



Artificial Intelligence in the Workplace: A 2024 Perspective For Employers

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Current Use Cases for Artificial Intelligence In the Workplace

How do we define A.I.?

- In October 2023, the White House issued an executive order on safe, secure and trustworthy development of A.I., or artificial intelligence.
- The Order defined the term “artificial intelligence” or “AI” to mean “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.”

What does this mean

- Artificial Intelligence and its use in commerce, engineering, and other disciplines is nothing new.
- However, rapid advances in “generative A.I.” have brought increased public awareness and new opportunities.
- “Generative A.I.” is technology that can create content, including text, images, audio, or video, when prompted by a user. Generative AI systems create responses using algorithms that are trained often on open-source information, such as text and images from the internet.



A.I. Workplace Use Grows

- **Employer Uses:**

- Hiring and Screening
- Business Intelligence
- Marketing & Sales
- Productivity Acceleration
- Productivity Recording and Capture
- Autonomous Logistic operations

- **Common Applications:**

- **Vervoe** (Hiring; A&I Resume Screening and Skills Assessment_
- **OpenAI Products** (Marketing; ChatGPT, Sora)
- **Lavender** (Sales; email coaching and cold emailing)
- **Amazon AWS Industrial AI Suite** (Productivity Capture; tools help companies identify potential equipment failures, productivity bottlenecks, and worker safety violations)
- **Torq** (Autonomous operation of trucks)

Where you might recognize A.I. at work in your office:

- Cut down on time spent reviewing applications
- Match high performers to their next role
- Evaluate employees' performance against other individual performance for promotion
- Target specific jobs to the “best” candidates
- Administrative: Scheduling, Summarize Notes, Create Copy
- Improve recruiting efficiency and reduce spend

Common Uses of A.I. in Employment Decision-Making

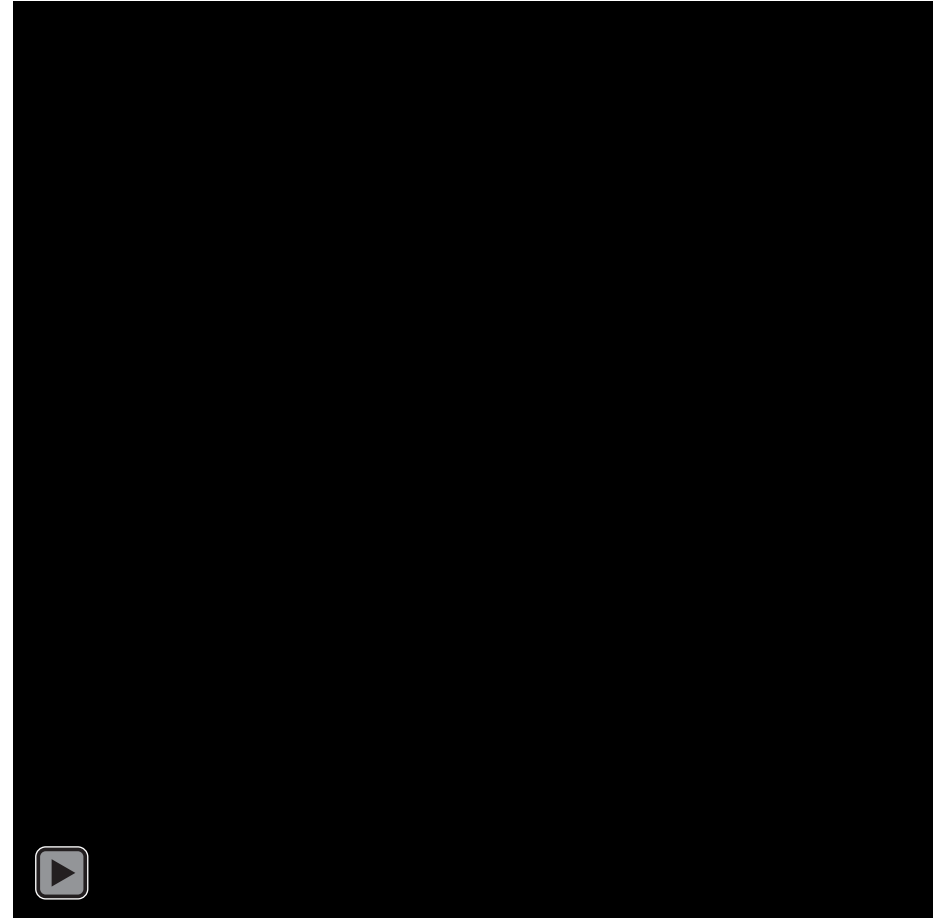
- A.I. can assist employers in performing hiring tasks such as analyzing resumes, and it can even perform facial analysis in interviews to evaluate a candidate's stability, optimism or attention span.
- While this can help streamline processes for employers, it can also create issues by enabling (even unintentionally) systemic discrimination and duplicating human biases.
- Although proponents of AI have said that AI will in fact eliminate human bias from the recruitment process, this is not always the case.
 - For example, AI software may use algorithms to analyze a candidate's facial movements, words, and speech patterns, and it could then evaluate these candidates by comparing their behaviors to other successful hires made by the Company. This may in turn inadvertently eliminate candidates with disabilities from the hiring process.

