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The Future of Work: Protecting Workers' Civil Rights in the Digital Age

Esther G. Lander
Partner, Akin Gump Strauss Hauer & Feld LLP

Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee, thank you for giving me the opportunity to testify on protecting workers' civil rights in the digital age.

I am a partner with the law firm Akin Gump Strauss Hauer & Feld LLP[1] in Washington, DC. My practice focuses on complex and systemic claims of employment discrimination. I previously served as the Principal Deputy Chief in the Employment Litigation Section of Department of Justice's Civil Rights Division ("ELS"), where I spent eight years enforcing Title VII the Civil Rights Act of 1964, *as amended* ("Title VII") against state and local government employers. During my tenure in ELS, I supervised dozens of pattern or practice lawsuits and investigations involving challenges to employment selection procedures under Title VII. Six years ago, I returned to private practice and a substantial part of my docket has been counseling clients regarding various kinds of employment assessments and tools to ensure that their selection procedures do not result in discrimination against any protected groups. I have also spoken and written extensively on employment testing and the legal implications of using technology in selection procedures.

I. Technology, Candidate Screening, and Compliance with Title VII

Employers are always searching for innovative, efficient, and cost-effective ways to source, screen, and identify top talent for all kinds of positions. Artificial Intelligence ("AI") solutions are attractive to employers because they are affordable, fast, and easy to administer. In addition, vendors who sell these products promise employers a competitive edge in the labor market, claiming that their tools can narrow a pool of thousands of candidates within seconds to identify those who are most likely to succeed on the job.

For example, there are recruiting algorithms that scour the internet to find qualified candidates for a particular job and then encourage them to apply. Vendors who sell these search tools, including through online platforms, claim to include variables that can predict who will be a top performer if hired. Some algorithms are "smart" in the sense that they constantly update

[1] With 20 offices, 85 practices and over 900 lawyers and professionals, Akin Gump Strauss Hauer & Feld LLP is among the world's largest law firms. Akin Gump has been repeatedly recognized as having one of the nation's premier labor and employment practices. The firm's labor and employment lawyers represent a wide range of employers on their most complex and challenging labor and employment legal problems, from wage and hour class actions and discrimination cases, to arbitrations involving key talent, to complex labor controversies.

based upon an employer's past hiring decisions to target candidates with similar characteristics to the employer's top performers. One vendor offers a service that scans over 450 million job candidates and identifies which candidates are likely to change jobs based on its collection of publicly-available information about applicants from social media websites.[2] Other companies create algorithms to narrow the applicant pool. For instance, some companies are marketing algorithms based upon words or phrases from employment applications or resumes of high-performing incumbents. Employers then use the algorithms to narrow applicant pools to those candidates with similar words or phrases on their applications or resumes.

Vendors are also marketing applicant tracking systems that source applicants at the initial stages of employee hiring.[3] These systems incorporate AI algorithms by mining the available public data on both passive and active candidates, "looking for statistical correlations that connect seemingly unrelated variables, such as patterns of social media behavior, with workplace performance."[4]

Another example of the technology being used in hiring is a chatbot that communicates with applicants by conducting the initial stages of the hiring process such as sourcing, screening resumes for minimum qualifications, and scheduling interviews.[5] At least 75 providers are competing to sell these services to recruiters and employers.[6] Some chatbots incorporate machine learning, which is "the science of getting computers to act without being explicitly programmed."[7]

Employers are also using algorithms to analyze video interviews, where a candidate prerecords videotaped answers to interview questions for an employer to later review at its convenience.[8] Goldman Sachs, for example, recently shifted all of its first round interviews to a video format.[9] Once videotaped, employers can subject the recordings to an algorithm that spots tens of thousands of hints about intents, habits, personality, and qualities in candidate responses.[10] The prerecorded video interview provides employers far more information about

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[2] Gaurav Kataria, *Introducing Entelo Insights*, ENTELO BLOG (May 1, 2018), https://blog.entelo.com/introducing-entelo-insights.

