Employer Update

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New York City Imposes Stringent Requirements on the Use of Artificial Intelligence in Workplace Hiring and Promotions

By Gary D. Friedman and Lauren E. Richards

On December 11, 2021, Int. 1894-2020A, a new bill regulating the use of artificial intelligence in hiring and promotion decisions in New York City, became law after Mayor Bill de Blasio neither signed nor vetoed the bill passed by the New York City Council on November 10, 2021. The new law, one of the first of its kind in the country, imposes stringent requirements for annual bias audits and disclosures to prospective and current employees. The law is scheduled to go into effect January 1, 2023.

We highlight the key new requirements below:

Required Bias Audit for Artificial Intelligence Tools

- Employers must ensure that any "automated employment decision tool" has been the subject of a "bias audit" no more than one year prior to use. The results of the bias audit must be made publicly available on the employer's or employment agency's website prior to use.
- "**Automated employment decision tool**" is defined broadly to include "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."
- "**Bias audit**" is defined as "an impartial evaluation by an independent auditor," which evaluation must include the assessment of disparate impact on the basis of race/ethnicity and sex.
    - The new law does not define what constitutes an "impartial evaluation," nor does it explain who will be considered an "independent auditor." It is unclear whether employers that use artificial intelligence tools provided by third-party vendors can rely on a disparate impact analysis conducted by the vendor itself.
    - The new law does not explicitly require that the bias audit address other protected characteristics, such as age, disability, sexual orientation, national origin, or religion. Nevertheless, employers should consider including such characteristics in any bias audit.

Providing Information to Employees and Candidates

- Employers must notify employees or candidates who "reside in the city" of the following: (1) that an automated employment decision tool will be used

in connection with an employment decision; and (2) the job qualifications and characteristics that the tool will use to assess the employee or candidate.

  - The limitation of this requirement to employees and candidates who "reside in the city" may be difficult to address in practice. Employers should evaluate whether they collect residential information about all applicants, and how to address this requirement with an increasingly remote workforce.
  - Employers should monitor any guidance issued, as this requirement is unclear in several respects. For example, it is not clear whether a non-NYC-based employer, where the hiring emanates from an office outside of New York City, would have to notify an applicant who will reside in the city. It also is not clear whether an employer will need to notify a job applicant who primarily resides outside New York City, but stays in the city on occasion.

- Employees and candidates must be notified no fewer than ten (10) business days before use of the tool. Employers should ensure that their hiring timeline allows for this 10-day notification period.
- Information about the type of data collected about employees and applicants, the source of that data, and the employer's data retention policy must be provided within thirty (30) days of a written request.

Alternative Selection Process or Accommodation

- Applicants and employees shall be given the opportunity to request an alternative selection process or accommodation. The law does not suggest any alternatives.
- We will monitor any additional guidance issued by New York City that may provide insight into whether this process is intended to resemble, for example, the reasonable accommodation request process under the Americans with Disabilities Act.

Penalties for Noncompliance

- Penalties include a $500 civil penalty for a first violation, and a $500-$1,500 penalty for each additional violation. There is no private right of action established for employees or applicants.
- Each day of use of the automated employment decision tool in violation of the new law is considered a separate violation, and the new law does not provide for an overall cap on penalties.

Key Takeaways

New York City's new law seeks to remedy two key areas of concern in the discussion of artificial intelligence tools in employment decisions—(1) disparate impact and (2) the information imbalance that makes it difficult for applicants to assess discrimination in hiring.

The new law comes at a time of increased focus on the use of artificial intelligence in hiring. The U.S. Equal Employment Opportunity Commission ("EEOC") recently announced that it is launching an initiative on the use of artificial intelligence, including hosting listening sessions and conducting research. EEOC Commissioner Keith Sonderling is leading the charge on this issue, and he has suggested that the EEOC intends to provide updated guidance to employers. Current EEOC guidance addressing disparate impact resulting from employment tests and other evaluations was issued in 1978. Some states have already imposed requirements on employers. For example, Illinois requires employers to explain to applicants how an artificial intelligence tool will be used and to inform the applicant of the applicant's characteristics that will be tracked and evaluated. And earlier this month, the Washington D.C. Council proposed city legislation to protect individuals from algorithms that make decisions (including but not limited to with respect to employment, credit, and housing) on the basis of an individual's protected characteristics.

We will continue to monitor this law and any related guidance and will provide updates on any material developments.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

Authors:

Gary D. Friedman
New York
+1 212 310 8963
gary.friedman@weil.com

Lauren E. Richards
New York
+1 212 310 8591
lauren.richards@weil.com

Practice Group Members:

John P. Barry
Practice Group Leader
New York
+1 212 310 8150
john.barry@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Sarah Downie
+1 212 310 8030
sarah.downie@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Amy M. Rubin
+1 212 310 8691
amy.rubin@weil.com

Paul J. Wessel
+1 212 310 8720
paul.wessel@weil.com

Silicon Valley
David Singh
+1 650 802 3010
david.singh@weil.com

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