EPIC Files Complaint with FTC Regarding AI-Based Facial Scanning Software

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As we have previously [blogged](), the use of third-party digital hiring platforms to select job applicants using video interviews can present an array of potential legal issues. A recent [Complaint]() filed with the Federal Trade Commission ("FTC") by a consumer advocacy organization, Electronic Privacy Information Center ("EPIC"), illustrates some of those potential pitfalls. EPIC asks the FTC to investigate the recruiting technology company [HireVue]() for alleged discriminatory screening of job applicants through its face-scanning software. HireVue asks job applicants to video-record answers to pre-approved questions and uploads those recordings. HireVue then uses artificial intelligence ("AI") to scan applicants' faces during the recorded answers to analyze facial expressions and grade applicants' expressions according to a non-public rubric.

The Complaint alleges that HireVue's recruiting tools are unfair and deceptive, producing results that are "biased, unprovable, and not replicable" through algorithmic models that fail to meet international standards to AI-based decision making, facial recognition software that could be racially biased or improperly used to identify sexual orientation, and discriminatory eye movement tracking captured in video assessments. The Complaint alleges that HireVue's software fails to adhere to the Universal Guidelines for Artificial Intelligence framework, a set of 12 non-binding principles announced in Brussels, Belgium, on October 23, 2018, at the [Public Voice]() symposium. The Universal Guidelines have not been adopted into law in the United States. The Complaint also alleges that HireVue's software could be biased towards certain groups of individuals, stating that "AI tools often contain gender biases" because the hiring algorithms are built "on data-based from top performers" that can be flawed. The Complaint further alleges that the eye-tracking software could disparately impact people with certain disabilities, e.g., visually impaired applicants whose eyes do not move in the same manner as the "sighted." In short, the Complaint calls into question many of the features HireVue uses in its video interview software.

Once a complaint has been filed with the FTC, the Commission undertakes an investigation. During the course of the investigation, the Commission must determine, under Section 5 of the FTC Act, if the trade practice complained about is unfair. "Unfairness" is determined by analyzing whether the practice at issue "causes or is likely to cause substantial injury to consumers … and not outweighed by countervailing benefits to consumers or to competition." Following an investigation, if the FTC has

"reason to believe" the law is being violated, it may initiate an enforcement action through an administrative or judicial process, which could result in the imposition of a temporary restraining order and preliminary injunction to halt the unfair conduct, and/or civil penalties or monetary relief, up to and including freezing assets.

While the HireVue investigation remains in the early stages, companies using any type of digital hiring software should proceed with caution pending the FTC's investigation. While companies do not have to cease using the technology, there are sensible steps they can take to mitigate against legal risk.

When utilizing third-party technology for the hiring process, employers should:

- Conduct due diligence on the product or software prior to purchase;

- Review legal requirements in the applicable jurisdiction (such as Illinois or outside the U.S.);

- Work with the vendor to conduct a job analysis prior to implementation;

- Monitor the use of the software and conduct adverse impact analyses to reduce the likelihood of disparate impact claims;

- Review overall results of the hiring process by analyzing job offer outcomes;

- Audit the systems and algorithms implemented for bias;

- Prepare an appropriate validation study; and

- Give prospective employees notice of the use of the software.

National Law Review, Volume X, Number 9

Source URL:https://natlawreview.com/article/epic-files-complaint-ftc-regarding-ai-based-facial-scanning-software