

STATE OF NEW YORK

7623--B

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 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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:

1 Section 1. The labor law is amended by adding a new article 36 to read
2 as follows:

ARTICLE 36

BOSSWARE AND OPPRESSIVE TECHNOLOGY ACT

Section 1010. Definitions.

6 1011. Electronic monitoring tools.

7 1012. Automated employment decision tools.

8 1013. Data access and accuracy.

9 1014. Retaliation prohibited.

10 1015. Civil liability.

11 1016. Violations.

12 1017. Powers of the commissioner.

13 § 1010. Definitions. For the purposes of this section, the following
14 terms have the following meanings:

15 1. "Aggregated employee data" means employee data that an employer has
16 combined, or collected together, in a summary or other form so that the
17 employee data cannot be identified with any specific employee.

18 2. "Automated employment decision tool" means any computational proc-
19 ess, automated system, or algorithm utilizing machine learning, statis-
20 tical modeling, data analytics, artificial intelligence, or similar

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

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1 methods that issues an output, including a score, classification, rank-
2 ing, or recommendation, that is used to assist or replace human decision
3 making on employment decisions that impact natural persons. "Automated
4 employment decision tool" does not include a tool that does not assist
5 or replace employment decision processes and that does not materially
6 impact natural persons, including, but not limited to, a junk email
7 filter, firewall, antivirus software, calculator, spreadsheet, database,
8 data set, or other compilation of data.

9 3. "Candidate" means any natural person or their authorized represen-
10 tative seeking employment through an application, or who is screened or
11 evaluated for recruitment, for a position of employment by a business
12 operating in the state.

13 4. "Continuous incremental time-tracking tool" means any system,
14 application or instrument that continuously measures, records and/or
15 tallies increments of time within a day during which an employee is or
16 is not doing a particular activity or set of activities.

17 5. "Electronic monitoring tool" means any system, application, or
18 instrument that facilitates the collection of data concerning worker
19 activities or communications by any means other than direct observation
20 by a natural person, including but not limited to the use of a computer,
21 telephone, wire, radio, camera, electromagnetic, photoelectronic, or
22 photo-optical system.

23 6. "Egregious misconduct" means deliberate or grossly negligent
24 conduct that endangers the safety or well-being of the individual,
25 co-workers, customers, or other persons, or that causes serious damage
26 to the employer's or customers' property or business interests, includ-
27 ing discrimination against or harassment of co-workers, customers, or
28 other persons or violations of the law.

29 7. "Employer" means any person who directly or indirectly, or through
30 an agent or any other person, employs or exercises control over the
31 wages, benefits, other compensation, hours, working conditions, access
32 to work or job opportunities, or other terms or conditions of employ-
33 ment, of any worker, including the state, county, town, city, school
34 district, public authority or other governmental subdivision of any
35 kind. "Employer" includes any of the employer's agents, contractors, or
36 subcontractors.

37 8. "Employee" means any natural person or their authorized represen-
38 tative acting for, employed by, or a person classified as an independent
39 contractor providing service to, or through, an employer operating in
40 the state. An employee shall be deemed to be operating in the state for
41 purposes of deeming an employee to be covered by this article if the
42 employee works at least part time at a location in the state, or if
43 fully remote, the employee is associated with an office in the state or
44 supervised by a person who works at least part time at a location in the
45 state. Employee can mean a former employee.

46 9. "Employee data" means any information that identifies, relates to,
47 describes, is reasonably capable of being associated with, or could
48 reasonably be linked, directly or indirectly, with a particular employ-
49 ee, regardless of how the information is collected, inferred, or
50 obtained. Data includes, but is not limited to, the following:

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

54 (b) biometric information, including the individual's physiological,
55 biological, or behavioral characteristics, including the individual's

1 deoxyribonucleic acid (DNA), that can be used, singly or in combination
2 with other data, to establish individual identity;

3 (c) health, medical, lifestyle, and wellness information, including
4 the individual's medical history, physical or mental condition, diet or
5 physical activity patterns, heart rate, medical treatment or diagnosis
6 by a health care professional, health insurance policy number, subscrib-
7 er identification number, or other unique identifier used to identify
8 the individual; and

