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Keeping Up with the EEOC: 5 Takeaways from its Algorithm Rewriting Settlement

Client Alert | March 23, 2023

On March 20, 2023, the U.S. Equal Employment Opportunity Commission ("EEOC") announced that it had entered into a conciliation agreement with DHI Group, Inc. ("DHI"), a job search website operator, after it found "reasonable cause" to believe that job ads posted by DHI's customers were violating Title VII of the Civil Rights Act of 1964 ("Title VII") by discouraging workers of American national origin from applying.[i]

5 Key Takeaways for Employers

1. **Rewriting Code:** Under the agreement, DHI agreed to rewrite its programming to "scrape" for keywords such as "OPT," "H1B," or "Visa" that appear near the words "only" or "must" in new job postings. The agreement requiring DHI to rewrite its algorithms is reminiscent of, albeit less extreme than, the Federal Trade Commission ("FTC") requiring companies to delete models and algorithms developed using impermissibly collected data, and may be a sign of the EEOC's approach going forward.[ii]
2. **Customer Posts:** The charges of discrimination filed against DHI were due to job ads posted by DHI's *customers*. Accordingly, the agreement requires DHI to revise its guidance to customers to specify that certain language (*e.g.*, "H-1Bs Only" or "H-1Bs and OPT Preferred") must be avoided in job ads.
3. **Employment Agencies:** In the EEOC's press release, the Miami District Office Director stated that the agreement "serves as a reminder that the provisions of Title VII extend to employment agencies." The EEOC's characterization of the website operator here as an "employment agency" is a position that is worth watching and might well generate litigation in the future.
4. **Other Public Actions:** While this is likely the first conciliation agreement of its kind for the EEOC, the agency previously filed a complaint alleging algorithmic age discrimination in May 2022 against iTutorGroup, Inc.[iii] Thus far, this case has made little progress beyond iTutorGroup filing an answer to the amended complaint on March 9, 2023.
5. **Maintained Focus on AI:** The EEOC's draft strategic enforcement plan for 2023 through 2027 (the "SEP") released in January 2023 indicated that the agency plans to focus on the use of AI tools across the employment lifecycle, as well as eliminating barriers arising from exclusionary job advertisements.[iv] In addition to its settlement agreement with DHI, the EEOC has shown its continued focus on this area through a pair of recent AI-centric expert panels. On March 11, 2023, EEOC Chair Charlotte A. Burrows moderated a panel titled, "Is AI the New HR? Protecting Civil Rights at Work."[v] As with the EEOC's public hearing on January 31, 2023,[vi] this panel notably did not include employers or developers or vendors of AI tools. Indeed, during the EEOC's public hearing, Commissioners Keith Sonderling and Andrea Lucas both underscored their disappointment with these key perspectives being absent from the expert panels.

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From the outset of 2023, there has been a significant uptick in proposed legislation seeking to govern automated decision-making in employment at the state level. We anticipate that this trend will continue and are carefully monitoring developments with these bills along with any updated guidance or regulations from the EEOC. Employers that have already implemented or are considering implementing automated tools in the workplace should consider the impact of these developments to ensure compliance with upcoming laws and enhanced regulatory scrutiny.

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[i] EEOC Press Release, *DHI Group, Inc. Conciliates EEOC National Origin Discrimination Finding* (Mar. 20, 2023), https://www.eeoc.gov/newsroom/dhi-group-inc-conciliates-eeoc-national-origin-discrimination-finding.

[ii] *See, e.g.*, *FTC Takes Action Against Company Formerly Known as Weight Watchers for Illegally Collecting Kids' Sensitive Health Data*, Fed. Trade Comm'n (Mar. 4, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-takes-action-against-company-formerly-known-weight-watchers-illegally-collecting-kids-sensitive (requiring destruction of any models or algorithms allegedly developed with the use of impermissibly collected data); *California Company Settles FTC Allegations It Deceived Consumers about use of Facial Recognition in Photo Storage App*, Fed. Trade Comm'n (Jan. 11, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/01/california-company-settles-ftc-allegations-it-deceived-consumers-about-use-facial-recognition-photo (requiring deletion of models and algorithms allegedly developed using photos and videos obtained without express consent from users).

[iii] *EEOC v. iTutorGroup, Inc.*, No. 1:22-cv-02565 (E.D.N.Y. May 5, 2022).

[iv] For more information, please see Gibson Dunn's Client Alert, Keeping Up with the EEOC: 10 Key Takeaways from its Just-Released Draft Strategic Enforcement Plan.

[v] SXSW, *Is AI the New HR? Protecting Civil Rights at Work* (Mar. 11, 2023), https://schedule.sxsw.com/2023/events/PP130959

[vi] EEOC, *Meeting of January 31, 2023 - Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier* (Jan. 31, 2023), https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or Jason Schwartz and Katherine Smith.

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