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The Risks of AI-Driven HR Tools for Data Protection and Privacy

Organizations are increasingly using data-driven tools for the recruitment and selection of personnel. However, the use of artificial intelligence and algorithms in recruiting systems also add risks for data protection and GDPR compliance. Lokke Moerel, professor at Tilburg University and senior of counsel at Morrison & Foerster, talks about the current developments in laws and regulations and what privacy professionals need to know.

The scarcity of talent in the job market and the increasing digitization mean that more and more organizations are using high-tech HR tools for the recruitment and selection of new employees. Think of job boards to find suitable candidates and online video platforms to interview applicants. In many cases, these tools are driven by artificial intelligence (AI). The systems use algorithms to, for example, make predictions about a possible match between the vacancy and the candidate.

"Over the last few years, we have seen a flurry of AI-driven tools, and the HR departments that procure and implement these tools do not always conduct any due diligence as to the design and development of them," says Lokke Moerel, professor of technology & law at Tilburg University and a member of the global Privacy and Data Security team of Morrison & Foerster, an international law firm that specializes in technology. Moerel is also a member of, among other organizations, the Dutch Cyber Security Council and the Supervisory Board of the Dutch foundation managing the .nl Internet country code top-level domain for the Netherlands.

Assessing Privacy Risks

Moerel, who will give a keynote speech during the Current Affairs Congress Data Protection & Privacy on October 7, 2021, emphasizes that privacy professionals have an important contribution to make to the responsible application of the new HR tools. "The tools that are on the market are often a black box and therefore the transparency and explainability requirements of the General Data Protection Regulation (GDPR) cannot be met. This is where privacy professionals really have a role to play in assessing the risks of applying algorithms. For example, the datasets with which algorithms train may show bias. This can lead to

discriminatory outcomes. Research shows that without active measures to mitigate bias, bias will arise in predictive hiring tools *by default*."

"A recruitment and selection process is rarely a single decision, but rather the culmination of a whole sequence of steps and decisions. Algorithms and AI tools play different roles throughout this process, and each component has its own pitfalls," says Moerel. "For example, AI-driven tools are used for searching for passive candidates, steering job ads to target candidates, screening applicants via video interviews, and filtering and ranking résumés for a shortlist of candidates. The common denominator of all tools is that once a candidate is excluded in a certain stage, he/she is not reconsidered at the next stage." If job ads never reach certain groups, these groups will also not enter the recruitment process.

A Systematic Review of the Entire Process

"Algorithms rarely make affirmative hiring decisions, but they do automate the rejections," Moerel warns. "In an HR department, it is sometimes thought that there is no automatic decision-making if, for example, a recruiter looks at the automatically generated shortlist of candidates and makes the selection based on that. But even in such a case, there is automatic decision-making because the algorithm has automatically excluded candidates when generating the shortlist. If bias occurs in deselection, then the processing does not meet the fairness requirement."

Moerel advises to systematically review the entire recruitment and selection process to prevent bias from creeping in. "Sometimes, at a specific stage, everything has been done to eliminate bias from the data used to train the specific algorithm. But algorithms are usually constantly updated via a so-called *feedback mechanism*, and bias may well be re-introduced at a later stage. Think of a recruiter who always selects mainly white male candidates from a shortlist. As a result, the algorithm will eventually also propose more white male candidates. In order to achieve good results, a review of all parts of the process, including the human interventions, is therefore required."

Example of Bias

In her keynote, Moerel discusses various examples of how bias in HR tools can arise. "Employers often use job boards and other online platforms to reach the most 'relevant' job seekers. These advertising platforms use algorithms that often make superficial predictions. They do not predict who will be successful in the role, but who is most likely to click on that job ad (so that the platform generates more revenue). Research shows that as a result, advertisements for taxi drivers, for example, mainly end up with men and advertisements for cashier positions mainly end up with women. These type of algorithms reinforce gender and racial stereotypes from the real world, even when employers have no such intent." The feedback loop may also be a pitfall, if the algorithm for delivering the ads is dynamically updated based on the recruiter's preferences and the interaction between recruiter and the candidate who responds to the ads.

Bias can also creep in during the interview process. Moerel explains, "There are tools to conduct online job interviews, whereby the AI analyzes the video and sound input of the candidate, and makes predictions about their personality, for example, by using facial recognition and analyzing the use of linguistics and grammar. But facial expressions and vocabulary vary greatly among different cultures. If a tool is not trained with data from a diverse group of cultures, there is a risk that the facial expressions of minority groups will be less well recognized."

Can you also provide examples where HR tools are used to reduce bias?

"In fact, all AI-driven tools that alert users to previously hidden patterns of bias are useful," says Moerel. "With the help of algorithms, you can actively search for diverse candidates and put them on a shortlist for consideration. There are also tools that screen the text of the job description to ensure inclusive language. Research has shown that women who read job descriptions with masculine-coded language found them less attractive and were less likely to apply for them. Here AI tools can bring real benefits."

Focus of Supervision for Data Protection and Privacy

IIR's Data Protection & Privacy Current Affairs Congress seminar has been specially developed for professionals who are looking for up-to-date knowledge about legal, practical, and ethical challenges around data protection, privacy, and GDPR compliance. The topic of AI-driven HR tools touches on a number of important themes that will be highlighted during the conference, in particular *responsible tech*.

Moerel signals a growing awareness about the risks of HR tools that uses AI. "We are seeing the first complaints that recruiting tools are discriminatory being filed, and a flurry of new laws, codes for ethical AI, and regulatory guidance targeting the use of AI, some of which even specifically targeting the use of AI in *the world of work* being launched. New York State now even has a bill pending that specifically proposes to regulate AI hiring tools. Also, the European Commission's new proposal for an AI Regulation will have a big impact." The Dutch Data Protection Authority further announced that application of AI is one of its main focus areas for its enforcement and has outlined the basic principles for GDPR compliance in an explanation of the legal framework.

Preparing for the European AI Regulation

The draft European proposal for an AI Regulation makes a distinction between AI systems and applications with a minimal or low risk (such as spam filters), a high risk (such as chatbots and deep fakes), and those that pose an unacceptable risk. The higher the risk, the stricter the rules. "AI systems used by employers for recruitment fall under the high risk category. Providers must comply with a heavy regime of risk management requirements, including monitoring, detection, and correction of bias. Rules also apply to users. They must monitor the AI system for correct operation and – if the user has control over data input – ensure that the data processing is relevant for the intended use." At the same time, the proposal emphasizes that existing legal obligations, such as the GDPR, continue to apply.

The AI Regulation will be assessed by the Member States and the European Parliament in the coming years. Moerel expects that the legislation will have a major impact. "I think that almost all HR tools that are currently on the market do not meet the standards of the draft AI

Regulation. Organizations would therefore do well to prepare for the future requirements. In addition, the active involvement of data protection officers and other privacy experts is certainly necessary."

Want to learn more about the impact of AI on data protection? Then follow the Current Affairs Congress Data Protection & Privacy in Amsterdam on 7 and/or 8 October.