[3] Russ Banham, *2016 Trends in Applicant Tracking Systems*, HRO TODAY (Feb. 2, 2016), http://www.hrotoday.com/news/talent-acquisition/2016-trends-in-applicant-tracking-systems/.

[4] Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 866 (2017).

[5] *See, e.g.*, Gregory Lewis, *Recruiting Chatbots Won't Take Your Job, But They May Make it Easier*, LINKEDIN TALENT BLOG (Aug. 21, 2017), https://business.linkedin.com/talent-solutions/blog/future-of-recruiting/2017/how-recruiting-chatbots-work-and-what-recruiters-and-candidates-.

[6] Jennifer Alsever, *How AI Is Changing Your Job Hunt*, FORTUNE (May 19, 2017), http://fortune.com/2017/05/19/ai-changing-jobs-hiring-recruiting/.

[7] STANFORD UNIV., *Machine Learning*, *Coursera*, https://www.coursera.org/learn/machine-learning (last accessed Mar. 8, 2019).

[8] Monica Torres, *New app scans your face and tells companies whether you're worth hiring*, THE LADDERS (Aug. 25, 2017), https://www.theladders.com/career-advice/ai-screen-candidates-hirevue.

[9] GOLDMAN SACHS, *Changes in Campus Recruiting* (June 24, 2016), http://www.goldmansachs.com/careers/blog/posts/changes-to-our-recruiting.html.

[10] *See* Torres, *supra* note 26.

candidates than even internet search algorithms. For example, it will check for voice inflections and microexpressions that convey a range of emotion based on psychological research.[11]

With so many technology-based tools coming to market, government enforcement agencies and civil rights groups have raised concerns about the possibility of unlawful discrimination. To date, however, there has been little litigation any of these technology-based selection tools, nor are there any published studies that show AI tools are more likely to result in discriminatory selections than more traditional employment tests. With that said, when employers implement technology to make selection decisions, it is important to understand how to do so correctly and avoid the risk of unlawful discrimination.

A. Basic Legal Principles of Employee Selection Procedures

One of the benefits of employment tests is that they enable employers to compare candidates using an objective measure that eliminates the potential for bias to influence decision-making. However, the possibility also exists that an employment test that appears fair in form will operate to disproportionately screen out candidates of a certain race, national origin, gender or other legally protected status. To address this conundrum, Congress passed the Civil Rights Act of 1991 (the "1991 Act"), making "disparate impact" discrimination an unlawful employment practice. Under the 1991 Act, an employment selection procedure that adversely impacts members of a protected group must be justified by the employer as job related for the position in question and consistent with business necessity.[12] Thus, the first question when assessing the legality of any employment selection procedure – whether it is a traditional written test or an AI tool – is does the procedure result in a disparate impact on members of a protected group?

A disparate impact occurs when a selection procedure disproportionately screens out candidates in the protected group from advancing to the next stage of the hiring process. Courts find disparate impact when protected group candidates are selected or "pass" the assessment at a "statistically significant" lower rate than majority group applicants. Statistical significance is a conclusion, based on mathematical probability, that the lower pass rate for protected group candidates was the result of the selection procedure, and not simply attributable to chance. In assessing disparate impact, the Supreme Court has required a standard deviation in excess of two or three to be probative of discrimination.[13] Therefore, before reaching any conclusions about whether algorithms and other technology used to screen candidates violate civil rights laws, one must first assess whether the screening mechanism results in a statistically significant difference in "pass" rates between those in the protected group and those in the majority group.

If a disparate impact is found, the inquiry does not end. As noted above, an employer can successfully defend its use of a selection procedure by demonstrating that the procedure is job related for the position in question and consistent with business necessity. The job relatedness of

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[11] *See* Sally Writes, *Three Disruptive Technologies to Hit HR Departments in 2018,* IT BRIEFCASE (Dec. 5, 2017), http://www.itbriefcase.net/three-disruptive-technologies-to-hit-hr-departments-in-2018.

[12] 42 U.S.C. 2000e-2 (Supp. V 1993).

