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November 29	Large Language Models, Open Source, and Ethical/Responsible AI: An IP Perspective
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January 12	CFIUS Focus on Transactions Involving AI and AI Companies
January 17	Artificial Intelligence in the Securities and Commodities Industry: A Primer
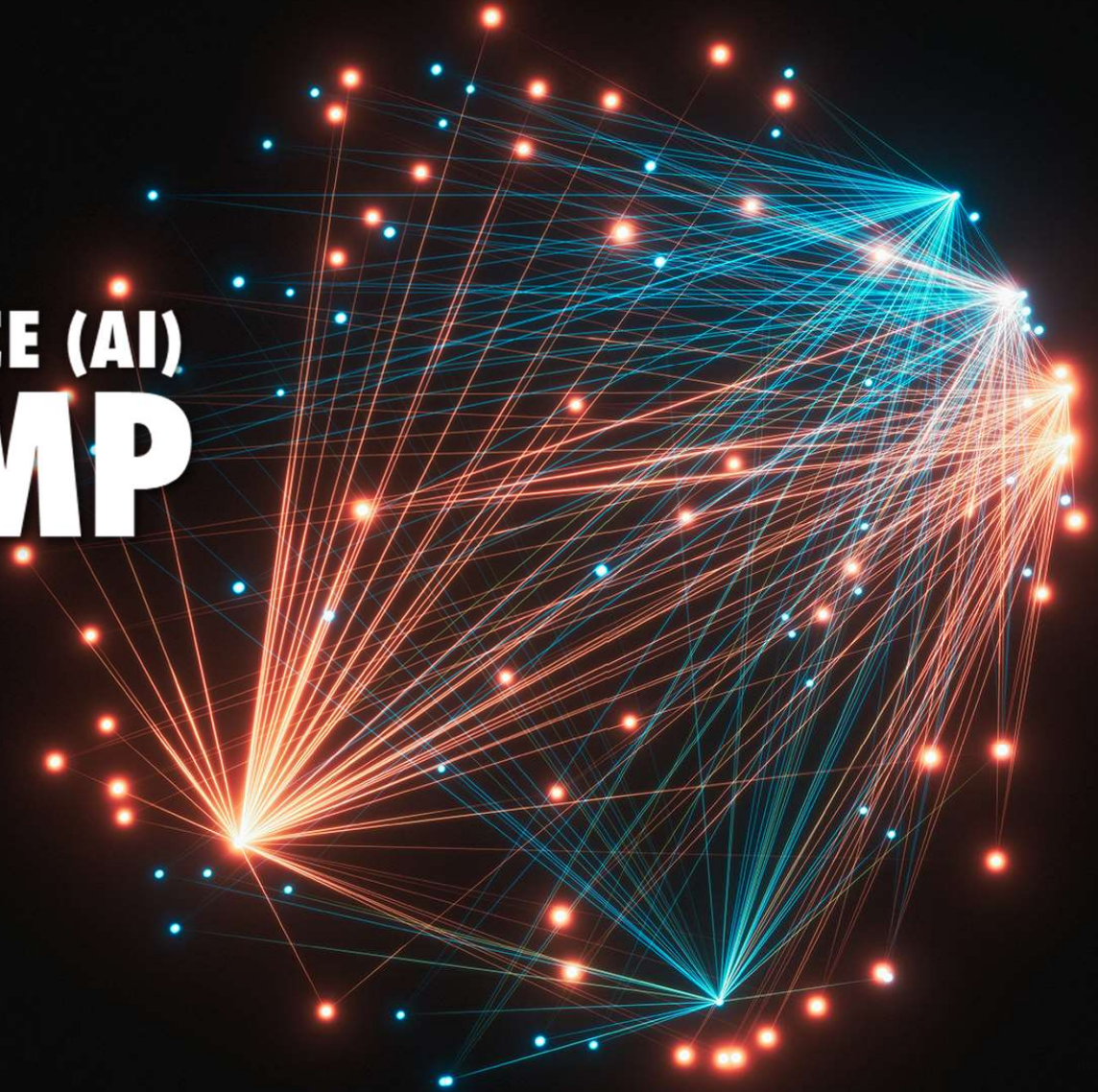
Host

Presenter

Andrew J. Gray IV

Melinda S. Riechert

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Use Of AI In Hiring And Other Employment Decisions.

