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EXECUTIVE SERIES: LABOR & EMPLOYMENT



AI and Employment Law Updates

Presented by:

Matthew Kohel, Esq., Saul Ewing

Robert Glaze, Senior Assistant General Counsel at CareFirst BlueCross BlueShield

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Matthew Kohel, Esq.

Partner | Artificial Intelligence, IP and Cybersecurity & Privacy



Baltimore, MD
Matthew.Kohel@saul.com
(410) 332-8710

Overview

- Counsels companies that develop and use artificial intelligence (AI) on AI governance and strategy, intellectual property, data privacy, and regulatory and compliance issues.
- Represents clients in commercial litigation, intellectual property matters, and with data privacy issues.

Degrees

- J.D., Brooklyn Law School
- B.A., Binghamton University

Attorney Name, Esq.

Senior Assistant General Counsel | CareFirst BlueCross BlueShield



Baltimore, MD
Robert.Glaze@carefirst.com
(410) 528-7905

Overview

- Has worked at CareFirst for 18 years, most recently as Employment and Benefits Counsel.
- Also supported the General Counsel and Companies' Boards of Directors advising on corporate governance matters for CareFirst's holding company system as well as the Healthworxteam, CareFirst's team that is responsible for innovation and investments in startups

Degrees

- J.D., University of Maryland Francis King Carey School of Law
- B.A., Randolph-Marcon College

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AI Is Not New and Has Many Uses

- AI – “Intelligence” of machines or technology that mimics human intelligence
 - See 15 U.S.C. § 9401(3), adopted by White House Exec. Orders
- 1950’s – emerging use of machines for reasoning, problem-solving, etc.
 - 1952 - Arthur Samuel developed a computer program that could independently play checkers
 - 1955 – Workshop at Dartmouth on “artificial intelligence,” coined this new term
- Nov. 30, 2022 – ChatGPT launches
- AI was a part of our life before ChatGPT
 - Siri, Alexa
 - Habit monitoring and social media feeds
 - Deepfakes
 - Facial recognition technology
 - Self-driving cars
 - Strategic games

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AI Terminology

- Machine Learning (ML) – AI involving algorithms that enable computer systems to iteratively learn from data and make decisions, inferences, and predictions
- Generative AI (GenAI) – AI that can produce “new” content in a manner that mimics human output
- LLM - Large Language Model – Based on a “neural network” with millions or billions of parameters
- Hallucination – Generating fictitious data
- Automated or algorithmic decision-making – an AI system that makes decisions without human involvement

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AI Use in Employment Practices

- Common uses of AI in employment practices
 - Applicant credential/resume screener
 - Applicant background checks
 - GenAI used to write performance reviews
 - Interview software
 - Employee activity monitoring software
 - Facial and voice recognition technology
 - Keystroke and employee movement monitoring
 - Computer-based skills testing

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Title VII's Disparate Treatment and Disparate Impact Tests

• Title VII generally prohibits intentional discrimination, or “disparate treatment” in employment, including employment tests that are “designed, intended or used to discriminate because of race, color, religion, sex or national origin.”

• Title VII also generally prohibits employers from using **neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex, or national origin**, if the tests or selection procedures are not “job related for the position in question and consistent with business necessity.” This is called “**disparate impact**” discrimination.

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EEOC Guidance on AI

According to EEOC guidance, **employers are 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

- Employers can be held responsible for the actions of their agents if the employer has given them authority to act on its behalf.
- This may include situations where an employer relies on the results of a selection procedure administered by its agent.



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EEOC Guidance on AI (con't)

Employers need to engage with hiring, recruitment, and performance monitoring vendors to determine what steps have been taken to evaluate whether an AI tool causes a **substantially lower selection rate** for individuals with a characteristic protected by Title VII.

If the vendor states that the tool should be expected to result in a substantially lower selection rate for individuals of a protected category, then the employer should consider whether:

- Use of the tool is job related and consistent with business necessity; and
- Whether there are alternatives that may meet the employer's needs and have less of a disparate impact

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EEOC and Algorithmic Discrimination

- *EEOC v. iTutorGroup* – Not alleged as AI specifically
 - EEOC sued claiming that the company's employment application software automatically rejected female applicants age 55 and older and male applicants age 60 or older
 - Named plaintiff initially applied for position using her real birthdate and her application was rejected. The next day, she applied using a more recent birthdate and submitted an otherwise identical application and was offered an interview
- Settled in September 2023
 - **\$365,000** paid by iTutor
 - Extensive continued training for employees who hire tutors
 - Issuance of a more robust anti-discrimination policy
 - EEOC monitoring at least the next **five years**

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AI and the Principal/Agent Relationship

- *Mobley v. Workday, Inc.* (N.D. Cal. 2024)
 - A job applicant sued software company Workday Inc., alleging that its automated tools rejected him from roles based on race, age, and disability
 - Claims based on the theory that a vendor could be liable as the agent of its employer-customer
 - MTD Denied - adequately alleged that the customers delegated traditional employment tasks to Workday
 - Workday is "an agent because its tools are alleged to perform a traditional hiring function of rejecting candidates at the screening stage and recommending who to advance to subsequent stages, through the use of artificial intelligence and machine learning"
 - The EEOC filed an amicus brief in support of Plaintiff

