

REMINDER FOR ILLINOIS (AND OTHER) EMPLOYERS: RESTRICTIONS APPLY WHEN USING ARTIFICIAL INTELLIGENCE ANALYSIS DURING THE HIRING PROCESS

Apr 17, 2023

SUMMARY

Illinois and other jurisdictions have adopted, or are considering, laws establishing parameters for employer use of AI during the hiring process.

The current attention being given to ChatGPT and other technologies using artificial intelligence (AI) is prompting companies to consider (or take another look) at how AI can and/or should play a role in their operations. From an employment law perspective, employers in Illinois – and elsewhere – should be aware of existing laws and guidance, and also should keep an eye out for the additional restrictions that will undoubtedly come as the use of AI becomes more prevalent.

In 2020, Illinois adopted the [Artificial Intelligence Video Interview Act \(820 ILCS 42/1\)](#), which establishes parameters for employer use of AI during the hiring process. If an employer intends to ask applicants to record video interviews so that it can use an AI analysis of such videos as part of the evaluation process, the employer must:

- Notify each applicant before the interview that AI may be used to analyze the interview and consider the applicant's fitness for the position;
- Provide each applicant with information before the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and
- Obtain the applicant's consent for the use of AI to evaluate the interview. Where consent is not obtained, AI may not be used to evaluate the applicant.

Sharing of such videos is limited to those with the expertise or technology necessary to evaluate the applicant's fitness for a position. The videos (including all copies) must be destroyed within 30 days of a request by the applicant. These restrictions presumably apply to both new hires and employees who are seeking new positions within a company.

Illinois is not the only jurisdiction with AI restrictions on the books or under consideration. Bryan Cave Leighton Paisner's Data Privacy group has prepared a [summary of current and pending AI legislation](#) around the United States.

California is among the jurisdictions currently reviewing proposed laws and regulations on the subject of the use of AI when making employment decisions, while Maryland enacted a law similar to Illinois' in 2020, placing restrictions on the use of facial recognition services during pre-employment interviews until the applicant provides consent.

A more extensive law will be enforced in New York City beginning July 5, 2023: The New York City Automated Employment Decision Tools Law ("AEDTL") which, among other things, requires employers to (a) conduct an audit for potential bias before using any artificial intelligence tools that screen candidates for hire or promotion, (b) give advance notice to candidates concerning the use of such tools, and (c) provide information on their websites about the tools and data collected. More information on the AEDTL is available [here](#).

The potential for bias in the use of artificial intelligence tools is a key concern of the federal Equal Employment Opportunity Commission (EEOC) as well. The EEOC launched an [agency-wide initiative](#) on the subject in 2021, with a goal of ensuring that, "the use of software, including artificial intelligence (AI), machine learning, and other emerging technologies used in hiring and other employment decisions comply with the federal civil rights laws that the EEOC enforces."

In May 2022, the EEOC issued guidance on the subject of, "[The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees](#)." This guidance provides definitions of key terms and explains how the use of algorithmic decision-making tools may violate the Americans with Disabilities Act (ADA), and notes that the use of a third-party vendor to develop and/or administer such a tool is not likely to insulate the employer from liability in connection with the results of using that tool. The EEOC held a public hearing on the issue of employment discrimination and the use of AI in January 2023, and is likely to continue its focus on this developing area.

As the use of AI in the hiring and selection process continues to evolve, employers should:

(1) become familiar with artificial intelligence concepts; (2) examine, understand, be able to explain, and monitor their automated recruiting tools and practices; and (3) take steps to avoid bias and comply with applicable law.

MEET THE TEAM



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