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Companies Using Video Interviews Beware: New Obligations for Positions Based in Illinois

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Increasingly, companies are using third-party digital hiring platforms to recruit and select job applicants. These products, explicitly or implicitly, promise to reduce or eliminate the bias of hiring managers in making selection decisions. Instead, the platforms grade applicants based on a variety of purportedly objective factors. For example, a platform may scan thousands of resumes and select applicants based on education level,

work experience, or interests, or rank applicants based on their performance on an aptitude test—whatever data point(s) the platform has been trained to evaluate based on the job opening.

Video Interviews

Video interviews constitute one type of product offered by certain digital hiring platforms. Video interviews may be offered in a variety of forms—from live interviews conducted by a hiring manager but simultaneously recorded for future audiences, to recorded interviews conducted by the computer program, giving applicants a limited time (e.g., 30 seconds) to record an answer to each question. In any recorded form, these digital hiring platforms use artificial intelligence (“AI”) to analyze an applicant’s answers. AI may be used to analyze facial expressions or eye contact, or even the speed of an individual’s response, in order to evaluate the quality of an applicant’s answers.

Such products raise a host of legal issues, including questions about hidden biases, disparate impact, disability accommodation, and data privacy.

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Video Interviews

The Artificial Intelligence Video Interview Act

One state has taken an initial step to put job applicants on notice of the use of these products. Last year, Illinois Governor J.B. Pritzker signed into law the Artificial Intelligence Video Interview Act¹ (“AIVI Act”), which creates disclosure requirements for companies that utilize video interview technology that relies on AI. Effective January 1, 2020, the AIVI Act requires an employer seeking to use AI-enabled video interviewing technology to do the following before hiring for an Illinois-based position:

1. Notify each applicant before the interview 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 before the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants; and
3. Obtain prior consent from the applicant to be evaluated by the AI program.

The AIVI Act also requires employers to take steps to protect applicants’ privacy. Under the AIVI Act, video interview recordings can only be shared “with persons whose expertise or technology is necessary in order to evaluate an applicant’s fitness for a position.”

In addition, upon request from the applicant, employers must destroy all copies of the videos (including back-ups) no later than 30 days after the applicant requests the employer to do so and must instruct “any other persons who received copies” of the videos to delete them. These destruction requirements may be burdensome for employers, who should remain cognizant of who has received copies within the employer’s organization and should work with the vendor to ensure proper storage and timely destruction of any such videos. Employers should also be prepared for conflicts between this provision and legal requirements to maintain copies of relevant information if litigation relating to such information is reasonably anticipated.

Illinois has a history of passing expansive laws protecting employees’ privacy, such as its 2008 Biometric Information Privacy Act² (“BIPA”). BIPA was the first law to require notification and consent in collecting

employee biometric data, and now the AIVI Act is a first-of-its-kind law in the nation with similar notification and consent procedures.

Although BIPA was largely ignored for almost a decade, recently there has been a slew of litigation involving compliance with the procedural obligations of the statute. The AIVI Act could result in a similar wave of lawsuits, provided the AIVI Act allows for a private right of action (which is not clear, as currently drafted).

At present, there are many questions left unanswered.

For instance, the AIVI Act does not define what AI means or provide guidance on the specific information an employer must provide to a candidate to satisfy its obligation to describe “how” the AI works.

The 30-day deletion requirement is similarly vague and may conflict with other legal, statutory, and/or regulatory obligations.

Nevertheless, it is likely that Illinois’s AIVI Act will not be an outlier. Other jurisdictions may quickly follow suit.

What Illinois Employers Should Do Now

Employers using AI technology for video interviewing to fill an Illinois-based position should do the following:

- Develop a method of providing notice and obtaining consent from applicants before conducting interviews.
- Establish a process for receiving and responding to requests for the deletion of an applicant’s interviews, taking into consideration the interplay with applicable records retention requirements.
- Be aware that compliance with the AIVI Act will not absolve employers from liability for a product that exhibits other legal deficiencies, such as failing to accommodate people with disabilities or discriminating against a protected class.
- Consult with counsel before implementing any type of digital hiring platform.

Notes

1. <http://www.ilga.gov/legislation/fulltext.asp?DocName=&Session-Id=108&GA=101&DocTypeId=HB&DocNum=2557&GAID=15&LegID=118664&SpecSess=&Session=>
2. <https://www.technologyemploymentlaw.com/announcements/illinois-supreme-court-declares-aggrieved-under-bipa-includes-those-with-no-injury/>.

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