

**THE FUTURE OF WORK: PROTECTING
WORKERS' CIVIL RIGHTS IN THE
DIGITAL AGE**

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN
SERVICES

COMMITTEE ON EDUCATION
AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, FEBRUARY 5, 2020

Serial No. 116-50

Printed for the use of the Committee on Education and Labor



Available via the: <https://edlabor.house.gov> or www.govinfo.gov

U.S. GOVERNMENT PUBLISHING OFFICE

39-731 PDF

WASHINGTON : 2021

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THE FUTURE OF WORK: PROTECTING WORKERS' CIVIL RIGHTS IN THE DIGITAL AGE

**Wednesday, February 5, 2020
House of Representatives,
Subcommittee on Civil Rights and Human Services,
Committee on Education and Labor
Washington, DC**

The subcommittee met, pursuant to call, at 2:03 p.m., in Room 2175, Rayburn House Office Building. Hon. Suzanne Bonamici [chairwoman of the subcommittee] presiding.

Present: Representatives Bonamici, Schrier, Lee, Comer, Stefanik, and Johnson.

Also present: Representatives Scott, Foxx, Takano, and Blunt Rochester.

Staff present: Tylease Alli, Chief Clerk; Ilana Brunner, General Counsel; Emma Eatman, Press Assistant; Eunice Ikene, Labor Policy Advisor; Stephanie Lalle, Deputy Communications Director; Andre Lindsay, Staff Assistant; Jaria Martin, Clerk/Special Assistant to the Staff Director; Kevin McDermott, Senior Labor Policy Advisor; Richard Miller, Director of Labor Policy; Max Moore, Staff Assistant; Veronique Pluviose, Staff Director; Carolyn Ronis, Civil Rights Counsel; Banyon Vassar, Deputy Director of Information Technology; Katelyn Walker, Counsel; Rachel West, Senior Economic Policy Advisor; Gabriel Bisson, Minority Staff Assistant; Courtney Butcher, Minority Director of Member Services and Coalitions; Rob Green, Minority Director of Workforce Policy; Jeanne Kuehl, Minority Legislative Assistant; John Martin, Minority Workforce Policy Counsel; Hannah Matesic, Minority Director of Operations; Carlton Norwood, Minority Press Secretary; and Ben Ridder, Minority Professional Staff Member.

Chairwoman BONAMICI. The Committee on Education and Labor will come to order. Welcome, everyone. I note that a quorum is present.

The Committee is meeting today for a legislative hearing to hear testimony on "The Future of Work, Protecting Workers' Civil Rights in the Digital Age."

I note for the Subcommittee that Congressman Mark Takano of California, Congresswoman Pramila Jayapal of Washington, Congresswoman Lori Trahan of Massachusetts, Congresswoman Yvette Clark of New York, and Congresswoman Lisa Blunt Rochester of

Delaware will be permitted to participate in today's hearing with the understanding that their questions will come only after all Members of this Subcommittee and then the Full Committee on both sides of the aisle who are present have had an opportunity to question the witnesses.

I will now move to opening statements. Pursuant to Committee Rule 7(c), opening statements are limited to the Chair and the Ranking Member. This allows us to hear from our witnesses sooner and provides all Members with adequate time to ask questions. I now recognize myself for the purpose of an opening statement.

Technology and automation have become entrenched in nearly every aspect of our society and culture. The intentions behind the use of technology may be noble, but our efforts to both assess and address the effects on our workplace have been inadequate.

In recent years, employers have harnessed new digital tools like recruiting and hiring algorithms, computer analyzed video interviews, and real time tracking of their workers, to cut the cost of hiring and managing workers.

This is our third hearing in our Future of Work series and today we will examine how the technologies that employers use for hiring and management may, intentionally or not, facilitate discrimination and undermine workers' civil rights. We will discuss how Congress, Federal agencies, and the business community can strengthen workplace protections to make sure workers are not left vulnerable to discriminatory practices.

And to prevent discriminatory hiring, firing, and monitoring practices, we will investigate whether new technologies are designed to account for implicit and explicit bias and are used transparently.

Proponents of new technologies assert that digital tools eliminate bias and discrimination by attempting to remove humans from the process. But technology is not developed or used in a vacuum.

A growing body of evidence suggests that, left unchecked, digital tools can absorb and replicate systemic biases that are ingrained in the environment in which they are designed.

For example, hiring algorithms often rely on correlations to make predictions about the capabilities of job candidates. Yet these tools can mistake correlation for causation and subsequently perpetrate harmful disparities.

In 2017, an algorithm built by Amazon to hire engineers was scrapped after it was found to favor men over women by penalizing graduates of women's colleges. Because men hold the majority of engineering positions, the algorithm had presumed that being male was a key characteristic of successful engineers when in reality, being male does not cause one to be a successful engineer.

New technologies that surveil and monitor workers can also exacerbate bias in the workplace. These tools may force workers to share their location, activities, and even private biometric information, sometimes without workers' knowledge or consent.

The technologies also allow employers to access private information that could be used to discriminate against workers. For instance, through certain workplace wellness programs, an employer could learn of a disability, a health condition, or genetic condition that is otherwise protected by antidiscrimination law.

Too often employers and technology vendors are not transparent about the design and use of digital tools, posing challenges for workers seeking redress for workplace discrimination.

Simply put, without transparent and responsible design, digital tools can further perpetuate and even exacerbate long-held biases that have led to workplace disparities, particularly for women of colors—color, individuals, women—individuals with disabilities, women, and older workers. Moreover, digital tools that are opaque in their design and operation cannot be held accountable. As traditional employment relationships shift dramatically in our modern economy, workers’ antidiscrimination protections are also in jeopardy.

As this Committee has established, new technologies have fundamentally restructured the workplace through the rise of gig and platform work.

These platforms have provided workers with new opportunities, but many employers have also used new technologies to deny workers basic protections.

For example, app-based companies frequently misclassify their employees as independent contractors, depriving them of protections and benefits such as minimum wage and overtime pay.

Worker misclassification is not unique to app-based companies. Some app-based companies directly hire their employees, as we learned from a business leader in our first Future of Work hearing.

Workers misclassified as independent contractors are also excluded from the majority of Federal workplace antidiscrimination laws, including protection under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

These gaps leave workers classified as independent contractors, whether misclassified or not, with few options to challenge discrimination.

We have the responsibility on this Committee to work with Federal agencies and the business community to strengthen workplace protections in the face of changing technology. And this should include the right to be free from workplace discrimination and the right to be hired based on qualifications rather than age, identity, or zip code.

We must compel employers and technology vendors to be transparent and accountable for new workplace technologies. We must invest in our key defenses against employment discrimination and empower the Equal Employment Opportunity Commission to address emerging forms of digital discrimination and we must identify and close the gaps in our Nation’s laws that leave workers vulnerable to misclassification, discrimination, and harassment on the job.

I request unanimous consent to enter into the record a letter from The Leadership Conference on Civil and Human Rights and Upturn and a recent report on hiring algorithms, equity, and bias from Upturn into the record.

Without objection, so ordered.

I look forward to our discussion today, and I now yield to the Ranking Member, Mr. Comer, for an opening statement and I do

want to note, I went long so if you want to take a little extra time, feel free.

[The statement of Chairwoman Bonamici follows:]

**Prepared Statement of Hon. Suzanne Bonamici, Chairwoman,
Subcommittee on Civil Rights and Human Services**

Technology and automation have become entrenched in nearly every aspect of our society and culture. The intentions behind the use of technology may be noble, but our efforts to both assess and address the effects on our workforce have been inadequate. In recent years, employers have harnessed new digital tools—like recruiting and hiring algorithms, computer-analyzed video interviews, and real-time tracking of their workers—to cut the cost of hiring and managing workers.

This is our third hearing in our Future of Work series. Today we will examine how the technologies that employers use for hiring and management may, intentionally or not, facilitate discrimination and undermine workers' civil rights. We will discuss how Congress, federal agencies, and the business community can strengthen workplace protections to make sure workers are not left vulnerable to discriminatory practices. And, to prevent discriminatory hiring, firing, and monitoring practices, we will investigate whether new technologies are designed to account for implicit and explicit bias and are used transparently.

Proponents of new technologies assert that digital tools eliminate bias and discrimination by attempting to remove humans from the processes. But technology is not developed or used in a vacuum. A growing body of evidence suggests that, left unchecked, digital tools can absorb and replicate systemic biases that are ingrained in the environment in which they are designed.

For example, hiring algorithms often rely on correlations to make predictions about the capabilities of job candidates. Yet these tools can mistake correlation for causation and subsequently perpetuate harmful disparities. In 2017, an algorithm built by Amazon to hire engineers was scrapped after it was found to favor men over women by penalizing graduates of women's colleges. Because men hold the majority of engineering positions, the algorithm had presumed that being male was a key characteristic of successful engineers. In reality, being male does not cause one to be a successful engineer.

New technologies that surveil and monitor workers can also exacerbate bias in the workplace. These tools may force workers to share their location, activities, and even private biometric information—sometimes without workers' knowledge or consent. The technologies also allow employers to access private information that could be used to discriminate against workers. For instance, through certain workplace wellness programs, an employer could learn of a disability, health condition, or genetic condition that is otherwise protected by anti-discrimination law. Too often employers and technology vendors are not transparent about the design and use of digital tools, posing challenges for workers seeking redress for workplace discrimination.

Simply put, without transparent and responsible design, digital tools can further perpetuate and even exacerbate long-held biases that have led to workplace disparities, particularly for workers of color, women, individuals with disabilities, and older workers. Moreover, digital tools that are opaque in their design and operation cannot be held accountable.

As traditional employment relationships shift dramatically in our modern economy, workers' antidiscrimination protections are also in jeopardy. As this Committee has established, new technologies have fundamentally restructured the workplace through the rise of "gig" and "platform" work. These platforms have provided workers with new opportunities, but many employers have also used new technologies to deny workers basic protections.

For example, app-based companies frequently misclassify their employees as "independent contractors," depriving them of protections and benefits such as minimum wage and overtime pay. Worker misclassification is not unique to app-based companies. Some app-based companies directly hire their employees, as we learned from a business leader in our first Future of Work hearing.

Workers misclassified as independent contractors are also excluded from the majority of federal workplace antidiscrimination laws, including protections under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. These gaps leave workers classified as independent contractors—whether misclassified or not—with few options to challenge workplace discrimination.

We have the responsibility on this Committee to work with federal agencies and the business community to strengthen workplace protections in the face of changing technology. And this should include the right to be free from workplace discrimination and the right to be hired based qualifications rather than age, identity, or zip code.

We must compel employers and technology vendors to be transparent and accountable for new workplace technologies. We must invest in our key defenses against employment discrimination, and empower the Equal Employment Opportunity Commission to address emerging forms of digital discrimination. And we must identify and close the gaps in our nation's laws that leave workers vulnerable to misclassification, discrimination, and harassment on the job.

I request unanimous consent to enter a letter from The Leadership Conference on Civil and Human Rights and Upturn and a recent report on hiring algorithms, equity, and bias from Upturn into the record.

I look forward to our discussion today, and I now yield to the Ranking Member, Mr. Comer, for an opening statement.

Mr. COMER. All right. Well, thank you, Madam Chair, and today we are here to discuss how technological advancements are affecting workers.

New technologies continue to increase efficiency, reduce costs for employers in recruiting and hiring and lead to quicker job placements and enhanced job opportunities.

In a statement to this Committee, the HR Policy Association noted, quote, in a recent survey 71 percent of staffing firms believe artificial intelligence will eliminate human bias from the recruitment process, unquote.

So not only can employers utilize new technologies to eliminate employment bias, but they can also be used to decrease time and the cost of doing business.

Technology has also driven the sharing economy which has created substantial opportunities for workers and job creators who are seeking flexible workforce arrangements so they can better compete in our ever-changing economy.

Workers are seeking out the benefits and flexibility these arrangements provide as they recognize how significantly they can improve their quality of life as well as their family's. This is a growing trend among American workers and job seekers that should be encouraged, not impeded.

Many businesses who also value flexibility and productivity are turning to independent contractors. The use of independent contractors makes sense for job creators looking to obtain high-quality services, for workers who want to offer their skills on their own terms, and for consumers who benefit from a reduction in the cost of goods and services.

Simply put, online platforms and other emerging technologies have given American workers more control, flexibility, and opportunity in the workplace than they have previously had. Regardless of technological advancements, every American should have the opportunity to achieve success in the workplace free from discrimination.

This is why there are important protections built into Federal law to prevent workplace discrimination. These protections are broadly written and continue to apply to new and emerging technologies.

These laws protect individuals from employment, discrimination based on age, color, disability, genetic information, national origin, race, religion, or sex.

Workers in the sharing economy are also protected. For example, the Fair Labor Standards Act has strong remedies in place for employers who incorrectly classify workers and violate minimum wage and overtime requirements.

All workers should be paid in full for their work. That is why Committee Republicans support enforcement of the FLSA. We shouldn't penalize Americans who work for themselves or the companies that do businesses with them.

Instead, we should applaud these Americans for their entrepreneurial spirit. Our Nation's laws were written so that they can be and are applied to employers' use of technologies in ways that protect workers.

Additionally, it should go without saying that the overwhelming majority of businesses follow the law and want to do what is expected of them. Bottom line, workers, job creators, and the U.S. economy are all benefitting from today's technological advancements.

Madam Chair, before we hear from our witnesses, I need to take a moment to point out the hypocrisy of today's hearing. My Democrat colleagues want to talk about protecting workers' rights while they simultaneously push radical legislation that will undermine the rights of workers.

H.R. 2474, the PRO Act, which we expect will be on the House floor for a vote tomorrow, is written to bail out the failing labor union business model that is being widely rejected by American workers.

This radical legislation would penalize entrepreneurship by creating an expansive, one-size-fits-all definition of an employee, which will increase costs for business owners as well as consumers while limiting worker opportunities for individuals who desire flexibility.

Instead, we should champion reforms that expand opportunities for flexibility, innovation, and entrepreneurship to give workers and job seekers opportunities to compete successfully in the modern economy.

I thank the witnesses for being here today and I look forward to their testimony and, Madam Chair, I yield back.

[The statement of Mr. Comer follows:]

**Prepared Statement of Hon. James Comer, Ranking Member,
Subcommittee on Civil Rights and Human Services**

"Today, we are here to discuss how technological advancements are impacting workers.

New technologies continue to increase efficiency, reduce costs for employers in recruiting and hiring, and lead to quicker job placements and enhanced job opportunities. In a statement to this Committee, the HR Policy Association noted: 'In a recent survey, 71 percent of staffing firms believe artificial intelligence will eliminate human bias from the recruitment process.' So, not only can employers utilize new technologies to eliminate employment bias, but they can also be used to decrease the time and cost of doing business.

Technology has also driven the sharing economy, which has created substantial opportunities for workers and job creators who are seeking flexible workforce arrangements so they can better compete in our ever-changing economy. Workers are seeking out the benefits and flexibility these arrangements provide as they recog-

nize how significantly they can improve their quality of life, as well as their families. This is a growing trend among American workers and jobseekers that should be encouraged, not impeded. Many businesses who also value flexibility and productivity are turning to independent contractors. The use of independent contractors makes sense for job creators looking to obtain high-quality services, for workers who want to offer their skills on their own terms, and for consumers who benefit from a reduction in the cost of goods and services.

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Workers in the sharing economy are also protected. For example, the Fair Labor Standards Act (FLSA) has strong remedies in place for employers who incorrectly classify workers and violate minimum wage and overtime requirements. All workers should be paid in full for their work. That is why Committee Republicans support enforcement of the FLSA. We shouldn't penalize Americans who work for themselves or the companies that do business with them. Instead, we should applaud these Americans for their entrepreneurial spirit.

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Instead, we should champion reforms that expand opportunities for flexibility, innovation, and entrepreneurship to give workers and job seekers opportunities to compete successfully in the modern economy.

I thank the witnesses for being here and I look forward to their testimony."

Chairwoman BONAMICI. Thank you, Mr. Comer. I know we will be having the PRO Act debate on the floor as well as in this Committee but now we are going to focus on the topic at hand. Without objection, all other Members who wish to insert written statements into the record may do so by submitting them to the Committee Clerk electronically in Microsoft Word format by 5 p.m. on Tuesday, February 18, 2020.

I will now introduce our distinguished panel of witnesses and I will introduce each witness before we begin questions. First, Ms. Jenny Yang served as the Chair of the U.S. Equal Employment Opportunity Commission from September of 2014 to January of 2017, and as Vice Chair and a Member of the Commission from 2013 to 2018.

Under her leadership, the commission launched the Select Task Force on the Study of Harassment in the Workplace to identify innovative solutions to prevent harassment at work. And she led efforts to strengthen the EEOC's annual data collection to include employer reporting of pay data.

Next, we have Dr. Ifeoma Ajunwa. She is an assistant professor of labor and employment law in the Law, Labor Relations, and History Department of Cornell University's Industrial and Labor Relations School and an associate faculty member at Cornell Law School.

She is also a faculty associate at the Berkman Kline Center at Harvard Law School and an affiliate of The Center for the Study of Inequality at Cornell University. She is a 2019 recipient of the National Science Foundation Career Award and a 2018 recipient of the Derrick A. Bell award from the Association of American Law Schools.

Dr. Ajunwa's research interests are at the intersection of law and technology with a particular focus on the ethical governance of workplace technologies.

And at the discretion of the Chair, I do want to mention that Derrick Bell was my law school dean when I went to law school at the University of Oregon, so it is an honor that you are here with that award, that distinguished award.

Ms. Esther Lander is a partner at Akin Gump Strauss Hauer & Feld LLP, Washington, D.C., where she focuses on complex employment litigation, high-stakes internal and government investigations, and client counseling.

She previously served as the Principal Deputy Chief of the Employment Litigation Section within the Civil Rights Division at the Department of Justice.

Mr. Peter Romer-Friedman is a principal at Gupta Wessler PLLC in Washington, D.C., where he heads the firm's new civil rights and class actions practice.

He maintains a dynamic and innovative civil rights docket with an emphasis on employment discrimination and benefits, fair housing, credit discrimination, and constitutional rights. The civil rights cases often arise at the cutting edge of the law and focus on solving both entrenched and emerging problems with novel approaches.

We appreciate all of the witnesses for being here today and we look forward to your testimony. Let me remind the witnesses that we have read your written statements and they will appear in full in the hearing record.

Pursuant to Committee Rule 7(d) and Committee practice, each of you is asked to limit your oral presentation to a 5 minute summary of your written statement.

Let me remind the witnesses as well that pursuant to Title 18 of U.S. Code Section 1001, it is illegal to knowingly and willfully falsify any statement, representation, writing, document, or material fact presented to Congress or otherwise conceal or cover up a material fact.

