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May 16, 2024

Assembly Science, Innovation and Technology Committee
Attn: Mikaela Chianese, Andrew Edmonson
State House Annex
Trenton, NJ 08625

RE: Legislation to Regulate the Use of Automated Tools in Employment Decisions (A. 3854, A. 3855, A. 4030) (Oppose).

Dear Chair Tully and Members of the Assembly Science, Innovation and Technology Committee:

On behalf of the Computer & Communications Industry Association (CCIA), I write to respectfully oppose the bills before the Committee pertaining to the regulation of automated tools in employment decisions (A. 3854, A. 3855, and A. 4030). CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms. CCIA shares the Committee's concern but emphasizes that more work can and must be done to study the potential implications of automated systems and related technology, before considering overly broad legislation that could harm businesses and innovation in the state.

Automated decision-making is complex. The use of this technology can generate both benefits and drawbacks. Since AI systems are nuanced, there could be a variety of unintended consequences if one were to regulate these technologies in haste.

The span of automated decision-making is elaborate and often misunderstood.[1] At its core, algorithmically informed decision-making is simply a set of techniques that can be used for doing tasks that would otherwise be accomplished manually or using traditional, non-AI technology. These technologies are data-driven and can efficiently process massive amounts of data to create gains in productivity and accuracy and support technological and scientific breakthroughs. Algorithmically-informed decision models touch almost every aspect of our day-to-day activities. This includes filtering spam emails, using ride-share apps, online shopping, plagiarism scans, using smartwatches to track a workout, monitoring online test taking, and pre-authorizing medical insurance before a visit.

However, ambiguous and inconsistent regulation at the state or local levels would undermine business certainty, creating significant confusion surrounding compliance. This type of regulatory patchwork may deter new entrants, harming competition and consumers. While we understand the importance of mitigating potential algorithmic bias, we must also strike the correct balance to avoid stifling the use of technology when organizations are looking to use AI technology as an essential tool to help their businesses.

For example, the definition of "automated employment decision tool" is overly broad. The definition is so broad that it would likely encompass a simple filter on a job application site that sorts applicants by basic

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[1] *See generally* Mike Masnick, *The Latest Version Of Congress's Anti-Algorithm Bill Is Based On Two Separate Debunked Myths & A Misunderstanding Of How Things Work*, Techdirt (Nov. 11, 2021), https://www.techdirt.com/2021/11/10/latest-version-congresss-anti-algorithm-bill-is-based-two-separate-debunked-myths-misunderstanding-how-things-work/.

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requirements for the job (*e.g.*, a required degree). It would even capture the federal government's use of salary scales to set pay rates, as they employ a decision algorithm to determine the appropriate pay rate based on various factors.

Further, given the rapid pace of change in AI and the risk of stifling innovation and creating compliance ambiguities, it is important to provide businesses with an outline of the ways that an automated decision tool (ADT) cannot be used rather than to provide how it can be used. CCIA also believes it is important to emphasize that something that is illegal under current New Jersey employment laws, such as discrimination based on a protected class, is illegal whether performed by a human or an ADT.

There are several ongoing studies at the national level aimed at understanding how to balance the capabilities and risks of algorithmically informed decision-making. These studies are intended to inform appropriately tailored and impactful regulation of such systems.

The AI systems that lawmakers seek to regulate are complex and warrant adequate understanding to reach intended outcomes appropriately. For example, the National Artificial Intelligence Initiative (NAII) was established by bipartisan federal legislation enacted in 2021.[2] The NAII is tasked with ensuring continued U.S. leadership in AI R&D while preparing the present and future U.S. workforce to integrate AI systems across all sectors of the economy and society. Importantly, NAII is doing so in partnership with academia, industry, non-profits, and civil society organizations. Most recently, the U.S. Congress passed legislation to create a training program to help federal employees responsible for purchasing and managing AI technologies better understand the capabilities and risks they pose to the American people.[3]

The National Institute of Standards and Technology (NIST) also launched the AI Risk Management Framework (RMF)[4], an ongoing effort aimed at helping organizations better manage risks in the design, development, use, and evaluation of AI products, services, and systems. The draft of the AI RMF was released in January 2023.[5] The NIST National Cybersecurity Center of Excellence[6] is also leading federal regulatory efforts to establish practices for testing, evaluating, verifying, and validating AI systems—exactly the type of standard that will help inform impact assessments such as those described in the bill.

The deliberate, thoughtful, and bipartisan fashion in which leaders at the federal level are approaching the wide variety of issues associated with artificial intelligence and algorithmic decision-making is encouraging. These ongoing studies by national experts should signal the complexity of the issue. Lawmakers should wait for and review forthcoming best practices by technical experts to help inform the development of national standards and regulations.

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[2] National Artificial Intelligence Initiative Act of 2020, Pub. L. No. 116-283, § 5001-5501, 134 Stat. 4523-4547 (2021).
[3] AI Training Act, Pub. L. No. 117-207, 136 Stat. 2238 (2022).
[4] NIST, *AI Risk Management Framework*, https://www.nist.gov/itl/ai-risk-management-framework (last accessed Feb. 24, 2023).
[5] NIST, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.
[6] NIST, *National Cybersecurity Center of Excellence, Mitigation of AI/ML Bias in Context*, https://www.nccoe.nist.gov/projects/mitigating-aiml-bias-context (last accessed Feb. 24, 2023).

Key requirements necessary for businesses to comply with "bias audits" should be clear.

Under the current language of A. 3854 and A. 4030, businesses would be prohibited from selling an ADT unless it has been subject to a bias audit within the previous year prior to it being offered for sale. However, these bills do not specify who must conduct the bias audit, whether the results of the assessment, which may include proprietary information, will be made available to the public, and where the audit assessments would be housed in order to verify by the Government or a potential purchaser of such ADT that the audit was conducted. Additionally, Employers may also be unaware of the use of an ADT if they utilize a recruitment service that uses an ADT but does not disclose it to the employer, potentially opening them up to violations under the proposed law.

Further, the requirement to carry out an bias audit for an ADT during the year that immediately precedes the date the employer first begins using the ADT is problematic. Specifically, it is not clear how a business would comply with this requirement if the employer is already using an ADT. In this case, an employer lacks the ability to retrospectively conduct a bias audit.

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CCIA urges Committee members to first study both the benefits and drawbacks of algorithmic technologies and to engage with practitioners and stakeholders to support the ongoing development of practicable solutions. We appreciate the Committee's consideration of these comments and stand ready to provide additional information as the Assembly considers proposals related to technology policy.

Sincerely,

Alex Spyropoulos
Regional Policy Manager, Northeast
Computer & Communications Industry Association