

California Fair Employment & Housing Council
Public Hearing on Algorithms & Bias
30 April 2021

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On behalf of the Center for Democracy & Technology (CDT), thank you for the opportunity to testify about the potentially discriminatory effects of algorithms that employers are increasingly using in hiring and other employment decisions.

CDT is a nonpartisan, nonprofit 501(c)(3) charitable organization dedicated to advancing civil rights and civil liberties in the digital world. CDT was founded more than a quarter-century ago with the mission of putting civil rights and civil liberties at the center of the digital revolution. We advocate for policies and laws that empower people to use technology for good while protecting against invasive, discriminatory, and exploitative uses. CDT has offices in Washington, D.C., and Brussels, and is funded by foundation grants for research and writing, corporate donations for general operating and program support, and individual program and event donations.

Among CDT's areas of focus are protecting and advancing workers' rights and the rights of disabled people in the face of the accelerating push by employers and technology companies to use algorithms to automate key decisions in the workplace and the labor market. We commend the Fair Employment and Housing Council ("the Council") for having the foresight to convene this hearing while policymakers still have the opportunity to frame the public debate surrounding the use of such algorithms, which can dramatically impact the lives and careers of workers, particularly those from marginalized groups.

When you apply for a job today, an algorithm might decide if you get an interview or if you get hired. Examples of hiring technologies include resume screening software, gamified assessments, automated video interviews, and personality tests. An algorithm will interpret how a person does on these tests to decide if they should be interviewed or hired. More employers are using algorithm-driven hiring tools, both for low-wage and high salaried jobs:

- Most companies with more than 100 employees require applicants to take a personality test.
- 33% of businesses use AI-powered hiring tools.
- Over 100 companies use a single facial recognition program that has analyzed over 1 million people's recorded video interviews.

CDT recently published a report titled, [Algorithm-driven Hiring Tools: Innovative Recruitment or Expedited Disability Discrimination?](#) Our report examines algorithm-driven hiring tools that may discriminate against disabled people and violate the Americans with Disabilities Act (ADA). We invite

the Department to visit the report for more details about how some of these tools work and a fuller discussion of the law.

This statement for the record summarizes our report while also noting where California law is similar or offers stronger protections for people with disabilities. This statement also urges the Department to increase enforcement actions, clarify employers' obligation to accommodate people with disabilities and avoid using tests and standards that discriminate against them, and flag counterproductive proposals that are percolating in city and state bodies across the country.

I. Algorithm-driven hiring tools often discriminate against disabled people.

Hiring tech can discriminate against disabled people in two major ways. Firstly, many algorithm-driven hiring tools are inaccessible to people with disabilities because they use tests in formats that disabled people cannot use. Secondly, many algorithm-driven hiring tools tend to unfairly screen out disabled applicants, either individually or in groups, for reasons unrelated to the job. **Both types of discrimination contribute to high unemployment and poverty rates for disabled people.**

All types of algorithm-driven hiring tools can discriminate against disabled people.

Resume screening software can perpetuate past discrimination because companies tend to train programs using data from existing employees. Such software might look for specific keywords that indicate certain kinds of achievements, such as honor societies, elite schools, or leadership positions. Disabled people are often less likely to have access to these opportunities. This means that the software may assume that disabled people tend to lack the traits correlated with success. Resume screening software might also look for gaps in applicants' resumes. Disabled people are more likely to have resume gaps because of disability discrimination, chronic illnesses, homelessness, or even incarceration. This means that the resume software may assume that disabled people are less reliable or good at their jobs.

Gamified assessments require applicants to take tests that look like simplistic video games. These tests purport to measure reaction time, impulsiveness, attention span, and other characteristics. They can also assess how people solve problems, take risks, and make decisions under pressure. Gamified assessments can outright exclude some disabled people, and discriminate against others:

- One test requires applicants to identify and click on red and green dots. This test is inaccessible to people with color-blindness.
- Another test asks applicants to hit the spacebar to blow up a balloon, purportedly to measure risk-taking. This test will be inaccurate and unreliable for people with paralysis, absent limbs, arthritis, and other mobility disabilities.
- Tests measuring reaction time, impulsiveness, and attention span will likely produce unreliable results if taken by people with disabilities like cognitive processing disabilities, ADD or ADHD, obsessive compulsive disorder, or anxiety. These disabilities can all affect a person's processing

speed and decision-making, but may not reflect on a person's ability to actually perform the core functions of any given job.

