Artificial intelligence in employment law and HR for a global workforce

Simmons & Simmons

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Agenda

- The current landscape

- The EU AI Act

- Existing legal considerations

- The vendor perspective

- Practical considerations

- Q&A

AI in the employment context

What's happening now within employers?

- Rapid adoption of AI systems and processes in HR technology.

- Large HCM management platforms, including Workday, are continually adding new AI features to increase the efficiency and effectiveness of the HR function.

- Huge number of HR Tech start-ups entering the market offering AI for specific tasks.

- AI now being used across the world for HR data analytics, process efficiency and employment decision making throughout the employment lifecycle.

- Employees are increasingly using AI tools in their roles (whether permitted or not!).

- Everything can be recorded, summarised, retained.

AI in HR

Recruitment

- Candidate sourcing
- Application sifting
- Drafting job descriptions and adverts
- Candidate relationship management
- Interviews and assessment

Workforce management

- Onboarding
- Monitoring and surveillance/ culture / pulse taking
- Performance management
- Expense management
- Internal mobility
- ER / HR chatbot
- Meeting summaries

Payroll and benefits

- Payroll processing
- PTO management
- Benefit enrolment and administration

Learning and development

- Individual learning and development programmes
- Compulsory training
- Coaching and mentoring

HR data and analytics

- HR records management
- DE&I data
- Performance ranking
- Compensation setting and benchmarking

Special protections for workers

Governments and other law-making bodies around the world have signalled their intentions to bring in special protections for the use of AI in the employment context

"The responsible development and use of AI require a commitment to supporting American workers…In the workplace itself, AI should not be deployed in ways that undermine rights, worsen job quality, encourage undue worker surveillance, lessen market competition, introduce new health and safety risks, or cause harmful labor-force disruptions."

– US President Joe Biden's executive order on AI, 30 October 2023

Special protections for workers

In the US:

- Existing law

  - EEOC Guidance underscores that existing laws apply to AI used in the workplace

    - Title VII and the ADA

- Additional guidance

  - *NIST AI Risk Management Framework and Resources*

  - *Future of Privacy Forum Best Practices for AI in Employment*

- *Proposed bills in 7 states (and counting)*

  - *California, Connecticut, Maryland, New York, Virginia, Vermont, Washington*

Special protections for workers

- Under the EU AI Act, AI technology used in employment, management of workers and access to self-employment will be classified as high-risk systems.

- In the UK, the Government said in February 2024 that it wants to harness the growth potential of AI, but not at the expense of employment rights and protections for workers.

- In the Netherlands, in January 2024, the Dutch government has asked the social and economic council to render an advice on the impact of AI on the Dutch labour market.

