

AI-Powered HR Systems Arrive: Legal/Ethical Benchmarking in a World of Algorithmic Bias

November 7, 2019

TEMS IEEE

Littler



Presented by



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Shareholder

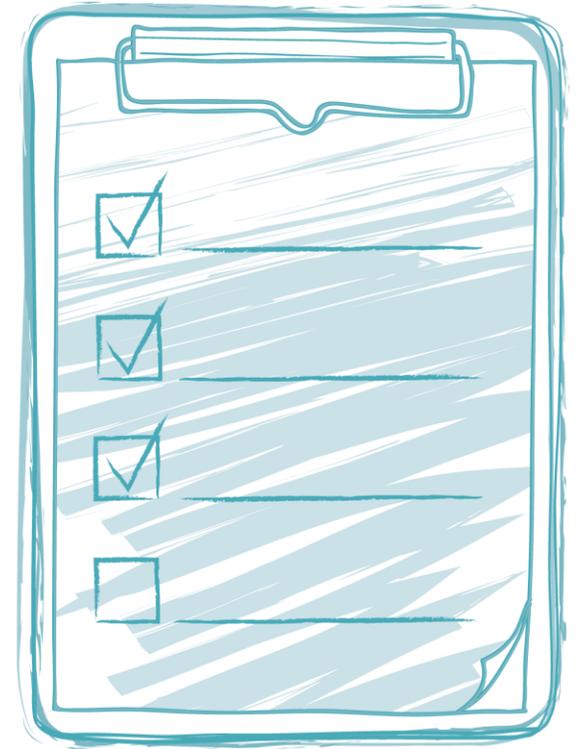
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Agenda

- AI-Powered HR Systems: Their Arrival and Unstoppable Mandate
- The Dark Side: The Call for Transparency and Coming Regulatory Climate
- The Dark Side: The Emergence of Algorithmic Bias & Biometric Class Actions
- Benchmarking Legal/Ethical Compliance for AI-Powered HR Systems and Practical Recommendations



November 6, 2019 Washington Post:

The Electronics Privacy Information Center: Filed Formal Complaint With Federal Trade Commission alleging:

“Unproven AI Recruiting Technology”

“Unfair and Deceptive Trade Practice”

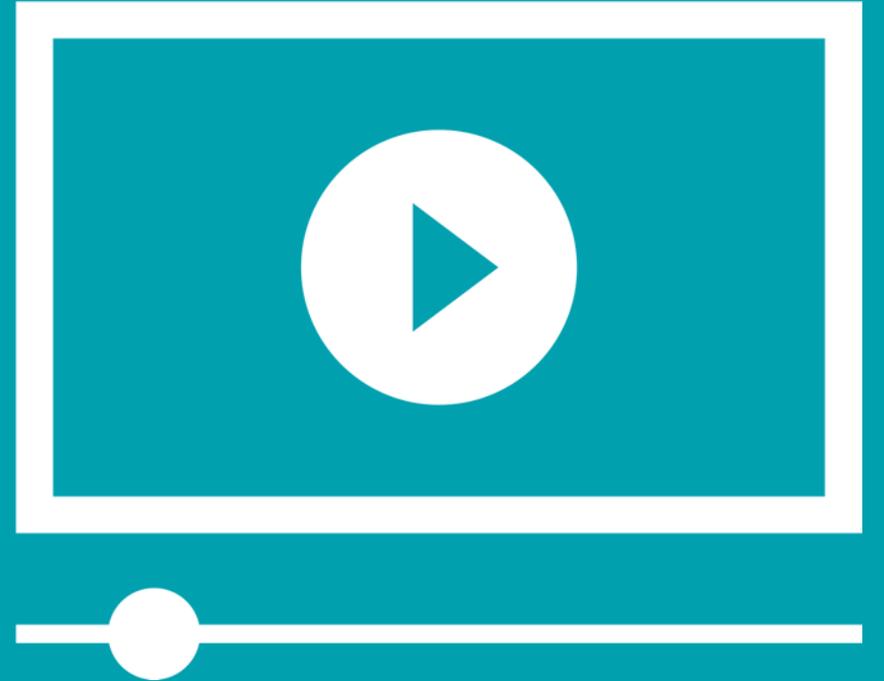
AI's Unstoppable March Transforming the Workplace

- August 9, 2019 Illinois Governor J. B. Pritzker signed the Illinois Artificial Intelligence Video Interviewing Act
 - Signals The Arrival of AI Reaching The Core of the Talent Assessment Process
 - Foreshadows the Coming Legislation, Regulations, and Litigation
- Accompanying AI's Unstoppable March Transforming the Workplace



What are these HR AI systems...?

