Recruiting in the Robot Age

Examining Potential EEO Implications in Optimizing Recruiting Through the Use of Artificial Intelligence

By Michael A. Chichester Jr. and Jaclyn R. Giffen

Artificial intelligence (AI) is no longer just a clever plot device existing in the imaginations of science-fiction writers and directors—it is beginning to permeate the workplace. On February 11, 2019, President Trump issued an Executive Order on Maintaining American Leadership in Artificial Intelligence.[1] While the executive order is largely aspirational, it is notable in that the U.S. government is prioritizing AI development.

Employers are at the forefront of using AI not only to expand their workforces' capabilities, but to streamline related human resources (HR) duties. Existing and emerging advanced technologies will aid employers in workforce planning, recruiting, and employee evaluation.[2] For example, in 2016, Russian startup Stafory created Robot Vera (https://ai.robotvera.com/static/newrobot_en/index.html) to review résumés, handle applicant phone screenings, and conduct video interviews. Stafory reports that Vera has conducted 1.4 million phone interviews and 10,000 video interviews. While Vera has been used predominantly in Russia and the Middle East, Stafory began two pilot projects in the United States in 2017 under the name "Wendy."[3]

The desire to use AI like Vera and sophisticated algorithms in the HR realm is driven in part by a desire to reduce human error and biases that can creep into decision making, leaving employers vulnerable to discrimination claims. Simply put, an algorithm is "a step-by-step procedure for solving a problem or accomplishing some end."[4] In this sense, algorithms are used to get through everyday life. Applying AI to hiring, the idea is to leverage huge amounts of data and complicated algorithms to identify and recruit optimal talent. However, AI is not immune to potential biases, and the increased use of algorithms to drive decision making has exposed the risk of "algorithmic bias." If an algorithm's built-in bias has a disparate impact on a certain class of individuals, what are the legal ramifications? Because an algorithm may be deployed to analyze vast swaths of data, known as "big data," and may be capable of self-learning (adjusting the algorithm based on data analysis), factors used to reach a decision may be completely
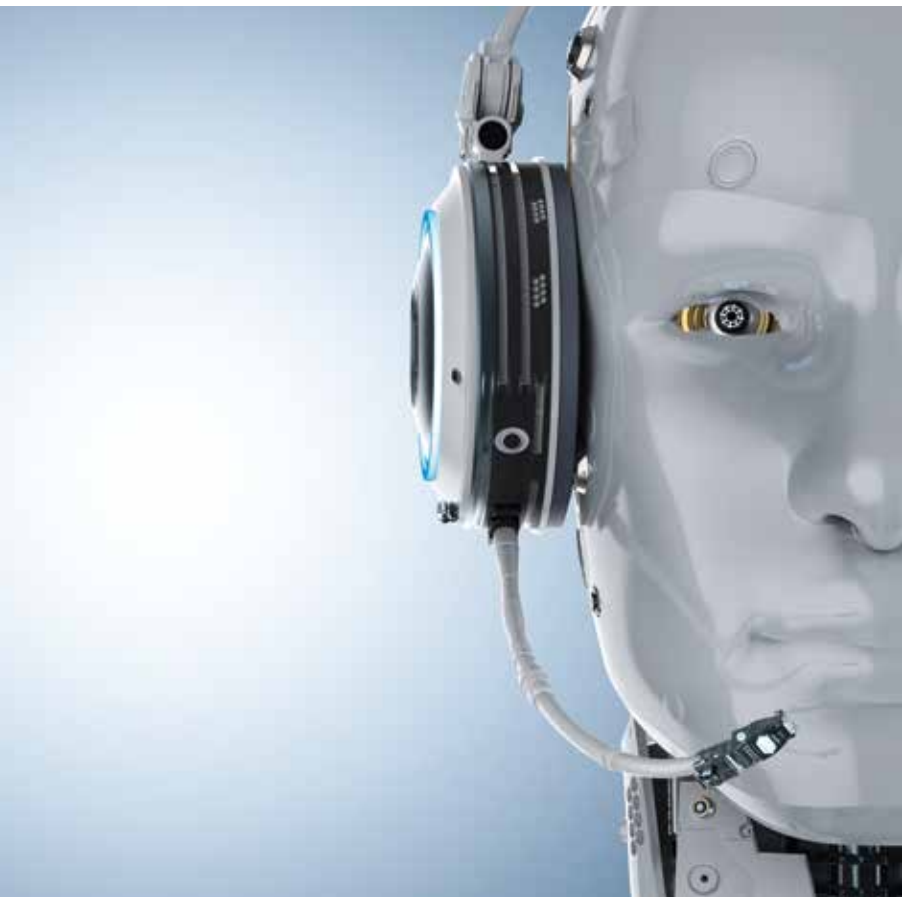
opaque.[5] Employers must become educated consumers of AI tools, understand the risks associated with such tools, and take simple but critical steps to safeguard against litigation.

