# Recruiting with Artificial Intelligence: What's the True Cost?

November 28, 2023

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**Employment Law Monthly**

Diversity, Equity, and Inclusion (DE&I) has become an increasingly important consideration in hiring practices across the country. As employers look to diversify their workforce and minimize recruiting costs, exploration of recruiting platforms that are powered by Artificial Intelligence (AI) have become more appealing to employers for several reasons. The strength of the use of AI in recruitment is the ability to sort through large volumes of resumes with lightning speed. AI undoubtedly analyzes information faster than any human can, which allows employees to focus their time on other pertinent tasks. So, what's the catch?

AI often is credited with removing bias in the screening and hiring process because it uses algorithms to combine multiple data points to search for the best candidate for the role for which it is charged with recruiting. However, even with the use of AI, both conscious and unconscious biases often creep into the process of selecting candidates, eliminating qualified candidates from the selection process. Even worse, AI actually may promote biased hiring practices due to its reliance on unconsciously prejudiced selection patterns such as demography, gender, and language. Rather than eliminating bias, as frequently advertised, AI is likely to perpetuate the status quo, as it is typically modeled on inadequate and biased data.

Due to these risks of bias and discrimination, legislators and state and federal agencies are proposing and enacting laws to restrain the use of AI in employment decisions.

- Equal Employment Opportunity Commission (EEOC): In January 2023, the EEOC issued a draft strategic enforcement plan that brought AI employment discrimination to the top of its priority list. However, this is not the first we have heard from the EEOC on this topic. The EEOC previously issued guidance in May 2022, regarding the use of AI technology in recruiting and employment decisions and the application of the Americans with Disabilities Act and subsequently filed its first AI-related discrimination lawsuit. *See EEOC v. iTutorGroup, Inc.,* No. 1:22-cv-02565 (E.D.N.Y. May 5, 2022).
- New York City: In July 2023, New York City's Department of Consumer and Worker Protection began enforcement of Local Law 144, which regulates the use of AI in "employment decisions." Prior to using AI-enhanced recruiting methods, Local Law 144 requires that employers: (1) conduct a bias audit; (2) notify candidates or employees residing in New York City about the use of such tools; and (3) notify affected persons that they may request an accommodation or alternative process. Violations are subject to civil penalties.
- Illinois (820 ILCS 42) and Maryland (H.B. 1202): Both states have enacted AI-related legislation that requires employers to obtain consent from candidates prior to the use of facial recognition technology during an interview (Maryland), and

the use of AI in making assessments based on tone, word choice, facial expressions, and other forms of analyses of candidates during video interviews (Illinois).

Currently pending in the New Jersey Legislature is Bill A4909, which would regulate the sale and use of "automated employment decision tools." A4909 defines these "automated employment decision tools" as "any system the function of which is governed by statistical theory, or systems the parameters of which are defined by systems, including inferential methodologies, linear regression, neural networks, decision trees, random forests, and other learning algorithms, which automatically filters candidates or prospective candidates for hire or for any term, condition or privilege of employment in a way that establishes a preferred candidate or candidates."

If enacted, A4909 would make unlawful the sale of automatic employment decision tools unless the following three requirements are met:

- The tool is the subject of a bias audit conducted in the past year prior to selling or offering the tool for sale.
- The sale of the tool includes, at no additional cost, an annual bias audit service that provides the results of the audit to the purchaser.
- The tool is sold or offered for sale with a notice stating that the tool is subject to the provisions of [A4909].

A4909 defines "bias audit" as "an impartial evaluation, including but not limited to testing, of an automated employment decision tool to assess its predicted compliance with the provisions of the [NJ Law Against Discrimination], and any other applicable law relating to discrimination in employment."

If this bill is enacted into law, it will be important for employers to thoroughly research the tools they will be using (including any tools that may be used by search firms or online recruiting companies) but it also will require specific action by employers during the recruiting process. The bill contains a notification requirement to candidates that, within 30 days of using the tool to screen candidates for employment decisions, employers must notify each candidate that the tool was "used in connection with the candidate's application for employment" and that it "assessed the job qualifications or characteristics of the candidate."

Neither A4909 nor its Senate counterpart S1926 have progressed through the New Jersey Legislature at this time. While A4909 almost unanimously passed the Assembly Labor Committee and was thereafter referred to the Assembly Science, Innovation, and Technology Committee earlier in 2023, the bill remains in the Science, Innovation, and Technology Committee, with no movement. Similarly, S1926 was referred to the Senate Labor Committee in March of this year, where it remains.

While these bills have not made much progress and may not be passed in their current form, employers in New Jersey (and elsewhere) should anticipate that AI recruiting legislation will be passed in the near future. With this in mind, employers should utilize the framework set forth in these bills to remain cognizant of the risks associated with AI in recruiting, and as a foreshadowing of legislation that may be forthcoming.

AI technology will continue to evolve, while legislation likely will continue to lag significantly behind. While the benefits of AI are incremental when used conservatively, those charged with making employment decisions should stay informed about the latest regulations, take stock of their current hiring practices, including whether and to what extent AI plays a role in those practices, confirm company policies are clear and up-to-date, consult with legal counsel to ensure compliance, and implement safeguards when necessary to protect their company from increased liability.

The Porzio Employment Team is available to help employers navigate evolving regulations, develop new policies, and mitigate the risk of liability.