CENTER FOR DEMOCRACY & TECHNOLOGY

October 24, 2022

To: New York City Department of Consumer and Worker Protection
42 Broadway
New York, NY 10004

Re: Proposed Rules to Implement Local Law 144 of 2021 on Automated Employment Decision Tools

The Center for Democracy & Technology (CDT) respectfully submits these comments on the Department of Consumer and Worker Protection's proposed rules relating to Local Law 144 of 2021 ("LL 144"), the ordinance that the New York City Council passed last fall relating to employers' notice and audit requirements for the use of Automated Employment Decision Tools (AEDTs). CDT is a nonprofit, nonpartisan 501(c)(3) organization based in D.C. that advocates for stronger civil rights protections in the digital age, including algorithmic tools that can affect workers' access to employment.

CDT supports laws and regulations that ensure that AEDTs are nondiscriminatory and job-related, include proper candidate notice, and are subjected to adequate auditing, oversight, and accountability. CDT appreciates the Council's efforts to establish some level of accountability for AEDTs through the passage of LL 144, and likewise appreciates the Department's efforts to bring clarity to that ordinance through its proposed rules. Nevertheless, as CDT explained after the ordinance passed, we do not believe the ordinance goes far enough in ensuring that AEDTs are tested for potential discriminatory effects, that candidates receive proper notice of the manner in which AEDTs assess them, or that adequate enforcement and remedies are available.[1]

Unfortunately, several of the proposed rules would further diminish the ordinance's effectiveness by narrowing its scope and application in ways that are not supported by the ordinance's text. Our comments discuss the ways in which we believe the draft rules can be strengthened to ensure that the City's workers are protected to the maximum degree possible under the ordinance.

[1] Matthew Scherer and Ridhi Shetty, *NY City Council Rams Through Once-Promising but Deeply Flawed Bill on AI Hiring Tools*, Center for Democracy & Tech. (Nov. 12, 2021), https://cdt.org/insights/ny-city-council-rams-through-once-promising-but-deeply-flawed-bill-on-ai-hiring-tools/.

Proposed interpretation of "Automated Employment Decision Tool" is narrower than the statutory definition

The statutory definition of "automated employment decision tool" covers all automated processes that "substantially assist or replace discretionary decision making" in employment decisions.[2] The proposed rules interpret this term as requiring that the output of an AEDT be the "sole[]" factor in a decision, be "one of a set of criteria where the output is *weighted more than any other criterion in the set*," or "overrule or modify conclusions derived from other factors." This interpretation is unjustifiably narrower than the statutory definition, which encompasses any system that "substantially assist[s]" human decision-making. The term "substantial" means "of ample or considerable amount, quantity, size, etc"[3] as well as items that are "important" or "essential."[4] Therefore, the plain meaning of the statutory definition would designate tools used in a broad range of contexts as AEDTs.

By narrowing the definition to tools that are given sole or primary weight, the proposed rules create a loophole companies could exploit. The rules do not require employers to provide meaningful transparency about how the outputs of AEDTs are weighted and about other factors considered to assess the same candidate. For an AEDT whose output is "one of a set of criteria," an employer could easily design a selection process that circumvents the ordinance or argue that the AEDT does not meet the rules' narrow definition of "substantially assist." For instance:

- An employer could rely on multiple distinct AEDTs and give all of their outputs the same weight; under the rules' definition, none would then qualify as AEDTs.
- An employer could rely on multiple AEDTs whose outputs are weighted differently, so only the one given the most weight would be subject to the ordinance's requirements.
- An employer could give an AEDT's output the same weight as the outputs of non-automated tools or methods used in the overall process, and such an AEDT would fall outside the audit requirements under the rules.

The proposed rules could also lead to inconsistent results--an AEDT that is given 40% weight in a hiring decision might not qualify (if another factor is weighted the same or slightly more), while

[2] N.Y.C. Admin. Code §20-870.
[3] Dictionary.com, *substantial*, based on the Random House Unabridged Dictionary, https://www.dictionary.com/browse/substantial (accessed October 11, 2022).
[4] *Id.*

one that is only given 15% weight might qualify (if there are numerous other factors with lesser weight also considered).

We urge the Department to either leave the term undefined, as the word "substantial" is commonly understood and can be given its plain and ordinary meaning, or else to define it as including tools whose output is "an important or significant factor in an employment decision."

