

Statement of Basis and Purpose of Proposed Rule

The Department of Consumer and Worker Protection (“DCWP” or “Department”) is proposing to add rules to implement new legislation regarding automated employment decision tools (“AEDT”). Local Law 144 of 2021 (“LL 144”) prohibits employers and employment agencies from using an automated employment decision tool unless the tool has been subject to a bias audit within one year of the use of the tool, information about the bias audit is publicly available, and certain notices have been provided to employees or job candidates.

These proposed rules establish that a bias audit of an AEDT must calculate the selection rate for each race/ethnicity and sex category that is required to be reported on to the U.S. Equal Employment Opportunity Commission (“EEOC”) pursuant to the EEO Component 1 report, and compare the selection rates to the most selected category to determine an impact ratio. These calculations are consistent with Section 1607.4 of the EEOC Uniform Guidelines on Employee Selection Procedures. See 29 CFR § 1607.4. These proposed rules generally clarify obligations of employers and employment agencies under the new law.

Specifically, these proposed new rules would:

- Define terms;
- Clarify the requirements for a bias audit;
- Clarify the requirements for the published results of the required bias audit;
- Clarify the requirements for notices that employers and employment agencies must provide to employees and candidates for employment; and
- Clarify other obligations for the employer or employment agency.

The Department published an initial version of these rules in September 2022. The Department received comments about that version from the public, including from employers, employment agencies, law firms, AEDT developers, and advocacy organizations. Various issues raised in the comments have resulted in changes to the proposed rules. These changes include:

1. Modifying the definition of AEDT to ensure it is focused;
2. Clarifying that an “independent auditor” may not be employed or have a financial interest in an employer or employment agency that seeks to use or continue to use an AEDT or in a vendor that developed or distributed the AEDT;
3. Revising the required calculation to be performed where an AEDT scores candidates;
4. Clarifying that the required “impact ratio” must be calculated separately to compare sex categories, race/ethnicity categories, and intersectional categories;
5. Clarifying the types of data that may be used to conduct a bias audit;
6. Clarifying that multiple employers using the same AEDT may rely upon the same bias audit so long as they provide historical data, if available, for the independent auditor to consider in such bias audit; and
7. Clarifying that an AEDT may not be used if its most recent bias audit is more than one year old;

Sections 1043 and 2203(f) of the New York City Charter and Section 20-104(b) of the New York City Administrative Code authorize the Department of Consumer and Worker Protection to make these proposed rules.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Proposed Rule Amendments

Section 1. Chapter 5 of Title 6 of the Rules of the City of New York is amended to add Subchapter T as follows:

Subchapter T: Automated Employment Decision Tools

§ 5-300. Definitions.

As used in this subchapter, the following terms have the following meanings:

Automated Employment Decision Tool. “Automated employment decision tool” or “AEDT” means “Automated employment decision tool” as defined by § 20-870 of the Code where the phrase “to substantially assist or replace discretionary decision making” means (i) to rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other factors considered; (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.

Bias Audit. “Bias audit” means “Bias audit” as defined by § 20-870 of the Code.

Candidate for Employment. “Candidate for employment” means a person who has applied for a specific employment position by submitting the necessary information or items in the format required by the employer or employment agency.

Category. “Category” means any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code as specified in part 1602.7 of title 29 of the code of federal regulations, as designated on the Equal Employment Opportunity Commission Employer Information Report EEO-1.

Code. “Code” means the Administrative Code of the City of New York.

Distribution Date. “Distribution date” means the date the employer or employment agency began using a specific AEDT.

Employment Decision. “Employment decision” means “Employment decision” as defined by § 20-870 of the Code.

Employment Agency. “Employment agency” means “Employment agency” as defined by 6 RCNY § 5-249.

Historical data. “Historical data” means data collected during an employer or employment agency’s use of an AEDT to assess candidates for employment or employees for promotion.

Independent Auditor. “Independent auditor” means a person or group that is capable of exercising objective and impartial judgment on all issues within the scope of a bias audit of an AEDT. An auditor is not an independent auditor of an AEDT if the auditor:

- i. is or was involved in using, developing, or distributing the AEDT;
- ii. at any point during the bias audit, has an employment relationship with an employer or employment agency that seeks to use or continue to use the AEDT or with a vendor that developed or distributes the AEDT; or
- iii. at any point during the bias audit, has a direct financial interest or a material indirect financial interest in an employer or employment agency that seeks to use or continue to use the AEDT or in a vendor that developed or distributed the AEDT.

