Holistic AI White Paper

Regulation of HR Tech

The Key Laws You Need to Know

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Holistic AI

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KEY TAKEAWAYS

- HR tech tools present an opportunity for increased innovation and efficiency but also present novel risks.
- Regulation to address the risks of HR tech tools is emerging globally, particularly in the US and Europe.
- The Illinois Artificial Intelligence Video Interview Act introduced transparency requirements and reporting of demographic characteristics.
- NYC Local Law 144 mandated bias audits of automated employment decision tools.
- California has proposed amendments to its employment regulations to address bias associated with automated-decision systems.
- California has also proposed a Workplace Technology Accountability Act to limit workplace monitoring, give workers rights to their data, and require impact assessments of automated and information systems.
- HR tech will be considered high-risk under the EU AI Act and subject to stringent obligations.
- Spain's Royal Decree 9/2021 (aka the rider law) gives platform-based delivery workers employment rights and imposes transparency obligations for employers using digital platforms for employment-related decisions.
- Other broad laws, such as the Algorithmic Accountability Act, DC's Stop Discrimination by Algorithms Act, and Canada's Artificial Intelligence and Data Act, will impose obligations on HR tech tools if passed.
- The Equal Employment Opportunity Commission has issued guidance on the impact of AI systems on those with disabilities.
- The Society for Industrial and Organizational Psychology has issued a statement on AI-powered recruitment tools.

INTRODUCTION

Artificial intelligence and automated systems are widely applied across all sectors to support Talent acquisition and talent management. Indeed, automated systems are being used throughout the talent pipelines, from sourcing to internal talent mobility and everything in between. While these technologies are scalable solutions and can offer many benefits, such as improving candidate experience, time and cost savings, and greater retention rates, they pose novel risks. For example, algorithms can perpetuate and amplify existing biases, mirroring potentially biased human judgments. These risks must be managed to ensure that the full potential of these tools is realised without causing harm to those who interact with them.

A key contribution to efforts to manage the risks of algorithmic talent management tools is legislation, which codifies best practices and adds some accountability for those who design, develop, and deploy automated tools. Indeed, regulation targeting HR tech is emerging worldwide, particularly in the US and Europe. These laws vary in their approach, with some targeting certain technologies or narrow jurisdictions, while others take a broader approach and implement cross-border regulation.

The following sections outline the key laws in the US and Europe that apply to HR tech – both those already enacted and in effect and those still at the proposal level – as well as recently published guidance for best practices in HR tech.

Law	Summary	Status
Illinois Artificial Intelligence Video interview act	Requires employers to give candidates notice that AI will be used to evaluate their video interview and the characteristics it will consider.	In effect – 1st January 2020
NYC Local Law 144	Requires bias audits of automated employment decision tools, publication of a summary of the results of the audit, and disclosure of the use of an automated tool and the characteristics it will consider.	Enacted - effective 15th April 2023

Proposed Amendments to Employment Regulations Regarding Automated Decision	Prohibits employers from discriminating against candidates based on protected characteristics, including using automated decision systems.	Proposed
California Workplace Technology Accountability Act	Limits electronic monitoring to locations and activities, requires impact assessments of automated decision systems and worker information systems, gives workers' rights about their data, and introduces notification requirements.	Proposed
EU AI Act	Considers HR systems high risk and subjects them to stringent requirements surrounding issues such as bias, data quality, transparency, and human oversight, and requires conformity assessments before they can be placed on the EU market.	Proposed
Spain's Royal Decree 9/2021 (Rider Law)	Gives platform-based delivery drivers employment rights and requires that all platform-based workers are informed about the parameters, rules and instructions that the system uses.	Effective 12th August 2021
US Algorithmic Accountability Act of 2021	Requires impact assessments of systems used in critical decisions such as employment to identify issues such as bias, performance, transparency, privacy and security, and safety.	Proposed

DC Stop Discrimination by Algorithms Act	Prohibits covered entities from using systems that discriminate based on protected characteristics and prevent subgroups from accessing important life opportunities.	Proposed
Canada's Artificial Intelligence and Data Act	Requires impact assessments to determine whether a system is high-impact and then establish measures to identify, assess and mitigate the risks of harm associated with the system.	Proposed

THE ILLINOIS ARTIFICIAL INTELLIGENCE VIDEO INTERVIEW ACT

The **Artificial Intelligence Video Interview Act** came into effect in Illinois on 1st January 2020. The first of its kind, the law affects employers using artificial intelligence to analyse video interviews completed by job applicants. It requires them to be more transparent about the algorithms they use to evaluate applications.

What are the notice requirements for employers?

Employers that ask applicants to complete a video interview, which will be analysed using AI, must give candidates notice that AI is being used to assess their fit for the position, how the AI works, and which characteristics will be used in the evaluation.

Do candidates need to consent to the use of AI?

Based on the information provided in the notice, candidates must consent to the video interview to be judged by AI before it occurs. If consent is not obtained, employers are not permitted to use the model to evaluate the interview submitted by the candidate.

What are the restrictions on sharing video interviews?

Video interviews must only be shared with those whose expertise or technology is required to evaluate the interview. This includes third-party vendors of the AI used to evaluate the video interview.

What is the procedure when an applicant requests that their interview be deleted?