- It is here already
  - 25% of employers use AI tools as part of the recruitment process
- Its use will likely only increase
- It is drawing increased scrutiny
  - EEOC published guidance re ADA
  - NY City Council new law requiring yearly bias audits of the tools and certain notice requirements
  - California has proposed regulations on use of AI in employment hiring and decisions
- As a result, companies need to evaluate their AI tools

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The stages of HR operations and how AI can be used

- Recruiting – identifying the best possible candidate and persuading him or her to apply

- Selection – choosing which candidates should receive offers to ensure that only the best employees are selected

- On boarding – bringing the employee into the organization to make him or her useful faster

- Training – improving the performance of employees by determining which training makes sense for employees to take, based on experiences of similar employees

- Performance management – identifying good and bad performers

- Promotion – who is the best person for the new role, and can that person handle the requirements of the position? Which career moves make sense to an employee?

- Transfer: identify vacant positions for existing employees

- Retention – how to determine who is likely to leave and how can we retain them

- Benefits – which benefits are best to attract and retain employees

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Artificial Intelligence: What is it?

- Use of computer systems and algorithms to evaluate and help make decisions regarding applicants and employees
  - Resume scanners and screeners
  - Employee monitoring
  - Chatbots
  - Video interviewing software
  - Testing programs
- Machine learning involves machines using large sets of data to make better predictions
- AI predictions are comparing data related to a job applicant to a model of a successful employee

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How AI Can Be Used in Recruiting and Hiring

- Problems in making hiring decisions
  - Takes too long to review resumes
  - Not enough qualified applicants
    - What is a qualified applicant for this position at this employer ("good fit")?
  - Most predictors of employee performance are not effective
  - Making the wrong decisions on hiring and promotions are expensive
  - Companies are having a hard time finding qualified diverse candidates
  - Find applicants who will stay a long time (and reduce the cost of hiring) – *e.g.,* shorter commute time
- Is an algorithm the solution?

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Use of AI in Recruiting and Hiring is Already Here

- Writing job descriptions with the attributes of a successful candidate

- Deciding where to post/advertise jobs

- Reading resumes and making first round of cuts based on matching the words in the job description to the words in the resume, or looking for particular terms
  - Does this lead to gaming the system by applicants?

- Interviewing candidates and comparing the applicant's responses to interview questions to predetermined ideal responses
  - Use of facial and voice recognition (diction, tone, word choice, facial movements, gestures)

- Following up with candidates
  - Chatbots answer questions and automate email/test communications

- Selection of candidates
  - Personality tests, playing games to make predictive assessments about an applicants characteristics

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Artificial Intelligence in Hiring: Diversity

- Is AI good or bad for diversity?

- Will the desire to increase racial and gender diversity, particularly in the tech industry, lead to increased use of AI in finding and hiring candidates?
  - One of the biggest issues is finding diverse candidates.
    - Would it be appropriate for a computer to look at the photos of people on LinkedIn to determine if they are diverse?

- Will the shift from traditional talent-evaluation processes to algorithmic processes that claim to remove bias from the hiring process result in more diversity? Adversarial networks can remove predictions that correlate to protected class data
  - Removing obvious data sources that correlate to protected class data has been proven to be insufficient

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Artificial Intelligence in Hiring: Diversity

- How can bias exist in the non-AI system?
  - Male vs. female names
  - "American" vs. "foreign" names
  - White vs. Black names
  - Asian vs. non-Asian names
  - Which college an applicant attended
- Computers can be programmed not to look at names, gender, race, or age in deciding who to interview for a position and thus eliminate bias from the earliest stages of the hiring process
- Will the desire to increase racial and gender diversity lead to increased use of AI in finding and hiring candidates?

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Artificial Intelligence in Hiring: Diversity

- On the other hand, a poorly designed AI system can discriminate on a much larger scale
  - Using the attributes of the current workforce to predict who to hire
    - One survey suggested that the most likely predictor of success was being called Jared and playing high school lacrosse
  - Social media advertising of positions only to people of certain age groups
    - Applicants never even learn of the opportunity to apply due to the algorithm
  - Biased inputs lead to biased outputs
  - Do multiple protected traits produce compounding disparate effects?

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Data Bias Example

A tech company used an AI tool to automate its recruiting process by rating applicants' resumes based on the resumes of past and current employees.

The input data used was biased – Used historical recruitment data from the last 10 years. Males made up the majority of applicants and hired employees.

