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2021 AAA STAFFING LAW VIRTUAL CONFERENCE **APRIL 29–30**



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Artificial Intelligence and Onboarding: Tools That Make Staffing Easier, or Legal Minefield?





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Artificial Intelligence and Onboarding: Tools That Make Staffing Easier, or Legal Minefield?

James A. Essey, president and chief executive officer, The TemPositions Group of Companies Jason B. Klimpl, Esq., partner, Tannenbaum Helpern Syracuse & Hirschtritt LLP; general counsel, New York Staffing Association Niloy Ray, Esq., shareholder, Littler Mendelson PC



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Benefits—Why Use AI for Recruitment and Onboarding?

- Broaden the hiring funnel and potentially increase diversity
- Efficiency
- Augment human decisions
- May reduce risk of implicit or unconscious bias





Risks of Using Al

- Al can still produce biased outcomes (including "invisible" bias)
- Al use may lead to overreliance on tool decisions
- Market unfamiliarity with AI processes may lead to lawsuits and government audits
- Compliance risks (e.g., privacy, discrimination) of using new technologies are not fully known





How AI Tools Work

Al tools use machine learning

- Build their own step-by-step processes
- Can learn and adapt sans human intervention **Tools that decide**
- Based on Big Data; permits "deep learning"
- Identifies unintuitive patterns

Bottom line: arithmetic vs. calculus

- Not straightforward to trace input to output
- Law and regulations need to catch up



Types of Tools

Tools that rank or prioritize

- Tools that test skills
- Tools that measure intangibles



Application of AI to Recruitment Life Cycle

- 1. Attracting and identifying candidates
- 2. Further qualifying candidates
- 3. Selecting candidates for assignment





- **Recruiter, Facebook, Instagram)**
 - staffing firm input (e.g., job descriptions)
 - advertisements, using AI to determine whom to market to
- When carefully used, both options enhance the speed and quality of results



Third-party tools that deliver candidates to you (e.g., Monster, ZipRecruiter, Indeed, LinkedIn

Some identify candidates from a pool, using AI to compare candidate input (e.g., résumés) to

Others attract candidates by posting your openings via social media and other online



Staffing firm must carefully review its input

Focus on essential job skills and functions. Scrutinize the following:

- Gendered terms and pronouns
- Appearance or grooming ("neat")
- Age references ("young," "recent graduate," "energetic," "junior/senior")
- Language requirements
- Vehicle ownership
- Experience limits
- Geographic or distance-related limitations (ZIP codes, etc.)
- Limits on employment gaps
- Education levels

Consider using AI tools that help vet job descriptions for bias/inclusion (e.g., Textio)



But input control (e.g., "blinding résumés") can't predict what Al uses to derive patterns, especially unintuitive patterns



Avoid using predictive hiring tools that ask the employer to identify "successful" or "high performing" employees based on description/résumés of groups of existing employees with similar demographics

Always ask: is information necessary and representative?

 \bullet resulted in problematic input consisting of mostly male candidates' résumés.



Example: One large company determined that software it was testing developed a bias against women because the software downgraded résumés with information related to their gender. This



To avoid "rubber stamping," consider human review of Al-selected candidates

- Determine feasibility of human review that removes ranking, score, or order
- Use more than one person on input (job descriptions, training sets, etc.)
- Joint decisions can help reduce risk of bias
- Balance loss of efficiency with risk mitigation





- Testing for adverse impact (Title VII, Americans With Disabilities Act)— "the third-party software made me do it" is likely not a good defense
- Uniform Guidelines of Employee Selection Procedures of 1978 \bullet
- Validity testing against job requirements
- Job related and consistent with business necessity \bullet
- Attorney-client privilege in testing



adverse impact claims do not consider whether discrimination was intentional—



Further Qualifying Candidates

Staffing firms may put candidates in applicant tracking system and then further qualify to determine suitability

Chatbots ("candidate engagement") tools

answer to prior questions (decision tree Q&A)

Testing tools

- Gamification and/or personality or behavioral characteristic tests
- identify "best" candidates

Interviewing tools (e.g., HireVue)

answers to "ideal" answers



Further qualify based on answers to various questions, some of which may be dependent upon

Employer may ask "top performing" or "successful employees" to play games to train software to

Eye contact; facial expressions; body language; tone; speech patterns or cadence; comparing

Further Qualifying Candidates

Scrutinize process and avoid rigidity

- Candidate opt-out or consent (IL, TX, WA, MD biometric laws)?
- Collection of protected personal information (CA, NY, WA, AR privacy laws)?
- Communication of staffing firm EEO policy to candidates?
- Communication of staffing firm's disability accommodation process-can candidate request modification of process to facilitate their personal accommodation needs?
- Vet chatbot's decision tree Q&A for potential bias ("Do you live within five miles of work site?" "Do you have any childcare obligations?" etc.)
- Is question or test necessary for the group of likely positions?
- Is process transparent? Candidates and public are generally distrustful of AI in hiring Does it actually work? Can it be tested and validated?