Before you begin your testimony, please remember to press the button on your microphone in front of you so it will turn on and the Members can hear you.

As you begin to speak, the light in front of you will turn green. After 4 minutes, the light will turn yellow to signal that you have 1 minute remaining. When the light turns red, your 5 minutes have expired and we ask you to wrap up. We will let the entire panel make their presentations before we move to Member questions. When answering a question, again, please remember to turn

your microphone on, and I first recognize Ms. Yang for your testimony.

TESTIMONY OF JENNY R. YANG, J.D., SENIOR FELLOW, URBAN INSTITUTE

Ms. YANG. Thank you. Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee, thank you for inviting me here today. I am a Fellow at the Urban Institute, but the views expressed are my own and shouldn't be attributed to Urban, its trustees or funders.

I would like to start by sharing a story of Kyle Behm, a bright college engineering student who applied for an hourly job at Kroger. He had held similar positions in the past yet after taking a personality assessment, he was scored red and rejected.

Kyle had earlier been diagnosed with bipolar disorder, so personality questions such as whether he experienced mood changes led many major retailers to reject him.

Sadly, Kyle is no longer with us today, but his father Roland continues to advocate to ensure people with disabilities are not systematically excluded by hiring assessments.

A new generation of AI-driven screens are transforming the lives of America's workers with profound implications for civil rights. To ensure an equitable future, we must ask the question who is at risk of being screened out. Otherwise, workers who fall outside of a set profile could be unemployable for reasons that are—aren't truly job related. Today, I will focus on two areas. First, I will discuss algorithmic hiring and discrimination. Second, I'll address new tech-driven civil rights concerns for workers on the job. Let's take a look at the stages of the hiring process through this hiring funnel. In the sourcing stage, employers recruit applicants. In the screening phase, employers assess applicant's abilities. In the interviewing stage, many employers now use video interviews to evaluate candidates. Finally, employers select candidates and set pay. In each stage, complex algorithms inform decisions.

Today, I will focus on screening algorithms. Because of the dramatic rise in online applicants, employees are using chat bots. Chat bots, resume screens, online assessments and web games to automate decisions.

Some employers are seeking to increase diversity by measuring abilities rather than relying on proxies such as elite university degrees.

Yet many employers simply attempt to automate their past hiring decisions which may reflect bias. Algorithmic systems can then replicate existing inequities on a massive scale. Bias can enter systems in several ways. First, bias may be introduced in the data using—used to train algorithms. Amazon's effort to build a resume screen highlights this challenge.

The computer models trained on resumes submitted over 10 years which were mostly from men. The model then learned to prefer males and penalize women's resumes containing words such as women's chess club or all women's colleges.

Second, bias may arise from the variables considered. Models may learn to utilize proxies for protected characteristics. For example, zip codes can be a proxy for race. The selection of variable can

reflect the blind spots of developers, a particularly acute concern given the lack of diversity in the fields.

Finally, humans may misuse the predictions and place undue weight on them. To ensure safeguards, I share three strategies for consideration.

First, an update to the Uniform Guidelines on Employee Selection Procedures of 1978 would incorporate the latest scientific understanding into unified government principles. Second, a third-party auditing system would promote accountability while having flexibility to evolve with technology and protect intellectual property.

Third, a worker's bill of rights for algorithmic decisions would ensure that individuals understand how decisions are made and have a process to challenge them.

Next, I'd like to turn to new tech-driven civil rights concerns for workers on the job. One significant concern is that increased surveillance and tracking of workers' interactions throughout the day may deter workers from coming together to raise civil rights concerns for fear of retaliation.

Another concern is that a growing reliance on customer ratings by tech platforms and automated performance systems can introduce harmful and unchecked bias.

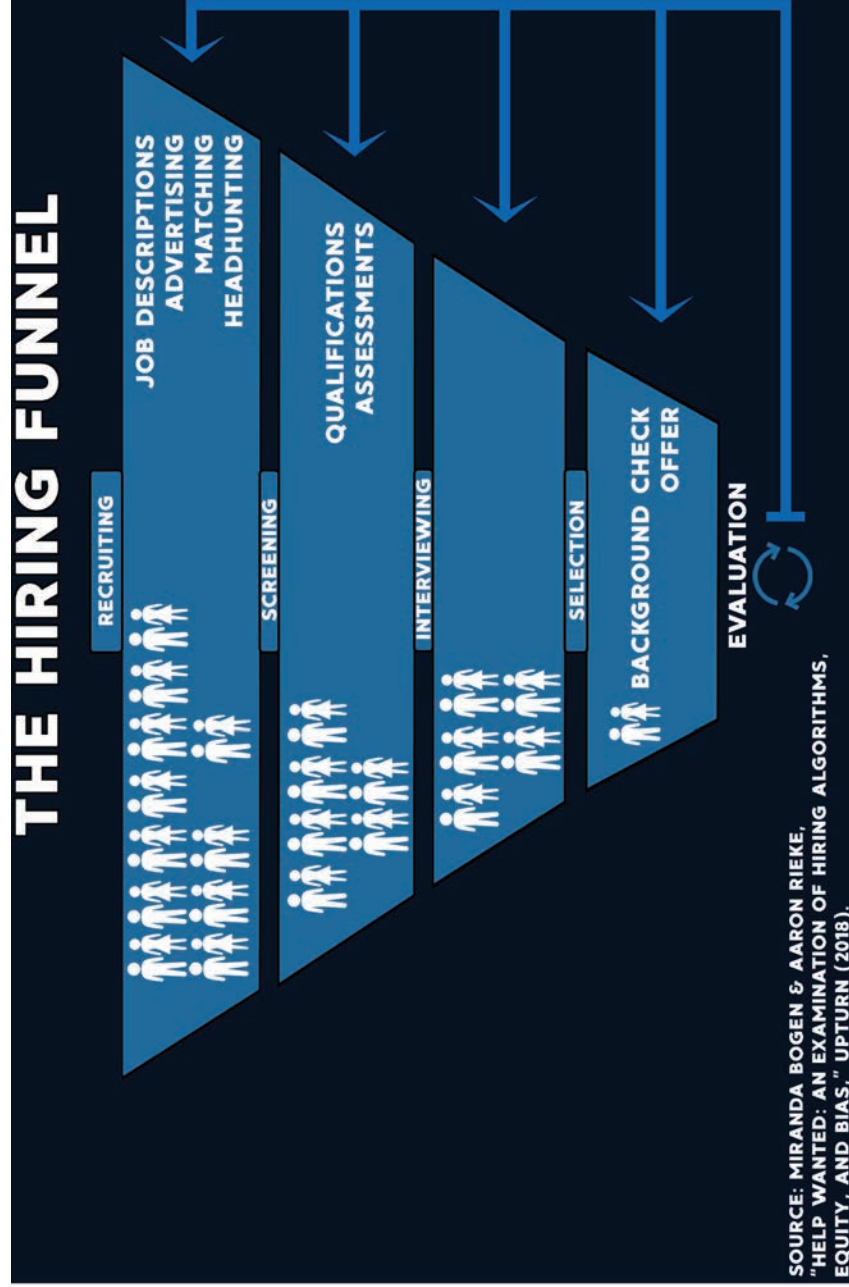
Finally, online platforms have disrupted traditional employment relationships, classifying many workers as independent contractors.

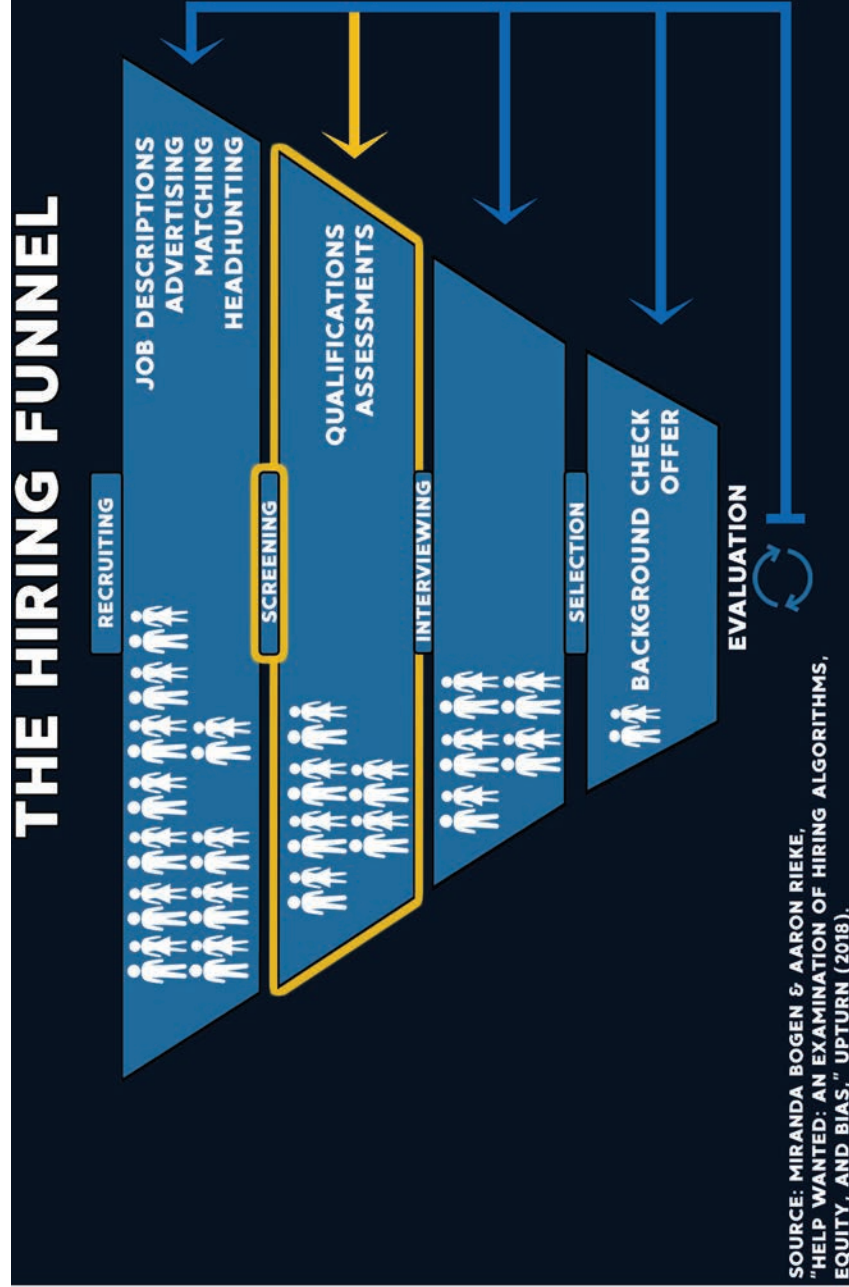
As non-employees, they aren't protected by most Federal anti-discrimination laws. Although Section 1981 prohibits intentional discrimination in contracting based on race and ethnicity, it doesn't prohibit other forms of discrimination such as sexual harassment.

States are filling these gaps by providing protections for independent contractors and making it more difficult to misclassify workers.

To ensure a future that advances equal opportunity, we need safeguards that create meaningful accountability. Focus cannot remain solely on optimizing processes for employers but must also consider the impact on workers' dignity and civil rights. Thank you. I look forward to your questions.

[The statement of Ms. Yang follows:]





Chairwoman BONAMICI. Thank you for your testimony. Dr. Ajunwa.

TESTIMONY OF IFEOMA AJUNWA, J.D., PH.D., ASSISTANT PROFESSOR OF EMPLOYMENT AND LABOR LAW, CORNELL UNIVERSITY

Ms. AJUNWA. Chair Bonamici, Ranking Member Comer, and members of the subcommittee, thank you for the opportunity to testify today.

I am a labor and employment law professor at Cornell University and I have been asked to testify today on two topics.

The first, employment discrimination and privacy concerns arising from automated hiring including automated video interviewing. And the second, privacy and discrimination concerns related to the use of workplace wellness programs and electronic workplace surveillance.

These technological advancements and the potential for employment discrimination beg for updates to labor and employment law.

I identify three major problems with automated hiring. The first, the design features of automated hiring platforms may enable employers to eliminate applicants from protected categories without retaining a record.

Second, intellectual property law which protects automated hiring from scrutiny could allow discriminatory practices to go undetected.

And third, the unrestricted portability of applicant data from automated hiring systems increases the chances of repeated employment discrimination resulting in algorithmic black balling.

Automated video interviews are the newest trend in automated hiring. With this new technology, candidates' responses are captured on video and then evaluated based on word choice, speech patterns, and facial expressions.

When video interviewing systems are trained on White male voices and faces, this disadvantages both racial minorities and White women whose facial expressions and tone of voice might be misinterpreted.

Other issues associated with automated hiring include the unregulated collection of applicants' personal data and the black box nature of how such information is used.

To date, there are no Federal regulations governing the collection, storage, or use of data from automated hiring. To remedy this, I propose three updates to labor and employment law.

First is the addition of a third cause of action, the discrimination per se doctrine, to Title VII. Second, the requirements for audits and certification of automated hiring systems. And third, a mandate for data retention and record keeping design features for automated hiring systems.

In addition to automated hiring, technology has advanced the capability of employers to monitor their workers through digital surveillance and also employee wellness programs. Beginning with punch card systems, advancing to GPS systems, and most recently microchips embedded under the skin, invasive workplace surveillance is now a part of life for most Americans.

For example, workplace wellness programs have evolved to offer health risk assessments and despite protections afforded by anti-discrimination laws, employers have started to offer genetic tests to employees.

With the introduction of genetic testing to workplace wellness programs contradicts both the letter and the spirit of the Genetic Information Nondiscrimination Act and the Americans with Disabilities Act.

To protect the health privacy of workers, my coauthors and I have proposed two new laws. First, the Employee Privacy Protection Act, the EPPA, would ensure that employee monitoring is constrained to the workplace and actual job tasks.

The EPPA would limit surveillance outside the workplace and would prohibit the monitoring of employees when they're off duty.

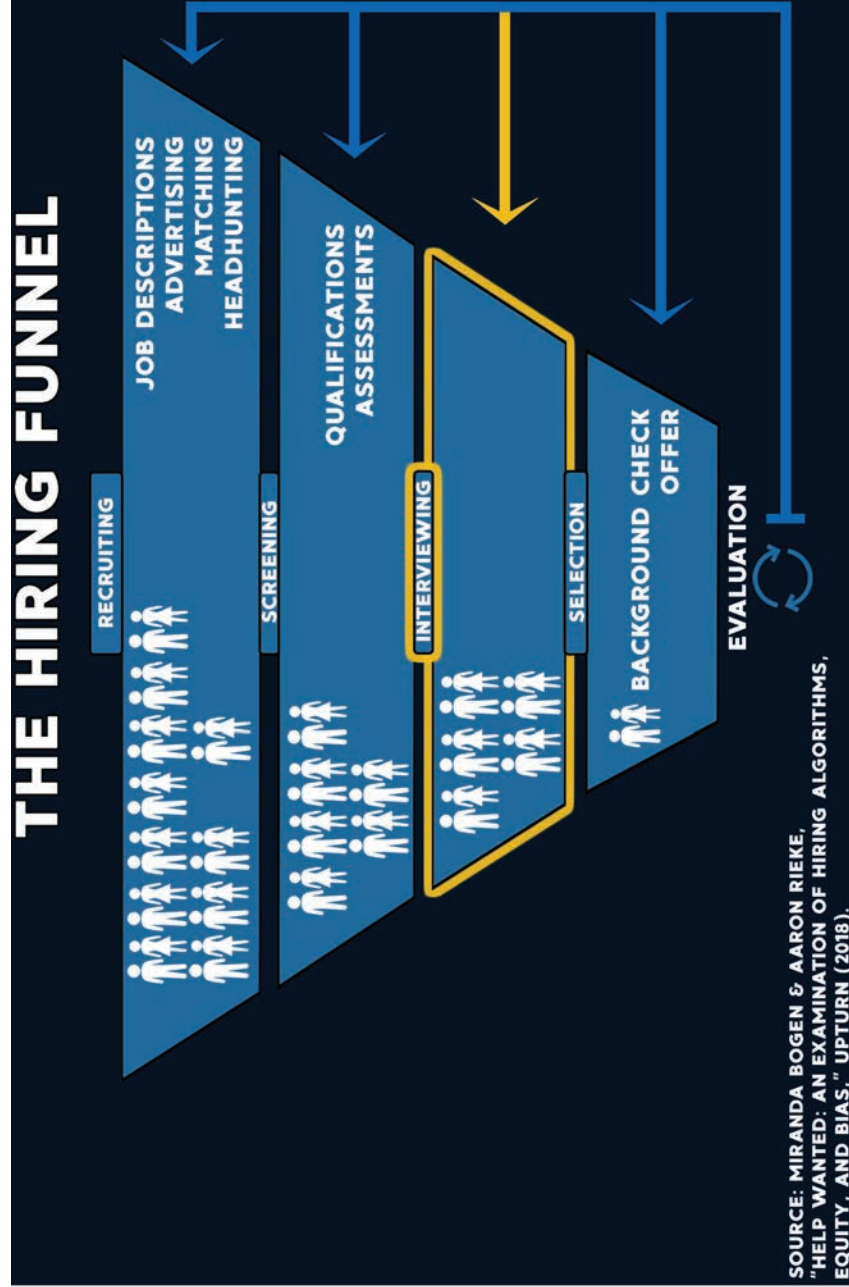
Second, the Employee Health Information Privacy Act, the EHIPA, would clarify that health information generated from workplace wellness programs are—is protected information under existing antidiscrimination and health privacy laws.

The EHIPA would also ensure that data collected from workers could not be sold without the employee's consent.

For the future of work, the primary concern should be whether workers will enjoy equal opportunity for employment and also thrive in workplaces that respect human privacy.

Governmental action is necessary to protect workers from being forced to trade their dignity in the employment bargaining. I thank the Committee for the opportunity to testify today and I look forward to your questions.

[The statement of Ms. Ajunwa follows:]



Chairwoman BONAMICI. Thank you for your testimony. I now recognize Ms. Lander for 5 minutes for your testimony.

**TESTIMONY OF ESTHER G. LANDER, J.D., PARTNER, AKIN
GUMP STRAUSS HAUER & FELD LLP**

Ms. LANDER. Thank you, Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee for allowing me to appear before you today.

I am a partner at the law firm Akin Gump in the firms' labor and employment group here in Washington, D.C. I previously served as the Principal Deputy Chief in the employment litigation section of the Department of Justice Civil Rights Division and I am appearing here today in my personal capacity.

In my written testimony, I describe the many benefits associated with using technology in employee selection procedures.