When requested by the applicant, employers must delete an applicant's interviews within 30 days. Any other parties who have a copy of the video interview must also delete the video, including any backups, and must comply with the employer's request.

What information must be reported?

Employers relying solely on AI to analyse video interviews must collect and report the race and ethnicity of the applicants who a) are not selected for an in-person interview following the AI analysis and b) are hired following the AI analysis. This should be reported to the Department of Commerce and Economic Opportunity annually by December 31 and include the data collected in the 12 months ending on November 30 preceding the report filing. The Department must then analyse the reported data and inform the Governor and General Assembly whether the data disclose a racial bias in the use of AI by 1st July each year.

Maryland's Use of Facial Recognition Services – Prohibition

Taking a similar approach to Illinois, Maryland's **prohibition of facial recognition** services used by employers took effect on October 1, 2020. Under this regulation, employers are prohibited from creating a facial template for facial recognition or persistent tracking during employment interviews unless the candidate has consented by signing a waiver.

The required waiver must include, in plain language, the candidate's name, the date of the interview, consent from the candidate, and whether they read the consent waiver.

In contrast to Illinois law, this prohibition does not require employers to outline how the technology works or collect and report any demographic information.

NEW YORK CITY'S BIAS AUDIT LEGISLATION

Following Illinois' targeted approach, the New York City Council has taken decisive action against a broader range of automated employment decision tools, passing **legislation** that **mandates bias audits** of these tools. As a result, Local Law 144, colloquially known as the NYC Bias Audit law, comes into effect on 15th April 2023. To clarify some of the requirements of this legislation, the Department of Consumer and Worker Protection has **proposed** some **additional rules**, for which there was a **public hearing** for individuals to submit their comments, concerns, and queries.

What is an automated employment decision tool?

A computational process derived from machine learning, statistical modelling, data analytics, or artificial intelligence that produces a simplified output (a score, classification, or recommendation) used to aid or automate decision-making for employment decisions (screening for promotion or employment).

The proposed rules clarify that machine learning, statistical modelling, data analytics, or artificial intelligence are a group of computer-based mathematical, computer-based techniques that generate a prediction of a candidate's fit, likelihood of success or classification based on skills/aptitude. First, a computer identifies the inputs, predictor importance, and parameters of the model to improve model accuracy or performance. Then, they are refined through cross-validation or a train/test split. They also clarify that a simplified output includes ranking systems.

What are some examples of an automated employment decision tool?

Video interviews, game-based/image-based assessments, and resume screening tools etc. that are scored or evaluated by an algorithm. Systems that rank candidates on their suitability for a position or how well they meet some criteria are also considered automated employment decision tools.

What are the notification requirements of the legislation?

At least ten working days before the tool is used, candidates must be informed that an automated employment decision tool is being used to assess them and allow them to request an accommodation or alternative selection process. The characteristics used to make the judgments and the source and type of data used within 30 days of a written request if it is not available on the website of the employer or the Employment Agency.

The proposed rules clarify that the notice can be given by including it in a job posting or by sending it through U.S. mail or e-mail. For employees specifically, notice can also be given in a written policy or procedure that is provided to employees, and for candidates, the notice can be included in the careers or jobs section of its website.

What is a bias audit?

An impartial evaluation of an automated employment decision tool carried out by an independent auditor that should include (but is not limited to) assessing for disparate impact against category 1 protected characteristics (race/ethnicity and sex/gender at minimum). Employers must provide a summary of this audit on their website if using automated employment decision tools to assess candidates residing in New York City and must inform them of the key features of the automated tool before using it.

The proposed rules specify that bias should be determined using impact ratios based on subgroup selection rate (% of individuals in the subgroup that are hired), subgroup average score, or both. In the case of systems that result in scores, ratios are calculated by dividing the group's average score by the average score of the highest scoring group:

$$\frac{\textit{Average score for a category}}{\textit{Average score for the highest scoring category}}$$

For systems that result in a classification, the impact ratio is calculated by dividing the selection rate (proportion that are allocated to the positive classification) of one group by the selection rate of the group with the highest rate:

$$\frac{\textit{Selection rate for a category}}{\textit{Selection rate for the most selected category}}$$

Although not explicated in the proposed rules, according to the Equal Employment Opportunity Commission, bias occurs when the selection rate of one group is less than four-fifths (.80) of the selection rate of the group with the highest rate. Therefore, bias can be said to be occurring when the impact ratios fall below .80 for a particular group.

What documentation do employers have to provide?

Employers using an automated employment decision tool must provide a summary of a current bias audit (< 1 year old) on their website or the website of the Employment agency before using the tool.

The proposed rules clarify that this summary should appear in the careers or jobs section of their website in a clear and conspicuous manner and should include the date of the most recent bias audit of such AEDT, the distribution date of the AEDT to which such bias audit applies, and a summary of the results (including selection rates and impact ratios for all categories).

Who does the legislation apply to?

Employers using automated employment decision tools to evaluate candidates or employees who reside in New York City for a position or promotion. However, since many employers outsource their automated employment decision tools from vendors, many employers will look to vendors to commission an audit on their behalf.

Are there penalties for noncompliance?

Up to $500 for the first violation and each additional violation occurring on the same day. Subsequent violations incur penalties of $500 - $1500.

Does this affect the civil rights of candidates?

