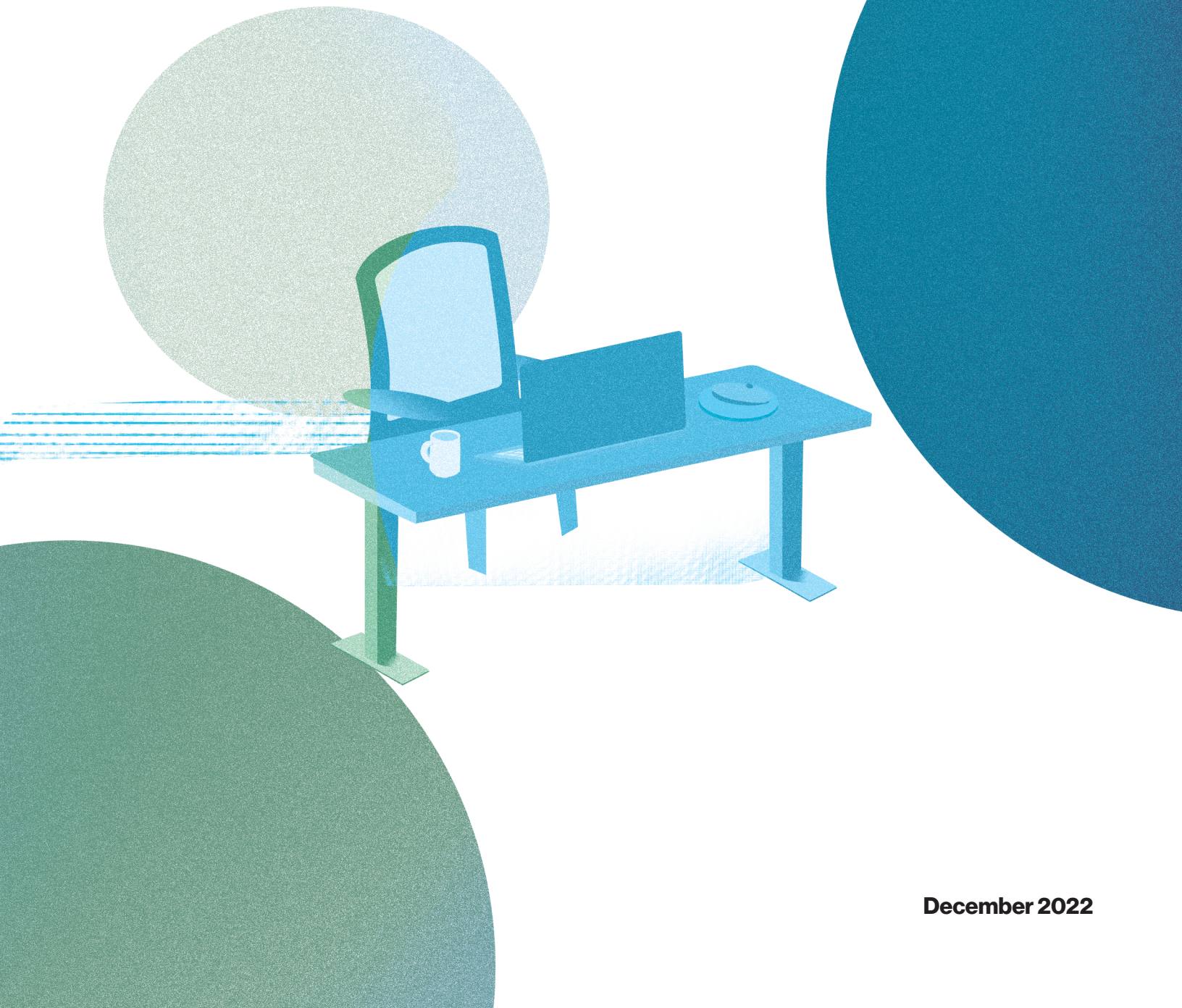


Civil Rights Standards

**for 21st Century Employment
Selection Procedures**



December 2022

Civil Rights Standards for 21st Century Employment Selection Procedures

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Endorsements



Center for Democracy & Technology (CDT)
American Association for People with Disabilities (AAPD)
American Civil Liberties Union (ACLU)
Autistic People of Color Fund
Autistic Self Advocacy Network (ASAN)
Autistic Women & Nonbinary Network (AWN)
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Color Of Change
The Leadership Conference on Civil and Human Rights
National Employment Law Project (NELP)
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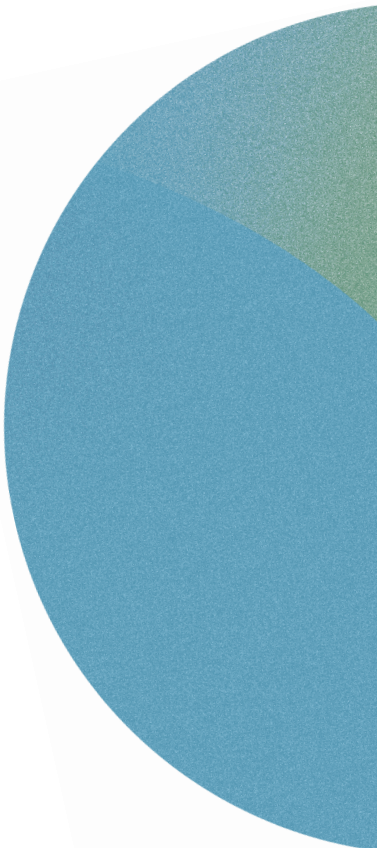
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Introduction

More than ever, employers are implementing new selection methods for virtually every stage of the employment process, from candidate sourcing and recruitment to employee evaluation and termination. Workers that face these tools are at an extreme information disadvantage, with little insight into how they are assessed or whether they face a risk of an unfair or discriminatory decision. In 2020, a broad coalition of civil rights and technology policy organizations published the [Civil Rights Principles for Hiring Assessment Technologies](#) (the “Principles”) in an effort “to guide the development, use, auditing, and oversight of hiring assessment technologies, with the goals of preventing discrimination and advancing equity in hiring.” In the two years that have followed, an increasing number of cities and states have considered legislation or regulations on hiring technologies that fail to implement – or even actively undermine – the Principles.

The Civil Rights Standards for 21st Century Employment Selection Procedures (the “Standards”) were drafted to operationalize and expand on the Principles. The Standards provide a concrete alternative to recent proposals that would set very weak notice, audit, and fairness standards for automated tools. They also map out a more rigorous and rights-focused approach as compared to the outdated rules that currently govern how employers assess whether their selection procedures are discriminatory and whether they actually measure the worker characteristics they claim to measure. The Standards have been drafted so that policymakers, industry groups, and employers alike can reference them when determining what information candidates should receive, how selection procedures should be audited, and how to ensure accountability when selection procedures threaten workers’ civil rights.