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

10 (i) human resources information, including the contents of an individ-
11 ual's personnel file or performance evaluations;

12 (ii) work process information, such as data relating to an individual
13 employee's performance, including but not limited to quantities of tasks
14 performed, quantities of items or materials handled or produced, rates
15 or speeds of tasks performed, measurements or metrics of employee
16 performance in relation to a quota, and time categorized as performing
17 tasks or not performing tasks;

18 (iii) data that captures workplace communications and interactions,
19 including emails, texts, internal message boards, and customer inter-
20 action and ratings;

21 (iv) device usage and data, including calls placed or geolocation
22 information;

23 (v) audio or video data or other information collected from sensors,
24 including movement tracking, thermal sensors, voiceprints, or facial
25 recognition, emotion, and gait recognition;

26 (vi) inputs to or outputs generated by an automated employment deci-
27 sion tool that are linked to the individual;

28 (vii) data collected through electronic monitoring or continuous
29 incremental time-tracking tools; and

30 (viii) data collected or generated on workers to mitigate the spread
31 of infectious diseases, including COVID-19, or to comply with public
32 health measures.

33 10. "Employment decision" means any decision made by the employer that
34 affects wages, benefits, other compensation, hours, work schedule,
35 performance evaluation, hiring, selecting for recruitment, discipline,
36 promotion, termination, job content, assignment of work, access to work
37 opportunities, productivity requirements, workplace health and safety,
38 and other terms or conditions of employment. For persons classified as
39 independent contractors or for candidates for employment, this means the
40 equivalent of these decisions based on their contract with or relation-
41 ship to the employer.

42 11. "Impact assessment" means an impartial evaluation by an independ-
43 ent auditor that complies with section one thousand twelve of this arti-
44 cle.

45 12. "Independent auditor" means a person or entity that conducts an
46 impact assessment of an automated employment decision tool in a manner
47 that exercises objective and impartial judgment on all issues within the
48 scope of such evaluation or assessment. A person is not an independent
49 auditor of an automated employment decision tool if they currently or at
50 any point in the five years preceding the impact assessment:

51 (a) are or were involved in using, developing, offering, licensing, or
52 deploying the automated employment decision tool;

53 (b) have or had an employment relationship with a developer or deploy-
54 er that uses, offers, or licenses the automated employment decision
55 tool; or

(c) have or had a direct financial interest or a material indirect financial interest in a developer or deployer that uses, offers, or licenses the automated employment decision tool.

13. "Meaningful human oversight" means a process that includes, at a minimum:

(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 impact assessment 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 paragraph (b) of this subdivision.

14. "Periodic assessment of worker performance" means assessing worker performance over the course of units of time equal to or greater than one calendar day.

15. "Protected class" means a class enumerated in section two hundred ninety-six of the executive law.

16. "Vendor" means any person or entity 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. "Vendor" includes any of the vendor's agents, contractors, or subcontractors.

§ 1011. Electronic monitoring tools. 1. (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 used 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, collects the least amount of data and is collected no more frequently than is necessary to accomplish the purpose, and the data collected is deleted once the purpose has been achieved.

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

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

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

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

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

12 (v) whether and how any employee data collected by the electronic
13 monitoring tool will alone or in conjunction with an automated employ-
14 ment decision tool be used to make an employment decision by the employ-
15 er or employment agency;

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

19 (vii) a description of where any employee data collected by the elec-
20 tronic monitoring tool will be stored and the length of time it will be
21 retained; and

22 (viii) an explanation for how the specific electronic monitoring prac-
23 tice is the least invasive means available to accomplish the monitoring
24 purpose.

25 (c) An employer shall establish, maintain, and preserve for three
26 years contemporaneous, true, and accurate records of data collected via
27 an electronic monitoring tool to ensure compliance with employee or
28 commissioner requests for data. The employer shall destroy any employee
29 data collected via an electronic monitoring tool no later than thirty-
30 seven months after collection unless the employee has provided written
31 and informed consent to the retention of their data by the employer.

