

## **AI! AI? AI. Oh!?: AI is ‘intelligent’ but is it Fair? Unbiased? Non-discriminatory? Legal and Business Resolutions to Implementing this Intelligent Tool**

*Ladies and gentlemen, distinguished guests, and esteemed colleagues, welcome to today's thought-provoking presentation titled "AI! AI? AI. Oh!?: AI is ‘intelligent’ but is it Fair? Unbiased? Non-discriminatory? Legal and Business Resolutions to Implementing this Intelligent Tool." In this engaging session, we delve into the fascinating realm of artificial intelligence (AI) and its profound impact on employment decisions. As AI continues to transform the way companies operate, its "intelligence" raises critical questions about fairness, bias, and discrimination. Today, we embark on a journey to explore the intricacies of AI's role in employment, shedding light on how companies are embracing this powerful tool while striving for equity and legality. Join me as we unravel the complexities and unveil potential resolutions to ensure that AI remains a force for good in the realm of employment.<sup>1</sup>*

Artificial intelligence (AI) is a wide-ranging branch of computer science concerned with building smart machines capable of performing tasks that typically require human intelligence. AI allows machines to model, or even improve upon, the capabilities of the human mind. This cutting-edge technology is at the forefront of technological advancement and is undeniably transforming how employers select, engage, discipline and reward employees. As this technology evolves at a breakneck pace, AI poses both risk and reward to companies who are increasingly relying on algorithms to determine who gets interviewed, hired, promoted, developed, disciplined, and fired.

According to recent studies, 83% of large employers surveyed in some form rely on AI in employment decision-making, and 86% of employers that use AI claim it is becoming a mainstream technology at their company.<sup>2</sup> As summarized in a recent Law Review article by EEOC Commissioner Keith E. Sonderling, et al., “the potential uses and benefits of AI in the workplace are legion.”

Advocates argue that AI speeds up the hiring process and eliminates human bias and subjectivity. If AI is well designed and properly deployed, it can help workers find their most rewarding jobs and match companies with their most valuable and productive employees. Proponents further argue that AI systems can be more efficient and thorough than human recruiters. Moreover, AI can enrich companies’ values and culture by eliminating unlawful discrimination and thereby advancing diversity, equality of opportunity, accessibility, and inclusion in the workplace. Research has consistently shown that AI tools used for employment decision-

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<sup>1</sup> Introductory paragraph drafted “by” Chat GPT in response to the prompt, “Write an introductory paragraph for a presentation regarding how employers are using AI in employment decisions. The presentation will include a discussion on how companies are using AI and what the risks of AI are in regards to employment discrimination” with a request to regenerate the response based on the title of presentation.

<sup>2</sup> Keith E. Sonderling, *Do Robots Care About Your Civil Rights?*, CHI. TRIB., [https://digitaledition.chicagotribune.com/infinity/article\\_share.aspx?guid=285d3467-3dbe-49b1-810e-014aefee1a3e](https://digitaledition.chicagotribune.com/infinity/article_share.aspx?guid=285d3467-3dbe-49b1-810e-014aefee1a3e) (last visited Sept. 1, 2022); see also Joe McKendrick, *AI Adoption Skyrocketed Over the Last 18 Months*, HARV. BUS. REV. (Sept. 27, 2021), <https://hbr.org/2021/09/ai-adoptionskyrocketed-over-the-last-18-months>.

making often result in a greater diversity of hires, unbiased promotion decisions, and better retention of employees through early detection of job dissatisfaction. Wearable technologies such as exoskeleton suits and robotic arms have been able to mitigate the effects of disabilities, thereby broadening employ while simultaneously preventing work-related accidents and improving productivity by reducing absences due to disability and illness.<sup>3</sup>

However, at the same time, the use of AI in employment decision-making triggers several foreseeable (and perhaps, unforeseeable) risks concerning discrimination. Critics of AI in employment decisions routinely point out that the systems relying on and controlled by human inputs are only as good as those who “feed the machine.”<sup>4</sup> For example, if an AI tool is screening applicants for interviews and one of the factors considered is proximity to the anticipated work location, a disparate impact could quickly arise if a specific protected class demographic tends to live in communities that are not as close to the office as other protected classes. In this example, searching for candidates who live close to work could unintentionally screen out employees based on protected class characteristics.