The Standards are the culmination of a year-long collaboration among a number of civil society groups. The coalition behind the Standards includes organizations that focus on racial justice, disability rights, digital rights, workers' rights, and a number of other civil rights and technology policy issues.

Workers that face these [new employment selection] tools are at an extreme information disadvantage, with little insight into how they are assessed or whether they face a risk of an unfair or discriminatory decision.

Executive Summary

Scope

The Civil Rights Standards cover all *workers* defined by Labor Department regulations as part of the labor force, regardless of whether they are classified as employees or contractors. Standard 2(ac). Consistent with existing antidiscrimination laws, they apply to all employers and employment agencies. The Standards cover the developers and sellers of selection procedures by explicitly classifying them as employment agencies. Standard 2(m). This reflects the fact that such vendors are increasingly filling roles traditionally performed by employment agencies.

Under the Standards, the definition of *selection procedure* (Standard 2(y)) includes every worker assessment that meets the following criteria:

- a. It is sold by a vendor or other employment agency, or is used to assess at least 100 workers per year;
- b. The score, recommendation, or other output it generates is primarily the result of automated, algorithmic, or deterministic processes; and
- c. Its output is used as a basis, factor, or recommendation in connection with *employment decisions*.

While the rapid rise of automated selection procedures is a key motivator for the Civil Rights Standards, the Standards also cover other worker assessments so long as their scores, recommendations, or other outputs are assigned through algorithms, standardized rubrics, or similar processes. The Standards cover traditional multiple-choice Scantron tests, for instance, because the output of such a



test is computed using a (non-computerized) algorithm, with the candidates' responses as inputs and the score as the output.

The Civil Rights Standards' definition of *employment decision* (Standard 2(n)) largely tracks with the definition in the [Uniform Guidelines for Employee Selection Procedures \(UGESP\)](#), which cover most major personnel decisions. The Standards expand the UGESP definition to include decisions setting terms or conditions of employment and selecting workers for targeted recruitment or advertising.

Nondiscrimination

The auditing standards (Standards 3 and 6) would require companies to take a proactive approach to mitigating discrimination risk by:

- Identifying and anticipating discriminatory barriers throughout a selection procedure's lifecycle;
- Exploring alterations, accommodation, and alternative selection procedures that might reduce or eliminate potential sources of discrimination; and
- Requiring companies to choose the least-discriminatory valid method for measuring candidates' essential job functions.

The Standards would further extend civil rights laws' prohibitions against selection procedures that constitute or contribute to employment discrimination. Specifically, Standard 9 would prohibit companies from:

- Using or marketing discriminatory selection procedures (including selection procedures that result in disparate treatment or disparate impact); failing to provide candidates with reasonable accommodation; and failing to choose the least discriminatory valid method of candidate assessment.
- Failing to alter a selection procedure or provide reasonable accommodation, where alteration or accommodation is necessary to ensure that the selection procedure validly measures candidates' ability to perform essential job functions.
- Retaliating against workers who request reasonable accommodation or otherwise exercise their rights under the Civil Rights Standards.

The Standards also call for a ban on certain selection procedures that create an especially high risk of discrimination. These include selection procedures that rely on analyzing candidates' facial features or movements, body language, emotional state, affect, personality, tone of voice, pace of speech, and other methods as determined by the enforcement agency. Standard 9(a)(11).

Job-Relatedness

Before using a selection procedure that might adversely impact members of a protected class, the Standards would require employers to demonstrate that the selection procedure is a *valid* method of measuring candidates' ability to perform the *essential functions* of each position for which it is used. See Standards 3(c)(3); 6(b)(3); 9(a)(3). An employer establishes the essential functions of a position through objective evidence, such as:

- Workers' past/present experiences and performance
- Time workers spend on each function
- Consequences of workers not performing the function

Regarding *validity* – that is, the extent to which a selection procedure is an accurate and effective means of measuring the essential job functions that it purports to measure – the Civil Rights Standards look to contemporary standards of social science, rather than the outdated UGESP. Standard 2(ab). They would preclude employers from establishing validity simply by showing that the selection procedure's output correlates with existing measures of job performance. Such exclusive reliance on correlational evidence has become increasingly common with the advent of automated selection procedures, but blind reliance on correlation can result in selection procedures that incorporate systemic biases or cultural norms that disadvantage vulnerable groups of workers, in addition to (or even to the exclusion of) characteristics that have a causal link to workers' ability to perform essential job functions.¹

Auditing

The Civil Rights Standards provide for both a pre-deployment audit before a selection procedure is first used to assess candidates, as well as ongoing audits conducted at regular intervals for as long as the selection procedure is in use. Both types of audits would be conducted by an independent auditor certified by the enforcement agency.

Standard 3 spells out a thorough *pre-deployment audit* that would have to be completed before a company could use a selection procedure. The Standards place this responsibility jointly on employers and vendors to encourage all parties involved in the development and use of a selection procedure to work together to ensure it is audited for the specific context(s) in which it will be used. The audit itself is conducted by an independent auditor, who would:

¹ In one instance, a vendor developed a resume screener that determined that the two factors most indicative of job performance were whether the candidate's name was Jared and whether the candidate had played high school lacrosse. Dave Gershorn, Companies are on the hook if their hiring algorithms are biased, *Quartz*, Oct. 22, 2018, <https://qz.com/1427621/companies-are-on-the-hook-if-their-hiring-algorithms-are-biased/>.

- Identify existing and potential future sources of discrimination;
- Evaluate the selection procedure's job-relatedness/validity for each position for which the selection procedure will be used;
- Determine what alterations or accommodation might be required to ensure the selection procedure fairly assesses all candidates; and
- Explore potential alternative approaches to candidate assessment to determine if a valid and less-discriminatory alternative is available.

The auditor would also examine the company's existing employment decision practices to identify existing sources and patterns of discrimination.

After a selection procedure is deployed, Standard 6 would require companies to conduct ongoing audits at least annually. The components of ongoing audits largely mirror those of the pre-deployment audit, except that the auditor would review the selection procedure's impact and validity in light of the real-world performance data and candidate feedback received since the last audit. The ongoing audit also analyzes any changes made to the selection procedure or to the essential functions of the position(s) for which it is being used.

Notice and Explanation

The Civil Rights Standards contemplate three levels of disclosure and transparency:

- Short-form disclosures (Standard 4);
- Detailed summaries of all audits (Standard 7); and
- Comprehensive recordkeeping (Standard 8).

The short-form disclosure is a candidate-facing document that is designed to help alleviate the severe information disadvantage that workers currently face when employers subject them to selection procedures. This disclosure would provide workers with key information about both the selection procedure and how workers can exercise their rights under the Civil Rights Standards and antidiscrimination laws. The proposed short-form disclosure would include:

- The position(s) for which the selection procedure is used, the characteristics the selection procedure is supposed to measure, and how those characteristics relate to the position's essential functions;
- Potential sources of discrimination identified during prior audits of the selection procedure;
- How candidates can raise concerns about the selection procedure and/or request accommodation; and
- A link where candidates can review the detailed audit summaries required by Standard 7.