32 (d) Notice of the specific form of electronic monitoring shall:

33 (i) be written in clear and plain language;

34 (ii) be provided to each employee, in the language identified by each
35 employee as the primary language of such employee, at the time of hiring
36 and at least annually thereafter;

37 (iii) be posted in a clear and conspicuous location in English and in
38 any other language that the employer regularly uses to communicate with
39 employees;

40 (iv) be made available in formats that are accessible to employees who
41 are blind or have other disabilities;

42 (v) provide the worker with actual notice of electronic monitoring
43 activities. A notice that states electronic monitoring "may" take place
44 or that the employer "reserves the right" to monitor shall not be
45 considered actual notice of electronic monitoring activities; and

46 (vi) be otherwise presented in a manner that ensures the notice clear-
47 ly and effectively communicates the required information to employees.

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

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

1 2. (a) Notwithstanding the allowable purposes for electronic monitor-
2 ing described in paragraph (a) of subdivision one of this section, an
3 employer shall not:

4 (i) use an electronic monitoring tool in such a manner that results in
5 a violation of labor, employment, civil rights, or human rights law or
6 any other law of this state;

7 (ii) use an electronic monitoring tool or data collected via an elec-
8 tronic monitoring tool in such a manner as to threaten the health,
9 welfare, safety, or legal rights of employees or the general public;

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

12 (iv) use an electronic monitoring tool in order to obtain information
13 about an employee's health, protected-class status, or membership in any
14 group protected from employment discrimination under section two hundred
15 ninety-six of the executive law or any other applicable law;

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

19 (vi) conduct audio or visual monitoring of bathrooms or other similar-
20 ly private areas, including locker rooms, changing areas, breakrooms,
21 smoking areas, employee cafeterias, lounges, areas designated to express
22 breast milk, or areas designated for prayer or other religious activity,
23 including data collection on the frequency of use of those private
24 areas;

25 (vii) conduct audio or visual monitoring of a workplace in an employ-
26 ee's residence, an employee's personal vehicle, or property owned or
27 leased by an employee;

28 (viii) use an electronic monitoring tool that incorporates facial
29 recognition, gait, voice analysis, or emotion recognition technology;

30 (ix) take adverse action against an employee based in whole or in part
31 on their opposition or refusal to submit to a practice that the employee
32 believes in good faith violates this article;

33 (x) take adverse employment action against an employee on the basis of
34 data collected via continuous incremental time-tracking tools except in
35 the case of egregious misconduct;

36 (xi) take adverse employment action against an employee based on any
37 data collected via electronic monitoring if such data measures an
38 employee's performance in relation to a performance standard that has
39 not been previously disclosed to such employee in violation of subpara-
40 graph (vi) of paragraph (b) of subdivision one of this section, or if
41 such data was collected without proper notice to employees or candidates
42 pursuant to section fifty-two-e of the civil rights law; or

43 (xii) where employees have union representation and where not
44 preempted by federal law, refuse to bargain over the implementation,
45 use, and ongoing evaluation of electronic monitoring tools.

46 (b) An employer shall not use employee data collected via an electron-
47 ic monitoring tool for purposes other than those specified in the
48 notice provided pursuant to paragraph (b) of subdivision one of this
49 section.

50 (c) An employer shall not sell, transfer, or disclose employee data
51 collected via an electronic monitoring tool to any other entity
52 unless it is required to do so under state or federal law, or necessary
53 to do so to comply with an impact assessment of an automated employment
54 decision tool pursuant to section one thousand twelve of this article.

55 (d) An employer shall not require employees to:

1 (i) physically implant devices that collect or transmit data, includ-
2 ing devices that are installed subcutaneously or incorporated into items
3 of clothing or personal accessories;

4 (ii) install applications on personal devices that collect or transmit
5 employee data or to wear or embed those devices; or

6 (iii) carry or use any device with location tracking applications or
7 services enabled unless the location tracking is:

8 (A) conducted during work hours; and

9 (B) strictly necessary to accomplish essential job functions and
10 narrowly limited to only the activities and times necessary to accom-
11 plish essential job functions.