[13] *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, n.14 (1977).

selection procedures typically involves a process called validation, which seeks to document a strong connection between the selection procedure at issue and the job or jobs for which it is being used. Courts assess the adequacy of validation efforts under the *Uniform Guidelines on Employee Selection Procedures* (the "*Uniform Guidelines*").[14]

The *Uniform Guidelines* were adopted in 1978 by the EEOC, the Civil Service Commission (succeeded by the Merit System Protection Board and the U.S. Office of Personnel Management), the U.S. Department of Labor, the Department of Justice, and the Office of Revenue Sharing.[15] The stated goal of the *Uniform Guidelines* is to establish a uniform standard governing the proper use of tests and other selection procedures.[16] The *Uniform Guidelines* recognize three forms of validation: content, criterion-related, and construct. Content validity demonstrates that the content of the selection procedure represents the content of the job, such as a pilot simulator for pilots or a typing test for administrative positions. Construct validity demonstrates that the content of the selection procedure measures a construct or underlying human trait (such as conscientiousness or adaptability), and that the trait is important to successful job performance. Construct validity is seldom used because obtaining empirical support requires a series of arduous and expensive research studies. Criterion-related validity asks an empirical question: Is performance on the selection procedure predictive, or significantly correlated with subsequent performance on the job? When validating a selection procedure using criterion-related validity, there must be a demonstrated statistical relationship between scores on the selection procedure and job performance or other important job behaviors. Criterion-related validity is considered the most suitable validation strategy for the typical AI tool, which purports to measure certain competencies or personality traits that predict who will be more successful on the job.

Finally, assuming an employer can meet its burden of proving job relatedness, Title VII obligates the employers to explore equally valid alternatives that either reduce or eliminate the adverse effect. Often this can be done by considering an alternative method of use, such as a different means of scoring the assessment, or combining or weighting the components of a selection process to see whether the statistical correlations with job performance hold while adverse impact is reduced.

B. Analyzing AI Selection Procedures under Title VII's Framework

If an employer chooses to implement artificial intelligence in the selection process – as so many companies have already begun to do – there are several factors that should be considered before reaching any conclusions about discrimination.

First, one must consider the difference between AI that identifies passive candidates, *i.e.*, individuals who have not expressed any interest in a position, from those tools that screen candidates who have already applied. Sourcing and recruiting algorithms are typically used to enhance an applicant pool. They quickly identify potential candidates with preferred

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[14] 29 C.F.R. Part 1607 (1978).

[15] *Id.*

[16] *Id.*

qualifications through a search of publicly posted resumes or other social media information, and they can do so far more cheaply than a recruiting firm. As a general matter, courts and enforcement agencies have considered affirmative recruiting efforts to be lawful under Title VII, even when targeted to a protected group to expand diversity. Thus, where affirmative outreach to passive candidates is undertaken to enhance traditional recruiting methods (such as job postings), civil rights laws are unlikely to be violated.[17] It is worth noting, however, that AI recruiting tools may "learn" to exclude from those recruited individuals of a certain race, gender, age, religion or other protected characteristics, which could expose an employer to claims of intentional discrimination. Thus, it is important for employers to know and understand the inputs for any algorithm before using it, including when updates occur as a consequence of machine learning.

Second, as previously noted, Title VII is not implicated unless there is a finding of adverse impact. Many of the AI and technology-based screening procedures on the market, which purport to measure personality traits, are far less likely to result in adverse impact on protected groups than traditional paper-pencil tests that measure cognitive abilities.

Third, the impact of sample size should be considered. AI tools have the ability to screen thousands of applicants within seconds. Once an employer uses an algorithm to screen all of its resumes or applications, the applicant pool for purposes of assessing adverse impact arguably will include everyone subject to the algorithm. It is commonly understood among labor economists and statisticians that, as a function of sample size, a very large applicant pool will result in a finding of statistical significance even though the magnitude of the difference may be quite small. The *Uniform Guidelines* account for this phenomenon by instructing employers to consider not only whether differences in selection rates are statistically significant, but also whether they are practically significant. Where the magnitude of the difference between the selection rates of majority and protected group members is small, courts have found no adverse impact even with a showing of statistical significance.