Video interviews require applicants to record themselves answering interview questions. Then, **voice or facial recognition software** analyzes the videos to evaluate the applicants' personality and capabilities. These software programs assume that successful employees will make similar amounts of eye contact, have similar facial expressions and body movements, and speak in similar tones of voice. These programs can discriminate against disabled people for a variety of reasons:

- Many autistic people and many blind people do not make typical eye contact.
- Many people with cerebral palsy and many people with Tourette's syndrome make involuntary body movements.
- Some people with depression, bipolar, or other psychosocial disabilities will speak in a flat, slowed tone of voice.
- Many deaf people and many people with traumatic brain injuries, Down syndrome, or cerebral palsy have atypical-sounding speech – or do not use speech to communicate at all.

Personality and IQ tests claim to identify and analyze an applicant's personality and intelligence, both of which may be unrelated to the job a person is applying for. Personality tests may measure traits such as openness, responsiveness, or life priorities or motivations. IQ tests assess vocabulary or other cognitive traits. These types of tests can discriminate against disabled people for many reasons as well:

- People with major depression or who are bipolar may score low on optimism on a personality test, even though optimism is rarely a job-related trait.
- People with ADHD or anxiety may have markedly different reaction times than neurotypical people.
- Autistic people may fail tests of cultural "fit" because of differences in affect and communication style.

II. Disability discrimination in algorithm-driven hiring tools is already illegal.

The Americans with Disabilities Act (ADA) already outlaws three types of employment discrimination against people with disabilities that can occur during the hiring process: inaccessible tests without accommodations, tests that tend to screen out people with disabilities unless the test is job-related and consistent with business necessity, and pre-employment medical examinations. **Algorithm-driven hiring tools can violate each of these rules.**

The ADA bans inaccessible test formats without reasonable accommodations. Employers have to make sure all applicants can take their hiring tests, whether or not they have a disability. If disabled people cannot use a specific type of test, employers have to provide an alternative test format. Even so, companies that design and market algorithm-driven hiring tools often fail to make their tests accessible or offer accessible alternatives. Employers and vendors that use these tools also often fail to provide any notice or explanation to applicants about how their tools work – information that applicants would need to be able to request accommodations.

The ADA also bans tests that tend to screen out disabled people unless the employer demonstrates that the test is job-related and consistent with business necessity. Together with the requirement that employers provide reasonable accommodation for disabled applicants, this means that employers cannot adopt tests that disadvantage disabled workers unless the test is limited to assessing traits that are tied to the essential functions of the job in question.

Many of the automated hiring tools being marketed today will tend to screen out workers with disabilities. For example, an applicant's disability, especially in tandem with their other marginalized identities, may have excluded them from the activities or experiences that a resume mining tool associates with a good job candidate. The candidate's resume may describe how they developed the same skills in different ways, but the resume mining tool may miss this, screening the applicant out without accurately measuring the applicant's skills.

Other types of algorithmic tools likewise will tend to disadvantage large numbers of candidates with disabilities. An automated assessment that asks candidates to match images of faces to emotions may adversely impact autistic people, among others. A personality test may assess traits such as "self-esteem" or "enthusiasm" that workers with certain mental or physical conditions may not display – or that they display in a way that the assessment does not detect. It makes sense for a company to test delivery truck driver applicants on their ability to drive a truck; a company should not test them on their optimism or self-esteem.

Lastly, many of the assessments may evaluate applicants on job functions that a disabled applicant could perform with accommodations that the assessment does not allow for. Under the ADA and California law, a candidate must be evaluated on how they could perform the essential functions of the job with reasonable accommodations; the standardized, mass-scale approach of many algorithmic tools simply does not allow for the individualized accommodation to which disabled workers are entitled.

The ADA also bans pre-employment medical examinations. Some employers have used personality tests that use methodologies originally designed for clinical diagnosis of mental health disabilities. Others have used hiring tests that are conducted by medical professionals. If employers are not permitted to use the results of such examinations as part of ordinary application processes, they likewise should not be permitted to use them simply by folding them into an automated selection procedure.

The Council's regulations, paralleling the ADA, restrict employers' ability to use tools and standards "that screen out or tend to screen out an applicant or employee with a disability or a class of individuals with disabilities." But **California law also imposes obligations on employers and grants rights to workers that go well beyond the ADA's provisions**, particularly when it comes to employers' obligation to provide reasonable accommodations. Here are some of the regulations that the Council has adopted to protect disabled workers, and how automated hiring tools might violate them:

