

**EEOC Hearing  
January 31, 2023**

**Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier  
Unofficial, Machine-generated Transcript**

0:00

good morning and welcome to today's public hearing of the U.S equal

0:05

employment opportunity commission which will focus on navigating employment  
discrimination in automated systems

0:12

including systems using artificial intelligence or AI the commission has

0:17

been examining these issues since at least 2016. first big hearing on big data and

0:26

employment decision making then in 2001 uh I'm sorry 2021 we launched an AI and

0:33

algorithmic fairness initiative in which the EOC has engaged stakeholders through the listing  
sessions identified key

0:40

issues built our internal capacity through training and issue technical assistance today's meeting  
continues at

0:47

work the hearing will now come to order this journey is being held in accordance with the  
requirements

0:54

is available please visit our website site

1:03

[www.educ.gov](http://www.educ.gov) for just details on this service and I'd like to extend a very well warm

1:10

welcome and this is your thanks to each of the witnesses for your thoughtful written testimony  
and for joining this

1:16

important discussion today before we begin I will briefly explain the procedures

1:22

the hearing is being recorded will be made of today's proceedings the

1:29

recording and the transcript as well as the biographies and written testimonies of our extinct  
Witnesses

1:41

I am responsible for regulating the course of this here we will begin with the opening  
statements for each member

1:47

of the commission followed by witness testimony and questions from the commission

2:05

[Music] each member of the commission will have

2:11

three minutes for opening statements and I'll begin one of this nation's greatest threats is

2:17

our commitment to the principles of fairness Justice and inequality as a society we must ensure that new

2:23

technologies are used in ways that reflect the basic values that throughout our history have been helped to make

2:30

America better stronger and fairer as the title of today's hearing suggests rapid adoption of AI and other automated

2:36

systems has truly opened a new frontier in an effort to protect civil rights

2:59

500 companies now use some form of automated tool to screen or rank

3:05

candidates for hire in recent surveys of its members of the society for human resource management found that nearly

3:12

one in four medium-sized employers uses automation or AI in their hiring process

3:18

so today's tools first to raise awareness about the promise

3:25

everyone should understand and contribute to a public debate over these Technologies AI and other algorithmic

3:33

decision making tools offer potential for great advances but they also may

3:38

perpetuate for free discriminatory barriers including in employment the states are simply too high to leave this

3:45

topic just to the efforts the second goal is to ensure that the EOC continues to do its part from educating employers

3:52

vendors unions and workers to bringing an enforcement actions when necessary to

3:57

address violations simply put there's no exception under foreign

4:10

[Music]

4:18

Mark here if we could have um the vice chair quickly do a test as we are

4:24

experiencing some Echo and I just want to avoid that moving forward can you hear me we can and the echo is

4:31

results you may begin remarks Now by sure thank you so much yeah

4:38

so thank you so much chair Burroughs for that introduction thank you to all our

4:45

Witnesses for being with us today for this important discussion thank you to

4:52

the members of the public who are joining us and whose input on these issues will be so important going

4:58

forward we as a society have come so far in the area of artificial intelligence

5:05

in just the last decade the availability of massive amounts of data plus

5:11

advancements in computing power needed to process all those data have propelled

5:16

the development of new AI systems as chair Burroughs noted former EEOC chair

5:23

Jenny Yang and former commissioner Victoria lipnick were prescient when

5:28

they held a commission hearing back in 2016 on big data in the workplace and

5:34

our current chair borroughs has continued this important Focus through the commission's artificial intelligence and

5:41

algorithmic fairness initiative of which today's hearing is apart I'd also like

5:47

to thank in particular commissioner sonderling for his really thoughtful contributions in this area

5:54

the EEOC supports Innovation and we're excited about the benefits that AI can

5:59

provide these benefits can revolutionize the way that we work potentially

6:05

improving efficiency Precision excuse me and even

6:10

non-discrimination in employment decisions but we must ensure that those

6:16

benefits are delivered in compliance with our eeo laws and don't perpetuate

6:21

historical discrimination or even inadvertently exclude or discriminate

6:27

against applicants or employees on prohibited bases the concepts and legal standards are  
6:33  
familiar based on long-standing legal principles that have governed non-discrimination  
obligations for  
6:41  
decades for example dispute impact Theory makes clear that we're a  
6:46  
selection Criterion disproportionately excludes a protected group the employer  
6:51  
must show that the Criterion is job related and consistent with business necessity the uniform  
guidelines on  
6:58  
employee selection procedures provide substantial insight into how to make  
7:04  
that showing and much of that information remains relevant and useful today  
7:10  
but we have a lot to learn about how how AI is being and can be used in the  
7:16  
workplace how our legal standards apply and how we can prevent discrimination on  
7:22  
this year Frontier  
7:28  
for example how can employers ensure that the data used to train algorithms  
7:33  
is unbiased and representative independent of the input data how can we  
7:39  
track whether algorithms are implemented in a non-discriminatory way how can  
7:44  
vendors and employers work together to integrate non-discrimination principles  
7:49  
into the design and use of the AI systems how do we evaluate AI systems  
7:57  
that rely on such a vast quantity of data such a deep web of inferences that  
8:03  
even their designers cannot explain how they work are there different considerations that  
8:09  
should guide us when AI is used in different workplace contexts whether recruitment screening  
or employee  
8:17  
monitoring I'm so excited to hear from our Witnesses today and to work in  
8:22  
partnership with my EEOC colleagues and our stakeholders as we pursue a goal  
8:28

that I know we all share ensuring that we can enjoy the benefits of new technology while protecting the

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fundamental civil rights that are enshrined in our laws today is just a

8:41

down payment on this continuing discussion and I look forward to working together on these critical issues thank

8:47

you thank you and we'll go now to

8:53

commissioner Sunderland thank you over the past few years I

9:00

began to study the issues surrounding technology in the workplace I've gotten to know many of the witnesses testifying

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today I'm grateful you're all here while some are inclined to focus on the challenges of AI it is equally important

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to highlight that AI can mitigate the risk of unlawful discrimination and create accessible workplaces that were

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previously unimaginable all goals of the EEOC today we are overwhelmingly going

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to hear about the potential of AI to discriminate to codify and scale individual bias we will hear bold face

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assumptions about how vendors are designing and selling these programs and how employers are allegedly implementing

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them to the detriment of their workers however determining how the EEOC should regulate in this area it is essential to

9:42

hear from a diverse and wide range of stakeholders including everyone from workers civil rights groups employers

9:49

and critically developers and vendors and even those investing in the creation

9:55

of this technology if personally spoken with all these groups each with extremely different views on how to

10:01

address this budding issue no matter my own personal opinions as a commissioner I am Duty bound to listen carefully to

10:09

anyone and everyone who's willing to discuss unfortunately that is not going to be the case today our first formal

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hearing on artificial intelligence alone is curiously missing representation from those who are actually innovating

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designing building and selling these products how are we supposed to know what products are being developed how

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they are supposed to be used versus how they're actually being used without hearing from a single entrepreneur in

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the trenches making them further out of the 12 Witnesses invited to testify today two are on behalf of employer

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organizations not a single witness today has ever designed built marketed sold bought or had the burden of implementing

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workplace AI programs nor are they the employers ultimately responsible to the

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EEOC for the unlawful use of AI employment tools the vendors that I've met with are taking their

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anti-discrimination efforts seriously they believe in their algorithms and in their potential to promote equal

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opportunity they're willing to discuss their methods designs and provide us with information on what is working what

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is not and where they need the eeoc's help to ensure that bad actors do not discredit the entire industry this

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hearing would greatly benefit from their Lessons Learned Innovation and best practices the EEOC should welcome this

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interest as we are in a critical time where the software can still be developed and designed in a lawful

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ethical and trustworthy fashion with the eeoc's expertise before it is completely

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pervasive in businesses of all side today the commission and the public are being deprived of this benefit instead

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we hear numerous theories assumptions and accusations on how these vendors tools are being used to discriminate

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with no rebuttal this is a disservice to the public and undermines whatever guidance or regulations are subsequently

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issued from this hearing therefore unlike the last time the EEOC issued guidance on AI it is critical that any

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further AI action be subject to a robust public comment period whereby all are

12:00

entitled to participate by law thank you

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thank you commissioner sonderling will go now to commissioner Lucas

12:17

thank you chair Burrows good morning and thank you to all the witnesses for taking time to prepare your testimony

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and share your expertise with us today each of you brings a unique perspective on this important topic and I look

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forward to an engaging discussion as we've already heard today and we'll hear again from many witnesses artificial

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intelligence is a part of many of our daily lives and a large portion of Americans use and interact with some

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form of artificial intelligence every day the employment context is no exception companies large and small are

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incorporating AI into recruitment hiring training assessments compensation and terminations proponents of AI it promise

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that it'll provide new benefits and efficiencies in these processes however everyone involved in the discussion

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around AI both AI proponents those urging caution and others recognize the potential for intentional and

13:04

unintentional discrimination to occur from an increased dependence and use of AI in the employment decision-making

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process so how do we balance the benefits and efficiencies that AI can provide with

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potential pitfalls what standards should be adopted to allow for continued use and growth of AI while protecting

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against potential for discriminatory impacts and outcomes how do we provide approach the process of providing

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compliance assistance and guidance so employers can actively work to prevent discrimination without us overreaching

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or over regulating these questions are all important and how we answer them will impact employers and workers

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Nationwide as we consider these and other questions I want to emphasize that existing civil rights laws such as Title

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VII already provide robust protections against discrimination in the workplace provided that we use them to their full

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including taking a fresh look at underused Provisions these laws have been successfully applied to new and

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emerging Technologies in the past and I am hopeful that I can apply it to AI in the IAI context in a manner that ensures

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that emerging technology is used in a way that is consistent with equal opportunity at work navigating the promise and Peril of AI

14:10

in our workplaces will require a thoughtful and collaborative approach involving all stakeholders

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so today as we engage in this deeply important discussion I look forward to hearing each of the witnesses

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perspectives on this matter however I Echo commissioner sanderling's concerns that an important stakeholder

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perspective is missing for this conversation it seems unquestionable the vendors and other categories of third

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party entities as well as the employers who are using AI themselves are a critical part of the use of AI and

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employment life cycle and in particular if some are as if as some argue vendors and other developers

14:43

of AI play a crucial role in contributing to potential problems with the use of AI and it seems to me that

14:49

these entities must be directly engaged in order to reach any meaningful productive Solutions therefore I think

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it is unfortunate that we do not have witnesses here today that can directly represent this important category of

15:00

stakeholders thank you thank you it's now my pleasure to introduce the speakers on our first 15:07

panel in the order that they will be speaking today Professor

15:14

cerisement welcome it's a Prof he's a professor in computer science at Brown

15:19

University and the director of the center for techno technological responsibility he also previously served

15:26

as the assistant director for Science and and Justice at the White House Professor Pauline Kim Welcome is the

15:33

Daniel Noyes Kirby professor of law at Washington University School of Law in St Louis she's an expert on the law

15:40

governing the workplace and the employment relationship Professor Kim's current research focuses on the use of

15:46

big data and artificial intelligence in the workplace next we have Jordan's transcribe welcome

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to you as well so he serves as vice president and leads the day-to-day operations at the U.S Chamber Of

15:57

commerce's Technology engagement Center Mr Crenshaw also manages the chambers privacy working group which is comprised

16:04

of nearly 300 companies and trade associations welcome as well to renika Moore who is

16:11

the director of the aclu's racial Justice program she is leading a dedicated team that uses litigation

16:17

advocacy Grassroots Grassroots mobilization and public education to dismantle barriers to equality for

16:24

persons of color before joining the ACLU Ms Moore served as labor bureau chief of

16:30

the New York Office of the Attorney General welcome and thank you again to our Witnesses and as a reminder you each

16:37

have five minutes for your remarks our information technology team will keep track of the time with the timer you

16:43

should be able to see that on your screens and we will begin with Professor vinakatas subramian so you have the

16:52

floor

[Suresh Venkatasubramanian](#), Deputy Director of the Data Science Initiative and, Professor of Data Science and Computer Science, Brown University

thank you chair Bruce and thank you commissioners of the EEOC for the

16:58

opportunity to provide witness to the commission today my name is Romanian I'm a professor at Brown University and

17:04

director of the center for Tech responsibility I'm a computer scientist who for the last decade I studied the ways in which

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automated systems and especially those that use artificial intelligence May produce discriminatory outcomes in

17:17

employment performance evaluation and in many other domains and most recently I served as the assistant director for

17:22

Science and Justice in the White House Office of Science and Technology policy in the Biden Harris Administration and

17:27

co-authored the blueprint for an example of Rights a document that lays out five key protections for those meaningfully

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impacted by the use of Automation and provides detailed technical companion for how these protections can be

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realized today I'd like to emphasize some of the key points from my written testimony in

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these oral remarks we are living in an age of fast-moving technological innovation that expands

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our idea of what's even possible as a computer scientist this gives me great joy to be part of this revolution

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we're also living in an age of unchecked Tech deployment that has disrupted systems and harms people in ways that

18:05

we're only beginning to reckon with there are algorithms for screening candidates that are discriminatory

18:11

outcomes they're tools that claim they can see inside our mind to our personality but that are based off an

18:16

unsound science there are unaccountable and opaque systems that lack the accountability we expect when life-altering decisions are made upon us over the past decade I've helped create

18:22

and have been part of a research Community comprised of technologists social scientists lawyers and academics from many disciplines

18:35

and what our research has shown is that data-driven Tech like Ai and machine learning

18:41

when deployed unthinkingly and without proper guard rails in place will inevitably cause Harms

18:49

so what should we do about it there are two problems that we need to solve here firstly we need to know how to install

18:57

guardrails around technology and thankfully years of innovative research and Collective action by policy makers

19:03

practitioners and researchers has given us a strong set of guardrails to work with the blueprint for an AI Bill of Rights

19:10

the AI risk management framework developed by nist which complements and is alignment of the grid and the eoc's

19:16

very own guidance on how automated hiring systems might comply with the Americans with Disabilities Act and so

19:22

much more these guidelines have many elements in common they say that claims that a piece of

19:29

hiring Tech is safe and effective should be verified they say that claims that Tech mitigates

19:35

to spread impact should be verified they said that this verification should continue after deployment on an ongoing

19:42

basis because after all the key advantage of machine learning is that it learns and adapts and so should its

19:48

verification they say that stakeholder input especially from those impacted by

19:53

technology is crucial to build trust and ensure that we get the benefits that

19:58

technology promises us and there's a second problem that we would solve we need to create positive

20:05

momentum towards developing and installing such guardrails many argue that guardrails limit

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Innovation and the potential for world-changing technological development I wish those who make those arguments

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could talk to the people I speak with developers inside some of the biggest Tech firms out there

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students entering the field of Technology Advocates who see the promise of technology to help their communities

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what is common amongst all these folks is fearlessness and Imagination and a

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strong belief that Tech is in fact malleable enough to be shaped in whatever direction we want to take it in

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they have much more faith in technology and its immense potential than in fact those arguing against those guardrails

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they see that protections help shape and direct innovation in ways that we can all benefit while also building Trust

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and they recognize that investment is needed to innovate that this investment will pay off richly because of benefits

21:02

will be widely distributed rather than only to a few and will in fact keep the United States at the Forefront of that

21:08

innovation we can help Channel this fearlessness and creativity with the guidance that

21:13

the EEOC can provide we don't need to be scared scared of experimenting or scared of

21:19

changing the way Tech development has gone on thus far but we need your help to do this  
thank

21:25

you for your time thank you and we'll go now to Professor Kim

21:39

[Pauline Kim](#), Daniel Noyes Kirby Professor of Law, Washington University School of Law

chair Burroughs Commissioners thank you for the opportunity to speak to you today I'm the  
Daniel Noyes curvy

21:44

professor of law at Washington University School of Law in St Louis before I was a law professor  
I was a

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civil rights lawyer in San Francisco one of the very first cases I worked on as a new lawyer and  
this was decades ago

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was a suit against a temporary employment agency this firm received requests for

22:04

temporary help and match them with workers with the required skills in doing so

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this agency willingly fulfilled customers discriminatory requests if for

22:16

example a company needed a temporary receptionist and wanted a white worker the  
temporary agency would only send

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white workers now today that kind of old-fashioned discrimination can occur

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through AI tools that automatically screen job candidates or match them with open positions

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the employer doesn't have to explicitly State a discriminatory preference the

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software might simply learn those preferences by observing its past hiring decisions

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and even employers who have no discriminatory intent could inadvertently rely on an AI tool  
that is

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systematically biased so these automated systems truly do represent a new frontier in civil  
rights

22:59

they use novel technologically complex processes but they can produce the same

23:06

troubling effects as past discriminatory practices so Title VII clearly prohibits the

23:12

blatantly discriminatory acts of the temp agency years ago and it undoubtedly applies to new forms

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of discrimination that are emerging today however the doctrine that has developed

23:24

with human decision makers in mind may need to be clarified to address the risks that are posed by automated

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systems simply prohibiting a model from using race sex or other protected

23:36

characteristics as a feature will not prevent it from discriminating because an AI tool can exclude workers

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by relying on proxy variables on the other hand a blanket prohibition

23:49

on considering protected characteristics when building a model is counterproductive

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in order to conduct audits to identify discriminatory effects or to diagnose why they are occurring

24:01

AI designers and employers will need information about those characteristics

24:07

so given the unique risks of automated systems I think there are several points on which the EEOC could offer some

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guidance to clarify the law right now so first the agency could make clear

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that AI tools that cause discriminatory effects cannot be defended solely on the

24:25

basis of statistical correlations instead the employer should have to demonstrate the substantive validity of

24:31

its selection Tools in other words that they are actually measuring job-related skills or attributes not simply relying

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on correlations and that they're not relying on any kind of arbitrary or implicitly biased features

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second the EEOC could offer guidance on the duty of employers to explore less

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discriminatory Alternatives in many situations there are multiple solutions for a given optimization problem

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employers should explore the available options and select one with the least discriminatory effects

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third the EEOC should make clear that taking steps to correct or prevent a

25:09

model from having a disparate impact is not a form of disparate treatment the

25:15

most effective strategies for de-biasing automated systems require paying attention to race and

25:21

other protected characteristics when building the model these strategies do not make decisions

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about individual workers turn on a protected characteristic and therefore they do not

constitute disparate

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treatment by making this clear the agency can encourage voluntary employer

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efforts to rigorously examine their practices and to avoid discriminatory effects

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and finally the EEOC could offer guidance about the legal responsibilities of labor market

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intermediaries like online advertising and job matching platforms employers

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should also be educated about how these platforms work and the risks that even when they are mutually targeting their

26:03

ads to try to reach a diverse audience they might be delivered in a biased way

26:09

because of the algorithm in the platform and that would reduce the diversity of the applicant pool and I think

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increasing understanding about that among employers could help with their recruitment process

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so automated decision systems are not inevitably discriminatory a well-designed and implemented system can

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reduce the influence of human bias and that's an important opportunity and

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important development but these tools are also not inherently objective or neutral either and the EEOC can play a

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critical role in ensuring that they are not misused and that equal opportunity is open to all in the era of big data

26:46

and AI so thank you again for the opportunity to speak thank you Professor Kim and now Mr  
26:54  
Crenshaw we go to you

[Jordan Crenshaw](#), Vice President, U.S. Chamber of Commerce

thank you good morning chair Burroughs

26:59

members of the EEOC my name is Jordan Crenshaw and I'm the Vice President of the U.S  
Chamber Of commerce's Technology

27:05

engagement Center it's my pleasure to talk to you today about how we can work to build  
trustworthy artificial intelligence AI

27:12

is changing the world as we know it by 2030 AI will have a 16 trillion dollar impact on the global  
economy but from a

27:19

practical level what does this mean AI is helping medical researchers develop future cures and  
tailor treatments to

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new variants of viruses and it's bolstering our cyber defenses against an evolving digital threat  
landscape

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but also from an employment context it's helping tackle supply chain issues where we have a  
lack of available truckers

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filling gaps like patient monitoring in places where there is unmet Need for skilled nurses  
assisting small

27:43

businesses to find qualified candidates for open positions particularly from non-traditional  
applicant pools and it's

27:49

helping employers avoid void their own potential bias in the hiring process AI is already here it's  
not going away

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and we cannot sit on the sidelines businesses at all levels must come to rely upon this  
technology a recent

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report that we release highlighted the importance of using technology by small businesses  
during the pandemic and a few

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of the takeaways from this report are 93 percent of small businesses are using at least one  
technology platform when small

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businesses use technology they contribute 17.7 trillion dollars to the U.S economy 86 percent of small

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businesses say technology helped their business survive coven 19. and 25 percent of small businesses actively

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plan to use AI in the near future however for AI to be fully embraced by

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Society Americans must have trust in it and while AI has many benefits as I

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previously mentioned we must also be cognizant of the fact that AI also brings a set of unique challenges that

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should be addressed so that concerns over its risks did not dampen Innovation and also help the insurance ensure the

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United States lead globally and trustworthy AI we recently pulled the American public

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about their views on artificial intelligence and if they generally help or hurt Society uh the findings were unanimous in that

29:02

most Americans learn about more Americans learn about AI the more comfortable they become with its potential role in society in fact the

29:09

same polling showed that 85 percent of Americans believe the U.S should lead an AI and nearly that same number of boys

29:15

that America is best positioned to develop ethical standards for it we agree

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it's why the chamber last year established its Commission on AI competitiveness inclusion and Innovation led by former Representatives John

