


RISE OF THE MACHINES

August 27, 2020

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OVERVIEW

- *“I need your clothes, your boots, and your motorcycle”* – The Terminator
- The global impact of AI has affected employers and their employees alike..
- As artificial intelligence technologies continue to evolve, employers seek answers to legal questions that have not been present in the past.



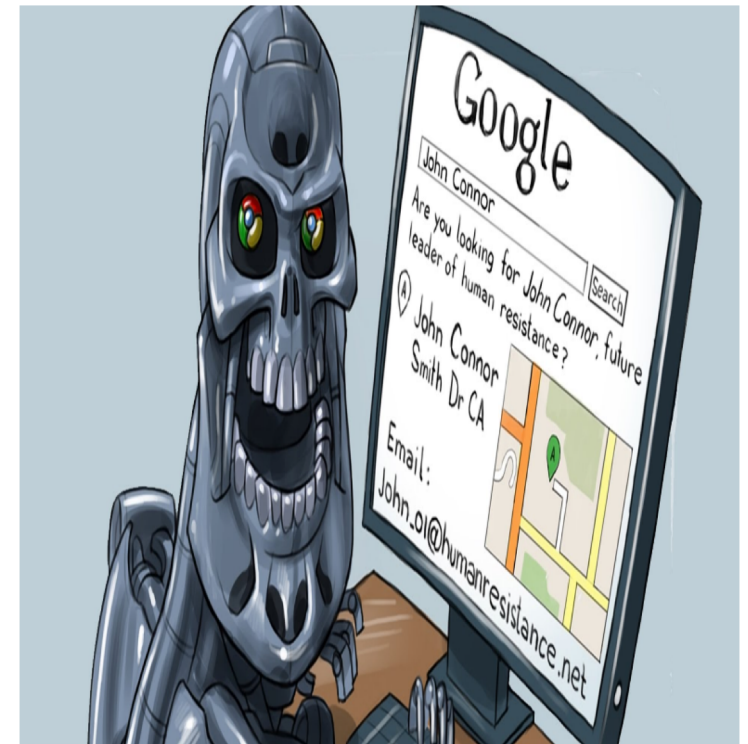
ARTIFICIAL INTELLIGENCE, GENERALLY

- Advanced technologies working together to perform tasks that normally require human input.
- AI in the workplace:
 - Talent Acquisition and Onboarding
 - On-the-job training
 - Monitoring of Employees
 - Data Implementation



HIRING

- Practical Considerations
 - Loss of Intuition/Reason. Lack of Emotional Intelligence.
- Anti-Discrimination Laws
 - Prohibit discrimination in hiring based on a prospective employee's membership in a protected class.
- No bias?
 - Even if AI does not see gender, age, or ethnicity, it could work against the employer's intent to be an equal opportunity employer.
- Other Considerations



HIRING (cont.)

- What can an employer do to help avoid these pitfalls?
 - Avoid being too reliant on AI for recruiting and selection efforts (e.g., not incorporating any type of emotional intelligence).
 - Ensure HR professionals have insight on how to properly utilize the technology and pick up on any biases the technology may possess.
 - Establish a detailed internal procedure for making employment decisions based on the use of AI.
 - Filter out protected information from any screenings and only utilize information that can be lawfully considered.
 - 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.
 - Ensure consistent treatment and monitoring in the screening process to avoid disparate treatment claims.
 - Document and keep records of all information reviewed, transmitted, and used in any employment decision

LEGISLATION

- Illinois’ “Artificial Intelligence Video Interview Act”
- New York City’s Local Law on the Sale of Automated Employment Decision Tools
- California’s Fair Hiring Resolution (ACR 125)
- Idaho’s House Bill 118 – Pretrial Risk Assessment Tool
- New Jersey’s “Algorithmic Accountability Act”
- State of Washington’s House Bill 2644
- State of Washington’s Senate Bill 6280
- President Trump’s Executive Order “Maintaining American Leadership in Artificial Intelligence”
- U.S. Congress’ “Algorithmic Accountability Act”

HIRING/DURING EMPLOYMENT

- The responsibility to ensure fairness and proper management of employees.
 - Employers should be particularly cautious when instituting AI to perform most functions you would otherwise have a human do.
 - After the hiring process and onboarding, employees require feedback and training on topics that technology just can't teach.
- 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.

