

LEGAL ALERT

November 27, 2017

Advancements in Tech Create Unique Legal Challenges as Corporate Reliance on Artificial Intelligence Increases

By: Joseph Maddaloni, Jr. & Clifford D. Dawkins, Jr.

The proliferation of artificial intelligence (“AI”) will undoubtedly have a significant impact on employers, however, perhaps not in the ways one might think. While AI, loosely defined as the ability of a computer to imitate intelligent human behavior, can enhance the efficiency of an organization, there exists potential unintended consequences for those who do not properly understand and apply the technology. As it concerns the realm of Labor & Employment Law, employers that adopt AI to perform basic hiring functions and personnel tasks without a thorough understanding of the technology may be unintentionally exposing themselves to costly litigation for discrimination. For longstanding corporations and established businesses, this lack of understanding risks pricey litigation; however, for tech startups and other young organizations, litigation over discriminatory practices can risk the viability of the business altogether.

Over the course of the last year, a number of articles, think pieces, and studies have emerged on the topic of AI, and its application to the business and legal worlds. While some scholars believe that the advent of AI is a positive and promising development for the future of these realms, others caution that AI and “machine learning,” the process by which AI teaches itself and evolves in its understandings over time, can have serious unintended consequences on both business and law. In the realm of labor and employment, AI is used to make hiring, performance evaluation, promotion, and termination decisions. What is more, AI most often outperforms even highly skilled and experienced humans, in terms of speed and accuracy.

However, most employers only have a superficial understanding of how AI works, which creates a vulnerability. Take, for example, the trend of employers utilizing AI to perform analyses on potential hires. These companies rely on AI to sift through large amounts of applicant data and parse out the best candidates based on predetermined hiring metrics. Aside from benefits of efficiency, the idea behind the use of AI to make these early determinations is that AI is generally believed to be more neutral and unbiased than any human being could possibly be. However, these hiring metrics are input by humans. And, therein lies the rub.

{01857690.DOCX;1 }

Florham Park
220 Park Avenue
Florham Park, NJ 07932
(973) 539-1000

Paramus
115 West Century Road
Suite 100
Paramus, NJ 07652
(201) 262-1600

Sparta
351 Sparta Avenue
Sparta, NJ 07871
(973) 295-3670

New York
116 West 23rd Street
Suite 500
New York, NY 10011
(212) 386-7628

Human beings, with all our flaws and prejudices, are the initial inputs for these systems, which means imperfect information is being fed into the AI. AI can only develop based on its inputs and the universe of information to which it has access. Thus, as sophisticated as they are, AI systems have been found to internalize, learn from, and act upon the human biases contained in the initial information used as the basis for their functioning.

To the point, in October of 2017 Google issued a public apology after tech professionals discovered that one of its AI algorithms was discriminating against racial minorities, homosexuals, and certain religious groups. The issue observed by AI experts was that the information used to initially “train” Google’s AI, such as photographs, books, blogs, social media posts, movie reviews, videos, and other types of content, contained racist, sexist, and/or homophobic data that taught Google’s AI to hold and operate from the same foundation of prejudices. Thus, we see that while these systems may be more efficient and cost-effective in some instances than human resources, they are presently no better than humans in ameliorating biases from key decision-making processes. Stated another way, AI is susceptible to bias and can act discriminatorily.

Notwithstanding, some scholars have opined that employers might rely on AI to circumvent liability for biased employment decisions, as the underlying technical basis for the AI’s outputs cannot be reviewed and challenged. This view is dangerously myopic. Few legal constructions exist to protect employers against the inevitable lawsuits that will arise from poorly designed and implemented AI. Fundamentally, the Constitutionally derivative protections of 42 U.S.C. § 1981 (“Section 1981”) and Title VII of the Civil Rights Act of 1964 (“CRA”) cannot be abridged, even in light of technological advancements.

Still, there are calls for regulation of AI from the individuals and entities developing the technology even today, and the impact on labor and employment matters awaits us on the not-so-distant horizon. As AI continues to grow and evolve, the need for regulation is becoming even more pronounced. In this light, it is not farfetched to consider that AI’s impact on the workforce will shift the way the law operates insofar as employers might expect to be held liable for their employment-related decisions, notwithstanding any reliance on AI.

The age of technological innovation and automation is upon us. Employers are therefore encouraged to heighten and focus their compliance and oversight efforts to adjust to recent technological developments and their impact on potential employer liability. Forward-thinking business owners and corporations must seek to eliminate bias from their employment decision to the greatest extent possible, and seek out legal services from practitioners versed in modern technological advancements and their impact on law and policy. In this regard, development of a proactive strategy to understand and avoid discrimination claims will ensure your business is not

{01857690.DOCX;1 }



caught in the wave of early adaptors of AI technology that will learn the hard way that there are no means of circumventing liability for discriminatory employment practices.

If you are concerned that your company's use of AI poses an unintended risk for discriminatory conduct or results, we can ease your mind with a thorough analysis and assessment of your policies, procedures and practices. For more information please feel free to contact any member of the firm's Labor & Employment Law Practice Group.

DISCLAIMER: This Alert is designed to keep you aware of recent developments in the law. It is not intended to be legal advice, which can only be given after the attorney understands the facts of a particular matter and the goals of the client.