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Delaney and Mike Ferguson this commission has been tasked with developing policy recommendations in

29:32

Three core areas trustworthiness Workforce preparation and international competitiveness

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our commission held field hearings in Austin Silicon Valley Cleveland London and even here in Washington D.C

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we've learned a lot and we plan to release our final recommendations in March of this year in the meantime while

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we wait for those recommendations we offer the following observations and recommendations about what it will take

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to maintain trustworthy AI leadership the federal government has a significant role to play in conducting fundamental

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research and trustworthy AI the chamber was pleased to see passage of the chips and science act in hopes to see the

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necessary Appropriations made for its implementation for trustworthy air d we also encourage investment in stem

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education we need a trained skilled and diverse Workforce that can bring multiple voices to coding and developing

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systems artificial intelligence is only as good as the data that it uses and that is why it is key to both government

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and the private sector team up to ensure there is quality data for more accurate and trustworthy AI government should

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prioritize improving access to their own data and models in ways that respect individual privacy and as Congress

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Congress looks to address issues like consumer privacy policy makers must be careful in whether or not they place too

30:44

many restrictions on private sector collection and use of data that could actually inhibit the ability of developers to improve and deploy AI

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systems in a more Equitable manner we discourage one-size-fits-all government mandates such as the use of

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third-party Auditors until standardization and best practices have been developed as technology like AI can

31:03

be used as a Force for good and employment we would caution against agencies viewing the mere use of sophisticated Tech tools like AI as

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suspicious and finally we must Embrace open source Frameworks like the nist AI

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risk management framework which is a consensus driven cross-sector and voluntary framework to leverage best

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practices these recommendations are only the beginning and we look forward to sharing our own AI commissions results

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with you soon so thank you for your time to address how the business Community can partner with you to maintain

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trustworthy AI leadership especially in employment thank you thank you Mr Crenshaw and we look

31:38

forward to those recommendations uh we'll go now to Miss Moore thank you

31:44

[ReNika Moore](#), Director of Racial Justice Program, American Civil Liberties Union (ACLU)

so I want to thank you chair Burroughs and the commission for the invitation to join such an esteemed panel of speakers

31:49

today the ACLU has engaged in advocacy and research to advance equity in the

31:56

use of Technology several years ago we with outning golden and the

32:01

communication workers of America filed a charge with the commission challenging Facebook's discriminatory ad targeting

32:07

of Housing and employment ads and we've also worked with CDT and other civil

32:12

rights organizations to develop civil rights standards for 21st century employment selection procedures which

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you'll hear more about from cdt's Matt Shearer later today and so we've already heard from the

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Commissioners and from other Witnesses about the benefits and the potential that new Ai and machine learning tools

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can make to the process of finding a job and make it more open and inclusive for people who historically face

32:37

discrimination but those benefits are by no means inherent to the tools and it's important

32:43

that we have necessary oversight and accountability to ensure that all workers have access to jobs

32:51

and one of the major reasons that we see that AI um does not function properly is that it

32:58

Powers tools that are trained and operated using large troves of data to other systems that may have structural

33:04

discrimination and what I'll talk about two examples where we see marginalized groups being disadvantaged in the data

33:12

first we see people of color are overrepresented in undesirable and unreliable data that often foreclose job

33:18

opportunities so I'm thinking of records that come from **criminal proceedings from eviction proceedings and from credit**

33:25

**history with criminal legal records** we know that black Latino and Native American people

33:31

are disproportionately represented in **criminal** databases due to variety of factors including racial profiling of

33:38

people of color and harsher outcomes in the **criminal** legal system with **eviction records** we similarly see

33:44

that black women are more likely to be targeted for **eviction** by landlords than other similarly situated groups of

33:50

renters and we know the data sets containing **criminal** legal records and **eviction**

33:56

records are also notoriously poor quality they contain incorrect or incomplete

34:01

names old or out of date entries and non-uniform terms that describe charges

34:06

or dispositions and other information that's necessary to understand outcomes

34:12

and with credit history because of a history of redlining and the targeting of predatory credit products like payday

34:18

loans and other barriers to credit we see the people of color have disproportionately high rates of

34:25

negative Credit Data and like the data from **Criminal** and **eviction** proceedings Credit Data is Rife

34:31

with data quality problems including errors and misleading or incomplete information

34:37

and so many AI driven selection tools heavily if not exclusively rely on data

34:43

from these sources to conduct background checks and as a result we see that black latino

34:49

Native American and other people of color may be more likely to be disadvantaged or lose out on job

34:54

opportunities because the data tell an incomplete or inaccurate story of the kind of candidate or employee they are

35:03

a second example we see is under representation of people with protected characteristics in the data that's often

35:09

used for AI tools like ad targeting or resume screening and several factors can

35:14

contribute to underrepresentation one we see groups of color on the wrong

35:20

side of the digital divide we know that black Native American and Latino households and people with disabilities

35:26

are less likely to have reliable high-speed internet access and without that kind of access people are less

35:32

likely to engage online with many of the systems that produce data including high quality data that are used to train and

35:40

develop tools we also know that trans people and other lgbtq people are more likely to use

35:46

names and pronouns that do not match their government identification which can obscure their information in data

35:54

and this underrepresentation of marginalized groups can create barriers to opportunity including learning about

36:00

jobs completing preliminary screening exercises or requesting accommodations

36:06

or assistance and so I and other Advocates speaking today offer several recommendations to

36:12

the commission to strengthen compliance and educate employers and to empower workers and I'll emphasize too that

36:20

particularly align with the eoc's recently released strategic enforcement plan we recommend that the commission

36:27

continues to pursue opportunities to increase enforcement including strategically selected targets to ensure

36:34

that we have accountability in the use of these systems and we commend the EOC on the initial guidance

36:41

on ADA compliance last year and we recommend that the commission issue guidance for Title VII compliance as

36:48

well as the ADEA identifying the most problematic tools and practices

36:54

these Technologies are complex and they're operating at a scale that's really unprecedented and so I want to

37:00

end by thanking the connect commission for leading this effort to guarantee the rights of workers online and offline

37:06

thank you thank you Miss Moore and to all of our panelists and so we will go now to

37:12

questions from the commission each commissioner will have 10 minutes for questions of this panel and I'll begin

37:19

with um Vice chair Samuels of the fourth thank you so much chair Burroughs and

37:26

thank you so much to our Witnesses for such insightful testimony I have many

37:31

more questions than I'll have time to ask today so I really do hope that we can continue this dialogue down the road

37:39

um but my first question I think is for Professor Kim um you talked about the difference

37:46

between correlation and substantive validity I wonder if you could say a

37:52

little bit more about that and about your views about what you guessed the uniform guidelines on employee selection

37:58

procedures requires you guess prefers to correlation but also makes clear that

38:06

employers have to abide by generally accepted validation standards and talks

38:12

about being job related and consistent with business necessity could could you

38:17

talk about what that showing would require sure so um the uniform guidelines talk about

38:24

several different ways in which validity can be established and I think one of those in particular the Criterion

38:30

related basis for validity uh there's some ambiguity around that and some have

38:35

suggested that if um that if a tool can show a

38:41

statistically significant or robust correlation between a job outcome

38:46

without really understanding why the features that are fed into the system are producing that robust statistical

38:52

correlation um that would nevertheless be sufficient to to validate the tool my concern is

39:00

that particularly because of the big data that is being used right now where uh some of these systems some systems

39:07

use you know very carefully curated data sets and and others some less

39:13

responsible vendors can go out and collect a lot of data um and just sort of feed it into the

39:20

system and see what kind of patterns emerge and the concern there is if

39:25

they're if they really don't know what the different features are that are being relied on and how they might relate to job performance or job skills

39:33

um they might be turning on they might show a strong correlation but it might

39:38

actually be that the correlation is a proxy for a protected characteristic or

39:44

is turning on some kind of um characteristic that um that if we were

39:50

to examine it more closely would say well maybe maybe that that's actually a proxy for a for some kind of biased

39:56

outcome and this goes again to this question of explainability where there's a lot of discussion around AI

40:03

explainability um so if for example um it turns out that positive job

40:10

performance is correlated with something like um the prediction that somebody is

40:16

likely to stay on the job for a long period of time if turnover is a consideration right

40:21

um or that they're not likely to take breaks in employment we might want to know that that's what's driving that the

40:28

outcome because it might be that that's actually just turning out to be a proxy for something like uh women of

40:33

childbearing age or individuals with disabilities who are more likely to take a break so I think it's important

40:39

um to clarify that a mere statistical correlation is not enough to justify a

40:46

tool thank you that's very helpful and I I take it your view is that you just

40:52

requires some showing of job relationship and causation Beyond correlation

40:59

um thanks very much I I have a question for uh Professor venkata subramanian

41:06

um you previously worked with uh an AI vendor and I'm interested about your

41:13

experience there can you talk a little bit about what kinds of audits or

41:20

evaluations vendors are doing to try to evaluate both the disparate impact of

41:27

their potential disparate impact of the tools that they're developing and the

41:33

validity or job relatedness of those criteria yeah thank you for that question and um

41:39

I will say that you know while I'll try to answer the question in the general and not try to be too specific but yes I

41:45

did work with one of the vendors or you know an imposter period in general I think

41:51

um at least in my experience vendors look to guidelines like those provided by the

41:57

EEOC to decide what to test and test only those things um if if they're if they're if they're

42:04

asked to sort of test for a specific form of disparate impact with regard to a specific characteristic like say for

42:11

example race that is exactly what they will do and they will do nothing else and as Professor Kim mentioned the

42:18

broader a broader understanding of the use of these Technologies in these contexts requires not just a narrow

42:25

focus on specific tests but a broader understanding of where this causation might be coming from and what could be

42:31

possible proxies and so I think a lot of the testing is done in good faith with whatever available Technologies there

42:37

but it's done in a way that is sufficient to answer potential legal inquiries and more testing is not done

42:44

because of the risk of the potential for future exposure if someone asks what the

42:49

result of the testing was so it's very conservative very geared towards satisfying the guidelines and that's

42:54

that's what I've seen in my experience both working directly as well as just seeing how this works and I should also

43:00

say that there are a lot of very good I mentioned like I mentioned a lot of very good uh Technologies working in these

43:07

settings really trying to push the envelope of what they can do regarding understanding how this AI system is

43:13

working how it can be done to mitigate problems and often there are

43:18

they need to be careful in what they test to make sure they don't incur liability later on and so that's become that

43:25

becomes a tension between the developers who want to do more testing and more evaluation and those often above them in

43:31

the management chain who are asking them not to that that's a helpful cautionary note

43:37

thank you uh with my remaining time I'm hoping that I can ask two questions uh

43:42

the next one is for Ms Moore um I think you talked about

43:47

underrepresentation of certain groups in the data that algorithms rely on and I

43:54

think that you are likely familiar with the announcement that meta made recently

43:59

about its variance reduction system where it is trying to identify variables

44:06

that might be proxies for protected characteristics one of the things that  
44:13  
meta noted was that the absence of data on certain things is hampering efforts  
44:20  
to evaluate impact and so my question for you is should we be collecting more  
44:27  
data about demographic characteristics or is that something that you too risky  
44:33  
for us to do even if it's in the interest of ensuring the fairness and  
44:39  
validity of particular selection tools  
44:44  
I think it is critical to to collect this data we have seen that across different sectors including in  
the  
44:51  
criminal justice sector as well and we rely on the collection of that data to  
44:56  
be able to understand what is happening um in terms of race and we know that  
45:01  
there are proxies for race that even if you're not explicitly collecting for example for race that  
proxies like zip  
45:08  
code um proxies like um college education there are other  
45:14  
ways in which often we we have seen AI systems learn and be able to accurately identify  
45:20  
um race um even when that specific characteristic is removed from the  
45:25  
system so I think we do need that visibility in order to monitor um and we we need the  
additional  
45:32  
transparency and we have recommended um that that be a that that be a feature of audits and  
that that is an area there  
45:39  
where the EOC can provide additional guidance and we would like to see the ability for  
independent audits in this  
45:46  
space in order to understand and learn how these systems are working um as per as Professor  
Kim noted it's  
45:53  
often unclear how exactly the algorithm is learning and why it is coming up  
45:58  
um with the with the outcomes the recommendations that it is um and that's that can be based  
on

46:04

correlations that um have nothing to do with job relatedness thank you that's helpful to hear  
Let Me

46:10

Circle back around to Professor Kim if I might just to say you've noted that you

46:16

think it is both imperative and lawful for designers and users of AI tools to

46:24

take protected characteristics into account can you say a little bit more about why you think  
that's important and

46:32

what the lawful approaches to doing so are yeah so I think the the the biggest

46:39

because of the possibility of proxy variables because of the possibility that

46:44

um past patterns of disadvantage are inadvertently brought into these systems

46:49

it's really important to be able to audit them and to assess them on an

46:55

ongoing basis and and I think there's a pretty broad scale agreement about that even if there's  
some disagreement in the

47:01

details of what that would look like but in order to do that in order to see if there are disparate  
impacts that are

47:07

occurring or to figure out where the problem is coming from is it a problem with  
underrepresentative data is it a

47:12

problem with four quality data um you know is it a problem with some kind of bias feature we  
need to have

47:19

information the designers of these products need to have information and they need to have  
certain degrees of

47:26

freedom to be able to explore that and I think the concern is If the message gets out if you take  
race or other protected

47:34

characteristics into account ever or anywhere in the model building process you're somehow  
going to run afoul of the

47:40

law that's going to tie the hands of the Builders of these systems to actually

47:45

try to understand what's going on and how to remove that bias so I think it's a fine line to walk  
but I think it is

47:52

important that um that there's a recognition that using this information to de-bias these

48:00

systems is not a form of discrimination and that employers and Builders of these systems should have some degrees of

48:06

freedom to do that in a way that is producing less discriminatory effects

48:13

well thank you so much to all of you again I have many more questions than I have time for but I really appreciate

48:19

all your input thank you we'll go now to commissioner sunderling

48:27

uh thank you uh first I'd like to go to Mr Crenshaw at the chamber

48:34

uh Mr Crenshaw at the chambers um ctac you've really been looking

48:39

broadly about regulation of artificial intelligence not just here in the United States

48:45

um but worldwide I've had a seat at that table so you know today we're talking about the use of AI employment

48:51

um but in your work at the chamber you've been looking at every agency under every law whether independent

48:59

agencies or their actual cabinet agencies so can you just uh kind of give us an overview of the general approach

49:06

that you're seeing the different factions of government with different jurisdictions taking on uh regulating Ai

49:13

and then the second part of that you know from your opinion and the private sector's opinion you know which one

49:19

seems to be uh the best approach no thank you commissioner I think that's

49:24

a great question um I think what we have seen um in the business Community uh is a variety of

49:30

approaches uh that have been taken um uh So currently um uh the uh National

49:37

Institute for standards and Technology over at the Department of Commerce released its voluntary risk management

49:43

framework uh designed to mitigate risk um this was congressionally mandated

49:48

from legislation put forward uh by Representatives Lucas and Johnson it was

49:54

bipartisan in nature um and I think one of the things about that approach uh was that it was open it

50:01

was transparent it brought together multiple stakeholders to develop uh voluntary uh best practices and

50:08

standards to mitigate risk for AI uh and I think in particular that approach is

50:15

helpful for small businesses for example who generally cannot weather or compete

50:21

with regulations uh like their larger counterparts can and this enables greater flexibility

50:27

um for those small businesses to mitigate risk um and I think one of the things about

50:33

the missed approach was it was it's iterative um every step of the way the public was involved uh had noticed about what was

50:40

coming next and what the language would look like potentially and also what it in fact take stakeholder input across

50:47

the board there's also a process right now that's congressionally mandated uh that's the

50:53

national AI advisory committee and that is also congressionally mandated that brings together an entire Committee of

50:59

industry and academic experts um in a way that's very similar to our own AI commission at the chamber and

51:06

they're looking at developing policy recommendations as well they're also doing field hearings they're also

51:11

seeking robust uh public record uh in their own recommendations and and I

51:16

think one of the things that's important as independent agencies look at a potential guidance or regulations or Frameworks

51:24

that they develop a robust record um you know we actually sent a letter to Independent agencies uh in November of

51:31

2021 really emphasizing the importance of of agencies taking an independent look at the data in front of them and

51:38

developing a robust record so that they're in compliance with the APA as well as enabling them to still continue

51:45

to receive Chevron deference in courts and it's important that agencies do develop those robust records so those

51:52

are those are examples of processes in place that have been put together to really develop those Frameworks other

51:58

other things we've seen though obviously we've seen the introduction of the AI Bill of Rights out of the White House

52:06

um I would say that one of our concerns there is we did not see quite as much

52:11

public input as we would have liked to have seen into that approach before it went out

52:17

um so I think that's one consideration that we'd have and that was also not a congressionally mandated product also

52:23

we've seen legislation going forward the American data privacy and protection act that does make it illegal to use

52:31

algorithms to discriminate against protected classes I think most in Industry would be uh if not all are

52:38

supportive of that full stop uh and but I do think that there are concerns there about potential requirements around

52:44

impact assessments and what type of risk is required in that instead for impact assessments to be triggered and finally

52:51

we've seen legislation in cities like DC that could potentially require small businesses to have to conduct impact

52:57

assessments and be subject to private rights of action that have failed so far and an employment specific regulation

53:03

too uh in the city of New York uh so we have seen efforts in the states we've

53:08

seen Everts on the federal side but you know in terms of the approaches that we find to be the best uh when you bring uh

53:16

different interests and stakeholder groups together uh whether it be Academia whether or not it'd be civil

53:21

society or industry it's best to have an open process one with a robust record

53:27

and one that's iterative so everyone is on notice about the different processes and steps going forward with the

53:33

development of a framework thank you for that very thorough uh comprehensive overview what I got out of it is obviously a transparency and

53:41

building trust through having a diverse set of stakeholders involved which seems other federal government agencies are

53:46

doing as well as what you're doing in the private sector you know the testimonies you've been doing across the country also have not been limited to

53:52

certain groups you have civil rights groups you have employers you have vendors there so I think that um obviously builds long-term says

54:00

guidance that everyone has a part in opposed to uh unilaterally issuing guidance so uh thank you I'm going to

54:06

move on in the time I have remaining I want to uh I'm just going to go with Suresh if I may a question for you um

54:15

thank you for your service recently in the federal government I know you're back uh in the private sector now so you

54:21

can maybe talk a little more freely and that the Bill of Rights we just heard about I know you were a co-author of

54:28

that and spent a lot of time in government working on that uh with the five principles safe and effective systems algorithmic discrimination

54:34

protections data privacy notice and explanation alternative options I'm just going fast for the people who don't know

54:39

of it so now um and those are you know it's a framework for everyone involved

54:46

in the private sector and government to use when uh taking AI into account they're designing it using Etc so now

54:53

that you're out of the government um what you know would have been if it was just more than five if there was a

54:58

five through ten or five through seven what uh essentially would you like to be in there in a second version of it what

55:04

didn't make it in there and what could be in there that could really help us here at the EOC what we're doing that didn't make the first cut

55:12

thank you for the question commissioner um actually I have to say that I think that

55:18

we spent a lot of you know a lot of time a lot of consultation figuring out what would be protections that made sense

55:25

that weren't too many that weren't too excessive but that captured the essence of what of the concerns that people have

55:31

been talking about regard to AI systems and I have to say these five cover all

55:37

of it and you know we were you know when you look at the regulations and the guidelines and the Frameworks all across

55:42

the world the oecd guidelines the guidelines on the general partnership and others they're they're very much in

55:48

line with the guidelines we had here and those five principles so I think at least I personally am quite happy with

55:54

where those five principles landed your other question was you know what things didn't make it in and what things I think

56:00

I think it would have been really great and I think we can we're continuing to

56:05

work on this is to really spell out the expectations of technical companions so I'm a computer scientist and you know

56:11

I'm a card-carrying computer scientist I like to say I believe that we have the technology and we have the Innovative

56:17

tools like things like explainability things like audience to be able to make sure that we can actually deploy AI in a

56:23

way that's great for everyone but with the guardrails and I think the technical companion does goes a long way towards

56:28

spelling out what those might look like but we can do a lot more and I think specific sector guidance especially in

56:34

the context of hiring like that EOC can do could really push things a long way forward to making this real and making

56:40

them concrete and tailored for the context where it matters here in hiring in a way that's again balances the

56:47

importance of using AI when it's effective with the guardrails that we want to put in place I appreciate that and as card-carrying

56:54

lawyers on the commission here we certainly need your input on on how to do that in my remaining uh minute and a

56:59

half I do want to get to uh Professor uh Kim uh you know as we've discussed uh

57:05

your paper in 2017 data-driven discrimination at work uh you know I've I've read carefully and uh I you know we

57:13

talk about in that paper you talk about uh classification bias and how classification bias suddenly you know

57:19

under Title VII which is a term um that I think you kind of coined or

57:25

raised awareness of in this paper on how AI can really bring this sort of new or

57:30

less used theory of discrimination under Title VII uh in the remaining time can you just uh tell us your point on that

57:37

uh that you brought up in the paper yeah sure so um classification bias was

57:44

something that I talked about in that 2017 paper um because I wanted to point out that uh

57:51

kind of the point that a number of us has made right that the new forms of discrimination

57:56

they're concerning they look a lot like traditional disparate impact but they raise some different questions because

58:02

of the way in which these tools operate and so I think you know we can think about them as disparate impact but I

58:09

thought it was also important to to sort of have another way of conceptualizing it so that we wouldn't necessarily be

