

# What The Artificial Intelligence Video Interview Act Means For You

by Andrew L. Goldstein

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## ABOUT THIS CLIENT ALERT

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Illinois recently enacted the Artificial Intelligence Video Interview Act (the “Act”) which takes effect on January 1, 2020. The Act generally applies to employers who use artificial intelligence (AI) to analyze videos of job applicants and subjects these employers to consent, transparency and data destruction requirements.

The use of AI in the workplace is growing. Many companies are offering systems and services that utilize AI to screen job candidates and determine their suitability for a position. A survey earlier this year of over 1,300 HR professionals, C-suite executives and in-house counsel indicated that more than 35% of the respondents are using AI in the recruiting and hiring process. As the use of AI to evaluate job candidates grows, so do concerns about protecting the privacy of the applicants.

Illinois is once again on the forefront in protecting the privacy of personal biometric information (see <https://www.freeborn.com/perspectives/client-alert-illinois-supreme-court-opens-floodgates-claims-under-illinois-biometric>). Illinois is the first state to enact a law regulating employers’ use of AI in the hiring process.

### Who is covered by the Act and what actions does it require?

The Act applies to any “employer that asks applicants to record video interviews and uses an artificial intelligence analysis of the applicant-submitted videos ... when considering applicants for positions based in Illinois.” The Act imposes the following requirements on these employers:

1. Notify each applicant before the interview that AI may be used to analyze the applicant’s video interview and consider the applicant’s

- fitness for the position.
2. Provide each applicant with information before the interview explaining how the artificial intelligence works and what general types of characteristics it uses to evaluate applicants.
3. Obtain, before the interview, consent from the applicant to be evaluated by the artificial intelligence program as described in the information provided.

The Act provides that employers may not share the applicant’s videos, except with persons whose expertise or technology is necessary in order to evaluate an applicant’s fitness for a position.

The Act requires employers to delete an applicant’s video within 30 days after receipt of a request from an applicant, and employers must instruct any other

persons who received copies of the applicant's video interviews to also delete the video, including all electronically generated backup copies.

## What is not clear under the Act?

The Act is relatively short and does not include definitions of key terms or concepts. The Act does not specify which employers are covered by it. It also does not define the meaning of "applicants for positions based in Illinois." Would the Act apply to an applicant located in Illinois who is recorded for an interview video for an out-of-state company for an out-of-state position?

The Act does not provide any guidance as to what "artificial intelligence analysis" means. Various service providers offer pre-employment assessment of applicants by analyzing video interviews, but not all of these systems or services use AI. Given this lack of clarity, it would be prudent for employers to comply with the Act whenever they perform any data analysis on applicant videos.

The Act does not provide any details on the form of the notice required to be given to applicants who are the subject of interview videos and it does not specify how the applicant must demonstrate its consent to the AI analysis. The Act also does not specify how long an employer must retain these notices.

The Act does not contain any exceptions to the requirement to delete videos within 30 days after request for when the employer is required by another law to retain the video for a longer period. For example, the Equal Employment Opportunity Commission (EEOC) requires that private employers retain hiring-related records for one year from the date of making the record. What if an applicant requests deletion of his or her video within this one-year period or when the employer is subject to a litigation hold order that covers the applicant's video?

The Act does not address enforcement or specify any penalties for violations of the Act. Will the Act include a private right of action, like Illinois' Biometric Information Privacy Act, which allows individuals to sue for violations of the Act, or can the Act only be enforced by the Illinois Attorney General?

It will be up to the courts in the future to interpret the Act, its applicability and its requirements.

*The Artificial Intelligence Video Interview Act applies to any "employer that asks applicants to record video interviews and uses an artificial intelligence analysis of the applicant- submitted videos ... when considering applicants for positions based in Illinois." The Act imposes [several] requirements on these employers.*



## What can employers do to comply with the Act?

In order to comply with the Act, employers should:

- Institute a business process to ensure that they do not record or accept a video from a job applicant before the required notice is received from the applicant consenting to the AI analysis of the video.
- Prepare a notice and consent form to be used by job applicants who are the subject of an interview and create a system to retain these forms. As noted above, the Act does not specify the form of this notice, but it should be clear and conspicuous and it should explain how the AI works and what general types of characteristics it uses to evaluate applicants in terms that are easy to understand. The applicant should assent to the notice in some manner, i.e., by signing it or clicking a box to accept the notice.

- Consider providing a non-AI alternative for applicants who decline to consent to an AI analysis of their videos. While a non-AI alternative is not mandated by the Act, such an alternative may be required by the Americans with Disabilities Act and providing a non-AI alternative would also address any concerns that the consent is not voluntary.
- Review and revise as necessary agreements with any third parties that provide a system or service that uses AI to evaluate job applicant videos to ensure that 1) the third party is required to comply with the employer's request to delete a video within 30 days, or less; 2) the third party is prohibited from sharing or disclosing the video; and 3) the third party indemnifies the employer from claims by applicants based on the third party's failure to comply with the Act. Employers should also obtain sufficient information from the third party to understand how the AI in the third party's system or service works so that the employer can explain it in the required notice to the applicant.
- Review and modify as necessary security systems to ensure that the employer can 1) comply with the requirement to delete applicant videos within 30 days from date of the request, and 2) prevent unauthorized access to the applicant videos.

If you want to learn more about how the Artificial Intelligence Video Interview Act will affect your business, contact Andrew Goldstein at [agoldstein@freeborn.com](mailto:agoldstein@freeborn.com).

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