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NYC's Artificial Intelligence Law: Key Takeaways From Newly Released FAQs

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On June 30, 2023, the New York City Department of Consumer and Worker Protection (the "DCWP") released Frequently Asked Questions ("FAQ")[1] regarding New York City's Local Law 144,[2] which went into effect on July 5, 2023.

Local Law 144 restricts employers and employment agencies from using an automated employment decision tool ("AEDT") in hiring and promotion decisions unless it has been subject to an annual bias audit conducted by an "independent auditor." The law also imposes posting and notice requirements to New York City applicants and employees subject to the use of AEDTs. The FAQs provide insight into how the DCWP will approach enforcing Local Law 144, including its penalty schedule, which imposes penalties ranging from $375 to $1500 for each violation of the bias audit, notice, and posting requirements.[3]

As summarized at a high-level below, the FAQs provide some helpful guidance for covered employers but questions remain regarding the law's scope and audit requirements.

1. NYC Office Location Is Key.

The FAQs clarify that Local Law 144 only applies to employers with a physical office in New York City that use an AEDT for (i) jobs located in New York City, at least part-time or (ii) for remote positions, if the location "associated with [such remote position]" is an office in New York City.

2. Covered Employment Decisions Need Not Be Final.

The DCWP previously emphasized during May 2023 roundtable events that Local Law 144 covers employment decisions "at any point in the process." Otherwise stated, the analysis of whether Local Law 144 applies is not limited to the ultimate employment decision.[4]

The FAQs echo this position and emphasize that the law defines "employment decisions" to include screening for hire or promotion. However, the FAQs also make clear that conducting outreach or sending invitations to *potential* job or promotion candidates falls outside the scope of the law.

3. Compliance Responsibility Rests With Employers, Not Vendors.

The FAQs state that a vendor of an AEDT is *not* responsible for conducting a bias audit of its tool. Instead, in the DCWP's view, covered employers and employment agencies are responsible for complying with Local Law 144's bias audit requirements.

4. Demographic Information May Not Be Inferred.

The FAQs expressly state that employers and employment agencies may *not* infer or impute data about an applicant's demographic information. This differs from other areas

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of law, such as the EEO-1 Component 1 Report, which permits observer identification to be used to determine an employee's race or ethnicity.[5]

Accordingly, bias audits may only be conducted using historical or test data, and cannot be run on demographic information inferred by an algorithm or otherwise.

5. No Set Threshold For Statistical Significance.

The DCWP has chosen not to set a specific standard for determining statistical significance, thereby leaving the determination to the independent auditor. If test data is used in lieu of historical data because the auditor determined that the historical data was not statistically significant, the public summary of the bias audit results must explain this decision.

6. No Specific Test Data Requirements.

The DCWP previously stated that Local Law 144's bias audit requirement provides flexibility regarding what data is used and who (*e.g.*, the vendor or employer) may provide data to the independent auditor.[6] The FAQs likewise provide that the DCWP has not set requirements for test data to allow for the "development of best practices in this rapidly developing field."

Notwithstanding this apparent flexibility and flux, the FAQs state that the summary of the bias audit must include the source of the data and an explanation of the data used. For example, if the test data is limited to a specific region or time period, the public summary is expected to explain why and/or how.

7. Bias Audit Need Not Be Position Specific.

Employers that hire for an array of different positions *may* rely on a bias audit that is based on the historical data of multiple employers if it is either (a) their first time using the AEDT or (b) they provide historical data from their use of the AEDT to the independent auditor. To that end, the FAQs state that there is no requirement that the employers providing historical data for a bias audit use the AEDT to hire or promote for the same type of position. The FAQs therefore suggest that the data used for the bias audit can be aggregated from an assortment of different positions—though whether doing so may be accurate or prudent will vary case-by-case.

8. Notice Need Not Be Position Specific.

The notice posted in the employment section of an employer's website for job applicants or in a written policy or procedure for candidates for promotion need *not* be position specific. The FAQs therefore appear to indicate that a notice's description of the job qualifications and characteristics assessed by the AEDT may be categorical.

9. Discrimination Claims Will Be Referred To The City Commission On Human Rights.

The FAQs state that any claims of discrimination involving AEDTs that are sent to the DCWP will be automatically referred to the New York City Commission on Human Rights. The DCWP will enforce only Local Law 144's prohibition on the use of AEDTs without a bias audit and the required notice and posting.

10. Numerous Questions And Ambiguities Remain.

Despite committing to address many unanswered questions raised during the DCWP's roundtable events, the FAQs leave a number of open questions.

For example, there is still no clarification regarding the statute's ill-fitting definition of an

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employment agency.[7] The final rules implementing Local Law 144 defined an "employment agency" as "all persons who, for a fee, render vocational guidance or counseling services, and who directly or indirectly represent" that they perform one of the enumerated functions such as arranging interviews or having knowledge of job openings or positions that cannot be obtained from other sources with a reasonable effort.[8] Since Local Law 144 is limited to applicants who have applied for a position (and not potential applicants), it is unclear how a definition focused on employment agencies attracting or assisting prospective applicants will be reconciled with the apparently narrower scope of the law.

The FAQs state that test data can be used to conduct a bias audit if demographic data is not available or collected, but it remains unclear whether covered employers could (let alone must) artificially create test data to conduct a bias audit, especially since the FAQs state that demographic data should not be inferred.

Finally, the FAQs state that a remote position "associated" with a New York City office is within the scope of the law, but the DCWP does not clarify or explain how a remote position may be "associated" with a New York City office. For example, it remains unclear if an "association" will be found if a remote employee reports to a manager in New York City, must occasionally come into the New York City office, or if their paycheck is issued from the employer's New York City office.

Conclusion

To date, New York City's Local Law 144 is the most expansive effort in the United States to attempt to regulate the use of automated decision tools in employment. Its impact will undoubtedly be closely watched (and scrutinized) by legal commentators and other states and cities. In the wake of the law's passage and throughout the subsequent rulemaking process, employers in New York City have been grappling with various questions about the law's scope and requirements. The FAQs are helpful in answering some of these questions. But many remain. As such, effective July 5, employers are faced with the unsettling prospect of attempting to comply with Local Law 144 without clear and comprehensive guidance.

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[1] DCWP, *Automated Employment Decision Tools: Frequently Asked Questions* (June 2023), https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf.

[2] NYC Int 1894-2020, Local Law 144 (enacted December 11, 2021), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9.

[3] RCNY, tit. 6, ch. 6, § 6-81, *Automated Employment Decision Tools Penalty Schedule* (effective Aug. 5, 2022), https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-134007.

[4] DCWP, *Local Law 144 of 2021 Automated Employment Decision Tool Roundtable with Business Advocates/Employers* (May 2023), https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-Educational-Roundtable-with-Business-Advocates-Employers.pdf.

[5] U.S. EEOC, 2021 EEO-1 Component 1 Frequently Asked Questions (FAQs), https://www.eeocdata.org/pdfs/2021_EEO_1_Component_1_FAQs.pdf.

[6] *Id.*

[7] *See* Harris Mufson, Danielle Moss, and Emily Lamm, *10 Ways NYC AI Discrimination Rules May Affect Employers*, Law360 (Apr. 19, 2023) (discussing the definition of

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"employment agency" under the final rules implementing Local Law 144).

[8] DCWP, *Notice of Adoption of Final Rule*, https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf.

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