

The purpose, prevalence, and legal pitfalls of AI in workforce management

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Artificial Intelligence (AI) is the latest tech buzzword to permeate the business landscape, just as “blockchain” had its moment in the sun in 2018. Companies large and small are rushing to incorporate AI into their business models, and B2B vendors are meeting demand head-on, being sure to point out that their products contain “AI.” But do businesses know what’s really going on behind the curtain of these products, and frankly, why should they care?

Well, when it comes to companies’ use of AI in the talent management lifecycle, the “secret sauce” in AI could lead to legal liability. In this article we will explore the common uses of AI in hiring, performance management, and termination of the employment relationship, and the pitfalls associated with the use of these products, which by design, are a black box.

What is artificial intelligence?

At the outset, it is important to understand what the term AI actually means. While computer scientists may quibble, artificial intelligence generally refers to computer software that is designed to mimic human decision-making.

The foundation of any AI system is advanced algorithms, which on a basic level, are highly complex decision trees that instruct a computer to sort data according to pre-programmed attributes. Algorithms can be enhanced, or trained, using machine learning. By analyzing past inputs, the algorithm “learns” to more accurately predict patterns in an effort to give an increasingly accurate result.

Think of the smartphone you have in your pocket. When you start typing a text message or an internet search query, the smartphone likely gives you several helpful suggestions of what to type next. The computer inside your phone is “learning,” based on your past behavior, what you are most likely to say next.

Building upon machine learning, scientists have designed neural networks to speed up the machine’s learning process. By feeding an algorithm heaps of data — which could be anything from text, images, audio or video recordings — the algorithm is “trained” to recognize patterns so that it can analyze and recognize data that it has not seen before.

A common example of this is image recognition software. A software designer feeds the algorithm thousands or millions of images of cats, so it has a pretty good understanding of what a cat

looks like. When it comes across a new picture of a cat that it’s never seen before, it can analyze the photo and correctly label it as “cat.”

So what’s the problem? As the old data processing maxim goes: garbage in, garbage out. Algorithms are just computer code, written by humans. The machine learning models, of which neural networks are just one type, are built on these man-made algorithms, and as we all can admit, humans make mistakes. But it’s not the common errors, like $2+2=5$, humans make errors of judgment and biases, implicit or otherwise.

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At the end of the day, if neural networks are designed to mirror human thought processes, then it stands to reason that they’ll “think” like their designers. What this means for businesses is that the familiar legal problems that arise in the employment relationship remain, unfortunately, unresolved by reliance on computers to handle more of the load.

How are businesses using AI to manage their workforce?

We’ve all heard about the latest AI darling, ChatGPT, the generative AI chatbot from OpenAI, which recently took the crown of fastest growing consumer application in history from previous record-holder TikTok. ChatGPT reached 100 million active users only two months after launch, while TikTok reached the mark in nine months.¹

For further comparison, it took Instagram 2.5 years to reach 100 million users. ChatGPT is being rolled into all sorts of consumer facing applications, and businesses are queuing up to incorporate generative AI into their portfolio.

While companies large and small are pondering how best to implement AI tools into more and different areas of their business,

one thing is clear, companies are most certainly using AI in their talent management practices already. A report published in 2021 by Harvard Business School in conjunction with Accenture found that 99% of Fortune 500 companies and 75% of *all* companies in the United States used automated application tracking software based on AI, machine learning, or natural language processing in their hiring practices.²

As reported by Venture Beat, the self-billed “AI talent management technology” company Eightfold surveyed Human Resources professionals and found that 92% of HR managers plan on increasing the deployment of AI in at least one area of their department, including talent acquisition and management processes, onboarding, and payroll processing.³ If your company isn’t already using software that relies on AI, then it will be soon. But how are businesses using these advanced computer programs?

Hiring

Recruitment is the gateway to AI use for many businesses. Almost every employer uses or relies on job search sites that use AI in some way during the hiring process, whether it be simple screening tools that weed out applications that don’t meet minimum criteria, or more complex recommendation algorithms that might rank candidates on likelihood of accepting an offer.

The EEOC warned employers against the use of hiring tools that may “screen out” applicants because their disability has caused them to have a “less favorable” resume.

However, this is just the tip of the iceberg. Software providers offer solutions that can fully automate the process from soup to nuts, including performing background checks of candidates’ criminal history and social media presence, and can even conduct the interview.

