An Employer's Guide to NYC's New AI Law – Are You in Compliance?

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The Great Resignation of 2021 and 2022 has spawned what we are calling "The Great Rehire." To sort through the deluge of new applicants, many employers have become more reliant on technology such as artificial intelligence and automated employment decision tools (AEDT).

If you are using AI and/or AEDT, beware. Starting January 1, 2023, New York City employers will be subject to one of the most sweeping regulations governing AEDT to date.

Local Law 144 prohibits employers from using AEDT in hiring or promotion decisions unless they have taken several affirmative steps, including conducting a bias audit. This may include tools like resume-scanning software and more advanced "chatbots" and "job-fit" algorithms.

To help clarify the law's many ambiguities, workplace regulators issued proposed regulations. The notice-and-comment period was originally set to end this week, but the city was unable to hold a virtual public hearing after too many participants joined the Zoom room and overwhelmed the system. The city rescheduled for November 4th and will continue to accept public comments until then. In the lead up to this law, here's what employers need to know to get into compliance:

Who does the law apply to?

The law covers employers and employment agencies that use AEDT in New York City and candidates and employees who reside in the City. However, New York is one of three jurisdictions leading the charge on employment AI legislation and is likely to seek influence beyond its borders, meaning any company hiring or promoting a New York City resident will likely be subject to aspects of the law.

How does the law define AEDT?

The law defines AEDT as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence" that issues a simplified output such as a "score, classification, or recommendation" used to "substantially assist or replace" a human's discretion in making "employment decisions." Those decisions include both hiring and promotions.

The proposed regulations clarify what would constitute substantially assisting or replacing human discretion, including when decisions are made based *only* on the system's output with no other factors taken into consideration, that output is weighed more than any other criteria, or when it overrules or modifies decisions based on other factors.

What must employers do under the new law?

1. **Complete an "independent bias audit" of their automated tools.** The audit must be conducted within a year of using the tool by an independent auditor. The proposed regulations clarify that the audit must calculate a "selection rate" and "impact ratio" for specific EEOC reporting categories including race, ethnicity, sex, and job types.

2. **Publish the results.** The date of the most recent audit, a summary of the results, and the distribution date of the AEDT or the date the employer began using a specific AEDT must be published in a "clear and conspicuous manner" on the employer's website.

3. **Notify candidates and employees residing in New York City at least 10 business days before using the tool.** Under the proposed regulations, a "candidate" is someone who has applied for a specific position by submitting, in the required format, the necessary information or items. AEDT notice can be placed on the career or jobs section of the employer's website, in a job posting, or via email or mail. For employees, notice can be included in a written policy, procedure, or job posting or provided person, by mail, or by email.

4. **Provide instructions for requesting an alternative selection or evaluation process.** Despite this requirement in the law, the proposed rules state that an employer is not required to provide an alternative selection process.

5. **Make information about the source and type of data collected by the tool and the employer's data retention policy available**, **with some exceptions.**

What are the penalties for failing to comply?

Failing to comply with this law could be costly. Penalties range from $500 to $1,500 for each violation and may accumulate quickly. Each day an AEDT is used in violation of the law is treated as a separate violation. Even more, failure to provide notice to candidates and employees is also counted as a separate infraction. Given the law's disclosure requirements, employers should also be aware of potential liability under local, state, and federal anti-discrimination laws should bias audits reveal potential discrimination.

What remains unclear?

Despite the proposed rules, aspects of the law remain uncertain including exact tools the law will cover, the precise requirements for bias audits, who can act as an independent auditor, and how this law will impact out-of-city employers and applicants.

What should employers do to prepare?

1. Immediately assess the automated tools you are using to make hiring and promotion decisions. If any may fall within the law, speak with counsel to ensure you are in compliance.

2. Review vendor contracts. Employers cannot deflect liability to their third-party vendors if those vendors run afoul of the law. Instead, government agencies will likely simply seek to hold both the employer and the third-party vendor liable.

3. Monitor New York City's law and the proposed guidance to understand your obligations starting in January of 2023.

4. Train your HR professionals and others involved in hiring and promotions to ensure compliance with the law's notice and disclosure requirements.

Employers should also keep in mind that New York City is not alone. Other jurisdictions, including Maryland and Illinois, have also enacted laws regulating these tools and may impose different obligations. For more on that, visit our previous blog. We'll be monitoring this issue and will post updates as January 1st approaches.