STATE OF NEW YORK

8328

2023-2024 Regular Sessions

IN ASSEMBLY

December 13, 2023

Introduced by M. of A. JOYNER -- read once and referred to the Committee on Labor

AN ACT to amend the labor law, in relation to restricting the use of electronic monitoring and automated employment decision tools; and to amend the civil rights law, in relation to making a conforming change

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new section 203-g to read as follows:

§ 203-g. Electronic monitoring and automated employment decision tools. 1. For the purposes of this section, the following terms have the following meanings:

(a) "Automated employment decision tool" means any computational process, automated system, or algorithm utilizing machine learning, statistical modeling, data analytics, artificial intelligence, or similar methods that issues a simplified output, including a score, classification, ranking, or recommendation, that is used to assist or replace decision making for employment decisions that impact natural persons. "Automated employment decision tool" does not include a tool that does not assist or replace employment decision processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

(b) "Bias audit" means an impartial evaluation by an independent auditor, which shall include, at a minimum, the testing of an automated employment decision tool to assess the tool's disparate impact on employees because of their age, race, creed, color, ethnicity, national origin, disability, citizenship or immigration status, marital or familial status, military status, religion, or sex, including sexual orientation, gender identity, gender expression, pregnancy, pregnancy outcomes, and reproductive healthcare choices.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(c) "Candidate" means any natural person or their authorized representative seeking employment through an application, or who is screened or evaluated for recruitment, for a position of employment by a business operating in the state.

(d) "Electronic monitoring tool" means any system that facilitates the collection of data concerning worker activities or communications by any means other than direct observation by a natural person, including the use of a computer, telephone, wire, radio, camera, electromagnetic, photoelectronic, or photo-optical system.

(e) "Employer" means any person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, benefits, other compensation, hours, working conditions, access to work or job opportunities, or other terms or conditions of employment, of any worker. "Employer" includes any of the employer's labor contractors.

(f) "Employee" means any natural person or their authorized representative acting for, employed by, or an independent contractor providing service to, or through, a business operating in the state.

(g) "Employee data" means any information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular employee, regardless of how the information is collected, inferred, or obtained. Data includes, but is not limited to, the following:

(i) personal identity information, including the individual's name, contact information, government-issued identification number, financial information, criminal background, or employment history;

(ii) biometric information, including the individual's physiological, biological, or behavioral characteristics, including the individual's deoxyribonucleic acid (DNA), that can be used, singly or in combination with other data, to establish individual identity;

(iii) health, medical, lifestyle, and wellness information, including the individual's medical history, physical or mental condition, diet or physical activity patterns, heart rate, medical treatment or diagnosis by a health care professional, health insurance policy number, subscriber identification number, or other unique identifier used to identify the individual; and

(iv) any data related to workplace activities, including the following:

(A) human resources information, including the contents of an individual's personnel file or performance evaluations;

(B) work process information, such as productivity and efficiency data;

(C) data that captures workplace communications and interactions, including emails, texts, internal message boards, and customer interaction and ratings;

(D) device usage and data, including calls placed or geolocation information;

(E) audio-video data and other information collected from sensors, including movement tracking, thermal sensors, voiceprints, or facial recognition, emotion, and gait recognition;

(F) inputs to or outputs generated by an automated employment decision tool that are linked to the individual; and

(G) data that is collected or generated on workers to mitigate the spread of infectious diseases, including COVID-19, or to comply with public health measures.

(h) "Employment decision" means any decision made by the employer that affects wages, benefits, other compensation, hours, work schedule, performance evaluation, hiring, selecting for recruitment, discipline, promotion, termination, job content, assignment of work, access to work opportunities, productivity requirements, workplace health and safety, and other terms or conditions of employment. For independent contractors or candidates for employment, this means the equivalent of these decisions based on their contract with or relationship to the employer.

(i) "Vendor" means any person who sells, distributes, or develops for sale an automated employment decision tool to be used in an employment decision made by an employer in the state.