58:15

completely trapped in the existing Doctrine around disparate impact if it

58:21

didn't fit this these new technological tools and so that was part of the idea to kind of go back to the text of the

58:27

statute and really think about um in 703 A2 what was it that was

58:33

intended to be forbidden and could that go a little bit beyond our you know sort of a too formalistic understanding a

58:39

different impact that we might have today and I think it's a you know fascinating Theory and something that you know we should consider how when

58:46

applying these new technologies to the older laws uh you know there could be different looks at you know a statute

58:52

you've seen many many times so thank you all very much for testifying and for the answering questions

58:59

thank you and we'll go now to commissioner Lucas

59:05

thank you um I want to follow up with uh you

59:11

Professor Kim and continue on uh some of this I am very interested in

59:16

particular about exploring the scope of textual liability under Title VII

59:22

um we talked about classification bias and the classification Provisions um uh something I don't think I saw as

59:28

much in your article uh in 2017 but perhaps was there and I apologize I missed it was the classification bias

59:35

classification prohibitions are also in the employment agency prongs of Title VII which are several of them

59:42

um and in particular I'm just very interested in the scope of textual liability for non-employer entities particularly employment agencies so

59:50

um as I'm sure you know but for the benefit of the group discussion Title VII has a separate liability provision

59:56

for employment agencies and the Title VII defines the term employment agencies

1:00:02

to mean an entity that regularly undertakes or with or without compensation to procure employees from

1:00:08

an employer or to procure for employees opportunities to work for an employer and the commission has both a 1990 and a

1:00:15

1991 guidance unemployment agencies where the nub the operative consideration is whether or not the

1:00:21

principal function or major activity is to procure employees or employment opportunities so in light of those

1:00:26

background considerations I was interested in having you explain more why you think that it's uncertain

1:00:34

whether an existing law reaches labor market intermediaries like online advertising and job net matching

1:00:40

platforms and unclear whether or not they um would be considered employment

1:00:45

agencies so I think that um job etching platforms would more easily

1:00:54

fall under the definition of an employment agency because those platforms their primary function

1:01:01

is to match uh job candidates and employers who are looking for looking to

1:01:09

hire somebody so in terms of the definition those platforms really are in the

1:01:15

business of procuring employees or procuring employment opportunities for for job candidates that seems to me

1:01:23

um pretty uh pretty comfortably to fit within the definition of an employment agency I think the online advertising

1:01:31

platforms um is a little bit more ambiguous when you have for example uh Facebook or

1:01:39

Google um and they are sending out employment ads but they're also

1:01:44

obviously a platform for all kinds of advertising and their role is a little

1:01:51

bit different from that of the job matching platforms I think that's a closer question  
1:01:58  
um and I I don't know that I have a definitive answer other than I think it's a little bit more on  
the edge it's  
1:02:04  
a little bit harder to answer definitively um because the their role in the labor  
1:02:11  
market is is a little bit more uh diffuse than in the case of the job  
1:02:16  
matching platforms hope that answers yeah that's helpful um that is sort of a Continuum in  
terms  
1:02:24  
of what you think uh is clear versus less clear in terms of these third-party  
1:02:29  
entities of course I I guess I should also mention and it's not the eeoc's  
1:02:35  
baileywick but the section 230 limitation on liability which the Supreme Court is considering  
now is is  
1:02:41  
the huge elephant in the room in terms of whether you could hold um even if these uh  
platforms were  
1:02:48  
considered to be employment agencies could they be held liable for discriminatory matching  
and that 230  
1:02:56  
pieces is an important unsettled question right now well certainly if Facebook or some other  
1:03:04  
um online Advertiser or other entity in that bucket was an employer we could hold them liable  
for employment just  
1:03:10  
employer-focused liability Provisions yeah so um it seems  
1:03:17  
like section 230 would necessarily automatically be an impediment there when we're talking  
about a different  
1:03:22  
parallel prong of Title VII yes I think that's right  
1:03:29  
um it depending on the facts could an AI vendor theoretically meet the definition of an  
employment agency under Title VII  
1:03:38  
um I think that would be possible as well yes because they're essentially  
1:03:45  
they're building the software that is then being used to procure  
1:03:51

the in the uh you know the the the worker for the employer or to procure

1:03:57

the um employment opportunities so um I think that there's a possibility again it might require a little bit of

1:04:03

inquiry into the kind of the technical details of exactly what the vendor is building and how it's being marketed and

1:04:11

how it's being used by employers but I would certainly think some of them would fall within the definition of an

1:04:16

employment agency um I but I also think there's a lot of pressure on vendors because of the

1:04:22

employer's potential liability um they should be asking the vendor

1:04:28

um to ensure that these tools are not discriminatory so I think that there's there's there's legal pressure on the

1:04:36

vendors from that direction as well third party interference Theory

1:04:41

um obviously that can be addressed in a variety of ways the silly Hospital Theory can be a little bit more purpose of this but there's arguably textualist

1:04:48

considerations there too about holding third-party as liable for interfering with employment opportunities given

1:04:55

Title VII refers to uh discriminate against an individual and not simply an employee is that an Avenue for potential

1:05:02

liability for some of these third parties um I think that is a potential Avenue

1:05:07

for liability I think the third party um interference cases of

1:05:13

um the ones that I'm familiar in with a much much more intentional in nature and so

1:05:19

um they would certainly reach um any kind of uh use of these tools um

1:05:24

you know building of the tools for intentional discrimination I think it may be harder

1:05:30

um if it's an unintentional effect of for example um

1:05:35

you know uh sort of there's a there's a pattern that wasn't immediately apparent or detected until

1:05:41

um later on although you know if there's active auditing going on it becomes apparent that one of these tools is

1:05:47

having a discriminatory effect at that point it might be possible to say Well if you know it you continue to use the

1:05:53

tool with an awareness of these problems at that point maybe the third party interference Theory could come into play

1:06:01

in in my Counseling of clients I sometimes found that they were hesitant to do a disparate impact analysis

1:06:07

because then they would find themselves with some knowledge and then struggling about whether or not that actually put

1:06:13

them in a better or worse situation and not doing it at all at all

1:06:18

um and and that brings me to some of your your points about uh the idea that

1:06:25

using demographics to audit doesn't automatically result in disparate treatment um for my perspective that doesn't seem

1:06:31

to be a novel Concept in that again when you're dealing with like a riff for example a large scale reduction in force

1:06:38

you um after you had conducted a first-line decision you would use demographics

1:06:45

to audit essentially but what seemed to be important there to me was that you

1:06:50

had a very bright line between the decision maker and the auditor um and it seems like your proposals

1:06:58

possibly would be fusing that and that concerns me a little bit right that

1:07:04

um if you build demographics into the algorithm then you both have the decision maker the algorithm

1:07:10

self-auditing but how do you remove the knowledge of of the of the demographic so I don't know this may be a question

1:07:17

more for someone who's who's technical maybe you know it but uh having that firewall would seem to be an important

1:07:24

way there so I think there is there is a difficult

1:07:29

gray area I think there are a lot of uses of race in the model building process that don't cross that line even

1:07:37

though it's the designers of the algorithm that might have access to this information so I mean a lot of the sort

1:07:43

of best practices in building these tools involve things like looking at the data right and and the quality of the

1:07:50

data and the representativeness of the data and one of the ways in which that inquiry should occur by looking at is

1:07:55

it is it demographically balanced right are the errors um when make sure the errors aren't

1:08:02

concentrated in a particular group in designing an algorithm we should be

1:08:07

thinking about what the target variable is or have we chosen a Target that is is neutral or does it in itself have some

1:08:15

bias built into in terms of how we're defining what would make a good employee and all those kinds of inquiries require

1:08:22

thinking about things like race and gender right is this is this target variable going to be biased against

1:08:27

women is it going to be biased against people who live in certain neighborhoods or as

1:08:33

ranika Moore was talking about right who might have an **eviction record** without paying attention to the problems um with

1:08:39

the quality of that data so I think there are a lot of things um when building the model it's

1:08:44

important to take advantage uh take have an awareness of these characteristics and to make sure they're not causing

1:08:50

bias there are definitely there's definitely a gray area if these

1:08:56

um characteristics are being used in some way in developing the predictions and I

1:09:03

think that there's um some close questions there which I will defer because I'm out of time

1:09:08

um to some of the more technical people you'll be talking to thank you it's very helpful I appreciate it

1:09:16

thank you so um I appreciate that and I will begin my uh 10 minutes I wanted to

1:09:23

start with an issue and going back to those two critical goals to make sure we

1:09:29

at the commission do as much as we can in this area to ensure that the civil rights are complied with and to assist

1:09:35

vendors and employers but also to make sure that there's a public debate and dialogue about these things so I'm going

1:09:41

to start with what we can do and one of the issues that's came up a little bit in the conversation is that

1:09:48

um you know we have the uniform guidelines for employment and selection procedures and they sort of represent a

1:09:55

consistent Federal framework for analyzing whether employment selection procedures could violate uh

1:10:01

anti-discrimination laws and they include among other things what's known as the four-fifths rule of thumb that

1:10:09

basically sort of gives a general outline for figuring out whether or not

1:10:15

um there's a disparate impact or an adverse impact on a particular demographic group and it is very clear

1:10:22

in those guidelines that that's really a general rule of thumb not an absolute legal standard and yet in the

1:10:29

conversations around how to make sure that um there's not discrimination with these

1:10:36

tools it seems that both with the employer vendor community and in general

1:10:43

there's a conversation as though that is the be-all and get all so

1:10:48

um it does seem that that's an area where the commission probably needs to

1:10:54

help employers vendors the public understand that the uniform guidelines

1:10:59

are a bit more nuanced than what seems to have gotten traction I wonder if and I will address this to all of you

1:11:06

starting with Professor Kim if you could just comment on that and do you have  
1:11:11  
suggestions foreign those nuances  
1:11:20  
I'm sorry the audio went out and I just lost the last please I apologize yes  
1:11:26  
let's um let me just say that I was asking about the uniform guidelines and whether or not each  
of you could  
1:11:33  
um in my view they're very clear  
1:11:41  
please stand by yes okay please proceed your boroughs thank you  
1:11:48  
with respect to the four-fifths rule of thumb in the uniform guidelines the  
1:11:54  
question that I had is whether or not there are ways in which the commission might help  
1:11:59  
make it clear that that's just a rule of thumb because that seems to be getting lost and it's  
almost as though this has  
1:12:06  
become the Hallmark of what needs to be done to prevent discrimination in this area it's  
certainly relevant but not the  
1:12:13  
only relevant uh Factor if you could comment on that uh  
1:12:19  
Professor if you were able to hear me if not I'll repeat yes I did catch at that time I'm sorry uh to  
have to have you  
1:12:25  
repeat it um yeah that's something that I has earned as well is that I think that there has been a  
tendency to  
1:12:32  
um kind of uh fasten on the four-fifths rule as a rule  
1:12:39  
um and of course it was not ever intended to be a strict rule of liability uh it was intended to be  
a  
1:12:45  
rule of thumb guiding enforcement actions by federal agencies and the the  
1:12:52  
courts in fact don't rely on the forfeits rule as a way of determining whether or not um there's  
liability I do think that's  
1:12:58  
an area in which it would be helpful to have more education about what's  
1:13:05  
required in terms of Legally the test is much more nuanced than that and that in

1:13:10

past cases courts and the commission have looked at things like um the pool

1:13:16

the applicant flow data and so on in ways that are much more nuanced

1:13:22

um I think um and perhaps others are better situated to speak to this but I think from the computer science

1:13:28

perspective um they don't want to read all those cases they want to take have the quick takeaway to know what it is that they

1:13:35

need to do but I think these increasing conversations between technical people and legal people I think will deepen

1:13:41

understanding on both sides of how that liability should be measured and that

1:13:48

it's going to be a much more subtle test than simply a cut off like the four-fifths rule

1:13:54

thank you so that's a perfect way for me to go to professor vinatu subramian and if you could just

1:14:02

comment I mean are there ways that in designing these um Technologies these automatic

1:14:09

technologies that are being used in employment where people could sort of test for adverse impact without simply

1:14:16

relying on the forefoot so funny anecdote my very first research

1:14:22

work on this topic nearly 10 years ago was on using the four flips rules so it's kind of funny that I got into this

1:14:28

space through the photos from itself to your question and I think the broader point about measures I I very much agree

1:14:34

that the you know computer scientists and being one of them you know if you have a measure people will fix it on one

1:14:40

particular measure as a way to decide okay what we need to do something this is something we will do it and I think

1:14:46

um to your point there are many ways in fact in the research community and beyond for how to evaluate

1:14:54

um the disparate outcomes arising from any kind of automated tool that don't just rely on the forefoot that rely on a

1:15:01

number of different measures so one concrete suggestion I might have is that you know as you sort of think about

1:15:06

guidance and educational material you sort of give people sort of a a palette a palliative option so think about and

1:15:13

also sort of try to explain to to folks how these different measures like the

1:15:18

foreign others captured different aspects of concern around disparate outcomes for individuals and I think

1:15:25

there's a lot of now understanding in the technical side on what these different measures represent and what

1:15:31

they don't right what their limits are and what their powers are and so thinking of this as a battery of tests

1:15:37

that together draw a picture of what the algorithm is doing versus having one measure I think is an effective way to

1:15:42

communicate this to developers and vendors building these tools so that's what I would recommend

1:15:47

thank you so I will go now to Mr Crenshaw on this Miss more if you could each um just tell me are there things

1:15:53

that the commission could do to sort of make clear What the uniform guidelines

1:15:59

actually say with respect to the four-fifths rule

1:16:04

I think this and uh chair Bros I think this brings up a very excellent point about the need to educate uh the

1:16:10

community uh the business community in particular about um you know the guidance that's out there

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um at the same time and it really strikes home the importance of having uh open dialogue uh that's iterative

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um and much like some of the processes we've seen over at nist to ensure that everyone gets a A View uh addressed uh

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in the process um as we go forward to uh and looking at potential policy recommendations uh you

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know we believe any framework really needs to have a risk based approach um as we go forward

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um and and those approaches also really do need to consider uh the benefits that technology provides and and for example

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uh you know we need to look at whether or not the technology is opening up new applicant pools that may not necessarily

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uh get access uh to employment opportunities or um you know we're looking at employee evaluations for

1:17:02

example um AI uh can be used to take out some of the the bias against an employee for

1:17:11

example if an employee is going through a promotional uh period and you look at reviews and evaluations AI would

1:17:19

actually could self-select out some of the the negative reviews which consumers always tend to more so go to a company

1:17:25

and complain uh and so this could actually level the playing field there as well so uh you know as we go forward

1:17:31

open transparent processes uh risk-based approach but also looking at the benefits as well but uh excellent

1:17:38

question thank you and uh Miss Moore I will let you have the last word if you could talk

1:17:44

about how we could educate um around this issue of the forefense rule but also you talked so eloquently

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about the effects um I really appreciate your testimony with respect to persons of color and the impact the real risk

1:17:58

um for employment opportunities there and so to the extent that you also wanted to speak to educating those

1:18:03

communities um and opening up this public conversation I would uh invite you to

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address that as well sure and I think those actually are related um in terms of the understanding of

1:18:15

what's Happening um the information deficit has always been there for hiring um in that often the the candidates

1:18:21

don't necessarily know what's happening but I think with the use of these new technologies that Gap has really widened

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um and so one of the roles that the EOC can play is helping to to bring some transparency

1:18:34

um and as Suresh commented on I know in in our own organization we have data scientists and analysts and they also

1:18:41

ask us about the application of the forefists rule and I think there is um something very attractive about that

1:18:48

hard number that Suresh talked about and so one of the things that um we can talk about is

1:18:55

um in the palette that Suresh talked about what are um the baselines that we're understanding in terms of the

1:19:01

applicant pool what are some ways to understand and evaluate the Baseline for

1:19:06

evaluating disparate impact um and then I think what we want to be

1:19:11

thinking about as well is recognizing and understanding where the data comes

1:19:17

from and um I think Suresh talked about the technical background we've talked about

1:19:22

it as model cards but really understanding um where the training data came from

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um where um when it was implemented like this version of the technology

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um and having some understanding um so that other independent Auditors can also look to see

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um the the value I'm sorry the quality of the data that is being used and so I think we've got to make more transparent

1:19:47

the process for developing the technology the process for deployment and that can then be used both by

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Advocates like the ACLU and other organizations to analyze but also by independent academics

1:20:01

to understand the value and then that will also provide value for workers

1:20:06

um to understand how these processes work um and I think for a notice to workers as well of when these Technologies are

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being used um what rights they have to request accommodations I think the ADA compliance was was extremely helpful but

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also understanding what the value is um for workers in terms of when

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information about them is being used under various Federal statutes so for example

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compliance under the Fair Credit Reporting Act and knowing when in a background check adverse credit

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information is being used and the EOC can work with other agencies to make that information more available in terms

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of their rights of notice and remedy to correct faulty information

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because such so many problems exist with the data that's coming in from these other systems

1:20:56

well thank you so much um unfortunately that concludes our first panel uh you all have been

1:21:03

incredibly helpful both in your written testimony and your comments today I actually could speak to you all day but

1:21:11

I'm not going to do that to you or to uh we have a you know a number of other future conversations I'm sure um so

1:21:18

thank you very much and uh thank you as well to the Commissioners um we're going to take a brief recess

1:21:24

and we'll resume at uh 11 25 A.M

## **PANEL 2**

try to

1:21:30

guess panels of our guests who will be with us

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today for your participation so um I would like to introduce each of you

1:21:43

in the order of uh speaking today so starting with Professor Manish raghavan

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in who is the Drew Houston Career Development professor at the MIT Sloan

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School of Management and Department of electrical engineering and computer science

1:22:02

before taking that position he was the post-doctoral fellow at Harvard Center

1:22:08

for research on computational computation and Society his research centers on the societal impacts of

1:22:14

algorithmic decision making we will also hear from Nancy tippins welcome it was a principal of the Nancy

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tippings Group LLC where she brings 30 years of experience to the company her

1:22:28

firm creates strategies related to workforce planning sourcing and recruiting job analysis employee

1:22:35

selection succession planning executive assessment and employee and leadership

1:22:41

development we also have Mr Gary Friedman a senior partner in Wild gotcha and manages

1:22:47

National nationally recognized employment litigation Practice Group he has served as the chair of the practice

1:22:54

and has more than 35 years of experience in employment law next uh Adam Klein who is the managing

1:23:01

partner of Adam and golden LLP and founded the firm's class action practice

1:23:07

area Mr Klein currently serves as lead or co-lead plaintiff's council in

1:23:13

numerous major class action lawsuits including those involving discrimination claims in

1:23:20

the financial services industry the high-tech industry and credit and criminal history records for employment

1:23:26

decisions so welcome to each of you and again to our Witnesses for being here today as a reminder each of you has five

1:23:34

minutes for your opening remarks and our it team will be keeping track of time with the timer that you should be able

1:23:40

to see on your screens this morning so let's begin with Professor ragavan thank

1:23:47

you so much and you have the form great thank you

[Manish Raghavan](#), Assistant Professor, Massachusetts Institute of Technology

thank you chair Burroughs Vice chair Samuels and members

1:23:53

of the commission for the opportunity to participate today so my name is Amish ragman I'm an assistant professor at the

1:23:58

MIT School of Management and Department of electrical engineering and computer science as Suresh put it earlier I made

1:24:04

card carrying computer scientist I researched the impacts of algorithmic tools on society in particular the the

1:24:10

use of machine learning in employment context I've extensively extensively studied the development of these tools

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and had multiple in-depth conversations with the data scientists who build them and so my testimony today will will

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build a little bit on our conversation in the previous panel and go into a little bit of the technical aspects of

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how the forecast rule of thumb has been applied to algorithmic systems in practice now automated systems are increasingly

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used in these employment contexts as we've heard and these modern AI systems need to be trained on data they're built

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to replicate the patterns in those data and this is the primary Avenue through which past discrimination can be carried

1:24:48

on into the present now without active intervention from developers automated employment tools will inevitably lead to

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disparities between legally protected groups my testimony today will focus on how developers of these predictive

1:25:01

models and practice attempt to comply with the law now when I say predictive model or sometimes simply model what I

1:25:07

mean is a piece of software that takes this input data about an applicant for example a resume and now puts a score

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intended to measure the quality of that applicants now developers typically create models based on historical data

1:25:19

so for example given a stack of resumes each annotated with its quality somehow a developer can then build a model that

1:25:25

essentially extrapolates these quality labels to new resumes developers of these models often test

1:25:32

them to see if they will result in significantly different selection rates between different protected groups and

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they primarily use the forefoose rule of thumb in practice do this now as discussed earlier today this is not necessarily what the law requires but in

1:25:45

my observation multiple firms have ended up converging on these practices now importantly developers run these

1:25:52

tests before the model is actually deployed and I want to get into the mechanics a little bit of how this is actually done

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so if you're a developer what you have to do is you collect a data set on which you are going to measure those selection

1:26:03

rates and you have to hope that this data set is somehow representative that is that it resembles the actual

1:26:08

population who will be evaluated with your model Now using this data set a developer can

1:26:13

attempt to determine whether the model in question will satisfy the four-fifths rule of thumb often they use other

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statistical tests that are more robust than the forefis rule but we'll stick with that for now now if the model fails such a test the

1:26:26

developer can modify or rebuild it to reduce the selection rate disparities and this is where a comment made by

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Professor Kim comes in uh that these practices require that a vendor consider

