Artificial Intelligence in Employment Law

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Artificial Intelligence (AI), once considered futuristic, is now commonly used to recruit, hire, retain and terminate employees. Currently, the most common way AI is used by employers is in recruiting and hiring. For example, employers have access to software that sifts through resumes and identifies job candidates to determine the best match for a given position and/or company. AI is also used to evaluate video interviews to determine which potential candidates are likely to be successful in a position or at a particular company.

Supporters of the use of AI believe it has multiple benefits, including increased time efficiency. By automating the process of hiring, AI can save employers a substantial amount of time in selecting candidates. This may increase the likelihood of hiring quality job candidates who are the desired fit for a given workplace. Employers also use AI to try to reduce intentional or implicit bias in the selection of successful job candidates, thus increasing the diversity of their workforces.

Employers considering the use of AI should be aware of two major concerns that have arisen from its use: the potential for invasion of employee privacy, and the risk of discriminatory decision-making that does not reduce hiring bias.

The Use of AI by Employers as a Privacy Concern

Since AI gathers a large amount of data about each employee that it evaluates, privacy is a big issue. Several states have already passed laws requiring certain steps be followed before an employer can use AI. Generally, these laws require that the employer make a disclosure about how employee information is collected, and the ways in which it will be used by the employer. The laws require that a potential employee consent in writing prior to the employer's use of AI, and that the data gathered be kept confidential and destroyed at the end of the process.

Concerns Regarding Biased Decision-Making

A lack of careful vetting of AI algorithms in software used by employers has resulted in discriminatory and biased hiring decisions. This illustrates the concept of "junk in, junk out," or the idea that data output is only as reliable as the information that is inputted. Thus, several states have passed legislation or have pending legislation that ensures that AI will not result in discriminatory employment decisions. For example, on January

1, 2023, a New York City law applying to employers and employment agencies that use "automated employment decision tools" will become effective, requiring a bias audit of any employer-used AI program to ensure that it does not yield discriminatory results. The law also requires companies to notify potential employees that the AI tool will be used in their decision-making process and establishes penalties for employers if they do not follow the law's regulations.

Takeaway: Employers who wish to use AI to automate the process of hiring or other employment decisions should ensure that they comply with state law that may concern the privacy rights of employees and/or the potential for bias in AI programs. If you need help in the use of AI in employment decisions or regarding any other federal or New Jersey employment law, contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

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