

New York City Will Soon Regulate Use of Artificial Intelligence in Employment Decisions

AUGUST 30, 2022

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On January 1, 2023, New York City employers will have to comply with a new law aimed at preventing bias in artificial intelligence hiring tools. These tools, which include algorithms and software geared towards finding ideal candidates, have come under fire in recent years for their potential to unlawfully discriminate against protected classes.

Employer Obligations

The New York City law, [Local Law Int. No. 1894-A](#), specifically regulates the use of “automated employment decision tools” in making employment decisions, including “any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.”

The law protects candidates and employees interviewing and working in New York City and provides that an automated employment decision tool may not be used to screen such candidates for employment and promotion unless the tool: (i) has been subject to a “bias audit” conducted no more than one year prior to the use of such tool; and (ii) a summary of the results of the most recent bias audit of such tool, as well as the distribution date of the tool, have been made publicly available on the website of the employer or employment agency prior to the use of such tool. A bias audit is an “an impartial evaluation by an independent auditor,” and includes, without limitation, “the testing of an automated employment decision tool to assess the tool’s disparate impact on persons of any [gender, race and job level] required to be reported by employers [on the Employer Information Report EEO-1] pursuant to [federal law].” Notably, the law does not state who or what qualifies as an “independent auditor.”

The law also requires that the New York City employer or employment agency satisfy certain notice requirements. First, the employer or employment agency must, no later than ten (10) days before such use, notify a candidate or employee that resides in New York City of (i) its intent to use an automated employment decision tool; and (ii) the job qualifications and characteristics that such automated employment decision tool will use in the assessment of such candidate or employee. The 10-day period is meant to allow the candidate or employee time to request an alternative process or accommodation. However, the law does not obligate an employer or employment agency to provide an alternative process or accommodation. Second, if information about the type of data collected from the automated employment decision tool is not disclosed on their website, an employer or employment agency must make available to a candidate or employee within 30 days of receiving a

written request, the following: (i) information about the type of data collected for the automated employment decision tool; (ii) the source of the collected data; and (iii) the employer or employment agency's data retention policy.

Penalties

Employers or employment agencies that violate this new law will incur a civil penalty of up to \$500 for the first violation (and each additional violation occurring on the same day as the first violation), and a civil penalty between \$500 and \$1,500 for each subsequent violation. The law provides for separate violations (i) each day on which an automated employment decision tool is used in violation of the law; and (ii) each time an employer or employment agency fails to provide proper notice under the law. In other words, these relatively minor penalties can multiply on a daily basis for employers that fail to correct issues violative of the law.

Analysis and Recommendations

There are several issues with this law that remain unclear. First, employers have no guidance on whom or what they should rely to audit their automated employment decision tools in order to comply with the law. The only requirement is that the auditor be "independent."

Second, these independent auditors have no guidance by which to ensure employers are compliant with the law. At present, the city has not issued any guidance of its own. Employers and auditors could refer to the U.S. Equal Employment Opportunity Commission technical assistance document that covers artificial intelligence hiring tools, though it is not presently known whether the city intends to use this guidance or issue some of its own.

Third, the 10-day notice requirement appears from the law's text to apply only to candidates or employees *living in* New York City (whereas the rest of the law seems to apply to any candidate or employee interviewing with or working for a New York City employer, regardless of residence). This limitation is likely negligible from a practical standpoint, however, as notice will most likely be made through the website of an employer or employment agency subject to the law.

Fourth, employers are not obligated to change the use of their automated employment decision tools simply based on a request from a candidate or employee, which leaves an open question regarding how such requests and responses will be treated or evaluated.

While we await answers to these questions, we encourage New York City employers to ensure that any automated employment decision tools they intend to use in 2023 undergo a bias audit by an independent auditor. The result of these bias audits should then be made available on New York City employers' websites. We further encourage New York City employers to work with employment counsel to develop and implement practices compliant with the notice provisions of the new law.

For more information, reach out to a member of Benesch's [Labor & Employment Practice Group](#).

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