The Institute for WORKPLACE EQUALITY

June 12, 2023

VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

Ms. Stephanie Weiner
Acting Chief Counsel
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW
Room 4725
Washington, D.C. 20230

Re: Comments by The Institute for Workplace Equality in Response to NTIA's AI Accountability Policy Request for Comment (NTIA-2023-0005)

Dear Ms. Weiner:

The Institute for Workplace Equality ("The Institute") submits the following comments in response to the U.S. Department of Commerce's National Telecommunications and Information Administration's ("NTIA") AI Accountability Policy Request for Comment, published in the *Federal Register* on April 13, 2023.

The Institute submits these comments to educate NTIA on the complex tapestry of laws and regulations that already protect individuals in the workplace, including from artificial intelligence ("AI") related harms. We appreciate NTIA's acknowledgement in the Request for Comment that some sectors may require a different regulatory approach[1] and that employment already has existing laws and standards to foster accountable AI.[2] For the reasons explained below, we hope that NTIA will agree with The Institute's conclusion that additional laws and regulations governing application of AI in employment are unnecessary and counterproductive.

[1] *See* U.S. Dep't of Com. Nat'l Telecomms. and Info. Admin., AI Accountability Request for Comment (Apr. 11, 2023), https://ntia.gov/issues/artificial-intelligence/request-for-comments (Asking "[w]hat different approaches might be needed in different industry sectors—like employment or health care?").
[2] *See e.g.*, AI Accountability Policy Request for Comment, 88 Fed. Reg. 22,433, 22,436-22,437 (issued Apr. 13, 2023) (Acknowledging existing law in the employment context in stating "[s]ome accountability mechanisms may use legal standards as a baseline. For example, standards for employment discrimination on the basis of sex, religion, race, color, disability, or national origin may serve as benchmarks for AI audits, as well as for legal compliance actions.").

I. Background on The Institute for Workplace Equality

The Institute is a national, non-profit employer association based in Washington, D.C. whose mission includes the education of federal contractors regarding their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions who represent many of the nation's largest and most sophisticated federal contractors. The Institute has long assisted employers in creating and maintaining diverse organizations free from workplace bias through a wide range of human resource management strategies, including HR tools that may include AI.

In response to the rapidly increasing implementation of AI in the workplace, The Institute created an Artificial Intelligence Technical Advisory Committee ("AI TAC") to draft a report outlining best practices for employers using AI in human resources. The AI TAC was composed of a wide range of subject matter experts, including data scientists, industrial organization psychologists, employment attorneys representing employers and workers, employers using AI tools for employment decisions, vendors who develop and provide AI tools for employment decisions, and former government officials. The resulting Report on EEO and DEI&A Considerations in the Use of Artificial Intelligence in Employment Decision Making (the "AI TAC Report") was issued in December 2022 and reflects the wide range of experience and expertise of AI TAC members.[3]

II. Introduction

We write on behalf of the numerous large employers who are our members to address the questions in NTIA's Request for Comment that relate directly or indirectly to the use of artificial intelligence in the workplace. Many organizations and individuals in the public and private sectors are rightly concerned that when artificial intelligence ("AI") is used by employers that it can result in bias towards protected groups, create unlawful discrimination, and serve to thwart sincere diversity, equity, inclusion, and accessibility efforts ("DEI&A"). Often employers are attracted by a promise that AI will streamline their hiring process without realizing the potential risks that come with inserting AI into personnel decisions without proper legal vetting.

As an organization that promotes and facilitates effective EEO compliance and DEI&A programs, we take such concerns from stakeholders seriously. To that end, we took it upon ourselves as an organization to create the AI TAC Report to provide employers with comprehensive guidance. Unlike other areas where AI is used, such as in security and retail, there are substantial statutory and regulatory schemes in place that protect employees from discrimination and other potential harms created by AI. Moreover, these existing laws and regulations are already fostering accountable AI. What we learned in developing the AI TAC Report is that protecting employees is a matter of following existing law and guidance from the

[3] *AI TAC Report,* Inst. for Workplace Equal., https://www.theinstitute4workplaceequality.org/ai-tac-report-release (A copy of the AI TAC Report will be submitted separately to NTIA as an additional part of The Institute's response to NTIA's AI Accountability Policy Request for Comment.).

agencies that regulate the workforce, such as the Equal Employment Opportunity Commission ("EEOC") and the Office of Federal Contract Compliance Programs ("OFCCP").

