

Responsible AI Use in Employment Hiring

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Burger. We're attorneys at Offit Kurman, and today we are talking about the Workday lawsuit, and more generally just the nature of this lawsuit as it relates to AI. So obviously we talk a lot about AI here on OK at Work as it relates to employment and other things, and management, and different topics 'cause obviously it's in a lot of what people do on a daily basis these days.

You may have seen on the news or in headlines that the company Workday is being sued related to some bias in its AI software as far as filtering out certain candidates in a discriminatory manner. And so obviously a lot of people use Workday for hiring and recruiting and use that platform.

And so anyone who uses it might be taking a look at [00:01:00] this wondering how it maybe impacts them. And I think it's also probably a good example of some of the things we've talked about as it relates to responsible AI usage in recruiting and hiring. So definitely a relevant topic, something that, we were expecting to see lawsuits like this and this one is a mainstream headline one for sure.

So Russell, what does this lawsuit and these headlines really mean to employers right now? What should they be thinking about?

Russell Berger: Yeah. So, when we talk about AI, we generally talk about a handful of, large categories of risk. We talk about accuracy, we talk about confidentiality, we talk about intellectual property rights, but one of those risks that we talk about frequently is bias.

And, that's essentially what this lawsuit against Workday is alleging is that, there's unlawful discriminatory bias in the way you screen candidates, and that violates the law. And like we don't know, right? We don't... Certainly you and I don't know maybe the plaintiffs don't know yet.

I don't know how they're coming up with their own analysis, but, they'll get into [00:02:00] discovery, and they'll certainly dive into those details. But I guess the point is for any employer is we don't know exactly how this software works, and we're taking a risk, any of us are taking a risk when we rely on software that...

and we kind of outsource a function to it that the software is functioning in a non-biased, lawful way. So I think there's a couple important things for, for business owners to take away from this is one, like you can't delegate that obligation. You, your business has to be compliant. So if you're reliant on a biased system, in theory, you're taking on all the risk of that biased system and you could be violating the law without knowing it because you've delegated to a biased system.

So, that's a risk for any business. So what do you do about that? One, you could have you could contract with Wor- and I don't know what Workday's service agreement looks like. My guess is they probably disclaim responsibility for this, but, maybe that's something that they have done or will do to [00:03:00] mitigate their risk as a business.

Because the other option is you don't use it, or you use it with enough controls in place that it takes away some of the advantages of the AI. And the third part is maybe they show you how it's programmed and they can prove that they're doing it in a lawful way. That'd probably be the best-case outcome, and we'll probably get there eventually, but we just don't know, the state of the software right now.

Sarah Sawyer: Yeah, I think it's a good reminder to ask the right questions and be really thinking about how these things work so that you understand what risk you're taking and how you might be able to mitigate it as it relates to either the programming or things that you're doing internally on your end, or as you mentioned, disclaiming, pushing that risk off.

But I think that it is, as we adapt to new technology, all of us are, have different comfort levels of, how things work, right? So I know my computer works when I turn it on. I don't really know how the mechanisms to bring us here onto this recording right now actually work. And I think it would take me a really long time to get up to speed to fully understand that, and I'm not necessarily suggesting we all become computer programmers.

However, having an [00:04:00] understanding a little bit more of a what are they doing? How are they processing the information? And asking those questions of your vendors when you are using the software around, confidentiality, around how the actual choices are being made, how things are being, weeded out, will help you make adaptations to the software that you're using or the programs that you're using or at least try to create a human component of reviewing what that program is doing.

So you gotta understand it to be able to make those adjustments and mitigate your risks, for sure.

Russell Berger: Yeah. Well, and in some respects, and this highlights a different issue a little bit, is, like the Workdays of the world are big business, like they've got real incentive to be compliant 'cause they wanna be able to put that seal of approval on their product and say, "Look we've been tested, we've been vetted, we've been in litigation, like we're good.

You can trust us. You should hire us." When you're working with a startup business or you're doing it on your own. We use Copilot here at Offit Kurman. If we were using Copilot to our own devices, like how are we guarding against bias creeping into that?

What steps [00:05:00] can we take to mitigate that risk? How are we reviewing to ensure that it's doing what we think it's doing and not, putting us in a position where we might be violating the law? I think that's a even more critical takeaway 'cause many of us are using AI in all these different ways, and we have to be thoughtful about, bias creeping into those use cases.

Sarah Sawyer: Yeah, and there's way to alter the settings. I know that's something that we've explored and clients have explored is altering those settings as well to help with that. So, well, thanks Russell. An interesting case. We'll see where it goes, and I'll see you next time.

Russell Berger: Thanks, Sarah.