

Exploring the Intersection: Generative AI and Employment Regulations*

Presented By:

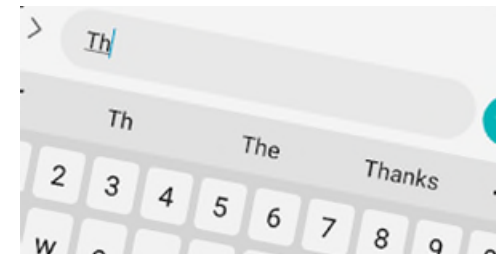
Tawny Alvarez, Partner
talvarez@verrill-law.com

What is AI?

- In layman's terms: *A sophisticated way of using computers to detect patterns and perform tasks that are typically associated with human thinking.*
- The way that AI “thinks” however, and the decisions that it “makes” are based on language models or inputs
 - ChatGPT uses inputs, and those inputs are created by humans...who have bias...but we don't know what those bias are because we don't have transparency into the process.
- AI is not self-sustaining, but requires human engagement

You're Already Using It . . . Even If You Didn't Realize It At the Time

- Remember this guy, who would ask if you need help writing a letter?
- Or the predictive text feature on your phone?
- Or how you can “filter” out applicants with less than two years of experience in certain job collection programs?
- Or how when you run a spell/grammar check you don't blindly accept all suggested edits/changes



Existing AI Laws/Executive Orders

- AI in Government Act (2020)—U.S. Office of Personnel Management to identify the skills and competencies needed for AI-related federal positions.
- The National AI Initiative Act (2021)—Overarching framework for a national AI strategy and federal offices and task forces to implement.
- AI Training Act (2022)—U.S. OMB to establish or provide AI training for acquisition workforce.
- Executive Order on Safe, Secure, and Trustworthy AI (2023)—AI standards covering all aspects of our daily lives including employment-related.
- White House’s Blueprint for an AI Bill of Rights (2022)—Used as the foundation for the 2023 Executive Order

Existing AI Regulations & Guidance

- EEOC AI and Algorithmic Fairness Initiative (2021)—requires that AI tools used for employment decisions are in compliance with EEOC laws.
- EEOC AI Guidance (2022)—States that employers use of software, algorithms, and/or AI for job evaluation and/or hiring decisions may violate the ADA.
- EEOC Technical Assistance Document (2023)—Sets forth concerns about use of AI and possible Title VII considerations
- OFCCP—AI and EEO for Federal Contractors (2024)—Provides list of key elements to be considered when using AI in employment-related situations.

Sampling of Proposed AI Laws (Federal)

- 2892—Algorithmic Accountability—Regulate companies' use of AI to make critical decisions that could affect an individual's employment and provide ongoing training and education.
- 262—Stop Spying Bosses—Seeks to stop technology that tracks employees (either activity or location) unless the employer has disclosed the use of such technology to applicants and employees and would require that the information be publicly provided with details about how it affects employment-related decisions.
- 2419—No Robot Bosses—Bans employers from making employment decisions (pay, benefits, scheduling) based exclusively on automated decision systems
- Multiple bills concerning cybersecurity and data privacy issues.
- Multiple bills concerning national framework regarding AI transparency and accountability.

Understand AI Risks in the Employment Relationship

Hiring

- Is there notice to applicants of their right to request a reasonable accommodation in the application process?
- Does the AI intentionally or unintentionally screen out individuals with a disability based on screening assessments or parameters?
 - If you tell the algorithm that you won't consider anyone who gets below a certain score on a screening test, that would not take into account a reasonable accommodation for an individual who may be able to perform the job duties but at a different pace/rate.
- Chat bots screening out individuals with gaps in employment
- Reading of speech patterns in video applications
- Personality tests that are based on the personality of individuals currently successful in the role.

Performance Tracking or Learning & Development

- Are reasonable accommodations taken into account when viewing accuracy or productivity standards?
- National Labor Relations Act
- Do you have an AI Policy?
 - Is the work product being produced by team members their own or could they be relying upon AI?
 - Have you educated employees about the risks associated with using publicly available AI and the company's confidential information/data?

Other Risk-Prone Areas

- Leave Administration/Accommodation Administration
 - You cannot simply outsource the interactive process to AI
- Employee Evaluations
 - How do leave laws and protected leaves play a role in the evaluation?
 - Does past experience/education play a role in the work evaluation?
 - Are the items being measured relevant to the position?

AI Helping You with Documents and Policies

Ways in which HR Could Use AI....with caveats

- **Creating Policies**
 - Don't have a Generative AI Policy? Could AI provide you with the building blocks to create one?
 - Should include: Purpose, Scope, Compliance with other Policies, Guidelines for Using AI Tools (including Confidential Information); AI Tool Audits; Training Obligations; Reporting Non-Compliance
- **Job Descriptions**
 - This could serve as a good starting point, but closely look at the qualifications necessary—are they necessary?
 - Look closely at the Physical Requirements—are they limiting the applicant pool by including “requirements” that are not actually requirements.
 - EEOC's view

ChatGPT in Action: Bank Teller Job Description

You
Please Provide a Job Description for a Bank Teller

ChatGPT
Job Title: Bank Teller

Job Summary:

As a bank teller, you will be the frontline representative of the bank, responsible for providing exceptional customer service while performing various financial transactions. You will assist customers with their banking needs, including deposits, withdrawals, loan payments, and account inquiries. Additionally, you will promote and cross-sell bank products and services to meet customer needs and contribute to the overall success of the branch.

