

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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New York City's New Law Regulating the Use of Artificial Intelligence in Employment Decisions

On Nov. 10, 2021, the New York City Council passed a bill that regulates employers and employment agencies' use of "automated employment decision tools" in making employment decisions. The bill was returned without Mayor Bill de Blasio's signature and lapsed into law on Dec. 11, 2021. The new law takes effect on Jan. 1, 2023. This new law is part of a growing trend towards examining and regulating the use of artificial intelligence (AI) in hiring, promotional and other employment decisions.

Requirements of the New Law. The new law regulates employers and employment agencies' use of "automated employment decision tools" on candidates and employees residing in New York City. An "automated employment decision tool" refers to "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 new law prohibits an employer or employment agency from using an automated employment decision tool in making an employment decision unless, prior to using the tool, the following requirements are met: (1) the tool has been subject to a bias audit within the last year; and (2) a summary of the results of the most recent bias audit and distribution data for the tool have been made publicly available on the employer or employment agency's website. A "bias audit" is defined as "an impartial evaluation by an independent auditor," which includes "the testing of an automated employment decision tool to assess the tool's disparate impact on persons of any component 1 category required to be reported by employers pursuant to" 42 U.S.C. § 2000e-8(c) and 29 C.F.R. § 1602.7.

The new law also requires employers and employment agencies to satisfy two notice requirements. First, at least 10 business days before using the tool, the employer or employment agency must notify a candidate or employee who resides in New York City of the following: (1) that an automated employment decision tool will be used in assessing the candidate or employee; and (2) the job qualifications and characteristics that the tool will use in the assessment. The employer or employment agency must allow the candidate or employee to request an alternative process or accommodation. However, the law is silent as to the employer or employment agency's obligation to provide such alternative process or accommodation. Second, the employer or employment agency must disclose on their website or make available to a candidate or employee within 30 days of receiving a written request, the following: (1) information about the type of data collected for the automated employment decision tool; (2) the source of the collected data; and (3) the employer or employment agency's data retention policy.

Penalties for Violations. Violations of the new law will result in liability for 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. Importantly, each day the automated employment decision tool is used in violation of the law constitutes a separate violation and the failure to provide any of the required notices constitutes a separate violation.

Recommendations for Timely Compliance. Employers with candidates or employees who reside in New York City can take several steps now to facilitate compliance with this new requirement when it goes into effect on Jan. 1, 2023. Employers should ensure that any covered automated employment decision tool that they plan to use in 2023 or thereafter to assess New York City candidates and employees is subject to a bias audit by an independent auditor and the results of such audit are available on their website. Additionally, we recommend that employers and employment agencies work with their legal counsel to develop and implement practices that comply with the notice provisions required by the new law.

Other Regulations on Automated Employment Decision Tools. Several states and cities have passed or are considering similar laws regarding the use of artificial intelligence and other technology in employment decisions. For example, Illinois' Artificial Intelligence Video Interview Act, which took effect Jan. 1, 2020, requires employers using AI interview technology to provide advanced notice and an explanation of the technology to applicants, to obtain the applicant's consent to use the technology and to comply with restrictions on the distribution and retention of videos. Similarly, Maryland enacted a law that took effect Oct. 1, 2020, which requires employers to obtain an applicant's written consent and a waiver prior to using facial recognition technology during pre-employment job interviews. California and Washington, D.C. have also proposed legislation that would address the use of AI in the employment context.

Additionally, on Oct. 28, 2021, the U.S. Equal Employment Opportunity Commission (EEOC) launched a new initiative aimed at ensuring artificial intelligence and other technological tools used in making employment decisions comply with the federal civil rights laws. As part of its initiative, the EEOC will gather information about the adoption, design and impact of employment-related technologies, and issue technical assistance to provide employers with guidance on algorithmic fairness and the use of artificial intelligence in employment decisions.

If you would like any assistance in preparing your organization for compliance with the New York City law on automated employment decision tools, please contact [Nicole Price](#), any attorney in our [Labor and Employment practice](#) or the attorney at the firm with whom you are regularly in contact.

