

BIG DATA, “PEOPLE ANALYTICS,” AND HIRING – DEVELOPING LEGAL ISSUES

Paul E. Starkman

(312) 517-7508

pstarkman@clarkhill.com

CLARK HILL

BIG DATA — WHAT IS IT, AND WHY SHOULD I CARE?

CLARK HILL

BIG DATA – GENERAL DEFINITIONS VARY...

- Big data
 - Marketing parlance or generic term
 - Definitions vary based on use, organizations, data sources, etc.
- Big data in human resources
 - Wikipedia's definition of People Analytics: The analysis of data from human resources in conjunction with other corporate data

BIG DATA IN HUMAN RESOURCES – MANY NAMES

- People Analytics a/k/a data analytics, talent analytics, Human Resources Analytics
 - Human Resource Analytics defined: The application of analytic processes to the human resource department of an organization in the hope of improving employee performance in order to get a better return on investment

DOES HUMAN RESOURCES ANALYTICS = PREDICTIVE ANALYTICS?

- Human resources/data analytics is used for the following purposes
 - Quickly gathering vast amounts of historical employee data
 - Finding better candidates and predicting their success in given roles
 - Diagnosing performance flaws in current employees
 - Identifying employees likely to resign or about to steal your trade secrets; *and among other things*
 - Improving workflow and productivity

HOW DOES HUMAN RESOURCES ANALYTICS WORK?

- Vendors tout that *People Analytics* can help gauge, predict and make decisions about everything from retention probability to what will motivate top sales people in the organization
- Types of people analytics
 - Software programs that source and match candidates to employers' job postings based on certain words used in the candidates' applications, resumes, and/or social media profiles
 - Automated online reference checking tools that assess the "fit" of applicants for an employer's culture
 - Computer game tests that estimate applicants' cognitive abilities

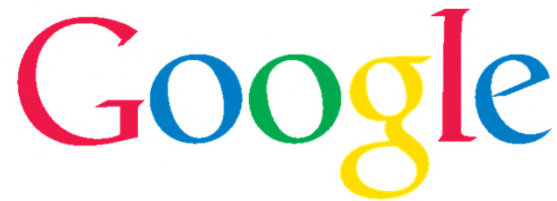
PREDICTIVE ANALYTICS MEETS HUMAN RESOURCES

- Example: eHarmony's "Elevated Careers" Online Service
 - On April 1, 2016, "eHarmony launched Elevated Careers, with the "goal of matching people to jobs that will fulfill them"
 - eHarmony's patented algorithm for love is based on 29 aspects of compatibility
 - Elevated Careers matches potential job candidates to employers based on 24 dimensions of culture, values and personality



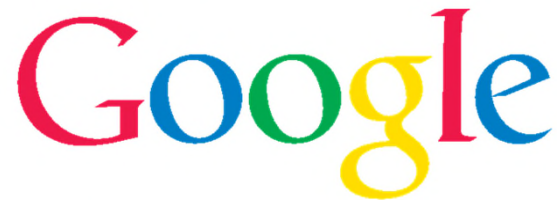
PREDICTIVE ANALYTICS MEETS HUMAN RESOURCES

- Example: Google
- How Google uses People Analytics to “Reinvent HR”
 - Google’s success attributed in large part to the fact that it is the world’s only data-driven HR function
 - Its approach has resulted in Google producing amazing workforce productivity results
 - But high salaries, stock options, free transportation, meals, laundry, playspace may also play a role in creating an “amazing workforce”



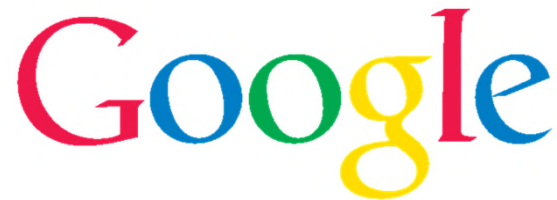
PREDICTIVE ANALYTICS MEETS HUMAN RESOURCES

- Google: All people decisions at Google are based on data and analytics
- But people management decisions at Google are guided by its “people analytics team”
 - The people analytics team attempts to identify insightful correlations and to provide recommended actions
 - The goal is to substitute data and metrics for the use of opinions
 - Google: Analytics are used to solve diversity problems



PREDICTIVE ANALYTICS MEETS HUMAN RESOURCES

- Google's employment algorithms
 - Google's hiring algorithm: Developed an algorithm for predicting which candidates had the highest probability of succeeding after they are hired
 - A retention algorithm: Google developed a mathematical algorithm to proactively and successfully predict which employees are most likely to become a retention problem



OTHER NOTABLE EXAMPLES

- eBay designed algorithms to reveal which workers might jump ship, using information on tenure, compensation, promotions, and feedback scores from managers
- IBM unveiled Blue Matching in 2016, using its Watson technology to connect thousands of employees with job opportunities. The software tallies data about each person's role, skills, experience, location preference, and performance and then suggests openings for the employee.
- General Electric is now testing machine learning to identify candidates for key promotions. Using HR data and profiles from a LinkedIn-style internal system, the software looks at correlations between the career paths of successful GE executives and others who have had similar jobs or leadership training.

IS SOFTWARE BETTER THAN PEOPLE AT MANAGING... PEOPLE?

CLARK HILL

IS SOFTWARE BETTER THAN PEOPLE AT MANAGING... PEOPLE?

