STATE OF NEW YORK

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2023-2024 Regular Sessions

IN SENATE

August 4, 2023

Introduced by Sens. HOYLMAN-SIGAL, JACKSON -- 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 -- 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

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 article 36 to read as follows:

ARTICLE 36

BOUNDARIES ON TECHNOLOGY ACT

Section 1010. Definitions.

1011. Automated employment decision tools; impact assessments.

1012. Automated employment decision tools; notice and restrictions.

1013. Data access, accuracy, and correction.

1014. Unlawful retaliation.

1015. Vendor notice.

1016. Enforcement.

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

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

2. "Automated employment decision tool" means any computational process, automated system, or algorithm derived from machine learning,

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

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statistical modeling, data analytics, artificial intelligence, or similar methods that issues an output, including a score, classification, ranking, or recommendation that is used to assist or replace human decision making on employment decisions that impact natural persons. "Automated employment decision tool" does not include a tool that does not automate, support, assist or replace discretionary employment decision-making 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.

3. "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.

4. "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, including the state, county, town, city, school district, public authority or other governmental subdivision of any kind. "Employer" includes any of the employer's agents, contractors, or subcontractors.

5. "Employee" means any natural person or their authorized representative acting for, employed by, or a person classified as an independent contractor providing service to, or through, an employer operating in the state. An employee shall be deemed to be operating in the state for purposes of deeming an employee to be covered by this article if the employee works at least part time at a location in the state, or if fully remote, the employee is associated with an office in the state or supervised by a person who works at least part time at a location in the state. Employee can mean a former employee.

6. "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:

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

(b) biometric information that can be used to establish individual identity;

(c) health 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

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

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

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

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

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

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

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

7. "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, and workplace health and safety. For persons classified as independent contractors or for candidates for employment, this means the equivalent of these decisions based on their contract with or relationship to the employer.

8. "Impact assessment" means an evaluation by an impartial auditor that complies with section one thousand eleven of this article.

9. "Impartial auditor" means a person or entity that conducts an impact assessment of an automated employment decision tool in a manner that exercises objective and impartial judgment on all issues within the scope of such evaluation or assessment.

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

11. "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. Automated employment decision tools; impact assessments. 1. It shall be unlawful for an employer with one hundred or more employees to use an automated employment decision tool for an employment decision unless such tool has been the subject of an impact assessment. Impact assessments for automated employment decision tools must:

(a) 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 the effective date of this article, within six months of the effective date of this article;

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

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

(d) consider, identify, and describe any 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;

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

(f) 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 impact assessment, and what actions may be taken to reduce or remedy that risk;

(g) 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

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

2. An employer subject to the provisions of this section shall conduct or commission subsequent impact assessments each year that the tool is in use for employment decisions. Subsequent impact assessments shall comply with the requirements of subdivision one of this section, and shall assess and describe any change in the validity or disparate impact of the tool.

3. An employer or vendor subject to the provisions of this section shall retain all documentation pertaining to the design, development, use, and data of an automated employment decision tool that may be necessary to conduct an impact assessment for a period of three years to ensure compliance with commissioner requests for data.

4. If an initial or subsequent impact assessment requires the collection of 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, and shall comply with any data retention and security requirements specified by the commissioner. Employee data provided to auditors for the purpose of an impact assessment 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 impact assessment.

5. If an initial or subsequent impact assessment 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, an employer shall refrain from using the tool until it:

(a) takes reasonable and appropriate steps to remedy that disparate impact; and

(b) where the employer believes the impact assessment finding of a disparate impact is erroneous, or that the steps taken in accordance with paragraph (a) of this subdivision sufficiently address those findings such that the tool may be lawfully used in accordance with this article, the employer shall submit to the commissioner 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.

6. It shall be unlawful for an impartial auditor, vendor, or employer to manipulate, conceal, or misrepresent the results of an impact assessment.

7. Nothing in this article shall be construed as prohibiting an employer from implementing a lawful affirmative action plan or engaging in otherwise lawful efforts to reduce or eliminate bias in employment decisions.

§ 1012. Automated employment decision tools; notice and restrictions. 1. (a) Any employer that uses an automated employment decision tool to assess or evaluate an employee or candidate shall notify employees and candidates subject to the tool before or at the time an employment decision is made:

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

(ii) 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;

(iii) 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; and

(iv) the results of the most recent impact assessment 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.

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

(i) written in clear and plain language;

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

(iii) posted on the employer's website in English and the ten most commonly spoken non-English languages in the state.