Employment discrimination can also arise if the unlawful biases or predilections of the company’s hiring professionals are inherited or learned by the AI tool. As a consequence, without proper vetting and analysis, AI tools can possibly inject subjective bias into what is otherwise supposed to be an unbiased and objective process, and thereby expose employers to liability.<sup>5</sup>

In the United States, several federal agencies – the Consumer Financial Protection Bureau, the Department of Justice’s Civil Rights Division, the Equal Employment Opportunity Commission, and the Federal Trade Commission – joined together to issue a Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems.<sup>6</sup> Specifically, these agencies have expressed their resolve to “monitor the development and use of automated systems and promote responsive innovation.” These agencies also “pledge to vigorously use our collective authorities to protect individuals’ rights regardless of whether legal violations occur through traditional means or advanced

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<sup>3</sup> Keith E. Sonderling, et al., *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami Law Rev., No. 1, November 8, 2022.

<sup>4</sup> *Id.* (citing William Magnuson, *Artificial Financial Intelligence*, 10 HARV. BUS. L. REV. 337, 354 (2020) (outlining an example of a firm or a rogue employee who constructs a machine learning algorithm that appears unbiased but in fact encoded certain biases to refrain from doing business with individuals of certain religions or races).

<sup>5</sup> Gary D. Friedman & Thomas McCarthy, *A.I. in Hiring: Potential Pitfalls for Employers*, WEIL (Oct. 20, 2020), <https://www.weil.com/articles/ai-inhiring-potential-pitfalls-for-employers>.

<sup>6</sup> Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems, R. Chopra, et al., Apr. 25, 2023 (last visited June 6, 2023); *see also* Miles Indest, et al., *Government Agencies Join Forces Against Bias and Discrimination in AI* (May 2, 2023), [Government Agencies Join Forces Against Bias and Discrimination in AI | McGuireWoods](#) (last visited June 6, 2023).

technologies.”<sup>7</sup> Indeed, now more than ever, regulators are trying to balance the benefits of new AI technology with its risks, particularly in the employment context. As a result, federal, state and foreign regulation is on the rise.

**Federal Regulation:** The National AI Initiative Act of 2020 (Division E, Sec. 5001) was enacted on January 1, 2021, and provides for a coordinated program across the entire Federal government to accelerate AI research and application for the Nation’s economic prosperity and national security.<sup>8</sup> The National AI Initiative’s mission, in part, is to prepare the present and future U.S. workforce for the integration of AI systems across all sectors of the economy and society.<sup>9</sup> In recent years, federal labor and employment enforcement agencies have increased focus on regulating the use of AI in the workplace. For example:

- **Equal Employment Opportunity Commission (EEOC):** In 2020, the EEOC launched an agency-wide initiative to sure that the use of software, including AI, machine learning, and other emerging technologies used in hiring and other employment decisions comply with the federal civil rights laws that EEOC enforces.<sup>10</sup> On Jan. 10, 2023, the EEOC issued a [draft strategic enforcement plan](#)<sup>11</sup> that placed AI-related employment discrimination at the top of its priorities. But the EEOC’s guidance on AI began as early as May 2022, when it issued [guidance](#)<sup>12</sup> on the Americans with Disabilities Act’s application to the use of AI technology in recruiting and employment decisions. That same month, the EEOC also filed its first lawsuit against an employer for allegedly discriminating in its use of AI technology during the hiring process.<sup>13</sup>
- **Office of Federal Contractor Compliance Programs (OFCCP):** In 2019, the OFCCP provided subregulatory guidance to clarify that its validation of employee selection procedures apply equally to any AI-based selection

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<sup>7</sup> *Id.*

<sup>8</sup> P.L. 116-283, Division E, § 5001.

<sup>9</sup> *Id.*; see also National Artificial Intelligence Initiative, *Overseeing and Implementing the United States National AI Strategy*, [www.ai.gov](http://www.ai.gov) (last visited June 6, 2023).

<sup>10</sup> EEOC, *Artificial Intelligence and Algorithmic Fairness Initiative*, <https://www.eeoc.gov/ai>, (last visited June 6, 2023).

<sup>11</sup> Draft Strategic Enforcement Plan, 88 Fed. Reg. 1379 (2023). <https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan> (last visited June 6, 2023).

<sup>12</sup> EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence> (last visited June 6, 2023).

