GLI GLOBAL LEGAL INSIGHTS

# AI, Machine Learning & Big Data

# 2022

**Fourth Edition**

Contributing Editor: **Charles Kerrigan**

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# Global Legal Insights
## AI, Machine Learning & Big Data

2022, Fourth Edition
Contributing Editor: Charles Kerrigan
Published by Global Legal Group

# GLOBAL LEGAL INSIGHTS – AI, MACHINE LEARNING & BIG DATA

## 2022, FOURTH EDITION

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*We are extremely grateful for all contributions to this edition.*
*Special thanks are reserved for Charles Kerrigan of CMS Cameron McKenna Nabarro Olswang LLP for all of his assistance.*

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk



ISBN 978-1-83918-190-0
ISSN 2632-7120



Printed and bound by TJ Books Limited
Trecerus Industrial Estate, Padstow, Cornwall, PL28 8RW
May 2022

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# Employment law risks and artificial intelligence: In the workplace, the metaverse and beyond

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## Introduction

The abrupt transition to remote work caused by the COVID-19 pandemic brought with it increased reliance on artificial intelligence ("AI") as virtually all facets of the employment lifecycle shifted from in-person to remote. The pandemic also opened the door for new AI to gain traction as employers sought ways to enhance the productivity and experience of the virtual workforce. For instance, while companies continued to use automated technology to screen résumés, analyse video interviews, and track employee productivity, some companies took it a step further and began exploring virtual reality ("VR") to bridge the gap between in-person work and remote work. Never before have we seen such rapid adoption and development of AI in the employment context.

The increased use of AI, however, comes with attendant risks: including the significant risk that automated algorithms, like humans, are not immune from bias. Indeed, algorithms are capable of adopting the inherent biases underlying past employment practices or social conventions embedded in their code, through the data sets they rely upon. In this regard, reliance on computerised decision-making can unknowingly cause employers to make decisions that implicate laws governing the employment relationship. Similarly, providing employees with access to VR comes with significant risks including, for example, the risk of exclusion for disabled employees, as well as the risk of privacy infringement, discrimination and sexual harassment. This chapter will examine some of the potential legal implications that may arise from the use of AI in the workplace as well as the legislative and regulatory responses.

## AI in the employment context

AI refers to the ability of a computer or program to perform tasks that typically require human intelligence or decision-making.[1] Advancements in AI technology in recent years have accelerated to the point that machines are currently complementing – and in some circumstances outright supplanting – human decision-making.

AI is no longer some abstract, futuristic concept. In fact, machine learning algorithms are more pervasive than most realise: these algorithms are routinely used by internet search engines to provide users with search recommendations, and by social media feeds in determining content to show users.[2] These algorithms "learn" by analysing data sets provided to them and identifying patterns in the data.[3] When the time comes to execute their tasks, these algorithms make decisions in an attempt to replicate the patterns they have identified.[4] In this sense, algorithms presuppose the accuracy of human decision-making and rely on these prior decisions by humans as a gold standard to replicate.

AI algorithms can be used to assist with decision-making at nearly every stage of the employment relationship. With respect to recruiting and hiring talent, AI can review résumés and even analyse video interviews submitted by candidates.[5] Some employers have even begun using recruiting "chatbots" – *i.e.*, virtual assistants that can communicate with candidates by asking screening questions, scheduling interviews, and collecting other pertinent recruiting information – to automate other aspects of the recruiting process.[6] Beyond reviewing résumés, employers have also begun using these tools to evaluate whether candidates will be a suitable "fit" with their organisation. For example, some services offer a series of games or other assessments that existing employees can complete. These services will then profile the employer's workforce based on current employee responses and, as candidates complete the assessment, these tools can recommend which candidates may be most likely to succeed in a given role and/or fit into the existing workplace culture.

