CENTER FOR DEMOCRACY & TECHNOLOGY

January 23, 2023

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

Re: Revised 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 ("DCWP") revised proposed rules to implement Local Law 144 of 2021 ("LL 144") relating to the auditing and notice requirements for employers' use of automated employment decision tools ("AEDTs"). CDT is a nonprofit, nonpartisan 501(c)(3) organization that advocates for stronger civil rights protections in the digital age. CDT's projects include advocating standards and safeguards to ensure that algorithm-driven systems do not interfere with workers' access to employment.

As CDT previously explained, LL 144's bias auditing and notice requirements would not ensure accountability in the use of AEDTs.[1] We submitted comments in October 2022 in which we described how the initial proposed rules would weaken LL 144's effectiveness further and identified changes to mitigate these concerns.[2]

We are encouraged to see some of our recommendations from our previous comments reflected in the revisions. Namely:

- The definition of "independent auditor" has been expanded to minimize auditors' potential conflicts of interest. This definition can be strengthened further by stating that an independent auditor is "a person or group that exercises objective and impartial judgment on all issues" within the scope of an AEDT's bias audit – instead of someone "that is capable of" doing so – to clarify that the auditor is obligated to actually exercise objective and impartial judgment.

[1] Matthew Scherer and Ridhi Shetty, *NY City Council Rams Through Once-Promising but Deeply Flawed Bill on AI Hiring Tools*, Center for Democracy & Technology (Nov. 12, 2021), https://cdt.org/insights/ny-city-council-rams-through-once-promising-but-deeply-flawed-bill-on-ai-hiring-tools/.
[2] Center for Democracy & Technology, Comments on New York City Department of Consumer and Worker Protection's Proposed Rules Implementing Local Law 144 (Oct. 24, 2022), https://cdt.org/wp-content/uploads/2022/10/CDT-Comments-on-NYC-AEDT-proposed-rules.pdf [hereinafter "October 2022 Comments to NYC DCWP"].

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- The information that employers and employment agencies must make publicly available must include the source and explanation of data used to conduct the bias audit.
- Bias audits must also calculate the AEDT's impact on intersections of sex with race or ethnicity.
- Notice to workers must include information on an AEDT's data retention policy, the type of data collected for the AEDT, and the source of the data.

However, these positive changes are outweighed by revisions to the proposed rules that further dilute the protections that LL 144 is supposed to secure. We urge DCWP to make further changes to better protect workers.

New proposed definitions of "automated employment decision tool" and "screen" limit the law's scope even further

The initial proposed rules recognized that LL 144 limits the definition of AEDTs to tools that "substantially assist or replace discretionary decision making," and defined this phrase to mean that the tool either relies "solely on a simplified output," uses a set of criteria in which the simplified output is the criterion given the greatest weight, or uses the simplified output to overrule or modify conclusions derived from other factors. Our previous comments explained that this would enable employers to use AEDTs that still substantially influence the overall employment decision but are not the sole or or primary criterion.[3]

The revised proposed rules make only one change to the definition of AEDTs: the phrase "or modify" is removed from the final clause of the definition, conveying that a tool is an AEDT *only* if it uses a simplified output that *overrules* conclusions derived from other factors, but not if the tool uses a simplified output that modifies such conclusions. This one change even further restricts the types of automated tools that would be covered, leaving more workers unprotected.

This change does not ensure the definition is "focused," as the statement of basis and purpose suggests; it instead creates a loophole that could swallow the law. Employers may be able to evade the requirements of LL 144 simply by casting AEDT's outputs as "recommendations" that human decision-makers either rubber-stamp or hesitate to contradict. We again urge the Department to adopt a definition that restores the full scope of the statutory text, either by leaving the term "substantially assist" with its plain and ordinary meaning, or by ensuring that

[3] *Id.* at 2-3.

the definition includes tools whose output is "an important or significant factor in an employment decision."

Similarly, the definition of "screen" previously applied to a determination about "whether *someone* should be selected or advanced in the hiring or promotion process" (emphasis added). Our previous comments noted that this definition would exclude targeted job advertising and targeted recruiting.[4] We advised that this definition should be broadened to apply to determinations, based on protected characteristics, about whether to represent that any employment or job position is available.[5] Instead, the revised proposed rules further narrow the definition of "screen" to only apply to a determination about whether a "candidate for employment or employee being considered for promotion" should be selected or advanced. This more explicitly excludes determinations about how job advertisements and recruiting efforts are targeted, enabling the use of automated tools to limit which workers learn of job opportunities.