2. (a) It shall be unlawful for an employer to use an electronic monitoring tool to collect employee data unless:

(i) the electronic monitoring tool is primarily intended to accomplish any of the following purposes:

(A) allowing a worker to accomplish an essential job function;

(B) ensuring the quality of goods and services;

(C) periodic assessment of worker performance;

(D) ensuring compliance with employment, labor, or other relevant laws;

(E) protecting the health, safety, or security of workers, or the security of the employer's facilities or computer networks;

(F) administering wages and benefits; or

(G) additional purposes to enable business operations as determined by the department;

(ii) the specific type of electronic monitoring tool is strictly necessary to accomplish the purpose, exclusively used to accomplish the purpose, and is the least invasive means to the employee that could reasonably be used to accomplish the purpose; and

(iii) the specific form of electronic monitoring is limited to the smallest number of workers and collects the least amount of data necessary to accomplish the purpose.

(b) Any employer that uses an electronic monitoring tool shall give prior written notice to all employees who may be subject to electronic monitoring and post said notice in a conspicuous place which is readily available for viewing by employees, pursuant to subdivision two of section fifty-two-e of the civil rights law. Such notice shall include, at a minimum, the following:

(i) a description of the purpose for which the electronic monitoring tool will be used, as specified in subparagraph (i) of paragraph (a) of this subdivision;

(ii) a description of the specific employee data to be collected, and the activities, locations, communications, and job roles that will be electronically monitored by the tool;

(iii) a description of the dates, times, and frequency that electronic monitoring will occur;

(iv) whether and how any employee data collected by the electronic monitoring tool will be used as an input in an automated employment decision tool;

(v) whether and how any employee data collected by the electronic monitoring tool will alone or in conjunction with an automated employment decision tool be used to make an employment decision by the employer or employment agency;

(vi) whether any employee data collected by the electronic monitoring tool will be used to assess employees' productivity performance or to set productivity standards, and if so, how;

(vii) a description of where any employee data collected by the electronic monitoring tool will be stored and the length of time it will be retained; and

(viii) an explanation for how the specific electronic monitoring practice is the least invasive means available to accomplish the monitoring purpose.

(c) An employer shall destroy any employee data collected via an electronic monitoring tool when the initial purpose for collecting the data has been satisfied or at the end of the employee's relationship with the employer, unless the employee has provided written and informed consent to the retention of their data by the employer.

(d) Notice of the specific form of electronic monitoring shall be clear and conspicuous and provide the worker with actual notice of electronic monitoring activities. A notice that states electronic monitoring "may" take place or that the employer "reserves the right" to monitor shall not be considered clear and conspicuous.

(e) (i) An employer who engages in random or periodic electronic monitoring of employees shall inform the affected employees of the specific events which are being monitored at the time the monitoring takes place. Notice shall be clear and conspicuous.

(ii) Notice of random or periodic electronic monitoring may be given after electronic monitoring has occurred only if necessary to preserve the integrity of an investigation of illegal activity or protect the immediate safety of employees, customers, or the public.

3. (a) Notwithstanding the allowable purposes for electronic monitoring described in paragraph (a) of subdivision two of this section, an employer shall not:

(i) use an electronic monitoring tool in such a manner that results in a violation of labor or employment law;

(ii) use an electronic monitoring tool in such a manner as to threaten the health, welfare, safety, or legal rights of employees;

(iii) use an electronic monitoring tool to monitor employees who are off-duty and not performing work-related tasks;

(iv) use an electronic monitoring tool in order to obtain information about an employee's religious beliefs, health or disability status, or immigration status;

(v) use an electronic monitoring tool in order to identify, punish, or obtain information about employees engaging in activity protected under labor and employment law;

(vi) use an electronic monitoring tool in order to or with the effect of informing a dynamic wage-setting system;

(vii) conduct audio-visual monitoring of bathrooms or other similarly private areas, including locker rooms, changing areas, breakrooms, smoking areas, employee cafeterias, lounges, areas designated to express breast milk, or areas designated for prayer or other religious activity, including data collection on the frequency of use of those private areas;

(viii) conduct audio-visual monitoring of a workplace in an employee's residence, an employee's personal vehicle, or property owned or leased by an employee, unless that audio-visual monitoring is strictly necessary to ensure employee health and safety, to verify the security of company or client data, or to accomplish other similarly compelling purposes;

(ix) use an electronic monitoring tool that incorporates facial recognition, gait, or emotion recognition technology;

(x) discipline or terminate the employment of an employee solely on the basis of their opposition of or refusal to submit to a practice that the employee believes in good faith that violate this section; or

(xi) where employees have union representation, refuse to bargain over the use of electronic monitoring tools.

