

Employee Relations

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New Regulations on the Use of Artificial Intelligence Software in Employment Are Likely to Generate Hardwired Confusion

By Richard M. Reice

In this article, the author explains that regulators are concerned that the growing use of artificial intelligence-based automated employment decision tools and the lack of human involvement in human resources decisions may result in a form of automated employment discrimination such that preventive regulation is needed.

The lure of artificial intelligence (AI)-based automated employment decision tools (AEDT) and the benefits they afford employers is understandably hard to resist.¹ Large companies receive tens of thousands, if not hundreds of thousands of resumes per year. The efficiencies of using an AI algorithm and a query to sift through, score and rank those resumes based on how closely they align with a given position's requirements with the purpose of selecting a smaller, qualified group of candidates are significant. Yet, regulators are concerned that the growing use of AEDTs and the lack of human involvement in human resources (HR) decisions may result in a form of automated employment discrimination such that preventive regulation is needed. In 2026, new laws regulating the use of AI systems in employment, some of the first to regulate the use of AI in the industry, will go into force in Illinois, Colorado, and in the European Union.

The transformative potential of AI in the workplace has sparked both excitement and concern. Despite the impressive capabilities of large language model (LLM) AI systems, their decision-making capacity is only as good as the data they are trained on and the algorithms used to process that data. No dataset – particularly one built by scraping the internet, thousands of resumes, and job descriptions – is free from bias.² The

The author is a partner in Sterlington PLLC's employment and litigation practices, focusing on civil litigation and labor and employment law.

preferences of programmers or their employers can find their way into algorithms and the wording of queries, leading to a “biased” output that skews results, such that people in the minority or the majority are negatively impacted. As a recent New York Times opinion columnist put it: “L.L.M.s are what they eat.”³

Although AI bias is rooted in math and not emotion, all states have laws that require employment decisions to be grounded in merit, not prejudice or biased data sets. Regardless of the fact that institutional DEI policies and disparate impact cases are currently disfavored, Title VII, the ADA, the ADEA and their state and local counterparts remain the law and are being vigorously enforced.

NEW YORK CITY

Before examining upcoming laws, we can learn from what has already gone wrong. New York City’s Local Law 144 (Local Law 144), passed in 2021 and enforced as of July 5, 2023, illustrates the pitfalls of poorly designed AI regulation.

Designed to protect job applicants from race and gender discrimination due to unfair algorithmic bias, the regulation requires employers who want to use an AEDT to screen applicant resumes and schedule applicant interviews to retain an outside third-party to audit their AEDT algorithms for bias and post the results on their company website. In addition, employers must provide job seekers with a notice that their application will be analyzed by an AEDT and provide them the ability to opt out of AEDT screening and instead request a human review.

Yet despite its good intentions, Local Law 144 has been a bust. A loophole in the rule provides that the only AEDTs covered by the law are only those that “substantially assist or replace discretionary [human] decision making” such that the employer relies solely on the AEDT results or score, “with no other factors considered.” As the term “substantially assist” is ambiguous, it allows employers to avoid Local Law 144 compliance on the basis that they are merely using an AEDT as an adjunct or aide to human decision making, not as a substitute. Another weak point is that the New York City Department of Consumer and Worker Protection, which has enforcement responsibility to ensure Local Law 144 compliance, does not initiate its own random audits to ensure employers adhere to the law. Rather, it only responds to complaints. As there have been no complaints, there has been no enforcement.

In 2024, Cornell University’s Citizen and Technology Lab (CatLab) and Consumer Reports conducted a joint study of Local Law 144 with Consumer Reports Magazine. The findings were startling. Out of 391 employers contacted, only 18 had published algorithm audit reports. Cornell’s CatLab suspects that even if firms maintain such data, they are not publishing it to avoid scrutiny and discrimination lawsuits.⁴ If New

York is truly concerned about regulating AEDTs, Local Law 144 will need substantial revision.

