



AI-generated artwork

The Dangers of AI in Employment-Related Software

As the presence of artificial intelligence (AI) in everyday life continues to proliferate, software companies that employers commonly contract with have started incorporating AI into their algorithms—potentially influencing employment decisions. Some software companies use AI to screen applications and analyze interviews, and some even help clear employees as healthy enough to begin a work shift. Simultaneously, lawsuits against employers who use AI-assisted employment-related software are increasing. Recent examples of litigation involving such software offer important lessons for employers seeking to reduce risk associated with using AI in the employment process.

Here are some notable cases that have addressed this issue over the past two years:

- In *Baker v. CVS Health Corp.*, an employer was sued in a putative class action suit because of its use of HireVue to conduct video interviews of job applicants, as HireVue allegedly collected biometric information from the interview to generate an “honesty score” for the employer without informing the applicant. The plaintiff alleged that this practice violates Massachusetts’s lie detector laws. While the case recently settled, the plaintiff’s complaint survived a motion to dismiss, meaning the employer may have expended significant resources on discovery, in addition to the costs of mediation and the settlement payment itself.
- In *Trio v. Amazon Web Servs., Inc.*, an Illinois employer was sued under state data privacy laws because it collected biometric information from its employees through an AI software tool intended to detect illness (implemented during a more heightened period of COVID-19 protocols) without proper disclosure to the employees. This case is in its early stages, with a decision on a motion to dismiss still pending.
- In *Mobley v. Workday, Inc.*, a job applicant sued Workday, a software company used by many employers for application screening, for allegedly automatically rejecting him for 100 potential jobs based on his mental health status, race, and age. The plaintiff alleges that Workday uses AI in its screening process via personality assessments, causing otherwise qualified applicants to be automatically rejected before their application reaches the employer. This case has partially survived a motion to dismiss in a California federal court.
- In *EEOC v. iTutorGroup Inc.*, the Equal Employment Opportunity Commission brought suit in a New York federal court against an employer that used screening software that allegedly automatically rejected applicants based on age. This case settled for \$365,000 (in addition to ongoing compliance monitoring by the EEOC).

Although some of these plaintiffs chose to name only the software contractors as defendants, each of these cases presents potential liability for employers themselves. As such, employers should keep in mind the following when working with employment-related software companies that may be using AI:

- In general, employers are liable for their agents’ actions, particularly if the employer delegates decision-making authority to that agent (such as in the *Mobley* case where plaintiff alleged that Workday was empowered to reject applicants automatically before the application ever reached the employer).
- Ask questions to the software companies that you use for employment matters about whether/how they implement AI in their software.
- While these cases often present legal questions of first impression, unlawful employment actions conducted by AI will create the same liability as if those actions were taken by a human.
- Pay attention to the unique employment and data privacy laws in your state (such as laws restricting the use of biometric information), and ensure that the software you use complies with those laws.
- When negotiating or renegotiating contracts with these software companies, pay attention to shifts in liability related to the use of AI which may result from these new cases.

**This client alert is for informational purposes and is not legal advice. View [previous issues](#) of Monday Minute.*

What's Next?

If you have questions about the incorporation of AI in your recruiting/hiring practices, need help drafting a policy for responsible AI use, or would like to ensure safeguards are in place, please contact our employment attorneys:

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