DREWACADEMY
DATA PROTECTION & CYBERSECURITY SERVICES

RISE OF THE ROBOT BOSSES: USING AI IN RECRUITMENT AND EMPLOYEE MONITORING

LEGAL GUIDES
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CONTENTS

Developments as of 11 April 2023

RISE OF THE ROBOT BOSSES: USING AI IN RECRUITMENT AND EMPLOYEE MONITORING

Artificial intelligence ("**AI**") can speed up the hiring process where thousands of CVs are to be screened – and after the employee is hired, to monitor the employee's productivity. However, it is important to ensure that the man-hours saved with the use of such AI tools does not come at the cost of man being made worse off. It has been reported that companies are reluctant to reveal what technology they are using, and vendors do not want to reveal how the technology they supply works, despite evidence that some AI systems may make biased or arbitrary decisions.[1]

Pre-employment: Resume screening

AI can be used to screen resumes based on certain criteria, in order to identify candidates to move to the next round of the recruitment process. This resume screening process may be entirely automated, or there may be a level of human review, but this is ultimately determined by the organisation that deploys it.

However, there are cases which show that using such AI-enabled resume screening tools may not necessarily lead to fairer outcomes. For example, Amazon discontinued the use of its recruiting tool because it preferred male candidates over female candidates, downgrading resumes that had the word "women's" and graduates of all-women's colleges.[2] The lesson from this is that if certain groups are not historically selected or employed for roles, and the AI tool is trained on such data, its future performance would also be based on such data.

Yet, at the same time, the use of AI also has the potential to make hiring practices fairer, because it forces people to look at past data and past hiring decisions. It can bring to light any inherent biases if there is a certain pattern of results. There also are views that making an AI model more explainable (i.e. the ability to explain how and why the model reaches a particular decision) will help to identify and correct the factors that result in biased outcomes.[3]

Developments around the world

To ensure that companies remain accountable for their use of AI in hiring, regulators are starting to enact legislation. New York City has enacted a law[4] (with enforcement commencing on 5 July 2023) that will prohibit the use of automated employment decision tools (to screen candidates for employment or promotion) unless a "bias audit" has been conducted by an "independent auditor" no more than a year before the use of the tool. The bias audit will assess the selection rate for each race/ethnicity and sex category (which are protected characteristics) to determine an "impact ratio". This was described as a "first of its kind"[5] law for employers.

Additionally, employers must make a summary of the results of the bias audit available on their websites. They must also notify employees and candidates that an automated employment decision tool will be used, the characteristics that it considers, and provide an option for them to opt out from it and request alternative selection processes.

Separately, the use of automated employment evaluation tools is also the subject of litigation. In February 2023, a job applicant in California filed a class action suit against Workday's AI-enabled employment screening tool, alleging that it discriminates against applicants based on their race, age and disability.[6] This case, which is still ongoing, is one of the first cases to allege discrimination based on the use of automated employment evaluation tools.

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[1] https://www.weforum.org/agenda/2022/12/ai-hiring-tackle-algorithms-employment-job/
[2] https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G
[3] https://www.forbes.com/sites/simonchandler/2020/02/18/how-explainable-ai-is-helping-algorithms-avoid-bias/?sh=620d3c065ed3
[4] https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf
[5] https://news.bloomberglaw.com/daily-labor-report/new-york-city-ai-bias-law-charts-new-territory-for-employers
[6] https://www.hrmorning.com/news/ai-discrimination-hiring-lawsuit/

Guidance available in Singapore

Singapore has not enacted any legislation relating to the use of automated employment screening tools yet. However, 2 guidelines issued by local regulators should be observed by organisations.

The first is the *Tripartite Guidelines on Fair Employment Practices* ("**Tripartite Guidelines**"), issued by the Tripartite Alliance for Fair & Progressive Employment Practice (which comprises the Ministry of Manpower, National Trades Union Congress, and Singapore National Employers Federation). The Tripartite Guidelines promote the adoption of fair and merit-based employment practices to prevent discrimination in the workplace, which employers are expected to abide by. In relation to recruitment, the Tripartite Guidelines provide that employees must be selected on the basis of merit (such as skills, experience or ability to perform the job), and factors such as age, race, gender (unless expressly required by the nature of the job, such as female therapists to perform spa treatments for female customers), religion (save where employees must perform religious functions or fulfil religious certification standards as part of the job requirements), marital status and family responsibilities, or disability, must not be considered.[7] The selection criteria must be made known to all job applicants and reviewed regularly to ensure it remains relevant.[8]