If used correctly, the business case is clear. Employers are able to harness the power of available data to efficiently make sound selection decisions, reduce manual labor, subject candidates to the same objective screening criteria, and eliminate the potential for implicit bias that exists with subjective decision making.

With so many technology-based tools on the market however, concerns have been raised that AI screening is resulting in unlawful discrimination.

To date there have been few lawsuits challenging AI tools and there are no published studies to show technology-based selections are more likely to result in discrimination than more traditional paper and pencil tests.

With that said, when employers implement technology to make selection decisions, it is important to understand the laws that already exist to protect applicants and candidates from unlawful discrimination.

Specifically, Congress passed the Civil Rights Act of 1991 which amended Title VII to make disparate impact discrimination an unlawful employment practice.

Under the 1991 act, any selection procedure that adversely impacts protected groups must be justified by the employer as job-related and consistent with business necessity.

To make this showing, employers must document a strong connection between the selection procedure and the job in question which typically involves a process called testing validation.

Courts assess the adequacy of an employer's validation efforts under the Uniform Guidelines on Employee Selection Procedures which were adopted by the EEOC and other government agencies to assess the lawfulness of selection procedures under Title VII.

Although the guidelines were established in 1978, which admittedly was a long time ago, they are well equipped to address the concerns expressed by other witnesses today about AI tools resulting in hiring decisions based on non-job-related correlations that screen out protected groups.

First, the guidelines anticipate developments in hiring techniques and tools and make clear that all selection procedures need to be reviewed in light of current understandings which in itself is a basis to reject validation studies premised on non-job-related correlations.

Second, the guidelines direct enforcement agencies to consider whether the selection procedure was carefully developed and is being used in accordance with professional standards. This concept is commonly referred to as competent test design.

So for example if an AI tool has machine learned to disproportionately screen out applicants from a protected group because they do not share the same zip code as successful incumbents, an employer would not be able to show competent test design even if a strong correlation exists between performing successfully on the job and one zip code. Third, the guidelines require that all validation studies include a complete and explicit description of the selection procedure that includes any measures that are being used. This written transparency requirement means that vendors cannot hide behind the so-called black box.

A proper validation study that complies with the guidelines must explain what the selection procedure is measuring and then correlate those measures with successful job performance, reduced turnover, or other important job-related behaviors.

And finally, regardless of how a selection procedure is validated, the guidelines require an investigation into fairness.

This investigation could include taking a deeper look at the selection procedure to see what items were in the case of AI tools, which screening criteria are causing adverse impact and to consider removing those criteria and making other modifications that will result in a fair selection procedure. I'd also like to briefly address the gig economy, an area where advances in technology have created opportunities for works and companies.

Gig workers can take advantage of low costs, flexible hours, and the ability to easily build an independent business. The ease of technology and the volume of workers using it has heightened concerns about worker misclassification.

However, there is a body of law that already exists to address this topic as does a comprehensive remedial scheme for workers who have been misclassified. The remedies for misclassified workers grow even more substantial when recovered on a class-wide basis which have served as a powerful deterrent against worker misclassification.

In closing, technology advances are beneficial to workers, employers, companies, and the economy. As the labor force and businesses adapt to these changes, employment laws are currently in place to ensure that worker rights are protected.

Thank you for the opportunity to speak with you today and share my thoughts on the important topics covered by this hearing. I look forward to answering your questions.

[The statement of Ms. Lander follows:]

TESTIMONY BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES

February 5, 2020

The Future of Work: Protecting Workers' Civil Rights in the Digital Age

Esther G. Lander
Partner, Akin Gump Strauss Hauer & Feld LLP

Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee, thank you for giving me the opportunity to testify on protecting workers' civil rights in the digital age.

I am a partner with the law firm Akin Gump Strauss Hauer & Feld LLP¹ in Washington, DC. My practice focuses on complex and systemic claims of employment discrimination. I previously served as the Principal Deputy Chief in the Employment Litigation Section of Department of Justice's Civil Rights Division ("ELS"), where I spent eight years enforcing Title VII the Civil Rights Act of 1964, *as amended* ("Title VII") against state and local government employers. During my tenure in ELS, I supervised dozens of pattern or practice lawsuits and investigations involving challenges to employment selection procedures under Title VII. Six years ago, I returned to private practice and a substantial part of my docket has been counseling clients regarding various kinds of employment assessments and tools to ensure that their selection procedures do not result in discrimination against any protected groups. I have also spoken and written extensively on employment testing and the legal implications of using technology in selection procedures.

I. Technology, Candidate Screening, and Compliance with Title VII

Employers are always searching for innovative, efficient, and cost-effective ways to source, screen, and identify top talent for all kinds of positions. Artificial Intelligence ("AI") solutions are attractive to employers because they are affordable, fast, and easy to administer. In addition, vendors who sell these products promise employers a competitive edge in the labor market, claiming that their tools can narrow a pool of thousands of candidates within seconds to identify those who are most likely to succeed on the job.

For example, there are recruiting algorithms that scour the internet to find qualified candidates for a particular job and then encourage them to apply. Vendors who sell these search tools, including through online platforms, claim to include variables that can predict who will be a top performer if hired. Some algorithms are "smart" in the sense that they constantly update

¹ With 20 offices, 85 practices and over 900 lawyers and professionals, Akin Gump Strauss Hauer & Feld LLP is among the world's largest law firms. Akin Gump has been repeatedly recognized as having one of the nation's premier labor and employment practices. The firm's labor and employment lawyers represent a wide range of employers on their most complex and challenging labor and employment legal problems, from wage and hour class actions and discrimination cases, to arbitrations involving key talent, to complex labor controversies.

based upon an employer's past hiring decisions to target candidates with similar characteristics to the employer's top performers. One vendor offers a service that scans over 450 million job candidates and identifies which candidates are likely to change jobs based on its collection of publicly-available information about applicants from social media websites.² Other companies create algorithms to narrow the applicant pool. For instance, some companies are marketing algorithms based upon words or phrases from employment applications or resumes of high-performing incumbents. Employers then use the algorithms to narrow applicant pools to those candidates with similar words or phrases on their applications or resumes.

Vendors are also marketing applicant tracking systems that source applicants at the initial stages of employee hiring.³ These systems incorporate AI algorithms by mining the available public data on both passive and active candidates, "looking for statistical correlations that connect seemingly unrelated variables, such as patterns of social media behavior, with workplace performance."⁴

Another example of the technology being used in hiring is a chatbot that communicates with applicants by conducting the initial stages of the hiring process such as sourcing, screening resumes for minimum qualifications, and scheduling interviews.⁵ At least 75 providers are competing to sell these services to recruiters and employers.⁶ Some chatbots incorporate machine learning, which is "the science of getting computers to act without being explicitly programmed."⁷

Employers are also using algorithms to analyze video interviews, where a candidate prerecords videotaped answers to interview questions for an employer to later review at its convenience.⁸ Goldman Sachs, for example, recently shifted all of its first round interviews to a video format.⁹ Once videotaped, employers can subject the recordings to an algorithm that spots tens of thousands of hints about intents, habits, personality, and qualities in candidate responses.¹⁰ The prerecorded video interview provides employers far more information about

² Gaurav Kataria, *Introducing Entelo Insights*, ENTELO BLOG (May 1, 2018), <https://blog.entelo.com/introducing-entelo-insights>.

³ Russ Banham, *2016 Trends in Applicant Tracking Systems*, HRO TODAY (Feb. 2, 2016), <http://www.hrotoday.com/news/talent-acquisition/2016-trends-in-applicant-tracking-systems/>.

⁴ Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 866 (2017).

⁵ See, e.g., Gregory Lewis, *Recruiting Chatbots Won't Take Your Job, But They May Make it Easier*, LINKEDIN TALENT BLOG (Aug. 21, 2017), <https://business.linkedin.com/talent-solutions/blog/future-of-recruiting/2017/how-recruiting-chatbots-work-and-what-recruiters-and-candidates->.

⁶ Jennifer Alsever, *How AI Is Changing Your Job Hunt*, FORTUNE (May 19, 2017), <http://fortune.com/2017/05/19/ai-changing-jobs-hiring-recruiting/>.

⁷ STANFORD UNIV., *Machine Learning*, Coursera, <https://www.coursera.org/learn/machine-learning> (last accessed Mar. 8, 2019).

⁸ Monica Torres, *New app scans your face and tells companies whether you're worth hiring*, THE LADDERS (Aug. 25, 2017), <https://www.theladders.com/career-advice/ai-screen-candidates-hirevue>.

⁹ GOLDMAN SACHS, *Changes in Campus Recruiting* (June 24, 2016), <http://www.goldmansachs.com/careers/blog/posts/changes-to-our-recruiting.html>.

¹⁰ See Torres, *supra* note 26.

candidates than even internet search algorithms. For example, it will check for voice inflections and microexpressions that convey a range of emotion based on psychological research.¹¹

With so many technology-based tools coming to market, government enforcement agencies and civil rights groups have raised concerns about the possibility of unlawful discrimination. To date, however, there has been little litigation any of these technology-based selection tools, nor are there any published studies that show AI tools are more likely to result in discriminatory selections than more traditional employment tests. With that said, when employers implement technology to make selection decisions, it is important to understand how to do so correctly and avoid the risk of unlawful discrimination.

A. Basic Legal Principles of Employee Selection Procedures

One of the benefits of employment tests is that they enable employers to compare candidates using an objective measure that eliminates the potential for bias to influence decision-making. However, the possibility also exists that an employment test that appears fair in form will operate to disproportionately screen out candidates of a certain race, national origin, gender or other legally protected status. To address this conundrum, Congress passed the Civil Rights Act of 1991 (the “1991 Act”), making “disparate impact” discrimination an unlawful employment practice. Under the 1991 Act, an employment selection procedure that adversely impacts members of a protected group must be justified by the employer as job related for the position in question and consistent with business necessity.¹² Thus, the first question when assessing the legality of any employment selection procedure – whether it is a traditional written test or an AI tool – is does the procedure result in a disparate impact on members of a protected group?

A disparate impact occurs when a selection procedure disproportionately screens out candidates in the protected group from advancing to the next stage of the hiring process. Courts find disparate impact when protected group candidates are selected or “pass” the assessment at a “statistically significant” lower rate than majority group applicants. Statistical significance is a conclusion, based on mathematical probability, that the lower pass rate for protected group candidates was the result of the selection procedure, and not simply attributable to chance. In assessing disparate impact, the Supreme Court has required a standard deviation in excess of two or three to be probative of discrimination.¹³ Therefore, before reaching any conclusions about whether algorithms and other technology used to screen candidates violate civil rights laws, one must first assess whether the screening mechanism results in a statistically significant difference in “pass” rates between those in the protected group and those in the majority group.

If a disparate impact is found, the inquiry does not end. As noted above, an employer can successfully defend its use of a selection procedure by demonstrating that the procedure is job related for the position in question and consistent with business necessity. The job relatedness of

¹¹ See Sally Writes, *Three Disruptive Technologies to Hit HR Departments in 2018*, IT BRIEFCASE (Dec. 5, 2017), <http://www.itbriefcase.net/three-disruptive-technologies-to-hit-hr-departments-in-2018>.

¹² 42 U.S.C. 2000e-2 (Supp. V 1993).

¹³ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, n.14 (1977).

selection procedures typically involves a process called validation, which seeks to document a strong connection between the selection procedure at issue and the job or jobs for which it is being used. Courts assess the adequacy of validation efforts under the *Uniform Guidelines on Employee Selection Procedures* (the “*Uniform Guidelines*”).¹⁴

The *Uniform Guidelines* were adopted in 1978 by the EEOC, the Civil Service Commission (succeeded by the Merit System Protection Board and the U.S. Office of Personnel Management), the U.S. Department of Labor, the Department of Justice, and the Office of Revenue Sharing.¹⁵ The stated goal of the *Uniform Guidelines* is to establish a uniform standard governing the proper use of tests and other selection procedures.¹⁶ The *Uniform Guidelines* recognize three forms of validation: content, criterion-related, and construct. Content validity demonstrates that the content of the selection procedure represents the content of the job, such as a pilot simulator for pilots or a typing test for administrative positions. Construct validity demonstrates that the content of the selection procedure measures a construct or underlying human trait (such as conscientiousness or adaptability), and that the trait is important to successful job performance. Construct validity is seldom used because obtaining empirical support requires a series of arduous and expensive research studies. Criterion-related validity asks an empirical question: Is performance on the selection procedure predictive, or significantly correlated with subsequent performance on the job? When validating a selection procedure using criterion-related validity, there must be a demonstrated statistical relationship between scores on the selection procedure and job performance or other important job behaviors. Criterion-related validity is considered the most suitable validation strategy for the typical AI tool, which purports to measure certain competencies or personality traits that predict who will be more successful on the job.

Finally, assuming an employer can meet its burden of proving job relatedness, Title VII obligates the employers to explore equally valid alternatives that either reduce or eliminate the adverse effect. Often this can be done by considering an alternative method of use, such as a different means of scoring the assessment, or combining or weighting the components of a selection process to see whether the statistical correlations with job performance hold while adverse impact is reduced.

B. Analyzing AI Selection Procedures under Title VII’s Framework

If an employer chooses to implement artificial intelligence in the selection process – as so many companies have already begun to do – there are several factors that should be considered before reaching any conclusions about discrimination.

First, one must consider the difference between AI that identifies passive candidates, *i.e.*, individuals who have not expressed any interest in a position, from those tools that screen candidates who have already applied. Sourcing and recruiting algorithms are typically used to enhance an applicant pool. They quickly identify potential candidates with preferred

¹⁴ 29 C.F.R. Part 1607 (1978).

¹⁵ *Id.*

¹⁶ *Id.*

qualifications through a search of publicly posted resumes or other social media information, and they can do so far more cheaply than a recruiting firm. As a general matter, courts and enforcement agencies have considered affirmative recruiting efforts to be lawful under Title VII, even when targeted to a protected group to expand diversity. Thus, where affirmative outreach to passive candidates is undertaken to enhance traditional recruiting methods (such as job postings), civil rights laws are unlikely to be violated.¹⁷ It is worth noting, however, that AI recruiting tools may “learn” to exclude from those recruited individuals of a certain race, gender, age, religion or other protected characteristics, which could expose an employer to claims of intentional discrimination. Thus, it is important for employers to know and understand the inputs for any algorithm before using it, including when updates occur as a consequence of machine learning.

Second, as previously noted, Title VII is not implicated unless there is a finding of adverse impact. Many of the AI and technology-based screening procedures on the market, which purport to measure personality traits, are far less likely to result in adverse impact on protected groups than traditional paper-pencil tests that measure cognitive abilities.

Third, the impact of sample size should be considered. AI tools have the ability to screen thousands of applicants within seconds. Once an employer uses an algorithm to screen all of its resumes or applications, the applicant pool for purposes of assessing adverse impact arguably will include everyone subject to the algorithm. It is commonly understood among labor economists and statisticians that, as a function of sample size, a very large applicant pool will result in a finding of statistical significance even though the magnitude of the difference may be quite small. The *Uniform Guidelines* account for this phenomenon by instructing employers to consider not only whether differences in selection rates are statistically significant, but also whether they are practically significant. Where the magnitude of the difference between the selection rates of majority and protected group members is small, courts have found no adverse impact even with a showing of statistical significance.

Fourth, when evidence of adverse impact exists, validation evidence must be considered before reaching any conclusions about whether a particular screening device is discriminatory. For example, an algorithm that disproportionately excludes women may be lawful nonetheless if it is supported by a professionally sound criterion-related validity study that documents a statistical correlation between the selection procedure (such as the data inputs for the screening algorithm) and successful job performance or other important aspects of the job (such as reduced turnover, for example). An employer can also “transport” validity from a vendor’s prior successful validation efforts, as long as the employer uses the selection procedure in the same way, and there is sufficient overlap between the employer’s jobs and work setting and the jobs and work setting where the original validation study took place.

¹⁷ Courts have permitted adverse impact challenges to word of mouth recruiting when used as an exclusive means of filling open positions, and upon finding gross statistical disparities between the racial or gender composition of the “otherwise qualified” labor market pool and the employer’s applicant pool. See, e.g., *United States v. Brennan*, 650 F.3d 65 (2d Cir. 2011); *United States v. City of Warren*, 138 F.3d 1083 (6th Cir. 1998); *Thomas v. Wash. Cnty. Sch. Bd.*, 915 F.2d 922, 924-26 (4th Cir. 1990); *United States v. Ga. Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973). By analogy, recruiting algorithms that serve as an employer’s primary recruiting tool may result in an adverse impact challenge if the algorithm is identifying substantially less diverse candidates than qualified applicants in the available labor market.

Finally, there is a difference between algorithms that are programed to find any correlation versus those that are designed to identify job related correlations. The *Uniform Guidelines* contemplate that any validation study begin with the undertaking of a job analysis and “competent” test design so that the selection device itself is linked in some fashion to the knowledge, skills, abilities or personal characteristics that are important for the job. Thus, if an algorithm is programed simply to find correlations, without regard to whether they bear any relationship to the job, between a candidate’s resume, word choices, or facial expressions and the resumes, word choices, or facial expressions of top performers, it is unlikely that competent design would be found. On the other hand, criterion-related validity would exist where screening criteria are connected to the competencies identified by the job analysis and are also highly correlated with successful job performance.

In conclusion, employers who proceed with AI solutions in the employment context would benefit from taking steps to ensure compliance with Title VII by reviewing and considering adverse impact studies and validation work before reaching any determination about potential discrimination. If implemented correctly, the business case for AI is clear: it allows employers to harness the power of all available data to more efficiently make hiring and promotion decisions. With the ability to analyze hundreds of thousands of applicants, these products can eliminate significant manual labor, and offer an advantage over competitors in identifying and hiring the best employees.

II. Technology, Wellness Programs, and Compliance with the Civil Rights Laws

Wellness programs at work have become commonplace and now exist at most fortune 500 companies. While these programs take many forms, their common goal is to positively influence employee behavioral and lifestyle choices and to support their emotional and physical well-being. One such wellness initiative allows employees to voluntarily sign up for digital health monitoring in exchange for cash, reduced health insurance premiums, or reimbursements for co-payments and deductibles.¹⁸ This trend is increasing and it is projected that annual sales of wearable devices for use in company wellness programs will grow to 18 million in 2023 across the United States.¹⁹

Although there are obvious gains associated with promoting a healthier workforce, critics are concerned that technology-driven wellness programs, such as tracking devices that allow employers to monitor an employee’s every movement, may result in discrimination against persons with disabilities or pregnant women. For example, if employers use personal health data from fit bits, such as heart rate or VO2 max (maximal oxygen consumption) to make or influence employment decisions, those with medical conditions could be adversely affected. Alternatively, where employers use these devices to reward employees for meeting health-related goals, those

¹⁸ Christopher Rowland, *With Fitness Trackers in the Workplace Bosses Can Monitor Your Every Step and Possibly More*, THE WASHINGTON POST, (Feb. 16, 2019, 7:13PM), https://www.washingtonpost.com/business/economy/with-fitness-trackers-in-the-workplace-bosses-can-monitor-your-every-step--and-possibly-more/2019/02/15/75ee0848-2a45-11e9-b011-d8500644dc98_story.html.

