



The Journal of Robotics, Artificial Intelligence & Law

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Considerations for Employers Using Artificial Intelligence

Amanda McCloskey*

In this article, the author explains that although employers undoubtedly find artificial intelligence tools to be useful, their usage potentially implicates many areas of concern, including discrimination claims and the disclosure of confidential company information.

Artificial intelligence (AI) enjoys headline limelight every day it seems, as its uses continue to expand. Notably, employers are using the latest in technology too. Not insignificantly, the usage of AI tools has raised concerns about triggering anti-discrimination laws and jeopardizing a company's proprietary and confidential information. As the popularity of AI in the workplace grows, and as the controlling body of law develops, these issues continue to heat up. Employers, beware!

Generally, AI tools predict outcomes based on already-analyzed historical data sets—a process denoted “supervised machine learning.” AI tools apply an algorithm, which dissects the data to create a model that predicts outputs.

Employers use AI in a variety of circumstances, including monitoring work performance, determining pay and promotions, and streamlining steps in the hiring process, such as analyzing resumes, predicting job performances, and performing facial analyses during video interviews.

Key Considerations for Employers Using AI

While employers undoubtedly find AI tools to be useful, their usage potentially implicates many areas of concern, two of which are discrimination claims and the disclosure of confidential company information.

Discrimination Claims: Title VII and the Americans with Disabilities Act

Employers should be aware that on April 25, 2023, the Equal Employment Opportunity Commission (EEOC) issued a joint statement¹ with the Consumer Financial Protection Bureau, the Department of Justice, and the Federal Trade Commission announcing the agencies' mutual commitment to applying to AI the laws they each administer. Pursuant to this mission, the EEOC twice has issued guidance discussing Title VII of the Civil Rights Act² (Title VII) and the Americans with Disabilities Act³ (ADA) and how each statute relates to AI in the workplace.

Notably for employers, the EEOC primarily focuses on the interplay between discrimination claims and AI tools, highlighting disparate impact claims under both Title VII and the ADA. Because AI tools rely on historical data sets to predict outcomes, to the extent unintentional biases constitute any of the data, the AI results may be impacted by those unintentional biases, leading to disparate impact claims. For example, an employer may utilize AI to analyze resumes and cull from them those the employer chooses to consider.

However, to create the algorithm that locates the “best” resumes, an employer necessarily must employ a historical data set—here, perhaps the resumes of current employees. Any information not included in the resumes of the current employees likely would be given a lower rank. To the extent that such lower ranking has a disparate impact on potential candidates in certain protected categories, the employer may have excluded unintentionally otherwise qualified candidates in violation of Title VII.

On the heels of the EEOC's multiple warnings to employers about the use of AI, the EEOC secured its first workplace AI settlement.⁴ On August 9, 2023, a tutoring company agreed to pay \$365,000 to settle an AI related age discrimination lawsuit with the EEOC. According to the EEOC's press release, the tutoring company had programmed its candidate review software to automatically reject female applicants aged 55 or older and male applicants aged 60 or older.

This case exemplifies how employers may be liable if there is a finding that technology was used to automate discrimination. “AI did it!” will not be a sufficient defense, so it is imperative for employers to beware of these potential algorithm biases.

Employers may decide to monitor and periodically audit the assemblage and results generated by AI tools in order to identify patterns and contexts that may indicate potentially unlawful disparate impact or other discriminatory treatment. Moreover, employers should carefully review their agreements with any vendors using AI on their behalf and determine appropriate duties for each party to address these risks.

Disclosure of Confidential Information

With chatbot programs such as ChatGPT receiving particular attention, another area in which AI has become prevalent is in its use to generate a variety of work products. Those programs expose risks to a company's confidential and proprietary information.

Specifically, AI tools, including those that are publicly available, rely on data each individual user inputs. If an employee uses AI to draft or create work product, the employee may be disclosing confidential company information. The AI tool not only stores that information, but uses it to respond to future user requests, thus inadvertently further exposing the information.

Laws and Regulations

No federal laws regulate the usage of AI in the workplace; two bills have been introduced recently with little traction thus far. On the other hand, several states and municipalities have enacted legislation regulating the employers' usage of AI. Illinois, an early pioneer of this shift, passed the Artificial Intelligence Video Interview Act⁵ in 2022, imposing certain requirements on employers that review and analyze interviews using AI.

Not long after that, Maryland enacted its Facial Recognition Technology law,⁶ prohibiting employers from using facial recognition during the hiring process without the candidate's consent.

New York City began enforcing a new law⁷ in 2023 that requires employers to audit their human resources technology systems for bias and then publish the results. Several other states and municipalities are presently contemplating similar legislation.

Conclusion

In conclusion, as technology evolves and proliferates, the EEOC and other federal agencies, as well as state legislatures and cities and towns around the country are likely to continue to focus on AI and its uses in the workplace. It is therefore imperative that employers be mindful of new enactments and regularly assess their usage and the implications of AI-assisted decision-making.

Notes

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1. <https://www.eeoc.gov/joint-statement-enforcement-efforts-against-discrimination-and-bias-automated-systems>.

2. <https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>.

3. <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

4. <https://www.eeoc.gov/newsroom/itutorgroup-pay-365000-settle-eeoc-discriminatory-hiring-suit>.

5. <https://ilga.gov/legislation/101/HB/PDF/10100HB2557enr.pdf>.

6. <https://mgaleg.maryland.gov/mgaweb/Legislation/Details/HB1202?ys=2020RS>.

7. <https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf>.