

"States Scramble to Regulate AI-Based Hiring Tools", Kaufman Dolowich attorney authors Paul Daugherty, Bruce Liebman, Kevin Yombor, Bloomberg Law, 4-10-2023

States are moving to regulate use of artificial intelligence to prevent bias and ensure applicants' consent, while the federal government has been sluggish about issuing guidance, Paul Daugherty, Bruce Liebman, and Kevin Yombor of Kaufman, Dolowich & Voluck say.

Employers have long used artificial intelligence to review resumes submitted in response to job listings where previously, they used text searches. Today, however, employers have access to AI-powered algorithms that do more than just search for identified keywords.

Modern forms of AI can understand and compare experiences across resumes to better evaluate a candidate's work history and compare it to the experiences needed for an open position.

While the Equal Employment Opportunity Commission issued a "Technical Assistance" document in May 2022 concerning compliance with Americans with Disabilities Act requirements when employers use AI for hiring, there are no applicable federal statutes.

In 2022, Congress considered the Algorithmic Accountability Act, which would have required that employers across states perform an impact assessment of AI decision-making. This bill ultimately never passed the House Committee on Energy and Commerce. On Jan. 31, the EEOC held a hearing exploring potential benefits and harms of using AI in employment decisions, but this did not result in a directive.

Given the absence of federal law and EEOC guidance, states have been required to confront these new technological advancements directly. Most states do not have relevant regulations. While some have considered it, only a few states have enacted laws concerning the use of AI for screening prospective employees.

Illinois

Employers in Illinois should pay attention to the Artificial Intelligence Video Interview Act. This law requires employers that use AI-enabled analytics in interview videos to take the following actions:

- *Notify each applicant about the use of AI technology*
- *Explain the AI technology to the applicant, how it works, and what characteristics it uses to evaluate applicants*
- *Obtain the applicant's consent before the interview*

The video must be destroyed within 30 days upon the request of the applicant, and employers must limit the distribution of the videos to only those individuals whose expertise is necessary to evaluate the applicant.

If the employer relies solely on AI to make a threshold determination before the candidate proceeds to an in-person interview, that employer must track the race and ethnicity of the applicants who do not proceed to an in-person interview as well as those applicants ultimately hired.

Maryland

Maryland employers are prohibited from using facial recognition service technology unless the applicant signs a waiver. The waiver must include:

- *Applicant's name*
- *Interview date*
- *That the applicant consents to the use of facial recognition during the interview*
- *Confirmation the applicant read the consent waiver.*

New York City

New York City recently passed the Automated Employment Decision Tool Act, taking effect April 15, 2023. This law conditions the use of AI technology used in employment decisions to be screened and audited on a yearly basis to ensure its use will not result in discrimination or disparate impact.

This "bias audit" must be conducted by a third party, and the results published on the employer's website. Employers are required to give applicants notice of the AI tools used and must provide an applicant an alternative selection process or accommodation, if available.

Jurisdictions Considering Law Changes

Additional AI laws are anticipated. Washington, D.C. is considering the Stop Discrimination by Algorithms Act of 2023, which would prohibit discrimination based upon a computer's algorithm.

It would also require D.C. employers to conduct annual third-party bias audits of the algorithm. The law would also require the employer to notify employees and applicants about use of AI in employment decisions.

California considered similar regulations in 2022 through the California Fair Employment and Housing Council. The proposed regulations would impose liability upon employers administering AI tools that have a discriminatory impact. California's proposed regulation is more expansive, seeking to impose liability if the AI tools caused a discriminatory impact, even if the automated systems were facially neutral. Thus, California looked to eliminate any need of showing discriminatory intent.

Employer use of AI technology is a fast-developing area of law that presents unique challenges. Employers must carefully watch for new legal developments as more states and the federal government seek to impose new regulations.

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Author Information

Paul W. Daugherty is an employment and general liability defense partner in the Chicago office of Kaufman, Dolowich & Voluck.

Bruce Liebman is co-managing partner of Kaufman Dolowich & Voluck's Florida offices and practices labor and employment law.

Kevin Yombor is a labor and employment and business litigation partner in the Ft. Lauderdale, Florida, office of Kaufman, Dolowich & Voluck.

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