(b) An employer shall not use employee data collected via an electronic monitoring tool for purposes other than those specified in the notice provided pursuant to paragraph (b) of subdivision two of this section.

(c) An employer shall not sell, transfer, or disclose employee data collected via an electronic monitoring tool to any other entity unless it is required to do so under state or federal law, or necessary to do so to comply with a bias audit of an automated employment decision tool pursuant to subdivision four of this section.

(d) An employer shall not require employees to either install applications on personal devices that collect or transmit employee data or to wear, embed, or physically implant those devices, including those that are installed subcutaneously or incorporated into items of clothing or personal accessories, unless the electronic monitoring is strictly necessary to accomplish essential job functions and is narrowly limited to only the activities and times necessary to accomplish essential job functions. Location tracking applications and devices shall be disabled outside the activities and times necessary to accomplish essential job functions.

(e) An employer shall not rely solely on employee data collected through electronic monitoring when making hiring, promotion, termination, disciplinary, or compensation decisions.

(f) The information and judgments involved in an employer's use of electronic monitoring data shall be documented and communicated to affected employees prior to the hiring, promotion, termination, or disciplinary decision going into effect.

(g) Data that provides evidence of criminal activity, when independently corroborated by the employer, or captured through the use of reasonable security measures that comply with paragraph (a) of subdivision two of this section, is exempt from this subdivision.

4. (a) It shall be unlawful for an employer to use an automated employment decision tool for an employment decision unless such tool has been the subject of a bias audit. Bias audits for automated employment decision tools must:

(i) be conducted no more than one year prior to the use of such tool, or where the tool was in use by the employer before this act became a law, within six months of this act becoming a law; and

(ii) be conducted by an independent and impartial party with no financial or legal conflicts of interest;

(iii) identify and describe the attributes and modeling techniques that the tool uses to produce outputs;

(iv) evaluate whether those attributes and techniques are a scientifically valid means of evaluating an employee or candidate's performance or ability to perform the essential functions of a role, and whether those attributes may function as a proxy for belonging to a protected class;

(v) consider, identify, and describe any disparities in the data used to train or develop the tool and describe how those disparities may result in a disparate impact on persons belonging to a protected class, and what actions may be taken by the employer or vendor of the tool to reduce or remedy any disparate impact;

(vi) consider, identify, and describe any disparities in the outputs produced by the tool that may result in a disparate impact on persons belonging to a protected class, and what actions may be taken by the employer or vendor of the tool to reduce or remedy that disparate impact;

(vii) evaluate whether the use of the tool may limit accessibility for persons with disabilities, or for persons with any specific disability, and what actions may be taken by the employer or vendor of the tool to reduce or remedy the concern;

(viii) identify and describe any other assessment of risks of discrimination or a disparate impact of the tool on members of a protected class that arise over the course of the bias audit, and what actions may be taken to reduce or remedy that risk;

(ix) for any finding of a disparate impact or limit on accessibility, evaluate whether the data set, attribute, or feature of the tool at issue is the least discriminatory method of assessing a candidate's performance or ability to perform job functions; and

(x) be submitted in its entirety or an accessible summary form to the department for inclusion in a public registry of such audits within sixty days of completion and distributed to employees who may be subject to the tool.

(b) An employer shall conduct or commission subsequent audits each year that the tool is in use to assist or replace employment decisions. Subsequent audits shall comply with the requirements of paragraph (a) of this subdivision, and shall assess and describe any change in the validity or disparate impact of the tool.

