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TECHNOLOGY MARATHON

AI & Recruiting

Melinda Riechert and Liz Polido
June 7 | 12:00-1:00 pm ET

Agenda

1 Overview

2 AI and Recruiting and Hiring

3 Q&A

Overview

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Artificial Intelligence: What Is It?

- A machine that learns from experience

- A machine that mimics human intelligence

- A technology that facilitates computers or robots to solve problems

- Machine learning: techniques to enable machines to improve at tasks with experience
  - The machine "learns" from the data it analyzes or tasks it performs and adapts its behavior based on what it learns from the data to improve its performance of certain tasks over time

- Data mining: Algorithms that use big data to analyze and reveal patterns and trends

- Deep Learning
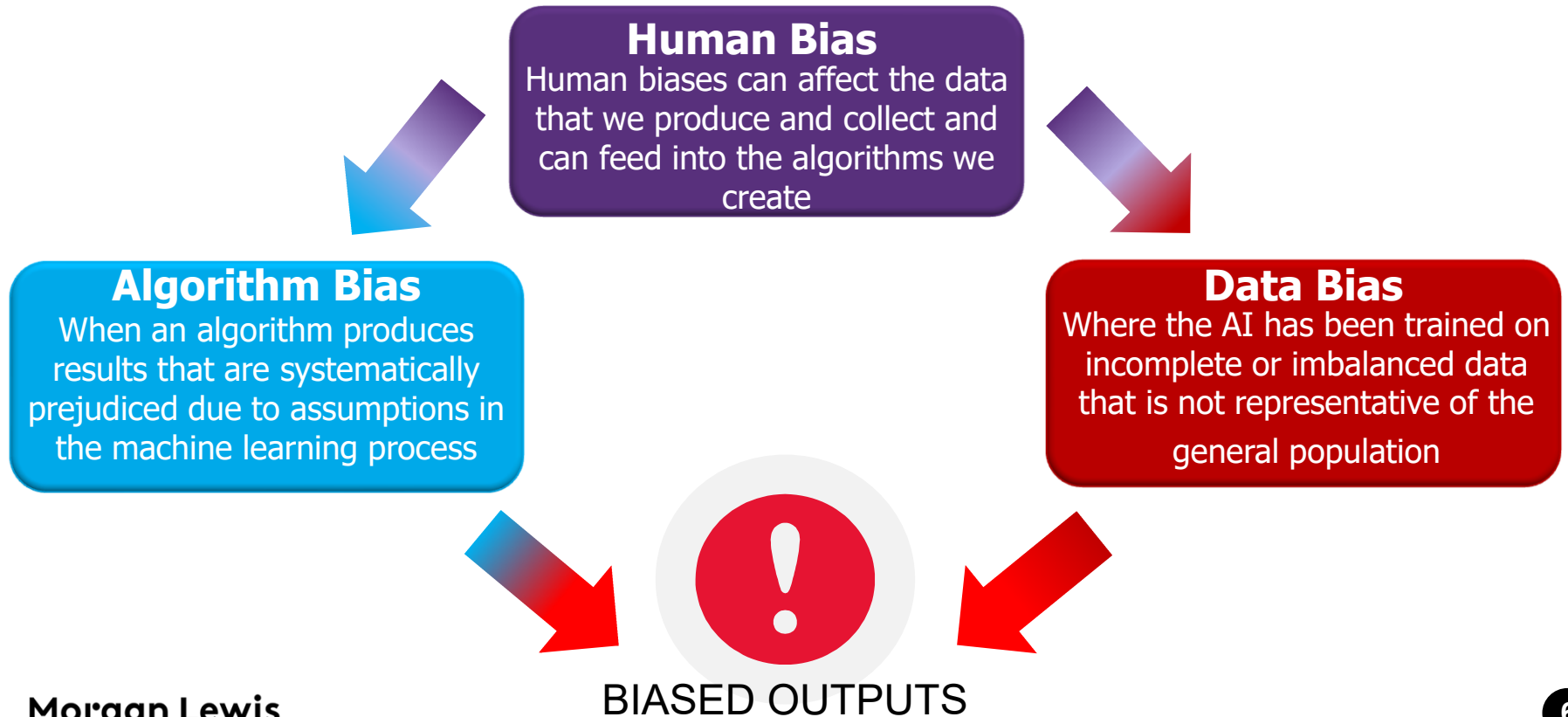
- Natural Language Processing (NLP)

