EPLI · ALGORITHMIC HIRING · ADA · DISPARATE IMPACT · BUSINESS NECESSITY · ALBEMARLE V. MOODY · MOBLEY V. WORKDAY · SELF-CRITICAL ANALYSIS PRIVILEGE

The Underwriter's Exhibit

Employment practices insurance, algorithmic hiring, and the disability plaintiff's proof

The governance market sells the record as protection. The insurance market is withdrawing the coverage that would pay if the record fails. And where the employment-practices insurer still covers an algorithmic-hiring claim, it conditions coverage on the exact artifacts, bias testing, human review, validation, that establish the disability plaintiff's case. The file that unlocks the policy is the file that proves the claim.

Travis Gilly · Real Safety AI Foundation

Gilly, T. (2026). The Underwriter's Exhibit: Employment Practices Insurance, Algorithmic Hiring, and the Disability Plaintiff's Proof. Working paper, July 2026 (v0.5).

THE FILE

- ✓ Job posting
- ✓ The score
- ✓ Human sign-off
- ✓ Final decision

"We kept the record."

The employer kept the record. Two markets disagree about what the record does.

The governance market sells that file as the thing that carries an employer through an investigation. **The insurance market, pricing the same technology, is walking away from the coverage that would pay if it doesn't.**

Each artifact the underwriter demands is an element of the plaintiff's case.

THE UNDERWRITER DEMANDS	THE PLAINTIFF RECEIVES
Bias testing	The disparate-impact statistic → prima facie case
Human review	The adopted recommendation → agency liability (*Mobley*)
Validation	The business-necessity showing (*Albemarle*)

Sources Mobley v. Workday, Inc., 740 F. Supp. 3d 796 (N.D. Cal. 2024); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Gilly, sec. I.

Two Markets, Opposite Verdicts

The record for sale, the coverage in retreat, and the one line that matters

Gilly, T. (2026). The Underwriter's Exhibit. Working paper, July 2026 (v0.5), sec. II.

One market sells the record as protection. The other won't insure what the record describes.

THE GOVERNANCE MARKET

Sells demonstrable diligence, document, retain, reconstruct. It answers a disparate-**treatment** claim about intent, and is sold as general when it is domain-specific.

THE INSURANCE MARKET

Declines to write the risk, the loss is "systemic and correlated," not a single claim. A generative-AI CGL exclusion shipped Jan. 1, 2026; 80%+ of carrier filings approved.

Silent AI exposure is walking the silent-cyber path: **standard lines exclude, a thin and expensive specialty market prices what remains.**

Sources Harris & Criddle, Fin. Times (Nov. 23, 2025); ISO Form CG 40 47 (eff. Jan. 1, 2026); Baker & Shortland, 17 Regul. & Governance 1000 (2023); Gilly, secs. II.A–B.

The general-liability exclusions are a decoy. The discrimination claim lives on a different line.

CGL covers bodily injury, property damage, advertising injury, none of them the coverage that answers a hiring-discrimination claim. That claim is **employment practices liability insurance**, and the mechanism there now has a form number.

W.R. BERKLEY · FORM PC 51380 00

"Artificial Intelligence Exclusion (Absolute)"

Amends the **Employment Practices**, D&O, and Fiduciary coverage parts; bars any claim arising out of the use, deployment, or development of AI.

Where it attaches, the algorithmic-hiring claim is simply uninsured.

Sources W.R. Berkley, Form PC 51380 00 (06-24); ISO Form CG 40 47; Gilly, sec. II.C.

Why the Disability Claim Does Not Run on Explainability

Three tracks to liability, and why opacity indicts the defendant

None of the three asks who decided. A richer file answers none of them.

TRACK 1 · PRE-OFFER BAR

Complete when it runs

A pre-offer assessment that infers a mental condition is a medical exam (*Karraker*). Scoring protocol doesn't cure it.

