A BILL FOR AN ACT

RELATING TO ALGORITHMIC DISCRIMINATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by

2 adding a new chapter to be appropriately designated and to read

3 as follows:

4 **"CHAPTER**

5 **ALGORITHMIC DISCRIMINATION**

6 § -1 **Definitions.** As used in this chapter:

7 "Adverse action" means a denial, cancellation, or other

8 adverse change or assessment regarding an individual's

9 eligibility for, opportunity to access, or terms of access to

10 important life opportunities.

11 "Algorithmic eligibility determination" means a

12 determination based in whole or in significant part on an

13 algorithmic process that utilizes machine learning, artificial

14 intelligence, or similar techniques to determine an individual's

15 eligibility for, or opportunity to access, important life

16 opportunities.

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1   "Algorithmic information availability determination" means

2   a determination based in whole or in significant part on an

3   algorithmic process that utilizes machine learning, artificial

4   intelligence, or similar techniques to determine an individual's

5   receipt of advertising, marketing, solicitations, or offers for

6   an important life opportunity.

7   "Covered entity" means any individual, firm, corporation,

8   partnership, cooperative, association, or any other

9   organization, legal entity, or group of individuals however

10 organized, including entities related by common ownership or

11 corporate control, that either makes algorithmic eligibility

12 determinations or algorithmic information availability

13 determinations, or relies on algorithmic eligibility

14 determinations or algorithmic information availability

15 determinations supplied by a service provider, and that meets

16 one or more of the following criteria:

17   (1)   Possesses or controls personal information on more

18   than twenty-five thousand residents of the State;

19   (2)   Has more than $15,000,000 in average annualized gross

20   receipts for the three years preceding the most recent

21   fiscal year;

1   (3)   Is a data broker, or other entity, that derives fifty

2   per cent or more of its annual revenue by collecting,

3   assembling, selling, distributing, providing access

4   to, or maintaining personal information, and some

5   proportion of the personal information concerns a

6   resident of the State who is not a customer or an

7   employee of that entity; or

8   (4)   Is a service provider.

9   "Important life opportunities" means access to, approval

10   for, or offer of credit, insurance, education, employment,

11   housing, or place of public accommodation as defined in section

12   489-2.

13   "Personal information" means any information held by a

14   covered entity, regardless of how the information is collected,

15   inferred, derived, created, or obtained, that is linked or

16   reasonably linkable to an individual, household, or personal

17   device. "Personal information" includes but is not limited to:

18   (1)   Individually identifiable information such as a real

19   name, alias, signature, date of birth, union

20   membership number, postal address, unique personal

21   identifier, online identifier, internet protocol

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1   address, media access control address, unique device

2   identifier, email address, phone number, account name,

3   social security number, military identification

4   number, driver's license number, vehicle

5   identification number, passport number, or other

6   similar identifiers;

7   (2) A person's race, national origin, religious

8   affiliation, gender identity, sexual orientation,

9   marital status, or disability;

10   (3) Commercial information, including records of personal

11   property; products or services purchased, obtained, or

12   considered; or other purchasing or consuming histories

13   or tendencies;

14   (4) Real-time historical geolocation data more specific

15   than a fifty-mile radius;

16   (5) Education records, as defined in title 34, Code of

17   Federal Regulations section 99.3 or any successor

18   regulation;

19   (6) Biometric data, including voice signatures, facial

20   geometry, fingerprints, and retina or iris scans; and

1   (7)   Inferences drawn from any of the information

2   identified in paragraphs (1) through (6) to create a

3   profile about an individual reflecting the

4   individual's predispositions, behavior, habits,

5   attitudes, intelligence, abilities, and aptitudes.

6   "Reasonably linkable to an individual, household, or

7 personal device" means personal information that can be used on

8 its own or in combination with other information reasonably

9 available to the covered entity, regardless of whether the other

10 information is held by the covered entity, to identify an

11 individual, household, or personal device.