Fourth, when evidence of adverse impact exists, validation evidence must be considered before reaching any conclusions about whether a particular screening device is discriminatory. For example, an algorithm that disproportionately excludes women may be lawful nonetheless if it is supported by a professionally sound criterion-related validity study that documents a statistical correlation between the selection procedure (such as the data inputs for the screening algorithm) and successful job performance or other important aspects of the job (such as reduced turnover, for example). An employer can also "transport" validity from a vendor's prior successful validation efforts, as long as the employer uses the selection procedure in the same way, and there is sufficient overlap between the employer's jobs and work setting and the jobs and work setting where the original validation study took place.

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[17] Courts have permitted adverse impact challenges to word of mouth recruiting when used as an exclusive means of filling open positions, and upon finding gross statistical disparities between the racial or gender composition of the "otherwise qualified" labor market pool and the employer's applicant pool. *See, e.g., United States v. Brennan,* 650 F.3d 65 (2d Cir. 2011); *United States v. City of Warren,* 138 F.3d 1083 (6th Cir. 1998); *Thomas v. Wash. Cnty. Sch. Bd.,* 915 F.2d 922, 924-26 (4th Cir. 1990); *United States v. Ga. Power Co.,* 474 F.2d 906, 925 (5th Cir. 1973). By analogy, recruiting algorithms that serve as an employer's primary recruiting tool may result in an adverse impact challenge if the algorithm is identifying substantially less diverse candidates than qualified applicants in the available labor market.

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Finally, there is a difference between algorithms that are programed to find any correlation versus those that are designed to identify job related correlations. The *Uniform Guidelines* contemplate that any validation study begin with the undertaking of a job analysis and "competent" test design so that the selection device itself is linked in some fashion to the knowledge, skills, abilities or personal characteristics that are important for the job. Thus, if an algorithm is programed simply to find correlations, without regard to whether they bear any relationship to the job, between a candidate's resume, word choices, or facial expressions and the resumes, word choices, or facial expressions of top performers, it is unlikely that competent design would be found. On the other hand, criterion-related validity would exist where screening criteria are connected to the competencies identified by the job analysis and are also highly correlated with successful job performance.

In conclusion, employers who proceed with AI solutions in the employment context would benefit from taking steps to ensure compliance with Title VII by reviewing and considering adverse impact studies and validation work before reaching any determination about potential discrimination. If implemented correctly, the business case for AI is clear: it allows employers to harness the power of all available data to more efficiently make hiring and promotion decisions. With the ability to analyze hundreds of thousands of applicants, these products can eliminate significant manual labor, and offer an advantage over competitors in identifying and hiring the best employees.

II. Technology, Wellness Programs, and Compliance with the Civil Rights Laws

Wellness programs at work have become commonplace and now exist at most fortune 500 companies. While these programs take many forms, their common goal is to positively influence employee behavioral and lifestyle choices and to support their emotional and physical well-being. One such wellness initiative allows employees to voluntarily sign up for digital health monitoring in exchange for cash, reduced health insurance premiums, or reimbursements for co-payments and deductibles.[18] This trend is increasing and it is projected that annual sales of wearable devices for use in company wellness programs will grow to 18 million in 2023 across the United States.[19]

Although there are obvious gains associated with promoting a healthier workforce, critics are concerned that technology-driven wellness programs, such as tracking devices that allow employers to monitor an employee's every movement, may result in discrimination against persons with disabilities or pregnant women. For example, if employers use personal health data from fit bits, such as heart rate or VO2 max (maximal oxygen consumption) to make or influence employment decisions, those with medical conditions could be adversely affected. Alternatively, where employers use these devices to reward employees for meeting health-related goals, those

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[18] Christopher Rowland, *With Fitness Trackers in the Workplace Bosses Can Monitor Your Every Step and Possibly More*, THE WASHINGTON POST, (Feb. 16, 2019, 7:13PM), https://www.washingtonpost.com/business/economy/with-fitness-trackers-in-the-workplace-bosses-can-monitor-your-every-step--and-possibly-more/2019/02/15/75ee0848-2a45-11e9-b011-d8500644dc98_story.html.

