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New York City Adopts Final Rules for Law Governing Automated Employment Decision Tools

The New York City Department of Consumer and Worker Protection (DCWP) adopted final rules for Local Law 144 on April 6, 2023. This landmark law prohibits employers from using automated employment decision tools (AEDTs) to evaluate job candidates or employees when making employment decisions, unless certain bias audit and notice requirements are met. Enforcement of the law will begin on July 5, 2023.

Summary of Employer Obligations Under Local Law 144

Covered Entities

Employers physically located in New York City, or that have job candidates or employees that reside in the city, fall within the scope of Local Law 144. Additionally, the law also applies to "employment agencies," which are defined broadly and include, among other organizations, entities that, for a fee, render vocational guidance or counseling services, provide information about job search techniques or strategies, or assist applicants in presenting their credentials to employers.

Covered AEDTs

Under Local Law 144, an AEDT includes "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" in employment decisions. The law expressly excludes tools such as junk email filters, firewalls, antivirus softwares, calculators, spreadsheets, databases, data sets, or other compilations of data that (1) do not automate, support, substantially

assist, or replace discretionary decision-making processes and (2) do not materially affect individuals.

A nonexhaustive list of tools that may fall within the definition of an AEDT includes the following:

- Applicant screening and rating or candidate stacking software.
- Automated learning and training programs.
- Virtual training programs.
- Onboarding software.
- Employee engagement and retention software.

Importantly, to be considered an AEDT within the meaning of the law, such tools must "substantially assist or replace" an employer's discretionary decision-making in hiring or promotion decisions. The final rules clarified that the phrase "to substantially assist or replace discretionary decision making" means:

- Relying solely on a simplified output (score, tag, classification, ranking, etc.) with no other factors considered.
- Using a simplified output as one of a set of criteria where the simplified output is weighted more than any other criterion in the set.
- Using a simplified output to overrule conclusions derived from other factors, including human decision-making.

Bias Audit Obligations

NYC's Local Law 144 prohibits an employer or employment agency from using AEDTs to make job candidate hiring or employee promotion decisions in New York City unless all three of the following conditions have been met:

- The AEDT has been subject to a "bias audit" within one year prior to its use.
- A summary of the bias audit results and the date the employer or employment agency began using the AEDT have been posted to the employer or employment agency's website.
- Certain notices are provided to employees or job candidates, as described below.

Either a covered employer, employment agency, or a vendor that developed or distributes the AEDT may commission a bias audit which must be completed by "Independent Auditors." "Independent Auditors" are defined as objective and impartial individuals or groups who (1) are not and have not been involved in the use, development, or distribution of the AEDT; (2) have not at any point during the bias audit been employed by the employer, employment agency, or AEDT vendor; and (3) have no direct financial interest or material indirect financial interest in the employer, employment agency, or AEDT vendor.

A bias audit must calculate the "selection rate" for certain race/ethnicity and sex categories and the "impact ratio" comparing the most selected category for each race/ethnicity, sex, and intersectional category. The final rules add additional requirements for bias audits, such as the publication of the number of individuals whose race/ethnicity and sex are "unknown" and thus excluded from the calculations.

Notice Obligations

Local Law 144 also requires covered employers or employment agencies to provide specific notices to employees or job candidates, including:

- At least 10 days' prior notice that the AEDT will be used and that the candidate or employee may request an alternative selection process or accommodation.

- At least 10 days' prior notice of the job qualifications and characteristics the AEDT will use to assess the candidate or employee.
- Information about the type, source, and retention policy relating to data collected for the AEDT.

Penalties

The Corporation Counsel of the New York City Law Department may enforce Local Law 144 and may fine employers or employment agencies not more than $500 on the day of the first violation, and between $500 and $1,500 for each subsequent violation.

Impact of the Final Rules

While the final rules largely mirror previously published proposed rules, the final rules (1) expand the scope of what technology may qualify as an AEDT, (2) add additional bias audit standards, (3) clarify the information that must be included in the bias audit and the type of information that must be disclosed in the audit summary, and (4) clarify when an employer may rely on a bias audit conducted using the historical data of other employers or employment agencies.

Looking Forward: What Employers Can Do Now

Employers and employment agencies physically located in New York City or that have job candidates or employees in the city should promptly assess whether applicant-screening or employee-evaluation technologies currently in use or being evaluated for future use fall within the scope of Local Law 144.

Many employers and employment agencies will likely be affected by this law; they should ensure that their AEDT bias audits and notice procedures comply with the law's requirements to avoid potential penalties. For more information about artificial intelligence (AI) and automated systems used in the employment context, please read our related Update.

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