Gauging The Scope Of NYC's New AI Employment Law

By **Harris Mufson, Justin DiGennaro and Emily Lamm** (August 31, 2023, 5:50 PM EDT)

As more employers use artificial intelligence tools to make employment decisions, administrative agencies and legislators have begun to take notice.

The U.S. Equal Employment Opportunity Commission, for example, recently required an online tutoring company, iTutorGroup, to pay $365,000 to job seekers who were allegedly subjected to algorithmic age discrimination.[1]

Meanwhile, earlier this year, Sen. Bob Casey, D-Pa., introduced the No Robot Bosses Act, which would prohibit employers from relying exclusively on automated decision systems, as well as impose disclosure, testing, validation, human oversight, and employee training requirements.[2]

And significantly, New York City's Department of Consumer and Worker Protection, or DCWP, has begun enforcing Local Law 144.[3] That law restricts employers and employment agencies in New York City from using an automated employment decision tool in hiring and promotions decisions unless the tool has been subjected to an annual bias audit of conducted by an independent auditor.

It also imposes notification and posting requirements concerning the use of such tools.

In advance of the July 5 enforcement date, employers in New York City had been clamoring for clearer guidance as Local Law 144 left many scratching their heads about the law's scope and bias audit requirements.

In response, in April, the DCWP issued final rules implementing the law.[4] It then published answers to FAQs on June 30.[5] The final rules and FAQs are helpful in resolving some of the open questions, but many still remain.
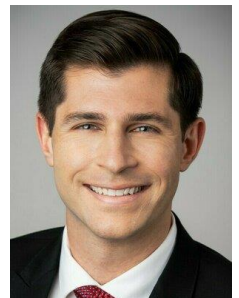
This article highlights some of the key clarifications and open questions facing employers attempting to comply with this novel law that attempts to regulate new and evolving technology.

NYC Office Location Is Key

The DCWP makes clear that Local Law 144 applies only to employers that use an automated

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employment decision tool in the city.

The FAQs clarify that the phrase "in the city" applies to instances in which: (1) the job is located, at least part time, in New York City, (2) the location "associated with" a fully remote job is an office in New York City, or (3) an employment agency is located in New York City, or if not, either (1) or (2) applies.

The FAQs do not explain what it means for a fully remote job to be associated with a New York City office.

As a result, employers lack meaningful guidance about whether the law's requirements apply to remote employees who report to or otherwise receive instructions from supervisors in New York City, if they must occasionally come into the New York City office, or if they receive their paycheck from an employer issuing payroll from a location in New York City.

Employment Decisions Need Not Be Final

To be covered by Local Law 144's annual bias audit requirement, an automated employment decision tool must be "used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons."

An employment decision is defined as screening "candidates for employment or employees for promotion within the city."

During its May roundtable events, the DCWP emphasized that the definition of employment decision in Local Law 144 includes decisions "at any point in the process" and not only the ultimate decision to hire or promote a particular individual.[6]

Likewise, the FAQs state that employment decisions include screening and are not limited to "just the final hiring or promotion decision."

Covered Employment Decisions Do Not Include Proactive Candidate Sourcing

In the wake of the law's passage, employers requested clarification about whether prospective and actual applicants for employment fall within the scope of the law.

The final rules clarified that a candidate for employment is limited to those who have "applied for a specific employment position by submitting the necessary information or items in the format required by the employer or employment agency."

To the extent ambiguity remained, the FAQs then further clarified that if an employer or employment agency uses an automated employment decision tool solely for purposes of identifying candidates by scanning resume banks, conducting outreach, or inviting applications — as opposed to evaluating applicants who had already applied — such use would not be subject to Local Law 144's requirements.

Little to No Specifics for "Test Data" or "Statistical Significance"

Local Law 144 generally requires the bias audit to use historical data, which is data collected during an employer's use of the automated employment decision tool.

However, the final rules state that if "insufficient historical data is available to conduct a statistically significant bias audit," then "test data" may be used. This clarification was helpful to address employers' concern about conducting a bias audit when it does not maintain historical data or has never before used an automated employment decision tool.

With that said, the final rules do not clearly explain what test data is, defining it as data "that is not historical data." Employers are therefore left to grapple with the question of what data can be used to conduct a bias audit and how to obtain it.

