Employers And Artificial Intelligence: 6 Pitfalls To Watch For

By **Vin Gurrieri**

Law360 (May 12, 2021, 7:37 PM EDT) -- With states rapidly lifting pandemic restrictions, employers looking to ramp up operations after a year of layoffs and lockdowns may be in the market for technology that speeds up the hiring process. But while artificial intelligence hiring tools may be tempting, they could leave businesses facing discrimination claims if not used carefully.

Whether employers are looking to use an automated system developed internally or one from an external party, there are benefits that employers may feel they're getting, such as the elimination of unconscious bias from the hiring process.

But those benefits may come at a cost, namely the potential that the AI tools unlawfully screen out people based on protected characteristics like age, sex and race. That could lead to discrimination lawsuits and costly class actions if the use of a faulty algorithm is widespread, a risk that is evermore acute if businesses are hiring in bulk as pandemic restrictions wane.

Nathaniel Glasser, co-leader of Epstein Becker Green's artificial intelligence practice group, said employers' increasing reliance on AI tools is "consistent with the trend we were starting to see even before the pandemic."

"We expect that because the pandemic has caused employers to utilize very strict tools not just for remote work but to hire people remotely, that trend will accelerate as people go back to work and a number of employers have to quickly increase their workforces," Glasser said.

Here, experts identify six potential pitfalls employers face when they deploy AI-based tools as part of their hiring and recruitment processes.

Skewed Underlying Data Yielding Biased Results

In the hiring context, AI tools can help match employers with candidates who are most likely to excel in the job. Some common ways those tools are used by businesses include sorting through resumes and other job application materials based on keywords that are likely predictors of future performance or excluding people with items on their resumes that the algorithm considers indicators of a bad fit for the job.

Those algorithms can be fed information about a company's existing workforce, particularly those who are high-performing workers, to fish out candidates with similar backgrounds and attributes.

But if the input contains a biased set of data, the AI tool could carry out existing biases.

For example, if a company's existing workforce is predominantly male and their resumes include references to traditionally male activities, the AI tool might use that knowledge to screen out resumes that mention a candidate's participation in women's leadership groups.

"The problem that could create is, for example, it could be screening out all sorts of applicants just based on the AI program because whatever the program is doesn't think that certain words [are] associated with high performance," said Brian Mead, a partner at McDermott Will & Emery LLP. "It

could decide that certain words [are] unlikely to [yield] successful candidates, and then it's prescreening out members of protected classes and categories of applicants in a discriminatory way."

Another example is when employers request that an AI tool prioritize people who live in a ZIP code within a few miles of the office, which could lead to bias claims if that geographic area is predominantly white and the search tool excludes a more diverse pool of applicants based on where they live even though they can perform the job.

AI vendors who may not be knowledgeable about equal employment opportunity laws might create a biased hiring process by building such standards into their algorithm, according to Adam Forman, a member at Epstein Becker whose practice focuses on emerging issues in the workplace related to technology.

"You have an unlawful disparate impact claim because even though the selection criteria on its face is neutral — it's just based on where someone lives, not their race — it has the impact of excluding people based on their race," Forman said. "That would be unlawful and makes the entire selection process suspect."

Overlooking Disability Accommodations

For employers that do have avoiding bias in mind when thinking about AI tools, the focus is usually on race, gender and age discrimination. But a different type of bias may fall through the cracks: disability discrimination.

Under the Americans with Disabilities Act, employers are required to make reasonable accommodations for employees or job applicants who have physical or mental disabilities. In the context of AI tools, it may be easy for employers to overlook the fact that some people, because of a physical limitation, may not be able to use the tool, Epstein Becker's Glasser said.

"Employers have to think about how the use of an algorithm might impact people with disabilities, and whether and to what extent they can offer a reasonable accommodation for an individual with a disability who might not be able to use the assessment as intended by the creator," Glasser said.

Forman added that disability inclusion "is a really big deal," since there are millions of Americans who have a mental or physical condition that would qualify as protected under the ADA.

"Some of these selection tools that require games or swiping right and left to test your personality are not accessible by people who have a disability," Forman said. "Or they are doing an assessment on how quick you answer or verbalize your answer. And if you have a learning impairment, that doesn't mean you are unqualified for the position with or without a reasonable accommodation, but you're getting screened out by the algorithm before you start. By the way, the same is true for people of different ethnicities or for whom English is not their native language."

Narrowing the Field Too Much with 'Microtargeting'

Even before resumes are sorted and applicants screened, there are AI tools available that help employers craft their initial job advertisements, as well as "passive sourcing" technology, which lets employers proactively seek out candidates who fit particular positions, according to Forman and Glasser.

Particularly when it comes to passive sourcing, one of the major legal risks employers face involves the practice of "microtargeting," or sending unsolicited employment ads to potential candidates whom algorithms identify as having the right background for a specific job.

The risk for employers lies in whether an algorithm identifies the best possible matches in a way that excludes a particular protected subset of applicants, like an algorithm that targets only people under 35 years old.