In addition to recruitment and hiring, employers are increasingly using algorithms for performance management.[7] Among other things, these tools have the ability to track the characters typed on an employee's keyboard, monitor whether an employee is paying attention to their computer screens using webcams and eye tracking software, surveil websites and applications used by employees and track how long employees spend on various tasks.[8] Moreover, the COVID-19 pandemic has created a ripe opportunity for the implementation of these tools as employees are increasingly working remotely.[9]

Employees who fail to meet specified performance metrics may also be subject to formal discipline, including termination of employment, at the recommendation of AI algorithms. Algorithms capable of identifying employees spending too much time off-task can generate disciplinary recommendations.[10] While some of these algorithms only make suggestions regarding warning or terminating employees, others are programmed to formally discipline employees entirely on their own and in some cases to generate termination notices.[11] In addition, some algorithms can even analyse patterns of conduct to predict when an employee is likely to quit, thereby permitting employer intervention and allowing companies to take action to retain critical talent.[12]

Algorithms have also found a home in the employment relationship beyond recruiting and performance management. In some instances, these tools can be used to match current employees to internal projects by analysing their skills and interests. By creating a marketplace of sorts where internal projects can be advertised, these algorithms can match employees to individual projects based on their capabilities, interests and the project's needs. These tools are advertised as a way to increase employee satisfaction by permitting employees to use the full range of their skills even if that means venturing (temporarily) outside of their regular unit. Likewise, employers are able to save costs by keeping the assignment in-house, thereby saving on costs associated with hiring externally.

## General risks associated with AI and VR

While the use of AI to streamline the hiring process or to oversee and manage employee performance offers organisations an alluring opportunity to improve efficiency, there are considerable risks.

Though a software engineer can programme an algorithm to start as an apparent neutral decision-maker, that neutrality can be unintentionally altered when the algorithm begins to "learn" from the data sets it receives.[13] If the training data contains unintentionally biased information, or was gathered in a way that was influenced by the biases of past decision makers, the algorithm may be susceptible to adopting such biases.[14] For example, an

algorithm designed to review résumés can be trained by analysing résumés previously submitted by applicants and may even be provided information regarding the characteristics of employees who have succeeded in the company. After reviewing this data, the algorithm can then evaluate future résumés based on patterns detected in the training data. While explicit bias within a data set can present issues, hidden biases within the training data can also influence the algorithm's decision-making, causing it to produce biased results. In reviewing and attempting to replicate the results it has previously analysed, the algorithm runs the risk of modelling the implicit biases underlying the training data.[15] Ultimately, this means that algorithms are only as good as the programmers who create them and the training data they are provided with. For this reason, it is imperative that employers exercise caution in implementing AI and enact procedures for monitoring and scrutinising potentially biased results.

Another challenge posed by AI is its often "black-box" nature. That is, many algorithms and their creators cannot provide precise explanations for their decisions.[16] This presents particular challenges in the employment context as the ability to explain why a candidate's résumé or interview was approved or rejected by an algorithm can impact an employer's ability to defend discrimination claims as discussed further below.

Like résumé review tools, the use of AI to analyse video interviews has become prolific. This technology, however, comes with inherent risk, particularly as it relates to disability discrimination claims.[17] For example, an AI designed to analyse video interviews and to evaluate, as part of its analysis, candidates' facial features, expressions, speech and body language (such as the candidate's gestures) during the interview may recommend denying employment to disabled individuals. Such an algorithm may not understand that a candidate is unable to emulate typical facial expressions, speak clearly, or make certain gestures because of a disability and may, therefore, believe that a disabled individual acted in an atypical manner, thus warranting a negative employment action. Accordingly, in addition to evaluating such a tool prior to its use, employers should consider providing prospective employees an opportunity to opt out of such analysis.

Outside of the recruiting context, the use of AI to provide remote employees with a virtual workplace in the metaverse is on the rise. Employers have begun considering (or in some cases, already using) VR to conduct meetings, employment trainings, and to help foster intra-employee relations by providing access to a virtual workspace.[18]

The metaverse at its most basic level is a virtual reality ("VR") world that allows its users to virtually interact with people and objects in real time. In some metaverse applications users can physically appear in 3D VR with the use of a VR headset, or they can control a 3D avatar with the assistance of computer software. In conjunction with VR, AI is used to ensure the VR experience closely mirrors real-life human interaction. For instance, to make avatar interactions realistic, AI is used to analyse facial expressions, emotions and voices.

