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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

The Next Frontier - AI and Workplace Technology For Employers

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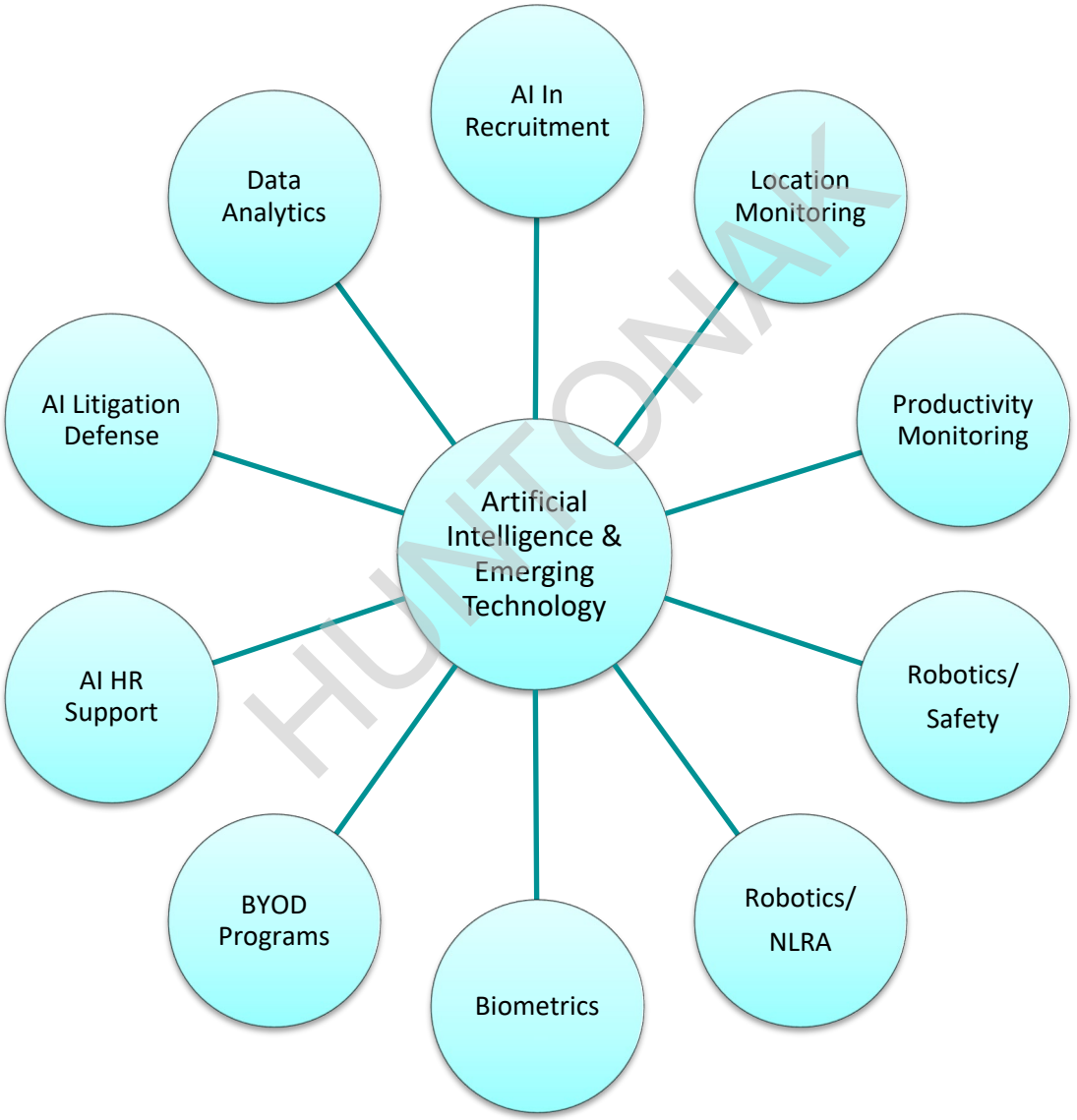


Agenda

- What is Artificial Intelligence and Generative AI?
- Popular AI Tools for the Workplace
- Legal Guardrails for the Use of AI/GAI in Workplaces
- Artificial Intelligence (AI) and Candidate Selection
- AI Employee Retention Tools
- Analyzing AI/GAI for Effectiveness and Compliance
- Confidentiality / Privacy Issues in Workplace AI
- Social Media Concerns
- Location and Proximity Monitoring: Risks and Best Practices
- Wrap-Up
- Q&A

Artificial Intelligence and Generative AI

- **Artificial Intelligence**
  - process involving designing machines meant for carrying out work only done by brains before
  - "Machine-based systems that…make predictions, recommendations or decisions influencing real or virtual environments."
    - Intelligent Resume Screening
    - Automated Candidate Sourcing
    - Testing Software
    - Performance Management Software

- **Generative Artificial Intelligence – goal of GAI is human-level intelligence**
  - ChatGBT, Siri, Alexa, Copilot, content generation, art creation, language translation

Popular Workplace AI Tools

- **Chatbots**
  - Removes human error or misinformation
  - Standardization of processes
- **Automated Candidate Sourcing**
  - Encourages candidates to apply
  - Reduces headhunter costs
- **Intelligent Resume Screening**
  - Saves time reviewing resumes
  - Choose from a smaller, qualified pool of applicants
- **Testing Software**
  - Measure cognitive skill
  - Analyze compatibility
- **Performance Management / Retention**
  - Data-driven performance analysis
  - Predict future behavior

Legal Guardrails for the Use of AI / GAI in Workplaces

Recap AI:
Disparate Treatment v. Disparate Impact

- **Recap: Examples of Common Uses in the Workplace**
  - Recruiting; resume screening; interview analysis; productivity monitoring; performance evaluation
- **Disparate Treatment**
  - Requires proof of intent to discriminate
  - Intent can be proven through direct or circumstantial evidence
  - Less likely AI would be used to intentionally discriminate
- **Disparate Impact**
  - Does not require proof of intent
  - Focuses on effect of facially neutral policy or practice
  - Often involves statistical expert analysis
  - Most likely form of discrimination through use of AI

EEOC Guidance

- **The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees**
  - Issued May 12, 2022
  - Identifies promising practices for employer using algorithmic decision-making tool, including:
    - describing in plain language and in accessible formats traits that algorithm is designed to assess, method by which those traits are assessed, and variables that may affect rating
    - informing all applicants that reasonable accommodations are available
    - training staff to recognize and process requests for reasonable accommodations
    - using tool designed to be accessible to individuals with as many different kinds of disabilities as possible
    - ensuring tool only measures abilities or qualifications that are truly necessary for job
    - asking vendor to confirm that tool that does not ask applicant questions that are likely to elicit information about disability or seek information about mental or physical impairments or health unless such inquiries are related to request for reasonable accommodation

NLRB Guidance

- **Electronic Monitoring and Algorithmic Management of Employees Interfering with Exercise of Section 7 Rights**
  - Issued October 31, 2022
  - Critical of electronic monitoring and algorithmic management of employees
  - "I will urge the [NLRB] to find that an employer has presumptively violated the [NLRA] where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the [NLRA]."
  - "If the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need—i.e., that its need cannot be met through means less damaging to employee rights—I will urge the [NLRB] to balance the respective interests of the employer and the employees to determine whether the [NLRA] permits the employer's practices."
  - "If the employer's business need outweighs employees' [NLRA] rights, unless the employer demonstrates that special circumstances require covert use of technologies, I will urge the [NLRB] to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains."

Biden Executive Order

- **Executive Order 14110 on Safe, Secure, and Trustworthy Artificial Intelligence**
  - Issued October 30, 2023
  - Addresses various issues:
    - Standards for safety and security
    - Privacy
    - Equity and civil rights
    - Consumer protection, patient protection, and educational resources
    - Worker protections
    - Innovation and competition
    - Global opportunities
    - Government use of AI

OFCCP Guidance

Issued updated guidance and FAQs on April 29, 2024

FAQ re Employer responsibility on AI

- "Covered federal contractors are obligated by law to ensure that they do not discriminate in employment and that they take affirmative action to ensure employees and applicants are treated without regard to their race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. These EEO obligations extend to the federal contractor's use of automated systems, including AI, when making employment decisions. OFCCP determines whether federal contractors are in compliance with laws enforced by OFCCP through compliance evaluations and complaint investigations on a case-by-case basis. Below are some examples of federal contractors' compliance obligations related to AI. Other, more detailed examples are provided in questions 5, 7, and 9.

