



2024 COMPLIANCE
DMEC CONFERENCE
DALLAS, TX | MARCH 25-28, 2024

Artificial Intelligence: Implementing Workplace Tools in a Sea of Uncertainty

March 27, 2024

Joseph “Joe” Lynett, New York City Office

Jennifer Rusie, Nashville Office

Jackson Lewis, LLP



Agenda



- What is A.I.?
- Employment Decision Making
- Coexisting With and Leveraging A.I.
- Complying with Emerging Law and Policy
- Questions

AR
MACHINE LEARNING
BLOCKCHAIN
INDUSTRY 4.0
DATA MINING
ROBOTICS
VOICE RECOGNITION
ARTIFICIAL INTELLIGENCE
NET NEUTRALITY
SMART CITIES
BIOMETRICS
ZETTABYTE
DEEP LEARNING
CLOUD
QUANTUM COMPUTING
VR
NEURAL NETWORK
BIG DATA
5G
FI-FI

PLAS
RAPPS
ALGORITHM
ACTIONABLE ANALYTICS
WEARABLES
AGILE
PREDICTIVE ANALYSIS
SaaS
IoT
MICROSERVICES



What is Artificial Intelligence or A.I.?

What is A.I.?

- Artificial intelligence leverages computers and machines to **mimic the problem-solving and decision-making capabilities of the human mind**
- Congress defined “AI” to mean a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.”

(IBM, 2023)



A.I. Around the World



- In 2023, we saw a rise in large language models such as ChatGPT create an enormous change in the use and performance of A.I.
 - With these new generative A.I. practices, deep-learning models can be pre-trained on vast amounts of raw, unlabeled data

(IBM, 2023)
- No democratic nation has adopted a federal law governing the use of A.I., but the technology continues to develop at a rapid pace
 - A.I. tools are being used by individuals and organizations worldwide, often with little regard for the risks and pitfalls
 - China is leading the pack right now, with its provisional regulations on A.I. becoming effective August 15, 2023
- A.I. is predicted to be the next big class action boom
- A.I. vendors and organizations using A.I. tools are already on the defense
 - Employers should be prepared to defend their vendors and A.I. use



Employment Decision Making

How do employers use A.I. in employment decision making?

No decisions should be made by A.I. alone

A.I. can *assist* employers in making the following employment decisions:

- Recruiting
- Hiring
- Training
- Promotion, demotion
- Salary
- End of employment





Coexisting With and Leveraging A.I.

Approximately 68% of United States workers worry that A.I. may take their jobs

- 80% of these workers are already using A.I. in some way in the workplace
 - U.S. workers are more familiar with A.I. tools than they think

(McKinsey, 2023)

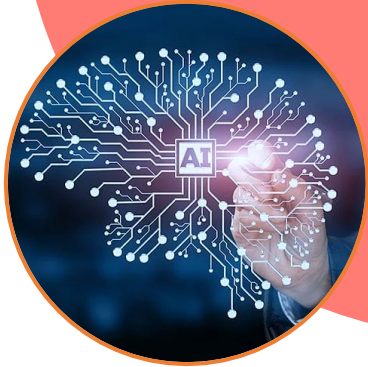
The key to mitigating employee fears about A.I. is education

- **Invest in training and other educational opportunities**
 - Provide employees the chance to come up with ideas on how to use A.I. tools to make their jobs or a workplace process more efficient
- **Create awareness and communicate**
 - Leadership plays a huge role
 - Be transparent about how A.I. will be used



Step 1: Mitigating Employee Fears

Step 2: A.I. Ethics



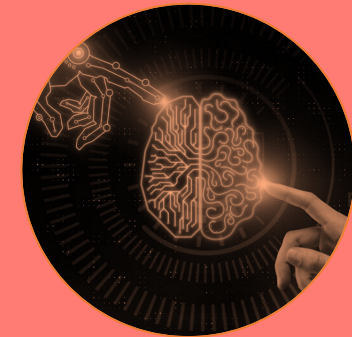
- 1 **Fairness and inclusivity**
- 2 **Data protection and right to privacy**
- 3 **Explainability and transparency**
- 4 **Responsibility and accountability**
- 5 **Human control**

(IBM, 2023)



- **Evaluate A.I. suitability** for your organization and department
 - What challenges can this solution address?
 - How does A.I. integrate with your current system?
 - Who at your company will support A.I., and how?
(Forbes, 2023)
- **Vet the vendor** and its product offerings
- Keep the **“human”** in “human resources”
 - A.I. should never be making a decision on its own
- To validate A.I.’s work, create **performance criterion** to regress against and compare
(McKinsey, 2023)
- A.I. can assist H.R. in the following ways, if not already:
 - Creating job descriptions
 - Compiling feedback to generate components of performance reviews

Step 3: Leveraging A.I.