¹⁹ *Id.*

with medical conditions could be unable to participate and reap the benefits that others without medical conditions have the opportunity to receive.

There are several existing laws that provide protections for employees whose employers use wellness programs. Under the Affordable Care Act, wellness programs are subject to a number of legal restrictions designed to ensure group health plans do not limit benefits based on health factors.²⁰ The Americans with Disabilities Act (“ADA”) prohibits employers from conducting medical inquiries into an employee’s medical conditions absent objective facts that suggest the employee’s job performance is being negatively affected by a condition. Genetic Information Nondisclosure Act (“GINA”) also prohibits employers from inquiring about employee genetic information. Both the ADA and GINA also contain exceptions, however, for an employee’s voluntary disclosure of medical information. Accordingly, the questions implicated by wellness programs that involve tracking devices are (i) are these programs truly voluntary; and (ii) is the data that employers are collecting a medical inquiry? The EEOC attempted to answer these questions in regulations that took effect in 2017. However, AARP successfully challenged the regulations and they were vacated by the court in 2019. The EEOC plans to publish a new wellness rule this year for notice and comment, which will provide an opportunity for employers, employees, and civil rights advocates to weigh in with their respective views on fitness trackers.

III. Independent Contractors and the Gig Economy.

The “gig economy” has created substantial opportunities for individuals to work as independent contractors because of low start-up costs, flexible hours, and the ability to work independently and build a business. Gig companies also offer workers an avenue to supplement their income and work on their own terms. In fact, gig arrangements have become so popular that in 2018 it was estimated that 36% of U.S. workers “have a gig work arrangement in some capacity.”²¹

Contractual “gig” arrangements can be beneficial to workers who need to earn extra income on a seasonal or as-needed basis, when their time permits, without taking on the commitment that is required to gain regular employment. Gig workers also are given a platform by these companies to run their own small business, and some entrepreneurial gig workers become independent contractors for multiple gig companies to maximize their opportunity for earnings. Gig arrangements are also beneficial to companies and the economy because they allow companies to expand their scope on a multi-state or national scale without having to expend substantial overhead that would otherwise prevent them from doing so.

True independent contractors do not qualify for protections under the Fair Labor Standards Act (“FLSA”) and other civil rights and worker protection laws. As such, many believe that employers are incentivized to misclassify their workers as contractors to save money

²⁰ Pub. L. No. 111-148, 124 Stat. 119.

²¹ Keith Cunningham-Parmeter, *Gig-Dependence: Finding the Real Independent Contractor of Platform Work*, 39 N. ILL. U. L. REV. 379, 389 (2019) (citing Shane McFeely & Ryan Pendell, *What Workplace Leaders Can Learn from the Real Gig Economy*, Gallup (Aug. 16, 2018), <https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx> [<https://perma.cc/9AGN-Q5DF>]).

and avoid being held accountable for compliance with employment laws. While worker misclassification is not a new phenomenon, the ease of technology and the volume of workers using it has heightened these concerns.

Independent contractors are distinguishable from employees in several ways. Although there are various legal tests that courts and government agencies apply, the amount of control exerted by the employer is typically the key factor. Existing federal employment laws, such as the FLSA, provide a robust and comprehensive remedial scheme for workers who have been misclassified. For instance, misclassified workers under the FLSA may obtain unpaid overtime premiums, liquidated damages, and a lengthy limitations period applies. These remedies become even more substantial when recovered on a class-wide basis, which has resulted in a spike of misclassification class action lawsuits, serving as a strong deterrent to employers engaging in misclassification.

IV. Conclusion

In closing, technological advances are benefiting workers, employers, and the economy. As the labor force and businesses adapt to these changes, employment laws currently in place are adequate to ensure that workers rights are protected. Thank you for the opportunity to speak with you today and share my thoughts on the important topics covered by this hearing. I look forward to answering your questions.

Chairwoman BONAMICI. Thank you for your testimony. I now recognize Mr. Romer-Freidman for 5 minutes for your testimony.

**TESTIMONY OF PETER ROMER-FRIEDMAN, J.D., PRINCIPAL
AND HEAD OF THE CIVIL RIGHTS AND CLASS ACTIONS
PRACTICE, GUPTA WESSLER PLLC**

Mr. ROMER-FRIEDMAN. Thank you. Good afternoon and thank you for the opportunity to testify today. My name is Peter Romer-Friedman, I'm a principal at Gupta Wessler PLLC and the head of the firm's civil rights and class actions practice.

As a civil rights lawyer, I've represented victims of discrimination in jobs, housing, credit, and public accommodations. They've included workers in many industries, service members, and veterans, victims of Hurricane Katrina and the foreclosure crisis, as well as farmers and ranchers. Lately I have focused on combatting digital bias.

Sixty years ago, there were no desktop computers or websites, but we did have entrenched discrimination in the workplace, housing, in public spaces.

If you picked up a newspaper in 1960, you'd see classified ads with segregated columns for male and female jobs. Job ads that stated explicit preferences based on race, gender, and age.

Congress tried to put an end to this biased advertising and recruiting when it enacted Title XII of the Civil Rights Act and the Age Discrimination in Employment Act.

Congress knew this discrimination has huge negative consequences. If you announce a job is for men, women are less likely to apply. If you primarily recruit men, mostly men will be hired.

For decades it appeared that these laws were working. Overt discrimination and statements in newspapers disappeared. Most employers stopped openly recruiting based on biased preferences. This all changed however, when employers decided to harness the power of the internet and social media to recruit workers. Advertising platforms like Facebook enabled employers to discriminate in their job advertising so that they could target job ads only to people of certain races, genders, ages, zip codes, and even political interests.

An untold number of employers deployed these very tools to expressly exclude workers from receiving their job ads based on many protected traits.

And until recently when Facebook made changes due to a settlement with my clients, it was possible for employers to exclude people from getting job ads based on thousands of categories unrelated to jobs.

For example, an employer could decide not to send their job ads on Facebook to people interested in Christianity, the Republican National Committee, the ACLU, or the AFL-CIO.

And just a few years ago, employers could target job ads on Facebook to people interested in heinous things like Hitler, White pride, fascism, rape, and ISIS.

There has never been a full public accounting of all the biased ads published on Facebook but here is what we know from investigative journalism and the investigation of my client, the Communications Workers of America.

Hundreds if not thousands of employers routinely excluded women and older workers from getting job ads on Facebook. The same bias was common in ads for housing, credit, and other financial services.

There have likely been hundreds of millions of incidents of digital bias. Here are a few real-life examples. T-Mobile sent job ads on Facebook targeting people who were only 18 to 38 years old. Amazon sent job ads on Facebook that targeted only people 18 to 50. A leading security installation company called Defenders sent job ads targeting only men 20 to 40.

Thankfully, many terrific advocates stepped up to challenge this harmful discrimination. Organizations like the CWA, the ACLU, National Fair Housing Alliance and my prior law firm, Outten & Golden.

We took Facebook to court and filed EEOC charges against dozens of employers that denied job ads to women or older workers.

After years of litigation, Facebook in March of 2019, agreed to make sweeping changes to its platform to prevent advertisers from denying job, housing, and credit ads based on protected statuses and Facebook recently implemented those changes. Still, we are very concerned that Facebook's own algorithm may be discriminating based on age and gender when Facebook itself decides which users will receive job ads within an audience the advertiser selected.

We are also troubled that dozens of major employers including Amazon, T-Mobile, and Capital One are claiming that Federal law does not bar them from denying job ads to workers based on a protected status like age.

We believe our Federal civil rights laws already outlaw this crude digital bias and recently we have seen the DOJ, EEOC, and HUD agree that it's illegal to deny job or housing ads based on a person's race, gender, or age.

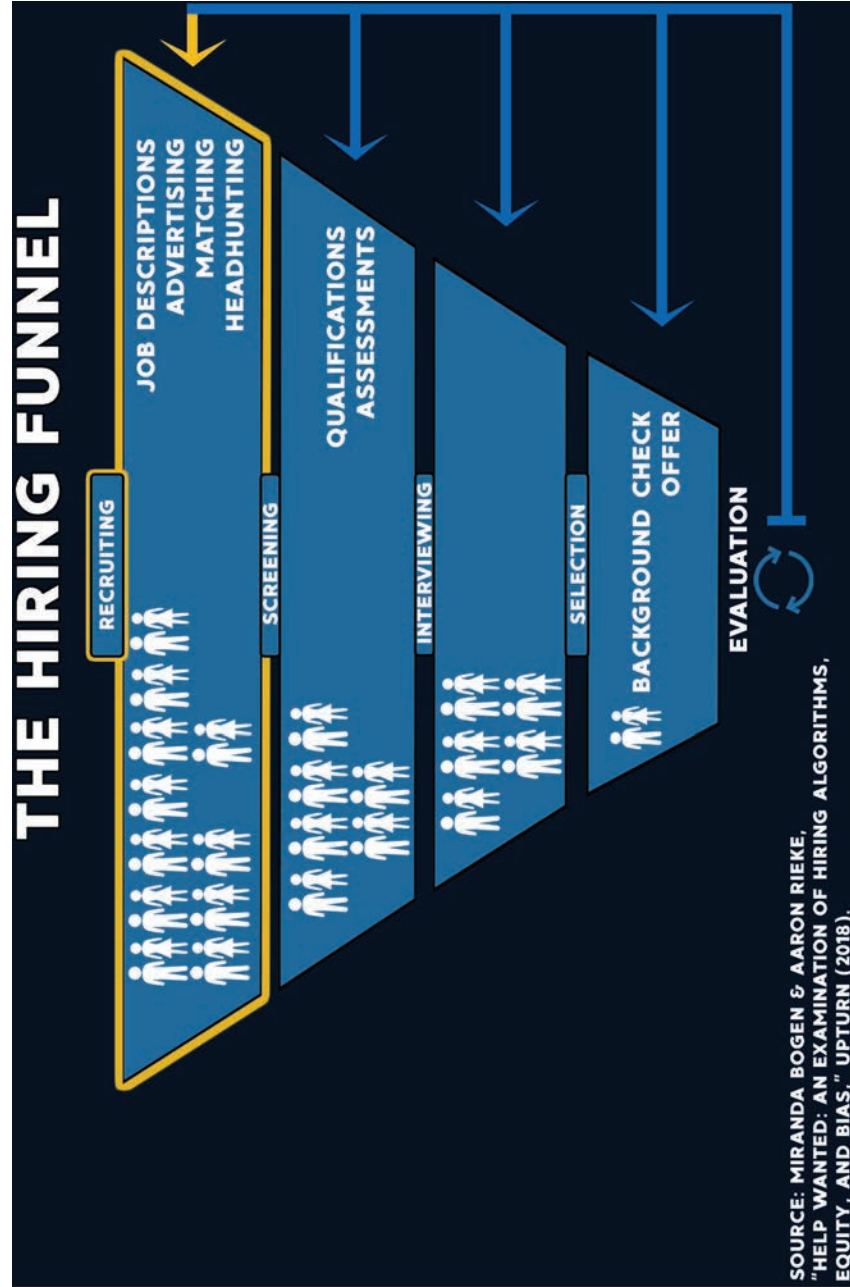
But Congress can and should take critical steps to clarify and strengthen Federal law to stop digital bias. I have recommended a range of critical steps that Congress can take including ensuring that tech platforms like Facebook are covered by civil rights laws, clarifying that certain types of digital bias are unlawful, requiring greater disclosure of digital practices and bias, and making sure that the Federal public accommodations law applies to online spaces, and ending section 230(c) immunity for commercial or paid advertising.

In too many areas of our society, the move fast and break things credo of powerful technology leaders like Mark Zuckerberg has turned back the clock by more than half a century. It has upended our civil rights, our civil discourse, and even the most basic facts that our society can agree upon.

Technology should not disrupt our civil rights. It shouldn't break equal opportunity. Technology should be a mechanism for making the promise of equal opportunity and integration a reality, especially in the workplace.

Thank you very much, appreciate the opportunity to answer any questions.

[The statement of Mr. Romer-Friedman follows:]




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Chairwoman BONAMICI. Thank you so much to each of our witnesses today. Under the Committee Rule 8(a), we will now question witnesses under the 5 minute rule.

And I want to say in light of all the testimony we heard today, I'm sure everyone wishes for more than 5 minutes because we have so many questions but I will now yield myself 5 minutes.

Professor Ajunwa, in your written testimony, you discuss how companies use automated video interviewing that permits the employer to evaluate factors that are not job related in the interviewing process.

Last year, in the Science, Space and Technology Committee, Joy Buolamwini is the founder of the Algorithmic Justice League testified on some of these issues and they discussed their experience with facial analysis software failing to detect their dark skin until they put on a white mask which uncovered both skin type and gender bias in the AI services from companies like Microsoft, IBM, Amazon.

So, Professor, what characteristic can employers evaluate when using automated video interviewing and do individuals typically know these factors being evaluated as they interview?

Ms. AJUNWA. Thank you for your question, Chair Bonamici. So, the—one of bigger problems that automated video interviewing is that oftentimes the job applicants don't actually know that they will be evaluated based on their video.

They just think that they're sending in a video that will then be viewed by humans but actually that video is actually being put through algorithms that are evaluating both the facial expressions, tone of voice, even word choice.

And the problem with that of course is that if you look at how the training of the algorithm is done, oftentimes the training is using a very limited pool of applicants so it could be all White male applicants and in which case, women who have different tones of voices or even people who are from other cultures and therefore have different facial expressions can actually be disadvantaged because then their responses can be misinterpreted by the algorithm.

Chairwoman BONAMICI. Thank you. Both on this Committee and on the Science Committee, we have a lot of conversations about the importance of diversifying the STEM, STEAM workforce and I think that is one step in solving this problem because obviously, it is designing the algorithm it makes a difference.

Mr. Romer-Friedman, in your testimony you said that job advertisements are often targeted based on categories that are not job related, or proxies, and you described how individuals may be excluded from seeing job ads. Thank you for the actual visual representation.

Do you consider excluding an individual from seeing a job ad because their experience exceeds a maximum number of years or because they attended a women's college for example, would those be examples of targeting based on proxies?

Mr. ROMER-FRIEDMAN. Absolutely, Chair Bonamici. These are the kinds of things that without the digital procedures and processes could be illegal. We see this a lot in the economy for older workers. They're excluded simply because they have too many

years of experience or they graduated from college a number of years ago.

But we are seeing the something accelerated and exacerbated in the digital space and that's a problem. We think that it clearly violates the law. It not only has a disparate impact; we think you can infer intentional discrimination from these kinds of clear proxies.

Chairwoman BONAMICI. And how could Congress best make sure that the employers are not using proxies to discriminate based on sex, age, religion, other categories, protected categories?

Mr. ROMER-FRIEDMAN. As I have recommended in my testimony, Congress could explicitly say that if a job category or if a category for targeting someone or evaluating someone is not directly related to the job or the opportunity, it simply is banned, it would be an unlawful practice.

In the same way that it's just strictly unlawful regardless of the intent to advertise a job that states a preference based on age or race or gender.

Chairwoman BONAMICI. Thank you. Ms. Yang, you're a former Chair of the Equal Employment Opportunity Commission. What additional resources could Congress provide to the EEOC, the Commission on Civil Rights, and the Office of Federal Contract Compliance Programs to adequately address the problems that were described today with algorithmic bias and digital discrimination in hiring?

Ms. YANG. Thank you, Chair Bonamici, for that question. The government plays a particularly important role in rooting out hiring discrimination because individuals typically don't know why they weren't hired.

So the EEOC made it a priority to look at recruiting and hiring discrimination and the agency has authority to open charges on their own investigation, even where an individual may not have enough information.

So right now under our current law, the Federal Government plays an incredibly important role in investigating concerns about hiring screens and the agencies need more resources. They need to be able to hire computer scientists and data scientists who understand how these systems work.

We had initially started a task force over 4 years ago back when I was at the EEOC. We had Professor Ajunwa testify and help us learn about these issues but we didn't have the capacity on staff to really, fully understand how to evaluate these systems, to understand how the Uniform Guidelines really need to be updated and having that technical know-how within the agency would be incredibly valuable.

Chairwoman BONAMICI. Thank you so much. I yield back and recognize the Ranking Member of the Full Committee, Ms. Foxx, from North Carolina for your questions.

Ms. FOXX. Thank you, Madam Chairwoman, and I want to thank our witnesses for being here today. Ms. Lander, the Federal laws prohibiting employment discrimination do not explicitly address the technologies we are discussing today. In your opinion though, are these statutes readily applied in the modern workplace and to employers' use of search engines, algorithms, and AI in the recruitment and screening process? Do you see gaps in these laws

or do you believe these laws are more than broad enough to cover new technologies?

Ms. LANDER. Thank you for that question. As a practitioner in this area who actually has counseled clients and reviewed some of the tools that we're talking about today, I have not had any difficulty applying the Uniform Guidelines as written to assess these tools and to provide feedback to both my clients and the vendors who are selling them regarding ways in which they should be modified or enhanced to ensure nondiscriminatory selections.

So to answer your question, yes, I do believe that it is not difficult to apply the Uniform Guidelines as they're currently written to address the concerns that are being raised by the panel today with regard to the technology tools that are on the market.

Ms. FOXX. Thank you, Ms. Lander. Ms. Lander, what are the upsides for business owners of using new technologies in recruiting and screening job candidates from the perspective of complying with non-discrimination laws?

In what ways are these technologies superior to other forms of job recruitment and screening when it comes to complying with the Federal laws prohibiting discrimination?

Ms. LANDER. Well, in this current climate that we are in, the volume of resumes and applications that are submitted, it's quite different than the day and age where somebody had to walk in a fill out a paper application.

Employers are being bombarded with, you know, thousands of applications sometimes when they have an opening and in its simplest form, AI tools are capable of simply scanning those applications or resumes simply to screen out those who don't even have the minimum qualifications for the job which saves a substantial amount of man power and time in trying to do that with a person.

To answer your question though about how these tools can help reduce discrimination, when done correctly, these tools eliminate the risk of implicit bias in decision making because when the criteria that they're screening for are job related, the entire screen is objective and is not susceptible to what somebody might believe when they see a particular name or they look at somebody and see a particular race or gender.

Ms. FOXX. Thank you. Ms. Lander, you discussed in your written testimony, the Uniform Guidelines on Employee Selection Procedures jointly written by the EEOC, the Civil Service Commission, Department of Labor, and Department of Justice and provide guidance for the employers and obviously you have mentioned those in your comments now.

