

Implicit Bias In The Workplace: What Are The Risks, And How Can Companies Mitigate Them?

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Presented by



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CA State Bar's New MCLE Requirements

Rule 2.72 of the Rules of the State Bar of California was amended effective September 24, 2020 to incorporate a new implicit bias education requirement. As such, on and after January 1, 2022, the total hours of required MCLE must now include no less than seven hours as follows:

- At least four hours of legal ethics.
- At least two hours dealing with elimination of bias. ***Of the two hours, at least one hour must focus on implicit bias and the promotion of bias reducing strategies.***
- At least one hour of education addressing competence issues.



What is Unconscious Bias?

What is Unconscious Bias?

- Our brains receive and process 11 million bits of information per second, but we can only consciously process 40 bits
- **Two levels of thinking:**
 - Level 1 – Thoughtful and Deliberate
 - Level 2 – Unthinking and Automatic
- Level 2 dominates much of daily life, making as much as 90% of your daily decisions



Level 2 – Unthinking and Automatic



- **Automatic** decision-making hard wired into everyone (e.g. fight or flight).
 - Used to assess whether an object, animal or person is dangerous. Not a negative trait. It is a necessary one.
- Bias is a subjective, predetermined preference towards a viewpoint about roles, behaviors or individuals
- Unconscious perceptions influence many of the most important decisions we make (hiring, mentoring, promoting, etc.)
- Social stereotypes about groups of people that impact our interactions, perceptions and beliefs about others that are outside of our consciousness.

Unconscious Biases

- Unconscious biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or intentional control.
- A Few Key Characteristics of Unconscious Biases:
 - Unconscious biases are **pervasive**. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
 - The unconscious associations we hold **do not necessarily align** with our declared beliefs or even reflect stances we would explicitly endorse.
 - We generally tend to hold unconscious biases that **favor our own ingroup**, though research has shown that we can still hold unconscious biases against our ingroup.
 - Unconscious biases are malleable. Our brains are incredibly complex, and the unconscious associations that we have formed **can be gradually unlearned** through a variety of debiasing techniques.

Adapted from the Kirwan Institute



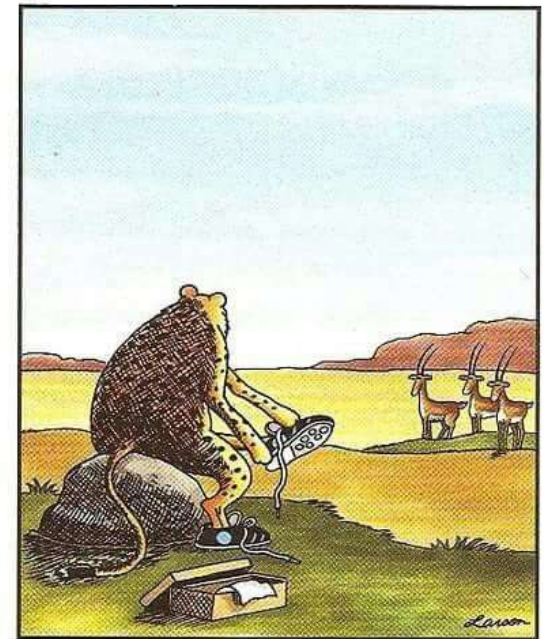


THE BIAS TEST

INSTRUCTIONS

On a scale of 1-10 (1 is lowest; 10 is highest), please rate each person on the following:

- **Successful**
- **Not Successful**
- **Similar to Me**



Man #1



On a scale of 1-10:

- **Successful**
- **Not Successful**
- **Similar to Me**

Woman #1



On a scale of 1-10:

- **Successful**
- **Not Successful**
- **Similar to Me**

Man #2



On a scale of 1-10:

- **Successful**
- **Not Successful**
- **Similar to Me**

Man #3



On a scale of 1-10:

- **Successful**
- **Not Successful**
- **Similar to Me**

Man #4 & 5



On a scale of 1-10:

- **Successful**
- **Not Successful**
- **Similar to Me**

Man #1

John Fetterman



- U.S. Senator from Pennsylvania. Elected in 2022.
- Lt. Gov. of Pennsylvania. Took office Jan. 15, 2019.
- Mayor of Braddock, PA from 2005-2019
- Master's degree in Public Policy from Harvard
- Served in the AmeriCorps

Woman #1

Pratibha Patil



- Attorney
- Economist
- First female president of India, 2007-2012

Man #2

Phillip Markoff



- Boston University Medical Student (2009)
- Craigslist Killer



Woman #2

Tamika Cross, MD

UT★Physicians
A Part of UTHealth

About Us Find a Provider / Clinic Patient Information Health Programs/Services



Tamika Cross, MD

Request an Appointment

Specialty: [Obstetrics and Gynecology](#)

About Reviews



4.8 out of 5 stars

[about our survey](#)