- In Singapore, a light touch approach is preferred and there are no plans to extend protections to employees beyond the current legal framework.
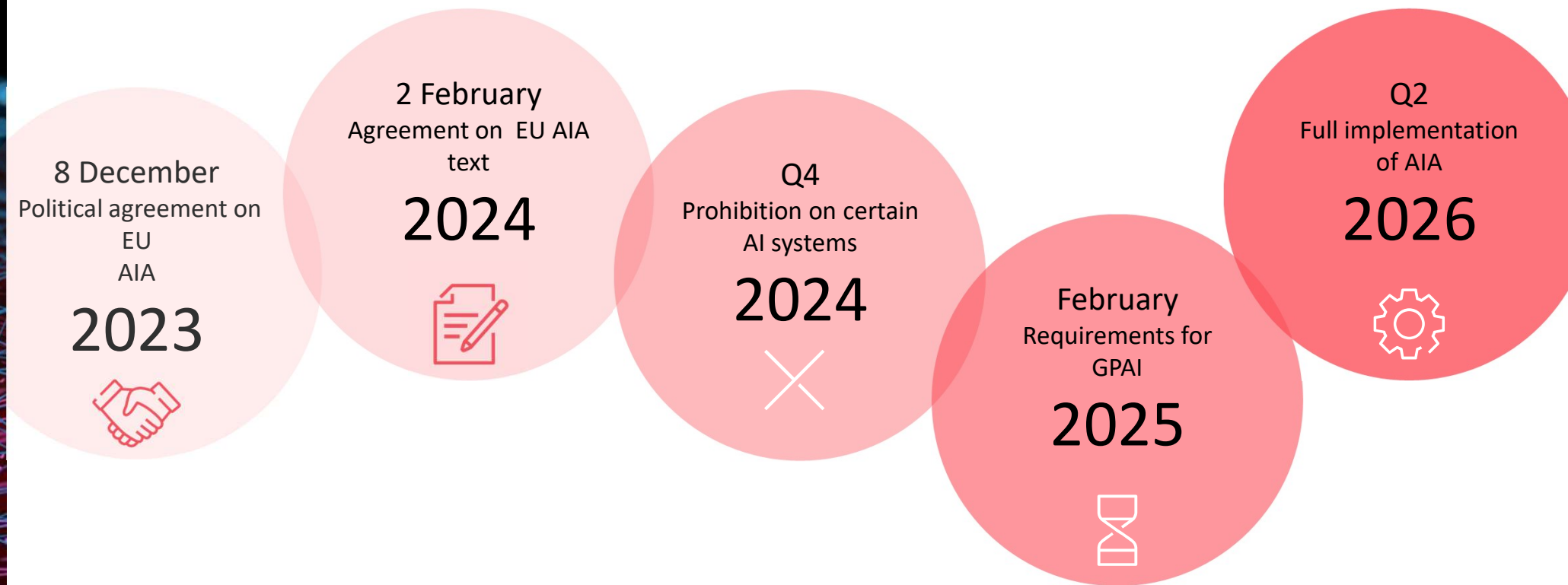
Special protections for workers

- Employers should expect AI use in the employment context to become more heavily regulated in most jurisdictions.

- But in many cases the legal framework is developing more slowly than the technology is being adopted.

- Employers therefore need to consider overarching principles and interaction with fundamental rights such as non-discrimination, access to employment, privacy and transparency as well as existing law.

The EU AI Act

Overview and status

8 December
Political agreement on
EU
AIA

2023

2 February
Agreement on EU AIA
text

2024

Q4
Prohibition on certain
AI systems

2024

February
Requirements for
GPAI

2025

Q2
Full implementation
of AIA

2026

Overview and status

- Binding regulation, comprising harmonised requirements, certification, market monitoring rules and enforcement through EU and Member State bodies

- Extra-territorial scope

- EU enforcement network with high fines for non-compliance

Overview and status

AI System:

"a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that can influence physical or virtual environments."

Extra-territoriality

AIA will apply to

- users of AI systems located within the EU

- providers placing on the market or putting into service AI systems in the EU, even where they are established outside of the EU

- providers and deployers of AI systems that are located outside of the EU, where the "output produced by the system is used in the [EU]"

Prohibited use and high-risk systems

- AI systems for emotional recognition in workplaces will be prohibited by the end of 2024.

- High-risk AI systems:

  - AI systems intended to be used for recruitment or selection purposes (notably for advertising vacancies, screening or filtering applications and evaluating candidates and in the course of interview or tests); and

  - AI intended to be used for making decision in the workplace (notably for promotion or termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance).

- Exceptions?

Obligation: high-risk AI systems

§ ——————

- Completing fundamental rights impact assessment ("FRIA") before using a high-risk AI system;

- Appropriate technical and organisational measures;

- Allocating competent, properly qualified and resourced human oversight;

- Ensuring relevant and sufficiently representative input data

- Keeping records of logs generated by the high-risk AI system; and

- Monitoring the operation of the high-risk AI system and reporting incidents to the provider and relevant national supervisory authorities.