Employment law issues may arise in connection with an employee's selection of an avatar and the clothing and physical characteristics of that avatar. Anti-harassment and discrimination laws may be implicated in situations where employees seek to select an avatar with visible racial characteristics different than their own, where employees select avatar clothing that some may find inappropriate, or where employees choose to emphasise or eliminate certain body characteristics.

A coworker's reaction to the selected avatar could lead to HR complaints. In addition, similarly to the risks associated with using AI to analyse video interviews, using AI to develop avatars presents a risk that the algorithm may unintentionally exclude characteristics or

traits associated with certain disabilities from the VR, giving the false appearance of a homogeneous workforce. Reliance upon VR may also result in the exclusion of, for example, disabled employees who either have visual impairments that impede the ability to access VR, or whose motor function abilities prevent them from using the necessary software.[19] Accordingly, employers should consider available accommodations to VR meetings, trainings and social events.

VR also poses certain risks associated with employee conduct and monitoring. For instance, there have been accounts of avatars being sexually assaulted and subject to harassing, threatening and/or degrading commentary.[20] Anti-sexual-harassment laws already in place may be interpreted to extend beyond the physical workplace, and as such, may subject employers to liability for harassing conduct in the metaverse. Accordingly, employers should carefully consider how best to monitor, regulate and discipline virtual employee conduct, in addition to crafting policies specific to the virtual workplace, while remaining mindful of employee privacy rights.

### Legislative response in the United States

Many landmark employment laws like Title VII were enacted long before the advent of AI. The technology's profound impacts could not have been predicted a few decades ago, particularly in the employment context. Although regulation of this technology is in its infancy, governments at all levels have begun considering various proposals aimed at regulating the use of AI in employment and other sectors where there exist particular concerns over bias. In the United States, most of this activity has occurred at the state and local level. To date, no jurisdiction appears to have expressly attempted to regulate VR and the metaverse in employment, though some jurisdictions have employment laws that extend beyond the physical workspace, such as anti-harassment laws that include conduct over the internet. Nevertheless, employers should anticipate that VR and the metaverse will be subject to future legislation and regulation.

### Implemented legislation

For starters, New York City recently enacted LOCAL Law Int. 1894-A, aimed at restricting employer's usage of AI in making hiring and promotion decisions. The law governs the use of "automated employment decision tools", which is defined as "any computational process, derived from machine learning, statistical modeling, data analytics, or AI, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision-making for making employment decisions that impact natural persons".[21] The law will take effect on January 1, 2023 and will prohibit the use of AI employee screening tools, unless the AI has been subject to a "bias audit", defined as "an impartial evaluation by an independent auditor" which tests, at a minimum, the tool's disparate impact. Under the new law, employers must also notify employees and candidates that AI will be used, and provide an opt-out option.

Illinois has likewise enacted measures to regulate the use of algorithms in the workplace. Under the Illinois Artificial Intelligence Video Interview Act, employers who use AI to analyse video interviews submitted by job applicants must: (i) provide prior notice to the applicant that AI may be used to analyse the applicant's video interview and evaluate the applicant's suitability for the position; (ii) provide the applicant information prior to the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and (iii) obtain the applicant's consent to be evaluated by the software.[22]

The law also prohibits employers from sharing a candidate's video with others except "persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position".[23] Finally, the law empowers candidates to request that an employer permanently delete their video interview within a specified time period.[24]

The Illinois General Assembly passed an amendment to the Artificial Intelligence Video Interview Act on July 9, 2021, to further confront racial biases that may infiltrate the use of AI in the hiring process. On January 1, 2022, the amendment took effect. The amendment requires employers who rely solely on AI to determine whether an applicant will receive an in-person interview to collect and report certain demographic information.[25] Such employers are required to report to the Illinois Department of Commerce and Economic Opportunity on an annual basis the race and ethnicity of applicants who are screened using AI technology and are not offered an in-person interview as well as the race and ethnicity of applicants who are hired.

