



**The Journal of Robotics,
Artificial Intelligence & Law**

Editor's Note: AI and the Law

Victoria Prussen Spears

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and in Between**

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Artificial Intelligence and Employment: From Applications to Recommendations, and In Between

James A. Sherer, Shareef S. Farag, Ariana Dindiylal, Brittany Yantis, and Fulton Wald*

In this article, the authors discuss the efficiencies as well as the risks for employers and agencies of using artificial intelligence in the job application process.

The modern job application process is an evolving adventure, rife with efficiencies associated with artificial intelligence (AI), but also potential risks for employers and agencies alike. With the inexorable increased availability and utilization of job or career aggregation websites,¹ the ability to mass apply to positions without reviewing the necessary qualifications—or even knowing what the job entails—is as simple as clicking a button. Additionally, in most circumstances, applying to a job without access to the internet is virtually impossible, and future generations of college graduates will likely never agonize over printing their resume to parchment paper.²

The advantages provided by digitizing the application process are mutually beneficial to both employers and applicants. The human resources (HR) function saves money with automated resume sorting. HR professionals can (and do) also search applicants' backgrounds,³ quickly evaluate resumes for key terms, and utilize “knockout” questions⁴ to winnow applicant pools. Applicants gain the ability to apply to jobs at anytime, anywhere. However, where barriers to apply for jobs are lowered, employers and employment agencies receive significantly more applications; a job that once received less than a hundred applications might now receive thousands.⁵ Despite the convenience the internet offers employers, HR departments cannot possibly manually review so many

applicants, and getting to the top of the pile becomes that much more difficult for applicants.

To confront the unprecedented volume of job applicants, employers and employment agencies have turned to AI to efficiently consider and screen candidates.⁶ But the challenge of narrowing the applicant pool to find qualified candidates now confronts emerging law and regulation focused on privacy and the application of AI, as well as existing requirements (such as how employers create applicant pools with diverse experiences that do not discriminate based on protected characteristics). To deploy approaches that address these hurdles and identify candidates with diverse experiences who are also qualified for the job, employers must fall back on more sophisticated AI measures to evaluate resumes. And when using sophisticated AI, employers should utilize historical data sets, but must do so responsibly.

The Rise of Resumes

With technology streamlining the application process, entry- and mid-level jobs have seen a surge in applicants. By the early 2010s, the average job yielded almost 120 applicants,⁷ and that number continues to rise. Today, it is estimated that one corporate job opening will yield 250 resumes in response, with only four to six of those candidates receiving an interview.⁸ And as each job opening garners more applicants, the job pool accordingly becomes more competitive. In the past several years, entry-level jobs that do not require prior experience have all but disappeared.⁹ At least 35% of jobs labeled “entry level” require two to three years’ experience, with certain industries like software being the most heavily represented.¹⁰ Even jobs that do not require this level of experience are now accruing applicant pools so large that those without experience likely will not be called back. Alarming, 43% of college graduates will not have a college-level job as their first job after school.¹¹ It is now estimated that it takes 100-200 applications to receive a job offer, with each application having an 8.3% chance of turning into an interview.¹²

In short, the job market, particularly for entry-level jobs, is extremely competitive, with job seekers aggressively sending resumes to see what results in a callback.¹³ In fact, the current job application process may actually encourage job seekers to mass

apply blindly,¹⁴ as a job application does not receive HR's careful review and consideration, but instead may only be reviewed if it is submitted at the right time and place. Seemingly, the only answer is for job seekers to cast a wide net.¹⁵