(c) An employer or vendor shall retain all documentation pertaining to the design, development, use, and data of an automated employment decision tool that may be necessary to conduct a bias audit. This includes but is not limited to the source of the data used to develop the tool, the technical specifications of the tool, individuals involved in the development of the tool, and historical use data for the tool. Such documentation must include a historical record of versions of the tool, such that an employer shall be able to attest in the event of litigation disputing an employment decision, the nature and specifications of the tool as it was used at the time of that employment decision. Such documentation shall be stored in such a manner as to be legible and accessible to the party conducting a bias audit.

(d) If an initial or subsequent bias audit requires the collection of sensitive employee data to assess a tool's disparate impact on employees, such data shall be collected, processed, stored, and retained in such a manner as to protect the privacy of employees. Employee data provided to auditors for the purpose of a bias audit shall not be shared with the employer, nor shall it be shared with any person, business entity, or other organization unless strictly necessary for the completion of the bias audit.

(e) If an initial or subsequent bias audit concludes that a data set, feature, or application of the automated employment decision tool results in a disparate impact on persons belonging to a protected class, or unlawfully limit accessibility for persons with disabilities, an employer shall:

(i) take reasonable and appropriate steps to reduce or remedy that disparate impact or limit on accessibility and describe in writing to employees, the auditor, and the department what steps were taken; and

(ii) if the employer believes the audit finding of a disparate impact or limit on accessibility is erroneous, or that the steps taken in

accordance with subparagraph (i) of this paragraph sufficiently address those findings such that the tool may be lawfully used in accordance with this section, describe in writing to employees, the auditor, and the department how the data set, feature, or application of the tool is the least discriminatory method of assessing an employee's performance or ability to complete essential functions of a position; or

(iii) if the employer believes the audit finding of a disparate impact or limit on accessibility is part of a lawful affirmative action plan or other lawful effort to reduce or eliminate bias in employment decisions, describe such plan or effort in writing to employees, the auditor, and the department.

(f) It shall be unlawful for an independent auditor, vendor, or employer to manipulate, conceal, or misrepresent the results of a bias audit.

5. Any employer that uses an automated employment decision tool shall notify employees and candidates subject to the tool no less than ten business days before such use:

(a) that an automated employment decision tool will be used in connection with the assessment or evaluation of such employee or candidate;

(b) the job qualifications and characteristics that such automated employment decision tool will assess, what employee or candidate data or attributes the tool will use to conduct that assessment, and what kind of outputs the tool will produce as an evaluation of such employee or candidate;

(c) what employee or candidate data is collected for the automated employment decision tool, the source of such data and the employer's data retention policy. Information pursuant to this section shall not be disclosed where such disclosure would violate local, state, or federal law, or interfere with a law enforcement investigation;

(d) the results of the most recent bias audit of the automated employment decision tool, including any findings of a disparate impact and associated response from the employer, or information about how to access that information if publicly available;

(e) information about how an employee or candidate may request an alternative selection process or accommodation that does not involve the use of an automated employment decision tool; and

(f) information about how the employee or candidate may (i) request internal review of the employment decision made by the automated employment decision tool in accordance with subdivision seven of this section and (ii) notification of the employee or candidate's right to file a complaint in a civil court in accordance with subdivision eight of this section.

6. (a) Notwithstanding the provisions of subdivision four of this section, an employer shall not, alone or in conjunction with an electronic monitoring tool, use an automated employment decision tool:

(i) in such a manner that results in a violation of labor or employment law;

(ii) in such a manner as to unduly intensify the conditions of work or to harm the health and safety of employees, including by setting unreasonable productivity quotas;

(iii) to make predictions about an employee or candidate for employment's behavior, beliefs, intentions, personality, emotional state, or other characteristic or behavior;

(iv) to predict, interfere with, restrain, or coerce employees engaging in activity protected under labor and employment law;

(v) to implement a dynamic wage-setting system that pays employees different wages for the same work;

(vi) to subtract from an employee's wages time spent exercising their legal rights; or

(vii) that involves facial recognition, gait, or emotion recognition technologies.