12 (e) An employer shall not rely primarily on employee data collected
13 through electronic monitoring when making hiring, promotion, termi-
14 nation, disciplinary, or compensation decisions. For an employer to
15 satisfy the requirements of this paragraph:

16 (i) An employer must establish meaningful human oversight of such
17 decisions based in whole or part on data collected through electronic
18 monitoring.

19 (ii) A human decision-maker must actually review any information
20 collected through electronic monitoring, verify that such information is
21 accurate and up to date, review any pending employee requests to correct
22 erroneous data, and exercise independent judgment in making each such
23 decision; and

24 (iii) The human decision-maker must consider information other than
25 information collected through electronic monitoring when making each
26 such decision, such as but not limited to supervisory or managerial
27 evaluations, personnel files, employee work products, or peer reviews.

28 (f) When an employer makes a hiring, promotion, termination, discipli-
29 nary or compensation decision based in whole or part on data gathered
30 through the use of electronic monitoring, it shall disclose to affected
31 employees at least fourteen days prior to the decision going into
32 effect:

33 (i) that the decision was based in whole or part based on data gath-
34 ered through electronic monitoring;

35 (ii) the specific electronic monitoring tool or tools used to gather
36 such data;

37 (iii) the specific data, and judgments based upon such data, used in
38 the decision-making process; and

39 (iv) any information used in the decision-making process gathered
40 through sources other than electronic monitoring.

41 § 1012. Automated employment decision tools. 1. (a) It shall be unlaw-
42 ful for an employer to use an automated employment decision tool for an
43 employment decision unless such tool has been the subject of an impact
44 assessment. Impact assessments for automated employment decision tools
45 must:

46 (i) be conducted no more than one year prior to the use of such tool,
47 or where the tool was in use by the employer before the effective date
48 of this article, within six months of the effective date of this arti-
49 cle;

50 (ii) be conducted by an independent and impartial party with no finan-
51 cial or legal conflicts of interest;

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

54 (iv) evaluate whether those attributes and techniques are a scientif-
55 ically valid means of evaluating an employee or candidate's performance
56 or ability to perform the essential functions of a role, and whether

1 those attributes may function as a proxy for belonging to a protected
2 class;

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

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

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

16 (viii) consider and describe potential sources of adverse impact
17 against protected classes that may arise after the tool is deployed;

18 (ix) identify and describe any other assessment of risks of discrimi-
19 nation or a disparate impact of the tool on members of a protected class
20 that arise over the course of the impact assessment, and what actions
21 may be taken to reduce or remedy that risk;

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

26 (xi) be submitted in its entirety or an accessible summary form to the
27 department for inclusion in a public registry of such impact assessments
28 within sixty days of completion and distributed to employees who may be
29 subject to the tool.

30 (b) An employer shall conduct or commission subsequent impact assess-
31 ments each year that the tool is in use to assist or replace employment
32 decisions. Subsequent impact assessments shall comply with the require-
33 ments of paragraph (a) of this subdivision, and shall assess and
34 describe any change in the validity or disparate impact of the tool.

35 (c) An employer or vendor shall retain all documentation pertaining to
36 the design, development, use, and data of an automated employment deci-
37 sion tool that may be necessary to conduct an impact assessment. This
38 includes but is not limited to the source of the data used to develop
39 the tool, the technical specifications of the tool, individuals involved
40 in the development of the tool, and historical use data for the tool.
41 Such documentation must include a historical record of versions of the
42 tool, such that an employer shall be able to attest in the event of
43 litigation disputing an employment decision, the nature and specifica-
44 tions of the tool as it was used at the time of that employment deci-
45 sion. Such documentation shall be stored in accordance with such record-
46 keeping, data retention, and security requirements as the commissioner
47 may specify, and in such a manner as to be legible and accessible to the
48 party conducting an impact assessment.

49 (d) If an initial or subsequent impact assessment requires the
50 collection of employee data to assess a tool's disparate impact on
51 employees, such data shall be collected, processed, stored, and retained
52 in such a manner as to protect the privacy of employees, and shall
53 comply with any data retention and security requirements specified by
54 the commissioner. Employee data provided to auditors for the purpose of
55 an impact assessment shall not be shared with the employer, nor shall it

1 be shared with any person, business entity, or other organization unless
2 strictly necessary for the completion of the impact assessment.