Federal contractors must:

- Maintain records and ensure confidentiality of records consistent with all OFCCP-enforced regulatory requirements. For example, contractors must keep records of resume searches, both from searches of external websites and internal resume databases, that include the substantive search criteria used.
- Cooperate with OFCCP by providing the necessary, requested information on their AI systems.
- Make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability as defined in OFCCP's regulations, unless the federal contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.
- An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. The contractor must make available the same level of benefits and privileges of employment to a qualified applicant or employee with a disability that are available to the average similarly situated employee without a disability.
- The reasonable accommodation obligation extends to the contractor's use of automated systems, including but not limited to, electronic or online job application systems.

Interagency Collaboration

- **DOL Guidance – April 29, 2024**
  - Covered implications of AI tech in employee monitoring – time worked (even if not productive) is still compensable
  - Geolocation tools – cannot be relied upon 100%, need to account for multiple site work
  - References NLRB guidance that employee surveillance could be considered retaliatory under NLRB in addition to FLSA
  - Use of AI and effects on FLMA, PUMP, etc.
  - Emphasized that use of AI is not an escape of liability under applicable laws
- **EEOC and OFCCP Updates – April 30 and May 2**
  - Continuous collaboration amongst several agencies
  - Expect additional guidance and proposed legislation
  - Focus of agencies

Illinois Law

- **Artificial Intelligence Video Interview Act**
  - Employer conducting AI-based video interview ***must*** provide applicant advance notice that AI may be used, inform applicant how AI works, obtain applicant's consent to evaluation by AI, and delete video within 30 days of applicant's request
  - Employer ***cannot*** share applicant video ***except*** with people whose expertise is necessary to evaluate applicant
  - Employer relying solely on AI analysis to select applicant for in-person interview ***must*** annually collect and report information to Illinois Department of Commerce and Economic Opportunity:
    - ethnicity and race of applicants not selected for in-person interviews
    - ethnicity and race of applicants hired
- Illinois Department of Commerce and Economic Opportunity ***must*** analyze data and report by July 1 of each year whether data discloses racial bias

Maryland Law

- **Regulates facial recognition services technologies during job interviews**
  - Employers are ***prohibited*** from using facial recognition services to create facial template during applicant's interview absent signed waiver by applicant
  - Signed waiver must contain applicant's name, interview date, applicant's consent to use of facial recognition during interview, and acknowledgment that applicant read waiver

New York City Law

- **Regulates Automated Employment Decision Tools (AEDTs)**
  - Employer only can use AEDT to screen candidate for employment if such tool has been subject of bias audit conducted no more than one year prior to use of tool and summary of audit and tool's distribution date has been made publicly available on employer's website
  - Employer using AEDT to screen candidate must notify candidate at least 10 business days before using tool that it will use tool to assess candidate, job characteristics and qualifications tool will use in assessing candidate, and candidate can request alternative selection process or accommodation
  - Employer shall make information about type of data collected for AEDT, source of such data, and employer's data retention policy available within 30 days of written request by candidate unless such information is disclosed on employer's website, or such disclosure would violate law or interfere with law enforcement investigation

What to Watch – Federal Legislation

- **Stop Spying Bosses Act**
  - Would require employer to disclose workplace surveillance to applicants and employees
  - Would prohibit employer from using workplace surveillance for certain reasons, including using an automated decision system to predict worker behavior unrelated to worker's job or monitoring activities related to unions
- **No Robot Bosses Act**
  - Would require employer who uses or intends to use automated decision system output in making employment-related decision to disclose certain information to applicants and employees, including a description of system, how employer uses or intends to use output in making employment-related decision, and how applicants and employees can appeal or dispute decision
  - Would prohibit employer from relying exclusively on automated decision system in making employment-related decision
  - Would prohibit employer from using automated decision system in making employment-related decision absent certain measures, including testing for discriminatory impact at least annually and public posting of results

What to Watch – States

- **Pending State Legislation on Bias Audits & Use Limits**
  - California – A.B. 2930
  - Washington – S.B. 6299; H.B. 1951
  - New York – S.B. S01623
  - Vermont
- Similar bills have failed to become law in Massachusetts and New Jersey, but they are trying again
- **Oklahoma Artificial Intelligence Bill of Rights**
- **Maine Act to Protect Workers from Employer Surveillance**

AI and Candidate Selection

What is AI in Employment Screening?

Artificial Intelligence uses computing to perform tasks which typically require human intelligence. Typical tasks include:

- Understanding natural language
- Learning
- Reasoning
- Problem solving

This technology impacts critical human capital business processes such as recruitment and talent management, driving automation and facilitating decision making.

Why use AI in employment screening?

- Gain insights into the talent pool
- Automate high-volume tasks
- Increase consistency and quality of decisions
- Decrease time to hire
- Decrease turnover
- Optimize ROI on individual employees and teams

Impact of Bias in AI Employment Screening

Self-Fulfilling Prophecy

- Algorithms may further establish homogenous hiring decisions where model **too closely tracks inputs** such as prior human hiring input
- Could be exacerbated where new, generated data is inserted back into the empirical inputs, creating a **loop of hiring homogeneity**.
- The model is essentially **overfitting** to a desired outcome, which has the potential to reinforces societal inequalities

Legal and ethical implications

- Regulations such as Reg S-K now requires SEC registrants to provide a human capital disclosure
- The three pillars of the principled-based reporting are **development, attraction and retention**
- Where AI bias leads to poor hiring decisions and quicker turnover, AI decisions may impact ability to attract the right candidates and could decrease outside investment

Discrimination by Proxy

- Unlikely to have complete and accurate information, e.g. diversity data from self-selecting employee surveys
- Omission doesn't solve the problem because missing data may be encoded within other variables, e.g. race within zip code and name combinations – see **discrimination by proxy**
- Must continually analyze data aggregation and imputation methods, as well as outputs, to continuously calibrate process

AI and Candidate Selection: How Algorithms May Discriminate

- **AI can reinforce institutional homogeneity**
  - Most algorithms need training data (e.g., resumes of high performing employees)
  - Results will mimic training inputs
  - If training models are homogenous, results may also reflect lack of diversity
- **AI may consider biased variables**
  - Algorithms may develop preferences for neutral criteria that are proxies for unintentional discrimination
    - E.g., Algorithm may favor zip codes close to the office which can serve as a proxy for race discrimination
    - E.g., Algorithm may favor ".edu" e-mail addresses, prejudicing older workers (ADEA concern)

AI in Background Checks: Overview

- **Use of AI to perform background checks involving:**
  - Criminal history
  - Driving record
  - Social Media
  - Past Litigation
  - Permits/Licenses obtained (e.g., concealed weapons)
  - Bankruptcies

AI in Background Checks: Benefits and Risks

Benefits

- Reduce onboarding time for new hires
- Provide continuous monitoring
- Increased number of data points from varied sources (e.g., social media)

Risks

- Improper use of criminal history
- Fair Credit Reporting Act violations
- Increased number of data points from varied sources (e.g., social media) can present unique legal challenges

AI Retention Tools

- AI designs **on-boarding** tailored to new employee's experience, skills, interests and cultural fit.
- **Predictive analytics** to identify employees at risk of leaving and propose intervention strategies.
- AI tailors **training** and skill development.
- AI **succession planning** and talent pipeline.
- Specialized **employee satisfaction surveys**, with pattern detection.
- Integrates **DEI considerations** with all of the above.

- **As a Tool for Applicants**
  - Is an application, essay or writing sample truly representative of the applicant's skills?
  - Specialized descriptors and turns of phrase in resumes.
  - Correspondence before and after interviews.
  - Interview preparation: cheat sheets on appropriate responses and jargon
  - **RISK**: GAI misrepresents the applicant's skills and experience.
  - **MITIGATION**: Specific acknowledgments and representations about sourcing.

