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# RISE OF THE MACHINES

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## I. Introduction.

A. Artificial Intelligence has infiltrated the very places we work ... where we live ... where we go to eat ... and it is here to stay...

1. As AI technology continues to evolve, employers seek answers to legal questions that have not been present in the past.

a. *“My CPU is a neural-net processor; a learning computer. The more contact I have with humans, the more I learn...”* – The Terminator

b. In theory, the more humans continue to fine tune and develop the advanced technology behind AI, the more “human-like” it becomes ... however, social and emotional intelligence in AI has not naturally flowed as a result of that advancement.

c. The most common positive emotions found in the workplace are: excitement, happiness, and satisfaction.

d. The most common negative emotions found in the workplace are: worry, frustration, anger, and disappointment.

e. AI, as of now, cannot replicate these particular emotions. Some of which have an impact on decision making in the workplace.

f. Workplace bias (i.e., actual emotional intelligence) (for better or worse) affects interviewing/hiring, coaching/development, diversity/inclusion, and discipline/termination.

B. *“I need your clothes, your boots, and your motorcycle...”* – The Terminator

1. *“You forgot to say please...”* The global impact of AI has affected employers and their employees alike.

2. For employers, the question becomes not when, but what will the future of work look like when it comes to making determinations in the amount of employees you need, the skills required, and the wages associated with the same.

3. For current employees, a 2017 study by Mckinsey & Company estimated that between 400 million and 800 million individuals around the world could be displaced by technology and need to find new jobs by 2030.

4. AI and its accompanying technology are powerful tools for recruiting and maintaining employees, as well as promoting products and services.

However, careless use (and overuse) of AI could result in a great deal of harm to your company.

5. We will therefore talk today about the future of AI in performing various human resources functions and what your company can do to ensure real human emotional intelligence does not get left in the past and what steps your company should be taking to protect itself in the next age of advanced technology.

## II. Artificial Intelligence, Generally.

A. AI is a combination of technologies working together in unison that gives a computer the ability to perform tasks that normally require human input, including the ability to make decisions.

B. Common uses of AI in the workplace:

### 1. Talent Acquisition and Onboarding.

a. AI is helping recruiters prioritize jobs more efficiently, screen, test, and hire talent faster, and match candidates to particular positions more effectively such as sorting out specific skills required rather than screening resumes themselves.

b. Effectively onboarding employees is an important to employee productivity, retention, and comfortability in starting a new position. Many companies simply do not have the capacity to onboard employees using actual face-to-face interaction so some will opt to using AI to explain specific job duties and responsibilities, obtain documentation, provide relevant information about the organization, and verify that employees read the employee handbook and other policies and procedures, if applicable.

### 2. On-the-job training.

a. Some employers use AI to determine which employees need training based on their position and that training is then facilitated without the need for human interaction.

### 3. Monitoring of Employees.

a. It is not uncommon for an employer to use AI technology to monitor employee productivity. That data is then collected to make human resources related decisions such as promotional opportunities or even discipline.

4. Data Implementation.

- a. AI can assist HR professionals in keeping data relevant and up-to-date with syncing various technologies across the organization instead of manually inputting data, which may help in the allocation of resources.

- C. Employees and employers alike use AI for varying purposes, both personal and work-related. This raises various legal and practical questions, issues, and pitfalls throughout every stage of the employment relationship.

III. Hiring –

- A. Talent acquisition is one of the most common uses of AI. Anywhere from screening candidates, scheduling interviews, to facilitating performance tests and questionnaires.

- B. More and more employers are taking steps to reduce the time it takes to find and recruit new employees.

- C. What are the benefits of using AI in the hiring process?

1. Identify potential candidates quicker.
2. Less time spent on recruitment could allow for more productivity in other areas such as sourcing, recruitment marketing, and overall employee management.
3. Identify candidates' professional qualifications and skills and determine whether they fit with the criteria for the position.
4. In theory, reduce “human bias” in the hiring process that could be shrouded in discrimination and preferential treatment.

- D. What are the risks of using AI in the hiring process?

