



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Communications and Legislative Affairs
Washington, D.C. 20507

January 15, 2021

The Honorable Michael F. Bennet
United States Senate
Washington, DC 20510

Dear Senator Bennet:

Thank you for your letter dated December 8, 2020, to Chair Janet Dhillon of the Equal Employment Opportunity Commission (EEOC or Commission) concerning new hiring technologies and your concerns about how those technologies may cause or deepen systemic discrimination. Chair Dhillon has shared your letter with me, and I am responding on her behalf. I have also sent an identical version of this correspondence to your colleagues who signed the December 8 letter to the Chair.

I. Legal Background

The laws enforced by the EEOC prohibit less favorable treatment of job applicants and employees on the basis of a protected characteristic (race, color, religion, sex, national origin, disability, genetic information, or over the age of 40 years).¹ Federal Equal Employment Opportunity (EEO) law also prohibits certain neutral employment practices that have a disparate impact on individuals or groups of individuals with a protected characteristic, unless there is a legally sufficient business justification for the practice. Specifically, under Title VII, a hiring procedure or other employment practice may need to be legally justified if it results in a disproportionately large negative effect on individuals with a particular legally protected personal characteristic.² To justify a practice that has a disparate impact under Title VII, the employer must demonstrate that it is job related and consistent with business necessity.³ If the employer shows that the selection procedure is job related and consistent with business necessity, the person challenging the employment practice may demonstrate that there is a less discriminatory alternative available that would not disproportionately exclude the protected group.⁴ Similarly, to justify a practice that has a disparate impact on older workers under the

¹ See Title VII of the Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e *et seq.*; section 501 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), 29 U.S.C. § 791; Titles I and V of the Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. § 12101 *et seq.*; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff *et seq.*; and the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.*

² 42 U.S.C. § 2000e-2(k).

³ 42 U.S.C. § 2000e-2(k)(1)(A).

⁴ 42 U.S.C. § 2000e-2(k)(1)(ii).

ADEA, the employer must demonstrate that the practice was based on a reasonable factor other than age (RFOA).⁵

With reference to protections for the disabled, a neutral hiring practice may also require a legal justification if it excludes or tends to exclude a qualified individual with a disability or a class of such individuals.⁶ To justify application of a standard where doing so would result in a qualified individual with a disability being screened out of an employment opportunity because of a disability, the employer must demonstrate that the practice accurately measures the ability to perform the job's essential functions and that the individual could not satisfy the requirement or perform the job with a reasonable accommodation.⁷

II. Prior Investigation and Enforcement

Your letter asks whether the Commission has ever used its authority to investigate and/or enforce against discrimination related to the use of new hiring technologies. To our knowledge, the Commission has not received a charge of discrimination from a complainant alleging discrimination based on the use of such technologies, and the Commission has not conducted enforcement proceedings alleging such discrimination.

III. Technical Studies

Section 705(g)(5) of Title VII grants the Commission the authority to “make such technical studies as are appropriate to effectuate the purposes and policies of [Title VII] and to make the results of such studies available to the public.”⁸ Your letter asks whether the Commission could use this or any other authority to study hiring technologies absent an individual charge of discrimination, and more specifically whether the Commission could request access to hiring assessment tools, algorithms, and applicant data to conduct tests to determine whether such tools may produce disparate impacts, meaning disproportionately large negative effects on applicants of a particular race, color, religion, national origin, or sex.

⁵ 29 U.S.C. § 623(f). *Smith v. City of Jackson*, 544 U.S. 228 (2005) (the ADEA authorizes recovery by employees in disparate impact cases); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 85 (2008) (holding that an employer defending an ADEA disparate impact claim bears the burden of production and the burden of persuasion on the RFOA defense). A question exists as to whether the ADEA’s prohibition of disparate impact discrimination extends to external applicants for employment. *See, e.g., Kleber v. CareFusion Corp.*, 914 F.3d 480, 485 (7th Cir.) (en banc) (“In the end, the plain language of § 4(a)(2) leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims”), *cert. denied*, 140 S. Ct. 306 (2019). *But see Rabin v. PricewaterhouseCoopers LLP*, 236 F. Supp. 3d 1126 (N.D. Cal. 2017) (holding that the ADEA permits disparate impact claims by job applicants). During the 116th Congress, the Protect Older Job Applicants Act was introduced in the House as H.R. 8381 to prohibit employers from asking the age or date of birth of an individual before the completion and submission of an application for employment by such a person.

⁶ 42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.10, 1630.15(b), (c); 29 C.F.R. pt.1630, app §§ 1630.10, 1630.15(b) and (c). 42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.10, 1630.15(b), (c); 29 C.F.R. pt.1630, app §§ 1630.10, 1630.15(b) and (c).

⁷ 42 U.S.C. § 12112(b)(6); 29 C.F.R. §§ 1630.10, 1630.15(b), (c); 29 C.F.R. pt.1630, app §§ 1630.10, 1630.15(b) and (c).

⁸ 42 U.S.C. § 2000e-4(g)(5).

Significant challenges exist concerning using Section 705(g)(5) to conduct studies on hiring assessment tools, algorithms, and applicant data. As a threshold matter, it is unlikely that employers would voluntarily share their records or data regarding these screening tools with the EEOC due to concerns about potential liability arising from a future Commissioner charge, charge investigation, or even litigation. Indeed, a subpoena issued by the Commission is judicially enforceable only if it is pursuant to an arguable or plausible basis for jurisdiction over a charge of discrimination.⁹ The Commission cannot seek judicial enforcement of a subpoena to compel an employer to produce records or data without such a jurisdictional basis.

This reluctance is likely to be compounded by other concerns that arise from the potentially proprietary nature of the technologies, methods, and information at issue. Any effort by the Commission to obtain, analyze, and release a report about these innovations and related information must take into account the extent to which these products and methods may constitute trade secrets or confidential, proprietary information. Indeed, depending on the information's characteristics, Congress has imposed prohibitions on the disclosure of this type of information to the public.¹⁰

Even if the EEOC could obtain such data with appropriate safeguards to protect trade secrets and other proprietary or confidential commercial information, it is not clear that the results of the analysis would have applicability to employers generally or consistently to those in the same region or industry. Specifically, the gamified assessments, personality assessments, and other data-driven hiring tools referenced in your letter most often operate by comparing applicants to a candidate profile that is based on the employer's current workforce.¹¹ The tool might search for applicants who match a personality profile based on the employer's current high performing employees. The fact that a hiring tool uses different candidate profiles for each employer means that its EEO implications are likely to be different for each employer.

For example, consider the question of whether the use of a hiring tool has a disproportionately large negative effect on individuals of a particular race or sex. Whether it has such an effect will clearly depend on the candidate profile being used, which, in turn, will depend on the particular workforce on which it is based. Thus, even if the study were to show that the use of a hiring tool has had a disproportionately large negative effect on a particular group in the past for the particular circumstances studied, the Commission could not, on that basis, reasonably infer that the "same" tool will have a similar impact when trained to measure applicants against a *different* profile based on a *different* group of employees.

⁹ See, e.g., *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662, 665 (4th Cir. 2016).

¹⁰ See, e.g., 18 U.S.C. § 1905.

¹¹ See, e.g., MIRANDA BOGEN & AARON RIEKE, UPTURN, HELP WANTED: AN EXAMINATION OF HIRING ALGORITHMS, EQUITY, AND BIAS 32-35 (Dec. 2018), <https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20--%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms,%20Equity%20and%20Bias.pdf> (discussing pymetrics, a company that offers gamified assessment). The tool might be trained, for example, to search for applicants who match a personality profile based on the employer's current high performing employees. *Id.*

It may be that there are technical studies that are both feasible and that would “effectuate the purposes and policies of [Title VII]”¹² and other statutes that provide the Commission with similar authority.¹³ Without knowing what those studies would entail, however, the Commission is unable to comment on whether it has the authority or the resources to carry them out.

IV. Guidance and Regulations

Your letter also asks whether the Commission has issued guidance, released publications, or conducted additional research on the use of data and technology in hiring in the wake of its meetings on the implications of data and digital technologies for equal employment opportunity, including its October 13, 2016, meeting about use of “big data.”¹⁴ It also asks whether the Commission plans to conduct any additional follow-up or release additional guidance or publications on the use of data and technology in hiring.

Although the Commission has not issued specific guidance or other publications addressing the type of data and technology in hiring referenced in your December 8th letter to the Chair, the basic requirements of the EEO laws generally apply in the same ways to these practices as they do to more traditional hiring practices. The Commission has published guidance explaining these principles.¹⁵

Although this letter does not constitute an official opinion of the EEOC, we hope this informal discussion of the issues raised in your inquiry is helpful.

¹² 42 U.S.C. § 2000e-4(g)(5).

¹³ See 42 U.S.C. § 12117(a) (incorporating into the ADA the “powers, remedies, and procedures set forth in” various sections of Title VII, including section 705(g)(5), codified at 42 U.S.C. § 2000e-4(g)(5)); see also CENTER FOR DEMOCRACY & TECHNOLOGY, ALGORITHM-DRIVEN HIRING TOOLS: INNOVATIVE RECRUITMENT OR EXPEDITED DISABILITY DISCRIMINATION? 18 (Dec. 2020), <https://cdt.org/wp-content/uploads/2020/12/Full-Text-Algorithm-driven-Hiring-Tools-Innovative-Recruitment-or-Expedited-Disability-Discrimination.pdf> (suggesting that statistical auditing may be insufficient to reveal potential ADA violations and that other kinds of analysis may be required).

¹⁴ Meeting on October 13, 2016, *Big Data in the Workplace: Examining the Implications for Equal Employment Opportunity Law*, <https://www.eeoc.gov/meetings/meeting-october-13-2016-big-data-workplace-examining-implications-equal-employment>.

¹⁵ See, e.g., 29 C.F.R. pt. 1607 (2019) (Uniform Guidelines on Employee Selection Procedures); EEOC, EMPLOYMENT TESTS AND SELECTION PROCEDURES (2007), <https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures>; EEOC, SECTION 15 RACE AND COLOR DISCRIMINATION (2006), <https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination>.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brett Brenner", with a long horizontal flourish extending to the right.

Brett A. Brenner

Associate Director

Office of Communications and Legislative Affairs