- **As a Tool for Employees / Management**
  - Internal work product – analysis, recommendations, performance assessments.
  - External / customer facing content.
  - **RISK**: Inaccurate / incomplete data as GAI source material.
  - **RISK**: Loss of customer confidence / lawsuits.
  - **RISK**: Discrimination under Title VII and EEO statutes.

Analyzing AI/GAI for Effectiveness and Compliance

But Why Audit?

- A 2018 MIT study found that current facial recognition software has up to 35% higher error rates for darker-skinned females compared to lighter-skinned males.
- Voice command software has difficulty understanding individuals who speak English as a second language.
- Allegations that AI recruiting algorithms are more likely to show ads for higher paying jobs to men over women.
- Illinois' Department of Children and Family Services spent $400K in a software to identify children at risk that flagged the wrong cases to follow up.
- A team of students beat a well-known image classification AI algorithm by rotating and cropping pictures.
- Spam filters sending the wrong emails to junk.

But Why Audit?

- EEOC Chair Burrows: **more than 80%** of employers are using AI in some form in their work and employment decision-making.
- EEOC and OFCCP are collaborating in evaluating firms' use of Artificial Intelligence (AI) tools in hiring decisions through their HIRE Initiative.
- **August 6, 2023: EEOC settles its first-ever AI hiring discrimination lawsuit.**
  - The agency alleged the AI tool was programmed to automatically reject older individuals.
- EEOC Brief in Workday
  - Arguing Workday can be responsible for tools it has developed for use in HR.

Talking through the analysis

Methodological decisions require interaction with employer and counsel as these decisions are mainly driven by business processes and laws and regulations.

- What time period to analyze?
- Which stages of the employment process the AEDT used?
- Which stages of the employment process to analyze?
- What measures of the AEDT output to analyze?
- Any exclusions from the analysis (individuals, locations, business units, jobs)?
- Any missing demographic information?

Adverse Impact: The Other "AI"

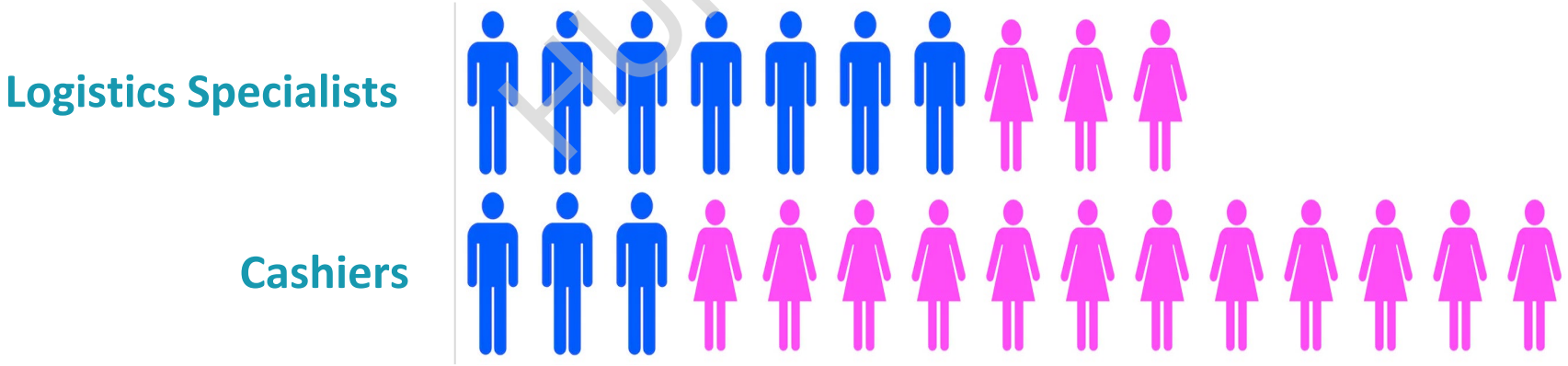
Retail establishment

Two types of jobs: logistics specialists and cashiers

Each figure below represents 5 applicants

50 applicants for logistics specialist jobs: 15 females, 35 males

75 applicants for cashier jobs: 60 females, 15 males



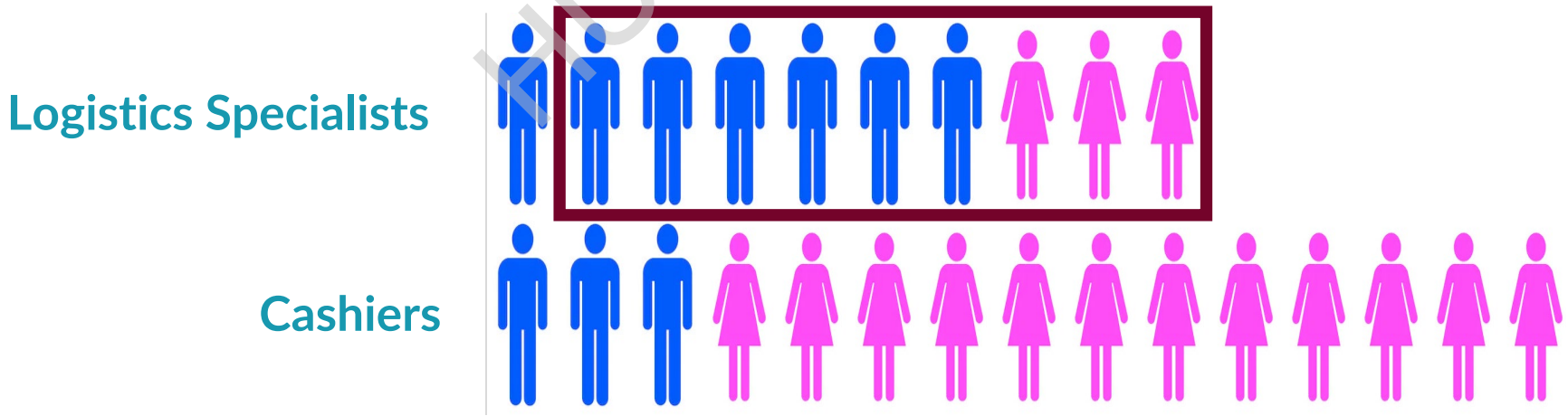
Adverse Impact: The Other "AI"

COVID-19 Pandemic begins

Lockdowns and switch to home deliveries

Hiring freeze for cashier positions (zero hires)

Hiring spree for logistics specialists (rectangle): 30 / 35 males and 15 / 15 females



Adverse Impact: The Other "AI"

Requisition	Female Applicants	Actual Females Hired	Expected Female Hires	Shortfall/ Excess	SDs	Stat. Sig?
Logistics Specialists	15	15	13.5	1.5	1.0	No
Cashier	60	0	0.0	0.0	0.0	No
All Reqs. – **Unadjusted**	75	15	27.0	-12.0	**-4.4**	**Yes**
All Reqs. – **Requisition-Adjusted**	75	15	13.5	1.5	1.0	No

A naïve comparison that ignores hiring rate differences between requisitions incorrectly identifies a hiring indicator unfavorable to women. The indicator arises because women were a larger fraction of the cashier applicants (no hires) and a lower fraction of the logistics specialist applicants (almost all hired).

A statistical comparison that accounts for hiring rate differences between requisitions correctly finds no adverse impact.