- Here's what people have said about HR Analytics
 - “It's like Moneyball for HR”
 - “In the past 10 months, he says, the percentage of companies using predictive HR analytics has doubled, from 4% to 8%”
 - “Relying only on past hiring data to build predictive algorithms could reinforce problems”
 - **“We don't do anything that would creep you out”**

IS SOFTWARE BETTER THAN PEOPLE AT MANAGING... PEOPLE?

- Faception, says its software detects criminal tendencies with 80 percent accuracy
 - “We encode facial appearances in proprietary image descriptors and train state of the art machine learning algorithms to predict personal traits, capabilities, and online behaviors”
- **Query: What does “accuracy” and “80 percent accuracy” mean?**



CAN ORGANIZATIONS TRUST PEOPLE ANALYTICS?

- Can you trust the algorithm?
 - Has it been tested and validated?
 - What are the data sources and data mix? (public data, organizational data, semi-private data like LinkedIn, personal data about the candidates)
- Do you understand the parameters set by the algorithm?
 - How are the factors/categories weighted?
- Has it been tested?
 - Against what?
- Will an algorithm shield an enterprise from liability?

HR ANALYTICS, HIRING AND LEGAL RISKS

- What are the legal risks in using Big Data/People Analytics in hiring?
 - Disparate impact
 - The legal standard: Any screening device that produces a statistically significant disparity between men and women, whites and blacks, etc. creates liability unless it is justified by “business necessity” *Griggs v. Duke Power Co.*, 401 U.S. 424 (1977) (holding that education requirements and written tests created such a disparate impact)
- Many programs make selection “decisions” based on factors that are not shown to be job related and consistent with business necessity

LEGAL RISKS IN USING BIG DATA/PEOPLE ANALYTICS IN HIRING

- Causes of disparate impact
 - Poorly designed matching systems
 - Candidate – job matching systems that restrict information to certain groups
 - Recommendation services that narrow instead of expand candidates
 - Data sets that lack information or disproportionately represent certain populations

ANALYTICS, HIRING AND LEGAL RISKS

- How to reduce the risk of a disparate impact from People Analytics
 - Using people analytics as one, non-determinative factor of a comprehensive hiring process may make the finding of a disparate impact less likely

ANALYTICS, HIRING AND LEGAL RISKS

- The Uniform Guidelines on Employee Selection Guidelines
 - Employers who use selection devices such as software programs or algorithms must comply with the Uniform Guidelines on Employee Selection Procedures (UGESP)
 - The Guidelines contain detailed and technical requirements for demonstrating their validity
 - While a software vendor's documentation supporting the validity of the test or program may be helpful, the responsibility for compliance with UGESP ultimately resides with the employer

THE LEGAL RISKS OF PEOPLE ANALYTICS IN EMPLOYMENT UNIFORM SELECTION GUIDELINES: VALIDATION AND BEYOND

- Some companies creating predictive programs to assist in hiring are purportedly performing validation analyses to prevent disparate impacts
- What type of “validation” was done? When?
- Does the “validation” travel to different industries?
- What “validation” will be done at your company to prevent disparate impacts and comply with the Uniform Guidelines

THE LEGAL RISKS OF PEOPLE ANALYTICS IN EMPLOYMENT ENTER THE FTC: THE *SPOKEO* DECISION

- The *Spokeo* decision was a 2012 consent decree that the FTC entered with online data broker, Spokeo, Inc.
- Spokeo assembled personal information from hundreds of online and offline data sources, including social networks, and merged that data to create detailed personal profiles, including name, address, age range, hobbies, ethnicity, and religion, and marketed these profiles for use by human resources departments in making hiring decisions
- The FTC charged that Spokeo violated the Fair Credit Reporting Act (FCRA)
- The FCRA applies to background checks by third party companies that are used by employers “for employment purposes”
- Spokeo agreed to pay \$800,000 in civil penalties as part of a consent decree with the FTC. *United States v. Spokeo, Inc.*, No. 2-12-cv-05001-MMM-SH (C.D. Cal. June 12, 2012)

THE LEGAL RISKS OF PEOPLE ANALYTICS IN EMPLOYMENT FTC'S 2016 REPORT ON BIG DATA

- A 2016 Federal Trade Commission (FTC) report entitled "Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues" (Jan. 2016)
- The FTC warned that certain uses of big data could implicate certain employment statutes
- The FTC announced that it "intends to monitor areas where big data practices could violate existing law" and "bring enforcement actions where appropriate"

THE LEGAL RISKS OF PEOPLE ANALYTICS IN EMPLOYMENT FTC'S 2016 REPORT ON BIG DATA

The FTC's 2016 Report listed "Best Practices" for the use of Big Data in employment and consumer transactions

1. Does the People Analytics vendor have reasonable procedures in place to ensure the maximum possible accuracy of the information they provide?
2. Does the vendor allow applicants and employees access information the vendor has about them?
3. Does the employer certify that the People Analytics information will not be used to violate EEO laws?
4. Does the employer provide disclosures and obtain authorization as required by the FCRA?
5. Does the employer provide pre-adverse action notice to applicants and employees, and thereafter provide post-adverse action notices to those same applicants and employees?
6. Does the people analytics process have an adverse effect or impact on a member of a protected class?
7. Is the employer and vendor maintaining reasonable security over the data used for People Analytics?

QUESTIONS?



Paul E. Starkman

(312) 517-7508

pstarkman@clarkhill.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL