ARTIFICIAL INTELLIGENCE IN THE WORKPLACE

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The workplace has evolved greatly over the last few decades. With the continuous introduction of technology, the advent of social media, and the transition of the workforce from the baby boomers to subsequent generations of workers, the pace of change has been rapid. These changes have been accelerated thanks largely to the Covid-19 pandemic. Remote work has become commonplace, with remote screening and hiring also becoming the norm. The use of artificial intelligence (AI) is not new to the workplace. It has been used to filter resumes and scan social media profiles of potential candidates. However, the pandemic and resultant remote workforce have acted as an impetus for further implementation of AI workplace tools. While there is no doubt that AI has the potential to add immense value to the workplace, the implementation of AI can raise important legal questions.

AI has become a trendy technology buzzword, but the technology is not difficult to conceptually understand. Before an AI system is used, the system is "trained" by using a basic data set. Using a machine learning algorithm, a computer system processes a training data set and "learns" how to optimize the results over time. As the AI processes this initial data, it learns which parameters of the data it can adjust to obtain a desired output, and how the system should process new data in order to optimize the output going forward. Because of this, an AI system is only as good as the data set that is used to train the algorithm. If the training data is skewed, for example by being racially biased, the output of the AI system will likewise be biased. Ensuring the AI is producing optimal (and non-discriminatory) results is crucial when implementing an AI system.[1]

AI for screening and hiring

The most notable AI workplace application is in the screening and investigating of potential candidates for a position. AI systems filter resumes to screen and rank potential candidates and scan the internet to perform background checks for finalists. Manually screening hundreds of applicants can take dozens of hours and be subject to the biases of the personnel doing the screening. AI capable of performing those actions at a fraction of the cost presents an attractive alternative. Additionally, AI-based screening, as compared to traditional screening, even shows potential for improving candidate placement by matching applicants with roles best designed for their skill sets.[2] More advanced AI applications can review video interviews, analyzing vocal tones, body language, and candidate responses, to generate interview reports and selection recommendations.[3]

As with the introduction of any new tool into the workplace, implementation of AI in a human resource context also comes with potential

downsides. Relying on an AI algorithm or any computerized screening system for candidate selection comes with the side effect of losing immediate reviewability by a human. Many potential candidates are now aware that unsophisticated automated systems for screening resumes depend upon "keyword" searches, and they revise their resumes to conform as closely as possible to the job posting. This leads to the AI system selecting resumes that are closely tailored to the job description and rejecting resumes for candidates who may actually be a better fit but do not know how automated resume scanning systems work. Although newer screening systems implementing more sophisticated AI algorithms overcome some of these prior limitations, the AI selections are ultimately only as good as the algorithms behind them. As a result, AI screening could unknowingly be selecting less-qualified candidates based on improper or unimportant parameters, or not selecting candidates that would be a superior fit for the position. To take it a step further, AI screening implicates compliance concerns and may even open an employer to discrimination liability.

Background on discrimination claims

The most notable pieces of antidiscrimination legislation are Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination Act, which prevent employer discrimination against employees based on race, color, national origin, sex, religion, and age. Potential causes of action stemming from Title VII include claims for disparate treatment and disparate impact.

Disparate treatment claims involve the *intent* of the employer to discriminate, and courts utilize the *McDonnell Douglas Corp. v. Green* framework as the basic form of analysis for a claim.[4] First, the plaintiff must present a prima facie case that: (i) they are a member of a protected class; (ii) they were qualified for and applied for an open position; (iii) despite being qualified, they were rejected for the position; and (iv) the position remained available after their rejection. Next, the burden shifts to the employer to show a legitimate non-discriminatory reason for the action. Finally, the plaintiff must demonstrate the stated reason was a pretext for the discrimination.[5]

Disparate impact claims, on the other hand, do not require an intent to discriminate and can be based on statistics that show a protected class being disproportionately screened out.[6]

How can an AI system discriminate?

With some background on discrimination claims, it's not that hard to draw the connection to AI-based screening, especially with the knowledge that these AI tools will be evaluated for non-compliance in the same manner that a normal hiring process would be evaluated. For instance, in one situation, the EEOC found reasonable cause to believe the ADA was violated simply because the advertisements for the opening were targeted to younger markets via Facebook.[7] Extrapolating this logic to the use of AI, it seems obvious that the employer will be held liable for any biases or discrimination resulting from the use of the tool. Essentially, if an adverse effect can be shown, meaning a prima facie case is present, the burden shifts to the employer (the user of the AI tool) to show that discrimination is not present. In the case of a disparate impact claim, the discrimination could be based on a completely algorithmically generated bias of which the employer is totally unaware. "'If the training phase for a big data algorithm happened to identify a greater pattern of absences for a group of people with disabilities … [t]he profile need not be tagged as 'disability'—rather it might appear to be based on some group of financial, consumer, or social media behaviors.'"[8]

In fact, there is evidence that this is actually happening to some employers already. Amazon's machine learning recruiting engine AMZN.O was scrapped for developing a bias against women, penalizing all candidate resumes containing the word "women's."[9] While the company maintains that the tool was never actually used to evaluate candidates, it serves as a valuable demonstration that even the tech giants are susceptible to this type of bias. Similarly, Apple's implementation of its credit card provoked ire from Twitter users after they noticed that Apple's

screening process systematically extended larger lines of credit to men than to women.[10] While not exactly an employment-based algorithm, it once again shows that even those with almost-unlimited resources may develop AI tools with discrimination-based biases.

Final considerations

What does this mean for employers seeking to leverage AI? The most important issue to keep in mind is that implementing an AI system does not eliminate employer liability if the system generates results that may be perceived as discriminatory. As such, employers must be very vigilant of the factors used during the algorithmic training phase and conduct regular internal audits to ensure that the actual implementation is non-discriminatory. This can be particularly difficult, since the outputs of an AI system may change over time as the AI system continues to learn.

While employers *should* already be aware of these potential algorithmic biases, they now have even more of a reason to make it a priority. AI-focused legislation is being introduced to address some of the aforementioned concerns. The Algorithmic Accountability Act, originally introduced in 2019 and reintroduced in 2022, would require commercial entities to conduct "impact assessments of automated decision systems and augmented critical decision processes"[11] Perhaps more imminent is local legislation targeting the same subject. In 2021, New York City Council enacted a regulation on "automated employment decision tools," which requires bias audits on all automated employment decision tools for candidates and employers within NYC.[12] The problem is that the AI systems are new, as are these assessments and audits, so there is little guidance to ensure that employers have sufficiently exercised their duty of care, and ultimately limited their liability in this regard.

Conclusion

Implementation of AI systems within the workplace presents an incredible opportunity for increased efficiency in the workplace, and can free up time for already-overworked staff. However, if not implemented correctly, it can put the organization at risk. A poorly managed AI system could easily result in greater liabilities than efficiencies, and properly evaluating, monitoring, and auditing an AI system could make the difference between these outcomes. Employers should be aware of both the potential benefits and dangers before plunging into this new world.

Notes

1 See IBM Cloud Education, Artificial Intelligence (AI), IBM (June 3, 2020), https://www.ibm.com/cloud/learn/what-is-artificial-intelligence.

2 See HireEZ, https://hireez.com/ ("hireEZ Talent Maps helps you develop strategic workforce plans and make informed decisions with industry-wide and competitor-specific benchmarking data and talent insights."); see also Kyle Wiggers, HireEZ, formerly Hiretual, raises $26M to expand its AI-powered recruitment platform, Venture Beat (Feb. 2, 2022), https://venturebeat.com/2022/02/02/hireez-formerly-hiretual-raises-26m-to-expand-its-ai-powered-recruitment-platform/ ("HireEZ's AI ranks candidates by how well they match the requirements of a job, and then automatically adjusts rankings for the next round of candidates based on user interactions.").

3 See myInterview, https://www.myinterview.com/; see also Sheridan Wall & Hilke Schellmann, We tested AI interview tools. Here's what we found, Tech. Review (Jul. 7, 2021), available at https://www.technologyreview.com/2021/07/07/1027916/we-tested-ai-interview-tools/ ("The algorithms analyze candidates' responses to determine personality traits. MyInterview also compiles scores indicating how closely a candidate matches the characteristics identified by hiring managers as ideal for the position.").

4 See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

5 Id.

6 See Griggs v. Duke Power Co., 401 U.S. 424 (1971).

7 See Commc'ns Workers of Am. v. T-Mobile US Inc., 5:17-CV-07232 (N.D. Cal. 2017).

8 Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC, US Equal Emp. Opportunity Comm. Press Release (Oct. 2016) (quoting Dr. Kelly Trindel, Chief Analyst in the Equal Employment Opportunity Commission's Office of Information, Research, and Planning), available at https://www.eeoc.gov/newsroom/use-big-data-has-implications-equal-employment-opportunity-panel-tells-eeoc.

9 See Jeffrey Dastin, Amazon scraps secret AI recruiting tool that showed bias against women, Reuters (Oct. 2018) https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.

10 Will Knight, The Apple Card Didn't 'See' Gender—and That's the Problem, Wired (Nov. 2019), available at https://www.wired.com/story/the-apple-card-didnt-see-genderand-thats-the-problem/.

11 HR6580, Algorithmic Accountability Act of 2022, 117th Cong., available at https://www.congress.gov/bill/117th-congress/house-bill/6580/text?q=%7B%22search%22%3A%5B%22algorithmic%22%2C%22algorithmic%22%5D%7D&r=7&s=1.

12 Int. 1984-2020, available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9.