Adverse Impact: The Other "AI"

- Correct hiring rate comparison: exclude cashier applicants (no hires)
- 100% of females hired (15/15) and 85.7% of males hired (30/35)
- The gender hiring rate difference is 14.3%, favorable to women, and statistically insignificant (1.0 SDs)
- No hiring indicator
- Mixing jobs that were not alike caused the "hiring indicator"

Adverse Impact in Artificial Intelligence Tools

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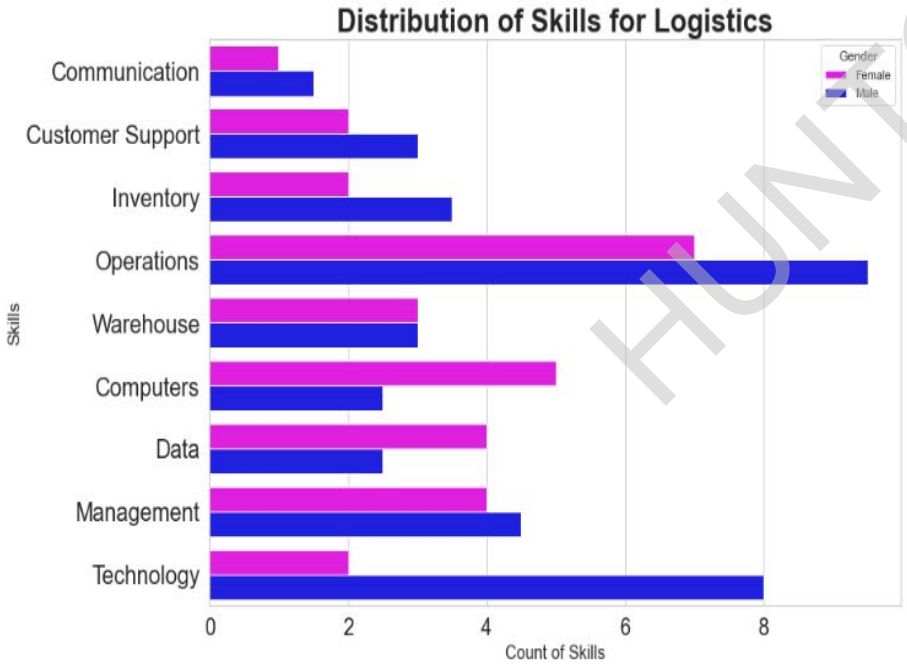
What if you train your AI tool on incomplete or irrelevant data?

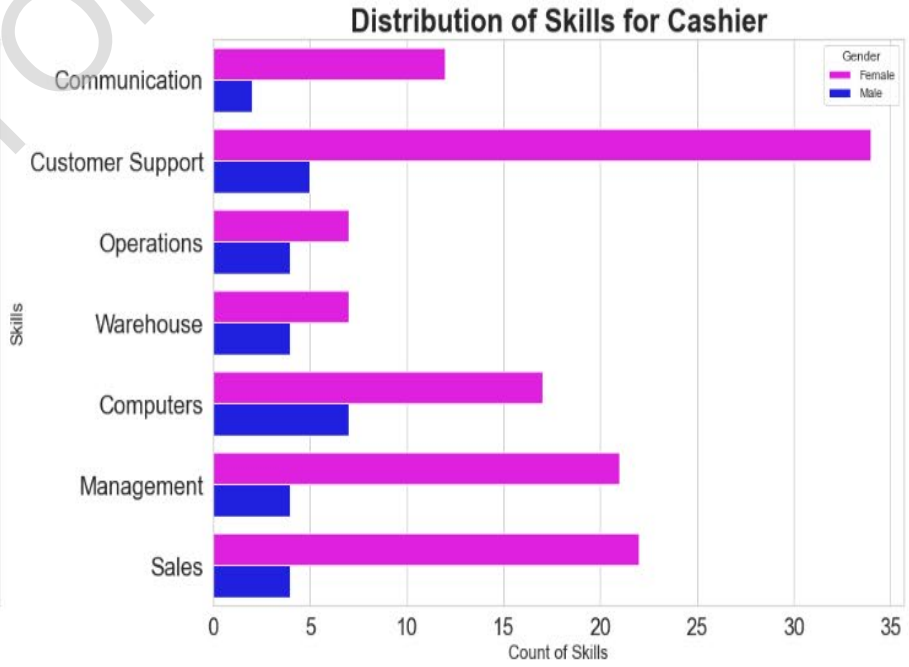
What if your AI model is missing vital context regarding goals?

Training an AI Model to Help in Hiring

Use recent hiring decisions to identify “good candidates.”

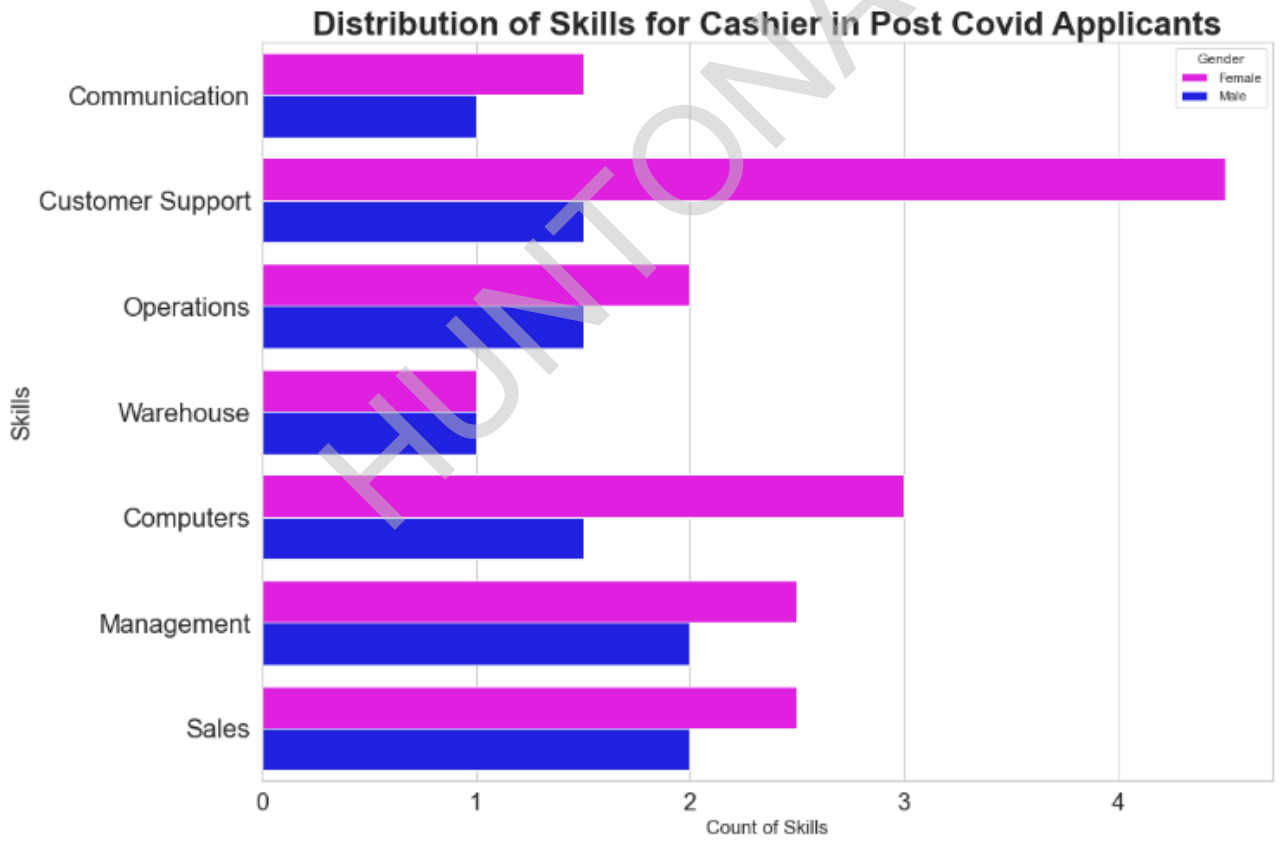
Candidates varied in their skills, and those skills varied across positions.





But…
Operational Needs Have Changed!

Stores are reopening. Cashiers are in high demand!



Statistics and Computer Science Work Their Magic!

A Look At The Training Data

In [109]:
```
x_train.head()
```

Out[109]:

	TechnicalSkill1_Communication	TechnicalSkill1_Customer Support	TechnicalSkill1_Inventory	TechnicalSkill1_Operations	TechnicalSkill1_Warehouse	TechnicalSkill2_Con
0	0	0	0	0	1	
1	0	0	0	0	1	
2	0	1	0	0	0	
3	0	0	1	0	0	
4	0	0	0	1	0	

In [175]:
```
variable_names = x_train.columns.tolist()
cl_names = [var.split("_")[-1] for var in variable_names]
print("List of Variable Names:")
for var in cl_names:
    print(var)
```

```
List of Variable Names:
Communication
Customer Support
Inventory
Operations
Warehouse
Computers
Data
Management
Sales
Technology
```


We processed and coded the skills to make them useful to the computer and programs.