Other critical definitions remain inappropriately narrow

Despite our previous suggestions, the definitions of "candidate for employment," "employment decision," and "employment agency" are left unrevised. As a result, the rules still exclude certain automated tools and actors from coverage that are part of the hiring or promotion process and contribute to discriminatory outcomes throughout the employment cycle. For instance, workers would not be protected from discriminatory targeted job advertising, as they would not be considered candidates and the advertising practice would not be recognized as an employment decision. Platforms that direct job advertisements or recruiters to specific people on behalf of employers would not be recognized as employment agencies despite performing the functions of an employment agency as defined under New York City's anti-discrimination laws and New York State law.[6] We urge the Department to broaden these proposed definitions, in accordance with our corresponding comments on the original proposed rules, which we incorporate herein by reference.[7]

Revisions to the bias audit requirements create new ambiguity

A new addition to the rules' section on bias audits states that the selection rate and impact ratio required for bias audits must separately calculate the AEDT's impact on sex categories,

[4] October 2022 Comments to NYC DCWP, *supra* note 2, at 3.
[5] *Id*. at 4.
[6] N.Y.C. Admin. Code § 8-102; N.Y. Gen. Bus. Law § 171.
[7] October 2022 Comments to NYC DCWP, *supra* note 2, at 3-4.

race/ethnicity categories, and intersectional categories of sex, ethnicity, and race. The unrevised language immediately preceding the addition already establishes this requirement with respect to sex categories and race/ethnicity categories: it states that "a bias audit must, at a minimum" calculate the selection rate for each category and calculate the impact ratio for each category. In its statement of basis and purpose of proposed rule, DCWP states that the revisions clarify that the impact ratio must be calculated separately to compare an AEDT's impact on each category. To better provide this clarification, Section 5-301(b)(3) should state that the calculations required in Section 5-301(b)(1)-(2) must be used to *compare* the impacts of the AEDT on each individual category and on intersectional categories of sex, ethnicity, and race.

Section 5-301(b)(4) states that when the AEDT classifies candidates or employees into "groups," the AEDT's selection rate, impact ratio, and impact on each category must be separately calculated for each group. Based on the parenthetical provided in the provision, the term "groups" appears to be referring to job qualifications and characteristics, but the term is vague in this context. Instead, the provision could refer to an AEDT "assigning" or "generating a classification" for candidates or employees being considered for promotion. This would align with the rules' definitions of "selection rate" and other terms. Another alternative would be for the section to refer to an AEDT classifying candidates or employees based on how job qualifications or characteristics are demonstrated. This would make it all the more important to define "job qualifications and characteristics" as well, which as our previous comments mention, neither the law nor the proposed rules define. The Department should include such a definition in its final rules.

The proposed rules state how the impact ratio can be calculated for an AEDT that selects or classifies candidates or employees and for an AEDT that scores candidates or employees. For the latter type of AEDT, the revised rules replace the previous formula, which was based on a comparison of the average score of people in a given category with the average score of people in the highest scoring category. In the revised rules, the formula is based instead on a comparison of scoring rate between these two categories. The revised rules also add a definition for "scoring rate": "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." To provide the necessary context to reliably determine whether a comparison of scoring rates reflects disparities, the results should also include the number of total applicants and selected applicants included in the sample.

New data requirements for bias audits enable employers to evade scrutiny

The revised proposed rules add a new Section 5-302 to establish that a bias audit must use historical data of the AEDT. If there is insufficient historical data for the bias audit, this section states that test data "may be used instead." If test data is indeed used instead, the bias audit must explain why historical data was not used for the audit, and it must explain how the test data was generated and obtained. Instead of stating that test data "may be used" if there is insufficient historical data, the section should state that test data "must be used instead," to make explicit that employers' obligations do not cease if they have insufficient historical data.

Section 5-300 adds definitions for "test data" and "historical data." "Historical data" is defined as "data collected during an employer or employment agency's use of an AEDT" to assess candidates or employees. This definition allows employers the discretion to decide the type and extent of data that must be used in the bias audit. "Test data" is defined simply as "data used to conduct a bias audit that is not historical data." Here, too, without any further parameters regarding the detail or extent of such data, any non-historical data could be sufficient for employers to consider test data for the purpose of bias audits.

