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What Employers Should Know About Proposed Calif. AI Regs

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With the rapid proliferation of artificial intelligence across industries and sectors, state legislatures have taken notice.

In the past few months alone, there has been a flurry of action at the state government level, including Connecticut, Illinois and Texas introducing bills to create government task forces to study AI,[1] Massachusetts proposing an act drafted with ChatGPT to regulate generative AI models[2] and at least four proposed bills governing automated-decision-making tools in employment.[3]

While many of these states are only starting to dip their toes into the regulatory ring in this space, California has been steadily building its foundation for over a year and is positioning itself as a key regulator of AI in employment.[4] Indeed, there have been a number of noteworthy proposals in California focused on automated-decision-making tools.[5]

This article focuses on two of California's recent proposals — regulations from the California Civil Rights Council and Assembly Bill 331 — and five things employers should know about them.

1. The council's proposed regulations would cover the disparate treatment and impact of AI.

On Feb. 10, the council issued a modification[6] to proposed employment regulations regarding automated-decision systems that it originally introduced as part of a public workshop phase in March 2022 and subsequently revised in July.[7]

The council — formerly known as the California Fair Employment and Housing Council — is housed within the California Civil Rights Department and tasked with implementing California's civil rights laws, including the California Fair Employment and Housing Act, or FEHA.

Under the automated-decision systems regulations, it would be unlawful for an employer to use selection criteria — including a qualification standard,

employment test, automated-decision system or proxy — if it has an adverse impact on, or constitutes disparate treatment of, applicants or employees under the FEHA unless shown to be job-related and consistent with business necessity.

A proxy is defined as a "technically neutral characteristic or category" that is correlated with one of the protected classes under the FEHA — i.e., race, sex, national origin, religion, etc. — while "automated-decision system" is defined as a "computational process that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts applicants or employees" and "may be derived from and/or use machine-learning, algorithms, statistics, and/or other data processing or artificial intelligence techniques."

Notably, the automated-decision systems regulations' proposed definition — i.e., of processes that merely "facilitate" human decision making — is arguably broader than New York City's Local Law 144, enforced beginning July 5, 2023, which only imposes bias audit and notice requirements on automated employment decision tools that "substantially assist or replace" human decision making in the context of hiring and promotion decisions.[8]

Further, the automated-decision systems regulations list "[d]irecting job advertisements or other recruiting materials to targeted groups" and "[s]creening resumes for particular terms or patterns" as examples of tasks performed by such systems. These fairly simplistic automated tasks suggest that the regulations intend to cast a wider net and capture more automated tools than Local Law 144.

A defense is available under the regulations if an employer is able to show that there is no less discriminatory policy or practice to serve its goals as effectively.

To support this defense, employers may provide "evidence of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, recency, and scope of such effort, the results of such testing or other effort, and the response to the results." However, the regulations do not presently provide any guidance on, or examples of, "anti-bias testing."

2. Impact assessments would be required by A.B. 331.

A.B. 331, proposed in January, would require developers and deployers of automated-decision tools to conduct an "impact assessment" of such tools.[9] Under this law, automated-decision tools are defined as "a system or service that uses artificial intelligence and has been specifically developed and marketed to, or specifically modified to, make, or be a controlling factor in making, consequential decisions."

While A.B. 331 does not define "artificial intelligence," it denotes "consequential decisions" as decisions or judgments that have "a legal, material, or similarly significant effect" on access to, or the terms or availability of employment, including pay, promotion, hiring, termination and automated task allocation.

The bill's focus on tools with a "legal, material, or similarly significant effect" mirrors the language of several existing privacy laws, such as Colorado's Privacy Act, which imposes heightened limitations on automated processing that produces "legal or similarly significant effects," including employment opportunities.[10]

As noted above, A.B. 331 would require an impact assessment, defined as a risk-based evaluation, of automated-decision tools that includes a number of elements, such as a summary of the data collected and processed by the tool; an adverse impact analysis based on sex, race or ethnicity; and a description

of efforts to address algorithmic discrimination and evaluate its validity or relevance.

Any significant updates to automated-decision tools would likewise warrant an impact assessment. Under the proposal, the results of an impact assessment would need to be maintained for two years.

Similar to New York City's Local Law 144, A.B. 331 would require an adverse impact analysis based on sex, race or ethnicity. However, instead of having to publicly post the results, A.B. 331 requires that the impact assessment be provided to the Civil Rights Department within 60 days of completion, and failure to do so could result in an administrative fine.

Most recently, A.B. 331 was re-referred to the Committee on Privacy and Consumer Protection on March 20, after being amended on March 16. The bill will be reviewed during the committee's next hearing on April 11, at which point it is expected to undergo a third reading and potentially be sent to the state Senate.

3. The council is making progress with the proposed regulations.

On Feb. 21, the council held a public meeting in which it reviewed the proposed modifications to the automated-decision systems regulations, during which it unanimously approved a motion to start a 45-day comment period.

Based on the council's process, similar to the rulemaking currently in process for the California Privacy Rights Act, the next step will include the submission of an initial statement of reasons and a notice of proposed rulemaking — including disclosures regarding the proposed action such as cost impacts or savings along with a statement regarding consideration of alternative measures — at which point a 45-day comment period will begin.

After the comment period concludes, the council may choose to approve the regulations and seek approval from the Office of Administrative Law or look to make further revisions and restart the process. If the Office of Administrative Law approves the regulations, they must be filed with the secretary of state to go into effect.