(b) An employer shall not rely solely on output from an automated employment decision tool when making hiring, promotion, termination, disciplinary, or compensation decisions.

(i) An employer shall establish meaningful human oversight of hiring, promotion, termination, disciplinary or compensation decisions assisted or replaced by automated employment decision tools. Meaningful human oversight requires:

(A) the designation of an internal reviewer with sufficient expertise in the operation of automated employment decision tools, sufficient familiarity with the results of the most recent bias audit of the employer's tool, and sufficient understanding of the outputs of the employer's tool to identify potential errors, discrepancies, or inaccuracies produced by the tool;

(B) that sufficient authority and discretion be granted to the designated internal reviewer to dispute, rerun, or recommend the rejection of an output suspected to be invalid, inaccurate, or discriminatory; and

(C) that the designated internal reviewer has the time and resources available to review and evaluate the tool output in accordance with clause (B) of this subparagraph.

(ii) An employer shall consider information other than automated employment decision tool outputs when making hiring, promotion, termination, disciplinary, or compensation decisions, such as supervisory or managerial evaluations, personnel files, employee work products, or peer reviews.

(c) An employer may not, where employees have union representation, refuse to bargain over the use of automated employment decision tools.

(d) An employer shall not require employees or candidates that apply for a position of employment to consent to the use of an automated employment decision tool in an employment decision in order to be considered for an employment decision, nor shall an employer discipline or disadvantage an employee or candidate for employment solely as a result of their request for accommodation.

7. (a) An employer shall offer employees and candidates a meaningful opportunity to request a reevaluation of the results of an employment decision made or assisted by an automated employment decision tool, if an employee or candidate believes or suspects that the decision resulted from inaccuracy, error, or bias in the tool, that the tool was used as the sole basis for the decision, or that the employer's use of the tool in some other way violates the provisions of this section, and the employee or candidate was meaningfully harmed by the outcome of the employment decision. An employee or candidate shall within thirty days of being notified of the employment decision provide the employer with a written request for reevaluation. Such written request shall include:

(i) the person's name, the employment decision at issue, and how the person was harmed by the outcome of the employment decision;

(ii) why the person believes or suspects the employment decision was informed by an inaccurate, erroneous, or biased output, was the result of an unlawful sole reliance on an automated employment decision tool, or otherwise violated the provisions of this section;

(iii) any evidence that may support the person's belief or suspicion; and

(iv) what reasonable remedial action the person would like the employer to take to investigate or remedy the believed or suspected harm, which may include providing the employee or candidate with outputs or documentation associated with the employment decision, providing the employee or candidate with documentation about the tool's most recent bias audit, or reprocessing the employee or candidate's data through the tool.

(b) An employer shall respond in writing to an employee or candidate's written request for reevaluation within sixty days of receipt of such request. Such written response shall include:

(i) any employment decision tool outputs regarding the person purporting to be harmed by the employment decision that were used in the making of the employment decision;

(ii) a description of the information other than the automated employment decision tool output that contributed to the employment decision;

(iii) whether the employer agrees with the employee or candidate's belief or suspicion that the decision was informed by an inaccurate, erroneous, or biased tool or output, that the tool was the unlawful sole basis for the decision, or that the employer otherwise violated the provisions of this section in its use of the tool, and why or why not;

(iv) if the employer disagrees with the employee or candidate's belief or suspicion, any evidence supporting the tool or output's accuracy and validity, the existence of meaningful human oversight, or the use of bases other than the tool in the making of the decision;

(v) if the employee or candidate requested the reprocessing of their data through the tool, the results or outputs of that reprocessing, and whether the results of the reprocessing have changed the employer's employment decision, and why or why not; and

(vi) if the employer refuses to take any reasonable remedial action requested by the employee or candidate, why they refuse to do so.