By casting a wide net, however, more job seekers are sending more resumes and cover letters that are not necessarily tailored to each employer's needs. This logically shifts the burden of application review onto HR departments, which are tasked with sorting through hundreds, if not thousands, of resumes depending on the desirability of the job. Inevitably, these HR departments have been forced to rely on AI to sort applicants. "There are major problems with the hiring processes," said Scott Dettman, chief executive officer of a U.S.-based career matchmaking service for new graduates.¹⁶ Dettman continued, stating that this type of resume review can be detrimental because it floods HR departments and forces them to rely on algorithms that do not consider soft skills or accomplishments.¹⁷ To avoid losing qualified candidates due to AI's narrow interpretation of resumes, the recommendation is to have AI focus less on the number of years with experience in a role, and more on individual characteristics and accomplishments; however, this recommendation is rarely implemented by HR departments using AI.¹⁸

This process of resume review by computer has contributed to the creation of a group of "hidden workers"; that is, people seeking employment who are consistently overlooked because the hiring process focuses on credentials they do not have rather than the value they can offer an employer.¹⁹ In the United States, there are an estimated 27 million hidden workers who would be employable under the right circumstances, and who would have a substantial impact if the workforce were able to re-absorb them.²⁰ Some of the barriers potentially gatekeeping these individuals from employment are applicant tracking systems (ATS) and recruiting management or marketing systems (RMS), which work in tandem to automate certain aspects of the recruiting process, such as scoring candidates for open positions.²¹ In one survey, over 90% of employers used their RMS to initially filter or rank potential middle-skills and high-skills job applicants.²² While these systems may seem necessary to streamline an application process otherwise overwhelmed by sheer numbers, the systems use parameters such as mandating a college degree or specific key words to pull candidates.²³ Due to these parameters, one survey reported that 88% of employers claimed that qualified high-skilled candidates had been vetted out

of the applicant pool by automated technology because they did not match the exact criteria in the job description; this number rose to 94% for middle-skills workers.²⁴ Currently, 99% of Fortune 500 companies use these automated tools.²⁵

Through the use of knockout criteria, 50% of companies using ATS and RMS automatically weed out resumes of applicants with more than a six-month gap on their resumes. This creates a certain level of bias, as candidates could have gaps for various reasons (such as being pregnant, having an illness, or simply relocating for a military spouse).²⁶ This practice may result in candidates who could be adequately trained to perform a job being automatically rejected due to potentially arbitrary (or potentially discriminatory) factors. Moreover, a majority of employers do not write an entirely new job posting for every open position—they modify existing postings, usually making minimal edits.²⁷ As employers continuously add more requirements to a posting, the number of qualified applicants shrink, and an ATS may use filters that eliminate almost every applicant, even qualified applicants, because so many requirements have been added to the job description.²⁸

Transparency and Reliance on Historical Data Sets

While many HR departments use AI to glean candidates, 92% of HR departments state that they outsource some or all of their AI tools; however, only 40% state that the vendors are “very transparent” in their methods to prevent discrimination or bias.²⁹ This has been identified as a concern, as there is little oversight to identify vendors using discriminatory AI and practices may continue even if problematic.

In one example, a third-party vendor used AI to assign traits to job applicants’ facial expressions in video interviews; this practice was discontinued because “visual analysis no longer significantly added value to the assessments.”³⁰ The vendor had previously used facial recognition technology without demonstrating that outcomes were not biased or showing any reliable evidence that a person could be judged by the relationship between facial expressions and what the person was saying while making that expression.³¹ The change came in the wake of serious criticism centered on the AI technology

at issue—critics called connecting facial recognition to job ability “pseudoscience” and “a license to discriminate.”³²

Based on that facial recognition technology, a Federal Trade Commission complaint was filed requesting an investigation of the vendor’s AI technology,³³ and the vendor’s advisory board’s expert on fairness quit their job due to the company’s resistance to ending video analysis.³⁴ The facial recognition technology was mainly accused of discriminating against people with disabilities: people whose faces did not emoter clearly enough for the technology to read, or who did not enunciate their words would not, for example, be considered “effective salespersons” by the technology because the AI had not been trained with data that included diverse sets of people.³⁵ This example is notable as it raised the potential for AI-based discriminatory practices within organizations (even if, in this case, only before the practice was ended due to social pressure). It also shows how data sets that do not account for diverse applicants can be potentially discriminatory.

