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EEOC Document Warns against Discriminatory Effects of Artificial Intelligence

The Equal Employment Opportunity Commission (EEOC) has issued a warning to employers who use automated systems, including artificial intelligence (AI), to monitor employees and make decisions about a range of employment matters. The document says its intent is to focus on preventing discrimination against job seekers and workers, in accordance with Title VII of the Civil Rights Act (Title VII).

Employers increasingly use automated systems, including those with AI, to help them with a wide range of employment matters, such as selecting new employees, monitoring performance, and determining pay or promotions. Without proper safeguards, according to the EEOC, their use runs the risk of violating existing civil rights laws.

"As employers increasingly turn to AI and other automated systems, they must ensure that the use of these technologies aligns with the civil rights laws and our national values of fairness, justice and equality," said EEOC Chair Charlotte A. Burrows. "This new technical assistance document will aid employers and tech developers as they design and adopt new technologies."

EEOC Not Shy about Using Its Authority

"I'm not shy about using our enforcement authority when it's necessary," Burrows told *Insurance Journal*. "We want to work with employers, but there's certainly no exemption to the civil rights laws because you engage in discrimination some high-tech way."

Burrows said one example of how automated systems can violate Title VII involves resumé screeners

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Non-Compete Agreements in Violation of NLRA

On May 30, 2023 NLRB General Counsel Jennifer Abruzzo sent a memo to all Regional Directors, Officers-in-Charge, and Resident Officers, setting forth her view that the proffer, maintenance, and enforcement non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act (NLRA) except in limited circumstances.

The memo explains that overbroad non-compete agreements are unlawful because they "tend to chill employees in the exercise of their Section 7 rights when the provisions could reasonably be construed to deny employees the ability to quit or change jobs by cutting off access to other employment opportunities for which they are qualified based on their experience, aptitudes, and preferences as to type and location of work," said General Counsel Abruzzo.

"This denial of access to employment opportunities interferes with

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when they produce a biased result if they are based on biased data.

"What will happen is that there's an algorithm that is looking for patterns that reflect patterns that it's familiar with," she said. "It will be trained on data that comes from its existing employees. And if you have a non-diverse set of employees currently, you're likely to end up with kicking out people inadvertently who don't look like your current employees."

Amazon, for instance, had to abandon its resume-scanning tool to recruit top talent after finding it favored men for technical roles – in part because it was comparing job candidates against the company's own male-dominated tech workforce.

Companies also need to be careful about "draconian schedule-monitoring algorithms" that penalize breaks for pregnant women or Muslims taking time to pray or allowing faulty software to screen out graduates of women's or historically Black colleges. The message is, Don't blame AI when the EEOC comes calling.

When the EEOC is made aware of these situations it will take action, said Burrows. In March, the tech job-search website Dice.com settled with EEOC to end an investigation over allegations it was allowing job posters to exclude workers of U.S. national origin in favor of immigrants seeking work visas.

Adverse Impact

The EEOC's new technical assistance document discusses adverse impact, a key civil rights concept, to help employers prevent the use of AI from leading to discrimination in the workplace. This document builds on previous EEOC releases of technical assistance on AI and the Americans with Disabilities Act and a joint agency pledge. It also answers questions employers and tech developers may have about how Title VII applies to use of automated systems in employment decisions and assists employers in evaluating whether such systems may have an adverse or disparate impact on a basis prohibited by Title VII.

This Just In

workers engaging in Section 7 activity in a number of ways—for example, workers know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions; their bargaining power is undermined in the context of lockouts, strikes and other labor disputes; and their social ties and solidarity leading to improvements in working conditions at workplaces are lost as they scatter to the four winds."

She explained, however, that in some cases, non-compete agreements could be lawful if the provisions clearly restrict only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships. "Moreover, there may be circumstances in which a narrowly tailored non-compete agreement's infringement may be justified by special circumstances." An example of this, one assumes, might be a non-compete agreement between an insurance broker and its employees regarding the broker's client list.

"I encourage employers to conduct an ongoing self-analysis to determine whether they are using technology in a way that could result in discrimination," said Burrows. "This technical assistance resource is another step in helping employers and vendors understand how civil rights laws apply to automated systems used in employment."

The EEOC's technical assistance document is part of its Artificial Intelligence and Algorithmic Fairness Initiative, which works to ensure that software—including AI—used in hiring and other employment decisions complies with the federal civil rights laws that the EEOC enforces.

The name of the document is "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964,"

Why You Need Employment Practices Liability Insurance (EPLI)

With increased government regulation related to employment issues, such as those we are reporting about in this issue, it's easy to see why carrying EPLI would be a good idea for most employers.

Whether you're dealing with existing employees or prospective employees during the interview process, every time your business interacts with people it faces the risk of an employment claim.

Some of the typical claims brought against employers allege:

- Discrimination (based on sex, race, age or disability, for example)
- Wrongful termination
- Harassment
- Other employment-related issues, such as failure to promote

Numerous federal laws specify the types of claims that your business may potentially face:

- Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, national origin and sex. It also prohibits sex discrimination based on pregnancy and sexual harassment.
- The Equal Pay Act of 1963, which prohibits employers from paying different wages to men and women who perform essentially the same work under similar working conditions
- The Civil Rights Act of 1966, which prohibits discrimination based on race or ethnic origin
- The Immigration Reform and Control Act of 1986, which prohibits discrimination based on national origin or citizenship of persons who are authorized to work in the United States
- The Americans with Disabilities Act of 1990, which prohibits discrimination against persons with disabilities
- The Bankruptcy Code, which prohibits discrimination against anyone who has declared bankruptcy
- Equal Employment Opportunity Act of 1972, which prohibits discrimination against minorities based on poor credit ratings
- The Age Discrimination in Employment Act, which prohibits discrimination against individuals who are age 40 or older

Unlike large corporations which have high employment practices insurance coverage lim-

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its, large human resource departments and legal staff, small and new businesses are the most vulnerable to employment claims.