Below we first review major statutory and regulatory schemes governing the workplace and explain why these laws that were written long before AI became commonplace are still applicable and enforceable against AI tools. Then we discuss the proper role of Federal agencies in light of the pre-existing legal structure governing employment. Finally, we provide examples of voluntary protocols that the U.S. government can promote to aid employers in complying with existing legal obligations. For the purposes of clarity, this comment addresses questions 6[4], 7[5], 9[6], 14[7], 17[8], 26[9], and 30(a)[10] in whole or in part.

III. Existing Laws Governing the Workplace

Much like financial services and healthcare, employment is already a highly regulated area with well understood and well-established laws. Though the major statutes governing employment are well known, it is worth reviewing them briefly.

Many of our Federal employment laws focus directly on preventing bias and discrimination. Title VII of the Civil Rights Act of 1964 ("Title VII") protects employees from discrimination by their employers on the basis of race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), and national origin. The Age Discrimination in Employment Act ("ADEA") protects employees age 40 and older from discrimination based on their age. The Americans with Disabilities Act ("ADA") prohibits discrimination against employees based on disability and requires employers to offer a reasonable accommodation to employees who can otherwise perform the essential functions of their position. Executive Order 11246 imposes affirmative action obligations on government contractors and prohibits

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[4] AI Accountability Policy Request for Comment, 88 Fed. Reg. at 22,439 (issued Apr. 13, 2023) (Question 6: "The application of accountability measures (whether voluntary or regulatory) is more straightforward for some trustworthy AI goals than for others. With respect to which trustworthy AI goals are there existing requirements or standards? Are there any trustworthy AI goals that are not amenable to requirements or standards? How should accountability policies, whether governmental or non-governmental, treat these differences?").
[5] *Id.* (Question 7: "Are there ways in which accountability mechanisms are unlikely to further, and might even frustrate, the development of trustworthy AI? Are there accountability mechanisms that unduly impact AI innovation and the competitiveness of U.S. developers?").
[6] *Id.* (Question 9: "What AI accountability mechanisms are currently being used? Are the accountability frameworks of certain sectors, industries, or market participants especially mature as compared to others? Which industry, civil society, or governmental accountability instruments, guidelines, or policies are most appropriate for implementation and operationalization at scale in the United States? Who are the people currently doing AI accountability work?").
[7] *Id.* (Question 14: "Which non-U.S. or U.S. (federal, state, or local) laws and regulations already requiring an AI audit, assessment, or other accountability mechanism are most useful and why? Which are least useful and why?").
[8] *Id.* at 22,440 (Question 17: "How should AI accountability measures be scoped (whether voluntary or mandatory) depending on the risk of the technology and/or of the deployment context? If so, how should risk be calculated and by whom?").
[9] *Id.* (Question 26: "Is the lack of a federal law focused on AI systems a barrier to effective AI accountability?").
[10] *Id.* (Question 30(a): "What role should government policy have, if any, in the AI accountability ecosystem? For example: a. Should AI accountability policies and/or regulation be sectoral or horizontal, or some combination of the two?").

discrimination against employees of government contractors based on race, color, sex, religion, sexual orientation, gender identity, and national origin.

Other important employment laws exist to protect employee pay, retirement income, and unionization rights. The Fair Labor Standards Act ("FLSA") requires the payment of overtime to employees deemed "non-exempt," requires payment of minimum wage, and sets limits on the employment of minors. The FLSA was amended by the Equal Pay Act to prevent discrimination in compensation based on gender. The Employee Income Retirement Security Act of 1974 ("ERISA") sets standards for fiduciaries of employee pension funds and welfare benefits plans. Finally, the National Labor Relations Act ("NLRA"), as amended gives employees the right to unionize and protects unionization efforts.

These are examples of the many laws protecting employees in the workplace, many of which are supplemented by corresponding laws at the state and local level. Additionally, these statutes are accompanied by regulations that clarify and expand their requirements, as well as sub-regulatory guidance issued by the agencies responsible for their enforcement. Most relevant to this discussion are the Uniform Guidelines on Employee Selection Procedures ("UGESP" or the "Guidelines"). The Guidelines are sub-regulatory guidance jointly issued in 1978 by the EEOC, OFCCP, the Department of Justice, and codified as regulations by OFCCP.