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Colorado's AI Act - "High Risk" Systems

- The first comprehensive US risk-based AI legislation for companies that do business in Colorado
 - Similar approach to the EU's AI Act
- Focus is on "high risk systems" – can result in the denial of important services to consumers
 - Educational and employment opportunities
 - Financial and lending services
 - Healthcare and insurance
- AI developers and deployers must use reasonable care to protect consumers from known or reasonably foreseeable risks of algorithmic discrimination
 - Disclose use of high risk AI systems to consumers
 - Implement risk management policies that address AI
- AI deployers must conduct AI impact assessments annually

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AI and Algorithmic Discrimination

- NYC Local Law 144 (2023) – using AI in hiring and job promotion decisions
 - Prohibits employers and employment agencies from using an automated employment decision tool (AEDT) in NYC unless a bias audit was performed
 - Employers must give notice that AI tools will be used and provide a summary of the audit on its website
- California Assembly Bill (AB) 2930
 - Failed to pass in 2024, but stay tuned in 2025
 - Prohibits "algorithmic discrimination"
 - An ADM system contributes to unjustified differential treatment or impacts disfavoring people based on various protected characteristics
 - Employers who use ADM tools must:
 - Conduct an impact assessment
 - Notify applicants of ADM system use
 - Implement governance program and technical protections

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AI and Algorithmic Discrimination

- Illinois HB 3773 – 1/1/26 Effective Date
 - Amends Human Rights Act and prohibits using AI that “has the effect of subjecting employees to discrimination on the basis of protected classes under Illinois HRA”
 - Requires employers to provide notice that the employer is using AI for purposes identified in the law
 - Extended protection to recruitment and hiring so applicants appear to be covered
- Defines AI like the Colorado AI Act
 - Also, separately defines GenAI
 - Does not include exemptions found in the Colorado AI Act
- Potential remedies include back pay, lost benefits, clearing of personnel file, emotional damages, hiring, promotion, reinstatement, front pay where reinstatement is not possible, and attorneys’ fees

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Algorithmic Discrimination – Common Legislative Themes

- Burden and potential liability on AI deployers, not just AI tool developers
- Implement AI governance policies
- Mandatory impact assessments and audits
- Disclose use of AI to potentially affected individuals
- Provide the right to opt out of AI ADM use
- *Key Takeaway - Develop a formalized approach to managing AI risk!*

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AI Facial Recognition Tools

- Maryland – Facial Recognition Service (2020)
 - Employers may not create a facial recognition template during an applicant's interview unless the applicant consents by signing a waiver
- Illinois – AI Video Interview Act (2020)
 - Notify applicants of AI use, explain how it evaluates applicants' characteristics, and obtain their consent
 - Applicant can request the destruction of video interviews
 - Annual report on the demographics of the applicants who were offered an interview, not offered an interview, and hired

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The ADA and Reasonable Accommodations

- Employers must provide reasonable accommodations to individuals with disabilities, including during the hiring process, unless doing so would create an undue hardship for the employer (42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9)
- Reasonable accommodation – a change in the way things are usually done to give equal opportunities to a person with a disability in applying for a job, performing a job, or accessing the benefits and privileges of employment

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AI and Reasonable Accommodations

- When a reasonable accommodation could be needed
 - Use of GenAI by employees who are vision or hearing-impaired
 - AI interview technology that does not work with a blind applicant's computer reading program
 - Video interviewing software that analyzes applicant speech patterns and an applicant with a speech impediment is rejected or given a low or unacceptable rating
 - AI tool's accuracy is reduced because it cannot properly assess an applicant with an impairment, leading to biased outcomes
 - Vision-impaired employee who uses voice to text software instead of a keyboard may be rated poorly by keystroke monitoring tools and lose a promotion
 - Applicant with limited manual dexterity has difficulty taking a test that requires use of a keyboard

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Compliance Through Governance

- AI risk management should be part of an organization's risk management strategy and tailored to the organization
- AI adoption best practices
 - Establish an AI task force, working group, committee
 - Cross-functional team of SMEs and who own AI
 - Implement written AI policies for the organization
 - Leverage existing policies (cyber, privacy, DLP, IP)
 - Identify use cases, permitted and prohibited activities
 - Stress respect for ethical use, minimizing biased outcomes, and IP and data privacy rights
 - Accountability for violations
 - Executive buy-in and messaging
 - AI Impact/Bias Assessment and Vendor Diligence

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AI Impact Assessment & Bias Mitigation

- Goals of an AI Impact Assessment
 - Identify opportunities where AI can provide value, improve efficiency, and create new revenue streams.
 - Assess risks related to data privacy, ethical considerations, and workforce implications
- Impact Assessment methodology - qualitative and quantitative
 - Define metrics and indicators to measure impact
 - What data is being used for development and training?
 - Data quality is critical
 - Have permissions to use this data?
 - Leveraging third party models?
 - Geography – where is the AI system developed and deployed?
 - What type of output is expected and how will it be used?
 - Oversight of AI development, deployment, maintenance, and output use
 - Impact on biased data on individuals and groups?

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