

# Surveying Legislative Trends As States Rush To Regulate AI

By **David Kappos and Sasha Rosenthal-Larrea** (April 18, 2024)

On Oct. 30, 2023, President Joe Biden signed an executive order aimed at promoting the responsible development and deployment of artificial intelligence.[1]

The near-100 page executive order represents a significant expansion of the Biden administration's 2022 AI Bill of Rights.[2] Consistent with its "whole-of-government" approach to other regulatory issues like competition, the order calls for AI regulation by more than 20 federal agencies, establishes an interagency AI council, and imposes numerous obligations on private companies that use and develop AI.

Congress, for its part, has held numerous hearings on various AI-related topics — and AI appears to be top of mind on Capitol Hill.

For example, on Jan. 10, members of the U.S. House of Representatives introduced the No AI FRAUD Act, aimed at protecting individual property rights in likeness and voice from unauthorized creation and use of AI-generated replicas.[3] However, as of April 18, no substantive AI legislation has been passed at the federal level.

While AI developers and business leaders await the implementation of federal regulations, and with Congress unlikely to pass comprehensive legislation any time soon, state legislatures continue to take matters into their own hands.

Just four months into 2024, nearly every state has introduced legislation aimed at the development and use of AI, as well as improving transparency around synthetic media produced by generative AI. This drastic increase in legislative activity at the state level reflects a growing awareness of the opportunities and risks presented by AI tools.

In general, state legislatures appear to prefer tackling discrete issues concerning AI rather than taking on more comprehensive AI legislation, with many bills across states covering similar issues through different means. As a result, AI developers and users may soon face the task of complying with a laundry list of laws as states continue to churn out issue-specific legislation.

This article surveys and analyzes trends in the impressive quantity of state AI legislation introduced thus far in 2024.

## Imposing Obligations on AI Developers and Deployers

Several pending state laws — New York S.B. 5641, Oklahoma H.B. 3835, Vermont H.B. 710 and Washington H.B. 1951 — would impose duties directly on developers and deployers of AI systems related to governance and transparency.[4]

Pertinent provisions include: (1) holding developers to a duty of reasonable care to avoid reasonably foreseeable risks of algorithmic discrimination; (2) forbidding deployers from using an AI system covered under the law to make consequential decisions unless the



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deployer has designed and implemented a risk management policy; and (3) requiring deployers to complete impact or risk assessments and notify individuals that the deployer is using covered AI systems to make a consequential decision concerning them.

Given the lack of legal certainty regarding the reasonable care standard in the context of AI development and use, developers and deployers may also consider taking additional affirmative steps to mitigate risks of algorithmic discrimination in their products to ensure they satisfy their duty of reasonable care.

Relatedly, California A.B. 2013 would require a developer of an AI system or service made available to Californians for use to post documentation on the developer's website regarding the data used to train the AI system or service, including the source or owner of the data set, whether the data set was purchased or licensed by the developer and whether the AI system or service continuously uses synthetic data generation in its development.[5]

With bills imposing different duties and obligations from state to state, it will be crucial for AI developers and deployers to assess and monitor the status of legislation in all states to which they may be subject.

### **Requiring Disclosure of the Use of Generative AI**

Other newly pending state laws cover synthetic media produced by or using generative AI.

Generative AI models are machine learning models trained to produce audio, visual, text or other content. Many state bills introduced in 2024 pertaining to generative AI require disclosure of the use of generative AI in certain contexts, with some even imposing criminal penalties in connection with fraud or the dissemination of deepfakes relating to election media and sexually explicit content involving minors.

In aggregate, these bills signal a desire for transparency of generative AI usage to encourage ethical use and accountability. Disclosure requirements may alert consumers to potential limitations of AI-generated content and protect consumers from their assumptions that certain media and communications are authentic.

- New York S.B. 7847 would require newspapers, magazines or other publications printed or electronically published in the state to identify and conspicuously imprint on the top of the page or webpage of such publication the parts of the publication that were composed using generative AI.[6]
- New York S.B. 7922 would require book publishers to include a conspicuous disclosure for books created wholly or partially using generative AI models.[7]
- Florida H.B. 1459 would require that, if a natural person is able to communicate or interact with an entity or person for commercial purposes through an AI mechanism, such entity or person must provide a clear and conspicuous statement on the entity's or person's internet homepage or landing page that such mechanism is generated by AI.[8]
- Virginia H.B. 697 would create additional criminal penalties for the use of synthetic media to commit a criminal offense involving fraud, and make a person who uses synthetic media to depict an individual civilly liable to that individual.[9]
- California S.B. 970 would (1) clarify that use of synthetic recordings, as defined in the bill, is deemed to be a false personation — i.e., assuming the identity of another

person with intent to deceive — for purposes of the bill's provisions and other criminal provisions, and (2) require any person or entity that sells or provides access to AI technology designed to create synthetic images, video or voice to provide a warning that misuse of the technology may result in civil or criminal liability for the user.[10]

## **Regulating Specific Uses of AI**

Some pending state laws would regulate AI use in specific contexts.

For example, Washington S.B. 6073 would require parties to litigation — including attorneys for a party or a pro se party — using generative AI or large language model tools to conduct legal research or draft documents for filing with a Washington state court to (1) disclose the use of AI, including the specific AI tool and the manner in which it was used, and (2) certify that all citations in the filed document were verified as accurate.[11]

While a verification of accuracy is consistent with existing rules of professional responsibility for attorneys, disclosure of the use of certain technology tools, including generative AI tools, is novel — e.g., attorneys do not need to disclose use of technologically advanced non-AI search tools.