Maryland has also implemented legislation in response to concerns about AI in the workplace. As of October 1, 2020,[26] Maryland law requires employers to obtain an applicant's consent prior to using a facial recognition service to create what the law refers to as a "facial template" during an interview. The measure defines a "facial recognition service" as "technology that analyses facial features and is used for recognition or persistent tracking of individuals in still or video images" and defines a "facial template" as "the machine-interpretable pattern of facial features that is extracted from one or more images of an individual by a facial recognition service".[27] Under the law, employers must obtain a signed waiver providing the applicant's consent. The waiver must state: (i) the applicant's name; (ii) the date of the interview; (iii) that the applicant consents to the use of facial recognition during the interview; and (iv) whether the applicant read the consent waiver.

### Proposed legislation

Numerous other jurisdictions, including Washington, D.C., have proposed bills aiming to regulate, among other things, the use of algorithms in the employment context.

For instance, in December 2021, the Stop Discrimination by Algorithms Act of 2021 was introduced in the Washington D.C. City Council.[28] As drafted, the bill would prohibit organisations from utilising AI that makes determinations, whether intended or otherwise, that segregate or discriminate against individuals on the basis of a protected characteristic, such as race, religion, or sex, unless such determinations are part of an affirmative action plan adopted pursuant to local of federal law. Organisations using AI would also be required to conduct annual audits of their AI determinations and information to determine whether it violates the Act. The bill would also require organisations to adhere to certain notice requirements.

At the federal level, in 2019, Democratic legislators introduced the Algorithmic Accountability Act into Congress.[29] Although the bill never proceeded beyond the committee stage, the Algorithmic Accountability Act of 2022 ("AAA") was subsequently introduced in February, 2022. If passed, the AAA would require covered entities to perform impact assessments of AI systems currently or anticipated to be used by the entity, and submit an annual summary report of the impact assessment to the Commission. As currently drafted, the impact assessment would require, among other things, identification of negative impacts of AI and adoption of mitigation strategies.[30]

Also at the federal level, lawmakers have begun calling on the Equal Employment Opportunity Commission ("EEOC") to address concerns raised over the use of AI tools

in employment. On December 8, 2020, 10 Democratic senators jointly sent a letter to the EEOC requesting information about the agency's authority and capacity to investigate AI hiring tools as part of its mission to prevent and remedy workplace discrimination.[31] The letter urged the EEOC to take an outsized role in ensuring AI does not inject bias into hiring decisions and called for effective oversight and auditing of this technology. The letter also raised concerns over specific technologies including, among other things, AI used to screen job applicants and to analyse video interviews to evaluate candidates. In response, on October 28, 2021, the EEOC announced a new initiative, the purpose of which is to ensure AI tools comply with federal employment law.[32] The initiative will examine how AI is used to make employment decisions, with the aim of providing employers and AI vendors a guide for ensuring the technology is aligned with federal law.

### International measures

The issue of algorithmic bias has also received international attention. On April 21, 2021, the European Commission unveiled a sweeping proposal aimed at regulating "high-risk" AI.[33] Annex III of the proposal specifically lists several AI systems used in the employment relationship as subject to regulation.[34] This provision specifically deems systems "intended to be used for recruitment or selection of natural persons, notably for advertising vacancies, screening or filtering applications, evaluating candidates in the course of interviews or tests" as "high-risk".[35] Likewise, AI systems to be used for "making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behavior of persons in such relationships" are also considered "high-risk".[36]

If passed, the proposal would impose hefty requirements on companies offering AI systems. Among other things, providers of AI systems would be required to establish a risk management system that monitors the high-risk AI throughout its entire life-cycle, accounting for the foreseeable risks associated with the specific tool.[37] Similarly, providers would also be required to thoroughly train, validate and test the data sets used to develop their AI systems, specifically with an eye towards possible biases that may be present in the data.[38] Providers would also be required to assess the "availability, quantity and suitability of the data sets" needed for the algorithm and would be required to identify "any possible data gaps or shortcomings and how those…can be addressed".[39] As for employers using "high-risk" AI systems in employment decision-making, they would be required to monitor the operation of the AI and to adhere to all instructions supplied by the provider in order to minimise the risk of, among other things, discrimination.[40] Where such a risk arises, the employer must suspend the use of the system and inform the provider.[41] Notably, the proposal would penalise non-compliance with its obligations by imposing administrative fines of up to 30,000,000 euros or, for a company, up to "6% of its total worldwide annual turnover for the preceding financial year, whichever is higher".[42]

While it remains to be seen whether the proposal will ultimately become law, it is clear that AI regulation remains on the European Commission's agenda.