3 (e) If an initial or subsequent impact assessment concludes that a
4 data set, feature, or application of the automated employment decision
5 tool results in a disparate impact on persons belonging to a protected
6 class, or unlawfully limits accessibility for persons with disabilities,
7 an employer shall refrain from using the tool until it:

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

11 (ii) if the employer believes the impact assessment finding of a
12 disparate impact or limit on accessibility is erroneous, or that the
13 steps taken in accordance with subparagraph (i) of this paragraph suffi-
14 ciently address those findings such that the tool may be lawfully used
15 in accordance with this article, describes in writing to employees, the
16 auditor, and the department how the data set, feature, or application of
17 the tool is the least discriminatory method of assessing an employee's
18 performance or ability to complete essential functions of a position.

19 (f) It shall be unlawful for an independent auditor, vendor, or
20 employer to manipulate, conceal, or misrepresent the results of an
21 impact assessment.

22 (g) Nothing in this article shall be construed as prohibiting an
23 employer from implementing a lawful affirmative action plan or engaging
24 in otherwise lawful efforts to reduce or eliminate bias in employment
25 decisions.

26 2. (a) Any employer that uses an automated employment decision tool to
27 assess or evaluate an employee or candidate shall notify employees and
28 candidates subject to the tool no less than ten business days before
29 such use:

30 (i) that an automated employment decision tool will be used in
31 connection with the assessment or evaluation of such employee or candi-
32 date;

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

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

43 (iv) the results of the most recent impact assessment of the automated
44 employment decision tool, including any findings of a disparate impact
45 and associated response from the employer, or information about how to
46 access that information if publicly available;

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

51 (vi) information about how the employee or candidate may:

52 (A) request reevaluation of the employment decision made by the auto-
53 mated employment decision tool in accordance with section one thousand
54 thirteen of this article; and

1 (B) notification of the employee or candidate's right to file a
2 complaint in a civil court in accordance with section one thousand
3 fifteen of this article.

4 (b) The notice required by this subdivision shall be:

5 (i) written in clear and plain language;

6 (ii) included in each job posting or advertisement for each position
7 for which the automated employment decision tool will be used;

8 (iii) posted on the employer's website in any language that the
9 employer regularly uses to communicate with employees;

10 (iv) provided directly to each candidate who applies for a position in
11 the language with which that candidate communicates with the employer;

12 (v) made available in formats that are accessible to employees who are
13 blind or have other disabilities; and

14 (vi) otherwise presented in a manner that ensures the notice clearly
15 and effectively communicates the required information to employees.

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

19 (i) in such a manner that results in a violation of labor, employment,
20 civil rights or human rights law or any other law of this state;

21 (ii) in a manner that harms or is likely to harm the health or safety
22 of employees, including by setting productivity quotas in a manner that
23 is likely to cause physical or mental illness or injury;

24 (iii) to make predictions about an employee or candidate for employ-
25 ment's behavior, beliefs, intentions, personality, emotional state, or
26 other characteristic or behavior;

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

29 (v) to subtract from an employee's wages time spent exercising their
30 legal rights;

31 (vi) in a manner not consistent with the scope of the impact assess-
32 ment required by subdivision one of this section; or

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

35 (b) An employer shall not rely primarily on output from an automated
36 employment decision tool when making hiring, promotion, termination,
37 disciplinary, or compensation decisions. For an employer to satisfy the
38 requirements of this paragraph:

39 (i) An employer must establish meaningful human oversight of such
40 decisions based in whole or in part on the output of automated employ-
41 ment decision tools.

42 (ii) A human decision-maker must actually review any output of an
43 automated employment decision tool and exercise independent judgment in
44 making each such decision;

45 (iii) The human decision-maker must consider information other than
46 automated employment decision tool outputs when making each such deci-
47 sion, such as but not limited to supervisory or managerial evaluations,
48 personnel files, employee work products, or peer reviews; and

49 (iv) An employer shall consider information other than automated
50 employment decision tool outputs when making hiring, promotion, termi-
51 nation, disciplinary, or compensation decisions, such as supervisory or
52 managerial evaluations, personnel files, employee work products, or peer
53 reviews.