Further Qualifying Candidates

- Special concerns with tools that purport to test intangibles—e.g., artificial interviews that evaluate truthfulness or veracity of responses, reliability, assertiveness, etc.
 - How does software account for cultural differences, e.g., eye contact or headcovering?
 - How does software account for disability-related considerations?
 - Did it work as intended?
 - Can it be tested and validated (likely hard)? Is it defensible?
 - Does it violate anti-polygraph laws?





Selecting Candidates for Assignment

Using tools to select previously qualified candidates for assignment

candidates; evaluate performance of tools, including outcomes testing



• Wash, rinse, repeat. Use same steps previously discussed for attracting and identifying candidates; scrutinize inputs, including description of "successful"



Selecting and Working With Software Vendors

- does software work; what factors does it use and how does it use them?
- whether it may trigger Fair Credit Reporting Act obligations; or considers certain demographics with less "desirable" social media presence
- Ask whether software offers "blind-hiring mode" (strips away demographicrelated information obtained from social media, etc.)



Understand and evaluate vendor's process and algorithm ("black box?")—how Understand whether software pulls (and presents to employers) information from outside sources, such as candidates' publicly available social media—and protected characteristics (e.g., member of place of worship), and/or screens out







Selecting and Working With Software Vendors

- Evaluate software "maturity"—how long and widely in use? Size of data set?
- done due diligence; what efforts?
- onerous vendor terms like "WE DO NOT WARRANT THAT ANY CONTENT COMPLIANT, UP-TO-DATE, RELIABLE, OR CORRECT."
- Get vendor agreement to cooperate in event of litigation or government investigation
- Consider "test" group or population



Obtain vendor representations regarding past testing and/or audits. Has vendor

Obtain vendor representations regarding litigation or government investigations Scrutinize and negotiate terms of service, including indemnification—especially PROVIDED ON OR THROUGH THE SERVICES IS ACCURATE, LEGALLY







Pay close attention to legal and regulatory developments

- with antidiscrimination laws and avoidance of disparate impact
- ability to investigate and regulate AI hiring tools



Additional Suggestions

Example: proposed New York City law would bar sale of "automated employment" decision tools" unless developer conducted anti-bias audits to assess compliance

Example: In December 2020, 10 U.S. senators sent a joint letter to the U.S. Equal Employment Opportunity Commission requesting information about the agency's



Class action mitigation

- easier



Additional Suggestions

"Failure to hire" claims generally are highly individual and hard to prosecute on a class basis—AI recruitment tools using common processes could make class certification

To mitigate the risk, consider use of arbitration agreements waiving class actions



Audit information security and privacy practices

- What data or information is stored or accessed? Biometrics?
- What security protocols are in place?



Additional Suggestions

• Are any federal, state, or local (or foreign) privacy laws implicated? General Data Protection Regulation (in the European Union)? Asia? South America?



Train your recruiters and other internal employees

- Can they spot issues?
- Can they mitigate risk?



Additional Suggestions

Do they understand the general antidiscrimination law framework (e.g., CSP)? Do they understand the potential connection between use of AI and bias?



Questions?





Reference Resource—Basic Vocabulary

- > Algorithm—A process or set of rules to be followed in calculations or other problemsolving operations. These are the step-by-step instructions computers follow to perform a task.
- > Machine Learning—The use and development of computer systems that are able to learn and adapt without following explicit instructions, by using algorithms or statistical models to analyze and draw inferences from patterns in data. Machine learning means the computer builds its own step-by-step instructions for performing specific tasks.
- > Artificial Intelligence—The theory and development of computer systems able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision-making, and translating between languages.
- > Big Data—Extremely large data sets that may be analyzed computationally to reveal patterns, trends, and associations, especially those related to human behavior and interactions. Big Data is a prerequisite for certain types of machine learning.