UGESP clarifies and interprets[11] employer obligations under Title VII and contractor obligations under EO 11246 as to "employee selection procedures" used to make employment decisions, such as who to hire, who to promote, and what compensation employees should receive.[12] Employee selection procedures "include job requirements . . . and evaluation of applicants or candidates on the basis of application forms, interviews, performance tests, paper and pencil tests, performance in training programs or probationary periods, and any other procedures used to make an employment decision . . ."[13] Selection procedures found to cause disparate impact on one or more protected categories (*e.g.*, the selection tool has an adverse impact on Asians) must be validated under UGESP if the employer wants a shield against liability, meaning the tool must be proven to be job related.[14] And even if the selection tool is shown to be job related, the employer must also show that there was not an equally effective less discriminatory alternative to that particular selection device.[15]

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[11] UGESP is non-binding guidance for employers under Title VII. However, UGESP was issued as a formal regulation by OFCCP and must be followed by government contractors under the purview of that agency. *See* 41 C.F.R. § 60-3.1, *et seq.*
[12] U.S. Equal Emp. Opportunity Comm'n ("EEOC"), Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures ("Q&A") (Mar. 1, 1979), Q&A No. 6.
[13] *Id.*
[14] *See* 29 C.F.R. § 1607.15.
[15] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

IV. The Role of Federal Agencies

As noted above, we appreciate NTIA's acknowledgement in the Request for Comment that some sectors may require a different regulatory approach[16] and that employment already has existing laws and standards to foster accountable AI.[17] In contrast to the current laws governing employment, the concept of bias is new in many sectors and concerns about how to protect against AI-generated bias in high-risk scenarios are legitimate in those sectors. New laws may be needed where no laws currently exist. In contrast, other sectors such as employment have well-developed laws that have long protected against discrimination. In those sectors, the need is not new law but rather clarification that AI applications are governed by the existing anti-discrimination laws and protections and efforts to educate all stakeholders, including employers, workers and employees and the public, about compliance with the existing laws in the use of AI tools.

This approach is embraced by the companies leading AI development. For example, Google recommends that regulatory agencies "issue detailed guidance on how existing authorities (e.g., those designed to combat discrimination or protect safety) apply to the use of AI" including by updating "existing oversight and enforcement regimes to apply to AI systems . . . and how to demonstrate compliance of an AI system with existing regulations …"[18] Microsoft advocated the same approach in its recent AI treatise "Governing AI: A Blueprint for the Future."[19] In a similar vein, IBM recommends that Congress "adopt a 'precision regulation' approach to artificial intelligence. This means establishing rules to govern the deployment of AI in specific use-cases, not regulating the technology itself."[20]

Notably, agencies with jurisdiction over the workplace are already updating existing guidance to cover AI, rather than calling for new laws and regulations. The EEOC is tasked with enforcing key civil rights statutes, such as Title VII, the ADA, and ADEA. The Commission has provided guidance that existing employment laws protect against AI-generated bias and companies

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[16] *See* U.S. Dep't of Com. Nat'l Telecomms. and Info. Admin., AI Accountability Request for Comment (Apr. 11, 2023), https://ntia.gov/issues/artificial-intelligence/request-for-comments (Asking "[w]hat different approaches might be needed in different industry sectors—like employment or health care?").

[17] *See e.g.*, AI Accountability Policy Request for Comment, 88 Fed. Reg. at 22,436-22,437 (issued Apr. 13, 2023) (Acknowledging existing law in the employment context in stating "[s]ome accountability mechanisms may use legal standards as a baseline. For example, standards for employment discrimination on the basis of sex, religion, race, color, disability, or national origin may serve as benchmarks for AI audits, as well as for legal compliance actions.").

[18] *A Policy Agenda for Responsible Progress in Artificial Intelligence*, Google, 10 (2023), https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/A_Policy_Agenda_for_Responsible_Progress_in_Artificial_Intelligence.pdf.

[19] *Governing AI: A Blueprint for the Future*, Microsoft Corporation, 19 (2023), https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RW14Gtw ("As Google rightly recommended in a new white paper just last week, it will be important for governments to 'direct sectoral regulators to update existing oversight and enforcement regimes to apply to AI systems, including on how existing authorities apply to the use of AI.' Agencies will need the funding, staff, and commitment to put these new tools to work.").

