

10 Ways NYC AI Discrimination Rules May Affect Employers

By **Harris Mufson, Danielle Moss and Emily Lamm** (April 19, 2023, 12:46 PM EDT)

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.[1]

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.[2] 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.

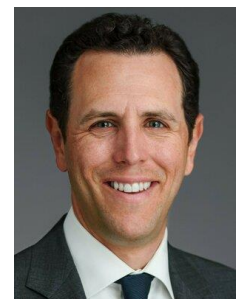
Local Law 144 defines an AEDT as:

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.



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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
- (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.

2. Bias auditors must be fully independent of the employer and the AEDT.

The final rules clarify that an "independent auditor" excludes anyone:

- "Involved in using, developing, or distributing the AEDT";
- Who "has an employment relationship with an employer ... that seeks to use or continue to use the AEDT or with a vendor that developed or distributes the AEDT"; or
- Who "has a direct financial interest or material indirect financial interest" in the employer or vendor.

Accordingly, employers should ensure that their bias auditors meet this definition of independence and neither have a direct or material indirect financial interest in the AEDT's vendor nor are involved in the use of the AEDT.

3. Candidates for employment are limited to actual applicants.

The final rules define a "candidate for employment" as "a person who has applied for a specific employment position by submitting the necessary information and/or items in the format required by the employer or employment agency."

As such, the final rules clarify that potential applicants who have not yet applied for a position are not covered by Local Law 144.

4. The summary of bias audit results must be publicly posted.

Local Law 144 requires annual audits of covered AEDTs. Under the final rules, employers and employment agencies must make the summary of the most recent bias audit's results publicly available on the employment section of their website in a "clear and conspicuous manner."

The summary must be posted for a period of at least six months after the latest use of the underlying AEDT and include the:

- Source and explanation of the data used to conduct the bias audit;
- Number of individuals the AEDT assessed that fall within an unknown category;
- Number of candidates; and
- Selection or scoring rates and the impact ratios for all categories.

The rules state that an active link to a website with the summary is sufficient to fulfill these posting requirements as long as the employer or employment agency makes it clear that the link is to the bias audit results.

5. Bias audit calculations differ for hiring and promotion decisions.

The final rules specify the required calculations for a bias audit, which include calculating the selection rate, scoring rate and impact ratio for each EEO-1 category on an employer's U.S. Equal Employment Opportunity Commission employer information report, i.e., race, ethnicity, and sex.

The final rules explain that the selection rate is "the rate at which individuals in a category are either selected to move forward in the hiring process or assigned a classification by an AEDT," which is generally consistent with the EEOC's Uniform Guidelines on Employee Selection Procedures.

Meanwhile, the scoring rate is "the rate at which individuals in a category receive a score above the sample's median score, where the score has been calculated by an AEDT."

Selection rates are to be calculated for AEDTs used in the hiring process, whereas scoring rates are to be calculated for AEDTs used in promotion.

6. Intersectional analyses of sex, ethnicity and race are required.

The final rules expressly require that bias audits include an intersectional analysis of protected categories, e.g., examining the impact rate for race and sex combined, in addition to analyzing each category independently.

7. Bias audits may use test data if historical data is insufficient.

The final rules state that bias audits must generally be conducted using historical data from an employer or employment agency's own use of an AEDT. The rules do, however, permit alternatives if their own historical data is insufficient.

For example, employers or employment agencies may rely on a bias audit that uses the historical data of other employers or employment agencies if they (1) have never used the AEDT or (2) provide their own existing historical data, even if statistically insignificant alone, to the independent auditor for use and consideration.

In addition, the rules state that an employer or employment agency may rely on test data if insufficient historical data is available to conduct a statistically significant bias audit. If test data is used, the summary of results of the bias audit must explain why this decision was made and how the data was generated and obtained.

8. Categories comprising less than 2% of the data may be excluded.

Consistent with the EEOC's Uniform Guidelines on Employee Selection Procedures, the final rules allow independent auditors to exclude a sex, race or ethnicity category that represents less than 2% of the data being used for the bias audit from the required calculations for the impact ratio.[3]

If a category is excluded, the summary of results of the bias audit must include a justification for the exclusion as well as (1) the number of applicants and (2) the scoring or selection rate for the excluded category.

Additionally, the number of individuals with an unknown sex or race/ethnicity category must be included in the summary.

9. Notice may be provided in the job posting or website employment section.

Local Law 144 requires employers to provide advance notice to individuals who reside in New York:

- At least 10 business days before use of the AEDT;
- The opportunity to request an alternative selection process or accommodation;
- The job qualifications or characteristics that the AEDT will use in connection with the assessment;
- The employer's retention policy; and
- The type and source of data collected for the AEDT.

The final rules outline several ways by which employers may provide notice for candidates and employees.

The final rules allow employers to provide notice to applicants:

1. "On the employment section of its website";
2. "In a job posting"; or
3. "Via U.S. mail or e-mail" at least 10 business days prior to use of the AEDT.

For employees, employers may provide notice "in a written policy or procedure" at least 10 business days prior to use or through the mechanisms outlined in the first two points above.

Meanwhile, the rules state that an employer satisfies the law's notice requirement regarding the type of data collected, the source of the data and the data retention policy by posting this information "on the employment section" of their website or by providing it in writing "via U.S. mail or e-mail" within 30 days of receiving a request to provide such information.

The final rules do not specify whether this time frame is 30 business days or calendar days.

10. The final rules define employment agencies.

The final rules define 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.[4]

"Vocational guidance or counseling services" are defined as "services which consist of one or more oral presentations" that provide information regarding qualifications generally required for a position or assess the suitability of individuals seeking employment for a position.

Since Local Law 144 only applies to actual applicants, it is unclear how this definition of an employment agency — which is largely focused on attracting or assisting prospective applicants — will be reconciled with the scope of the law itself.

Conclusion

New York City's Local Law 144 is the most comprehensive effort to regulate employers' use of artificial intelligence technology in the United States.

By July 5, employers and employment agencies that have already implemented or are considering implementing AEDTs in hiring or promotion in New York should ensure that they are prepared to comply with the bias audit, notice and posting requirements of Local Law 144.

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[1] NYC Dep't Consumer & Worker Prot., Notice of Adoption of Final Rule (Apr. 6, 2023), <https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf>.

[2] NYC Local Law 144 (Dec. 11, 2021), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9>. For more details, please see Gibson Dunn's New York City Enacts Law Restricting Use of Artificial Intelligence in Employment Decisions.

[3] EEOC, Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (Mar. 1, 1979), <https://www.eeoc.gov/laws/guidance/questions-and-answers-clarify-and-provide-common-interpretation-uniform-guidelines>.

[4] 6 RCNY § 5-249, <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-19916>.