

## Talking Points In Opposition to [Intro 1894](#)

**Issue:** The bill would regulate the use of automated decision tools in employment decisions.<sup>1</sup>

**Current Law and Guidance:** Background checks are governed by federal and state law.

- *The FCRA.* When employers use a third-party background check company, the [federal Fair Credit Reporting Act](#) (FCRA) and the [New York fair credit reporting law](#) will protect applicants and employees. Among other things, these laws demand strict accuracy procedures, require adverse action notices, allow consumer access to the consumer report, and create rigorous regimes to process disputes. The law imposes obligations on both employment screening companies, called consumer reporting agencies (CRAs) and employers. When an employer does not use a background check company, these federal and state protections do not apply.
- *The EEOC.* Under federal [Guidance](#) from the Equal Opportunity Employment Commission (EEOC), automatic denials for applicants with criminal histories are generally prohibited.
- *Local Human Rights 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.
- *The FTC's 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.

### Reasons for Opposition:

#### *Limiting bias and protecting applicants and employees*

- Technology in hiring reduces unintentional discrimination in employment. Algorithms can remove the pervasive unconscious bias that we know exists in human decisions. Employers must make decisions about prospective employees, and human decisions often include subconscious bias. Augmented tools can complement but might not be a substitute for elevated human interaction. Unconscious bias does not mean bad or knowing intentions, but it does mean what the term says -

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<sup>1</sup> 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.

- unconscious bias. To reduce persistent 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 burdening employers with additional cost and adding 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 hiring 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.

#### *Helping applicants, employees, and employers move in jobs more quickly*

- Jobs are scarce. 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 can help employers and consumers improve matching logic to properly align the right consumer with the correct record.
- Technology is often grounded in human-supervised machine learning to ensure the 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.

*There are substantial drafting problems in the bill that are hard to cure*

- The definition of an “automated employment decision tool” is flawed. 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.

- 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.
  - The phrase “help to decide” 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.

*The proposal requires serious, sensitive 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 the employers’ applicants, information about their 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 New York City, job applicants, or companies want that information to be shared and stored.

*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 actually 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” (from [Green v. Missouri Pac. Railroad](#)). The *Green* factors require employers 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.

#### **About the Consumer Data Industry Association**

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