Risk Considerations in the use of Artificial Intelligence Software

Artificial Intelligence (AI) seems to be permeating our technology and software. Observers say that we are in a period of AI break-out with new products and programs emerging at a rapid pace. In most cases it makes things work quicker and better. Despite the warnings that AI could take over the world and lead to human subservience or destruction, it is here to stay. Community centers are now employing software systems that incorporate aspects of artificial intelligence. New programs like chatbot can answer questions, write student papers, and create volumes of documentation in minutes.

AI also powers some programs that are used in engineering and human resources applications. Proponents of Artificial Intelligence look at AI's ability to create sometimes simple solutions to complex problems. In a Slate article in their "future tense" section entitled "The Delusion at the Center of the A.I. Boom" (March 29, 2023), the author describes "solutionism" as possibly creating more problems than it solves. An example is AI powered medical evaluations that propose solutions that the patient can't afford, increases overall healthcare costs, and the prescription of large numbers of tests and procedures that might be more harmful than curative.

Artificial Intelligence is a product of human inputs and decisions. In that sense it is "artificial" because it lacks human characteristics like compassion and emotional intelligence that have a role in the decisions we make. The decisions humans make also go into the development of AI powered software where human biases can creep into the programming. Recently, "Bloomberg Law" (3/13/2023 web article), cautioned that a recent lawsuit against Workday alleged that biases programmed into the Workday platform for screening job applicants "disproportionately disqualify applicants who were black, disabled, or over 40." The suit was against Workday, not the employer. However, it does raise the possibility of risk to anyone who knowingly uses a biased employment platform. The solution to recruitment might contain the seeds of risk to the employer who relies on the employment platform to make hiring decisions. Another example of bias in artificial intelligence programming comes from the Georgetown Security Studies Review in an article entitled "Racism is Systemic in Artificial Intelligence Systems, Too" (May 26, 2021). The article describes an Amazon facial recognitions system that preferred lighter skinned men over darker skinned women and men. The system had "learned" from "millions of photographs inputted by humans." The system was scrapped by Amazon, but it illustrated the potential for harm in use for employment, healthcare, and criminal justice applications.

In a web-based publication called "Legal Dive" (3/9/2023), author Laurel Kalser says that AI is used to "evaluate large databases to determine work outcome, performance, turnover, absenteeism, injury reduction, and sales." Subjecting this data to analysis may result in "algorithmic bias" even if there is no employer intent to discriminate. In other words, the bias may be built into the program and result in discriminatory recommendations or actions.

Recommendations made in the Bloomberg article include establishing standards for "bias proofing" AI tools used in the employment process and auditing the software to find or recognize biases. The Equal Employment Opportunity Commission began to pay close attention to bias in artificial intelligence programs in 2021. In May 2022 the EEOC issued guidance regarding discrimination against employees with disabilities. Their guidance states:

- Risk Exposure for Vendor Software. Employers who deploy AI-driven decision-making tools to evaluate employees or job applicants may be liable under the Americans with Disabilities Act (ADA) for the shortcomings of that technology. Even if the AI tool was developed or administered by a third-party vendor, the employer can be on the hook — especially if the employer has "given [the vendor] authority to act on the employer's behalf."

They also expressed concern about the use of the software to screen out disabled applicants and they warn against software that markets itself as "bias free."

On January 31, 2023, the EEOC held a hearing on "Navigating Employment Discrimination in AI and automated systems: A New Civil Rights Frontier." Just the title of the hearing offers a warning that they will be looking at these issues as they rule on employment cases. The hearing focused on AI systems that "perpetuate historical discriminatory biases" as well as the data used to train algorithms and laws that can be used in relation to these new technologies.

Fund Members should be careful about their use of employment related software and not blindly accept the AI decision without closely examining the potential for bias. Bring the real human element into the decision-making process so that you are not influenced into unconscious discriminatory actions. The EEOC is not looking at the software vendor but at you.