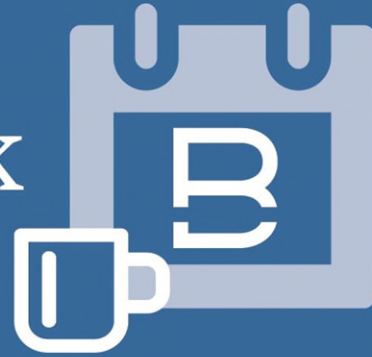


# The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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## EEOC Issues New Guidance on AI Use

The rise of artificial intelligence (“AI”) is all over the news of late, so much so that the EEOC has weighed in. The EEOC recently issued [new guidance](#) addressing the intersection of the ADA and AI software and algorithms usage by businesses. Many employers use AI software and algorithm tools to help screen applicants in the hiring process, including the use of resume-scanners that prioritize certain keywords in applications and “chatbots” that ask applicants about their qualifications to filter-out those who do not meet certain requirements. But, according to the EEOC, there are three ways in which a business’s algorithm usage may violate the ADA.

- The employer does not provide a “reasonable accommodation” that is necessary for a job applicant or employee to be rated fairly and accurately by the algorithm;
- The employer relies on an algorithmic decision-making tool that intentionally or unintentionally “screens out” an individual with a disability, even though that individual is able to do the job with a reasonable accommodation; or
- The employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA’s restrictions on disability-related inquiries and medical examinations.

Businesses don’t need to abandon AI tools and algorithms entirely. However, employers should take precautions to ensure their reliance on technology doesn’t give rise to an ADA violation. Consider the following:

- Tell applicants or employees what steps an evaluation process includes and offer to provide any assistance needed in completing the process. AI tools may not take into account the possibility that individuals are entitled to reasonable accommodations during the application process. For example, an AI-algorithm timed knowledge test may be difficult for a person dealing with a manual-dexterity disability. Providing an applicant with an avenue to request assistance if needed is essential to complying with the ADA.
- Track and analyze hiring data to ensure there is no disparate impact in interviews and hiring. Just because your algorithm claims to be “bias-free” or has been “validated” as such, this does not necessarily mean that the algorithm will not have an adverse impact in practice. Importantly, the EEOC also reminded employers that they are liable for vendors used in the hiring process, so employers will be liable for any AI tools that inadvertently create a disparate impact on disabled applicants.

With new laws going into effect and being contemplated across the country, employers should reexamine their AI and algorithm usage to protect against a possible uptick in AI-related lawsuits. Bassford Remele is committed to being at the forefront in assessing the interplay between AI and employment law. If you have any follow-up questions about your AI usage in the workplace, we are here to help.

#### **A Real-Life Example of the Perils ChatGPT in the Legal Industry**

One final AI-related follow-up; we covered some of the perils of using ChatGPT in a recent edition of [The Work Week](#). Well, our precautionary tale became a real-life nightmare in New York, as [covered in the news last week](#). A lawyer in New York utilized ChatGPT to write a brief in opposition to a motion to dismiss. Just like we warned, ChatGPT created citations to caselaw that did not exist. Opposing counsel noticed when they didn’t recognize the caselaw cited in the brief. The lawyer stated in a responding affidavit that it was his first time using ChatGPT and he was unaware that it could provide false information. In its order, the Court observed that the ChatGPT-brief appears to contain “bogus judicial decisions with bogus quotes and bogus internal citations.” Unsurprisingly, the matter is set for a sanctions hearing this week.

This case is a practical reminder that ChatGPT and other similar AI products are not a foolproof substitute for actual legal work. Be smart, be careful, and reach out to us before rolling the dice with AI!

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