"Candidate for employment" should include all workers subjected to an AEDT

The ordinance defines "employment decision" to mean "to screen candidates for employment or employees for promotion in the city." This definition is already too narrow as it only covers decisions to hire or promote.[5] This excludes decisions regarding "terms, conditions, and privileges of employment" that were previously covered in the legislative text when it was originally introduced.[6]

The proposed rules would unduly restrict this definition even further by limiting what it means to "screen" a "candidate for employment." The proposed rules specify that to "screen" is to determine "whether someone should be selected or advanced in the hiring or promotion process" and that a candidate is only someone "who has applied for a specific employment position." Those definitions are inconsistent with the text of the ordinance; while the ordinance's *notice* requirement only applies to "a candidate *who has applied for a position* for an employment decision," the bias audit requirement applies more broadly to tools used by employers to "screen a candidate for an employment decision." The rules' definition thus inserts language that is not consistent with the term's use in the text of the ordinance.

By narrowing the ordinance's scope to the screening of candidates who actively apply for a job, the proposed rules exclude several categories of automated tools, such as those that target job advertisements or search resume databases or social media to recruit potential candidates. This would exclude a significant number of workers from the ordinance's protection because such tools increasingly determine the candidate pool for jobs in the city.[7] The definition of "screen" is also seemingly narrower than the definition of discriminatory practices under the current City

[5] N.Y.C. Admin. Code §20-870.
[6] Int. No. 1894.
[7] Note that even among workers who do submit an application, the proposed rules' requirement that a worker submit information "in the format required" by the employer could give employers an opportunity to exclude workers from the bill's notice requirements (or from the adverse impact calculations in a bias audit) on a technicality.

Administrative Code, which states that it is unlawful to "represent that any employment or position is not available when in fact it is available." N.Y.C. Admin. Code § 8-107(a)(1).

The rules instead should align more closely with the City's civil rights laws by clarifying that to "screen" means to "make a determination about whether someone should be selected or advanced in the hiring or promotion process, or whether to represent that any employment or job position is available, on the basis of characteristics protected under N.Y.C. Admin. Code § 8-107." The rules should define "candidate for employment" as "a person who applies for a position or who is subjected to an employment decision." This will ensure that all people screened or assessed by an AEDT--and thus all people whose employment prospects the AEDT affects--are covered by the ordinance's bias audit requirements.

Definition of "employment agency" relies on narrow language and should be clarified

The proposed rules use the definition of "employment agency" given in § 5-249 of the Department's regulations, which only says that an "employment agency" includes "all persons who, for a fee, render vocational guidance or counseling services, *and* who directly or indirectly represent" that they do one of the enumerated functions that can help people apply for or secure jobs.[8] The same provision states that "vocational guidance or counseling services" means "services which consist of one or more oral presentations" *and* perform other enumerated functions for people seeking employment.[9] Since the proposed rules only apply to people who have applied for specific job positions, the proposed rules' reference to § 5-249 is only relevant to entities that provide oral presentations to jobseekers *and* that represent that they can secure job positions for the jobseekers who have already applied to those positions.

Given the increasing prevalence of *employer* service providers in the labor market, the definition of "employment agency" should be broad enough to subject any person using AEDTs to try to procure employees for employers or job opportunities for workers to the bill's notice and bias audit requirements. New York State's full definition of "employment agency" captures employer service providers because it applies to "any person who, for a fee, procures or attempts to procure (i) employment or engagements for someone seeking employment or engagements, or (ii) *employees for employers seeking the services of employees*."[10] Similarly, NYC's anti-discrimination laws define the term as "any person undertaking to procure

[8] 6 RCNY §5-249 (emphasis added).
[9] *Id.*
[10] N.Y. Gen. Bus. Law § 171 (emphasis added).

employees or opportunities to work."[11] Both of these definitions would apply to entities that the proposed rules aim to hold accountable. Therefore, the final rules should more directly refer to the broader definition in the State's law and the City's anti-discrimination laws.