Common Uses of A.I. in Employment Decision-Making

- Further, if an employer utilizes a third-party vendor to provide A.I. services during the hiring process, it may be difficult for the employer to establish a level of control over the process and ensure that the vendor's programs, processes, or algorithms are not resulting in unintentional discrimination.
- This is especially the case if the vendor's programs or algorithms are identified as trade secrets or are otherwise confidential, as they may then be protected from disclosure to employers.

Quick Note on Deepfakes

- Deepfakes are videos, audio, photos, text messages, and other forms of media created using A.I. that are extremely hard to differentiate from the real or authentic thing.
- Deepfakes are created to convince someone that something happened when it did not actually occur.
- Like this statement by Donald Trump
- Videos of employees and managers now have the potential to be edited or altered to be realistic, difficult to identify as fraudulent





Regulation of A.I. in Employment

Increased Use Draws Increased Legislative and Scrutiny at State Level

- Concerns about the impact of algorithmic processes on hiring, performance assessments, productivity and other terms and conditions of employment has created increased regulatory activity.
- Several states and municipalities have laws that explicitly protect job seekers from applications utilizing A.I. to impact hiring decisions (i.e. Maryland, Illinois, and New York City)
- Other states and municipalities are contemplating or have proposed legislation regulating A.I. use in hiring (i.e. California, New Jersey, and D.C.)

Federal Interest in Regulating A.I. in Employment

- In May 2023, the Equal Employment Opportunity Commission released guidance focused on preventing discrimination against workers and job seekers
- That Guidance specifically calls out Employers to ensure that the models they are using do not screen out any applicant class:
 - **“16. Does an employer have an obligation to make reasonable accommodations to applicants or employees with visual disabilities who request them in connection with the employer’s use of software that uses algorithms or artificial intelligence (AI) as decision-making tools?”**
- Yes. Algorithmic or AI decision-making tools might intentionally or unintentionally “screen out” individuals with disabilities in the application process and when employees are on the job, even though such individuals are able to do jobs with or without reasonable accommodation.^[70] For example, an applicant or employee may have a visual disability that reduces the accuracy of an AI assessment used to evaluate the applicant or employee. In such cases, the employer has an obligation to provide a reasonable accommodation, such as an alternative testing format, that would provide a more accurate assessment of the applicant’s or employee’s ability to perform the position, absent undue hardship.” See <https://www.eeoc.gov/laws/guidance/visual-disabilities-workplace-and-americans-disabilities-act#q16>

EEOC Also Scoring Wins in A.I. Bias Litigation

- *EEOC v. iTutorGroup, Inc., et al.*, (E.D.N.Y)(Civil Action No. 1:22-cv-02565), EEOC filed Age Discrimination suit against Defendant iTutorGroup for programming their tutor application software to automatically reject female applicants aged 55 or older and male applicants aged 60 or older. Defendant settled for \$365K and consent agreement.

The Plaintiff's Bar is Catching On

- *Mobley v. Workday, Inc.*, No. 23-CV-00770-RFL, 2024 WL 208529, at *1 (N.D. Cal. Jan. 19, 2024), Derek Mobley alleges Workday, Inc., provided companies with algorithm-based applicant screening tools that discriminated against him and other similarly situated job applicants on the basis of race, age, and disability. Mobley alleges that, as an African-American man over the age of forty with anxiety and depression, he applied to 80 to 100 jobs with companies that use Workday's screening tools and received not a single job offer. Defendant moved to dismiss. Although Judge granted motion, the Court noted that there were grounds to amend.

Takeaways

- Employers need to be aware of the implications of the use of AI in hiring and should not assume that because AI technology is handling tasks such as applicant screening, they do not have to worry about preventing discrimination in the hiring process. Rather, employers need to be involved in understanding how these AI tools work and take steps to ensure that use of these tools does not disparately impact applicants in protected groups.
- In addition, if employers utilize a third-party vendor to provide AI technology, they need to discuss these issues with the vendor and make sure there is transparency in the vendor's processes regarding the elimination of bias when using their tools.
- EEOC Chair Burrows has noted that employers need to exercise due diligence and ask vendors “what’s under the hood” of their algorithms before using them to vet candidates. For example, she has indicated that employers need to question vendors about whether any algorithm or other AI screening tool allows for reasonable accommodations in the hiring process, which is a requirement for employees with disabilities under the Americans with Disabilities Act. According to Burrows, “if the vendor hasn’t thought about that, isn’t ready to engage in that, that should be a warning signal.”

