



# New York City's AI Employment Law – Key Legal Risks & Considerations

June 9, 2023

**GIBSON DUNN**

# MCLE Information:

This program has been approved for credit in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 1.0 credit hour, of which 1.0 credit hour may be applied toward the areas of professional practice requirement. This course is approved for transitional/non-transitional credit.

Gibson, Dunn & Crutcher LLP certifies that this activity has been approved for MCLE credit by the State Bar of California in the amount of 1.0 hour.

Gibson, Dunn & Crutcher LLP is authorized by the Solicitors Regulation Authority to provide in-house CPD training. This program is approved for CPD credit in the amount of 1.0 hour. Regulated by the Solicitors Regulation Authority (Number 324652).

Neither the Connecticut Judicial Branch nor the Commission on Minimum Continuing Legal Education approve or accredit CLE providers or activities. It is the opinion of this provider that this activity qualifies for up to 1 hour toward your annual CLE requirement in Connecticut, including 0 hour(s) of ethics/professionalism.

Application for approval is pending with the Colorado, Illinois, Texas, Virginia and Washington State Bars.

Please see the link to the CLE form below:

[https://gibsondunn.qualtrics.com/jfe/form/SV\\_6tExMK2Fv4EJReS](https://gibsondunn.qualtrics.com/jfe/form/SV_6tExMK2Fv4EJReS)

# AGENDA

---

**01** Overview: Current Landscape

---

**02** Background

---

**03** Requirements

---

**04** Bias Audit Readiness

---

**05** Best Practices

---

# Overview: Current Landscape

GIBSON DUNN

01

# 2023 So Far...

AI Act moves ahead in EU Parliament with key committee vote

**From retail to transport: how AI is changing every corner of the economy**

SUBCOMMITTEE ON PRIVACY, TECHNOLOGY, AND THE LAW  
*Oversight of A.I.: Rules for Artificial Intelligence*

Amazon Joins Microsoft, Google in AI Race Spurred by ChatGPT

**The lawsuit that could rewrite the rules of AI copyright**

Scoop: Schumer lays groundwork for Congress to regulate AI

Prepare For Federal Agency Scrutiny On AI Discrimination

**ChatGPT is entering a world of regulatory pain in Europe**

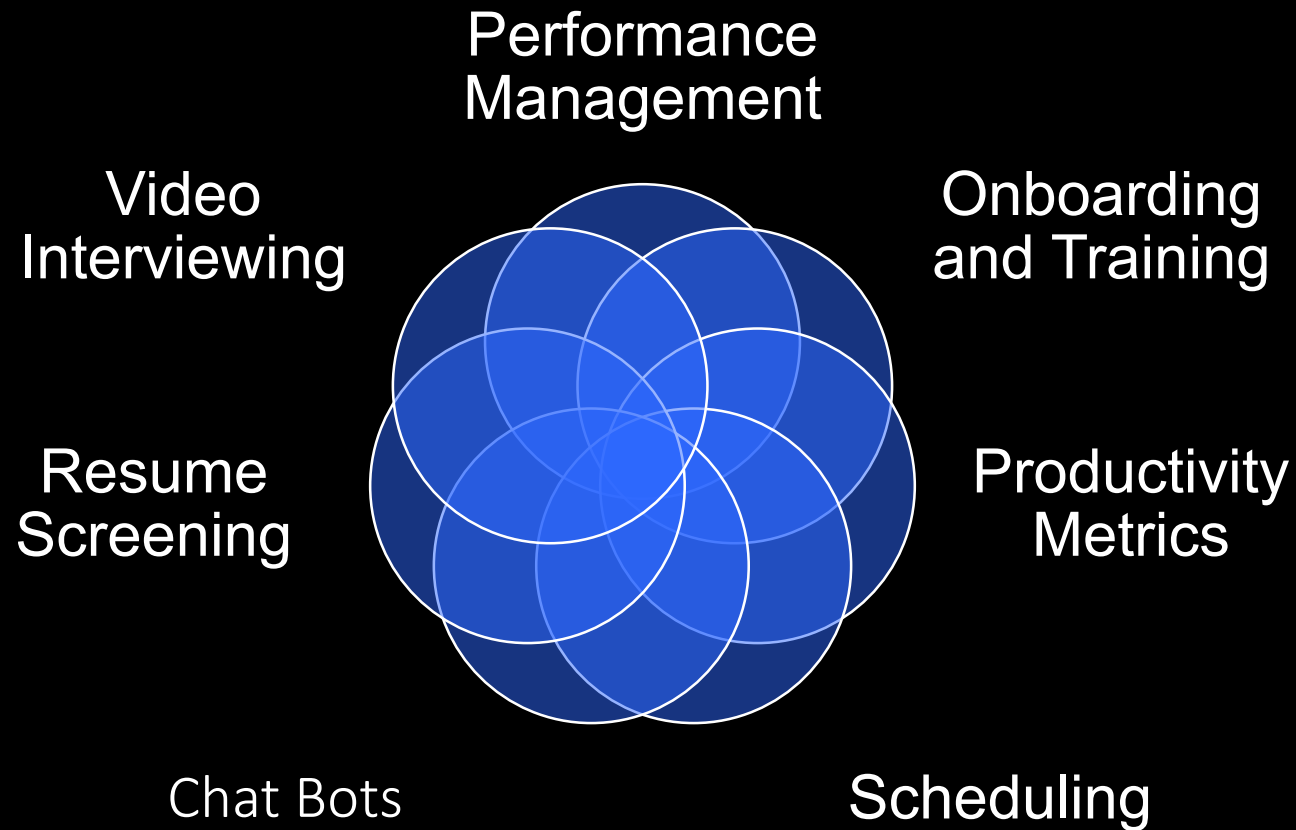
AI chatbot makes itself an easy target for privacy regulators as fears around artificial intelligence grow.