The requirements for "independent auditors" should be strengthened to ensure truly independent audits

The proposed definition of "independent auditor" would ensure some semblance of independence by requiring an auditor be "a person or group that is not involved in using or developing" the AEDT for which they perform a bias audit. This does not go far enough, however, in ensuring true independence. An independent auditor should be required to be free of financial or personal conflicts of interest. In addition, the auditor should have a duty to accurately report the results of all tests and analyses conducted during the course of the audit; otherwise, a vendor may be able to pressure an auditor to withhold or modify audit results that are unfavorable to the vendor.

Consequently, we recommend that "independent auditor" be defined as "a person or group that is responsible for conducting a bias audit of an AEDT and that:

- Is not involved in using or developing such AEDT;
- Certifies in the audit report that all results from the audit have been reported and are complete and accurate; and
- Has no financial, personal, or other conflict of interest that would compromise or call into question the auditor's duty or ability to design and conduct the audit to measure impact effectively and to completely and accurately report the audit results."

Notice should be communicated directly to candidates

The ordinance requires an employer to give candidates notice that an AEDT will be used to assess them "no less than ten business days before such use and allow a candidate to request an alternative selection process or accommodation."[12] The rules permit an employer to satisfy this notice requirement simply by posting such a notice "on the careers or jobs section of its

[11] N.Y.C. Admin. Code § 8-102.
[12] N.Y.C. Admin. Code § 20-871(b)(1).

website in a clear and conspicuous manner." But the mere posting of such information does not satisfy the notice requirement contemplated by the ordinance.

As the ordinance text indicates, a key purpose of this requirement is to allow candidates who may need to request an alternative assessment method or accommodation an opportunity to do so.[13] The information required by § 20-871(b)(2) regarding the "job qualifications and characteristics" the AEDT will measure is, relatedly, essential for a candidate to determine whether they may need to make such a request. However, these requirements to notify candidates about the use of an AEDT and qualifications and characteristics it will measure are not enough to ensure candidates have the opportunity to request accommodations or alternative assessment methods.

First, neither the ordinance nor the proposed rules define "job qualifications and characteristics." This leaves employers with the discretion to provide vague or limited information about the characteristics or qualifications that an AEDT will assess. Posting such information on a website does not address the information gap candidates may encounter. Rather, notice should describe to candidates all criteria that the AEDT will evaluate, the purpose of evaluating that criteria, and the data used to measure those criteria.

Second, by allowing employers to satisfy their "notice" obligation by posting the information on a website, the ordinance effectively places the onus on workers to find out that they are being subject to an AEDT and how the AEDT will be used. This exacerbates a flaw in the ordinance itself, which does not require employers to proactively provide candidates with notice about the type of data an AEDT will collect, the sources of such data, or the employer's data retention policy. Rather, it requires employers who do not include this information on their websites to provide it to candidates *upon written request*. The proposed rules simply affirm this, only adding a requirement to post instructions on employers' websites on how to make such written requests--again, placing the onus on candidates to find the necessary information. This is not "notice" in any meaningful sense.

Third, neither the ordinance nor the proposed rules require employers to ensure that websites where notices are provided are easily accessible to candidates with disabilities or candidates without reliable Internet access.

[13] *Id.*

Further, the proposed rules do not clarify that employers have a duty to fulfill requests for reasonable accommodations or alternative assessment methods.

We recommend that the final rules:

- Affirm employers' duty to provide accommodations, recognizing that the use of an AEDT does not relieve employers of this responsibility.
- Require employers to proactively notify candidates that they will be assessed by an AEDT, with a description of the qualifications and characteristics the AEDT will measure, types of data it will use, the sources of the data, and employers' data retention policies.
- Require employers to provide this notice through multiple channels that make the notice accessible to candidates with different needs, rather than allowing employers to choose a single method of notice that does not effectively give candidates the information they need to decide whether they should request accommodations.

Conclusion

While LL 144 recognizes the need for accountability in the use of AEDTs, the law's requirements fall short by merely clarifying employers' existing obligations to report race-, ethnicity-, or sex-based disparate impact and offering notice requirements that employers could easily circumvent. The proposed rules do not effectively implement--much less strengthen--the law's obligations. Instead, the proposed rules limit the law's protections further with narrowed definitions that would exclude several tools from the auditing and transparency requirements. We urge the Department to ensure that final rules maximize the law's requirements to more effectively hold employers accountable for preventing discriminatory outcomes when they deploy AEDTs.

Respectfully submitted,

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