



**TALENT
TECH LABS**

The Impact of AI Regulations on HR Technology and Employers

TABLE OF CONTENTS

Introduction: The Impact of AI Regulations on HR Technology

3

David Francis, VP, Research, Talent Tech Labs

AI in HR: The Shifting Legal Landscape and What Recruiters Should Know

4

Stephen C. Dwyer, Senior Vice President and Chief Legal and Operating Officer, American Staffing Association

Thriving in an AI-Regulated World

8

David Francis, VP, Research, Talent Tech Labs & Craig Leen, Former OFCCP Director and Eightfold Advisory Board Member

Building an Operating System for Responsible AI

15

Navrina Singh, Founder and CEO, Credo AI

TTL Analysis

20

David Francis, VP, Research, Talent Tech Labs

INTRODUCTION

The Impact of AI Regulations on HR Technology

In a 2017 survey undertaken by Talent Tech Labs of Talent Acquisition technology providers, more than 90% of responding vendors claimed some use of Artificial Intelligence (AI) in their applications. If we asked the same firms today, we suspect we'd get a far more muted response. Have technology providers stopped building? Has innovation suddenly slowed down? No. Rather, the regulatory winds have changed, and what was once a ticket to lofty valuations and demos with the C-suite has seemingly overnight turned into what seems a potential liability and "risk" to be "managed."

Led by a New York ordinance planned to go into effect next year that will mandate how organizations measure and leverage hiring tools that use AI (with penalties for non-compliance), municipalities around the country (and the world) are grappling with regulating the use of AI-based hiring tools. While the goals are lofty (to ensure employers don't discriminate against protected classes by using AI), the ramifications of these regulations are potentially profound, and organizations are struggling to understand how to stay compliant and competitive in their hiring processes.

WHAT'S IN THIS ISSUE

This issue of the Trends Report unpacks this rapidly evolving space with an eye toward what's happening currently, how organizations can best operate now and prepare for the future, and what an ethical and functional AI ecosystem that works for employers, candidates, and regulators alike might look like.

We start with an article from Stephen C. Dwyer, Chief Operating and Legal Officer of the American Staffing Association, that outlines the current AI-focused laws and regulatory guidance and its immediate impact on employers and provides practical suggestions for operating compliantly in the near term.

We then explore a wide-ranging interview with Craig Leen, the former Director of the OFCCP, who provides historical context on regulations and work, discusses how AI regs are likely to evolve while sharing the regulators' perspective, comments on the relative risk of various kinds of AI applications in the hiring process, and advises builders and employers on best practices for building a best-in-class tech stack while staying compliant.

Finally, every problem has a sharp entrepreneur with a novel solution, and the challenge of managing AI risk in a changing regulatory environment is no exception. We end this issue of the Trends Report with an article from Navrina Singh, Founder and CEO of Credo AI, a platform for ensuring auditability and ethical and explainable use of AI across a broad range of technology vendors.

AI is transforming how we live, access services, and find work. The current AI-targeted regulations are likely the beginning of a much more robust and far-reaching framework (or the beginning of a web of disparate frameworks), and talent leaders and builders across the Ecosystem would do well to get up to speed on this important topic. We hope this issue of the Trends Report is valuable as you navigate the regulatory seas.



David Francis
VP, Research Director,
Talent Tech Labs

SECTION 1

AI in HR: The Shifting Legal Landscape and What Recruiters Should Know

by Stephen C. Dwyer¹

TTL INTRODUCTION

In this article, Stephen Dwyer, Chief Operating and Legal Officer of the American Staffing Association, discusses the state of play of AI regulations currently in place and provides practical suggestions for operating compliantly as a hiring organization looking to leverage AI-based tools.

As human resource professionals continue to widely embrace new technologies to find, screen, interview, and hire qualified candidates, two things are becoming abundantly clear. First, the term “artificial intelligence (AI)” has almost become ubiquitous in the human resources context, broadly referring to resume screening algorithms, facial recognition and video interviewing software, machine learning, chatbots, and more. Second, AI has drawn the attention of policymakers and regulators seeking to ensure such tools do not run afoul of antidiscrimination laws by “baking in” biases that may unlawfully discriminate against protected classes of workers, including minorities and people with disabilities.

The following summarizes the current status of regulatory guidance, laws, and recent legislative proposals of which recruiters should be aware.

AI DRAWS THE ATTENTION OF CONGRESS AND THE EEOC

In December 2020, in the midst of alleged hiring bias facilitated by social media platforms, several U.S. senators expressed their concerns by [writing](#) to the chair of the Equal Employment Opportunity Commission. They noted that, as Covid began to subside, “some companies [would] seek to hire staff more quickly” and “turn to technology to manage and screen large numbers of applicants to support a physically distant hiring process.” They urged the EEOC to ensure that AI would not create “built-in headwinds for minority groups” by investigating and auditing AI’s effects on protected classes, prosecuting discriminatory hiring assessments or processes, and providing guidance for employers on designing and auditing equitable hiring processes.

^[1] Stephen Dwyer is Senior Vice President, Chief Legal and Operating Officer of the American Staffing Association, a national trade association that represents staffing firms. The information in this article is not intended, and should not be construed, as legal advice. Readers should consult with their legal counsel regarding the issues discussed herein.

The following year, the EEOC announced its Artificial Intelligence and Algorithmic Fairness Initiative. The chair of the agency remarked, “the EEOC is keenly aware that these tools may mask and perpetuate bias or create new discriminatory barriers to jobs. We must work to ensure that these new technologies do not become a high-tech pathway to discrimination.”

The EEOC pledged to:



Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions



Identify promising practices



Hold listening sessions with key stakeholders about algorithmic tools and their employment ramifications



Gather information about the adoption, design, and impact of hiring and other employment-related technologies

True to its word, in May 2022, the EEOC issued technical guidance titled, [The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees](#). The guidance illustrates how AI may unlawfully discriminate against those with disabilities and suggests steps employers can take to avoid liability. For example, AI might not afford those with disabilities reasonable accommodations during the hiring process, might screen out those with disabilities who could do the essential functions of a job with or without reasonable accommodation, or might make unlawful disability-related inquiries during the hiring process.

To address these potential liabilities, the guidance suggests that employers make clear to applicants how they can request reasonable accommodations; provide notice to applicants before using AI to assess their suitability for the role, and confirm with vendors that their AI tools do not run afoul of the Americans with Disabilities Act (ADA) or other laws.

Importantly, even if employers confirm compliance with their AI vendors, the EEOC takes the position that employers still could be liable if their use of third-party AI discriminates against those with disabilities. The guidance states that “employers may be held responsible for the actions of their agents, which may include entities such as software vendors if the employer has given them authority to act on the employer’s behalf.”

Some employer groups, including the American Staffing Association, which represents staffing agencies, have urged the EEOC to afford employers a good faith reliance defense to discrimination charges if the employers utilize AI products that have been audited or tested for bias and the results have been made publicly available. The rationale behind such defense is that it is unreasonable to hold employers liable for processes they do not control and did not create, i.e., how the vendor’s AI was developed. Therefore, to the extent they exercise due diligence by utilizing AI software that has been audited or tested for bias, the employers should not have liability.

Unfortunately, the EEOC has not recognized a due diligence exception based on the use of validated AI products. Regardless, as a best practice, recruiters should verify with their vendors that their AI products comply with the law and should consider seeking indemnification in the event the AI is found to be biased or discriminatory.



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