



**AMERICAN STAFFING ASSOCIATION SUBMISSION
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
REGARDING THE USE OF ARTIFICIAL INTELLIGENCE IN HIRING
August 10, 2022**

The American Staffing Association is the largest trade association for the U.S. staffing industry and the leading voice for staffing, recruiting, and workforce solutions firms. ASA and its affiliated chapters advance the interests of the industry across all sectors through advocacy, research, education, and the promotion of high legal, ethical, and professional standards and practices.

We appreciate the Equal Employment Opportunity Commission’s consideration of this submission as the agency considers guidance or technical assistance with respect to employers’ use of artificial intelligence (AI) in the hiring process.¹ The purpose of this submission is to provide background on the staffing industry; explain how staffing firms operate and use technology to recruit and place temporary employees in jobs; and further explain why certain proposals by state and local legislatures (notably, requiring bias audits of software and advance notice of AI use to candidates), pose practical challenges that will frustrate staffing firms’ ability to place people in jobs.

In short, we propose that (i) to the extent the EEOC recommends that AI software be audited for bias, such audits should be conducted by the AI vendor or a neutral third-party under contract with such vendor, and that, absent particular use of AI software in a discriminatory fashion (for which current anti-discrimination laws would apply), employers be afforded a good faith reliance defense to claims that the audited software has an unlawful disparate impact; and (ii) any advance notice requirement to candidates regarding the use of AI can be satisfied by postings on employer websites, which may include non-proprietary information provided by the software provider.

Introduction—The Staffing Industry

The staffing industry is comprised of more than 20,000 staffing firms that employ approximately 16 million temporary employees annually. Staffing firms contribute over \$160 billion to the national economy by providing temporary staffing, recruiting and permanent placement, outsourcing and outplacement, and human resource consulting services. On any given week, more than three million temporary employees are gainfully employed throughout the country.

Staffing firms supply temporary employees to every industry in every job category, including industrial labor, office support, health care, engineering, science and information technology, and various professional and managerial positions. Businesses of all industry types across the United States rely

¹ We request that any guidance clearly define the term, “artificial intelligence,” such that employers and third-party providers have a clear understanding of what technology is covered.

upon the staffing industry to provide workforce flexibility which allows them to keep fully staffed during busy times, provide temporary support to major projects, and promote business growth.

For employees, the benefits of staffing are equally significant—including independence, job flexibility and diversity, skills training, and an entry point and bridge to permanent employment for millions of workers. Nearly nine out of ten staffing employees report that temporary work makes them more employable. One-half indicate it is a way to get a permanent job. In fact, typically one-third of temporary employees are offered permanent positions by clients where they worked on assignments, two-thirds of whom accept such offers.²

How Staffing Agencies Operate and Use Technology to Recruit and Screen Candidates

Staffing firms generally use technology to find job candidates in one of four ways. First, they may post a job title and description to a job board such as Monster, Indeed, LinkedIn, and others; and after the job description is matched against the content of resumes, the job board recommends top matching resumes to the firm. Once potential candidates are identified, the job board may display them in a ranked fashion, sometimes with a numerical score. A firm using these job boards will generally have no knowledge of how the board’s algorithmic analysis screens, recommends, or ranks potential candidates.

Second, when a firm receives a job requisition from a client, its third-party applicant tracking system (ATS) searches its internal database of candidates. These may be existing candidates who have applied for previous jobs or those who apply directly with the firm for the current job. In response to any given job advertisement, staffing firms can receive thousands of resumes from applicants. The firm’s ATS then selects resumes or candidates that it believes match the job description; it does this by finding key word matches in the resume and the job description; by using a semantic search which relies upon synonyms; or, in even more sophisticated fashion, by matching resumes of candidates based on an analysis of those attributes likely to success in the position.

Third, the ATS may affirmatively search various job boards and web sites to select resumes or candidates that it believes match the job description. The ATS does so much in the way it searches and matches candidates from the staffing firm’s internal candidate pool.

Finally, the ATS may search the Internet for so-called “passive” candidates, i.e., those not actively looking for a job. For example, to find a software engineer, the ATS’ algorithm might search for open-source code and the engineers who wrote it; evaluate the code for sophistication; and invite qualified individuals to apply.

Practical Difficulties Raised by State and Local “Artificial Intelligence” Proposals and Proposed Solutions

Against this backdrop of staffing firms’ use of ATS technology, some jurisdictions have proposed legislation or rules on how AI may be utilized in the hiring process; common to these proposals are a requirement that the software be audited for bias at least annually, and that advance notice of AI use and other details of the AI be given to job candidates.

² American Staffing Association, 2014 Staffing Employee Survey.

With respect to the audit requirement, some proposals are unclear as to which party, the AI provider or the employer, must perform the audit, while others suggest that employers must conduct them. We respectfully request that, to the extent that the EEOC recommends that audits be conducted, the employer's responsibility be limited to engaging only with AI providers that test their AI models for bias at least annually and publicly post the results; these tests should be conducted by the vendors or neutral third parties under contract with the vendors.

Audit responsibility should not fall on employers because they do not have access to the proprietary information of how AI was created, or any similar information that would be needed to perform an audit. Even if an employer could somehow access this proprietary information, it would be duplicative and unnecessary to have hundreds of thousands of employers conducting the same audits of third-party AI; this would be particularly true with respect to the thousands of staffing firms that use the same third party vendors.

Moreover, staffing firms and other businesses often use multiple third-party platforms (such as Monster, Indeed, LinkedIn, CareerBuilder, ZipRecruiter, etc.), especially in tight job markets. This means small businesses would be forced to pay for multiple audits annually, causing an extreme financial burden. Equally problematic, a user of such platforms will have no access to the algorithmic analyses used, or the pool of potential candidates screened, recommended, or rejected, thus making a meaningful bias audit impossible.

To avoid placing such an unreasonable burden on employers, and to eliminate duplication of efforts, we request that (i) the provider of AI be held responsible, through recommended limits on employer engagement, for performing, or hiring a specialist to perform, an audit of its technology; (ii) employers be held responsible for using AI that has been audited with publicly available results from the AI provider; and (iii) employers be afforded a good faith reliance defense when faced with claims that the audited software has an unlawful disparate impact. Such requirements are similar to the "validation" of tests used in the pre-employment process in which the testing provider ensures that the test design is free from inherent bias. To protect against improper use of the test, employers must adhere to non-discrimination laws that carry significant penalties for improper actions. The same laws would protect applicants should audited software be misused by a particular employer.

Further, to the extent the EEOC suggests that employers provide applicants with advance notice of AI, we request that the notice be limited to fact that the employer may use AI and any non-proprietary particulars the AI provider may disclose, and that staffing firms be allowed to provide such notice on their websites. Regarding the advance posting requirement, some candidates for assignments—for example, substitute teachers—may be offered an assignment starting the day after they apply for a position. In such cases, it would be impossible for staffing firms to notify the candidate of AI use and wait a prescribed period of time before filling the assignment; indeed, such requirement would impede job opportunities because the jobs would be gone before the notice period expires. Regarding the content of the notice, employers do not have access to the characteristics analyzed by a vendor's tool to make its assessment, except to the extent a vendor chooses to disclose this information.

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We appreciate the EEOC's consideration of the foregoing and look forward to working with the Commission to address these important issues in a constructive way.

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