ILLINOIS

In 2024, Illinois – likely having studied New York’s missteps – opted for a different strategy. Through HB 3733, the Illinois Human Rights Act (IHRA) was amended to address the use of AEDTs directly.⁵

Effective January 1, 2026, the new amendments define AI as a “machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, recommendations, or decisions that can influence physical or virtual environments.” It further defines “Generative AI” to mean, in part, an “automated computing system that, when prompted with human prompts, descriptions, or queries, can produce outputs that simulate human-produced content.”⁶

Under the amendments, it will be a civil rights violation for an employer to use AI in making employment decisions – including hiring, promotion, discharge, or changes to the terms of employment – if that use results in discrimination against protected classes. Notably, the law also prohibits using zip codes as an indicator of protected status. The law further requires an employer to provide notice to an employee that the employer is using artificial intelligence when making employment decisions.⁷ The Illinois Department of Human Rights (IDHR) is charged with establishing “any rules necessary for the implementation” of HB 3733 and with determining what, when, and how such notice is to be given.

Unlike New York’s Local Law 144, Illinois law does not limit itself to AEDTs that only “substantially assist or replace discretionary decision making.” In Illinois, it appears that any use of AEDTs will be covered by the law and therefore subject to claims of bias and misuse such that it violates the IHRA. Of course, no statute is perfect, and the Illinois law has its own ambiguities. It remains to be seen how phrases such as “having the effect of subjecting employees to discrimination” will be interpreted, how much use of AI in making employment decisions is too much, such that it becomes actionable.

Employers using AEDTs will need to carefully document their systems, audit for bias, and provide clear notice to employees and applicants. Aggrieved individuals can file a charge with the IDHR or bring suit in Illinois circuit court.

COLORADO

If the New York and Illinois laws are relatively limited steps towards AI system regulation, Colorado’s Artificial Intelligence Act (CAIA) is an enormous leap in AI/AEDT regulation that goes where no AI regulation has gone before, impacting AEDTs and beyond. Effective June 30, 2026,⁸

the Colorado legislation requires developers and users of AI (the latter referred to as deployers) to take “reasonable care” to prevent “algorithmic discrimination” when using AI systems to make a “consequential decision” regarding the provision, denial, or the cost of “education or education enrollment, employment or employment opportunity, a financial or lending service, an essential government service, health-care services, housing, insurance, or a legal service.”⁹

In what may become a blueprint for subsequent AEDT regulation in other states, CAIA focuses on “high-risk” AI systems, meaning those “used to generate any content, decision, prediction, or recommendation that is used as a basis to make a consequential decision concerning a consumer.”¹⁰ In the employment context this might include, but not be limited to, selection for an interview, a promotion, or layoff. CAIA mandates that developers of high-risk AI systems use “reasonable care” to protect consumers – Colorado residents – from any “known or reasonably foreseeable risks of algorithmic discrimination arising from the intended and contracted uses” of an AI system.

What constitutes “reasonable care” in the design of AI systems in Colorado, and likely elsewhere as these laws proliferate and come on-line, will certainly be the subject of litigation. Notwithstanding this mandate, the statute builds in a presumption of reasonable care, if the developer of the AI system provides a “general statement describing the reasonably foreseeable uses and harmful or inappropriate uses of high-risk [AI] system” and documents the:

- Data used to train the system;
- System limitations including known or reasonably foreseeable risks of algorithmic discrimination given its intended use and to supply such information to the Colorado attorney general;
- Purpose (intended use) of the system and the degree of human monitoring when used to make, or to be a substantial factor in making, a consequential decision;
- Benefits of use;
- Steps taken to mitigate algorithmic discrimination before its release/use; and
- Suitability of the system’s data sources and their potential inherent biases.

Additionally, should a developer learn from a reliable source that its high-risk AI system has, or may have resulted in algorithmic discrimination, the developer must inform the Colorado attorney general and known deployers of the system.

Like a developer, the “deployer,” in our context an employer or a third-party vendor to the employer, has a similar duty to use reasonable care to protect consumers (applicants and employees) from known or reasonably foreseeable risks of algorithmic discrimination and must implement a detailed “risk management policy” that satisfies CAIA. This would require the deployer (employer) to, among other things, specify the “principles, processes, and personnel that the deployer uses to identify, document, and mitigate known or reasonably foreseeable risks of algorithmic discrimination.” In addition, an “impact assessment must be completed annually and within 90 days of any system modification.” It must include, in part, the dataset used in the AI system, and the metrics used to evaluate the system’s performance.

Job applicants and employees must be allowed to opt out of data processing by AI. If they do not opt out, they must be notified if an AI system substantially contributed to a consequential decision. Adverse decisions must be accompanied by a written explanation, details of the AI system’s use, the data processed, and a process for appeal or correction of inaccurate information.