Statistics and Computer Science Work Their Magic!

Fitting Logistic Regression

```
model = LogisticRegression()
```

```
model.fit(x_train, y_train)
```

```
LogisticRegression()
```

```
y_pred = model.predict(x_test)
```

```
#probabilities
y_pred_prob = model.predict_proba(x_test)[:,1]
```

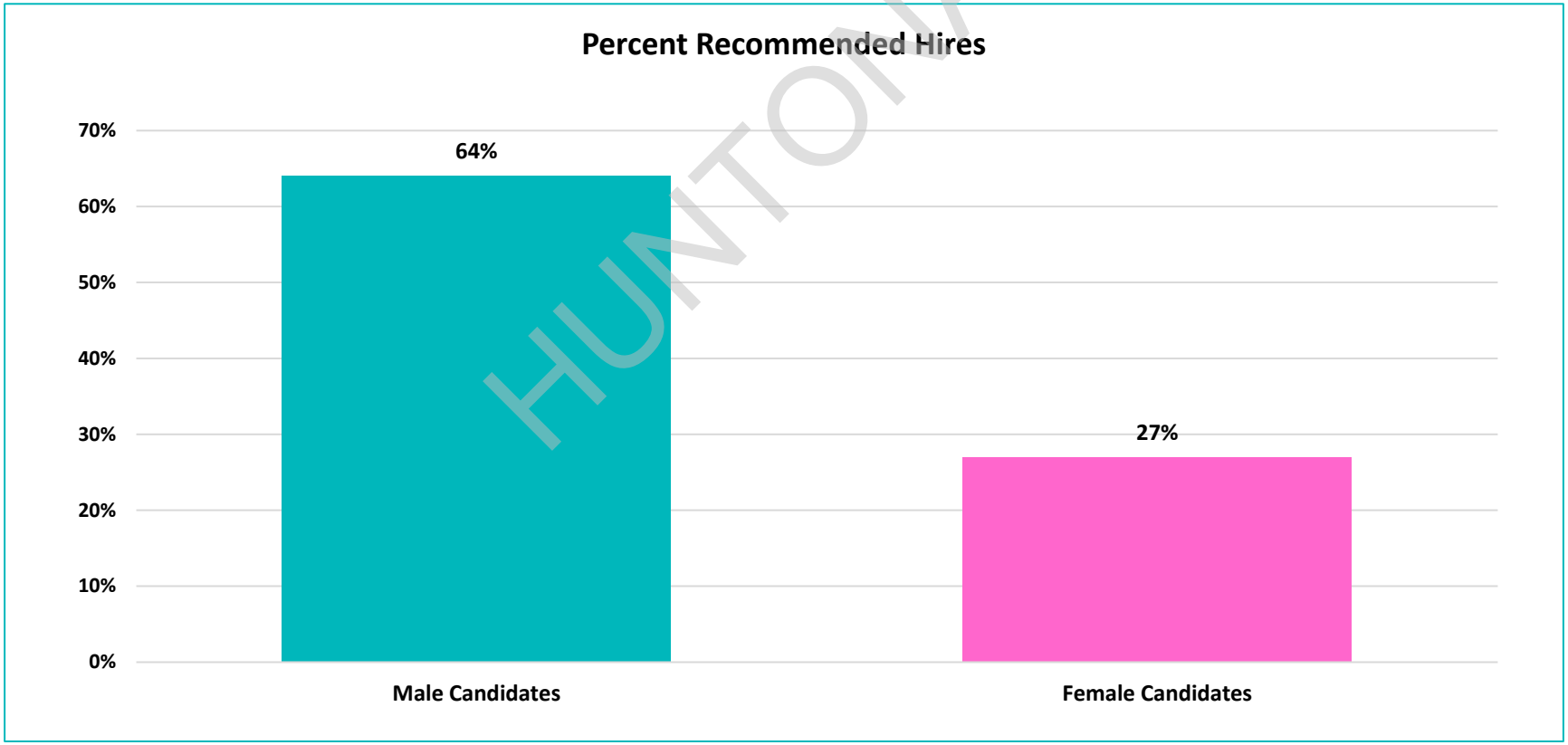
```
display_results=result_df.drop(columns=['Gender'])
display_results.head()
```

	ApplicationID	JobCategory	TechnicalSkill1	TechnicalSkill2	Hired	Pred_Hired	Prob_Hired
0	1	Logistics	Operations	Technology	0	1	0.875814
1	2	Logistics	Inventory	Management	1	1	0.622724
2	3	Logistics	Operations	Management	1	1	0.542854
3	4	Logistics	Warehouse	Computers	1	0	0.340662
4	5	Logistics	Customer Support	Data	1	0	0.402406

- The model “learns” skills that predicted recent hires.
- Aside: Logistic regression has been in the hiring analysis toolkit for decades!

AI Recommendations

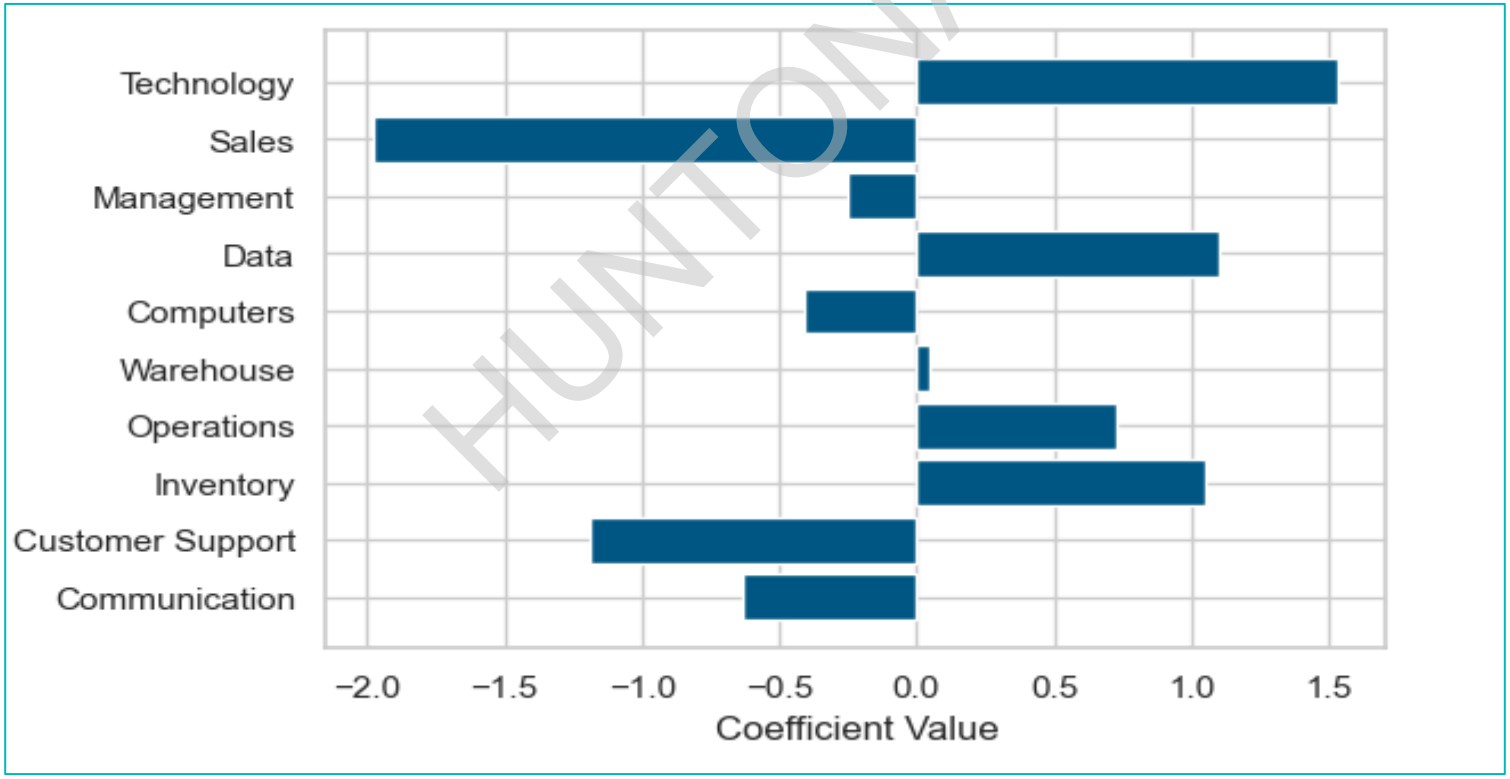
- The Model recommended hiring 27% of female and 64% of male candidates.
- Gender was not in the model. Why the gender imbalance?