TRACK 2 · ACCOMMODATION

The step that was skipped

No intent or comparator needed. A file of the screen working as designed documents the missing accommodation. Reconstruction is not accommodation.

TRACK 3 · DISPARATE IMPACT

The pivot

The employer must validate the tool, an affirmative, statistical, prospective showing the governance file lacks and an opaque model cannot generate.

Sources 42 U.S.C. §12112(d)(2)(A); Karraker v. Rent-A-Center, 411 F.3d 831 (7th Cir. 2005); Alexander v. Choate, 469 U.S. 287 (1985); Albemarle, 422 U.S. 405; Gilly, secs. III.A.1–3.

The model that cannot be explained is the model that cannot be validated.

THE INVERSION

Opacity beats the treatment plaintiff who needs intent. It sinks the disability defendant who must validate the box.

NO LAUNDERING

Human review adopts an unvalidated screen; *Mobley* keeps the tool in the chain as the employer's agent.

NO BOTTOM LINE

A balanced workforce cannot immunize a specific barrier (*Teal*). The duty runs to the individual.

A post-hoc explanation, human or machine, is not a validation study, and the model's narration is not evidence of its computation.

Sources Mobley, 740 F. Supp. 3d at 808–09; Connecticut v. Teal, 457 U.S. 440 (1982); Turpin et al. (2023); Lanham et al. (2023); Gilly, secs. III.B–C.

The Loop: The Coverage Artifact Is the Liability Exhibit

One record, demanded by three converging regimes, and a remedy insurance never reached

Gilly, T. (2026). The Underwriter's Exhibit. Working paper, July 2026 (v0.5), sec. IV.

Both parties ask the same question. It has one answer, in one set of documents.

"Whether the tool is a valid, accessible, supervised selection device", the insurer asks it to price the risk; the plaintiff asks it to prove the wrong. Same question.

So every artifact that grants or preserves coverage advances the claim. **The file that opens the policy is the file that proves the wrong.** Not a coincidence of one policy form, a property of the question.

Sources Albemarle, 422 U.S. at 425; Mobley, 740 F. Supp. 3d at 808–09; Gilly, sec. IV.A.

Three regimes point at one file, and the self-interested one is the tell.

01 · RECORDKEEPING

The Uniform Guidelines already require records of a selection procedure's adverse impact, plus validation standards.

02 · PUBLIC AUDIT

NYC Local Law 144 requires a bias audit and public posting, the impact statistic disclosed by operation of law.

03 · INSURANCE

Conditions coverage on the same testing, review, and validation, contractual, self-interested, and the most revealing.

> *When the party limiting its own exposure demands the identical file as the party proving liability, the documentation is not a defense of the decision. It is a description of it.*

Sources 29 C.F.R. §§1607.4, 1607.5, 1607.14; N.Y.C. Local Law 144 of 2021; Forrest, 1534 Annals N.Y. Acad. Sci. 19 (2024); Gilly, sec. IV.B.

No policy pays a court order to redesign the system, and that is the relief the case actually seeks.

A systemic challenge seeks Rule 23(b)(2) injunctive relief, a design change for everyone the tool screens. That is **a change to operations, not a covered loss.** It was outside insurability before any AI exclusion existed.

The exclusions now withdraw the damages coverage **on top of** a remedy insurance never reached. The employer keeps the operational remedy in full, and faces the damages remedy without a payer.

Sources Fed. R. Civ. P. 23(b)(2); Gilly, sec. IV.C.

PART V OF VII

The Privilege Escape Hatch Fails

Run the audit under privilege, and the insurance regime forces the two waivers

Gilly, T. (2026). The Underwriter's Exhibit. Working paper, July 2026 (v0.5), sec. V.

The two moves the insurance regime compels are the two that waive the privilege.

TO UNLOCK COVERAGE → DISCLOSE

Satisfying the underwriter means disclosing the substance of the testing, which is voluntary disclosure, a waiver.

TO DEFEND THE CLAIM → RELY

Arguing business necessity or reasonable oversight means relying on that same testing, which is reliance, a waiver.