1:26:38

protected characteristics while building the model even though the model itself is agnostic to those characteristics now

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one way of thinking about this is that a vendor has to use information about protected characteristics to identify

1:26:49

proxy variables that they can then remove from the models under these practices a firm can try to

1:26:56

guarantee that a tool that it releases will not exhibit selection rate disparities in practice this guarantee

1:27:01

is hard to make selection rate disparities depend not only on the model but on the data on which it's evaluated

1:27:07

so a model that appears to have no selection rate disparities on past data may still produce selection rate

1:27:13

disparities when deployed simply because a firm cannot guarantee that the past data will be representative of future

1:27:19

applicants there are several limitations to this

1:27:24

approach I'll spell it one of them concretely here but my testimony my written testimony contains more details

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one particular limitation of this approach is that it fails to really consider the validity of a tool in particular how this validity might

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differ across protected groups this is often known as differential validity and

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as professor of venker Superman mentioned earlier firms tend to test for exactly what they think the law requires

1:27:48

and nothing else and this is for fear of the exposure that it might bring if they do now differential validity has been

1:27:54

recognized as a problem throughout many machine learning systems and it has been identified by the American Psychological

1:28:00

Association as a particular thing to test for when validating personal selection procedures yet because it

1:28:06

doesn't explicitly appear in the uniform guidelines and it firms do not perceive that the law requires them to test for

1:28:12

it they have often let it go under the radar the final thing I will mention is one

1:28:19

particular strength of the forefist rule of thumb which is that it can create some benefits by pressuring firms to

1:28:24

search for Less discriminatory alternatives what I mean by this is equally accurate models with smaller selection rate

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disparities and there's been a lot of recent empirical work showing that models with very similar accuracy can actually vary dramatically in their

1:28:37

selection routes grades for different subgroups and so the four-fifths rule of thumb can encourage firms to try to

1:28:43

reduce adverse impact without actually reducing the performance of their models

1:28:49

thank you for your time and I'm looking forward to any questions you might have thank you very much we'll go now to miss tippins you have the floor

[Nancy Tippins](#), Principal, The Nancy T. Tippins Group LLC

1:28:57

good morning everyone the society for industrial and organizational psychology has set

1:29:03

Professional Standards for employment assessments that are based on scientific research and best practices these are

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called the principles for the validation and use of personnel selection procedures

1:29:14

psyop has also developed several documents that clarify how the principles apply to ai-based assessments

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much of the principles is aligned with the uniform guidelines and they apply to AI based assessments however today I'd

1:29:30

like to highlight five areas in which the principal's Professional Standards go beyond those in the guidelines

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first the principles emphasize the importance of some form of job analysis not only to justify appropriate measures

1:29:46

of work behaviors or job performance as required by the guidelines but also to  
1:29:51  
determine what knowledge skills and abilities what we call ksaos should be  
1:29:56  
measured in addition because a correlation between a predictor and a Criterion  
1:30:02  
alone is not sufficient to indicate job relevance a job analysis facilitates our  
1:30:09  
understanding of how that predictor relates to the requirements of the job and the Criterion  
measure  
1:30:16  
second the guidelines require validation with selection procedures in most situations where  
there is adverse impact  
1:30:23  
from a professional perspective validation is also necessary to demonstrate the accuracy of a  
selection  
1:30:30  
procedure regardless of whether adverse impact exists validation evidence is  
1:30:36  
also necessary for employers to evaluate alternative selection procedures  
1:30:42  
third for psychologist fairness is an assessment is a multi-dimensional concept with many  
aspects one is equal  
1:30:49  
outcomes which refers to equal Pass rates or equal mean scores or cost groups that definition  
of fairness has  
1:30:56  
been rejected by testing professionals but when failed we believe it should stimulate further  
investigation into the  
1:31:03  
source of those differences Equitable treatment refers to Equitable testing conditions including  
access to  
1:31:10  
practice materials performance feedback opportunities for retesting and opportunities for  
reasonable  
1:31:16  
accommodations the principles recommend that employers audit their selection systems to  
ensure  
1:31:22  
equal treatment for all applicants inform applicants of the ideal conditions for taking an  
assessment  
1:31:27  
provide alternatives to applicants who lack proper testing conditions or equipment and also  
provide a reasonable

1:31:36

accommodations equal access to constructs refers to the opportunity for all test takers to show

1:31:43

their level of ability on the job relevant ksaos being measured without

1:31:48

being unduly advantaged or disadvantaged by job irrelevant personal characteristics such as race ethnicity

1:31:56

gender or disability content and format of the assessment mechanism should not limit an individual

1:32:02

from demonstrating relevant skills unless they are job related

1:32:07

there are two kinds of unbiased that are very important one point of testing the measurement bias refers to systematic

1:32:13

errors and assessment scores or Criterion measures that are not related to the ksaos being measured measurement

1:32:20

bias may be evaluated by sensitivity review conducted by subject matter experts who examine items and

1:32:26

instructions and determine if predictor is differentially understood by demographic cultural or linguistic

1:32:32

groups when hundreds of variables are being used in an algorithm demonstrating

1:32:37

freedom from measurement bias may be very difficult for evaluating each item

1:32:42

is not feasible predictive bias refers to systematic errors that result in subgroup differences in the predictor

1:32:50

Criterion relationship the method for evaluating bias from complex algorithms are used have not

1:32:57

been thoroughly researched or tested in Court decisions fourth documentation of the development

1:33:03

and validation of Assessments should be considered for computation should should be sufficient for computational

1:33:09

reproducibility and could accomplish all of the information listed in the guidelines as well as details that are

1:33:16

specific to ai-based assessments fifth the guidelines are clear on the

1:33:21

requirements for documenting adverse impact of the selection process the guidelines describe the four-fifths

1:33:28

rule as an appropriate measure of adverse impact but it may not be sufficient because the principles

1:33:33

represent Professional Standards for employment tests they do not discuss adverse impact except to admonish IO

1:33:39

psychologists to comply with applicable regulations in practice most i o

1:33:45

psychologists recognize the complexity of evaluating adverse impact and assess it in a variety of ways

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in conclusion ai-based assessments hold the promise of being effective tools for

1:33:57

predicting future behavior and systematic unbiased ways however those assessments need to meet legal

1:34:03

guidelines and Professional Standards thank you thank you we'll go now to uh Mr Friedman

1:34:10

welcome

1:34:19

if you could begin again we're having trouble with your sound if you could uh try it one more time

[Gary D. Friedman](#), Partner, Weil, Gotshal & Manges LLP

1:34:26

okay is that better thank you uh chair brosen and uh Commissioners

1:34:33

thank you very much for inviting me to testify today before the commission on this important emerging issue in the

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field of employment law I am a management side employment lawyer who represents businesses in a wide

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array of sectors across the U.S and hope to bring the perspective of employers who are using and contemplating using AI

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in my testimony my written testimony discusses these issues in Greater detail

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but I'm here this morning to just highlight orally several topics as an  
1:35:03  
important threshold matter I can state with confidence that that our clients  
1:35:09  
are focused like a laser on using AI responsibly and in addition to deploying  
1:35:15  
those tools for Speed efficiency quality and performance are equally focused on  
1:35:21  
mitigating the effects of unconscious bias and stereotyping and human decision making So to  
that extent I think the  
1:35:29  
commission employers and employees are all rowing in the same direction over the past five  
years I have seen a  
1:35:36  
markedly increased Focus among employers on racial Justice and gender equality in  
1:35:42  
the workplace resulting in growing efforts to use AI tools and other types  
1:35:48  
of automation to enhance diversity equity and inclusion initiatives  
1:35:53  
companies have found and Studies have shown that the use of AI can reduce unconscious bias  
in in making employment  
1:36:00  
decisions a Yale study showed that when evaluating candidates for police chief  
1:36:05  
human evaluators justifies choosing men without college degrees over women with  
1:36:11  
college degrees because streets Barts purportedly was the most important Criterion however  
when the names and the  
1:36:18  
applications were reversed evaluators chose men with college degrees over women without  
college degrees claiming  
1:36:26  
that degrees were the more important criteria if the criteria had been set in advance  
1:36:32  
unconscious biases against women could have been mitigated because evaluators would not  
have been able to justify  
1:36:39  
their decisions post-hoc another study AI can reduce Reliance on  
1:36:46  
workplace decision making that is heavily influenced by who you know or  
1:36:51  
the nature of your personal professional relationship with the individual is that those types of  
considerations tend to

1:36:57

skew in favor of those who are not in Legally protected classifications illustrative of this is a study of the

1:37:05

Fisher College of Business which analyzed the use of machine learning in selecting board members uh by comparing

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human selected boards with predictions of machine learning algorithms the study

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found that in comparison to algorithms selected directors management selected directors were more likely to be male

1:37:24

had larger networks and had many past and current directorships by contrast

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the machine algorithm found that directors who were not friends of

1:37:35

management had smaller networks and had different backgrounds from those of management were more likely to be

1:37:42

effective directors including by monitoring management more rigorously and offering potentially more useful

1:37:49

opinions about policy suggesting that directors from diverse backgrounds would

1:37:54

be more effective in terms of the path forward regardless of the industry there

1:37:59

are some key guide posts that can help companies use AI responsibly and help mitigate the risk of violating the

1:38:05

anti-discrimination laws transparency companies should be upfront about the

1:38:10

use of AI as required by some of the state and city laws that have regulated in this space applicants and employees

1:38:18

should know when they are being evaluated by a machine algorithm as opposed to a human reviewer auditing

1:38:24

whether it is self-auditing or third-party auditing it is important that companies are proactive in

1:38:31

mitigating potential biases of AI to date there is a lack of consensus of

1:38:37

which metrics and data Auditors should use to audit AI technology how it should

1:38:42

become standard practice for auditing companies to disclose the assumptions used for determining relevant protected

1:38:50

characteristic used in bias audits vendor vetting critical as members of

1:38:56

the commission have stated the AI tool made me do it is not a defense to a

1:39:01

discrimination claim there is guidance out there from a number of organizations such as the data and Trust Alliance

1:39:07

clients that tell employers that questions they need to ask include what measures are taken to detect and

1:39:14

mitigate bias what approaches are used to remediate bias and what measures have

1:39:20

been taken to correct any potential errors so I thank you very much for giving me

1:39:26

the time this morning and I look forward to answering your questions thank you and now we'll go to Adam Klein

1:39:32

welcome

[Adam Klein](#), Managing Partner, Outten & Golden

good morning thank you chair Bros and thank you members of the commission for

1:39:37

providing me to speak to them very interested in the subject and I look forward to an interesting and helpful

1:39:43

discussion let me start my comments by just observing that my world and out in

1:39:50

the gold is to represent individual employees and applicants who are exposed to or subject to hiring selection using

1:39:57

automated AI systems and in that context there are several serious concerns about

1:40:04

the use of these types of Technologies and let me just outline what those are one and I think critically there's a

1:40:11

complete lack of transparency or if you like opaqueness in terms of how these systems are deployed by employers for

1:40:19

recruiting sourcing and hiring selection and to focus on recruiting and sourcing

1:40:25

in particular a topic that's not been addressed substantively yet today we

1:40:31

have identified particular uh platforms on social media particularly Facebook

1:40:36

and others that use systems that differentiate potential applicants or

1:40:44

recruiting tools that use immutable characteristics as a means to identify

1:40:49

and filter potential applicants through a sourcing recruiting channel it's commonly used  
endemic to the workplace

1:40:56

and a serious concern another major problem that we've identified and something again that  
the

1:41:04

EOC should really focus on is a point that Dr Tippins made which is that

1:41:09

conceptually the starting point of any hiring selection system must include a

1:41:16

job analysis and an assessment of the essential functions or competencies of asaos of the job  
that is a fundamental

1:41:24

step in any hiring selection procedure that is consistent with the uniform

1:41:30

guidelines side principles and Title VII itself and yet there's a conceptual

1:41:36

break from that requirement using AR AI hiring selection procedures essentially

1:41:43

AI systems do not rely on the job requirements or competencies to a job

1:41:50

analysis and competency model and instead looks at correlations based on

1:41:55

information that may or may not be relevant to the requirements of job or performance in the  
job that's a

1:42:02

fundamental break from the types of selection procedures and systems used by

1:42:08

all employers since the start of the Civil Rights Act of 1964 as an admin and

1:42:14

the eoc's role in this area another core point I want to make about

1:42:19

this topic two things one there's an assumption that there's a practical

1:42:26

value in selecting applicants using AI systems meaning that employers using AI

1:42:33

technology identify and hire people applicants who

1:42:38

are capable or perhaps better at the Target performing the target job relative to others and that's an

1:42:45

unproven assertion I've not heard today and I don't think the commission has heard any real evidence to support that

1:42:53

idea that AI is capable of predicting the performance of applicants in the

1:43:00

Target jobs that is something that's of serious concern another concern relating to that General

1:43:08

point is that the AI systems May instead screen out

1:43:13

characteristics of focus on our favor characteristics that instead focus on or

1:43:18

relate to cost savings like whether a potential employee would be available

1:43:24

and not out sick or take leave for other medical reasons as a way to cross save

1:43:30

or to save the company money and obviously those kinds of characteristics while understandable from a profit and

1:43:38

loss of Revenue perspective or profitability perspective likely screen

1:43:43

out based on gender and age characteristics meaning that there are correlations between the availability of

1:43:50

particular applicant or employee and gender and age characteristics and I would say to you that age discrimination

1:43:57

in particular and hiring is of significant concern and I would say is under enforced and underappreciated in

1:44:04

our Workforce a topic that needs to be focused on and I have significant concern that the use of AI Technologies

1:44:11

in particular will simply perpetuate continuing age bias in hiring selection

1:44:17

I would also urge the EOC to consider a cross-agency coalition working with the

1:44:25

Department of Justice of CCP and Department of Labor FTC and the office of Science and Technology policy and to

1:44:31

construct a network or a Consortium of subject matter experts who would

1:44:37

understand how these Technologies work in practice and are able to advise the commission

thank you and I appreciate

1:44:43

any additional questions thank you very much and we will begin

1:44:49

now with questions uh starting with the vice chair yeah before well thank you so much chair

Burroughs

1:44:57

and thank you so much to our Witnesses for this invaluable testimony as I said in our first panel

I have many more

1:45:04

questions than I can ask in 10 minutes and I do hope that this will be a continuing dialogue

1:45:11

um let me start with Mr Friedman and

1:45:16

just uh reference a study that you mentioned in your testimony about the

1:45:23

ways in which AI can potentially be used to diversify Boards of directors that's

1:45:30

an interesting concept and I wonder if you can speak a little bit more about it and also tell me if companies that are

1:45:38

using AI for their employees because they believe it enhances efficiency

1:45:44

maximizes accuracy helps to promote diversity or to eliminate implicit bias

1:45:50

are also using those tools in selecting members of their Boards of directors

1:45:57

so and that's an excellent question uh Vice chair um that particular study was trying to

1:46:05

determine uh who would be the most effective at their role as a board

1:46:10

member and uh what it was looking to accomplish was to determine whether what

1:46:17

the population they were taking a look at in particular involved those who had really been supported by management

1:46:26

um and were frankly being re-elected on a regular basis and they was trying to

1:46:32

predict um whether and and the criteria for who constitutes an effective uh director

1:46:40

Minds can vary in that regard but uh among the factors that they looked at is  
1:46:46  
who is going to hold management accountable who is going to hold them in check who's going  
to come up with a  
1:46:52  
diverse perspectives Etc and what what the study concluded is  
1:46:58  
that um if you look at those who are sort of  
1:47:03  
perpetually elected those who serve perpetually on boards it tends to skew  
1:47:09  
towards a particular population in this case overwhelmingly male those who have  
1:47:14  
large networks and those who have done this many times before as opposed to  
1:47:21  
those who may not have had the robust supportive management I don't necessarily call them  
Outsiders per se  
1:47:27  
but but those who really didn't have the large networks and Cone activities and  
1:47:34  
so what was interesting about the study is that it it really showed that those  
1:47:40  
who were maybe part of the quote Inner Circle were not necessarily those who  
1:47:46  
were going to be the most effective in their roles and therefore uh the the  
1:47:51  
algorithm was designed to determine you know who is going to be most effective  
1:47:56  
in uh keeping a a company on on task and  
1:48:02  
and coming up with Creative Solutions uh to complex problems and and what it concluded is  
that uh if you uh look at  
1:48:11  
those characteristics you are more likely to have a diverse uh board membership in in terms of  
companies that  
1:48:19  
use AI for their employment decisions also used it for board of directors  
1:48:24  
selections I think that that is in its infancy uh frankly I'm not seeing that  
1:48:30  
uh being done in the same way that it's been done for screening and hiring and  
1:48:37  
assessments um but I think it's in its gestational stages thank you that's very helpful  
1:48:44

um let me turn to Dr tippins thank you so much for your suggestions about ways  
1:48:50  
in which we can expand upon you gasp to ensure validity and fairness of tests  
1:48:56  
and AI criteria um I want to ask you about off-the-shelf AI products where employers purchase  
1:49:04  
tools from vendors that are not customized for their particular jobs could you talk a little bit  
about the  
1:49:13  
ways in which employers need to be sure that a test that has potentially been  
1:49:19  
validated for one job needs to be assessed in the context of a perhaps  
1:49:26  
similar but different job that's a great question uh from an the  
1:49:33  
perspective of industrial and organizational psychology we would argue that each test use has  
to be validated  
1:49:40  
for the particular interpretation you're going to make from that test score so if  
1:49:46  
a test has been developed and validated on job a you cannot assume that it will also be  
1:49:53  
effective for job B in making that interpretation that the test is going to  
1:49:58  
predict performance and job B so we would argue that there needs to be a  
1:50:04  
job analysis to understand what the job requires look at the relationship between that test and  
the job  
1:50:11  
requirements and then do a validity study so that there is some evidence to support the  
predictor Criterion  
1:50:18  
relationship and the interpretation you're going to make from that test score that's helpful and  
I suspect that  
1:50:25  
vendors are not in fact doing that with these off-the-shelf products I don't know if you know  
1:50:31  
um some do some don't Fair answer  
1:50:37  
um thanks uh Professor McGovern um you wrote an article uh a little  
1:50:44  
while ago it focused on issues of uh model multiplicity and the fact that  
1:50:52  
there are different AI tools that not only can have differing levels of

1:51:00

disparate impact if they in fact have disparate impact but that also may be more or less accurate in predicting

1:51:08

success on the job or whatever it is that the employer is trying to assess for can you talk about the extent to

1:51:16

which assessment of Alternatives is part of what vendors are looking at whether

1:51:23

that's something that should be more standardized and the extent to which

1:51:30

um sorry my organization is going to shut down my computer at noon yikes um I the

1:51:37

extent to which that ought to be part of the validation analysis that employers

1:51:44

and vendors are engaging in yeah absolutely so when models are

1:51:50

trained what you typically do is you say here's the data find me the model that maximizes

1:51:56

accuracy on this data and the Assumption baked into that is that if there are many models that achieve roughly the

1:52:03

same accuracy you don't care which one you get but there actually might be significant differences between those models there

1:52:09

might be Model A over here that has 90 accuracy and very large selection rate

1:52:15

disparities that might be model B over here that has 89.5 accuracy and much smaller selection rate disparities and

1:52:22

so what you have to do is to start to think about what are the trade-offs that you're willing to make as a developer of a model if you have these multiple

1:52:28

objectives you might care about accuracy you might also care about minimizing selection rate disparities if you care

1:52:34

about both of those things then you need to specify that you care about both of those things when building and developing a model and so what these new

1:52:42

techniques that we're building in the computer science Community allow you to do is to say in this search for a model

1:52:48

find me something that gives me high accuracy but also tries to reduce selection rate disparities and so this

1:52:55

in some sense automates the search for Less discriminatory Alternatives because you can say among these many possible

1:53:01

models you can get can you find me one that reduces selection rate disparities and we're developing the techniques and

1:53:07

tools to do that now empirically we've seen evidence to say this is actually impossible in practice this is both you

1:53:13

know reported in the research also in my conversations with many of the developers of these tools what they say is there's actually a lot of

1:53:20

heterogeneity among different models that there's empirically a lot of room for maneuver for maneuvering from the

1:53:28

perspective of reducing selection rate disparities now should this become can this become standard practice I believe

1:53:34

so it requires some additional work on the part of a developer there's some cost to it to actually conduct this

1:53:40

search to develop an algorithm in a way that actually is sensitive to both of these objectives as opposed to only

1:53:46

focusing on accuracy I believe that that's worth it could be something that the EEOC encourages

1:53:52

thanks that's very helpful and let me use my remaining one minute and two

1:53:58

seconds to ask Mr Klein uh your lawyer as you know the law provides that a

1:54:06

selection procedure uh that flanktips have to identify the component

1:54:13

of a selection procedure that is responsible for any disparate impact unless those components are not capable

1:54:21

of separation for analysis how do you think that standard works with AI

1:54:27

particularly when there are thousands of pieces of data that go into predicting

1:54:33

any algorithmic formula it's a very challenging problem software

1:54:39

essentially what happens is that if there are several steps in a hiring selection process that leads to a

1:54:45

particular can uh being selected for employment and AI is part of that chain

1:54:51

of events then it would be very difficult to identify the adverse impact

1:54:56

or the impact of the AI system on the hiring selection process overall but if I could just back up and just point out

1:55:03

that I do think there's just a fundamental lack of agreement from the i

1:55:08

o community and the computer scientists in terms of what the fundamentals are of how these systems work in practice and

