STATE OF NEW YORK

7623

2023-2024 Regular Sessions

IN SENATE

August 4, 2023

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

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

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

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

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

(a) "Automated employment decision tool" means any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons. "Automated employment decision tool" does not include a tool that does not automate, support, substantially assist or replace discretionary 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) monitoring production processes or quality;

(C) assessment of worker performance;

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

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

(F) administering wages and benefits; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) An employer shall conduct its own assessment before making hiring, promotion, termination, or disciplinary decisions independent of employee data gathered through electronic monitoring. This includes corroborating the electronic monitoring employee data by other means, including a supervisor's documentation or managerial documentation.

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

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

(d) Data that provides evidence of criminal activity, when independently corroborated by the employer, is exempt from this subdivision.

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

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

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

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

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

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

candidate or employee. Such notice shall be made no less than ten business days before such use; and

(iii) if not disclosed on the employer or employment agency's website, information about the type of data collected for the automated employment decision tool, the source of such data and the employer or employment agency's data retention policy shall be available upon written request by a candidate or employee. Such information shall be provided within thirty days of the written request. 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) When an employer can corroborate the automated employment decision tool output and makes the hiring, promotion, termination, disciplinary, or compensation decision based on that output, a notice containing the following information shall be given to affected employees:

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

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

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

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

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

(F) a copy of any bias audits regarding the automated employment decision tool in question.

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

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

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

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

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

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

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

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

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

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

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