

EEOC, Other Federal Agencies Set the Pace for Employers Using AI in the Workplace

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It is safe to say that the use of artificial intelligence (AI) went mainstream in 2023. With the widening acceptance of AI, dozens of industries have raced to adopt the technology into various operations at a staggering pace – including adopting AI in human resources (HR) processes in the workplace. But, employers and HR departments should keep pace with federal agencies seeking to mitigate risks associated with AI in the workplace.

AI in the Workplace

AI in the workplace is moving at a fast clip. According to the [Equal Employment Opportunity Commission \(EEOC\)](#), as many as 83% of employers, and as many as up to 99% among Fortune 500 companies, are using some form of AI to screen or rank candidates for hiring.

The use of AI in the workplace is not new from an HR perspective. Employers have long been able to use AI to perform certain HR functions in the recruiting process, such as resume screening. But now, employers can use AI for other recruitment functions, such as administering personality and aptitude tests or analyzing video interviews. Once workers are on-boarded, employers can use AI to help with worker safety, protection, management, and productivity through real-time locating systems and other technologies.

Federal Agencies' Guidance

With the introduction of AI comes great benefits, several federal agencies seek to cut in on potential consequences by issuing guidance, requesting information, and devising plans for AI in the workplace in the following ways:

- On January 26, 2022, the federal Occupational Safety and Health Administration (OSHA) issued a [trade release](#) announcing an update and expansion of a chapter in the OSHA Technical Manual on [Industrial Robot Systems and Industrial Robot System Safety](#). The update notes that advances in AI boost the abilities and uses of

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robot systems in industrial applications. The revisions add current “technical information on the hazards associated with industrial and emergent robot applications, safety considerations for employers and workers, and risk assessments and risk reduction measures.”

- On May 12, 2022, the EEOC issued its guidance on AI “discuss[ing] how existing ADA requirements may apply to the use of [AI] in employment-related decision making and offers promising practices for employers to help with ADA compliance when using AI decision making tools.”
- The same day, on May 12, 2022, the Department of Justice reported issued guidance that “outlines issues that employers should consider to ensure that the use of software tools in employment does not disadvantage workers or applicants with disabilities in ways that violate the ADA.”
- On October 31, 2022, the National Labor Relations Board (NLRB) General Counsel issued a memorandum recommending that the NLRB “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 protected concerted activity.
- On January 10, 2023, the EEOC issued a draft strategic enforcement plan which announced that the agency would focus “on employment decisions, practices, or policies in which covered entities’ use of technology contributes to discrimination based on a protected characteristic. These may include, for example, the use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence; use of automated recruitment, selection, or production and performance management tools; or other existing or emerging technological tools used in employment decisions.”
- On May 1, 2023, the White House Office of Science and Technology Policy (OSTP) announced that it will be releasing a public request for information (RFI) “to learn more about the automated tools used by employers to surveil, monitor, evaluate, and manage workers.” The OSTP states that responses to the RFI “will be used to inform new policy responses, share relevant research, data, and findings with the public, and amplify best practices among employers, worker organizations, technology vendors, developers, and others in civil society.”
- On May 18, 2023, the EEOC issued its guidance explaining the application of Title VII to an employer’s use of automated systems, including AI, noting that the scope of the guidance “is limited to the assessment of whether an employer’s ‘selection procedures’—the procedures it uses to make employment decisions such as hiring, promotion, and firing—have a disproportionately large negative effect on a basis that is prohibited by Title VII.”

Employers should expect to see more federal guidance on AI as technologies continue to develop.

What Employers Can Do to Stay in the AI Race

With federal agencies’ guidance in mind and an expectation of more regulation to come, employers should take proactive steps to ensure the use of AI in the workplace keeps pace with developing law. These steps include:

- Understanding that AI in the workplace is governed by several different laws, including privacy laws, data security laws, and anti-discrimination laws at the state and federal levels.
- Considering including references to the use of AI in the recruiting, hiring, and

employment process in employment policies and notices.

- Partnering with HR, IT, and legal counsel to ensure that AI practices remain competitive while compliant with local and federal law.

For additional information on employer considerations before using AI and automated decision-making systems in the workplace, check out a previous Quirky Questions [article](#) on the topic.

The idea that AI can create numerous benefits in the workplace seems to be gaining traction. Federal guidance issued in 2022 and 2023 signal that regulation of AI in the workplace will strive to keep up with the strides made in technological advances.

Employers and HR can stay ahead of the curve by keeping abreast of, and following, regulations applicable to their company.