What is Bias in AI?
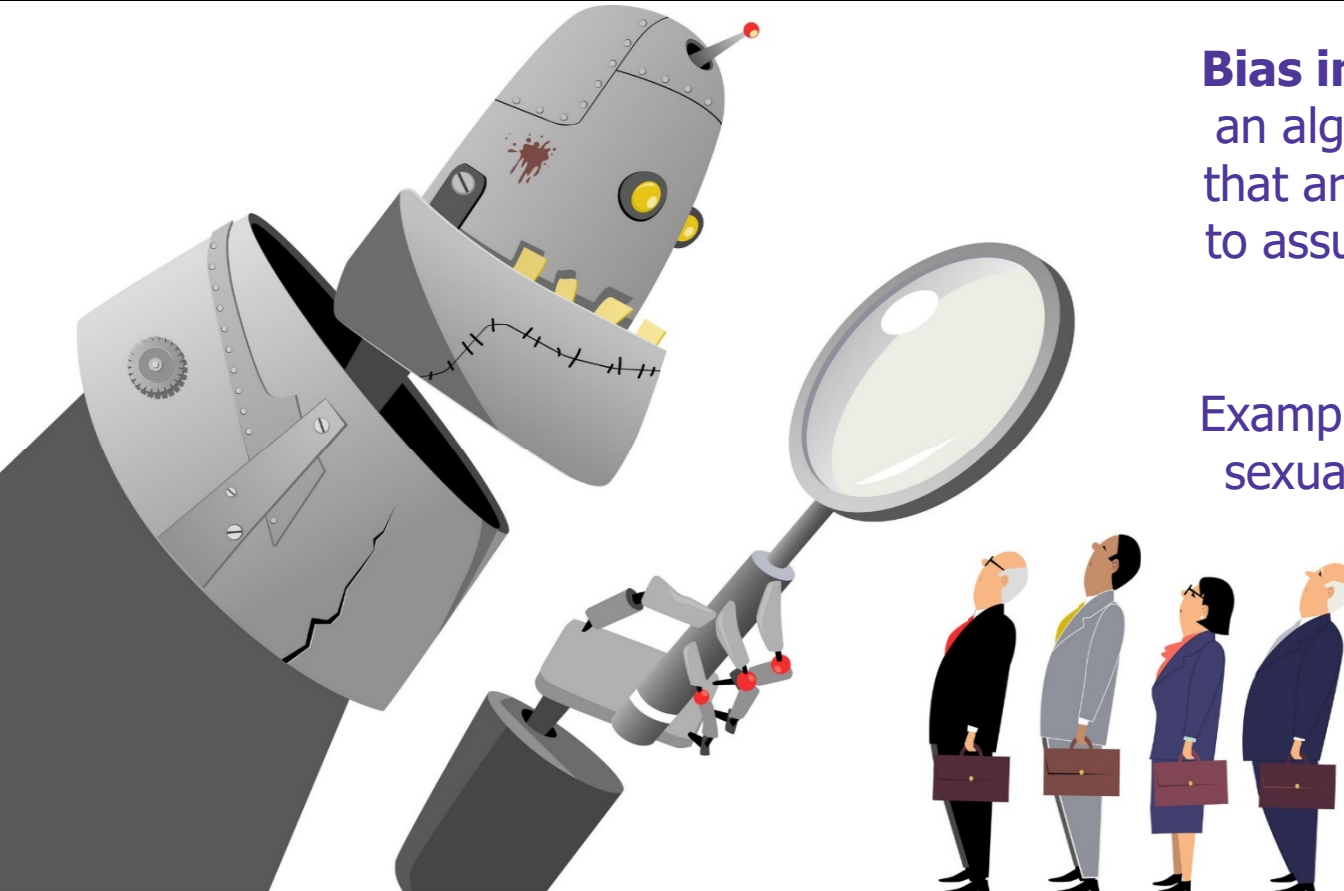
Bias in AI is a situation where an algorithm produces results that are biased/prejudiced due to assumptions in the machine learning process.

Examples include: gender, age, sexual orientation, and racial bias.

