

Illinois becomes first state to regulate employers' use of artificial intelligence to evaluate video interviews

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NOVEMBER 12, 2019

With so many questions surrounding artificial intelligence's effect on the workplace and workforce, one wonders whether future Labor Day celebrations will take on new meaning. Employers in Illinois may face these questions sooner than others following passage of a new Illinois law¹ that regulates the use of artificial intelligence ("AI") to analyze and evaluate job applicants' video interviews.

Applying AI-based analytics to job interviews is an increasingly common practice.

The Artificial Intelligence Video Interview Act imposes duties of transparency, consent and data destruction on organizations using AI to evaluate interviewees for jobs that are "based in" Illinois. The measure, passed unanimously in the Illinois legislature and approved by the Governor in early August, becomes effective January 1, 2020.

Applying AI-based analytics to job interviews is an increasingly common practice. Some companies claim their technology analyzes an applicant's facial expressions, gestures, tone, and word choice to evaluate the applicant's honesty, attitude, positivity, overall sentiment, and language competence.

Others claim their AI will help ensure interview questions focus on effective job performance indicators, or will serve as an initial screening to find candidates with the right skills.

Proponents of the technology suggest it allows companies to reach and interview more candidates from more backgrounds, removes bias from human interviewers performing the same assessments during live interviews and performs these assessments more scientifically.

At the same time, some have raised concerns that this technology may introduce algorithmic bias, wherein the AI technology draws inaccurate or unfounded conclusions about applicants based on their race, ethnic background, gender, or even a medical condition because the technology relied on data that was not representative of the general population or was otherwise insufficient. Still others have raised concerns about the data use and privacy aspects of AI-based video analytics.

TRANSPARENCY, CONSENT AND DATA DESTRUCTION DUTIES CENTRAL TO AI VIDEO INTERVIEW ACT

Rather than ban the use of this technology, the Illinois legislature adopted a framework to provide job candidates information about, and some control over, the use of video interview evaluation systems that rely on AI.

The new law requires companies hiring for jobs "based in" Illinois that use "artificial intelligence analysis" of video interviews to:

- (1) NOTICE – Notify the applicant, in advance, that the organization is using the technology to analyze video interviews;
- (2) TRANSPARENCY – Explain to the applicant "how the [AI] works" and what general characteristics the technology uses to evaluate applicants;
- (3) CONSENT – Obtain, in advance, the applicant's consent to use the technology;
- (4) LIMITS ON DISTRIBUTION – Limit the distribution and sharing of the video to only those persons "whose expertise or technology" is necessary to evaluate the applicant; and
- (5) DUTY TO DESTROY – Upon request from the applicant, destroy the video (and all backup copies) within 30 days upon request of the applicant.

AMBIGUITY IN THE STATUTE LEAVES SIGNIFICANT QUESTIONS UNANSWERED

The Illinois legislature left some big questions unanswered when adopting the AI Video Interview Act. The statute does not define some key terms, including "artificial intelligence" and "artificial intelligence analysis." As such, the precise scope and reach of the new law is ambiguous.

Companies might use AI to evaluate a specific candidate who interviews by video (for example, by analyzing the applicant's positivity or sentiments), which would clearly be covered. However, employers might also use AI to analyze how well an interviewer is doing, to track data about its candidates, to analyze and improve

the questions it asks during interviews or to generate broader analytics about its hiring process — activities that the new measure does not appear to cover.

Further, purely administrative tasks — like ensuring a video interview is processed into a particular format and sent to the right human recipients for review — might also be a result of AI analysis but would not trigger the statute.

Other open questions center around the law's transparency obligation, which does not prescribe how much detail about the AI technology an employer must provide when "explaining how artificial intelligence works" to an applicant. Nor does the measure detail what kinds of "characteristics" of the AI employers must disclose.

Notably, the legislature declined to require that notice, consent or the explanation be in writing (although that obligation was explicitly included in an earlier version of the bill). As such, verbal communications would appear to satisfy these duties (although written communications would be advantageous as discussed below). It is also unclear how Illinois will enforce the new law, given that it does not include a private right of action or any explicit penalties.

One could imagine applicants who are not hired following a non-compliant, AI-assisted video interview bringing a tort claim and citing the new law as a duty of care that the employer failed to follow. Such applicants might also have a claim under existing state and federal anti-discrimination laws based on algorithmic bias.

Further, it is not clear whether data that an employer extracts or derives from the video interviews (both important data elements in the functionality of robust machine learning AI systems) is subject to the destruction duty under the law.

The statute is silent on this point. Similarly, the statute's video destruction mandate may create risk for employers concerning compliance with record retention or preservation obligations under federal law or other state laws, including regulations mandating that employers maintain certain documents and records related to hiring decisions for a longer period of time.

Finally, there is no guidance on what it means for a job to be "based in" Illinois, and the statute is silent as to whether employees may refuse to consider applicants who refuse to consent.

Before deploying this technology, employers should thoughtfully consider how to address these ambiguities as well as other questions, including when a vendor is used, how to ensure compliance by the vendor with these legal requirements, and issues concerning indemnification.

AI VIDEO INTERVIEW ACT MAY BE A PRECURSOR TO OTHER LAWS REGULATING USE OF AI

Illinois is at the forefront of regulating technology and personal data. Its biometric privacy law — known as BIPA — is the most robust of its kind in the country and is the only one with a private cause of action under which someone can sue for penalties and attorneys' fees even if they have not suffered a concrete injury².

However, as noted below, data that falls under the video interview law may very well be subject to BIPA, too. For this reason, employers who have jobs "based in" Illinois and utilize video interview analytics should ensure their process complies both with BIPA and the new law. This means preparing necessary disclosures and AI transparency explanations for job candidates to review and sign prior to the interviews, ensuring the data remains protected, and having a system in place to destroy the videos upon request.

As AI technology adoption increases, it is possible (if not likely) that other states will follow Illinois' example and adopt new rules limiting the use of AI in hiring, or other functions.

The Society for Human Resource Management recently explained³ that companies around the world are increasing investments in AI for human resource functions.

As AI technology adoption increases, it is possible (if not likely) that other states will follow Illinois' example and adopt new rules limiting the use of AI in hiring, or other functions. For example, California,⁴ New York,⁵ and Washington⁶ have all adopted or introduced measures that focus on the increasingly prevalent role of AI in commerce, society and the workplace.

As the technology continues to gain in proficiency and adoption, state legislatures (as well as federal and local lawmakers) will be watching and testing out different approaches to regulation.

DWT's AI Team⁷ advises companies on the issues presented by the adoption of AI and machine-learning technologies. Please contact the authors for more information about Illinois' AI Video Interview Act and compliance issues raised by this new measure.

NOTES

¹ <https://bit.ly/33CsSn8>

² <https://bit.ly/2MrwRNx>

³ <https://bit.ly/2JuezMk>

⁴ <https://bit.ly/2MTyuCU>

⁵ <https://bit.ly/2px7i4V>

⁶ <https://bit.ly/2UerS7X>

⁷ <https://bit.ly/35MfzCv>

This article first appeared on the Westlaw Practitioner Insights Commentaries web page on November 12, 2019.

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