TALENT MANAGEMENT IN A VOLATILE ECONOMY

FROM RECRUITMENT TO RIFS

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I. RECRUITMENT

A. Chatbot or Recorded Interactions

Many employers are using virtual interviewers to allow applicants to (record an) interview anytime, anywhere, on their smart phones, tablets, or laptops, helping open up the applicant pipeline and speed the time between posting and filling open positions. These virtual interviews generally come after an at least-partially-automated process in which unsatisfactory applicants are screened out using a series of knock-out questions in an online application.

In 2010, the EEOC Office of Legal Counsel issued a staff opinion letter (which does not qualify as an official opinion of the EEOC but does offer some insight on EEOC thinking on this issue), opining that video interviews are acceptable, as long as the questions are not discriminatory (e.g., based on age, gender, race, etc.--just as would be prohibited in a live interview). However, the staff opinion letter goes on to include several warnings about video interviews (“[B]iased treatment is not always conscious. The EEO laws prohibit not only decisions driven by . . . animosity, but also decisions infected by stereotyped thinking. . . . . . . . View a video may trigger unconscious bias, especially if opportunities for face-to face conversation are absent . . . .”) (emphasis added). The staff opinion letter also suggests several possible risk-mitigation techniques (“[B]efore using video resumes and other video screening devices, [an employer] could proactively formulate and communicate to selection officials how the video resumes can help assess specific qualifications and skills that are necessary for success in the position. Additionally, [an employer] could require that several people assess each video resume in relation to the stated job requirements”).

B. Artificial Intelligence –Transforming the Global Workplace

Many employers also are using Artificial Intelligence (AI) to evaluate applicant electronically-input information, resumes, and recorded interviews to help narrow the field and choose better employees. AI is a phrase coined by cognitive scientist John McCarthy in 1955 to refer to the science of making intelligent machines. AI allows machines to learn from experience, evaluate data, and make choices to execute human-like tasks. Self-driving automobiles are a good example. Onboard computers evaluate data from sensors, GPS mapping, and other sources and make human-like decisions based on those inputs to navigate the vehicle.

AI and technology likely will continue to dramatically alter critical HR responsibilities, including talent acquisition (recruitment) and talent development (retention). AI has the potential to do lots of good in the talent management arena, like the following:

• Improve Efficiency and Insight in Candidate Assessment

By relying on its ability to recognize and interpret nuance, AI promises to transform simple resumes, cover letters, and communication with candidates into insightful, powerful tools to quickly and efficiently review large amounts of data and determine if particular individuals are a good fit for an organization. Smart AI mechanisms, we are told, can scan, read, and evaluate applicants, quickly eliminating lots of them from the recruiting process.
Reduce Human Bias

AI may be able to remove the potential for skewed or biased human perspectives that can inhibit the decision-making process. This may be able to help protect an organization from discrimination litigation and also create a more cohesive, communicative workplace.

C. Discrimination Issues

While AI and machine learning tools may be able to eliminate human conscious bias from HR decision-making processes, the greatest legal challenge they present comes from Title VII’s disparate impact doctrine. In a disparate impact case, a plaintiff (or governmental agency) must first show that a facially neutral employment practice causes disparate impact on a protected class. If the plaintiff makes a prima facie showing, the employer must then demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. However, even if the employer can prove the practice is job related and driven by business necessity, a plaintiff will still prevail on a disparate impact claim if the plaintiff proves the employer could have used an alternative employment practice with less discriminatory impact. Generally, a practice is deemed discriminatory if the adverse impact is both statistically and practically significant (questions that routinely devolve into a battle of the experts).

An example of AI tools that are likely to be challenged as discriminatory include data-mining and machine-learning programs aimed at sorting and analyzing large volumes of applicant data, particularly for large companies. Two best practices when evaluating whether such practices have a disparate impact are (a) auditing for disparate impact regularly, and (b) validation studies (e.g., criterion, content, or construct) to establish and, as necessary, tweak the selection tools used are predictive of or correlate significantly with important elements of the job performance. Employers should use these practices before the tools are implemented, and follow guidance provided by the EEOC in its Uniform Guidelines on Employee Selection Procedures.

Employers generally are well-advised to conduct this research in a privileged context and at the direction of in-house counsel to help prevent the disclosure of sensitive materials to a government agency during an investigation or to a private plaintiff in civil litigation.

Tools such as data-mining and machine-learning also may subject employers to claims for disparate treatment (i.e., intentional discrimination). To the extent an employer knowingly applies a tool that treats protected groups disproportionately based on the tool’s inputs or outputs, a court may be inclined to impute motive or intent based on the employer’s knowledge of the tool’s disparate impact, especially if evidence establishes that the employer knowingly implemented the tool because of its effects. Unlike with disparate impact claims, a finding of disparate treatment could subject employers to significant punitive damages.

Increased use of machine-learning tools to supplant human decision makers also may undermine arguments that outside counsel has at its disposal to defeat class certification in a Rule 23 class action or to obtain decertification in a collective action.
II. RETENTION

To state the obvious, strong employee engagement is critical to employee retention. Employee engagement is the relationship between an organization and its employees. An engaged employee is one who is fully absorbed by and enthusiastic about their work and so takes positive action to further the organization’s reputation and interests. It is the emotional commitment the employee has to the organization and its goals.