12   "Service provider" means any entity that performs

13 algorithmic eligibility determinations or algorithmic

14 information availability determinations on behalf of another

15 entity.

16   § -2 Prohibited practices; exemptions. (a) A covered

17 entity shall not make an algorithmic eligibility determination

18 or an algorithmic information availability determination on the

19 basis of an individual's or class of individuals' actual or

20 perceived race, color, religion, national origin, sex, gender

21 identity or expression, sexual orientation, familial status,

1 source of income, or disability in a manner that segregates,

2 discriminates against, or otherwise makes important life

3 opportunities unavailable to an individual or class of

4 individuals.

5   (b) Any practice that has the effect or consequence of

6 violating subsection (a) shall be deemed to be an unlawful

7 discriminatory practice.

8   (c) Nothing in subsection (a) shall prohibit covered

9 entities from using individuals' personal information as part of

10 an affirmative action plan adopted pursuant to state or federal

11 law.

12   § -3 **Relationships with service providers.** Any covered

13 entity that relies in whole or in part on a service provider to

14 conduct an algorithmic eligibility determination or an

15 algorithmic information availability determination shall require

16 by written agreement that the service provider implement and

17 maintain measures reasonably designed to ensure that the service

18 provider complies with this chapter.

19   § -4 **Right to notice and disclosure.** (a) A covered

20 entity shall:

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1   (1)   Develop a notice that explains how the covered entity

2   uses personal information in algorithmic eligibility

3   determinations and algorithmic information

4   availability determinations, including:

5   (A)   What personal information the covered entity

6   collects, generates, infers, uses, and retains;

7   (B)   What sources the covered entity uses to collect,

8   generate, or infer personal information;

9   (C)   Whether the personal information is shared, sold,

10   leased, or exchanged with any service providers

11   for any kind of consideration, and if so, the

12   names of those service providers, including

13   subsidiaries of the service providers;

14   (D)   A brief description of the relationship between

15   the personal information and the algorithmic

16   eligibility or algorithmic information

17   availability determinations;

18   (E)   How long the covered entity will hold the

19   personal information; and

20   (F)   The rights provided under this chapter;

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1   (2)   Ensure that the notice developed and made available

2   under paragraph (1) of this subsection:

3   (A)   Is clear, concise, and complete;

4   (B)   Does not contain unrelated, confusing, or

5   contradictory materials; and

6   (C)   Is in a format that is:

7   (i)   Prominent and easily accessible;

8   (ii)   Capable of fitting on one printed page; and

9   (iii)   Provided in English, as well as in any non-

10   English language spoken by at least five

11   hundred individuals in the State population;

12   (3)   Within thirty days after changing its collection or

13   use practices or policies in a way that affects the

14   content of the notice required by paragraph (1) of

15   this subsection, update that notice;

16   (4)   Make the notice required under paragraph (1) of this

17   subsection continuously and conspicuously available:

18   (A)   On the covered entity's website or mobile

19   application, if the covered entity maintains a

20   website or mobile application; and

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1   (B) At the physical place of business or any offline

2   equivalent the covered entity maintains; and

3   (5) Send the notice required under paragraph (1) of this

4   subsection to an individual before the first

5   algorithmic information availability determination it

6   makes about the individual by:

7   (A) Mail, if the personal information was gathered

8   through the individual contacting or contracting

9   with the covered entity through mail;

10   (B) Email, if the personal information was gathered

11   through the individual contacting or contracting

12   with the covered entity through email, or if the

13   covered entity has the individual's email address

14   for another reason;

15   (C) Informing individuals through a "pop-up"

16   notification upon navigation to the covered

17   entity's website or within the covered entity's

18   mobile application; or

19   (D) Providing a clear and conspicuous link on the

20   covered entity's website's homepage, or the home

1   screen of its mobile application, leading to the

2   notice.