The subchapter should not be construed to limit the rights of any candidate or employee for an employment decision to bring civil action. Therefore, candidates' civil rights are not affected and other relevant equal employment laws must still be followed by the employer.

The proposed rules clarify that nothing in the legislation requires employers to comply with requests for alternative procedures or accommodations, but these practices may be covered by other legislation (e.g., the Americans with Disabilities Act).

CALIFORNIA'S PROPOSED AMENDMENTS TO EMPLOYMENT REGULATIONS REGARDING AUTOMATED DECISION SYSTEMS

In the wake of the Illinois and NYC legislation, California has also started to take steps to regulate the use of automation in recruitment. As such, California has **proposed amendments** to its employment regulations to extend **non-discrimination practices** to automated-decision systems.

Who do the proposed amendments affect?

Employers with five or more employees are subject to this regulation, which includes employees outside of California, but they are not covered by the act protections if the prohibited activity did not occur in California. Vendors, or agents, acting on behalf of an employer are also considered an employer under this regulation.

How do the proposed amendments define automated-decision systems?

An automated-decision system (ADS) is a computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorises, recommends, or makes or facilitates employment-related decisions. This includes systems used to direct job advert targeting, screening resumes, analysis of facial expressions, word choice, and voices in video interviews, computer-based tests and game-based assessments, and the measurement of constructs such as personality, aptitude, cognitive ability, or cultural fit through automated tests.

What is automated-decision system (ADS) data?

Automated-decision system (ADS) data is used to develop or apply machine learning, algorithms, or artificial intelligence as part of an ADS. This includes training data, data provided by applicants or employees or information about applicants or employees that has been analysed by an ADS, and data produced by an ADS.

Under the proposed amendments to California's employment legislation, it is prohibited to use automated-decision systems that limit, express a preference for, or screen out applicants based on protected characteristics or proxies of characteristics unless there is an affirmative defence for using this criterion.

How are artificial intelligence and machine learning defined?

Artificial intelligence is a machine learning system that can make predictions, recommendations, or decisions that influence real or virtual environments when given a set of human-defined objectives. Typically, the developer relies partly on the computer's analysis of data to determine the criteria to use to make decisions.

Machine learning is an application of artificial intelligence where a system can automatically learn and improve based on data or experience without the need for explicit programming.

What are the requirements for using ADSs to make decisions based on criminal history?

An applicant must be notified if an employer plans to withdraw an employment offer based on the applicant's criminal history, and the decision to withdraw the offer involves using an ADS. The applicant must be provided with a copy or description of any report or information from the operation of the automated decision system, related data, and assessment criteria used as part of an automated -decision system resulting in the withdrawn employment offer.

What are the restrictions on conducting medical or psychological exams of an applicant?

Before an offer is extended to an applicant, procedures to conduct a medical or psychological exam, including by using an ADS, are not permitted. This includes using tests of optimism, emotional stability, extraversion, intensity, and tests of mental ability to make a medical or psychological enquiry.

Which characteristics are protected under the proposed amendments to California's employment legislation?

The legislation prohibits discrimination based on characteristics including race, national origin, gender, accent, English proficiency, immigration status, driver's license status, citizenship, height or weight, national origin, sex, pregnancy or perceived pregnancy, religion, and age unless they are shown to be job-related for the position in question and are consistent with business necessity.

How long does a company need to retain data?

Anyone involved in the advertisement, sale, provision, or use of a selection tool, including an ADS, must retain records of the assessment criteria used for each employer or entity that is provided with the tool for at least 4 years after the tool is last used.

CALIFORNIA'S WORKPLACE TECHNOLOGY ACCOUNTABILITY ACT

To increase the accountability surrounding the use of technology in the workplace, California has also proposed a Workplace Technology Accountability Act (AB-1651). The main contributions of this Act are to restrict the data that can be collected about workers to only activities that have proven business necessity, give workers access to their data, and require data protection and algorithmic impact assessments of worker information systems and automated decision tools, respectively.

How does the proposed California Workplace Technology Accountability Act define automated decision systems?

An automated decision system (ADS) or algorithm is a computational process, including those derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that makes or assists with making employment-related decisions. The output of these systems is any information, data, assumptions, predictions, scoring, recommendations, decisions, or conclusions generated by an ADS.

What rights do workers have concerning their data?
Workers can request information about the information an employer is collecting, storing, analysing, interpreting, or disseminating about them, including:

- The specific categories and pieces of data that are retained
- The source of the data
- The purpose for collecting, storing, analysing, or interpreting worker data
- Whether and how the data relates to essential job functions and if it is used to make employment-related decisions
- Whether the data is being used as an input for an ADS and the output of the tool
- Whether the data was the output of an ADS
- The names of any vendors or third parties that have access to the data or that generated the data

Workers also have the right to review their data for inaccuracies and request corrections.

What are the notification requirements concerning worker data?

Employers that control data collection shall inform workers regarding the categories of data to be collected and explain how the data collection relates to essential job functions. Furthermore, workers must be informed when employers collect data to make or assist employment-related decisions.

Employers also need to answer relevant questions, such as whether data will be deidentified and whether the employers will use the data at the individual or aggregated level. In addition, the question of whether data is being shared with a third party, who they are, and why data is being shared will need to be addressed. Further notification requirements include the length of data retention, workers' right to access and correct data, relevant data impact assessments, and any active investigations by the Labor Agency.