Impact Ratio. “Impact ratio” means either (1) the selection rate for a category divided by the selection rate of the most selected category or (2) the scoring rate for a category divided by the scoring rate for the highest scoring category.

$$\text{Impact Ratio} = \frac{\text{selection rate for a category}}{\text{selection rate of the most selected category}}$$

OR

$$\text{Impact Ratio} = \frac{\text{scoring rate for a category}}{\text{scoring rate of the highest scoring category}}$$

Machine learning, statistical modelling, data analytics, or artificial intelligence. “Machine learning, statistical modelling, data analytics, or artificial intelligence” means a group of mathematical, computer-based techniques:

- i. that generate a prediction, meaning an expected outcome for an observation, such as an assessment of a candidate’s fit or likelihood of success, or that generate a classification, meaning an assignment of an observation to a group, such as categorizations based on skill sets or aptitude; and
- ii. for which a computer at least in part identifies the inputs, the relative importance placed on those inputs, and other parameters for the models in order to improve the accuracy of the prediction or classification; and
- iii. for which the inputs and parameters are refined through cross-validation or by using training and testing data.

Scoring Rate. “Scoring Rate” means 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.

Screen. “Screen” means to make a determination about whether a candidate for employment or employee being considered for promotion should be selected or advanced in the hiring or promotion process.

Selection Rate. “Selection rate” means 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. Such rate may be calculated by dividing the number of individuals in the category moving forward or assigned a classification by the total number of individuals in the category who applied for a position or were considered for promotion.

Example. If 100 Hispanic women apply for a position and 40 are selected for an interview after use of an AEDT, the selection rate for Hispanic women is 40/100 or 40%.

Simplified output. “Simplified output” means a prediction or classification as specified in the definition for “machine learning, statistical modelling, data analytics, or artificial intelligence.” A simplified output may take the form of a score (e.g., rating a candidate’s estimated technical skills), tag or categorization (e.g., categorizing a candidate’s resume based on key words, assigning a skill or trait to a candidate), recommendation (e.g., whether a candidate should be given an interview), or ranking (e.g., arranging a list of candidates based on how well their cover letters match the job description). It does not refer to the output from analytical tools that translate or transcribe existing text, e.g., convert a resume from a PDF or transcribe a video or audio interview.

Test data. “Test data” means data used to conduct a bias audit that is not historical data.

§ 5-301 Bias Audit.

- (a) An employer or employment agency may not use or continue to use an AEDT if more than one year has passed since the most recent bias audit of the AEDT.

(b) Where an AEDT selects candidates for employment or employees being considered for promotion to move forward in the hiring process or classifies them into groups, a bias audit must, at a minimum:

- (1) Calculate the selection rate for each category;
- (2) Calculate the impact ratio for each category; and
- (3) The calculations required in paragraphs (1) and (2) of this section must separately calculate the impact of the AEDT on:
 - i. Sex categories (i.e., impact ratio for selection of male candidates vs female candidates),
 - ii. Race/Ethnicity categories (e.g., impact ratio for selection of Hispanic or Latino candidates vs Black or African American [Not Hispanic or Latino] candidates)
 - iii. intersectional categories of sex, ethnicity, and race (e.g., impact ratio for selection of Hispanic or Latino male candidates vs. Not Hispanic or Latino Black or African American female candidates).
- (4) Where an AEDT classifies candidates for employment or employees being considered for promotion into groups (e.g., leadership styles), the calculations in paragraphs (1), (2), and (3) of this subdivision must be performed for each group.

Example: An employer wants to use an AEDT to screen resumes and schedule interviews for a job posting. To do so, the employer must ensure that a bias audit of the AEDT was conducted no more than a year prior to the planned use of the AEDT. The employer asks the vendor for a bias audit. The vendor provides historical data regarding applicant selection that the vendor has collected from multiple employers to an independent auditor who will conduct a bias audit as follows:

<u>Sex Categories</u>				
	<u># of Applicants</u>	<u># Selected</u>	<u>Selection Rate</u>	<u>Impact Ratio</u>
Male	1390	667	48%	1.00
Female	1181	555	47%	0.979

<u>Race/Ethnicity Categories</u>				
	<u># of Applicants</u>	<u># Selected</u>	<u>Selection Rate</u>	<u>Impact Ratio</u>
<u>Hispanic or Latino</u>	408	204	50%	0.97
<u>White (Not Hispanic or Latino)</u>	797	412	52%	1.00
<u>Black or African American (Not Hispanic or Latino)</u>	390	170	44%	0.84
<u>Native Hawaiian or Pacific Islander (Not Hispanic or Latino)</u>	119	52	44%	0.85
<u>Asian (Not Hispanic or Latino)</u>	616	302	49%	0.95
<u>Native American or Alaska Native (Not Hispanic or Latino)</u>	41	18	44%	0.85
<u>Two or More Races (Not Hispanic or Latino)</u>	213	96	45%	0.87

