

## Frequently Asked Questions – Proposed Rules of NYC Dept Consumer & Worker Protection Implementing AI Audit Law (Local Law 144 of 2021)

### 1. Do the proposed rules provide any further clarification of when an AEDT uses "machine learning, statistical modelling, data analytics, or artificial intelligence"?

Yes. The proposed rules clarify that "machine learning, statistical modelling, data analytics, or artificial intelligence" means a group of mathematical, computer-based techniques:

- 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
- 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
- For which the inputs and parameters are refined through cross-validation or by using training and testing data."

### 2. How do the proposed rules define when AEDTs "substantially assist or replace discretionary decision-making?"

AEDTs fall within the scope of the AEDT law if they are used to "substantially assist or replace discretionary decision-making for making employment decisions that impact natural persons."

This means the AEDTs:

- Rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other factors considered;
- Use a simplified output as one of a set of criteria where the output is weighted more than any other criterion in the set; or
- Use a simplified output to overrule or modify conclusions derived from other factors including human decision-making.

### 3. What must be included in the bias audit according to the [proposed rules](#)?

Bias audits must provide data sufficient to evaluate whether there is "disparate impact" discrimination under the approach long used by the EEOC and courts. This means the audit results must include selection rates and impact ratios for each category of candidate based on race/ethnicity and gender. The proposed rules also provide explanations of the terms "selection rates" and "impact rates":

- Selection rate is defined as "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."
- Impact ratios are defined as "either (1) the selection rate for a category divided by the selection rate of the most selected category or (2) the average score of all individuals in a category divided by the average score of individuals in the highest scoring category."

#### **4. What data reflect disparate impact discrimination?**

Generally speaking, there will be a presumption of disparate impact discrimination if the AEDT produces an impact ratio of 80% or less. That means:

- Use of the tool results in members of a protected group being selected at a rate that is 80% or less than the selection rate of the group with the highest selection rate; or
- The AEDT assigns scores (rather than making selections), and the average score for those in a protected group is 80% or less than the average score of those in the highest-scoring group.

This 80% threshold, known as the four-fifths rule, is presumed evidence of discrimination but is not a hard and fast rule. Sample size and other factors (such as legitimate business needs) may impact whether a selection rate/average score may be determined to be evidence of discrimination.

#### **5. What are the penalties for failing to timely comply with the AEDT law?**

The Department of Consumer and Worker Protection published a [penalty schedule](#) for violations of the AEDT law, with penalties ranging from \$375-\$1,500 for each violation. Additionally, covered employers should be aware that they may face potential liability under federal, state and city anti-discrimination laws if the required disclosures reveal potential disparate impact.

#### **6. Are there any important areas the proposed rules do not address?**

The proposed rules address many of the ambiguities introduced by the AEDT law, though certain gaps still remain. For example:

- It remains unclear whether and to what extent the AEDT law applies to non-resident employers that maintain operations in New York City. While the AEDT law requires notice be provided only to residents of New York City, it also defines the term "employment decision" as "screen[ing] candidates for

employment or employees for promotion within the city," suggesting all employers with operations within New York City may be subject to the law. The proposed rules do not provide clarity on this critical issue.

- The law requires employers to perform an audit prior to using an AEDT, but it is unclear what such an audit should look like if the employer has not used the AEDT before. For example, can an employer rely on an independent audit of the AEDT as performed by another organization? Can it rely on an independent audit performed by the maker/licensor of the AEDT? Can it rely on training data or simulated decision-making using its own data? Additionally, though the rules define "independent auditor" as a "person or group that is not involved in using or developing an AEDT that is responsible for conducting a bias audit of such AEDT," it remains unclear as to how this language may be applied under a number of circumstances and who qualifies as an "impartial" evaluator under the AEDT law. This is clearly an area of interest for regulators, so covered employers would be well-served to feel comfortable that their auditor meets the "impartial" criteria.