

Illinois' Artificial Intelligence Video Interview Act: What You Need to Know

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Publications

Overview

Over the past two years, there has been an increasing number of services that purport to use artificial intelligence (AI) to help employers make hiring decisions. Companies such as Gecko, HireVue, and Mya use video footage of interviews to evaluate and make hiring recommendations based on applicants' facial expressions, body language, word choice, and tone of voice. As these services have gained popularity, they have started to draw the interest of legislators who are concerned with the potential negative implications of this technology.

Illinois is the first state to tackle this issue. It passed the Artificial Intelligence Video Interview Act in August 2019. The bill officially went into effect in January 2020 and applies to all employers that use an AI tool to analyze video interviews of applicants for positions based in Illinois.

The law has two components that employers need to be aware of: (1) notice and consent; and (2) privacy and deletion rights.

Notice and Consent

The primary feature of the law is disclosing the use of AI. This is a key goal of legislators because the technology is not readily apparent when in use. The law requires employers to notify applicants before the interview that AI may be used to analyze their video interview and consider the applicant's fitness for the position. The statute does not specify whether that notice must be in writing, but written notice would be the best practice.

The law also requires employers to provide applicants with information before the interview explaining how the AI works and what general types of characteristics it uses to evaluate applicants. It is unclear how much information must be provided here, but this

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could be a sticking point for employers since the AI systems are generally secretive about how exactly they work.

Finally, after appropriate notice has been provided, the law requires employers to obtain the applicants' consent to use the AI system to review their interviews. Again, the law does not specify whether consent must be in writing, but written consent should be obtained as a best practice.

Privacy and Deletion Rights

Illinois is a trailblazer in protecting the privacy of biometric information such as the video interviews at issue here. Consistent with that belief, Illinois enacted two key privacy components to this statute.

First, the statute provides that an employer may not share applicant videos, except with persons whose expertise or technology is necessary in order to evaluate an applicant's fitness for a position. Second, the law gives applicants the right to request that their video is deleted. If an applicant sends a request for an employer to delete their video, the employer must delete the interview *and* instruct any other parties who received copies of the interview to also delete the video (including electronic backups). The deletion must be done within 30 days of receipt of the deletion request.

Going Forward

The Artificial Intelligence Video Interview Act represents the first attempt to legislate the new field of AI interviews, and Illinois employers need to make sure they put in place the proper procedures to provide notice, obtain consent, and respond to deletion requests. While this is a step forward for employee privacy, it is a small one, and it may create document retention and data security obligations that don't apply to "regular" interviews. For instance, employers may use AI to eliminate bias from the hiring process, but they need to ensure that the technology's data algorithms don't favor characteristics that could be culture-specific. Furthermore, employees who decline to consent to the AI system are not guaranteed the right to an interview without the use

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of the technology. Finally, unlike the Illinois Biometric Information Privacy Act, there is no explicit cause of action in this law so the risk of litigation for failure to properly comply is relatively low.

For questions and assistance regarding this topic, please feel free to contact any member of our Privacy and Data Security Team.

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