<sup>13</sup> See *EEOC v. iTutorGroup, Inc., et al.*, No. 1:22-cv-02565 (E.D.N.Y. May 5, 2022).

procedures used to make any employment decision, including hiring, termination, promotion, and demotion.<sup>14</sup>

**State Law Regulation:** Some states have also waded into this subject matter from a statutory and regulatory standpoint.<sup>15</sup> For example, on July 5, 2023, New York City’s Department of Consumer and Worker Protection will begin enforcement of [Local Law 144](#), which regulates the use of AI in “employment decisions.” Before employers or HR departments use automated employment decision tools to assess New York City residents, they must generally: (1) conduct a bias audit; (2) notify candidates or employees residing in the city about the use of such tools; and (3) notify affected persons that they may request an accommodation or alternative process. Violations of the law are subject to civil penalties, which may accrue daily and separately for each violation.

In 2020, Illinois enacted the Artificial Intelligence Video Interview Act ([820 ILCS 42](#)) to govern the use of AI to assess video interviewees for jobs in Illinois. Employers recruiting in Illinois should take special care to: (1) obtain consent from applicants before using AI, after explaining how the AI works and its evaluation standards; and (2) ensure proper control of video recordings and deletion upon request. Unlike New York City’s law, however, the Illinois law does not include explicit civil penalties.

In 2020, Maryland passed its AI-employment law, called [H.B. 1202](#). H.B. 1202 prohibits employers from using facial recognition technology during an interview for employment to create a facial template without consent. Consent requires a signed waiver that states: (1) the applicant’s name; (2) the date of the interview; (3) that the applicant consents to the use of facial recognition; and (4) whether the applicant read the consent waiver. Like the Illinois law, the Maryland law does not include a specific penalty or fine.<sup>16</sup>

**Foreign Regulation:** AI regulation is not limited to the United States. In April 2021, the European Commission proposed the [Artificial Intelligence Act](#),<sup>17</sup> which could

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<sup>14</sup> See Nathaniel Glasser, et al., *Are Your AI Selection Tools Validated? OFCCP Provides Guidance for Validation of AI-Based Algorithms*, National Law Review (July 31, 2019), <https://www.natlawreview.com/article/are-your-ai-selection-tools-validated-ofccp-provides-guidance-validation-ai-based> (last visited June 6, 2023).

<sup>15</sup> Yasser A. Madriz, et al., *Employers Beware: The Rise of AI (Regulation)* (Apr. 17, 2023), [Employers Beware: The Rise of AI \(Regulation\) | McGuireWoods](#) (last visited June 6, 2023).

<sup>16</sup> Several other states have introduced bills to regulate AI. *Id.* For example, in Washington, D.C., the Stop Discrimination by Algorithms Act ([B24-0558](#)) sought to restrict the use of algorithms that make decisions based on protected personal traits. In Massachusetts, [MA H.B. 136](#) sought to require certain “data aggregators” using automated technology to perform: “(i) continuous and automated testing for bias on the basis of a protected class; and (ii) continuous and automated testing for disparate impact on the basis of a protected class.” While both bills appear to have died in chambers, similar bills are likely to resurface in the future. Finally, many states are creating councils to oversee AI and new regulations. In Texas, for instance, [H.B. 2060](#) would establish the Artificial Intelligence Advisory Council to monitor Texas state agencies’ use of AI systems. In 2020, the Texas Workforce Commission allegedly was “able to clear its backlog of unemployment claims with a chat bot.”

<sup>17</sup> European Commission, “Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union

transform AI regulation in much the same way that the General Data Protection Regulation transformed data privacy. The EU's proposed AI Act focuses on accountability, transparency, user rights and risk assessment, with regulations adapting to the AI technology's risk tier: unacceptable, high, limited and minimal. Moreover, the World Economic Forum recently published a toolkit for HR professionals on the responsible use of AI-based HR tools.<sup>18</sup>

The following resources, all cited herein and available on-line, will help develop a working “e-library” as to the use and regulation of AI issues related to employment decisions.

- <https://www.eeoc.gov/ai>
- <https://www.eeoc.gov/select-issues-assessing-adverse-impact-software-algorithms-and-artificial-intelligence-used>
- <https://www.eeoc.gov/joint-statement-enforcement-efforts-against-discrimination-and-bias-automated-systems>
- <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>
- <https://repository.law.miami.edu/umlr/vol77/iss1/3/>
- <https://rules.cityofnewyork.us/wp-content/uploads/2022/12/DCWP-NOH-AEDTs-1.pdf>
- <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>
- [Government Agencies Join Forces Against Bias and Discrimination in AI | McGuireWoods](#)
- <https://www.whitehouse.gov/wp-content/uploads/2022/12/TTC-EC-CEA-AI-Report-12052022-1.pdf>

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Legislative Acts,” COM(2021) 206 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0206> (last visited June 6, 2023).