The output was therefore biased – The recruiting system incorrectly learned that male candidates were preferable. The system favored applicants based on words like "executed" or "captured" that were more commonly found on men's resumes and penalized resumes that included the word "women."

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The Problem

- How do you define a "desirable employee"?

- How does the programmer decide what characteristics make an employee "good"?
  - Subjective: Action-oriented, intelligent, productive, detail-oriented, grit, ability to multi-task, fitting into the company culture, values, conscientious, integrity, emotional intelligence
  - Objective: Background, school attended, degree obtained, prior employer, length of employment, number of interviews, performance review scores, referral sources, background checks
    - But are these factors more a product of the parents' socio-economic status rather than the candidate's ability to successfully perform the job?
  - Objective: Outcome data – by identifying recent hires who produce measurable outcomes (job performance) and then using these as models to compare applicants to → removes employer bias, socioeconomic background, etc., from the process

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What AI can do

- Determine the attributes of a successful employee
  - e.g., ask the employer's top performers to play brain games to determine the ideal candidate, then have the candidates play the same games to determine if they are suitable candidates
  - Is this approach effective, or is the mindset of long-term confident employees different than that of an applicant?
  - Does it reinforce existing biases?*
  - Are these attributes distinct from poor performers, or do both have the same attributes?
  - Is this distorted by prior hiring decisions?

* https://hbr.org/2014/08/the-problem-with-using-personality-tests-for-hiring

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The Problem

- An employee who would be good for one job at one company under one manager with one team might not be good for another job at another company under a different manager working with a different team

- To work, the algorithm needs data!

- Too many job roles

- Database management: so many different databases storing information that don't communicate and share with each other
  - Applicant tracking, performance management, compensation

- Lack of historical data or too little data to make machine learning valuable

- No data on candidates who were not hired

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The Problem

- Will an algorithm based on data from other employers work in your workplace?
- Will the gender and ethnicity of the programmer influence the result?
- Are algorithms just "our opinions embedded in code"?
- What if the data sets are incomplete, incorrect, or non-representative?
- Can applicants and employees learn to game the system?

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The Problem

- Should the algorithm look at social media information in making its decisions in hiring, promotions, and whether employees are flight risks?
  - Do applicants and employees perceive this information as violating their privacy rights?
  - Will applicants and employees change their social media behavior?
  - Will using social media increase the risk of discrimination claims?

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Benefits of AI

- Streamlines the recruiting process
  - Too many applications, resumes, and cover letters and not enough time to review
  - How to find passive candidates
- Increases efficiency
  - Find and attract high-quality candidates
  - Find diverse candidates
  - Hire candidates faster and for less
  - Better candidate fit
- Increases fairness
  - Fairer interviewing and screening
  - Does it remove bias from the hiring process when the recruiter does not know the gender, race, or age of the applicant?

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Risks – Fairness

- Hiring and firing have serious consequences and society demands fairness
  - Employers are expected to be able to explain and justify the practices they use
- Distrust of AI
  - Users can't see and understand how decisions are made
  - The public distrusts artificial intelligence in hiring
- Importance of transparency, particularly in promotion and pay decisions
  - Will employees perform as well if promotion and pay decisions are made by a computer rather than their supervisor?

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Risk of Discrimination Lawsuits

- Does use of AI reduce the role of the individual hiring managers' biases or does it reproduce and deepen systemic patterns of discrimination reflected in today's workforce data?

- Algorithmic bias, leading to discrimination claims

- Algorithms are backward-looking and may reflect and repeat past biases
  - If men or whites had higher performance review scores in the past, when there were fewer women or minorities in the workplace, does that mean the company should hire men over women and whites over minorities?
  - Do performance review scores reflect the biases of the scorer?

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Risk of Discrimination Lawsuits

- **Disparate treatment**: intentional discrimination based on a protected characteristic

- **Disparate impact**: using a facially neutral practice that has a disparate impact on a protected characteristic – *e.g.*, hiring people living in zip codes close to the office
  - Discriminatory in operation
  - Compare the selection rates for minority and non-minority candidates to see if they are "statistically significant" and not likely the product of chance
  - Does, for example, the algorithm give a lower score to women, or a lower score to attributes disproportionately associated with women?

