OFCCP GUIDANCE EXPANDS FEDERAL SCRUTINY OF ARTIFICIAL INTELLIGENCE USE BY EMPLOYERS

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US Labor, Employment, and Workplace Safety Alert

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> UPDATE: Please note, as a result of President Donald Trump's repeal of former President Joe Biden's Executive Order 14110 and President Trump's issuance of the executive order entitled "Removing Barriers to American Leadership in Artificial Intelligence," as of 23 January 2025, information in the below alert may be out of date or not reflect current federal executive branch policies, and certain links may be inaccessible. Despite these changes, employers must still comply with existing federal and state laws and should stay up to date on developments relating to artificial intelligence (AI) in the workplace. Employers should continue to regularly monitor and audit the AI systems they use for algorithmic bias, maintain a form of human oversight over consequential decisions, and have policies in place for training employees on AI tools. The firm will continue to publish alerts to keep employers informed on this ever-evolving topic.

INTRODUCTION

On 29 April 2024, the US Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) issued nonbinding guidance (Guidance) on how federal contractors and subcontractors (collectively referred to as contractors) should use artificial intelligence (AI) to ensure compliance with existing equal employment opportunity (EEO) obligations under federal law. OFCCP's Guidance is part of the federal government's ongoing effort to address employers' growing use of AI when making employment decisions.[1] Among other things, the Guidance establishes new record keeping requirements, asserts contractor liability for the actions of AI providers and describes the analysis that will be applied for determining whether AI practices have a disparate impact on protected groups.

OFCCP GUIDANCE ORIGINS AND GOALS

OFCCP's Guidance comes on the heels of President Biden's October 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (Executive Order 14110), which addressed coordinating the federal government's response to the development and use of AI throughout the United States. Executive Order 14110 gave the secretary of labor one year to "publish guidance for Federal contractors regarding nondiscrimination in hiring involving AI and other technology-based hiring systems." The overarching

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goal of OFCCP's Guidance mirrors that of Executive Order 14110: promoting the responsible and compliant use of AI while combatting potential AI-related bias or adverse impact in employment-related decisions.

EMPLOYMENT-LAW CONSIDERATIONS FOR FEDERAL CONTRACTOR AND SUBCONTRACTOR AI USE

As a threshold matter, OFCCP's Guidance provides comprehensive definitions for AI, algorithms, and automated systems, some of which are already codified in federal regulations.[2] To the extent that OFCCP's Guidance mirrors DOL's existing definitions of such terms, that similarity may increase the likelihood that such interpretations receive deference from state departments of labor or other federal agencies and thus have a broader impact on employers.

OFCCP's Guidance also states that third-party AI vendors of employment-related software (e.g., resumé scanners) are not liable for complying with OFCCP's nondiscrimination and affirmative-action requirements—only federal contractors and subcontractors are. Thus, according to OFCCP, federal contractors cannot delegate their compliance obligations to third-party AI vendors and cannot shift liability to third-party AI vendors.

This part of OFCCP's Guidance is in possible tension with the US Equal Employment Opportunity Commission's (EEOC) position on third-party AI vendor liability. On 9 April 2024, EEOC argued that a third-party AI vendor may potentially be directly liable under Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA).[3]

EEOC asserted that in certain circumstances a third-party AI vendor could be an employment agency, indirect employer, and employer agent under Title VII, the ADA, and ADEA where the vendor allegedly "exercised sufficient control over [plaintiff] and other applicants' access to employment opportunities to qualify as an indirect employer."[4] EEOC's theory of liability focused on the third-party AI vendor's alleged role as a gatekeeper between job applicants and prospective employers.[5]

Notably, OFCCP's Guidance requires federal contractors to maintain extensive records about their use of AI so OFCCP can effectively execute compliance evaluations and complaint investigations. Indeed, if federal contractors or subcontractors use a third-party AI vendor, they must ensure that vendor contracts allow them to provide OFCCP with all AI-related records and cannot use a third-party vendors' unwillingness or inability to provide such records as a defense.[6]

In addition, OFCCP's Guidance explains that the agency will continue to use the Uniform Guidelines on Employee Selection Procedures (UGESP)[7] when analyzing whether federal contractor AI use may cause adverse impact on a protected group of job applicants or current employees. OFCCP's use of UGESP in assessing AI use has been consistent across administrations and mirrors the EEOC's approach in conducting similar analyses.

