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10 Ways NYC AI Discrimination Rules May Affect Employers

Client Alert | April 20, 2023

The New York City Department of Consumer and Worker Protection, or DCWP, released final rules on April 6 regarding the city's Local Law 144 and announced that it would begin enforcement on July 5.

Local Law 144 restricts employers and employment agencies from using an automated employment decision tool in hiring and promotion decisions unless it has been the subject of a bias audit by an "independent auditor" no more than one year prior to use. The law also imposes certain posting and notice requirements to applicants and employees subject to the use of AEDTs.

The DCWP is vested with the authority to amend the Rules of the City of New York under the New York City Charter and New York City Administrative Code. As detailed below, the DCWP's final rules make a number of noteworthy changes and attempt to clarify the law.

1. The rules attempt to clarify the scope of covered AEDTs.

Local Law 144 defines an AEDT as:

> Any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons.

The final rules seek to clarify two of the key phrases within this definition.

The final rules define "machine learning, statistical modeling, data analytics, or artificial intelligence" as a group of mathematical, computer-based techniques:

- That generate a prediction, e.g., an assessment of a candidate's fit or likelihood of success, or a classification, e.g., categorizing applicants based on skill sets or aptitude; and
- For which a computer identifies, at least in part, the inputs and their relative importance and, if applicable, other parameters to improve the model's predictive accuracy.

The phrase "to substantially assist or replace discretionary decision making" is defined as:

i. To rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other factors considered; or
ii. To use a simplified output as one of a set of criteria where the simplified output is weighted more than any other criterion in the set; or

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iii. To use a simplified output to overrule conclusions derived from other factors including human decision-making.

Notably, this definition appears to permit employers to use the AEDT without conducting a bias audit where an AEDT's output falls outside the specified circumstances.

Local Law 144 provides several examples of tools outside the scope of covered AEDT, i.e., calculators, junk email filters and spreadsheets. The final rules, however, do not provide any further examples.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the authors:

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