Risk Insights: Senior Living & LTC

Episode 15

Employing AI - Balancing opportunities and challenges

Welcome to the *Risk Insights: Senior Living & LTC* podcast, hosted by Tara Clayton with Marsh's Senior Living & Long-term Care Industry Practice. Tara, a former litigator and in-house attorney, speaks with industry experts about a variety of challenges and emerging risks facing the industry.

Tara Clayton:

Hello, and welcome to *Risk Insights: Senior Living and Long-Term Care*. I'm your host, Tara Clayton. In today's episode, we're continuing our conversation on various risks in the employment context, focusing today on the discussion around the growing use of artificial intelligence by employers, and the potential risk that AI poses related to discriminatory impact.

For our discussion today, I'm joined by La'Vonda McLean. She's the Managing Director and Employment Practices Liability and Wage and Hour Product Leader with Marsh FINPRO. La'Vonda, thanks so much for joining us today.

La'Vonda McLean:

Yes. Thank you, Tara, for having me.

Tara Clayton:

La'Vonda, I know that you have a lot of experience really connected to your prior work as an employment attorney. So I'd love if you could just take a few minutes to talk to our audience about your background.

La'Vonda McLean:

Sure. Yes, absolutely. So as you said, I am a former practicing attorney. I practice labor and employment law. But before I transitioned to the law practice, I actually began my career in the insurance industry as an employment practices liability underwriter, and then I left the industry, attended law school, practiced labor and employment law, and came back into the industry on the broking side. So I've done a lot of speaking engagements and artificial intelligence first, you know, with talking to clients about it, also at various seminars and forums.

As you can imagine, just the employment landscape, the potential for unconscious bias as it pertains to AI has been top of mind. And so it's something that I'm personally passionate about, but also just within my role, I have the opportunity to talk about it quite frequently.

Tara Clayton:

Awesome. La'Vonda, you really have seen employment risks from all angles, so I'm really excited to talk with you about this today. And as you said, top of mind, I think artificial intelligence is... Every article that I see here lately has has some connection to, "What is AI? How is it shaping and changing businesses?" So looking from an employment context and knowing we're seeing so much on this topic, is this really, truly a new topic? Or is there some historical context that's important for listeners to understand?

La'Vonda McLean:

Yes. Absolutely. So AI is not necessarily new within the employment space. However, there are newer iterations of AI that are becoming more prevalent and that's why it appears as if floodgates have opened and there is this new technology that never existed before and, it's been around. So I just want to back up for a second and talk about the broad category of artificial intelligence, which I'll refer to as AI.

So it refers to the development of computer systems that can simulate human intelligence, such as learning and problem-solving. And then within that broad category of AI, you have different subsets of it. So some of those subsets is what we're hearing about, which makes it seem as if it's new technology. But it is, it's

emerging and growing. So you have the machine learning, which is where a computer is programmed to continuously learn patterns and make predictions from the data.

And then the big term that we hear is generative AI. So the generative AI refers to a type of AI system that is designed to generate new content or information that is not explicitly programmed or preexisting in its training data. And so that is where we're sort of seeing a lot of hype and news articles and things flashing over our internet about AI that makes it seem as if this is something that is completely new.

Tara Clayton:

Great. That's very helpful to know. To your point, not new but definitely evolving and growing those different subsections, we're seeing more in the Generative AI space. Knowing how engaged you are with a variety of industries and employers on this topic, where are some of the areas that you see — particularly this new use of AI — where are you seeing it in the employment context?

La'Vonda McLean:

Yeah. So in the employment context, there's been various iterations of AI, as I said, that has been used. So think about... Kind of the first iteration was resume screening. So you receive resumes and you utilize the tool to just quickly screen through all the resumes, just to make sure that they have the basic qualifications. So that's something that's been used throughout, from an HR perspective that's considered to be a form of AI. So definitely in the recruiting and hiring process we've seen AI being used.

But now as this generative AI is emerging and growing, it creates new content so now we see employers using it in the recruiting and hiring process, such as actually drafting and creating job descriptions. Now, it could also be used to help you kind of skim through resumes and determine who's going to be the best candidate for this particular role and create a ranking system for you. So definitely we're seeing a lot of usage in it, of AI in the recruiting and hiring process.