Sources of Bias in AI

Human Bias
Human biases can affect the data that we produce and collect and can feed into the algorithms we create

Algorithm Bias
When an algorithm produces results that are systematically prejudiced due to assumptions in the machine learning process

Data Bias
Where the AI has been trained on incomplete or imbalanced data that is not representative of the general population

BIASED OUTPUTS

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Data Bias Example

A Tech company used an AI tool to automate its recruiting process by rating applicants' resumes based on the resumes of past and current employees.

The input data used was biased – Used historical recruitment data from the last 10 years. Males made up the majority of applicants and hired employees.

The output was therefore biased – The recruiting system incorrectly learned that male candidates were preferable. The system favored applicants based on words like "executed" or "captured" that were more commonly found on men's resumes and penalized resumes that included the word "women."

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Algorithm Bias Example

A healthcare provider used an algorithm to review data from over 200 million people to predict which patients would likely need extra medical care.

The algorithm was biased – The algorithm's designers used previous patients' health care spending as a proxy for medical needs. This was a bad interpretation of historical data because income and race are highly correlated metrics and making assumptions based on only one variable of correlated metrics led the algorithm to provide inaccurate results.

The output was therefore biased – The algorithm was producing faulty results that favored white patients over black patients, reducing the number of Black patients identified for necessary additional care.

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Why Is AI Bias Such a Potential Issue?
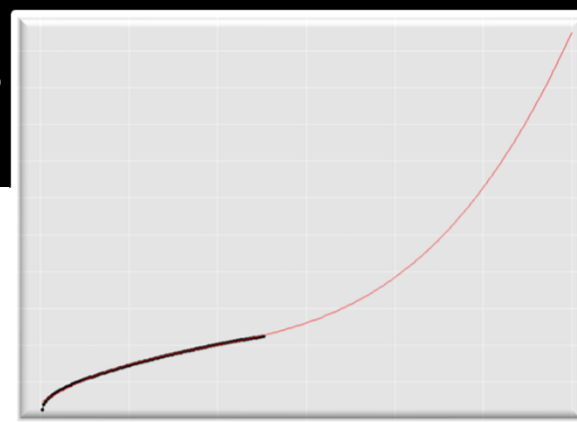
Some form of bias is likely to exist in a significant proportion of decision making

Is AI bias any worse than employees blindly following a corporate policy that has been based on bias?

Arguably not — But wait!

AI has the potential to increase bias issues as it can undertake decision making on a vast scale — extrapolating individual or minor bias issues into potentially significant issues with major consequences for organizations

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AI and Recruiting and Hiring

How AI Is Used in Recruiting and Hiring

How AI Can Be Used in Recruiting and Hiring

- Writing job descriptions
- Deciding where to post/advertise jobs
- Reading resumes and making first round of cuts
- Interviewing candidates
  - Will interviews discriminate against those with dark skin, accents or disabilities?
- Following up with candidates
- Selection of candidates

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How AI Can Be Used in Recruiting and Hiring

- As businesses quickly reopen following the pandemic, they will need to make rapid hiring decisions
  - Too few applicants
  - Takes too long to review resumes
  - Not enough qualified applicants
    - What is a qualified applicant for this position at this employer ("good fit")?
  - Most predictors of employee performance are not effective
  - Making the wrong decisions on hiring and promotions are expensive
  - Companies are having a hard time finding qualified diverse candidates
  - Find applicants who will stay a long time (and reduce the cost of hiring) – *e.g.,* shorter commute time
- Is an algorithm the solution?

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Artificial Intelligence Is Already Here!

- Computer programs that determine the ideal candidate, review job applications, and interview candidates

- "Evaluating candidates" with word matching (NLP)

- Gamified and personality assessments

- Candidate "engagement" – chatbots to answer questions, automate email/text communications

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Artificial Intelligence in Hiring: Diversity

- Is AI good or bad for diversity?
- Per the EEOC: Carefully designed and properly used AI can advance diversity
- How can bias exist in the non-AI system?
  - Male vs. female names
  - "American" vs. "foreign" names
  - White vs. Black names
  - Asian vs. non-Asian names
  - Which college an applicant attended
- Computers can be programmed not to look at names, gender, race, or age in deciding who to interview for a position and thus eliminate bias from the earliest stages of the hiring process
- Will the desire to increase racial and gender diversity lead to increased use of AI in finding and hiring candidates?