Right Learning, Wrong Question!

The model “learned” that recent hires had skills such as “Technology,” “Data,” and “Inventory.”

The model also “learned” that “Sales,” “Customer Support,” and other cashier-relevant skills were virtually absent among recent hires.



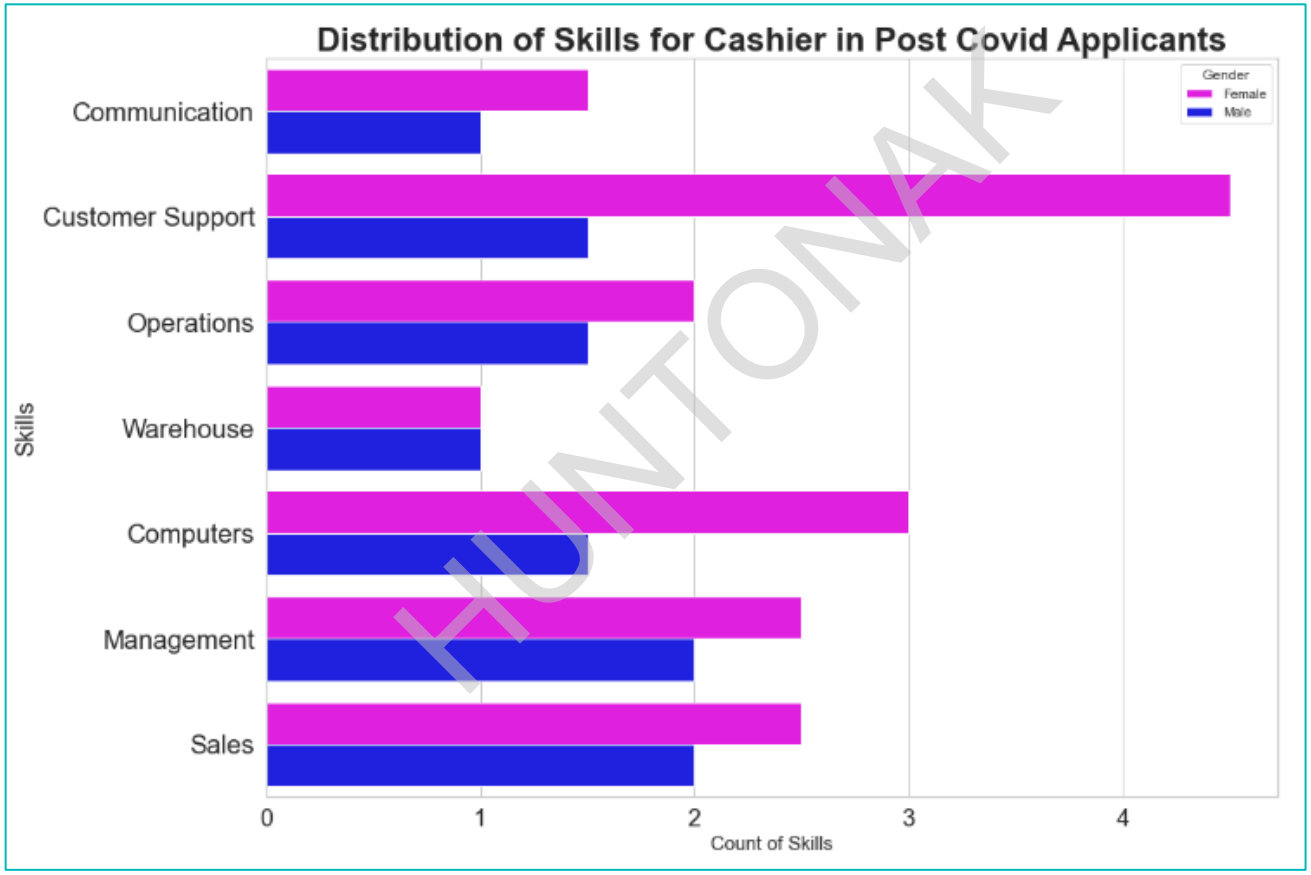
Training an AI Hiring Tool Using Inappropriate Data

The AI Tool equated (correlated) "good candidate" with resume terms such as:

- "Logistics Manager"
- "BS, Logistics"
- "Worked in logistics department at XYZ Corp."

<u>Outcome</u>: The AI tool over-selected male candidates

Gender Differences in Skills + Incorrect Model = Bad Hiring Advice



This Scenario is More Common than You Think

You may think: “No way this can happen in the real world”

Well, it already happened:

“[T]he technology favored candidates who described themselves using verbs more commonly found on male engineers’ resumes”

Imagine a more “realistic” scenario:

- Jobs closer in skill requirements.
- Geographical and temporal differences in candidates’ demographics and skills.

How to approach this bias audit?

What is a bias audit according to NYC Law?

- A bias audit is an impartial evaluation by an independent auditor.
- At a minimum, an independent auditor's evaluation must include calculations of selection or scoring rates and the impact ratio across sex categories, race/ethnicity categories, and intersectional categories.
- The Law does not require any specific actions based on the results of a bias audit.

Broader/More Proper Assessment of AI Bias

- Requires applying a broader adverse impact analysis
- Accounting for how the employment decisions are made
- Comparing individuals who are compared to each other

New York City's Law - Bias Audit Reporting

Impact ratio calculations required by NYC Law

Formula to Use Depends on What AEDT Does (*Scoring vs Selection*)

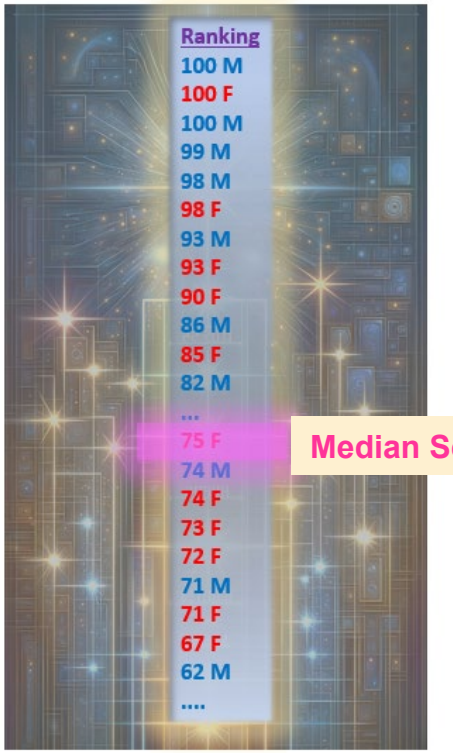
$$Selection\ Rate\ Impact\ Ratio = \frac{Selection\ Rate\ for\ a\ Category}{Selection\ Rate\ of\ the\ Most\ Selected\ Category}$$

or

$$Scoring\ Rate\ Impact\ Ratio = \frac{Scoring\ Rate\ for\ a\ Category}{Scoring\ Rate\ of\ the\ Highest\ Scoring\ Category}$$