AI's role in HR recruitment and hiring

Using algorithms to review résumés and other data to determine which applicant is the best fit is becoming commonplace. For example, HiredScore (https://hiredscore.com/), founded in 2012 and winner of a 2016 IBM Beacon Award for Outstanding Smarter Workforce/Kenexa Solution, leverages big data and predictive analytics to create custom recruiting algorithms to identify the highest priority candidates. Similarly, ZipRecruiter (https://www.ziprecruiter.com/) brands itself as "the smartest way to hire, for any size company in every industry," and explains it uses a "powerful algorithm that connects the right content with the right people."

Another company, HireVue (https://www.hirevue.com/), markets itself as an assessment and video interview software tool leveraging AI to assist companies in making "better predictions, better decisions, better hires." HireVue combines interviews and predictive analytics to help companies make better and faster hiring decisions while eliminating the unconscious bias that exists with human review. Its platform also uses games to assess applicants' competencies. The information is provided to the employer to assess candidates.

Whether an employer uses easily observable AI such as Vera or opts for other AI tools such as HireVue's games approach, the purpose is to streamline hiring procedures and eliminate the unconscious bias that can creep into hiring decisions. So what can go wrong?

What is algorithmic bias?

Algorithmic bias is the notion that humans who design the algorithms used in tools such as Vera inadvertently build their own unconscious biases into the algorithm, which could negatively impact a particular candidate group. As a simple example, assume that a review of a company's résumé data demonstrates that its employees living in a particular zip code are its most successful. Based on that correlation, the algorithm could begin focusing on candidates from that zip code. But what if that zip code's population is 98 percent Caucasian? Although the algorithm is using a neutral data point (zip codes), is it potentially creating a disparate impact on non-Caucasian applicants? If this hypothetical situation were to arise, the employer would need to be prepared to explain its AI processes to defend against a possible discrimination claim—but understanding why the algorithm generated a particular outcome could itself prove challenging.

Understanding the root of this bias is often complicated due to the proprietary, trade-secret nature of algorithms. It may be even more complicated to understand if the algorithm is self-learning and constantly adjusting as it ingests new data. And while HR management has increasingly deployed the use of algorithms, it remains a largely unregulated area. Litigation over the use of AI has been brought in other arenas, however, such as using algorithms in criminal sentencing or using employees' biometrics (such as fingerprints or voice patterns) without proper consent.[6] In the employment context, private and nonprofit entities are studying the effects of AI, algorithms, and related processes on workers.

At a Glance

Artificial intelligence (AI) is no longer just a clever plot device existing in the imaginations of science-fiction writers and directors—it is beginning to permeate the workplace. Employers are at the forefront of harnessing AI and must be prepared to navigate this brave new world.

The AI Now Institute at New York University (https://ainowinstitute.org/) researches the social implications of AI. The institute has created an algorithmic accountability policy toolkit that explains how algorithms are used in a government setting and provides tools for learning more information.[7] On the other end of the spectrum, O'Neil Risk Consulting & Algorithmic Auditing (http://www.oneilrisk.com/) conducts audits to help employers assess algorithms for bias with the goal of creating a standard for the field. O'Neil Risk helps employers with assessing risks associated with using algorithms, using algorithms fairly, and planning for litigation. Many believe the purpose of AI and algorithms is to level the playing field; both AI Now and O'Neil Risk are working to create processes and procedures to eliminate algorithmic bias to ensure the field is level.

