NYC AI Bias Bill May Be Compliance Headache For Employers

By **Vin Gurrieri**

Law360 (December 3, 2021, 10:29 PM EST) -- A nearly enacted New York City law would require businesses to conduct bias audits before using automated hiring tools and notify city-based applicants about how the technology works. The proposed legislation raises tricky compliance questions, and foreshadows what similar laws elsewhere might look like, attorneys say.

The bill, known officially as Int. 1894-2020, was passed by the New York City Council on Nov. 10 by a 38-4 vote and is currently awaiting Mayor Bill de Blasio's signature. If finalized without major hiccups, the law will take effect in January 2023.

Although businesses have time before the city's potential new rules are scheduled to kick in, management-side attorneys say it is the latest example of lawmakers increasingly wading into employers' use of artificial intelligence-based tools — legislative initiatives that will only gain steam as the technology becomes more prevalent.

"I think the New York City ordinance is just the latest of what I think is an increasing trend of state and local governments taking up the issue of the use of artificial intelligence in hiring," said Mark Girouard, chair of Nilan Johnson Lewis PA's labor and employment practice.

Bias Audits on Tap, But What Makes Them Valid?

New York City's proposal promises to pose various compliance challenges for businesses once it is in place.

One of the central elements of the legislative proposal is an amendment to the city's administrative code titled "Automated Employment Decision Tools." It requires that employers and employment agencies perform a "bias audit" on automated employment decision-making and screening tools that are used for hiring and promotions within a year of them being used.

Before an automated tool is rolled out, businesses must also post on their websites a summary of the results of the bias audit, a term defined in the bill as an "impartial evaluation" of those tools "by an independent auditor."

But it remains vague how a bias audit, which is supposed to assess whether a particular tool creates a disparate impact based on sex, race or ethnicity, can satisfy the "independent" prong, attorneys say.

"I don't think it's all that clear at this point in terms of what is going to be satisfactory to [the NYC Department of Consumer and Worker Protection], assuming that there was an enforcement action taken against a company, for lacking of [an] adequate bias audit," said Eric Su, a New York-based partner at Crowell & Moring LLP. "I think it's one thing to have engaged a vendor who has conducted an audit, but I don't think the criteria is quite clear as to what would constitute a sufficient audit."

Girouard similarly noted that federal standards have existed since the 1970s regulating how employers use pre-employment selection tools, but that New York City's law "is a bit unique" in that it will require an independent audit.

But what isn't apparent from the New York City ordinance, he said, is whether it is enough for an AI tool to test as nonbiased across an entire industry or job type, or whether an audit must show it won't perpetuate bias for each specific employer that wants to use it.

"It's not clear whether an employer having their vendor provide the bias audit would be considered independent or not," Girouard said.

The "more cautious approach," according to Girouard, would be for businesses to ask potential AI vendors if they had an independent bias audit of the screening tool completed, and more specifically if any independent audit was done in relation to the types of jobs the employer is looking to fill.

"If the vendor says, 'Yes, we've done a bias audit, but it's for, you know, package handling jobs,' and you're going to be using the tool for executive manager jobs, I think there's a question of whether that's actually a valid or transportable bias audit because it relates to a different population," Girouard said.

How Tricky Will It Be to Sort Out Residency?

Besides bias audits, the city's bill includes various other elements, including that businesses notify any applicant "who resides in the city" both that an automated tool will be used and what criteria it will take into account to weed out applications for promotions or jobs. Those notices must be provided at least 10 days before the tool is used, and job candidates will have a chance to ask for an "alternative selection process" or accommodation. Companies found to be in violation of the law would be subjected to monetary civil penalties.

Those requirements, however, could potentially raise numerous issues for employers, one of which is figuring out exactly who should receive a notice.

"There are definitely going to be compliance questions as employers in and around New York City use automated employment decision tools," said Nathaniel Glasser, co-leader of Epstein Becker Green's artificial intelligence practice group.

For example, Glasser questioned whether the 10-day notice requirement applies to "each and every use" of a particular tool and how employers will be able to meet that obligation "when you have a fast-moving interview and hiring process."

Additionally, he questioned how the law will apply if, for example, a New York City-based company is hiring for a position in New Jersey where the applicant pool likely includes a mix of city residents and nonresidents.

"It only applies to candidates that reside in the city, which will actually be a complicating factor for employers that are hiring into New York City roles because employers may not know as an initial matter where somebody resides," Glasser said. "So, employers are going to have to make a decision as to whether or not they obtain a candidate's residency before giving the notice. You can give the notice only to those candidates that reside in the city or end up giving the notice to everybody for a particular role regardless of where they might live."

However, Epstein Becker member Adam Forman, who also co-chairs the firm's AI practice, cautions that in making those considerations, employers should keep in mind that asking people where they live could itself result in unlawful disparate impact.

"It puts the employer in a pickle," Forman said. "As a practical proposition, if you're an employer recruiting citizens of New York City and seeking to use [a] tool, even though you'll get people from outside the city, it may be an all or nothing proposition. And when I say that, I really mean an all proposition — you want to comply with local law [and] it just means you may be giving information to those who otherwise aren't legally required to receive it."

How Many Other Jurisdictions Will Jump Aboard?

While New York City's proposed law is itself notable, attorneys said it isn't an outlier when it comes to lawmakers increasingly eyeing AI as an area that warrants more oversight.

One recent example, according to Nilan Johnson's Girouard, is the Artificial Intelligence Video Interview Act in Illinois, which imposed certain requirements on employers if they opt to use video interviews that are scored or evaluated by AI.

Those two bills, Girouard said, share "a few hallmarks … [that] I think we will see continue to appear in other state and local legislation" even if jurisdictions opt to approach AI in different ways.

Those common threads fall mainly into three buckets, including transparency in letting job seekers know an AI tool is being used, and the concept of "explainability" that allows job candidates to understand what an AI tool is screening for and that the criteria is job related, he said.

A third trend in AI bias legislation is the "idea of consent or an ability to opt out of artificial intelligence being used," according to Girouard.

"I wouldn't be surprised as we continue to see other state and local governments take up this issue that those ideas of explainability, transparency and informed consent are going to play out in all of those," Girouard said.

Besides drawing attention from states and municipalities, employers' use of AI is increasingly catching the attention of federal regulators.

The U.S. Equal Employment Opportunity Commission recently announced a new initiative aimed at ensuring that AI and algorithms that are used in hiring and employment decisions don't run afoul of federal civil rights laws.

As part of its program, the EEOC said it would create an internal working group to coordinate the

agency's activities, host listening sessions and issue technical guidance for using AI to make employment decisions.

"I do think that [New York City's law] portends future actions by other jurisdictions, whether it will be on a local level, such as a municipality, city, township, state level ... or a federal level," said Forman of Epstein Becker. "With the EEOC announcing a task force recently to take a closer look, I think we will see regulation of an employer's use of artificial intelligence or as the New York City bill calls it, 'automated tools.'"

--Additional reporting by Amanda Ottaway. Editing by Abbie Sarfo.