<u>Intersectional Categories</u>						
-	-	-	<u># of Applicants</u>	<u># Selected</u>	<u>Selection Rate</u>	<u>Impact Ratio</u>
<u>Hispanic or Latino</u>		<u>Male</u>	<u>205</u>	<u>90</u>	<u>43.9%</u>	<u>0.841</u>
		<u>Female</u>	<u>190</u>	<u>82</u>	<u>43.2%</u>	<u>0.827</u>
<u>Non/Hispanic or Latino</u>	<u>Male</u>	<u>White</u>	<u>412</u>	<u>215</u>	<u>52.2%</u>	<u>1.000</u>
		<u>Black or African American</u>	<u>226</u>	<u>95</u>	<u>42.0%</u>	<u>0.806</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>87</u>	<u>37</u>	<u>42.5%</u>	<u>0.815</u>
		<u>Asian</u>	<u>321</u>	<u>167</u>	<u>52.0%</u>	<u>0.997</u>
		<u>Native American or Alaska Native</u>	<u>24</u>	<u>11</u>	<u>45.8%</u>	<u>0.878</u>
		<u>Two or More Races</u>	<u>115</u>	<u>52</u>	<u>45.2%</u>	<u>0.866</u>
	<u>Female</u>	<u>White</u>	<u>385</u>	<u>197</u>	<u>51.2%</u>	<u>0.981</u>
		<u>Black or African American</u>	<u>164</u>	<u>75</u>	<u>45.7%</u>	<u>0.876</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>32</u>	<u>15</u>	<u>46.9%</u>	<u>0.898</u>
		<u>Asian</u>	<u>295</u>	<u>135</u>	<u>45.8%</u>	<u>0.877</u>
		<u>Native American or Alaska Native</u>	<u>17</u>	<u>7</u>	<u>41.2%</u>	<u>0.789</u>
		<u>Two or More Races</u>	<u>98</u>	<u>44</u>	<u>44.9%</u>	<u>0.860</u>

(c) Where an AEDT scores candidates for employment or employees being considered for promotion, a bias audit must, at a minimum:

- (1) Calculate the median score for the full sample of applicants;
- (2) Calculate the scoring rate for individuals in each category;
- (3) Calculate the impact ratio for each category;
- (4) The calculations required in paragraphs (1), (2), and (3) of this section must separately calculate the impact of the AEDT on:
 - i. Sex categories (i.e., impact ratio for selection of male candidates vs female candidates),
 - ii. Race/Ethnicity categories (e.g., impact ratio for selection of Hispanic or Latino candidates vs Black or African American [Not Hispanic or Latino] candidates)
 - iii. intersectional categories of sex, ethnicity, and race (e.g., impact ratio for selection of Hispanic or Latino male candidates vs. Not Hispanic or Latino Black or African American female candidates).

Example: An employer uses an AEDT to score applicants for “culture fit.” To do so, the employer must ensure that a bias audit of the AEDT was conducted no more than a year from the planned use of the AEDT. The employer provides historical data on “culture fit” score of applicants for each category to an independent auditor to conduct a bias audit as follows:

<u>Sex Categories</u>		
	<u>Scoring Rate</u>	<u>Impact Ratio</u>

Male	<u>54.3%</u>	<u>1.00</u>
Female	<u>44.7%</u>	<u>0.82</u>

<u>Race/Ethnicity Categories</u>		
	<u>Scoring Rate</u>	<u>Impact Ratio</u>
<u>Hispanic or Latino</u>	<u>64.2%</u>	<u>1.00</u>
<u>White (Not Hispanic or Latino)</u>	<u>37.5%</u>	<u>0.58</u>
<u>Black or African American (Not Hispanic or Latino)</u>	<u>50.0%</u>	<u>0.78</u>
<u>Native Hawaiian or Pacific Islander (Not Hispanic or Latino)</u>	<u>62.5%</u>	<u>0.97</u>
<u>Asian (Not Hispanic or Latino)</u>	<u>41.7%</u>	<u>0.65</u>
<u>Native American or Alaska Native (Not Hispanic or Latino)</u>	<u>62.5%</u>	<u>0.97</u>
<u>Two or More Races (Not Hispanic or Latino)</u>	<u>50.0%</u>	<u>0.78</u>