Another example involved a technology company that attempted to adopt AI for resume review, but dropped the project because they were unable to stop the AI from discriminating against women.³⁶ This might have been because the technology industry was (and still is) male dominated; in this instance, the company’s computer model was developed with 10 years of resumes from mainly male applicants.³⁷ The company’s AI training model, in turn, seemed to prioritize male candidates related to arbitrary factors.³⁸ For example, the AI would penalize resumes that included all-women’s colleges, or even simply had the word “women’s” in it, even if it involved a woman participating in a predominately male activity, such as “women’s chess club captain.”³⁹

Discrimination arises mainly because companies like the above rely on limited historical data sets. These data sets most commonly use data collected from previous decades; however, in previous decades, certain industries primarily hired white men for certain positions and promotions, such as the legal or tech industry.⁴⁰ If AI is comparing current job candidates against a baseline of white men who previously held the position, this makes it less likely that someone other than a white man will get the position now, due to the AI’s data set of “ideal workers” involving solely white men.⁴¹

This criticism is well known in the industry. “For example, if Black people were systematically excluded from the past, and

if you had no women in the pipeline in the past, and you create an algorithm based on that, there is no way the future will be properly predicted. If you hire only from ‘Ivy League schools,’ then you really don’t know how an applicant from a lesser-known school will perform, so there are several layers of bias,” said Jelena Kovačević, IEEE Fellow, William R. Berkley Professor, and Dean of the NYU Tandon School of Engineering.⁴² Notably, some critics have little faith that completely unbiased AI is achievable: “If the largest and greatest software company can’t do it,” said Wendy Rentschler, head of Corporate Social Responsibility at a software company, where she champions diversity, equity, and inclusion, referring one of the tech giants, “I give great pause to all the HR tech and their claims of being able to do it.”⁴³

The main takeaway is not that AI should never be used, but rather that AI is not a “magic bullet.”⁴⁴ When used responsibly and with certain boundaries to help a company’s “human capital be more strategic,” AI can actually prove highly useful to employers.⁴⁵ Proponents of AI boast that by prioritizing diverse data sets, AI could help overcome the implicit bias of human reviewers.⁴⁶ Traditional hiring methods have a “very low accuracy rate” in predicting job success, and human recruiters to fall back on stereotypes to evaluate candidates instead of considering their actual skills.⁴⁷ For example, resumes with “Black-sounding names” are less likely to receive interview offers⁴⁸—AI trained with diverse data sets could overcome this issue of implicit bias by sorting resumes without including names in its resume analysis, unlike a human reviewer, who would implicitly consider the name heading the resume.⁴⁹

While AI has flaws, however, it also carries a huge potential to help streamline and diversify the recruiting process, and thus should continue to be used by companies in an ethical manner.⁵⁰ These imperfections combined with the great benefits AI brings to society illustrate the need for soft law (“a reference to frameworks that provide for substantive expectations and rules and that incorporate professional guidelines and best practices, codes of conduct, and other private standards without integrated regulatory enforcement mechanisms”)⁵¹ as a potential remedy, discussed further below, to assist with implementing AI into everyday life.⁵²

Laws and Regulations

The New York City AEDT Law

As companies increasingly depend on AI to make employment decisions, new and developing regulations have emerged that seek to prevent bias in AI in the employment context through required notice, disclosures, and bias audits or impact assessments. For example, Illinois recently amended its Illinois Artificial Intelligence Video Interview Act to require employers who rely solely on AI to determine whether an applicant will receive an in-person interview to collect and disclose certain demographic information to the Illinois Department of Commercial and Economic Opportunity.