Artificial Intelligence Jobs: How Will AI Change The Job Market?



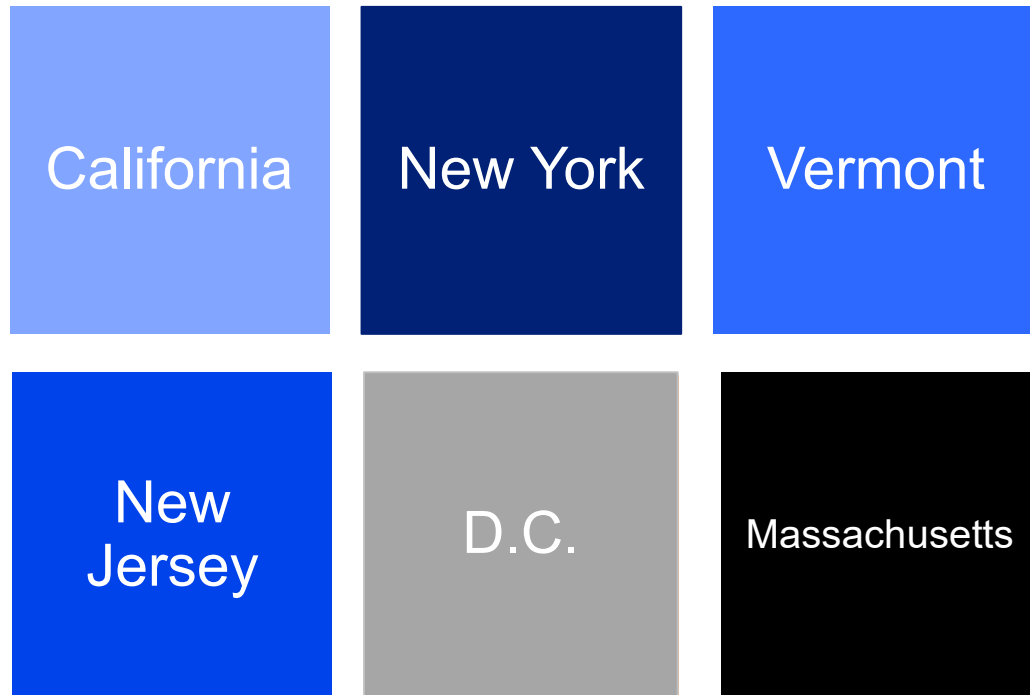
AI May Be New But It's Not Unregulated, FTC's Bedoya Says