54 (c) An employer may not, where employees have union representation and
55 where not preempted by federal law, refuse to bargain over the use of
56 automated employment decision tools.

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

6 § 1013. Data access and accuracy. 1.(a) An employer shall ensure that
7 any data collected through electronic monitoring that may be used for
8 the purposes of an employment decision is accurate and, where relevant,
9 kept up to date.

10 (b) A current or former employee whose data was collected by their
11 employer through electronic monitoring has the right to request a copy
12 of the employee's own data, and a copy of the aggregated employee data
13 for similar employees at the same establishment for the same time
14 period, if that data may be or was used for the purposes of an employ-
15 ment decision. A former employee is limited to one request per year
16 pursuant to this subdivision.

17 (c) An employer that receives a written or oral request for informa-
18 tion pursuant to this section shall comply with the request as
19 soon as practicable, but no later than seven calendar days from the date
20 of the request. An employer shall not take adverse action against an
21 employee based on their request for their own or aggregated employee
22 data, nor shall an employer provide those records at a cost to the
23 current or former employee. An employer shall provide information pursu-
24 ant to this section in English or, if applicable in the language identi-
25 fied by the employee as the primary language of such employee.

26 (d) An employer that does not monitor this data has no obligation to
27 provide it.

28 2. (a) An employer that uses electronic monitoring to collect employee
29 data to assist in an employment decision must provide employees with the
30 opportunity to review and request correction of such data both at the
31 time of its collection and after.

32 (b) An employer that receives an employee request to correct inaccur-
33 ate data collected through electronic monitoring shall investigate and
34 determine whether such data is inaccurate.

35 (c) If an employer, upon investigation, determines that such data is
36 inaccurate, the employer shall:

37 (i) promptly correct the inaccurate data and inform the employee of
38 the employer's decision and action;

39 (ii) review and adjust, as appropriate, any employment decisions that
40 were based on the inaccurate data and inform the employee of the adjust-
41 ment; and

42 (iii) inform any third parties with which the employer shared the
43 inaccurate data, or from which the employer received the inaccurate
44 data, and direct them to correct it, and provide the employee with a
45 copy of such action.

46 (d) If an employer, upon investigation, determines that the data is
47 accurate, the employer shall inform the employee of the decision not to
48 amend the data, the steps taken to verify the accuracy of the data, and
49 any evidence supporting the decision not to amend the data.

50 3. (a) An employer that uses data collected via an electronic monitor-
51 ing tool or outputs from an automated employment decision tool to make
52 an employment decision shall provide employees affected by such action
53 written notice of the decision at least fourteen calendar days before
54 such action shall take effect. Such notice of adverse employment action
55 shall contain:

56 (i) any performance standards used to make the employment decision;

1 (ii) any of the employee's data collected through electronic monitor-
2 ing that was used to make the employment decision;

3 (iii) any aggregated employee data of employees performing the same or
4 similar functions at the same establishments for ninety days prior to
5 the employment decision;

6 (iv) any outputs from an automated employment decision tool that was
7 used to make the employment decision;

8 (v) a copy of the most recent impact assessment of any automated
9 employment decision tool that was used to make the employment decision;
10 and

11 (vi) what other information, standards, or data, other than data
12 collected via electronic monitoring or outputs produced by automated
13 employment decision tools, was used by the employer to make the employ-
14 ment decision.

15 (b) An employee subject to an employment decision based on data
16 collected via an electronic monitoring tool or outputs from an automated
17 employment decision tool who believes the employment decision to be the
18 result of inaccurate data or an inaccurate or erroneous output by an
19 automated employment decision tool may request a reevaluation of the
20 decision by the employer. Such request shall be in writing, including by
21 text message or electronic mail, and shall include at a minimum:

22 (i) the employee's name;

23 (ii) the data or output the employee alleges is inaccurate or errone-
24 ous; and

25 (iii) any evidence the employee has that such data or output is inac-
26 curate or erroneous.

