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New Proposed Rules on New York City Law to Regulate Use of Automated Hiring Tools

Law and the Workplace on **October 5, 2022**

On Friday, September 23rd, the New York City Department of Consumer and Worker Protection issued a Notice of Public Hearing and Opportunity to Comment on Proposed Rules ("Proposed Rules") related to Local Law 144 ("the Law"), a New York City law regulating the use of "automated employment decision tools" by employers, set to go into effect January 1, 2023.

Definitions

Substantially assist or replace discretionary decision

The Proposed Rules provide explanatory definitions which narrow some of the more broadly worded language in the Law. The Law defines the term "automated employment decision tool" to mean "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 for making employment decisions that impact natural persons." The Proposed Rules define the critical phrase "to substantially assist or replace discretionary decision making" to a narrow set of circumstances where a decision maker: i) relies "solely" on the output of the tool ("score, tag, classification, ranking, etc."), with no other factors considered; ii) considers the tool's output in making the decision, weighted more than any other criteria considered, or iii) uses the tool's output to overrule or modify conclusions derived from other factors. Therefore a tool is likely not covered by the Law if the tool's output is not the most significant or only factor driving a promotion or hiring decision.

Candidate for employment or employees for promotion

The Law regulates “employment decisions” involving the hiring of “candidates for employment” or “employees for promotion.” The Proposed Rules define “Candidate for employment” narrowly as a “person who has applied for a specific employment position” and completed that application “by submitting the necessary information and/or items in the format required by the employer or employment agency.” The Proposed Rules, however, do not address the definition of “employees for promotion.” As such, the Law may be more broadly interpreted in the promotion context.

Bias Audit

Under the Law, employers and employment agencies cannot use a covered AEDT unless the tool has been subject to a bias audit within one year. The new Proposed Rules guide bias audits in certain circumstances — “where an AEDT selects individuals to move forward in the hiring process or classifies individuals into groups.” Where the AEDT does meet that description, the bias audit must at a minimum: “(1) Calculate the selection rate for each category and (2) Calculate the impact ratio for each category.” Where an AEDT classifies individuals into groups, the Proposed Rules state “the calculations in paragraphs (1) and (2) must be performed for each such classification.”

Additionally, the Proposed Rules state that “[w]hen an AEDT scores applicants or candidates,” the bias audit must at a minimum: “(1) Calculate the average score for individuals in each category; [and] (2) Calculate the impact ratio for each category.” Significantly no guidance is given regarding bias audits for covered AEDTs that do not match those circumstances. A best practice would be to follow the Proposed Rules for all bias audits performed.

One unresolved issue is how employers who do not collect data such as the race and gender of applicants or candidates can perform the impact ratio calculations. It is often advisable not to ask questions about protected characteristics during the job application process unless law or regulation requires it.

Published Results

The Law requires a publicly available summary of the results of the most recent bias audit of the AEDT posted on the employer or employment agency's website before using the tool. The Proposed Rules state that the summary must be posted "on the careers or jobs section of their website in a clear and conspicuous manner." The Proposed Rules also require that employers keep the summary of results and distribution date posted for at least six months after last using the AEDT for an employment decision.

Notice

The Proposed Rules allow posting required notices to prospective applicants on the employer's website, in a job posting, or via U.S. mail or e-mail. For notice to employees, the Proposed Rules state that an employer may include the notice in a written policy or procedure, in a job posting, or via U.S mail or e-mail.

The Law and the Proposed Rules provide that employers who use a covered AEDT must notify employees or candidates that they can "request an alternative process or accommodation." The Law, however, is silent as to whether an employer must provide an alternative process or accommodation, and the Proposed Rules explicitly state that nothing in the Law "requires an employer or employment agency to provide an alternative selection process."

DCWP will hold a public hearing on the Proposed Rules at **11:00 am on Monday, October 24, 2022**. All comments must be submitted on or before **Monday, October 24, 2022**.