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The Honorable Laurie A. Cumbo
New York City Council
250 Broadway
New York, NY 10007

Dear Councilmember Cumbo,

I write on behalf of the Consumer Data Industry Association (CDIA) to oppose Intro 1894.[1] The proposal attempts to regulate technology-driven algorithms in hiring even though they often help reduce bias in hiring.[2] The bill does nothing to address the subjective, unconscious bias that can sometimes exist when mental algorithms in human hiring are used. An employer's use of augmented intelligence is rarely a binary decision. When used appropriately by employers, a combination of human and technology tools can help reduce bias and get people to work more quickly in ways that are fair, legal, and replete with second chances. Technology in hiring can reduce unintentional discrimination in employment. Technology in hiring meets the urgent need to hire quickly, hire smartly, and hire remotely. Intro. 1894 stands in the way of tools to reduce hiring bias, and it stands in the way of getting people working again.

1. Federal, state, and local statutes, rules, and guidance protect job applicants

The Fair Credit Reporting Act. When employers use a third-party background check company, called a consumer reporting agencies (CRAs), federal Fair Credit Reporting Act (FCRA) and the New York fair credit reporting law will protect applicants and employees. Among other things, these laws have strict accuracy constraints, require adverse action notices, allow consumer access to the consumer report, and demand rigorous regimes to process disputes. The law imposes obligations on both employment screening companies and employers. When an employer does not use a background check company, these federal and state protections do not apply.

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[1] CDIA is the voice of the consumer reporting industry, representing consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments, and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition, and expanding consumers' access to financial and other products suited to their unique needs

[2] The bill would (1) Regulate the use of automated employment decision tools, which, for the purposes of this bill, encompass certain systems that use algorithmic methodologies to filter candidates for hire or to make decisions regarding any other term, condition or privilege of employment; (2) Prohibit the sale of such tools if they were not the subject of an audit for bias in the past year prior to sale, were not sold with a yearly bias audit service at no additional cost, and were not accompanied by a notice that the tool is subject to the provisions of this bill; and (3) Require any person who uses automated employment assessment tools for hiring and other employment purposes to disclose to candidates, within 30 days, when such tools were used to assess their candidacy for employment, and the job qualifications or characteristics for which the tool was used to screen.

Equal Employment Opportunity Commission (EEOC) Guidance. Under federal Guidance from the EEOC, automatic denials for applicants with criminal histories are generally prohibited.

New York City ban-the-box law. New York City has one of the strictest ban-the-box laws in the country, a law that strictly regulates screening for and denial of applicants.

Federal Trade Commission AI Guidance. The Federal Trade Commission (FTC) issued Guidance for users of artificial intelligence and algorithms. The guidance tells users (1) Not to deceive consumers about how they use automated tools; (2) To be transparent when collecting sensitive data; (3) If they make automated decisions based on information from third-party vendors, they may be required to provide the consumer with an "adverse action" notice; (4) If they deny consumers based on algorithmic decision-making they should explain why; (5) If they use algorithms to assign a score to a consumer, they should disclose the key factors that affected the score, in rank order; and (6) If they change the terms of a deal based on an automated tool, they should tell consumers.

2. There are significant operational, technical, and legal problems with Intro. 1894.

A. Augmented technology helps limit bias and protect applicants and employees, but the bill would upend tools to help job applicants

Many people have become more informed about the unconscious bias that can exist in hiring decisions. Technology in hiring reduces unintentional discrimination in employment. Algorithms can remove the unconscious bias that we know exists in some human decisions. Augmented tools can complement human interaction. Unconscious bias does not mean bad or knowing intentions, nor are most hiring managers intentionally discriminating, but the term does mean what the term says -- unconscious bias. To reduce discrimination against a suspect class, employers have embraced objective rules that specify when criminal history will disqualify from proceeding and when they will move an applicant forward. Objective criteria in technology-assisted decisions can prevent excessive weight from being applied to a candidate's criminal history. Any government regulation should seek to preserve augmented intelligence, rather than erect more barriers to hiring.

When an employer uses a background check company, the background checks are regulated by the federal and state fair credit reporting laws. Additional regulation, like that in Intro 1894, will make hiring difficult in a climate where hiring is already exceedingly challenging.

Federal and state background check laws, like the FCRA and the ban-the-box law, and EEO laws impose heavy obligations on background check companies and employers and afford job applicants with substantial rights.