Standard 7 would require employers to prepare and publish detailed summaries of each pre-deployment (Standard 3) and ongoing audit (Standard 6). These audit summaries are designed to provide enforcement agencies and workers' advocates with enough information to determine whether an investigation or complaint regarding a selection procedure is warranted. To that end, the audit summaries would:

- Describe the audit's methodology, findings, results, and conclusions for each element specified in the audit;
- Explain any changes made to the selection procedure during the course of the audit; and
- Be posted on the employer's website, filed with the relevant enforcement agency, and linked in the short-form disclosure that Standard 4 requires.

Standard 8's comprehensive recordkeeping requirements provide the final layer of disclosure and transparency. Employers would retain "all data, code, and other information necessary to allow for subsequent independent audits and investigations regarding the lawfulness and validity of the selection procedure," and provide those records to the enforcement agency or an assigned auditor upon request. Covered information would be retained for five years or for as long as the selection procedure is used, whichever period of time is greater.

Oversight and Accountability

The Standards call for strengthening oversight and accountability of selection procedures by giving candidates greater input and a right to an explanation in the selection process (Standard 5), and by providing a strong regime for enforcement and remedies (Standards 9-11).

Under Standard 5, employers and employment agencies would have to:

- Allow candidates to request accommodation or raise concerns regarding the selection procedure, and provide human review of such communications.
- Provide a post-assessment explanation that identifies the information that led to an adverse employment decision, and allow candidates to submit corrections or supplementary information in response.
- Provide accommodation, an alternative selection method, or reevaluation if necessary to avoid unlawful discrimination.
- Give candidates facing assessment by automated selection procedures the right to opt out and be assessed instead through human review, a non-automated selection procedure, or other alternative means.

In addition to barring discrimination and retaliation (see *Nondiscrimination* section), Standard 9 calls for policymakers to make it unlawful for employers and employment agencies to:

- Fail to comply with the Standards' requirements pertaining to audits, notice, disclosure, and recordkeeping.
- Provide knowingly false or materially misleading or incomplete information in the Standards' required documentation.
- Extract a candidate's biometric data available through administration of a selection procedure, or disseminate such data without the candidate's consent for commercial third-party use.

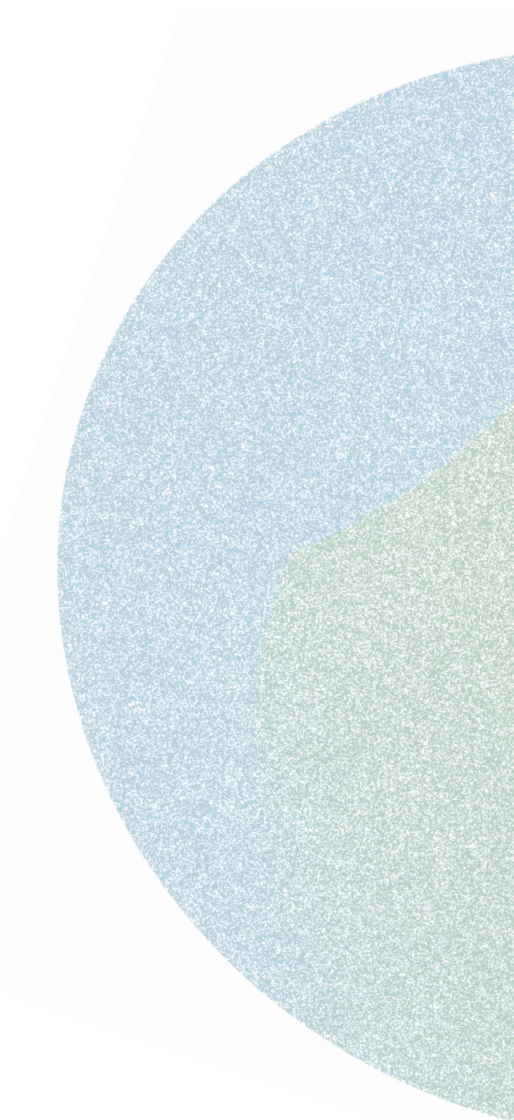
The Standards call for enforcement and remedies to be made available through both civil and administrative actions. Enforcement agencies would be able to pursue civil penalties, injunctive relief, actual damages, and other remedies against employers and vendors, as well as against auditors where applicable under Standard 9, which would also create a private right of action for certain violations of the Standards.

Standard 10(e) calls for imposing joint and several liability on all employers and vendors involved in the development and use of a discriminatory selection procedure. This approach incentivizes both employers and vendors to proactively prevent discrimination resulting from their selection procedures, and also ensures that workers have a remedy in cases where a party is judgment-proof or a jury has difficulty allocating responsibility for discrimination.

Civil Rights Standards

Standard 1: Statement of Purpose

The policies specified in these Standards would:

- 
- a. Reinforce and elaborate upon state and federal civil laws' prohibitions against the use of employment selection procedures that have the intent or effect of discriminating against members of any protected class on the basis of a protected attribute;
 - b. Require designers, developers, vendors, and employers to ensure that selection procedures are audited, both prior to deployment and regularly during the course of their use, for all forms of unlawful discrimination, including but not limited to disparate treatment discrimination, disparate impact discrimination, failure to provide reasonable accommodation, and discrimination in advertising employment opportunities;
 - c. Establish notice, disclosure, and recordkeeping requirements for the users of selection procedures;
 - d. Ensure that selection procedures assess candidates solely on the basis of valid measurements of essential job functions using the least discriminatory method available;
 - e. Establish mechanisms for investigation and enforcement that vindicate the rights of candidates affected by the use of discriminatory selection procedures while encouraging transparency and cooperation by the users of selection procedures; and
 - f. Provide adequate remedies for members of protected classes who experience unlawful discrimination, or any other violation of their legal rights, as a result of a selection procedure.

Standard 2: Definitions

For the purposes of these Standards, the following terms have the following meanings:

- a. *Accessibility*. The term “accessibility” means the degree to which workers with disabilities are able to access the functionality of, and benefits associated with, a device, good, service, or program, in a manner equally as effective as the access that others are able to utilize. In the context of selection procedures, this includes, but is not limited to, the degree to which:
 - 1. Workers with disabilities are able to acquire the same information, engage in the same interactions, and be assessed in a manner comparable to workers without disabilities, with substantially equivalent ease of use; and
 - 2. Potential access barriers for workers with disabilities have been avoided or eliminated in the design or administration of the selection procedure, or mitigated by making appropriate and effective accommodation available.
- b. *Accommodation*. The term “accommodation” means, with respect to a specific selection procedure, the provision of tools or changes to the environment or the way in which the selection procedure is usually administered that a worker can request at or before the time the selection procedure is administered. An effective accommodation is an accommodation that allows a worker with a protected attribute to access the selection procedure and be measured by it in an equally effective manner as, and on equal footing with, other workers.
- c. *Adverse impact*. The term “adverse impact” means a substantial difference in scores, selection rates, or other outputs or effects of a selection procedure that disadvantages members of any protected class in an employment decision.
- d. *Alteration*. The term “alteration” means a change made to the design, structure, functioning, or content of a selection procedure.
- e. *Alternative selection procedure*. The term “alternative selection procedure” means, with respect to a given selection procedure, a selection procedure that:
 - 1. Was developed or validated separately from the selection procedure at issue;
 - 2. Measures significantly different knowledge, skills, abilities or other characteristics; or
 - 3. Significantly differs from the selection procedure at issue in the method or process by which it measures the knowledge, skills, abilities, or other characteristics.

This includes a selection procedure that has undergone such a significant alteration that it satisfies subparagraph (2) or (3) of this paragraph.

- f. *Applicant*. An “applicant” is a candidate who meets the following criteria:
1. The candidate submitted an expression of interest in employment with an employer or employment agency;
 2. The employer or employment agency considered the candidate for a particular position, for multiple positions, or for employment opportunities that may arise in the future; and
 3. The candidate had not removed themselves from further consideration or otherwise indicated that they were no longer interested in working for the employer or employment agency.
- g. *Auditor*. An “auditor” is a person licensed by the enforcement agency pursuant to Standard 12(a)(3) to conduct the audits described in Standard 3 and Standard 6; who is independent of all employers, employment agencies, and other persons and entities that designed, developed, or used the selection procedure being audited; and whose methodologies for conducting such audits have been approved by the enforcement agency.
- h. *Automated selection procedure*. An “automated selection procedure” means a selection procedure that is based in whole or in significant part on machine learning, artificial intelligence, computerized algorithms, automated statistical or probabilistic modeling, or similar techniques.
- i. *Candidate*. The term “candidate” means any worker who is the subject of an employment decision made by a selection procedure, regardless of whether that worker applied for, expressed an interest in, or removed themselves from consideration for the position(s) for which the selection procedure is used.
- j. *Candidate pool*. The term “candidate pool” means the population of candidates on which the selection procedure is being used or, for a selection procedure that has not yet been deployed, the population of candidates on which the selection procedure will be used.
- k. *Deployed*. The term “deployed” means, with respect to a particular selection procedure, the period starting with the first time the selection procedure is used to make employment decisions for a position. “Pre-deployment” means the period before the first such use of a selection procedure, including but not limited to periods where the selection procedure is first being designed, developed, trained, tested, and validated for use for a position or multiple positions.
- l. *Employer*. The term “employer” means a person who retains or accepts labor or services from a worker, including an agent of such a person, which is of sufficient size to be deemed an employer pursuant to relevant employment discrimination laws.

- m. *Employment agency*: An “employment agency” is any person who procures workers for an employer; procures for workers opportunities to work for an employer; knowingly sells, offers for sale, or distributes assessments, software, or technology that is used to make or inform employment decisions; engages in a contract with an employer or another employment agency to provide services, software, or technology that collects, stores, analyzes, or interprets candidate information; or operates an online job board, platform, or other service that employers or employment agencies use to assist in the making of employment decisions. “Employment agency” also includes an agent of such a person, but does not include the developer or distributor of software or other technology if that person:
1. Was not aware that the software or other technology would be used to make employment decisions; and
 2. Placed the software or other technology in the public domain without any license or reservation of rights, or made it available under a copyleft, GPL, BSD, or similar license that allows any member of the public to copy, distribute, or modify the source code or other technology without payment, royalties, or fees.
- n. *Employment decision*. The term “employment decision” includes but is not limited to hiring, promotion, demotion, referral, retention, termination, compensation; setting the terms, conditions, or privileges of employment; selecting workers for recruitment, interviewing, or targeted job or career advertising; and licensing and certification, to the extent that licensing and certification may be covered by applicable federal, state, or local laws against employment discrimination. Other decisions, such as training or transfer, may also be considered employment decisions if they alter a worker’s terms or conditions of employment or lead to any of the decisions listed in the preceding sentence.
- o. *Enforcement agency*. The term “enforcement agency” refers to the office responsible for investigation and enforcement within the agency, department, or division of government responsible for interpreting and enforcing laws against employment discrimination.
- p. *Essential functions*. The term “essential functions” means the fundamental job duties of a position and does not include the marginal functions of the position. Essential functions are to be determined based on objective evidence such as the amount of time workers spend performing each function, the direct consequences of not requiring workers in the position to perform the function, the direct consequences of a worker failing to perform or inaccurately performing the function, the terms of any applicable collective bargaining agreement, and workers’ past and present work experiences and performance in the position in question. Past and current written job descriptions and the employer’s reasonable, non-discriminatory judgment as to which functions are essential may be evidence as to which functions are essential for achieving the purpose of the job, but may not be the sole basis

for this determination absent the objective evidence described above. “Essential functions” does not include prerequisites that the employer establishes that do not relate to the work activities of the job itself, such as being able to work all shifts, to work overtime, or to arrive at work at a specified time.

- q. *High-risk selection procedure.* The term “high-risk selection procedure” means a selection procedure that relies on analysis of a candidate’s affect or emotional state; personality; facial features or movements, body language, gait, tone of voice, vocal pitch, or pace of speech; heart rate, respiration, or other bodily functions regulated by the autonomic nervous system; or any other technique or methodology identified by the enforcement agency as creating an especially high risk of unlawful discrimination.
- r. *Interactive process.* The term “interactive process” means an informal communication or series of communications with a candidate with a disability to clarify whether the candidate requires accommodation or an alternative selection procedure under applicable law and to identify appropriate accommodation(s) or alternative selection procedure(s).
- s. *Opt-out.* The term “opt-out” means a candidate’s decision not to be assessed by an automated selection procedure, and to instead be assessed through human review or an alternative, non-automated selection procedure.
- t. *Person.* The term “person” includes any natural person, entity, public body, trust, or unincorporated organization.
- u. *Position.* The term “position” means a particular job or role at a particular employer.
- v. *Protected attribute.* The term “protected attribute” means a personal characteristic or trait that is protected from employment discrimination under any applicable federal, state, or local law.
- w. *Protected class.* The term “protected class” means a group or class of persons sharing one or more protected attributes in common.
- x. *Proxy.* The term “proxy” in the phrase “proxy for a protected attribute” means a facially neutral attribute or set of attributes that are so closely associated with or predictive of a protected attribute that the selection procedure’s use of the facially neutral attribute(s) has substantially the same practical effect on workers with the attribute(s) as use of the protected attribute(s) themselves.
- y. *Selection procedure.* The term “selection procedure” means any measure, combination of measures, test, method, or process to assess workers that meets the following criteria:

1. It is:
 - A. Sold or distributed by an employment agency; or
 - B. Used to assess at least 100 workers per year;
2. It outputs a score, ranking, recommendation, evaluation, or other judgment that is primarily the result of:
 - A. Automated processes, including processes that are based in whole or in significant part on machine learning, artificial intelligence, computerized algorithms, automated statistical or probabilistic modeling, or similar techniques; and/or
 - B. Standardized processes, whether automated or non-automated, where outputs are generated algorithmically or deterministically; and
3. The output described in paragraph (2) is used as a basis for any employment decision, as a factor in any employment decision, to provide a recommendation with respect to any employment decision, or to assist, influence, or inform human decision-makers or automated systems in the making of any employment decision.