Education/Training

Medical School

Meharry Medical College School of Medicine, 2013

Residency

The University of Texas Health Science Center at Houston, 2017



- Chief OB/GYN Resident at the Harris Health Lyndon B. Johnson Hospital, University of Texas Health Science Center at Houston
- Delta Air Lines staff didn't believe she was a doctor during an in-flight medical emergency

The New York Times

Black Doctor Says Delta Flight Attendant Rejected Her; Sought 'Actual Physician'

By Christine Hauser

Oct. 14, 2016



Man #3



Oscar Schindler

- *Schindler's List* starring Liam Neeson. Won 7 Oscars, including Best Picture and Best Actor.
- Served in the Nazi military running a weapons factory employing Jewish workers. Directly responsible for saving 1,200 Jewish people from Nazi concentration camps.
- Spend his entire fortune bribing Nazi officials to save his workers. Declared bankruptcy in 1958 and was supported for the rest of his life by assistance payments from Jewish relief organizations (aka *Schindlerjuden* – “Schindler Jews”)

Man #4 & 5 Couple applying for marriage license in Seattle, WA.



The Impact of Unconscious Bias on the Workplace

Unconscious Bias in the Workplace

- The potential influence of bias in the workplace is wide-ranging.
- Unconscious bias affects how we evaluate talent, performance, assignments, and promotions.

Unconscious Bias in the Workplace

- Center for Talent Innovation's report, *Disrupt Bias, Drive Value*, there are three major costs that companies experience when employees perceive bias:
 - Burn outs – Increased sense of alienation, reduced sharing of ideas, reduced sense of pride in work.
 - Bust outs – Attrition.
 - Blow ups – Increased expression of negative views of employer, intentional failure to follow through on important tasks, refusal to refer people to employer.



Implicit Bias in Artificial Intelligence

What is AI Bias?

- Artificial Intelligence (AI) bias refers to the tendency of algorithms to reflect human biases. In today's climate of increasing representation and diversity, this becomes even more problematic because algorithms could be reinforcing biases, and it's difficult to know about them until they've been programmed into the software.
- **What are the types of AI Bias?**
 - **Cognitive biases:** These are unconscious errors in thinking that affects individuals' judgements and decisions. These biases arise from the brain's attempt to simplify processing information about the world. Cognitive biases could seep into machine learning algorithms via either:
 - designers unknowingly introducing them to the model
 - a training data set which includes those biases.
 - **Lack of complete data:** If data is not complete, it may not be representative and therefore it may include bias. For example, most psychology research studies include results from undergraduate students which are a specific group and do not represent the whole population.

Real-Life Examples of Implicit Bias in AI

- In 2018, Amazon reportedly scrapped an AI and machine learning-based recruitment program after it was found that the algorithm was biased against women. Amazon's AI model was programmed to vet candidates by observing patterns in resumes submitted to the company over a 10-year period. The majority of those candidates had been men, which led the system to deduce that male candidates were preferred over female candidates.
- In 2019, researchers found that an algorithm used in US hospitals to predict which patients will require additional medical care favored white patients over black patients by a considerable margin. Because the expense of healthcare emphasizes an individual's healthcare needs, the algorithm considered the patients' past healthcare expenditures.
- According to a 2015 study, only 11 percent of the individuals who appeared in a Google pictures search for the term "CEO" were women. Research revealed that Google's online advertising system displayed high-paying positions to males much more often than women.

Employer Uses of Artificial Intelligence

- Employers now have a wide variety of computer-based tools available to assist them in hiring workers, monitoring worker performance, determining pay or promotions, and establishing the terms and conditions of employment. Employers may utilize these tools in an attempt to save time and effort, increase objectivity, or decrease bias.

Examples include: resume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived “cultural fit” based on their performance on a game or on a more traditional test.

- Employers must take care that their AI does not run afoul of federal, state, or local employment laws.



EEOC Guidance and Recommendations

On May 12, 2022, the Equal Employment Opportunity Commission (“EEOC”) and the Department of Justice released technical guidance entitled *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*.

Recommendations:

- Employment technology should provide clear instructions for requesting accommodations
- Employment technology should ensure that requesting a reasonable accommodation does not diminish the applicant’s opportunities
- Provide staff training
- Ensure the vendor complies with applicable regulations



Legal Risks of Implicit Bias

Lawsuits Based on Imp

These news anchors say their bosses are grooming younger women who look like them to take their jobs



DIVERSE-IT

By Sharon Florentine, Senior Writer, CIO | FEB 1, 2019 2:30 AM PST

NEWS ANALYSIS

Oracle the latest to face pay discrimination

Oracle allegedly withheld \$400 million in wages from racially underrepresented workers to a U.S. Department of Labor complaint filed last week.



