

United States Senate
Washington, D.C. 20510

December 8, 2020

The Honorable Janet Dhillon
Chair
Equal Employment Opportunity Commission
131 M Street N.E.
Washington, D.C. 20507

Dear Chair Dhillon:

We write to request information about the Equal Employment Opportunity Commission (EEOC)'s oversight authority for hiring technologies. As businesses begin to re-open according to guidelines for the novel coronavirus 2019 (COVID-19) pandemic, some companies will seek to hire staff more quickly as many qualified people apply for open positions. Under these conditions, employers are likely to turn to technology to manage and screen large numbers of applicants to support a physically distant hiring process.¹ Under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Commission is responsible for combatting discrimination in the U.S. workforce, including discrimination resulting from hiring and other employment technologies.²

Hiring technologies include a range of tools used in the employee selection process to manage and screen candidates after they apply for a job.³ They include new modes of assessment, such as gamified assessments or video interviews that use machine-learning models to evaluate candidates, as well as other instruments, such as general intelligence or personality tests, coupled within modern applicant tracking systems.⁴

While hiring technologies can sometimes reduce the role of individual hiring managers' biases, they can also reproduce and deepen systemic patterns of discrimination reflected in today's workforce data.⁵ Today, Black and Latino workers are experiencing significantly higher

¹ See, e.g., Adam S. Forman, Nathaniel M. Glasser & Christopher Lech, *Insight: Covid-19 May Push More Companies to Use AI As Hiring Tool*, Bloomberg Law (May 1, 2020), <https://news.bloomberglaw.com/daily-labor-report/insight-covid-19-may-push-more-companies-to-use-ai-as-hiring-tool>.

² 42 U.S.C. § 2000e-5.

³ See Miranda Bogen & Aaron Rieke, Upturn, Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias 26-39 (Dec. 2018), <https://www.upturn.org/reports/2018/hiring-algorithms/>.

⁴ *Id.*

⁵ See *Id.* at 8-9.

unemployment rates than their white counterparts.⁶ The unemployment gap between Black and white workers is the highest it's been in five years.⁷

Combatting systemic discrimination takes deliberate and proactive work from vendors, employers, and the Commission. Job applicants alone cannot effectively learn about and challenge discriminatory hiring processes. As the Commission acknowledged in its 2016 systemic program review, “[h]iring or nonselection remains one of the most difficult issues for workers to challenge in a private action, as an applicant is unlikely to know about the effect of hiring tests or assessments, or have the resources to challenge them.”⁸

The Commission is responsible for ensuring that hiring technologies do not act as “built-in headwinds for minority groups.”⁹ Effective oversight of hiring technologies requires proactively investigating and auditing their effects on protected classes, enforcing against discriminatory hiring assessments or processes, and providing guidance for employers on designing and auditing equitable hiring processes.

Today, far too little is known about the design, use, and effects of hiring technologies. Job applicants and employers depend on the Commission to conduct robust research and oversight of the industry and provide appropriate guidance. It is essential that these hiring processes advance equity in hiring, rather than erect artificial and discriminatory barriers to employment. Accordingly, we request information about the Commission’s authority and capacity to conduct the necessary research and oversight to ensure equitable hiring throughout the economic recovery and beyond.

Please provide answers to the following questions, including any underlying documentation in support of the responses:

- 1) Has the Commission ever used its authority to investigate and/or enforce against discrimination related to the use of hiring technologies? If so, please discuss the nature and results of such investigation or enforcement activity.
- 2) Under Section 705(g)(5) of Title VII, the Commission has the authority to “make such technical studies as are appropriate to effectuate the purposes and policies of this

⁶ See U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey (last modified July 2, 2020), https://www.bls.gov/web/empsit/cpsee_e16.htm.

⁷ See Jonnelle Mart, *Gap in U.S. Black and white unemployment rates is widest in five years*, Reuters (July 2, 2020), <https://www.reuters.com/article/us-usa-economy-unemployment-race/gap-in-us-black-and-white-unemployment-rates-is-widest-in-five-years-idUSKBN2431X7>.

⁸ Jenny R. Yang, Equal Employment Opportunity Comm’n, *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission* (July 7, 2016), <https://www.eeoc.gov/advancing-opportunity-a-review-systemic-program-us-equal-employment-opportunity-commission>.

⁹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (internal quotations omitted).

subchapter and to make the results of such studies available to the public.”¹⁰ Can the Commission use this or any other authority to study and investigate the development and design, use, and impacts of hiring technologies *absent an individual charge of discrimination*? Please explain why or why not.

- a) Could the Commission, for example, request access to hiring assessment tools, algorithms, and applicant data from employers or hiring assessment vendors and conduct tests to determine whether the assessment tools may produce disparate impacts? Please explain why or why not.
 - b) If the Commission were to conduct a study as described in question (1)(a), could the Commission publish or summarize its findings in a public report? Please explain why or why not.
 - c) What, if any, additional authority and resources would the Commission need to proactively study and investigate hiring assessment technologies?
- 3) The Commission periodically issues guidance and regulations, incorporating input from public meetings, discussion, and comments. The Commission has held several meetings on the implications of data and digital technologies on equal employment opportunity, including a meeting on October 13, 2016, on the “use of big data” in equal employment opportunity.¹¹
- a) Has the Commission followed up on these meetings by providing any guidance, releasing publications, or conducting additional research on the use of data and technology in hiring? If so, please explain and provide documentation of such follow-up.
 - b) Does the Commission have plans to conduct any additional follow-up or release additional guidance or publications on the use of data and technology in hiring?

Thank you for your time and consideration.

¹⁰ 42 U.S.C. § 2000e-4(g)(5).

¹¹ Equal Employment Opportunity Commission, Use of Big Data has Implications for Equal Employment Opportunity, Panel Tells EEOC (Oct. 13, 2016), <https://www.eeoc.gov/newsroom/use-big-data-has-implications-equal-employment-opportunity-panel-tells-eeoc>; see also Equal Employment Opportunity Commission, Meeting of March 12, 2014 — Social Media in the Workplace: Examining Implications for Equal Employment Opportunity Law (March 12, 2014), <https://www.eeoc.gov/meetings/meeting-march-12-2014-social-media-workplace-examining-implications-equal-employment>.

Sincerely,



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United States Senator



Cory A. Booker
United States Senator



Sherrod Brown
United States Senator



Elizabeth Warren
United States Senator



Catherine Cortez Masto
United States Senator



Christopher A. Coons
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