Under what circumstances is worker data collection or electronic monitoring permitted?

Electronic monitoring of workers or collection, storage, analysis, or interpretation is only permittable if allowing a worker to accomplish an objectively proven job function. In addition, it is also allowed when used to monitor production processes or quality. Finally, electronic monitoring of workers is often applied to ensure compliance with employment laws, protect workers' health, safety, or security, and administer wages and benefits.

What are the notification requirements concerning electronic monitoring?

Employers or vendors acting on behalf of an employer that plans to electronically monitor workers should give a clear and conspicuous notice of their planned activity and inform them of their right to correct their data. This should include:

- A description of the allowable purpose for that specific form of monitoring and why it is strictly necessary
- The specific activities, locations, communications, and job roles that will be monitored; the technologies used to conduct the specific form of monitoring and the worker data that will be collected
- Whether this data will be used to make or inform employment-related decisions
- Whether the data will be used to assess productivity performance or set productivity standards

- The names of vendors or third parties acting on the employer's behalf or to whom the data collected will be transferred
- The organizational positions that are authorized to access the data
- The dates, times, and frequency of monitoring
- A description of where the data will be stored and how long it will be retained
- How that form of monitoring is the least invasive form possible

What are the notification requirements concerning automated decision systems?

Within 30 days of the legislation going into effect, employers or vendors acting on their behalf must provide notice to workers of the use of an automated decision tool through the routine communication channel. Notices should outline the nature, purpose and scope of decisions that will be influenced by an ADS, the types of ADS outputs, and the specific category and sources of worker data that the system will use. Employers should also inform employees of the individual, vendor, or entity that created the system and that will run, manage and interpret its results. A copy of this notice should also be provided to the Labor Agency within 10 days of the distribution to workers, and notices should be updated following any significant updates or changes to the system.

What are the impact assessment requirements?

Employers that develop, procure, use or implement an ADS or worker information system are required to complete an algorithmic impact assessment or data protection impact assessment, respectively Impact assessments must occur before the use of the system, or retroactively for systems in use at the time of the legislation coming into effect, and should be conducted by an independent assessor with the relevant experience and understanding of the system.

What is the focus of the impact assessments?

An impact assessment aims to evaluate the potential risks posed by a system. These include discrimination against protected classes, violations of legal rights, direct or indirect physical or mental harms for algorithmic systems, and privacy harms for worker information and algorithmic systems. Assessors should also identify whether a system could have a chilling effect on workers exercising their legal rights or a negative economic or material impact on workers. Impact assessors must also assess whether a system has the potential to infringe on the dignity and autonomy of workers and errors (false positives and negatives).

What is the consultation process for impact assessments?

When conducting either type of impact assessment, the assessor is required to consult workers who are potentially affected by the ADS or worker information system under investigation. This can include the identification of the risks to be evaluated and mitigation strategies to mitigate these risks. The assessor should also make the preliminary assessment available to workers for anonymous review and comment, and employers are prohibited from retaliating against workers who participate in this.

Who is in scope?

Employers of workers that operate from a workplace in California who collect data about their workers, use electronic monitoring, or use automated employment decision tools to make employment-related decisions about workers. Vendors who act on behalf of employers also share liability and must comply.

ANALYSIS: NEW YORK CITY VS CALIFORNIA'S APPROACHES TO REGULATING BIAS AND DISCRIMINATION

While all three regulations aim to reduce potential harms associated with HR tech tools using nearly identical definitions for the tools themselves, albeit using slightly different terminology (automated employment decision tool v. automated-decision system), there are some notable contrasts between them including who is in scope and the level of due diligence required to identify and mitigate risks.

Who does the legislation affect?

California's Proposed Modifications apply to employers with five or more employees. Employees outside of California are included in the count but are not covered by the protections of the modifications if the prohibited activity occurred outside of California, according to the California Fair Employment & Housing Council (FEHC). In contrast, the Workplace Technology Accountability Act and the NYC Bias Audit legislation do not outline exemptions for certain employers.

How are California and New York City enforcing their legislation?

While NYC's Local Law 144 and the Proposed Modifications focus on isolated decisions that result from the use of AEDTs, California's Workplace Technology Act is broader in scope. The legislation offers workers greater protection from everyday automated decisions that may cause potential harm and discriminatory impact, placing stricter safeguards on employees' workplace privacy rights, not only unjust hiring.

The Workplace Technology Accountability Act and the New York City legislation require independent assessments by a third-party auditor of automated tools used in hiring, assessment, and promotion. The Act specifies that employers and vendors must conduct an algorithmic impact assessment, which tests for bias or discriminatory outcomes, along with other factors such as errors and potential privacy harms and informs mitigation strategies for any risks identified. In contrast, New York City's Local Law only requires an impartial bias audit before a tool is used and does not prescribe additional requirements should bias be found in a system.

California and NYC diverge in their approach to liability. Local Law 144 places the responsibility on employers to comply. Comparatively, California's compliance obligations are wider spread. Both vendors and agents acting on behalf of an employer are considered an employer under the proposed laws. In this case, vendors and agents equally share liability and must comply. As a result, under New York Law, employers and employment agencies could incur penalties of up to $1,500 per violation per day for noncompliance. Similarly, failure to meet California's strict record-keeping and data-collection requirements can result in hefty breach fines.

Strict notification, collection and data retention requirements are at the core of all three pieces of legislation for employers and vendors wishing to deploy an automated decision tool. Most critically, the Proposed Modifications condone any unlawful discrimination based on protected characteristics without demonstration of business necessity, a difficult task to prove.

THE EU AI ACT

First proposed on 21 April 2021, the European Commission's proposed Harmonised Rules on Artificial Intelligence (EU AI Act), seek to lead the world in AI regulation. Likely to become the global gold standard for AI regulation, the rules aim to create an 'ecosystem of trust' that manages AI risk and prioritizes human rights in the development and deployment of AI. Since first being proposed, an extensive consultation process has resulted in a number of amendments being proposed to the rules in the form of compromise texts, the latest of which was put forth by the Czech presidency. Expected to pass within around a year, the Act will have implications for AI systems being used in the EU.

Who will be affected by the EU AI Act?

Broadly speaking, providers of AI systems established in the EU must comply with the regulation, along with those in third countries that place AI systems on the market in the EU, and those located in the EU that use AI systems. It also applies to providers and users based in third countries if the output of the system is used within the EU. Exempt from the regulation include those who use AI systems for military purposes and public authorities in third countries.

How will HR tech be regulated?

The regulation uses a risk-based approach, where systems are classed as having low or minimal risk, limited risk, high risk, or unacceptable risk. Low risk systems include spam filters or AI-enabled video games and comprise most of the systems currently being used on the market. Systems with limited risk are those that i) interact with humans, ii) detect humans or determine a person's categorisation based on biometric data, or iii) produce manipulated content.

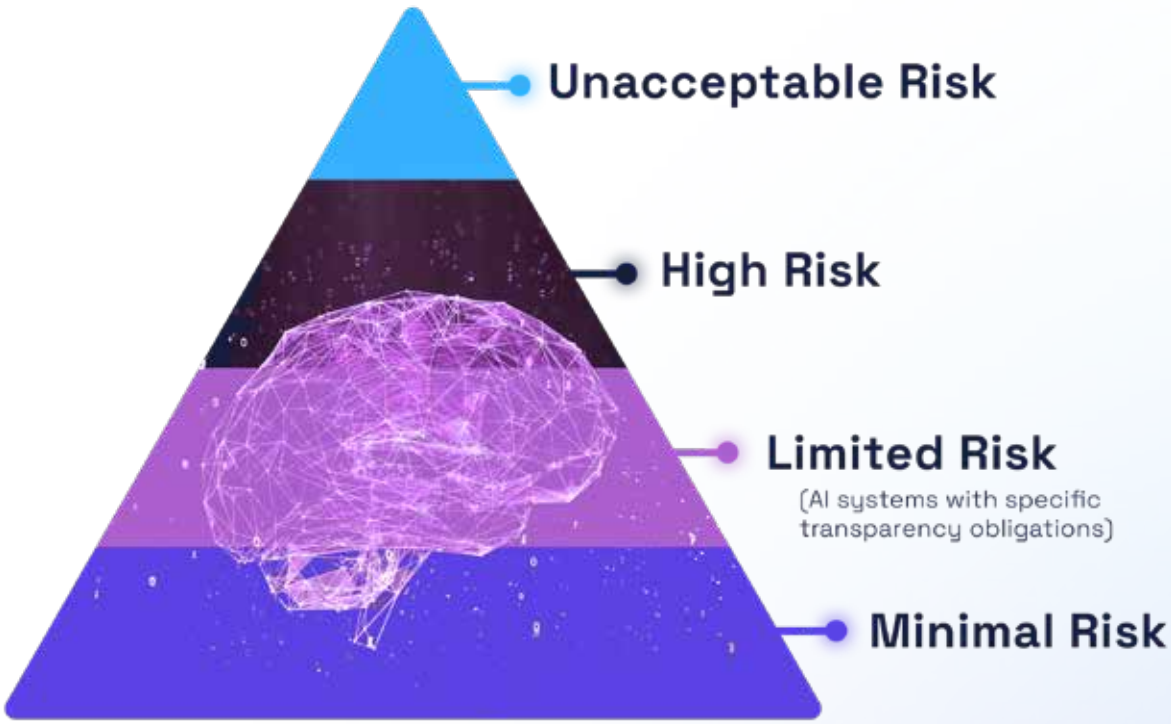
High-risk systems are ones that can have a significant impact on the life chances of a user, including systems used in:

- Biometrics
- Critical infrastructure
- Education and vocational training
- Employment, workers management and access to self-employment
- Access to and enjoyment of essential private services and essential public services and benefits
- Law enforcement

- Migration, asylum and border control management
- Administration of justice and democratic processes

Systems with unacceptable risk are those that manipulate behaviour in a way that may result in physical or psychological harm, exploit the vulnerabilities of particular groups, are used for social scoring by governments, or are used for real-time biometric monitoring in a public area by law enforcement.

Under this classification, HR tech systems are considered high-risk. Specifically, systems used for employment, to manage workers, or to access self-employment are high-risk under the latest compromise text. This includes systems to place targeted job advertisements, filter and evaluate candidates, make promotion and termination decisions based on personal traits or characteristics, and monitor and evaluate performance.



What are the implications for HR Tech?

The obligations for different systems are proportionate to their risk. Since HR tech tools are considered high-risk, they are subject to the most stringent rules. Requirements concern the use of high-quality data, having appropriate documentation practices, transparency, adequate human oversight, testing for accuracy and robustness, and establishing a risk management framework to identify and mitigate risks.

Before high-risk systems can be put on the EU market, they must also undergo conformity assessments to determine whether they meet the requirements of the legislation. Systems that pass must then bear the CE logo and be registered on an EU database before they can be placed on the market. Following any major changes to the system, such as if the model is retrained on new data or some features are removed from the model, the system must then undergo additional conformity assessments to ensure that the requirements are still being met, before being re-certified and registered in the database.

ANALYSIS: THE EU AI ACT V CALIFORNIA'S EMPLOYMENT LEGISLATION

Overwhelmingly, both of California's proposed laws are narrowly focused mainly on automated employment decision tools used in recruiting, hiring, promotion and work monitoring. While the movement has gained traction in regulating AI systems used in hiring and employment-related decisions, the EU AI Act is far more expansive, taking a sector-agnostic approach and banning certain unacceptable technologies, such as social scoring.

Separately, the European Commission has taken the opportunity to require conformity assessments for high-risk systems. This approach to regulation departs from other national strategies by introducing a mandatory CE-marking procedure with a layered approach to enforcement. Like the conformity assessments required by the EU AI Act, the Workplace Technology Accountability Act requires data protection impact assessments of worker information systems and algorithmic impact assessments of automated decision systems, which can help ensure compliance with the legislation requirements and inform risk management strategies. Both Acts also require ongoing monitoring, are re-evaluation when significant changes are made to the system. However, a critical difference between the assessments required by these acts is that nothing in the EU AI Act specifies that third parties must carry out conformity assessments. In contrast, Californian impact assessments must be carried out by a third party with the relevant experience and expertise.

Similarly, California and the EU have strict notification obligations, placing employee rights of action at the top of mind. For example, under EU requirements, the law mandates that people be notified when they encounter biometric recognition systems or AI applications that claim to be able to read their emotions. Taking a slight departure but aligned nonetheless, California compels employers to notify workers when electric monitoring of automated systems occurs in the workplace, only permitted upon job necessity.

SPAIN'S RIDER LAW: EMPLOYMENT RIGHTS AND ALGORITHMIC TRANSPARENCY

Within the EU, individual countries are also engaging in their own efforts to increase the accountability for employers using algorithmic systems. For example, Spain is the first country to launch a **regulatory sandbox** to facilitate experimentation of the rules of the EU AI Act in a controlled environment. In addition to this, Spain's **Royal Decree-Law 9/2021** (RDL 9/2021), so-called the rider-law, amends the Workers' Statute to safeguard the labour rights of delivery workers whose work is coordinated through digital platforms. The law, which came into effect on 12 August 2021, has two major contributions: a

presumption of employment for delivery providers whose working conditions are determined using a digital platform and algorithmic transparency requirements in relation to all workers who work through a digital platform.

What are the presumptions of employment?

Under this royal decree, workers that provide delivery services for any consumer product or good on behalf of an employer that has the power to manage or control working conditions using an algorithmic system or digital platform will benefit from a presumption of employment. These so-called riders move therefore fall under the scope of Spain's Workers Statute Law, which regulates terms of employment in Spain, and give workers that have more flexibility and freedom in their working arrangements the same protections as other employees.

However since this is only a **presumption of employment**, this means that employers could provide evidence to the contrary and that indicates that they do not exercise their powers of organization, direction and control over platform-based delivery workers. Nevertheless, this provision is an important step towards ensuring safer and fairer working conditions for delivery workers with atypical contracts.

What are the algorithmic transparency requirements?

As well as giving riders additional protection and rights, the royal decree also makes a ground-breaking contribution; employers are required to be transparent about the digital platform they use for decision-making about working conditions and access to and maintenance of employment, including those used for profiling. These transparency requirements, which modify article 64.4 of the Workers Statute, apply to all employers using digital platforms for these purposes, not just those used in reference to riders or delivery drivers. Under the decree, employers must now inform employees' legal representatives or **works council**, of the parameters, rules and instructions that the algorithms or AI systems are based on.

What additional guidance is available?

To support Spain's efforts towards greater transparency and accountability for algorithmic systems, the Ministry of Labour has **published guidelines** on algorithmic data in the workplace to bring obligations around algorithmic systems in a labour context together and provide a tool to specify and systematize information obligations. The guidelines begin by defining algorithms and outlining how automated decision systems can be used in the workplace, including for hiring decisions, monitoring and surveillance, and management of work. The guidelines then summarise how GDPR applies to algorithmic systems and how the transparency obligations can be met, along with the requirements for impact assessments of the design and implementation of algorithms under Spanish data protection law.

