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INSIGHTS

**AI, Machine Learning
& Big Data**

2021

Third Edition

Contributing Editors: **Matt Berkowitz & Emma Maconick**

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2021, THIRD EDITION

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Artificial Intelligence: Employment Law Risks and Considerations

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Introduction

Employers have become increasingly reliant on artificial intelligence (“AI”) in connection with managing many facets of the employment lifecycle including hiring, performance management, and termination decisions. Companies are using automated technology to screen résumés, analyse video interviews, suggest (or outright select) which candidates to hire, track employee productivity, issue written discipline, or recommend termination of employment. The rush to adopt this automated technology is the quest for enhanced efficiency in employment decision-making, reducing time spent on such tasks that consume significant amounts of time of management and Human Resources personnel.

The increased use of AI, however, comes with attendant risks including the significant risk that automated algorithms, like humans, are not immune from bias. Indeed, algorithms are capable of adopting the inherent biases underlying past employment practices or social conventions embedded in their code, through the data sets they rely upon. In this regard, reliance on computerised decision-making can unknowingly cause employers to make decisions that implicate laws governing the employment relationship; laws which could not have reasonably contemplated the widespread use of AI in the employment context at the time they were written. This chapter will examine some of the potential legal implications that may arise from the use of AI in the workplace as well as the legislative and regulatory response to the increased presence of AI in the workplace.

What is AI and how is it used in the employment context?

AI refers to the ability of a computer or program to perform tasks that typically require human intelligence or decision-making.¹ Advancements in AI technology in recent years have accelerated to the point that machines are currently complementing – and in some circumstances outright supplanting – human decision-making.

AI is no longer some abstract, futuristic concept. In fact, machine learning algorithms are more pervasive than most realise: these algorithms are routinely used by internet search engines to provide users with search recommendations or social media feeds in determining content to show users.² These algorithms “learn” by analysing data sets provided to them and identifying patterns in the data.³ When the time comes to execute their tasks, these algorithms make decisions in an attempt to replicate the patterns they have identified.⁴ In this sense, algorithms presuppose the accuracy of human decision-making and rely on these prior decisions by humans as a gold standard to replicate.

AI algorithms can be used to assist with decision-making at nearly every stage of the employment relationship. With respect to recruiting and hiring talent, AI can review

résumés and even analyse video interviews submitted by candidates.⁵ Some employers have even begun using recruiting “chatbots” – *i.e.*, virtual assistants that can communicate with candidates by asking screening questions, scheduling interviews, and collecting other pertinent recruiting information – to automate other aspects of the recruiting process.⁶

In addition to recruitment and hiring, employers are increasingly using algorithms for performance management.⁷ Among other things, these tools have the ability to track the characters typed on an employee’s keyboard, monitor whether an employee is paying attention to their computer screens using webcams and eye tracking software, surveil websites and applications used by employees and track how long employees spend on various tasks.⁸ Moreover, the COVID-19 pandemic has created a ripe opportunity for the implementation of these tools as employees are increasingly working remotely.⁹

Employees who fail to meet specified performance metrics may also be subject to formal discipline, including termination of employment, at the recommendation of AI algorithms. Algorithms capable of identifying employees spending too much time off-task can generate disciplinary recommendations.¹⁰ While some of these algorithms only make suggestions regarding warning or terminating employees, others are programmed to formally discipline employees entirely on their own and in some cases to generate termination notices.¹¹ In addition, some algorithms can even analyse patterns of conduct to predict when an employee is likely to quit, thereby permitting employer intervention and allowing companies to take action to retain critical talent.¹²

General risks associated with AI

While the use of AI to streamline the hiring process or to oversee and manage employee performance offers organisations an alluring opportunity to improve efficiency, there are considerable risks.

Though a software engineer can program an algorithm to start as a neutral decision-maker, that neutrality can be unintentionally altered when the algorithm begins to “learn” from the data sets it receives.¹³ If the training data contains unintentionally biased information, or was gathered in a way that was influenced by the biases of past decision makers, the algorithm may be susceptible to adopting such biases.¹⁴ For example, an algorithm designed to review résumés can be trained by analysing résumés previously submitted by applicants and may even be provided information regarding the characteristics of employees who have succeeded in the company. After reviewing this data, the algorithm can then evaluate future résumés based on patterns detected in the training data.¹⁵ While explicit bias within a data set can present issues, hidden biases within the training data can also influence the algorithm’s decision-making, causing it to produce biased results. In reviewing and attempting to replicate the results it has previously analysed, the algorithm runs the risk of modelling the implicit biases underlying the training data. Ultimately, this means that algorithms are only as good as the programmers who create them and the training data they are provided with. For this reason, it is imperative that employers exercise caution in implementing AI and enact procedures for monitoring and scrutinising potentially biased results.