We'll continue to see that. There are efficiencies, and there's a good part of using that, right? Now instead of having hundreds of people (laughs), you know, scan resumes, you have one tool that can quickly and efficiently get through thousands of resumes at one

particular time. But that's not the only context where we see it. That's just the one that we hear about the most. But the way AI is emerging, is that it can be used throughout your entire employment life cycle.

So not just recruiting and hiring, but now you're hired on and you're an employee. You've probably seen chatbots before. So a chatbot comes up and it's asking you questions, and so it can answer just typical employee questions for you, such as, "How do I sign up for benefits?" So employers use that as well. That's a form of AI that's interacting with you as if it's a human or someone in HR, but it's not. It's a chatbot that you're talking to.

It can also be used throughout the performance evaluation process. There's different iterations of how advanced that technology can be. But some organizations could potentially use AI to basically look across their entire organization of 30,000+ employees and determine who gets a 5, the best rating. Who gets a 4, who gets a 3, as opposed to it being looked at in silos. So there's definitely a great evolvement in how AI is and can be used throughout the employment life cycle that we're seeing.

Tara Clayton:

That's really interesting. La'Vonda, I've talked with some of our colleagues at Mercer, really around workforce challenges, particularly in the healthcare space. So hearing really how creatively AI could be used to help maybe look at some work transformation and/or just efficiencies to your point.

La'Vonda McLean:

Right.

Tara Clayton:

The full life cycle of the employment process. But at the same time, I hear efficiencies around picking the right potential job candidate, combing through resumes, and it feels like there could be some sort of risk that providers and employers need to be thinking about. So can you talk to us about some of those risk areas?

La'Vonda McLean:

Exactly. So this is where we get into the algorithmic bias, the unconscious bias part, the potential discriminatory impact of the usage of AI. At the end of the day, AI is not discriminatory. (laughs). But the data

that is fed into AI could have discriminatory outcome. The output is only as good as the input. So think about it in this perspective. You are an employer and there's certain characteristics that you're looking for within a particular candidate.

And so you feed data into the system that shows historically, these are the individuals that have been successful in this role. Now let's say that it's a technical type of role, and historically, most of the people that have applied and received those jobs are men. Well, the algorithm could teach itself that females are not qualified for this role and will not be the best candidates for this particular role. So that definitely wasn't the intent when the employer was utilizing that tool, but that is one of the unintended consequences that happened because of the data that's being fed into the, into the system.

And I know we're talking about the employment context, but also there is third party exposure too. So when we think about just the healthcare industry perspective, just patients, and how AI may be being utilized to help with just the- the standard of care for patients. If the information that's being fed in into whatever system is being used is not looked at from a lens of bias and making sure that it is unbiased or scraping those kind of biases of data, then that's the output that you're going to get.

And so that's why the human element needs to always stay place. And then on top of all of that, listen. We already have established laws. I think what we'll see is as... We may see litigation around this area. We may see, um, some of those laws involving more. Clearly, when Title VII, for instance, was enacted, artificial intelligence was not top of mind. (laughs).

So we have existing framework of laws that are already in place. So you have Title VII, which prohibits discrimination based off of race, gender, sex, national origin. You have the American with Disabilities Act, the Age Discrimination in Employment Act. And we have privacy laws, which are all over the place, federal and state laws. Candidly, employers, I commend you for having to navigate all of these things. You just have your regular personal injury and workplace tort type of laws, such as defamation and negligent evaluation.

So right now, what, from a regulatory perspective, the Equal Employment Opportunity Commission has said is that those laws have not changed. You still have to be

in compliance with those laws. And just because it's technology, that technically may be having the unintended consequences, that does not alleviate the employer of their ultimate obligation to make sure that these tools that are being used, are used in a responsibly and ethical way that is not having a discriminatory impact.

Tara Clayton:

Interesting. Yeah. I think to your point, it's easy to lose sight of, while this may be "new" technically doesn't mean that there's not very, very old laws that have been on the books for many years — to your point, AI was not a thought at all — that would apply in this situation. La'Vonda, one of the employment things I talked about in the last episode was, we're seeing a lot of activity from agencies like the EEOC, but also the Department of Labor, the NLRB on really employer obligations versus what maybe a vendor.

