

Exploring AI in HR Practices

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, and my colleague Russell Berger, both attorneys at Offit Kurman. And today we are talking about AI regulations as it relates to employment. So often we'll talk on OK at Work a little bit about just how different state laws can give us an indication of where things might be headed.

We've seen this with non-competes and restrictive covenants that, one state might start to do something, and then the other states look and say, "Hey, that's a good idea. We like how that's drafted. Maybe we need to do something similar." Especially states that are close by or have similar political makeup or similar priorities.

And right now we're seeing some of this happen in the state of Illinois, where we have some AI employment-specific regulations. Also, they have some other ones that are floating around there but that are coming out that employers are having to look at [00:01:00] there, and I think it might be a prediction of kind of what might be to come in other areas.

I know other states are looking at that. But what is something that, the employers should be thinking of as these things are rolling out especially what we're seeing with the state of Illinois?

Russell Berger: Yeah. Well, I mean, as a starting point, if you're in a state that doesn't have specific AI and employment regulations that doesn't mean you're not subject to law when it comes to how you use AI in employment. You're subject to all the employment laws that have been in place.

AI's just another avenue where they might be applied. And so, with that said, I think it's important, to regulate how your HR team or your recruiting team is using AI. We're starting to see the issues really with respect to recruiting. Is AI exhibiting a bias in the way it's filtering candidates and who it's identifying as strong candidates for a position?

Ultimately, those are a violation of pretty much any state or federal anti-discrimination law. If there's a bias in how AI is doing that, that's your responsibility as the employer. So making sure that you have a [00:02:00] plan, you know what you're doing, and you're guarding against bias is a really important starting point for leveraging AI in the employment and in particular the recruiting space.

Sarah Sawyer: Yeah, and knowing how it's being used as you're implementing AI, how it might be used, thinking ahead about how your employees might be using it. Obviously, we've talked about having policies in place. There's also ways, in addition to coaching your employees on how to use it or not be using it, there can sometimes be ways, depending on what product you're subscribed to and you're using, to change settings.

So if your employees are starting to ask it questions that maybe they shouldn't be asking or asking it to do things, that might increase the chance for that bias to happen. They might get a bounce back and say that the AI can't do that, those types of things. So there is different avenues to explore there.

I know I think recruiting and hiring are gonna be big areas that we're gonna see a lot of the initial regulation around similar to what we've seen around disclosures that people need to make to people around background checks or different things that they're doing in that process.

I [00:03:00] think it's an area where-- that's kind of ripe for disclosure laws and transparency around how people are using AI in that process. So I think that's something to keep an eye out as well, and it'll probably mirror some of those rules people already have in place as it relates to some of those other hiring tools.

I like how you used that. That it's just, it's a tool that we're looking at, just like a lot of other tools that have been developed to help with HR process and hiring process and all those things to make people's jobs easier and to help. It is another tool, but I think we're gonna see similar regulations and policies that we're gonna need to put in place as it relates to this tool.

Russell Berger: Yeah. Well, in particular in Illinois, one of the things they're requiring is disclosure of use. That's something we've seen in other jurisdictions as well. Not every jurisdiction has that, so if you don't have to disclose it, no legal obligation to do so.

But I do think it makes sense to think in those terms and if I had to disclose it, could I? Can I articulate what I'm using, how I'm using it, what my [00:04:00] safeguards are? Because if you get sued over discrimination you're gonna have to explain all that anyway and why it's not discriminatory. So I think thinking in those terms, if I had to explain to someone how I was using AI, how would I explain it?

And paired with what safeguards can I put in place to mitigate risk of this thing going off the rails, either through discrimination bias-type issues or through privileged confidential, confidentiality of information issues. If you're getting people's job applications, you don't wanna just load it into the free ChatGPT so the internet now has it, and ChatGPT is learning based off of it.

So, how are you doing it in a safe way, a secure way? And when you write this out- Easy enough to see, there might be some holes in here. There's some things we could do better. What is my process? How do I improve it? And then you can write those into, version two of kind of your AI and HR protocol.

Sarah Sawyer: Yeah, no, definitely important. It's just another thing to be paying attention to, but I think ultimately it'll be a good tool. But [00:05:00] definitely, we're keeping an eye on the state laws as they develop, well, thank you, Russell. We'll see you next time.

Russell Berger: Thanks, Sarah.