# How Is AI Being Used In Employment?



# Legal Landscape

## Proposed Laws



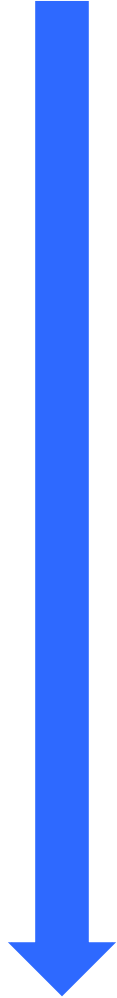
## Passed



# Background



# Local Law 144's History

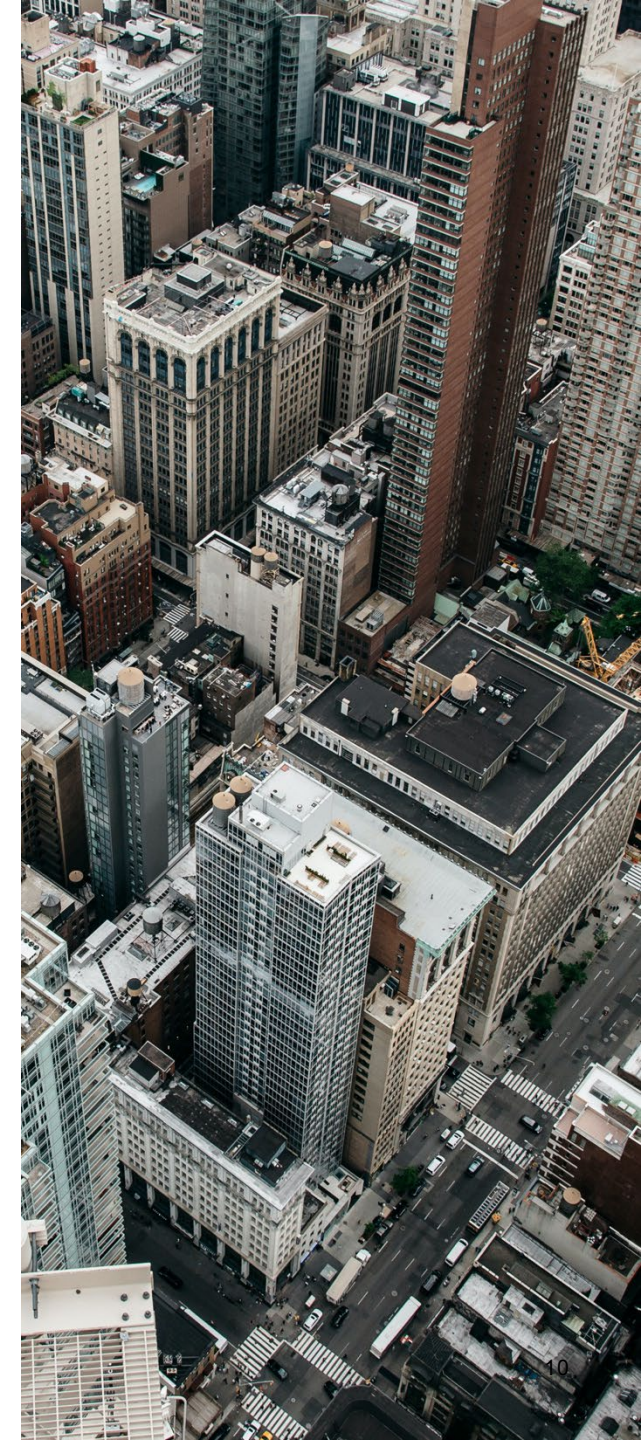


- Introduced: February 2020
- Enacted: December 2021
- Proposed Rules Issued: September and December 2022
- Original Enforcement Date: January 1, 2023
- Final Rules Released: April 6, 2023
- DCWP Roundtable: May 22, 2023
- **Enforcement Begins: July 5, 2023**

# Scope

## Applies “in the City”

- If the position is located in NYC
  - Bias audit + notices to NYC residents
- If the position is located outside of NYC
  - No bias audit or notices required
- If the position is fully remote . . .
  - Only NYC office → bias audit + notices to NYC residents
  - No NYC office → no bias audit or notice required
  - NYC + outside offices → fact specific analysis



# Automated Employment Decision Tools (AEDTs)

- Machine learning, statistical modeling, data analytics, or AI

- Group of mathematical, computer-based techniques
  - That generate a prediction (e.g., scores, rank, categorization, or assessment)
  - For which a computer, at least in part, identifies:
    - The inputs;
    - The relative importance placed on those inputs; and
    - If applicable, other parameters for the models in order to improve the accuracy of the prediction or classification