Based on your experience, do the guidelines apply to the algorithms in AI that many employers are using that is somewhat repetitious to my first question, and do the guidelines provide useful information and best practices for employers?

Ms. LANDER. They do. Some of the tools that we're discussing are recruiting tools and some are hiring or selection tools.

So the guidelines are aimed at any sort of hiring test or selection device that makes decisions that allows people to proceed in the hiring process.

So when it comes to recruiting, there is a difference between sourcing, which is efforts to expand your pool of eligible candidates

or applicants that meet your qualification, the qualifications for the job.

And so some of these tools are being used to simply to expand and enhance traditional forms of recruiting. And if people aren't being excluded, if it's not an exclusive method of recruiting or the sole method of recruiting, then arguably adverse impact is not going to be an issue and so in that case, if there is no adverse impact, the guidelines don't come into play.

Ms. FOXX. Quick, quick question. If an employer wrongly classifies an employee as an independent contractor, isn't there significant potential liability for the employer including back pay and liquidated damages under the Fair Labor Standards Act which provides substantial incentives not to classify workers incorrectly?

Ms. LANDER. Yes. That's correct. Not only is back pay and liquidated damages available, for willful violations, the statute of limitations goes back 3 years.

And when you—the class action activity in this space has been quite active and it has actually changed behavior and a lot of employers and companies and workers are all quite aware of the issues involved with misclassification and rights are being protected and asserted on a regular basis through the courts.

Ms. FOXX. Thank you, Madam Chairwoman, I appreciate your indulgence.

Chairwoman BONAMICI. I now recognize the Chairman of the Full Committee, Mr. Scott from Virginia for 5 minutes for your questions.

Mr. SCOTT. Thank you. Ms. Ajunwa, several of you mentioned, you know, if a women's college gets mentioned that could have a negative effect. Who decides what instructions are given to create the algorithm and what happens when you get some kind of hit? Who does it, who actually designs it?

Ms. AJUNWA. Thank you very much for your question. I guess the question is who comes up with the criteria used for programming the algorithm.

And oftentimes algorithms are programmed by vendors who then sell them to employers. But also, employers can have algorithms that I call bespoke, meaning that these algorithms are created specifically for that employer.

So this of course can change the liability whether the algorithm has been created by the vendor or specifically created at the behest of the employer.

So I guess my focus today is really the first scenario. When the algorithm is being created by a vendor and the employer perhaps does not know exactly what has gone into the algorithm and also how it has been trained.

So really, my advocacy today is really for both the auditing and certification of automated hiring systems before they are deployed, before they can actually be used in the workplace. Because I do believe that, you know, as all the witnesses have stated, if automated hiring is used properly or correctly, they could be helpful.

The problem is they currently are not, right. The problem is that there are currently no regulations to actually ensure that they are being used correctly and appropriately.

Mr. SCOTT. Well, once you have designed—once its designed with the discrimination kind of embedded, if the employer bought it from a vendor, would they be immunized from any kind of intentional discrimination?

Ms. AJUNWA. So that is a gray area. That's a gray area in terms of the law because one thing that Title VII requires is intent and other than intent the showing of disparate impact.

And both things can be hard to prove if the automated hiring system is coming from a vendor because first, you can argue perhaps there is no intent on the side of the employer but then there is also the issue of even establishing disparate impact because you would need statistical proof and the automated hiring is—the automated hiring system might have been designed not to retain all the record that you need for that group.

Mr. SCOTT. Well, how does the employer know, he buys this little algorithm thing and uses it, turns out it's screening people. How would he know?

Ms. AJUNWA. He wouldn't. So that is why I am advocating for an audit requirement for employers who do then buy automated hiring systems or use automated hiring systems.

Mr. SCOTT. Thank you. Ms. Yang, the Ranking Member brought up independent contractors. If you are an independent contractor, you are not protected under the employer employee Title VII, ADA, and others.

In—but you would be protected under Section 1981 of the Civil Rights Act of 1866 where you can't discriminate. Are there limitations in Section 1981 in terms of pursuing discrimination claims if you are an independent contractor?

Ms. YANG. Yes. Federal law provides very limited protections for independent contractors. Under Section 1981, the claims must prove intentional discrimination which can be very difficult to show in the case of algorithmic bias.

In addition, it only covers race and also ethnicity discrimination but not other bases, right. So it wouldn't cover sexual harassment, age discrimination, disability—based discrimination.

And our Federal antidiscrimination laws contemplate that true independent contractors will have the bargaining power that they don't need to be protected against discrimination.

But the way in which many companies are misclassifying independent contractors today means that many individuals do not truly have bargaining power and they need the protection of our antidiscrimination laws.

Mr. SCOTT. Thank you. Madam Chair, I yield back.

Chairwoman BONAMICI. Thank you, Mr. Scott. I now recognize Ms. Stefanik from New York for 5 minutes for your questions.

Ms. STEFANIK. Thank you, Chairwoman Bonamici. Ms. Lander, I appreciate that you raised how contractual or gig arrangements can be beneficial to workers, as I believe this perspective needs to be central in our discussions on worker classification.

Millennials, as you know, now comprise the largest cohort in the U.S. labor force and these workers place a higher value on the flexibility and fulfillment that can exist outside the rigid constraints of traditional employment.

For years, independent contracting has sparked entrepreneurship and provided an important source of income and flexibility to millions of Americans including students, veterans, and single parents.

In your testimony you mentioned how there are various legal tests courts and government agencies applied to distinguish employees from independent contractors.

I have heard from employers, particularly small business owners, that this inconsistency between various agencies has muddled the line on worker classification and really created compliance challenges.

Do you believe that harmonizing the legal test across Federal agencies would help draw a clearer bright line on the issue of worker classification and help workers as well as business owners know when misclassification has indeed occurred?

Ms. LANDER. Yes, I do think that would actually make life a lot easier for employers. However, the problem is that the definition of employee differs from statute to statute and so unfortunately what that means is when courts are interpreting whether a particular civil rights or labor law applies, they have to look at the statutory text and apply it. So as easy as it would be to have a uniform definition, if you're going to be honest to the statutes that involve workers, you can't have a uniform definition across all of the agencies.

Ms. STEFANIK. So how would you address that then? If there is a uniform definition legislation which I have worked on, what would we need to do in addition to that?

Ms. LANDER. Well, I'm not a lawmaker so I can't really answer that question.

Ms. STEFANIK. Great. Well, your perspective is important on that. I would like to follow up on that issue to make sure that we get this right.

And very briefly, what would happen, what would be the impact of bringing California's ABC test nationwide and would it allow workers who value freedom and flexibility the choice to maintain their status as independent contractors?

Ms. LANDER. My understanding of the California test is that it moves away from the traditional right to control which is a critical element in all of the independent contractor analyses under the various laws and talks about the essence of the business.

And so if a worker is engaging in services that is the essence of the company's business and I don't know if I'm wording that exactly right, then he or she can't be an independent contractor.

And that would essentially completely change the entire working dynamic for not just the gig economy which has been a tremendous boon and not only for companies that have been able to expand their reach where they otherwise couldn't, but it's also been wonderful for as you described in your opening remarks, for individuals who need the flexibility to work different schedules and seasonally and things of that sort.

Ms. STEFANIK. Thank you. You know, as we discuss this issue, I think it is really important that we channel these technological and entrepreneurial opportunities for young people and members of the nontraditional workforce, people that maybe are augmenting

their full time job, people that as they are aging want to earn some money on the side. You know, there is lots of benefits to this gig economy and we have to remember, it is totally voluntary by individuals who seek out those opportunities. And with that I yield back.

Chairwoman BONAMICI. Thank you very much and I now recognize Dr. Schrier for 5 minutes for your questions.

Ms. SCHRIER. Thank you so much to all of you for being here. I really enjoyed reading your testimonies and hearing you today and it is so interesting to think about really there is a rabbit hole that you can go down when you start thinking about how every question you ask or every parameter you put in an algorithm can lead down the line to some sort of discrimination.

And I think that this was all developed for efficiency and to cast like a broader net but a more specific net but in doing that with so many of the things you talked about like age or even look alike that looks at a current workforce, has led to discrimination inadvertently.

And so I represent part of Washington State and they just had a future of work task force and they released a report in December talking about automation in the workplace and how AI will change the way we work but it barely touched on this topic of algorithmic discrimination and how that leads to people even finding out about jobs or being eligible for jobs. And so, Ms. Lander, you talked about kind of a look back, you know, once a system is in place, how do we look at it and see if it is discriminating.

And I am wondering if there is a way to look forward? So this is sort of question for Ms. Yang, Dr. Ajunwa about whether you—whether there are things that we can do to either fundamentally change the way these algorithms work or whether we should look in another place and change privacy laws so that the algorithms can't even obtain some of that information and how you might balance those two.

Ms. YANG. Thank you for that question. I think we have a lot of opportunity to make algorithms work more fairly than they are right now. And it starts with ensuring that the information you're considering is truly job related.

And we talked about the training data. Is it diverse and representative of the full spectrum of people that can perform the job? And then what are the criteria that you're building into the variables? Are you thinking about abstract personality characteristics that maybe have some correlation but a heck of a lot of people would also be able to perform the job even if that weren't their top personality characteristic??

And so it comes back to ensuring that we are really being rigorous about the screen being job related. And the closer you can tailor what you're selecting for to behaviors on the job, the more you can minimize the risk of screening people out who could perform the job.

And I do think many advances in technology now will allow us if you design a system up front to document the decisions so that you can explain how they were made which is necessary under our current laws to ensure accountability. Employers themselves, even if they say I didn't design it, I didn't know what was in the algo-

rithm, they are nonetheless responsible. And my view is that they absolutely need to understand how these decisions are made. They need to be able to explain them through when the government comes in and asks about their system or in litigation and I do think we need new laws both to protect privacy but also to create the right incentives because these cases are very expensive to litigate.

Ms. SCHRIER. This is, I'll get back to kind of a follow-up question. I wanted to give you a chance Dr. Ajunwa to give a, your answer and then I have a follow-up question about it.

Ms. AJUNWA. Thank you very much for your question. I do strongly agree that we have to be forward looking because being backward looking is basically taking action after the harm has already been done and I think we can actually prevent a lot of harm from the onset.

And that includes for example mandates for the design of these automated hiring systems which we don't yet have. And you're very right to pinpoint that part of the problem is the way that we handle privacy, especially privacy of workers in the United States and that part of the problem is thinking through what sort of information is actually being pulled into the system of automated hiring—

Ms. SCHRIER. And it is all out there.

Ms. AJUNWA. Right.

Ms. SCHRIER. Can I just quickly in the interest of time, my next part was about you had said are these issues kind of pertinent to the job?

And so a few years ago, Google had a project called Aristotle and they found out that what really mattered was not so much your engineering degree but how well you worked with others.

Ms. AJUNWA. Right.

Ms. SCHRIER. And so they kind of lifted up characteristics like a team leader or a club leader or being on a sports team. But even that then chooses for perhaps competitive people or people who always want to be the star of the show and might not really lead to the best workplace.

I wondered if you could just comment about that because it is job related but it could have inadvertent outcomes.

Ms. YANG. Part of the challenge is that you may be testing only on your current workforce, right. So you will be replicating that current model.

I think algorithmic formulas, you know, algorithmic systems can help us identify bias within broader systems. You know, we might think confidence, you know, expressed in resumes as words like executed, will mean you're going to perform well. In fact, more men use those words and in fact that might not mean you can perform well, right. Confidence doesn't always equal competence.

And I think the more we can use these kinds of technology systems to help identify where some of the bias is within processes, then we can actually start to break down some of the historic bias.

Ms. SCHRIER. Thank you.

Ms. AJUNWA. And I would add that, you know, having actual record-keeping mandates would aid in this endeavor, right. So to be able to see what are the people that are actually applying, what are the people that are getting selected, but then also checking that against the wider pool that's out there.

So, you know, somebody mentioned nontraditional workforce. So for example, people who have gaps in employment are oftentimes excluded algorithmically by automated hiring systems. And this can negatively impact women who are often called upon to be caregivers.

It can also impact formerly incarcerated citizens who have been rehabilitated and who are trying to reenter the workforce. It can impact veterans.

So I really think, you know, having a proactive approach to ensure that there is proper record-keeping for automated hiring systems and also proper auditing of automated hiring systems will really be a boon for employers, not just employees.

Ms. SCHRIER. Thank you.

Chairwoman BONAMICI. We are going to move on to the Ranking Member of the Subcommittee, Mr. Comer from Kentucky, for his questions.

Mr. COMER. Thank you, Madam Chair, and I appreciate all the witnesses being here today. Ms. Lander, in the modern economy, job recruitment is migrating online.

Based on your experience, what are job seekers and employers gain from the use of online platforms when it comes to finding and filling jobs?

Ms. LANDER. The ability to scan the internet to find opportunities for work is a tremendous gain for workers. I can remember back when I was job hunting and had to look in the newspaper at classified ads so it's a completely different world that we live into today.

Mr. COMER. Ms. Lander, under current law if an employer is using technology to screen job applicants that has a negative impact on a protected class, the employer may need to demonstrate the screening criteria is job related and consistent with the business necessity.

What goes into conducting this analysis and would the employer have to demonstrate a strong connection between the screening criteria and the job that the employers trying to fill?

Ms. LANDER. Yes. It's the Uniform Guidelines process for validating a selection device is extremely rigorous. The two most common ways are content validity and criterion validity.

Content validity is less likely to apply to the kinds of tools that we're discussing because content validity is typically the content of the test or selection device matches the content of the job, like a pilot simulator or a typing test. Here, we are talking about devices that screen for either minimum qualifications or particular personality characteristics and those are typically justified by criterion validity which is a rigorous statistical process of matching performance data with performance on the selection device.

Mr. COMER. So what are some best practices for an employer when it is considering using an online platform or a vendor that employs AI to find suitable job candidates?

Ms. LANDER. As Ms. Yang said, the employer can't get off the hook simply by saying that the employer relied on the vendor.

So employers are responsible for knowing how they are screening their candidates and so any employer that is thinking of using a tool that uses AI or any other sort of technology to screen can-

didates should be insisting upon seeing the vendor's adverse impact studies as well as the validation work that has been done and to understand what kind of screening criteria is being used to screen their candidates.

Mr. COMER. Okay. Let me ask you this one last question. If an employee is incorrectly classified as an independent contractor, wouldn't this worker retain all the legal protections of an employee including the protections of our current civil rights law?

Ms. LANDER. Yes. Misclassified workers who are actually employees are protected by all of the employment laws.

Mr. COMER. And I want to ask Mr. Romer-Friedman, you had mentioned Facebook in your opening testimony and what—Facebook gets a lot of criticism, bipartisan criticism, here in Congress. What can Facebook and what should Facebook do differently with respect to this subject we are talking about here today?

Mr. ROMER-FRIEDMAN. Sure, thank you, Ranking Member Comer. So we have already made a lot of progress lately with Facebook. They've created a special portal for job, housing, and credit ads where you don't have at this point in time most of these demographics as selection options to target or exclude and that's great and we applaud them for doing that. At the same time, as I mentioned in my testimony, Facebook has to decide who will see what ad, right. So let's say I want to send an ad to everyone here in District of Columbia, but I'll only buy 10,000 impressions, right. 10,000 people who are going to see the ad.

Facebook has got to decide who is going to see those ads. We allege and we are going to get this hopefully in discovery and litigation that age and gender are being used and a group called Upturn has done a study showing that there are racial and gender impacts so that even if the employer doesn't want to discriminate by relying on the ad delivery algorithm of Facebook, it may be doing just that and even worse than what was going on for years in the first place where the employer was expressly excluding certain groups.

And so as you said, and I completely agree with this. Most businesses want to follow the law and they want to comply.

Mr. COMER. Right.

Mr. ROMER-FRIEDMAN. And that's where I disagree with Ms. Lander that creating greater clarity in the law always helps compliance and reduces litigation. And I think that's, you know, everyone can agree that those are good things.

Oftentimes you do that in regulations that the EEOC can issue but Congress can do that too and I think the laws that Congress enacts express the values of this Congress.

So for example, one very basic thing is Amazon says it has a right to send job ads to younger people and not send them to elderly people as long as they put the job ad on their website.

That's something where there, they say there's an ambiguity in the law. Congress could step right in there and make it clear you can't use race, gender, age, disability, veteran status, political status, for example to exclude people from getting recruited or getting job ads. Simply put.

Mr. COMER. Madam Chair, I have to throw this statistic in here. My congressional district, the recent poll, they polled all the congressional districts on Facebook usage. 84 percent.

Mine was the second highest in Congress. 84 percent of the adults in my congressional district get on Facebook at least once a day. So I am a, I represent a Facebook district so.

Chairwoman BONAMICI. That is fascinating, Mr. Comer.

Mr. COMER. We are also trying to—

Chairwoman BONAMICI. You made me want to—

Mr. COMER. That is right.

Chairwoman BONAMICI.—look at where mine is and everybody else's is. It is really interesting. And next we recognize Ms. Lee from Nevada for 5 minutes for your questions.

Ms. LEE. Thank you. Thank you all for being here. This has been really an interesting topic to think about all the iterations of what can be, what we view as helping us in this modern day to actually promoting discrimination that we have not thought about.

I am going to turn to older Americans because this body passed the Protecting Older Americans Against Discrimination Act last month with bipartisan support which restores the ability of older Americans to apply the so-called mixed motive framework which was afforded to protect other classes of individuals under Title VII of the Civil Rights Act to claims of age discrimination.

So in light of the new challenges that we are facing in the digital age, I would like to ask you, Mr. Romer-Friedman, you touched upon this a little bit in your last answer.

Are there other actions that we should be taking to ensure that older workers have the same protections as other protected classes?

Mr. ROMER-FRIEDMAN. That's a great question and, you know, I think my former colleague David Lopez who is the general counsel of the EEOC during the Obama Administration has pointed out to me many times that age discrimination has become so normative and so kind of baked into our society that people don't even think it's illegal. Right. So we have to I think treat it very seriously.

To that end, mixed motive is so important to protect because it this algorithmic bias, digital discrimination discussion, companies will say well, age was just one of hundreds of factors that could have influenced that decision.

Of course, then it's very difficult to piece together how age was used. You shouldn't have to show that age was more determinative in a decision than you would have to for gender or race but that's the case right now.

I think, you know, one thing that could be done is making clear that the Age Discrimination Employment Act applies to applicants for disparate impact claims. Right.

Two courts of appeals have held that if you want to bring a disparate impact claim, you can only do it as an employee under the ADEA, you can't do it as an applicant. And that's the whole purpose of the ADEA, to allow older people to get hired. And, you know, at the end of the day we need to make sure that things like companies not being able to screen out when they're recruiting based on the date of graduation or the years of experience and just completely take that person out of the picture digitally, those are the kinds of things that need to be implemented right away.