- Video Interviewing and Assessments
- Blind Resumes
- Ensure all applicants are getting a “thank you for applying” email
- Utilizing chat bots to give candidates access to information they need at anytime
- Quickly getting open job information out on Social Media
- Having algorithms screen resumes for you



HR is Buzzing About AI

7 Ways Artificial Intelligence is Reinventing Human Resources

3 Ways That A.I. Is Transforming HR and Recruiting

5 Ways (AI) in

The Rise of AI in Recruitment | AI for Recruitment is Here

Is the March of AI into HR inevitable?

- HR is preparing to embrace AI tools without knowing exactly what they will deliver or change.
- For many companies, the first pilots of AI are in talent acquisition.
 - Can see significant, measurable, and immediate results
 - Reduces time to hire
 - Increases productivity for recruiters
 - Delivers an enhanced candidate experience that is seamless and simple
- Many feel if they don't adopt AI systems, they will fall behind.
 - Will they? Are they?



AI and HR's New Digital Mandate

- No facet of HR remains untouched and the potential is just emerging: Bain & Company
 - online recruiting,
 - AI-assisted interviewing,
 - and machine learning predicting who will resign,
 - chatbots handling out-sick notices,
 - smart redesign algorithms evaluating performance and identifying employees for layoff.
- The Promise: Cost savings, speed, quality and accuracy – all essential to remain competitive.

