February 2024

DOWNS
SOLICITORS AND NOTARIES

AI GUIDANCE

SCOPE OF THIS NOTE

Although artificial intelligence (AI) systems have existed in some form for years, their applications in the workplace are only more recently being realised. Modern employers have become receptive to, and in some cases even reliant on, certain recruitment and management tools which are powered by AI, giving rise to what has been dubbed an era of 'algorithmic management'.

Most of the law in England and Wales that governs the employment relationship was not designed with the use of generative AI platforms and large language models (LLMs), such as ChatGPT, in mind. Therefore, employers could soon be facing some unique regulatory challenges and should be as informed and prepared as possible to confront potential misuses of AI in their workplaces.

This note will outline what AI is, its various uses and limitations in the workplace, and how responsible employers should approach some of the key compliance and legal risks involved when engaging in algorithmic management. ***Specialist advice should be obtained before taking, or refraining from taking, actions based on comments in this update which is only intended as a briefing note.***

Read More

February 2024

WHAT IS AI?

AI systems are forms of computer technology where the machine software 'learns' from its data, analysing patterns and trends so it can adapt its behaviour based on observations from tasks performed or information received. The machine effectively mimics the natural intelligence and capacity for learning in humans to improve its performance.

Generative AI is a subset of AI that uses computer algorithms to produce a wide range of content, including text and images, from a large dataset, often in response to a prompt or question by the user.

LLMs are a branch of generative AI that use algorithms to process natural language and create predictive text based on the trends they have observed. ChatGPT is a widely known example of this type of AI, capable of giving human-like answers to questions phrased in ordinary, everyday terms.

AI IN THE WORKPLACE

Employees might use an LLM as a text and idea generation tool, or they might use AI to assimilate and summarise large quantities of information. But employers are also frequently using AI as a time-saving management device. The three most common uses of algorithmic management in business practice are: (1) recruitment; (2) day-to-day management; and (3) performance review.

As part of its recruitment processes, an employer might wish to use AI tools to undertake CV and application form sifts, search a prospective employee's social media accounts for key terms, analyse facial cues during video interviews, or perform automatic filtering of candidates via online testing.

AI can also be used in routine management functions like shift scheduling and task allocation, disseminating internal information and fielding employee questions through the use of chatbots and auto-generated FAQs. The main attraction for employers here is that time saved equals productivity gained, but using AI in this way can also reduce opportunities where human discretion (fairly exercised) may be necessary, for instance when deciding whether to approve a holiday request or grant a bonus.

Lastly, the use of data collection on the workforce to guide and enhance performance review is growing. The data output is even being used to select candidates for promotion and to inform decisions on pay.

The upshot of using AI in the workplace for employers is that, at least in theory, they should be able to save time on admin and devote it instead to areas where human managers are needed most; mentoring and supporting their workers, resolving workplace disputes, and channelling employee skillsets to where they are best placed. But unfortunately, delegating decision-making to a machine will bring with it certain risks and drawbacks that should make any employer wary of using automated processes to manage their employees.

WHAT ARE THE RISKS?

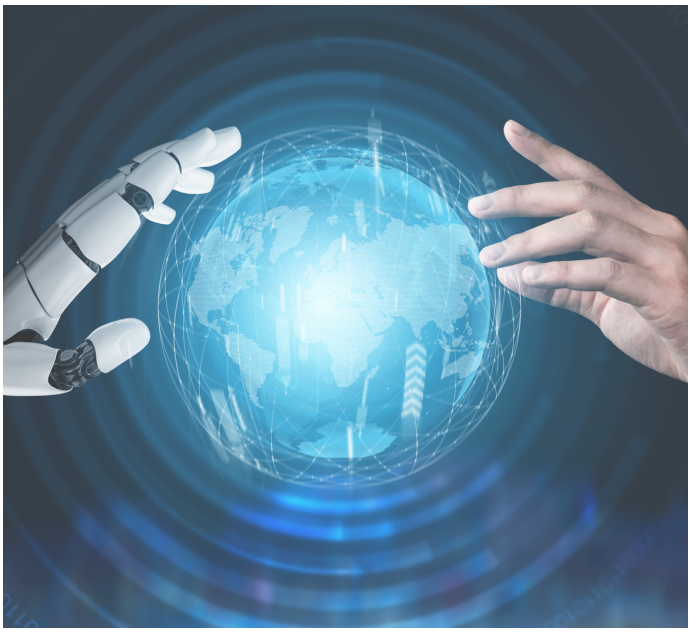
The potential complications are twofold. There are those risks arising from inadequacies in the technology output itself, and then there is the broader impact on the engagement and capability of the workforce.