New York City, however, was the first jurisdiction in the United States to add notice and audit requirements for AI, specifically for the use of automated employment decision tools (AEDT(s)). Local Law No. 144 (the NYC AEDT Law)⁵³ prohibits an employer or employment agency from using an AEDT unless: (1) the tool has been subject to a bias audit completed by an independent auditor no more than one year prior to the tool's use, and (2) a summary of the most recent bias audit and the distribution date of the tool has been made publicly available on the employer or employment agency's website prior to the use of the tool.⁵⁴ Such bias audits are subject to explicit requirements depending on how the tool operates, including calculations for impact ratios for sex categories, race/ethnicity categories, and the intersection of the two.

New York City indicated that the onus is on employers to provide proof of this outcome-focused bias audit but noted that multiple employers may use the same audit provided it includes their data. Further, New York City clarified that an independent auditor may not be employed by or have a financial interest in an employer or employment agency that seeks to use the tool or in a vendor that developed or distributed the tool.⁵⁵

The NYC AEDT Law further requires that employers and employment agencies provide notice of the tool to candidates or employees who reside in New York City 10 business days before the tool is used.⁵⁶ Employers and employment agencies are also required to make certain data retention disclosures regarding the tool.⁵⁷ While the law requires that notice must include instructions for how an individual can request an alternative selection process

or reasonable accommodation under other laws if available,⁵⁸ New York City has stated that an employer or employment agency is not obligated to provide such an alternative selection process,⁵⁹ at least under this law. Enforcement of the law began on July 5, 2023.

Despite these developing regulations that seek to prevent bias in AI through required audits and prior use of AI in legal practice for discovery,⁶⁰ the AI auditing industry is nascent, with industry standards and best practices still in development. However, violations of the NYC AEDT Law will result in liability of up to \$500 for the first violation and each additional violation occurring on the same day as the first violation, and between \$500 and \$1,500 for each subsequent violation.⁶¹ Each day the automated employment decision tool is used in violation of the NYC AEDT Law constitutes a separate violation and the failure to provide the required notices constitutes a separate violation.⁶²

Other Laws

The NYC AEDT Law is just the first among several emerging laws and regulations governing automated decision tools in the hiring process. In 2021, the Equal Employment Opportunity Commission (EEOC) launched an agencywide Artificial Intelligence and Algorithmic Fairness Initiative to ensure the use of AI, machine learning, and other emerging technologies used in hiring and employment decisions complies with federal civil rights laws enforced by the agency.⁶³ As EEOC Chair Charlotte A. Burrows then stated, “the EEOC is keenly aware that these tools may mask and perpetuate bias or create new discriminatory barriers to jobs. We must work to ensure that these new technologies do not become a high-tech pathway to discrimination.”⁶⁴

Also at the state level, the District of Columbia has proposed a Stop Discrimination by Algorithms Act, seeking to prevent discriminatory outcomes in algorithmic decision by demanding notice and transparency requirements, including a bias audit.⁶⁵ Further, California, New York, and New Jersey have each introduced bills similar to the NYC AEDT Law. California’s bill would impose obligations on employers similar to the NYC AEDT Law to evaluate the impact of an automated decision tool through an impact assessment, provide notice regarding its use, and provide for the formation of a governance program.⁶⁶ The bill further prohibits a

deployer of an automated decision tool from using it in a way that contributes to algorithmic discrimination.

Notably, neither the New York nor New Jersey bills prohibit the use of AI tools if the bias audit shows a discriminatory effect. The 2022 New Jersey bill does not even require publication of the bias audit results. Rather, New Jersey's bill prohibits the *sale* of AEDTs by vendors, unless the tool (1) is subject to a bias audit, (2) includes an annual bias audit service at no additional cost, and (3) is sold with a notice stating the tool is subject to the law.⁶⁷ If passed, the New Jersey law would further require employers to notify each candidate within 30 days that the tool was used in connection with the candidate's application for employment and that it assessed the job qualifications or characteristics of the candidate.⁶⁸ New York State's 2023 bill provides requirements similar to those of the NYC AEDT Law but instead calls the bias audit a "disparate impact analysis."⁶⁹ In addition to making a summary of the disparate impact analysis available on the employer's or employment agency's website, the bill also requires that the summary be provided to the New York Department of Labor on an annual basis.⁷⁰