Enforcement of CAIA is solely within the jurisdiction of the Colorado Attorney General. Violations of CAIA may constitute unfair trade practices under Colorado law,¹¹ the remedies for which run from injunctive relief to significant monetary damages. CAIA does provide a developer or deployer defendant facing enforcement an affirmative defense that it has discovered and cured the violation as a result of, among other things, information/feedback that the developer or deployer encourages others to provide them, an internal review and QC process, or that the AI system complies with the AI-RMF and ISO/IEC 42001.¹²

EUROPEAN UNION

With the exception of Colorado, the United States has been slow to holistically regulate the use of AI in the workplace. In contrast, the European Union (EU) has not hesitated. In 2024, it passed the EU AI Act (the Act) which establishes across almost all industries, excluding the military, regulations regarding the development and use of AI systems in member states. The Act will prove transformative. The EU will establish an AI Office and European Artificial Intelligence Board to oversee the enforcement of the legislation, and each member state will designate a national authority with the competence to enforce the legislation at the national level.

The Act focuses on risk management, transparency, data governance, and ethical AI practices. The Act will impact multi-nationals, because it additionally applies to deployers of AI systems that have their place of business within the EU, use information from an AI system located outside of the EU within the EU, or there are “affected persons” within the EU. The most extensive regulations, set to come into force on August 2, 2027, fall on developers of “high-risk” AI systems, a category which will

include the uses of AI by employers to manage their workforces. This includes AI systems that profile individuals, i.e. automated processing of personal data to assess various aspects of a person's life, such as work performance, economic situation, health, preferences, interests, reliability, behavior, location or movement. In the workplace this would mean (i) recruitment or selection, or (ii) making decisions that affect terms of the work relationship, promotion or termination of work, allocating tasks on the basis of individual behavior or personal traits, or monitoring or evaluation of individuals in the workforce. There are also notice requirements to ensure transparency, and a host of regulations regarding data quality, documentation, cybersecurity, and the need for human oversight.

Much like under Colorado's law, the providers of high-risk AI systems must document how the system was "evaluated for performance and mitigation of algorithmic discrimination before being deployed and what "data governance" measures are used to assure the suitability of data sources for the system's intended purpose. Providers are further required to document compliance, maintain records, provide user manuals, build in human oversight, etc.

Various provisions of the Act were to be phased in over the next six to 36 months, although at present there is a movement by big tech and the new administration in Washington to extend parts of its implementation and to amend its provisions so as to be less burdensome, in part because the EU has yet to publish the long-awaited "AI Code of Practice" which is supposed to help AI developers comply with the Act. Some European leaders, such as Swedish Prime Minister Ulf Kristersson, have called the rules "confusing" and asked the EU to pause the Act.¹³

In the meantime, the portion of the Act that is already in effect regards "Prohibited AI Practices," some of which are not yet technically feasible, and serves as a wake-up call as to the potential dangers of AI. These include "emotion recognition" systems that infer emotions at the workplace or in education institutions; "social scoring," meaning AI systems that evaluate or classify natural persons or groups of persons based on social behavior or personal or personality characteristics, with the social score leading to detrimental or unfavorable treatment; and "biometric categorization," AI systems that categorize people based on their biometric data to deduce or infer their race, political opinions, trade union membership, religious or philosophical beliefs, sex-life or sexual orientation.

2026 AND BEYOND

Regulating workplace use of AI technology will face many challenges and will spur much confusion regarding compliance until sorted by clarifying regulations or court orders. AI system developers and employers will have to invest time and resources to determine how to interpret and implement new AI system regulations, design compliant systems,

establish policies and procedures for their use and related human oversight, and guard against their misuse and built-in biases. Ironically, if AEDTs are to be used to make employment-related decisions, the pressure on employers to document worker behavior, strengths and weaknesses, in-service trainings, achievements and disappointments, and promise for promotion may be greater than ever if such documentation can reliably be used as AEDT datapoints.

