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Commission on Civil Rights

Respect....Integrity...Effective Communication

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March 6, 2024

House Bill 1255 – Labor and Employment - Automated Employment Decision Tools – Prohibition

POSITION: Support

Dear Chair Wilson, Vice Chair Crosby, and Members of the House Economic Matters Committee:

The Maryland Commission on Civil Rights ("MCCR"; "The Commission") is the State agency responsible for the enforcement of laws prohibiting discrimination in employment, housing, public accommodations, health services and state contracts based upon race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, gender identity, genetic information, physical and mental disability, and source of income.

HB 1255 requires employers to conduct annual impact assessments if they are using algorithmic decision systems or automated employment decision tools to make certain decisions. The impact assessment will be a documented risk-based evaluation of a system that employs algorithmic decision making. The Maryland Department of Labor is directed to adopt regulations governing the development and performance of impact assessments. The employer's system cannot be deemed "high risk", which means it is likely to result in unlawful discrimination or have an unlawful disparate impact on an individual or group of individuals on the bases of actual or perceived characteristics. The system must have an impact assessment in the year immediately before it is used and every year thereafter.

An algorithmic decision system is defined as a computational process that facilitates decision making, including decisions derived from machines, statistics, facial recognition, and decisions on paper. An automated employment decision tool is defined as a system that automatically filters applicants or potential applicants for employment or for a term, condition, or privilege of employment in a way that establishes a preferred applicant for employment. Additionally, within 30 days after use, an employer must notify applicants if they were subject to the system to assess job qualifications or characteristics of the applicant. Every 30-day period the notice is not provided is a separate violation. A failure to provide notice will result in a $500 civil penalty for a first violation and at least a $500 civil penalty for a second violation, but not exceeding $1,500 for a second or subsequent violation.

"Our vision is to have a State that is free from any trace of unlawful discrimination."

Technology companies have been working with artificial intelligence ("AI") for many years without much involvement from the public at large. More recently, several major companies have begun releasing user friendly versions so most people and businesses can direct AI systems to create a variety of works or accomplish simple tasks. AI systems are innovative, but novel so their limits have not yet been explored. AI has many capabilities, but as always, breaking new ground can include unexpected consequences.

In simple terms, AI is meant to replicate human intelligence and problem-solving skills. It does this by using its data sets to analyze patterns, information, and facts. Then, by using mathematical instructions called algorithms, it can make estimations, predictions, calculations, recommendations, or decisions. [1] This technology has been applicable in many settings like manufacturing, app software, translations, and medical interventions.

In a relatively short amount of time, a significant number of reports have detailed the current issues and possible risks with implementing AI in certain settings. The human creators that design and train an AI system can impart their personal biases into the system. If these systems are left unchecked, there is a great risk for harm. Thus far, Illinois and New York are the only states that have passed similar legislation to protect employees from an employer's use of AI. There have been proposed bills addressing this issue in New Jersey and Massachusetts, but neither bill progressed.

Current facial recognition software has had problems recognizing Black people for a long time.[2] Black Americans have faced unwarranted police action because of facial recognition technology incorrectly identifying them as perpetrators of alleged crimes. In 2019, an MIT student wrote an article for Time Magazine about problems with racial and gender bias in AI. She tried to use a facial recognition program at her school, but her dark skin was not detected by the system. She later learned that the AI was trained using predominantly light-skin men. In another instance, LinkedIn users learned that the site's advertising program showed preference for male names over female names in searches.

Unfortunately, there is no easy fix to these issues because making AI "blind" to things like gender for example, does not prevent unlawful discrimination. The AI will depend on other information such as typically male and female names or resumes listing all-women educational institutions when aligning patterns in its decision-making process.[3] It's clear that depending on the application, AI can be harmful in some circumstances. AI is currently being used to do things like direct robots, sort loan applications, and inform an employer's hiring decisions.

It is important to create a framework for employers across the State to protect vulnerable employees and their right to work. HB 1255 provides guidance for employers to utilize

[1] A.W. Ohlheiser, *AI automated discrimination. Here's how to spot it.*, VOX MEDIA, Jun. 14, 2023, https://www.vox.com/technology/23738987/racism-ai-automated-bias-discrimination-algorithm.
[2] Natasha N. Johnson & Thaddeus L. Johnson, *Police Facial Recognition Technology Can't Tell Black People Apart*, SCIENTIFIC AMERICAN, May 18, 2023, https://www.scientificamerican.com/article/police-facial-recognition-technology-cant-tell-black-people-apart/.
[3] Ohlheiser, *supra*.

algorithmic decision systems and automated employment decision tools in a way that ensures fairness. AI has the potential to be revolutionary and benefit our communities, but we have the responsibility to prepare the landscape to limit the associated risks. HB 1255 appropriately provides some safeguards for applicants and employees by preventing possible discriminatory actions created by the unregulated use of AI systems for employment decision making.

For these reasons, the Maryland Commission on Civil Rights urges a favorable report on HB 1255. Thank you for your time and consideration of the information contained in this letter. The Maryland Commission on Civil Rights looks forward to the continued opportunity to work with you to improve and promote civil rights in Maryland.