> *And even a privileged analysis cannot reach the fact: Upjohn protects communications, not the underlying facts. The disparate impact is a fact, and it surfaces whether or not a lawyer ran the test.*

Sources Univ. of Pa. v. EEOC, 493 U.S. 182 (1990); Deel v. Bank of Am., 227 F.R.D. 456 (W.D. Va. 2005); Volpe v. US Airways, 184 F.R.D. 672 (M.D. Fla. 1998); Upjohn Co. v. United States, 449 U.S. 383 (1981); Gilly, secs. V.A–C.

To keep the proof from the plaintiff, the deployer must give up either the coverage or the defense.

Withhold the substance from the insurer and a bare attestation fails the questionnaire, **forfeiting the coverage.** Decline to rely on the testing and you **forfeit the defense.**

The one real statutory safe harbor, insurance-compliance self-evaluative privilege, protects the insurer's audits, not the employer's; is state-bound; and governs regulatory compliance, not a federal disability claim. **A different room from the one the deployer is in.**

Sources 215 ILCS 5/155.35; Lawndale Restoration v. Acordia of Ill., 853 N.E.2d 791 (Ill. App. 2006); Gilly, secs. V.D–E.

Implications

Risk conversion, a perverse equilibrium, a discovery map, and honest limits

Gilly, T. (2026). The Underwriter's Exhibit. Working paper, July 2026 (v0.5), sec. VI.

Sold as risk transfer, the documentation is risk conversion.

The record turns a diffuse, hard-to-prove exposure into a concrete, discoverable one, exactly as the coverage that would pay is withdrawn or conditioned on producing that record. The EPLI insurer has become **a private regulator of workplace AI.**

ASK THE GOVERNANCE ADVISOR

Not "is the file complete?" but: "have you explained that the file the insurer requires is the file the plaintiff will use, and that the coverage behind it is contracting?"

Sources Talesh, 43 Law & Soc. Inquiry 417 (2018); Ben-Shahar & Logue, 111 Mich. L. Rev. 197 (2012); Baker & Shortland (2023); Gilly, sec. VI.A.

It rewards the insured that doesn't test, and equips the plaintiff of the one that does.

The perverse equilibrium. Untested is undocumented is no exhibit, at the cost of coverage and of the safety testing the design meant to encourage. Honest testing satisfies the carrier and arms the plaintiff. A private route to the deterrence the Court feared from privileges.

The discovery map. The renewal file, the AI questionnaire and responses, and the testing/review/validation records are predictable high-value targets that exist because insurance required them. What discovery once pried loose, the insurance relationship now **assembles and dates.**

Sources Univ. of Pa. v. EEOC, 493 U.S. 182 (1990); N.Y.C. Local Law 144 of 2021; Gilly, secs. VI.B–C.

The claim is bounded, and stated at the confidence its sourcing supports.

1. Exclusions aren't universal; the floor is contracting, not gone. Legacy occurrence policies may still respond.
2. §504's disparate-impact reach is assumed post-*Choate*; validation rides on meaningful access.
3. *Mobley* is a pleading-stage decision, cited for its theory, not as a merits holding.
4. Recordkeeping has limits, sample-based for high-volume procedures, narrowing what discovery reaches.
5. The EPLI questionnaire specifics rest on trade and broker reporting, not filed forms, held at that confidence.

Sources Choate, 469 U.S. at 297–299; Mobley, 740 F. Supp. 3d 796; 29 C.F.R. §1607.4(A); Gilly, sec. VI.D.

The record cannot defend the decision, the violation was complete before it began, or it documents the skipped step, or it is the missing validation. And it cannot be hidden, because the two acts that unlock coverage are the two that waive the privilege, and the disparate impact is a fact in any event.

The record is not a defense of the decision. It is the indictment, assembled at the insurer's request and dated by the renewal.

Sources Gilly, The Underwriter's Exhibit, sec. VII, Conclusion.

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