Are you using any A.I. tools in your HR Functions?

- **Which ones? How are you utilizing them?**

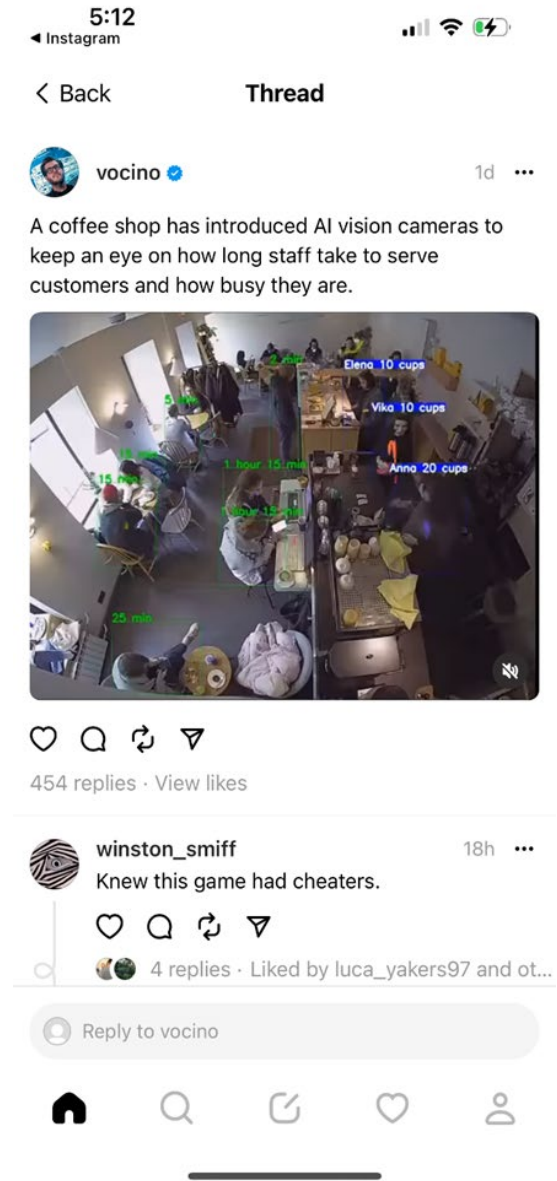


A.I. Issues for Traditional Labor

What do you think?

The VP of Strategy for a Coffee Franchise wants to install cameras and an AI algorithm to measure the productivity of their employees while working on shift. This location has been less profitable than others in recent months. A manager has reported that other than scattered talk from dissatisfied employees about what they make per hour and one employee talking about a “card signing”, things are normal here.

As HR director, can you spot any risks with this plan?



Be Careful!

- This might lead to ULP. Indicators here about potential unionization efforts- dissatisfaction with pay, and talk of “signing cards.” The VP’s plan, while driven by P&L, could be a risk point for an unfair labor charge filed with the NLRB
- The NLRB can penalize employers for “monitoring” under Section 8(a)(1), even where the employees

NLRB Signals Concern Around A.I. Surveillance

- In October 2022, GC Abruzzo issued GC 23-02, urging the NLRB to find electronic monitoring or automated management practices illegal if such monitoring or management practices interfere with Section 7 rights of employees.
- Spells out that NLRB would find a violation for using AI to monitor or surveil employees, discipline employees who protest employer use of algorithmic measurement tools or pace of work, or screen employees for labor friendly tendencies.
- High Bar to Meet: An employer can avoid a violation of the NLRA if it can demonstrate that its business needs require the electronic monitoring and management practices and the practices “outweigh” employees’ Section 7 rights. Secondly, the employer must also demonstrate that it provided the employees advance notice of the technology used, the reason for its use, and how it uses the information obtained. Must show “special circumstances” justifying “covert use” of the technology in order to avoid a finding of violation.



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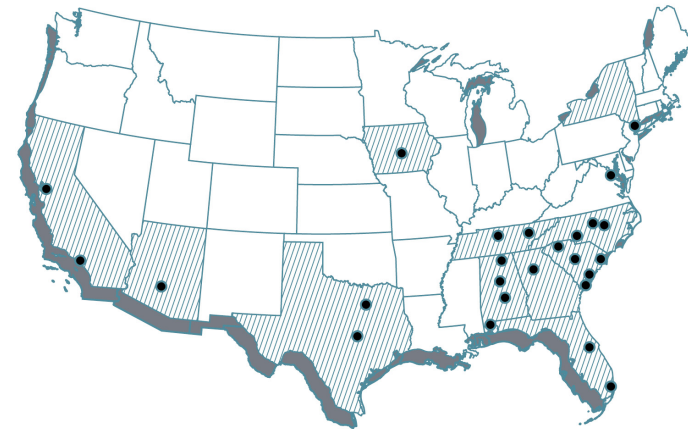
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