- California employers must “consider all applicants with or without disabilities or perceived disabilities on an equal basis for all jobs.” But employers are not considering disabled applicants on an equal basis if an employer adopts inaccessible hiring technologies or hiring technologies that penalize disabled people for the ways they would perform the essential functions of a job.
- Employers also must “consider and accept applications from applicants with or without disabilities equally” and cannot make inquiries that are “likely to elicit information about a disability . . . at any time before a job offer is made.” **If a hiring technology is inaccessible or only accessible with accommodations, many disabled applicants will be forced to disclose disabilities that they might not have needed to disclose otherwise.**
- Employers must proactively “select and administer tests” to ensure that those tests are “accessible to applicants and employees with a disability” and to provide “reasonable accommodation . . . in testing conditions” for disabled applicants. Similarly, employers have “an affirmative duty to make reasonable accommodation(s) for the disability of any individual applicant if the employer knows of the disability.” This affirmative duty to accommodate is broader than its ADA counterpart. It also exists independent of employers’ general duty to avoid discriminating against disabled people. **Employers violate these requirements if they adopt tests that, by their very nature and design, are difficult for disabled people to complete or that disadvantage disabled people.**
- California employers must demonstrate that “an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.” In other words, **employers in California have an explicit, affirmative duty to explore alternative selection procedures before they can adopt one that discriminates against disabled people.**
- The Council has correctly recognized that statistical methods of determining whether disparate impacts exist are neither necessary nor proper when evaluating tests for disability discrimination. Specifically, the regulations state that “[s]tatistical comparisons between persons with disabilities and persons who are not disabled are not required to show that an individual with a disability or a class of individuals with disabilities is screened out by selection criteria.”

III. The Fair Employment and Housing Council should build on its regulatory framework to better equip employers to achieve compliance, and the Department must apply and enforce existing authority to protect disabled workers’ rights.

The Council’s regulations clearly prohibit many of the discriminatory algorithmic tools marketed today. But the Council could build on its existing regulations to clarify that employers’ duty to use

nondiscriminatory selection procedures requires proactive steps on their part to investigate and mitigate potential sources of discrimination against disabled workers. By imposing affirmative obligations on employers, these stronger regulations will signal how the Department will assess the legality of algorithm-driven hiring tools that have an adverse impact on disabled workers.

The needed policy changes are, in many ways, simply extensions and applications of principles that the Council has already enunciated. The Council's regulations, like the ADA, require employers to avoid using tools that would unfairly discriminate against **any** disabled worker, regardless of whether the discrimination occurs on a scale large enough to be statistically significant. Additionally, the Council's regulations last year addressing "online application technology" require employers to provide a way to request accommodations if they use automated selection criteria that limit or screen on the basis of protected characteristics, including disability.

Taken together, these regulations imply that employers:

- Must be proactive in ensuring that disabled applicants are able to compete on an equal basis with non-disabled applicants; and
- Cannot evade laws protecting disabled workers simply by conducting statistical tests, or by relying on the potentially small number of adversely affected disabled people as a defense.

The Council should issue regulations that give these principles explicit force and effect by affirmatively requiring employers, **before** deploying a selection tool, to investigate potential sources of discrimination against disabled workers and either correct them or ensure that reasonable accommodations or alternative selection procedures are available. This will help ensure that disabled workers are neither dissuaded from applying nor unfairly disadvantaged when they apply for open positions.

We believe the needed changes could be accomplished through regulations issued by the Council, as simple extensions of employers' duty, before it can use a tool that tends to screen out people with disabilities, to demonstrate that a tool is job-related and consistent with business necessity and that no alternative selection procedures are available. The new regulation should make it clear that these obligations require employers to:

- Proactively investigate each selection tool's design;
- Identify all potential sources of discrimination through which the tool could screen out any individual with a disability or class of people with disabilities;
- Identify any potential accommodations, modifications to the tool, or alternative selection procedures that would allow potentially disadvantaged applicants with disabilities to compete "on equal an equal basis" for any jobs for which the tool is to be used;
- For each identified potential source of discrimination against disabled workers, either:
 - Offer an effective accommodation, along with an adequate opportunity to request it;

- Modify the tool to eliminate the source of discrimination; or
- Offer an alternative selection procedure; and
- Disclose use of any automated tools to applicants, so that applicants who require accommodations that the employer did not anticipate have a meaningful opportunity to request them.

If no effective accommodation or modification is possible, and if no alternative selection procedure could be offered to disabled workers that would eliminate the source of discrimination, then the employer should be prohibited from using the tool.

These rules could and should be applied to all selection procedures that employers utilize, but they are particularly essential for automated decision tools because applicants are often not aware how they are being assessed (or even that they are being assessed) by algorithms.

The Council's standards should, in short, reinforce the principle that there is no one-size-fits-all way to check compliance with the full panoply of employers' nondiscrimination obligations to disabled workers under California law.

