AI In Hiring: Legislative Responses And Litigation Potential

By **Lloyd Chinn and Thomas Fiascone**

The development and usage of artificial intelligence in employment decisions are on the rise, and it is controversial. Employers are using AI to advertise, recruit, hire and evaluate performance with lower costs and increased efficiency.

But what makes AI intriguing beyond cost is its potential to evaluate without bias job applicants' resumes, cover letters and even responses to interview questions. AI arguably offers employers the ability, at least in theory, to eradicate bias from the hiring process.

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Some AI performs tasks like matching job candidates with jobs based on skills, while others evaluate candidates' written submissions, assess candidates through game-playing and even evaluates the performance during standardized videotaped interviews. Virtually all (if not all) of the purveyors of these products emphasize their potential for the elimination of bias.

But there have been glitches — and they have spawned concerns. For example, Amazon.com Inc. reportedly abandoned an AI program that reviewed resumes and suggested job candidates after it began to favor disproportionately male applicants.[1] The AI in use apparently had trained itself based on resumes Amazon had received over the previous 10-year period, a pool which happened to be male-heavy.

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Then, when the AI started evaluating applicants, it favored male candidates based on what it perceived to be Amazon's preferences, but was in reality merely reflecting the gender makeup of resumes previously received. Amazon apparently detected the issue relatively quickly and ended the program.

For all of AI's potential benefits in the hiring process, the possibility of unintended consequences remains. To paraphrase, biased data in, bias out.

How AI makes decisions is at the center of the question of whether it eliminates or perpetuates bias. But an AI developer is not likely to be too keen on disclosing the essence of its product, the technology inside the black box that gives it value in the marketplace.

Legislative Responses

Notwithstanding the controversy around AI in the employment setting, only one state has enacted legislation specifically addressing it. Illinois adopted the Artificial Intelligence Video Interview Act, which will become effective Jan. 1, 2020. The law, applicable when employers request video interviews and use AI to analyze those videos, requires that employers notify applicants ahead of time that AI may be used for analysis, provide information on what the AI evaluates, and obtain consent from the applicant. The law also limits an employer's ability to share the videos, and requires destruction upon request from the applicant.

The Illinois law thus addresses to some extent the concern about the operation of AI by requiring that employers "[provide] each applicant with information before the interview

explaining how the artificial intelligence works and what general types of characteristics it uses to evaluate applicants."[2] While it is far too early to know the level of detail that will be required to satisfy this disclosure requirement, it may well end up striking the right balance between the developer's legitimate confidentiality interests and the candidates' desire to understand how they are being evaluated.

Other states and Congress have begun to focus on automated decision-making more generally. Washington state introduced a bill that would establish guidelines for the government's use of automated decision systems. The bill notes that "[reliance] on automated decision systems without adequate transparency, oversight, or safeguards can undermine market predictability, harm consumers, and deny historically disadvantaged or vulnerable groups the full measure of their civil rights and liberties."[3] Similarly, the New York City Council created a task force in 2017 with a goal of creating transparency in the city's use of algorithms.

At the federal level, Sens. Cory Booker, D-N.J., and Ron Wyden, D-Ore., and Rep. Yvette Clarke, D-N.Y., have sponsored the Algorithmic Accountability Act which would, as one of its aims, have companies regularly review their AI applications for discriminatory biases. This bill would cover companies with revenue of over $50 million per year and that have access to large amounts of consumer data. Thus far, the bill has stalled in Congress.

Litigation Potential

While several lawsuits have been filed in the context of AI-driven job advertising that allegedly discriminated against older applicants and women, there has not been any similar effort reported in the context of AI-based hiring decisions. Reliance upon third party-provided AI in hiring decisions may well help insulate employers from intentional bias claims — especially if it is the employer's legitimate understanding that the AI in question is designed to reduce or eliminate bias.

More difficult questions may arise in the context of disparate impact claims. If plaintiffs are able to demonstrate that a particular AI hiring process has a disparate impact on race, color, religion, sex or national origin, then the burden shifts to the employer to show that the AI process is job-related and consistent with business necessity. As to a disparate impact based on age, the test is different and easier for employers to meet; if plaintiffs demonstrate that a neutral practice has a disparate impact, the employer must show that the impact is based on a reasonable factor other than age.

If an employer is relying upon an AI selection process, and a disparate impact is established, the employer might be required to unpack the AI itself to meet its burden. Indeed, the U.S. Equal Employment Opportunity Commission long ago issued a fact sheet on employment tests and selection procedures and addressed that subject in the context of disparate impact claims.[4]

Not surprisingly, the EEOC did not address AI back then, but it did refer to, "[personality] tests and integrity tests [that] assess the degree to which a person has certain traits or dispositions," which arguably could encompass various forms of AI currently in use. Among the best practices noted by the EEOC is the following: "Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used."

And the EEOC further noted it is the employer's (and not the vendor's) responsibility to ensure the test's validity. Thus, employers may well have to understand and indeed,

validate, the AI they are using to be able to defend themselves in a disparate impact action.

Relatedly, while employers are presumably responsible for the AI they use in hiring, employers are most certainly seeking to obtain indemnification from AI vendors in the event the employer is ultimately found liable for discrimination based on an AI-driven process.

The Future

As employers ever increasingly rely on AI in the employment process, and particularly in hiring, the question of whether it eliminates or perpetuates bias will be central to debates over its utility. In resolving that question, the algorithms themselves as well as the underlying data upon which they rely are likely to become focal points from both a legislative perspective and in litigation.

While very little has occurred on either front thus far, this will likely change as the use of AI grows. How the potential disclosure of that information will be addressed and whether it can be accomplished in a manner that the AI vendors themselves can live with remains to be seen.

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[1] https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.

[2] http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=101-0260.

[3] State of Washington, House Bill 1655 (2019).

[4] https://www.eeoc.gov/eeoc/newsroom/release/12-3-07.cfm.