ACLU

AMERICAN CIVIL LIBERTIES UNION

<u>**VIA ELECTRONIC MAIL (Commissionmeetingcomments@eeoc.gov)**</u>

October 28, 2016

Commission Meeting
EEOC Executive Officer
131 M Street, N.E.
Washington, D.C. 20507

To Whom It May Concern:

The American Civil Liberties Union (ACLU) commends the EEOC for exploring the potential dangers to equal employment opportunity posed by "big data." The agency's recent public meeting on the topic[1] and its inclusion of the issue in its new Strategic Enforcement Plan[2] reflect a proactive stance that will help assure that new technologies do not become new tools for discrimination.

The ACLU is a non-profit, non-partisan organization committed to protecting the rights and liberties guaranteed by the United States Constitution and by state and federal legislation. The ACLU works both to safeguard individuals' rights to privacy and to ensure full equality for members of historically marginalized groups, including people of color, women, immigrants, people with disabilities, and lesbian, gay, bisexual, and transgender people. Our work on privacy issues, in recent years, has centered on the importance of regulating and securing the vast quantities of data about individuals generated as we move through the digital landscape. The ACLU has also worked at the intersection of these privacy and equality issues before, for instance as a signatory along with other civil rights groups, to the Civil Rights Principles for the Era of Big Data.[3]

We write because we are particularly concerned about big data's effects in two discrete respects, neither of which were extensively addressed during the EEOC's October 13 public meeting: (1) job advertisements – specifically, behavioral targeting, which enables employers to deliver such

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[1] U.S. Equal Employment Opportunity Commission, Meeting of October 13, 2016, "Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law," https://www.eeoc.gov/eeoc/meetings/10-13-16/index.cfm.

[2] U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan, Fiscal Years 2017-2021 7, https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf ("[T]he increasing use of data-driven selection devices" is an area "of particular concern.").

[3] *Civil Rights Principles for the Era of Big Data*, The Leadership Conference on Civil and Human Rights, http://www.civilrights.org/press/2014/civil-rights-principles-big-data.html (last visited Oct. 20, 2016); *see also* ACLU Letter to FTC Chairwoman Edith Ramirez (Oct. 7, 2014), https://www.aclu.org/sites/default/files/assets/141027_ftc_comment.pdf.

advertisements to particular populations and thus reinforce labor market segregation – and (2) employers' tracking of incumbent employees' health data, which carries the risk of identifying, and penalizing, employees who are or plan to become pregnant.[4] We urge the EEOC to include these issues among the big data-driven practices that it is currently exploring, and to issue policy guidance on both topics.

Job Advertisements

Equal employment opportunity law prohibits recruitment and advertising practices that discriminate against members of protected groups. Title VII prohibits discrimination on the basis of "race, color, religion, sex, or national origin," whether that discrimination is intentional or results from a neutral practice that has a disparate impact.[5] Title VII also prohibits "print[ing] or publish[ing] or caus[ing] to be printed or published" a notice or advertisement "indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin," except "when religion, sex, or national origin is a bona fide occupational qualification for employment."[6] EEOC's Compliance Manual makes clear that Title VII prohibits discriminatory recruitment practices, such as "recruiting from racially segregated sources, such as certain neighborhoods, schools, religious institutions, and social networks."[7] One example is if an employer "refuses to advertise its jobs in newspapers that circulate in" an overwhelmingly Black nearby city.[8] By the same logic, Title VII prohibits the refusal to place advertisements where they would reach women, LGBT individuals, older workers, and other protected groups.

Title VII governs online recruitment and advertising practices with no less force, and as data-based advertising techniques and advertising platforms allow for new forms of targeted marketing, the risk of discrimination grows. Such targeting causes individuals moving through the online world to see different advertisements depending on their personal characteristics, potentially alerting them to particular employment opportunities while denying them information about others.

For example, researchers at Carnegie Mellon recently found that high-paying executive jobs were disproportionately shown to male users.[9] It is not clear

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[4] As has been noted by other advocates, such practices also pose the equally troubling danger of enabling discrimination on the basis of disability, genetic identity, sexual orientation, and gender identity. *See*, *e.g.*, Alex Rosenblat, *et al.*, "Data and Civil Rights: Health Primer," Data and Civil Rights Conference (Oct. 30, 2014), http://www.datacivilrights.org/pubs/2014-1030/Health.pdf.
[5] 42 U.S.C. § 2000e-2(a)-(b); (k)(1). Note that "sex" includes "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Additionally, EEOC considers the statute's ban on sex discrimination to include discrimination on the basis of sexual orientation and on gender identity. *See Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015); *Macy v. Holder*, EEOC No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).
[6] 42 U.S.C. § 2000e-3(b).
[7] E.E.O.C. Compliance Manual § 15-VI (2006).
[8] *Id.* & n.86 (citing cases).
[9] Byron Spice, *Questioning the Fairness of Targeting Ads Online*, Carnegie Mellon University News, http://www.cmu.edu/news/stories/archives/2015/july/online-ads-research.html.