1. The law regarding permissible use of AI in the hiring process is under-developed, so there are a number of potential pitfalls awaiting employers who use AI exclusively, or even a combination of humans and AI, in the hiring process.
2. Practical considerations.
  - a. Loss of Intuition/Reason.

- i. How does the company know the AI is making the best possible decision related to candidates who are applying for a position with the company?
  - ii. Take this conversation for instance between John Connor and the Terminator:
    - a. Connor: *We need to get my mother.*
    - b. Terminator: *Negative. The T-1000's highest probability for success now will be to copy Sarah Connor and to wait for you to make contact with her.*
    - c. Connor: *Great, but what happens to her?*
    - d. Terminator: *Typically, the subject being copied is terminated.*
    - e. Connor: *Why didn't you tell me? We gotta' go right now!*
    - f. Terminator: *Negative. She's not a mission priority.*
    - g. Connor: *She's a priority to me!*
  - iii. AI might need a little “input” from qualified HR professionals to fully assist in making the best judgment for the organization.
  - iv. Generally, AI has one objective, and follows it. Consider instituting a human component to make final decisions.
    - a. Google had a contract with the U.S. Military to create an AI powered surveillance system for unmanned aerial vehicles, codenamed Project Maven. The idea was to give the government real-time battlefield command and control and the ability to track, tag, and spy on targets without human involvement. Google backed out of the project after employees believed its overall application and supposed utilization was “unethical” because it weaponized artificial intelligence.
- b. Lack of emotional intelligence.
- i. How does the company make up for the lack of emotions in the hiring process?
3. Anti-discrimination laws.

- a. Federal, state, and local anti-discrimination laws prohibit discrimination in hiring based on a prospective employee's membership in a protected class.
  - i. On the federal level, employers must pay attention to, among others, Title VII, Age Discrimination in Employment Act, Americans with Disabilities Act, 42 USC § 1981, Equal Pay Act, Genetic Information Nondiscrimination Act, Uniformed Services Employment and Reemployment Rights Act, Immigration Reform and Control Act.
  - ii. And in June 2020, the Supreme Court of the United States ruled that sexual orientation and transgender status are now protected classes under federal law.
- b. How do you ensure AI is not using information regarding an individual's protected characteristics in any decision making regarding the candidate?
- c. Is there disparate impact discrimination because of who AI is or isn't recruiting and hiring?
  - i. Title VII prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not "job-related and consistent with business necessity."
  - ii. Even if AI does not see gender, age, or ethnicity, it could work against the employer's intent to be an equal opportunity employer.
    - a. In 2014, e-commerce giant Amazon had a team of engineers build artificial intelligence to review job applicants' resumes with the aim of automating the search for top talent. However, it backfired. It found that the new system was not operating in a gender-neutral way. The technology was trained to vet applicants by observing patterns in the resumes over a 10-year period, most of which were submitted by men, which was a reflection of the overall workforce in the technology industry. In essence, it created a disparate impact against women and Amazon eventually scrapped the project due to the unreliability and the negative impact it had.

- b. Although not intentional, an AI algorithm based on geographic area such as zip code could have a discriminatory impact on those who do not live in any of the neighborhoods where the algorithm is searching, inadvertently excluding residents of neighborhoods populated predominately by minorities.
- iii. As of late 2019, the EEOC was investigating at least two cases involving claims that algorithms used to help make hiring, promotion, and other job decisions unlawfully discriminated against certain groups of workers. The EEOC, however, has not yet reported on the specific details of those matters.
- d. The law is very limited on the topic but as the technology grows the law will catch up:
  - i. An Illinois law dubbed the “Artificial Intelligence Video Interview Act” went into effect on January 1, 2020. The Act provides that:
    - a. an employer that asks applicants to record video interviews and uses an artificial intelligence analysis of applicant-submitted videos shall:
      1. notify each applicant in writing before the interview that artificial intelligence may be used to analyze the applicant's facial expressions and consider the applicant's fitness for the position;
      2. provide each applicant with an information sheet before the interview explaining how the artificial intelligence works and what characteristics it uses to evaluate applicants;
      3. obtain written consent from the applicant to be evaluated by the artificial intelligence program.
      4. provides that an employer may not use artificial intelligence to evaluate applicants who have not consented to the use of artificial intelligence analysis.
      5. provides that an employer may not share applicant videos, except with persons whose

expertise is necessary in order to evaluate an applicant's fitness for a position.