A lot of times, when I think of technology, we're working with that third-party vendor. Are you seeing anything there that employers need to be mindful of what still remains their obligation there?

La'Vonda McLean:

Yes, 100% it remains the employer's obligation. So the Equal Employment Opportunity Commission has come out and made it very clear that your defense cannot be, and will not be sufficient to say, "Well, hey, I hired this third-party vendor. They are the ones who's at fault here, not me." Because at the end of the day, the employer is the one who purchased the tool, is utilizing the tool. So that responsibility still remains with the employer, from a legal perspective, as far as the regulatory bodies are concerned.

The EEOC has been very vocal on this area. They issued several technical assistant documents, which is not binding on employers, but it does give you guidance on where they're going to be focusing their effort. You should take heed to it because it allows you to understand sort of what they're going to be looking for, if they come knocking.

So one of the biggest areas that they've been focusing on is from a disability perspective. So as I was talking about in the recruiting and hiring process, some employers are, could be using personality types of test technology or facial recognition tools that can determine like, "Are you being truthful? Are you lying? Will you be

a good fit for this role?" There's all these types of tools that are coming up that can be used, but if someone has a disability, are they being made even aware that an AI tool is being used?

So they're very focused on the disability aspect of things. And then just in general, discrimination as it pertains to race, gender, any of the protected classes as well. So high focus. And then President Biden also issued an Executive Order in October of last year around the responsible use of artificial intelligence. And so there's no specific rules or law in there. But what it is, is basically a document that's giving guidance to all the federal agencies on how they should be looking at this issue, how they should be responsibly implementing it into the federal government and just applying the laws that already exist to make sure that it continues to be a tool that's not used in a discriminatory way.

I think what we'll continue to see is a focus on fairness, transparency, accountability, accuracy, and human oversight. Those are my predictions of what's going to continue to be the regulatory focus around AI.

Tara Clayton:

La'Vonda, you mentioned the guidance on the federal side. Are you seeing states—because we know the employers have the federal as well as state and local, right, obligations of laws that they have to be aware of—are you seeing any kind of state activity in response to this?

La'Vonda McLean:

Yes. Yes, we are. (laughs). So as far as what you're going to see is more some of the defined laws that's going to be at the state level right now. New York is one of the main states, it's actually in New York City, it's one of the main jurisdictions that has their own law in place. And it is based off of the use of algorithms in the hiring and recruiting process. So they require that you conduct a bias audit of the tools that are being used, that you provide notification to applicants that you are utilizing these tools.

You also have California that's exploring some legislation around this. So we will definitely continue to see a lot of state regulatory movement around this because as we all know, it takes a while sometimes for the federal government. So it becomes tricky for employers to navigate, but there is definitely is state

laws that are in place, and we expect to see more of that. But even just outside of that, it's global.

The European Union has the EU AI Act. You have the United Kingdom. You have several other countries as well that are all in the race to all be the leaders in just how AI is going to be used and the regulation around AI. So it's not just a US focus. It's not just a state focus. But it is definitely a global and international focus.

Tara Clayton:

It sounds like it's going to be a continued evolving, not just evolving use of the technology, but evolving guidance and potentially laws that are impacting the way that employers are utilizing this new technology that's coming out.

You mentioned, La'Vonda, earlier, one of the ways that employers can get more efficiency through using this type of this technology and talking about different risk areas out there. One of the things you mentioned, kind of taking away multiple people having input into decisions or reviewing maybe applicants that are coming in, have one tool that's doing it all.

And I just wonder, from a risk perspective, does that give you pause of, "Hey employer, you need to think about this increased exposure for maybe these type of claims because of that?"

La'Vonda McLean:

In general, it can lead to increased class actions. So for instance, whereas before, if you have several different individuals within HR, within a business unit, that are going through resumes and making decisions on who they're going to select for an interview, or who they're going to hire for a particular job. Now if you have a system that's used across the entire organization and it is screening applicants based off of certain criteria, and deciding for you who should be interviewed for a particular job, or who should be hired.

Well, now, it makes it easier to potentially assert a class action because you have sort of one tool that's making those decisions versus several different individuals or people that is making those decisions. That's an area that I just think employers should be aware of and focus on where there could potentially be some increased risk.