Responsibilities:

1. Greet customers in a friendly and professional manner, providing prompt and efficient service.
2. Process customer transactions accurately and efficiently, including deposits, withdrawals, transfers, and check cashing.
3. Assist customers with account inquiries, balance inquiries, and account maintenance.
4. Identify opportunities to cross-sell bank products and services, such as savings accounts, credit cards, and loans.
5. Educate customers on the features and benefits of various banking products and services.
6. Adhere to bank policies and procedures to ensure compliance with regulatory requirements and mitigate risk.
7. Balance cash drawer and maintain accurate records of all transactions.
8. Resolve customer issues and complaints in a timely and professional manner.
9. Collaborate with team members to achieve branch goals and targets.
10. Stay informed about changes in banking regulations, products, and services to provide accurate information to customers.

Qualifications:

1. High school diploma or equivalent.
2. Previous customer service experience preferred.
3. Strong communication and interpersonal skills.
4. Excellent attention to detail and accuracy.
5. Ability to multitask and work efficiently in a fast-paced environment.
6. Basic computer skills and familiarity with banking software.
7. Knowledge of banking products and services is a plus.
8. Ability to maintain confidentiality and handle sensitive information with discretion.
9. Willingness to participate in ongoing training and professional development.
10. Flexibility to work weekdays, weekends, and some holidays as needed.

Physical Requirements:

1. Ability to stand for extended periods.
2. Ability to lift and carry up to 25 pounds.
3. Manual dexterity to operate a computer keyboard and cash handling equipment.
4. Visual acuity to read and interpret documents and customer information.

Working Conditions:

Bank tellers typically work in a climate-controlled indoor environment, often behind a counter or at a desk. The job may require occasional overtime during peak periods, such as month-end or holiday seasons.

AI May Make the Decision, But The Company Keeps the Liability

- Employers are liable for the decisions that AI “makes”
- Intention is irrelevant in disparate impact case
- *Mobley v. Workday, Inc. (N.D. Cal.)* Hearing on Mt. to Dismiss Amended Complaint was May 14
 - *Class Action lawsuit alleging that Workday’s platform is more likely to deny applicants who are African-American, suffer from disabilities and/or are over 40.*
 - *Workday provides HR Management Services to medium-sized and large organizations and provides customers with an applicant screening service.*
 - *Alleges that the AI screening system is made up of human biases that have adversely affected certain demographics.*
 - *Plaintiff has applied for over 100 positions thru the platform and been denied each time.*

Investigations

Don't Trust the internet....or your eyes... or your ears

- Deepfake AI
 - Deepfakes often transform existing source content where one person is swapped for another. They also create entirely original content where someone is represented doing or saying something they didn't do or say.
 - Employees saying or doing something they did not do
 - Pikesville Maryland principal goes viral after recording of him making racially insensitive and antisemitic remarks. Months later, police conclude it was a deepfake generated by AI.
- Maintain a zero-trust mindset.
 - Prioritize critical thinking
 - Check to see if there are parts of the video/image publicly available elsewhere

Employee Surveillance

- All monitoring of employee activities could violate Employee's Section 7 rights under the National Labor Relations Act and Section 8(a) rights if the surveillance “would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act.”
 - Must be narrowly tailored to address legitimate business needs
 - Example of behavior that may not be narrowly tailored –
 - Transcription and recording of all zoom meetings on company business account are sent to management team.

So What You're Saying is Don't Use AI?

Nope; that's not the solution!

- Your company will need to use AI to remain competitive
- In doing so, however, you will have to check and double-check to make sure that the AI tools you are implementing are free from bias and not otherwise violating your obligations under state and federal law
- Question vendors on their inputs—their biases become your organization's biases.
- Check the output—Are you seeing applicants from diverse backgrounds or is every candidate cookie-cutter images of each other?

What Does This Look Like Specifically?

- If the tool requires interface engagement, is the interface accessible to as many individuals with disabilities as possible?
- Are there alternative formats of materials available (and if so, what formats)?
- Are there any limitations where no alternative format would be available/an individual with a certain disability would be unable to engage similarly in the process as an individual without limitations?
- Has the vendor performed an audit to identify biases within the algorithm/materials? For example, did the vendor perform an audit to determine whether any of the traits or characteristics that are measured by the tool are correlated with certain disabilities?
- Companies should additionally take steps to make sure the assessments:
 - clearly indicate that reasonable accommodations, including alternative formats and alternative tests, are available if needed as a result of a disability;
 - provide clear instructions as to how to request reasonable accommodations; and
 - in advance of the assessment, provide those undergoing the assessment by the algorithmic decision-making tool with as much information about the tool as possible, including information about which traits or characteristics the tool is designed to measure, the methods by which those traits or characteristics are to be measured, and the disabilities, if any, that might potentially lower the assessment results and how this is related to the essential functions of the job.

Additional Steps to Take

- In Performance evaluations:
 - Train staff as to how to respond to requests for accommodations
 - Audit the current evaluation process to determine whether it unfairly disadvantages individuals who have been provided with reasonable accommodations
 - If the audit determines that there are gaps that make the evaluation inequitable or otherwise disadvantages individuals, make edits to the process
 - If the performance management system is outsourced to a third party, see previous slides concerning making sure the process is free from bias.
 - Make sure we are measuring only abilities or qualifications that are truly relevant to the position

Thank You

Tawny Alvarez

talvarez@verrill-law.com