3   (b) A covered entity need not provide the notice described

4   under subsection (a) of this section if another covered entity

5   has provided notice to the same individual for the same action

6   as part of a contracted arrangement with the covered entity.

7   (c) A covered entity that is subject to subsection (a)(1),

8   with respect to any individual whose personal information the

9   covered entity holds as described in that subsection, shall not

10   use any personal information of the individual in an algorithmic

11   eligibility determination unless the covered entity has provided

12   the individual with notice consistent with that subsection.

13   (d) If a covered entity takes any adverse action with

14   respect to any individual that is based in whole or in part on

15   the results of an algorithmic eligibility determination, the

16   covered entity shall provide the individual a written or

17   electronic disclosure that includes:

18   (1) The covered entity's name, address, email address, and

19   telephone number;

20   (2) The factors the determination depended on; and

21   (3) An explanation that the individual may:

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1   (A)   Access any personal information pertaining to

2   that individual that the covered entity used to

3   make the determination;

4   (B)   Submit corrections to that information; and

5   (C)   If the individual submits corrections, request

6   that the covered entity conduct a reasoned

7   reevaluation of the relevant algorithmic

8   eligibility determination, conducted by a human,

9   based on the corrected data.

10   §   -5 **Auditing for discriminatory processing and**

11 **reporting requirement.** (a) A covered entity shall annually

12 audit its algorithmic eligibility determination and algorithmic

13 information availability determination practices to:

14   (1) Determine whether the processing practices

15   discriminate in a manner prohibited under   -2;

16   (2) Analyze disparate-impact risks of algorithmic

17   eligibility determinations and algorithmic information

18   availability determinations based on actual or

19   perceived race, color, religion, national origin, sex,

20   gender identity or expression, sexual orientation,

1   familial status, genetic information, source of

2   income, or disability;

3   (3) Create and retain for at least five years an audit

4   trail that records, for each algorithmic eligibility

5   determination:

6   (A) The type of algorithmic eligibility determination

7   made;

8   (B) The data used in the determination, including the

9   source of the data;

10   (C) The methodology used by the entity to establish

11   the algorithm;

12   (D) The algorithm used to make the determination;

13   (E) Any data or sets of data used to train the

14   algorithm;

15   (F) Any testing and results for model performance

16   across different subgroups or for discriminatory

17   effects;

18   (G) The methodology used to render the determination;

19   and

20   (H) The ultimate decision rendered;

21   (4) Conduct annual impact assessments of:

1   (A)   Existing systems that render algorithmic

2   eligibility determinations and algorithmic

3   information availability determinations; and

4   (B)   Prior to implementation, new systems that render

5   algorithmic eligibility determinations and

6   algorithmic information availability

7   determinations;

8   (5) Conduct the audits under paragraphs (1), (2), and (3)

9   of this subsection in consultation with third parties

10   who have substantial information about or participated

11   in the covered entity's algorithmic eligibility

12   determinations and algorithmic information

13   availability determinations, including service

14   providers; and

15   (6) Identify and implement reasonable measures to address

16   risks of an unlawful disparate impact identified in

17   the audits and impact assessments conducted under

18   paragraphs (1), (2), and (3) of this subsection,

19   including the risks posed by determinations made by

20   the covered entity's service providers.

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1   (b)   A covered entity shall annually submit a report

2 containing the results of the audit mandated under this section

3 to the department of the attorney general on a form provided by

4 the department of the attorney general. The report shall

5 contain the following information:

6   (1) The types of algorithmic eligibility determinations

7   and algorithmic information availability

8   determinations that the covered entity makes;

9   (2) The data and methodologies that the covered entity

10   uses to establish the algorithms;

11   (3) The optimization criteria of the algorithms used to

12   make the determinations;

13   (4) Any data or sets of data used to train the algorithms,

14   and the source or sources of the data;

15   (5) The methodologies the covered entity uses to render

16   the determinations;