A group of two or more purported selection procedures, each of which satisfies both paragraph (2) and paragraph (3), is the same purported selection procedure for purposes of paragraph (1)(B) if they derive from the same development process; were tested, trained, or validated together; rely on common data; or are marketed under common trade or product names.

- z. *Small employer*. The term “small employer” means an employer with fewer than 15 full-time equivalent workers.
- aa. *Use*. To “use” a selection procedure means to utilize the selection procedure to make an employment decision about a candidate.
- ab. *Validity*. The term “validity” means the extent to which a selection procedure is an accurate and effective means of measuring the essential job functions that it purports to measure, using the principles of test validation under contemporary standards of social science at the time the selection procedure is used, but a selection procedure is not valid for purposes of these Standards if the evidence for validity is based solely on correlation between the output of the selection procedure and measures of job performance, unless the employer or employment agency using the selection procedure supports the correlational evidence with theoretical, logical, or causal reasoning sufficient to explain why the specific attributes measured by the selection procedure should be predictive of the ability to perform essential job functions.
- ac. *Worker*. The term “worker” means an employee, contractor, paid or unpaid intern, applicant, or any other person who offers or provides labor or services in exchange for compensation or other benefits. “Worker” also includes any individual who is

considered part of the labor force under the applicable standards and guidance issued by the United States Department of Labor's Bureau of Labor Statistics, regardless of whether the individual is currently working. In any proceeding involving the terms of these Standards or brought under any provision of these Standards, a plaintiff or complainant who claims to be a worker should be presumed to be a worker, and the employer or employment agency answering the complaint or other action should bear the burden of demonstrating that the plaintiff or complainant is not a worker.

Standard 3: Pre-deployment audits

An employer or employment agency should not use a selection procedure unless:

- a. Prior to procurement or use of the selection procedure, an auditor has examined the employer's existing employment decision practices to identify disparities between protected classes, the use of proxies for protected attributes, and other potentially discriminatory patterns of disparate treatment and disparate impact on protected classes with respect to employment decisions. This requirement should not apply to small employers.
- b. An auditor has conducted a pre-deployment audit on the selection procedure for each position for which the selection procedure is to be used. Each employer and employment agency that uses, sells, distributes, or develops the selection procedure should have a joint and non-delegable responsibility for ensuring that an audit compliant with this Standard is performed before the selection procedure is deployed. Such employers and employment agencies may enter into contracts assigning obligations, duties, and indemnification responsibilities relating to the conduct of a pre-deployment audit, but such contracts should not abrogate any party's duty to ensure that a proper audit is conducted or liability under these Standards in the event of non-compliance. The audit should:
 1. Identify and describe essential functions for each position for which the selection procedure will be used to evaluate candidates, explain why these functions are in fact essential, and demonstrate that the selection procedure is scientifically valid in measuring candidates' ability to perform these essential functions;
 2. Identify and describe the methods and techniques used to design the selection procedure, the attributes and criteria on which the selection procedure relies, and any other input or aspect of the design, development, validation, or testing of the selection procedure that the enforcement agency determines necessary;
 3. For any automated selection procedure, describe the sources of the training/ modeling data, and the steps taken to ensure that the training data and samples are accurate and representative in light of the position's candidate pool;
 4. Determine whether the decisions, recommendations, scores, or other outputs of the selection procedure have an adverse impact on members of any protected class using at least one reasonable and appropriate test of statistical significance and one reasonable and appropriate test of effect size, describe the tests of statistical significance and effect size used to test for the presence and extent of such adverse impacts, and describe the nature and extent of any adverse impacts detected;
 5. Determine whether the administration of the selection procedure or its results limits accessibility for persons with disabilities, or for persons with any specific disability;

6. Explain whether and how the selection procedure reduces or otherwise addresses discriminatory outcomes identified under paragraph (a), or risks of such outcomes, in the employer's employment practices;
 7. Consider and describe potential sources of adverse impact against protected classes that may arise after the selection procedure is deployed;
 8. Identify and describe any attributes on which the selection procedure relies and determine whether the selection procedure engages in disparate treatment by relying on any protected attribute or any proxy for a protected attribute to make an employment decision;
 9. Determine, for any adverse impacts or limitations on accessibility detected during the audit, whether alterations to the selection procedure can be made, whether effective accommodation can be provided, and whether less discriminatory alternative selection procedures or other assessment methods are available, that would mitigate the adverse impact or limitation on accessibility while retaining validity in measuring candidates' ability to perform essential functions;
 10. Identify any other reasonable alterations needed to ensure that the selection procedure validly and effectively assesses the abilities of candidates from each protected class to perform each position's essential functions; and
 11. Include any other information or sections required under the rules and regulations of the enforcement agency.
- c. If the pre-deployment audit described in paragraph (b) of this Standard identifies any reliance on any protected attribute or proxy for a protected attribute, adverse impact, or limitation on accessibility:
1. The employer alters the selection procedure, and the auditor reasonably determines that the alteration eliminated the potential discrimination or inaccessibility;
 2. In the case of reliance on a protected attribute or proxy for a protected attribute, the auditor reasonably determines that the use of the attribute or proxy is lawful pursuant to a valid affirmative action plan;
 3. In the case of adverse impact or limitations on accessibility, the auditor reasonably determines that the selection procedure is both valid and the least discriminatory method of assessing the candidate's ability to perform the essential job function(s); or
 4. In the case of limitations on accessibility, if the limitation cannot be eliminated by alteration, the employer or employment agency makes an effective accommodation available.
- d. The employer incorporates and implements any reasonable alterations identified in paragraph (b)(10) and/or paragraph (c) of this Standard; and

- e. The conditions and manner in which the employer uses the selection procedure, and purpose for which the employer uses the procedure, comport with the specifications of the selection procedure as implemented after the incorporation of alterations described in paragraph (d) of this Standard.

