

10 Evolving AI Compliance Considerations For Employers

By **Cassandra Gaedt-Sheckter and Emily Lamm** (March 1, 2023, 6:14 PM EST)

In the pursuit of finding more effective and efficient ways to recruit, train, evaluate and retain employees, employers have turned to the use of automated tools.

Some employers use artificial intelligence to sort through high volumes of applications, select applicants for automated interviews or guide candidates through the application process. Meanwhile, others are leveraging AI to ensure employee safety and monitor productivity and performance.

Following a momentous year in 2022, employers must now consider the application of, and potentially prepare to comply with, a series of new transparency, data and auditing requirements imposed by state and local AI and privacy laws affecting such tools, many of which are taking effect in 2023.

For example, beginning in April, New York City employers using automated employment decision-making tools in hiring and promotion will have to navigate new notice and bias auditing requirements.

Meanwhile, California employers will need to be ready for the enforcement of applicant and employee data rights under the California Consumer Privacy Act, as amended by the California Privacy Rights Act, which took effect Jan. 1.

At the same time, we are continuing to see increasing involvement from the U.S. Equal Employment Opportunity Commission in this space, as well as ongoing legislative efforts to regulate the use of automated tools in the workplace.

In this article, we will address the top 10 takeaways for consideration regarding AI and privacy developments for employers already using, or contemplating the use of, automated tools in the employment lifecycle.

1. Applicants and employees have data rights in California.

As of Jan. 1, the CCPA, as amended by the CPRA, provides employees and job applicants with rights regarding the personal information their employer or prospective employer collects and maintains about them.[1]



Cassandra Gaedt-Sheckter



Emily Lamm

These rights include the right to access personal information — which may go beyond already-existing personnel record requests — request deletion of personal information, correct personal information, and the right to opt out of sharing personal information for cross-context behavioral advertising purposes.

In addition, applicants and employees have the right to be free from discrimination for exercising their rights under the CPRA. Before enforcement begins July 1, employers may need to take steps to ensure compliance, including drafting or updating privacy notices for these populations in an accessible location to inform employees of their rights and the data processing practices.

In addition, and often as a predicate, employers should identify the types of information collected and the reason for collection — e.g., complying with a legal requirement — to understand whether any information may be excluded from coverage of certain rights and to include sufficient disclosures in the notices.

Where companies must comply with these requirements for their California applicants and employees, they may prudently consider application of these rights and notices to all in the U.S.

Note also that the California Privacy Protection Agency launched a comment period on proposed rulemaking regarding cybersecurity audits, risk assessments and automated decision making on Feb. 10, suggesting that more regulations are ahead.[2] The latter may also affect the AI side of the house, as discussed below.

2. Enforcement of New York City's Local Law 144 will begin April 15.

Although New York City's Local Law 144[3] was originally slated to go into effect Jan. 1, the Department of Consumer and Worker Protection announced in December 2022 that it would delay enforcement until April 15.

With this announcement, the DCWP also issued revised proposed rules seeking to implement Local Law 144 and held a second public hearing Jan. 23. While it remains to be seen what the final proposed rules will encompass, New York City employers using certain automated employment decision-making tools, or AEDT, in hiring and promotion may be subject to the law's notice and bias audit requirements.

Based on the latest version of the proposed rules, a bias audit will need to be conducted by an independent auditor who is not connected to the AEDT and include a disparate impact analysis on the intersectional categories of sex, ethnicity and race.

Local Law 144 also requires applicants and employees to be provided with notice at least 10 business days before AEDT use that includes a description of the characteristics being assessed, and the opportunity to request an alternative process or accommodation.

3. Illinois and Maryland already regulate automated video interviewing.

While there has been much attention surrounding New York City's Local Law 144, the existing laws in Illinois and Maryland should not be overlooked for employers using automated video interviewing.

Illinois regulates the use of AI video interview analysis — i.e., video interview platforms that use AI to assess and score applicant responses — by requiring consent from applicants, providing applicants with

the right to request that their video interview be deleted, and requiring employers to provide advanced notice about the use of AI, transparency about how it works, and what characteristics will be used to evaluate the applicant.[4]

Illinois also imposes data collection and reporting requirements on employers solely relying upon AI video analysis to determine if an applicant is selected for an in-person interview.