New York City's Law - Bias Audit Reporting

Impact ratio based on scoring rate



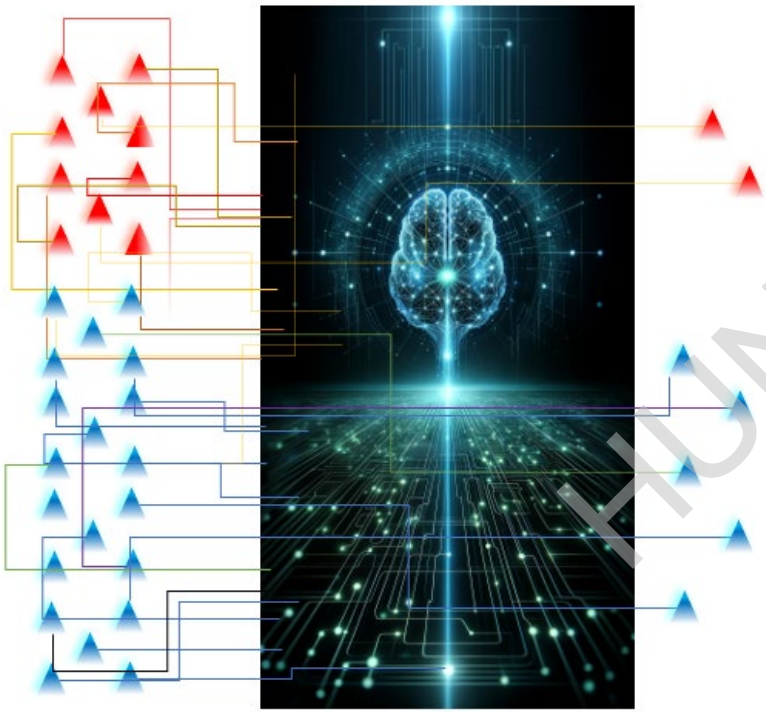
$$Female\ Scoring\ Rate = \frac{10\ Females\ above\ Median}{40} = 25\%$$

$$Male\ Scoring\ Rate = \frac{20\ Males\ above\ Median}{50} = 40\%$$

$$Scoring\ Rate\ Impact\ Ratio\ = \frac{25\%}{40\%} = 62.5\%$$

New York City's Law - Bias Audit Reporting

Impact ratio based on selection rate



$$Female\ Selection\ Rate = \frac{2}{10} = 20\%$$

$$Male\ Selection\ Rate = \frac{5}{20} = 25\%$$

$$Selection\ Rate\ Impact\ Ratio\ = \frac{20\%}{25\%} = 80\%$$

New York City's Law - Bias Audit Reporting

An Example of Analytical Approach and Results

Company XYZ

- Uses AI technology in hiring process
- Sales Associates in NYC
- Applicants answer questions and play games → Assessment scores are generated by an AEDT
- Must meet or exceed cutoff score to pass to next stage

New York City's Law - Bias Audit Reporting

Phase I: Impact Ratio (NYC AEDT Bias Audit)

Sales Associates Position

Above Cutoff Score versus Below Cutoff Score

Gender	# of Applications	% of Overall Applications	Cutoff Score	# Applications Above Cutoff Score	Passing Rate	Impact Ratio
Female	695	51.9%	50	392	56.4%	69.7%
Male	**644**	**48.1%**	**50**	**521**	**80.9%**	**100.0%**
Overall	***1,339***		***50***	***913***	***68.2%***	

AI Analyses – A Closer Look

Phase II: Multiple Pools Analyses

Sales Associates Position
Above Cutoff Score versus Below Cutoff Score

Req ID	# Female Applicants	# Male Applicants	# Female Applicants Above Cutoff	# Male Applicants Above Cutoff	% Applicants who are Female	% Applicants Above Cutoff who are Female	Expected # Female Applicants Above Cutoff	Difference (Actual-Expected)	# S.D.	Significant
All Req IDs	695	644	392	521	52%	43%	450.1	-58.1	-3.95	Adverse
287197	188	95	130	90	66%	59%	146.1	-16.1	-2.31	Adverse
287221	41	75	20	54	35%	27%	26.2	-6.2	-1.50	Neutral
292104	106	91	101	25	54%	80%	67.8	33.2	5.93	Favorable
298563	193	55	50	50	78%	50%	77.8	-27.8	-6.70	Adverse
304776	10	10	10	10	50%	50%	10.0	0.0	0.00	Neutral
264720	57	150	40	134	28%	23%	47.9	-7.9	-1.34	Neutral
264773	57	44	31	44	56%	41%	42.3	-11.3	-2.64	Adverse
265408	43	124	10	114	26%	8%	31.9	-21.9	-4.50	Adverse

AI Analyses – A Closer Look

Phase III: Regression Analysis

Sales Associates Position
Above Cutoff Score versus Below Cutoff Score

Req ID	# Female Applicants	# Male Applicants	Odds Ratio	# S.D.	Significant
All Req IDs	**695**	**644**	**0.92**	**-0.98**	**Neutral**
287197	188	95	0.84	**-1.38**	Neutral
287221	41	75	0.94	**-0.42**	Neutral
292104	106	91	1.79	**3.64**	Favorable
298563	193	55	0.65	**-2.42**	Adverse
304776	10	10	1.03	**1.16**	Neutral
264720	57	150	0.90	**-1.09**	Neutral
264773	57	44	0,96	**-0.33**	Neutral
265408	43	124	0.72	**-2.05**	Adverse

Logistic regression model

Dependent variable: Above Cutoff Score (Yes/No)

Control variables: Total years of sales experience, education, worked for direct competitor, gender

New York City's Law - Bias Audit Reporting

Overview of Statistical Analyses:

- Engage outside counsel to ensure confidentiality of sensitive discussions under the protection of attorney-client privilege.
- Gain a thorough understanding of the data and the scope of its application in analyzing bias.
- Make methodological decisions – coordination between the employer and counsel.
- Understand the limitations of Impact Ratio—It is a rule of thumb, not a statistical test.
- Model the decision-making process as closely as possible given the available data.

Confidentiality and Social Media Issues

Using AI to Trawl Employees' Social Media

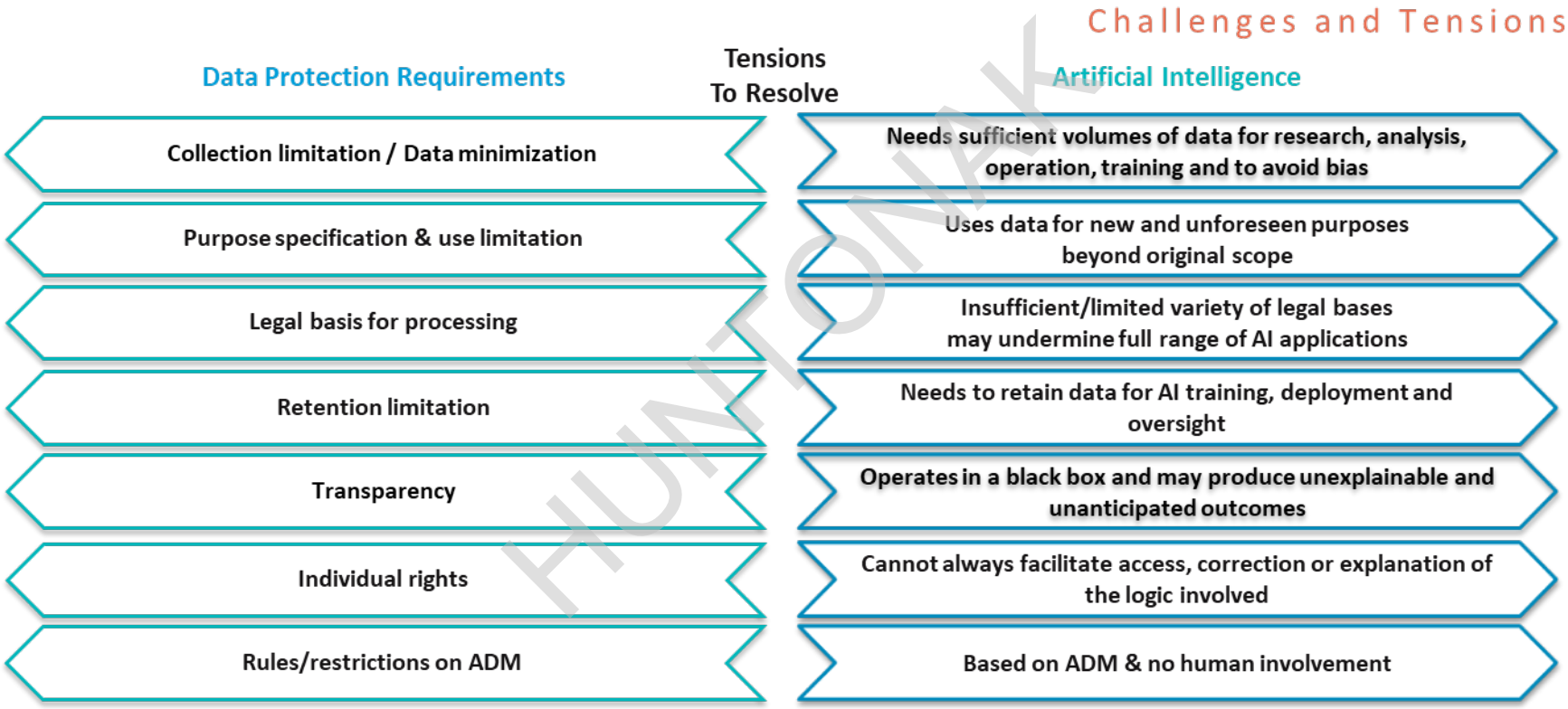
- **What Constitutes Objectionable Social Media Content?**
  - Considerations should be job-related
  - Threatening posts
  - Posts which contradict representations made to the employer
  - Beware of possibility for mistaken identity
- **Employee Privacy Concerns**
  - Social media companies have blocked certain vendors from accessing their sites
  - State laws protecting lawful off-duty conduct (e.g., Colorado, New York)
  - Social media can reveal protected characteristics not otherwise discernible from a resume