In light of the separation of the UK from Europe, the European Commission's agenda, if passed, will not apply to the UK. On September 22, 2021, the UK Government published their 10-year AI strategy.[43] Among other considerations, the publication focuses on the need for investigation into, and adoption of regulatory and governance frameworks to address and mediate the risks and harms associated with AI across all industries. The publication does not go into detail pertaining to what regulations are being considered, but assures readers that more information will be forthcoming.

### Legal risks in the employment context

Notably, many existing employment laws within the United States were enacted at a time before AI was involved in employment decision-making so it remains to be seen how courts will apply these laws to this new technology. In particular, courts will soon have to determine how to analyse discriminatory intent in the context of algorithms that have gone awry. One challenge that may impact the attempt to apply existing law to AI technology, lies in attributing discriminatory *animus* to an entirely digital system. Additionally, the proliferation of AI also brings attendant concerns over employee privacy.

### Disparate treatment claims

In the United States, discrimination claims under various federal and state laws can be premised upon a disparate treatment or a disparate impact theory, or both. A disparate treatment claim asserts that the plaintiff was subjected to intentional discrimination.[44] If a plaintiff meets the minimal pleading requirements to assert a claim of disparate treatment, the burden then shifts to the employer to offer a "legitimate, nondiscriminatory reason" for the challenged action.[45] Ultimately, a plaintiff may prevail by proving that the employer's justification for the action was merely pretextual, *i.e.*, the action was indeed motivated by discrimination.[46]

The failure to prove discriminatory intent or raise an inference of discriminatory intent, is fatal to a disparate treatment claim.[47] Given the algorithmic, rather than human, methodology of AI systems, plaintiffs asserting a disparate treatment claim may have difficulty demonstrating proof of discriminatory intent. Although some courts have permitted disparate treatment claims to proceed based on allegations of implicit bias, it remains unclear how courts will view AI decision-making.[48]

Judicial analysis of AI decision-making will likely centre on whether an autonomous algorithm's decisions can properly be imputed to an employer under the law. If an algorithm begins producing biased results after reviewing faulty or biased training data consisting of prior decisions made by humans, a plaintiff may argue that the algorithm has merely adopted the organisation's pre-existing discriminatory *animus*.

One additional challenge facing employers using AI may be proving that there was a legitimate, non-discriminatory reason for the adverse employment action. Namely, if an employer cannot explain how its algorithm operates, it may not be able to offer a non-discriminatory reason as to why a certain candidate was, for example, not selected for a position. Hence arises the need for transparency in the algorithm's functioning. And in recent years, consultants and technology companies have begun offering auditing services and tools that are capable of explaining an algorithm's decisions.[49] As algorithms become increasingly explainable, employers will have greater options for evaluating and fully understanding the decisions rendered by their AI tools. Employers who have audited their algorithms for bias and who can explain why their AI made a decision about a particular candidate and the non-discriminatory factors considered in rendering the decision are likely to be better suited in meeting their burden to present a legitimate, non-discriminatory reason for an adverse employment action.

### Disparate impact claims

Plaintiffs may, in certain circumstances, bring discrimination claims using a disparate impact theory. To succeed on such a claim, the plaintiff must demonstrate that a facially neutral employment practice had a disproportionate effect on a protected group.[50] Unlike

a disparate treatment claim, a plaintiff alleging disparate impact need not demonstrate that discriminatory *animus* motivated the adverse employment action.[51]

To establish a *prima facie* disparate impact claim, courts generally require a plaintiff to: (1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two.[52] Once a *prima facie* case is established, the burden of persuasion then shifts to the employer to show that the policy or practice is "job related for the position in question and consistent with business necessity".[53] Where an employer succeeds in establishing the business necessity defence, the plaintiff can only succeed on a disparate impact claim by demonstrating that an alternative, less discriminatory method exists for accomplishing the same job performance-related business interest.[54]