In light of its persistence since March 2022, the council appears poised to move the automated-decision systems regulations forward. Most recently, the council's Algorithms and Bias Hearing Subcommittee provided a short update on the regulations on April 3, noting that they are hoping to get them out for public comment very soon.[11]

4. Distinguishing between developers and deployers is a potential trend.

The distinction between sellers or designers (i.e., developers) and users (i.e., deployers, who are often employers) of automated tools is likely to be part of the ongoing discussion between legislators and regulators, especially since A.B. 331 and the automated-decision systems regulations would impose differing requirements on developers and deployers.

For example, A.B. 331 provides separate, albeit similar, provisions outlining the impact assessment requirements for developers and deployers, respectively.

Under the bill, developers would also be required to provide deployers with a statement regarding the intended uses of the tool, known limitations — including foreseeable risks of algorithmic discrimination

— the types of data used to program or train the tool, and a description of the tool's evaluation for validity and explainability.

In addition, either the deployer or the developer must: (1) make publicly available an AI policy that outlines the types of automated-decision tools in use or made available to others; and (2) establish and maintain a "governance program" that includes safeguards for algorithmic discrimination associated with the use of the tool.

Moreover, under the newly added Section 11013(c)(8) of the March 2023 automated-decision systems regulations, those who sell or provide an automated-decision system — i.e., developers — are explicitly referenced and would be subject to record-keeping requirements, which would include data used or resulting from each employer to whom an automated-decision system is sold, as well as the training set, modeling, assessment criteria and outputs from the system.

During the council's Feb. 21 meeting, one council member remarked that it would be very difficult for sellers of such systems to be able to comply with these requirements because they may not have ongoing access to the data used or resulting from employers to whom they are sold.

Although it remains to be seen whether the council will make further revisions on this, or other, points, at least some regulators and legislators appear to recognize the different roles that developers and deployers have in the context of automated-decision-making tools, as well as the realities and potential limitations of the proposed regulations.

5. The council's proposed regulations purport to broadly characterize "employment agencies."

The FEHA defines an employment agency as "any person undertaking for compensation to procure employees or opportunities to work."[12]

In contrast, the automated-decision systems regulations would define an "employment agency" as "[a]ny person undertaking, for compensation, services to identify, screen, and/or procure job applicants, employees or opportunities to work, including persons undertaking these services through the use of an automated-decision system."

This definition is arguably broader than that of the FEHA, as the automated-decision systems regulations would cover not only procuring employees or opportunities for work, but also the identification and screening of job applicants and employees.

The use of automated-decision-making tools and systems in recruiting, hiring and promotion raises new questions about what constitutes an employment agency and whether they should be covered under existing and new laws.

Indeed, the U.S. Equal Employment Opportunity Commission recently announced a conciliation agreement with DHI Group Inc., a job search website operator, that was likely premised on the EEOC's characterization of DHI as an employment agency subject to Title VII of the Civil Rights Act of 1964.[13]

Based on its investigation, the EEOC found "reasonable cause" to believe that job ads posted by DHI's customers were violating Title VII by discouraging workers of American national origin from applying. As a condition of settlement, the agreement required DHI to rewrite its programming to "scrape" for keywords in new job postings, revise guidance to customers to specify certain language that must be

avoided in job ads and compensate the estate of the original complainant.

The EEOC's apparent decision to characterize this job search website operator as an employment agency under Title VII, as well as the broadened definition of "employment agency" under the automated-decision systems regulations detailed above, may each be a sign of thorny litigation ahead.

Conclusion

After years of little to no action, regulation and legislation at the intersection of AI and employment are on the rise.

Employers utilizing AI should keep a close eye on California, with a particular focus on the council's automated-decision systems regulations, which, if passed, would aim to hold employers and employment agencies liable for disparate impact or treatment arising from automated-decision-making systems.

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[1] Conn. S.B. No. 1103 (Introduced Feb. 23, 2023), https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=SB01103&which_year=2023; Ill. H.B. 3563 (introduced Feb. 17, 2023), https://www.ilga.gov/legislation/103/HB/10300HB3563.htm; Texas H.B. No. 2060 (introduced Feb. 8, 2023), https://legiscan.com/TX/bill/HB2060/2023.

[2] Mass. S.D. 1827 (introduced Jan. 20, 2023), https://fastdemocracy.com/bill-search/ma/193rd/bills/MAB00055296/#overview.

[3] N.J. A4909 (introduced Dec .5, 2022), https://www.njleg.state.nj.us/bill-search/2022/A4909; N.Y. A.B. 00567 (introduced Jan. 9, 2023), https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00567&term=2023&Summary=Y&Actions=Y&Text=Y; Vermont H. 114 (introduced Jan. 26, 2023), https://legislature.vermont.gov/Documents/2024/Docs/BILLS/H-0114/H-0114%20As%20Introduced.pdf; D.C. B25-0114 (introduced Feb. 2, 2023), https://lims.dccouncil.gov/Legislation/B25-0114.

[4] See, e.g., https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1651; https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/03/AttachB-ModtoEmployRegAutomated-DecisionSystems.pdf.

[5] See, e.g., https://cppa.ca.gov/regulations/pdf/invitation_for_comments_pr_02-2023.pdf.

[6] https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/02/Attachment-C-Proposed-

Modifications-to-Employment-Regulations-Regarding-Automated-Decision-Systems.pdf.

[7] https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/03/AttachB-ModtoEmployRegAutomated-DecisionSystems.pdf.

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

[9] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB331

[10] https://leg.colorado.gov/sites/default/files/2021a_190_signed.pdf.

[11] https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/03/Notice-and-Agenda-for-2023.04.03-CRC-Meeting.pdf.

[12] Cal. Gov. Code Sec. 12926(e), https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=12926.&nodeTreePath=3.3.4.3&lawCode=GOV.

[13] https://www.eeoc.gov/newsroom/dhi-group-inc-conciliates-eeoc-national-origin-discrimination-finding.