[20] Written Testimony of Christina Montgomery, Chief Privacy and Trust Officer, IBM Before the U.S. Senate Judiciary Committee Subcommittee on Privacy, Technology, and the Law Hearing on "Oversight of AI: Rules for Artificial Intelligence," 4 (May 16, 2023), https://www.judiciary.senate.gov/imo/media/doc/2023-05-16%20-%20Testimony%20-%20Montgomery.pdf.

applying AI tools should comply with those laws as they have for decades with other HR tools. As NTIA notes[21] in the Request for Comment, in May of 2022 the EEOC released a technical assistance document entitled "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees" (the "ADA Guidance"). In the ADA Guidance, the EEOC explains how the ADA applies to AI enabled hiring tools and that the law requires, among other things, that employers offer a reasonable accommodation to individuals whose performance on AI hiring assessments might be negatively impacted by their disability.[22] The ADA Guidance also explained to employers that they will be liable under the ADA for implementing AI hiring tools that have the effect of screening out qualified individuals with disabilities from the hiring process who would otherwise be able to perform the job with a reasonable accommodation.[23] The ADA Guidance gives the example that "video interviewing software that analyzes applicants' speech patterns in order to reach conclusions about their ability to solve problems is not likely to score an applicant fairly if the applicant has a speech impediment that causes significant differences in speech patterns."[24] Finally, the ADA Guidance laid "promising practices" for employers to follow to stay on the right side of the law.

In May of 2023, the EEOC released additional guidance called "Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964" (the "Selection Procedures Guidance").[25] The Selection Procedures Guidance explained that employers can be held liable under Title VII for using AI enabled tools in hiring and promotions that causes a disparate impact on individuals based on race, sex, and other protected categories.

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[21] *See* AI Accountability Policy Request for Comment, 88 Fed. Reg. at 22,436 (issued Apr. 13, 2023).

[22] *See* U.S. Equal Emp. Opportunity Comm'n ("EEOC"), The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022) ("Algorithmic Decision-Making Tools and Reasonable Accommodation" section, Question 6), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence (**Q 6**: "When an employer uses algorithmic decision-making tools to assess job applicants or employees, does the ADA require the employer to provide reasonable accommodations?" **A:** "Under the ADA, employers need to respond promptly to requests for reasonable accommodation . . . . the employer must provide an alternative testing format or a more accurate assessment of the applicant's or employee's skills as a reasonable accommodation, unless doing so would involve significant difficulty or expense (also called 'undue hardship')").

[23] *Id.* ("Algorithmic Decision-Making Tools That Screen Out Qualified Individuals with Disabilities" section, Question 8) (**Q 8:** "When is an individual 'screened out' because of a disability, and when is screen out potentially unlawful?" **A:** "Screen out occurs when a disability prevents a job applicant or employee from meeting—or lowers their performance on—a selection criterion, and the applicant or employee loses a job opportunity as a result. The ADA says that screen out is unlawful if the individual who is screened out is *able to perform the essential functions of the job* with a reasonable accommodation if one is legally required.").

[24] *Id.* ("Algorithmic Decision-Making Tools That Screen Out Qualified Individuals with Disabilities" section, Question 9).

[25] *See* U.S. Equal Emp. Opportunity Comm'n ("EEOC"), Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964, https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used.

The AI-TAC Report concluded that the Guidelines clearly apply to AI enabled selection tools and that in most circumstances the tools can be validated if found to be causing adverse impact.[26] Critically, the EEOC subsequently confirmed that conclusion in the Selection Procedures Guidance.[27] OFCCP also takes the position that the Guidelines apply to AI driven selection tools and cautions contractors that "[i]f OFCCP discovers that a contractor's use of an AI-based selection procedure is having an adverse impact at a contractor's establishment, the contractor will be required to validate the selection procedure . . ."[28]

Both the EEOC's ADA Guidance and the Selection Procedures Guidance are part of the EEOC's broader Artificial Intelligence and Algorithmic Fairness Initiative "to ensure that the use of software, including artificial intelligence (AI), machine learning, and other emerging technologies used in hiring and other employment decisions comply with the federal civil rights laws that the EEOC enforces."[29]

In addition to guidance and initiatives, the agencies tasked with regulating the workplace have publicly taken enforcement positions regarding AI. In October of 2022, the General Counsel of the National Labor Relations Board, Jennifer Abruzzo, released a memorandum outlining the application of the NLRA, as amended to AI used for employee productivity monitoring and surveillance.[30] The memorandum lays out what will now be the enforcement position of the NLRB's regional offices. The memorandum declares various types of AI enabled employee monitoring and surveillance unlawful if they interfere with bargaining rights under the NLRA.[31] Additionally, this April leaders from the EEOC, the Department of Justice Civil Rights Division, the Consumer Financial Protection Bureau ("CFPB"), and the Federal Trade Commission ("FTC") held a joint press conference announcing that they plan to use their authority under existing laws to protect against harms generated by AI.[32]

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[26] *AI TAC Report,* Inst. for Workplace Equal., 56-61 (Dec. 2022), https://www.theinstitute4workplaceequality.org/ai-tac-report-release.