Tara Clayton:

Yeah. That makes sense, La'Vonda. In talking about the increase with risk, and, your comment about the EEOC's position of, "No, employer, you don't get to pass on the liability, transfer the risk to that third-party vendor that you're working with. You still own that obligation." What are questions or guardrails that employers should be thinking through when they're looking to utilize AI in their employment practices?

La'Vonda McLean:

Employers should definitely understand the role of continuous human oversight. The overall messaging should not be eliminating or replacing jobs, rather repurposing and creating more efficiencies for the way that we work. But that human oversight is going to remain critically important throughout the process. Also, just making sure that employers are vetting the vendors, the tools, and the data and understand the data the AI tool has been trained on because as I said, the output is only as good as the input, so you want to make sure that you have an understanding of the data that's being used. And also, how are your vendors helping you to mitigate some of these potential risks that can happen?

It's also important just to have appropriate policies in place to make sure that employees understand, your organization's perspective on the responsible use of these AI tools. It just depends on how you're utilizing those tools within the organization. You want to make sure that you're implementing training and education, especially when it comes to HR, so that they are able to maybe, perhaps see some concerning trends from the output that may be coming out of some of these tools. And then also very important to conduct regular testing and audits to ensure that the tools are implemented in a fair and unbiased manner.

This is not a technology where you build it out and you put it on the shelf, and you just let it run itself in perpetuity. Continuously testing it, performing audits on the system just to make sure that there's no discriminatory impact or unconscious bias that's occurring is going to be very important as well.

Tara Clayton:

AI potentially can change the way we look at hiring applicants. Is there anything providers need to be thoughtful of as it relates to the ADA or any of those laws that we talked about that maybe they weren't having to think through before specific to applicants?

La'Vonda McLean:

Yes. Absolutely. So the... I think the big area there is when you're thinking about applicants and the American with Disabilities Act, as I said, if you're an employer utilizing certain AI technology that, you know, someone who has a particular disability is unable to use, or if they do use the technology, it may provide skewed results for them? Then you need to actually go through an accommodation process with that particular applicant.

So a lot of times employers think about the reasonable accommodation process with your employee. Someone comes to you and they say that they may have a medical condition and that they need a reasonable accommodation. That's sort of how we normally think about it. But there is this newer level now, where you may need to provide some type of accommodation for an applicant for employment because of some of the tools that you might be utilizing.

For instance, there could be a tool that's being used that is just kind of as, you know, maybe you're talking. It is scanning and just kind of seeing how you're responding to questions. Are you looking face-forward? Are your eyes kind of rolling around? Do you seem not focused? But if someone has a particular disability where perhaps that is part of their disability and the results show that they're not very focused. The attention span isn't great. You know, things like that?

I mean, that could be based off of their disability. And that is why one of the main areas that states have been focused on, and I think we'll continue to see that, is that employers will be required to advise or provide notice to applicants that they are actually utilizing this technology. That has been an area too, that the EEOC is focused on, which goes about the transparency that I talked about, is making sure that people are aware that these tools are even being used, so they can at least have the conversation now and say, "Well, is there something else that I could potentially use?" or "Is there another option for me?"

Tara Clayton:

That makes sense from a transparency standpoint. But these are all things, and this is good. I think, La'Vonda, the information you've shared has been, to me, very educational and helpful because when you start looking

at technology and playing around with AI, I don't think you necessarily think through all the scenarios, right, where potentially it could result in some type of discriminatory impact. So it's really helpful just to hear your perspective of what you've seen, how you've seen some other employers dealing with this, how you say states are coming out with guidance. I think, when a few states start to do it, you start to see more and more states kind of mimic and follow suit. So this has been incredibly helpful. I really appreciate you joining us today.

La'Vonda McLean:

And thank you. I appreciate you inviting me. It was great.

Tara Clayton:

This is a top of mind topic. And honestly, I think we're just going to continue to see this evolving for all. So La'Vonda, I'm sure we will be talking much more frequently on this topic.

For our listeners, La'Vonda puts out a lot of great content. We will have our website linked for more on this topic as well as other employment practices liability risk so be sure to check our show notes for that link. Also, be sure you subscribe so you don't miss any of our future episodes on great topics, just like today's. You can find us on your favorite podcast platforms, including Apple and Spotify.

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