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Risk of Discrimination Lawsuits

- Can the employer show the practice is job-related and consistent with business necessity?
  - Is the sought-after trait job-related?
  - Does the algorithm accurately predict future job performance?
  - Or is it a proxy for discrimination?
- Can the employer prove that its algorithm meets these requirements?
  - Will the developer of the algorithm be willing to share this information with a jury?
- Is there a less discriminatory alternative?
  - Are there other tests or section devices that would also serve the employer's legitimate interests?

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Risk of Class Actions

- Failure to hire claims are usually individualized and thus not suitable for a class action

- But will the use of AI create a common issue that makes the case a good candidate for a class action?

- Vendors and companies that use AI need to be prepared to defend their use of algorithms in hiring to ensure that there is no implicit or unintended bias

- Companies that hire AI vendors should carefully negotiate their contracts with the vendors to obtain representations as to the product's fairness and indemnification and cooperation provisions in the event of a lawsuit or government investigation

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Risk of Disability Discrimination

- US law protects job applicants from disability discrimination and requires that applicants with a disability be accommodated

- The ADA and state and local laws also limit an employer's ability to make disability-related inquiries at the recruiting stage

- Applicants may have disabilities that are negatively impacted by AI tools, particularly speech patterns, facial expressions, or disabilities that affect movements

- The farther a job evaluation strays from the essential functions of the job, the more likely it is to be discriminatory

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EEOC Guidance

- The EEOC issued guidance warning employers that using algorithms and artificial intelligence in making hiring decisions can result in discrimination based on disability.

  – Obligation to provide reasonable accommodations to job applicants and employees
    – applicant with manual dexterity issues has trouble using keypad, and may need an oral test
    – use of chatbots by blind applicant
    – applicant with gap in job history due to a disability
    – applicants with speech impediments

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What Can You Do?

- Find out the demographics of the representative sample that your company's data will be compared to

- Test the model to make sure that groups from certain demographics are not being excluded

- Make sure you have a diverse applicant pool before AI reviews resumes

- Ask your vendors how they deal with bias and ask them to share their validation results

- Hire an industrial organization psychologist to conduct validation research

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What Can You Do?

- Understand the AI tools

- Use pilot programs to assess bias

- Assess your decision-making criteria and objectives to ensure that the essential requirements of the position are clear, accurate and objective

- Make sure the data used by the tool is not biased

- Check the results of the use of the tool and compare to human decision makers' results

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Monitor Results

- Employers should audit the results of the algorithms to confirm there is no discrimination
  - For example, are men receiving higher scores than women on a given trait? If so, can the model be adjusted?
  - Make sure communications regarding the purchasing, use, concerns, and testing of the product involve lawyers who can provide legal advice which would be protected by the attorney-client privilege
  - Will audits be protected by the attorney-client privilege?
- Algorithms will always be changing as machine learning uses new data to keep predictions current
- As algorithms are changed, is this an admission of discrimination during the time the algorithm was being used?

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Mitigating the Risk of Disability Discrimination

- Need to ensure both that candidates can use the technology and that the skills it measures don't unfairly exclude candidates with disabilities

- Job candidates and employees should be informed of AI tools being used in their selection process or evaluations

- Employers should have accommodation plans if the candidate discloses that they have a disability

- Train AI tools with more diverse data that includes employees with disabilities (who are currently underrepresented in the workforce)

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Defending Against Claims

- Do all the things suggested above!

- Be actively involved in selecting the vendor and understanding the tools

- Stay informed regarding pending legislation to ensure AI tools are consistent with federal, state, and local law

- Try to get indemnification from the AI companies, or at least representations that their tools are unbiased and their cooperation in defending against claims

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AI and Privacy

- FTC has issued a series of reports on AI and related consumer and privacy issues, with report with most recent on April 19, 2021
    - Be transparent with consumers about how you use automated tools (e.g., FTC's WW Settlement)
    - Be transparent when collecting sensitive data
    - Look out for automated decisions, which can prejudice unfairly and raised issues under the FCRA
    - Decisions based on algorithms must be explained to customers / consumers

California Consumer Privacy Act (CCPA)

- California passed into law the California Consumer Privacy Act (CCPA) on March 28, 2019.

- The law started on January 1, 2020.

- Enforcement began July 1, 2020.

- Must give notice about collection and use of Personal Information

- Mut respond to requests, delete and give right to opt out of sale

- Starting January 1, 2023, cannot retain personal information for longer than reasonably necessary for the stated purpose for which it was collected

- Does not include anonymized/deidentified/aggregate data

- Failure to comply could result in significant penalties and reputational harm.