- Substantially assist or replace discretionary decision-making

- Tool is the only factor in employment decision (e.g., resume screening software selecting individuals for in-person interviews)
- Tool is the highest weighted factor in employment decision (e.g., resume screening that is accompanied by human review)
- Tool overrules employment decision (e.g., applicants removed from pool if not a “good fit”)

# Penalties

- NYC’s Department of Consumer and Worker Protection (DCWP) Penalty Schedule:

Citation	Violation Description	First Violation	First Default	Second Violation	Second Default	Third and Subsequent Violation	Third and Subsequent Default
Admin. Code § 20-871(a)	Failure to comply with requirements for use of an automated employment decision tool	\$375	\$500	\$1,350	\$1,500	\$1,500	\$1,500
Admin. Code § 20-871(b)	Failure to comply with notice requirements related to automated employment decision tools	\$375	\$500	\$1,350	\$1,500	\$1,500	\$1,500

- Each day a tool is in violation gives rise to a separate violation.



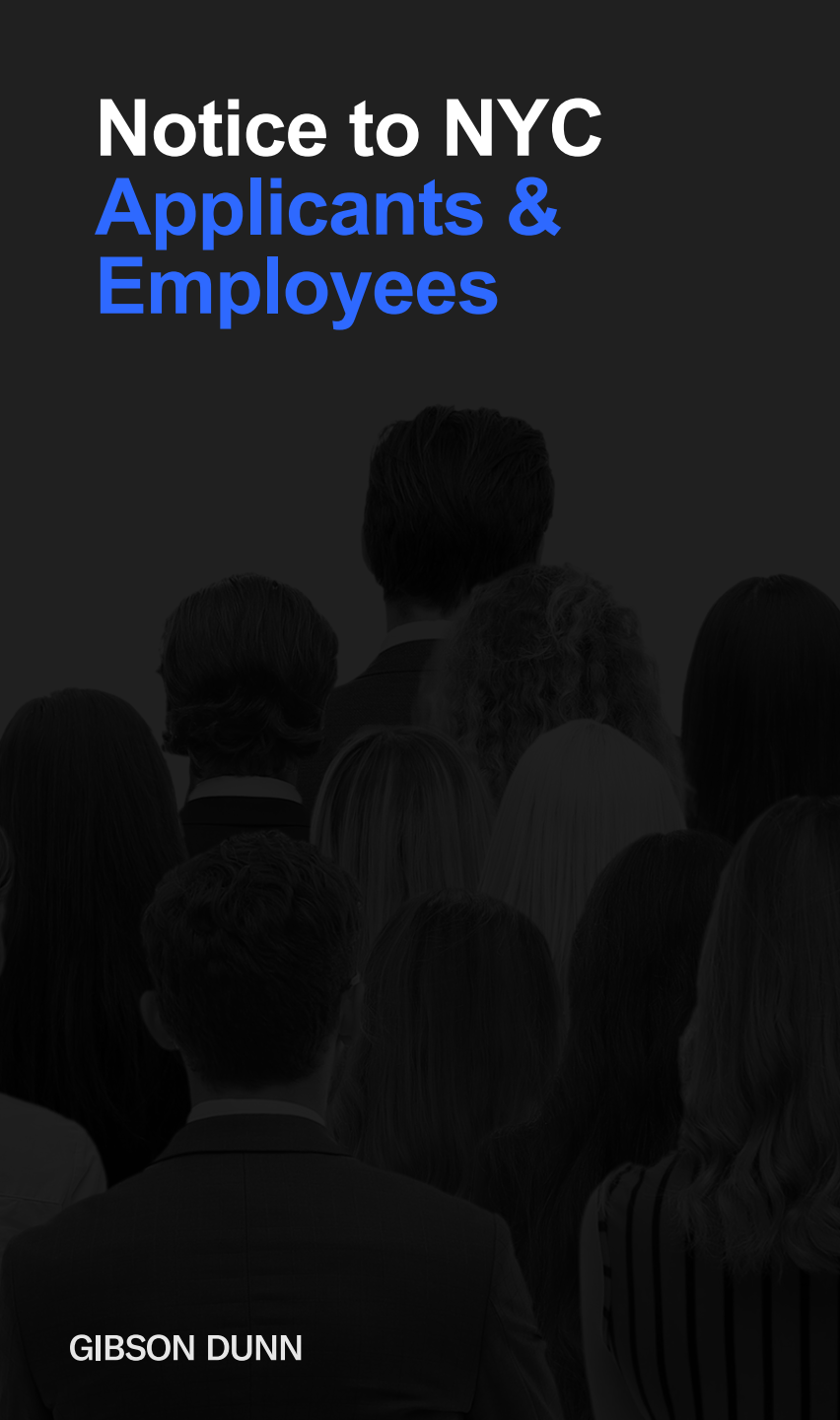
# Requirements

# Independent **Bias Audit**

- Performed by an independent auditor
- Within one year prior to use for hiring or promotion
- Minimum Calculations
  - Selection or Scoring Rate
  - Impact Ratio
  - Sex and Race/Ethnicity Categories + Intersectional Categories
    - Categories representing less than 2% of the data may be excluded
- Historical Data or Test Data