B. Augmented technology helps applicants, employees, and employers move in jobs more quickly, but the bill would upend tools to help job applicants

We are all critically aware that jobs are scarce, and hiring is slow. New York needs to get moving again. During the pandemic, remote hiring is vital to filling jobs, and that may still be true when the pandemic passes. Temporary and gig hiring is on the rise. Jobs are being filled across city, county, and state lines for remote work in New York and elsewhere. To fill jobs quickly, employers need modern tools for a modern economy to validate identity and to verify whether objective criteria are met to get someone working right away. Technology, like algorithms, can quickly fill essential positions and remove barriers to hiring.

Technology can emphasize higher degree offenses and recent offenses for employers to aid their decision making. These tools allow employers to focus on the records that matter the most. Technology-assisted decisions can reduce unconscious bias for information that is not relevant to the job position and enable a quicker, more consistent, and fair hiring process.

Technology adds value to help employers and consumers because augmented intelligence can improve matching logic to properly align the right consumer with the correct record. Technology, which is often grounded in human-supervised machine learning, can help ensure that background checks meet the legal obligations for maximum possible accuracy. Automation can help standardize how criminal charges are reported in a more consistent format despite the variations in court records.

C. The bill contains substantial drafting problems in the bill that are hard to cure

"Augmented employment decision tool." The definition of an "automated employment decision tool" is flawed and needs a closer review. The term means

> any system whose function is governed by statistical theory, or systems whose parameters are defined by such systems, including inferential methodologies, linear regression, neural networks, decision trees, random forests, and other learning algorithms, which automatically filters candidates or prospective candidates for hire or for any term, condition or privilege of employment in a way that establishes a preferred candidate or candidates.

Read logically, human decisions with latent, unconscious bias are not subject to regulation under the introduction, but automated decision tools that are transparent and neutral would be regulated. This deeply flawed application of legislation would do a disservice to employers and job applicants across the city.

"Decision." The definition of a "decision" is flawed. This term "means to screen candidates for employment or otherwise to help to decide compensation or any other terms, conditions, or privileges of employment in the city." Under the FCRA, for 50 years, there has been a commonly accepted definition in federal and state hiring law called an "adverse action." Adverse actions include denial of work or promotions when the decisions are made in whole or in part on information from background check services. "Decisions" is a term already covered in the definitions of "adverse actions" and the legislation overlooks long-standing federal and state definitions.

"Help to decide." The phrase "help to decide" in the definition of an "employment decision" is so broad that it means nothing and everything all at the same time. Augmented decision tools can help remote, and gig workers get back to work faster, especially in a word where personal contact is limited, if not impossible. Technology tools can be used to verify identity, authenticate criteria such as identity documents, current licensing, and to identify if a worker is subject to sanctions or restrictions. These are critical tools to keep essential workers in the field and to replace human interaction where it is not available.

D. The proposal requires serious, unnecessary, and unwanted invasions of consumer privacy

The measure could lead to substantial privacy invasions of job applicants. The introduction requires users of automated decisions to test an automated decision engine against each of the protected classes enumerated in § 8-107 of the Human Rights Law. Such testing would require companies to obtain from applicants (via hiring managers) information about actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, sexual orientation, uniformed service or alienage or citizenship status. It is hard to imagine that the government, job applicants, or companies want that information to be shared and stored as contemplated by the proposal.

E. The proposal is against the EEOC Guidance; Compliance is improved with AI

Not only is Intro. 1894 contrary to EEOC Guidance, compliance with EEOC Guidance is improved with the use of augmented intelligence. The EEOC recommends employers against a "one-size-fits all" screening mechanism for all jobs in all situations. To avoid that blanket approach, employers must first conduct a targeted criminal background screen and then engage in an individualized assessment of persons with criminal background records. This initial step - a targeted screen of individuals with criminal records involves – is aided by the use of AI. In conducting this initial step, employers are instructed to look at three factors, referred to as the "*Green* factors" (*Green v. Missouri Pac. Railroad*). The *Green* factors require employers to consider (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct, or the completion of a criminal sentence; and 3) the nature of the job currently held or sought.

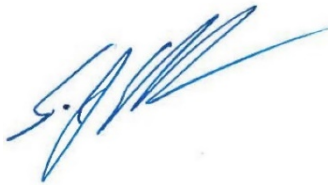
3. Conclusion

When used appropriately by employers, a combination of human and technology tools can help root out bias and get people to work more quickly in ways that are fair, legal, and replete with second chances.

Technology in hiring can reduce unintentional discrimination in employment. Technology in hiring meets the urgent need to hire quickly, hire smartly, and hire remotely. Intro. 1894 stands in the way of tools to reduce hiring bias, and it stands in the way of getting people working again.

I hope that this information is helpful to you. Please let me know if you have any questions or need additional information.

Sincerely,



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