- ii. On February 27, 2020, New York City introduced a local law to amend the administrative code of the city of New York, in relation to the sale of automated employment decision tools:
  - a. This bill would regulate the use of automated employment decision tools, which, for the purposes of the bill, encompass certain systems that use algorithmic methodologies to filter candidates for hire or to make decisions regarding any other term, condition or privilege of employment.
  - b. The bill would prohibit the sale of such tools if they were not the subject of an audit for bias in the past year prior to sale, were not sold with a yearly bias audit service at no additional cost, and were not accompanied by a notice that the tool is subject to the provisions of this bill.
  - c. The bill would also require any person who uses automated employment assessment tools for hiring and other employment purposes to disclose to candidates, within 30 days, when such tools were used to assess their candidacy for employment, and the job qualifications or characteristics for which the tool was used to screen. Violations of the provisions of the bill would incur a penalty.
  - d. The bill proposes a civil penalty of \$500 for the first individual violation with up to a \$1,500 penalty for each subsequent violation.
- iii. With the goal on increasing the rate of hire for minorities, the California Assembly introduced and passed the Fair Hiring Resolution (ACR 125).
  - a. The Fair Hiring Resolution calls on state and federal policymakers to encourage the development and use of new AI and algorithm-based technologies as tools for HR professionals to reduce bias and discrimination in hiring and promotion, while also helping employers more effectively identify qualified talent.



- iv. On March 28, 2019, Idaho Governor Brad Little signed into law a bill (House Bill No. 118) requiring public disclosure of all documents, data, and other information used to create a pretrial risk assessment tool.
  - a. The purpose of the law is to provide public access to this information for purposes of public inspection, auditing, and testing. The law also provides criminal defendants the right to review “all calculations and data used to calculate the defendant's ... risk score” where a court or expert witness have used or relied upon a pretrial risk assessment tool in any respect, including for sentencing purposes.
  
- v. On May 20, 2019, New Jersey legislators introduced bill A5430, which is named the New Jersey Algorithmic Accountability Act.
  - a. The bill directs the Director of the Division of Consumer Affairs in the Department of Law and Public Safety (director) to require certain businesses, or covered entities, as that term is defined in the bill, to conduct automated decision system and data protection impact assessments (impact assessments) of their automated decision system and information systems.
    1. The bill defines "automated decision system" as a computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that makes a decision or facilitates human decision making and that impacts consumers.
    2. The bill defines "information system" as a process, automated or manual, that involves personally identifiable information, such as the collection, recording, organization, structuring, storage, alteration, retrieval, consultation, use, sharing, disclosure, dissemination, combination, restriction, erasure, or destruction of personally identifiable information and does not include automated decision systems.

b. The impact assessments described in the bill would be submitted to the director.

1. The impact assessments are to determine whether there are any biases relating to race or other factors within the automated decision system or if there are any threats to the security of a consumer's personally identifiable information within the information system.

2. The bill provides that, if the director determines, after reviewing the impact assessments and information submitted pursuant to the bill, that an interest of the residents of the State has been or is being threatened or adversely affected by a practice that violates the bill, the Attorney General of the State may institute civil action on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

a. A violation of this bill's provisions is deemed an unlawful practice and a violation of the consumer fraud act, which includes a penalty of not more than \$10,000 for the first offense and not more than \$20,000 for the second and each subsequent offense.

vi. Interestingly enough, Microsoft and Amazon have been vocal in Washington State about having lawmakers regulate artificial intelligence.

a. In January 2020, the State of Washington legislature introduced House Bill 2644.

