

## Medley Of State AI Laws Pose Employer Compliance Hurdles

By **Danielle Moss, Harris Mufson and Emily Lamm** (March 30, 2022, 3:16 PM EDT)

As employers face increasing challenges to finding and retaining talent, many have turned to artificial intelligence as a potential solution.

Some companies use automated tracking or management systems to evaluate, screen and/or hire employees. Others use AI to identify qualified candidates and to recruit talent.

Depending on how AI is utilized, employers may be subject to a patchwork of recently enacted state and local laws. In this article, we address those laws, preview potential new ones, and provide practical guidance for employers that are already using, or may in the future use, AI for employment purposes.



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### Legislative Landscape

#### *Illinois and Maryland*

U.S. laws regulating AI are fairly recent and rapidly evolving.

In 2019 and 2020, Illinois and Maryland became the first states to pass laws that directly regulate employers' use of AI when interviewing candidates, albeit with varying approaches.

On the one hand, Illinois regulates the use of artificial intelligence analysis.[1] Maryland, on the other, restricts employers' use of facial recognition services that analyze facial templates during interviews.[2]

While both states require employers to obtain consent from applicants, Illinois requires employers to provide applicants with (1) advance notice about the use of AI, (2) transparency about how it works, and (3) what characteristics will be used to evaluate the applicant.

Illinois limits an employer's ability to distribute any video recording of the interview beyond those whose expertise or technology is necessary for the applicant's evaluation, and requires employers to destroy the video within 30 days of a request from an applicant.[3]



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Illinois recently amended its law, effective this January, to require employers relying solely upon AI video analysis to determine if an applicant is selected for an in-person interview to annually collect and report data on the race and ethnicity of (1) applicants who are hired, and (2) applicants who are and are not offered in-person interviews after AI video analysis.[4]

### ***New York City***

New York City recently **passed** the broadest AI employment law in the U.S. That law, which is effective Jan. 1, 2023, will regulate employers' use of AI tools for hiring and promotion decisions.[5]

Specifically, before utilizing AI in New York City, employers will be required to audit the AI tool to ensure its use will not result in disparate impacts based on race, ethnicity or sex.

Employers will also be required to publicly post a summary of the AI tool's bias audit to its website, as well as provide applicants and employees with notice of the tool's use and a description of the characteristics being assessed.

### ***Potential New Laws On the Horizon***

Other AI laws may be forthcoming. For example, Congress is considering the federal Algorithmic Accountability Act, which, if passed, would require employers across states to perform an impact assessment of any automated decision-making system that has a significant effect on an individual's access to, terms or availability of employment.[6]

Washington, D.C., is also currently considering a law that would prohibit adverse algorithmic eligibility determinations — based on machine learning, AI or similar techniques — in an individual's eligibility for, access to or denial of employment based on a range of protected traits, including race, sex, religion and disability.[7]

If passed, the law would require D.C.-based employers to conduct audits of the algorithmic determination practices, as well as provide notice to individuals about how their information will be used.

In recognition of this growing trend of regulating employers' use of AI, in October 2021, the U.S. Equal Employment Opportunity Commission announced an initiative[8] to ultimately "provide guidance on algorithmic fairness and the use of AI in employment decisions."

However, the EEOC is still in the early stages of its initiative.

As discussed below, notwithstanding the current lack of guidance, employers may take certain steps to mitigate risks and ensure compliance with their legal obligations.

### **Employer Best Practices**

#### ***1. Assess whether AI is being used for employment purposes.***

Employers should first examine whether they are using AI for employment purposes. This inquiry may

not be as simple as it sounds, since a broad range of employment tools may be considered AI technology.

New York City's law, for example, broadly defines "automated employment decision tools" 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.[9]

Even if employers are not using AI tools for hiring purposes, they should consider assessing whether they are using or will use AI tools for other employment purposes.

For example, if an AI tool is used to monitor employees' work efficiency, that tool may be collecting data that could be used to assess performance as part of a promotion, demotion, bonus or other employment decision.

Proactive planning regarding the use of AI tools is important because many of the enacted laws require advance notice, postings and/or bias audits before using the tools.

## **2. Conduct bias audits.**

Wherever required, employers should conduct a bias audit of the AI tool. Unfortunately, what constitutes an adequate bias audit is far from clear.

In theory, a bias audit is intended to test for whether an AI tool disproportionately and negatively affects a trait or class protected by law, such as race, gender, age, ethnicity or disability.

Without clear guidance from the EEOC or equivalent state and local agencies, there is no universal, standardized approach to conducting bias audits regarding AI tools.

Under New York City's AI law, the requisite bias audit must include an assessment of the tool's disparate impact based on race, ethnicity and sex.[10]

Although the NYC law does not appear to require a bias audit based on other protected traits under federal, state or local law — such as age or disability — employers may still consider conducting a more comprehensive audit.