Recent studies have demonstrated that it is difficult to preserve the neutrality of algorithms once unleashed. For example, facial recognition software has been shown to misidentify people of colour at significantly higher rates than their white counterparts.¹⁶ The biases inherent in facial recognition technology are so difficult to cure that several large companies have announced they will no longer offer these technologies to law enforcement.¹⁷

By way of another example, in 2018, it was widely reported that Amazon ceased using a recruiting tool it had spent several years developing after the algorithm began demonstrating

a persistent bias against female candidates.¹⁸ The algorithm was trained to evaluate job applicants with training data comprising résumés submitted to the company over a 10-year period.¹⁹ In light of historical gender disparities in the technology sector, the résumés the algorithm was trained with came mostly from male candidates.²⁰ Ultimately, the algorithm began disfavoring female applicants, penalising résumés that included the word “women’s” and penalising graduates of two all-women’s colleges.²¹ Although programmers attempted to salvage the tool and cure its biases, the project was ultimately scrapped when the issue could not be resolved.²² The tool was never actually used by the company’s recruiters to evaluate candidates.²³

Another challenge posed by AI is its often “black-box” nature. That is, many algorithms and their creators cannot provide precise explanations for their decisions.²⁴ This presents particular challenges in the employment context as the ability to explain why a candidate’s resume or interview was approved or rejected by an algorithm can impact an employer’s ability to fend off discrimination claims as discussed further below.

Legislative response in the United States

Many landmark employment laws such as Title VII were enacted long before the advent of AI. Indeed, the technology’s profound impacts could not have been predicted a few decades ago, particularly in the employment context. Although regulation of this technology is in its infancy, governments at all levels have begun considering various proposals aimed at regulating the use of AI in employment and other sectors where there exists a particular concern over bias. In the United States, most of this activity has occurred at the state and local level.

Implemented legislation

For starters, Illinois has enacted measures to regulate the use of algorithms in the workplace. Under the Illinois Artificial Intelligence Video Interview Act, employers who use AI to analyse video interviews submitted by job applicants must: (i) provide prior notice to the applicant that AI may be used to analyse the applicant’s video interview and evaluate the applicant’s fitness for the position; (ii) provide the applicant information prior to the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and (iii) obtain the applicant’s consent to be evaluated by the software.²⁵ The law also prohibits employers from sharing a candidate’s video with others except “persons whose expertise or technology is necessary in order to evaluate an applicant’s fitness for a position”.²⁶ Finally, the law empowers candidates to request that an employer permanently delete their video interview within a specified time period.²⁷

The Illinois General Assembly is also currently considering an amendment to the Artificial Intelligence Video Interview Act to further confront racial biases that may infiltrate the use of AI in the hiring process. On April 21, 2021, the proposed amendment passed the Illinois House of Representatives. If passed by the Illinois Senate and signed into law by the Governor, the amendment would require employers who rely solely on AI to determine whether an applicant will receive an in-person interview to collect and report certain demographic information.²⁸ Such employers would be required to report to the State of Illinois on an annual basis the race and ethnicity of applicants who are screened using AI technology and are and are not offered an in-person interview as well as the race and ethnicity of applicants who are hired.

Maryland has also implemented legislation in response to concerns about AI in the workplace. As of October 1, 2020,²⁹ Maryland law requires employers to obtain an

applicant's consent prior to using a facial recognition service to create what the law refers to as a "facial template" during an interview. The measure defines a "facial recognition service" as "technology that analyses facial features and is used for recognition or persistent tracking of individuals in still or video images" and defines a "facial template" as "the machine-interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service".³⁰ Under the law, employers must obtain a signed waiver providing the applicant's consent. The waiver must state: (i) the applicant's name; (ii) the date of the interview; (iii) that the applicant consents to the use of facial recognition during the interview; and (iv) whether the applicant read the consent waiver.