Standard 4: Short-form disclosures

- a. Any employer or employment agency that uses a selection procedure should prepare a short-form disclosure for each such selection procedure that:
 1. States the positions for which the selection procedure is or will be used and what types of employment decisions will be made or informed by the selection procedure;
 2. Describes, for each position:
 - A. The knowledge, skills, abilities, and other characteristics that the selection procedure measures;
 - B. How those characteristics relate to the position's essential function(s);
 - C. How the selection procedure measures those characteristics; and
 - D. How to interpret the results or other outputs of the selection procedure;
 3. Identifies any reasonably foreseeable accommodation that candidates may require;
 4. States that candidates may, and provides up-to-date information on how to, request and access any accommodation or alternative selection procedures, communicate concerns regarding the selection procedure, file a civil or administrative complaint with the enforcement agency, or submit supplementary information, as set forth in Standard 5;
 5. For an automated selection procedure, specifies when and how the candidate may opt out of the selection procedure, as described in Standard 5(a)(4); and
 6. Clearly identifies a functional URL that links to the detailed summaries, described in Standard 7, of all prior audits and adverse impact assessments.
- b. The short-form disclosure should be:
 1. Provided in English, in any non-English language spoken by at least one percent (1%) of the population of the relevant jurisdiction, and in any other language that the employer or employment agency regularly uses to communicate with workers or candidates;
 2. Written in clear and plain language;
 3. Made available in formats that are accessible to people who are blind or have other disabilities; and
 4. Otherwise presented in a manner that ensures the disclosure clearly and effectively communicates the required information to candidates.
- c. An employer or employment agency should attach or conspicuously link an up-to-date short-form disclosure within each posting, advertisement, or recruitment communication regarding a position for which it may use the selection procedure.
- d. Except as provided in paragraph (e) of this Standard, each employer or employment agency that uses a selection procedure should:

1. Provide the short-form disclosure to each candidate within a reasonable time prior to the use of the selection procedure;
 2. Publish short-form disclosures for all selection procedures the employer uses on the employer's website and on any platform used to receive or process applications for a position or positions. The form should be posted in PDF or HTML format, or in another digital format if that format has been authorized by the enforcement agency.
- e. When an employment agency uses a selection procedure on behalf of a small employer, the employment agency should be responsible for fulfilling the obligations set forth in paragraph (d) of this Standard.

Standard 5: Procedure to request accommodation, communicate concerns, or opt out; right to explanation for adverse actions

- a. Prior to using a selection procedure on an applicant, an employer or employment agency should:
 1. Provide each applicant who may be subjected to the selection procedure a copy of the short-form disclosure described in Standard 4, and in accordance with the format and accessibility standards specified in that Standard;
 2. Provide the applicant with a meaningful opportunity to request accommodation or an alternative selection procedure or other assessment method, or to otherwise communicate concerns to the employer or employment agency regarding the selection procedure's ability to validly evaluate the applicant's ability to perform the position's essential functions;
 3. Engage in an interactive process with candidates with disabilities if the candidate requests accommodation or if the employer or employment agency knows of the candidate's need for accommodation; and
 4. If the selection procedure is an automated selection procedure, allow the applicant to opt out of using the selection procedure and assess the applicant through human review, a non-automated selection procedure, or other means of assessment, on equal footing with applicants who are assessed through the automated selection procedure.
- b. After subjecting a candidate to a selection procedure, an employer or employment agency should:
 1. Provide an explanation that identifies the factors, candidate characteristics, and other information that led the selection procedure to render an adverse employment decision with respect to each position for which the selection procedure assessed the candidate; and
 2. Provide the candidate with a meaningful opportunity to submit corrections or otherwise provide supplementary information challenging factors identified under Standard 5(b)(1) and/or the selection procedure's overall ability to validly measure the candidate's ability to perform the position's essential functions.
- c. Employers and employment agencies who receive requests, corrections, or other information from candidates pursuant to Standard 5(a)(2) or (b)(2) should be deemed to have knowledge of the information and requests for accommodation included therein and do each of the following within a reasonable amount of time after receiving the information from the candidate:
 1. Assign a natural person to review the information before the employment decision is finalized and determine whether provision of an accommodation, assessment of the candidate by alternative means, or reevaluation is warranted or needed to ensure compliance with applicable antidiscrimination laws;

2. Provide the requested accommodation, reevaluation, or alternative selection procedure or other assessment method if failing to do so would create a substantial risk of unlawful discrimination;
 3. If the candidate made a specific request, provide the candidate with a decision on whether the candidate's request will be granted or denied, and the reasons for that decision;
 4. Retain all information and documentation relating to the candidate communication in accordance with Standard 8; and
 5. Review the information and requests as part of the next ongoing audit, as described in Standard 6.
- d. A candidate's failure to invoke or utilize any of the rights or procedures described in this Standard should not:
1. Waive or affect the availability of any other rights, procedures, or remedies under these Standards or any other applicable law; or
 2. Be used as evidence regarding the candidate's need for accommodation if the candidate is ultimately selected or hired.

Standard 6: Ongoing audits and adjustments

- a. After a selection procedure has been deployed, the selection procedure should undergo ongoing audits at standardized intervals that ensure the selection procedure is audited at least once per year for each position for which the selection procedure is used. Each employer and employment agency that used, sold, distributed, or developed the selection procedure should have a joint and non-delegable responsibility for ensuring that ongoing audits compliant with this Standard are performed. Each ongoing audit should be conducted by an auditor who analyzes and documents in detail:
 1. Whether and how each position's essential functions, the characteristics of the candidate pool, or other features relevant to the validity of the selection procedure have changed since the pre-deployment audit and, if applicable, the last ongoing audit;
 2. If the parameters, training data, or other input components of the selection procedure have changed, whether and how the changes have affected the pre-deployment audit determinations identified in Standard 3(b);
 3. Whether and how the decisions, recommendations, scores, or other outputs of the selection procedure have had an adverse impact on members of any protected class, using the adverse impact testing standards and procedures specified in Standard 3(b)(4);
 4. Any new sources of adverse impact that may arise if the employer continues to use the selection procedure;
 5. The effectiveness of efforts to mitigate any potential adverse impacts identified during the pre-deployment audit;
 6. What new or additional reasonable alterations to the selection procedures or individual accommodation, if any, would improve the selection procedure's accessibility or its ability to fairly, validly, and effectively assess the abilities of candidates from each protected class to perform each position's essential functions without unlawful discrimination;
 7. The clarity and completeness of the adverse action notices and explanations described in Standard 5(b)(1);
 8. Whether less discriminatory alternative selection procedures or other methods of assessment are now available, using the standards specified in Standard 3(b)(9); and
 9. Any other information or issues required under the rules and regulations of the enforcement agency.
- b. An employer or employment agency should cease use of a selection procedure for a position if the ongoing audit reveals:
 1. That the essential functions of the position have changed since the pre-deployment audit, in which case the employer should conduct a new pre-deployment audit;

2. Any reliance on any protected attribute or proxy for a protected attribute, unless it has been eliminated or the auditor reasonably determines that the use of the attribute or proxy is lawful pursuant to a valid affirmative action plan;
 3. Any adverse impact or limitation on accessibility, unless it has been eliminated or:
 - A. The employer demonstrates that the selection procedure is the least-discriminatory valid method for assessing candidates' ability to perform essential job functions; or
 - B. In the case of a limitation on accessibility, if the limitation cannot be eliminated by altering the selection procedure, the employer or employment agency makes effective accommodation available; or
 4. A need for a reasonable alteration as described in paragraph (a)(6) of this Standard, until the employer has implemented the reasonable alteration.
- c. An ongoing audit that complies with this Standard should be conducted regardless of whether a selection procedure has been changed since the pre-deployment audit.
- d. The enforcement agency should have discretion to require certain selection procedures to be audited more frequently than once per year, but nothing in these Standards should be construed as:
1. Suggesting that the enforcement agency allow any selection procedure to be audited less frequently than once per year; or
 2. Preventing employers from auditing selection procedures more frequently than once per year, or more frequently than required under applicable rules and standards issued by the enforcement agency.