The Ministry of Manpower can take action against organisations that do not adhere to the Tripartite Guidelines, by curtailing their work pass privileges such that they are debarred from making and renewing work pass applications for their potential and existing employees.[9]

The second is the Model Artificial Intelligence Governance Framework ("**Model Framework**") issued by the Infocomm Media Development Authority ("**IMDA**") and the Personal Data Protection Commission ("**PDPC**"). The Model Framework sets out principles for the ethical and responsible use of AI, with practical recommendations for organisations to follow in order to mitigate bias in the datasets used to train the AI model, amongst other objectives. For more information on the Model Framework, please refer to our article on the "Issues you must consider before deploying Artificial Intelligence in your business: an explainer of Singapore's Model Artificial Intelligence Governance Framework"[10].

At the end of the day, organisations have an incentive to ensure that the automated employment decision tools they employ are well-calibrated and minimise discriminatory practices. If a CV screening system that identifies candidates to proceed to the next stage (i.e. an interview) produces a false positive, where an unqualified candidate is invited for an interview, the impact may only be the time cost to the employer and the candidate.[11] However, if the system produces a false negative, a qualified candidate (regardless of age, race, gender, etc.) will miss out on an employment opportunity, and the organisation will miss out on a candidate that would have been an asset.[12]

Employee monitoring

To monitor an employee's use of an organisation's resources at work, such as monitoring the employee's e-mail account and Internet browsing history, employers are turning to a variety of tools, some utilising AI, and some which do not.

To the extent that the employer complies with the Personal Data Protection Act 2012 ("**PDPA**") where "personal data" is involved, such practices may be permissible. Organisations should ensure that they have a legal basis to collect such information, whether with consent from the employee, or other legal bases in the PDPA, such as —

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[7] See pages 2, 5 and 7 of the Tripartite Guidelines
[8] See page 3 of the Tripartite Guidelines
[9] https://www.tal.sg/tafep/getting-started/fair/tripartite-guidelines
[10] The article is available at: https://www.drewnapier.com/DrewNapier/media/DrewNapier/Incorporating-Singapore-Model-Artificial-Intelligence-Governance-Framework-into-your-business.pdf.
[11] https://ico.org.uk/for-organisations/guide-to-data-protection/key-dp-themes/guidance-on-ai-and-data-protection/what-do-we-need-to-know-about-accuracy-and-statistical-accuracy/
[12] *Ibid.*

(a) where the collection, use or disclosure of personal data is for the purpose of managing or terminating the employment relationship with the individual[13];

(b) where the collection, use or disclosure of personal data is necessary for evaluative purposes (e.g. for determining the suitability, eligibility or qualifications of the individual to whom the data relates for employment, promotion or continuance in employment)[14].

Nevertheless, the organisation's actions are still subject to what a reasonable person would consider appropriate given the circumstances.[15] This means that an organisation should ensures that the data it collects it not excessive for the purpose of monitoring how an employee is using company resources (e.g. to track data usage rather than every website visited, unless the nature of the employee's role calls for it), and it should not collect sensitive personal data such as information about the employee's medical conditions that have no relation to the employee's performance at work.[16]

Where the basis for collecting the information is for managing or terminating the employment relationship with the individual, the organisation must also inform the individual of the purpose for which the organisation is collecting, using or disclosing the personal data about the individual.[17] The organisation may do so through employment contracts, employee handbooks, or notices in the company's intranet.[18]

Singapore's position on the use of algorithms to manage and deploy workers

In Singapore, Parliament has indicated that regulating or auditing algorithms used to manage workers is not the only solution to ensure worker welfare – instead, policies to protect workers and enhanced representation of them in dialogues with employers may be the better way. This is reflected in the Parliamentary Question and response on 12 September 2022.[19]

Member of Parliament Mr Leon Perera had asked the Minister for Manpower whether the Government "will (i) consider regulating platform companies to ensure they do not encourage excessive risk-taking by gig and platform workers to fulfil orders, such as by taking on too many jobs an hour or riding during dangerous weather and (ii) study the artificial intelligence and algorithms of such platform companies to ensure that this is not the case."

The Minister for Manpower replied that there were a series of measures ongoing, where their impact would be assessed and further measures introduced if necessary —

(a) the Workplace Safety and Health Council was working with delivery platforms and companies to review work processes to enhance the safety of the workers on the road to prevent accidents;

(b) the Advisory Committee on Platform Workers was looking into strengthening protections for the workers, including financial compensation for work injuries; and

(c) a Tripartite Workgroup had been formed to propose a framework that allows platform workers to be formally represented in discussions with platform companies.