Illinois and Maryland are not alone in their efforts. The federal government recently enacted its own landmark artificial intelligence legislation. On January 1, 2021, the Senate, like the House before it, overrode former President Donald Trump's veto of the National Defense Authorization Act for Fiscal Year 2021.³¹ A provision of the law, known as the National Artificial Intelligence Initiative Act of 2020 ("NAIIA"), was enacted as a result of the congressional override. The NAIIA seeks to establish the United States as a world leader in AI development by investing over \$6 billion toward AI initiatives, including research and educational and training programmes. In addition, the NAIIA directs various federal agencies to research applications for AI, coordinate research and development, prepare guidelines for AI, and to consider risk-mitigation measures for AI, among other things. Pursuant to the NAIIA, the newly-created National Artificial Intelligence Initiative Office is tasked with serving as a hub for coordination between various federal agencies on AI research and development. The National Artificial Intelligence Initiative Office is also tasked with performing outreach to diverse stakeholders, including civilian organisations, to ensure public input is incorporated into AI initiatives.

Proposed legislation

Numerous other jurisdictions, including New York City and California have proposed bills aiming to regulate, among other things, the use of algorithms in the employment context.

On February 27, 2020, the New York City Council introduced Int. 1894–2020.³² The bill, which is currently being considered by the Council, received a hearing before the Committee on Technology in November 13, 2020. If passed, the bill would regulate the sale of "automated employment decision tool[s]" that filter candidates "for hire or for any term, condition or privilege of employment in a way that establishes a preferred candidate or candidates".³³ Technology companies would be required to conduct annual bias audits prior to selling automated employment decision tools in New York City. Likewise, companies who utilise such tools would be required to notify job applicants that the tool was used in connection with their candidacy.³⁴ This disclosure must be made within 30 days of the evaluation and must also state the qualifications or characteristics considered by the algorithm.³⁵

Notably, the bill expressly reserves the New York City Commission on Human Rights' ability to enforce the New York City Human Rights Law ("NYCHRL") as it relates to the use of this software. As explained below, it generally remains an open question whether the use of AI may trigger liability under current state and federal anti-discrimination laws. The New York City bill, however, aims to expressly bring this technology within the scope of the NYCHRL.

California has also begun considering regulation of AI. On December 7, 2020, the Automated Decision Systems Accountability Act of 2021 was introduced in the California Assembly.³⁶ The bill, which has since seen significant amendments narrowing its scope,

initially sought to regulate the use of automated decision systems (which the bill referred to as “ADS”).³⁷ As originally drafted, the bill would have required businesses in California that utilise ADS to, among other things, implement processes that continually test their ADS for biases and conduct assessments to determine whether their ADS “has a disproportionate adverse impact on a protected class”.³⁸ The bill also would have required businesses to consider alternatives to ADS or “reasonable modifications that may be taken to limit adverse consequences on protected classes”³⁹ and to submit an ADS impact assessment to the Department of Financial Protection and Innovation outlining the vendor of the ADS and its uses, among other things. Although the original version of the bill sought to regulate the use of ADS by private businesses, the bill has since been amended and its requirements have changed considerably. Most notably, the new version of the bill now only applies to prospective state and local government contractors instead of private businesses at large. Nevertheless, the original iteration of the bill serves as an indication that expansive regulation may be on the horizon.

At the federal level, in 2019, Democratic legislators introduced the Algorithmic Accountability Act (“AAA”) into Congress.⁴⁰ Although the bill never proceeded beyond the committee stage, several senators have stated that they plan to introduce a new version of the bill in 2021. The AAA in its original form was consumer focused, and did not directly implicate the employment relationship.⁴¹ Given recent developments, however, it would not be surprising to see a more sweeping version of the proposed law introduced.

Also at the federal level, lawmakers have begun calling on the Equal Employment Opportunity Commission (“EEOC”) to address concerns raised over the use of AI tools in employment. In or around October 2019, reports surfaced that the EEOC had begun investigating at least two cases involving claims that algorithms used to make employment decisions unlawfully discriminated against certain workers.⁴² While further details have yet to be released, calls for further EEOC review of AI have not subsided. And, on December 8, 2020, 10 Democratic senators jointly sent a letter to the EEOC requesting information about the agency’s authority and capacity to investigate AI hiring tools as part of its mission to prevent and remedy workplace discrimination.⁴³ The letter urged the EEOC to take an outsized key role in ensuring AI does not inject bias into hiring decisions and called for effective oversight and auditing of this technology. The letter also raised concerns over specific technologies including, among other things, AI used to screen job applicants and to analyse video interviews to evaluate candidates.