Existing legal considerations: Data protection

Key Considerations

AI in the employment context will rely on new and increased use of employee personal data.

Existing data protection considerations for example under GDPR in UK and the European Union:

- *Is there a legal basis for processing the data?*
- *Is the processing covered by the employee (or candidate) privacy notices?*
- *Is a data protection impact assessment required?*
- *Are appropriate levels of security in place?*
- *Are any new data transfer agreements required?*
- *Will this be restricted automated decision making?*

Existing legal considerations: UK

Protection of employees from discrimination

- Equality Act 2010: an employer cannot treat an employee, a worker or a candidate less favourably because the possess a "protected characteristic".

- Those protected characteristics include sex, gender reassignment, disability, age, sexual orientation, pregnancy and maternity, race and religion or belief.

- AI systems may be trained on data which contains biases and may lead to discriminatory decision making. The employer is liable for the discrimination and not the provider of the system.

- Awards for discrimination are uncapped and would represent losses plus an award for injury to feelings.

Defending employment litigation

With AI increasingly taking a role in decision making in the employment context, in the UK employers should be considering how they would defend a claim made in the Employment Tribunals where AI has played a role:

- *Will there be disclosable documents that explain how the decision was made?*
- *Would sensitive information about other employees or how decisions are made become disclosable?*
- *Is there a manager who can own the decision as a witness?*
- *Is the employer able to explain how the AI system works and how it reached any decisions or recommendations?*
- *Is the employer able to explain how the AI system and any training data on which it relies was tested for bias?*

Existing legal considerations: Netherlands

Netherlands

Currently no **specific** Dutch regulation on AI yet.

- Nevertheless, from an employment perspective, there are legal considerations at **the intersection of AI and co-determination**, for example:

  1. Where considered use of an AI tool within a company may require **the advice** of the works council:
     - *a significant capital investment;*
     - *introduction of major technological facility;*
     - *loss of jobs due to a reduction/change in activities?*

  2. Where a certain AI tool might be used in the context of *performance reviews, recruitment, processing of personal data*, etc. (works council's **right of consent**).

Netherlands

AI on the work floor: how to enforce safe/ethical use of AI by employees?

- The employer's **instruction right:** a ban on the use of certain AI-tools for work-related activities

- How does that work in practice?

Netherlands

Contractual provisions: the potential of a redrafted non-confidentiality clause

> **Confidentiality and non-disclosure**
>
> The Employee shall at all times during the continuance of his/her employment under the Agreement and/or after termination of the Agreement – irrespective of the manner in which and the reasons for which his/her employment may be terminated – treat as strictly confidential and not disclose or communicate to third parties, whether directly or indirectly, in any form or manner whatsoever, any information which comes to his/her knowledge regarding the practice, business dealings and affairs of the Employer and/or the Group Companies and/or its customers and other business relations, all this in the broadest sense, unless the discharge of his/her duties as [JOB TITLE] of the Employer requires the disclosure of such information to third parties on a need-to-know basis or is authorised in writing by the Employer or as ordered by a court of competent jurisdiction. For the avoidance of any doubt, entering confidential information (within the meaning of the foregoing sentence) into any Artificial Intelligence tool (such as, for example, ChatGPT) without the express prior written approval of the Employer, shall also constitute a breach of this confidentiality clause.

Existing legal considerations: Singapore

Model AI Governance Framework 2.0

S <u>Singapore</u>

a. Organisations using AI in decision-making should ensure that the decision-making process is **explainable**, **transparent** and **fair**.

Although perfect explainability, transparency and fairness are impossible to attain, organisations should strive to ensure that their use or application of AI is undertaken in a manner that reflects the objectives of these principles as far as possible. This helps build trust and confidence in AI.

b. AI solutions should be **human-centric**.

As AI is used to amplify human capabilities, the protection of the interests of human beings, including their **well-being** and **safety**, should be the primary considerations in the design, development and deployment of AI.

