

Regulatory Investigations

Regulating AI: AGs Balance Consumer Protection With Innovation

Artificial intelligence (AI) is everywhere, and it is increasingly used to make decisions that directly impact consumers in many ways — predicting events and outcomes, executing contracts, transporting goods, and even assisting doctors and patients in clinical decision-making. As an enormous boost to both productivity and accuracy, AI can potentially improve our economy and the quality of life of consumers.

However, for all its benefits, AI usage also demonstrates its potential to cause substantial harm by amplifying pre-existing bias and worsening socio-economic disparities. As such, its increased usage has spurred action from lawmakers, civil advocacy groups, state attorneys general (AGs), and other regulators and policymakers who seek to understand it, balance its advantages with the potential risk of harm, and create guidance and regulation for its use.

As their states' top consumer protection regulators, AGs' growing concern over AI's potential for bias has increased their requests for transparency in how AI uses algorithms in automated decision-making that could pose significant risks to individuals' fundamental rights. Unconscious biases can easily enter machine learning because the data that feeds an AI model is just as important as the algorithm or model itself, and the quality of the data used to train AI can directly impact the models' ability to achieve unbiased results. It is important to avoid using biased data in AI.

State AGs' broad investigative power under their respective consumer protection laws has created a growing trend to obtain information about a company's use of AI by issuing civil investigative demands for details about the type of data fed to models, how models are trained, and what type of human intervention, if any, occurs. Several AGs already took, or announced that they plan to take, action by introducing legislation that would restrict automated-decision systems in certain contexts and by proposing more structured oversight of its use.

In addition to state AG activity, the Federal Trade Commission also warned that it would use enforcement for "sold or used" algorithms that result in a disparate impact



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to consumers, and the White House's Office of Science and Technology released a blueprint for a "bill of rights" that identified five key harms AI may inflict upon individuals. The U.S. Food and Drug Administration further issued its final guidance in September 2022 on clinical decisions support software, raising related concerns about automation bias in decision-making around patient care.

While emerging technologies offer incredible advantages beyond human capabilities, questions and concerns over algorithmic discrimination loom, forcing regulators to keep up with these rapidly evolving technologies. Unless and until any new legislation addresses AI regulation, expect state AGs to continue using their consumer protection powers to investigate and bring enforcement actions, while also focusing on passing legislation at the state level to safeguard consumers' rights without disrupting the important, and often beneficial, role that algorithms play in our lives.



Practice Area News

Stop Discrimination in Algorithms Act of 2021. In December 2021, former Washington D.C. Attorney General Karl Racine introduced legislation that would prohibit companies and institutions from using algorithms that produce discriminatory results and require certain disclosures to consumers. If passed, the act would also require companies and organizations to audit their algorithms annually for discriminatory patterns, and document how they built their algorithms, how the algorithms make determinations, and all determinations made by them.

National Association of Attorneys General Center on Cyber and Technology. In May 2022, the NAAG Center on Cyber and Technology (CyTech) was announced, which will develop resources to support state Attorneys General in understanding emerging technologies, including machine learning, artificial intelligence, and potential bias and discrimination that may result. Part of CyTech's mission will involve forming strategic partnerships with other government agencies, academics, nonprofits, and the private sector on technology-related issues and developments.

California Fair Employment and Housing Council Draft Modifications to Employment Anti-Discrimination Laws. On March 15, 2022, the California Fair Employment & Housing Council released draft revisions to the state's employment non-discrimination laws to restrict automated-decision systems (ADS) in the employment context. The draft regulations would prohibit ADS that screen out or "tend to screen out" an applicant or employee on the basis of a protected characteristic unless it is shown to be job-related and consistent with business necessity.

Colorado Senate Bill 113. On June 8, 2022, Colorado passed SB 113, which requires state agencies to, among other things, provide an accountability report prior to using facial recognition. The law also requires that agencies provide notice of intent to use the technology, which must include details such as the type of data collected, how the data will be collected and processed, and the purpose and benefits of its use.

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