Against this backdrop of AEDT use is the increasing number of employment-related lawsuits filed each year.¹⁴ This confluence of escalating employment litigation and AI HR decision making will certainly give rise to a new subset of employment discrimination lawsuits in which AI software and its developers, users, and regulators will come under attack. These lawsuits will likely focus on statutory interpretation and on adverse employment actions generated, in whole or in part, by an AEDT. Much of the litigation will involve questions of first impression and may bring a new level of technical complexity to employment law cases involving algorithm design, the appropriateness of AEDT related datasets, the queries put to them, and whether there is sufficient human oversight. Thus, it is foreseeable that future employment litigation teams may, at times, not only include a lawyer and an economist, but also a computer scientist and statistician.

NOTES

1. An AI system in general is defined as a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions, influencing, real, or virtual environments.” Algorithmic discrimination, as defined in the White House Office of Science and Technology Blueprint of an AI Bill of Rights (October 2022).

2. As the U.S. Commerce Department points out: “[T]he risks posed by AI systems are in many ways unique...AI systems, for example, may be trained on data that can change over time, sometimes significantly and unexpectedly, affecting system functionality and trustworthiness in ways that are hard to understand. AI systems and the contexts in which they are deployed are frequently complex, making it difficult to detect and respond to failures when they occur. AI systems are inherently socio-technical in nature, meaning they are influenced by societal dynamics and human behavior. AI risks – and benefits – can emerge from the interplay of technical aspects combined with societal factors related to how a system is used, its interactions with other AI systems, who operates it, and the social context in which it is deployed. Artificial Intelligence Risk Management Framework (AI RMF 1.0), at pg. 3, the National Institute of Standards and Technology, U.S. Dep’t Commerce (January 2023).

3. Zeynep Tufekci, Musk’s Chatbot Started Spouting Nazi Propaganda. That’s Not the Scary Part,” *New York Times*, July 11, 2025 (<https://www.nytimes.com/2025/07/11/opinion/ai-grok-x-llm.html>).

4. Wright, L., Muenster, R. M., Vecchione, B., Qu, T., Cai, P., Smith, A., . . . & Matias, J. N. (2024). Null Compliance: NYC Local Law 144 and the challenges of algorithm accountability. In *The 2024 ACM Conference on Fairness, Accountability, and Transparency*.

New Regulations on the Use of Artificial Intelligence Software

5. Illinois as previously regulated the use of AI used in video interviews. The Illinois Artificial Intelligence Video Interview Act (AIVIA) (Effective January 1, 2020, amended January 1, 2022) requires employers to notify applicants about the use of AI to analyze their video interviews and explain how the AI works. Employers must also obtain applicant consent, limit video sharing, and delete recordings upon request. If AI is the sole basis for selecting candidates for in-person interviews, employers must collect and report race and ethnicity data annually to the Illinois Department of Commerce and Economic Opportunity.
6. IHRA § 2-102 (M-N).
7. IHRA § 2-102 (L)(1-2).
8. Colorado lawmakers passed a special session bill on August 26, 2025 to delay the effective date of the Colorado AI law by six months until June 30, 2026, to allow greater time to consider revisions.
9. Algorithmic Discrimination per CAIA “means any condition in which the use of an artificial intelligence system results in an unlawful differential treatment or impact that disfavors an individual or group of individuals on the basis of their actual or perceived age, color, disability, ethnicity, genetic information, limited proficiency in the English language, national origin, race, religion, reproductive health, sex, veteran status, or other classification protected under the laws of this state or federal law. CAIA’s definition of an “AI system” is identical to Illinois’ set forth above.
10. “Consumer” is merely defined as a “Colorado resident.”
11. CO Rev Stat § 6-1-105 (2021).
12. In collaboration with the private and public sectors, NIST working with industry and users has, by the publication of AI-RMF 1.0 (see footnote 2), developed a framework to better manage risks to individuals, organizations, and society associated with AI. The published standards are voluntary use and are designed to improve the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of AI products, services, and systems.
13. Supantha Mukherjee, Will the EU Delay Enforcing its AI Act, Reuters, July 3, 2025.
14. Nationwide, there were a total of 15,424 employment lawsuits filed in the U.S. district courts in 2023. That number increased in 2024 to 16,576. (Statistical Tables for the Federal Judiciary December 2024). And that does not include the thousands of other cases filed in the various state and local courts around the country. Given the Supreme Court’s recent decision in *Ames v. Ohio Dep’t. of Youth Services*, which further opened the door to “reverse” discrimination lawsuits, these numbers are likely to increase further.

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