

STATE OF NEW YORK

7623

2023-2024 Regular Sessions

IN SENATE

August 4, 2023

Introduced by Sen. HOYLMAN-SIGAL -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

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 technical change

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

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

3 § 203-f. Electronic monitoring and automated employment decision
4 tools. 1. For the purposes of this section, the following terms have the
5 following meanings:

6 (a) "Automated employment decision tool" means any computational proc-
7 ess, derived from machine learning, statistical modeling, data analyt-
8 ics, or artificial intelligence, that issues simplified output, includ-
9 ing a score, classification, or recommendation, that is used to
10 substantially assist or replace discretionary decision making for making
11 employment decisions that impact natural persons. "Automated employ-
12 ment decision tool" does not include a tool that does not automate, support,
13 substantially assist or replace discretionary decision-making processes
14 and that does not materially impact natural persons, including, but not
15 limited to, a junk email filter, firewall, antivirus software, calcula-
16 tor, spreadsheet, database, data set, or other compilation of data.

17 (b) "Bias audit" means an impartial evaluation by an independent audi-
18 tor. Such bias audit shall include but not be limited to the testing of
19 an automated employment decision tool to assess the tool's disparate
20 impact on persons of any component 1 category required to be reported by
21 employers pursuant to subsection (c) of section 2000e-8 of title 42 of
22 the United States code as specified in part 1602.7 of title 29 of the
23 code of federal regulations.

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

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

6 (d) "Employer or employment agency" means any person who directly or
7 indirectly, or through an agent or any other person, employs or exer-
8 cises control over the wages, benefits, other compensation hours, work-
9 ing conditions, access to work or job opportunities, or other terms or
10 conditions of employment, of any worker. "Employer" includes any of the
11 employer's labor contractors.

12 (e) "Employee" means any natural person or their authorized represen-
13 tative acting employed by, or an independent contractor providing
14 service to, or through, a business operating in the state and residing
15 in the state.

16 (f) "Employee data" means any information that identifies, relates to,
17 describes, is reasonably capable of being associated with, or could
18 reasonably be linked, directly or indirectly, with a particular employ-
19 ee, regardless of how the information is collected, inferred, or
20 obtained. Data includes, but is not limited to, the following:

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

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

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

34 (iv) any data related to workplace activities, including the follow-
35 ing:

36 (A) human resources information, including the contents of an individ-
37 ual's personnel file or performance evaluations;

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

40 (C) data that captures workplace communications and interactions,
41 including emails, texts, internal message boards, and customer inter-
42 action and ratings;

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

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

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

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

53 (g) "Employment decision" means any decision made by the employer that
54 affects wages, benefits, other compensation, hours, work schedule,
55 performance evaluation, hiring, discipline, promotion, termination, job
56 content, assignment of work, access to work opportunities, productivity

1 requirements, workplace health and safety, and other terms or conditions
2 of employment. For independent contractors or candidates for employment,
3 this means the equivalent of these decisions based on their contract
4 with or relationship to the employer.

5 2. (a) It shall be unlawful for an employer or an employment agency to
6 use an electronic monitoring tool to surveil employees residing in this
7 state unless:

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

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

11 (B) monitoring production processes or quality;

12 (C) assessment of worker performance;

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

15 (E) protecting the health, safety, or security of workers;

16 (F) administering wages and benefits; or

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

19 (ii) the specific type of electronic monitoring tool is strictly
20 necessary to accomplish the allowable purpose and is the least invasive
21 means to the employee that could reasonably be used to accomplish the
22 allowable purpose; and

23 (iii) the specific form of electronic monitoring is limited to the
24 smallest number of workers and collects the least amount of data neces-
25 sary to accomplish the allowable purpose.

26 (b) Any employer that uses an electronic monitoring tool shall notify
27 employees it intends to subject to electronic monitoring who reside in
28 the state that they will be subject to such monitoring pursuant to
29 subdivision two of section fifty-two-c of the civil rights law. Such
30 notice shall include, at a minimum, the following:

31 (i) a description of the allowable purpose for which the electronic
32 monitoring tool will be used, as specified in subparagraph (i) of para-
33 graph (a) of this subdivision;

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

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

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

41 (v) whether any employee data collected by the electronic monitoring
42 tool will alone or in conjunction with an automated employment decision
43 tool be used to inform an employment decision by the employer or employ-
44 ment agency;

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

48 (vii) a description of where any employee data collected by the elec-
49 tronic monitoring tool will be stored and the length it will be
50 retained; and

51 (viii) an explanation for how the specific electronic monitoring prac-
52 tice is the least invasive means available to accomplish the allowable
53 monitoring purpose.