The U.S. Equal Employment Opportunity Commission (EEOC) is also exploring AI's impact on the workplace and the antidiscrimination statutes it oversees. On October 13, 2016, the EEOC empaneled a slate of experts in Washington, D.C.,
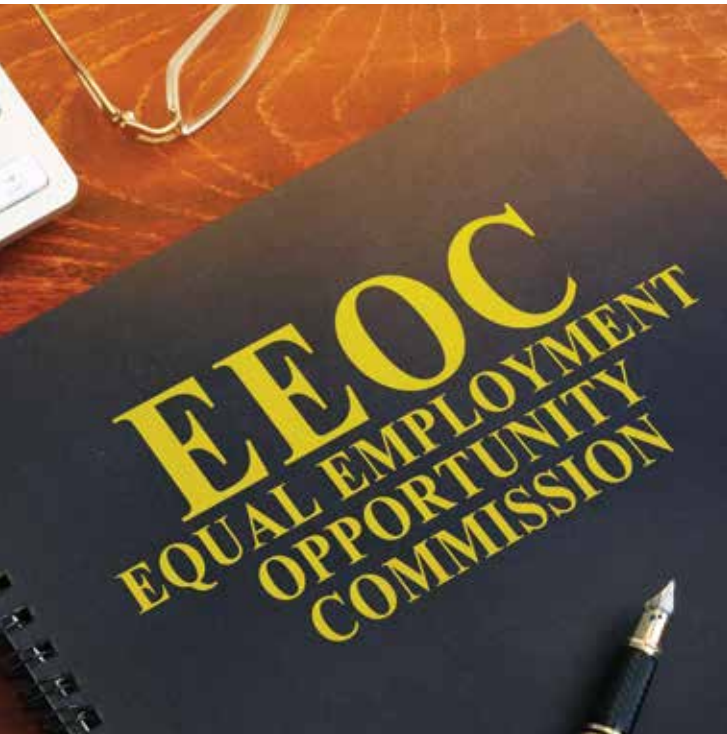
to discuss the matter of big data in the workplace.[8] In her opening remarks, Commissioner Charlotte A. Burrows said:

> [I]n short, the algorithms used to assess big data are only as good as the assumptions that underlie them. Because the use of big data in employment is just beginning, this is an ideal time for the Commission to take a close look at this issue and see whether there are concrete suggestions that can help employers and employees benefit from this new technology… while still advancing equal employment opportunity.[9]

As Littler shareholder Marko Mrkonich testified, a critical next step for regulators, employers, and other stakeholders is learning about the opportunities for using AI and how it can be properly deployed.[10]

What can you do about it?

Employers can expect the wave of workplace AI tools to continue, and they should use those that best fit their HR needs. To help safeguard against litigation, employers should consider the following.

Become an educated consumer

Before implementing algorithms or automated decision-making programs, think critically about the information you want to learn or the processes you want to expedite through these tools. Select a vendor that best aligns with your company's goals. The vendor should be able to answer all your questions and concerns. For example, HireVue's chief technology officer published a blog post setting forth the steps it takes to prevent algorithmic bias and common misconceptions about AI tools.[11] It is ultimately the employer's responsibility to ensure its workplace is free from discrimination.

Know your data

Companies use algorithms to mine data they have already collected to predict certain outcomes. An applicant's résumé, LinkedIn profile, and answers to screening questions are all data points that can be analyzed for predictive indicators of whether the applicant is the right fit. But predictions are only as accurate as the data being analyzed. In other words, garbage in equals garbage out. The data should be complete with no missing or unreliable factors, fit the questions you want answered, and be voluminous enough to provide statistically relevant results.

Review your processes

HR departments automate processes to save time and money. But a "set it and forget it" mindset increases the risk of litigation. Automated decision-making programs will continue to generate results under the same rules and parameters until programmed otherwise. Although AI potentially minimizes risks associated with human error and unconscious bias, human involvement must not be eliminated. Regularly reviewing your automated decision-making programs, including the data being used, is necessary.

Learn about data privacy

As the use of AI in the workplace increases, employers will gather more data about employees and applicants. As a result, employers will see an increase in legislation regulating the use and protection of personal data. In 2018, new data laws included the European Union's General Data Protection Regulation (GDPR), the GDPR-styled California Consumer Privacy Act, and data-breach notification laws in several states.[12] Biometric privacy laws were enacted in Illinois, Texas, and Washington,[13] and similar legislation has been introduced in additional states, including Michigan in 2017.[14] The wave of legislation will continue, and employers must stay current to ensure compliance.