The EEOC is not the only federal agency to begin considering these issues, however. On April 19, 2021, the Federal Trade Commission (“FTC”) published a blog post indicating that biased algorithms can potentially violate the Federal Trade Commission Act and the Fair Credit Reporting Act.⁴⁴ In this post, the FTC emphasised the need to avoid discriminatory outcomes and to embrace transparency in the use of algorithms.⁴⁵ Though the agency’s next steps are unclear, the post is clear: the FTC is focused on biased algorithms.⁴⁶

Regulation of facial recognition technology

In addition, many states and cities have also begun implementing measures regulating the use of facial recognition technology by governmental agencies and private entities. These measures have largely served as responses to concerns over facial recognition technology and the rates at which it misidentifies individuals. On May 19, 2019, San Francisco became the first city in the United States to prohibit the use of facial recognition technology.⁴⁷ While the measure does not regulate the use of this technology by private entities, it does

prohibit city agencies and the city's police force from employing facial recognition. Other jurisdictions have also followed suit, including Boston, Massachusetts,⁴⁸ Portland, Oregon, and Washington State, among others.⁴⁹

Portland's measures are particularly sweeping. In September 2020, the city enacted two separate ordinances prohibiting the use of facial recognition. In addition to prohibiting the use of facial recognition by city government and the police,⁵⁰ these ordinances also enacted a ban on the use of such technology by private entities in places of public accommodation.⁵¹

International measures

The issue of algorithmic bias has also received international attention. On April 21, 2021, the European Commission unveiled a sweeping proposal aimed at regulating "high-risk" AI.⁵² Annex III of the proposal specifically lists several AI systems used in the employment relationship as subject to regulation.⁵³ This provision specifically deems systems "intended to be used for recruitment or selection of natural persons, notably for advertising vacancies, screening or filtering applications, evaluating candidates in the course of interviews or tests" as "high-risk".⁵⁴ Likewise, AI systems to be used for "making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behavior of persons in such relationships" are also considered "high-risk".⁵⁵

If passed, the proposal would impose hefty requirements on companies offering AI systems. Among other things, providers of AI systems would be required to establish a risk management system that monitors the high-risk AI throughout its entire life-cycle, accounting for the foreseeable risks associated with the specific tool.⁵⁶ Similarly, providers would also be required to thoroughly train, validate, and test the data sets used to develop their AI systems, specifically with an eye towards possible biases that may be present in the data.⁵⁷ Providers would also be required to assess the "availability, quantity and suitability of the data sets" needed for the algorithm and would be required to identify "any possible data gaps or shortcomings and how these can be addressed".⁵⁸ As for employers using "high-risk" AI systems in employment decision-making, they would be required to monitor the operation of the AI and to adhere to all instructions supplied by the provider in order to minimise the risk of, among other things, discrimination.⁵⁹ Where such a risk arises, the employer must suspend the use of the system and inform the provider.⁶⁰ Notably, the proposal would penalise non-compliance with its obligations by imposing administrative fines of up to 30,000,000 Euros or, for a company, up to "6% of its total worldwide annual turnover for the preceding financial year, whichever is higher".⁶¹

While it remains to be seen whether the proposal will ultimately become law, it is clear that AI regulation remains on the European Commission's agenda.

Legal risks in the employment context

Notably, many existing employment laws were enacted at a time before AI was involved in employment decision-making so it remains to be seen how courts will apply these laws to this new technology. In particular, courts will soon have to determine how to analyse discriminatory intent in the context of algorithms that have gone awry. One challenge that may impact the attempt to apply existing law to AI technology, lies in attributing discriminatory *animus* to an entirely digital system. Additionally, the proliferation of AI also brings attendant concerns over employee privacy. Finally, with respect to unionised workplaces, employers will soon have to consider the possible duty to bargain over the implementation of AI.