Plaintiffs asserting disparate impact often rely on statistical evidence to demonstrate that a disparity exists in outcome between groups.[55] A court tasked with deciding a disparate impact claim based on the use of algorithms may, however, stray from the traditional disparate impact analysis and opt to rely on a different line of cases for its analysis. Through *Griggs v. Duke Power Co.* and its progeny, the Supreme Court has created a slightly different standard for cases involving tests that impact promotion and hiring decisions. These cases hold that where a plaintiff makes a *prima facie* showing that an employment test has a disparate impact on a protected class, the burden shifts to the employer to demonstrate that the use of its test or selection criteria is job-related.[56] If the employer can demonstrate that the test in question is job-related, the burden returns to the plaintiff to demonstrate "that other tests or selection devices without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'".[57]

Under this approach, the black-box nature of AI can be problematic and a need for AI that is transparent and explainable becomes critical. To satisfy its burden in this hypothetical scenario, an employer would be required to explain the factors its algorithm evaluates in its decision-making as well as how these factors are job-related. An employer that has carefully audited its AI to be explainable and to screen résumés and make other employment decisions based strictly on performance-related considerations is likely to meet its burden. Nevertheless, employers must be vigilant in considering whether other, less discriminatory approaches exist to accomplish the same goals as the burden will return to plaintiffs to make this showing. For this reason, it is imperative that employers examine their relationships with AI holistically, scrutinising the tools they implement and ensuring they have considered non-algorithmic solutions.

### Other privacy concerns

Privacy concerns may also arise when exploring what criteria an algorithm may consider in rendering its decisions. A complete understanding of the information an algorithm has access to about a candidate or employee is critical to avoiding violations of law aimed at protecting employee privacy.

For example, concerns can arise if an algorithm is able to access a candidate's criminal history or social media. Many state and local governments have passed so-called "ban-the-box" laws that prohibit employers from considering certain aspects of a candidate's arrest records or criminal history in making a hiring decision. AI designed to research a candidate that is not programmed to disregard certain information concerning a candidate's arrest records and/or criminal history may expose an employer to liability under these laws.

Privacy concerns also arise over the collection, storage, and use of individual data by algorithms. An employer using an AI tool tasked with conducting résumé and employment application reviews should take care to understand: (i) how the employer will store and

delete the candidate's data; (ii) whether and, if applicable, how the AI tool will store this data; (iii) whether and to what extent the firm that created the AI tool will have access to this data in any way; (iv) how the firm will use this data; and (v) what steps the employer and the firm will take to safeguard candidate and employee data. In recent years, social media and technology companies have seen unprecedented growth, thanks in part to their ability to leverage and sell consumer data. For example, social media platforms in particular do not typically charge users a fee for their service, instead utilising user data to drive advertising revenue, sell other products, and otherwise monetise their audience.

Significantly, employers are subject to data retention requirements when employees threaten or file claims against them. The use of data storage vendors and cloud-based accounts to collect and store employee data collected by the employer, or by certain AI tools, should raise concerns about possible data retention and spoliation issues. Cloud vendors maintain their own data retention policies and practices that may run afoul to an employer's obligations under the law. There is also concern that in the event of bankruptcy or acquisition of a cloud vendor, data could be lost. To prepare for these possibilities, employers should carefully research the policies and practices maintained by their data storage vendors to ensure they comply with applicable federal and state laws, and should consider backup storage methods to safeguard against possible data loss. Employers who utilise data storage vendors and cloud-based accounts must take care to promptly issue litigation, to hold their vendors upon notice of a threatened claim or legal action.

Employers must develop a clear understanding of the full lifecycle of data provided to vendors and AI tools and make sure that all appropriate measures are taken to store that data in a way that is consistent with legal requirements, preserve the data so that it is available to defend against future claims, and limit access to the data to protect the privacy needs of the employee and the proprietary concerns of the employer.