AI tools are transforming the workplace. Automating and simplifying HR processes is only scratching the surface in terms of how AI can elevate a company. The Emma Coalition

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is a nonprofit, nonpartisan organization designed to prepare businesses for the effects of automation on employees.[15] Using the Emma Coalition and its resources is one way employers can stay informed of the rapid growth and change in AI. Employers that remain educated, regularly analyze their data, and monitor how that data is being used are well-positioned to avoid needless litigation and remain at the forefront of innovation. ∎

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ENDNOTES

1. Metz, *Trump Signs Executive Order Promoting Article Intelligence*, The New York Times (February 11, 2019) <https://www.nytimes.com/2019/02/11/business/ai-artificial-intelligence-trump.html> [https://perma.cc/CH55-Z48H]. All websites cited in this article were accessed April 20, 2019.
2. Bullock, *The Top 6 Ways That Artificial Intelligence Will Affect Your Business In The Near Future*, Forbes (February 25, 2019) <https://www.forbes.com/sites/lilachbullock/2019/02/25/the-top-6-ways-that-artificial-intelligence-will-affect-your-business-in-the-near-future/#553e7efd1966> [https://perma.cc/JT2V-SDYR].
3. *Russian HR robot wins global startup competition*, East-West Digital News (October 27, 2017) <http://www.ewdn.com/2017/10/27/russian-hr-robot-wins-global-startup-competition/> [https://perma.cc/PM6G-9SFT].
4. "Algorithm," Merriam-Webster Dictionary (online) <https://www.merriam-webster.com/dictionary/algorithm>.
5. Mathiason, et al, *Future Workforce—2018 Thought Leadership Roundtable Report*, Littler (December 13, 2018) <https://www.littler.com/files/18_littler_future_workforce_thought_leadership_0.pdf> [https://perma.cc/3ML7-NPWU].
6. Tashea, *Risk-assessment algorithms challenged in bail, sentencing and parole decisions*, ABA Journal (March 2017) <http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole> [https://perma.cc/6KTT-BDLE] and Appenteng & Gordon, *Biometric Privacy Case Before Illinois Supreme Court Could Open Litigation Floodgates*, Littler (November 16, 2018) <https://www.littler.com/publication-press/publication/biometric-privacy-case-illinois-supreme-court-could-open-litigation> [https://perma.cc/XQF6-JVUB].
7. AI Now Institute, *Algorithmic Accountability Policy Toolkit*, New York University (October 2018). This and other informative publications are available at <https://ainowinstitute.org/reports.html>.
8. Equal Employment Opportunity Comm, Meeting of October 13, 2016—Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law <https://www.eeoc.gov/eeoc/meetings/10-13-16/index.cfm> [https://perma.cc/LE7G-YXLT].
9. *Id.* at Meeting Transcript [https://perma.cc/7F4R-9MUX].
10. *Id.*
11. Larsen, *Artificial Intelligence, Diversity & Inclusion, Hiring Assessments*, HireVue (June 21, 2018) <https://www.hirevue.com/blog/hirevue-assessments-and-preventing-algorithmic-bias?hsCtaTracking=225aef8f-1156-4d38-aa7d-59d1bb626549%7C7c681f74-b268-4a44-8470-fcf8ddb08688> [https://perma.cc/L3JE-6NHS].
12. Appenteng, *Fourth Quarter 2018 Workplace Privacy Update*, Littler (September 17, 2018) <https://www.littler.com/publication-press/publication/fourth-quarter-2018-workplace-privacy-update> [https://perma.cc/Y87W-JBFY]; Gordon & Gray, *Unraveling the Newest Development in the Data Protection Juggernaut: What does the "California Consumer Privacy Act of 2018" Mean for Employers?*, Littler (July 9, 2018) <https://www.littler.com/publication-press/publication/unraveling-newest-development-data-protection-juggernaut-what-does> [https://perma.cc/6VQT-CDJZ]; and Gordon & Appenteng, *Navigating Global Payroll Under Impending EU General Data Protection Regulation*, Littler (September 7, 2017) <https://www.littler.com/publication-press/publication/navigating-global-payroll-under-impending-eu-general-data-protection> [https://perma.cc/2KUZ-3FSM].
13. Gordon & Appenteng, *Dear Littler: What Does Our Company Need to Do Before We Begin Using Biometric Timeclocks?*, Littler (December 6, 2017) <https://www.littler.com/publication-press/publication/dear-littler-what-does-our-company-need-do-we-begin-using-biometric> [https://perma.cc/9Q3N-H2Z6].
14. 2017 HB 5019. Although a new biometric privacy bill has not yet been reintroduced in Michigan this year, it is still early in the state's legislative session.
15. *The Emma Coalition: Securing the Future of Global Employment*, Littler <https://www.littler.com/service-solutions/wpi/emma-coalition>.