"Soft" Law and AI

"Soft law is an ideal step to address [AI concerns,]"⁷¹ particularly those involving resume review. First, "soft law" is the concept of non-binding law that creates imprecise but directed obligations to regulate an industry that does not have precise laws in place yet because it is in the process of maturing and changing, like AI in the employment industry.⁷² It applies to situations where there may be an ability to adjust expectations as circumstances change. While soft law offers many different recommendations for employers, researchers have boiled considerations down to several main points:⁷³

- Do job seekers benefit from the employer's use of AI?⁷⁴ If an employer uses AI to overcome past hiring biases, this could be a benefit to job applicants. If the AI can be trained to ignore factors such as age, race, or gender, this could make the hiring process more equitable. AI can still be ethically made, while being unethically deployed. Making sure HR departments are focused on creating benefits to

job seekers, as stakeholders in AI's ethical usage, can help keep AI ethical in the long run.⁷⁵

- Can job seekers give informed consent to participate in a hiring pool that utilizes AI?⁷⁶ To offer job seekers informed consent, companies can take cues from the health care industry, which has addressed ethical risk mitigation since at least the 1970s.⁷⁷ In health care, patients are only treated after care providers gain informed consent.⁷⁸ This logic could be applied to job applicants—employers could warn applicants that AI will be used in the screening process and how their data will be used throughout the process. If applicants give consent, this gives job applicants higher comprehension of the job process.
- Employers using AI should be able to justify its use over methods that are potentially more accurate or less biased.⁷⁹ This means employers must understand how AI compares to other options and be able to show that AI is the most useful, accurate, and least biased tool available to them.
- Users should be able to explain the AI's logic. "For example, an algorithm that predicts that certain patterns of language use/word frequency, or certain physical attributes of someone's voice/speech, are relevant markers of future job fit, is ethically less defensible than an algorithm that explains that this specific pattern of communication or speech is indicative of higher anxiety, lower stress-resilience, or antisocial personality traits. As a general rule, explainable AI models are more ethical than black-box models."⁸⁰ This means not only companies, but the HR employees who utilize AI for resumes, should understand their AI algorithms at a granular level and offer guidance on the details of their algorithms.⁸¹ "Creating a culture in which a data and AI ethics strategy can be successfully deployed and maintained requires educating and upskilling employees, and empowering them to raise important questions at crucial junctures and raise key concerns to the appropriate deliberative body."⁸² Employees should also be incentivized to review AI and rewarded for their efforts through perks or bonuses⁸³ and to maintain high ethical standards.⁸⁴
- Employers should explain to job seekers why they selected or rejected them for the position so that applicants can know their strengths and weaknesses.⁸⁵ Pre-AI, it was too

cost prohibitive to explain an individual's rejection, but this process can now be automated using AI. Thus, companies can explain to candidates how they can improve in their next job application.

- "Candidates' personal data should be protected and kept confidential, and their personal data and information should be optimized for maximum anonymity."⁸⁶ To protect this data, companies can once again take cues from the health care industry by practicing ethical risk mitigation and informed consent.⁸⁷
- Companies should construct an internal Governance Board to oversee how certain departments, like HR, use the AI.⁸⁸ This would ensure each department is using AI in a uniform manner and practicing basic AI precautions.