Further, the Council should also remove barriers to holding employers accountable. Workers and advocates have no insight into the tools' training data, what the tools actually measure, how the tools produce their outputs, or how much these outputs influence the ultimate employment decision. To reduce the huge information disadvantage that workers currently face regarding the nature and impact of selection tools, the Council should require that employers make the results of their design and impact audits public or, at a minimum, require employers to maintain records of such audits that the Department can later review for compliance.

The Department and the Council should also use their platforms to educate employers and workers alike about the potential risk of disability discrimination that these tools pose. If and when the Department receives complaints alleging discrimination related to algorithmic employment decision tools, it should use its investigative authority to gain additional information about both the nature of the tool at issue and the steps that the employer took to ensure it is fair to disabled workers and compliant with California law.

Through Director's Complaints, the Department also has the authority to bring cases where appropriate to enforce state law even in the absence of a worker complaint. When the Department becomes aware of employers that are using algorithmic tools that incorporate gamified assessments, personality tests, audio/visual analysis, or other techniques that are likely to unfairly disadvantage disabled workers, it should not hesitate to use the Director's Complaint authority to pursue investigations on its own initiative.

IV. California must avoid harmful regulatory and legislative schemes.

Many existing legislative and regulatory proposals regarding algorithm-driven employment decision tools in California and elsewhere do not account for the legal and ethical concerns described above. Some are well-intentioned but incomplete; others are likely intended to head off liability before serious enforcement and interpretations are issued. Major trends include:

- Proposals that require transparency, but fall short of requiring meaningful, proactive, and ongoing examination of potential bias in these tools.
- Proposals do not ensure that workers have sufficient prior notice about how the tools will evaluate them so that workers can determine whether they can request accommodations or challenge possible employment discrimination.
- Proposals that focus exclusively on racial and gender discrimination, neglecting disability discrimination and disabled workers who are multiply marginalized, as well as discrimination based on age, sexual orientation, or minoritized religious affiliation.
- Proposals that set low or ambiguous bars for compliance and provide safe harbors to employers and vendors who clear them

The state must reject proposals that disincentivize employers and vendors from proactively reducing all forms of bias in their tools. For example, a bill introduced in the legislature last session would have effectively provided immunity from civil rights lawsuits to employers who use “pretested assessment technologies” so long as they demonstrated validity under the 40-year old Uniform Guidelines for Employee Selection Procedures and perform an analysis that shows either “an increase in the hiring or promotion of the protected class” or “no disparate impact on the protected class.” It defined “disparate impact” according to a test of statistical significance where only protected classes “existing in 2 percent or more of the applicant population” would have qualified for protection.

This proposed safe harbor would have effectively provided employers with a license to discriminate against disabled workers. The federal Uniform Guidelines allow employers to demonstrate validity by showing a statistical relationship between assessment results and job performance ratings. But statistical testing is not adequate to capture all the ways in which assessments can screen out disabled workers. There are far too many types of disabilities to be able to statistically test whether a tool discriminates against disabled people as a whole. Further, even among people with the same type of disability, specific experiences vary significantly both within the group and in the same person’s life in different contexts.

The annual testing requirement is similarly deficient. Most disabled workers have conditions that exist in less than 2% of most applicant populations. Even for classes of disabled workers large enough to qualify for disparate impact testing, the bill would have allowed companies to use the discriminatory tool so long as the employer demonstrates that they experienced the slightest improvement in representation of a protected group after adopting it. That runs contrary to the ADA and California law, which prohibit the use of tools that unfairly screen out any disabled worker.

The state must avoid legislative or regulatory proposals that create such safe harbors for employers who use tools that tend to screen out any disabled workers. Employment selection procedures have never enjoyed such protection before when they cause discriminatory outcomes, and safe harbors certainly should not be introduced in the face of new technologies that make it far more difficult to discern how discriminatory decisions were made. In addition, employers and developers of algorithmic tools often invoke intellectual property rights that make such tools harder to examine. Therefore, selection procedures certainly should not be held to a lower standard now than they were in previous generations, when the design process for employment tests was more transparent and the basis for their results more readily explainable.

V. Conclusion

California has long led the nation in preserving and advancing the rights of disabled workers. It provides protections that go well beyond those of federal law and the laws of other states. In the face of the new threats to disabled workers' rights that automated hiring tools pose, we urge the Council to continue its policy leadership. The Council should use its power to enforce existing protections for disabled workers. The Council should also issue new regulations and guidance where necessary to ensure that the adoption of innovative tools does not trample the rights, livelihoods, and dignity of disabled workers.