

LEGAL NEWS FOR YOUR BUSINESS

July 2022

General Business Alert

ARTIFICIAL INTELLIGENCE AND THE ADA: WHAT EMPLOYERS NEED TO KNOW

On May 12, 2022, the Equal Opportunity Employment Commission (“EEOC”) published guidance for employers using computer-based tools for employment decisions in compliance with the Americans with Disabilities Act (“ADA”). These tools may be used to screen applicant resumés, assess worker productivity, or determine pay and promotions, among other uses. Without certain safeguards, however, these tools may cause employers to “screen-out” or inadvertently discriminate against job applicants and current employees with disabilities. The guidance applies to three main categories of tools:

- **Software** refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function, including applications. Software may be used for resumé-screening, chatbots, video interviewing, analytics, employee monitoring, and other employment uses.
- **Algorithms** refer to a set of instructions that can be followed by a computer to accomplish an objective. Employment software and apps often use algorithms to evaluate employees and job applicants. They can be used at various points in the employment process.
- **Artificial Intelligence (“AI”)** refers to a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Employers may rely on recommendations and predictions produced by AI to make decisions regarding hiring, promoting, and termination of employees.

The EEOC allows the use of these tools, but recommends employers follow a set of “promising practices” to ensure ADA compliance. These practices include providing reasonable accommodations when appropriate, training staff to recognize and respond to requests for reasonable accommodations as efficiently as possible, using accessible tools

that have undergone user testing, and ensuring that tools directly assess only attributes that are necessary to perform the essential functions of a position. In addition, employers can be held responsible for discriminatory effects of software provided or utilized by a third party, so please proceed with caution.

Any questions, or need assistance, we are happy to help.

Healthcare Provider Alert

HHS ANNOUNCES AUDIO-ONLY TELEHEALTH IS ALLOWED UNDER HIPAA

In response to the pandemic, the U.S. Department of Health and Human Services (“HHS”) announced that its Office of Civil Rights (“OCR”) would use discretion in enforcing certain provisions of the HIPAA Privacy and Security Rules for providers using audio-visual methods and platforms to provide healthcare services via telehealth. As the pandemic shifts, the future of this discretion remains uncertain, prompting HHS to announce new guidance for the use of audio-only telehealth methods.

On June 13, 2022, HHS released new guidance on the acceptability of audio-only telehealth once the enforcement discretion policy lapses with the end of the Public Health Emergency. This guidance is aimed to increase accessibility of healthcare services for those in rural areas and those who may not be able to access video technology due to a disability or extenuating circumstances. Here’s how the different aspects of HIPAA apply to audio-only telehealth:

- ***HIPAA Privacy Rule:*** Audio-only telehealth is acceptable under the HIPAA Privacy Rule as long as providers still take steps to safeguard protected health information (“PHI”). Steps include using a private space, or if one is unavailable, lowering voices and avoiding the use of speakerphone.
- ***HIPAA Security Rule:*** While HIPAA’s data security safeguards do not apply to standard telephone lines; smartphone apps, VoIP platforms, technologies that record and/or transcribe telehealth sessions, and messaging apps that electronically store audio messages do fall under the HIPAA Security Rule. Security risk analyses should be conducted to assess the security of PHI when using these technologies, and analyses should be further used to construct a risk management plan.
- ***Business Associate Agreements (“BAA”):*** If a telecommunications service provider (“TSP”) only connects a provider and patient and does not create, maintain, or store PHI, no BAA is needed. However, if a TSP creates, maintains, or stores any form of PHI, a BAA will be necessary.

HHS clarified that these guidelines apply regardless of whether any health plan covers or pays for audio-only telehealth. As the end of the enforcement discretion period gets closer, providers should take this guidance into account and make sure practices are in full HIPAA compliance.



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