27 (c) An employer that receives a request for reevaluation of an employ-
28 ment decision pursuant to this section shall investigate the
29 employee's claim of inaccurate or erroneous information and respond to
30 the employee as soon as practicable, but no later than seven calendar
31 days from the date of the request. If an employer, upon investigation,
32 concludes that no inaccurate data or erroneous output was used to make
33 the employment decision, it shall provide the employee with evidence of
34 such accuracy and validity. If an employer, upon investigation,
35 concludes that inaccurate data or an erroneous output did contribute to
36 the employment decision, the employer shall inform the employee in writ-
37 ing of such error or inaccuracy and take action to reevaluate the
38 employee with corrected data or without the use of an automated employ-
39 ment decision tool.

40 § 1014. Retaliation prohibited. 1. It shall be unlawful for a person
41 to take any retaliatory action, as defined in section seven hundred
42 forty of the this chapter, against any employee or candidate because:

43 (a) such employee or candidate opposes or discloses, or threatens to
44 disclose to a supervisor, hiring manager, or public body an activity,
45 policy or practice of the employer or vendor that the employee or candi-
46 date reasonably believes is in violation of this article, or any rule or
47 regulation issued pursuant to this article;

48 (b) such employee or candidate provides information to, or testifies
49 before, any public body conducting an investigation, hearing or inquiry
50 into any such activity, policy or practice by such employer or vendor,
51 or otherwise participates in such investigation, hearing, or inquiry;

52 (c) such employee or candidate objects to, or refuses to participate
53 in any such activity, policy or practice;

54 (d) such employee or candidate exercises their rights protected under
55 this section or informs others of such rights; or

1 (e) such person believes that the employee or candidate engaged in any
2 of the activities described in paragraphs (a), (b), (c) or (d) of this
3 subdivision.

4 2. A candidate or employee need not make explicit reference to any
5 section or provision of this article or of any provision of this chapter
6 or human rights law to trigger the protections of this section.

7 3. An employer or other person violates this section where the employ-
8 ee's protected activity is found to be a contributing factor for the
9 adverse action. Where the commissioner or a court finds an employer or
10 other person has violated this section, it may order the relief speci-
11 fied in section two hundred fifteen of the this chapter.

12 § 1015. Civil liability. 1. If an employer fails to respond to a
13 current or former employee or candidate's request for reevaluation of an
14 employment decision pursuant to section one thousand thirteen of this
15 article, or if a current or former employee or candidate continues to
16 have reason to believe they were harmed by the unlawful use of an inac-
17 curate or biased automated employment decision tool or other violation
18 of this article, the employee or candidate may initiate an action in a
19 court of competent jurisdiction to enforce the provisions of this arti-
20 cle. An employer that violates this article shall be liable for liqui-
21 dated damages in the amount of five hundred dollars for each violation
22 or, where an employee or candidate has suffered actual damages as a
23 result of such violation such as reduced pay, worse working conditions,
24 denial of advancement or access to better pay or working conditions,
25 discipline, or termination, then the employer shall be liable to an
26 affected employee or candidate for the greater of liquidated damages or
27 two times the employee or candidate's actual damages, which shall
28 include back pay, front pay, and lost benefits, and may be awarded
29 injunctive, declaratory, and the employee may be awarded damages for
30 emotional distress and any other reasonable or appropriate relief. An
31 employer shall also be liable for reasonable attorneys' fees and costs,
32 except such liquidated damages may be up to the greater of one thousand
33 dollars for each violation or three times actual damages if found that
34 the actions were willful, or in the case of violations of section one
35 thousand fourteen of this article, such relief as is specified in
36 section two hundred fifteen of this chapter.

37 2. In any civil action claiming that an employer has violated this
38 article in its use of electronic monitoring or automated employment
39 decision tools, any person, employer, vendor, or other business entity
40 that used, sold, distributed, or developed the tool shall be jointly and
41 severally liable to a prevailing plaintiff for all damages awarded to
42 that prevailing plaintiff, except that where a person, employer, vendor,
43 or other business entity knowingly sells, provides, or distributes a
44 tool to an employer with fewer than fifteen employees, the vendor, not
45 the small employer, shall be liable for any unlawful acts.