Brief

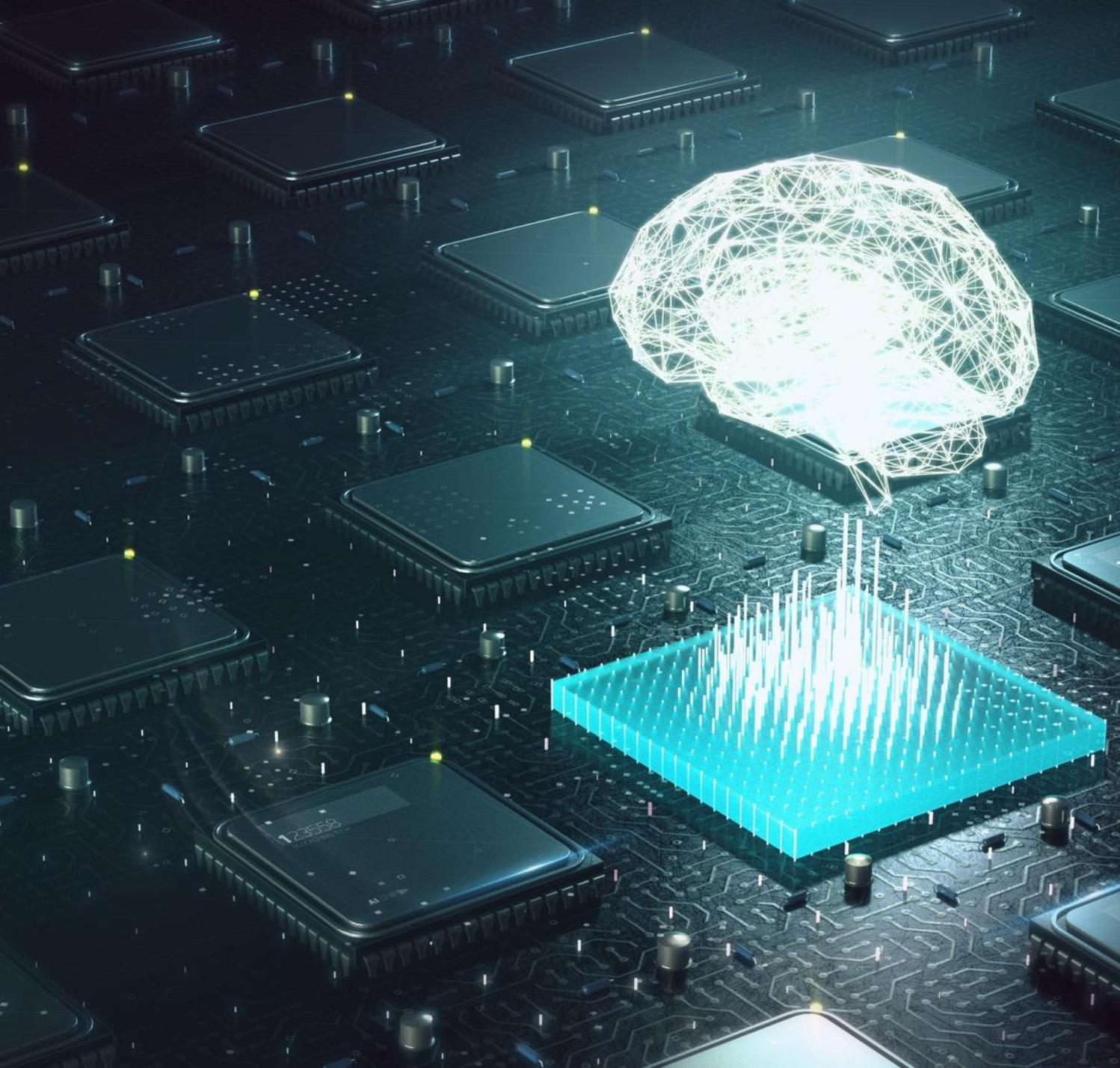
HR's New Digital Mandate

Digital technologies have become essential for HR to engage top talent and add value to the business.

