

The Impact of Technology on Employment Practices: The Rise of AI and Related Litigation Risks

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Topics and Overview

- Legislative Update: New York City, California
- Federal Attention to AI Issues
- Emerging International Regulatory Regimes – EU AI Act
- Bring Your Own Device Policies & Risk Mitigation Best Practices
- Litigation Trends



POLL: AI Applications

Does your company...

1. Use a sophisticated Human Resources Information System (“HRIS”)?
 - Does your company use the HRIS to automate selection decisions?
 - If so, does your company annually assess the results for adverse impact?
2. Encourage use of wellness programs, e.g. through Fitbit, MoveSpring, Verywell Fit?
 - What about an employee biometric data collection protocol?
3. Use or plan to use a tool that is covered by the NYC law (and thus plan to publish bias audit results)?



New York Local Law 144



NYC 144: Is it an AEDT?

- The statute defines *AEDT* to be:
 - any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence,
 - that issues [a] simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for ...
 - ... employment decisions that impact natural persons.



NYC 144: What is a covered employment decision?

- (Only) hiring and promotion
- (Only) candidates who have applied for a specific job
- (Only) hiring or promotion decisions that “screen” candidates or employees by determining whether they “should be selected or advanced” in the process



NYC 144: “Substantially Assist Or Replace Discretionary Decision Making”

- Only AEDTs which “substantially assist or replace discretionary decision making” are covered
- Final Rule – standard met only if the output of the AEDT is used
 1. as the sole criterion in making the employment decision, with no other factors considered;
 2. as a criterion that is given more determinative weight than any other criterion; or
 3. to overrule conclusions derived from other factors including human decision-making.



NYC 144: Bias Audit Requirement

- Independent auditor – a controversial requirement
- Annual public summary of results of bias audit
- Multiple organizations can use the same bias audit, if each employer provides historical data to the independent auditor
- Vendor can hire an independent auditor to review its AEDT
- Vendor can provide the audit to organizations that wish to use the tool



NYC 144: Notice Requirement

At least 10 business days before use of the tool:

1. AEDT is being used in assessing and evaluating the candidate
2. The job qualifications and characteristics the AEDT will use in its analysis
3. AEDT's data source, type, and the employer's data retention policy
4. That a candidate may request an alternative selection process or accommodation



NYC 144: Coverage

- Applies to:
 - Employers physically located in NYC
 - Candidates or employees located in NYC
- Does not apply to:
 - Positions based outside NYC for non-NYC employers
- Law is not explicit regarding applicability to remote-work positions that may be performed in NYC



NYC 144: Coverage



Applicability “in the City”

- **Position located in NYC**
 - Bias audit required
 - Notices required for NYC residents
- **Position located outside NYC**
 - Bias audit and notices not required
- **Fully Remote Position**
 - Employer only has a NYC office
 - Bias audit required
 - Notices required for NYC residents
 - Employer does not have a NYC Office
 - Bias audit and notices not required
 - Employer offices in NYC and outside NYC
 - Fact specific analysis



NYC 144: Other Considerations

- Alternative Selection Process or Accommodation
 - ADA access versus non-ADA “opt out”
- Penalties
 - Separate, daily violations



NYC 144: What Should Employers Do Right Now?

- Catalogue any potentially covered AEDTs currently in use or being developed
- Determine if the AEDT is/will be used for positions filled in NYC
- Decide and document how the AEDT output is/will be weighted vis-à-vis other factors – the escape hatch
- If covered – balance legal risk with operational value
 - Revisit decision to use with NYC-based candidates
 - If vendor-provided, request vendor for results of bias audit – seek indemnification?
 - Publish results before using with NYC-based candidates



POLL: Is this an AEDT for purposes of NYC 144?

- A tool that uses machine learning to evaluate candidates based on their resumes, where the output is weighted 33% in a selection process that also weights a pre-employment test at 33% and interview results at 33%
- A spreadsheet that can be sorted by candidate GPA
- A junk email filter that screens out applications from recruiters
- Software that reviews resumes of successful employees, then screens applicant resumes looking for similar candidates



California AB 311



California Assembly Bill 331

- Current proposal - targets discrimination from AI software in employment, education, housing, utilities, health care, financial services, legal services and other areas
- Regulates “developers” and “deployers”
- Key requirements:
 - Annual impact assessments
 - Notice to persons affected by AI
 - Internal governance program
- Enforcement by CRD
 - Current proposal also provides for private right of action



CA AB 331: Key Definitions

- **Algorithmic discrimination:** “the condition in which an automated decision tool contributes to unjustified differential treatment or impacts disfavoring people based on” protected categories
- **Artificial intelligence:** “a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing a real or virtual environment”
- **Automated decision tool:** “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”



