

# 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:

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

### ARTICLE 36

#### BOUNDARIES ON TECHNOLOGY ACT

##### Section 1010. Definitions.

6 1011. Automated employment decision tools; impact assessments.

7 1012. Automated employment decision tools; notice and  
8 restrictions.

9 1013. Data access, accuracy, and correction.

10 1014. Unlawful retaliation.

11 1015. Vendor notice.

12 1016. Enforcement.

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 derived from machine learning,

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

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1 statistical modeling, data analytics, artificial intelligence, or simi-  
2 lar methods that issues an output, including a score, classification,  
3 ranking, or recommendation that is used to assist or replace human deci-  
4 sion making on employment decisions that impact natural persons. "Auto-  
5 mated employment decision tool" does not include a tool that does not  
6 automate, support, assist or replace discretionary employment decision-  
7 making processes and that does not materially impact natural persons,  
8 including, but not limited to, a junk email filter, firewall, antivirus  
9 software, calculator, spreadsheet, database, data set, or other compila-  
10 tion of data.

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

15 4. "Employer" means any person who directly or indirectly, or through  
16 an agent or any other person, employs or exercises control over the  
17 wages, benefits, other compensation, hours, working conditions, access  
18 to work or job opportunities, or other terms or conditions of employ-  
19 ment, of any worker, including the state, county, town, city, school  
20 district, public authority or other governmental subdivision of any  
21 kind. "Employer" includes any of the employer's agents, contractors, or  
22 subcontractors.

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

32 6. "Employee data" means any information that identifies, relates to,  
33 describes, is reasonably capable of being associated with, or could  
34 reasonably be linked, directly or indirectly, with a particular employ-  
35 ee, regardless of how the information is collected, inferred, or  
36 obtained. Data includes, but is not limited to, the following:

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

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

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

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

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

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

1 (iii) data that captures workplace communications and interactions,  
2 including emails, texts, internal message boards, and customer inter-  
3 action and ratings;

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

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

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

11 7. "Employment decision" means any decision made by the employer that  
12 affects wages, benefits, other compensation, hours, work schedule,  
13 performance evaluation, hiring, selecting for recruitment, discipline,  
14 promotion, termination, job content, assignment of work, access to work  
15 opportunities, productivity requirements, and workplace health and safe-  
16 ty. For persons classified as independent contractors or for candidates  
17 for employment, this means the equivalent of these decisions based on  
18 their contract with or relationship to the employer.

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

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

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

27 11. "Vendor" means any person or entity who sells, distributes, or  
28 develops for sale an automated employment decision tool to be used in an  
29 employment decision made by an employer in the state. "Vendor" includes  
30 any of the vendor's agents, contractors, or subcontractors.

31 § 1011. Automated employment decision tools; impact assessments. 1. It  
32 shall be unlawful for an employer with one hundred or more employees to  
33 use an automated employment decision tool for an employment decision  
34 unless such tool has been the subject of an impact assessment. Impact  
35 assessments for automated employment decision tools must:

36 (a) be conducted no more than one year prior to the use of such tool,  
37 or where the tool was in use by the employer before the effective date  
38 of this article, within six months of the effective date of this arti-  
39 cle;

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

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

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

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

50 (f) identify and describe any other assessment of risks of discrimi-  
51 nation or a disparate impact of the tool on members of a protected class  
52 that arise over the course of the impact assessment, and what actions  
53 may be taken to reduce or remedy that risk;

54 (g) for any finding of a disparate impact or limit on accessibility,  
55 evaluate whether the data set, attribute, or feature of the tool at

1 issue is the least discriminatory method of assessing a candidate's  
2 performance or ability to perform job functions; and

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

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

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

18 4. If an initial or subsequent impact assessment requires the  
19 collection of employee data to assess a tool's disparate impact on  
20 employees, such data shall be collected, processed, stored, and retained  
21 in such a manner as to protect the privacy of employees, and shall  
22 comply with any data retention and security requirements specified by  
23 the commissioner. Employee data provided to auditors for the purpose of  
24 an impact assessment shall not be shared with the employer, nor shall it  
25 be shared with any person, business entity, or other organization unless  
26 strictly necessary for the completion of the impact assessment.

27 5. If an initial or subsequent impact assessment concludes that a data  
28 set, feature, or application of the automated employment decision tool  
29 results in a disparate impact on persons belonging to a protected class,  
30 an employer shall refrain from using the tool until it:

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

33 (b) where the employer believes the impact assessment finding of a  
34 disparate impact is erroneous, or that the steps taken in accordance  
35 with paragraph (a) of this subdivision sufficiently address those find-  
36 ings such that the tool may be lawfully used in accordance with this  
37 article, the employer shall submit to the commissioner how the data set,  
38 feature, or application of the tool is the least discriminatory method  
39 of assessing an employee's performance or ability to complete essential  
40 functions of a position.

41 6. It shall be unlawful for an impartial auditor, vendor, or employer  
42 to manipulate, conceal, or misrepresent the results of an impact assess-  
43 ment.

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

48 § 1012. Automated employment decision tools; notice and restrictions.

49 1. (a) Any employer that uses an automated employment decision tool to  
50 assess or evaluate an employee or candidate shall notify employees and  
51 candidates subject to the tool before or at the time an employment deci-  
52 sion is made:

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

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

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

11 (iv) the results of the most recent impact assessment of the automated  
12 employment decision tool, including any findings of a disparate impact  
13 and associated response from the employer, or information about how to  
14 access that information if publicly available.

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

16 (i) written in clear and plain language;

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

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

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

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

26 (ii) in a manner not consistent with the scope of the impact assess-  
27 ment required by section one thousand ten of this article.