By Michael Heric

October 10, 2018 • 12 min read





The Dark Side: The Call for Transparency & Coming Regulatory Climate

The Call for Transparency & Coming Regulatory Climate



Worker Acceptance and the Call For Transparency

The Call for Transparency & Coming Regulatory Climate

Lessons from the Illinois AI Video Interviewing Act



The Call for Transparency & Coming Regulatory Climate

GDPR Mandates and Creating Expectations



The Call for Transparency & Coming Regulatory Climate

California Consumer Privacy Act and AB 25

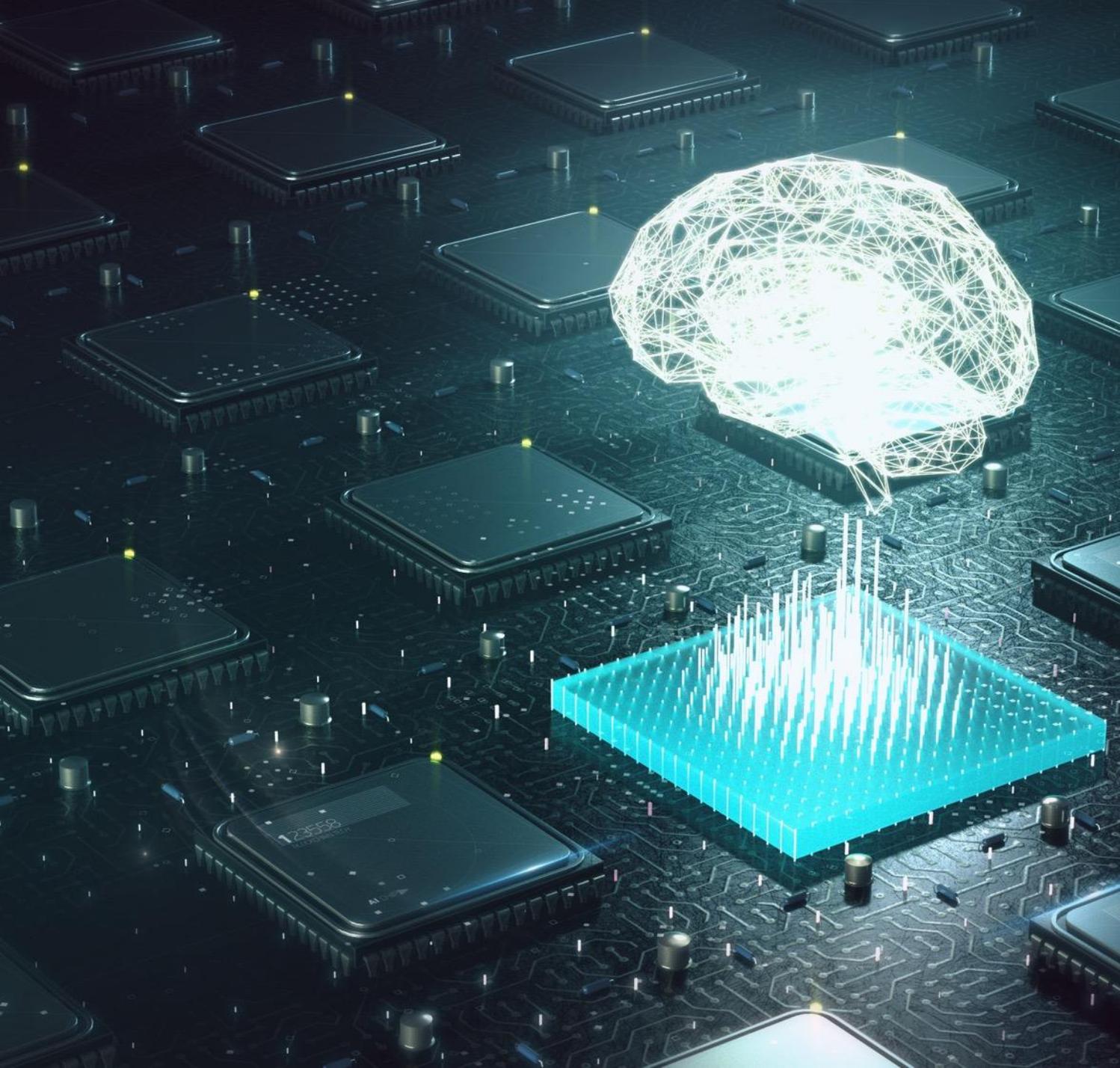


The Call for Transparency & Coming Regulatory Climate

Tiered Transparency and the Downside of Too Much Technical Details

The Call for Transparency & Coming Regulatory Climate

The Black Box vs. Glass Box Debate



The Dark Side: The Emergence of Algorithmic Bias & Biometric Class Actions

The Dark Side of AI-Powered HR Systems

The New York Times

Opinion

Beware of Automated Hiring

It won't end employment discrimination. In fact, it could make it worse.

By Ifeoma Ajunwa

Dr. Ajunwa is an expert on employment and labor law.

Oct. 8, 2019



The Emergence of Algorithmic Bias & Biometric Class Actions

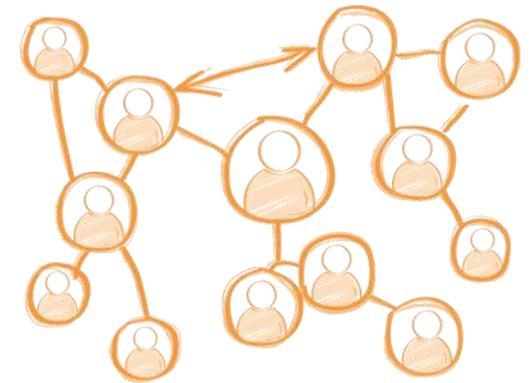
- AI-powered talent acquisition includes both recruiting and assessment.
- Such systems are often described and viewed as more objective because of the technology. This can be true or misleading, and sometimes even false.
- AI uses algorithms which are created by humans and can reflect human biases— both intentionally and unintentionally created.
- Using AI-powered HR systems requires awareness of the potential of Algorithmic Bias, which can include biases that are unlawful such as discriminating against talent on basis of protected categories such as age, sex, race, color, disabilities, religion, national origin, and several others, depending on applicable laws.
- Intentional discrimination is possible, such as alleged age restriction on social media advertising.

The Emergence of Algorithmic Bias & Biometric Class Actions

- Algorithms increasingly deploy pattern recognition known as machine learning. Such systems learn from test data that often is collected regarding the most successful existing employees. If most of these employees are men, for example, patterns can be identified that favor men over women.
- Examples of disparate impact include zip codes, language, names, and even seemingly objective criteria, such as years of experience.
- One of the greatest challenges facing employers is algorithmic bias class actions.
 - EEOC increases scrutiny and review.
 - Plaintiff's counsel are actively looking for ways to bring such suits.
 - Several demand letters have issued.
 - Class Actions are now being filed (Disability and Age cases).

