

Comments of

Center for AI and Digital Policy (CAIDP.ORG)

The U.S. Equal Employment Opportunity Commission (EEOC) Draft Strategic Enforcement Plan

Docket number: EEOC-2022-0006
February 8, 2023

The Center for AI and Digital Policy (CAIDP) welcomes the opportunity to provide public comments and recommendations on the EEOC [draft Strategic Enforcement Plan \(SEP\)](#) for Fiscal Years 2023-2027.¹ We appreciate EEOC including algorithmic systems, including artificial intelligence (AI), in the workplace as a subject matter focus, and the acknowledgment of increasing use of automated systems by employers to make hiring decisions.

CAIDP is a global independent, research and education organisation. We train AI policy advocates, researchers, and practitioners across 60+ countries. CAIDP currently serves as an advisor on AI policy to the OECD, UNESCO, European Union, the Council of Europe, the Global Partnership on AI, and other national and international organizations. Our mission is to promote a better society, more fair, more just - a world where technology promotes broad social inclusion based on human rights, democratic institutions, and the rule of law.²

Title VII of the Civil Rights Act of 1964,³ Americans with Disabilities Act (ADA),⁴ and The Age Discrimination in Employment Act of 1967 (ADEA)⁵ provide protections against unlawful employment practices. Collectively, these federal laws promote employment and protect against discriminatory employment decisions. Employment decisions should be based on the requirements of a job compared against an individual's skills and experience, respecting the person's dignity and sense of self-worth. Automated techniques have introduced new challenges to fairness and transparency in employment decisions. In 2022, EEOC published an extremely useful technical assistance document "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees" (Technical Guidance).⁶

As enshrined in the Universal Declaration of Human Rights (spearheaded by the United States), 1) everyone has the right to work, to free choice of employment, to just and favorable

¹ The U.S. Equal Employment Opportunity Commission (EEOC) [Draft Strategic Enforcement Plan](#)

² CAIDP, About, <https://www.caidp.org/about-2/>

³ 42 U.S.C. 2000e-2. Title VII of the Civil Rights Act of 1964.

⁴ 42 U.S.C. §§ 12101-213. Americans with Disabilities Act

⁵ 29 U.S.C. Age Discrimination in Employment Act

⁶ EEOC. May 12, 2022. Technical assistance document "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees".

<https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>

conditions of work and to protection against unemployment; 2) everyone, without any discrimination, has the right to equal pay for equal work; 3) everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection; and 4) everyone has the right to form and to join trade unions for the protection of his interests.⁷

Employers use algorithmic systems (based on data analytics, statistical modeling, AI and machine learning – henceforth referred to as ‘algorithms’) to reach a wider pool of candidates, engage with previously passive candidates, and increase the diversity and opportunity for better hires. Algorithms provide the possibility to analyze existing employment practices and workforce composition for inequities, reach a wider pool of talent more efficiently, and make it easier for candidates to apply to new roles. They also apply the same rule to all candidates, providing consistency and traceability for decisions. However, not all algorithms are created equal, and no algorithm is independent of its data, model, and the decisions of its designers and users.

Such emerging technologies create new challenges and possibility of disparate impact and treatment that must be addressed by EEOC in the Strategic Enforcement Plan. The SEP will require an immense joint effort to increase the benefits and mitigate the risks of algorithmic systems, while protecting the rights of the workers. The tools which are of most concern both for the EEOC, and policymakers and regulatory agencies globally are those systems which are used:

- to rank, score, classify, rate, recommend, match, or analyze a candidate against a job description (which may have biased results).⁸
- to surveil the activities of workers (which may deprive workers of their rights).
- to score productivity of workers and make performance or compensation decisions (which may impact the health and safety of the workers and undermine their rights).⁹

Federal law provides clear guidance and a starting point for the analysis, Title VII of the Civil Rights Act prohibits:

- discrimination “against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities”.
- discriminatory use of test scores, to adjust the scores of, use different cut-off scores in employment related tests on the basis of race, color, religion, sex, or national origin.
- consideration of race, color, religion, sex, or national origin in employment practices.

⁷ The [Universal Declaration of Human Rights \(UDHR\)](https://www.un.org/en/about-us/universal-declaration-of-human-rights). 1948. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

⁸ CAIDP Policy Brief. September 2, 2022. State of AI Policy and Regulations in Employment Decisions. <https://www.caidp.org/app/download/8410870963/AIethicist-HumanResources-RecentDevelopments-09022022.pdf>

⁹ Zoe Corbyn. April 27, 2022. Bossware is coming for almost every worker’: The software you might not realize is watching you. *The Guardian*, 27. <https://www.theguardian.com/technology/2022/apr/27/remote-work-software-home-surveillance-computer-monitoring-pandemic>

EEOC Strategic Enforcement Plan - Subject Matter Priorities

Subject Matter Priority 1 - Eliminating Barriers in Recruitment and Hiring

CAIDP opposes structural discrimination and bias that undermine human rights and rule of law. We also warn against amplification of historical biases and power imbalances by algorithmic systems used for employment decisions (hiring, promotion, termination, compensation, performance management).¹⁰ While AI systems can be beneficial when designed inclusively and used responsibly, these systems can also amplify embedded bias at speed and scale.¹¹ Unfortunately, workers of colour, female and LGBTQ+ workers, people with disabilities, more senior workers, people with criminal records, people in low-wage jobs are often the ones experiencing the algorithmic barriers.

