Artificial Intelligence in the Employment Relationship: Friend or Foe?

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Artificial Intelligence (“AI”) is no longer the stuff of sci-fi movies or alien invasions. The technology has permeated everyday life from Siri and Alexa to Facebook and Google. While marketing teams have been relying on AI for years to help streamline business efforts and target consumers, employers have finally joined in on the hype.

While the use of AI can be an efficient and cost effective means for employers to handle tasks such as talent acquisition, compensation analysis, and administrative functions, it is not without its challenges. As lawmakers on the federal and state level struggle to catch up with the rapidly changing technology, it is imperative for employers to stay ahead of the curve and ensure that their use of AI is not exposing them to costly litigation.

The Growing Use of AI
AI is often used in the workplace to assist employers with recruitment through the use of algorithms to make hiring decisions. Notably, although common sense would suggest that AI would help eliminate unconscious (or conscious) bias in the hiring process, it has quickly become apparent that the risk of bias persists.

The Potential for Implicit Bias and Disparate Treatment

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against an individual on the basis of race, color, sex, national origin or religion with respect to all aspects of employment. According to the Bureau of Labor Statistics, the growth of employment in computer science and engineering jobs is more than double the national average. Despite the surge in this field, women and minorities continue to be under-represented. Back in 2016, the U.S. Equal Employment Opportunity Commission stated that diversity in the high-tech sector is “a timely and relevant topic for the Commission to investigate and address.” Since then, some companies have evaluated using AI in the recruitment process in order to increase diversity in their workforce. Unfortunately, it can sometimes have the opposite effect.

When companies train computer programs to filter out the best candidates for interviews, the learning is often based on prior resumes or attributes of previously hired successful candidates. Given the disparity between genders or even races in certain professions, using past data will only perpetuate the problem, as algorithms are taught to favor specific characteristics or experience.

Similarly, employers considering the implementation of AI in the workplace should be cognizant of the potential for age discrimination claims. The federal Age Discrimination in Employment Act (“ADEA”) prohibits age-based discrimination against applicants or employees age 40 or over. The use of AI in the workplace to streamline certain activities could result in a disparate impact on an older workforce and potentially expose a company to discrimination claims. Specifically, if older workers struggle to adapt to new technology, or implicit bias results in the perception that younger employees are better suited to handle the changes than their older counterparts, older employees may be the first to go if the company undergoes a reduction in force as a result of the use of AI.

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