A Gallup Management Journal article reported a recent study of U.S. workers:

- Only 29% are actively engaged in their jobs. These 29% work with passion and feel a profound connection to their company.
- 54% of employees are not engaged at all. These employees are essentially checked out, or sleepwalking through the work day.
- 17% of employees are actively disengaged. They are acting out their dissatisfaction at work through disruption, passive aggression, and even sabotage.

Everyone knows we need engaged employees. The (multi)-billion dollar question is how to get and keep them engaged—especially the generations that are our target employees.

The 10 C’s of Engagement are a great way to engage employees:

1. **Connect** – leaders should show that they value their employees
2. **Career** – leaders should provide challenging and meaningful work to their employees
3. **Clarity** – managers must convey a clear vision to employees
4. **Convey** – expectations to employees and provide feedback
5. **Contribute** – people want to know that their input matters. Allow employees to give you feedback and suggestions
6. **Control** – employees want to have some control over the flow and pace of their work
7. **Collaborate** – studies demonstrate that when employees work in a team atmosphere, and are allowed to develop trust and respect for each other, they outperform other, non-team workplaces
8. **Credibility** – employees want their organizations to be credible
9. **Confidence** – employees want to believe in the leaders
10. **Congratulate** – praise and recognition are a powerful way to get positive behaviors to repeat

Engaging in workplace fun also is an important factor in keeping employees engaged. Based upon the research on the differing generations, fun is a really important factor in keeping employees engaged. Workplace fun is similar but also different from non-workplace fun. Workplace fun is experiencing enjoyment, belongingness, and a sense of playfulness while fulfilling one’s professional duties.
When the workplace is hostile, boring, or uncertain, and especially following a layoff, employees report:

- 87% are less likely to recommend their company as a good place to work
- 64% say that productivity decreases
- 81% say that customer service decreases

Fun has lots of tangible benefits, as summarized in *The Levity Effect* by Adrian Gostick & Scott Christopher:

- Helps recruit/retain good talent
- Is associated with increased creativity
- Inspires employees to put up with challenging circumstances
- Increases trust and camaraderie
- Enhances internal communication
- Can be used to build/strengthen company culture
- Helps create more loyal employees and customers

Two good ways to move toward fun are to **normalize** and to **familiarize**.

**Normalize** means addressing issues and doing the basics of showing value. The efforts must be genuine. You cannot treat a sick culture with doughnuts in the coffee room. First, you must do all you can to be certain you have a healthy environment. That includes supervision/management being fair and even-handed and work to create an environment must emphasize respect and dignity.

**Familiarize** means learning who our employees are, their education, their earnings, and their interests. Breaking bread together is one of the most effective methods, though you can’t rely on that exclusively (religious, health, and other restrictions preclude some participation). You should consider contests (with prizes) and recognition.

Measuring employee engagement, to assess areas of strength and improvement, continues to be a challenge. Paper surveys seem like relics from the past, and most online surveys feel only one-step-up. Vendors promise AI will improve HR and legal decision-making by using predictive analytics and AI to provide management with insight into employee satisfaction levels, predicting possible future sources of turnover to identify and correct individual, departmental, or systemic issues before they become problematic or costly. AI-based assistance has the potential to drive relevant and contextual alerts to managers based on conversations occurring within an organization.

**III. RIFs**

Many economists predict RIFs in the coming months. Employers should be ready to conduct RIFs in a manner that retains the best, most skilled employees. While an easy and logical goal to articulate, that takes work and time during the RIF selection process, which by definition is time-cruncheted and usually full of stress and oftentimes emotion.

The two basic ways in which RIFs can be conducted are:

- **By skills (a/k/a) musical chairs** – evaluates all employees capable of performing the duties of the roles/positions being retained, regardless of whether
the employee currently is in a position impacted by the RIFs. While this retains the most talented employees, it takes considerable work and often is disruptive (even more than a usual RIF) because employees generally are moved in and out of lots of positions, not just those impacted by the current RIF. The breadth of the employee evaluation has a direct impact on the amount of work and disruption—e.g., if an employer evaluates the skills of all employees in the entire organization (which generally is impractical), that will be more disruptive than an evaluation of all the positions in the Accounting Department (when only Accounts Payable Clerks are being RIFed).

- **By current position (using skills)** – Determines which positions/functions will be impacted (i.e., positions employer can live without) and evaluates for RIF only the employees currently in those positions. While easier than the "By skills" approach, this method does not always end up with the most qualified in the positions after the RIF.

For either approach, if an employer evaluates employees during the RIF selection process to determine which should be RIF'ed, there is a risk if the RIF evaluation process is at odds with the prior, during-employment evaluation process.

A third approach—by current position (using strict seniority)—also is a possibility. While very legally defensible (since it relies on a single objective criterion—seniority), most employers do not use this approach because it has the potential to RIF the most talented employees, leaving behind less talented employees.

An often overlooked but very important aspect of RIF management is to treat employees being RIFed with dignity, respect, and compassion in the written and oral communication and follow-up processes.
ENDNOTES


4. Id.

5. Id.

6. Pauline T. Kim, Data-Driven Discrimination at Work, William and Mary L. Rev. 857-936 (2017); Written Testimony of Ifeoma Ajunwa, J.D., Ph.D., Harvard University Assistant Professor of Law, at https://www.eeoc.gov/eeoc/meetings/10-13-16/ajunwa.cfm.

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Recruitment
- Innovation
- Veterans
- Untapped populations
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Retention

- Employee engagement
- Employee surveys

10 C’s of Employee Engagement

1. Connect
2. Career
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Reductions in Force

- By skills/all positions
- By skills/current position
- By seniority/current position
- Dignity & respect
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