In addition to carrying employment practices liability insurance, taking these steps can also reduce your risk:

1. Develop an employee handbook detailing your company's workplace policies and procedures, including attendance, discipline and complaints. The employee handbook should also contain an employment at-will statement and an equal employment opportunity statement.
2. Create a job description for each position that clearly defines expectations of skills and performance.
3. Conduct periodic performance reviews of employees and carefully note the results in the employee's file.
4. Develop a screening and hiring program to weed out unsuitable candidates on paper before calling them to interview in person.
5. Use an employment application that contains an equal employment opportunity statement along with a statement, that if hired, employment will be "at-will." This means their employment can be terminated at any time, for any reason or for no reason at all, with or without notice. Also ensure that your employment application does not contain any age indicators, such as date graduated high school, as this could increase your risk for age discrimination claims.
6. Conduct background checks on all possible candidates.
7. Institute a zero-tolerance policy regarding discrimination, substance abuse and any form of harassment. Make sure you have an "open door" policy in which employees can report infractions without fear of retribution.
8. Create an effective record-keeping system to document employee issues as they arise, and what the company did to resolve those issues.
9. Review potential loss exposures with your insurance agent and purchase adequate employment practices liability insurance.

For more information on EPLI, please contact us.

[Adapted from Nationwide Insurance]

Don't Forget Your Umbrella

If your business is the typical small or mid-sized business, you probably have somewhere between $500,000 and $2 million in liability coverage under your business owner policy (BOP) or commercial general liability policy. How does umbrella coverage work with these policies to provide extra liability protection?

Liability insurance covers you from losses due to claims your company, its employees or products or services caused harm or wrong to a third party. Sometimes, however, your organization can be considered "vicariously liable" when another business, such as a subcontractor, causes harm when doing work on your behalf. In these cases, you would want the contractor or other business' policy to apply rather than yours.

There are two ways to obtain coverage under another entity's policy. In the first, "contractual indemnity," your contract with the other party requires it to "indemnify," or cover you for any liability costs resulting from your joint operations. Alternatively, you can also require the other party to name your firm as an additional insured under its insurance policy.

However, obtaining additional insured status often provides greater protection than contractual indemnity. Some states and courts look unfavorably on contractual indemnity because subcontractors who want business sometimes have little bargaining power. Additional insured coverage, on the other hand, causes no such problems.

For your contractor to provide you with "additional insured" coverage, it must obtain an additional insured endorsement, which modifies its general liability policy. Unlike the policy owner (or "named insured"), the additional insured has no responsibility for keeping any records needed for determining premiums, paying premiums or reporting claims.

When you require additional in-

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sured coverage under another organization's policy, you'll probably ask for a certificate of insurance to provide proof of coverage. Be aware that the certificate provides proof that the coverage existed on the date the certificate was issued. The named insured can cancel coverage without providing notice to you. You can request the insurer to provide you thirty days' notice of cancellation or nonrenewal of the endorsement. However, the certificate is not part of the policy and not binding on the insurer. In the case of large or high-risk projects, you can request that the contractor modify its policy with an endorsement that obliges the insurer to provide this notice.

Considerations for Subcontractors

If the shoe is on the other foot and you are a subcontractor, obtaining additional insured endorsements for contractors and providing the required certificates can be an administrative hassle. To solve this problem, you can buy a blanket additional insured endorsement. This provides additional insured coverage to any party with which you enter a contractual agreement (typically a construction contract or equipment rental contract).

Blanket additional insured endorsements are not as desirable for the additional insured. Blanket endorsements do not name specific additional insureds, so the insurer cannot provide notice of cancellation or nonrenewal. They usually provide narrower coverage as well — for example, many of these endorsements state that coverage ends when operations are completed. This could be construed to eliminate coverage for claims that occur during operations but aren't filed until later.

For more information on covering additional insureds, please contact us.

How Is EPLI Underwritten?

Underwriters use a variety of metrics to determine what to charge for Employment Practices Liability Insurance (EPLI) and the scope of coverage to offer.

- The number of people you employ
- Whether you've had prior suits lodged against your company
- The percentage of employee turnover
- Whether you have established rules and practices in place, such as an employee handbook that clearly addresses sexual harassment.
- Whether you have procedures in place that allow employees to report harassment and other forms of discrimination, and to do so without fear of retaliation.

Depending on the size of your company, EPLI can be offered as an endorsement to a business owner policy (BOP) or a general liability policy. Also, a specific stand-alone policy can be written in conjunction with a BOP.

EPLI coverage is usually written on a claims-made basis. This means the incident resulting in the claim had to occur during the coverage period. Because employment claims often come months or even years after the alleged incident, your company might be vulnerable if your insurance coverage was dropped or if tail coverage (liability insurance that extends beyond the end of the policy period) wasn't purchased.

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