From Principles to Practice

Internal Governance Structures and Measures

- Clear roles and responsibilities in your organisation
- SOPs to monitor and manage risks
- Staff training

Determining the Level of Human Involvement in AI-augmented Decision-making

- Appropriate degree of human involvement
- Minimise the risk of harm to individuals

Operations Management

- Minimise bias in data and model
- Risk-based approach to measures such as explainability, robustness and regular tuning

Stakeholder Interaction and Communication

- Make AI policies known to users
- Allow users to provide feedback, if possible
- Make communications easy to understand

AI Verify

TRANSPARENCY ON USE OF AI AND AI SYSTEMS
Ensuring consumer awareness on use and quality of AI systems
▶ Transparency

UNDERSTANDING HOW AI MODEL REACHES DECISION
Ensuring AI operation/ results are explainable, accurate and consistent
▶ Explainability   ▶ Repeatability/Reproducibility

SAFETY & RESILIENCE OF AI SYSTEMS
Ensuring AI system is reliable and will not cause harm
▶ Safety   ▶ Security   ▶ Robustness

FAIRNESS/NO UNINTENDED DISCRIMINATION
Ensuring that use of AI does not unintentionally discriminate
▶ Fairness   ▶ Data Governance

MANAGEMENT AND OVERSIGHT OF AI
Ensuring human accountability and control
▶ Accountability   ▶ Human agency and oversight
▶ Inclusive growth, societal and environmental well-being

Test your AI systems against internationally accepted AI Principles

Build trust with your stakeholders with reports generated by our Toolkit

Shape regulator-developed Testing Framework and enhance Toolkit with industry best practices and benchmarks

Contribute to the international standards development

A Guide to Job Redesign in the Age of AI

Transforming Jobs

Assess the impact of AI on tasks, including whether each task can be automated or augmented by AI or remain in human hands, and decide which jobs can be transformed within an appropriate time frame.

Charting Clear Pathways Between Jobs

Chart task pathways between jobs within an organisation and identify the tasks employees would need to learn to transition from one job to another.

Clearing Barriers to Digital Transformation

Suggest ways to address potential challenges and support employees when implementing AI.

Enabling Effective Communication Between Employers and Employees

Build a shared understanding within the organisation on "why", "what", and "how" AI will augment human capabilities and empower employees in their career.

Workplace Fairness Act 2024

- Any adverse employment decision based on any protected characteristic deemed unlawful
- Unclear if AI users and/or developers potentially liable for discriminatory outcomes – risk to employers
- Damages:
  - Tribunal awards: S$30,000 cap
  - Civil actions: uncapped

Protected Characteristics

- Sex
- Marital status
- Pregnancy
- Caregiving responsibilities
- Race
- Disability
- Religion
- Age
- Nationality
- Language
- Mental health conditions

Vendor insights:
Workday

Vendor insights

- *Responsible AI is a shared responsibility*
  - *Developers, deployers, end users*
  - *Scope of obligations, control, and visibility*
- *Internal education*
  - *What is bias?*
  - *Use case specific approach*
  - *No silver bullets / "Remember the Wright brothers"*
  - *Leverage existing frameworks*
- *Practical considerations*
  - *Scalability*
  - *AI Entry points*
    - *oCHRO, oCFO, oCIO, business technology teams, procurement*

Responsible AI at Workday
Innovating ethically and responsibly

Our Principles

→ Amplify human potential
→ Positively impact society
→ Champion transparency and fairness
→ Deliver on our commitment to data privacy and protection

Our Program

→ Leadership commitment
→ Dedicated resources
→ Cross-company support
→ Guidelines, processes, and standards
→ Scalable tools