what caused this result, but two different kinds of behavioral targeting practices can lead to discrimination. First, many advertising platforms allow advertisers to select which users will view their advertisements based on protected class status—advertisers can check a box to display advertisements only to men, or only to those between 18 and 35, or, in some cases, only to members of particular racial or ethnic groups (or to target their advertisements *away* from members of particular groups). This kind of straightforward targeting is evidence of intentional discrimination. Second, without any obvious intentionality, the algorithms that advertising platforms employ may direct advertisements toward or away from users based on protected characteristics. So, for example, an algorithm may "learn" that men are more likely to click on certain advertisements, or that people in certain zip codes are more likely to apply to low-wage jobs, or that users who visit Latino media websites do not engage with particular job advertisements. This kind of algorithmic discrimination, which takes many forms and has many explanations, is evidence of a disproportionate impact.

Because the advertisements a user sees may be based on race, gender, or other protected characteristic, or may be based on factors or combinations of factors that function as proxies for these characteristics, we are in danger of creating the contemporary equivalent of classified advertisements separated into "help wanted - men" and "help wanted - women." This incarnation of recruiting discrimination could be even more pernicious than that historical practice, however, because today's job seekers may never know which job advertisements they were not being shown.

Health Data Tracking

Employers' practice of monitoring employees' consumption of health-care services, as a means of strategic planning and cost control, is well-known.[10] But there is a growing chorus of voices, including not only civil rights advocates but medical ethicists, who see in such practices the potential for motivating – while masking – discriminatory decisions.[11] Indeed, a recent editorial in *JAMA Internal Medicine* sounded the alarm that "several features of pregnancy make it a problematic subject for predictive analytics."[12] Most notably, the authors noted that such tracking could identify a female employee who merely is *contemplating* pregnancy, due to her undergoing certain diagnostic tests, for instance. Yet it is not universally accepted in the courts whether that not-yet-pregnant employee even qualifies for protection

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[10] *See*, *e.g.*, Jay Hancock, "Workplace Wellness Programs Put Employee Privacy at Risk," *CNN* (Oct. 2, 2015), http://www.cnn.com/2015/09/28/health/workplace-wellness-privacy-risk-exclusive/.

[11] *See*, *e.g.*, Kevin McGowan, "Big Bad Data May Be Triggering Discrimination," *Bloomberg Law* (Aug. 15, 2016), https://bol.bna.com/big-bad-data-may-be-triggering-discrimination/; Valentina Zarya, "Employers Are Quietly Using Big Data to Track Employee Pregnancies," *Fortune* (Feb. 17, 2016), http://fortune.com/2016/02/17/castlight-pregnancy-data/; Rachel Emma Silverman, "Bosses Tap Outside Firms to Predict Which Workers Might Get Sick," *The Wall Street Journal* (Feb. 17, 2016), http://www.wsj.com/articles/bosses-harness-big-data-to-predict-which-workers-might-get-sick-1455664940.

[12] Stephanie R. Morain, Leah R. Fowler, and Jessica L. Roberts, "What to Expect When [Your Employer Suspects] You're Expecting," *JAMA Internal Medicine* (Sept. 6, 2016), http://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2547204.

under the Pregnancy Discrimination Act (PDA) – and even if it were, such a claim would depend on that employee knowing that her employer is aware of her intention to become pregnant. The *JAMA Internal Medicine* commentators further observed that employers' knowledge of imminent pregnancy costs could result in their taking preventive action that harms *all* women, such as by declining to hire any women for a particular period of time so as to limit such expenditures.

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Again, we applaud the EEOC's vigorous efforts to identify big data's implications for equal employment opportunity, and to take steps to inform employers, employees, and the wider public about these risks. We urge that the EEOC include targeted job advertisements and misuse of women's health data in this initiative. We also urge the agency to ultimately issue policy guidance for employers – as well as employment agencies, advertising platforms, and third-party providers of health monitoring services – to educate them about their respective responsibilities under the equal employment laws in creating and using big data. To the extent that it is necessary for the EEOC to issue guidance in order to assure proper fit between technological realities and enforcement of Title VII – including but not limited to broadening its definition of an "applicant," and clarifying whom is protected by the PDA – we encourage the EEOC to take those steps, as well.

We would welcome the opportunity to discuss these matters, or to otherwise serve as a resource to the EEOC in this critical endeavor. For more information, please do not hesitate to contact ACLU Legislative Counsel Jennifer Bellamy at jbellamy@aclu.org or (202) 715-0828.

Sincerely,

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