Applying Confidentiality / Data Protection Principles to AI

Need to consider the challenges and tradeoffs with processing PI for AI in accordance with data protection principles:

- **Lawfulness**
  - Will the legal basis require consent?
- **Fairness**
  - Are there discriminatory or ethical implications?
  - Need to consider automated decision-making rights and restrictions
- **Transparency**
  - Will maintaining a public privacy notice suffice?
- **Purpose Limitation**
  - Will you be gathering data for undetermined or secondary purposes?
  - Data hoarding is problematic
- **Data Minimization**
  - Can you meet the high bar for de-identification while retaining useful data?
- **Accuracy**
  - Is there a duty to correct or delete the raw data sets? Results?
- **Storage Limitation**
  - Are there bans on unlimited retention of data sets?
- **Security and Confidentiality**

Confidentiality / Data Protection



Read more in CIPL's First AI Report on **Artificial Intelligence and Data Protection in Tension**
https://bit.ly/2QUP2xy

Key Accountability Tools for AI

Leadership and Oversight

- DPO and senior management (boards, committees)
- Network of AI leads, lead legal counsel and privacy engineers

Privacy Reviews

- Risk and benefits assessment / document tradeoffs
- Identify measures to mitigate impact on individuals

Inventorying

- Document types of data and if/how they can be linked back to an individual
- Note how the data processing evolves and if the purpose of the processing changes

Policies and Procedures

- Incident Response Plans, Data Subject Rights Policy, Audit and Monitoring Procedures, Vendor Due Diligence, *etc.* to cover both the training and deployment phases of AI

Training and Awareness

- Involve privacy professionals and engineers
- Fairness and ethics training

Internal Supervision and Verification

- Complaints handling, redress mechanisms and remediation
- Ongoing monitoring, verification and mitigation

Consider requiring ML vendor to:

- Ensure fairness and prevent unwanted bias
- Agree on regular updates and reviews of accuracy
- Guard against changing population and concept drift
- Use privacy enhancing technologies
- Require appropriate safeguards and breach notification
- Employ ethics-by-design
- Ensure appropriate leadership and supervision of the ML process
- Perform ongoing monitoring, audits, evaluation and training
- Perform ML risk assessments
- Implement risk-mitigating measures (e.g., embed human review of data output, maintain documentation)

AI Vendor Diligence Questionnaires – Key Questions

- How does vendor balance accuracy with data minimization?
- Is model's output determinative or used only as a recommendation?
- Has vendor incorporated human review?
- Does vendor engage in data scraping practices to obtain data?
- How does vendor ensure fairness and accuracy, and prevent unwanted bias/potential discrimination?
- Has vendor conducted ML Risk Assessment and what was the outcome?
- Does ML model design allow identification and extraction of relevant data to respond to DSRs?
- How does vendor's accountability program include ML model?
- Does vendor keep data of customers separate?
- Does vendor derive value from customer data analysis and re-use data for benefit of other customers?

AI Productivity Monitoring

Productivity Monitoring: Examples of Available AI

Keystroke Monitoring. Tracks and records keyboard activity, whether into web browsers, instant messages, e-mails, applications, documents or other programs.

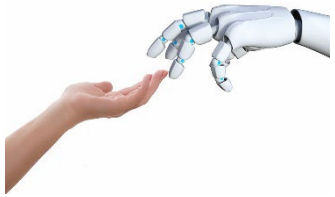
Activity tracker. Monitors/tracks web browsing, records which applications are used and the amount of time spent on each. May take periodic screenshots.

Email tracking. Measures how many emails employees are sending and receiving, how much time spent on messages, and identifies busiest days and times.

Data loss prevention solution. Detects anomalous patterns or behavior through keystroke logging, network traffic monitoring, and natural language processing.

Facial recognition tool. Uses workers' webcams for various purposes, including to record when an employee had stepped away from his computer.

Engagement Algorithm. Used to detect employee emotions, unhappiness, and disengagement. Looks for patterns to predict when workers are likely to quit or engage in behavior adverse to the company.



Productivity Monitoring: Benefits To Your Workplace

Learning how employees work best. Identify tools employees need, discover employees' most productive periods and which teams work best.

Decreasing distractions. Identify websites and activities that create distraction. Reduce, block or prohibit use.

Keeping employees on task. Monitored employees tend to stay on task more; The Hawthorne Effect.

Keeping employees accountable. If employee did not finish a project, you may be able to see why.

Rewarding exceptional performance. Identify and reward productivity.

Balancing workloads. Identify those that are overworked and those that do not have enough to do. Redistribute workloads appropriately.

Starting a conversation. May help managers identify earlier those employees who are struggling and start a conversation to help the employee improve.

Some states have imposed greater limitations than federal law

- **Connecticut** and **Delaware** require employers to inform workers of email monitoring
- **Colorado** and **Tennessee** require email monitoring policies
- **California**, **Florida**, **Louisiana** and **South Carolina** guarantee citizens a right to privacy
- **California** and **Illinois** require employers to obtain consent from third parties before intercepting emails sent to employees
- **California**, **New York**, and **Massachusetts** have enacted spyware laws prohibiting access to personal devices without prior authorization

Common Law Invasion of Privacy Claims

- Elements *differ* by jurisdiction
- Courts generally weigh the employee's reasonable expectation of privacy against the employer's legitimate business interest

Productivity Monitoring: Legal Considerations

Electronic Communications Privacy Act (ECPA)

National Labor Relations Act (NLRB)

- Surveillance of employees engaged in concerted activity may be unfair labor practice.

The 4th Amendment

- May cover certain public employees. Prohibition against unlawful search and seizure.

General Data Protection Regulation

- Applies in the European Union. Requires necessity, awareness, and agreement.

California Consumer Protection Act (CCPA)

- Requires "notice at collection" at or before personal information collected.
- Identifies "browsing history, search history, and information regarding a [worker's] interaction with an internet website, application, or advertisement" within scope.

State Social Media Password Protection Laws

- Over 25 states have laws that prohibit employers from requesting or requiring employees to provide credentials to their online personal accounts.

Practical Tips for Employers

Thinking about AI Correctly

- AI requires accurate and complete data and a thorough understanding of the project.
- Consult outside counsel and have frequent conversations with vendors.
- **Introspective Questions:**
  - How do I know AI is working?
  - How much AI? Which type of AI?
  - All HR processes? Some?
  - Which vendor to choose?
- **Do not** blindly follow AI.

Questions?

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Additional Resources

Hunton Employment & Labor Perspectives Blog:

Analysis and Development in Employment & Labor Issues

https://www.huntonak.com/hunton-employment-labor-perspectives/

HuntonAK Insights

https://www.huntonak.com/insights/informed

Thank you!