# Notice to NYC Applicants & Employees

A dark, grayscale image showing the silhouettes of a crowd of people from behind, looking towards the right. The silhouettes are of various heights and shapes, suggesting a diverse group of individuals. The background is a gradient from dark to light.

- 10 Business Days Prior to Use
- Instructions for how to request a reasonable accommodation or alternative selection procedure
- Disclose use of AEDT + job qualifications and characteristics assessed
- Provided in one of the following ways:
  - In a job posting
  - Via U.S. mail or email
  - On employment section of website (applicants) or in a written policy or procedures (employees)
- Opportunity to request data collection practices

# Public Posting

The following must be publicly posted in an employment-related section of the employer's or employment agency's website:

- Summary of bias audit results
- Distribution date of AEDT





# Bias Audit Readiness

# What is AI Bias?

Bias is a systematic prejudice due to erroneous assumptions in the AI or algorithmic system

AI bias can have significant negative consequences, including perpetuating and exacerbating social inequity. It is important to identify and address biases in AI systems in order to promote fairness.

## Example Sources of AI Bias

### Data & Inputs

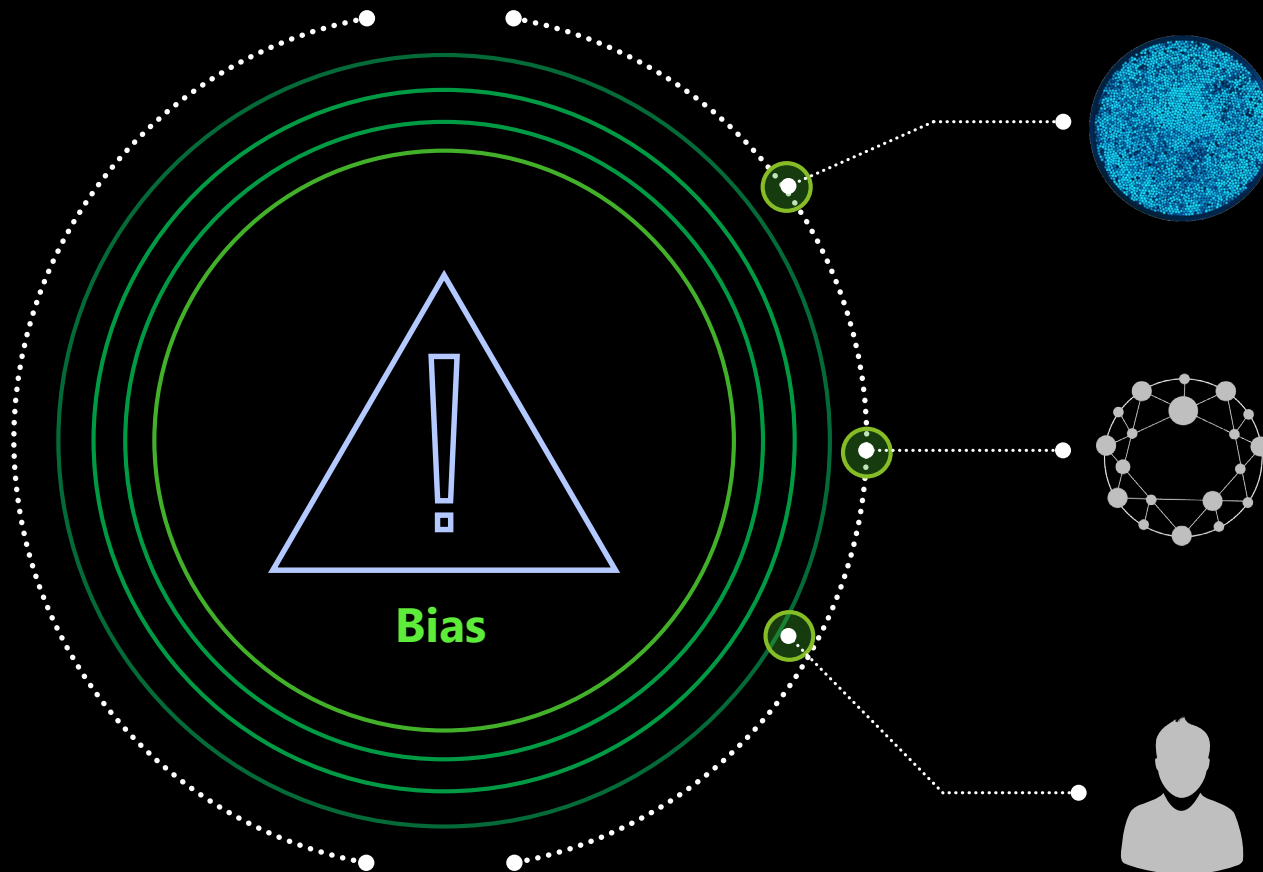
- Underrepresentation with fewer positive outcomes for classes or group in the data
- Historical data may reflect historical societal disparities