Ms. LEE. Thank you. Thank you. As we talked about this and I, we deal with this a lot in Congress is that new technologies are

far outpacing our ability to focus on regulating and certainly that is what we are seeing here today.

So as we look at, I would like to just open this up to all of you. Looking down the road, are there potential future developments in workplace or hiring technologies beyond the ones we have talked about today that particularly concern you when it comes to protecting workers rights from employment discrimination? I will start with you, Ms. Yang.

Ms. YANG. Thank you for that question. I am concerned about the increasing worker surveillance and monitoring. Many workers now are tracked all throughout the day. There are productivity metrics that can sometimes be so aggressive that they can interfere with a pregnant woman's ability to go to the bathroom, you know, prayer time, all kinds of civil rights concerns.

But also just the simple tracking of people throughout the day may really deter workers from coming together and raising concerns so I do have concerns about that.

And I did want to add one other point about the age discrimination. You know, older workers are disproportionately represented at independent contractor positions and so it's especially important that even properly classified independent contractors have anti-discrimination protections. Right.

And if somebody says well, I'm not going to hire you just because you're old, like right now you have no protections against that. And I think that's something that needs to change as well.

Ms. LEE. Right. Thank you.

Ms. AJUNWA. Thank you very much for your question. First in response to, you know, your concern for older workers, I do want to note that I have seen in my research more discriminations against older workers in terms of their ability to participate in a sort of a digital workplace. So people will use words like digital native to really exclude older workers so that's something of concern.

I also wanted to point out that workplace surveillance is actually something that is on the rise. As I mentioned, the microchips that are being embedded under the skin, but also, I see workplace wellness programs as a site of workplace surveillance.

For example, now with the sort of trend or introduction of genetic testing as part of workplace wellness programs. That really raises the question of increased, you know, health discrimination or increased discrimination against people with disabilities whether real or imagined.

Because genetic testing is actually just telling you the propensity for disease, but employers might look at it as actually determinative when it's really not.

So I think that's a huge concern and something we should really, you know, act against.

Ms. LEE. Right, thank you. All right. My, whoops, my time has expired. Thank you.

Chairwoman BONAMICI. We now recognize Mr. Takano, a Member of the Full Committee from California for 5 minutes for your questions.

Mr. TAKANO. Thank you, Chairwoman Bonamici, for this very important hearing. As the workforce is changing and we transition

to a society more dependent on technology, it is extremely important that we understand how these tools will impact the workforce.

Currently there is a lack of transparency and without knowing the algorithm behind the program we have no way of knowing if these tools will remove or reinforce bias.

Professor Ajunwa, as companies are looking to ensure that they remove bias and are mitigating against disparate impact, they would need to know what protected classes potential employees belong too.

We know that the more sensitive the information is, information such as sexual orientation or disability status, the less likely a candidate will disclose this information. So my first question is if companies are unable to obtain this sensitive information from candidates, how can and should they mitigate bias?

Ms. AJUNWA. So that's an excellent question. Of course, you can't compel applicants to release information that's protected information. However, employers can do analysis after the fact to see if there is indeed a disparate impact based on looking at for example the—this is after the fact, not during the employment decision.

You know, just to look at the categories of people that have applied versus the categories of people that were hired. And this can then help them take steps in the future perhaps to broaden their advertisement pool to attract more people from protected categories if they are lacking those types of people.

Mr. TAKANO. A post-hiring review. Ms. Yang, while many companies or vendors will claim that they are complying with the EEOC regulations, we know that many do not because they are currently, they currently operate in a gray area. Does the EEOC have the ability to regulate the companies and vendors that are contracted by employers to conduct hiring?

Ms. YANG. That's a very important question. The EEOC does have an important role to play. The agency has sub-regulatory authority under statutes like Title VII and can provide guidance which is the Uniform Guidelines is one form of guidance on how the agency believes vendors should validate hiring screens.

So certainly, the agency could provide more up-to-date guidance on some of the difficult issues where there are gray areas.

You know, a lot of people say are correlations sufficient to demonstrate that validity? I don't believe they are. It would be helpful for the agency to make that clear and explain why.

Mr. TAKANO. Well, what recourse if any does the EEOC have to hold these companies accountable in the gray area?

Ms. YANG. Well, during the course of an investigation, I mentioned earlier the EEOC has the authority to open its own investigation on the commissioner's charge or directed investigation depending on the statute.

So even if an individual doesn't have enough information to come forward but the EEOC learns of a problem, it can open an investigation. If it finds a problem, it can actually litigate it to enforce the law.

But the challenge is having enough information to know where the problems are because as you mentioned there is a very big gap in knowledge because of the lack of transparency about how many of these systems work.

Mr. TAKANO. Well, thank you. Thank you. Professor Ajunwa, we know that auditing the algorithm and the code can help us understand if the code is biased. But what kind of auditing should be done and should it be the responsibility of the EEOC to do this?

Ms. AJUNWA. Thank you very much for your question. So the question of how the audits of automated hiring systems should be completed or performed is one that I address in my two law review articles, "The Paradox of Automation as an Anti-Bias Intervention" and "Automated Employment Discrimination."

I don't come down on one side whether it has to be a governmental agency, or it can be a third-party agency similar to for example LEED, which certifies green buildings. So of course, there is some utility in having it be a governmental agency but also there is also the recognition of scarce resources.

Mr. TAKANO. Well, so maybe, maybe not the government but what kind of auditing should be done?

Ms. AJUNWA. So the kinds of auditing that should be done should be one that's done with an, essentially an interdisciplinary team so it should include lawyers, so labor and employment lawyers.

It should include data scientists who are trained to write code and to understand how machine-learning codes work. It should include people who are versed in diversity research in terms of creating a diverse workforce. So it should be an interdisciplinary team.

Mr. TAKANO. Well, thank you. Madam Chair, while we should not fear technology and the wonders of using it to increase productivity and efficiency, we cannot move toward a society where everything from employment to housing are guided by systems that are largely unchecked. Thank you and I yield back the balance of my time.

Chairwoman BONAMICI. Thank you, Mr. Takano. And finally, last but not least, we will recognize Ms. Blunt Rochester from Delaware for 5 minutes for your questions.

Ms. BLUNT ROCHESTER. Yeah. Thank you, Madam Chairwoman, for this very important hearing and thank you to the panelists.

I had the opportunity last month, about two months ago to start a future work caucus here in the Congress, a bipartisan future work caucus and what you have shared today really highlights the clarion call for all Members of Congress to be engaged in this, in these discussions.

To me it appears that technology has really outpaced policy and the people and so your participation here today is really important. And there are so many topics, I wish I could have had everybody's time that is not sitting here because there are issues like language barriers that we haven't talked about, the diversity of those people doing the design work, and making sure that those algorithms are working and even returning citizens.

I have a criminal justice bill called Clean Slate that deals with people who are coming out of prison but therefore are having challenges getting to work.

And I want to start off by finalizing Ms. Lee's question because you two didn't get a, Ms. Landers or Mr. Romer-Friedman didn't

get a chance to answer the question about your one concern, your big concern.

And then I want to ask the whole panel if there was one thing Congress could do right now that would it be? So if I could start with Ms. Landers and I have 3 minutes and 40 seconds left.

Ms. LANDER. So I'll be quick. The thing that occurred to me is that we are really moving in a really positive direction in terms of teleworking and worker flexibility.

However, there are a lot of laws like for example in California and even under the FLSA that put such restrictions on the employer and having to monitor very carefully—

Ms. BLUNT ROCHESTER. Yeah. So laws focusing on—

Ms. LANDER.—individual worktime that they're reluctant to allow people the flexibility to telework. And so I think that's a growing area because the generation that's coming up after me really enjoys working from Starbucks.

Ms. BLUNT ROCHESTER. Yeah. So telework. Thank you. Mr. Romer-Friedman.

Mr. ROMER-FRIEDMAN. Thanks. If I could just say this whole line of argument that independent contracting is flexibility and having employer employee relationship is not is a farce.

You can do all the flexibility you want through the traditional employer relationship, get all the protections that the New Deal and Great Society and subsequent laws created.

To your question, Congresswoman, I think that, you know, we saw a scandal a couple weeks ago with Clearview that a company essentially did, collected all photographs from people, from pretty much everyone on the internet who was on social media and created facial recognition, gave that to law enforcement mostly.

I think it's concerning to me that we are seeing the millennials and the next generation grow up in a time of social media.

I think at some point employers will be able to literally press a button and get every—from every piece of information about someone that has been on the internet forever which not just could be embarrassing to people but won't be representative.

And if you point out, you know, someone who is returning from prison from, who's, you know, who has paid their debt to society with time, that person may have all that stuff come up in the same way that right now you don't want a criminal record even if it's not a conviction to be used for employment. So that's going to be a big issue.

Ms. BLUNT ROCHESTER. Yeah. A big issue, thank you. And Dr. Ajunwa, in terms of the thing that the Congresswoman—

Ms. AJUNWA. Yeah, thank you so much for your question. I think really what is urgent for government to do right now is to ensure that automated hiring is regulated. As it stands there are just no regulations as to what information is collected, how that information is evaluated and also what even happens to that information whether the applicant is hired or not.

And so governmental action is definitely needed both to audit and certify the automated hiring system but also to ensure that all the data that is being collected on applicants is not something that's then used against the applicant in the future.

Ms. BLUNT ROCHESTER. Yeah. Excellent, thank you. and, Dr. Yang, Ms. Yang.

Ms. YANG. Thank you. I believe a workers' bill of rights is needed so that workers understand how algorithms are making decisions and how that might impact them.

Because people like Kyle Behm, he only knew he was screened out because a friend who worked at the company told him. Most people don't know this information and then the systems don't get to improve from feedback loops about why people were excluded, right.

So if people know, you know what, I don't think you're going to accurately transcribe my accent with the type of screen you're using, they can raise that concern and try to make systems better.

Ms. BLUNT ROCHESTER. Yeah. Thank you. And I have so many more questions which I will follow up with many of you afterwards.

One question I did have for Dr. Ajunwa, you mentioned microchips. I was just curious. I was looking for that in the testimony. Could you speak a little bit more on that?

Ms. AJUNWA. Sure, thank you for your question. So your question pertained to the use of microchips embedded under the skin.

Ms. BLUNT ROCHESTER. Yeah.

Ms. AJUNWA. As a new really I think a surveillance tool. So many corporations are marketing this as a convenience for employees in terms of helping them to open doors or access sensitive areas.

But in my opinion, because these chips are permanently with the employee, they can track the employee wherever that employee is, even off the job. So I do see them as surveillance devices.

Ms. BLUNT ROCHESTER. Yeah. Well, my time has run out but I thank you all for your testimony and we will be following up with you.

I know data privacy is something that we are doing on my other Committee, Energy and Commerce, so look forward to working with you. Thank you and thank you, Madam Chairwoman.

Chairwoman BONAMICI. Thank you so much and I want to remind my colleagues that pursuant to Committee practice, materials for submission for the hearing record must be submitted to the Committee Clerk within 14 days following the last day of the hearing, preferably in Microsoft Word format.

The materials submitted must address the subject matter of the hearing. Only a Member of the Committee or an invited witness may submit materials for inclusion in the hearing record. Documents are limited to 50 pages each.

Documents longer than 50 pages will be incorporated into the record via an internet link that you must provide to the Committee Clerk within the required timeframe, but please recognize that years from now that link may no longer work. I always like that part.

So again, I want to thank the witnesses for their participation today. What we have heard is very valuable and I think, I know many of us have a lot more questions and Members of the Committee may submit those questions.

We ask that you please respond in writing. The hearing record will be held open for 14 days to receive those responses. And I remind my colleagues that pursuant to Committee practice, witness questions for the hearing record must be submitted to the Majority Committee staff or Committee Clerk within 7 days and they must address the subject matter of the hearing.

And I now recognize the distinguished Ranking Member for his closing statement.

Mr. COMER. Thank you. Madam Chair, to begin with, I ask unanimous consent to place in the record a statement from HR Policy Association providing views on today's hearing topic.

Chairwoman BONAMICI. Without objection.

Mr. COMER. And I just again want to thank the witnesses who came here to testify. This is an issue we are going to hear a lot more about and we certainly want to be on top of this.

I appreciate all of the suggestions and like to often remind this Committee we have a lot of laws already on the books that address most of the subjects and topics that we discuss in this Committee but it is always good to review the issues as they emerge and make sure that if there is anything that we can do in a bipartisan way in Congress to improve the civil rights of workers then we certainly need to do that and that is certainly a bipartisan issue.

But again, thank you all for being here today and, Madam Chair, I yield back.

Chairwoman BONAMICI. Thank you very much Mr. Comer, and I recognize myself for a purpose of making a closing statement. And thank you again to you, to the witnesses for your expertise which I very much appreciate.

I just want to reiterate that what the Ranking Member said is that we often work on a bipartisan basis and I certainly think that this is an issue where we could do that.

I know, Ms. Lander, you—a couple of times said things like done correctly or used properly and I think those are the key questions of the use of this technology if it is done correctly and used properly, and I think that is the if that we are going to be working on solving.

Today's hearing exposed how digital hiring, evaluation, and management tools can threaten to replace civil rights protections and left unchecked, these largely non-transparent technologies can amplify and perpetuate existing biases that intentionally or unintentionally discriminate against workers. Our civil rights enforcement institutions and the laws they enforce have not kept pace with the technologies that employers are using to recruit, screen, interview and manage workers.

And as our modern workplaces continue to change and employers increasingly rely on independent contractors, whether misclassified or not, accountability for violations of workers' basic civil rights can be diffused, and far too often many workers will be excluded from key antidiscrimination protections.

So Congress must fulfill its responsibility to preserve and expand workers' civil rights by requiring transparency in the algorithms that are used to recruit, hire, and evaluate workers.

Preventing employers from stripping workers of their anti-discrimination protections through misclassification and clarifying,

updating, and better enforcing our landmark civil rights laws to meet the challenges workers face in the digital age.

Technology has a tremendous amount of promise, but it is the if used properly, if used correctly.

Congress has an opportunity to incentivize innovation in workplace technologies that will put workers first and protect and uphold equal employment opportunities.

And if we work together, we can shape a future in which businesses can and will continue to innovate and workers can and will enjoy strong antidiscrimination protections and I think simply put: the future of work will be what we make it.

So thank you again. If there is no further business, without objection, the Committee stands adjourned.

[Additional submissions by Chairwoman Bonamici follow:]

The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036
202.466.3311 voice
202.466.3435 fax
www.civilrights.org



Officers
Chair
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Women & Families
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**Policy and Enforcement
Committee Chair**
Michael L. Leshman
Anti-Discrimination League
President & CEO
Vinita Gupta

February 3, 2020

The Honorable Suzanne Bonamici
Chairwoman
Civil Rights and Human Services Subcommittee
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

The Honorable James Comer
Ranking Member
Civil Rights and Human Services Subcommittee
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

**RE: Civil Rights and Human Services Subcommittee Hearing on
The Future of Work: Protecting Workers' Civil Rights in the Digital Age**

Dear Chairwoman Bonamici and Ranking Member Comer:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, and Uptum, a nonprofit organization that advances equity and justice in the design, governance, and use of technology, we thank you for the opportunity to submit our views on hiring technologies and ask that this statement be entered into the record of the Subcommittee hearing entitled "The Future of Work: Protecting Workers' Civil Rights in the Digital Age," scheduled for February 5, 2020.

Hiring is a critical gateway to economic opportunity, determining who can access consistent work to support themselves and their families. Technology is changing every step of the hiring process. Today's workforce reflects decades of discrimination against individuals and communities that have been historically marginalized in society. With significantly more transparency, oversight, and public deliberation, some new hiring technologies might help improve upon this baseline. However, this will not happen by default.

In 2014, The Leadership Conference was pleased to join with a broad national coalition of civil rights, technology policy, and media justice organizations in endorsing Civil Rights Principles for the Era of Big Data.¹ These Principles emphasized, among other things, the importance of ensuring fairness in automated decisions. More specifically, they explained

¹ The Leadership Conference on Civil and Human Rights, Civil Rights Principles for the Era of Big Data, (Feb. 27, 2014), <https://civilrights.org/civil-rights-principles-era-big-data/>.



that “[s]ystems that are blind to the preexisting disparities faced by ... communities [that are disadvantaged or that have historically been the subject of discrimination] can easily reach decisions that reinforce existing inequities.”

A recent Upturn report, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, conducted a survey of predictive tools throughout the entire hiring process — including sourcing (e.g., online advertising and job boards), assessments (e.g., tests, games, and video interviews), and selection (e.g., background checks and offer terms).² The report found that, at each of these stages, predictions based on past hiring decisions and evaluations can reproduce patterns of inequity, even when tools specifically intentionally exclude race, gender, age, and other protected attributes.

In October 2019, together with Upturn, the Urban Institute, and the Lawyers' Committee for Civil Rights Under Law, The Leadership Conference convened about 50 people with expertise across disciplines — from computer and data scientists, industrial and organizational psychologists, employment lawyers, and advocates to explore a path forward to ensure fairness and equity in the design and deployment of hiring algorithms. Building on those discussions, civil rights organizations are working together to identify principles for employers, technology vendors, and other organizations to advance civil rights. These are issues of active, urgent interest to a wide range of stakeholders.

While this work is ongoing, we offer the following basic recommendations to guide this Committee's inquiry:

1. **Hiring technologies should not discriminate.** There is already ample public evidence that hiring technologies can adversely affect protected groups, even when they do not directly consider protected attributes.³ Moreover, hiring assessment technologies, which can include games and facial analysis, can create novel barriers for people with disabilities. Statistical testing for discrimination, while critical, will not guarantee that a hiring assessment is fair. All organizations involved in employment selection—including employment agencies, hiring assessment developers, and vendors—must holistically scrutinize their use of new technology.
2. **Job applicants deserve to be evaluated based on their abilities to perform the job.** Technology cannot substitute for a rigorous analysis of the skills and abilities required for a particular job. While machine learning can easily identify abstract patterns that are statistically

² Upturn, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, December 2019, <https://www.upturn.org/reports/2018/hiring-algorithms/>.

³ See, e.g., Ali et. al., *Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes*, April 2019, <https://arxiv.org/abs/1904.02095> (showing the potential for discrimination in Facebook's ad delivery); Sapiezynski et. al., *Algorithms that "Don't See Color": Comparing Biases in Lookalike and Special Ad Audiences*, December 2019, <https://arxiv.org/abs/1912.07579> (showing the potential for discrimination in Facebook's ad targeting); Dave Gershgorin, *Companies are on the hook if their hiring algorithms are biased*, Quartz, October 22, 2018, <https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased/>; Drew Harwell, *A face-scanning algorithm increasingly decides whether you deserve the job*, Washington Post, November 6, 2019, <https://www.washingtonpost.com/technology/2019/10/22/ai-hiring-face-scanning-algorithm-increasingly-decides-whether-you-deserve-job/>.