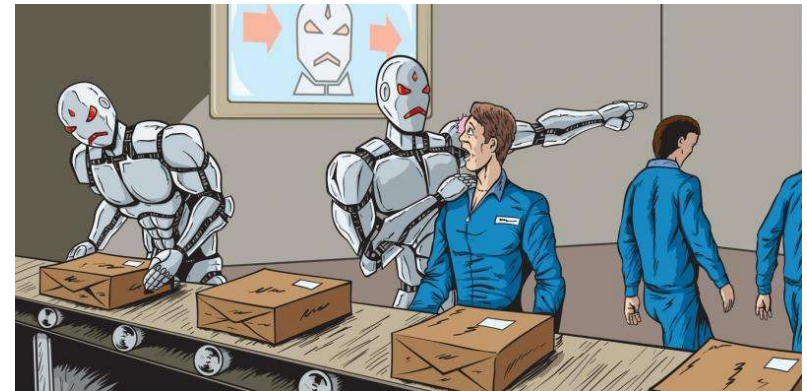
DURING EMPLOYMENT

- Generally, employers have the authority to monitor an employee's use when he or she is using the company's computer systems.
 - Clearly articulate through a properly drafted and enforced policy what employees may or may not do as related to the use of company property.
 - Narrowly tailor the policy to the company's legitimate business interests, culture, needs, and realities.
 - Train human resources on appropriate and effective employee monitoring and enforcement.



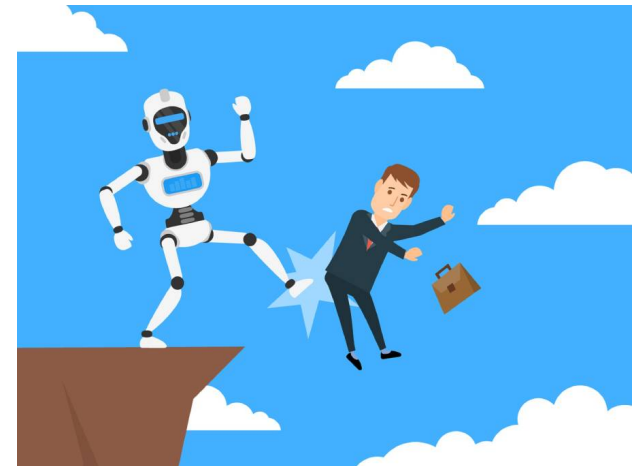
DURING EMPLOYMENT (cont.)

- 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.
- 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.
- 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.



ADVERSE ACTIONS

- What other laws 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?
- Reduction in Force (RIF)
 - 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.



ADVERSE ACTIONS (cont.)

- RIF Continued.
 - Poorly conducted RIFS will adversely affect the organization.
 - Creates the potential class-action and individual wrongful-discharge lawsuits and charges of discrimination with the EEOC.
 - Avoiding discrimination in the RIF process
 - 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.



ADVERSE ACTIONS (cont.)

- Employee Discipline
 - any application of using AI to discipline employees should be met with extreme caution
 - Most discipline from using AI will likely stem from the monitoring of employees.
 - 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.



ADVERSE ACTIONS (cont.)

- Anti-Discrimination Laws
 - Employers are prohibited from taking any action against applicants or employees on the basis of membership in a protected class.
 - 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.
 - Ensure the company does not take any adverse actions against the individual because of the individual's membership in a protected class.
 - Be cautious in using information learned from an employee's social networking page to discipline or terminate an employee if the individual recently filed or lodged a discrimination complaint.
 - On the other hand, employers should also consider the potential liability they may incur because of the social media activities of their employees.
 - Employers have a duty to redress complaints of harassment or discrimination known to the employer if related to the workplace, which could extend to alleged harassment or discrimination occurring via social media.



CONCLUSION

- 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.
- 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.



ANY QUESTIONS?