The Emergence of Algorithmic Bias & Biometric Class Actions

- Algorithmic Bias and Coming Class Actions
 - AI's Debated Promise To Make Talent Recruitment and Assessment More Objective, Reducing Both Intentional and Unconscious Human Bias.
 - Human Bias Can Influence Algorithm Design and Operation, e.g, employment gaps, cultural fit, and years of experience.
 - AI's Machine Learning, Deep Learning, & Neural Networks and How They Learn: Potential For Disparate Impact Based Discrimination.
 - Anticipated Surge in Algorithmic Bias Class Actions: A Bipolar Disorder Diagnosed College Student with Near-Perfect SAT Score Rejected By Several Employers Using An AI-Powered Personality Test; Manufacturing Company Using AI Selection Tool For Layoffs Alleged To Violate Age and Pensions Acts.
 - From Lie Detector Statutes to the Federal Credit Reporting Act: Unanticipated Legal Compliance Challenges



The Emergence of Algorithmic Bias & Biometric Class Actions

Biometric Identification Requirements, Challenges, and Class Actions

- Informed Consent State Statutes (Over 200 Class Actions Under Illinois Biometric Information Privacy Act)
- UK High Security Firm Failed To Use Encryption And Stored Actual Retina and Fingerprint Scans.

Major breach found in biometrics system used by banks, UK police and defence firms

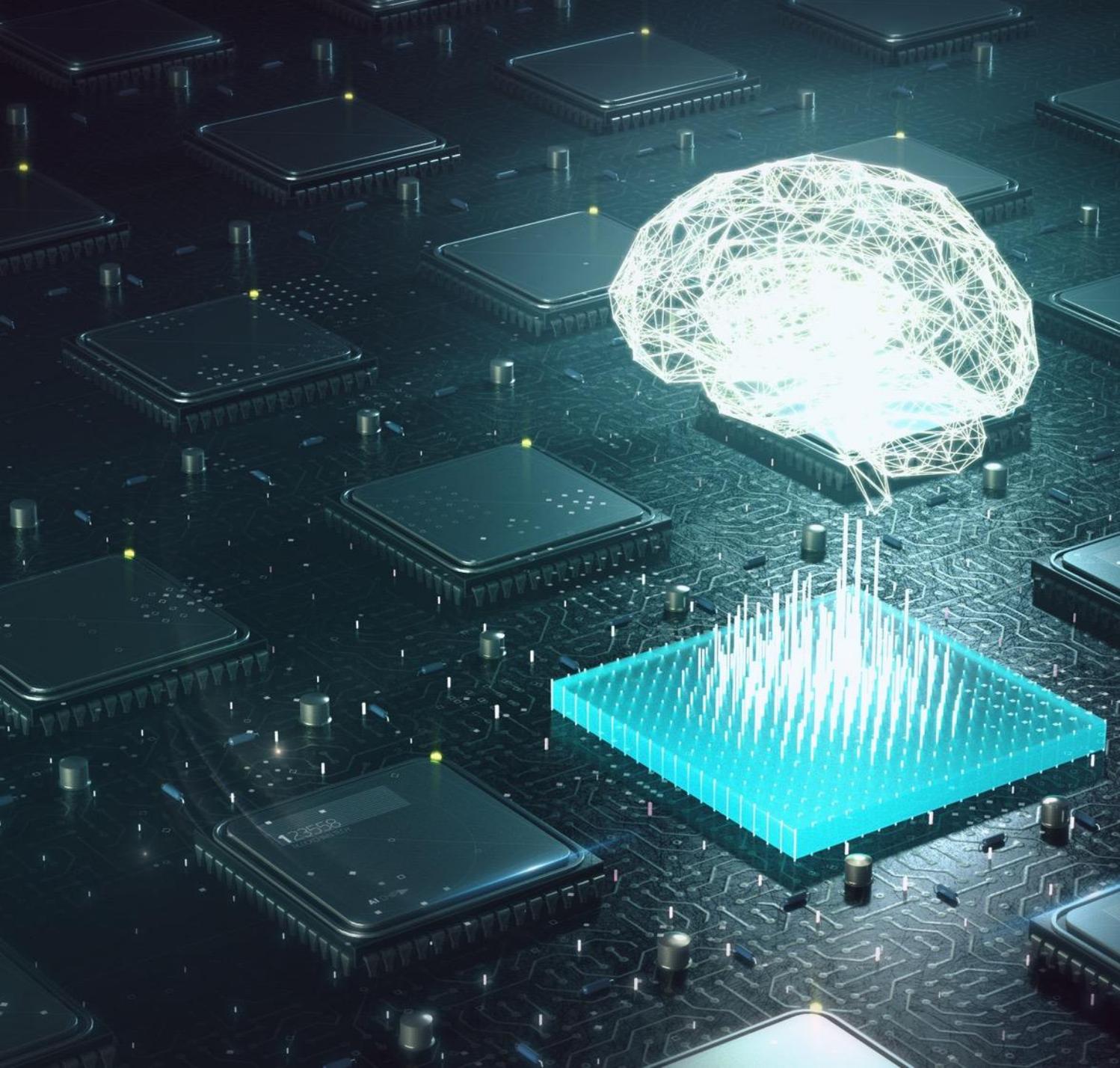
[theguardian.com/technology/2019/aug/14/major-breach-found-in-biometrics-system-used-by-banks-uk-](https://www.theguardian.com/technology/2019/aug/14/major-breach-found-in-biometrics-system-used-by-banks-uk)