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Artificial Intelligence in Hiring: Diversity

- On the other hand, a poorly designed AI system can discriminate on a much larger scale
  - Using the attributes of the current workforce to predict who to hire
    - One survey suggested that the most likely predictor of success was being called Jared and playing high school lacrosse
  - Social media advertising of positions only to people of certain age groups
    - Applicants never even learn of the opportunity to apply due to the algorithm
  - Biased inputs lead to biased outputs
  - Do multiple protected traits produce compounding disparate effects?

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The Problem

- How do you define a "desirable employee"?

- How does the programmer decide what characteristics make an employee "good"?
  - Subjective: Action-oriented, intelligent, productive, detail-oriented, grit, ability to multi-task, fitting into the company culture, values, conscientious, integrity, emotional intelligence
  - Objective: Background, school attended, degree obtained, prior employer, length of employment, number of interviews, performance review scores, referral sources, background checks
    - But are these factors more a product of the parents' socio-economic status rather than the candidate's ability to successfully perform the job?
  - Objective: Outcome data – by identifying recent hires who produce measurable outcomes (job performance) and then using these as models to compare applicants to → removes employer bias, socioeconomic background, etc., from the process

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The Problem

- An employee who would be good for one job at one company under one manager with one team might not be good for another job at another company under a different manager working with a different team

- To work, the algorithm needs data!

- Too many job roles

- Database management

- Lack of historical data or too little data to make machine learning valuable

- No data on candidates who were not hired

The Problem

- Will an algorithm based on data from other employers work in your workplace?
- Will the gender and ethnicity of the programmer influence the result?
  - Effect of lack of diversity in tech in Silicon Valley
- Are algorithms just "our opinions embedded in code"?
- What if the data sets are incomplete, incorrect, or non-representative?
- Can applicants and employees learn to game the system?

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The Problem

- Should the algorithm look at social media information in making its decisions in hiring, promotions, and whether employees are flight risks?
  - Do applicants and employees perceive this information as violating their privacy rights?
  - Will applicants and employees change their social media behavior?
  - Will using social media increase the risk of discrimination claims?

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Benefits of AI

- Streamlines the recruiting process
  - Too many applications, resumes, and cover letters and not enough time to review
  - How to find passive candidates
- Increases efficiency
  - Find and attract high-quality candidates
  - Find diverse candidates
  - Hire candidates faster and for less
  - Better candidate fit
- Increases fairness
  - Fairer interviewing and screening
  - Does it remove bias from the hiring process when the recruiter does not know the gender, race, or age of the applicant?

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Risks of AI in Recruiting and Hiring

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Risks – Fairness

- Hiring and firing have serious consequences and society demands fairness
  - Employers are expected to be able to explain and justify the practices they use

- Distrust of AI
  - Users can't see and understand how decisions are made
  - The public distrusts artificial intelligence in hiring

- Importance of transparency, particularly in promotion and pay decisions
  - Will employees perform as well if promotion and pay decisions are made by a computer rather than their supervisor?

Risk of Discrimination Lawsuits

- Does use of AI reduce the role of the individual hiring managers' biases or does it reproduce and deepen systemic patterns of discrimination reflected in today's workforce data?

- Algorithmic bias, leading to discrimination claims

- Algorithms are backward-looking and may reflect and repeat past biases
  - If men or whites had higher performance review scores in the past, when there were fewer women or minorities in the workplace, does that mean the company should hire men over women and whites over minorities?
  - Do performance review scores reflect the biases of the scorer?

Risk of Discrimination Lawsuits

- **Disparate treatment**: intentional discrimination based on a protected characteristic

- **Disparate impact**: using a facially neutral practice that has a disparate impact on a protected characteristic – *e.g.*, hiring people living in zip codes close to the office
  - Discriminatory in operation
  - Compare the selection rates for minority and non-minority candidates to see if they are "statistically significant" and not likely the product of chance
  - Does, for example, the algorithm give a lower score to women, or a lower score to attributes disproportionately associated with women?

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Risk of Discrimination Lawsuits

- *Ricci v. Destafano*, 55 U.S. 557 (2009)
- Can the employer show the practice is job-related and consistent with business necessity?
  - Is the sought-after trait job-related?
  - Does the algorithm accurately predict future job performance?
  - Or is it a proxy for discrimination?
- Can the employer prove that its algorithm meets these requirements?
  - Will the developer of the algorithm be willing to share this information with a jury?
- Is there a less discriminatory alternative?
  - Are there other tests or section devices that would also serve the employer's legitimate interests?

