SANDB≡RG
PHO≡NIX

AI in Employment: EEOC Issues Guidance on Preventing Discrimination

AUTHOR: JAMES KEANEY

Much ink has been spilled recently on the profound and disruptive impacts that many people believe artificial intelligence (AI) is having and will have on all aspects of our lives. This includes use and reliance on artificial intelligence tools such as ChatGPT and other similar technologies.

But will AI impact labor and employment law? If so, how? The answer to the former question seems to clearly be yes, but the answer to the latter question is less clear. How will these technologies fit into existing legal frameworks for handling employment related issues and disputes?

Time will tell, but the Equal Employment Opportunity Commission (EEOC) has launched an Artificial Intelligence and Algorithmic Fairness Initiative to start to address these questions. On May 18, 2023, as part of this initiative, EEOC published guidance on preventing workplace discrimination in connection with the use of automated or algorithmic systems that draw upon artificial intelligence technology.

The guidance is contained in a technical assistance document titled "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures under Title VII of the Civil Rights Act of 1964" and can be found here.

The guidance focuses on the issue of adverse or "disparate" impacts resulting from use of technology such as AI. In other words, it addresses the issue of *unintentional* discrimination or discriminatory effects resulting from operation or use of software or algorithms in the hiring, firing, promoting, or demoting process.

The guidance strongly encourages employers to conduct "self-analyses" of their use of software or algorithmic systems in such processes on an ongoing basis to proactively guard against discriminatory impacts of such use. It also offers rules of thumb for employers to consider in evaluating their own use of such software or algorithms.

At the end of the day, the document is simply guidance for employers; it is not law. However, as such AI-based software increasingly makes its way into the modern workplace, it is important for employers to take note of the EEOC's positions on the issue. In the view of the EEOC, there is an ever-present threat that discrimination can result from the use of such software, so employers should be prepared and proactive in reviewing and refining their practices over time.

Do not hesitate to contact a member of our Labor and Employment Team to discuss these issues further.