Of note, D.C.'s proposed bill would require an audit of disparate impact risks and algorithmic eligibility determinations based on a broader range of protected characteristics than the New York City law, including requiring audits for disparate impact based on religion, national origin, gender identity or expression, sexual orientation, familial status, source of income, and disability.[11]

The federal Algorithmic Accountability Act, if passed, would similarly mandate that AI be audited based on a range of protected characteristics beyond race, ethnicity and sex.[12]

Aside from the scope of the audit, employers should consider who is qualified to conduct it, and under what methodology.

For example, employers may decide that the audit should be conducted by an independent auditing firm.

Notably, the New York City law requires the audit to be "an impartial evaluation by an independent auditor."<sup>[13]</sup>

As an initial step, employers should confirm that any vendors that are supplying their AI technology have conducted testing to ensure their tools do not have an adverse impact on protected traits covered by applicable law, and have utilized established methodology to do so.

In the absence of additional guidance, employers may look to the EEOC's four-fifths rule as potentially illustrative.

Released in the EEOC's 1979 guidelines, that rule, in sum, provides that the protected class may be adversely affected by the employment decision if the selection rate of the protected class is less than 80% of the selection rate of the nonprotected class.<sup>[14]</sup>

Notably, though, the EEOC regulations further provide that an employer does not violate anti-discrimination laws if (1) the selection procedure is shown to be job-related and consistent with business necessity through test validation, and (2) there is no equally effective alternative procedure with a lesser adverse impact.<sup>[15]</sup>

Another issue to consider is the frequency of the AI bias audit.

The New York City law, for example, requires that the bias audit be conducted "no more than one year prior to the use of such tool."<sup>[16]</sup>

Meanwhile, the proposed bill in D.C. and the Algorithmic Accountability Act would require annual audits.<sup>[17]</sup>

### ***3. Prepare and distribute required notices and postings.***

Another core element of existing and potential AI laws is transparency.

Covered New York City employers, for example, should ensure that they have prepared notices for distribution to candidates and employees at least 10 business days before using AI tools.<sup>[18]</sup> By contrast, the Illinois and Maryland laws are silent on how much advance notice is required.

Regardless, such notices should clearly explain how the tool works, and what job qualifications and characteristics are being considered.

Employers should also be proactive to comply with public posting requirements.

For example, New York City's law requires that employers post a summary of the bias audit<sup>[19]</sup> to their website.

To date, the city has not released a sample posting.

In the absence of a sample or guidance, employers should carefully consider what information to

publicly post, including the type and sources of data collected, data retention policies, and a statement regarding the organization's use of such AI tools.

#### **4. Consider waivers.**

Employers should also consider whether to obtain consent and waivers from applicants and employees regarding the use of AI tools, as consent is required in Illinois, and waivers are required in Maryland.[20]

Although consent and waiver forms may already be utilized by organizations to comply with other privacy laws, AI-related laws and regulations may have different requirements.

#### **5. Consider accommodation requests.**

Another issue to consider is that these AI-focused laws are silent as to what, if any, obligations an employer has to make accommodations relating to the use of AI tools.

There is no explicit requirement in the Illinois, Maryland or New York City laws that employers provide an alternative for applicants if they refuse to consent to the AI tool.

Nevertheless, accommodation requirements under federal law — e.g., the Americans with Disabilities Act and Title VII of the Civil Rights Act — and other state and local laws may be implicated if, for example, an applicant or employee refuses to use an AI tool as part of an accommodation request.

At a minimum, employers should be prepared to respond and, as appropriate, engage in an interactive or cooperative dialogue about any such requests.

### **Takeaways**

AI is a fast developing area of law that presents unique questions and challenges.

Employers that have already implemented or that may implement AI tools in the workplace should consider all applicable laws and best practices to ensure compliance.

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[1] 820 ILCS 42, Illinois AI Video Interview Act (effective Jan. 1, 2020).

[2] Md. Code, Lab. & Empl. § 3-717, Facial Recognition Services Law (effective Oct. 1, 2020).

[3] Supra note 1.

[4] Ill. Public Act 102-0047 (effective Jan. 1, 2022).

[5] Int. No. 1894-2020, New York City, Law Restricting Use of Artificial Intelligence in Employment Decisions (effective Jan. 1, 2023).

[6] 117th Cong., H.R. 6580, Algorithmic Accountability Act of 2022 (proposed Feb. 4, 2022).

[7] Washington, D.C., Stop Discrimination by Algorithms Act of 2021 (proposed Dec. 8, 2021).

[8] <https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness>.

[9] Supra note 5.

[10] Id.

[11] Supra note 7.

[12] Supra note 6.

[13] Supra note 5.

[14] EEOC, Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (Mar. 1, 1979), <https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines>.

[15] EEOC, Employment Tests and Selection Procedures (Dec. 1, 2007), <https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures>.

[16] Supra note 5.

[17] Supra notes 6, 7.

[18] Supra note 5.

[19] Id.

[20] Supra notes 1, 2.