1. The bill would prohibit the use of artificial intelligence technology to determine a person's "state of mind, character, propensities, protected class status, political affiliation, religious beliefs or religious affiliation, immigration status, or employability" in any public space.



access that will facilitate AI research and development by the private sector.

- b. The order also requires the National Institute of Standards and Technology (“NIST”) and the National Science and Technology Council to provide guidance regarding AI regulation and development in the United States.
- c. On April 10, 2019, congressional legislators introduced the Algorithmic Accountability Act into the House and Senate.
  - 1. To direct the Federal Trade Commission to require entities that use, store, or share personal information to conduct automated decision system impact assessments and data protection impact assessments.
    - a. automated decision system means a computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that makes a decision or facilitates human decision making, that impacts consumers.
    - b. automated decision system impact assessment means a study evaluating an automated decision system and the automated decision system’s development process, including the design and training data of the automated decision system, for impacts on accuracy, fairness, bias, discrimination, privacy, and security that includes, at a minimum:
      - i. a detailed description of the automated decision system, its design, its training, data, and its purpose
      - ii. an assessment of the relative benefits and costs of the

automated decision system in light of its purpose

- iii. an assessment of the risks posed by the automated decision system to the privacy or security of personal information of consumers and the risks that the automated decision system may result in or contribute to inaccurate, unfair, biased, or discriminatory decisions impacting consumers.

4. Other considerations.

- a. Although not unlawful in practice, it might just not work the way it's intended.
- b. Making hiring decisions based on technology alone could also lead to applicants who just aren't the "right fit" for your organization. An important aspect of running a successful company is that you have all the right pieces in place, including competent employees who will be team players. Preset qualifications given to AI around education, work experience, etc. might not always be the most important considerations.

E. What are some things an employer can do to help avoid these pitfalls?

- 1. Avoid being too reliant on AI for recruiting and selection efforts (e.g., not incorporating any type of emotional intelligence).
- 2. Ensure HR professionals have insight on how to properly utilize the technology and pick up on any biases the technology may possess.
- 3. Establish a detailed internal procedure for making employment decisions based on the use of AI.
  - a. How is it used? To what extent? Who makes the final decisions? Is there a way to track the process by which the AI operated?
- 4. Filter out protected information from any screenings and only utilize information that can be lawfully considered.

5. If you use multiple vendors to facilitate your AI programming, ensure the programs work congruently and obtain assurances on the functionality of the programs and its ability to work as intended.
6. If you use a vendor to supply the AI technology, negotiate that the vendor waive any no liability clauses in the contract in the case of litigation due to potential discrimination.
7. Ensure a third-party audit of the programs used.
8. Ensure consistent treatment and monitoring in the screening process to avoid disparate treatment claims.
9. If it comes to the attention of the employer that a certain technology or algorithm is not working as intended, immediately stop use of the technology and determine the cause.
10. Document and keep records of all information reviewed, transmitted, and used in any employment decision (ensure there is a backup system).
11. Ensure employees and potential candidates understand how AI is used in the decision making processes of the organization.

#### IV. Hiring/During Employment.

- A. One important issue that comes up in both the hiring and during employment is the responsibility to ensure fairness and proper management of employees.
  1. Employers should be particularly cautious when instituting AI to perform most functions you would otherwise have a human do.
    - a. After the hiring process and onboarding, employees require feedback and training on topics that technology just can't teach.
    - b. Training on common workplace issues such as discrimination or harassment.

#### V. During Employment.

- A. As with the hiring process, AI can be a powerful tool for companies during employment. One way companies such AI during employment is to monitor employees.
  1. Monitoring employees