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Risk of Class Actions

- Failure to hire claims are usually individualized and thus not suitable for a class action

- But will the use of AI create a common issue that makes the case a good candidate for a class action?

- Vendors and companies that use AI need to be prepared to defend their use of algorithms in hiring to ensure that there is no implicit or unintended bias

- Companies that hire AI vendors should carefully negotiate their contracts with the vendors to obtain representations as to the product's fairness and indemnification and cooperation provisions in the event of a lawsuit or government investigation

Risk of Disability Discrimination

- US law protects job applicants from disability discrimination and requires that applicants with a disability be accommodated

- The ADA and state and local laws also limit an employer's ability to make disability-related inquiries at the recruiting stage

- Applicants may have disabilities that are negatively impacted by AI tools, particularly speech patterns, facial expressions, or disabilities that affect movements

- The farther a job evaluation strays from the essential functions of the job, the more likely it is to be discriminatory

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Mitigating Risks of AI in Recruiting and Hiring

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What Can You Do?

- Find out the demographics of the representative sample that your company's data will be compared to

- Test the model to make sure that groups from certain demographics are not being excluded

- Make sure you have a diverse applicant pool before AI reviews resumes

- Ask your vendors how they deal with bias and ask them to share their validation results

- Hire an industrial organization psychologist to conduct validation research

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What Can You Do?

- Understand the AI tools

- Use pilot programs to assess bias

- Assess your decision-making criteria and objectives to ensure that the essential requirements of the position are clear, accurate and objective

- Make sure the data used by the tool is not biased

- Check the results of the use of the tool and compare to human decision makers' results

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Monitor Results

- Employers should audit the results of the algorithms to confirm there is no discrimination
  - For example, are men receiving higher scores than women on a given trait? If so, can the model be adjusted?
  - Make sure communications regarding the purchasing, use, concerns, and testing of the product involve lawyers who can provide legal advice which would be protected by the attorney-client privilege
  - Will audits be protected by the attorney-client privilege?
- Algorithms will always be changing as machine learning uses new data to keep predictions current
- As algorithms are changed, is this an admission of discrimination during the time the algorithm was being used?

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Mitigating the Risk of Disability Discrimination

- Need to ensure both that candidates can use the technology and that the skills it measures don't unfairly exclude candidates with disabilities

- Job candidates and employees should be informed of AI tools being used in their selection process or evaluations

- Employers should have accommodation plans if the candidate discloses that they have a disability

- Train AI tools with more diverse data that includes employees with disabilities (who are currently underrepresented in the workforce)

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Defending Against Claims

- Do all the things suggested above!

- Be actively involved in selecting the vendor and understanding the tools

- Stay informed regarding pending legislation to ensure AI tools are consistent with federal, state, and local law

- Try to get indemnification from the AI companies, or at least representations that their tools are unbiased and their cooperation in defending against claims

Enforcement and Regulation of AI in Recruiting and Hiring

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Regulation of AI in Hiring

- **1978 Uniform Guidelines on Employee Selection Procedures** regulate pre-employment testing and testing for employment decisions (hiring, promotions, demotions, retention)

- **Algorithmic Accountability Act of 2022**
  - This bill proposes to direct the FTC to promulgate regulations that require any "covered entity" to perform impact assessments for bias, effectiveness, and other factors, when using automated decision systems to make critical decisions

- A number of states have passed or pending AI legislation

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New York City Law

- Effective on January 1, 2023

- Requires companies to do independent bias audits on AI tools used for hiring

- It is unlawful for an employer to use an automated employment decision tool to screen candidates for employment or promotion in New York City unless:

  - the tool has undergone a bias audit no more than one year prior to its use;

  - a summary of the most recent bias audit is made publicly available on the employer's or employment agency's website; and

  - the candidate or employee is notified at least 10 business days in advance of the interview that AI will be used and the job qualifications and characteristics that the tool will assess

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New York City Law

- "Employment decision" means "to screen candidates for employment or employees for promotion within the city"

- The candidate or employee must have an opportunity to request an alternative selection process

- Failure to adhere to these requirements will result in civil penalties for each day that the AI tool is used

- What to expect

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- **IL** (January 2020): Law that imposes transparency, consent, and data destruction duties on employers using AI video interviews to screen applicants