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

32 (i) An employer shall establish meaningful human oversight of such  
33 decisions based in whole or in part on the output of automated employ-  
34 ment decision tools. Such meaningful human oversight of such decisions  
35 shall require consideration of information other than automated  
36 employment decision tool outputs, including but not limited to: supervi-  
37 sory or managerial evaluations, personnel files, employee work products,  
38 or peer reviews.

39 (c) An employer shall not require employees or candidates to consent  
40 to the use of an automated employment decision tool in an employment  
41 decision in order to be considered for an employment decision, nor shall  
42 an employer discipline or disadvantage an employee or candidate for  
43 employment as a result of their request for accommodation.

44 § 1013. Data access, accuracy, and correction. 1. (a) An employer  
45 shall ensure that any employee data that is used by an automated employ-  
46 ment decision tool for an employment decision is accurate and, where  
47 relevant, kept up to date for a period of three years.

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

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

55 (d) An employer that receives a written or oral request for informa-  
56 tion pursuant to this section shall comply with the request as

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

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

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

8 2. (a) An employer that receives an employee request to correct inac-  
9 curate data shall investigate and determine whether such data is inaccur-  
10 rate.

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

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

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

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

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

26 § 1014. Unlawful retaliation. For purposes of this article, there  
27 shall be a rebuttable presumption of unlawful retaliation if an employer  
28 in any manner discriminates, retaliates, or takes any adverse action  
29 against any employee within ninety days of the employee doing either of  
30 the following:

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

33 2. Making a complaint related to any violation of this article, inclu-  
34 sive, to the commissioner, the department, other local or state govern-  
35 mental agency, or the employer.

36 § 1015. Vendor notice. 1. Any vendor who sells, distributes, or offers  
37 for use to an employer an automated employment decision tool shall noti-  
38 fy employers that use of such tool is subject to the requirements of  
39 this article. Such notice shall include:

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

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

45 (c) a copy of or directions on how to access any assessments of dispa-  
46 rate impact or bias conducted by the vendor on the automated employment  
47 decision tool; and

48 (d) information on or directions on how to access more information  
49 regarding the employer's responsibility and liability under this arti-  
50 cle.

51 2. The notice required by this section shall be:

52 (a) written in clear and plain language;

53 (b) provided before an employer may begin use of the automated employ-  
54 ment decision tool; and

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

1 § 1016. Enforcement. 1. The commissioner shall adopt rules and regu-  
2 lations implementing the provisions of this article. The commissioner  
3 shall be authorized to enforce the provisions of this article and to  
4 assess civil penalties as provided in sections two hundred fifteen and  
5 two hundred eighteen of this chapter. The civil penalties provided  
6 for in this section shall be in addition to and may be imposed concu-  
7 rently with any other remedy or penalty provided for in this chapter.

8 2. The attorney general may initiate in a court of competent jurisdic-  
9 tion action that may be appropriate or necessary for correction of any  
10 violation of this article, including mandating compliance with the  
11 provisions of this article, securing injunctive, declaratory, or such  
12 other relief as may be appropriate, ordering payment of civil penalties,  
13 and recovering damages and liquidated damages.

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

17 If the commissioner determines that an employer has violated a  
18 provision of article six (payment of wages), article nineteen (minimum  
19 wage act), article nineteen-A (minimum wage standards and protective  
20 labor practices for farm workers), article twenty-one-A (warehouse work-  
21 er protection act), article thirty-six (boundaries on technology act),  
22 section two hundred twelve-a, section two hundred twelve-b, section one  
23 hundred sixty-one (day of rest) or section one hundred sixty-two (meal  
24 periods) of this chapter, or a rule or regulation promulgated there-  
25 under, the commissioner shall issue to the employer an order directing  
26 compliance therewith, which shall describe particularly the nature of  
27 the alleged violation. A copy of such order shall be provided to any  
28 employee who has filed a complaint and any authorized representative of  
29 ~~[him or her]~~ such employee. In addition to directing payment of wages,  
30 benefits or wage supplements found to be due, and liquidated damages in  
31 the amount of one hundred percent of unpaid wages, such order, if issued  
32 to an employer who previously has been found in violation of those  
33 provisions, rules or regulations, or to an employer whose violation is  
34 willful or egregious, shall direct payment to the commissioner of an  
35 additional sum as a civil penalty in an amount not to exceed double the  
36 total amount of wages, benefits, or wage supplements found to be due. In  
37 no case shall the order direct payment of an amount less than the total  
38 wages, benefits or wage supplements found by the commissioner to be due,  
39 plus the liquidated damages in the amount of one hundred percent of  
40 unpaid wages, the appropriate civil penalty, and interest at the rate of  
41 interest then in effect, as prescribed by the superintendent of finan-  
42 cial services pursuant to section fourteen-a of the banking law per  
43 annum from the date of the underpayment to the date of the payment.  
44 Where the violation is for a reason other than the employer's failure to  
45 pay wages, benefits or wage supplements found to be due, the order shall  
46 direct payment to the commissioner of a civil penalty in an amount not  
47 to exceed one thousand dollars for a first violation, two thousand  
48 dollars for a second violation or three thousand dollars for a third or  
49 subsequent violation. In assessing the amount of the penalty, the  
50 commissioner shall give due consideration to the size of the employer's  
51 business, the good faith basis of the employer to believe that its  
52 conduct was in compliance with the law, the gravity of the violation,  
53 the history of previous violations and, in the case of wages, benefits  
54 or supplements violations, the failure to comply with recordkeeping or  
55 other non-wage requirements.

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