Very Broad Definition of "Personal Information"

- Personal information includes any information that "that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."
  - Much broader than the definition of personal information under CA's security breach notification law and historic definitions in US
  - More like GDPR
- Extremely broad definition intended to include the sort of robust consumer profile and preference data collected by social media companies and online advertisers

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CCPA Definition of Personal Information

1) Name, address, personal identifier, IP address, email address, account name, Social Security number, driver's license number, or passport number

2) Categories of PI described in California's customer records destruction law

3) Characteristics of protected classifications under CA or federal law

4) Commercial information, including records of personal property; products or services purchased, obtained, or considered; or other purchasing or consuming histories or tendencies

5) Biometric information

6) Geolocation data

7) Internet or other electronic network activity, such as browsing history, search history, and information regarding a consumer's interaction with a website, application, or advertisement

8) Audio, electronic, visual, thermal, olfactory, or similar information

9) Professional or employment-related information

10) Education information that is subject to the Family Educational Rights and Privacy Act

11) *Inferences drawn from any of the information listed above to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes*

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Regulation of AI in Hiring

- **1978 Uniform Guidelines on Employee Selection Procedures** regulate pre-employment testing and testing for employment decisions (hiring, promotions, demotions, retention)

- **Algorithmic Accountability Act of 2022**
  - This bill proposes to direct the FTC to promulgate regulations that require any "covered entity" to perform impact assessments for bias, effectiveness, and other factors, when using automated decision systems to make critical decisions

- A number of states have passed or pending AI legislation

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EEOC Enforcement

- Under the Biden administration, the EEOC is stepping up its enforcement efforts in the area of AI and machine learning-driven hiring tools

- The EEOC recently announced that it is launching an initiative to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws

- On May 12, 2022 the EEOC issued guidance on the application of the ADA to AI tools in employment https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence

- The main elements of the guidance are:
  - Definitions of key terms
  - Identification of potential violations
  - "Promising Practices" for employers

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State and Local Laws on Artificial Inteligence

- Alabama: Established counsel to review issue and advise the government on use and development of AI

- Colorado: Prohibits insurers from using external consumer data in a way that unfairly discriminates.

- Illinois: Amends the AI Video Interview Act, requires disclosure and consent and reporting data to the state government.

- Maryland: Regulates use of facial recognition in interviews without written consent

- Mississippi: Requires instruction on AI and machine learning in K-12 curriculum.

- Bills being considered in other states (MA, DC, NY, WA),

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New York City Law

- Effective on January 1, 2023
  - See Morgan Lewis Lawflash New York City Proposes New Rules to Clarify Law on Employers' Use of Artificial Intelligence – Publications | Morgan Lewis
- Proposed rules have been issued
- Requires companies to do independent bias audits on AI tools used for hiring
- It is unlawful for an employer to use an automated employment decision tool to screen candidates for employment or promotion in New York City unless:
  - the tool has undergone a bias audit no more than one year prior to its use;
  - a summary of the most recent bias audit is made publicly available on the employer's or employment agency's website; and
  - the candidate or employee is notified at least 10 business days in advance of the interview that AI will be used and the job qualifications and characteristics that the tool will assess

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New York City Law

- "Employment decision" means "to screen candidates for employment or employees for promotion within the city"
- Applies to employees or candidates who reside in the city, not where the job is, so companies need to check where candidates reside
  - Employers outside the city have to comply if the candidate resides in the city
- A candidate is someone who applied for a specific employment position by submitting the necessary information in the format required by the employer
  - Screening LinkedIn resume would not be included
- The candidate or employee must have an opportunity to request an alternative selection process
- Failure to adhere to these requirements will result in civil penalties for each day that the AI tool is used

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California Proposed Regulations

- The California Civil Rights Department (formerly the DFEH) has proposed regulations on artificial intelligence to screen job applicants or make other employment decisions.

- Would make it unlawful for an employer or covered entity to "use … automated-decision systems, or other selection criteria that screen out or tend to screen out an applicant or employee … on the basis" of a protected characteristic, unless the "selection criteria" used "are shown to be job-related for the position in question and are consistent with business necessity."

- "automated-decision system," is any "computational process, including one derived from machine-learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants."