- **MD** (October 2020): Law that prohibits employers from using a facial recognition service for the purpose of creating a facial template during an applicant's interview unless an applicant consents

- Many states have pending legislation, including California, New Jersey, New York, Washington, and Washington DC

- **One Federal Law?** Companies starting to call for regulation – overarching federal approach potentially preferable

EEOC Enforcement

- Under the Biden administration, the EEOC is stepping up its enforcement efforts in the area of AI and machine learning-driven hiring tools

- The EEOC recently announced that it is launching an initiative to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws

- On May 12, the EEOC and DOJ issued separate guidance documents on the application of the ADA to AI tools in employment

- The main elements of the guidance are:
  - Definitions of key terms
  - Identification of potential violations
  - "Promising Practices" for employers

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Conclusion

- AI is here to stay

- But we need to understand its weaknesses and protect against its potential biases

- Make sure the systems can be audited and corrections made

- Consider adopting AI compliance policies with a view to bias prevention, the proper use of AI, and a plan to mitigate biases if they are uncovered

- Consider arbitration agreements with class action waivers

Questions Going Forward

- Is the future of recruiting AI?

- Do algorithms work?

- Are they fair, when they make decisions based on probability and the behaviors of others to predict the probability of future behavior?

- Even with these problems, do the benefits from the use of AI outweigh the problems?

- Is using AI better than relying on humans?

- Is it legally riskier to rely on AI than on humans, and do the benefits outweigh the risks?

- Should use of AI in recruiting and hiring be regulated?

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Q&A

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Resources

- Uniform Guidelines on Employee Selection Procedures
  https://www.uniformguidelines.com/

  – Created 4/5 statistical rule of thumb

- Organization of Economic Cooperation and Development Principles on AI
  https://www.oecd.org/going-digital/ai/principles/

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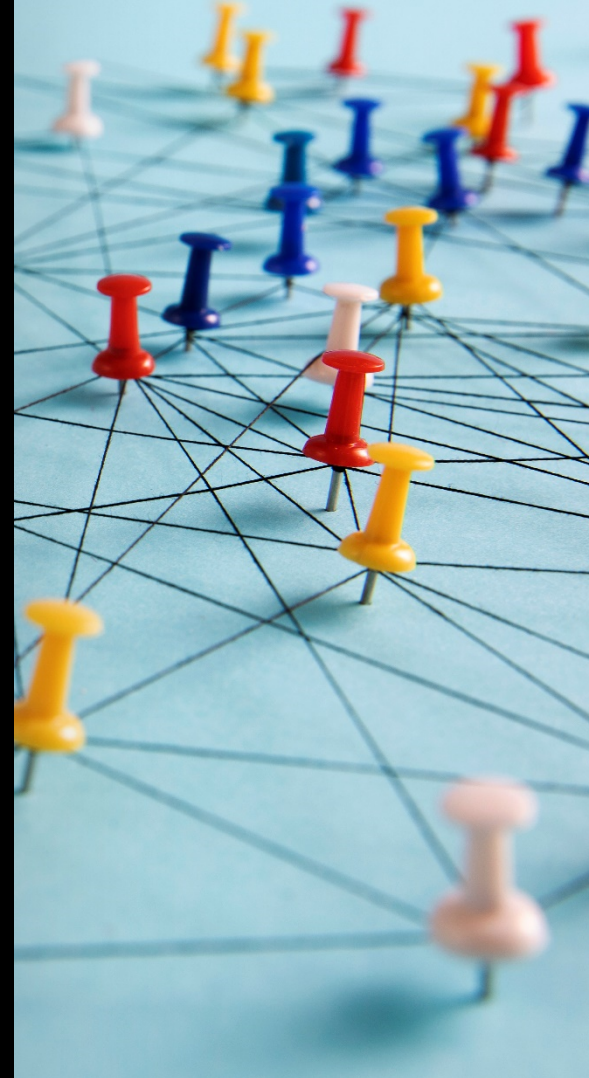
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Melinda has experience litigating and arbitrating both class actions and single-plaintiff cases. Melinda defends clients in wage and hour, whistleblower, wrongful termination, discrimination, harassment, retaliation, breach of contract, trade secret, and all other types of employment disputes. Melinda has won verdicts for her clients in six jury trials and four bench trials, and she has won numerous summary judgments and arbitration awards.

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Our Global Reach

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