EEOC Breaks New Ground by Settling First-Ever AI Discrimination Lawsuit: 10 Pointers to Avoid Robot Bias

Insights

8.14.23

We've reached another milestone in the AI revolution: the federal agency charged with enforcing anti-bias laws just recorded its first-ever settlement in a case involving AI discrimination in the workplace. The Equal Employment Opportunity Commission's (EEOC's) August 9 legal filing in a New York federal court revealed that a tutoring company agreed to pay $365,000 to resolve charges that its AI-powered hiring selection tool automatically rejected women applicants over 55 and men over 60. What are the 10 steps you can take to ensure your organization doesn't befall the same fate as you adopt new AI technologies? *[To learn more about this issue, underline register today for the AI Strategies @ Work Conference underline where we'll discuss this and many other issues impacting the modern business environment.]*

What Happened?

An applicant rejected from a position at iTutorGroup thought something was fishy when they allegedly submitted their same resume again but this time included a younger birthdate – and this time secured an interview. They took their complaint to the EEOC, which filed a lawsuit against the employer on behalf of more than 200 applicants alleging age and gender discrimination. The lawsuit alleged that the company illegally screened out women applicants over 55 and men over 60.

iTutor denied the allegations and continues to deny any wrongdoing despite entering into a voluntary Consent Decree settlement with the EEOC last week. Besides paying out $365,000 to the group of over 200 rejected applicants, iTutor agreed to adopt anti-discrimination policies and conduct trainings to ensure compliance with equal employment opportunity laws. The company must also consider anew all applicants that were purportedly rejected because of their age.

Why is This Such A Big Deal?

There are two reasons why this settlement is significant in nature:

- **This is a first-of-its-kind settlement.** The EEOC has underline launched a broader initiative underline to ensure AI workplace tools comply with anti-discrimination laws, and this settlement is a groundbreaking achievement for the agency as it begins this new push. It is certainly not the last one we'll see over the coming months and years.

- **We expect to see more legal actions and more settlements** because the use of AI in employment settings is exploding. Approximately 79% to 85% of employers now use some form of AI in recruiting and hiring – and that number will surely increase. Given this exponential rise, employers are bound to have questions about compliance best practices.

10 Pointers to Ensure Fair AI Use and Avoid Discrimination Claims

In order to ensure you don't go down the same path as the company that recently settled its EEOC discrimination claim, here are 10 points you should consider adopting.

1. Conduct Diverse Testing

Before fully implementing any AI tools in the HR arena, you should rigorously test them using diverse data sets. Such a practice ensures that the software won't inadvertently discriminate against certain groups.

2. Regularly Review Your AI-Powered HR Tools

In addition to evaluating any AI tools you intend to use for HR purposes <u>before</u> you implement them to ensure they don't end up resulting in discriminatory behavior, you should continue to <u>periodically review them</u> to make sure things stay compliant. Ensuring that no inherent biases exist in the software is a crucial step in upholding your company's commitment to diversity. <u>As the EEOC has clearly stated</u>, you can't pass the buck and blame your software vendor if their AI product ends up committing discriminatory or biased acts with your applicants or employees.

3. Conduct Bias Audits

New York City recently became the first jurisdiction to require employers using AI in the employment context to conduct AI bias audits – and it won't be the last. Even if your organization isn't subject to <u>the NYC law</u> (or any of the soon-to-be-adopted laws to follow), conducting an AI bias audit (with the help of your legal counsel) could be an invaluable tool in rooting out unintentional discrimination at your workplace.

4. Train Your HR Teams

Your human resources department should get a crash course on the use of AI in human capital management so they can be your front line when it comes to ensuring fairness. Make sure they have the knowledge and skills to utilize whatever AI tools you adopt without inadvertently perpetuating biases. Besides your regular anti-discrimination training, you should ensure they receive support related to the application and interpretation of AI in all HR functions.

5. Establish Clear Workplace Policies

How can you harness the power of AI in a responsible way? A critical step is developing a thorough workplace GenAI policy. This Insight provides a list of 10 things you should include in any AI policy (and provides a link so you can obtain your own complimentary template policy).

An explicit and well-communicated policy can act as a foundation for fair HR practices.

6. Open Communication

You should foster an environment where applicants and employees are aware of the use of AI in the HR environment, and they feel comfortable voicing concerns about perceived biases. A guidance document issued by the EEOC earlier this month highlights how an applicant's or employee's knowledge of the use of AI in the disability law context could create a pathway to ensure that you provide necessary reasonable accommodations.

7. Don't Eliminate All the Humans

Your HR professionals should play a vital role in workplace decision-making. We're being somewhat facetious by even suggesting you can remove all human interaction and replace them with robots. But to the extent that you are incorporating AI technology to supplement and support your HR efforts, you need to make sure you retain a healthy dose of human judgment in your workplace decision-making.

8. Incorporate Feedback Loops

No matter how advanced your predictive analytics, it's hard to predict the real-world dynamics that can arise once you deploy your AI systems. So try to encourage feedback from internal stakeholders – and external candidates and other third parties – regarding their experiences with your AI-driven processes. This will allow you to identify and rectify potential biases or other issues that might arise.

9. Seek Out Expertise

Given the complexities of AI and its intersection with workplace law, you should partner with legal counsel who understands the many issues that need to be considered – data privacy, confidentiality, trade secrets, bias audits, copyright law, labor law, and overall best practices, just to name a few. Whether you educate existing in-house counsel, recruit new talent, or retain outside lawyers with a focus in AI, you should take steps to have experienced counsel at your side.

10. Stay Up to Speed

The world is changing at a frenetic pace, especially when it comes to the intersection of AI and human capital management. We recommend you subscribe to Fisher Phillips' Insight System to gather the most up-to-date information on AI, as we will continue to monitor further developments and provide updates on this and other workplace law issues.

Join Us in Person!

Register today for the AI Strategies @ Work Conference taking place this September 27-28 in Washington, D.C., where we'll discuss the intersection of artificial intelligence and the modern business environment. We'll meet just steps from where lawmakers and regulators are debating AI to discuss how impending regulation will impact businesses and human capital management. We'll also explore AI's transformative impact across various industries by providing practical use case scenarios, highlighting how to seize competitive advantages, and showing how you can position yourself as a leader in the era of AI.

Conclusion

If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our Artificial Intelligence Practice Group.

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