Further, the new Section 5-302 states that a bias audit can use historical data for any employer or employment agency that uses the AEDT when that AEDT is used by multiple employers or employment agencies. This section adds that an employer or employment agency may only rely on a bias audit that uses another's historical data if that employer or employment agency also provides the independent auditor with its own historical data. The revised proposed rules do not address what the independent auditor is obligated to do with an employer's own historical data if the employer relies on a bias audit that uses another employer or employment agency's historical data. In addition, if an employer relies on a bias audit that uses a different employer or employment agency's historical data, that bias audit is even less likely to accurately capture the AEDT's impact on race, sex, and intersectional categories that would be reflected in that employer's own historical data.

To address these issues, we urge the Department to modify Section 5-302 to require an employer's bias audit to use *all* of their own historical data covering the period since the last bias audit was conducted or, if it is the first bias audit for a tool, all available historical data from the employer's own use of the tool. The Department should also clarify that a bias audit can only use data from other employers if all the following conditions are met:

- Other employers' historical data is only used to *supplement* the employer's own historical data;

- Other employers' historical data is used only to the extent needed to draw meaningful conclusions about the tool's discriminatory impact;
- The bias audit distinguishes the employer's own historical data from the data it is using from other employers.

These changes would ensure that employers and vendors cannot manipulate what data the bias audit includes, and ensure that all relevant historical data for each employer is included in each bias audit.

Notice requirements still keep workers at a disadvantage

As mentioned above, the revised proposed rules take a positive step by providing for candidates or employees to receive information about the AEDT data retention policy and the type and source of data collected. Our previous comments urged the DCWP to ensure that employers must proactively provide these details and describe all criteria that will be evaluated and the purpose for using such criteria to workers.[8] We added that all of this information should be provided to workers prior to an AEDT's use and through multiple channels to make notice more accessible to workers with different needs. Otherwise, the onus is left on workers to try to find these details on employers' websites or submit a written request for these details.

However, the revised proposed rules do not require these details to be provided prior to an AEDT's use. Section 5-304(d) continues to allow for employers to wait until they receive a written request to provide information about the AEDT data retention policy and type and source of the collected data, in which case employers are required to provide instructions in a "clear and conspicuous manner" on how to make this request. The revisions clarify that employers must comply with the written request within thirty days, but they do not address whether this notice would be provided before or after an AEDT's use. A fundamental part of all data policies is *prior* notice explaining what data is collected, where it comes from, and how it will be treated – it should be required, not optional, to inform workers about how their data will be handled *before* they provide their data. Therefore, we urge the Department to issue rules explicitly stating that, where practicable, these forms of notice should come before the AEDT's use and should be provided through multiple channels.

Meanwhile, the only information that Section 5-304(b)-(c) requires employers to provide ten days prior to an AEDT's use is (1) that an AEDT will be used and (2) the "job qualifications and

[8] *Id.* at 6-7.

characteristics" that it will evaluate. The term "job qualifications and characteristics" remains undefined, so this ten-day notice period will not ensure that candidates and employees receive the necessary details about how they will be assessed early enough in the selection process to make an informed decision about whether they may need to request accommodations or alternative selection processes. As recommended above, the Department should add a definition for "job qualifications and characteristics" that includes the criteria an AEDT will assess and the purpose of using such criteria.

The revised proposed rules also remove in-person notice from Section 5-304(b)-(c) as a way for employers to provide prior notice, so employers would only be required to provide notice by U.S. mail or email ten days prior to using an AEDT. Unless notice by U.S. mail reaches the worker ten days prior to the AEDT's use, notice by U.S. mail may not provide for timely notice compared to email, and both methods do not account for workers who may rely on in-person notice because they may not have a stable mailing address or internet access. Because this revised definition puts already-marginalized workers at a further disadvantage, the Department should restore the in-person notice option.

Conclusion

We appreciate that some of our recommendations are reflected in the revised proposed rules, but other new changes to the rule will further exclude certain types of discriminatory automated assessment methods from transparency requirements and weaken the auditing and notice obligations under LL 144. DCWP should structure the final rules to establish clearer and more effective auditing obligations for the field of automated assessment methods and to make sure workers receive a meaningful opportunity to access accommodations or alternative methods that provide a fairer selection process.

Respectfully submitted,

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