Reference Resource—Basic Vocabulary

- > Supervised Learning—The process of training a model by feeding it labeled input data as well as and then confirming when the model correctly identifies cats. Also, e-discovery document review).
- > Unsupervised Learning—The process by which algorithms train themselves by analyzing large
- possible to "work backward" from the output to figure out how the machine arrived where it did.



correct output data (give the example of cat videos annotated by humans to identify the cats in the videos

amounts of data that are neither classified nor tagged and looking for patterns therein (clustering).

> Glass Box Al or Explainable Al—Machine learning technology where the outputs can be understood by humans. This generally means the input variables and object weightings can be understood, and it is



Reference Resource—Basic Vocabulary

- others).



> Black Box Al or Opaque Al—Machine learning technology where models are created directly from data by an algorithm using unsupervised learning, meaning that humans, even those who design these algorithms, cannot understand how the variables are being combined to make predictions.

> **Bias**—Results from a model that are systematically prejudiced due to faulty assumptions. This often arises from the choice of training and test data and their failure to represent the true population. This generally results in outcomes which are systematically less favorable to individuals within a particular group, but where there is no relevant difference between groups that justifies the divergent outcomes.

 \succ **Bias Testing**—The process of using statistical analysis to look for and identify biased outcomes (statistical significance—in practice two standard deviations from the mean, four-fifths rule—80%,



Reference Resource—Types of Tools

Tools that rank or prioritize

device and the position's requirements

Tools that decide



• Assess "skill" inputs against a specific job req or series of job reqs and assign a score based on the "fit" between an applicant's skills as summarized in a résumé or other input

 Purport to identify the best candidate for a position—work in a fashion that is fundamentally similar to prioritization tools but present a single "best" candidate for a position or a list of ranked candidates with the "best" specifically identified



Reference Resource—Types of Tools

Tools that test

• Technology enabled testing platforms, games

Tools that purport to test intangibles

process, or purport to measure drive, intelligence, etc.



• Tools that purport to measure an applicant's veracity during the interview



The information presented in this presentation does not represent legal advice, which should come from a legal adviser with knowledge of specific facts and circumstances.







James A. Essey



James A. Essey is the president and chief executive officer of TemPositions Group of Cos., one of the nation's largest regional staffing firms. Since joining the TemPositions Group of Cos. in 1985, Jim has focused the firm on developing a number of niche businesses, heading each with industry experts. He has also been responsible for the closing of 15 acquisitions. Through his efforts, TemPositions is one of the true full service staffing companies in the market today. Jim currently serves as the chairman of the American Staffing Association's legal and legislative committee and is legislative co-chair for the New York Staffing Association.





Niloy Ray, Esq.



nray@littler.com

benefits, and labor law matters.



- Niloy Ray is a shareholder of Littler Mendelson, P.C. Littler is the largest law practice in the world exclusively devoted to representing management in employment, employee
- Niloy's nationwide practice focuses on the litigation of critical e-discovery, information governance, and other data-driven employment issues and challenges. He routinely counsels clients on workplace transformation, compliance, and litigation avoidance.
- Niloy relies on his prior career—coding, designing, and leading the development of software applications—to inform his legal analyses with practical technology insight.
- A member of The Sedona Conference Working Group 1 and EDRM, and faculty member/presenter at numerous national conferences, Niloy speaks, writes, and presents regularly on all topics relating to electronically stored information.



Jason B. Klimpl, Esq.



klimpl@thsh.com 212-508-7529 Jason is a partner in the Employment Law Group of Tannenbaum Helpern Syracuse & Hirschtritt LLP. In this capacity, he advises clients on a broad range of employment law matters, such as wage and hour compliance; health hcare; equal opportunity actions and policies; employment agreements and restrictive covenants; independent contractor and consulting issues; reductions in force; technology and privacy concerns; and other human resources counseling.

Jason is also the general counsel of the New York Staffing Association and is heavily involved in legal and legislative efforts to support the staffing industry.

Jason has written numerous employment law articles and is a contributing faculty member of both Lawline and the National Academy of Continuing Legal Education. Jason is also a member of the Manhattan Chamber of Commerce's Speakers Bureau and Help Desk.

Awarded Martindale-Hubbell "Preeminent" peer review rating.

Named 2013 - 2020 New York Super Lawyer (Rising Star).

Finally, the New York Enterprise Report named Jason the winner of the Best Attorneys and Accountants "Rising Star Attorney" category.