CA AB 331: Key Definitions

- **Consequential decision** [in employment]: a decision or judgment that has a legal, material, or similarly significant effect on an individual's life relating to the impact of, access to, or the cost, terms, or availability of employment, workers management, or self-employment, including, but not limited to
 - pay or promotion,
 - hiring or termination,
 - or automated task allocation



CA AB 331: Impact Assessment Components

- Statement of the purpose of the ADT; its intended benefits, uses, and deployment contexts
- Description of ADT's outputs and how the outputs are used to make, or are a controlling factor in making, a consequential decision;
- Summary of the type of data collected from natural persons and processed by the ADT
- Statement of the extent to which the deployer's use of the ADT is consistent with or varies from developer's statement
- Analysis of the potential adverse impacts on the basis of sex, race, color, ethnicity, religion, age, national origin, limited English proficiency, disability, veteran status, or genetic information
- Description of safeguards that are or will be implemented by the deployer to address any reasonably foreseeable risks of algorithmic discrimination
- Description of how ADT will be used by a natural person, or monitored when it is used, to make or be a controlling factor in making, a consequential decision
- Description of how the ADT has or will be evaluated for validity or relevance



CA AB 331: Notice Requirements

- Deployer must provide:
 - statement of the purpose of the ADT;
 - contact information for the developer; and
 - plain language description of the ADT that includes a description of any human components and how any automated component is used to inform a consequential decision.
- Opt-out provision



CA AB 331: Penalty Provisions and Status of Bill

- Penalties – civil fines
 - Fine of up to \$10,000 per violation per day
 - A deployer (employer) that uses an AEDT without completing an impact assessment could be subject to penalties for \$10k/day, per applicant/employee
- Status
 - Reported out of Committee; moving through Appropriations in the Assembly
 - Then moves to the CA Senate



POLL: Employer Reactions to AB 331

- **What are the biggest concerns flowing from CA AB 331?**
 - Private right of action
 - CRD's authority to enforce
 - Ambiguity as to penalties
 - Required sharing of information by deployers as to the intended uses of ADTs
 - All of the above



Illinois Artificial Intelligence Video Interview Act



Illinois Artificial Intelligence Video Interview Act

- Effective January 1, 2020
- Specifically addresses AI in video interviews
- Does not define “artificial intelligence”
- Requires notice and consent of applicant



Federal Regulatory Approach



EEOC and DOJ Guidance – AI and the ADA

- EEOC: “Americans With Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees”
 - Reasonable accommodations when using algorithmic decision-making tools
 - Safeguards to prevent workers with disabilities from being “screened out” from consideration even if they can do the job with or without a reasonable accommodation
 - Use of AI resulting in prohibited disability-related inquiries or constituting a “medical examination”
- DOJ: “Algorithms, Artificial, and Disability Discrimination in Hiring”



EEOC Strategic Enforcement Plan

- Focus on eliminating barriers in recruiting and hiring:
 - Automated systems that intentionally exclude or adversely impact protected groups
 - Restrictive application processes or systems that impede access by protected groups
 - Screening tools that or requirements that disproportionately impact workers based on their protected status



Joint Statement on Enforcement Efforts Against Discrimination And Bias In Automated Systems

- EEOC, DOJ, CFPB, and FTC: AI has the potential to “produce outcomes that result in unlawful discrimination”
 - Data and Datasets
 - Model Opacity and Access
 - Design and Use
- Seeking to enforce “responsible innovation”



EEOC's Guidance On Assessing Adverse Impact in AI

- May 18, 2023: new EEOC guidance “outlines considerations for incorporating automated systems into employment decisions”
- Provides some technical guidance for assessing adverse impact – but generally emphasizes that Title VII obligations apply in the AI context
- Encourages employers to conduct ongoing self-analyses to ensure that their use of technology does not inadvertently result in discrimination
- Bottom Line: Nothing Earth-shattering or new



Recent Federal Regulatory and Legislative Developments



OFCCP Revised Proposed Scheduling Letter

- Revisions initially Proposed November 20, 2022; Revised Draft Proposed May 2, 2023
- New item requesting “Documentation of a contractor’s policies and practices regarding all employment recruiting, screening and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures.”