1:55:15

the idea that AI is essentially identifying competencies or the job

1:55:20

requirements and then searching for those characteristics let's not have these systems work and I think that's a

1:55:27

very important and fundamental problem that needs to be addressed

1:55:34

okay apologies if I share you're on me sorry I'm I'm out of time but thank you all

1:55:41

for these helpful responses I will now turn it back to chair Bros thanks so much so now commissioner

1:55:48

Sunderland you have the fourth

1:55:54

uh I want to start with uh Miss uh Tippin sorry

1:55:59

your point you there um so as you know I've been spending a lot of time with uh iOS and uh have

1:56:08

really been trying to make sure that the uh both everyone involved is aware of

1:56:15

your uh very important practice and all the work you're doing in this area and and I've often said at the end of the

1:56:20

day when you know who was going to do this this testing who can actually assist

1:56:26

employers lawyers Auditors with the actual standards and putting pen to

1:56:32

paper and I believe that largely is gonna um file on iOS so from your perspective

1:56:38

can you talk about a little bit what you and psyop are doing to sort of raise awareness of io's place uh in this big

1:56:46

picture here again an area where now that employment assessments and sort

1:56:52

of testing on your side are now being digitized they're going to be scaled more um so there's certainly going to be a

1:56:58

greater need so can you talk about some of the work and guidelines that you put out through psyop sure

1:57:04

um just to give a little background industrial and organizational psychologists are are trained to study

1:57:12

people in the context of work many of us are very deeply trained in selection and

1:57:17

assessment testing um we have created this document the principles for the

1:57:23

validation and use of the Personnel selection procedures which is aligned

1:57:29

with the standards for educational and psychological testing that is produced by the American Psychological Association the aera and the ncme in

1:57:38

because of this change that commissioner sonderling is has noted with respect to

1:57:44

the digital digitalization of testing and the introduction of AI based

1:57:49

assessments we have taken an active interest in how do our testing standards

1:57:55

apply to these somewhat unique forms of testing so we have created a document

1:58:02

that takes the principles and says this is what's relevant this is what's not relevant and given some guidance on how

1:58:09

you might we meet the requirements that the principles puts out

1:58:14

we have also created basic guidelines to say to employers

1:58:22

here are the things you need to do you need to have evidence of your test validity you need to have evidence of

1:58:28

your test reliability you need to document this information it's not enough for me to say as a professional

1:58:35

oh I think this test looks good I need to have the evidence to support it and  
1:58:40  
then I think a third area where we're really active is we are trying to inform the HR community  
of the of the rules and  
1:58:49  
the the guidelines and the things they need to do in order to make sure that an  
1:58:55  
AI based assessment or any other Test meets the uniform guidelines but also  
1:59:01  
meets the professional requirements we want to make sure that people are using a test that  
actually does what it they  
1:59:08  
think it's going to do typically it's predicting performance or some other job-related criteria and  
so we want to  
1:59:15  
make sure that that that they are aware that they need evidence to support  
1:59:21  
the use of that test well that's really helpful and it really seems very much geared towards the  
people who are you  
1:59:28  
know not only designing these products but the employers also with the ultimate liability of  
using these products and  
1:59:34  
you know and from your perspective and with your specialty see where it fits in a larger piece  
of the puzzle of having  
1:59:41  
that really important knowledge that is now bring uh back at the table in a way  
1:59:46  
because of these new assessments so certainly you know I recommend everyone look at the  
the great work that you all  
1:59:52  
are doing there because it really lays it out as you heard specifically related to how to actually  
do this you hear so  
1:59:57  
much talking about oh perform an audit do do this be uh you know have standards  
2:00:02  
and but you know from the i o field which is obviously different and legal it actually is giving you  
some qualifications based upon our  
2:00:09  
long-standing law so thank you very much for your work I want to now switch  
2:00:14  
um to Mr Friedman and um thank you for you know your extensive testimony you've  
2:00:20

written on this topic uh for the American Bar Association um before we've had uh discussions  
so  
2:00:26  
you're in a unique position that um you know you're likely going to have to not only assist uh  
employers with  
2:00:34  
creating um the lawful use of it on the front end but if things go wrong you're going to  
2:00:40  
be also the ones showing up in court to sort of Defending um these cases and you know how to  
2:00:46  
defend not Title VII cases but now with this extra layer of Technology potentially making a  
decision so let me  
2:00:52  
just ask you a very broad question as as uh essentially the only representative uh for the  
employer Community who has  
2:01:01  
the purchasing power for this you know what do employers really want here and if the  
commission is going to actually  
2:01:07  
say something how can we actually say it in a way that employers can Implement  
2:01:12  
understand and not buy violate the law which I do not believe anyone intentionally wants to do  
yeah that's a  
2:01:20  
that's an excellent question and I I think you can draw from existing uh  
2:01:26  
statutes uh both the Ada and also the Equal Pay Act so for example uh one of  
2:01:33  
the things that uh my clients have been doing uh for decades and actually now  
2:01:38  
we're doing it a lot more frequently um our pay Equity audits now when you do  
2:01:44  
those pay Equity audits you are basically opening up the hood and  
2:01:49  
looking at the the motor the carburetor and everything else to assess frankly uh  
2:01:55  
the human capital factors that are necessary in determining whether there's a disparity I think  
employers are far  
2:02:02  
more advanced and skilled in self-analysis here than uh perhaps is  
2:02:08  
out there and the common understanding because they've been doing it for a while they've  
also been doing it for a  
2:02:14

while in the Ada a context obviously you know going back to the early 90s when  
2:02:20  
you have to determine what are the essential functions of the job that has been honed over a  
long period of time so  
2:02:27  
this is not a novelty act for our clients and answer to your question I  
2:02:32  
just like overtime audits in the wage and hour context or minimum wage or classification I  
mean employers are used  
2:02:38  
to and comfortable with doing these Audits and and how do we now bring that same level of  
comp Comforts where  
2:02:44  
employers are going to hire outside counsel to do it themselves to do you know pay Equity  
audit Which is popular now or or just traditional audits on  
2:02:51  
classification how do we get that mindset now for employers to start doing it right now as  
they're you thinking  
2:02:58  
about putting this into effect or as they use it yeah and and so what I what I think in addition to  
obviously  
2:03:04  
guidance from the EEOC I I think uh I mentioned in my paper uh one a statute  
2:03:12  
as it relates to equal pay uh has a good faith uh sort of self-haven if you will if you engage in  
self-critical analysis  
2:03:19  
of of pay issues you can take that concept and broaden it and and you want  
2:03:25  
to incentivize uh our clients our corporate clients to actually  
2:03:31  
self-critically analyze what's going on in terms of the job requirements uh in  
2:03:38  
in terms of uh the requirements for selection and the the way to do that is  
2:03:44  
to walk that fine balance between look requiring transparency everyone that  
2:03:50  
I've spoken to among my clients uh raises their hand and says there should be no mystery  
around what we're doing  
2:03:57  
particularly at the hiring stage and so that disclosure is is not a  
2:04:04  
problem but what they want to be able to do is they want to be able to uh self-audit and self-  
critically analyze

2:04:11

in a way that allows them to do it uh without a huge risk in the process I

2:04:17

haven't spoken to anybody who is against the concept of an audit even an outside

2:04:23

audit as long as they are competent to do it the New York law of course requires you to publish that on your

2:04:30

website and that's still a work in progress as to exactly what's going to be required but that's an example of

2:04:36

something that will disincite our clients to use this technology

2:04:42

effectively so I think what they're looking for from the EEOC is is really

2:04:47

guidance room to maneuver room to self-critically analyze without

2:04:53

um punishment uh thank you and my remaining a minute uh Mr Klein I want to turn to you uh we've had this discussion

2:05:01

before and I think it's a really critical point from your perspective and that the vast majority of employees who

2:05:07

are subject to this technology have no idea that they're being subject to an automated tool I know there's some new

2:05:13

disclosure requirements but just you know whether it's a determination about pay about your location of work or

2:05:19

whether or not you get hired whether you get fired a lot of times they may say well a human manager didn't they didn't like me and it wasn't potentially based

2:05:26

on a discriminatory algorithm that you know affected me and from an enforcement

2:05:31

perspective as a civil law enforcement agency obviously our mission is to enforce these laws and that's what you

2:05:36

do on the plaintiff side as well so you know what can we do and what are you

2:05:41

doing to raise awareness to employees that they may be subject to this technology and that they may have rights

2:05:49

under our long-standing lost to file a charge uh even though they may not know that a computer made that this decision

2:05:56

so I have two quick answers to that thank you for the question one is uh as you've noted commissioner the UFC itself

2:06:02

can issue with Commissioners charges in uh furtherance of an investigation of

2:06:07

potential violations of Title VII and the other statutes the Ada in particular as as well and you're right look you're

2:06:13

the agency itself my Law Firm the civil rights committee where generally we're not going to receive complaints that

2:06:20

from people who say to us that I was the victim of algorithmic discrimination or the victim of discrimination based on

2:06:26

the application of the computer algorithm it's simply not going to happen they have no capacity or ability

2:06:32

to understand that they were subject to or exposed to these systems or that they

2:06:37

were denied employment or had their rights violated under the various of Life Stacks it's just simply not

2:06:44

um observable so it's a serious problem foreign

2:06:49

thank you thank you so we'll go now to commissioner Lucas

2:06:57

thank you um I want to uh continue with um Mr Klein along that same line so you know

2:07:05

it in terms of disclosure requirements you've just been saying that many employees will be able to articulate the

2:07:11

developerative Discrimination they won't really understand it even if you have some sort of disclosure requirement

2:07:18

what kind of disclosure could possibly be intelligible to your average employee or layperson or even someone who's

2:07:23

relatively sophisticated but not a computer scientist um that would be meaningful because

2:07:29

obviously any disclosure requirement is going to have some burden on it and then you're hopeful that you're you're not

2:07:36

just creating a paper requirement essentially right no it's a serious concern well I'll say this you know the Civil Rights

2:07:42

Community writ large so I would include organizations I would include organized labor CWA for example has been very

2:07:49

active in this area ARP the ACLU there are a number of different civil rights organizations that have substantial

2:07:55

resources and the capacity to understand what people are discussing in terms of

2:08:01

their interactions with AI technology particularly in hiring context and so uh

2:08:07

it could be that um there are charges that need to be filed at the EOC commission needs to investigate I would

2:08:13

urge doc to coordinate with various other government agencies the FTC for

2:08:19

example the Department of Justice has been very active Christian Clark leadership in particular on this issue

2:08:24

with Facebook there are lots of tools available to the federal government and it may require a lot more diligence and

2:08:31

focus in order to identify and expose problems with these systems in terms of

2:08:37

impact on civil rights uh you also mentioned that you're very concerned about age discrimination in

2:08:43

this space and just in general that age discrimination is under enforced um as a general matter I'm very

2:08:49

concerned about age discrimination and it's under enforcement as well it's an interest in mind um could you tell me a little bit more

2:08:55

about why you think age discrimination in particular is something that is a risk here

2:09:01

so one of the issues here is what's driving employers to use automated or AI systems and I would assert to you that

2:09:08

part of it may very well be cost savings or a profit motive which is perfectly understandable and reasonable but in

2:09:16

some sectors of our Workforce including call centers for example availability of

2:09:21

employee drop employees drives profitability it drives revenue and so

2:09:26

it would make logical sense for employers to filter out or not hire people who may need sick leave or are

2:09:34

not as available and some of the stereotypes around age and gender May

2:09:39

Force employers into you know uh or

2:09:44

rather you know create opportunities rather for mischief and violations of our statutes because of those

2:09:50

foreign

2:09:55

interesting point uh you know in terms of the benefits of of AI for diversity

2:10:02

purposes I do find though that sometimes the highest risk for age

2:10:09

discrimination in riffs is when you have some forms of diversity racial gender

2:10:15

diversity being prioritized over age diversity and that

2:10:21

you could end up having conflicts between different protective characteristics do you view that as a

2:10:27

risk from AI in terms of perhaps its use for separation decisions or riffs or

2:10:33

other discriminate other sort of uh employment life cycle um decisions

2:10:40

I think that that is a serious concern uh and in fact uh you know you see a lot of adverse impact based on age when

2:10:46

risks do occur that it's a serious issue um I will say you know just go back to what Dr Timmins identified which is look

2:10:53

there needs to be a fundamental or conceptual framework to understand what

2:10:58

the selection criteria are either for hiring or for selection for rip based on a job analysis based on valid reliable

2:11:05

Fair decisional processes that are linked to accurate and reliable data and

2:11:11

I would urge you or suggest to you that we've not heard a real connection

2:11:16

between those Concepts and use of these AI Technologies either in terms of hiring or a selection for reductions in

2:11:24

force and so that sort of fundamental disconnect is a serious concern and something that the EOC really needs to

2:11:30

focus on have you seen any complaints alleging algorithmic discrimination or use of AI

2:11:38

in in a riff or termination decision I've not personally seen uh employers

2:11:44

use an AI system at least not uh that visible to uh my clients it may be that

2:11:51

it's used but not something that the employer wants to talk about or reveal to its employees so I I don't know to be

2:11:58

honest with you it's an interesting yeah I'm just thinking about the fact that you know the odoo wbpa notices

2:12:04

require um you know disclosure for a variety of positions in the UC has taken the

2:12:09

position and it's and it's I think very helpful Guidance the selection criteria need to be part of that notice so should

2:12:15

AI be used in that there would need to be some kind of complex disclosure there that's already a requirement without us

2:12:22

doing anything else um on the flip side of that I'd like to hear from Mr Friedman um about whether or not he's seen his

2:12:29

clients uh using AI in any termination or separation or large-scale separation

2:12:35

decisions uh really not not much

2:12:40

um and and I I think that there's probably some discomfort uh at this

2:12:46

point in time in in going down that road I think that my clients have focused on

2:12:52

it primarily at the screening hiring stage and also in terms of certain performance

2:12:58

Assessments in certain industries is like transportation for example where

2:13:05

for example safety can be measured through artificial intelligence but uh

2:13:11

not not seeing it your point is an excellent one and and I will say this

2:13:16

also uh and that this is an area in which our clients have been doing this

2:13:23

for a long time in terms of reductions in force and the analysis that goes with it that correlates with age is as I'm

2:13:30

sure you know cost is always a factor and reductions in force and I'm sure you know all the case law with respect to

2:13:36

correlation of cost and age um and and I I can tell you from my experience I'm involved in these

2:13:43

large-scale reductions I'm I do have a seat at the table and there is an

2:13:48

intense focus on age as well as race and gender

2:13:55

that sort of answers one of the questions I was going to ask for you to respond to Mr Clinton's concerns about

2:14:02

uh Age and and cost uh so from your perspective you're seeing your clients

2:14:07

uh be very mindful of potential age impacts and try to mitigate them is that

2:14:12

right yes I've definitely seen it uh and uh there is uh really you know in a

2:14:21

reduction in force although cost is obviously a huge driver in that process what I've not seen is sort of an across

2:14:30

the board well so this population for the most part 50 and over uh are

2:14:35

typically making you know 15 percent more than the population that's under 50 or under 40. uh and and so therefore uh

2:14:44

we really need to focus on this group I think that the the the focus is very

2:14:50

much on uh the job uh it's it's very focused on the department and there's an

2:14:57

acute awareness of of an adverse impact on on older workers uh you know we can

2:15:02

engage in a discussion about um the the sense of how productive some of these older workers uh are and

2:15:10

and and my clients are often uh sort of agonizing uh when there is a position that needs to be eliminated with someone

2:15:17

who's been there for 15 20 years and has been incredibly productive so I have seen a high level of Consciousness uh on

2:15:24

the issue of age uh over particularly over the last 10 years uh in terms of other uses of AI have you

2:15:32

seen anyone using uh AI or algorithms for voluntary diversity initiatives

2:15:38

putting a thumb on the scale for example to incorporate demographics uh so that

2:15:44

you were having a larger set in terms of your uh your candidate pool or possibly

2:15:51

um having a preference in in the AI to select uh more to to create some sort of

2:15:56

balance yeah very good question and and the answer is I'm beginning to see it I'm beginning to see it in a variety of

2:16:03

ways one of them is uh casting a wider Geographic net

2:16:10

um you know particularly in a more remote oriented world where a lot of

2:16:15

hybrid Arrangements uh we all know that there can be bias associated with race

2:16:21

if for example you're hiring only uh geographically proximate to your place

2:16:26

of business I have seen a focus on widening the net I've also seen a focus

2:16:32

on widening the types of for example

2:16:37

colleges and universities from which businesses seek to draw and a real focus

2:16:44

on you know rather than drawing assumptions or conclusions based on a

2:16:50

certain swath of colleges and universities it's expanding That Base which is pulling in a more diverse

2:16:56

population thank you very helpful thank you

2:17:01

um so I will go uh next to Professor ragavan um just back to First principles with

2:17:08

respect to um how we shall we say build you know

2:17:13

under the hood if you will and one of the things that I thought was really interesting about your testimony was

2:17:19

this concept of differential validity and I'd like you to just expound on that a little bit that

2:17:25

um you know we've heard a lot today about the importance of what training data is used and how good the data is

2:17:33

with respect to various demographic populations and um talk to me a bit if you could explain

2:17:39

how you might get differential validity and what significance that may have to

2:17:44

this conversation sure so the the first thing to recognize is that different populations are

2:17:51

distributed differently people go to schools in different places people have different activities that

2:17:56

they do they have different work histories and so on and what that means is that a predictor that works well for

2:18:02

one demographic group may not necessarily work well for a different demographic group the other thing to keep in mind is that

2:18:09

with machine learning with AI with all these automated tools the general rule is that the more data

2:18:16

you have the more accurate your predictions will be now if you combine these two things together what you get

2:18:21

is the following if you have more data from historical applicants from one

2:18:26

demographic group relative to another then you should expect that your predictor will perform more accurately

2:18:33

on that that demographic group than the other now one place that this is manifested quite publicly is in facial

2:18:40

recognition systems there's a lot of public examples about how facial analysis and facial recognition systems did better on male and lighter skin

2:18:47

faces and this is primarily because a lot of their training data the vast majority of their training data was male

2:18:53

and lighter skin faces now you might be worried the same thing might happen in the employment context

2:18:59

where if a lot of your applicants in the past have been from particular demographic groups then that is where

2:19:05

your predictor will perform the best at the expense of other demographic groups and that's how something like differential validity can arise where

2:19:11

you're able to make very accurate judgments or at least more accurate judgments about people who look like the

2:19:17

people that you've seen in the past and less accurate judgments about people who you haven't seen frequently in the past

2:19:25

thank you that's helpful so even if you have something that may be valid in selecting candidates and tell you who's

2:19:32

a good candidate from a particular demographic if you your training data hasn't really been in uh sort of diverse

2:19:39

if you will it may not work as well for other um other demographic groups since you

2:19:46

mentioned uh the question of you know facial recognition it reminded me that

2:19:52

we started to hear about um the use of that actually in employment other kinds of tests we

2:19:58

talked a lot about hiring and recruitment today but are there other kinds of um you know select areas in

2:20:06

which these selection devices or evaluation devices are being used other than the just you know what we sort of

2:20:12

commonly think of as hiring and recruitment I think I would take this this hiring

2:20:18

test and actually break it up into multiple stages because I don't think it's it's one discrete decision right there's you advertise your job some

2:20:25

people interview or some people apply and then you select some of those resumes and you interview certain people

2:20:30

and then you make offers to people each of those is a different stage of the pipeline and requires different tools so

2:20:36

for instance we heard a little bit today about the very introduction systems that meta is implementing their advertising  
2:20:41  
system right that is going to be a very different type of application and a different solution to what you might see  
2:20:47  
for resume screening or for perhaps making predictions about salary that you  
2:20:52  
should offer to someone these are all completely different applications I think have different considerations now  
2:20:57  
beyond the recruitment context I haven't seen quite as many that get used  
2:21:03  
throughout the employment life cycle there are some in employee evaluation  
2:21:08  
and and then some for uh for termination reduction in force but I think at least  
2:21:14  
the ones that Garner the most attention and in my estimation have the most use are in  
2:21:20  
uh recruitment I would say that there are primarily things like resume screening and then also large platforms  
2:21:27  
like LinkedIn Career Builder Monster who are using machine learning and algorithms on the back end to determine  
2:21:32  
for instance you run a LinkedIn search who shows up in your search results that is a machine learning system or an AI  
2:21:38  
system working back there which follows a pretty different format from the ones that we've been discussing because the  
2:21:43  
goal of that system say take a search query a software engineer and return a ranked list of results and and this has  
2:21:50  
different implications for who ends up near the top of the results who shows up on page two and never really gets seen as much so the analysis that you might  
2:21:57  
do there is a bit different so I would say even within recruitment there's a wide variety of applications that we  
2:22:02  
should be thinking about that don't follow this the simple formal format of somebody applies and you make a yes no  
2:22:08  
decision on them thank you that's helpful um going back to this question of

2:22:14

differential validity I take it from your uh written testimony but that's something that

2:22:20

um you know as you're designing such a system you could check uh for can you talk to me about that

2:22:26

um as well right so often when you evaluate when you're building and designing a system

2:22:32

you'll evaluate it and one of the things that you will commonly see in an

2:22:37

evaluation is validity right aggregate across the entire population what is

2:22:42

less common is to see that validity disaggregated by different parts of the population or for different demographic

2:22:48

groups and I think that disaggregated valuation is actually quite important it's definitely feasible

2:22:54

the the challenge is that you do need to have demographic data on the people in your training set now this this often is