Standard 7: Audit summaries

- a. For each pre-deployment or ongoing audit, the auditor should prepare a detailed summary of the results of each audit that:
 1. Includes the plain-language definitions of “audit” and “adverse impact” published by the enforcement agency;
 2. Explain that the selection procedure was audited and tested for adverse impacts and why;
 3. Describes the audit’s methodology, findings, results, and conclusions for each element described in Standard 3(b) or Standard 6(a), as applicable;
 4. If the selection procedure has been changed pursuant to Standard 3(e), Standard 6(a)(6), or Standard 6(b)(2)-(4), or ceased pursuant to Standard 6(b), describes the nature of any changes and the reasons for any changes or cessation of use of the selection procedure; and
 5. Includes all other information required by the rules and regulations of the enforcement agency.
- b. Each employer and employment agency should:
 1. If it has a website, post each audit summary on a dedicated and easily searchable page on its website, and keep the audit summary posted throughout the period of time that the employer or employment agency uses the selection procedure or any derivative of the selection procedure and one year thereafter; and
 2. File each audit summary with the enforcement agency, which should catalog audit summaries for each employer and employment agency and post them on the enforcement agency’s website within seven days of filing.

Standard 8: Recordkeeping

- a. For each selection procedure that the employer or employment agency uses, sells, or distributes, the employer and employment agency should retain all data, code, and other information in their possession or control necessary to allow for subsequent independent audits and investigations regarding the lawfulness and validity of the selection procedure, including:
 - 1. All documentation of impact and validity evidence for the selection procedure required under Section 15 of the Uniform Guidelines on Employee Selection Procedures, 41 CFR § 60-3.15;
 - A. Subject to subparagraph (1)(B), an employer or employment agency with fewer than 100 full-time equivalent workers should be permitted to retain simplified records relating to a selection procedure, as specified in paragraph (A)(1) of 41 CFR § 60-3.15, except the records should include the simplified information about all protected classes, and should include information on all protected attributes shared by more than one percent (1%) of the labor force for which the selection procedure is used.
 - B. An employment agency that sells selection procedures to employers; distributes selection procedures to employers; or administers, distributes, or uses selection procedures on employers' behalf, should retain full records of the impact and validity of the selection procedures, regardless of the size of the employment agency.
 - 2. Copies of every version of each short-form disclosure described in Standard 4 and every audit summary described in Standard 7;
 - 3. Records of each request for accommodation, request to be assessed by alternative means, or other communication received pursuant to Standard 5; the employer or employment agency's response to each such communication or request; and the reasons for its response;
 - 4. Records of each notice and explanation of adverse action described in Standard 5(b)(2);
 - 5. Any other information that the employer or employment agency relied upon when it decided whether to develop, procure, or use the selection procedure;
 - 6. Any other information that an auditor relied upon during a pre-deployment or ongoing audit; and
 - 7. All other data, code, records, or other information regarding the selection procedure required under the rules and regulations of the enforcement agency.
- b. All documentation, data, results, and other records and information described in this Standard should:
 - 1. Be retained for as long as the selection procedure is used, or five years, whichever period is greater;
 - 2. Be secured during the retention period in a manner conforming to

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- contemporary cybersecurity industry standards, applicable health and personal information privacy laws, and any rules or regulations issued by the enforcement agency; and
3. Upon request, be securely provided to the agency or agencies responsible for enforcing laws relating to employment discrimination, as well as to any auditor duly retained to conduct an audit on a selection procedure to which the information is relevant.
- c. To the extent that the records and information retained under this Standard include a candidate's personal information, the employer or employment agency should not sell, release, transfer, provide access to, or divulge in any manner the records or information to any third party, other than to an auditor in connection with an audit that is in progress, unless:
1. The third party is an employer or employment agency that wishes to make an employment decision regarding the candidate;
 2. The employer or employment agency provides the candidate with a notice that discloses:
 - A. The name of the third party to which the employer or employment agency wishes to disclose the candidate's personal information;
 - B. The position(s) for which the third party wishes to make an employment decision;
 - C. The type(s) of employment decision the third party wishes to make regarding the candidate; and
 - D. The specific personal information that will be disclosed to the third party and the purpose that this information will fulfill in the third party's decision; and
 3. The employer or employment agency obtains separate, specific, and affirmative written consent from each such candidate with respect to each position with each third party.
- d. Candidates should be protected from retaliation if they refuse to consent to the sharing of their data under paragraph (c) of this Standard.

Standard 9: Unlawful employment practices

Laws and regulations should be updated, amended, enacted, or promulgated to the extent necessary to ensure that the following are deemed unlawful employment practices under the laws of the jurisdiction in question:

- a. For an employer or employment agency to use, sell, or distribute a selection procedure:
 1. That contains technical elements, methods, or features that individually, or in concert, result in adverse impact for protected classes, unless the employer or employment agency establishes that the selection procedure was the least discriminatory valid method of measuring candidates' ability to perform the essential functions of the relevant position(s) at the time the employer or employment agency used the selection procedure;
 2. That contains elements, methods or features that individually, or in concert, use protected attributes, or proxies of such attributes, to limit, segregate, classify, or deprioritize candidates for employment opportunities, including but not limited to selection procedures that use such attributes to make less available an advertisement for an employment opportunity on a physical or digital media platform or webpage, except pursuant to a valid affirmative action plan;
 3. Without altering the selection procedure or providing reasonable accommodation, where such alteration or accommodation is needed to ensure that the selection procedure validly and effectively assesses the abilities of candidates from a protected class to perform each position's essential functions;
 4. That, if used, would otherwise violate any prohibition on discrimination or lead to any unlawful employment practice under the laws of the United States or this jurisdiction;
 5. That contains elements, methods, or features that cannot be adequately assessed for scientific validity, accuracy, or compliance with the provisions of these Standards;
 6. That has not been subjected to the audits described in Standards 3 and 6 or that unreasonably continued to use a selection procedure without adequately addressing potential sources of discrimination or invalidity identified during such audits;
 7. Without complying with the notice, disclosure, candidate communication, and other provisions of Standards 4 and 5;
 8. For which compliant summaries have not been prepared, submitted, or published, as described in Standard 7;
 9. Without maintaining all records, or without providing all relevant information to an enforcement agency or auditor, in accordance with Standard 8; or
 10. That is a high-risk selection procedure.

