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New York State Introduces Bill to Impose Restrictions on the Use of AI Tools in Employment Decisions

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A bill introduced in the New York State Senate on August 4, 2023, would impose statewide requirements regulating tools that incorporate artificial intelligence to assist in employee monitoring and the employment decision-making process. (See Bill S07623 ("S07623")). The proposed requirements are much broader than those imposed by the New York City Automated Employment Decisions Tools ("AEDT") Law which took effect on July 5, 2023.

Electronic Monitoring Tools

Under S07623, it is unlawful for an employer or employment agency to use an electronic monitoring tool ("EMT") to surveil employees residing in New York, unless the electronic monitoring tool is primarily intended to accomplish certain allowable purposes, including facilitating essential job functions, overseeing production and quality, evaluating employee performance, ensuring legal compliance, safeguarding worker health and safety, managing wages and benefits, and other purposes deemed necessary by the department for smooth business operations.

An electronic monitoring tool ("EMT") is defined under the proposed law as "any system that facilitates the collection of data concerning worker activities or communications by any means other than direct observation, including the use of a computer, telephone, wire, radio, camera, electromagnetic, photoelectronic, or photo-optical system." The EMT must be "strictly necessary" and "the least invasive means to the employee that could reasonably be used" to accomplish the allowable purpose. The specific form of electronic monitoring must also be limited to the smallest number of workers and collect the least amount of data necessary to accomplish the allowable purpose.

The proposed law also mandates that employers provide “clear and conspicuous” notice of their intention to use EMTs. The notice requirements include details about the intended use of the tool, specifics of employee data collection and monitoring parameters, the potential of collected data in an AEDT, the role of the data in employment decisions, its application in evaluating productivity and setting performance benchmarks, storage and retention specifics of the collected data, and an explanation as to how the EMT is the least invasive means to accomplish its intended purpose.

Employers are prohibited from selling, transferring, or disclosing employee data collected via the EMT. Moreover, S07263 requires that any employee data be destroyed when the purpose has been satisfied or at the end of the employment relationship unless otherwise requested by the employee.

Automated Employment Decision Tools

S07623 makes it unlawful for an employer or employment agency to use an AEDT for an employment decision unless the tool was subject to a bias audit no more than one year before the use of the tool. An “employment decision” includes “any decision made by the employer that affects wages, benefits, other compensation, hours, work schedule, performance evaluation, hiring, discipline, promotion, termination, job content, assignment of work, access to work opportunities, productivity requirements, workplace health and safety, and other terms or conditions of employment.” This “bias audit” must involve an impartial evaluation by an independent auditor. And a summary of the results must be made publicly available before using the tool. Under the proposed law, an AEDT is defined as “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 affect natural persons.”

An employer or employment agency using AEDTs must also comply with certain notice requirements outlined by the law. At least ten days before the evaluation, employers must notify any employee or candidate residing in New York that an AEDT will be used in their assessment with a description of the job qualifications and characteristics to be assessed by the tool. This notice must allow the candidate to request an alternative selection process or an accommodation that does not involve use of the tool. Employers may not require employees or candidates to consent to the use of AEDTs, nor discipline or retaliate against an employee who requests an accommodation.

Finally, the proposed law specifies that employers may not rely solely on output from AEDTs when making hiring, promotion, termination, disciplinary, or compensation decisions.

Penalties

Employers who violate the law may be subject to fines of up to $500 for a first violation and each additional violation occurring on the same day as the first violation, and between $500 and $1,500 for each subsequent offense.

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