- a. Generally, employers have the authority to monitor an employee's use when he or she is using the company's computer systems.
  - i. An employer should ensure employees understand these policies and the appropriate use of company technology. Clearly articulate the expectations.
    - a. Highlight the company's ownership of and ability to monitor the company's computer systems and related equipment, and explain that no duty of privacy can be expected with the usage of these company systems.
    - b. Restricting or prohibiting employees from accessing certain websites while using the employer's electronic communications device, network, or other resources.
- b. Some employers may decide to prohibit an employees' use of social media or from accessing certain websites on company-issued devices, or they may decide instead to allow such use but to limit personal activity during working hours. AI technology can do some of the following:
  - a. Log or count keystrokes;
  - b. Detect certain keywords such as 'shopping' or 'basketball' or words that would be inappropriate in the context of the workplace;
  - c. Take screenshots of workstations;
  - d. Determine how long an employee has been inactive.
  - e. Detect productivity level and use that information to rank employees
- c. With the onset of COVID-19 and many people working remotely, some employers have turned to "productivity management" software to keep track of what employees are doing while they work from home.
  - i. Monitoring employees, down to the keystroke, is legal in the U.S. based on the Electronic Communications Privacy Act of 1986, but now some employees are working from home, which means employers are monitoring them in what is supposed to be a private environment.

- d. Even when a company's system detects certain activity that is against company policy, ensure to have HR staff and/or a manager look deeper into the matter.
  - i. Employees should not have any expectation of privacy when using company-provided computers, laptops, and other electronic and communication devices in any manner, including to send or receive emails, browse the internet, and/or send or receive instant messages, texts, or the like.
  - ii. Disciplining or discharging an employee for transferring the employer's proprietary, confidential, and/or financial data or information to the employee's personal internet account without the employer's authorization.
  - iii. Conducting investigations or requiring an employee to cooperate in investigations if there is reasonable cause to believe that there has been any alleged unauthorized transfer of confidential, proprietary, and/or financial data or information to the employee's personal internet account, and/or any other alleged employment-related misconduct, violation of law, or violation of the employer's work rules, as specified in an employee handbook, which is related to activity on the employees personal internet account.
  - iv. Complying with a duty to monitor or retain employee communications that is established under federal or state laws, rules, regulation, or the rules of a self-regulatory organization.
- B. Given the somewhat unpredictability of AI, what can an employer do to protect itself against legal liability and harm as related to monitoring employees?
  - 1. Clearly articulate through a properly drafted and enforced policy what employees may or may not do as related to the use of company property.
    - i. How the company will handle employees who email or chat arguably inappropriate, but not unlawful, communications such as illicit photos, profanity, or other potentially derogatory content.
    - ii. The company's strategy to preserve good business relationships and promote a positive corporate image an.
    - iii. How the company will train employees once the policy is in place so they understand what is allowed and prohibited.



- iv. How the company will monitor compliance and enforce the policy, including what the repercussions will be for violations.
  - b. Companies should use an appropriate use policy to remind employees that workplace activity is not private, including appropriate restrictions covering:
    - i. Employee use of company technology.
    - ii. Employee use/misuse of company intellectual property assets, including confidential, proprietary, and privileged information.
    - iii. Employee use/misuse of third-party intellectual property assets.
    - iv. Protection of third-party privacy in the context of employees' personal use.
    - v. Harassment of others.
    - vi. Discrimination.
    - vii. Defamation and disparagement.
  - c. Companies should also train human resources on appropriate and effective employee monitoring and enforcement, being careful not to impose unnecessary, impractical, or intrusive restrictions on employee use of the company's computer systems.

## VI. Adverse Actions.

- A. We have talked about some of the legal pitfalls associated with AI in hiring and during employment, but, what other legal and/or practical considerations should an employer take into account if it is planning to take an adverse action against an individual with the assistance of AI?
  - 1. Reduction in Force (RIF)
    - a. Conducting RIF analyses that lead to furlough or layoffs and using data that has been compiled by artificial intelligence should always contain a human component in the decision making process on who to layoff or furlough or terminate.

- i. Poorly conducted RIFS will adversely affect the organization.
  - ii. Creates the potential class-action and individual wrongful-discharge lawsuits and charges of discrimination with the EEOC.
- b. Avoid discrimination in RIFs
  - a. Review the process to determine if it will result in the disproportionate dismissal of older employees, employees with disabilities or any other group protected by federal employment discrimination laws.
  - b. If certain groups of employees are affected more than other groups, determine if you can adjust your layoff/RIF selection criteria to limit the impact on those groups, while still meeting your business's needs.

