➤ Researchers at Cornell University found only 18 of 391 New York City employers has posted results

#### Implementation of Local Law 144

- > Very narrow definition of AEDTs allows for loopholes of broader use
- Compliance regulation is dependent on employee and applicant complaints none submitted so far
- > Law is intended to grow new market of auditors and compliance monitoring
- > Looking forward towards more legislation what will be effective vs. ineffective
- ➤ Push for adopting European Union Parliament (EU) AI Act, approach more focused on policy, governance, and monitoring

#### § 3-717. Employers prohibited from use of facial recognition service technologies during job in...

West's Annotated Code of Maryland Labor and Employment Effective: October 1, 2020

West's Annotated Code of Maryland Labor and Employment Title 3. Employment Standards and Conditions (Refs & Annos) Subtitle 7. Miscellaneous (Refs & Annos)

Effective: October 1, 2020

MD Code, Labor and Employment, § 3-717

§ 3-717. Employers prohibited from use of facial recognition service technologies during job interviews

#### Currentness

#### Definitions

(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.

#### In general

(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.

#### Applicant's consent to use by signing waiver

(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.

#### Credits

Added by Acts 2020, c. 446, § 1, eff. Oct. 1, 2020.

MD Code, Labor and Employment, § 3-717, MD LABOR & EMPLY § 3-717

Current through legislation effective through April 11, 2023, from the 2023 Regular Session of the General Assembly. Some statute sections may be more current, see credits for details.

END OF DOCUMENT

Documents In Sequence

#### Maryland



#### Washington State – HB 1951 (2023-2024 Legislative Session)

H-2264.1

HOUSE BILL 1951 State of Washington 68th Legislature 2024 Regular Session By Representatives Shavers, Ryu, Ramel, Gregerson, Macri, Duerr, and Prefiled 12/14/23. Read first time 01/08/24. Referred to Committee on Consumer Protection & Business. AN ACT Relating to promoting ethical artificial intelligence by 2 protecting against algorithmic discrimination; and adding a new 3 chapter to Title 19 RCW. 4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON: NEW SECTION. Sec. 1. The definitions in this section apply 6 throughout this chapter unless the context clearly requires (1) "Algorithmic discrimination" means the condition in which an 9 automated decision tool contributes to unjustified differential 10 treatment or impacts disfavoring people on the basis of race, color, 11 national origin, citizen or immigration status, families with 12 children, creed, religious belief or affiliation, sex, marital 13 status, the presence of any sensory, mental, or physical disability, 14 age, honorably discharged veteran or military status, sexual 15 orientation, gender expression or gender identity, or any other 16 protected class under RCW 49.60.010. (2) "Artificial intelligence" means a machine-based system that 18 can, for a given set of human-defined objectives, make predictions, 19 recommendations, or decisions influencing a real or virtual 20 environment. HB 1951

#### Hawaii – HB 1607 (2024 Legislative Session)

HOUSE OF REPRESENTATIVES THIRTY-SECOND LEGISLATURE, 2024 STATE OF HAWAII H.B. NO. **1607** 

#### A BILL FOR AN ACT

RELATING TO ALGORITHMIC DISCRIMINATION.

#### BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

```
adding a new chapter to be appropriately designated and to read
as follows:

"CHAPTER

ALGORITHMIC DISCRIMINATION

s -1 Definitions. As used in this chapter:
"Adverse action" means a denial, cancellation, or other
adverse change or assessment regarding an individual's
eligibility for, opportunity to access, or terms of access to
important life opportunities.

"Algorithmic eligibility determination" means a
determination based in whole or in significant part on an
algorithmic process that utilizes machine learning, artificial
intelligence, or similar techniques to determine an individual's
```

Washington, D.C. Bill 25-114

1	12h
2	Councilmember Anita Bonds Councilmember Robert C. White, Jr.
3 4 5 6	Janeus Lewis George  Councilmember Janeese Lewis George  Councilmember Charles Alle
7 8 9 10	Council thember Zachary Parke
11 12 13	
14 15 16	A BILL
17 18 19 20	IN THE COUNCIL OF THE DISTRICT OF COLUMBIA
21 22 23 24 25	To prohibit users of algorithmic decision-making from utilizing algorithmic eligibility determinations in a discriminatory manner, to require corresponding notices to individuals whose personal information is used, and to provide for appropriate means of civil enforcement.
26	BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this
27	act may be cited as the "Stop Discrimination by Algorithms Act of 2023".
28	Sec. 2. Findings and declaration of policy.
29	The Council of the District of Columbia makes the following findings:
30	(a) It is the sense of the Council that technological advancements should support the
31	dignity and well-being of the people of the District.
32	(b) Computers and data-derived decision-making tools play ever larger roles in modern
33	life. As of 2019, 90 percent of U.S. adults regularly used the internet. Approximately 76 percent
34	of households in the District of Columbia have a broadband internet subscription, and many wh
35	lack a home internet connection use smartphones to go online.

#### **State Executive Orders**

- ➤ Maryland (EO 01.01.2024.02)
- ➤ Virginia (Number Thirty (2024))
- ➤ California (EO N-12-23)
- ➤ Pennsylvania (EO 2023-19)









## Litigation

EEOC v. iTutorGroup, Inc., et al., No. 1:22-cv-02565 (E.D.N.Y. 2022)

# i Tutor Group

## Litigation

Mobley v. Workday, Inc., No. 3:23-cv-00770-TSH (N.D. Cal. 2023)



## Litigation

Real Women in Trucking v. Meta Platforms, Inc. (EEOC Complaint)





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## **Best Practices**

#### **Employees**

Familiarize yourself with relevant employment discrimination laws

- ➤ Title VII
- >ADA
- > ADEA
- ➤ State & Local Laws

#### **Employees**

Know when to request accommodations

- ➤ Al video interviews
- ➤ Applicant testing
- >Employment monitoring

#### **Employees**

Keep track of productivity; request results of any AI monitoring or testing conducted by employers

#### **Employees**

File charge with EEOC or obtain advice from private counsel

#### **Employers**

Familiarize yourself with relevant employment discrimination laws

- ➤ Title VII
- > ADA
- > ADEA
- ➤ State & Local Laws

(Look familiar???)

#### **Employers**

Thoroughly vet vendors

#### **Employers**

Familiarize yourself with White House and EEOC guidance, executive orders



#### **Employers**

Use companies who consider potential discriminatory impacts as a model

#### **Employers**

Conduct routine internal audits of Al systems

#### **Employers**

Question vendors (and consult with outside counsel if needed)

#### **Employers**

Provide notice of rights to employees and applicants

- > Reasonable accommodations
- ➤ Privacy notices

## Conclusion



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## Q & A



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# Thank you!



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