Turning first to the limitations in the technology itself, one particular flaw of AI tools is that they are only as good as the training data they are fed. If training data littered with unconscious human bias, even historic discrimination and ethnic stereotypes, is used to teach decision making, hen an AI tool could take those unwelcome factors and treat them as essential to achieving a desired result. If AI is used in this way to make management decisions, it could lead to a discrimination claim.

An employer that acts in an ostensibly discriminatory way can, in some instances, avoid liability by demonstrating that its actions are a 'proportionate means of achieving a legitimate aim'. However, where an AI tool has made a discriminatory decision for the employer, there is likely to be a 'transparency void' where the employer's lack of understanding in the algorithm mechanics renders it unable to explain how or why a decision was reached.

Another danger of overreliance on AI output in the workplace is that AI tools lack the context-sensitivity to be considerate where circumstances require a human touch. For instance, in the context of recruitment, some employers are using facial and body language recognition software to analyse video interviews as a way of weeding out unwanted candidates. But using facial cue analytics could be penalising applicants with autism and other conditions affecting facial expressions, and facial recognition software has been criticised for failing to read non-white faces. This could result in claims for disability and race discrimination under the Equality Act 2010.

A more general commercial concern is that employees who make use of publicly accessible LLMs will lack control over how their inputted data is used. This should raise some serious questions about data and security protection, as it would put the safety of sensitive and confidential information at risk. AI tools have also been found to fabricate information, known as



hallucinating, which threatens content accuracy.

Looking to the wider impact on the labour force, reliance on generative AI to undertake tasks previously done by employees may lead to a deskilled and disenfranchised staff. The infiltration of AI into recruitment and employee onboarding might dehumanise the important settling-in stage for new employees, which is so vital to their integration into the organisation, potentially impacting retention down the line.

Outsourcing decision-making to a machine also reduces transparency and jeopardises the common law duty of trust and confidence between employer and employee, possibly leading an employee to claim constructive dismissal. Reducing the need for human cognition when managing employees will relieve some of an employer's workload but could also threaten the existence of the line manager role. The more managers rely on AI to do their jobs for them, the more redundant their own roles become.

In the light of the legal risks involved, many employers will use AI tools to supplement their own decision-making rather than to replace it altogether. Overall responsibility for workplace decisions will normally remain with a human manager, and employers should consider being transparent with their employees wherever possible on the use of AI in their workplaces.

Consideration should be given to employee consultation before adopting AI systems. This may be necessary under the collective consultation rules if its implementation results in 20 or more redundancies within a 90-day period or if triggered by an information and consultation agreement with staff or a collective agreement with a trade union. Whether or not it is a legal requirement to consult employees before implementing AI, some effort to involve them in the decision is likely to improve overall workforce engagement. Openness and consideration can go a long way with staff and could give them confidence that the algorithms are being used in an ethical way.

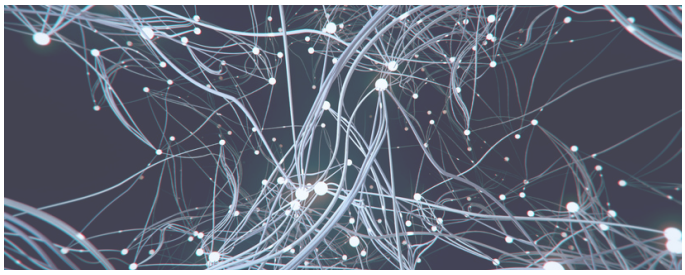
Combatting machine bias can only be achieved through a careful selection of the data set and auditing of the AI system, and it is advisable that employers receive training on the mechanics of any algorithm before use. Any candidate or employee profiling or automated decision-making should be strictly monitored in line with the data protection principles and GDPR legislation to ensure there is a lawful basis for processing. Particular care needs to be taken where the data processed may include special category personal data, such as biometric data which uniquely identifies a natural person, or where it may be possible to identify protected characteristics such as disability, race or age from the data

WHAT SHOULD EMPLOYERS DO TO PROTECT THEMSELVES

processed. This will likely mean conducting a Data Privacy Impact Assessment prior to introducing particular AI to help identify and minimise the data processing risks. A way to safeguard data subjects may be to ensure that decisions are not based solely on automated processing and that there is always a meaningful human review by those with decision making powers.

Lastly, an effective way of managing AI may be to implement a flexible and nuanced policy which clearly defines the acceptable uses of AI in the workplace. This may prevent employees from feeling as though they need to hide their AI usage and should aid staff in harnessing the productivity gains that AI tools can provide. The AI policy should be set out in writing. Although the appropriate level of control and detail in the policy will be dictated by the employer's business needs, it may cover such issues as: use; ethics; permitted platforms; monitoring and surveillance; confidentiality and data protection and training.

For employment law related advice please get in touch with us at:
employlaw@downslaw.co.uk.



01306 880110 employlaw@downslaw.co.uk 156 High Street, Dorking RH4 1BQ