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New Illinois Requirements on Use of AI to Screen Job Applicants Present Challenges for Employers

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State law regulation of the use of artificial intelligence ("AI") in hiring is happening now. Illinois Governor JB Pritzker recently signed the Artificial Intelligence Video Interview Act (the "Act") into law. Effective January 1, 2020, the Act imposes new requirements on employers that use artificial intelligence to screen job applicants for Illinois-based positions using video-recorded interviews.

AI tools covered by the Act allow an applicant to videotape an interview at any time, without traveling or fitting into a recruiter's schedule. These tools also may be used by employers to narrow the pool of candidates for consideration by recruiters and hiring managers. To do that, the tools typically rely on facial and voice recognition technology to screen candidates for characteristics that are ostensibly predictive of job performance and in a manner that is ostensibly less susceptible to discriminatory bias. Whether a tool actually operates in a non-discriminatory manner, however, is one of the challenges associated with employers' use of AI. Many employers invest in validation studies to support the use of these tools and minimize the risk of discrimination claims.

With the Act, Illinois is the first state to provide a legislative response to the use of AI in the hiring process. Given the ways that AI has already started to disrupt and transform the workplace, it is almost guaranteed that other jurisdictions will follow suit.

The Illinois Artificial Intelligence Video Interview Act

The requirements of the Act apply when employers recruiting for Illinois-based positions use video-recorded interviews *and* use AI to analyze the applicant-submitted videos. Under the Act, *before asking applicants to submit video interviews* employers must do three things:

1. Notify each applicant that AI may be used to analyze the applicant's video interview and consider the applicant's fitness for the position;

2. Provide each applicant with information explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and

3. Obtain consent from each applicant to be evaluated by the AI program.

The employer may only share the video with persons whose expertise or technology is necessary to evaluate the applicant's fitness for the position. Upon request from the applicant, the employer must delete the video interview and instruct others who received copies of the video to do the same within 30 days.

The Act does not create a private right of action. Nor does it set forth any penalties state regulators may impose for employer violations. Still, it creates significant challenges for employers who use these tools.

Practical Considerations

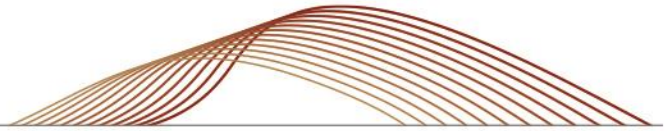
Employers use video-recorded interviews in many ways, not all of which implicate the use of AI. Some record interviews simply to allow hiring managers to view the recordings at their convenience, without relying on technology to analyze the video-recorded interviews. Whether an employer will rely on AI analysis for selections on any particular requisition, however, may depend among other things upon the number of candidates who apply. Moreover, multi-state employers often solicit candidates for openings in multiple locations, only some of which may be Illinois-based. So whether the Illinois requirement applies to a given requisition or applicant may be unclear. Meanwhile, notice and consent must be provided prior to the recording of the interview. So the potential for AI analysis of video-recorded interviews for jobs that may be Illinois-based practically triggers the notice and consent requirements.

The Act does not provide specific direction regarding the employer's obligation to explain "how the artificial intelligence works" and the "general types of characteristics" it uses to evaluate applicants. Employers typically advertise job requirements including descriptions of personal and professional qualities used to evaluate applicants. So the second component of this requirement may easily be satisfied.

"[H]ow the artificial intelligence works," however, likely will be considered by the employer or the product owner as a trade secret. Not to mention, how it works may be the subject of a validation study conducted under the privilege. Moreover, explaining how algorithms reach their decisions is notoriously difficult, as the AI trains on data to reach its own decisions in a way that is not hard-coded by its human developers (also known as the "black box problem" of AI). The required description of how the tool works may therefore be subject to challenge or accusations of vagueness or inaccuracy, and could be used by unsuccessful applicants and their counsel to develop legal theories for potential claims. Therefore, employers will need to tread carefully in crafting this description, balancing considerations of accuracy, protecting trade secrets, and minimizing fodder for potential litigation.

There also are potential implications under the European Union General Data Protection Regulation ("GDPR"). The regulators and broader authoritative bodies have already quite clearly stated that while consent is required for automated processing of personal data, an employer cannot validly obtain consent from an employee or applicant because the relationship is "imbalanced." Employers receiving applications from individuals protected by GDPR should give careful consideration to the lawful basis for using AI technology.

The Act also does not address how employers reconcile the requirement to delete the videos upon request with potentially conflicting business needs and legal obligations. Validation studies to support the proper use of these tools may be complicated if significant numbers of applicants request the deletion of their videos. Employers involved in litigation or facing the threat of claims may have conflicting preservation obligations. Most federal contractors are required to preserve "[a]ny personnel



or employment record made or kept by the contractor . . . for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later," 40 C.F.R. § 60-1.12, and virtually all employers have the same preservation obligations under the Uniform Guidelines on Employee Selection Procedures.

Employers Need To Act Now

Employers operating in Illinois that use video-recorded applicant interviews should take notice and begin preparations for the upcoming effective date of January 1, 2020. If AI is used in any manner to narrow the pool of candidates for consideration, the employer must consider carefully: (a) how it will determine which job postings trigger the Illinois Act's requirements; (b) how it will meaningfully describe the operation of the AI to applicants without disclosing confidential information or providing fodder for litigation; and (c) how it will manage applicant requests for deletion of videos.

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