An Employer's Overview Of AI Legislation In 5 Jurisdictions

By **Jason Schwartz, Naima Farrell and Emily Lamm** (May 30, 2023, 4:15 PM EDT)

As the flurry of headlines focused on artificial intelligence makes clear, AI is hot across industries, sectors and areas of the law.

Indeed, one recent legislative proposal in California — Assembly Joint Resolution 6 — has even called for a temporary moratorium on the training of AI systems more powerful than GPT-4 to allow time for AI governance systems to catch up.[1] Yet, the use of AI in employment continues to grow, garnering the attention of the White House and state legislatures alike.[2]

At this point, many employers are likely aware of the rapidly approaching July 5 enforcement date for New York City's AI law, Local Law 144.[3] However, many employers operate in multiple jurisdictions and are likely wondering what other legislative proposals are in the pipeline and how they compare to New York City's law.

These proposals are rapidly evolving and, at times, fall subject to the overarching regulatory plans of their state. For example, California's A.B. 331 — which would have required impact assessments for automated decision tools used in employment — was killed by California's Assembly Appropriations Committee on May 18.[4]

A few days before, members of the California Privacy Protection Agency Board raised concerns about this bill because CPPA had already been tasked with regulating automated decision making and, as CPPA Board Member Alastair Mactaggart put it, is "the only realistic AI regulator in North America."[5]

In this article, we offer an overview of AI-related proposals in five jurisdictions — Massachusetts,[6] New York,[7] New Jersey,[8] Vermont[9] and Washington, D.C.[10] — including the key similarities and differences as compared to New York City's Local Law 144, as well as practical takeaways about the regulatory and legislative trends that are emerging.

As a quick reminder, Local Law 144 requires employers using covered automated employment decision tools in hiring and promotion to: (1) have an independent auditor conduct a bias audit of the tool based on race, ethnicity and sex; (2) provide notice to applicants and employees subject to the tool; and (3) publicly post a summary of the bias audit and distribution date of the tool.[11]

Jason Schwartz

Naima Farrell

Emily Lamm

Below we provide a chart summarizing the employment decisions covered by each of the proposed laws as well as the key ways in which the proposals differ from Local Law 144.

JURISDICTION	COVERED EMPLOYMENT DECISIONS	KEY REQUIREMENTS DIFFERING FROM LOCAL LAW 144
Massachusetts H.B. 1873	• 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.	• An algorithmic impact assessment, which includes a description of the outputs, the types of decisions that will be made, an evaluation of risks including discrimination and privacy, and a description of the methodology used to evaluate the identified risks and mitigation measures. • Notices about the use of automated decision systems to workers and the Department of Labor & Workforce Development, including the nature, purpose, and scope of decisions for which such systems will be used, the type of outputs generated, the specific category and sources of worker data used, the identity of who created and will manage the system, and any changes to the system. • A data impact assessment. • Notices for electronic monitoring and data collection. • Employers prohibited from "solely" relying on the output of an automated decision system to make a hiring, promotion, termination or disciplinary decision and must establish meaningful human oversight. • No public posting requirement.
New York A.B. 00567	• Screening employment candidates or prospective candidates for hire in any way that establishes a preferred candidate or candidates.	• Disparate impact analysis based on sex, race, ethnicity or other protected classes. • No notice requirement. • No public posting requirement.
New Jersey A.B. 4909	• Screening candidates for employment or otherwise deciding compensation or any other terms, conditions, or privileges of employment.	• A bias audit assessing the tool's compliance with New Jersey's Law Against Discrimination. • Notice to each candidate within 30 days of the use of the tool, including the job qualifications and characteristics the tool assesses.

