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New York City Enacts Law Restricting Use of Artificial Intelligence in Employment Decisions

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Effective January 1, 2023, New York City employers will be restricted from using artificial intelligence machine-learning products in hiring and promotion decisions. In advance of the effective date, employers who already rely upon these AI products may want to begin preparing to ensure that their use comports with the new law's vetting and notice requirements.

The new law governs employers' use of "automated employment decision tools," 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 impact natural persons."

The law prohibits the use of such tools to screen a candidate or employee for an employment decision, unless it has been the subject of a "bias audit" no more than one year prior to its use. A "bias audit" is defined as an impartial evaluation by an independent auditor that tests, at minimum, the tool's disparate impact upon individuals based on their race, ethnicity, and sex. Notably, the new law does not define who (or what) is deemed an adequate independent auditor. It also does not address employers' use of an automated employment decision tool that is found to have a disparate impact through a bias audit – neither expressly prohibiting the use of such tools nor permitting their use if, for example, it bears a significant relationship to a significant business objective of the employer.

An employer is not permitted to use an automated employment decision tool to screen a candidate or employee for an employment decision until it makes publicly available on its website: (1) a summary of the tool's most recent bias audit and (2) the distribution date of the tool.

The new law also includes two notice requirements, both of which must occur at least ten business days before an employer's use of an automated employment decision tool. Employers interested in using such tools must first notify each candidate or employee who resides in New York City that an automated employment decision tool will be used in connection with an assessment or evaluation of the individual. The candidate or employee then has the right to request an alternative selection process or accommodation. Employers must also notify each candidate or employee who resides in New York City of the job qualifications and characteristics that the tool will use in its assessment.

In addition, a candidate or employee may submit a written request for certain information if it has not been previously disclosed on the employer's website, including: (1) the type of data collected for the automated employment decision tool, (2) the source of such data, and (3) the employer's data retention policy. Employers are required to respond within 30 days of receiving such a request.

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The new law will be enforced by the City and does not create a private right of action. It does provide for potentially significant monetary penalties, including a penalty of no more than $500 for an initial violation and each additional violation occurring that same day, and then penalties between $500-$1,500 for subsequent violations. Significantly, each day that an automated employment decision tool is used in violation of the new law is considered a separate violation. The failure to provide the requisite notice to each candidate or employee constitutes a separate violation as well.

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The potential for learned algorithmic bias has recently been a topic of interest for legislatures and regulatory agencies. For example, on October 28, 2021, the EEOC announced a new initiative aimed at prioritizing and ensuring that artificial intelligence and other emerging tools used in employment decisions comply with federal civil rights laws.

The following Gibson Dunn attorneys assisted in preparing this client update: Danielle Moss, Harris Mufson, Gabby Levin, and Meika Freeman.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following:

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