[19] *Id.*

with medical conditions could be unable to participate and reap the benefits that others without medical conditions have the opportunity to receive.

There are several existing laws that provide protections for employees whose employers use wellness programs. Under the Affordable Care Act, wellness programs are subject to a number of legal restrictions designed to ensure group health plans do not limit benefits based on health factors.[20] The Americans with Disabilities Act ("ADA") prohibits employers from conducting medical inquiries into an employee's medical conditions absent objective facts that suggest the employee's job performance is being negatively affected by a condition. Genetic Information Nondisclosure Act ("GINA") also prohibits employers from inquiring about employee genetic information. Both the ADA and GINA also contain exceptions, however, for an employee's voluntary disclosure of medical information. Accordingly, the questions implicated by wellness programs that involve tracking devices are (i) are these programs truly voluntary; and (ii) is the data that employers are collecting a medical inquiry? The EEOC attempted to answer these questions in regulations that took effect in 2017. However, AARP successfully challenged the regulations and they were vacated by the court in 2019. The EEOC plans to publish a new wellness rule this year for notice and comment, which will provide an opportunity for employers, employees, and civil rights advocates to weigh in with their respective views on fitness trackers.

III. Independent Contractors and the Gig Economy.

The "gig economy" has created substantial opportunities for individuals to work as independent contractors because of low start-up costs, flexible hours, and the ability to work independently and build a business. Gig companies also offer workers an avenue to supplement their income and work on their own terms. In fact, gig arrangements have become so popular that in 2018 it was estimated that 36% of U.S. workers "have a gig work arrangement in some capacity."[21]

Contractual "gig" arrangements can be beneficial to workers who need to earn extra income on a seasonal or as-needed basis, when their time permits, without taking on the commitment that is required to gain regular employment. Gig workers also are given a platform by these companies to run their own small business, and some entrepreneurial gig workers become independent contractors for multiple gig companies to maximize their opportunity for earnings. Gig arrangements are also beneficial to companies and the economy because they allow companies to expand their scope on a multi-state or national scale without having to expend substantial overhead that would otherwise prevent them from doing so.

True independent contractors do not qualify for protections under the Fair Labor Standards Act ("FLSA") and other civil rights and worker protection laws. As such, many believe that employers are incentivized to misclassify their workers as contractors to save money

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[20] Pub. L. No. 111-148, 124 Stat. 119.

[21] Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractor of Platform Work*, 39 N. ILL. U. L. REV. 379, 389 (2019) (citing Shane McFeely & Ryan Pendell, *What Workplace Leaders Can Learn from the Real Gig Economy*, Gallup (Aug. 16, 2018), https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx [https://perma.cc/9AGN-Q5DF]).

and avoid being held accountable for compliance with employment laws. While worker misclassification is not a new phenomenon, the ease of technology and the volume of workers using it has heightened these concerns.

Independent contractors are distinguishable from employees in several ways. Although there are various legal tests that courts and government agencies apply, the amount of control exerted by the employer is typically the key factor. Existing federal employment laws, such as the FLSA, provide a robust and comprehensive remedial scheme for workers who have been misclassified. For instance, misclassified workers under the FLSA may obtain unpaid overtime premiums, liquidated damages, and a lengthy limitations period applies. These remedies become even more substantial when recovered on a class-wide basis, which has resulted in a spike of misclassification class action lawsuits, serving as a strong deterrent to employers engaging in misclassification.

IV. Conclusion

In closing, technological advances are benefiting workers, employers, and the economy. As the labor force and businesses adapt to these changes, employment laws currently in place are adequate to ensure that workers rights are protected. Thank you for the opportunity to speak with you today and share my thoughts on the important topics covered by this hearing. I look forward to answering your questions.