- Contains record keeping requirements

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Conclusion

- Is the future of recruiting AI?
- Do algorithms work?
- Are they fair when they make decisions based on probability and the behaviors of others to predict the probability of future behavior?
- Even with these problems, do the benefits from the use of AI outweigh the problems?
- Is using AI better than relying on humans?
- Is it legally riskier to rely on AI than on humans, and do the benefits outweigh the risks?
- Should AI be used in hiring but not in promotions?
- Should algorithms be used to determine whom to fire?
  - e.g., firing employees who have the attributes of others who have embezzled in the past

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Best Practices

- AI is here to stay

- But we need to understand its weaknesses and protect against its potential biases

- Understand the company's current practices and planned use of AI tools

- Make sure the systems are not biased and accommodate those with disabilities
  - We have a list of experts who can conduct audits and a list of what a good audit should include

- Make sure the systems can be audited and corrections made

- Make sure you comply with NY City law for all residents of NY (and that you know where applicants reside!)

- Update data retention policies and comply with privacy laws

- Consider adopting AI compliance policies with a view to bias prevention, the proper use of AI, and a plan to mitigate biases if they are uncovered

- Consider arbitration agreements with class action waivers

- Keep monitoring developments!

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Questions Going Forward

- Is the future of recruiting AI?

- Do algorithms work?

- Are they fair, when they make decisions based on probability and the behaviors of others to predict the probability of future behavior?

- Even with these problems, do the benefits from the use of AI outweigh the problems?

- Is using AI better than relying on humans?

- Is it legally riskier to rely on AI than on humans, and do the benefits outweigh the risks?

- Should use of AI in recruiting and hiring be regulated?

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Resources

- Uniform Guidelines on Employee Selection Procedures
  https://www.uniformguidelines.com/
  - Created 4/5 statistical rule of thumb
- Organization of Economic Cooperation and Development Principles on AI
  https://www.oecd.org/going-digital/ai/principles/

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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/ topics/coronavirus- covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.
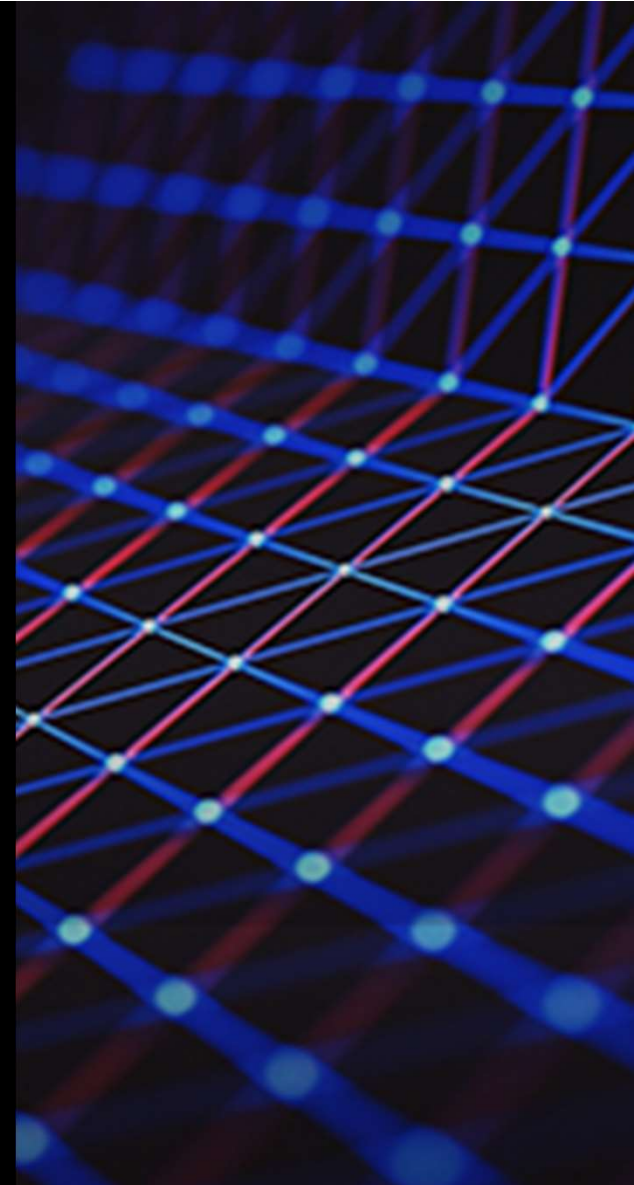
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Melinda Riechert has experience litigating and arbitrating both class actions and single-plaintiff cases. Melinda defends clients in wage and hour, whistleblower, wrongful termination, discrimination, harassment, retaliation, breach of contract, trade secret, and all other types of employment disputes. Melinda has won verdicts for her clients in six jury trials and four bench trials, and she has won numerous summary judgments and arbitration awards.