### Design & Development

- AI systems may identify statistical connections or proxies to protected class attributes
- Feature engineering can introduce harmful features (such as *time between jobs* which might impact men or women differently)

### Use & Application

- Use of AI system without appreciation of assumptions and limitations of the model.
- Lack of bias testing and monitoring, decision makers can perpetuate potentially biased outcomes



# Bias Testing Approaches

Bias testing can be complex and requires a multifaceted approach across several dimensions of data<sup>1</sup>

## High-Level Approaches

### ● Dataset Profiling

Data exploration into how protected and non-protected features are distributed within the dataset. Includes absolute or normalized views.

### ● Protected Feature Impact Analysis

Visualize the impact that protected features have on the average applicant. Categorize the protected features based on their impact to both local and global populations.

### ● Protected Group Assessment

Perform an assessment of protected groups (where data available) to understand potential disparities across any dimensions in the data set.

### ● Non-Protected Feature Risk Assessment

Perform an assessment of non-protected features to determine any potential proxies for protected features that have unintended disparities.

### ● Model Assessment and Tracking

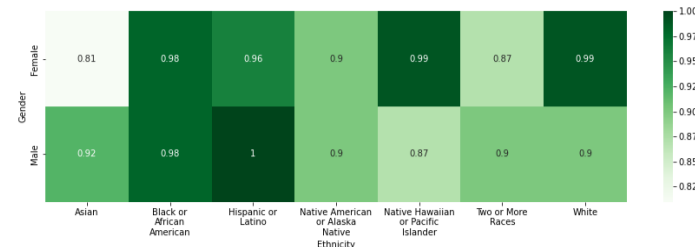
Perform assessments of overall model performance initially and on and ongoing basis. Monitor drift and other statistical indicators.

1. Does not represent a comprehensive list.

## Types of Bias Testing

**Impact ratio analysis** used to quantify disparate impacts at intersectional data points

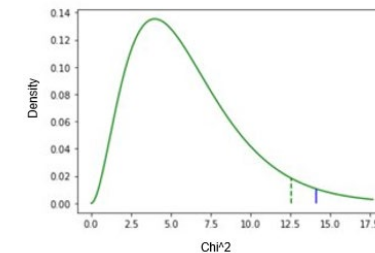
	Ethnicity	Gender	AgeGroup	Applied	Selected	Selection_Rate	Impact_Ratio
0	Asian	Female	40+	18	13	0.72	0.72
1	Asian	Female	<40	18	14	0.78	0.78
2	Asian	Male	40+	24	19	0.79	0.79
3	Asian	Male	<40	16	15	0.94	0.94
4	Black or African American	Female	40+	46	39	0.85	0.85
5	Black or African American	Female	<40	43	41	0.95	0.95
6	Black or African American	Male	40+	67	61	0.91	0.91
7	Black or African American	Male	<40	25	22	0.88	0.88
8	Hispanic or Latino	Female	40+	19	15	0.79	0.79
9	Hispanic or Latino	Female	<40	15	15	1.00	1.00



**Multidimensional analysis** to compare outcomes across various groups

```
FAIL: [ Ethnicity ] - The selection rates ARE NOT EQUAL
Test statistic: 14.162244526939975
Critical value: 12.591587243743977
p-value: 0.027875388355958312
Degrees of freedom: 6
```

**Statistical tests** to validate findings or discover hidden bias



# What Organizations Can Do Now

While there are still questions related to NYC LL 144, there are several practices that organizations can consider to be proactive and prepared for the law going into effect on July 5<sup>th</sup>, 2023.



## Determine the Scope

**Identify any AEDTs currently in use or planned for future use.**

- ✓ Determine if they substantially assist or replace discretionary decisions related to employment.
- ✓ Identify if any service providers are involved in the development of AEDTs and coordinate with them to obtain relevant information to comply with the proposed requirements.



## Create an Inventory

**Develop an inventory to categorize and track identified AEDTs.**

- ✓ Include where and how AEDTs are used and a process for tracking updates.
- ✓ Use the inventory to assist in identifying, assessing, and tracking risks for the AEDTs and ongoing compliance with the proposed law.
- ✓ Include any relevant details such as an AEDT owner, developer (internal or external), and users; type of algorithm; status of the AEDTs, frequency of testing, and results; as well as when and which version was last audited.



## Gather Data & Perform Initial Assessment

**Identify data used by the AEDTs and other candidate or employee data retained by the organization and perform preliminary assessments.**

- ✓ Assess if the organization needs to retain additional data to perform the proposed impact calculations.
- ✓ Perform a “dry run” of the proposed calculations and draft the proposed disclosures to identify potential gaps prior to an independent party performing the bias audit.



## Coordinate Across Functions

**Determine the additional impacted functions across the organization and the involvement required from relevant stakeholders.**

- ✓ Coordinate with human resources and legal functions/departments to prepare or adapt necessary disclosures to comply with the proposed requirements.
- ✓ Assess the governance and oversight practices in place for these efforts (e.g., roles and responsibilities, levels of review, policies and procedures).

# Leading Practices for Consideration

In addition to the practices to address the current requirements for NYC LL 144-21, there are more holistic practices around governance, model development and testing, and the review function that can provide a foundation for organizations to **prepare for potential expanded requirements as the regulatory environment evolves.**



## Governance

- **Implement a governance model** over AEDTs that includes **leading practices, relevant frameworks, and regulations.**
  - The adoption of an appropriate framework, such as [Trustworthy AI™](#), is important in addressing risk considerations such as **fairness, bias, and transparency.**
- If applicable, leverage or adapt preexisting governance frameworks, policies, and testing procedures.



## Model Development and Testing

- **Evaluate the model owner or service provider's test plans and results**, which may include the following components:
  - Procedures and controls to confirm internal/external data inputs for bias, completeness, and consistency.
  - Data proxies that are identified, justified, and tested for bias.
  - Sensitivity analysis to understand underlying model output responsiveness to changes in certain variables or parameters.
- **Track the performance of AEDTs on a regular basis** with a **robust ongoing monitoring process** that includes controls over the inputs and outputs and monitors the sensitivity and stability of the underlying models.
- **Document** the organization's governance, development, and testing of AEDTs.



## Review Function

- **Implement a second line of defense** to review and test AEDTs.
- Evaluate the adequacy of testing and **identify any gaps in the testing plan.**
- Evaluate any **changes to governance and policies, performance and ongoing testing results, remediation of gaps or deficiencies in related controls and processes**, as part of an ongoing monitoring plan.
- **Keep relevant stakeholders** across the organization informed of the results of the monitoring plan.

# How Deloitte Can Help

We bring industry and technology experience to help mitigate bias risk throughout the AI journey from **strategy to implementation.**

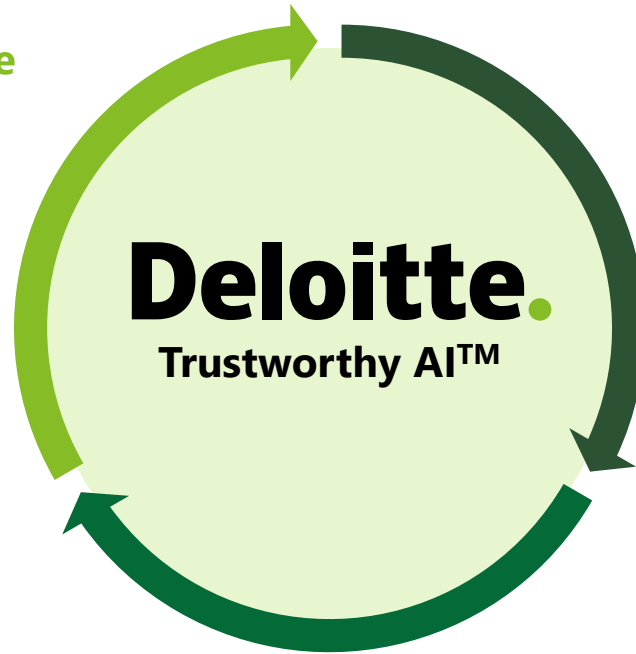


## AI Strategy and Governance

Assist management in establishment of an AI risk management strategy and governance structure to manage risks, promote accountability, and enable compliance.

### — Illustrative Objectives —

- Appropriate oversight by executive leadership, the board, and enterprise risk functions
- Organizational structures in place to coordinate and manage risks for bias
- Policies, procedures, and guidance exist to ensure accountability and integration of controls in operational processes



## AI Monitoring, Testing, and Validation

**Objective assessment of automated decision systems, including AI enabled systems, models, and data for bias.**



## AI Design, Development, Deployment, and Use

Assist management in development and implementation of AI and ML model risk processes, tools, and controls to address risks throughout the data and product development life cycle.

### — Illustrative Objectives —

- Appropriately designed AI risk management protocols, tools, and controls
- Effective integration into product/model development processes, and supporting documentation
- Training and guidance on ethical AI practices

### — Illustrative Objectives —

- Bias assessment and testing procedures related to regulatory requirements
- Effectiveness assessment and validation of AI models, systems, and related controls

# Best Practices

# What Can You Do?

## Policies, Procedures, and Tools

- 1) Conducting Job Analyses
- 2) Conducting Routine Bias Audits and Monitoring for Bias
- 3) Providing Adequate Notice to Users
- 4) Conducting Thorough Vendor Due Diligence
  - Ensuring compliance with national and international standards and laws
  - Tailoring the automated tool to your organizational needs





# High Level Takeaways About **Local Law 144**

- **Enforcement Begins July 5, 2023**
- **Conduct Annual Bias Audits**
- **Publicly Post Summary of Bias Audit + Distribution Date**
- **Prepare Notices to NYC Applicants and Employees**
- **FAQs Forthcoming**



**GIBSON DUNN**

**THANK YOU!**

Danielle Moss

*Partner*

Gibson, Dunn & Crutcher LLP

[DMoss@gibsondunn.com](mailto:DMoss@gibsondunn.com)

Emily Lamm

*Associate*

Gibson, Dunn & Crutcher LLP

[ELamm@gibsondunn.com](mailto:ELamm@gibsondunn.com)

**Brian Cassidy****Audit & Assurance  
Partner**Deloitte & Touche LLP  
Email: [bcassidy@deloitte.com](mailto:bcassidy@deloitte.com)**Ryan Hittner****Audit & Assurance  
Managing Director**Deloitte & Touche LLP  
Email: [rhittner@deloitte.com](mailto:rhittner@deloitte.com)**John Fogarty****Audit & Assurance  
Senior Manager**Deloitte & Touche LLP  
Email: [johfogarty@deloitte.com](mailto:johfogarty@deloitte.com)**Ed Hayden****Audit & Assurance  
Senior Manager**Deloitte & Touche LLP  
Email: [ehayden@deloitte.com](mailto:ehayden@deloitte.com)**Morgan Dove****Audit & Assurance  
Senior Manager**Deloitte & Touche LLP  
Email: [mdove@deloitte.com](mailto:mdove@deloitte.com)

This publication contains general information only and Deloitte is not, by means of this publication, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This publication is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this publication.

The services described herein are illustrative in nature and are intended to demonstrate our experience and capabilities in these areas; however, due to independence restrictions that may apply to audit clients (including affiliates) of Deloitte & Touche LLP, we may be unable to provide certain services based on individual facts and circumstances.

**About Deloitte**

As used in this document, "Deloitte" means Deloitte & Touche LLP, a subsidiary of Deloitte LLP. Please see [www.deloitte.com/us/about](http://www.deloitte.com/us/about) for a detailed description of our legal structure. Certain services may not be available to attest clients under the rules and regulations of public accounting.

Copyright © 2023 Deloitte Development LLC. All rights reserved.