Meanwhile, Maryland requires employers to obtain consent from applicants through a signed waiver prior to the use of facial recognition services in applicant interviews.[5]

Where employers are already required to comply for their Illinois and Maryland applicants subject to automated video interviewing, they should consider application to all applicants in the U.S.

Further, when drafting notices about the use of automated tools, the notice requirements under the Illinois' law, New York City's Local Law 144, and the CCPA/CPRA should be considered in tandem.

4. The EEOC's involvement with AI continues to grow.

The EEOC has wasted no time in 2023. On Jan. 13, the EEOC released a draft strategic enforcement plan for 2023 through 2027, which highlights the use of AI tools in recruitment, screening, hiring, promotion and other employment decisions as an area of priority for the agency.[6]

Employers can expect the EEOC to issue new technical guidance as it did in May 2022, propose new regulations that will be subject to public comment, and bring enforcement actions — the first of which was filed in May 2022 alleging algorithmic age discrimination.[7][8]

Additionally, on Jan. 31, the EEOC held a public hearing covering an array of considerations for vendors and employers of AI tools, with a particular focus on the Uniform Guidelines on Employee Selection Procedures — including the utility of the four-fifths rule and validation tests — and the potential for the EEOC to participate in auditing or certifying AI tools.[9]

5. Consider the NIST's risk management framework.

On Jan. 26, the National Institute for Standards and Technology released the first version of its Artificial Intelligence Risk Management Framework. The voluntary framework provides recommendations for incorporating trustworthiness considerations into the design, development, use and evaluation of AI products, systems and services.

In particular, the framework emphasizes the centrality of ongoing risk monitoring in light of new and unforeseen risks that may emerge over time. While not specifically applying to employee-related data, this is an additional measure to consider, particularly in the context of other requirements when crafting AI governance processes.

6. Watch litigation and regulation of monitoring tools.

Given the increase in monitoring and surveillance tools implemented during the COVID-19 pandemic, as well as heightened public awareness about the use of such technology, there could be an increase in litigation seeking to enforce employee privacy and security rights, including with respect to breaches under the CCPA/CPRA, state consumer protection statutes and common law.

Regulators have also stepped in to warn employers of the potential consequences of such tools. For example, there is a newly introduced bill pending in New York City that would limit an employer's ability to use data from electronic monitoring to make a termination or disciplinary decision.[10]

Meanwhile, a Pennsylvania bill introduced in February would require employers using monitoring tools to make public disclosures to applicants or employees.[11]

In addition, the general counsel of the National Labor Relations Board issued a memorandum in late October 2022 in which she raised concerns regarding the use of monitoring technologies, hiring and screening tools, and automated management tools to intentionally surveil or discriminate against organizing activities.[12]

Notably, in addition to proposing a strict scrutiny framework for these tools, the memorandum proposed that the NLRB require employers to disclose the use of monitoring to employees as well as how the information obtained is used.

7. States are proposing additional privacy laws creating employee data rights.

While the states that have passed laws regarding personal information have continued to exempt HR-related information, there are a handful of proposed privacy laws that would create data rights for employees, similar to California's.

For example, Washington's January reintroduction of the People's Privacy Act, H.B. 1616, defines covered individuals broadly to include individuals residing in Washington with no exclusion for employees.[13]

Notably, in addition to the expected rights and obligations found in other recently passed laws, the bill would make it an unlawful employment practice "to use artificial intelligence enabled profiling to make decisions that produce legal effects or similarly significant effects concerning individuals," including employment opportunities.

While the People's Privacy Act was previously introduced in January 2021, this reintroduction may garner more support given the legislative momentum in this space.

Likewise, New York's Digital Fairness Act, S.B. 2227, introduced in January 2023, applies to all individuals located in New York and would require covered employers to provide meaningful notice about the use of personal information to applicants and employees as well as an opportunity to opt out.[14]

8. California has been very active in proposing AI and employment laws.

Beyond the CCPA and CPRA, California has also been very active in proposing employment laws relating to AI.

