Employment & Labor Alert
May 10, 2024

ATTORNEY GENERAL ISSUES AN ADVISORY ON THE APPLICATION OF MASSACHUSETTS LAW TO ARTIFICIAL INTELLIGENCE

The Massachusetts Attorney General's Office (AGO) recently issued an Advisory to inform employers, and other users of Artificial Intelligence (AI), about how anti-discrimination and other laws apply to using AI. The Advisory acknowledges the lack of a universally agreed-upon definition of AI and offers the following working definition for its purposes, which is the definition used in President Biden's October 30, 2023 Executive Order.

> **AI Defined**
> Artificial Intelligence is a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inferences to formulate options for information or action.

While recognizing that AI has tremendous potential benefits for society, the AGO identifies the many instances where "AI has been found to generate false information or results that are biased or discriminatory," as a risk for users, including employers, that needs to be mitigated. The AGO points to claims by AI developers and suppliers that AI is a "black box," meaning it is unknown exactly how AI performs various processes or generates its results.

The Advisory clarifies that there are no specific AI regulations. However, AI systems deployed in employment settings must adhere to established federal and Massachusetts laws. These include the Massachusetts Consumer Protection Act, G.L. c. 93A, § 2; the Massachusetts Anti-Discrimination Law, G.L. c. 151B, § 4; and the Massachusetts Data Security Law, G.L. c. 93H.

AI and the Massachusetts Consumer Protection Act

First, the AGO focuses on the Consumer Protection Act (G.L. c. 93A) and how it applies to AI use. This law establishes a framework for "unfair and deceptive" practices, which applies to evolving technologies like AI. The AGO identifies specific deceptive practices related to AI that violate the Consumer Protection Act:

- Falsely advertising the quality, value or usability of AI systems.
- Supplying an AI system that is defective, unusable, or impractical for the purpose advertised, particularly where harmful risks or dangers cannot be detected by the average user.
- Misrepresenting the reliability, manner of performance, safety, or condition of an AI system. This includes claims that an AI system is free from bias, is not susceptible to malicious use by a bad actor or is compliant with state and federal law.

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- Misrepresenting audio or video content of a person for the purpose of deceiving another to engage in a business transaction or supply personal information. Examples of such misrepresentation include deepfakes, voice cloning, or chatbots used to engage in fraud.

Important Definitions
Deepfake: An image, or a video or audio recording, that has been edited using an algorithm to replace the person in the original with someone else (especially a public figure) in a way that makes it look authentic. Merriam-Webster, https://www.merriam-webster.com/dictionary/deepfake.
Voice Cloning: A digital copy of a person's unique voice, including speech patterns, accents, voice inflections and even breathing, built by training an algorithm with a sample of a person's speech. Mohamed Lazzouni, "Voice Cloning: What It Is and Why It's Scary" (June 13, 2023), available at https://builtin.com/artificial-intelligence/what-is-voice-cloning.

AI and the Massachusetts Anti-Discrimination Law

The Advisory emphasizes that the Massachusetts Anti-Discrimination Law, G.L. c. 151B, which protects individuals from discrimination based on protected categories such as disability, race, color, national origin, religion, and sex (which includes pregnancy, sexual orientation and gender identity), also applies to AI systems, including algorithmic decision-making tools, that perform employment-related functions such as:

- Pre-employment screening
- Reasonable accommodation
- Pay or promotion
- Performance management
- Time-on-task tracking
- Workplace surveillance
- Automated personnel management

Employers will likely be held responsible if the use of AI tools inherently discriminates against or excludes certain protected groups in algorithm-based decision processes related to hiring, firing and the terms and conditions of employment. It is important to remember that users of AI are not shielded from liability for any discrimination caused by the use of AI tools.

AI and the Massachusetts Data Security Law

The Advisory also references the Massachusetts Data Security Law, G.L. c. 93H, which requires AI developers, suppliers and users, including employers, to take necessary and appropriate steps to safeguard personal information used by AI systems.

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Takeaways

As a general reminder, AI is subject to existing laws, such as the Massachusetts Consumer Protection, Anti-Discrimination, and Data Security Laws.

For employers, the most important concerns at this point are to be aware that AI can exclude employees or prospective employees based on their membership in a legally-protected category, and to protect employee's personal information. To help prevent against such unlawful discrimination and data privacy concerns, employers should consider the following steps:

- As part of any AI software acquisition process, ask the vender the following:
  - To explain how their software platform makes decisions and recommendations,
  - The source of the data used by the platform, and, particularly, whether they have complied with data protection laws,
  - Whether they have audited results to determine if there is inherent bias or discrimination, and to provide you with results.
- Maintain human involvement in AI-assisted functions to help protect against discrimination by:
  - Monitoring results
  - Providing an appeal process
  - Consider an AI opt out option
  - Managing the reasonable accommodation process
- Implement robust data security measures for personal information used by AI systems and implement the proper protocol in the event of a breach.
- Keep up to date on the developing legal framework.

This Client Alert was prepared by Etty Singer and Nan ONeill and was reviewed by Kevin Bresnahan and Kier Wachterhauser. If you have any questions about this issue, please contact the attorney responsible for your account, or call (617) 479-5000.

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