Engage PEO Client Alert

EEOC Addresses Use of AI in Employment Selection Procedures

WHAT'S NEW: On May 18, 2023, the EEOC issued a technical assistance document confirming that Title VII of the Civil Right Act of 1964 applies to an employer's use of automated systems including artificial intelligence (AI). The technical assistance document, "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964" reinforces the importance of the EEOC's existing *Uniform Guidelines on Employee Selection Procedures* and provides some key take aways for employers as they incorporate more advanced tools in the hiring, promotion and termination processes.

WHAT IT MEANS:

The EEOC does not provide thorough guidelines for the use of automated systems in selection procedures, but it does provide insight pertaining to employers' responsibilities.

- According to the EEOC, "automated systems" includes software, algorithms, and artificial intelligence such as resume scanners, employer monitoring software, virtual assistants or chatbots, video interviewing software as well as testing software.
- The EEOC reiterates that it is the employer's responsibility to ensure that the use of these tools does not create a *disparate impact*. In other words, the tool or procedure does not negatively impact the selection rate for a protected class or cause different selection results for one group compared to another.
    - As the EEOC sets forth in its *Uniform Guidelines on Employee Selection Procedures*, if the ratio of the selection rates for two groups is less than 4/5 (or 80%), then the difference between the two groups is "substantial."
    - Notably, in its technical document, the EEOC maintains that the 4/5 rule is only a rule of thumb and that an employer that satisfies the standard is not necessarily insulated from disparate impact claims.
- Employers are responsible for software and programs created by outside vendors. Thus, employers should work with their vendors to ensure that disparate impact has been considered and evaluated.
- Failure to adopt a less discriminatory algorithm that was considered during the development process may give rise to liability.

WHAT EMPLOYERS SHOULD DO: Employers should assess all automated systems currently used for selection procedures and put in place mechanisms for review and monitoring of those systems. Employers should check with vendors of any software programs or systems to ensure that they have been tested and reviewed for potential disparate impact issues. Clients using Engage's online recruitment vendor have access to an AI Job Description Generator.

Please reach out to your Engage Human Resources Consultant if you have any questions concerning this alert or other H.R.-related matters.