It has been widely reported that advanced facial recognition technology from Clearview has been used during interviews to analyze applicants’ responses as well as their verbal affect to judge suitability for a position, a practice that has led to allegations of bias in the technology.⁴ A company called Tars Technologies advertises an “Interview Chatbot” to HR departments for the purpose of gathering preliminary information from candidates before, or even in place of, live human interviews.

AI chatbots are also utilized for various in-house services such as answering basic benefits and payroll questions, managing reporting requirements, and even measuring workplace morale. With the success of ChatGPT, and other competitors arriving on the scene, the use of generative AI is likely to grow in the interview and onboarding process.

Performance management

While perhaps not as well-known, AI is deployed in the context of performance management to shorten the time between performance and appraisal of employee work product. Typically the first step for such AI-enhancement is to automate the performance appraisal cycle through the use of objective self- and peer-reviewed feedback.

However, since not all employee performance can be measured through quantifiable production goals, organizations have turned to incorporating new data points to measure employee productivity in real time, instead of assessing it just once or twice per year as has traditionally been done. Many vendors advertise that these “continuous evaluation” products analyze employees’ communications, calendar events, time-on-screen in meetings, and other productivity-related activities to assign “productivity scores” to their employees.

A 2019 survey⁵ by consulting firm Mercer revealed that only 2% of companies surveyed felt that their approach to performance management delivered exceptional value, and 70% admitted that there is a need to improve the link between performance management and other talent decisions. Statistics like these expose a prime opportunity for AI to step in and potentially deliver the insight that traditional performance management models have failed to provide for so long.

Reductions in force

Nobody likes to hear the word “layoffs,” but with the risk of economic recession top-of-mind these days, many companies are examining how to preserve their budgets through reductions in their workforce. More than ever, such decisions will be data-driven, and AI is already playing a role.

Ninety-eight percent of Human Resources leaders surveyed by software marketplace Capterra said their department will rely on software and algorithms to reduce labor costs in the next recession.⁶ Forty-seven percent said they were “entirely comfortable” making layoff decisions based on recommendations from such technology.⁷

The metrics gathered through AI-enabled performance management software play into such calculations, but vendors advertise that beyond productivity scores, their software can also predict trainability of layoff candidates to aid an employee’s decision whether to retain improvable talent. AI-enabled platforms can also identify “flight risk” employees who are likely to leave the company within a short period of time, and thus ostensibly make them a better target for layoff.

The upshot in utilization of AI for layoffs is that it reduces the strain on HR departments already facing unhappy customers. It may also provide some cover from legal issues that inevitably arise during mass terminations by providing “objective” reasoning for selecting particular layoff candidates.

Legal pitfalls on the road to AI implementation

Since the use of AI in employment decisions is plainly here to stay, the federal government and state lawmakers are taking notice, and

taking action. While their actions are aimed at legitimate potential harms of unfettered deployment of AI — such as unintentionally baked-in bias — they may ensnare well-meaning employers who buy off-the-shelf “black box” AI platforms without doing their due diligence.

Federal efforts to regulate AI use in employment

On May 12, 2022, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance⁸ that addressed the ways that AI and algorithm-powered software can run afoul of the Americans with Disabilities Act (ADA). The Commission emphasized the obligation of employers to provide accommodations to employees who may not be able to interact with the software program due to a disability.

The EEOC also warned employers against the use of hiring tools that may “screen out” applicants because their disability has caused them to have a “less favorable” resume — the example given is an individual who has a gap in their work experience due to medical reasons. The U.S. Department of Justice backed the EEOC, issuing guidance the same day that largely echoes the warning against AI-related disability discrimination.⁹

And just this January, the EEOC released a draft of its Strategic Enforcement Plan for the next four years which listed as its first priority discrimination in the hiring and recruitment process through the use of AI and machine learning systems.¹⁰

Without waiting long to make good on its resolution, on May 18, 2023, the EEOC issued additional guidance related to the use of AI in employers’ selection processes and its potential for violations of Title VII of the Civil Rights Act of 1964.¹¹ Unlike its previous guidance, the Commission sets forth specific rules for the use of AI tools to augment any “measure, combination of measures, or procedure” to inform an employer’s decision about “whether to hire, promote, terminate, or take similar actions toward applicants or current employees.”

The guidance cautions that any automated tool that causes a “selection rate” at a ratio of less than four-fifths of the selection rate of another group risks violating Title VII by having a disparate impact on the disadvantaged group. Perhaps most importantly to businesses, however, is that unlike some states’ laws, the EEOC concluded that employers are ultimately responsible for the effects of the software employed, regardless of whether a third-party vendor implements or administers it.