The major contribution of these guidelines is the tool for complying with transparency requirements of privacy law and the Workers Statute. Divided into four sections, the tool covers information that should be disclosed in relation to:

- **General information on the use of algorithms or AI to make automated decisions** – the decisions the system is used for, the technology used by the algorithm, the software used and who supplies it, and the use of human interventions
- **Information on the logic and operation used by the algorithms** – the types of profiles created (if relevant), the variables used and whether they relate to personal information, the model parameters, detail about the training and validation data, detection of inaccuracies or errors, and audits or impact assessments
- **Information on the consequences of using the algorithm** – consequences of decisions for workers, male and female equality and the potential for biased outcomes
- **Including any other relevant information** – informing workers about the use of algorithms for automated decisions

OTHER PROPOSED REGULATIONS

US ALGORITHMIC ACCOUNTABILITY ACT OF 2022

Taking a pragmatic approach to reducing bias and discrimination, the US Algorithmic Accountability Act of 2022 addresses growing public concerns over the widespread use of automated decision systems (ADS). Introduced on 3 February 2022, the renewed act, H.R. 6580, is the first federal legislative effort to regulate AI systems in the United States. The Act would authorise the Federal Trade Commission (FTC) to enforce reporting guidelines and regulations that require companies to conduct impact assessments for bias, effectiveness and other factors for high-risk automated systems affecting U.S. citizens. The FTC would establish a Bureau of Technology that employs 50 staff to support this. Moreover, the Bill sets a benchmark for ethical and legal evaluation by requiring organisations to compare the performance of a new ADS with that of the pre-existing decision-making processes before deployment if they intend to use it to augment or replace human decision-making.

Who is affected by the legislation?

The Act applies to any covered entity (i.e., any person, partnership, or large corporation) that deploys or sells augmented processes and either (i) makes more than $50 million a year, (ii) has over $250 million in equity value or (iii) process or controls the information of over one million consumers or consumer devices. However, smaller corporations that are "substantially owned, operated or controlled" by a large company will also have to follow these rules under section 2 of the Bill.

Requirements for covered entities

Under the law, systems used for critical decisions require impact assessments. Defined broadly, these systems include those relating to the access to or cost, terms, or availability of:

- Education and vocational training
- Employment, worker management, and self-employment
- Essential utilities (electricity, heat, water etc)
- Family planning
- Financial services
- Healthcare (includes mental healthcare, dental, and vision)
- Housing or lodging
- Legal services
- Other services, programs, or opportunities determined by the FTC

What does the Act Mean for HR Tech?

Under the law, covered entities are required to perform an ongoing evaluation of any differential performance associated with data subjects' race, colour, sex, gender, age, disability, religion, socioeconomic, or veteran status for which the covered entity has information. The system would also have to be evaluated in terms of its performance, transparency and explainability, privacy and security, personal and public safety, efficiency, and cost. In addition, the Bill would force the FTC to provide annual anonymised aggregated reports on trends using the submitted documentation – subjecting entities to strict record-keeping requirements for processes that involve sensitive data and personal information.

When it comes to employment decisions (i.e., those relating to sourcing, hiring, recruitment, etc.), organisations using such systems should be aware of the potential for bias or introducing disparate impact based on age, race, sex, national origin, or any other protected characteristics. For businesses and organisations that have yet to establish any systems or processes to identify, detect or mitigate AI harms – complying with the Act will be burdensome unless steps are taken early. Testing for bias, ensuring that there is appropriate documentation and governance of the system, and using data minimisation and data protection techniques can improve the transparency of AI decisions, provide consumers with more information regarding data and AI use, and keep users of these systems safe.

DC'S STOP DISCRIMINATION ACT AND HR TECH

Introduced in 2021 as part of US efforts to regulate AI, the District of Columbia has proposed the Stop Discrimination by Algorithms Act to prohibit non-profit and for-profit organisations from using algorithms that make decisions based on protected characteristics. The law would apply broadly to any organisation that meets at least one of the following conditions: processes personal information of more than 25,000 Washington DC residents; has greater than $15 million in annualized gross receipts; is a data broker; or is a service provider that provides algorithmic decision-making to others. To mitigate the potential harm caused by algorithmic bias, the Act contains four key provisions

- **Prohibition:** Companies and organizations would be prohibited from using algorithms which produce biased/unfair results.
- **Annual Audits:** Companies and organizations would be mandated to perform yearly audits to ensure their algorithms and algorithms processing practices are not directly discriminating, nor do they show disparate impact on certain groups. Companies and organizations would also have to document and share with the Office of the Attorney General how their algorithms are built, how they make decisions, all the decisions made and audit results.
- **Transparency:** For consumer transparency, companies and organisations must make easy-to-understand disclosures about the personal information being collected and how their algorithms reach decisions. Companies and organisations would also have to provide in-depth explanations to consumers if an algorithm makes an unfavourable decision and allow consumers to submit for corrections.
- **Penalties:** The penalties outlined would be $10,000 per individual violation and can be either personal or civil.

Who Would be Affected by the Stop Discrimination by Algorithms Act?

Entities that possess or control personal information on more than 25,000 District residents, have greater than $15 million in annual revenue, are a data broker or entity that derives more than 50% of their annual revenue from the collection, assembly, sale, distribution, or licensing of personal information of any District residents who are not a customer or employee, or who are a service provider would be subject to compliance with the Act.

What does this mean for HR Tech?

The Act seeks to prohibit such entities from using algorithms that prevent particular subgroups from accessing important life opportunities. Although such opportunities are yet to be defined, employment-related decisions will likely fall within the scope of this. However, unlike other US legislations with compliance grace periods, entities would be expected to comply as soon as the Act is passed. Therefore, steps must be taken early to comply with the regulations set out in the Act once they have been finalised to ensure compliance if the Act is passed.

