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Legislation Regulating AI in Employment

By Amory McAndrew | April 8, 2024

The New York City law is avoidable, and the New York state law is pending, but employers should not forget about the impact of the federal requirements on their use of automated employment decision tools.

Many employers are turning to artificial intelligence (AI) tools like resume scanners, chatbot interviewers and personality tests to help them weed out candidates and make the hiring process more efficient. In response, many jurisdictions are proposing and passing laws regulating the use of AI in the employment context. These laws prohibit employers from using automated employment decision tools (AEDT) unless they have been subject to a bias audit, the information about the bias audit is publicized and notices have been provided to employees or candidates.

Some of these laws, such as the one that became effective in New York City last summer, are drafted such that the exceptions essentially swallow the rule. The proposed New York state bills close that loophole, applying onerous requirements on every employer who uses AI to assist them in their workplace decisions. While the New York City law appears to not go far enough and the future of the proposed New York state law is uncertain, employers should remember that the federal laws against discrimination still apply to employment decisions.

Regardless of whether the New York City law does not apply to them, or the New York state law is passed, employers who are subject to Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA) should ensure that their use of AI aligns with federal prohibitions on discrimination and do not lead to disparate impacts on protected groups.

The definition of an AEDT under the New York City law (Local Law 144) that went into effect July 5, 2023, was narrow enough that many employers determined that compliance was not required. 2021 N.Y.C. Local Law No. 144, N.Y.C. Admin. Code. §20-870. The definition of AEDT in the pending New York state legislation (S7623 or A9315) is much broader than the city law and will likely impact many more employers and tools than most realize.

According to the "Frequently Asked Questions" published by New York City's Department of Consumer and Worker Protection on June 29, 2023, an AEDT is a computer-based tool that:

- "Uses machine learning, statistical modeling, data analytics, or artificial intelligence;
- Helps employers and employment agencies make employment decisions; and
- Substantially assists or replaces discretionary decision-making."

Excluded from Local Law 144's definition of an AEDT are tools that do not "automate, support, substantially assist or replace discretionary decision-making." The rules implementing Local Law 144 shed further light on the meaning of the phrase "substantially assist or replace discretionary decision-making" and a

presentation created by the city's Department of Consumer and Worker Protection provide examples. Rules of City of New York Department of Consumer and Worker Protection (6 RCNY) §5-300.

According to those materials, an AEDT "substantially assists or replaces discretionary decision-making" in the employment decision when the tool:

- is the only factor (e.g. resume screening software alone selects interview candidates);
- is the heaviest weighted factor (e.g. where both resume screening software and human reviewers rate applicants, the software rating outweighs the human rating); or
- overrules any other factor (e.g. resume screening software disqualifies candidates from receiving an interview).

Therefore, employers do not have to comply with the audit and disclosure requirements when human discretion outweighs the AI decision making. Given how few employers have made audit disclosures compared to the number of companies who use AI for employment decisions, it seems likely that employers are claiming that they meet the requirements of this loophole or are easily modifying their methods to avoid the law's reach.

The proposed New York state legislation pending in the legislature (S7623 and A9315) attempts to close the loophole in Local Law 144 that gives employers large discretion in determining whether the audit and notice requirements apply to them. While the test under Local Law 144 is whether the AEDT outweighs human involvement, the New York State bills apply to any automated system or AI that is used to "replace" or even just "assist" human decision making. Thus, if one of these New York state bills is passed, these rules will apply to nearly every employer that uses AI in their employment decisions.

If S7623 or A9315 is passed as proposed, what are the key takeaways for employers?

1. **The laws apply to every employer and just about every employment decision.** The two New York bills apply to employers of all sizes and will apply to any "employment decision", including any decision made by the employer that affects wages, benefits, other compensation, hours, work schedule, performance evaluation, hiring, recruitment selections, discipline, promotions, job content, assignment of work, access to work opportunities, productivity requirements, workplace health and safety and, the large catch all, "any other terms or conditions of employment." In fact, the laws do not apply to just employees or candidates for employment, the proposed laws also apply to the equivalent hiring and engagement decisions for independent contractors.

2. **Failing to comply can lead to a lawsuit.** The proposed bills provide employees and candidates a private right of action and the ability to recover damages, attorneys' fees and liquidated damages up to 300%.

3. **An employer cannot use an AEDT without subjecting it to an annual bias audit.**

4. **There are many notice requirements.** An employer that uses an AEDT shall notify employees and candidates subject to the tool the qualifications and characteristics it will assess, what data will be collected, the results of the most recent bias audit, information about how an employee or candidate can request an alternative selection process that does not involve an AEDT, and information about how the employee or candidate may request internal review of the employment decision made by the AEDT and information about their right to file a complaint.

5. **An employee can request a redo.** Under certain circumstances, an employer must offer employees and candidates a meaningful opportunity to request a re-evaluation of the results of an employment decision made or assisted by an AEDT.

6. And after all that, **an employer cannot rely solely on the output from an AEDT** when making hiring, promotion, termination, disciplinary or compensation decisions.

Even if these bills are not passed or an alternative bill, such as S5641, proposed on March 10, 2023, that contains a definition of AEDT more similar to Local Law 144 (only those tools which are the "controlling factor" in an employment decision will be subject to the auditing and disclosure requirements) is passed, employers who are subject to Title VII and the ADA must still be aware of how their use of AI could lead to employment claims under existing federal laws prohibiting discrimination. Therefore, just as employers apply a disparate impact analysis to their more traditional decision-making processes, they should assess employment decisions made using AEDT.

The Equal Employment Opportunity Commission has released various technical assistance documents explaining how Title VII and the ADA apply to an employer's use of AEDT's incorporating AI. These documents provide guidance to employers about how to assess that their use of AI aligns with federal prohibitions on discrimination.

While more employers are turning to these tools in an effort to increase efficiency and objectivity in their decisions and workplace operations, they must continue to closely monitor the decisions made using AI to determine that they are in fact not negatively impacting employees and candidates at a disproportionate rate who fall into various protected categories regardless of whether there is applicable legislation in making such bias auditing mandatory.

While it appears that most New York City employers can avoid the requirements of Local Law 144 and that the proposed New York state laws are still being reviewed, employers should be mindful of the existing federal requirements.

Amory W. McAndrew *is a partner at Hoguet Newman Regal & Kenney, where she counsels employers in best practices on employment law matters and investigates internal reports of discrimination and harassment.*