OFCCP requires federal contractors and subcontractors to show that their use of AI is valid if it has an adverse impact on a protected group. Validity can be shown with studies of the AI selection procedure (e.g., resumé scanners, search algorithms, etc.) focused on content, criteria, and construction. Such validity studies are meant to show whether AI selection procedures, for example, consist of data that is representative, predictive, or significantly correlated with important aspects of the job-at-issue for which candidates are being assessed.[8]

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Pursuant to the UGESP, OFCCP must also include in scheduling letters to federal contractors a request for information on how they intend to use AI in an employment context. Therefore, federal contractors that are selected by OFCCP for an audit must initially identify any AI used when they make key employment decisions. If, after analyzing key employment decisions, OFCCP finds adverse impact on a job group or title based on a protected group status, then it will give the contractor an opportunity to include statistical controls, such as preferred qualifications in hiring. Should OFCCP's analysis still detect adverse impact, it will ask if tests used related to its finding are validated and, if so, could be consistent with business necessity. If such tests are valid, then OFCCP will not determine that there was disparate impact on a protected group. If the tests are invalid, then a disparate impact may exist.

Of course, federal contractors using AI must also comply with Section 503 of the Rehabilitation Act of 1973. This law bars disability discrimination in federal contracting employment, similar to the ADA. Specifically, OFCCP expects federal contractors to notify job applicants and current employees of AI use in the workplace and permit them to seek disability accommodations linked to AI.

AI BEST PRACTICES FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS

Although the AI landscape is ever evolving and legislation, rules, and guidance on the topic are ever changing, employers can and should take the following steps now to ensure that their use of AI is consistent with the OFCCP's Guidance:

- Provide advance and clear notice to job applicants and employees about how AI is being used in key employment decisions, including hiring, firing, promotion, etc;
- Afford job applicants and employees an opportunity to identify and correct potential misinformation considered by AI that influenced key employment decisions;
- If employees are unionized or have AI working groups, then include representatives or a broader diversity of opinions in internal discussions and decisions about AI use in the workplace;
- Ensure that private and sensitive job applicant and current employee information used by AI is shielded from disclosure to third parties;
- Regularly monitor and audit AI use to identify potential algorithmic bias or adverse impact prior to regulatory, media, or internal scrutiny;
- Periodically train supervisors and employees on AI use and ensure that a properly trained person approves any AI-suggested employment decisions;
- Create a permanent AI governing body to coordinate internal oversight and ethical guidelines; and
- When using third-party AI software, ensure that vendors have considered and taken active steps to combat algorithmic bias and adverse impact, including through criterion validity studies, which can be borrowed under OFCCP's guidance, and ensure that your vendor contracts allow you to access and disclose the vendor's records.

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Finally, the OFCCP did not foreclose the possibility of additional agency guidance on AI use by federal contractors. Therefore, employers should monitor any updates from the agency and adjust their policies, procedures and documents accordingly.

The lawyers of our Labor, Employment, and Workplace Safety practice and our OFCCP and Affirmative Action Compliance area regularly counsel clients on the issues discussed above and are well-positioned to provide guidance and assistance to clients on these significant developments.

FOOTNOTES

[1] OFCCP's Guidance was issued without a notice-and-comment period or feedback from the federal contractor and subcontractor community regarding potential compliance concerns.

[2] 15 U.S.C.A. § 9401 (defining artificial intelligence as "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments"). environments").

[3] *See* Brief for the EEOC as Amicus Curiae, *Mobley v. Workday, Inc.*, 3:23-cv-00770-RFL (N.D. Cal.).

[4] *Id*. at 17; see also *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973) ("While neither hiring nor reinstatement may be relevant outside the context of direct employment, both injunctive and back pay relief (in the sense of monetary damages for lost employment opportunities) may be available, in an appropriate case, against respondents who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and who deny such access by reference to invidious criteria.")

[5] OFCCP's Guidance did not acknowledge the possible tension between OFCCP's and the EEOC's position on this topic. OFCCP has consistently taken the position regarding third-party consultants that a contractor employer could not delegate its compliance obligations to a third-party AI vendor since Executive Order 11246 requires federal contractors themselves to take affirmative steps to ensure that equal opportunity is provided in all aspects of employment.

[6] This obligation is consistent with OFCCP's Internet Applicant Rule, which requires federal contractors and subcontractors to maintain records about hiring through the internet and other technologies (e.g., resumé searches from external websites and internal resumé databases and substantive search criteria, etc.). *See* https://www.dol.gov/agencies/ofccp/faqs/internet-applicants

[7] *See* 41 C.F.R. § 60-3.1 et seq.

[8] OFCCP's Guidance is silent on how to assess AI for algorithmic bias—in contrast to, for example, New York City Local Law 144, which mandates annual bias audits for automated employment decision tools used by employers—so the agency, for now, will only assess AI from a legal compliance perspective if adverse impact occurs.

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