17   (6) Any performance metrics the entity uses to gauge the

18   accuracy of the assessments, including accuracy,

19   confidence intervals, and how those assessments are

20   obtained;

1   (7)   The frequency, methodology, and results of the impact

2   assessments or risk assessments that the entity has

3   conducted;

4   (8)   Within the description of each of the decisions in

5   paragraphs (1) through (7), the rationale for each

6   decision;

7   (9)   Whether the covered entity has received complaints

8   from individuals regarding the algorithmic eligibility

9   determinations and algorithmic information

10   availability determinations it has made; and

11   (10)   If the covered entity has determined that one or more

12   of the exemptions referred to in section   -2(c)

13   apply to practices that would otherwise violate

14   section   -2(a), a declaration and explanation of the

15   covered entity's reliance on those exemptions.

16   (c)   To the extent consistent with federal law or state

17 law, a covered entity may, in place of the report required by

18 subsection (a), submit to the department of the attorney general

19 a report previously submitted to a federal, state, or other

20 government entity, if that report contains the required

21 information or is supplemented with missing information.

1   (d) The attorney general may adopt rules pursuant to

2 chapter 91 necessary to implement the reporting provisions of

3 this section.

4   § -6 **Enforcement; penalties.** (a) In any case in which

5 the attorney general has reason to believe that any person has

6 used, is using, or intends to use any method, act, or practice

7 in violation of this chapter or rule adopted under this chapter,

8 or has failed to provide a notice, a disclosure, or a report

9 required by this chapter, the attorney general may commence

10 appropriate civil action for:

11   (1) A temporary or permanent injunction;

12   (2) Penalties as described in subsection (c) of this

13   section;

14   (3) Damages or restitution; or

15   (4) Any other relief that the court considers appropriate.

16   (b) In the course of an investigation to determine whether

17 to seek relief, the attorney general may subpoena witnesses;

18 administer oaths; examine an individual under oath; require

19 sworn written responses to written questions; and compel

20 production of records, books, papers, contracts, and other

21 documents.

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1   (c) Any covered entity or service provider that violates

2   this chapter shall be liable for a civil penalty of not more

3   than $10,000 for each violation, which may be recovered in a

4   civil action brought by the attorney general.

5   (d) Any civil penalty assessed for a violation of this

6   chapter, and the proceeds of any settlement of an action brought

7   pursuant to this section, shall be deposited in the litigation

8   deposits trust account under section 28-16.

9   (e) Any person aggrieved by a violation of this chapter

10   may bring a civil action in any court of competent jurisdiction,

11   and the court may award an amount not less than $100 and not

12   greater than $10,000 per violation or actual damages, whichever

13   is greater.

14   (f) In a civil action brought under either subsection (c)

15   or (e) of this section in which the plaintiff prevails, the

16   court may also award:

17   (1) Punitive damages;

18   (2) Reasonable attorney's fees and litigation costs; and

19   (3) Any other relief, including equitable or declaratory

20   relief, that the court determines appropriate.
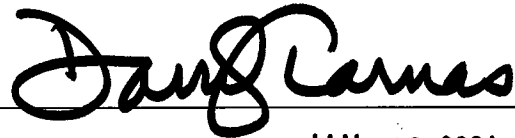
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1   (g) In a civil action brought under subsection (e) of this

2 section, a violation of this chapter or a rule adopted under

3 this chapter with respect to an individual constitutes a

4 concrete and particularized injury to that individual."

5   SECTION 2. This Act shall take effect upon its approval.

6

INTRODUCED BY: _____

JAN 1 6 2024

Report Title:
Department of the Attorney General; Algorithmic Discrimination; Artificial Intelligence

Description:
Prohibits users of algorithmic decision-making from utilizing algorithmic eligibility determinations in a discriminatory manner. Requires users of algorithmic decision-making to send corresponding notices to individuals whose personal information is used. Requires users of algorithmic decision-making to submit annual reports to the Department of the Attorney General. Provides for appropriate means of civil enforcement.

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