The National Institute of Standards and Technology

On January 26, 2023, the National Institute of Standards and Technology (NIST) published its Artificial Intelligence Risk Management Framework (AI RMF version 1.0).⁸⁹ The AI RMF strived to be a risk-based, resource-efficient living document with planned, regular updates through a consensus-driven and transparent process.⁹⁰ The AI RMF promotes trustworthy AI using a risk-based approach, where "risk" refers to the composite measure of an event's probability of occurring and the magnitude of the resulting consequences.⁹¹ To this end, the AI RMF Core, which provides outcomes and actions that enable dialogue, understanding, and activities to manage AI risks, has four functions:⁹²

1. The *Govern* function encourages strong internal governance and practices.⁹³ It ensures that risks and potential effects are identified, measured, and managed effectively and consistently and provides a top-down structure by encouraging senior leadership to set the tone for risk management. The ultimate goal of this function is that AI risk management functions can align with organizational policies and strategic priorities whether or not they are related to AI systems.
2. The *Map* function establishes the context to frame risks related to an AI system. The information gathered while carrying out this function enables risk prevention and

informs decisions for processes such as model management and an initial decision about the appropriateness or the need for an AI solution. The goal of the Map function is for AI users to have sufficient contextual knowledge about AI system impacts that will aid them in the decision to design, develop, or employ AI.

3. The *Measure* function employs quantitative, qualitative, and mixed-method tools, techniques, and methodologies to analyze, assess, benchmark, and monitor AI risk and related effects. It uses knowledge relevant to AI risks identified in the Map function and informs the Manage function. Measuring AI risks includes tracking metrics for trustworthy characteristics, social impact, and human AI configurations. Processes developed or adopted through the Measurement function should include rigorous software testing and performance assessment methodologies that include associated measures of uncertainty, comparisons to performance benchmarks, and formalized reporting and documentation results.
4. The *Manage* function entails allocating risk management resources to mapped and measured risks on a regular basis and as defined by the Govern function. Contextual information gleaned from stakeholder feedback and other expert consultation processes established in the Govern function and carried out in the Map function are also used in this function to decrease the likelihood of system failures and negative effects. Systematic documentation practices established in the Govern function and used in the Map and Measure functions bolster AI risk management efforts to increase transparency and accountability.

In short, the NIST promotes (1) strong internal governance of AI, (2) providing users with contextual information for the use of AI, (3) rigorous quantitative and qualitative testing of AI, and (4) developing regular feedback and documentation from designers and deployers regarding AI.

The EEOC

The EEOC recently published, in the Federal Register, a draft of its Strategic Enforcement Plan (the Plan).⁹⁴ Its subject matter

priorities for the fiscal years 2023-2027 provided that “[t]he EEOC will focus on recruitment and hiring practices and policies that discriminate against racial, ethnic, and religious groups, older workers, women, pregnant workers and those with pregnancy-related medical conditions, LGBTQI+ individuals, and people with disabilities.”⁹⁵ It then specifically noted that one of its main concerns was overseeing “the use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups” and “screening tools or requirements that disproportionately impact workers based on their protected status, including those facilitated by artificial intelligence or other automated systems, pre-employment tests, and background checks.”⁹⁶ The EEOC’s main concern with these automated systems was a “lack of diversity in certain industries and workplaces (such as construction and high tech, among others),”⁹⁷ and while the EEOC did not specifically mention the usage of historical data sets to train AI, their plan certainly indicated that their main concern with automating hiring systems was addressing the harms associated with “gatekeeping” of historically excluded persons from various spaces.

The Plan then included a section that addressed selected emerging and developing issues, where it briefly discussed technology-related employment discrimination.⁹⁸ The EEOC stated that it planned to focus more heavily on “employment decisions, practices, or policies in which covered entities’ use of technology [that] contributes to discrimination based on a protected characteristic. These may include, for example, the use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence; use of automated recruitment, selection, or production and performance management tools; or other existing or emerging technological tools used in employment decisions.”⁹⁹

This was the first time the EEOC included that type of language in their Strategic Enforcement Plan, and provided a clear signal that the EEOC was alarmed by the rise in AI usage in hiring practices, particularly in light of so many allegations of AI discriminating against protected classes. In a related discussion, Victoria Lipnic, a former Republican EEOC commissioner, stated that “[e]mployers need to take note: if allegations of discrimination are made they are not going to be allowed to claim ‘it wasn’t me; the algorithm did it!’”¹⁰⁰ Employers should be wary that the EEOC is now turning

an eye to automated hiring practices, and should strive to ensure they understand how AI works internally or how their vendors are using AI to screen candidates.

