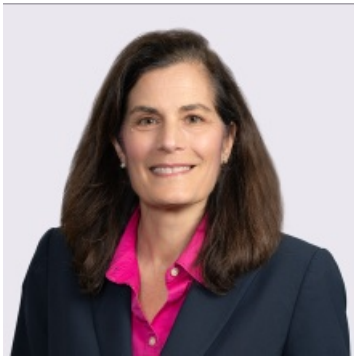


Finding Diverse Talent in the Manufacturing Industry Revisited: A Skillful Scavenger Hunt

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Even as the U.S. Bureau of Labor Statistics [reports](#) increased hiring in the manufacturing industry over the last year, filling certain positions remain a challenge, especially for those that require highly skilled workers. Greater use of technology in the industry can help employers and recruiters successfully cast a wider net to attract qualified, diverse candidates.

As technology becomes more commonplace in the screening process, however, the government has become more focused on potential law violations. Recruiters and manufacturers routinely and successfully rely on artificial intelligence (AI), algorithms, chatbots, resume scanners, and other software incorporated as part of the screening process. Government regulators encourage (i) the well-intended employer to review practices and processes, because even a “neutral” policy or practice (for example, relying on software such as AI) could have a disparate impact on and unlawfully screen out individuals in protected groups, and (ii) transparency in screening, which also is an underlying legislative state and local trend.

Key Government Guidance

In 2021, the Federal Trade Commission (FTC), which regulates consumer protection and unfair business practices, [voiced concerns](#) about the use of AI, for example, where it could potentially produce bias results, creating unintended disparities for certain protected individuals. The FTC offered practical suggestions for employers, such as reminding companies to design sourcing models to account for any shortcomings or data gaps, carefully review the data, and periodically monitor outcomes.

Further, the federal Equal Employment Opportunity Commission (EEOC), responsible for enforcing certain employment-related laws, [announced](#) it launched an agency-wide initiative to ensure the use of software, including AI, was compliant with the federal laws it enforces. Examples the EEOC provided of “software” include AI, resume scanners prioritizing applications using certain keywords, “virtual assistants” or “chatbots,” video interfacing that may evaluate speech patterns, and testing software that provides job fit scores. Significantly, in 2020, the EEOC [sued](#) a non-manufacturing employer alleging its online recruitment software automatically rejected an older applicant.

Additionally, on May 12, 2022, the EEOC, in its Technical Assistance Document, and the U.S. Department of Justice (DOJ), in its guidance on “Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring,” focused on removing barriers created by technology and the recruiting process on individuals with disabilities. Employers are [reminded](#) to review not only their data, but the process, and the resultant impact of whether it potentially excludes individuals with disabilities or how reasonable accommodations can be provided.

Consider the scenario where an employer uses software that has the purpose or effect

of evaluating or rejecting candidates who have “significant” gaps in their employment history. A person who was diagnosed with and had surgery due to a recurring cancer may have been out of the workforce for a brief or even extended period. Under the newest guidance, and the EEOC’s lens, if a particular gap was caused by a disability, the EEOC may question the process, *i.e.*, is there a potential issue because the applicant had a gap and was screened out because of the disability?

Another example is the use of video interviewing as part of the hiring process to analyze problem-solving capabilities. The software may be scoring an applicant with a speech impediment or other obvious impairment unfairly. According to the EEOC, this could be an issue under the Americans with Disabilities Act (ADA) if proper steps are not taken or safeguards are not in place to avoid any scoring bias.

With the EEOC and DOJ cautioning employers about the use of AI and other recruiting tools in their respective guidance, employers should begin to review their:

1. Reliance on algorithmic decision-making tools. Government regulators like the EEOC and DOJ are concerned that even employers that do not intend to discriminate may use a hiring technology that may inadvertently lead to unlawful discrimination;
2. Method of seeking medical or disability-related information and how they conduct medical exams to ensure they do not otherwise violate the ADA; and
3. Communications regarding offers of a reasonable accommodation (and the lack of communication).

Next Steps for Manufacturers

Manufacturers need to be proactive. Employers should review and understand current hiring practices, processes, and recruiting technology to minimize risk of liability. Employers can further review and strengthen their “reasonable accommodation” message to applicants, where appropriate, and attempt to continue to ensure equal access to a broad array of candidates.

Other steps include:

- Ask any software vendor your company uses the following questions about the recruiting tool: How was the tool developed? Was the tool developed with individuals with disabilities in mind? Was the product separately validated as being job-related and non-discriminatory (considering the limits of validation in this area)?
- Clearly communicate to applicants how to request a reasonable accommodation regarding any aspect of the recruiting and application process. A request for a reasonable accommodation need not be express. If a candidate tells the employer that a medical condition may make it difficult to take a test, the candidate may have requested a reasonable accommodation.
- Regularly review and examine the “outcome” of hiring technologies and make necessary adjustments, where appropriate.
- As in other areas, *promptly* respond to an applicant’s request, including a request for accommodation.

- Be transparent. Tell applicants about the type of technology being used in the recruitment process and how they will be evaluated. (Review any state and local requirements in this area as well.)
- Conduct periodic audits and review of all the above steps.

This is an evolving area. Manufacturers will need to be mindful of how government enforcement trends and new legislation affect the use of technology in recruiting. By constantly reviewing, improving, and monitoring the use of AI in the recruiting process for potential unintended consequences, employers can be successful in their search for talent while minimizing their exposure to liability.

For more information about the navigating legal issues relating to the search for talent, contact the Jackson Lewis attorney with whom you work.

(Summer Associate Ian Landman contributed to this article.)

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