Big Data in Employment Law: An ACC-NCR Workshop

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Big Data in Employment Law - Agenda

- Scenarios – Table Exercises and Reports Out
- Common Uses of Big Data in Employment – 2018
  - Key definitions and terms
  - Recruitment and Hiring
  - Other
- Key Legal Issues
  - Disparate treatment
  - Disparate impact
  - Internet applicant issues – whittling the applicant pool
  - UGESP issues
VP for Talent Acquisition (TA) schedules a 60-minute meeting with you, the chief employment counsel, for OragoogbookIn. He brings you up to speed on a project the HR business analytics group within TA has completed regarding software developers OragoogbookIn has hired over the last five years. Through predictive analytics, the group has determined that employees with the following characteristics have both performed better than the average software developer and have remained at the Company for longer periods of time than the average software developer:

• Graduated with a GPA between 3.1 and 3.3 from a school that ranks in the top twenty in Computer Science, but is not located in California
• Lives within three miles of OragoogbookIn’s main campus after being hired
• Used certain phrases on their resumes
• Spend less than 60 minutes on the Company’s website browser during the course of a work day
• Have ordered at least four books on-line annually
• Have worked at fewer than three companies before being hired by OragoogbookIn
• Have enrolled in the “employee only” option under the company’s health care plans

Algorithm would permit the Company to better find among its 25,000 applicants for software developer positions individuals who have these characteristics. Estimated save is $15MM/year
“Cari – We have now completed the ‘Successful VP Profile Project’ I may have told you about back when we launched it in April 2017. Based on our analysis of directors who have become successful VPs at BigHouse over the last ten years, the key characteristics are the following:

- Advanced degree (beyond BA or BS)
- 12-15 years of total work experience (with no more than four of those years at another company)
- Average meeting time of less than four hours per day as a director
- Eats in our Company café at least twice per week
- Spends between 2 and 3 hours outside of normal business hours on email each work day and at least 3 hours on email each weekend
- Has taken at least one professional development course from our in-house continuing education program each year
- Maintains membership in at least two professional organizations each year.

We have also found that the following characteristics of a director were correlated to poor performance once he or she was promoted to a VP:

- Held jobs at more than five other companies before joining BigHouse
- Majored in Psychology in undergraduate studies
- Is a fan of Cleveland sports teams
- Has sought expense account exceptions twice the normal average for directors.

Plan to use this algorithm to identify candidates for succession planning and promotion to VP. We start succession planning on Monday with the EVPs and the first cycle of promotions will be on March 1. Assume you are OK with this – let me know before the Monday meetings if you have questions. Best, Sally (Global EVP of HR)”
Scenario #3 – Petty Analytics

The OFCCP, which is auditing Petty’s headquarters facility, sends its “on-site letter” identifying the documents it wishes to review while on-site and provides a listing of the HR personnel it intends to interview, including your VP for Talent and your recruiters. Among the documents the OFCCP requests are any contracts between your company and any social media site through which you recruit personnel and copies of position advertisements you use to recruit candidates for employment.

While preparing for the on-site review, you learn that Petty has a contract with a social media company through which it directs position announcements to individuals who are age 18-38 and appear to be interested in customer service positions, all of which the social media company ascertains through its members’ on-line activity and profiles. All of your recruiters, as well as your VP for Talent, are aware of this contract and the resulting practice, but this is the first you have learned of it. Your VP for Talent explains that a third party sourcing and analytics company has shared with you data “proving” that customer service representatives tend to perform best during their first 15 years of employment.
Definitions for Today

Big Data – In the employment context, refers to the use of algorithms, data mining and other technology-based methods of evaluating vast amounts of information about individuals.

Predictive Analytics - The practice of extracting information from existing data sets in order to determine patterns and predict future outcomes and trends. In the employment context, this can mean identifying characteristics of applicants or incumbents who are most likely to succeed in a targeted position.

Artificial Intelligence – Encompasses a range of technologies that learn over time as they are exposed to more data. Examples include chatbots, biometrics, and speech recognition.
Big Data – Emerging Uses

Recruiting and Selecting – recruiting talented workers by scraping various sources, including social media; screening candidate pools for eligible applicants; predicting likelihood of success on the job

• Behavioral assessment based on selection from 108 pairs of statements to reduce recruiter involvement and ultimately replace the behavioral interview currently used

• Neuro-science based games to assess fifty key cognitive and emotional traits that provide candidates with a profile of their key attributes, guidance on jobs and industries that match those attributes, and a list of companies to focus on. Used as additional information to identify candidates that might otherwise be overlooked

• Psychometric assessments in animated theme park environment to use as recruiting screen. Assessment measures mental agility, attention, cognitive speed, spatial aptitude, numerical processing ability
Big Data – Emerging Uses

Other Recruitment and Selection examples

- Algorithms that data scrape and score resumes/applications
  - Broader text analysis of written materials
- Algorithms that data scrape/score a broader set of sources (e.g. the internet, internal HRIS, ATS)
- Video interviews where answers as well as facial expression, tone of voice, and language patterns are evaluated
- Simple or complex “games” that collect personality or cognitive measurements

Additional context:

- Methods may be “supervised” or “unsupervised”
- All of the above may be used to collect data that are then evaluated based on some type of “ideal/preferred profile”
- All of the above may be used in the context of both internal and external decisions
- In some situations the tools may be used to make formal selection decisions; in other situations the tools may be used to passively recruit/find high potential candidates from various sources (e.g., the workforce, previous applicant pools, the internet)
Big Data – Emerging Uses

Other

• Identifying sexual harassers in the workplace – Advanced Discovery product
• Identifying “at-risk” leavers
• Identifying pay inequality
• Employee health/well being metrics
• Social media/employee attitudes tracking
Legal Issues – Big Data Uses in Employment

• **Disparate Treatment**
  - *CWA v. T-Mobile, Amazon Inc., et al.*
  - Is protected group status incorporated into the algorithm?

• **Disparate Impact**
  - Uniform Guidelines on Employee Selection Procedures (UGESP)
    - Adverse impact, job relatedness, less impactful alternative available
    - Algorithms are inductive – driven by data, not an understanding of the causal relationship between the variables and the outcome it seeks to predict
  - Challenges associated with machine learning and AI – is every iteration a new selection procedure that must be validated?

• **Internet Applicant Issues**

• **Disability Issues**
Legal Issues – Big DataUses in Employment

• **Damages and Potential Exposure**
  - Full range of remedies under applicable state and federal laws – back pay, compensatory damages, punitive damages, attorneys fees, costs
    - **CWA** – seeks remedies under various state laws, including DC, NY, NJ, Ohio, WA state
    - Injunctive relief
  - Class action/systemic discrimination allegations – large applicant pools
    - Assume seven- or eight-figure exposure if class of plaintiffs is 20+ applicants
Solutions and Risk Quantification

**Low Risk**
- Informational only
- Late in process
- Expands pool

**Moderate Risk**
- Influences decision
- Late in process
- Narrows pool
- No adverse impact

**High Risk**
- First screen
- Decisive factor
- Narrows pool
- Adverse impact
Solutions and Risk Quantification

• **Assume it is a selection procedure subject to UGESPP**
  • Conduct privileged adverse impact analyses
  • Validation – can be tricky; not static
    • Validate accuracy over time and with various employee segments
    • Job analysis – does the algorithm measure KSAs related to job performance rather than reflecting demographics of current employees

• **Vendor due diligence**
  • *See* Eric’s tips
  • Ask: What is the purpose of the tool, what is it measuring, can it be validated, and do subgroup differences exist
Questions?
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