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[13] See paragraph 10 of Part 3 of the First Schedule to the PDPA. The PDPC has stated that "allocating computer resources and monitoring how the employee uses company computer network resources" can fall within the purpose of entering into, managing or terminating an employment relationship - please see 6.21 of the PDPC's Advisory Guidelines on the Personal Data Protection Act for Selected Topics, available at: https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Advisory-Guidelines/AG-on-Selected-Topics/Advisory-Guidelines-on-the-PDPA-for-Selected-Topics-17-May-2022.pdf.

[14] See paragraph 2 of Part 3 of the First Schedule to the PDPA. "Evaluative purpose" is defined in section 2(1) of the PDPA.

[15] See section 3 of the PDPA.

[16] Benjamin Wong, *Data Protection Implications of Modern Employee Monitoring Software* (2021) 33 SAcLJ 101 at 113, accessible at https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1598/Citation/JournalsOnlinePDF

[17] See section 20(5) of the PDPA.

[18] See 6.20 of the PDPC's Advisory Guidelines on the Personal Data Protection Act for Selected Topics, available at: https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Advisory-Guidelines/AG-on-Selected-Topics/Advisory-Guidelines-on-the-PDPA-for-Selected-Topics-17-May-2022.pdf

[19] https://www.mom.gov.sg/newsroom/parliament-questions-and-replies/2022/0912-written-answer-to-pq-on-excessive-risk-taking-by-gig-and-platform-workers-to-fulfil-orders

The Minister for Manpower advised that in relation to regulating the incentives and algorithms of platform companies, "we need to be cautious about regulating them" so as to avoid the risk of "over-regulation".

As of 23 November 2022, the Government accepted all 12 recommendations by the Advisory Committee on Platform Workers to strengthen protections for platform workers.[20] Amongst other measures, platform companies must provide the same scope and level of work injury compensation as employees are entitled to under the Work Injury Compensation Act 2019.

Looking forward

AI will continue to be used in transforming the workplace. In Singapore, the IMDA, PDPC and the Lee Kuan Yew Centre for Innovative Cities in the Singapore University of Technology and Design have released *A Guide to Job Redesign in the Age of AI*, for businesses to harness this technology in a practical and human-centric way.[21] The Guide encourages organisations to break down employees' job roles into "tasks', describing the actions that comprise the specific role, so that the organisation can assess whether AI can and should be deployed for that task.[22] This is so that even roles that appear very 'fluid' or 'bespoke', such as consulting or artistic direction, can benefit from the use of AI.[23]

AI has the potential to enhance efficiency in the workplace, but the challenges it poses, especially in the case where unrepresentative data used in training the AI model can lead to results that favour one group over another, must be adequately addressed so that *everyone* reaps the full benefits from it.

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[20] https://www.mom.gov.sg/newsroom/press-releases/2022/government-accepts-recommendations-by-the-advisory-committee-on-platform-workers
[21] See [2.1] of the Guide to Job Redesign
[22] See [2.10] and [2.11] of the Guide to Job Redesign
[23] See [2.10] of the Guide to Job Redesign

DREW DATA PROTECTION & CYBERSECURITY ACADEMY

Drew Data Protection & Cybersecurity Academy (Drew Academy) was established in 2020 by Drew & Napier to help our clients build their capabilities and develop and implement organisational strategies, structures, policies and processes to meet their legal, regulatory and compliance obligations. Drew Academy offers a range of courses in areas such as data protection, cybersecurity, data governance and in-house commercial practice. A particular focus for us is the delivery of workplace learning solutions and development of customised training courses. We also offer outsourced DPO services and data protection consulting services through our experienced team of practitioners.

Drew Academy is helmed by Lim Chong Kin and David N. Alfred. Our course leaders are experienced in various aspects of data and cyber governance, data protection, cybersecurity engineering and in-house commercial practice.

ARTIFICIAL INTELLIGENCE AND DIGITAL TRUST

Drew & Napier's Artificial Intelligence (AI) and Digital Trust practice brings together its expertise across several technology-related domains and in fields as diverse as data protection, cybersecurity, healthcare, Fintech, intellectual property and competition law (to name a few) to advise clients on the full range of legal issues relating to AI and Digital Trust. In addition to advising on commercial, regulatory and international / cross-border issues, our advice extends into areas such as governance and ethics as we seek to enable our clients to navigate areas where laws and legal principles are still emerging.

Working together with the Drew Academy, we provide solutions that reflect our deep understanding of underlying technologies, the risks and uncertainties involved and practical business considerations. Internationally, there is a growing consensus on AI governance.

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