In early October 2022, the White House Office of Science and Technology Policy published what it calls a “Blueprint for an AI Bill of Rights” that lays out five principles for fair utilization of AI.¹² Among those principles relevant to employers is a right to not face discrimination by algorithms, a right to proactive notice and consent before use of such systems, and the right to protection from abusive data practices. The document is aspirational only, and carries no force of law, but it gives companies an idea of where they might face pushback in their implementation of AI-powered software.

On October 31, 2022, the National Labor Relations Board (NLRB), which enforces laws protecting workers’ rights to unionize, issued

a memorandum¹³ through its General Counsel on the topic of employer surveillance of workers through the use of AI software to monitor and rate employee performance. The memo asked the NLRB’s adjudicative body to adopt a standard that would presume the unlawfulness of such employer surveillance when it tends to inhibit workers’ efforts to organize collectively.

Not to be left out, the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) have also listed algorithmic discrimination as top priorities for 2023.

State laws lead the way

Whereas the federal government’s approach has been light on legislative action and heavy on executive announcements, some states have been enacting laws to limit the negative byproducts of AI’s spread for some time.

Illinois’ Artificial Video Interview Act¹⁴ went into effect all the way back in January 2020, and requires employers that use AI to analyze video interviews, as the name suggests, to notify applicants of the practice and obtain affirmative consent to do so. A 2022 amendment¹⁵ to the law also requires companies who rely solely on these practices to gather and report race and ethnicity data for applicants who are hired or rejected.

New York City is in the process of rolling out a law passed in 2022 that sets strict prerequisites before employers can utilize AI tools in employment decisions.¹⁶ Entitled the “Automated Employment Decision Tools” law, companies that rely on AI, machine learning, or other computational models, must submit their software for an independent bias audit before it can be implemented.

The results of the audit must also be posted on the company’s public-facing website. Companies also have a duty under the law to disclose to applicants, before an interview, whether the tool will be used as well as what data will be collected.

The Council of the District of Columbia has put forward the “Stop Discrimination by Algorithms Act” that mirrors the New York City law, but also broadly prohibits intentional and unintentional discrimination by AI software based on protected characteristics.¹⁷ Postponed in 2022, the bill is expected to move forward in 2023.¹⁸

Rounding out the mix, California’s Department of Fair Employment and Housing (DFEH) has proposed changes to its discrimination rules which would make it illegal to use AI tools that screen out job candidates or employees on the basis of their protected characteristics.¹⁹

What can employers do to protect themselves?

What should be clear by now is that both federal and state governments are zeroing in on regulating the integration of AI into workforce management. Agencies will be closely scrutinizing companies’ use of these systems, and will be keen to set the tone through aggressive enforcement. The laws are still developing.

Other than Illinois and New York City, no federal or state law directly targets employers’ use of AI. But that doesn’t mean that employers are immune from existing federal and state laws which may apply. AI is only a tool. Its wielder is still bound to follow the law.

Here are ten things employers can do to ensure compliance with the law:

- Continue to monitor the developing legal framework in this area.
- Make sure that they understand the legal and statistical nuances of disparate impact discrimination or partner with employment counsel who does.
- Maintain human involvement in AI-assisted selection procedures to ensure that disparate impact discrimination does not occur.
- Partner with employment counsel who have expertise in this area and conduct privileged audits of their AI-assisted selection procedures to ensure that they comply with the law. Indeed, in its May 18, 2023 guidance, the “EEOC encourages employers to conduct self-analyses on an ongoing basis to determine whether their employment practices have a disproportionately large negative effect on a basis prohibited under Title VII or treat protected groups differently.”
- Before or during the software-acquisition stage, find out how a vendor’s software platform actually makes decisions or recommendations.
- Ask the vendor what data the software collects, and how that data is collected, to determine possible conflict with data protection laws.
- Ask that the vendor provide bias or discrimination audit results and consider independently verifying the results in-house.
- Heed the EEOC’s admonition that employers that learn that an AI tool is creating a disparate impact need to “take steps to reduce the impact or select a different tool in order to avoid engaging in a practice that violates Title VII.”
- Ensure that all software has accessibility features for disabled applicants and employees.
- Designate a responsible person to keep their hands on the wheel. Ultimately, the company may be on the hook for violations, so a second set of (human) eyes can spare a company an expensive headache.

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Notes

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