Artificial Intelligence

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Artificial intelligence ("AI") has disrupted, and will continue to change, how virtually every workplace operates. AI technologies are increasingly being used, for example, in recruitment and hiring, engagement, and general human resource ("HR") functions. AI tools can now analyze job postings, give recommendations to target specific demographics, assess applicants' soft skills, and match those against current top performers to predict the most suitable employees. Plus, digital interview platforms can use AI to evaluate a candidate's tone, language, and facial expressions to predict whether that person is suitable for a particular role. Traditional HR functions now performed by AI include everything from scheduling interviews, assisting in onboarding new hires, and responding to employees' basic HR-related questions.

Although employers may welcome AI in the workplace, the technology has its downsides and detractors. For instance, AI tools used in employment decision-making, such as selecting new workers, can be set up in a way that perpetuates stereotypes and disparately impacts certain populations, thus leading to lawsuits. Labor unions have been pushing back against the rise of AI, concerned that it will replace some human workers, and have been demanding certain contractual protections for affected workers. Also, state governments are beginning to regulate the use of AI, in an effort to protect human job applicants and workers. Lastly, many argue that current AI cannot adequately replicate the empathy and soft skills required by HR professionals.

In this rapidly evolving area, employers rely on attorneys in the AI team at Epstein Becker Green ("EBG") to help them effectively handle the thorny issues and risks that can arise when AI is introduced to, or used in, a workplace.

Artificial Intelligence: Workplace Issues

AI in Recruitment and Hiring

Sourcing and selecting new employees can be a time-consuming and expensive process. Our clients are constantly looking for ways to make this process more cost efficient and effective. AI-based tools offer employers the ability to recruit and evaluate candidates at scale—using data in ways that the tools' vendors typically boast will be more predictive of future performance and reduce bias in decision-making. These offerings include gamified skill assessments, video interviewing capabilities, and job description analyses. When using these tools, however, employers must be cognizant of the potential for discrimination—including both disparate treatment and disparate impact—the affect the technology will have on people with disabilities, and the disclosure requirements of federal and state laws.

AI to Supplement HR Functions

Once hired, employees may encounter AI in a variety of ways, including when interacting with an HR department. For instance, employers may use chatbots (computer programs using AI to simulate conversation with human users) to perform HR generalist functions—such as responding to requests for paid time off ("PTO") balances or completing paperwork—and even to conduct intake of harassment and discrimination complaints. While chatbots may be capable of augmenting the work of HR generalists, employers must take care to identify scenarios in which human intervention is more appropriate or otherwise required.

AI in Employee Benefits

Employers also use AI tools to improve the design, delivery, administration, and communication of employee benefits. For instance, AI tools may be used to evaluate benefit plan options on an enterprise basis, or to recommend the most cost-effective or efficient medical plan in which a specific employee should enroll as increased personalization is introduced into benefits programs. Chatbots may also be utilized to assist with benefit enrollment inquiries from employees. Plan sponsors and plan fiduciaries need to ensure that the information being provided by these tools is in compliance with applicable plan terms and that any personal data that is collected, transmitted, processed, and/or stored is secure and protected.

In addition to the legal issues raised by using AI tools in employee benefits programs, the usage of AI in the workplace will continue to shape the "future of work" and employee benefits considerations, such as portable benefits constructs, impact of gig workers on employer-sponsored plans, and severance and transition programs.

We provide counseling and advice on the many issues that an organization must consider when introducing or utilizing AI in the workplace, including issues relating to:

- Compliant usage of HR technology (i.e., people analytics, digital interview platforms, chatbots, big data)
- Wearables in the workplace and accessibility
- Union avoidance, collective bargaining, and labor relations
- Wage and hour disputes
- Workplace data privacy and security
- Employment-related litigation
- Employee benefits and compensation design and compliance
- Workplace transition policies
- Immigration
- eDiscovery of data collected by machines
- Occupational health and safety (OSHA)

In addition, the firm provides corporate transactional services and, through affiliate EBG Advisors, strategic workplace management consulting services.

How We Can Help

EBG's AI team will guide you on implementing AI, including predictive (or people) analytics, and big data in your workplace. If, for example, you want to use AI tools in your hiring process, we will evaluate AI vendors for their employee recruitment, selection, and onboarding functions to assess the product offerings, review vendor contracts, and conduct general diligence regarding the vendor. Once a product has been adopted, we will monitor and test the product and determine whether the product raises red flags from a legal perspective, using a validation strategy compliant with the Uniform Guidelines on Employee Selection Procedures and any other applicable laws and regulations. Upon implementation, we will evaluate the product using a legally compliant validation strategy.

In addition, if you decide to delegate certain functions to a chatbot—such as tracking benefits and PTO, or explaining employee benefits programs to employees—we will help you evaluate the questions asked by the chatbot, confirm that the chatbot has built-in processes to elevate certain matters for human review, determine that the chatbot is providing information consistent with its intended function, and ensure that the chatbot creates a favorable experience for employee-users.

Further, we will advise you on a gamut of labor and employment issues—whether you're dealing with wearables in the workplace and their accessibility, collective bargaining and labor relations matters involving workers displaced by AI, potential discriminatory biases in AI technology, or privacy and security concerns regarding employee data collected by AI technologies, among other issues—to ensure that you're staying in compliance with all applicable laws/regulations and minimizing your risks as much as possible.

Learn more at https://www.ebglaw.com/artificial-intelligence/.

Representative Experience

Below is a sampling of the AI-related matters on which our AI team recently worked:

- Counseled employers on compliance with various employment laws regarding implementation of a variety of AI tools, including tools relating to marketing, job descriptions, candidate rankings, talent acquisition, candidate communications, automated interviewing and scheduling, candidate assessments, and onboarding

- Advised multiple clients, including those in media, financial services, restaurant, and sports industries, regarding the adoption and implementation of AI assessments in hiring

- Advised an employer on the legal issues related to using a popular AI-based interview tool, assessed a game-based platform, and analyzed the potential use of a big data employee workflow productivity product

- Analyzed a technology company's AI-enabled employee self-service module to help employees and managers further improve productivity by streamlining communication and reducing manager workloads

- Assisted a retail client and a financial services client in evaluating the questions asked by their chatbots to ensure that the algorithms, among other things, would be able to distinguish between various types of employee requests

- Provided legal and HR compliance oversight for AI-related initiatives that use big data mining techniques to determine success, advancement, and departure rates

- Developed a severance plan for a health care organization replacing certain positions with machines