For example, on Feb. 21, California's civil rights council held a hearing in which it reviewed revised draft regulations that would make it unlawful for an employer to use an automated-decision system in an array of employment decisions if it has an adverse impact on or constitutes disparate treatment of applicants or employees unless shown to be job-related and consistent with business necessity.[15]

Also in February, a California Senate bill was introduced seeking to establish the Office of Artificial Intelligence within California's Department of Technology.[16]

Additionally, California's Workplace Technology Accountability Act, A.B. 1651, would require employers using automated decision systems to prepare and publish summaries of their algorithmic and data protection impact assessments describing the methodology, findings, results and conclusions of each assessment.[17]

Unlike other laws, A.B. 1651 purports to be much broader in scope, as it encompasses an array of employment decisions beyond interviewing — as in Illinois and Maryland — or hiring and promotion, as in New York City.

Notably, the bill would require the establishment of meaningful human oversight with a designated internal reviewer. Employers can expect to see human review and oversight requirements in future laws and regulations.

9. Take heed of international developments.

Although the European Union's legislative process is ongoing with respect to the Artificial Intelligence Act, the act currently classifies AI systems used in employment as high risk and would require employers to implement a risk management system and ensure there is human oversight over such AI systems.

Meanwhile, Germany's Works Constitution Act imposes several requirements on the use of AI in employment on all Germany-based employers, including obtaining consent from the German Works Council for any recruiting processes — e.g., prescreening and applicant selection — involving AI.

10. Track the proposed laws in New Jersey, New York and Washington, D.C.

Introduced in December 2022, New Jersey's A.B. 4909 would regulate the use of AEDTs in hiring decisions to minimize discrimination in employment.[18] Similar to New York City's Local Law 144, employers would have to notify candidates of the use of an AEDT and conduct a bias audit.

Likewise, New York introduced A.B. 00567 in January, which would regulate the use of AEDTs in filtering employment candidates or prospective candidates for hire and require such tools to be subject to an annual disparate impact analysis.[19]

Meanwhile, Washington, D.C.'s Stop Discrimination by Algorithms Act was reintroduced in February, and 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.[20]

The law would also require Washington, D.C.-based employers to conduct audits of algorithmic determination practices and provide notice to applicants and employees about how their information is used.

Although this law was originally introduced in December 2021, a public hearing was held in September 2022 and in November 2022, Washington, D.C.'s Council Committee Chair Robert White announced that he is committed to advancing this bill in the first quarter of 2023.[21]

Overall Takeaway

Regulation and legislation at the intersection of AI, privacy and the workplace are rapidly increasing and raising unique questions and challenges for employers.

Employers that have already implemented or are considering implementing automated tools in the workplace should consider the impact of these developments to ensure compliance with upcoming laws and enhanced regulatory scrutiny.

Cassandra Gaedt-Sheckter is a partner and Emily Maxim Lamm is an associate at Gibson Dunn & Crutcher LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Cal. Civ. Code § 1798.100 et seq.

[2] https://coppa.ca.gov/regulations/pdf/invitation_for_comments_pr_02-2023.pdf.

[3] <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9>.

[4] 820 ILCS 42.

[5] Md. Code, Lab. & Empl. § 3-717.

[6] <https://www.federalregister.gov/documents/2023/01/10/2023-00283/draft-strategic-enforcement-plan>.

[7] https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.

[8] EEOC v. iTutorGroup, Inc., No. 1:22-cv-02565 (E.D.N.Y. May 5, 2022).

[9] <https://www.eeoc.gov/newsroom/eeoc-hearing-explores-potential-benefits-and-harms-artificial-intelligence-and-other>.

[10] <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5958217&GUID=44D72CEC-FE82-4A43-BA31-4BB15FBC15EB>.

[11] https://www.casey.senate.gov/imo/media/doc/stop_spying_bosses_act_one_pager.pdf.

[12] <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and>.

[13] <https://lawfilesex.t.leg.wa.gov/biennium/2023->

24/Pdf/Bills/House%20Bills/1616.pdf?q=20230126125146.

[14] <https://www.nysenate.gov/legislation/bills/2023/S2277>.

[15] <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/02/Attachment-C-Proposed-Modifications-to-Employment-Regulations-Regarding-Automated-Decision-Systems.pdf>.

[16] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB313.

[17] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1651.

[18] <https://www.njleg.state.nj.us/bill-search/2022/A4909>.

[19] <https://calcivilrights.ca.gov/civilrightscouncil/previous-meetings-and-agendas/>;
https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A00567&term=&Summary=Y&Text=Y.

[20] <https://lims.dccouncil.gov/Legislation/B25-0114>.

[21] <https://www.robertwhiteatlarge.com/statement-stop-discrim-algorithms/>.