## 2. Discipline of an Employee

- i. There are many considerations and nuances to discipline, and when you introduce artificial intelligence into the equation, any application of using AI to discipline employees should be met with extreme caution.
- ii. Most discipline from using AI will likely stem from the monitoring of employees.
- iii. If AI technology inadvertently identifies legally protected medical conditions, absent an employer having a legitimate justification for collecting that data and appropriate notice to the employees, it could expose the employer to liability.
- iv. The human component in disciplining employees with the help of AI means that there should be zero final decisions on discipline unless someone has personally conducted their own independent investigation into the matter.
- v. Working with experienced in-house or external professionals and attorneys to review and audit data collection can help identify potential liabilities and put appropriate safeguards in place to limit exposure.

3. Anti-discrimination laws and use of AI in monitoring potential and current employees.

- a. The use of AI in recruiting employees may mean that is easier to comb through an applicant's various social media pages like LinkedIn or Facebook, for instance.
- b. Employers are prohibited under federal, state, and local non-discrimination laws from taking any action against applicants or employees on the basis of membership in a protected class.
  - i. If information regarding an applicant's or employee's membership in a protected class is discovered via the individual's social media profile(s), ensure the company does not take any adverse actions against the individual because of the individual's membership in a protected class.
    - a. Keep in mind an employer that views an individual's social media account and decides to discipline or terminate the individual could have greater difficulty defending a subsequent discrimination claim if the social media account revealed the applicant was a member of a protected class.
  - ii. Ensure consistent treatment in taking any action based on any social media conduct or postings.
    - a. *Marshall v. Mayor and Alderman of City of Savannah, Ga.*, 366 Fed. Appx. 91 (11th Cir. 2010).
      1. Female probationary firefighter who was disciplined for posting pictures of fellow firefighters next to revealing pictures of herself on her MySpace page claimed that she was singled out and treated differently than male firefighters who engaged in the same or similar conduct.
      2. Court dismissed her case on summary judgment, finding she failed to establish her *prima facie* case of sex discrimination because she did not show other similarly situated male employees were treated more favorably.

- b. *Williams v. Wells Fargo Fin. Acceptance*, 564 F. Supp. 2d 441 (E.D. Pa. 2008).
  - 1. African American employee who was fired for sending sexually suggestive and otherwise inappropriate emails in violation of his employer's policies claimed his termination was the result of race discrimination.
  - 2. Court found there was enough evidence that employees who were not African American were treated more favorably than the plaintiff and denied employer's motion for summary judgment.
- iii. Also be cautious in using information learned from an employee's social networking page(s) to discipline or terminate the employee if the individual recently filed or lodged a discrimination complaint. And/or if the social media account reveals what could potentially constitute protected activity.
  - a. In that case, the company will need to show the protected activity did not cause the social media investigation and/or did not result in disproportionate disciplinary action when compared to other employees.
- c. On the other hand, employers should also consider the potential liability they may incur because of the social media activities of their employees, especially if the employer became aware of the activities through the using of monitoring technology.
  - i. Harassment and/or discrimination claims may impute liability to the employer if the employer does not take appropriate steps to monitor and address an employee's social media once it is on notice that potentially unlawful conduct may be occurring.
  - ii. Employers obviously do not have a strict obligation to monitor employees' social media (and indeed may not be permitted to monitor without permission), but, an employer has a duty to redress complaints of harassment or discrimination known to the employer if related to the workplace.

- a. It is conceivable this could extend to alleged harassment or discrimination occurring via social media.
- iii. Ensure prompt investigatory and remedial action is taken if the company becomes aware of allegedly harassing or discriminatory social media conduct made by or to an employee.

VII. Conclusion.

- A. The significant prevalence and use of artificial intelligence by employers raises a myriad of practical and legal considerations, many of which have not yet been addressed by courts and/or statutes.
- B. Employers must therefore exercise caution and ensure they do not violate the rights of their current or prospective employees in taking any swift actions with the use of artificial intelligence that is not at least vetted by professionals before implementation or application to workplace decisions.