Bias related to algorithmic employment systems is not only about datasets. A more comprehensive understanding and awareness of the bias pipeline is needed to uncover the extent of bias in AI systems.¹² A narrow framing on ‘algorithmic bias is a data problem’ can lead vendors and employers to ignore or minimize bias in models, relevant metrics, design decisions, and implementation.

- *CAIDP recommends EEOC to adopt a wider scope of bias, and align its education, technical guidance and litigation activities accordingly.*

Some employers directly surveil worker or job applicant social media accounts.¹³ Some employers demand login access to social media accounts, and some use vendor tools to monitor the accounts. Such access can invade the privacy of job applicants and employees and provide information to employers they otherwise would not know. Workers might refrain from expressing their true identities (e.g.. sexual preference, religion, ability, political or social leanings etc) outside of the workplace if they know employers are monitoring their social presence.

Some employers use background checking (similar to tenant screening tools) or social media scanning vendors which parse social media interactions of both applicants and workers and provide ad hoc or ongoing risk scoring to employers. There is no requirement for these vendors to have accurate reporting, or any liability for errors, biased results or spurious correlations which they provide to the employers and which ultimately have negative impact on individuals.

- *CAIDP recommends EEOC warn and educate employers about the possibility of infringing on Title VII with the use of such tools.*

¹⁰ CAIDP Statements to European Commission, European Parliament, European Council and AIDA Committee regarding the Draft EU AI Regulation of April 20, 2021, July 28, 2021, 16 December, 2021 and May 10, 2022. <https://www.caidp.org/resources/eu-ai-act/>

¹¹ Tam Harbert. April 2, 2022. Regulations Ahead on AI. SHRM. <https://www.shrm.org/hr-today/news/all-things-work/pages/regulations-ahead-on-artificial-intelligence.aspx>

¹² Merve Hickok. July 22, 2020. Why was your job application rejected: Bias in Recruitment Algorithms? Medium. <https://medium.com/@MerveHickok/why-was-your-job-application-rejected-bias-in-recruitment-algorithms-part-1-4ab24573c384>

¹³ Ellen Sheng. April 15, 2019. Employee privacy in the US is at stake as corporate surveillance technology monitors workers’ every move. *CNBC*.

Some employers conduct online search for job applicants ahead of making employment decisions. However, even without inquiring about criminal history or other protected category information (such as disability, sexual preferences, etc), employers can still access this information.¹⁴ Furthermore, online searches can be racially biased against black-sounding names. Academic research has shown that “ads suggesting arrest tend to appear with names associated with blacks, and neutral ads or no ads appear with names associated with whites, regardless of whether the company placing the ad reveals an arrest record associated with the name.”¹⁵

- *CAIDP recommends EEOC warn and educate employers about the possibility of bias and errors.*

Subject Matter Priority 2 - Protecting Vulnerable Workers and Persons from Underserved Communities from Employment Discrimination

In the Technical Guidance, EEOC recommended employers ensure that “the algorithmic decision-making tools only measure abilities or qualifications that are truly necessary for the job” and that “necessary abilities or qualifications are measured directly, rather than by way of characteristics or scores that are correlated with those abilities or qualifications.” Some algorithmic tools show mere correlations amongst a selected group of current employees. These correlations are then applied as a rule to job applicants. The tools should be designed for the skills and competencies necessary for a particular job and show job-relatedness or business necessity.

- *CAIDP recommends EEOC to underline that measuring abilities truly necessary for the job applies to all employers, and that it is not meant as a consideration for only workers with disabilities.*

The historical hiring, pay and promotion practices within an organization may be significantly biased and favour certain groups. In such cases, using the attributes of such selected groups on which the algorithms are trained will not result in more diversity. In fact, the practice will clone more of the same. The system will help entrench the status quo on in an organization, further widening the discriminatory pay gap, diversity gap, and worsening working conditions. If the organization is not aware of bias issues, or if it chooses not to know about these issues, these emerging technologies can serve as a veil to discriminatory practices.