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correlated with positive job performance in a particular population, these patterns are often not clearly related to job requirements.

3. **Job applicants should be given appropriate notices and explanations.** Today, it can be difficult for applicants to know when they are being evaluated by hiring assessment technologies, or understand the nature of the assessment. This can prevent people with disabilities from knowing when and whether they will need a reasonable accommodation. Moreover, hiring algorithms should be an opportunity for job applicants, not just employers or technology companies, to receive useful insights about their performance.
4. **Employers and vendors should be more transparent about their use of hiring technologies and conduct public, third-party audits.** It can be incredibly difficult for civil society organizations, researchers, and regulators to understand how hiring technologies are being used in the market today. This inhibits a fulsome understanding of how technology is affecting job seekers' civil rights and prevents the development of remedies that may be necessary to ensure that a system works fairly and protects the interests of those that are disadvantaged or have historically been the subject of discrimination. Organizations that develop or use hiring assessments should also maintain the data necessary to audit assessments for discrimination and job-relatedness.
5. **Hiring technology should be subject to more proactive oversight.** The U.S. Equal Employment Opportunity Commission (EEOC) must have the means and tools to conduct proactive oversight and enforcement over organizations that develop and use hiring assessment technologies. In today's employment selection process, applicants cannot be expected to independently initiate complaints of discrimination.

We appreciate the Subcommittee's attention to these important issues and look forward to working with you to ensure hiring technologies are developed and used in ways that respect people's civil rights. Please contact Gaylynn Burroughs, Senior Policy Counsel at The Leadership Conference on Civil and Human Rights, at burroughs@civilrights.org or Aaron Rieke, Managing Direct at Upturn, at aaron@upturn.org if you would like to discuss these issues further.

Sincerely,

Vanita Gupta
President & CEO
The Leadership Conference

Harlan Yu
Executive Director
Upturn

Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias: <https://www.upturn.org/reports/2018/hiring-algorithms/>

[Additional submission by Mr. Comer follow:]

STATEMENT BY THE HR POLICY ASSOCIATION

**TO THE
SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES
COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES**

**HEARING ON
THE FUTURE OF WORK: PROTECTING WORKERS' CIVIL RIGHTS IN THE DIGITAL AGE**

FEBRUARY 5, 2020



INTRODUCTION

HR Policy Association members have long maintained a commitment to attracting and retaining diverse, inclusive workforces. This commitment does not primarily stem from compliance concerns—it is an essential aspect of competitive business strategy in a global economy, as well as being the right thing to do. The use of new technologies, such as artificial intelligence, has great potential to help companies achieve their diversity and inclusion goals, among other objectives. They are also novel enough to merit careful consideration of their shortcomings to ensure their implementation achieves responsible and effective results, particularly since they are still evolving. Yet, care must be taken not to enact regulation that inadvertently slows the progress possible through their use—especially in the areas of diversity and inclusion, where the elimination of bias, both conscious and unconscious, calls for new approaches and solutions.

HR Policy Association is the lead public policy organization of chief human resource officers representing more than 390 of the largest employers doing business in the United States and globally. The Association convenes these executives not simply to discuss how human resource practices and policies should be improved, but also to help create and promote HR strategies and initiatives for diverse and inclusive workforces. Collectively our members employ more than 20 million employees worldwide and have a market capitalization of more than \$7.5 trillion. In the United States, Association members employ over 9 percent of the U.S. private sector workforce.

DIVERSITY AND INCLUSION IS A PRIORITY FOR HR POLICY ASSOCIATION MEMBERS

According to a 2019 poll of HR Policy Association member Chief Human Resource Officers, “diversity and inclusion” is a top-five concern in their role as the top HR executives in large corporations. Relatedly, “talent management, including recruitment and retention” and “cultural transformation” also make the top five. For large companies, it is clear that attracting and retaining top talent and achieving the right culture—resulting in a diverse and inclusive workforce—is a core component of their business strategies.

In the United States, diversity is often viewed in legal and political terms such as “affirmative action,” with policies aimed at ensuring that historically under-represented populations do not continue to be left behind in the U.S. workforce. Our companies fully support achieving equality in the workforce, which is the goal of policies such as Executive Order 11246 and the equal employment opportunity laws.

The terminology and framework companies more frequently use, however, is “diversity and inclusion,” which goes beyond a legally mandated numerical approach to encompass leadership messaging and practices and other ways in which a welcoming and inclusive culture is created and sustained. The use of the word “inclusion” also underscores the priority of creating a strong sense of unity among the employee population, notwithstanding recognition of individual differences.

Creating a culture of diversity—and embracing all that means within different contexts globally—gives companies a competitive advantage. Diversity is a critical component of a number of business imperatives, including enabling innovation, attracting and retaining top talent, and improving customer orientation and satisfaction. The idea that companies with a culture of diversity are better off from a business perspective is supported by the experience of our members. One HR Policy member said in an interview: “We have offices in more than 35 countries, across 100 markets, and a workforce of around 50,000 people. Our employees have to be able to work effectively in cross-border teams, they’ve got to be able to deliver goods and services for clients ranging from individual investors to corporate institutional clients. Diversity is an imperative.”

A growing body of research bears out the same: companies able to achieve leading levels of diversity within their respective industries are more likely to outperform those that have not. A recent study by Boston Consulting Group finds that firms with above-average diversity scores earned 19% more revenue due to innovation than companies with below-average diversity scores.¹ In part because of this reason, and though there is still considerable room for progress, the United States and global companies doing extensive business within the U.S. are in the vanguard of expanding diversity and inclusion of under-represented populations. These companies frequently use the American experience as a catalyst for progress in other parts of the worldwide business community. This experience reflects not only the successes of the U.S. legal regime in its continuing attempts to eradicate discrimination and its historical effects, but also a cultural imperative generally embraced within the United States overall and particularly by its corporate community.

Meanwhile, large companies are at the forefront in battling discrimination against individuals. As previously noted, a common misconception is that companies’ commitment to diversity and inclusion is purely legal, driven by the need to comply with governmental imperatives such as those enforced by agencies like the Department of Labor’s Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission, in addition to their state and local counterparts. There is no denying that these laws and their enforcement serve an important purpose, but the reality is that diversity and inclusion go well beyond legal necessity: we are repeatedly told by HR leaders that it is the “smart thing to do” in ensuring human resource policies that further a company’s business goals.

Finally, it is also worth noting that for global companies, diversity also has an international element that seeks to ensure that the workforce reflects the company’s global footprint and customer base. Not surprisingly, companies operating on a global level face a more complex challenge in promoting diversity and inclusion. The challenge manifests on two levels—one within the country where operations exist and the other involving the company’s global employee population. With regard to the first, there are varying legal requirements in the jurisdictions within which companies may operate. In fact, diversity-related legal requirements in most countries outside the U.S. often focus exclusively on disability and gender, with little or no attention paid, for example, to ethnicity or nationality. Yet, for all the reasons stated previously, the absence of legal requirements typically does not stop companies from working to apply their own cultural diversity and inclusion imperatives wherever they have employees.

¹ Abouzahr, Katie; Krentz, Matt; Lorenzo, Rocio; Tsusaka, Miki; Voigt, Nicole. “[How Diverse Leadership Teams Boost Innovation](#).” Boston Consulting Group, January 23, 2018.

HR LEADERS ARE CAUTIOUS BUT OPTIMISTIC ABOUT NEW TECHNOLOGIES IN THE WORKFORCE

HR Policy members are hopeful that new technology-enabled capabilities, such as artificial intelligence-enabled hiring and recruiting solutions, will help companies achieve their diversity and inclusion goals. In a recent survey, 71% of staffing firms believe artificial intelligence will eliminate human bias from the recruitment process.² While in some cases there are issues to be solved, such as data sets that unintentionally propagate patterns of bias, new technologies can be improved with the appropriate vetting by those who employ them, whereas human nature has shown less propensity for change in this respect. Nevertheless, it is still ultimately a human responsibility to ensure that bias in employment is eliminated.

New technologies can also decrease the time and cost of doing business. According to a recent report, on average, talent acquisition professionals spend almost one-third of their work week sifting through resumes for a single role, and nearly 1 in 3 respondents spend over 20 hours per week performing this task.³ Enabled by these new capabilities, workers will be freed from performing rote tasks that can be automated and new arenas for creating value will be opened. The time spent searching for, identifying, and interviewing job candidates will significantly decrease, saving firms hours of manpower time in order to find and hire the right candidates. Such results are valuable: According to an Accenture study, a poor hire can cost up to five times the annual salary of that person.⁴ A good hire, on the other hand, increases productivity, improves morale, and enhances a company's image as a good employer.

It is important to note, however, that these capabilities are relatively new, and are in many cases unproven. Significant questions about the impact these technologies may have on companies' HR objectives, including their diversity and inclusion efforts, have not yet been answered in full. For example:

- How do we assemble enough information to develop data sets that are large enough for AI to prove useful without compromising individual interests in privacy?
- Assuming we can assemble sufficiently large datasets to apply AI solutions, is the data we compile of high enough quality to allow AI to perform better than human-driven evaluations?
- Would algorithms that screen applicants for interviews help eliminate human bias, both intentional and unconscious, or would they simply make discriminatory animus even harder to detect and remedy?
- Regarding applications in wellness programs, does their use result in equitable outcomes for all workers, regardless of disability, pregnancy, or any other difference or life circumstance among them? Do employees respond to positive feedback in ways that improve their physical health? Or do they spend more time focused on identifying, and gaming, the algorithm itself?

These are just some of the many questions we as corporate leaders—and as a society—will need to answer.

² [“Artificial Intelligence in Recruiting: Industry Report 2019.” Ceipal. December 11, 2019.](#)

³ De Lara, Kathleen; Holden, Lisa; Trigg, Mike. [“2018 Recruiting Trends Report.” Entelo. 2018.](#)

⁴ Chambliss, Corey; Vaughan, Kristen. [“Next generation talent assessment.” Accenture.](#)

Large companies are seeking technologies that support, and do not undercut, their business goals of achieving a diverse and inclusive workforce. Therefore, even the most progressive and successful companies championing diversity and inclusion must wage a continuing battle against unconscious bias, which can be a barrier among hiring managers during sourcing and talent acquisition processes and can negatively impact diversity efforts. There is legitimate concern that data used in automated decision-making solutions, the manner in which certain technologies are deployed, and the practices surrounding use of such technologies may propagate or create patterns of bias, even in circumstances where the technology is deployed in order to help eliminate bias.

To better understand new hiring and recruiting software solutions, in 2018 HR Policy Association launched the Recruiting Software Initiative. Talent acquisition leaders assembled to create the RSI Review Board, which reviewed more than 30 vendors that offer platforms in recruiting, the majority of which highlighted their use of cutting-edge artificial intelligence technology. The Review Board did not promote any one software solution over another. Instead, it assessed each solution through the distinct lenses related to the application's ability to adapt, mitigate unconscious bias, comply with labor regulations, exhibit successful integrations, justify outcomes, and demonstrate returns directly correlated to the vendor's platform.

The Review Board recognized vendors that demonstrated innovative approaches to improving the ability of employers to identify, attract, evaluate and retain critically important talent. "Badges" could be earned in several areas—adaptability, applicant experience, bias, compliance, integration, justification, and returns. The Review Board applied high standards, matching that of their own companies, in awarding badges. Some vendors did not receive any. Only seven vendors received badges for "compliance." Notably, no badges were awarded for bias mitigation. (Note: It should not be concluded that bias was increased in these instances. The Review Board simply was not able to assess the value of bias mitigation based on the evidence submitted. In other words, "the jury is still out" in this area.) The experience underlined companies' high standards, commitment to closely examining such solutions before deploying them, and the potential for the improvement of the solutions on the marketplace.

In light of the value that can be provided, and the potential of these new technologies, there is reason to be optimistic that talent assessment technology will over time help companies determine the right fit for their company while achieving diversity and inclusion goals.

ANTI-DISCRIMINATION LAWS SHOULD APPLY IN ANY SITUATION—including THOSE INVOLVING NEW TECHNOLOGIES

Existing anti-discrimination laws were designed well before the emergence of many new workplace technologies. However, this does not necessarily mean that the laws have been outpaced by technological improvement, since they are largely "technology-neutral," meaning they are applicable to any situation—including those involving new technologies such as artificial intelligence. These include Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Age Discrimination in Employment Act of 1967, each of which prohibit the use of discriminatory employment tests and selection procedures.

For example, in the case of Title VII of the Civil Rights Act, employers are prohibited from “using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not ‘job-related and consistent with business necessity.’”⁵ The particulars of such neutral tests or selection procedures is not the focus of the statute—rather, the measure keys in on discriminatory outcomes, regardless of whether they were intentional. The Americans with Disabilities Act and the Age Discrimination in Employment Act offer similar protections. Thus, they have the quality of standing the test of time, much like many of the laws of the United States.

This quality is especially important in the face of new technology’s high rate of development. Intel co-founder Gordon E. Moore famously postulated that the rate of improvement he observed from 1959 to 1965—in which the number of transistors on integrated circuits doubled every two years—would continue “for at least 10 years.”⁶ The exponential growth rate Moore observed continued not only for the next ten years, but the next half century, to today and perhaps beyond. This progress has enabled an explosion of new technologies and increased capabilities, from wearables to the widespread use of artificial intelligence.

In the face of an exponential rate of technological advancement, it is important that our laws apply not just to today’s world, but in future scenarios as well. Given that it is impossible to accurately assess how technology will develop (notwithstanding its rate of development), the current focus of our equal employment opportunity laws promises to persevere where a technology-focused measure may not.

CONCLUSION

While tremendous progress has been made in diversity and inclusion, particularly in the United States, there are more opportunities to ensure that these important values are embedded within companies’ cultures, with a shared commitment among all leaders at the highest levels, and an acceptance of measures to ensure accountability throughout a company. As a member CHRO said, “Creating a mindset and culture of inclusion must permeate all levels of the organization, and the tone must be set at the top.” New technologies hold promise to help in these efforts. And while we fully embrace the goals of governmental efforts to protect civil rights in this area, we note the technology-neutral nature of existing non-discrimination laws that enable their application in new such contexts. We would thus suggest a cautious approach that recognizes the constantly changing technological landscape and technology’s potential to help solve diversity and inclusion problems that have historically hindered the workforce from operating at its full potential.

⁵ [“Employment Tests and Selection Procedures.”](#) The U.S. Equal Employment Opportunity Commission. September 23, 2010.

⁶ Moore, Gordon E. [“Cramming More Components Ono Integrated Circuits.”](#) *Electronics*, Volume 38, Number 8, April 19, 1965.

[Questions submitted for the record and their responses follow:]

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February 25, 2020

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Mr. Peter Romer-Friedman, J.D.
 Principle and Head of the Civil Rights and Class Actions Practice
 Gupta Wessler PLLC
 1900 L Street, NW
 Suite 312
 Washington, D.C. 20036

Dear Mr. Romer-Friedman:

I would like to thank you for testifying at the February 5th Civil Rights and Human Services Subcommittee hearing entitled *"The Future of Work: Protecting Workers' Civil Rights in the Digital Age."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Tuesday, March 10, 2020 for inclusion in the official hearing record. Your responses should be sent to Rachel West of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
 Chairman

Enclosure

Subcommittee on Civil Rights and Human Services
"The Future of Work: Protecting Workers' Civil Rights in the Digital Age."
Wednesday, February 5, 2020 2:00 p.m.

Representative Suzanne Bonamici (D-OR)

- How should Congress approach the reforms that you suggested in the testimony and still balance the needs of companies to protect their trade secrets? Is it possible to accomplish both simultaneously?

Representative Jahana Hayes (D-CT)

- You state in your written testimony that "age-restricted and gender-restricted advertisements on Facebook implicate the same problem as the discriminatory ads in classified sections more than 50 years ago" and that the exclusionary advertising practices of today's hiring "is arguably more harmful than the segregated classified ads of a half-century ago, because then a woman could still see and respond to an ad that said the employer preferred a man." Can you explain how the inability to see and respond to discriminatory ads causes greater harm to equal opportunity in the workforce?
- There is disagreement among federal courts over whether Title VII of the *Civil Rights Act* applies to online establishments such as these. Can you expand on your reasoning about why these laws should apply with equal force to digital as well as brick-and-mortar establishments?
- Can the problems of digital discrimination and analytic bias be reduced or eliminated by simply requiring employers to target certain numbers of members of each protected class? If not, why not and what alternative should be used?
- Can you discuss in further detail how Congress should classify entities like Facebook, LinkedIn, and ZipRecruiter to ensure that job applicants benefit from the protection of Title VII?



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GREGORY F. MURPHY, NORTH CAROLINA
JEFFERSON VAN DREW, NEW JERSEY

Ms. Jenny R. Yang, J.D.
Senior Fellow
Urban Institute
500 L'Enfant Plaza, SW
Washington, D.C. 20024

Dear Ms. Yang:

I would like to thank you for testifying at the February 5th Civil Rights and Human Services Subcommittee hearing entitled *"The Future of Work: Protecting Workers' Civil Rights in the Digital Age."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Tuesday, March 10, 2020 for inclusion in the official hearing record. Your responses should be sent to Rachel West of the Committee staff. She can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman

Enclosure

Subcommittee on Civil Rights and Human Services
"The Future of Work: Protecting Workers' Civil Rights in the Digital Age."
Wednesday, February 5, 2020 2:00 p.m.

Representative Suzanne Bonamici (D-OR)

- In your testimony you noted that "the EEOC has authority to open a Commissioner's charge under Title VII and that the district offices may open a direct investigation under the ADEA and ADA where concerns arise." How often has the EEOC made use of this tool? Should the EEOC make greater use of this tool to better establish how our current antidiscrimination laws apply in the presence of predictive hiring technologies?
- What issues do individuals with disabilities face in bringing claims of discrimination under the Americans with Disabilities Act for digital discrimination? What actions should be taken to make sure that protections under the ADA are enforceable?
- How do federal antidiscrimination protections in the United States compare to those in States or other parts of the world, such as the European Union's General Data Protection Regulation? Should Congress consider strengthening existing laws to something similar to these international standards?



March 10, 2020

Chairman Robert C. "Bobby" Scott
2176 Rayburn House Office Building
U.S. House of Representatives
Washington, DC 20515

Subcommittee Chair Suzanne Bonamici
2231 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Scott and Subcommittee Chair Bonamici:

Thank you again for the opportunity to testify before the House Education and Labor Committee on February 5, 2020. I am writing to respond to the questions for the record that I received from members of the Committee. Attached to this letter are my responses.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Romer-Friedman".