White House Office of Science and Technology Policy

- May 1, 2023: RFI to “to learn more about the automated tools used by employers to surveil, monitor, evaluate, and manage workers”
 - Workers’ firsthand experiences with surveillance technologies;
 - Details from employers, technology developers, and vendors on how they develop, sell, and use these technologies;
 - Best practices for mitigating risks to workers;
 - Relevant data and research; and
 - Ideas for how the federal government should respond
- “8 of the 10 largest private U.S. employers tracked individual workers to assess their productivity” – NYT



Hearing: Oversight of AI - Rules for Artificial Intelligence

- May 16, 2023
- Emphasis on licensing, compliance & safety standards
- Pursuit of “transparency and trust”
- Disclosure and audit requirements
- National and global coordination



Emerging International Regulatory Frameworks



EU Proposed AI Act

- Assigns applications of AI to three risk categories
 - **Unacceptable risk** - government-run social scoring of the type used in China - banned.
 - **High-risk applications** - CV-scanning tool that ranks job applicants - subject to specific legal requirements.
 - **Other applications** - applications not explicitly banned or listed as high-risk are largely left unregulated.
- Bottom Line: International and national employers using AI in employment will soon be subject to a patchwork of regulation – reason for concern



POLL: AI Governance

Where is your company on its AI-governance journey?

1. Don't use AI – avoid it at all costs
2. Don't need a special governance process, since AI is just a difference of scale and speed
3. In the process of establishing an AI governance process
4. Have a documented and established AI governance process



AI Governance - People

- Internal –
 - IT-Systems
 - Supply Chain/Contracts
 - HR/People Analytics
 - Legal department
- External –
 - Government regulators
 - Government enforcement authorities
 - External vendors running AI
 - External vendors evaluating use of AI



AI Governance – Disparate Impact Analyses

- Disparate Impact Analyses
 - Determining when to insert demographics into AI (or how to keep demographics out of AI)
 - “Sandbox”-ing disparate impact analyses
 - Risks of statistics and changing/learning AI
 - AI-class action risk



Other Workplace Technologies



BYOD: Legal Considerations

- FLSA compliance
- Liability for employee actions while using personal devices
- Data breach notifications
- Privacy issues
- Legal discovery
- Third-party apps



Use of Other Technology to Track and Monitor Employees

- State frameworks: Connecticut, Delaware, California
- Wearables at work
- Employee biometrics
 - Wellness programs
 - Timekeeping – *EEOC v. Consol Energy Inc.*
 - State law prohibitions on microchipping
- NLRA considerations
- Litigation Trends and Risks



POLL: BYOD Usage

- Does your company have a BYOD practice?
 - Has your company performed an audit of third-party apps that employees that use for work-related communications?
 - Does your company use NLRA-compliant employee productivity monitoring software?



Personal Devices and Third Party Apps - DOJ Guidance

- Monaco Memo
 - To receive cooperation credit in a criminal investigation companies must have policies that allow for the collection and production of all non-privileged responsive documents
 - Includes all work-related communications (*e.g.*, texts, e-messages, or chats), and data contained on phones, tablets, or other devices that are used by its employees for business purposes



Personal Devices and Third Party Apps – DOJ Guidance

- Key Takeaways:
 - Assess the means and methods employees are using to engage in business related communications
 - Update policies to address what is learned from the assessment
 - Understand the tension between privacy laws and the right of employers to protect and access its data on employee devices
 - Make sure there is no expectation of privacy in work communications for those using BYOD



Personal Devices and Third Party Apps: DOJ Guidance

- Key Takeaways
 - Monitor for compliance
 - Discipline and take other appropriate corrective actions in response to violations
 - Publicize – through training and otherwise – company responses to violations
 - Make clear no one is exempt
 - Encourage internal whistleblowing



Conference and Messaging Technology

- Zoom and Teams Meetings
- Other Messaging Platforms
- Key Litigation Considerations and Risks
 - Preservation and Collection of Evidence
 - Preparing and Responding to Discovery Requests
 - Recording Meetings and Obtaining Consent
 - Privilege and Waiver Risks
 - Avenue for Employee Complaints



AI and Technology Litigation Trends



Illinois Biometric Privacy Law

- New class actions up 65% in months following Illinois Supreme Court decision in *Cothron v. White Castle System Inc.*
- 5-year statute of limitations clarified by *Tims v. Black Horse Carriers Inc.*



Evidence Preservation

- *Twitter, Inc., v. Elon R. Musk et al.* – October 5, 2022
 - Signal messages not produced – and presumed auto-deleted
 - Highlights need to understand how custodians communicate
- *Drips Holdings, LLC v. Teledrip, LLC* – September 29, 2022
 - Slack messages not preserved, resulting in sanctions



BYOD Discovery Pitfalls

- *In re Pork Antitrust Litig.* – March 31, 2022
 - A defendant may have “a practical ability to demand” the employees turn over their personal devices but not “control” over the devices for the purposes of discovery



Workday Lawsuit

- Class action complaint filed in N.D. Cal on February 21, 2023
- Alleges that Workday is an “employment agency” under Title VII
- Plaintiff alleges discrimination on the basis of race, age, and disability
- Seeks class of “former, current, and future applicants who have been denied employment due to the discriminatory administration of Workday’s screening products”



Thank you



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