Josh Taylor

August 14,
2019

The fingerprints of over 1 million people, as well as facial recognition information, unencrypted usernames and passwords, and personal information of employees, was discovered on a publicly accessible database for a company used by the likes of the UK Metropolitan police, defence contractors and banks.

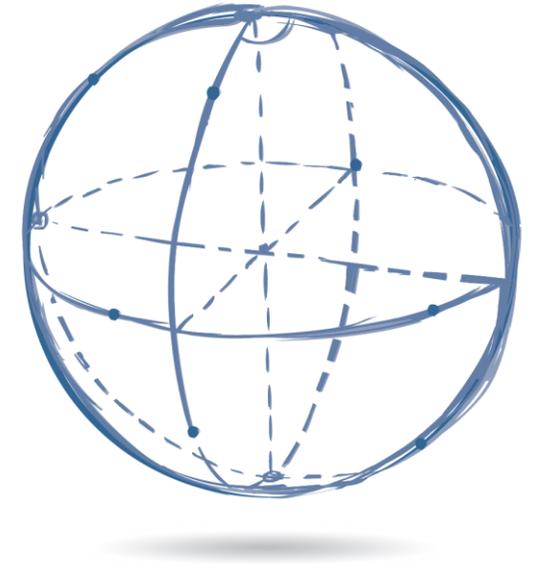




Benchmarking Legal Compliance for AI-Powered HR Systems & Practical Recommendations

Benchmarking Legal Compliance for AI-Powered HR Systems

- Benchmarking Legal Compliance for AI-Powered HR Systems
 - Vital Role of In-House Legal Compliance Attorney as Part of the Overall Multi-Disciplinary and Diverse Compliance Team. Catalogue and Understand Existing Laws and Regulations Regarding Algorithmic intelligence, Data, and Privacy Rights, Including Regulatory Environment.
 - Incorporate Legal Compliance Review and Documentation Into All Phases of Development of AI-Powered HR Systems: Design, Building, Implementation, and Monitoring.
 - Determine Whether HR System Includes Automated AI Decision Making; If So, Include Human Oversight and Ability To Change Decisions.



Benchmarking Legal Compliance for AI-Powered HR Systems

- Adopt Audit Standards, and Documentation Methods and Process.
- Assess the Transparency and Explainability Levels of the AI System For Users, Developers, Legal Compliance Team, and Anticipated Response From Regulators and Litigation: Lessons from Prisoner Sentencing Algorithms to Predictive Coding Will Help Determine Expected Disclosure Requirements Mandated By Regulators and the Litigation Process.
- Make Training Data Selections and Testing One of the Most Critical Legal Compliance Benchmarks: This Data Selection Will Be Important In Avoiding Algorithmic Bias and Will Likely Be Sought By Regulators and In Litigation.
- Audit the Origin, Quality, and Fitness of Your Data.
- Repeated Use of Data Analytics to Audit Throughout Development, and Especially For Monitoring: Single Audits vs. Continuous Audits.