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Serving as the leader of the firm's semiconductor practice and as a member of the firm's fintech and technology industry teams, Andrew J. Gray IV concentrates his practice on intellectual property litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on AI, machine learning, Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.
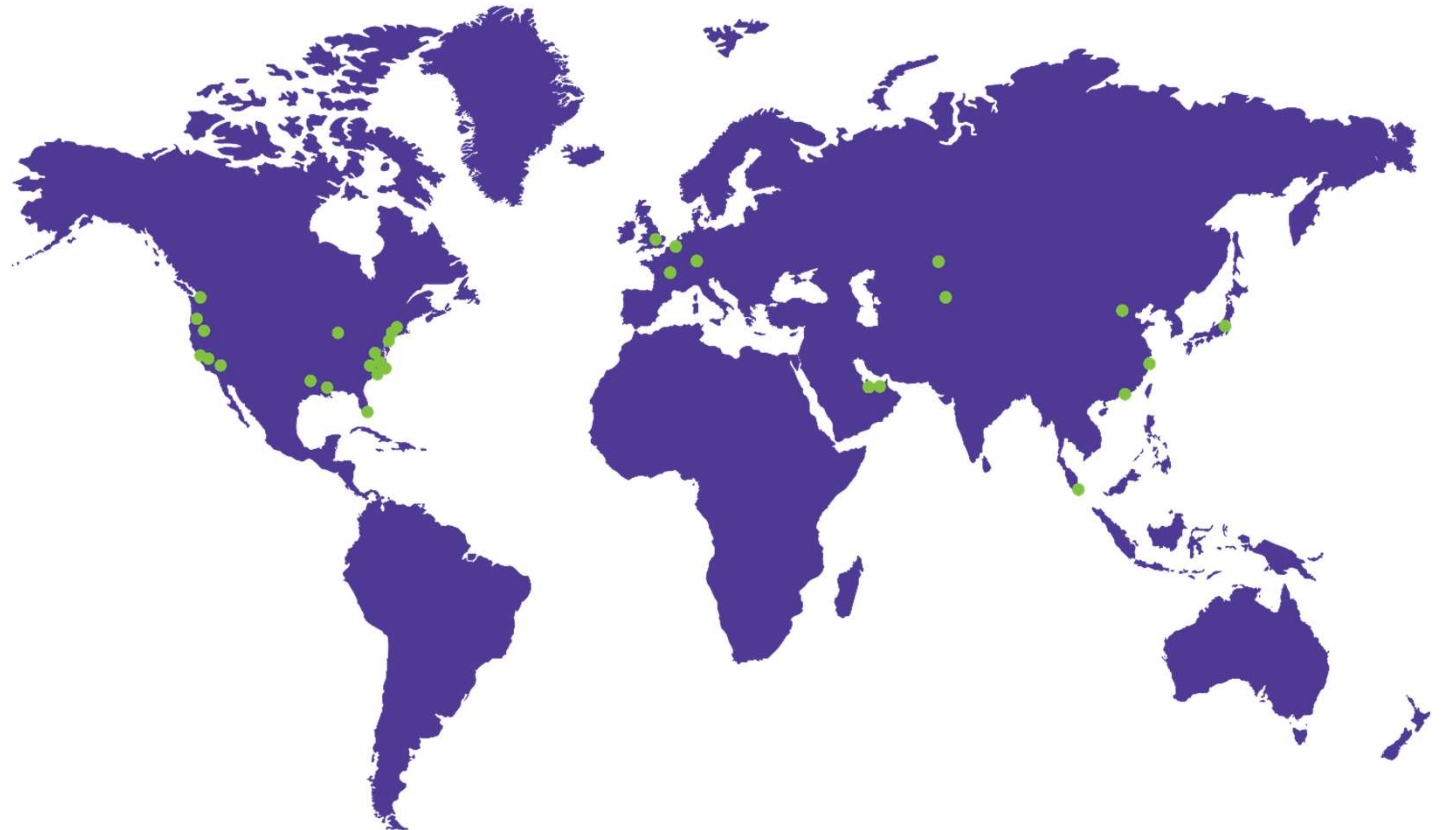
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