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OFCCP Releases New AI Guidance for Federal Contractors



The Office of Federal Contract Compliance Programs (OFCCP) released [updated guidance](#) for the use of artificial intelligence (AI) by federal contractors on April 29, 2024—the latest indication that federal contractors' use and development of AI will come under regulatory scrutiny.

The latest guidance follows President Biden's October 30, 2023, [Executive Order 14110](#) calling for agency efforts to mitigate risks related to AI, which mandated the U.S. Department of Labor (DOL) to "publish guidance for federal contractors regarding nondiscrimination in hiring involving AI and other technology-based hiring systems." For further coverage on President Biden's Executive Order (EO) 14110, which has been an ongoing topic of discussion in legal circles that intersect technology and hiring, see our November [Update](#) and follow-up [podcasts](#) addressing implications of the EO.

In this Update, we cover the ins and outs of the OFCCP's latest AI guidance and consider headwinds federal contractors may face as they attempt to use AI for hiring while complying with the OFCCP's new requirements.

Our [companion Article](#) covers the DOL's new guidance on interactions between AI and the Fair Labor Standards Act. The DOL released the parallel guidance on the same day as the OFCCP's AI guidance, indicating the breadth of new efforts by the Biden administration to address the use of AI in employment contexts.

Background

Executive Order 14110, formally titled "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," charges multiple federal agencies with producing guidelines to regulate the use and implementation of AI across a range of well-regulated fields, including the use of AI by federal contractors. In particular, EO 14110 tasked the secretary of labor with promulgating new nondiscrimination guidelines covering the use of AI and other technology-based hiring systems for federal contractors. As the primary subagency within the DOL regulating federal contractor compliance with federal nondiscrimination obligations,

the OFCCP was tasked with developing this latest guidance.

Although the OFCCP guidance specifically derives from EO 14110's mandate, the push to address discriminatory uses of AI has been an ongoing focus of the Biden administration. In 2021, at the direction of the administration, the Equal Employment Opportunity Commission (EEOC) launched an initiative on the use of AI in employment contexts to gather information on the impact of AI on employment decisions, including how using AI comports with civil rights laws. As discussed in a [prior Update](#), the EEOC followed up that initiative with its own guidance on the use of AI in hiring and other employment actions on May 18, 2023.

The Guidance's New AI Nondiscrimination Obligations

Primarily, the guidance addresses the use of AI in hiring and other employment decisions as they relate to existing federal contractor obligations enforced by the OFCCP. Under Executive Order 11246, as amended, federal contractors, including subcontractors, are required to not only ensure equal employment on the basis of race, color, religion, sex, and national origin, but also to take affirmative steps to ensure equal opportunity in all aspects of their employment practices, which the OFCCP is tasked with regulating through compliance reviews and investigations. These requirements are implemented in the Federal Acquisition Regulation (FAR) in standard contract clauses. See, *e.g.*, FAR 52.222-25 and 52.222-26.

To align these EO 11246 obligations with the Biden administration's AI EO, the OFCCP's latest guidance clarifies that federal contractors' compliance obligations as they relate to AI include:

- Ensuring that applicants or employees with known disabilities are reasonably accommodated unless such accommodation would be an undue hardship.
- Retaining records on the impact and validity of selection procedures, including AI tool selection procedures.
- Maintaining confidentiality in accordance with all OFCCP regulatory requirements.
- Cooperating with OFCCP requests for information on federal contractors' AI systems.
- Cross-referencing AI systems against applicable nondiscrimination laws and the Uniform Guidelines on Employee Selection Procedures, especially when a selection procedure using AI results in an adverse impact on a protected group.
- Conducting routine independent assessments of AI systems for bias and/or inequitable results.
- Exploring potential alternative selection procedures.
- Refraining from delegating federal contractor nondiscrimination and affirmative action obligations to third-party products and services, including AI screening tools.

In its recent guidance, OFCCP reminds federal contractors of the subagency's obligations to investigate federal contractors that fail to perform their nondiscrimination obligations. The guidance clarifies that future and ongoing OFCCP investigations will include decision-making tools that use an AI system. The guidance primarily addresses federal contractors' use of predictive AI, which is AI that can "make predictions, recommendations, or decisions influencing real or virtual environments," rather than generative AI, which instead generates new content.

The Guidance's "Promising Practices" for Federal Contractors

In addition to reminding federal contractors of their nondiscrimination obligations, including as they relate to the use and implementation of AI, the guidance endorses a series of "promising practices" for federal contractors to consider when using AI for employment decisions. Those "promising practices" include, among others:

- Providing notice to applicants and employees of the intent to use AI for employment decisions.

- Providing clear and accessible terms for requesting and obtaining reasonable accommodations in the hiring process, as applicable.
- Describing for applicants and employees the types of data that will be captured and used by AI systems.
- Safeguarding applicant and employee privacy while also ensuring transparency on how the AI system contributes to an employment decision.
- Training staff on appropriate uses of AI in employment decisions.
- Monitoring AI systems for adverse impacts on protected classes.
- Creating governance structures for the oversight of AI systems, including the review of their impact and data requirements.
- Drafting vendor contracts to ensure that AI vendors carefully maintain records in accordance with all OFCCP regulatory requirements and are able to provide them to the OFCCP during compliance evaluations.

OFCCP clarifies in its latest guidance that the "promising practices" outlined above are not all expressly required but may be helpful in avoiding harm to workers and risks from routine compliance evaluations.

Next Steps for Federal Contractors

As noted in the latest guidance, AI protocols and best practices are likely to change in response to ongoing developments in both predictive and generative AI. At the federal level, the Office of Management and Budget issued [guidance](#) to federal agencies dated March 28, 2024, related to AI innovation, risk management, and procurement, setting in motion a series of activities among federal agencies with a direct impact on federal contractors. Further, state law efforts to promote AI innovation while also signaling concerns about its misuse and impact on privacy and other interests are proliferating rapidly. New York's Governor Kathy Hochul recently announced that New York would establish Empire AI, a consortium aimed at making the state a leader in AI research. The consortium is expected to study the impact of AI on labor, underserved communities, income inequality, and the broader technology industry, with regulations expected to follow suit. Similarly, the California Privacy Protection Agency recently voted 3-2 to advance rules on how businesses may use AI. On May 8, 2024, the Colorado House passed a bill to regulate the uses of AI. That bill, which had previously passed the Colorado Senate, now awaits signature by Governor Jared Polis. These rules impact a wide range of practices associated with AI, including the collection of personal information and notices required before applying AI technology.

For now, federal contractors that use AI systems for employment decisions, especially for selection procedures, should review their existing procedures for compliance with these latest OFCCP directives and any applicable state regulations. Although the list of "promising practices" is neither exhaustive nor required of federal contractors, federal contractors should further identify which of those practices can be implemented without causing undue hardship to their organization's operations.

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