## Conclusion

As employers begin to incorporate AI and VR into more facets of their operations and workplace, employers are cautioned to carefully examine the AI tools they are using to ensure compliance with local and federal law and to ensure any algorithms being used remain free from bias. Employers are also advised to carefully consider revising and/or adopting internal policies and practices in connection with AI and VR usage, such policies should clearly stipulate how the company plans to use AI/VR, employee conduct expectations, ramifications for misconduct, and employee rights and reporting mechanisms. Employers should exert special caution when considering entering the metaverse, and carefully consider best practices for employee monitoring and disciplining, as well as careful scrutiny of AI algorithms used to develop avatars to ensure diversity is reflected in both the real-world workplace as well as the virtual one. While the efficiency gains and resource savings associated with AI, and the opportunity for "face-to-face" social interaction offered through VR can be compelling, employers take time to fully understand the technology they are interacting with and the associated risks prior to implementing.

* * *

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24. 820 ILL. COMP. STAT. ANN § 42/15.
25. 820 ILL. COMP. STAT. ANN § 42/20.
26. H.B. 1202, 2020 Leg., 441st Sess. (Md. 2020).
27. *Id.*
28. DC B24-0558, 2021-2022, 24th Council (D.C. 2021).
29. H.R. 2231, 116th Cong. (2019); S. 1108, 116th Cong. (2019).
30. H.R. 6580, 117th Cong., 2d Sess. (2021–2022).
31. Letter from Michael F. Bennet, U.S. Senator, *et al*., to Hon. Janet Dhillon, Chair, EEOC (Dec. 8, 2020), https://www.bennet.senate.gov/public/_cache/files/0/a/0a439d4b-e373-4451-84ed-ba333ce6d1dd/672D2E4304D63A04CC3465C3C8BF1D21.letter-to-chair-dhillon.pdf.
32. Press Release, EEOC, EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness (Oct. 28, 2021), EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness | U.S. Equal Employment Opportunity Commission.
33. *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* (Apr. 21, 2021), https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=75788.
34. *Annexes to the Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* (Apr. 21, 2021), https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=75789.
35. *Id.* at 4.
36. *Id.*
37. *See supra* note 33 at 47.
38. *Id.* at 48.
39. *Id.*
40. *Id.* at 58.
41. *Id.*

42. *Id.* at 82.
43. HM Gov't, National AI Strategy (Sep. 28, 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1020403/National_AI_Strategy_mobile_version_.pdf.
44. *Espinal v. Nat'l Grid NE Holdings 2, LLC*, 693 F.3d 31, 34 (1st Cir. 2012).
45. *Best v. Cal. Dep't of Corr.*, 21 F. App'x 553, 558 (9th Cir. 2001).
46. *Id.*; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).
47. *See, e.g.*, *Tucker v. Ga. Dep't of Pub. Safety & its Div.*, No. CV208-33, 2009 WL 2135807, at *1 (S.D. Ga. July 15, 2009).
48. *See Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 775-78 (E.D. Wis. 2010) (considering as additional evidence the extent to which the supervisor accused of discriminatory conduct may have viewed others "through the lens of an uncomplimentary stereotype" and holding that, in addition to failing to provide a credible explanation for failing to provide plaintiff a bonus awarded to other non-black employees, the supervisor "behaved in a manner suggesting the presence of implicit bias"); *Samaha v. Wash. State Dep't of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843, at *4 (E.D. Wash. Jan. 3, 2012) ("Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee.").
49. Simon Chandler, "How Explainable AI is Helping Algorithms Avoid Bias", *Forbes* (Feb. 18, 2020), https://www.forbes.com/sites/simonchandler/2020/02/18/how-explainable-ai-is-helping-algorithms-avoid-bias/?sh=32197e9e5ed3.
50. *See Mandala v. NTT Data, Inc.*, 975 F.3d 202, 207 (2d Cir. 2020).
51. *Id.*
52. *Id.*
53. 42 U.S.C. § 2000e-2(k)(1)(A).
54. *See Mandala*, 975 F.3d at 208.
55. *Id.* at 209; *see also Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994-95 (1988) ("Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation."); *Mandala*, 975 F.3d at 210; *United States v. Pennsylvania*, No. 14-CV-1474, 2017 WL 4354917, at *6 (M.D. Pa. Oct. 2, 2017).
56. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 998 (1988).
57. *Albemarle Paper Co.*, 422 U.S. at 425 (quoting *McDonnell Douglas Corp. v. Green*,411 U.S. 792, 801 (1973)).

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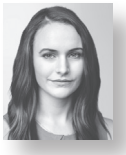

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