Step 4: Remembering the Risks



Employers can be on the hook for decisions made by A.I., even where they were not involved in the development of the selection process criteria or the creation of the algorithmic decision-making program itself

1. Bias and discrimination issues
2. Data privacy issues
3. Employee-Employer relations issues
4. Navigating a new legal and policy landscape



Complying with Emerging Law and Policy





What is an Automated Employment Decision Tool?

- Under New York City law, an **AEDT** is defined as a computer-based tool that:
 1. Uses machine learning, statistical modeling, data analytics, or artificial intelligence; and
 2. Helps employers and employment agencies make employment decisions; and
 3. Substantially assists or replaces discretionary decision-making
- What is a **bias audit**?
 - Under New York City law, a bias audit is an impartial evaluation by an independent auditor
 - At a minimum, an independent auditor's evaluation must include calculations of selection or scoring rates and the impact ratio across sex categories, race/ethnicity categories, and intersectional categories





AI & Employment – Federal Developments

- **May 2023:**

- EEOC Issues Technical Assistance: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964.

- **August 2023:**

- First EEOC Consent Decree with AI-related claims: EEOC v. iTutorGroup.

- **October 2023:**

- President Biden signs Executive Order on Artificial Intelligence dated October 30, 2023.



White House Issues Executive Order Regarding AI

- Direct the following actions related to employment:
 - Secretary of Labor to develop guidelines to mitigate the harms and maximize the benefits of AI for workers by addressing displacement, labor standards and related issues.
 - Chair of Council of Economic Advisers to produce a report on AI's potential labor market impacts and study and identify options for strengthening federal support of workers facing labor disruptions.
 - Federal Trade Commission to develop rules to ensure fair competition in the AI marketplace and workers protection from harms enabled by the use of AI.
 - Office of Management and Budget to issue guidance to agencies for assessing and mitigating disparate impact, algorithmic discrimination, and more.
- Order also calls for the Department of Homeland Security and Department of State to identify new pathways and build upon existing programs to attract and retain the best foreign nationals with AI knowledge, skills, and education.



AI & Employment –State Developments

■ **January 2023:**

- New Jersey proposes Assembly Bill 4909 requiring companies to notify candidates of the use of AI when screening applicants.
- California proposes AB 331 and SB 721 (Becker) modifying use of AI in automated-decision systems.
- Vermont proposes Assembly Bill 114 restricting the use of AI in employment decision making.

■ **February 2023:**

- Massachusetts introduces House Bill 1873 restricting the use of AI when making employment-related decisions.
- Washington, D.C. introduces “Stop Discrimination by Algorithms Act of 2023”.

■ **July 2023:**

- New York City regulation (Local Law 144) on using AEDT in employment goes into effect.

EEOC Resources



- As part of its **A.I. and Algorithmic Fairness Initiative**, in May 2023, the EEOC released a new resource on A.I. and compliance with Title VII
 - Focuses on **disparate impact**: neutral tests or selection procedures that have the effect of disproportionately excluding persons based on a protected category, if the tests or selection procedures are not “job related for the position in question and consistent with business necessity”
 - Answers questions such as: Is an employer responsible under Title VII for its use of algorithmic decision-making tools even if the tools are designed or administered by another entity, such as a software vendor? **In many cases, yes.**
- The EEOC has published multiple technical assistance documents on this topic over the past 2 years
- The EEOC is focusing on hiring and training its employees to evaluate A.I. discrimination cases

■ Issues Employers Using A.I. Should Consider



- Understanding the use and risks
- Tracking the application and requirements of established and emerging laws, guidance, and frameworks
- Considering application of guardrails or key principles,
 - Notice, informed consent, transparency, privacy and security, fairness, nondiscrimination, and ability to understand and challenge outcome
- Incorporating “promising practices” suggested by the EEOC
- Oversight of the use of the tool
- Vetting the vendor and the product offering the tool
- Record retention obligations



Questions?



Thank you.