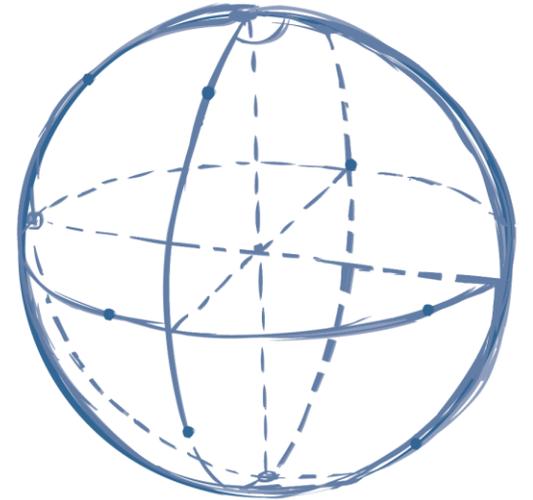
Benchmarking Legal Compliance for AI-Powered HR Systems

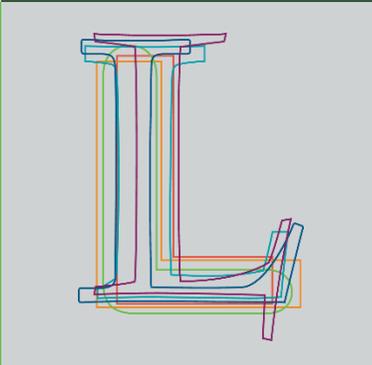
- Customize Legal Compliance Check-List Based On Type of AI-Powered HR Systems and Jurisdictions.
- Evaluate and Potentially Use AI-Powered Legal Compliance Assessment Tools, Including Proven Industry Toolkits and Qualified Independent Researchers.
- Conduct a Similar Legal Compliance Review Of Third-Party Systems, Including Indemnity Agreements.
- Determine Likely Application of Attorney-Client Privilege, Trade Secret Protections, and Other Privileges, Including Limitation of Attorney-Client Privilege Over Underlying Data.



Compliance Review

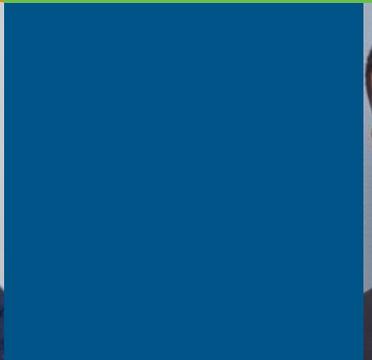
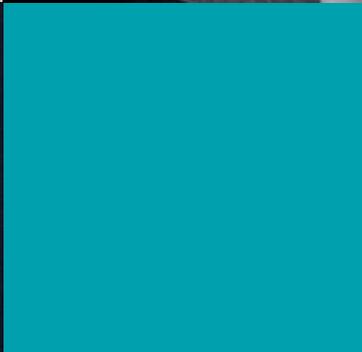
- Consider Conducting Your Compliance Review Such That It Qualifies Under The Self-Evaluation Requirements for a Safe Harbor Under the Massachusetts Act to Establish Pay Equity (MEPA).
- Your Jurisdiction Is Likely Outside of Massachusetts But The Self-Evaluation Requirements Are Likely To Be Used In Future Safe Harbor Legislation and Are Base-Line Standards for a Legal Compliance Review of Any AI-Powered HR System.
- The MEPA's Self-Evaluation Must Be "Reasonable in Detail and Scope," Conducted in Good Faith, Include an Adequate Number of Jobs and Employees (Positions and Applicants) Based On All Relevant and Available Information, and Be Reasonably Sophisticated in Analysis of the Tasks Performed.
- While the Purpose of the Self-Evaluation of AI-Powered HR Systems Is To Provide Reasonable Levels of Legal Compliance, the MEPA Only Requires the Elimination of Disparities in a Reasonable Amount of Time.

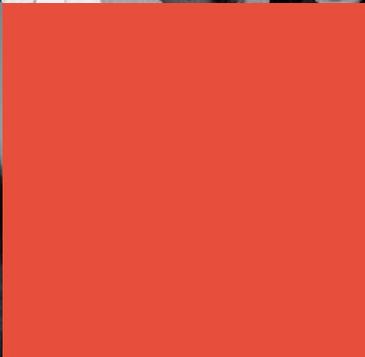
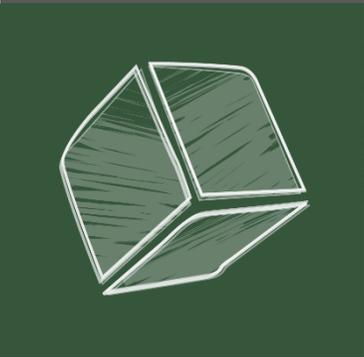




Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.





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