54 (c) An employer or an employment agency shall not use employee data
55 collected via an electronic monitoring tool for purposes other than

1 those specified in the notice provided pursuant to paragraph (b) of this
2 subdivision.

3 (d) An employer or an employment agency shall not sell, transfer, or
4 disclose employee data collected via an electronic monitoring tool to
5 any other entity unless required to do so under state or federal law.

6 (e) An employer or an employment agency shall destroy any employee
7 data collected via an electronic monitoring tool when the initial
8 purpose for collecting the data has been satisfied or at the end of the
9 worker's relationship with the employer, unless there is a reasonable
10 interest for the worker to access the data after the relationship has
11 ended.

12 (f) Notice of the specific form of electronic monitoring shall be
13 clear and conspicuous and provide the worker with actual notice of elec-
14 tronic monitoring activities. A notice that states electronic monitoring
15 "may" take place or that the employer "reserves the right" to monitor
16 shall not be considered clear and conspicuous.

17 (g) (i) An employer who engages in random or periodic electronic moni-
18 toring of workers shall inform the affected workers of the specific
19 events which are being monitored at the time the monitoring takes place.
20 Notice shall be clear and conspicuous.

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

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

35 3. (a) Notwithstanding the allowable purposes for electronic monitor-
36 ing described in paragraph (a) of subdivision two of this section, an
37 employer shall not:

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

40 (ii) use an electronic monitoring tool in such a manner as to unduly
41 or extremely intensify the conditions of work or to harm the health and
42 safety of employees;

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

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

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

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

53 (vii) conduct audio-visual monitoring of bathrooms or other similarly
54 private areas, including locker rooms, changing areas, breakrooms, smok-
55 ing areas, employee cafeterias, lounges, areas designated to express
56 breast milk, or areas designated for prayer or other religious activity,

1 including data collection on the frequency of use of those private
2 areas;

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

9 (ix) use an electronic monitoring tool that incorporates facial recog-
10 nition, gait, or emotion recognition technology;

11 (x) discipline or terminate the employment of an employee solely on
12 the basis of their refusal to comply to the collection of their data by
13 an electronic monitoring tool; or

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

16 (b) An employer shall not rely solely on employee data collected
17 through electronic monitoring when making hiring, promotion, termi-
18 nation, disciplinary, or compensation decisions.

19 (i) An employer shall conduct its own assessment before making hiring,
20 promotion, termination, or disciplinary decisions independent of employ-
21 ee data gathered through electronic monitoring. This includes corrob-
22 orating the electronic monitoring employee data by other means, includ-
23 ing a supervisor's documentation or managerial documentation.

24 (ii) If an employer cannot independently corroborate the employee data
25 gathered through electronic monitoring, the employer shall not rely upon
26 that data in making hiring, promotion, termination, or disciplinary
27 decisions.

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

32 (d) Data that provides evidence of criminal activity, when independ-
33 ently corroborated by the employer, is exempt from this subdivision.

34 4. It shall be unlawful for an employer or an employment agency to use
35 an automated employment decision tool for an employment decision unless:

36 (a) such tool has been the subject of a bias audit conducted no more
37 than one year prior to the use of such tool; and

38 (b) a summary of the results of the most recent bias audit of such
39 tool as well as the distribution date of the tool to which such audit
40 applies has been made publicly available on the website of the employer
41 or employment agency prior to the use of such tool.

42 5. (a) Any employer or employment agency that uses an automated
43 employment decision tool to screen or otherwise evaluate an employee or
44 a candidate who has applied for a position for an employment decision
45 shall notify each such employee or candidate who resides in the state of
46 the following:

47 (i) that an automated employment decision tool will be used in
48 connection with the assessment or evaluation of such employee or candi-
49 date who resides in the state. Such notice shall be made no less than
50 ten business days before such use and allow a candidate to request an
51 alternative selection process or accommodation that does not involve the
52 use of an automated employment decision tool;

53 (ii) the job qualifications and characteristics that such automated
54 employment decision tool will use in the assessment of such candidate or
55 employee, and any outputs the tool will produce as an evaluation of such

1 candidate or employee. Such notice shall be made no less than ten busi-
2 ness days before such use; and

3 (iii) if not disclosed on the employer or employment agency's website,
4 information about the type of data collected for the automated employ-
5 ment decision tool, the source of such data and the employer or employ-
6 ment agency's data retention policy shall be available upon written
7 request by a candidate or employee. Such information shall be provided
8 within thirty days of the written request. Information pursuant to this
9 section shall not be disclosed where such disclosure would violate
10 local, state, or federal law, or interfere with a law enforcement inves-
11 tigation.