2:23:00

the case in employment context but may not always be the case now when you have that demographic information

2:23:06

then you can say I can not only report the validity of this model or of this assessment I can also report the

2:23:13

validity on men or the validity over women and I can compare those numbers and say are they similar to each other

2:23:18

or are they dramatically different and if they are dramatically different that is an indication that your assessment

2:23:23

isn't going to perform the way that you want it to in practice that it will perform better for certain subgroups of the population than others and it is an

2:23:30

indication that the primary thing that you should do to fix that is there's likely a problem with the data that is

2:23:35

imbalanced towards one group versus another now there are other problems that can cause differential validity but

2:23:41

that in practice is the most common source foreign thank you that's very helpful I

2:23:47

wanted to go now to Mr Friedman and one of the things that I've been thinking

2:23:53

about a lot has been in the Ada context which obviously you know as you assess

2:23:59

uh discrimination under the Ada it works differently than under Title VII with

2:24:06

respect to whether or not a candidate might be screened out of a process um and one of the things that I wanted

2:24:12

to ask about you mentioned transparency uh as one of the concepts that has been

2:24:17

coming up in your practice in this area and I'm curious as to whether or not you

2:24:24

think there are things that we as a commission could do to encourage employers to really focus on

2:24:30

transparency with respect to persons with disabilities or um particularly if they need some sort

2:24:37

of accommodation and in particular if you haven't automated a purely automated

2:24:43

process that occurs to me that you you will find it difficult to raise your

2:24:48

hand and ask for that interact interactive process that could lead to getting a reasonable accommodation if

2:24:53

you need one for disability so I was wondering if you could just speak to that uh generally sure so uh maybe I can

2:25:01

answer that it's excellent question by giving you an illustration from one of my clients so they use in in hiring for

2:25:09

a particular set of compliance positions they will use an online tool it's a 45

2:25:15

minute time test that is designed to ascertain who's a good researcher and

2:25:21

who's a good writer and I would say that one of the the benefits of this is that

2:25:27

they're less interested in uh and focusing on you know phds in English

2:25:32

they really are interested and and you know the top schools you went to they're really interested in focusing in on how

2:25:39

effective you are because the algorithm scores the exam during the 45 minutes at

2:25:44

the at the end and based on your ability to research and write to your question your Bros let's say someone has a  
2:25:52  
generalized anxiety disorder um or you know a a mental disability or  
2:25:57  
ADHD or something like that you might say Well they're not going to perform as well on a timed test what are they  
2:26:04  
supposed to do under these circumstances and in answer to your question as to how  
2:26:10  
the EEOC can be effective in this space in that kind of context I know  
2:26:15  
traditionally uh you're not supposed to raise any issues with respect to your disability pre-offer  
2:26:23  
um and in this instance right uh if you really wanted this position you were a great researcher and a great writer but  
2:26:30  
you were anxious about being able to accomplish it in 45 minutes I think what would be useful is the EEOC  
2:26:37  
should create some guidance for employers to be able to accommodate  
2:26:42  
someone who is going to be just as effect active once they hit the job in  
2:26:48  
researching and writing in that compliance position without uh actually being adversely impacted by virtue of  
2:26:54  
the fact that maybe that particular time test did not endured to their benefit for sort of Maximum result so I think  
2:27:02  
guidance in that space uh is going to be very important for the EEOC  
2:27:07  
okay so I think I'm out of time I was uh you know just wanted to commend all of  
2:27:13  
you for your time here in the excellent truly excellent written testimony I was  
2:27:21  
hoping to get a chance to ask uh questions of Dr tippins and Mr Klein so  
2:27:26  
I apologize for that but I'm going to try and stick to the schedule that we promised to you and to my colleagues  
2:27:32  
here at the commission and so I will um say thank you and wrap up this round uh  
2:27:39  
we are at um time for that and that concludes our second panel so

2:27:46

um we will be breaking now for lunch and I would say let's come back at 1 30 so

2:27:51

that we can stay on time thanks so much

2:28:07

pardon me if I may just get the intention of our interpreters thank you momentarily

2:28:14

we'll begin and now may I present chair Charlotte Burrows

2:28:23

thank you welcome back to our hearing on automated systems and Ai and employment

2:28:30

welcome also to our members of the public and the fellow Commissioners and

2:28:35

of course those who are speaking today and who have sent us such excellent

2:28:40

testimony um to share your insights so with that let me introduce the speakers on our

2:28:47

final panel in the order that they will be speaking today first Matt sharer is

2:28:53

senior policy Council for workers rights and Technology policy at the center for democracy and Technology his work

2:29:00

focuses on the use of AI in hiring and other employment decisions workplace

2:29:06

privacy and surveillance and helping workers to use data and Technology to

2:29:12

empower themselves next Heather Tinsley fix is a thought leader and influencer in age diversity

2:29:19

working to advance the value of older workers and the business case for building age diverse and age-inclusive

2:29:27

organizations as a senior advisor of employer engagement at AARP she leads the AARP

2:29:34

employer pledge program a nationwide group of employers that's

2:29:45

please stand by

2:29:52

School of Law and an adjective of a business where she is a rethink lab

2:30:00

director of the artificial intelligence decision making research

2:30:08

Berkman Klein Center at Harvard University since when was a researched

2:30:16

interests all right the intersection with the particular Focus

2:30:22

if our attendees would please stand by while we resolve the technical issue

2:30:32

chair Burroughs could we please Begin Again and could we please begin again with the

2:30:38

bio from Heather Tinsley fix

2:30:47

I'm sorry and not hero from which witness apologies chair Burroughs we are

2:30:54

going to have to resolve the connection issue with the computer before we can begin as your audio is too distorted so

2:31:01

I think we have support coming for you now thank you I'm just going to put you on

2:31:06

mute now chair Burrows while the issue is resolved if our Witnesses could please stand by

2:32:07

thank you to our attendees if you could please stand by with us while we resolve a technical issue

2:37:19

please stand by

2:38:01

hi everyone can people hear me yes ma'am we can hear you wonderful I'm Vice chair

2:38:07

Jocelyn Samuels and apologies for our technical difficulties wouldn't you know

2:38:13

that in the hearing about artificial intelligence we would end up having to deal with technical issues but I'm just

2:38:21

going to start from scratch to um introduce our panelists so that we

2:38:27

can get right into their testimony I think that uh chair Burroughs introduced

2:38:34

uh Mr sharer who I am just now scrolling to

2:38:40

uh where I can apologies

2:38:53

excuse me one second

2:39:13

apologies

2:39:25

hi is everyone able to hear me oh are you back I am and I so apologize it is

2:39:31

such a pleasure to have such patient and thoughtful colleagues so thank you um Vice chair Samuels and I think what I

2:39:39

will do is return to um introduce Professor ajunwa I think I was just

2:39:45

starting there um if that is correct bear with me I did not know I had lost you all

2:39:51

um so very happy to have you here and once again Professor jinwa is a tenured law professor at the University of North

2:39:59

Carolina um School of Law and an adjunct professor at the Keenan flager School of

2:40:05

Business where she is a rethink.lab we think lab fellow she's also the founding

2:40:11

director director of the artificial intelligence decision making research program at UNC law and a faculty

2:40:19

associate at the Workman Klein Center at Harvard University since 2017. Professor

2:40:25

Jun was research and interests are at the intersection of Law and Technology with a particular focus on the ethical

2:40:32

governance of workplace technology so perfect for today's discussion also Alex Engler is a professor at the Brookings

2:40:39

institution where he studies the implications of artificial intelligence on governance with a focus on social

2:40:46

policy so he recently returned from Berlin and Brussels where he worked at

2:40:52

on the European Union's AI act as a Fulbright Schumann Innovation scholar so

2:40:58

welcome to all of you and you will each have five minutes for your opening statements thank you for your patience

2:41:04

once again and we'll begin with Mr Sharon you have the floor

[Matthew U. Scherer](#), Senior Policy Counsel for Workers' Rights and Technology, Center for Democracy and Technology

2:41:09

chair Burroughs Vice chair Samuels and Commissioners good afternoon my name is Matt chair and I am Senior policy

2:41:16

counsel for workers rights and Technology at the center for democracy and Technology CDT is a non-profit

2:41:23

nonpartisan organization that advocates for stronger civil rights Protections in the digital age

2:41:28

cdt's workers rights project examines among other workplace Technologies

2:41:35

automated employment decision tools or aedts while these tools can improve the

2:41:41

efficiency of the Recruitment and hiring process they can also interfere with workers access to employment and limit

2:41:47

their advancement opportunities CDT has worked with a broad Coalition of civil rights and public interest

2:41:53

organizations over the past several years to develop principles and standards regarding these technologies

2:41:59

that Center and Advance the interests of workers particularly those from historically marginalized and

2:42:05

disadvantaged groups as the commission is aware more and more employers are using new hiring Technologies to make

2:42:12

critical employment decisions but history shows that while technology has the potential to make work and

2:42:18

workplaces safer fairer and more accessible not all new technologies live

2:42:23

up to their hype and in certain cases they've even caused Great harm the stakes are especially high with

2:42:29

aedts which could impact the careers and livelihoods of countless workers

2:42:34

policymakers and employers alike should scrutinize aedts carefully due to the

2:42:39

unique risks of discrimination they pose today's automated tools rarely if ever make an effort to directly measure a

2:42:47

worker's actual ability to perform the essential duties and tasks that will be expected of whoever the employer hires

2:42:53

for a given position instead some claim to assess workers based on personality or other subjective

2:43:00

characteristics untethered from actual job duties others use correlation-driven machine learning methods that can lead

2:43:07

the tool to focus on a relevant and potentially discriminatory characteristics such tools pose a risk

2:43:13

of discrimination against already disadvantaged groups of workers who often are unrep underrepresented in the

2:43:20

data used to train aedts and whose relevant skills and abilities may not be as obvious to an automated system

2:43:27

the current legal landscape needs clarification and refinement to address these concerns the uniform guidelines do

2:43:33

not adequately reflect the many changes in law and social science that have occurred in the five decades since they

2:43:39

were drafted perhaps even more disturbingly some vendors and Allied special interest groups have actively

2:43:44

sought policy changes that would weaken or undercut existing protections or confuse employers and workers about what

2:43:51

current Law requires it was against this backdrop that CDT partnered with many of the nation's

2:43:58

leading civil rights organizations including the ACLU which is also represented at today's hearing to create

2:44:04

the Civil Rights standards for 21st century employment selection procedures the standards were published last month

2:44:10

with the endorsements of 13 civil and digital rights groups the standards Provisions would detect and prevent

2:44:16

discrimination by requiring that all selection tools be clearly linked to essential job functions mandating

2:44:22

pre-deployment and ongoing audits to ensure tools are non-discriminatory and job-related throughout their life cycle

2:44:29

ensuring that companies select the least discriminatory assessment method available

2:44:34

prohibiting certain tools that propose a particularly high risk of discrimination such as facial analysis and personality  
2:44:41  
testing adopting the standards would also improve transparency and accountability by creating multiple layers of  
2:44:48  
disclosure requirements including concise candidate disclosures detailed audit summaries and comprehensive record  
2:44:54  
keeping by ensuring candidates can communicate concerns mandating clear  
2:44:59  
procedures for disabled candidates to access accommodation and giving candidates a right to human review in  
2:45:05  
the case of automated tools while the rise of automated decision tools was the impetus for this work the  
2:45:13  
standards apply to all formalized selection procedures they provide a roadmap to managing the risks associated  
2:45:18  
with modern selection tools while centering the rights and dignity of workers particularly those most at risk  
2:45:24  
of technological discrimination they also provide a concrete alternative to proposals that would set very weak  
2:45:30  
notice audit and fairness standards for automated tools and my written testimony describes the  
2:45:35  
standards and the other topics I have discussed today in Greater detail as the commission completes its strategic enforcement plan over the coming weeks  
2:45:41  
and months we urge it to use its platform and authority to ensure that workers not machines remain at the center of the future labor market the  
2:45:48  
rights of workers particularly vulnerable and marginalized workers must not be trampled or glossed over for the sake of convenience or efficiency thank  
2:45:55  
you thank you we'll go now to miss Tenley fix

[Heather Tinsley-Fix](#), Senior Advisor, Employer Engagement at AARP

2:46:01

thank you chair Burrows and distinguished Commissioners on behalf of our 38 million members and all older

2:46:06

Americans thank you for the opportunity to speak to you today AARP believes that any type of

2:46:12

discrimination in the workplace is unacceptable and too often when discussing discrimination age is not

2:46:17

included although ageism continues to be a widespread problem in terms of age bias and discrimination

2:46:24

the potential pitfalls associated with the use of AI in hiring and workforce management platforms are at the root the

2:46:31

same for older candidates as they are for other protected classes namely the quality or relevance of available data

2:46:39

and the normative judgments baked into the process of what good looks like

2:46:45

however the way those pitfalls affect older workers can look a little different or come from unexpected places

2:46:50

so here are some examples in terms of the type and amount of data collected

2:46:55

to the extent that algorithms scrape and use data from social media posts and activity from professional digital

2:47:02

profiles or internet browsing history to power their predictive rankings older adults may be left out of the

2:47:08

consideration set due to either a lack of those types of data in their digital footprint or the fact that fewer older

2:47:16

job candidates are considered when building ideal candidate profiles furthermore any data point collected

2:47:22

that explicitly reveals or serves as a proxy for age such as date of birth years of experience or date of

2:47:29

graduation can be noticed by the algorithm as part of a pattern denoting undesirable

2:47:34

candidates and signaled the algorithm to lower their ranking or screen them out entirely  
2:47:40  
number two cultural norms there are a host of unconscious assumptions baked into our culture  
that associate age with  
2:47:47  
slowing cognitive decline and inability to learn new things and resistance to  
2:47:53  
change these Norms inform the way the job descriptions are worded Target variables  
2:47:58  
are defined interviews are conducted and assessments are designed and scored for example if  
reaction time is a  
2:48:06  
variable on which candidates are scored older workers may be at a disadvantage research  
shows that older brains exhibit  
2:48:13  
slower processing speeds but greater contextual knowledge however if skills assessments or for  
2:48:20  
example the analysis of interview footage are optimized towards the performance of younger  
brains by the  
2:48:26  
data scientists working on them older workers could receive arbitrarily lower scores  
2:48:32  
additionally older workers could be excluded at the start of the hiring process because they  
never see the job ads to begin with  
2:48:38  
in 2017 pro-publica revealed that Facebook was allowing organizations to age Target their  
employment ads  
2:48:45  
and this can also include the way job descriptions are worded so phrases like recent college  
grad and digital native  
2:48:52  
are explicitly ageist but even subtle references such as fast-paced high  
2:48:57  
energy and super fun have been shown to deter older workers from applying  
2:49:03  
and finally there's the feedback loop of decisions taken by recruiters or hiring managers  
2:49:09  
to the extent that algorithms learn from the preferences and decisions made against older  
candidates during the  
2:49:15  
recruiting process they will spot the patterns in the data that indicate an older candidate and  
subsequently promote  
2:49:21  
those candidates less frequently and less far through the automated process

2:49:26

so for example if an older candidate makes it past the resume screening process but then gets confused by or

2:49:32

interacts poorly with a chatbot that data Could Teach the algorithm that candidates with similar profiles should

2:49:38

be ranked lower this also applies to Performance data so again to the extent that performance

2:49:44

evaluations or other employment related decisions such as who is selected for training who gets assigned to Innovative

2:49:50

projects or high performing teams the extent to which those decisions are influenced by the ageism of human actors

2:49:57

and then that data is fed into ranking algorithms as proof points older workers

2:50:02

could be disadvantaged so what can employers and the EEOC do to mitigate the risks of this kind of

2:50:08

discrimination in terms of practical guidance there are many steps employers can take to

2:50:14

specifically address the risk of unintended age discrimination and bias first stop asking for age-related data

2:50:21

in applications such as dates of birth or graduation unless there is a proven business reason to do so

2:50:28

second pay close attention to the words used in job descriptions and don't cap the years of experience required so

2:50:35

replacing the phrase two to five years experience with at least two years experience signals that candidates of

2:50:42

all ages are welcome to apply don't age Target employment ads on platforms that allow such targeting just

2:50:49

don't do it even if that includes filters that approximate age such as job seniority or years of experience

2:50:56

look for vendors who work with certified i o psychologists in particular as has been noted before by other panelists any

2:51:03

use of non-employment related data should be vigorously scrutinized for its potential to rely on correlation rather

2:51:09

than causation request regular and independent audits of algorithmic performance include age

2:51:17  
as an element of diversity equity and inclusion initiatives driving awareness of the value of age diversity at work

2:51:23

will help shift a culture of unconscious ageism and finally Empower recruiters to

2:51:29

challenge hiring managers who exhibit conscious or unconscious preferences for candidates based on age there is a

2:51:36

strong business case for the inclusion of older workers as part of an age diverse Workforce

2:51:41

very quickly on the legislative front AARP supports both federal and state level initiatives to ban age-related

2:51:47

questions during the application process Connecticut and Delaware have enacted such bans

2:51:53

and at the federal level AARP supports the protect older job applicants act as

2:51:58

well as the bipartisan protecting older workers against Discrimination Act

2:52:04

again thank you for providing us the opportunity to testify today and I look forward to answering any questions

[Ifeoma Ajunwa](#), Associate Professor of Law, University of North Carolina School of Law

2:52:10

thank you professor junwa uh greetings to all

2:52:17

campers and Commissioners thank you for inviting me to testify at this important public meeting on employment

2:52:23

discrimination in Ai and automated systems I am a law professor at University of North Carolina School of

2:52:29

Law of law where I am also the founding director of the EI decision make making research program I have previously

2:52:37

testified before this Commission in 2016 and in 2020 I also testified before the

2:52:42

Congressional education and labor committee on the issue of workers rights in the digital age

2:52:47

first I make note of the business Trend towards the use of automated hiring

2:52:54

programs the top 20 private Employers in the Fortune 500 lists all make use of automated hiring systems this list is

2:53:01

comprised of mostly retail companies with large numbers of workers in low wage or entry-level work

2:53:07

it is true that many businesses turn to automate hiring in an attempt to diversify their workplace

2:53:14

yet there is evidence that such algorithmic decision-making processes

2:53:20

May sign me the progress of anti-discrimination laws automated hiring programs are initially

2:53:27

advertised as a way to clone your best worker a slogan that in effect replicates fives this is precisely

2:53:35

because automated hiring programs take the nebulous concept of cultural fit for a given Corporation organization and

2:53:43

concretize it into select algorithmic variables that are standings for

2:53:48

protected categories the creation of these proxy variables can have racial

2:53:53

gender and age discrimination effects in contravention of anti-discrimination laws for which this commission has

2:54:00

regulatory power such as Title VII of the Civil Rights Act and the age discrimination and Employment Act I'll

2:54:08

illustrate this problem with an example shared by an employment and labor lawyer who had been hired to audit an automated

2:54:15

hiring system as reported by the lawyer when the automated system was presented with training theater and then queried as to

2:54:23

which two variables were found to be the most relevant the system reported back

2:54:28

that those variables as the name Jared and also whether the

2:54:35

applicant had played High School across as confirmed by Social Security records

2:54:41

the name Jared is highly correlated to individuals who are both white and male  
2:54:47  
furthermore lacrosse is a sport that isn't found in all high schools rather it is an extensive sport  
that is found  
2:54:54  
in well-funded high schools located in affluent neighborhoods that are more likely to be  
predominantly white given  
2:55:01  
the history of racial segregation in the United States thus in this Insidious manner proxy  
2:55:07  
variables as part of automated hiring systems can enact on lawful racial and  
2:55:13  
gender employment discrimination finally I point to the use of automated  
2:55:18  
video interviewing with facial analysis and emotion detection has inherently  
2:55:23  
flawed and discriminatory automated hearing practice in 2018 60 of  
2:55:30  
organizations were using video interviews but the use of automated video interviews sharply  
increased to 86  
2:55:38  
in 2020 due to the covid-19 pandemic this automated practice is akin to  
2:55:45  
disproved pseudoscience of phrenology and thus should be banned automated video  
interviews that are  
2:55:53  
scored by a speech algorithms provide opportunity for accent discrimination  
2:55:59  
and the ones that claim to detect emotion from facial analysis further enable  
2:56:05  
racial and gender discrimination given cultural and gender differences and how  
2:56:10  
emotions are expressed I offer four proposals that EOC should consider as  
2:56:15  
part of its enforcement of our employment and tradition laws first the EOC should consider the  
addition of a  
2:56:22  
third cause of action for Title VII of the Civil Rights Act a third cause of action which I call  
discrimination per  
2:56:28  
se would shift the burden of proof from applicant to employer so long as an  
2:56:34  
applicant is able to point to a feature or requirement of an automated hiring system that seems  
egregiously