2. (a) Notwithstanding the provisions of section one thousand ten of this article, an employer shall not use an automated employment decision tool:

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

(ii) in a manner not consistent with the scope of the impact assessment required by section one thousand ten of this article.

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

(i) An employer shall establish meaningful human oversight of such decisions based in whole or in part on the output of automated employment decision tools. Such meaningful human oversight of such decisions shall require consideration of information other than automated employment decision tool outputs, including but not limited to: supervisory or managerial evaluations, personnel files, employee work products, or peer reviews.

(c) An employer shall not require employees or candidates 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 as a result of their request for accommodation.

§ 1013. Data access, accuracy, and correction. 1. (a) An employer shall ensure that any employee data that is used by an automated employment decision tool for an employment decision is accurate and, where relevant, kept up to date for a period of three years.

(b) A current or former employee whose data was used by an automated employment decision tool for an employment decision has the right to request, and the employer shall provide, a copy of the employee's own data.

(c) Such requested records pursuant to this section shall be provided at no cost to the current or former employee. A former employee is limited to one request per year pursuant to this subdivision.

(d) An employer that receives a written or oral request for information pursuant to this section shall comply with the request as

soon as practicable, but no later than fourteen calendar days from the date of the request.

(e) An employer shall provide information pursuant to this section in English or, if applicable, in the language identified by the employee as the primary language of such employee.

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

2. (a) An employer that receives an employee request to correct inaccurate data shall investigate and determine whether such data is inaccurate.

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

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

(ii) review and adjust, as appropriate, any employment decisions that were based on the inaccurate data and inform the employee of the adjustment; and

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

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

§ 1014. Unlawful retaliation. For purposes of this article, there shall be a rebuttable presumption of unlawful retaliation if an employer in any manner discriminates, retaliates, or takes any adverse action against any employee within ninety days of the employee doing either of the following:

1. Initiating the employee's first request in a calendar year for information pursuant to section one thousand thirteen of this article.

2. Making a complaint related to any violation of this article, inclusive, to the commissioner, the department, other local or state governmental agency, or the employer.

§ 1015. Vendor notice. 1. Any vendor who sells, distributes, or offers for use to an employer an automated employment decision tool shall notify employers that use of such tool is subject to the requirements of this article. Such notice shall include:

(a) information about the requirements of the employer under this article and the exemption from certain requirements or liability under this article according to the employer's size;

(b) information about the penalties for non-compliance with this article and liability imposed on the employer by this article;

(c) a copy of or directions on how to access any assessments of disparate impact or bias conducted by the vendor on the automated employment decision tool; and

(d) information on or directions on how to access more information regarding the employer's responsibility and liability under this article.

2. The notice required by this section shall be:

(a) written in clear and plain language;

(b) provided before an employer may begin use of the automated employment decision tool; and

(c) otherwise presented in a manner that ensures the notice clearly and effectively communicates the required information to employers.

§ 1016. Enforcement. 1. The commissioner shall adopt rules and regulations implementing the provisions of this article. The commissioner shall be authorized to enforce the provisions of this article and to assess civil penalties as provided in sections two hundred fifteen and two hundred eighteen of this chapter. The civil penalties provided for in this section shall be in addition to and may be imposed concurrently with any other remedy or penalty provided for in this chapter.

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 injunctive, declaratory, or such other relief as may be appropriate, ordering payment of civil penalties, and recovering damages and liquidated damages.

§ 2. The opening paragraph of subdivision 1 of section 218 of the labor law, as amended by chapter 43 of the laws of 2023, is amended to read as follows:

If the commissioner determines that an employer has violated a provision of article six (payment of wages), article nineteen (minimum wage act), article nineteen-A (minimum wage standards and protective labor practices for farm workers), article twenty-one-A (warehouse worker protection act), article thirty-six (boundaries on technology act), section two hundred twelve-a, section two hundred twelve-b, section one hundred sixty-one (day of rest) or section one hundred sixty-two (meal periods) of this chapter, or a rule or regulation promulgated thereunder, the commissioner shall issue to the employer an order directing compliance therewith, which shall describe particularly the nature of the alleged violation. A copy of such order shall be provided to any employee who has filed a complaint and any authorized representative of [~~him or her~~] such employee. In addition to directing payment of wages, benefits or wage supplements found to be due, and liquidated damages in the amount of one hundred percent of unpaid wages, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount not to exceed double the total amount of wages, benefits, or wage supplements found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the liquidated damages in the amount of one hundred percent of unpaid wages, the appropriate civil penalty, and interest at the rate of interest then in effect, as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars for a first violation, two thousand dollars for a second violation or three thousand dollars for a third or subsequent violation. In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements.

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.