12 (b) An employer shall not require employees or candidates that apply
13 for a position of employment to consent to the use of automated employ-
14 ment decision tool in an employment decision in order to be considered
15 for an employment decision, nor shall an employer discipline or disad-
16 vantage an employee or candidate for employment solely as a result of
17 their request for accommodation.

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

21 (i) in such a manner that results in a violation of labor or employ-
22 ment law;

23 (ii) in such a manner as to unduly or extremely intensify the condi-
24 tions of work or to harm the health and safety of employees, including
25 by setting unreasonable productivity quotas;

26 (iii) to make predictions about an employee or candidate for employ-
27 ment's behavior, beliefs, intentions, personality, emotional state, or
28 other characteristic or behavior unrelated to the employee's essential
29 job functions;

30 (iv) to predict, interfere with, restrain, or coerce employees engag-
31 ing in activity protected under labor and employment law;

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

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

36 (vii) that draws on facial recognition, gait, or emotion recognition
37 technologies.

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

41 (i) An employer shall conduct its own evaluation of the employee
42 before making a hiring, promotion, termination, disciplinary or compen-
43 sation decision, independent of the output used from the automated
44 employment decision tool. This includes establishing meaningful human
45 oversight by a designated internal reviewer to corroborate the automated
46 employment decision tool output by other means, including supervisory or
47 managerial documentation, personnel files, or the consultation of
48 coworkers.

49 (ii) Meaningful human oversight requires that the designated internal
50 reviewer meet the following conditions:

51 (A) The designated internal reviewer is granted sufficient authority,
52 discretion, resources, and time to corroborate the automated employment
53 decision tool output.

54 (B) The designated internal reviewer has sufficient expertise in the
55 operation of similar systems and a sufficient understanding of the auto-

1 mated employment decision tool in question to interpret its outputs as
2 well as results of relevant bias audits.

3 (C) The designated internal review has education, training, or experi-
4 ence sufficient to allow the reviewer to make a well-informed decision.

5 (iii) When an employer cannot corroborate the output produced by the
6 automated employment decision tool, the employer shall not rely on the
7 system to make the hiring, promotion, termination, disciplinary, or
8 compensation decision.

9 (iv) When an employer can corroborate the automated employment deci-
10 sion tool output and makes the hiring, promotion, termination, discipli-
11 nary, or compensation decision based on that output, a notice containing
12 the following information shall be given to affected employees:

13 (A) the specific decision for which the automated employment decision
14 tool was used;

15 (B) any information or judgments used in addition to the automated
16 employment decision tool output in making the decision;

17 (C) the specific employee data that the automated employment decision
18 tool used;

19 (D) the individual, vendor, or entity who created the automated
20 employment decision tool;

21 (E) the individual or entity that executed and interpreted the results
22 of the automated employment decision tool; and

23 (F) a copy of any bias audits regarding the automated employment deci-
24 sion tool in question.

25 (v) When an employer uses corroborated output from an automated
26 employment decision tool to make a hiring, promotion, termination,
27 disciplinary, or compensation decision, notice shall be given to the
28 affected worker prior to the implementation of that decision.

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

31 7. (a) Any person who violates any provision of this section or any
32 rule promulgated pursuant to this section is liable for a civil penalty
33 of not more than five hundred dollars for a first violation and each
34 additional violation occurring on the same day as the first violation,
35 and not less than five hundred dollars nor more than fifteen hundred
36 dollars for each subsequent violation.

37 (b) Each day on which an electronic monitoring tool or automated
38 employment decision tool is used in violation of this section shall give
39 rise to a separate violation of subdivisions two, three, four, and five
40 of this section.

41 (c) Failure to provide any notice to a candidate or an employee in
42 violation of subdivision five of this section shall constitute a sepa-
43 rate violation.

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

49 8. The attorney general or such other persons designated by the
50 department may initiate in any court of competent jurisdiction any
51 action or proceeding that may be appropriate or necessary for correction
52 of any violation of this section, including mandating compliance with
53 the provisions of this section or such other relief as may be appropri-
54 ate.

55 9. The provisions of this section shall not be construed as to limit
56 any right of any employee or candidate for employment to bring a civil

1 action in any court of competent jurisdiction, or to limit the authority
2 of the division of human rights to enforce the provisions of article
3 fifteen of the executive law.

4 § 2. Section 52-c of the civil rights law, as added by chapter 583 of
5 the laws of 2021, is renumbered section 52-e.

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