<u>Intersectional Categories</u>				
-	-	-	<u>Scoring Rate</u>	<u>Impact Ratio</u>
<u>Hispanic or Latino</u>	<u>Male</u>		<u>75%</u>	<u>1.00</u>
	<u>Female</u>		<u>50%</u>	<u>0.67</u>
<u>Non/Hispanic or Latino</u>	<u>Male</u>	<u>White</u>	<u>35%</u>	<u>0.47</u>
		<u>Black or African American</u>	<u>50%</u>	<u>0.67</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>75%</u>	<u>1.00</u>
		<u>Asian</u>	<u>58.3%</u>	<u>0.78</u>
		<u>Native American or Alaska Native</u>	<u>62.5</u>	<u>0.83</u>
		<u>Two or More Races</u>	<u>50%</u>	<u>0.67</u>
	<u>Female</u>	<u>White</u>	<u>40%</u>	<u>0.53</u>
		<u>Black or African American</u>	<u>50%</u>	<u>.67</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>50%</u>	<u>0.67</u>
		<u>Asian</u>	<u>25%</u>	<u>0.33</u>
		<u>Native American or Alaska Native</u>	<u>62.5%</u>	<u>0.83</u>
		<u>Two or More Races</u>	<u>50%</u>	<u>0.67</u>

§ 5-302 Data Requirements.

- A bias audit conducted pursuant to section 5-301 of this Chapter must use historical data of the AEDT. If insufficient historical data is available to conduct a statistically significant bias audit, test data may be used instead.
- If a bias audit uses test data, the summary of results of the bias audit must explain why historical data was not used and describe how the test data used was generated and obtained.

- (c) A bias audit of an AEDT used by multiple employers or employment agencies may use the historical data of any employers or employment agencies that use the AEDT. However, an employer or employment agency may rely on a bias audit of an AEDT that uses the historical data of other employers or employment agencies only if it provided historical data from its use of the AEDT to the independent auditor for the bias audit or if it has never used the AEDT.

§ 5-303 Published Results.

- (a) Prior to the use of an AEDT, an employer or employment agency in the city must make the following publicly available on the employment section of their website in a clear and conspicuous manner:
- (1) The date of the most recent bias audit of the AEDT and a summary of the results, which shall include the source and explanation of the data used to conduct the bias audit and the selection rates and impact ratios for all categories; and,
 - (2) The distribution date of the AEDT.
- (b) The requirements of subdivision (a) of this section may be met with an active hyperlink to a website containing the required summary of results and distribution date, provided that the link is clearly identified as a link to results of the bias audit.
- (c) An employer or employment agency must keep the summary of results and distribution date posted for at least 6 months after last using the AEDT for an employment decision.

§ 5-304 Notice to Candidates and Employees.

- (a) The notice required by § 20-871(b)(1) of the Code must include instructions for how an individual can request an alternative selection process or a reasonable accommodation under other laws, if available. Nothing in this subchapter requires an employer or employment agency to provide an alternative selection process.
- (b) To comply with § 20-871(b)(1) and (2) of the Code, an employer or employment agency may provide notice to a candidate for employment who resides in the city by doing any of the following:
- (1) Provide notice on the employment section of its website in a clear and conspicuous manner at least 10 business days prior to use of an AEDT;
 - (2) Provide notice in a job posting at least 10 business days prior to use of an AEDT; or,
 - (3) Provide notice to candidates for employment via U.S. mail or e-mail at least 10 business days prior to use of an AEDT.
- (c) To comply with § 20-871(b)(1) and (2) of the Code, an employer or employment agency may provide notice to an employee being considered for promotion who resides in the city by doing any of the following:
- (1) Provide notice in a written policy or procedure that is provided to employees at least 10 business days prior to use of an AEDT;
 - (2) Provide notice in a job posting at least 10 business days prior to use of an AEDT; or,
 - (3) Provide notice via U.S. mail or e-mail at least 10 business days prior to use of an AEDT.
- (d) To comply with § 20-871(b)(3) of the Code, an employer or employment agency must:
- (1) Provide information on the employment section of its website in a clear and conspicuous manner about its AEDT data retention policy, the type of data collected for the AEDT, and the source of the data;
 - (2) Post instructions on the employment section of its website in a clear and conspicuous manner for how to make a written request for such information, and if a written request is received, provide such information within 30 days; or,
 - (3) Provide an explanation to a candidate for employment or employee being considered for promotion why disclosure of such information would violate local, state, or federal law, or interfere with a law enforcement investigation.