Disparate treatment claims

In the United States, discrimination claims under various federal and state laws can be premised upon a disparate treatment or a disparate impact theory, or both. A disparate treatment claim asserts that the plaintiff was subjected to intentional discrimination.⁶² If a plaintiff meets the minimal pleading requirements to assert a claim of disparate treatment, the burden then shifts to the employer to offer a “legitimate, nondiscriminatory reason” for the challenged action.⁶³ Ultimately, a plaintiff may prevail by proving that the employer’s justification for the action was merely pretextual *i.e.*, the action was indeed motivated by discrimination.⁶⁴

The failure to prove discriminatory intent or raise an inference of discriminatory intent, is fatal to a disparate treatment claim.⁶⁵ Given the algorithmic, rather than human, methodology of AI systems, plaintiffs asserting a disparate treatment claim may have difficulty demonstrating proof of discriminatory intent. Although some courts have permitted disparate treatment claims to proceed based on allegations of implicit bias, it remains unclear how Courts will view AI decision-making.⁶⁶

Judicial analysis of AI decision-making will likely centre on whether an autonomous algorithm’s decisions can properly be imputed to an employer under the law. If an algorithm begins producing biased results after reviewing faulty or biased training data consisting of prior decisions made by humans, a plaintiff may argue that the algorithm has merely adopted the organisation’s pre-existing discriminatory *animus*.

One additional challenge facing employers using AI may be proving that there was a legitimate, non-discriminatory reason for the adverse employment action. Namely, if an employer cannot explain how its algorithm operates, it may not be able to offer a non-discriminatory reason as to why a certain candidate was, for example, not selected for a position. Hence arises the need for transparency in the algorithm’s functioning. And in recent years, consultants and technology companies have begun offering auditing services and tools that are capable of explaining an algorithm’s decisions.⁶⁷ As algorithms become increasingly explainable, employers will have greater options for evaluating and fully understanding the decisions rendered by their AI tools. Employers who have audited their algorithms for bias and who can explain why their AI made a decision about a particular candidate and the non-discriminatory factors considered in rendering the decision are likely to be better suited in meeting their burden to present a legitimate, non-discriminatory reason for an adverse employment action.

Disparate impact claims

Plaintiffs may, in certain circumstances, bring discrimination claims using a disparate impact theory. To succeed on such a claim, the plaintiff must demonstrate that a facially neutral employment practice had a disproportionate effect on a protected group.⁶⁸ Unlike a disparate treatment claim, a plaintiff alleging disparate impact need not demonstrate that discriminatory *animus* motivated the adverse employment action.⁶⁹

To establish a *prima facie* disparate impact claim, courts generally require a plaintiff to: (1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two.⁷⁰ Once a *prima facie* case is established, the burden of persuasion then shifts to the employer to show that the policy or practice is “job related and consistent with business necessity”.⁷¹ Where an employer succeeds in establishing the business necessity defence, the plaintiff can only succeed on a disparate impact claim by demonstrating that an alternative, less discriminatory, method exists for accomplishing the same job performance-related business interest.⁷²

Plaintiffs asserting disparate impact often rely on statistical evidence to demonstrate that a disparity exists in outcome between groups.⁷³ A court tasked with deciding a disparate impact claim based on the use of algorithms may, however, stray from the traditional disparate impact analysis and opt to rely on a different line of cases for its analysis. Through *Griggs v. Duke Power Co.* and its progeny, the Supreme Court has created a slightly different standard for cases involving tests that impact promotion and hiring decisions. These cases hold that where a plaintiff makes a *prima facie* showing that an employment test has a disparate impact on a protected class, the burden shifts to the employer to demonstrate that the use of its test or selection criteria is job-related.⁷⁴ If the employer can demonstrate that the test in question is job-related, the burden returns to the plaintiff to demonstrate “that other tests or selection devices without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship’”.⁷⁵

Under this approach, the black-box nature of AI can be problematic and a need for AI that is transparent and explainable becomes critical. To satisfy its burden in this hypothetical scenario, an employer would be required to explain the factors its algorithm evaluates in its decision-making as well as how these factors are job-related. An employer that has carefully audited its AI to be explainable and to screen résumés and make other employment decisions based strictly on performance-related considerations is likely to meet its burden. Nevertheless, employers must be vigilant in considering whether other, less discriminatory, approaches exist to accomplish the same goals as the burden will return to plaintiffs to make this showing. For this reason, it is imperative that employers examine their relationships with AI holistically, scrutinising the tools they implement and ensuring they have considered non-algorithmic solutions.

Title VII agency issues

Another wrinkle for Title VII claims is whether the conduct of a completely autonomous AI algorithm can be imputed to the employer for purposes of liability. More specifically, Title VII prohibits “unlawful employment practice[s]” perpetrated by an “employer”.⁷⁶ The statute goes on to define “employer” as “a person ... who has fifteen or more employees ... and any agent of such a person”.⁷⁷ The reference to “any agent” has been interpreted “to import respondeat superior liability into Title VII” – *i.e.*, Title VII holds employers accountable for the actions of its agents.⁷⁸ In a typical Title VII case, an “agent” usually refers to a supervisor or manager of the employer. However, it remains to be seen how this language will be interpreted when the decision maker is an AI algorithm.