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- b. For any person to retaliate or otherwise discriminate against a worker for:
 - 1. Requesting a reasonable accommodation;
 - 2. Opting out of an automated selection procedure;
 - 3. Otherwise exercising their rights under these Standards;
 - 4. Opposing any practice or conduct that the worker reasonably believes to be prohibited by these Standards; or
 - 5. Making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under these Standards.
 - c. For an employer or employment agency to extract biometric data made available through a selection procedure or disseminate such data to unauthorized third parties for commercial purposes.
 - d. For an employer, employment agency, or auditor to include knowingly false, materially misleading, or materially incomplete information in an audit summary, notice, enforcement agency filing, or other documentation required under these Standards.
 - e. For an employer to use an automated selection procedure without first obtaining preclearance from the enforcement agency, as described in Standard 11(c).

Standard 10: Enforcement, remedies, and liability

Laws and regulations should be updated, amended, enacted, or promulgated to the extent necessary to ensure that the following enforcement mechanisms and remedies are available:

- a. The enforcement agency should have authority to bring an administrative or civil action against an employer or employment agency for any unlawful employment practice described in Standard 9, paragraph (a) or (b). If the enforcement agency proves that the alleged unlawful employment practice occurred, the agency or court should:
 1. Assess a civil penalty for each calendar day that an employer or employment agency used the selection procedure that was the subject of the unlawful employment practice;
 2. Enjoin the employer or employment agency from continuing to use the selection procedure, or any related or derivative selection procedure, that was the subject of the unlawful employment practice;
 3. Issue any other such orders as the agency or court deems necessary to eliminate the effects of the unlawful employment practice and prevent future violations, including but not limited to the payment of actual damages to affected candidates.
- b. The enforcement agency should have authority to bring an administrative or civil action against an auditor for any unlawful employment practice described in Standard 9, paragraph (d). If the enforcement agency proves that the alleged unlawful employment practice occurred, the agency or court should assess a civil penalty.
- c. The enforcement agency should have authority to bring a civil action in any court of competent jurisdiction to enjoin the use, sale, or marketing of any selection procedure that the enforcement agency has reasonable cause to believe has resulted, is resulting, or will result in an unlawful employment practice.
- d. Any person who has been subjected to any unlawful employment practice described in Standard 9, paragraph (a), subparagraphs (1), (2), (3), (4), (7), or (10), or described in Standard 9, paragraphs (b) or (c), should be able to file a complaint with the enforcement agency or a civil action in any court of competent jurisdiction.
 1. In any civil action under this paragraph, a prevailing plaintiff, or, in a successful class action, each member of the class, should be able to obtain, for each unlawful employment practice, the greater of:
 - A. \$500 per prevailing plaintiff or, in a successful class action, per each member of the class; or
 - B. Actual damages.

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2. In any civil action under this paragraph, a court should:
 - A. Award a prevailing plaintiff costs and reasonable attorney fees;
 - B. Enjoin the employer from continuing to use the selection procedure, or any related or derivative selection procedure, that was the subject of the unlawful employment practice; and
 - C. Issue any other such orders as the court or agency deems necessary to eliminate the effects of the unlawful employment practice and prevent future violations.
 - e. In any civil action claiming that an employment decision made using a selection procedure has violated an applicable law against employment discrimination, each employer and employment agency that used, sold, distributed, or developed the selection procedure used in the employment decision should be jointly and severally liable to a prevailing plaintiff for all damages awarded to that prevailing plaintiff for the unlawful discriminatory practice and any liquidated damages awarded under paragraph (b) of this Standard, except that in instances where an employment agency knowingly sells, provides, or distributes a selection procedure to a small employer, the small employer should not be liable for any unlawful discriminatory practices or other unlawful acts of the employment agency.

Standard 11: Enforcement agency authority and responsibilities

- a. The enforcement agency should promulgate rules:
 - 1. Detailing the degree and content of human review required when an employment decision is made by an automated selection procedure;
 - 2. Providing effective complaint processes for workers claiming to be aggrieved by an employer's use of a selection procedure;
 - 3. Establishing certification procedures for auditors and their methodologies for conducting pre-deployment and ongoing audits, as well as the standards that auditors' methodologies must meet to obtain certification;
 - 4. Establishing standards for what types and degrees of disparity constitute an adverse impact;
 - 5. Specifying any situations other than those described in the text of these Standards under which a candidate may choose to opt-out of a selection procedure;
 - 6. Specifying what additional information employers must include in the short-form disclosure described in Standard 4, and providing plain-language definitions of "audit," "adverse impact," and any other technical terms used in short-form disclosures;
 - 7. Specifying what findings, data, conclusions, and other information must be included in the summaries described in Standard 7;
 - 8. Specifying what information employers must retain as part of their recordkeeping obligations under Standard 8, as well as the cybersecurity and personal privacy standards governing any information retained under Standard 8;
 - 9. Designating additional selection procedures as high-risk selection procedures beyond those specifically enumerated in Standard 2(q), but the enforcement agency's rulemaking authority should not extend to removing the high-risk designation from the types of selection procedures specifically enumerated in Standard 2(q);
 - 10. Establishing reporting, investigation, and enforcement procedures that incentivize cooperation by employers, employment agencies, and other parties subject to these Standards and related laws against employment discrimination; and
 - 11. Providing all other guidance, procedures, and interpretations necessary or beneficial to implementing and enforcing the provisions of these Standards.
- b. The enforcement agency should publish example forms for the short-form disclosure, pre-deployment audit summary, ongoing audit summary, and any other documents, disclosures, or records that the enforcement agency deems necessary or beneficial, and should update such example forms when warranted.

- c. The enforcement agency should establish a preclearance process for automated selection procedures, under which employers must demonstrate that an automated selection procedure is the least discriminatory valid method of measuring essential job functions before it may be used for a particular position.
- d. The enforcement agency should update its rules as appropriate to keep pace with changes in employment discrimination laws, technological advancements, the nature and content of selection procedures, and the social science of test validation.

Standard 12: Construction

- a. The remedies described in these Standards are intended to be non-exclusive, and the provisions of these Standards should not be implemented in a manner that limits any preexisting right of any candidate to bring a civil action in any court of competent jurisdiction, limits the authority of appropriate agencies to enforce employment discrimination laws, or prohibits localities from enacting laws that provide greater or additional protection.
- b. The existence of Enforcement Agency preclearance to use an automated selection procedure under Standard 11(c) should not alter, eliminate, or otherwise affect any person's liability or remedies under other applicable law, including but not limited to laws relating to employment discrimination, nor should evidence of preclearance be admissible in any action involving a claim of an unlawful employment practice, including but not limited to actions for employment discrimination.

The Standards provide a concrete alternative to recent proposals that would set very weak notice, audit, and fairness standards for automated tools. They also map out a more rigorous and rights-focused approach as compared to the outdated rules that currently govern how employers assess whether their selection procedures are discriminatory and whether they actually measure the worker characteristics they claim to measure.

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