Additional clarity may be necessary to determine which tools qualify as AI, such as whether legal research tools that have underlying AI capabilities as part of their search functions qualify as using AI tools.

On March 21, Tennessee adopted H.B. 2091, the Ensuring Likeness Voice and Image Security Act, adding "voice" to its existing protections against unauthorized commercial uses of individuals' image and likeness, and imposing liability for algorithms and software that have the primary purpose of producing individuals' photographs, voice or likeness without the individual's authorization.[12] The amendment was motivated in large part by a desire to protect Tennessee musicians from the proliferation of AI-generated synthetic media.

## **Addressing the Risk of Algorithmic Discrimination**

Another trend in state legislation involves regulating the risk of discriminatory outcomes resulting from deployment of AI systems.

Various guidance and policies have already been introduced in the U.S. to combat AI bias based on certain protected characteristics. Such guidance and policies include the White House's 2022 AI Bill of Rights and the National Institute of Standards and Technology's AI Risk Management Framework.[13]

Some states had enacted legislation applicable to this area previously. In 2024, the trend appears to be accelerating, with states introducing legislation to explicitly incorporate the use of AI into existing anti-discrimination laws or creating new legal frameworks addressing algorithmic discrimination. This focus on AI discrimination reflects an awareness of the risks presented by AI tools, but does not necessarily provide a clear path forward for detection of potentially discriminatory effects.

Companies considering AI vendors or acquisitions should thus conduct due diligence to assess a developer's or target's approach to sourcing and managing training data, e.g., evaluating whether the AI model's training data set is balanced across all groups as to

which it will be making predictions; ongoing monitoring for bias, e.g., performance monitoring and drift monitoring; and independent auditing.

- Georgia H.B. 890 would expand the state's current anti-discrimination laws to include discrimination resulting from the use of or reliance upon AI or automated decision tools. The law would also prohibit reliance upon AI or automated decision tools as a defense to discrimination claims.[14]
- Washington H.B. 1951 would prohibit the use of automated decision tools that result in algorithmic discrimination, which is defined therein as "the condition in which an automated decision tool contributes to unjustified differential treatment or impacts disfavoring people" on the basis of protected class memberships.
- Hawaii H.B. 1607 would prohibit certain "covered entities" — as defined in the bill — from making algorithmic eligibility or information availability determinations on the basis of actual or perceived protected class memberships. This bill would also require covered entities to annually audit its algorithmic eligibility and information availability determination practices to analyze the disparate impact risks of such practices, and submit such results to the attorney general.[15]

Until comprehensive federal legislation governing AI is enacted, it seems clear that states will continue to address discrete policy issues concerning AI within their own legislatures.

Companies developing and deploying AI systems and their legal counsel should closely and continuously monitor the increasing volume of state legislative proposals — and likely enacted laws — governing AI.

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[1] Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Nov. 1, 2023).

[2] Off. of Sci. and Tech., Exec. Off. of the President, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (2022).

[3] No AI FRAUD Act, H.R. 6943, 118th Cong., 2d Sess. (as introduced in House, Jan. 10, 2024).

[4] S.B. 5641, 2024 Leg., Reg. Sess. (N.Y. 2024) (as introduced in Senate, Mar. 10, 2023), H.B. 3835, 59th Leg., 2d Sess. (Okla. 2024) (as introduced in House, Feb. 6, 2024), H.B. 710, 2024 Leg., Reg. Sess. (Vt. 2024) (as introduced in House, Jan. 9, 2024), H.B. 1951, 68th Leg., 2024 Reg. Sess. (Wash. 2024).

[5] Assemb. B. 2013, 2024 Leg., Reg. Sess. (Cal. 2024).

- [6] S.B. 7847, 2024 Leg., Reg. Sess. (N.Y. 2024) (as introduced in Senate, Jan. 3, 2024).
- [7] S.B. 7922, 2024 Leg., Reg. Sess. (N.Y. 2024) (as introduced in Senate, Jan. 3, 2024).
- [8] H.B. 1459, 91st H.R., 2024 Reg. Sess. (Fla.), (as introduced in House, Jan. 9, 2024).
- [9] H.B. 697 2024 Leg., Reg. Sess. (Va. 2024) (as proposed by H. Comm. for Ct. of Just., Feb. 2, 2024).
- [10] S.B. 970 2024 Leg., Reg. Sess. (Cal. 2024) (as introduced in Senate, Jan. 25, 2024).
- [11] S.B. 6073, 68th Leg., 2024 Reg. Sess. (Wash. 2024) (as introduced in Senate, Jan. 9, 2024).
- [12] H.B. 2091, 113th Gen. Assemb., 2024 Reg. Sess. (Tenn. 2024).
- [13] Dep't of Com., Nat'l Institute of Standards and Tech., NIST AI 100-1, AI Risk Management Framework (AI RMF 1.0) (Jan. 2023).
- [14] H.B. 890, 2024 Leg., Reg. Sess. (Ga. 2024) (as introduced in House, Jan. 10, 2024).
- [15] H.B. 1607, 32 d Leg., 2024 Reg. Sess. (Haw. 2024) (as introduced in House, Jan. 17, 2024).