Publications

California Regulates the Use of AI in Employment Decisions

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Effective October 1, 2025, California will join a growing number of jurisdictions that regulate the use of automated-decision systems (ADS) in employment decisions. Employers in California should review their use of ADS in employee selection and assessment to ensure compliance with the state's amended Fair Employment and Housing Act (FEHA) regulations and mitigate legal risks associated with algorithmic discrimination.

Using Automated Decision Systems in Employment

The amended FEHA regulations expand the definition of "employer" to include any agent acting directly or indirectly on behalf of an employer in making employment decisions, including those assisted by ADS. The regulations broadly define ADS as any "computational process that makes a decision or facilitates human decision making." These systems, which utilize data and algorithms (e.g., artificial intelligence or natural language processing models), are increasingly used by employers for screening job candidates and assessing employee performance. Specifically, the regulations cite the following examples of tasks performed by ADS:

- Computer-based assessments that measure an applicant or employee's skills, abilities, personality, aptitude, or otherwise make predictive assessments about an applicant or employee;
- Directing job advertisements or recruiting efforts to specific groups;
- Screening resumes;
- Analyzing an applicant's voice and/or mannerisms during an interview; or
- Analyzing employee or applicant data from third parties.

The regulations make clear that it is unlawful for an employer to use ADS or selection criteria that discriminates against an applicant, employee, or class of applicants or employees on the basis of protected characteristics. The regulations provide examples of how ADS can result in discrimination, such as measuring an applicant's skill or reaction

time, which may disadvantage individuals with certain disabilities, or analyzing an applicant's tone of voice or facial expressions, which could discriminate based on race, national origin, disability, or gender. Employers must thus consider whether use of ADS has discriminatory effect, and may be obliged to provide reasonable accommodation for applicants and employees.

Key Provisions of the New Rules

- **Prohibition on Discriminatory Use**: Employers are prohibited from using ADS in a manner that discriminates against individuals or classes of individuals based on characteristics protected by FEHA.
- **Affirmative Defense**: Employers can assert an affirmative defense if they use anti-bias testing or similar proactive measures to prevent unlawful discrimination in the use of ADS.
- **Record Retention**: Employers must now retain records of ADS data in addition to their preexisting obligation to retain records of personnel actions. The regulations further increase the required records preservation period from two to four years.

Takeaways for Employers

1. **Review Existing Use of ADS and Implement Anti-Bias Measures**: Employers should review their current use of ADS and consider implementing anti-bias testing and policies to prevent unlawful discrimination. Regular bias audits and anti-bias testing are recommended to evaluate AI tools. Employers who are considering using ADS in employment decisions may want to limit the use of automated tools to those validated under the U.S. Equal Employment Opportunity Commission's (EEOC) Uniform Guidelines on Employee Selection Procedures. Employers should also consider implementing policies on anti-discrimination in AI use and procedures to prevent unlawful discrimination in employment decisions assisted by ADS.

2. **Maintain Records**: Beyond the requirement to retain ADS data under the amended regulations, employers should maintain records of all data used and generated by ADS in employment decisions. This includes corresponding decisions and any bias audits, which can help document efforts to prevent unlawful discrimination.

3. **Consider Indemnification Agreements**: Given the expanded definition of "employer" to include agents acting directly or indirectly on behalf of the employer, employers using vendors or third-party recruiters should consider including indemnification agreements for violations of FEHA caused by the third party.

California is among a growing number of jurisdictions regulating the use of ADS and AI in employment decisions. Employers should stay informed about changes in regulations to ensure ongoing compliance with applicable state and local laws.