The DCWP also effectively punted on defining "statistical significance," explaining in the FAQs that it sought to provide flexibility for independent auditors and to allow for the "development of best practices in this rapidly developing field."

The FAQs state that the publicly posted summary of the bias audit must include the source of the data, how it was sourced or developed, and an explanation of the data used.

As such, the DCWP has taken the position that employers are required to publicly explain the specifics of the test data selected and why there was insufficient historical data to conduct a statistically significant audit.

Compliance Responsibility Rests With Employers, Not Vendors

The FAQs state that a vendor of an automated employment decision tool is not responsible for conducting a bias audit of its own tool.

Instead, employers are ultimately responsible for complying with Local Law 144's bias audit requirements. Having said that, the FAQs also provide that a vendor may have an independent auditor perform a bias audit of the vendor's own tool.

For example, if the automated employment decision tool has never been used before, the final rules and FAQs state that an employer may rely exclusively upon the historical data of other employers. Under these circumstances, the employer may be able to rely upon a bias audit conducted by an independent auditor that was engaged by the vendor.

However, once the employer has used the automated employment decision tool and amassed a sufficient amount of its own historical data, the employer would no longer be able to rely upon such a bias audit based exclusively on the historical data of other employers.

Local Law 144's Bias Audit Does Not Relieve Employers of Their Obligations Under Other Anti-Discrimination Laws

The FAQs state that compliance with Local Law 144 alone will not insulate employers and employment agencies from potential liability associated with their use of automated employment decision tools as employers remain subject to federal, state and local anti-discrimination laws.

Further, the FAQs state that the DCWP will refer any claims of discrimination to the New York City Commission on Human Rights.

EEOC Commissioner Keith Sonderling has similarly stated that compliance with Local Law 144 does not

provide immunity in the context of existing equal employment opportunity laws,[7] which protect many more categories and characteristics than Local Law 144's coverage of sex, race and ethnicity.

As such, employers must be thoughtful in terms of the historical data and test data that they use to conduct the bias audit — e.g., by ensuring that a diverse, high-quality dataset is used — and cognizant of the results of a bias audit to the extent it reveals a disparate impact, especially because such results must be publicly disclosed.

Conclusion

Although many laws have been proposed during the first half of 2023, New York City's Local Law 144 is the most expansive law in the U.S. regulating the use of automated employment decision tools in employment. Its effect will undoubtedly be closely watched — and scrutinized — by the federal government, states and other cities.

New York state, for example, is considering a trio of very similar laws.

A.B. 567 would require employers using automated employment decision tools to screen employment candidates to conduct disparate impact analyses based on sex, race, ethnicity and other protected classes.[8]

A.B. 7859 would require notice to each employee or applicant who would be subject to an automated employment decision tool, including the job qualifications and characteristics used in its assessment and information about the type of data collected for use by the automated employment decision tool.[9]

Similarly, S.B. 7632, introduced on Aug. 4, mirrors all the requirements of Local Law 144 but would also cover a much broader array of employment decisions affecting the terms or conditions of employment and expressly apply to independent contractors.[10]

Notably, S.B. 7632 would prohibit employers from solely relying on an automated employment decision tool's output in making a hiring, promotion, termination, disciplinary or compensation decision. Although Local Law 144 is not a paragon of clarity, New York legislators seem convinced that it serves as a model worth reproducing and expanding.

In the wake of Local Law 144's passage and 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 unfortunately, many critical questions still remain.

As a result, employers and employment agencies are faced with the unsettling reality of attempting to comply with the law without clear guidance, while simultaneously developing policies that satisfy their business needs and account for the developing patchwork of federal, state, and local laws governing the use of artificial intelligence technology.

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[1] https://www.law360.com/employment-authority/articles/1709709.

[2] https://www.casey.senate.gov/news/releases/no-robot-bosses-casey-introduces-legislation-to-protect-workers-from-being-managed-by-ai-and-bots.

[3] https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9.

[4] https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf

[5] https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf.

[6] https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-Educational-Roundtable-with-Business-Advocates-Employers.pdf.

[7] https://www.computerworld.com/article/3703650/eeoc-chief-ai-system-audits-might-comply-with-local-discrimination-laws-but-not-federal-ones.html.

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