Responsible AI Practices

Human Oversight

Disclosure & Transparency

Fairness

Maintenance & Monitoring

Record Keeping

Validity & Reliability

Explainability & Interpretability
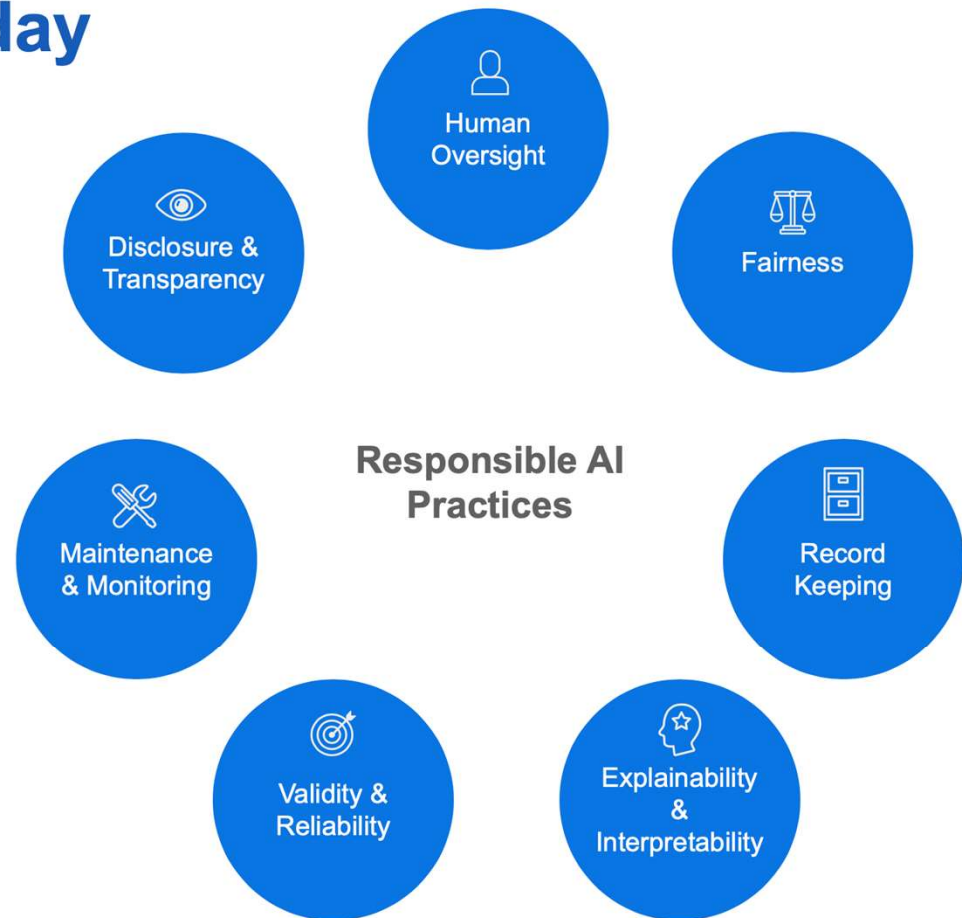
Practices

Responsible AI Guidelines

Human Oversight

Practices & protocols for ensuring human-in-the-loop as it relates to development, implementation, & use

Fairness

Measurement and management of any disparities

Record Keeping

Practices related to logging and versioning requirements

Explainability & Interpretability

Meaning associated with the underlying mechanisms and outputs of the AI system

Validity & Reliability

Benchmarking performance against appropriate criteria

Maintenance & Monitoring

The application of systems, tools, and controls to understand and address AI system risks, impacts, and potential harms

Disclosure & Transparency

Making available information about the system and options on how to engage with it

Practical measures

Practical measures

1 Identify and risk assess the AI systems and processes you are using now.

2 Risk assessment should include current legal requirements, incoming regulations such as AIA and the evolving legal landscape.

3 Consider guiding principles: transparency and explainability, human oversight, impact on fundamental rights.

4 Put in place a governance framework for implementing new AI technologies.

5 Work closely with vendors to understand not only the systems but the approach to future compliance with evolving regulation.

Q&A