AI’s potential implications in the class action context

In the United States, a class action lawsuit is a procedural tool under certain federal or state rules of civil procedure that can be utilised when a group of people purportedly suffer similar injuries as a result of some alleged conduct. As a result, class action lawsuits have the potential to consolidate hundreds or even thousands of claims into one proceeding.

To certify a class, the representative plaintiffs purporting to bring the class action must demonstrate, among other things that: there are questions of law or fact common to the class and the claims or defences of the representative parties are typical of the claims or defences of the class.⁷⁹

The use of AI algorithms presents a unique risk of class action certification, particularly where an allegedly biased algorithm is used to screen groups of candidates – or indeed every candidate – who applies for employment. In such circumstances, a plaintiff is likely to argue that issues of commonality and typicality – two elements of the class certification analysis that are typically hotly contested – are readily established across the class.⁸⁰ To effectively counter

such arguments, employers should have an in-depth understanding as to how their algorithms work and be able to establish, for example, that common issues do not predominate across the class. By understanding the factors the algorithm used in evaluating each member of the proposed class and demonstrating that each individual was evaluated based on their own individual qualifications, an employer can improve its ability to challenge class certification.

AI's potential implications in the unionised context

Recent projections estimate that by 2030, approximately 40 million U.S. workers will be replaced by automation.⁸¹ Such automation trends raise unique considerations in the unionised context.

Under the National Labor Relations Act, employers have a legal duty to bargain in good faith with a union over mandatory subjects of bargaining such as changes to wages, hours, or working conditions.⁸² While automation and AI are not expressly defined as mandatory subjects of bargaining under the NLRA, bargaining over these topics may be required based on the *effects* the implementation of this technology has on working conditions, terminations and layoffs, and/or other mandatory subjects of bargaining.⁸³

Indeed, in *First Nat'l Maintenance Corp. v. NLRB*, the U.S. Supreme Court held that “bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business”.⁸⁴ Thus, in this context, to the extent AI programs or machinery results in displacing workers to reduce labour costs, employers may have an obligation to bargain over the resulting layoffs.

Likewise, employers may be required to bargain over their decision to implement AI for purposes of performance management. Take, for example, an AI tool designed to track productivity of employees in the workplace. The NLRB has ruled that employer surveillance of employees engaged in union activity may violate the NLRA.⁸⁵

Other privacy concerns

Privacy concerns may also arise when exploring what criteria an algorithm may consider in rendering its decisions. A complete understanding of the information an algorithm has access to about a candidate or employee is critical to avoiding violations of law aimed at protecting employee privacy.

For example, concerns can arise if an algorithm is able to access a candidate's criminal history or social media. Many state and local governments have passed so-called “ban-the-box” laws that prohibit employers from considering certain aspects of a candidate's arrest records or criminal history in making a hiring decision. AI designed to research a candidate that is not programmed to disregard certain information concerning a candidate's arrest records and/or criminal history may expose an employer to liability under these laws.

In a similar vein, the Fair Credit Reporting Act (“FCRA”) and state analogues may establish compliance requirements for employers who rely on consumer reports or social media screenings that fall under their purview. Employers who review consumer reports in making employment decisions are required to provide written disclosure to the applicant or employee indicating that it will obtain and consider the report prior to requesting the report from a consumer reporting agency.⁸⁶ Employers are also required to obtain the candidate or employee's written consent prior to obtaining a consumer report.⁸⁷ To the

extent an algorithm is not prohibited from considering consumer or social media reports or is otherwise able to access this information, employers must be mindful of their disclosure obligations under the FCRA.

Conclusion

As the trend of workplace automation continues, employers are cautioned to carefully examine their relationships with AI to ensure compliance with the existing (and quickly growing) body of employment laws that affect the use of this technology. Employers are also well advised to carefully scrutinise, on a recurring basis, any algorithms used in their employment decision-making to ensure that these systems are free from bias. While the prospect of leveraging AI in pursuit of efficiency gains and resource savings is enticing, employers should be intentional about what types of AI they are implementing and any associated risks.

* * *

Endnotes

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