CANADA'S ARTIFICIAL INTELLIGENCE AND DATA ACT

Introduced in June 2022 under Bill C-27, Canada's **Artificial Intelligence and Data Act** (AIDA) builds on Canada's robust privacy legislation with a principles-based approach to AI regulation. The AIDA applies to private sector companies that design, develop, or produce artificial intelligence systems for use in international or interprovincial trade and commerce. Under the Act, prohibited automated systems are those that cause:

- Physical or psychological harm to an individual, damage to an individual's property, or economic loss to an individual
- Produce biased outputs, such as an AI system output that adversely differentiates without justification on one or more of the prohibited grounds of discrimination set out in the **Canadian Human Rights Act**

High-impact systems

While AIDA is yet to define what is a high-impact system, it will likely follow the EU's lead and classify HR tech systems as high-impact. Under the law, developers, designers, providers and managers of AI systems will need to undertake assessments to determine whether their systems are "high-impact" and would need to publish on a publicly available website a plain-language description of the system, if making a high-impact system available

for use. Organisations must also disclose information about the different kinds of content they produce, the choices, suggestions, or forecasts they make, the safeguards put in place to reduce the possibility of harm or biased results from using the system, and any other details as required by law, accessible to the public.

As a technical guide, the **Algorithmic Impact Assessment tool**, developed by the Government of Canada for use by state agencies in their procurement and use of AI, can be used as a guide to understand Canada's approach to regulating AI more widely.

What does the legislation mean for HR Tech?

If passed, the AIDA would impose significant governance and transparency requirements on companies that wish to deploy automated-decision tools on the Canadian market. AIDA would also establish a Data Commissioner to monitor company compliance forcing companies to conduct third-party audits and to register compliance orders with the courts. Moreover, it is likely the Act would set a precedent for provinces and territories across Canada to introduce and potentially enact legislation towards regulating AI across different verticals, as seen in the US. To satisfy Canadian Law and best prepare for upcoming global regulations, organisations should take steps to address, mitigate, and document the potential harms that may result from automated decision-making.

GUIDANCE FOR HR TECH BEST PRACTICES

Equal Employment Opportunity Commission's Guidance on Disability Accommodations

The Equal Employment Opportunity Commission's (EEOC) **Uniform Guidelines** on employee selection procedures have governed hiring practices in the US since 1978 as part of the Civil Rights Act. One of the key contributions of these Guidelines is the four-fifths rule, which is widely used as the threshold for determining whether a system is biased, based on hiring rate impact ratios. Although these guidelines do not address automated tools used in selection, the EEOC has demonstrated its efforts towards developing more targeted interventions for the use of AI with its Artificial Intelligence and Algorithmic Fairness Initiative to examine how technology changes the ways employment decisions are made and provide guidance to employers, employees, job applicants, and vendors.

As well as this initiative, the EEOC recently released **guidance** on the use of software, algorithms, and AI in the judgements of job applicants. Specifically,

the new guidance focuses on how such technology could violate the Americans with Disabilities Act (ADA).

For example, violations could occur if employers do not provide a reasonable accommodation that would allow the applicant to be rated fairly and accurately by the algorithm or if the algorithm screens out individuals with disabilities if they would be able to perform the job with a reasonable accommodation. Violations could also occur if the tool is used to screen for disabilities. Reasonable accommodations could include specialist software or equipment, alternative selection methods, and being allowed to work in a quiet location.

To prevent violations of the ADA, the guidelines suggest staff should be trained to recognise requests for reasonable accommodations and develop or obtain alternative selection procedures. Employers could also clearly signpost how accommodations should be requested, and should ensure that the characteristics being considered by the algorithm are those that are essential to the job function.

SIOP Guidelines on AI-Based Assessments

As well as the guidance from the EEOC, psychologists working with HR tech can also benefit from the Society of Industrial and Organizational Psychology's **guidance** on the effective use of AI-based assessments. While this does not provide extensive insights, the guidance outlines five key criteria that are the minimum to consider when using AI-driven assessments:

- Assessments should produce scores that are considered fair and unbiased
- Assessment scoring and content should clearly be related to the job
- Scores should predict future job performance, or other relevant outcomes, accurately
- Assessments should consistently measure job-related
- Decisions related to the development and scoring of AI-driven assessments should be well documented to allow for verification and auditing

The guidelines also emphasise the role that psychologists can play in informing policy using their scientific knowledge of the field, and their rigorous training in the development and validation of pre-employment tests.

WHAT'S NEXT?

The passing and proposal of laws targeted at regulating HR tech and the stringent requirements for HR tech tools under broader legislation signals that managing the risks of automated talent management tools is becoming an increasing priority around the world. With the varying statuses of these laws, the compliance journey must be started early to get ahead of these regulations.

Partnering with Holistic AI can help you prepare for these laws. Our experts combine insights from policy and business psychology with expertise in computer science to holistically examine a system's data, code, and outputs to identify and mitigate risks and help you be compliant with the relevant laws. We have published widely in this space, and have developed our own auditing frameworks, including one specifically for HR. Schedule a demo to find out more about how we can help you embrace your HR tech with confidence.

GOT QUESTIONS OR WANT TO SCHEDULE A CHAT? CONTACT US AT

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