		• No public posting requirement for employers.
		• Tools sold or offered for sale must provide an annual bias audit service that provides the results of the audit to the purchaser.
Vermont H.B. 114	• Decisions that affect an employee's compensation, benefits, or terms and conditions of employment; relates to the discipline, evaluation, promotion, or termination of an employee; or relates to the hiring of an individual or employee for a position or job. • Electronic employee monitoring.	• Impact assessment requiring a description of the system, its purpose, the data it uses and its outputs; an assessment of its necessity; an assessment of the potential risks of using the system; a summary of the measures taken to mitigate against risk; and a description of the methodology used to prepare the assessment. • Notice for electronic monitoring, including the intended purpose, the uses of the generated data, and a description of the technologies used. • Incorporation of facial, gait or emotion recognition technology prohibited. • Outputs must be corroborated by human oversight. • No public posting requirement.
Washington, D.C. B. 25-0114	• Eligibility for, access to or denial of employment.	• Audit of algorithmic determination practices, including a disparate impact analysis based on race, color, religion, national origin, sex, gender identity or expression, sexual orientation, familial status, genetic information, source of income or disability. • Reports of the annual audit submitted to the Office of the Attorney General for the District of Columbia. • Notice to individuals via mail, email, or website, including the data collected, generated, inferred, used, and retained; the sources used to collect, generate, or infer the data; the rights provided under the law; and a description of the relationship between the data and the algorithmic eligibility determination. • No public posting requirement.

Takeaways

For employers operating across jurisdictions, keeping up with the myriad of regulatory and legislative developments in the AI space is becoming increasingly challenging. Nevertheless, there are a few key themes across the aforementioned proposals released thus far.

First, each of the proposed laws would require some sort of impact assessment or analysis to be conducted by the employer deploying an AI tool or the vendor developing and selling the AI tool in the case of New Jersey.

Second, most of the proposals require notice to individuals who will be subject to an AI tool's decision making. These notice requirements aim to provide transparency and allow applicants and employees to understand how the tool will assess them. Applicants and employees can then take action in response as needed, such as by requesting a reasonable accommodation under the Americans with Disabilities Act if necessary.[12]

Third, the scope of these proposed laws is often much broader than existing laws, covering employment decisions ranging from compensation to task allocation to termination. Where adverse impact analyses are required, some jurisdictions — e.g., Washington, D.C. — would require the analysis to assess the potential impact on an array of protected characteristics beyond Local Law 144's focus on race, ethnicity and sex.

In light of this rapidly developing patchwork of AI-related proposals, vendors of automated employment decision-making tools and employers using or considering the use of these tools should be sure to keep up with these developments and prepare to comply with potentially forthcoming requirements.

Jason Schwartz is a partner and co-chair of the labor and employment practice group at Gibson Dunn & Crutcher LLP.

Naima Farrell is a partner at the firm.

Emily Maxim Lamm is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AJR6.

[2] https://www.whitehouse.gov/ostp/news-updates/2023/05/01/hearing-from-the-american-people-how-are-automated-tools-being-used-to-surveil-monitor-and-manage-workers/.

[3] https://rules.cityofnewyork.us/rule/automated-employment-decision-tools-updated/.

[4] https://www.assembly.ca.gov/media/assembly-appropriations-committee-20230518; https://www.law360.com/articles/1594222/what-employers-should-know-about-proposed-calif-ai-regs.

[5] https://www.youtube.com/watch?v=y4H9HWy5siA.

[6] https://trackbill.com/bill/massachusetts-house-bill-1873-an-act-preventing-a-dystopian-work-environment/2400154/.

[7] https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00567&term=2023&Summary=Y&Actions=Y&Text=Y.

[8] https://www.njleg.state.nj.us/bill-search/2022/A4909.

[9] https://legislature.vermont.gov/Documents/2024/Docs/BILLS/H-0114/H-0114%20As%20Introduced.pdf.

[10] https://lims.dccouncil.gov/Legislation/B25-0114.

[11] https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9; https://www.law360.com/employment-authority/articles/1596454/10-ways-nyc-ai-discrimination-rules-may-affect-employers.

[12] https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.