PwC Lawsuit Alleges Older Applicants Were Target Of Collective Discrimination In Recruiting Efforts

After a recent court ruling against PricewaterhouseCoopers (PwC), companies will want to review recruiting efforts to ensure that older candidates are not being impacted by unconscious bias and discrimination. In *Rabin, et al. v. PricewaterhouseCoopers*, the federal court ruling granted collective action to plaintiffs who allege

The screenshot shows the CBS News website interface. At the top, there is a navigation bar with 'NEWS', 'SHOWS', and 'LIVE' dropdown menus, along with a search icon. The main headline reads: 'A top flutist, paid \$70,000 less than a male oboist, sues for gender bias'. Below the headline, it says 'BY AIMEE PICCHI' and 'DECEMBER 12, 2018 / 4:02 PM / MONEYWATCH'. On the right side of the article preview, there are social media sharing icons for Facebook, Twitter, and YouTube.



Evidence of Implicit Bias in Litigation

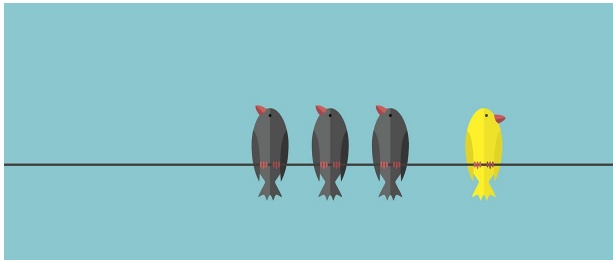
- Arguments are being made to courts and before juries that implicit bias can result in discrimination in even the most well-intentioned employer's workplace practices. Some courts have accepted implicit bias evidence. Some have not.
- A trend may be developing that permits judges and jurors to consider implicit bias theory and evidence as part of the overall proofs presented in employment discrimination cases.
 - ***Kimble v. Wisconsin Department of Workforce Development*, 690 F. Supp. 2d 765 (E.D. Wis. 2010)** – The court determined that implicit bias played a role in decision not to give plaintiff a pay raise.
 - ***Samaha v. Washington State Dep't of Transp.*, 2012 WL 11091843 (E.D. Wash. 2012)**- The court agreed with the plaintiff that testimony about implicit bias was relevant to the proof of intentional discrimination and could be “helpful to the jury” in understanding how implicit bias functions in the employment setting.
 - ***Martin v. F.E. Moran, Inc.*, 2017 WL 1105388 (N.D. Ill. 2017)** - A federal district court allowed expert testimony from an assistant law professor with a Ph.D. in social psychology concerning implicit bias in a race-discrimination case



- All requests for information should be **related to the job(s)** for which the applicant is applying
 - Employers should not request information that is **likely to elicit** information about protected characteristics -- on application forms, job interviews, or in background or reference checks
 - Employers should not ask for a **photograph** of an applicant (If needed for identification purposes, a photograph may be obtained after an offer of employment is made and accepted.)
- Whenever possible, ask all applicants the same questions to **standardize** the interviewing process
- If the applicant volunteers information which would be illegal to request, the employer may not use that information as a basis for rejecting the applicant
- **Liability** for discrimination exists, regardless of whether the information was unlawfully solicited or volunteered!

Best Practices for Addressing Implicit Bias in the Workplace

Recognizing and Addressing Implicit Bias in the Workplace



- Have a basic understanding of the cultures from which your clients/coworkers come
- Try to recognize situations that magnify stereotyping and bias
- Understand that it is a long-term endeavor
- Anonymize where possible
- Foster or create employee networks (*e.g.*, resource/affinity groups)
- Be conscious of areas where bias can impact institutional decision making (**hiring**, discipline, work assignments, promotions)

How to Tackle Implicit Bias in Recruiting & Hiring

- **Job descriptions**
 - Requirements job-specific
 - Avoid problematic pronouns or age-specific language
- **Resumes**
 - Process? Guidelines? Standardized?
 - Consider: blind review
- **Setting Salary Ranges**
 - Pay scales current and reflect actual practices?
 - Consider:
 - Market surveys
 - Standardized compensation bands
 - Criteria within bands *i.e.* 1-3 yrs of experience vs. 3-5 yrs
 - Avoid admonishments not to discuss compensation



How to Tackle Implicit Bias in Recruiting & Hiring

■ Interviews

- Best practices:
 - 70/30 Rule
 - Avoid Tangents
 - Avoid: Halo, Similar-to-Me, Contract Effects
 - Allow for Silence
- Consider:
 - Structured format
 - Interview guide/Same questions
 - Panel interviews with ratings; diversity of input



How to Tackle Implicit Bias in Recruiting & Hiring

■ Interview Notes

- Best Practices:
 - Only record what happened in the interview
 - Record objective facts, not subjective impressions
 - Use quotes deliberately
 - Choose: fast or neat. Re-write as needed before litigation
 - Preserve notes
- Consider:
 - Panel Scoring
 - Consensus Building Towards Overall Rating
 - Consistency



Thank You

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