2:56:41  
discriminatory for a particular protected class the employer would then  
2:56:46  
bear the burden of showing what the statistical results of the audits of the automated hiring  
system that identified  
2:56:54  
automated hiring feature does not in fact have a disparate impact on a protected class  
2:57:00  
second the EOC should mandate employer audits of any automated hiring systems  
2:57:05  
in use I argue that the ESC should require external audits as internal  
2:57:10  
audits are not enough the EOC could choose to take on these external audits or it could certify  
2:57:18  
third-party vendors that would provide those options third the EEOC perhaps in cooperation  
2:57:24  
with FTC should develop its own automated governance tools in the form  
2:57:30  
of AI or automated systems that could then provide audit services to corporations deploying  
automated hiring  
2:57:37  
systems finally the EOC should release an advisory notice that the United the  
2:57:44  
uniform guidelines on employee selection procedures govern the use of variables  
2:57:50  
used in other algorithmic hiring and that the design of automated hiring systems should be to  
retain full records  
2:57:57  
of both completed and also failed application attempts all variables selected for admitted  
2:58:04  
hiring systems should then meet Criterion content and construct validity  
2:58:10  
for the specified job position this will lessen opportunities for proxy  
2:58:15  
variables to be deployed from lawful employment discrimination against protected categories  
2:58:21  
with that I once again expressed my gratitude to chair borers and her affiliate Commissioners  
for the  
2:58:27  
opportunity to present these remarks and proposals in support of the EOC mission  
2:58:33  
of equal employment opportunity for all thank you so much  
2:58:39  
thank you and now we go to Mr Engler you have to work

[Alex C. Engler](#), Fellow, Brookings Institute and Adjunct Professor, Georgetown University

2:58:45

good afternoon my name is Alex Engler I'm a fellow at the Brookings institution an associate fellow at the

2:58:51

center for European policy studies and an Adjunct professor at Georgetown University I primarily study the

2:58:57

interaction between algorithms and social policy and there's this research is informed by a decade of experiences

2:59:03

as a data scientist I thank the commission for the opportunity to offer testimony today and I know with

2:59:09

apologies that I have used the privilege of going last to make some small changes to my submitted text so I can emphasize

2:59:15

what you haven't already heard today first I want to commend the EOC on last year's technical assistance detailing

2:59:21

how AI hiring tools can be discriminatory against people with disabilities and how their developers might comply with the Americans with

2:59:27

Disabilities Act I applaud this work and will continue to hold it up as an example to other federal agencies

2:59:32

especially for how it considers the entire socio-technical process of hiring and not just the algorithms alone

2:59:39

this work from EEOC is especially encouraging because the story of AI hiring is not unique almost all critical

2:59:45

decisions in the employment context are experiencing algorithmization this includes AI applications for targeted

2:59:51

job ads recruitment **background checks** task allocation evaluation of employee performance wage setting promotion

2:59:58

termination and others well AI hiring receives the most attention these other AI employment 3:00:04

systems are used by thousands of businesses and affect millions of Americans the prevailing evidence suggests it's a bit uncertain but it

3:00:11

suggests that for medium and small businesses our medium and large businesses algorithmic systems will soon

3:00:16

contribute significantly to or perform outright the majority of all employment decisions in the categories mentioned

3:00:22

above that most employment decisions will be assisted by or made by an AI system is a

3:00:29

sea change in the employer employee relationship and in turn requires a significant adaptation by the EEOC

3:00:36

continuing the work of the AI and algorithmic fairness initiative the EOC should systemically consider these AI

3:00:42

applications develop tailored guidance for each under all of the ai's eeoc's

3:00:47

legal authorities including Title VII of the Civil Rights Act the Americans with stability Disabilities Act the age

3:00:53

discrimination Employment Act the Equal Pay Act and others and also further build necessary capacity for information

3:00:59

gathering and enforcement that I'll talk about in a minute this is an enormous undertaking it will

3:01:05

take time and dedicated Staffing and resources and I also expect that over time it will affect the structure and

3:01:12

core functions of the EEOC while a great challenge that is the appropriate response to the new

3:01:18

algorithmic paradigm in employment the European Union has recognized the gravity of this challenge the eu's AI

3:01:25

Act is focused on the use of algorithms and socioeconomic decisions including access to public benefits Financial

3:01:32

Services as well as employment most relevant the euai ACT will categorize almost everything I've mentioned so far

3:01:38

as a high risk AI application that's job ads recruitment background checks task allocation employee performance

3:01:44

promotion all those categories will be high risk as a result covered AI

3:01:50

developers will have to meet standards for the input data for the accuracy and robustness of those models for

3:01:56

transparency and explainability to users for some degree of human oversight as well as writing technical documentation

3:02:03

all of these requirements this is potentially have interest to the EOC all of these requirements necessitate the

3:02:08

creation of Standards which may help inform some of the difficult questions that the EEOC may also face relevant to

3:02:15

the regulation of specific AI employment applications the euai ACT will also require that

3:02:21

developers register their AI systems and perform and preserve the data reflecting its use and performance

3:02:28

which EU Regulators are then empowered to review this effectively enables AI audits algorithmic audits to ensure

3:02:34

Conformity with the AI Act the registration will also lead to a public database from all of these

3:02:40

systems also potentially an informative resource for the EEOC much like the EU in addition to new

3:02:46

regulatory guidance and technical assistance the EEOC should actively consider developing new AI oversight

3:02:52

capacity especially while further developing the draft strategic enforcement plan

3:02:57

an important takeaway from my Brookings research is that a trend the transition to an AI employment systems may

3:03:03

represent a possibility for a more just labor market but those better outcomes are absolutely not guaranteed

3:03:10

while an effective and independent auditing Market might help self-regulate

3:03:15

AI systems that's not going to emerge on its own acting as a regulatory backstop and

3:03:20

creating real Stakes for violating anti-discrimination laws the EOC has the potential to change these incentives for

3:03:26

the better a few things you can do in terms of building that capacity the EOC can  
3:03:31  
continue its efforts to hire data scientists especially those who specialize in Regulatory  
Compliance or  
3:03:36  
algorithmic Auditors aside from these and view of enforcement actions the EOC  
3:03:42  
can look to acquire and evaluate AI employment systems in order to improve its own  
understanding as well as the  
3:03:48  
public knowledge of AI employment systems this might be informed by the uai ACT database or  
the National  
3:03:53  
Institute for standards and Technologies facial recognition uh testing program which evaluates  
3:04:00  
facial recognition software and publishes results both enforcement actions and more public  
3:04:05  
information can influence the key players as we've talked about a lot today the vendors of  
employment systems  
3:04:11  
these vendors have enormous amount of Leverage over the market and influencing their  
behavior is key to leading to a  
3:04:17  
more Equitable and transparent outcomes in the future of an algorithmically driven labor  
market in the short and medium term the  
3:04:23  
development of new EEOC capacity for algorithmic oversight is a significant hurdle but this will  
be just as critical  
3:04:29  
as the development of new policy guidance and technical assistance in order to ensure the just  
application of  
3:04:34  
AI and employment I again thank the commission for its invitation today and I welcome your  
questions  
3:04:40  
thank you so we will go now to questions from each of the Commissioners beginning  
3:04:47  
with Vice chair Samuels and uh each of us will have 10 minutes thank you  
3:04:53  
thank you uh so much chair Burroughs and thank you to all of our witnesses as has  
3:04:59  
been true of every panel today you all have shared such valuable insights and  
3:05:06  
so much expertise in this big new civil rights Frontier I really do hope that

3:05:13

this can be part of a continuing dialogue where we continue to learn from

3:05:19

all of the valuable work that you're doing um but let me start with Mr sharer

3:05:25

um I found your civil rights standards very thoughtful and interesting and

3:05:33

among them you call for uh expansion of record-keeping requirements

3:05:41

so that uh individual stakeholders vendors employers can learn from uh the

3:05:50

work that developers of AI have done can you say a little bit more about what

3:05:55

documentation you think entities are required to keep now and what you would

3:06:01

expand beyond what may be the current requirements

3:06:09

thank you Vice chair um right now the uniform guidelines

3:06:14

require and the related EEOC regulations regarding eo1 forms Etc require

3:06:22

employers to keep a fair amount of documentation relating to the outcomes

3:06:28

of their selection processes the the outcomes of their hiring decisions

3:06:34

they typically do not require a great level of technical record-keeping when

3:06:42

it comes to how it was that they selected the selection procedures that

3:06:47

they did how those selection procedures operate the manner in which candidates

3:06:53

are given notice require regarding what selection tools are being used and how

3:06:59

they operate what Provisions for accommodation were given to candidates

3:07:04

and how it was explained to them or whether it even was explained to them how they could  
access accommodate stations a lot of that information

3:07:12

has not been in place in part because the uniform guidelines were developed

3:07:18

before the Ada came into effect so the uniform guidelines which is the main

3:07:25

source of information that employers have to maintain regarding the selection

3:07:30

procedures that they used don't take into account a great deal of the rights  
3:07:37  
that workers now have under federal law so really from the ground we tried to kind  
3:07:44  
of come up from a ground up perspective when we were developing the standards and thinking  
of what is all the  
3:07:50  
information that a regulator or a more sophisticated  
3:07:58  
stakeholders such as uh workers rights Advocates if there's litigation the  
3:08:04  
attorney's involved what information might they need to look at in order to determine whether  
the selection process  
3:08:11  
as a whole as well as the individual selection tools were chosen in a manner that were  
consistent with federal law  
3:08:17  
and not just certain federal laws but all federal anti-discrimination laws so  
3:08:22  
it would include things like what sorts of notices did you give candidates what were the exact  
content  
3:08:29  
of them did you receive information or requests from candidates for accommodation did you  
provide  
3:08:37  
accommodation and if you did not what how did you communicate that decision to  
3:08:42  
the applicant for targeted job advertisements it would you'd have to keep records regarding  
who  
3:08:50  
was shown the ads uh or not necessarily these specific individuals but you would  
3:08:55  
have to keep records indicating how those ads were how it was decided that  
3:09:00  
Those ads would be shown to perspective prospective candidates all of this is basically meant to  
3:09:09  
provide a basis for regulators and investigators to come along later and be  
3:09:14  
able to determine whether or not compliance was achieved um  
3:09:20  
yeah this isn't to say that existing record-keeping obligations you know are  
3:09:25  
not a great start and that the EOC lacks enforcement Authority in order to collect a lot of this  
information already but it is not clearly spelled

3:09:32

out in existing regulations thanks that is very helpful

3:09:37

um let me follow up with a quick question on a different topic the Civil Rights standards also call uh for the

3:09:44

availability of human Alternatives if individuals want to request a human

3:09:51

review of what has happened through an online technological process how could

3:09:58

those kinds of human review Systems be created in ways that wouldn't undermine

3:10:04

the efficiency that I think employers are seeking from use of AI tools

3:10:11

sadly I don't think it can I think I think you have to have some trade-off of efficiency in order to ensure that each

3:10:18

candidate receives the individualized assessment of their ability to perform the job which I would argue that Title

3:10:25

VII the Ada and other federal anti-discrimination laws require D um you could conceivably design a

3:10:33

process where the human review is done

3:10:39

in a manner that allows essentially kind of an expeditious

3:10:44

review where you provide not the entire Suite of

3:10:50

application materials so that it's not a complete start from scratch review of it but rather there is some sort of

3:10:59

recommendation that is output by the system and the factors that the system

3:11:04

took into account when making that recommendation or provided to the human review so it's not necessarily the case

3:11:11

that it was kind of fudged exactly what human review entails but the idea would

3:11:16

not necessarily be okay you would have some candidates who would essentially be

3:11:22

reviewed by a human recruiter without the AI and then others would be reviewed by an AI without a human recruiter the

3:11:29

idea is you'd have some sort of check and backstop to make sure that the output that the machine was creating

3:11:35

actually makes sense and properly accounts for the candidates individualized characteristics and

3:11:41

briefly a major reason that's important is that for particularly for underrepresented groups the ways in

3:11:48

which their skills and competencies show up may not be obvious to an automated system so there needs to be some sort of

3:11:55

opportunity to explain well no it says that I don't the the machine says that I

3:12:01

don't have any experience in X Y or Z but I do look at this and if it's a completely automated

3:12:07

process and there's no opportunity for a candidate to make that explanation then that is where you can run into potential

3:12:15

discrimination issues because that is often keyed to what people are more represented in the training data

3:12:22

thank you so much that's that is really helpful um let me turn to Mr Engler and say

3:12:28

you've written a lot about open source software as a way for AI designers to be

3:12:36

able to evaluate and assess the validity and impact of their AI tools can you say

3:12:45

a little more about uh what open source software would enable designers to do

3:12:52

and whether that can automate this is kind of a meta question automate the audience that a lot of our

3:13:00

Witnesses have called for today sure um thanks for that question this is

3:13:06

an underexplored angle um a lot of the data science Community

3:13:11

which is like the underlying community of people who actually build these things are incredibly dependent on open

3:13:16

source software um to make these tools and the vast majority of tools we're talking about are built in open source software and

3:13:23

then made proprietary and sold right um so the availability of tools that can

3:13:29

be used for more fair uh AI systems affects the average data scientists

3:13:35

ability to do their job there are a bunch of these systems out there already IBM has made systems called AI fairness

3:13:43

360. Microsoft has one called fairlearn there's one from University of Chicago and others

3:13:48

individual researchers and academics like Chris molner uh have have made these and so across all of these they do

3:13:55

increase sort of the average capacity of a data science to make Fair tools um they don't necessarily solve all of

3:14:02

your problems they don't automatically solve the incentives that still takes time and energy for an average data

3:14:08

scientist to make a really fair system right that's more time they're spending on that and less time delivering on a

3:14:14

new feature for a client so it doesn't solve the incentive problem but better open source software can make it easier

3:14:20

incrementally easier to make safer and fairer systems you know and I was

3:14:25

encouraged that the National Science Foundation for instance had funded some of this research and it would be great to see more I hope that answers your

3:14:31

question it does thank you so much and uh unfortunately I only have 2017 seconds

3:14:38

left but I do hope that professor ojua and Ms Tinsley fix will have an

3:14:44

opportunity to continue this conversation thank you all for your really valuable input

3:14:51

thank you we'll go now to commissioner sunderling thank you I'll stick with uh Mr Angler

3:15:03

yep Mr okay there you are all right

3:15:08

um well thank you for um testifying you know for you who has been looking at this issue for a long time and sort of

3:15:15

poking uh through your writings and advocacy poking federal agencies to

3:15:20

start taking a look at this especially the EOC this must be a very welcome day for you and pinching yourself to be

3:15:27

testifying about uh all the the noise you've been making for a long time on

3:15:32

this so I do want to thank you personally for pushing this issue forward both here at the commission and other Agency for many many years but um

3:15:40

I want to talk about your recent time uh in Europe uh the a the EU AI act has

3:15:46

obviously talked about uh globally because it's really the first comprehensive uh AI uh piece of

3:15:52

legislation obviously there's significant issues there about who's going to enforce it and how that's going to work

3:15:58

um but from your perspective have really dug into it I think it's worth uh discussing a little more about it's kind

3:16:04

of a two-part question number one what do you think we can learn from the implementation there we're there specifically identifying uh employment

3:16:11

as a higher risk and then on the flip side you know what can they um learn

3:16:16

from us realizing that a lot of these higher risk programs require robust

3:16:22

disclosure and auditing and sort of the same issue we're we're having with New York's uh proposal when you get down to

3:16:28

well how do you do it on it and and people are going to still look whether it's in Europe or in New York City or

3:16:35

wherever to what the EEOC says on this you so so this is the kind of dual part question of what can the EU learn from

3:16:43

us and what can we learn from them as we're all sort of tackling the same issue sure great question thanks again for

3:16:50

that and thanks for the kind words about my work I really appreciate that um though frankly your job is much

3:16:55

harder okay so the euai ACT does some things that I think many of us who are

3:17:02

concerned about algorithmic protections want to see the good news is that it's comprehensive it's going to require a

3:17:09

reaction to all of these different areas of employment and that has just sort of good coverage right so you're gonna

3:17:15

we're gonna get standards and law on all those things and I do think the process

3:17:20

of actually writing down some technical standards across all those different applications of AI and employment will be very

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challenging for the for the EU but also very informative for the rest of the world so they're going to take a crack

3:17:34

at this it's going to be challenging but something meaningful will likely uh result the AI high risk database I also

3:17:41

mentioned will be literally every single piece of software that does this will have to be made publicly available in a

3:17:48

database so just the the sort of density in this market will also be available now there are downsides of the European

3:17:55

approach for instance it's very reliant on a single set of requirements that

3:18:00

will have to be evaluated in all of these different applications AI hiring and AI wage setting and AI task

3:18:06

management are actually pretty different right even within AI hiring you might have an analysis of a cover letter

3:18:12

versus a predictive model towards a specific employee performance again very

3:18:18

different so are they really going to be able to write consistent standards across the board

3:18:23

um for even within those sectors it's it's hard to know one thing that's nice about the US approach that the EEOC has

3:18:30

already demonstrated an ability to do is really get very very deep into a specific area of potential AI harms like

3:18:38

it did with the guidance for AI hiring under the Americans with Disabilities Act you can consider both the

3:18:44

socio-technical side that is how humans and algorithms and the interaction between the software and the humans

3:18:50

unfolds and then create standards and guidance around that despite the fact that the EU is going to have more

3:18:55

coverage and I think there is a lot to learn there I do think the US in some ways will have better specific tailored

3:19:01

as it gets through all these applications even if that takes a long time I hope that trade-off makes sense

3:19:07

just to answer your last question algorithmic auditor another important part of this that use saying it's going

3:19:13

to build the capacity to do this that is implicit in the law that they can check to inform compliance with these

3:19:19

standards there's also going to be a lot of lessons learned there right and I've written some about this for Brookings and I will submit that longer report on

3:19:26

what a algorithmic audited hiring is but hopefully that is enough to give you a

3:19:32

sense thank you for the question thank you very much I want to go to Professor ajua

3:19:38

um I I guess I we must have crossed paths on Friday at UNC I'm sorry we didn't get a chance to uh catch up but

3:19:45

we will in front of everyone in the public so um you know in in your in your written

3:19:51

testimony in your remarks I want to hone in on um the EEOC should create its own audit

3:19:56

tools and this is something I'm really interested in because I've heard from a lot of vendors that I've spoken to

3:20:02

um that they can go to the you know if you're making an organic food at Whole Foods or

3:20:08

something you can get a sticker from the USDA saying it's organic we've all seen those on there and they've been asking

3:20:14

you know why can't the EEOC or ofccp at the Department of Labor essentially stamp our AI products and say we're EEOC

3:20:21

certified I mean certainly that would uh help with um sales but in a way I think there is

3:20:26

some analogy there and I think you're alluding to this if we create it's our own audit tools and we have some sort of

3:20:32

certification programs that means the vendors come and work with us that means they're agreeing to a

3:20:38

standard although everyone has to agree to the standard of Title VII there's no opting in or opting out of federal employment loss but at least going uh

3:20:45

you know above and beyond and saying you know we're at least doing some testing transparency explainability reporting

3:20:50

whatever that looks like you know I certainly think there would be a lot of interest in that from what I'm hearing

3:20:55

with vendors and I think that's a really good thing because just enhances the compliance of this program gives the

3:21:01

EEOC and the federal government I don't want to say a partnership but it gives them you know at the table with the

3:21:06

people who are are creating this potentially life-changing software but um that being said you bring it up

3:21:13

and I'm really curious from your perspective of what that looks like and how we would do something like that

3:21:19

uh yes so uh first thank you so much uh commissioner sanderling for that

3:21:24

question um as you mentioned employment is such uh an indelible part of our Lives it's

3:21:30

such a a life-changing position to either have a job or not have a job right so the fact that we have this

3:21:37

automated hiring systems are a gatekeeping employment opportunity uh is

3:21:43

a matter of concern it's a matter of legal concern and I do believe that auditing those systems is imperative

3:21:51

um that's the name of my paper the auditing imperative for automated hiring systems and you know as you you

3:21:57

mentioned I believe that the EEOC should certainly be in the business of

3:22:03

certifying any third-party vendors that would offer audits

3:22:08

um because that would be a way of ensuring that those audits are actually meaningful audits

3:22:14

um you know we've heard in the past of companies conducting internal audits or even extra Journal Audits and then the

3:22:22

results are questionable or don't necessarily event at like a very

3:22:27

rigorous audit so I believe that if the EOC actually gets involved it can make sure that any

3:22:34

audits carried out with its certification actually will meet

3:22:39

um important standards um you know already in place in terms of case law in terms of Title VII for

3:22:47

ensuring equal employment opportunity and certainly certainly from the market if you don't have that standard if you

3:22:55

don't have that sticker or working with the EEOC you know employers although they're free

3:23:00

to probably wouldn't buy it right and right investors probably wouldn't invest in you know with all the amount of money

3:23:07

going to artificial intelligence wouldn't invest in a program that doesn't meet those standards of certification so it is a wonderful idea

3:23:14

and I thank you for raising it and I'd definitely like to talk more about that but in my limited time I'm going to go

3:23:20

to Mr Shearer um I I want to talk to you briefly about a

3:23:25

point and you probably uh can anticipate where I'm going to go about your um the

3:23:31

model legislation you put out which we've discussed at length but I do want to raise awareness of it I think it kind

3:23:37

of piggybacks into a testimony earlier about a safe harbor provision or something for employers to be able to

3:23:44

test and try in your uh proposed legislation there's a small business

3:23:49

exception can you explain that just a little bit for smaller employers and how that could be applicable to some of the

3:23:56

concerns you know if your standards did become let's say law or regulation from

3:24:01

some of the management side attorneys you heard for after about trying to implement it and having some leeway

3:24:06

there of course uh first brief correction uh

3:24:11

standards not legislation it could be used as the basis for

3:24:17

legislation but we certainly hope that maybe just giving you some free advertising yes yes uh but we certainly hope that

3:24:25

the commission will uh consider it in the absence uh consider some of the principles in the absence of legislation

3:24:30

um but to answer your question about small employers there are a few

3:24:35

Provisions that where to back up briefly really what we tried

3:24:43

to do with the Civil Rights standards was to make it so that between vendors and employers whichever party was best