Peter Romer-Friedman

Question from Representative Suzanne Bonamici (D-OR)

How should Congress approach the reforms that you suggested in the testimony and still balance the needs of companies to protect their trade secrets? Is it possible to accomplish both simultaneously?

Answer

In my testimony, I encouraged Congress to enact legislation that would require advertising platforms and employers to disclose certain types of information about employers' digital advertising campaigns and other digital recruiting activities, as well as information about the programs, systems, software, applications, or processes that employers use to make employment decisions.

Overall, I do not believe that the vast majority of information on advertising, recruiting, and other employment decisions involves or implicates trade secrets of employers. A trade secret is not merely information that a company would prefer not to disclose publicly, and the federal government often requires disclosure of such information to advance various public policy objectives, including civil rights. As the Supreme Court explained in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974):

According to the Restatement [of Torts] [a] "trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers." The subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.

Id. at 474 (citations omitted). Accordingly, information that is often known publicly or generally known by other businesses does *not* constitute a trade secret. *See id.*

The type of advertising, recruiting, and other employment-related information for which I am proposing to require public disclosure does not implicate any trade secrets, because much of this information is already made public to third parties, such as the platforms on which an employer advertises. Even though some of this information already may be disclosed to third parties, the information is not presented or organized in a way so that the vast majority of people or regulators can access it or analyze it to determine whether discrimination is occurring. And that is one of the reasons why it is necessary to have mandatory disclosures that advance the goal of civil rights.

For example, even if ad platforms disclose to users that they are receiving ads because of their age (*e.g.*, 18-40), older people whose rights are being violated will not receive the job ad and cannot see the disclosure that younger users may receive. Moreover, if an employer is using a specific program or software provided by a third party to determine who will be interviewed or hired, or to determine employees' compensation, the third party's widely used program or software is not a trade secret or information that needs to be kept private. And information about hiring, pay, and various

demographics is already required to be provided to the Equal Employment Opportunity Commission (EEOC) so that the EEOC can analyze whether employers are discriminating. Thus, the information that I am suggesting Congress required disclosure of would not be that different in character than information that is already disclosed. However, digital systems that utilize data in a discriminatory way are not currently being evaluated at all or in a comprehensive manner by regulators or worker advocates to prevent, identify, or stop discrimination in the workplace.

Finally, to the extent actual trade secrets could be implicated by federal legislation requiring various disclosures, government regulators can execute protective orders and/or confidentiality agreements with employers to prevent inappropriate disclosures or the misappropriation of trade secrets. The same types of agreements protect trade secrets and sensitive information in federal and state courts every day throughout the nation.

Questions from Representative Jahana Hayes (D-CT)

You state in your written testimony that “age-restricted and gender-restricted advertisements on Facebook implicate the same problem as the discriminatory ads in classified sections more than 50 years ago” and that the exclusionary advertising practices of today’s hiring “is arguably more harmful than the segregated classified ads of a half-century ago, because then a woman could still see and respond to an ad that said the employer preferred a man.” Can you explain how the inability to see and respond to discriminatory ads causes greater harm to equal opportunity in the workforce?

Answer

Discriminatory advertisements in classified ads sections of newspapers in the 1950s and 1960s caused harm, because they conveyed the message through discriminatory language that women, people of color, or older Americans should not apply for certain jobs or would not be hired for certain jobs. For example, if an advertisement said that a job is a “Male Job,” or “For Whites Only,” women and people of color, respectively, would understand the discriminatory message and be less likely to apply for the job. At the same time, because in the 1950s and 1960s discriminatory newspaper ads were shown to all people who read the newspaper, a woman or a person of color could read these ads, see that the job is open, and apply for the job knowing that—at least since 1964 at the federal level—the employer was required to give each person an equal shot at the job.

In contrast, today employers can use micro-targeting techniques on digital platforms to completely deny their ads to women, people of color, older people, and people in other protected classes. As I described in my testimony, this practice means that people in certain protected classes will never receive certain employers’ job ads and, as a result, they will not hear about the job or apply for it. In that respect, an employer who wants to discriminate based on a protected class now has an even greater ability to precisely discriminate and steer people away from hearing about or applying for a job than in the 1950s or 1960s. Moreover, this new practice of micro-targeting in employment advertising and recruiting is much more secretive than the old forms of discriminatory advertising,

which makes it harder for regulators, workers, or civil rights advocates to identify, combat, and stop these harmful practices.

There is disagreement among federal courts over whether Title VII of the Civil Rights Act applies to online establishments such as these. Can you expand on your reasoning about why these laws should apply with equal force to digital as well as brick-and-mortar establishments?

Answer

I believe that there is a strong legal argument that advertising platforms like Facebook *are* employment agencies as defined by Title VII of the Civil Rights Act, and therefore they must follow Title VII's anti-discrimination provisions on advertising, recruiting, and hiring employees. At the same time, this issue is an open question and could take some time for the federal courts to resolve. Thus, to ensure that advertising platforms and other online companies that play a direct role in advertising, recruiting, and hiring workers follow federal anti-discrimination protections, Congress should clarify that such entities are employment agencies or should add a new category of entities that are subjected to Title VII's standards. These types of digital entities are playing and will likely have an outsized role in determining which job opportunities workers hear about in the future.

Under current law, I believe that Facebook and other ad platforms are employment agencies that must currently follow Title VII, which defines an "employment agency" as a person "who "regularly undertak[es] . . . to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." 42 U.S.C. § 2000e(c).

Facebook has taken many actions that shows that it procures employees for employers and procures work opportunities for employees. As my clients have alleged in civil rights litigation, Facebook regularly receives compensation from employers to place advertisements for employers—and provide related marketing, recruitment, sourcing, advertising, branding, information, and/or hiring services—to recruit applicants for employment and encourage them to apply for employment with such employers. Facebook identifies users who are seeking employment so that Facebook can assist advertisers who want to target their advertisements to Facebook users who may be interested in employment opportunities. And Facebook is one of the largest venues for employers to seek applicants for employment. By taking these actions, Facebook's is no different than an employment agency that searches for workers who are interested in finding jobs, categorizes the workers, gives a database of the workers to an employer, and then contacts only certain workers on the list in accordance with the employer's preferences.

Facebook has argued that it is not an employment agency, because it is similar to a newspaper, and that courts have generally held that Title VII was not intended to extend to newspapers. However, federal courts and the EEOC have recognized that a newspaper *can* be an employment agency if it takes affirmative acts to classify ads in a discriminatory way, such as creating two separate columns for "Female" and "Male" jobs and honoring advertisers' designation of ads for a specific group. *Morrow v. Miss. Publishers Corp.*, No. 72 Civ. 17, 1972 WL 236, at *1-4 (S.D. Miss. Nov. 27, 1972); EEOC

Compliance Manual § 631.2(b)(1) Private Employment Agencies, 2006 WL 4672853 (2006) (newspaper “is not liable as an employment agency” “[t]o the extent that a newspaper doesn’t exercise control, or actively classify advertisements”) (citing *Morrow*, 1972 WL 236, at *1-4, and Commission Decision No. 74-117, CCH EEOC Decisions (1983) ¶ 6429 n.2 (*Morrow* suggests a newspaper is an employment agency “if a newspaper actively participates in classifying the advertisement which it publishes”)). Until very recently, Facebook played a central, affirmative role in identifying and classifying the race, national origin, sex, and age of its users and sending employment ads to users based on such unlawful classifications.

Moreover, Facebook is not a newspaper or a similar entity that merely passively publishes the ads of others. Facebook functions as a modern-day marketing or advertising firm that assists employers to identify workers (including until recently based on their race, national origin, sex, and age), guides the marketing strategy, creates the ads, and delivers the ads to prospective employees. The only thing Facebook has in common with a newspaper from the 1960s (or even in 2020) is that it delivers advertisements. Even its delivery of ads is completely different than a newspaper’s delivery. Unlike newspapers that deliver the same paper to everyone, until very recently Facebook would send job ads to only certain people based on specific racial demographics, sex, age, and locations.

Can the problems of digital discrimination and analytic bias be reduced or eliminated by simply requiring employers to target certain numbers of members of each protected class? If not, why not and what alternative should be used?

Answer

In the short run, it would be an acceptable solution to reduce bias in digital advertising by requiring employers to target certain portions of each protected class. At the same time, advertising platforms and employers often do not have access to data or information on many of the protected statuses of applicants or employees, such as national origin, color, and religion. This would make it difficult to stop algorithmic bias for numerous protected statuses.

Moreover, such an outcome-oriented solution would not address the unfair *inputs* that algorithms utilize even when they are not related to jobs. Thus, in addition to requiring fair outcomes, it is important for legislation and regulations to require that only fair and job-related inputs be used for explicit targeting of audiences, lookalike audiences, and algorithmic delivery of job ads. Whether inputs are directly related to protected classes or can serve as proxies for protected classes, those inputs should not be permitted when determining which applicants will be targeted or excluded in job advertising and recruiting.

Can you discuss in further detail how Congress should classify entities like Facebook, LinkedIn, and ZipRecruiter to ensure that job applicants benefit from the protection of Title VII?

Answer

As I described in my testimony, there are at least two ways to ensure that online platforms and digital employee sourcing companies follow Title VII. First, Congress can establish aiding and abetting liability for entities that knowingly assist employers or employment agencies in committing violations of federal anti-discrimination laws.

Second, Congress can either broaden the definition of employment agency or create a new category of entities that must follow Title VII in the same manner as employers, labor organizations and employment agencies, such as an “employment services provider” category. The definition of “employment agency” or a new category such as “employment services provider” could be “Any person who provides employment services to, for, or on behalf of an employer, employment agency, or labor organization, including but not limited to publishing any notice or advertisement relating to employment, recommending, deciding, or influencing which persons receive advertisements or recruiting relating to employment, or recommending, deciding, or influencing which persons should be considered for, advanced in the hiring process, or hired.”

Jenny R. Yang's Answers to Questions for the Record

Following the February 5, 2020

Subcommittee on Civil Rights and Human Services

"The Future of Work: Protecting Workers' Civil Rights in the Digital Age."

March 10, 2020

Questions from Representative Suzanne Bonamici (D-OR)

1. In your testimony you noted that "the EEOC has authority to open a Commissioner's charge under Title VII and that the district offices may open a direct investigation under the ADEA and ADA where concerns arise." How often has the EEOC made use of this tool? Should the EEOC make greater use of this tool to better establish how our current anti-discrimination laws apply in the presence of predictive hiring technologies?

EEOC Commissioners have authority to issue charges of discrimination on their own initiative pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act. EEOC field office directors have authority to open directed investigations under the Age Discrimination in Employment Act and the Equal Pay Act. As the Supreme Court recognized in *EEOC v. Shell Oil Company*, 466 U.S. 54, 69-70 (1984), the Commission has the authority to issue and investigate Commissioner Charges under the same standards that apply to charges filed by members of the public. *Id.* at 81.

The EEOC has increased the use of Commissioner Charges since 2006 when the EEOC Systemic Task Force issued a report¹ that recommended increased use of Commissioner Charges and directed investigations as important tools for pursuing systemic investigations, which had been underutilized by the agency. In 2006, the Commission unanimously voted to reaffirm the importance of Commissioner Charges, and the EEOC initiated investigations as a central component of the its systemic program. From 2002-2005, the EEOC opened an average of three Commissioner Charges annually, compared to an average of 16.5 charges annually from 2006-2015. During this same period, approximately 75 percent of Commissioner Charges focused on discrimination in hiring, since workers typically lack information about discriminatory hiring policies or practices.

¹ Commissioner Leslie Silverman, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*, March 2006, https://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

As detailed in the report, *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*,² issued on July 7, 2016, hiring is one of the most difficult issues for workers to challenge in a private action. This is especially true when an algorithmic hiring screen leads to discrimination. An applicant is unlikely to have access to essential information about how an algorithmic hiring screen operates or to have insight into a broader pattern of exclusion necessary to challenge such screens. Even individuals who suspect a digital screen may be discriminatory often do not have the resources to bring such a challenge or may fear coming forward due to the risk of retaliation and harm to future job opportunities.

Effective oversight cannot rely on individual workers filing charges of algorithmic discrimination, given the barriers workers face in coming forward. The EEOC is uniquely suited to proactively investigate systemic recruiting and hiring discrimination concerns raised by algorithmic assessments through its Commissioner Charge and directed investigation authority. The EEOC has access to EEO-1 demographic data on the composition of an employer's workforce to inform investigations. Through its investigatory power, the EEOC can evaluate how algorithmic screens operate and impact applicants. For example, in the investigation and conciliation of a Commissioner's Charge, EEOC found that four of the assessments a national retailer used to screen applicants for hire violated Title VII and the ADA. The successful conciliation resulted in the employer discontinuing the tests and performing a validity study for the assessments, as well as providing \$2.8 million to those denied hire due to the allegedly discriminatory screens.³ Commissioner Charges and EEOC initiated directed investigations provide the EEOC with essential enforcement tools to proactively investigate the predictive hiring technologies to promote equal opportunity.

2. What issues do individuals with disabilities face in bringing claims of discrimination under the Americans with Disabilities Act for digital discrimination? What actions should be taken to make sure that protections under the ADA are enforceable?

Digital hiring systems raise particularly serious risks of discrimination against people with disabilities. Since disabilities manifest in a wide range of ways, it can be difficult for employers and test designers to consider the full breadth of barriers that hiring screens can raise for people with disabilities. This can also make it difficult to design solutions to meet the spectrum of issues presented. Algorithmic screening systems are typically trained on current employees' profiles, so the algorithm will attempt to select applicants with similar characteristics to successful employees. If people with disabilities are underrepresented in a current workforce, which is often the case, algorithms may not recognize the positive qualities applicants with

² *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, July 7, 2016, https://www.eeoc.gov/eeoc/systemic/review/#_ftnref22.

³ *Id.*

disabilities bring to the job and instead interpret underrepresented traits to be undesirable ones. For example, with video-based interviewing systems, AI matches applicants' facial expressions, speech patterns or cadence with current employees. People with disabilities, such as autism, may deviate from the typical patterns of eye contact or speech. As a result, these assessments may exclude highly qualified people with disabilities. To address these concerns, models must be trained on a diverse set of training data, including a significant number of people with a range of disabilities, so that an algorithm can learn characteristics of people with disabilities who are successful on the job. Another concern raised by machine-learning models is that researchers have demonstrated that some AI considers language about having a disability inherently negative.⁴ Many AI-driven hiring screens rely on natural language processing, raising a significant risk that machine learning models will reinforce and perpetuate bias against people with disabilities who have been historically excluded from job opportunities based on stereotypes.

Individuals with disabilities face significant barriers in bringing claims of digital discrimination. Because of the lack of transparency on how algorithmic hiring systems operate, applicants will often be unaware of when they may need to request a reasonable accommodation to be assessed fairly. In addition, because applicants do not receive information to explain why they may have been excluded by a screen, individuals are often unable to ascertain if a disability-related consideration contributed to that decision. To ensure ADA protections are enforceable, employers and assessment vendors should disclose sufficient information about how screens work and the characteristics that are measured, so that individuals can request a reasonable accommodation. In addition, where employers provide meaningful information about why a particular decision was made, applicants can raise concerns about variables that may operate to unfairly exclude people with disabilities and thereby assist test designers in improving their selection screens. Once vendors are on notice of challenges that impact individuals with disabilities, such as the way certain personality-based questions can exclude qualified individuals with mental disabilities, they should take proactive steps to redesign assessments to minimize bias not only for employers that may face an immediate risk of litigation but for all employers using those screens.

The EEOC is well positioned to issue guidance to employers on how to create safeguards to prevent disability discrimination in algorithmic employment screens. This could include how to document efforts to ensure diverse training data that include people with disabilities and how to conduct effective bias audits. Such guidance can also address information that employers and vendors should provide before an individual takes an assessment so an applicant can

⁴ Ben Hutchinson, Vinodkumar Prabhakaran, Emily Denton, Kellie Webstersdenuyl, *Unintended Machine Learning Biases as Social Barriers for Persons with Disabilities*. <https://storage.googleapis.com/pub-tools-public-publication-data/pdf/00f5e80a5ba35699fee847b0f564eba016f603b3.pdf>.

determine whether to request a reasonable accommodation. In addition, guidance for employers on the parameters for providing an explanation for why an individual is denied hire, will assist employers and workers in better identifying discrimination based on disability. The ADA prohibits employers from asking applicants to answer medical questions or take a medical exam before a job offer. Additional guidance from the EEOC on when employment assessments constitute an illegal medical exam such as through testing reflex times or screening for mental health issues through personality assessments would be valuable to employers and workers.

3. How do federal anti-discrimination protections in the United States compare to those in States or other parts of the world, such as the European Union's General Data Protection Regulation? Should Congress consider strengthening existing laws to something similar to these international standards?

The United States does not have comprehensive data and privacy protections similar to the European Union's General Data Protection Regulation (GDPR) and other international standards.⁵ More than one hundred and thirty countries have now passed comprehensive data protection laws.⁶ The GDPR, which went into effect in 2018, offers a robust approach to data protection that requires companies collecting or processing data of EU residents to comply with stricter transparency, accountability, and data minimization requirements. Under GDPR, individuals generally have a right not to be subject to a selection decision based solely on automated processing, if the decision produces legal effects or significantly affects an individual. A debate remains over whether GDPR and similar frameworks offer a "right to explanation" about specific automated decisions. Some assert that the GDPR does not by its terms provide such a right, while others contend that several provisions of the GDPR when read together require the provision of meaningful information about the logic involved in automated decisions.

To provide effective safeguards against bias in algorithmic decisionmaking, the United States may wish to consider adopting standards that explicitly require a meaningful explanation of the decision and set forth the parameters for what it means to meet this standard. Having a human as part of the process may serve as a check against bias, but it may not serve as a sufficient safeguard if the human cannot identify or understand why an algorithm produced a decision. Thus, the United States may wish to create standards to explain the contours of meaningful human review needed to minimize the risk of bias in automated decisions.

⁵ Kate Crawford, Roel Dobbe, Theodora Dryer, Genevieve Fried, Ben Green, Elizabeth Kaziunas, et al., *AI Now 2019 Report* (New York: AI Now Institute, 2019). https://ainowinstitute.org/AI_Now_2019_Report.html.

⁶ Graham Greenleaf, *Global Data Privacy Laws 2019: 132 National Laws & Many Bills*, (Privacy Laws & Business International Report 157 May 29, 2019: 14–18, 2019). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3381593.

[Whereupon, at 3:34 p.m., the subcommittee was adjourned.]