- *CAIDP recommends EEOC to incentivize employers to use algorithmic tools to uncover problematic areas in their workforce practices.*
- *CAIDP recommends EEOC to incentivize in-depth procurement due diligence when employers engage with vendors, Employers need to build internal capacity to responsibly understand the benefits, risks and limitations of algorithmic systems.*

¹⁴ Merve Hickok. August 10, 2022. Written Comments Regarding California Code of Regulations, proposed Modifications to Employment Regulations Regarding Criminal History.

¹⁵ Latanya Sweeney. 2013. Discrimination in Online Ad Delivery. Communications of the ACM, Vol. 56 No. 5.

Subject Matter Priority 3 - Addressing Selected Emerging and Developing Issues

- CAIDP commends EEOC on expanding the “vulnerable” and “underserved” worker priority to include additional categories of workers. Algorithmic discrimination creates new types (and new forms) of discrimination which goes beyond protected characteristics. Algorithmic systems create categorizations beyond the protected class categories, which may result in biased outcomes.
- *CAIDP recommends EEOC to mandate scientific validity for algorithmic systems used for employment decisions. Pseudoscientific systems, such as emotion detection and biometric categorization claiming to assess a person’s character, trustworthiness, or riskiness are not scientifically valid.¹⁶ History provides us ample example of these approaches were used to oppress and criminalize vulnerable groups. They are not related to job necessities.*

Increasingly, employers use worker surveillance products to monitor the activities of their workers.¹⁷ ¹⁸However, most of the time, the surveillance and/or tracking systems and devices blur the line between what is necessary to conduct and complete work vs what should be private. Such surveillance and tracking can provide protected information to an employer. Notice of such protected information which would not otherwise have been known to the employer can create legal risks for the employer and opens the possibility for allegations of discrimination.¹⁹

- *CAIDP recommends EEOC to collaborate with other relevant offices within the U.S. Department of Labor to clarify lawful monitoring practices and applications.*
- *CAIDP recommends EEOC to provide guidance on protection of worker data collected by employers, or by other parties on their behalf. Workers may not know data is collected about them, or even if they know, they may not access data or have any say over what the collecting entity might do with their data. Workers may not even understand the full complexity of the data, the inferences made about them, or the extent of possible impact or harm.*

Subject Matter Priority 5 - Preserving Access to the Legal System

Currently, the burden of proof for unlawful employment practice based on disparate impact is established only “if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related

¹⁶ Arvind Narayanan. How to recognize AI snake oil. Princeton University. <https://www.cs.princeton.edu/~arvindn/talks/MIT-STS-AI-snakeoil.pdf>

¹⁷ Marc Rotenberg, Testimony and Statement for the Record, The Privacy and Consumers Workers Act. Sept. 24, 1991. (“the advent of new information collection techniques have placed employees under new and unprecedented kinds of surveillance.”), https://web.mit.edu/gtmarx/www/labor_hr_testimony.pdf

¹⁸ Ifeoma Ajunwa, Kate Crawford, and Jason Schultz. 2017. Limitless Worker Surveillance, 105 Cal. L. Rev. 735. <https://ssrn.com/abstract=2746211>

¹⁹ Keith E. Sonderling, Bradford J. Kelley, and Lance Casimir. 2022. *The Promise and The Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIA L. Rev. 1. repository.law.miami.edu/umlr/vol77/iss1/3

for the position in question and consistent with business necessity.” However, when algorithmic systems are used, job applicants have no access to the model design or the to the outcomes / selection ratios. Similarly, some systems may have restrictive design which make it difficult or impossible to even access and engage with the system.

In the Technical Guidance, EEOC had recommended employers to describe “in plain language and in accessible formats, the traits that the algorithm is designed to assess, the method by which those traits are assessed, and the variables or factors that may affect the rating.”

“Transparency notices” do not provide sufficient information to the affected individual to make a meaningful assessment of the system or to contest unfair outcomes. The better approach is to require algorithmic transparency. This is a foundational requirement for fairness and accountability for AI systems and is well established in modern privacy law and the emerging AI policy frameworks.²⁰ President Biden highlighted the need to establish algorithmic transparency in the 2023 State of the Union speech.²¹ This recommendation followed from the earlier work of the White House Office on Science and Technology Policy.²²

- *CAIDP recommends that EEOC implement algorithmic transparency to ensure that individuals have access to the logic of the automated system and can meaningfully contest adverse outcomes.*

Implementing SEP Priorities

Outreach:

- CAIDP commends EEOC Chair Burrows for launching the AI and Algorithmic Fairness Initiative, bringing together industry and civil society partners to discuss the most important impacts of algorithmic systems in the workplace.²³
- CAIDP also commends the many educational and outreach activities conducted by EEOC Commissioner Sonderling, making EEOC more accessible to a variety of stakeholders.
- *CAIDP recommends that the EEOC incentivize employers to invest in professional training of HR practitioners and build a better understanding of benefits and risks of algorithmic systems.*
- *CAIDP further recommends that the EEOC work with Human Resources organizations, such as SHRM and HRCI, to incentivize skills and capacity-building training. HR*

²⁰ Marc Rotenberg, *Artificial Intelligence and the right to algorithmic transparency* in M. Ienca, et al, *The Cambridge Handbook of Life Science, Information Technology and Human Rights* (Cambridge University Press 2022).

