

COVID-19 Pandemic Puts Workplace Technology in the Spotlight

Employers must recognize benefits and legal pitfalls

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The COVID-19 pandemic has elevated the role of technology in the workplace, and more employers are relying on artificial intelligence, machine learning and virtual reality to save money and limit in-person contact.

These technologies can be effective tools for hiring, training and assessing employee performance, as well as creating meaningful interactions during a time of isolation. However, employers must ensure that their use of technology doesn't run afoul of employment and labor laws.

"It's incredibly important for HR organizations and hiring managers to understand the nuances of the technology that they're using if it is making decisions on their behalf," said Marc Goldberg, chief technology officer at the Society for Human Resource Management (SHRM) in Alexandria, Va. He was speaking during a panel discussion at the American Bar Association's 14th Annual Labor and Employment Law Conference, which was held virtually.

Artificial Intelligence

Goldberg compared artificial intelligence (AI) to the man behind the curtain in "The Wizard of Oz." Many people are familiar with AI through their smartphone's virtual assistant, such as Google Assistant, Alexa and Siri. This technology "allows us to have those kinds of interactions that give us the illusion that the computer is thinking and making decisions, when in reality it's using what amounts to a dictionary or encyclopedia to give us some very smart answers to the questions that we pose to it," he said.

AI is already being used in the workplace through human resource information systems, legal support systems and marketing systems that help businesses communicate with employees and potential clients.

"These are complicated and nuanced systems," Goldberg said. They can help businesses make better hiring decisions and improve performance management throughout the employee experience.

He cautioned that technology must reflect its intended business value—such as finding high-quality job candidates—not accidentally encode biases.

Machine Learning

Machine learning is defined as "the use and development of computer systems that are able to learn and adapt without following explicit instructions, by using algorithms and statistical models to analyze and draw inferences from patterns in data," according to dictionary.com.

Machine learning is a process by which a machine learns to become intelligent by itself, explained Adam Forman, a management attorney with Epstein Becker Green in Chicago and Detroit, during the session.

Chatbots are an example that allows for natural conversation to answer questions. For example, employees can ask a chatbot how much time they have left in their paid-time-off (PTO) bank.

Chatbots can be used to have introductory conversations with job candidates, schedule interviews, send new-hire paperwork and help with the onboarding process.

"The idea is that if you can take some of these lower-level functions and offload them to a machine, you free up your human resources talent to deal with the more sophisticated issues," Forman said.

But there's a caveat: Employers need to think about potential issues that machine learning hasn't figured out. The chatbot may not know if an employee is asking how much leave is left in a PTO bank or asking questions that could trigger a legal obligation under the Family and Medical Leave Act.

Legal counsel can help organizations that plan to use these products, Forman said.

Virtual Reality

Virtual reality technology usually involves a headset and controllers and immerses the user into a simulated experience.

"Having the ability to create a virtual environment allows employers to unlock certain ... 'superpowers' in the workplace for their employees," said panelist Ying Huang, associate general counsel for Facebook in Menlo Park, Calif.

Superpowers include the ability to have people in distant parts of the world meet in the same space virtually and have many of the same sensations as if they were meeting face to face, she explained.

The COVID-19 pandemic has accelerated the need for virtual reality in the workplace, since people cannot meet physically to collaborate. Virtual reality creates a sense of connection, and provides efficiencies and savings for the workplace, Huang said.

For example, Nestle Purina Petcare built a virtual tour of its warehouse that sales associates can share with customers, which saves travel costs and time and is also safer than walking through the warehouse.

Legal Considerations

"Employers really need to be very careful with the technology that they select and the impact that it may have," noted the panel moderator, Nicole Horberg Decter, an attorney with Segal Roitman in Boston who represents labor unions and employees.

Tiseme Zegeye, an employee-side attorney with Lieff Cabraser in San Francisco, said AI and other technologies can be useful tools to weed out biases in some circumstances. For example, AI can help employers write gender-neutral job postings.

However, she noted, there are some problems with AI tools. Biases can be introduced into AI by the people creating the algorithms, the variables that are used, the data that is fed into the algorithm and any employment decisions that are made based on the system.

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Employees may bring a disparate impact claim when a practice that seems neutral has a disproportionate impact on a protected class. For example, an employer may target job candidates that live in zip codes that are close to the office. But that practice could unintentionally lead to race discrimination based on the demographics of the area.

Sometimes employers deliberately discriminate by targeting certain groups for employment, such as younger job candidates rather than older candidates. This may violate the Age Discrimination in Employment Act.

"Accessibility is important," Forman said. Employers need to ensure that hiring tools are accessible for candidates with mental and physical impairments. Additionally, personality tests shouldn't ask questions that would be deemed disability-related inquiries or medical examinations—which are impermissible at the pre-offer stage.

Employers need to ensure that the activities the algorithm is analyzing are related to the essential functions of the job. Work with the product vendor, Forman suggested, to ensure that the algorithm is mapped to those functions.

He said employers can expect more legal challenges as these tools become mainstream.

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