

Employee Relations LAW JOURNAL

Artificial Intelligence Hiring Tools: ACLU Warns Employers and AI Companies It Will Not Stand for Deceptive “Bias-Free” Promises

By Todd J. Horn and Sarah A. Fucci

In this article, the authors examine risks associated with the use of artificial intelligence hiring tools and steps employers can take to minimize those risks.

We all have fallen victim to good marketing at some point. Just like all product and service providers, artificial intelligence (AI) companies are no fools when it comes to the benefits of good marketing. The use of AI in hiring has come under increasing scrutiny for its potential to screen out candidates based on characteristics protected by state, local, and federal discrimination laws, such as race, disability, and gender, among others. However, AI is not all bad. In fact, you have likely noticed more and more employers starting to explore the upsides to delegating hiring tasks from overworked human resources employees to AI tools, such as a more efficient hiring process. At last, you want in on the action. So, you begin searching for a vendor, weighing the pros and cons, and come across a company that promises that its tools provide fair and unbiased selection and that the unbiased nature of its tools is backed by scientific evidence—and such tools may even help you recruit diverse candidates and foster a more diverse workforce. Jackpot! This sounds like a win-win scenario, right? Well, maybe not.

The authors, attorneys with Venable LLP, may be contacted at thorn@venable.com and safucci@venable.com, respectively.

THE FEDERAL TRADE COMMISSION'S WARNINGS ABOUT FALSE, DECEPTIVE, AND UNFAIR AI MARKETING CLAIMS

Over the past few years, the Federal Trade Commission (FTC) has kept a close eye on the development and use of AI, releasing a number of blog posts and reports warning companies of the risks of using AI tools in their business. For example, the FTC has warned¹ companies about using AI to combat online problems because of concerns that AI tools can be inaccurate, biased, and discriminatory by design and incentivize reliance on increasingly invasive forms of commercial surveillance. The FTC has also warned² generally about the use of AI tools that have biased or discriminatory impacts and the risks³ of exaggerating and overpromising what an AI algorithm can deliver. The FTC's blog posts and guidelines over the years have made clear that it will not stand for untruthful, unsubstantiated, false, or deceptive claims made by companies about their use of AI or the capabilities of their AI.

Indeed, the FTC's recent enforcement actions concerning AI make its commitment to protecting consumers against unfair or deceptive practices all the more apparent.

For example, the FTC banned Rite Aid⁴ last year from using AI facial recognition tools for five years because the tools had been used without adequate safeguards.

Earlier this year, the FTC permanently banned⁵ the operators of a money-making scheme and the companies they controlled from selling business opportunities or coaching programs involving e-commerce stores for making unfounded promises to consumers of quick financial gains through its AI technology.

More recently, the FTC banned NGL Labs, LLC,⁶ from offering its "NGL: ask me anything" app (an anonymous messaging app) to anyone under the age of 18 for falsely claiming that its AI content moderation program filtered out cyberbullying and other harmful messages.

FTC TO POTENTIALLY WEIGH IN ON "BIAS-FREE" MARKETING OF AI HIRING TOOLS

Currently at play is whether companies that utilize the types of "bias-free" promises described above when marketing their AI tools in the context of hiring and other employment processes are engaging in deceptive and unfair acts under the FTC Act. More specifically, the American Civil Liberties Union Foundation (ACLU) has asked the FTC to investigate "bias-free" marketing claims made about certain AI hiring tools that it alleges are not in fact "bias-free," but instead administer tests that adversely impact autistic and neurodivergent people and those with other mental health disabilities, as they test for and screen out candidates based on characteristics that are directly linked with those associated with their disabilities, notwithstanding the fact that such characteristics

are likely not necessary to perform the essential functions of the job. In addition to discrimination based on disability, the ACLU claims that certain AI hiring tools also discriminate based on race.

ACLU'S WARNINGS TO EMPLOYERS

While the ACLU's focus right now is on the marketing claims made by companies that sell the AI tools, this does not mean that employers that use these tools are off the hook. The ACLU warns employers of the potential consequences of failing to vet AI assessment tools, using tools that carry a high risk of discrimination, and failing to provide notice of their use of such tools. The most obvious of these consequences is the risk of legal exposure under anti-discrimination laws.

Another potential risk is losing out on qualified candidates who have been screened out based on factors unrelated to their ability to successfully perform the duties of the job for which they are applying.

In addition, it should come as no surprise that AI assessment tools that carry a risk of discriminating against certain applicants will inevitably lead to a less diverse workforce and deprive employers of the attendant benefits of fostering diversity and inclusion in the workplace.

EMPLOYER OR NOT, YOU MUST CONSIDER POTENTIAL EXPOSURE TO EMPLOYMENT DISCRIMINATION CLAIMS

Human rights advocates and those who believe they have been adversely impacted by AI hiring tools are unlikely to shy away from seeking to hold both AI vendors and employers liable for employment discrimination. The ACLU has already signaled as much, as its FTC complaint comes on the heels of two class-wide charges it filed at the end of 2023 with the Equal Employment Opportunity Commission (EEOC) against both the AI vendor and the employer that uses the vendor's AI hiring tools on behalf of a job applicant who was required to take an AI hiring assessment as part of the employer's recruiting and hiring process, and was allegedly screened out of the candidacy pool based on a protected characteristic.

For employers, this means that you should not blindly give in to tempting marketing or take AI vendors at their word. While the ACLU's recent activity shows that AI vendors are likely to find themselves alongside employers in employment discrimination lawsuits, chances are you will still inevitably be at the forefront of any such lawsuits. If you are utilizing or plan to utilize AI in your recruiting and hiring process, it would be remiss to do so without properly vetting AI vendors and the tools they are selling and reviewing compliance requirements under applicable law

and published guidance from the EEOC, the FTC, and any other applicable federal, state, or local agencies.

For AI companies, this means you cannot just “talk the talk,” but you also must be able to “walk the walk.” In other words, without sufficient support to back up claims about your products and by not providing employers and other consumers with full transparency, not only do you risk legal exposure to employment discrimination claims, but the ACLU and FTC have seemingly made clear that they may seek to hold AI companies accountable under consumer protection laws as well.

NOTES

1. <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-report-warns-about-using-artificial-intelligence-combat-online-problems>.
2. <https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check>.
3. <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>.
4. <https://www.ftc.gov/news-events/news/press-releases/2023/12/rite-aid-banned-using-ai-facial-recognition-after-ftc-says-retailer-deployed-technology-without>.
5. <https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-action-leads-ban-owners-automators-ai-e-commerce-money-making-scheme>.
6. <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-order-will-ban-n-gl-labs-its-founders-offering-anonymous-messaging-apps-kids-under-18-halt>.

Copyright © 2024 CCH Incorporated. All Rights Reserved. Reprinted from *Employee Relations Law Journal*, Winter 2024, Volume 50, Number 3, pages 37–40, with permission from Wolters Kluwer, New York, NY, 1-800-638-8437, www.WoltersKluwerLR.com