8. (a) If an employer fails to respond to an employee or candidate's request for reevaluation, or if the employee or candidate continues to have reason to believe they were harmed by the unlawful use of an inaccurate or biased automated employment decision tool or other violation of this section, the employee or candidate may initiate an action in a court of competent jurisdiction to enforce the provisions of this section. An employer that violates this section shall be liable for actual damages to any employee or candidate that has suffered damages due to such violation, reasonable attorneys' fees and costs, and, unless the employer proves a good faith basis to believe that its actions were in compliance with the law, one hundred percent of the total amount of actual damages, except such liquidated damages may be up to three hundred percent if found that the actions were willful.

(b) In any civil action claiming that an employer has violated this section in its use of electronic monitoring or automated employment decision tools, any person, employer, vendor, or other business entity that used, sold, distributed, or developed the tool shall be jointly and severally liable to a prevailing plaintiff for all damages awarded to that prevailing plaintiff, except that where a person, employer, vendor, or other business entity knowingly sells, provides, or distributes a tool to an employer with fewer than fifty employees, the vendor, not the small employer, shall be liable for any unlawful acts.

9. (a) Any person who violates any provision of this section or any rule promulgated pursuant to this section is liable for a civil penalty

of not more than five hundred dollars for a first violation and each additional violation occurring on the same day as the first violation, and not less than five hundred dollars nor more than fifteen hundred dollars for each subsequent violation.

(b) Each day on which an electronic monitoring tool or automated employment decision tool is used in violation of this section shall give rise to a separate violation of this section.

(c) Failure to provide any notice to a candidate or an employee in violation of subdivision two or five of this section shall constitute a separate violation.

(d) A proceeding to recover any civil penalty authorized by this section is returnable to any tribunal established within any agency designated to conduct such proceedings, or, in a city of over one million in population, such hearing may be held by a hearing officer employed within the office of administrative trials and hearings.

10. The attorney general may initiate in a court of competent jurisdiction action that may be appropriate or necessary for correction of any violation of this section, including mandating compliance with the provisions of this section or such other relief as may be appropriate.

11. The provisions of this section shall not be construed as to limit the authority of the division of human rights to enforce the provisions of article fifteen of the executive law.

§ 2. (a) The department of labor shall promulgate any rules and regulations necessary to implement the provisions of this section.

(b) The department of labor shall within one hundred eighty days of this act becoming a law have established a means of collecting, storing, and making publicly available any bias audits or summaries of bias audits submitted by employers or vendors in the state. Such department shall promulgate rules and regulations by which employers, vendors, or employees may request the redaction of certain information from said bias audits or summaries thereof, if that information is proprietary, sensitive, or poses a threat to the privacy of employees or candidates.

§ 3. Section 52-c of the civil rights law, as added by chapter 583 of the laws of 2021, is renumbered section 52-e and is amended to read as follows:

§ 52-e. Employers engaged in electronic monitoring; prior notice required. 1. For purposes of this section, employer means any individual, corporation, partnership, firm, or association with a place of business in the state. It shall not include the state or any political subdivision of the state.

2. (a) Any employer who monitors or otherwise intercepts telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage of or by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio, or electromagnetic, photoelectronic or photo-optical systems, shall give prior written notice upon hiring to all employees who are subject to electronic monitoring. The notice required by this subdivision shall be in writing, in an electronic record, or in another electronic form and acknowledged by the employee either in writing or electronically. Each employer shall also post the notice of electronic monitoring in a conspicuous place which is readily available for viewing by its employees who are subject to electronic monitoring. Such written notice shall comply with the requirements of subdivision two of section two hundred three-g of the labor law.

(b) For purposes of written notice required by paragraph (a) of this subdivision, an employee shall be advised that any and all telephone

conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means.

3. The attorney general may enforce the provisions of this section. Any employer found to be in violation of this section shall be subject to a maximum civil penalty of five hundred dollars for the first offense, one thousand dollars for the second offense and three thousand dollars for the third and each subsequent offense.

4. The provisions of this section shall not apply to processes that are designed to manage the type or volume of incoming or outgoing electronic mail or telephone voice mail or internet usage, that are not targeted to monitor or intercept the electronic mail or telephone voice mail or internet usage of a particular individual, and that are performed solely for the purpose of computer system maintenance and/or protection.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law.