²¹ The White House, FACT SHEET: In State of the Union, President Biden to Outline Vision to Advance Progress on Unity Agenda in Year Ahead. February 7, 2023. (“We must also demand transparency about the algorithms companies use that far too often discriminate against American . . .”), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/07/fact-sheet-in-state-of-the-union-president-biden-to-outline-vision-to-advance-progress-on-unity-agenda-in-year-ahead/>

²² The White House, Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights*. October 2022.

²³ EEOC. October 28, 2021. AI and Algorithmic Fairness Initiative. <https://www.eeoc.gov/ai>

professionals make decisions to procure algorithmic systems, use these systems to make decisions, and at times, train the machine learning algorithms with their user behaviour. They should be the front-line promoters for fair, transparent, and accountable algorithmic systems, and the defender against biased and discriminatory systems. EEOC can multiply its outreach and educational efforts through coordination with the professionals most involved in employment decision-making processes.

Education and Training:

CAIDP commends the commitment from EEOC Chair Claudette Burrows “to educate employers, workers and other stakeholders on the potential for unlawful bias so that these systems do not become high-tech pathways to discrimination.”²⁴

- *CAIDP recommends that EEOC increase awareness of employers, vendors, auditors, and consultants of their obligations and responsibilities for the fairness of algorithmic systems, and create educational videos, providing examples and accessible guidance on possible impacts of algorithmic systems.*

Technical Assistance to Employers and Vendors:

- CAIDP recommends that the EEOC:
 - Provide a similar technical guidance document detailing how algorithmic systems, if not designed and used properly, can undermine Title VII of the Civil Rights Act of 1964 and The Age Discrimination in Employment Act.
 - Identify “[promising practices](#)” (as identified in the Technical Guidance) for employer and vendors to target.
 - Make it clear to vendors and employers that Impact Ratio (4/5ths Rule) is not and should not be the only way to test disparate impact and bias for the outcomes of a system. A lot of organizations use this rule of thumb as a stamp of approval, or to suggest their system is perfectly valid and unbiased, without paying attention to other design and implementation issues.
 - Advise if designing algorithmic models in a way that will always result in selection ratios meeting 4/5ths Rule could be considered as ‘disparate treatment’? Some algorithmic models can calibrate the results before showing them to users of the system. In doing so, the system can make biased calibrations. However, the employer would be led to think that the outcomes of the system are dependent on candidates’ attributes.
 - Collaborate with a community of practice (vendors, employers, civil society organizations, auditors) to create a voluntary audit framework and pilot as a sandbox.

²⁴ EEOC hearing, titled “Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier,”

Such initiative would bring different perspectives and experiences together to highlight both benefits and risks of algorithmic systems in an inclusive way). EEOC needs to address the urgent public need to ensure employment equity but also has scarce resources. This sandbox approach can clarify expectations for all stakeholders, balance the workload between participants, create a supporting environment and develop an employment-focused framework.

Enforcement & Litigation:

- **Commissioner’s Charge:** As mentioned above, when talking about algorithmic systems, the burden of proof for individual job applicants or employees to start a disparate impact case is extremely high. The EEOC can raise awareness on how to individuals and organizations can request the issuance of a Commissioner’s Charge for an inquiry into individual or systemic discrimination.
- **Directed Investigations:** The EEOC has the authority to sue private entities under Title VII, Title I of the ADA, and Title II of GINA. The EEOC has the authority to sue both public and private entities under the Equal Pay Act and the ADEA. Similar to suit filed against online tutoring company (EEOC v. iTutorGroup, Inc),²⁵ Commission can start targeted investigations on algorithmic systems which are widely debated for their pseudoscientific or biased outcomes.
- **Collaboration with Other Federal Agencies:** Although the main liability for biased outcomes of algorithmic tools remains with employers, the EEOC can collaborate with Federal Trade Commission (FTC) to investigate vendors’ claims about what their product can do or whether products can deliver fair or unbiased results, and whether vendors are honest about the source of data used in the algorithms and how the outcomes will be used.

Thank you for your consideration of our views. We would welcome the opportunity to exchange with you further about these recommendations.

Sincerely,



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²⁵ EEOC. May 5, 2022. EEOC Sues iTutorGroup for Age Discrimination. <https://www.eeoc.gov/newsroom/eeoc-sues-itutorgroup-age-discrimination>