Big Data, Background Checks, and Discrimination

Insights
5.18.16

On May 4, 2016, the White House released a report entitled "Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights" to herald its focus on discrimination in "big data" assisted personnel screening algorithms. While the statement was too vague to inform the public of any new enforcement policy or the degree of sophistication with which such a policy might be enforced or even what institution will bear the burden of remedying the perceived issues, it is clear that the intended scope is expansive.

The report roughly explained that screening algorithms may use factors that are correlated with protected categories to automate a discriminatory hiring practice. As an example, it explained that a requirement for a minimum exposure to computer systems may inherently discriminate against women because on average, women begin using computers at a later age than men. It also cited the same requirement as a potential source of age discrimination.

The publication is consistent with the Administration's recent efforts to overhaul employment practices. Early in his first term, President Obama signed the Fair Pay Act into law. Late last year, the EEOC published its proposed revision to EEO-1 reporting requirements to include income bracket and job category. This latest "report" suggests much more expansive and aggressive policies than some probably expected.

Perhaps the most concerning aspect of the White House's report is the advertised enthusiasm towards abandoning statistical principles in the name of creating a policy that changes workplace demographics. The computer literacy example is especially indicative of an intent to examine correlation without analyzing causation.

What does this have to do with privacy? Many employers utilize third party questionnaire and interview services in their applicant screening processes. In the example given with a minimum required experience with computers, many employers may not even have the opportunity to review an application that does not meet a minimum criteria—the employer may not even be aware that it is engaging in what the White House may soon consider discriminatory hiring practices.

Additionally, the report discussed credit checks and criminal checks, which also are often a step in the employment process. Regulations governing background checks may also see a makeover that expands the scope of private information that may not be considered or republished.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Before the end of the year, employers should expect to see revisions to regulations or enforcement policies that will significantly change the definition of compliant applicant screening procedures.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.