The EEOC has already brought suit against three integrated companies for utilizing discriminatory AI. All three companies provided English-language tutoring services to students in China; the integrated companies hired thousands of U.S.-based tutors per year for online tutoring positions.¹⁰¹ However, the companies' recruitment software automatically rejected older applicants because of their age—specifically, the program rejected female applicants of 55 years or older, and male applicants of 60 years or older.¹⁰² In total, with the aid of AI, the integrated companies' software rejected more than 200 qualified applicants in the United States based on age alone. This violated the Age Discrimination in Employment Act (ADEA) and created a cause of action for the EEOC to file suit.¹⁰³ This suit represented a new crusade for the EEOC: addressing digital discrimination. Although the company offered fully remote work for employees to provide services abroad, the deployment of discriminatory AI created grounds for suit.

Another contemporary suit, a class action filed in February 2023, alleged that a software vendor utilized AI systems and screening tools that disqualified job applicants who are Black, disabled, or over the age of 40 at a disproportionate rate.¹⁰⁴ The vendor, notably, was a software *vendor* who was hired by HR departments as a third party to screen candidates.¹⁰⁵ The class action alleged that the vendor provided its screening tools to hundreds, if not thousands, of companies, and that the use of its algorithm and screening products "constitute[d] a pattern and practice of discrimination."¹⁰⁶ The suit is currently pending in California federal court.¹⁰⁷

AI Audits

As discussed above, a few state legislatures, like New York and New Jersey, have introduced regulations that require bias audits in certain instances. Other state legislatures, like Washington, D.C.,¹⁰⁸ and California,¹⁰⁹ proposed bills in 2023 that seek to prohibit employers from making discriminatory decisions by requiring annual audits and notification of AI use to prospective employees. The European Union has also adopted a regulation, the General Data Protection Regulation (GDPR), which imposes various strict

requirements on organizations that target or collect data related to people in the European Union.¹¹⁰

Regardless of whether they are currently required to, companies should consider conducting bias audits regularly to ensure that their AI systems are functioning ideally. To evade the negative effects of AI and adopt good AI practices early on, regular audits can help keep AI systems as closely aligned with ethical and legal standards as possible. There are several audit frameworks that can guide the self-audit process, and the main audit frameworks in current application are:

- The *COBIT Framework* (Control Objectives for Information and Related Technology), which is used for IT governance and enterprise management.¹¹¹
- The Institute of Internal Auditors (IIA's) *AI Auditing Framework*, which assesses the design, development, and working of AI systems and their alignment with the organization's objectives through three main components: strategy, governance, and human factor.¹¹²
- The Committee of Sponsoring Organizations (COSO's) *Enterprise Risk Management (ERM) Framework*, which provides a frame of reference for assessing the risks for AI systems in an organization.¹¹³

While each framework has different components, they all focus on risk strategy, governance of AI, and how humans are managing AI. When conducting audits, organizations should observe these well-recognized regulations and frameworks, embrace transparency by using independent third-party audit processes and auditors, ensuring data sets and AI source code are open to external inspection, and publishing the results of third-party audits.¹¹⁴

Recommendations

How Can Employers Avoid AI Discrimination Lawsuits?

- *Consider That Knowledge Is Power*
 - HR departments should have a basic understanding of the AI they are using, even if they outsource the algorithms. HR employees who know the basics of what to look for in AI can better spot AI discrimination.

