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NYC Set to Enforce Law to Regulate Use of Automated Hiring Tools Starting July 5

Law and the Workplace on **April 7, 2023**

New York City will begin enforcing the New York City Automated Employment Decision Tools ("AEDT") Law, **on July 5, 2023**, delaying the previously announced enforcement date of April 15.

On April 6, 2023, after two sets of proposed Rules and a lengthy notice and comment process, that included public hearings in November 2022 and January 2023, the New York City Department of Consumer and Worker Protection issued final Rules on April 6. The final Rules include several material changes, such as an expanded definition of "machine learning, statistical modeling, data analytics, or artificial intelligence" and clarified requirements for the bias audit and notice and disclosure requirements.

Definitions

The final Rules modify the definition of "automated employment decision tool," which first appeared in the September 2022 proposed rules. 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 final Rules expand the definition of "machine learning, statistical modeling, data analytics, or artificial intelligence," beyond the definition which appeared in the proposed Rules, by deleting the phrase: "[techniques] for which the inputs and parameters are refined through cross-validation or by using training and testing data."

Significantly, the final Rules retain the narrow definition of “to substantially assist or replace discretionary decision making” as a limited set of circumstances where a decision maker using an AEDT relies solely on the output of the tool, considers the tool’s output in making the decision, weighted more than any other criteria considered, or uses the tool’s output to overrule or modify conclusions derived from other factors. This means that an AEDT is likely only covered by the Law if its output is the most significant or only factor driving a promotion or hiring decision.

Bias Audits

Under the Law, before using an AEDT that selects candidates for employment or employees being considered for promotion, an employer or employment agency must have an independent auditor conduct a bias audit. The audit must be repeated annually. The final Rules state that the audit must calculate each protected category’s selection rate and the impact ratio for each category, as well as the number of individuals the AEDT assessed that were not included in the required calculations because they fall within an unknown category. The audit must also calculate the median score for the entire sample of applicants and indicate the number of individuals not included in the calculations because they fall within an unknown category if an employer or employment agency uses an AEDT for promotions.

The final Rules clarify how an audit can be conducted in the absence of historical data. If there is insufficient historical data to conduct a statistically significant audit, the bias audit may use test data. The audit must explain why historical data was not used and describe how the test data was generated and obtained.

Published Results

Employers or employment agencies must post the date of the most recent bias audit with a summary of the results and the date that they began using the AEDT on their website. The summary of results and distribution date must be posted for at least six months after the latest use of the AEDT for an employment decision.

Notice to Candidates and Employees

The Law also requires employers or employment agencies to provide notice to candidates and employees who reside in New York City that an AEDT will be used, which allows for a request for an alternative selection process or accommodation and notice of the job qualifications and characteristics that the AEDT will use. Employers or employment agencies must provide instructions on how an applicant can request an alternative selection process or reasonable accommodation under "other laws." The final Rules specifically indicate that the Law does not require providing an alternative selection process, leaving the provision of such a process to the potential requirements of other laws (e.g. an accommodation request under the federal ADA or the New York City or state Human Rights Laws).

Takeaways

Employers in New York City should determine whether they or any employment agencies they rely upon are using covered AEDTs and ensure they are prepared to comply with the Law's requirements before the July 5 effective date.

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