46 § 1016. Violations. 1. (a) Each day on which an electronic monitoring
47 tool or automated employment decision tool is used in violation of this
48 article shall give rise to a separate violation of this article.

49 (b) Failure to provide any notice to a candidate or an employee in
50 violation of section one thousand eleven or one thousand twelve of this
51 article shall constitute a separate violation.

52 (c) Any person who violates any provision of this article or any rule
53 promulgated pursuant to this article may be liable for a civil penalty
54 in the amounts provided under paragraph (b) of subdivision one of
55 section two hundred fifteen of this chapter in order to punish
56 violations and deter future violations.

2. 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 article, including mandating compliance with the provisions of this article, securing any of the remedies authorized under this article including recovering damages and liquidated damages as specified in section one thousand fourteen of this article and securing injunctive, declaratory, or such other relief as may be appropriate, and ordering payment of civil penalties.

3. The provisions of this article 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, or as to preempt any municipality from adopting a local law, rule, or regulation establishing requirements, standards, or enforcement measures in addition to those established under this article.

§ 1017. Powers of the commissioner. 1. The commissioner shall:

(a) promulgate rules specifying the data retention, security, and privacy requirements for all data collected during the course of, and all results or outputs of, the impact assessments required by this article;

(b) develop and publish model employer notices for the use of electronic monitoring and automated employment decision tools that employers may utilize in their adoption of the notices required by this article; and

(c) promulgate such other rules and regulations as may be necessary to carry out this article.

2. The commissioner shall establish an administrative process for receiving and investigating complaints from employees and candidates or their representatives. The commissioner shall have the same powers of investigation as under article nineteen of this chapter. If after investigation the commissioner finds that an employer or person has violated any provision of this section, the commissioner may exercise the same enforcement powers provided under paragraph (b) of subdivision one of section two hundred fifteen of this chapter and may order any relief that may be appropriate or necessary for correction of any violation of this article, including mandating compliance with the provisions of this article, securing any of the remedies authorized under this article including recovering damages and liquidated damages as specified in section one thousand fourteen of this article and securing injunctive, declaratory, or other relief as may be appropriate, and ordering payment of civil penalties or reasonable attorneys' fees and costs.

3. The commissioner shall establish a means of collecting, storing, and making publicly available any impact assessments or summaries of impact assessments submitted by employers or vendors in the state. The commissioner shall promulgate rules and regulations by which employers, vendors, or employees may request the redaction of certain information from said impact assessments or summaries thereof, if that information is proprietary, sensitive, or poses a threat to the privacy of employees or candidates.

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

1 2. (a) Any employer who monitors or otherwise intercepts telephone
2 conversations or transmissions, electronic mail or transmissions, or
3 internet access or usage of or by an employee by any electronic device
4 or system, including but not limited to the use of a computer, tele-
5 phone, wire, radio, or electromagnetic, photoelectronic or photo-optical
6 systems, shall give prior written notice upon hiring to all employees
7 who are subject to electronic monitoring. The notice required by this
8 subdivision shall be in writing, in an electronic record, or in another
9 electronic form and acknowledged by the employee either in writing or
10 electronically. Each employer shall also post the notice of electronic
11 monitoring in a conspicuous place which is readily available for viewing
12 by its employees who are subject to electronic monitoring. Such written
13 notice shall comply with the requirements of article thirty-six of the
14 labor law.

15 (b) For purposes of written notice required by paragraph (a) of this
16 subdivision, an employee shall be advised that any and all telephone
17 conversations or transmissions, electronic mail or transmissions, or
18 internet access or usage by an employee by any electronic device or
19 system, including but not limited to the use of a computer, telephone,
20 wire, radio or electromagnetic, photoelectronic or photo-optical systems
21 may be subject to monitoring at any and all times and by any lawful
22 means.

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

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

35 § 3. This act shall take effect on the one hundred eightieth day after
36 it shall have become a law. Effective immediately, the addition, amend-
37 ment and/or repeal of any rule or regulation necessary for the implemen-
38 tation of this act on its effective date are authorized to be made and
39 completed on or before such effective date.