- If HR departments outsource their AI programs, they should thoroughly vet the program and discuss bias concerns with third-party vendors.
- Third-party vendors should present (for all members of the HR department who interact with resumes or the AI) how their AI works and what data sets they use.
- By having a more knowledgeable HR department, more employees can recognize that while AI is helpful, it should not be relied on wholly.
- Consider consulting outside experts with AI-specific knowledge to discuss the pitfalls of AI resume review.
- *Be Mindful That AI Is a Work in Progress*
 - HR employees should carefully consider initiatives that hand pick diverse candidates that fall outside the scope of the AI resume pull, regardless of whether the AI seems to be skewed.
 - There are still major benefits to having human connection and judgment as part of the application selection process.
- *Give People a Chance*
 - HR departments should consider interviewing candidates who do not meet all qualifications that AI was programmed to find, to the extent that such additional qualifications might still indicate satisfactory job performance.
 - HR departments should consider interviewing candidates that were not selected by AI. Just because AI pulls a candidate with the “correct” qualifications—the ones it was programmed to find—that does not necessarily mean that person is a good fit for the company. An applicant who does not perfectly match the job description but who has values that align with the company’s mission could benefit the company in the long term, perhaps even more than an AI-selected candidate.
- *Consider Back-End Effects*
 - HR departments should monitor whether the AI is pulling members from only one ethnicity or gender. For example, if AI presents the HR department with 6-10 resumes for every job and almost all of these

are of the same ethnicity and/or gender, they should take notice and reconsider the AI usage.

- *Do Not “Over Tailor” AI Programs*
 - Often, AI programs can get too specific when HR departments add skills and qualifications to a job description when the job does not actually require these skills. This results in AI assessing too many baseline factors (e.g., requiring a college degree, requiring no gaps in resume, etc.) and yielding inaccurate results.
- *Consider Prioritizing “Soft Skills”* as the AI Program may not
 - HR departments can tailor AI programs to look for skills other than “hard skills,” such as “+3 years’ experience with Java Script.”
 - AI can instead be used to find key words such as “affinity group” or “women’s [sports]” in an effort to identify candidates that are not accounted for in the typical historical data sets.
- *Keep a “Paper” Trail*
 - Whether or not HR departments design their AI or deploy third-party AI, they should document how the AI is used and the usual outcomes.
 - There are concepts to record-keeping for new technologies that may apply;¹¹⁵ there will likely be upcoming requirements under law.
 - Deployers should also document what data sets were used in creating AI.

Conclusion

With the rise of technology, job applicants can apply to more jobs than ever (and do it quickly, at scale). These applications can overburden HR departments, creating a need for AI to assist in the review of resumes. However, AI is not perfect; it can evidence certain biases due to training from historical data sets and selective application.

Due to the potential discriminatory nature of AI, legislation and soft law guidance has come out curtailing employers’ AI usage. Regarding new laws such as NYC’s AEDT law, or soft law such as

EEOC and NIST oversight, legislators have an eye toward keeping AI fair.

Employers should be aware of how their AI is programmed and trained to ensure that AI does not run afoul of these new laws or discriminate against protected classes. To address these issues with AI, employers should particularly understand how third-party vendors program AI and pay attention to the candidates AI chooses for certain roles to ensure their AI is choosing diverse sets of candidates.

Notes

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several other qualified candidates for arbitrary reasons, AI has essentially done its job. Additionally, much of this research surrounding AI and resume pulling does not consider the error rate of humans potentially overlooking qualified candidates. While AI is highly criticized, there is a chance that AI review is actually still more accurate than human review. This can be seen in other AI uses, such as Technology Assisted Review, where researchers found that AI actually had significantly better recall and precision rates of relevant documents during discovery than human reviews did during discovery. See J. Sherer et al., *Court Guideposts for the Path to Technology Assisted Review Adoption* (Feb. 2018), *The Computer & Internet Lawyer* 35(2):1-7, <https://www.bakerlaw.com/webfiles/Litigation/2018/Articles/2018-02-01-The-Computer-And-Internet-Lawyer.pdf>.

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