"The computer just follows instructions and it sends the ad to people in that demographic," Forman said. "You can imagine that if you're looking for certain skill sets or criteria, there's a risk that you may be either intentionally — disparate treatment — or unintentionally by having a statistically

significant negative impact on a particular group of people — disparate impact — discriminating against swaths of individuals."

Mead similarly said that if the AI tool or the code it uses isn't properly sorting through application materials, employers "could end up in a situation where it's discriminating against certain protected categories of job applicants and potential employees."

"From a legal standpoint, the concern in a situation like that, if you are using AI, would be a discriminatory disparate impact claim on the hiring of certain protected individuals — say, for example, race, sex, age — and that disparate impact potentially violates Title VII or the Age Discrimination in Employment Act," Mead said.

Video Interviews Pose Unique Risks

Besides the risk of AI tools having faulty algorithms or screening processes, Mark Girouard, chair of Nilan Johnson Lewis PA's labor and employment practice, said another danger arises if employers opt for an automated video interviewing tool, particularly as the ongoing pandemic has left more employers relying on virtual interviews.

Video interview technology can measure applicants on a variety of attributes, including the length of time it takes for them to answer questions, and it can evaluate them on other aspects of their performance.

"Many of these video interview tools contain artificial intelligence-based scoring or were developed using artificial intelligence," Girouard said, noting that such technology is part of employers' broader use of technology as they ramp operations back up.

But Girouard said several layers of compliance concerns exist when AI-based scoring is part of the video interviewing process, highlighting in particular the recently enacted Artificial Intelligence Video Interview Act in Illinois.

The law addresses issues such as transparency and privacy, mandating that applicants be notified that their video will be scored using AI and what criteria is used as part of the scoring. The law also requires businesses to obtain applicants' consent to being evaluated by the AI tool. Employers are barred under the law from using an AI-based video interview tool if employees opt out and must delete all copies of a recorded video interview within a month if the applicant asks them to do so.

"Secondly ... there's always a potential for bias. That's true with any selection tool, but I think it's especially true for an AI hiring tool if it's a true pass-fail," Girouard said. "Once something like that is operating at scale, it definitely would have the potential to have adverse impacts against protected groups."

Failing to Test Algorithms

Employers can also easily land in hot water if they simply buy or develop an AI tool and effectively plug it in without fully understanding how the algorithm actually works.

That could result in an unlawful disparate impact claim down the line if the AI tool uses a proxy that adversely affects a particular group of people. And if the use of the algorithm is widespread and affects a large number of people, it could open the door for class actions, Glasser said, calling it "a major legal consideration that employers have to be aware of [and] be prepared for whenever they are implementing [AI]."

To mitigate any risk, businesses have to test their algorithms for adverse impacts and, if those impacts exist, they have to decide whether to keep using it, Glasser said.

"If so, they have to have the algorithm validated to demonstrate that there is a connection between the assessment being conducted by the algorithm and the job duties and responsibilities for which it's being used," Glasser said. "Employers that don't audit and validate their algorithm expose themselves to this initial risk."

In the rush to staff up, Girouard said, employers may inadvertently increase their legal risk if they use a hiring or screening tool in ways that don't match the purpose for which it was designed or to fill jobs "for which it hasn't been validated."

"As they're looking at, 'How do we get back up to speed quickly?' they may look to deploy that tool for other jobs for which it hasn't been validated," Girouard said, noting that it's risky for employers because they won't be able to document that it's a valid tool for the way it's being used if they're called upon to do so.

Girouard also suggested that before agreeing to work with a vendor, businesses should ask how they track adverse impacts or disparities their tools create and how they work to minimize those effects, and they could ask to see a vendor's technical reports to learn about how they document an AI tool's performance.

"There are questions you can ask during the [request for proposal] process that will demonstrate whether the tool provider … has the compliance chops to help defend their practices if there is a challenge," Girouard said.

Enforcers Stepping Up

In addition to lawsuits, one of the risks lurking for employers is the potential for government regulators to start taking a more active role in policing how AI is deployed in hiring and recruitment.

In late December, a group of 10 Democratic senators that included Michael F. Bennet, D-Colo.; Elizabeth Warren, D-Mass.; and Cory Booker, D-N.J., wrote to the U.S. Equal Employment Opportunity Commission asking for input about the agency's authority and ability to police AI bias in hiring, mentioning specifically the scenario of businesses being in a race to hire new workers as pandemic restrictions are relaxed.

The commission **responded** by saying it hadn't yet done any work in the area, stating in a letter that it "has not received a charge of discrimination from a complainant alleging discrimination based on the use of such technologies," and it hasn't "conducted enforcement proceedings alleging such discrimination."

Girouard noted that the potential for more government involvement in this area hasn't been lost on some businesses.

"Employers I think are becoming increasingly aware that this is an area of regulatory focus; that it's frankly likely to be an increased area of focus for the Biden administration as well," Girouard said, adding that companies "at the same time [are] getting more interest [from people] on the business side for using these tools."

--Additional reporting by Anne Cullen. Editing by Haylee Pearl.