[27] *See* Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 ("Questions and Answers" section, Question 2), https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used (**Q 2:** "Can employers assess their use of an algorithmic decision-making tool for adverse impact in the same way that they assess more traditional selection procedures for adverse impact?" **A:** "If use of an algorithmic decision-making tool has an adverse impact on individuals of a particular race, color, religion, sex, or national origin, or on individuals with a particular combination of such characteristics. . . then use of the tool will violate Title VII unless the employer can show that such use is 'job related and consistent with business necessity' pursuant to Title VII.").

[28] U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, Validation of Employee Selection Procedures, Question 6 (last updated July 23, 2019), https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures#Q6.

[29] U.S. Equal Emp. Opportunity Comm'n ("EEOC"), Artificial Intelligence and Algorithmic Fairness Initiative, https://www.eeoc.gov/ai.

[30] Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights, Memorandum GC 23-02 (Oct. 31, 2022).

[31] *Id.* at 8.

[32] Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Chair Burrows Joins DOJ, CFPB, And FTC Officials to Release Joint Statement on Artificial Intelligence (AI) and Automated Systems (Apr. 25. 2023),

V. Voluntary Compliance Tools

While existing employment regulations are sufficient to prevent bias, the government can continue to promote additional voluntary best practices that may supplement legal obligations. As EEOC Commissioner Keith Sonderling explained in a recent law review article "[s]everal federal agencies have promoted voluntary compliance as an effective vehicle to deal with the challenges with AI. Initial AI guidance from the EEOC, FTC, and other federal agencies all serve as mechanisms for companies to begin self-governance based on each agency's stated interests."[33]

For example, the AI-TAC Report discussed the twin concepts of transparency and notice. The Report recommended that employers are transparent with applicants and employees that they are being evaluated by AI for a position or a promotion.[34] While this is not required by law in most jurisdictions, doing so aids in compliance with existing law. Applicants who are aware that they will be evaluated by AI (notice) and are given some understanding of how the AI tool works (transparency) will know if they need to ask for a reasonable accommodation due to a disability. This approach is embraced by the EEOC, which recommends that employers provide "all job applicants and employees who are undergoing assessment by the algorithmic decision-making tool with as much information about the tool as possible . . . and the disabilities, if any, that might potentially lower the assessment results or cause screen out."[35] Other similar voluntary compliance tools can be recommended by the agencies.

VI. Conclusion

The Institute for Workplace Equality appreciates the opportunity to submit comments in response to the U.S. Department of Commerce's National Telecommunications and Information Administration's AI Accountability Policy Request for Comment.

As NTIA recognized in the Request for Comment, employment is one of the sectors that warrants an approach that takes into account the existing, comprehensive legal framework and laws governing the workplace that provide protections against unlawful discrimination. The EEOC properly is the lead agency in addressing unlawful discrimination in terms and conditions of employment, whether due to the application of AI tools or other actions. And, importantly, the EEOC has confirmed that it has sufficient authority under the existing statutes to address applications of AI that result in unlawful discrimination, and it is exercising that authority. Similarly, the NLRB and the Department of Justice also have demonstrated that the current statutes

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https://www.eeoc.gov/newsroom/eeoc-chair-burrows-joins-doj-cfpb-and-ftc-officials-release-joint-statement-artificial.

[33] Keith Sonderling & Bradford J. Kelley, *Filling the Void: Artificial Intelligence and Private Initiatives*, North Carolina Journal of Law and Technology Volume 24, Issue 4, May 2023, 192-193.

[34] *See AI TAC Report,* Inst. for Workplace Equal., 23-24, https://www.theinstitute4workplaceequality.org/ai-tac-report-release.

[35] U.S. Equal Emp. Opportunity Comm'n ("EEOC"), The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (May 12, 2022), ("Algorithmic Decision-Making Tools That Screen Out Qualified Individuals with Disabilities" section, Question 12), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.

and implementing regulations by the agencies are effective in addressing AI-related workplace discrimination issues. Any overarching recommendations relating to new AI-related requirements to achieve accountable AI should recognize that the existing comprehensive statutory scheme is sufficient to address unlawful discrimination in the workplace that is AI-related. Accordingly, any recommendations for new statutory or regulatory changes to address AI should exempt the workplace, in recognition of and deference to the effective, comprehensive discrimination protections that are in place.

The Institute for Workplace Equality looks forward to continuing to work with NTIA and other federal agencies in effectively and efficiently addressing AI in the workplace. The Institute would be pleased to provide additional information or to respond to any questions that you may have.

Respectfully submitted,

Barbara L. Kelly
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The Institute for Workplace Equality