3:24:49

positioned to bear the cost of an audit or of compliance would do so

3:24:57

so in the case of small vendors and large employers they may well keep make

3:25:02

the decision that the employer Bears the full cost of it and vice versa if it's a

3:25:09

large vendor that sells its Wares to many many small employers but there are a few things such as an audit of the

3:25:17

existing Employment Practices of an employer that really it doesn't make

3:25:22

sense to apply it into small employers for a few reasons one is the cost burden that it would impose but another for the

3:25:29

audit of the existing practices is that if you're going to do a statistical audit of some kind you may need a larger

3:25:35

number of employees or candidates than a small employer will have in their

3:25:41

database as it were in order to conduct an effective statistical audit so for

3:25:46

smaller employers certain of the requirements were either in that case it  
3:25:52  
was completely relieved in another instance where it was  
3:25:58  
um uh usually there's joint in several liability that's recommended but when a  
3:26:04  
selection tool results in discrimination and in the case of small employers the  
3:26:11  
any any discrimination that results from a selection tool that is sold by a vendor  
3:26:17  
to a small employer so a lot the the vendor can the vendor is solely  
3:26:24  
responsible essentially for the cost of that discrimination the small employer doesn't bear the  
expense in that  
3:26:29  
instance and the hope with these sorts of Provisions is that every party  
3:26:35  
involved has a strong stake in ensuring that everybody's doing what they're  
3:26:41  
supposed to so the vendor has a strong incentive to make sure that the small employer uses  
the tool exactly in the  
3:26:47  
manner in which it is intended to be used that they don't make modifications to it that may  
change the  
3:26:52  
characteristics of it in a way that may cause discrimination and that way again the party that is  
kind of in the best  
3:26:59  
position to bring resources to Bear to prevent discrimination from recurring can do so  
3:27:05  
uh thank you all very much thank you we'll go now to commissioner Lucas  
3:27:16  
thank you um and thank you to all the witnesses uh this entire day it's been very  
3:27:23  
interesting um and we appreciate your you all uh coming here virtually to speak with us about  
this important topic  
3:27:30  
um I'd like to turn back to uh Professor ajua I have a few questions about some  
3:27:36  
of your additional uh recommendations um commissioner sonderling talked to you about uh uh  
your recommendation about  
3:27:43  
the EOC developing its own audit program um I think it's your third recommendation  
3:27:50

um apologies if it's not that the right order but uh it's the one that in which you recommend that the EUC release an

3:27:56

advisory notice that us governs the use of variables and algorithmic hiring

3:28:01

um can you tell me a little bit more about that recommendation

3:28:06

yes so thank you so much for that question um as it stands um you know a lot of

3:28:13

what is happening with automated hiring systems is very black box meaning that

3:28:19

um employers can really just um use whatever training data they feel is

3:28:25

relevant um and have the algorithms uh really machine learning algorithms sort out

3:28:31

what variables um can then be used for the Target variable which is finding the best

3:28:36

worker unfortunately in doing that um as I mentioned this can result

3:28:42

actually in the creation of proxy variables that are standards for

3:28:47

protected categories such as race gender uh Etc which then um actually results in

3:28:54

employment discrimination so for my proposal which is

3:29:01

um based on looking at the uniform guidelines on employee selection those guidelines advise that job selection

3:29:10

criteria should focus on Criterion validity content validity and

3:29:17

constructability so what that means is that when choosing variables for uh selecting uh

3:29:24

individuals for jobs we actually need to pay attention to ensure that those variables actually are

3:29:31

related to the job at hand what does that mean it means that evidence of the validity of a test or other selection

3:29:38

procedure by Criterion related validity study should consist of empirical data

3:29:45

demonstrating that the selection procedure is predictive right or significantly correlated not

3:29:54

just slightly correlated significantly correlated with important elements of

3:29:59

job performance also evidence of the validity of a test or other selection

3:30:04

procedure by content validity study should consist of data showing that the

3:30:11

content of the selection procedure is representative of the important aspects

3:30:17

of performance on the job and then finally evidence of the validity of a

3:30:22

test of construct validity should consist of data showing that

3:30:29

um the procedure actually measures the degree to which candidates have

3:30:35

identifiable characteristics which have been determined to be important in

3:30:41

successful performance in the job so what is all this thing you know for the way people out there it's saying that

3:30:47

the variables actually have to be highly predictive of job performance or highly

3:30:55

correlated to successful job performance they can't just be we found that most of

3:31:01

our you know top performers have this trait and therefore we're going with those variables because if you do that

3:31:09

if you just use traits that are highly correlated to your top performance what

3:31:14

happens is that you basically replicating the workforce you already have and if you think about workforces

3:31:22

where women have been typically excluded people of color having typically excluded using such training data is

3:31:30

basically replicating those racial and gender imbalances and if you allow me

3:31:36

commissioner I can share a story you know that illustrates this so you know the audit study that showed the um

3:31:43

variable uh Jared and High School lacrosse right I mentioned this in my testimony those were highly correlated

3:31:50

in terms of the top performers of that position but are they highly correlated

3:31:56

to the actual job that's what the uniform guidelines on employee selection

3:32:02

actually requires if I if I can just um interject so I guess my question to some degree is whether or not we just need to

3:32:08

do a better job of informing people about what is already in ugas um drawing your attention to our 1979 q

3:32:16

a section one question five and six and I think this is a large scale uh

3:32:23

knowledge gap for things more than just AI but also things like using college

3:32:28

degree requirements regardless of whether or not you have a complex algorithm screening out or simply it's

3:32:34

just in your job ad um you know by its face these guidelines uh state that uh

3:32:40

you know the question is do the guidelines only apply to rent tests and it points out no they apply to all

3:32:45

selection procedures used to make employment decisions including interviews review of experience education work samples physical

3:32:52

requirements evaluations of performance so and then what practice are covered by the guidelines goes into even more

3:32:57

detail that's question six um so I mean really pretty much any employee selection procedure which I

3:33:04

think by its face would cover algorithms is already covered by you guessed so

3:33:09

you're thinking perhaps just more education and Outreach to advise uh exactly stakeholders of the of that

3:33:15

coverage right right I I I certainly think there is a need for education and Outreach and

3:33:21

I think the trend towards AI can make some employers forget right that um this

3:33:28

AI is still a selection procedure that still needs to follow EOC guidelines and

3:33:34

I think a reminder is um very necessary um and this is a question for both you

3:33:41

and um uh Ms Tinsley fix both of you talked about drop down um uh menus with respect to age

3:33:48

discrimination um I've heard this discussed in a variety of different contexts

3:33:55

um but uh you know I'm very troubled by the

3:34:01

process that that's still happening so I guess our you know looks like a lot of that arose the scrutiny there came out

3:34:07

of a 2017 investigation in Illinois or either of you aware of this being a prevalent practice or is this more of

3:34:14

sort of an ongoing recommendation for people to not fall into this obvious Pitfall because if it's still happening

3:34:21

I'm very interested in hearing about it well I mean I'll jump in real quick and

3:34:27

say that we don't have a good sense of the prevalence with which this kind of uh selection data point is collected we

3:34:34

do know however that it's pretty prevalent to to ask some kind of age-related question whether or not it's the drop down that's limited to a

3:34:40

certain number of years or it's just asking for the date of your uh you know graduation from high school or or

3:34:47

um university so that is a lot more prominent than the drop down um and I don't know how much into what degree um

3:34:54

you know vendors are still using that drop down that's limited um or another thing that often happens and we sometimes will counsel order job

3:35:01

applicants to do is just put in 999 if you're given you know a date field that

3:35:06

you have to fill out so that you're you're sort of masking um your age that uh you know that's a

3:35:12

practice that we will sometimes tell older job Seekers But ultimately that's a hack that's a

3:35:18

workaround it's not solving for the the problem which is you know do you need to know that this candidate is older than 18 fine ask them if they're older than 18 they don't need to know if they're 35 55 75 right so in

3:35:27

terms of its prevalence I'm sorry I can't answer that but um uh my you know Mr General might know more

3:35:35

right um you know I think as a um Miss uh Tinsley fix mentioned it is difficult to

3:35:42

actually note the prevalence of many of these issues because there are no records right um being kept on them

3:35:49

um in any sort of centralized way um I would actually also note that the

3:35:55

drop down menu problem is illustrative of a bigger problem of um design right

3:36:01

on user interface um so a lot of these automated hiring programs aren't necessarily designed

3:36:08

with EOC principles in mind they're not necessarily designed with the Discrimination principles in mind so I

3:36:16

do think education of people who are doing uh the software development or the

3:36:21

creation of this automated hiring programs is also essential just to think about you know how the user interface

3:36:28

could encourage advertently or inadvertently um things like age discrimination and

3:36:35

the way ways that certain interfaces actually can enable proxy variables because a lot of times they don't ask

3:36:41

the age directly they ask something like college graduation or a date of your

3:36:47

first job things like that um so I think you know really paying attention to design mandates I think is

3:36:55

also a really important uh area too yeah I would definitely I think that's a really good point which is sometimes

3:37:01

it's just a matter of of educating the designers right like these um you know the folks in age inclusive design

3:37:07

principles or ADA Compliant design principles thank you if only we had some users or

3:37:14

developers here today um unfortunate in my mind um I think I'm out of time thank you

3:37:22

thank you so I wanted to start off by um first of all talking a little bit about

3:37:29

this uh question of third party auditing uh it's come up quite a bit today and I

3:37:35

wanted to follow up on some of it so I think I would start first of all um with Professor Juno and Mr sharer

3:37:42

just to uh drill down a little bit on that because

3:37:47

third-party auditing obviously carries some risks depending on the incentive structure let's say uh between the

3:37:55

relationship with the auditor and what's most likely their clients and so just

3:38:00

thinking through that um there may be an incentive for the auditor to be more lenient you've sort

3:38:07

of raised some of those um but what role in terms of that

3:38:13

there's also this question of not wanting to stifle Innovation right so the question of the ecoc's role

3:38:19

potentially in auditing um can you talk to to both of those a

3:38:26

little bit in terms of the risks with third-party Auditors and how we might

3:38:31

um do that more effectively and also the risks if the government does it that

3:38:37

that might actually end up sort of unduly channeling

3:38:43

um innovation in a particular way right so you know if you don't mind Matt

3:38:49

I'll jump in um so I think you know with third-party audits um you know there are

3:38:55

pros and cons as you know right there there's the idea that you know third-party Auditors could be co-opted

3:39:01

right by the corporations that they serve and you know return audits that are not necessarily meaningful or

3:39:07

transparent um and I think you know that is an important risk um to consider but I also

3:39:14

think that the market will quickly sort of um disallow such gaming right because if

3:39:22

say a third-party auditor is not rigorous or transparent and then later on obviously there arises an issue where

3:39:30

an applicant then observes um a problem with the automated hiring system that will be a signal for other

3:39:38

corporations not to use that auditor so I think actually in terms of the market

3:39:44

survival of the third party auditors that will I think incentivize that

3:39:50

incentivance actually to have rigorous audits meaningful audits that being said

3:39:56

I think also um having a safe harbor as other um you know panelists have mentioned

3:40:02

that as I mentioned in my paper um for corporations who do take it upon

3:40:09

themselves to invite third-party audits um is essential um right for that sort of

3:40:15

um it's you know the for the kind of like rigorous audits that can actually expose problems you do want to see

3:40:22

Harbor you do want to Grant some sort of grace period uh for corporations to then

3:40:28

fix issues that arise as for stifling Innovation um I don't see this as actually a

3:40:35

problem I actually see this as encouraging Innovation I think when you allow third-party audits you can

3:40:41

actually more easily find issues with the design processes of automated hiring

3:40:47

systems you can find features that are perhaps not as efficient as was um you

3:40:53

know conceived and therefore this can actually spur Innovation it can actually

3:40:58

in fact allow third-party Auditors to be spearheading Innovative

3:41:04

um you know development of automated hiring systems that would actually better conform to the EOC guidelines so

3:41:11

I don't think those worries are um I mean they're founded but I don't think they're necessarily an impediment for

3:41:18

the EOC to take action in allowing third-party audits

3:41:23

thank you so uh Mr chair so I definitely agree with uh Professor

3:41:31

ajun was take on both the

3:41:36

the need for third party auditing uh if for no other reason then it is not

3:41:42

realistic to expect a government agency to take on the full burden of auditing

3:41:48

all the companies that need auditing and if you have some sort of system for

3:41:53

certifying independent auditors then you can essentially

3:41:58

ensure that somebody other than the internal people who have a stake in

3:42:05

seeing the selection tool succeed and be used take a look at it and check it for

3:42:12

compliance with federal law now there are potential issues with third-party auditing the most famous

3:42:19

example is probably Arthur Anderson and Enron you know you can have a third-party auditor that is more

3:42:26

interested in maintaining its relationship with the business and being brought back as the auditor year after year than they are with the external

3:42:34

Impressions that they leave about the quality of their audits and that can lead to ignoring issues that are even

3:42:40

glaringly obvious that has unfortunately happened repeatedly with Auditors in uh the Securities world and in other

3:42:47

sectors before it it's not an easy thing to guard against I think that there would have to be strict rules requiring

3:42:53

the independence of the Auditors both from a financial perspective and from Banning them from trying to cross-sell

3:43:00

other services and things like that that might create a greater incentive for them to try and develop a relationship

3:43:05

with the business that is based on something other than ensuring that their tools are going to be audited correctly

3:43:11

and by probably by establishing some sort of

3:43:16

system where the enforcement agency in this case the EOC that certifies them

3:43:22

would provide information to the public so that they can see okay when these

3:43:28

Auditors uh audit a tool how often is it that there is a finding of

3:43:33

discrimination regarding a tool that was made by that company and then information can kind of reduce the

3:43:39

friction and ensure that bad Auditors do not repeatedly get hired

3:43:46

um there's no perfect solution to it I think that as with uh the efficiency

3:43:51

trade-off that I mentioned earlier there is an innovation trade-off when you have Auditors but that cost benefit analysis

3:43:57

is something that I think needs to be done and in the case of

3:44:03

anti-discrimination laws the cost to Society of having tools out there that are discriminating against workers is

3:44:11

worth some sort of trade-off in terms of slowing down Innovation to the degree necessary to make sure that the

3:44:17

Innovation is actually beneficial

3:44:22

pardon me chair Burrows you're on mute thank you it's interesting that you mentioned some other context and um so I

3:44:30

take from that potentially that you think maybe looking at how audits have worked in other areas such as the

3:44:36

financial industry might be of some help to us if we were to sort of think this

3:44:41

through more deeply okay um and I wanted to go to Mr Engler I have really appreciated

3:44:49

um having you here and and your work as long with everyone's else's and have watched very closely some of the

3:44:55

discussion in the European Union around Ai and those developments and

3:45:01

um also the some of the examples as we've had our own but one one that comes

3:45:07

to mind of some of the the risks and I think it's been informative in the policy discussions there have been

3:45:12

around what happened with the Dutch cabinet a few years back and having it

3:45:17

was a apparently in the child welfare system an algorithm That was supposed to

3:45:23

ferret out fraud but actually just really use things that were indicia  
3:45:29  
of you know particular social economic status and other demographic  
3:45:34  
um elements such that uh you know something to the tune of 10 000 families were separated  
from their you know told  
3:45:41  
to pay back uh public benefits that they did not actually owe um and so uh that I think has been  
3:45:49  
illustrative to them and to us of what high high stakes can be at issue obviously not an  
employment situation  
3:45:56  
but clearly a reminder of why it's so important to get this right one of the  
3:46:01  
things I thought was interesting in your testimony was the reference to public  
3:46:06  
filing if you will or making public the different AI systems that are used there  
3:46:12  
and that that could be something that's of use to the commission and other Federal Regulators  
here in the United  
3:46:17  
States could you expand on that a little bit in terms of how you could see that being of help to  
3:46:25  
us and and you know tell us a little bit more about how that's uh intended to  
3:46:30  
work sure I'll try to be brief so in two ways I think what we're going to see  
3:46:35  
from the European Union is really valuable us first purely how many of these AI employment  
systems there are  
3:46:42  
how many companies are using them I mean just pure coverage right I think that we  
3:46:48  
that is going to be the single best source of knowledge for the total impact of these systems uh  
broadly that exists  
3:46:57  
um even if it's pretty light on the specific details of each it'll give a much better sense of  
coverage there will  
3:47:02  
also likely be a non-trivial amount of overlap between the companies that operate there and  
the companies that operate here just off the top of my head  
3:47:09  
there's lots of international business software like Microsoft Vita that could qualify in certain  
ways and that'll both  
3:47:15

be used in the EU and Multinational businesses as it is in the US

3:47:21

um secondly the process of writing standards for these requires a lot of technical knowledge meaning in order to

3:47:29

create standards around their function which I'm not endorsing these standards they could be significantly industry

3:47:34

written or not written by a broad set of stakeholders it's not clear but in order

3:47:40

to write them you have to really get into the weeds of these applications and so simply the pure amount of exploration

3:47:45

they're going to do I think will be really valuable and those standards um should be largely public or you may

3:47:53

actually have to pay a small fee but uh pretty valuable in in sort of looking deeply at the system so I'm optimistic

3:47:59

that the public knowledge from that will be substantial with your about with apologies I also just want to mention

3:48:05

that I've actually written a paper on AI auditing in hiring including considering

3:48:10

the incentives of third-party Auditors including considering analogies in other

3:48:16

areas like uh financial services and financial auditing and I will happily admit that for the record but it gets at

3:48:22

some of the of your last question as well thank you thank you and um I am delighted to see

3:48:31

that I still have an additional minute so that's very exciting I thought I was almost out of time so I appreciate that

3:48:38

um I wanted to just ask each of you if you have with respect to some of the

3:48:43

conversations um we've been having uh additional thoughts on the kinds of expertise that

3:48:51

the EEOC should be hiring we've talked a very high level about that but in terms of our we're looking at sort of our data

3:48:58

strategy in the future and obviously in this particular area specifically but um

3:49:03

talk to me if you have suggestions we've been working on our training Etc in more detail so I would offer that  
3:49:10  
um to any of you I I would start probably with Mr sharer but anyone who wants to jump in for the sake of time go  
3:49:17  
ahead just briefly I I think that you need a  
3:49:22  
combination of technical expertise from people who are familiar with the machine learning and statistical methods that  
3:49:29  
are now becoming predominant in a lot of the development of these tools you  
3:49:34  
certainly still need industrial organizational psychologists preferably those that have specialized  
3:49:41  
in some way in the use of selection procedures modern selection procedures  
3:49:47  
that rely on correlation and statistical methods um and beyond that I think that just  
3:49:55  
looking for people who have in who who have a proper understanding of that it's  
3:50:03  
not just automated tools but all a lot of different types of selection procedures that are being used today  
3:50:10  
are have the potential for discrimination and automated tools and the rise of them should be a basis for  
3:50:19  
taking a closer look at the ways in which companies are auditing or excuse me are deploying these tools in general  
3:50:28  
okay thank you and I just realized I am actually out of time so I uh but what I will do is plan to Circle back with each  
3:50:35  
of you I am so grateful um and also uh congratulations on the  
3:50:40  
Civil Rights standards I that was uh I know a huge lift um so thanks to each and every one of  
3:50:47  
you uh I know that um it took an enormous amount of time to prepare for today and we are enormously  
3:50:53  
grateful um so that concludes today's presentation of testimony and questions  
3:50:59  
um and we truly are facing a new civil rights Frontier as this conversation so  
3:51:06

aply demonstrates so as we at the commission continue to advance equal employ employment opportunity it's

3:51:13

really clear that we've got to be focusing in particular at employers use

3:51:19

of automated Tools in our ongoing work and doing it in ways that really will

3:51:24

support those who work in this area um and first and foremost ensure that

3:51:31

these tools are used consistently with um our civil rights laws because

3:51:38

everyone needs to really understand how much is at stake here how clearly these

3:51:44

decisions and this new approach to employment is going to and is already

3:51:50

affecting Americans everyday lives so our Ai and algorithmic fairness

3:51:56

initiative here at the EOC will continue moving forward in gathering additional information

educating stakeholders

3:52:02

educating ourselves and of course combating algorithm discrimination where we find it so in

closing I'd like to

3:52:08

recognize the many EEOC staff who work tirelessly to prepare for today's hearing we owe them a special debt of

3:52:16

gratitude and particularly to our office of Information Technology team whose

3:52:22

extraordinary work and dedication has really made this hearing possible I'd

3:52:28

like also to thank the office of executive Secretariat the office of communications and legislative affairs

3:52:35

our EEOC Office of legal counsel my dedicated colleagues in the chair's

3:52:40

office who worked on this hearing thank you very much I'm so grateful to you our

3:52:46

AI working group and of course the many others at this agency and especially to

3:52:53

acknowledge the contributions and the excellent work and expertise of Vice

3:52:58

chair Samuels each of the Commissioners and their respective staffs for their

3:53:04

support and contributions and ideas so finally thanks to the public and to our

3:53:10

EOC staff across the country that joined us virtually for this hearing we're going to be holding the commission

3:53:16

hearing record open for 15 days and invite any of you who would like to from

3:53:21

the virtual audience as well as members of the public and our panelists to submit any additional written comments

3:53:29

on the subject of today's hearing you can learn more about how to submit comments on our website

3:53:36

[www.eeoc.gov](http://www.eeoc.gov) and with that we are a joint thank you

English (auto-generated)