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Perspective

In New York City, Subjectivity Trumps Data Analytics

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On Jan. 1, 2023, a New York City ordinance, Local Law Int. No. 1894-A, will make it unlawful for employers to use artificial intelligence, or other data-driven tools, to help select which employees to hire or promote, no matter how accurately these selection tools have performed, unless those tools are certified as "unbiased" according to an unspecified standard. The evidence justifying this requirement is scant, and it will likely hurt the people it intends to help.

Credit: tadamichi/Adobe Stock

Rather than prohibiting bias associated with screening tools that *inaccurately* assess applicants and employees, as federal and most state laws provide, New York is the first city in the nation to burden employers with certifying that their selection tools are "unbiased," regardless of their accuracy. Employers that rely on data analytics now must retain a third party to perform an undefined "bias audit," and certify that the screening metrics do not disproportionately exclude members of various demographic groups.

The law's poor construction creates an HR nightmare for employers seeking to staff up. The only alternative under the law, which an applicant or employee may ask for, is a subjective assessment, which this enactment fails to constrain or describe in any way. Yet the law

provides no guidance on how to decide between an employee who receives a glowing subjective assessment and another who scores highest based on data analytics. Further, a candidate must be given 10 days to elect a subjective assessment, so a job scheduled to remain open for 30 days must remain open for 40, so a late-arriving applicant can take advantage of this 10-day window before the job is filled. Even worse off are employers that seek to engage temporary or contingent workers immediately—these applicants presumably must be given 10 days' notice that artificial intelligence will be used in applicant screening. By the time an applicant is able to apply, they likely will find the job has already been filled.

If it sounds confusing, that's because it is.

This ordinance turns a blind eye to decades of psychological research establishing that data-based decisions are both more accurate and less biased than subjective decisions. Recognizing that subjective assessments are prone to both explicit and implicit bias, a vast body of psychological literature establishes that data-driven methodologies improve the quality of selections and eliminate the biases associated with human judgment. In contrast, NYC's new law brands data-driven practices as suspect but exempts subjective decisions from the ordinance. But historically it was the exclusion of disfavored groups, based on prejudice under the guise of subjective knowledge, that led to testing requirements in the civil service systems that long ago displaced patronage. Why are subjective decisions, demonstrably prone to error, bias, and corruption, now regarded as inherently fair, or at least fairer than data-based decisions?

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The flaws noted above are but some of the defects in NYC's law, and are even more glaring when viewed in the national spotlight. Other cities may differ in their skepticism regarding data-driven methods and reverse the priority reflected in the city's law. If other cities follow New York's lead, but not its priorities, a national or international employer may face a patchwork of municipal laws, some favoring objective, data-driven protocols and others favoring subjective assessments. The detrimental effects of these laws soon would draw the attention of the courts and Congress, which hopefully will impose uniformity.

But there is no need to wait that long. Time remains for a more considered evaluation of the trade-offs and priorities reflected in the current law and a repeal or amendment that reflects these important concerns.

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