New York City Department of Consumer and Worker Protection

<u>Notice of Public Hearing and Opportunity to Comment on Proposed Rules</u>

What are we proposing? The Department of Consumer and Worker Protection ("DCWP" or "Department") is proposing to add rules to implement new legislation clarifying the requirements for the use of automated employment decision tools within New York City, the notices to employees and candidates for employment regarding the use of the tool, the bias audit for the tool, and the required published results of the bias audit.

When and where is the hearing? DCWP will hold a public hearing on the proposed rules. The public hearing will take place at 11:00AM on Monday, January 23, 2023. The public hearing will be accessible by phone and videoconference.

- To participate in the public hearing via phone, please dial 646-893-7101
    - Meeting ID: 228 381 285 379
    - Password: TG5jkM

- To participate in the public hearing via videoconference, please follow the online link: https://tinyurl.com/59fjw928
    - Meeting ID: 228 381 285 379
    - Password: TG5jkM

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to DCWP through the NYC rules website at http://rules.cityofnewyork.us.

- **Email.** You can email comments to Rulecomments@dcwp.nyc.gov.

- **By speaking at the hearing.** Anyone who wants to comment on the proposed rules at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 436-0396. You can also sign up on the phone or videoconference before the hearing begins at 11:00AM on Monday, January 23, 2023. You can speak for up to three minutes.

Is there a deadline to submit comments? Yes. You must submit any comments to the proposed rules on or before Monday, January 23, 2023.

What if I need assistance to participate in the hearing? You must tell DCWP's External Affairs division if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You may tell us by telephone at (212) 436-0210 or by email at Rulecomments@dcwp.nyc.gov. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by Monday, January 16, 2023.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at http://rules.cityofnewyork.us/. A few days after the hearing, all comments received by DCWP on the proposed rules will be made available to the public online at http://www1.nyc.gov/site/dca/about/public-hearings-comments.page.

What authorizes DCWP to make this rule? Sections 1043 and 2203(f) of the New York City Charter and Section 20-104(b) of the New York City Administrative Code authorize the Department of Consumer and Worker Protection to make these proposed rules. This proposed rule was not included in the Department of Consumer and Worker Protection's regulatory agenda for this Fiscal Year because it was not contemplated when the Department published the agenda.

Where can I find DCWP's rules? The Department's rules are in Title 6 of the Rules of the City of New York.

What laws govern the rulemaking process? DCWP must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose of Proposed Rule

The Department of Consumer and Worker Protection ("DCWP" or "Department") is proposing to add rules to implement new legislation regarding automated employment decision tools ("AEDT"). Local Law 144 of 2021 ("LL 144") prohibits employers and employment agencies from using an automated employment decision tool unless the tool has been subject to a bias audit within one year of the use of the tool, information about the bias audit is publicly available, and certain notices have been provided to employees or job candidates.

These proposed rules establish that a bias audit of an AEDT must calculate the selection rate for each race/ethnicity and sex category that is required to be reported on to the U.S. Equal Employment Opportunity Commission ("EEOC") pursuant to the EEO Component 1 report, and compare the selection rates to the most selected category to determine an impact ratio. These calculations are consistent with Section 1607.4 of the EEOC Uniform Guidelines on Employee Selection Procedures. See 29 CFR § 1607.4. These proposed rules generally clarify obligations of employers and employment agencies under the new law.

Specifically, these proposed new rules would:

- Define terms;
- Clarify the requirements for a bias audit;
- Clarify the requirements for the published results of the required bias audit;
- Clarify the requirements for notices that employers and employment agencies must provide to employees and candidates for employment; and
- Clarify other obligations for the employer or employment agency.

The Department published an initial version of these rules in September 2022. The Department received comments about that version from the public, including from employers, employment agencies, law firms, AEDT developers, and advocacy organizations. Various issues raised in the comments have resulted in changes to the proposed rules. These changes include:

1. Modifying the definition of AEDT to ensure it is focused;
2. Clarifying that an "independent auditor" may not be employed or have a financial interest in an employer or employment agency that seeks to use or continue to use an AEDT or in a vendor that developed or distributed the AEDT;
3. Revising the required calculation to be performed where an AEDT scores candidates;
4. Clarifying that the required "impact ratio" must be calculated separately to compare sex categories, race/ethnicity categories, and intersectional categories;
5. Clarifying the types of data that may be used to conduct a bias audit;
6. Clarifying that multiple employers using the same AEDT may rely upon the same bias audit so long as they provide historical data, if available, for the independent auditor to consider in such bias audit; and
7. Clarifying that an AEDT may not be used if its most recent bias audit is more than one year old;

Sections 1043 and 2203(f) of the New York City Charter and Section 20-104(b) of the New York City Administrative Code authorize the Department of Consumer and Worker Protection to make these proposed rules.

New material is underlined.
[Deleted material is in brackets.]

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

<center>**Proposed Rule Amendments**</center>

Section 1. Chapter 5 of Title 6 of the Rules of the City of New York is amended to add Subchapter T as follows:

<center>**Subchapter T: Automated Employment Decision Tools**</center>

§ 5-300. Definitions.

As used in this subchapter, the following terms have the following meanings:

Automated Employment Decision Tool. "Automated employment decision tool" or "AEDT" means "Automated employment decision tool" as defined by § 20-870 of the Code where the phrase "to substantially assist or replace discretionary decision making" means (i) to rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other factors considered; (ii) to use a simplified output as one of a set of criteria where the simplified output is weighted more than any other criterion in the set; or (iii) to use a simplified output to overrule conclusions derived from other factors including human decision-making.

Bias Audit. "Bias audit" means "Bias audit" as defined by § 20-870 of the Code.

Candidate for Employment. "Candidate for employment" means a person who has applied for a specific employment position by submitting the necessary information or items in the format required by the employer or employment agency.

Category. "Category" means any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code as specified in part 1602.7 of title 29 of the code of federal regulations, as designated on the Equal Employment Opportunity Commission Employer Information Report EEO-1.

Code. "Code" means the Administrative Code of the City of New York.

Distribution Date. "Distribution date" means the date the employer or employment agency began using a specific AEDT.

Employment Decision. "Employment decision" means "Employment decision" as defined by § 20-870 of the Code.

Employment Agency. "Employment agency" means "Employment agency" as defined by 6 RCNY § 5-249.

Historical data. "Historical data" means data collected during an employer or employment agency's use of an AEDT to assess candidates for employment or employees for promotion.

Independent Auditor. "Independent auditor" means a person or group that is capable of exercising objective and impartial judgment on all issues within the scope of a bias audit of an AEDT. An auditor is not an independent auditor of an AEDT if the auditor:
i.   is or was involved in using, developing, or distributing the AEDT;
ii.   at any point during the bias audit, has an employment relationship with an employer or employment agency that seeks to use or continue to use the AEDT or with a vendor that developed or distributes the AEDT; or
iii.   at any point during the bias audit, has a direct financial interest or a material indirect financial interest in an employer or employment agency that seeks to use or continue to use the AEDT or in a vendor that developed or distributed the AEDT.

Impact Ratio. "Impact ratio" means either (1) the selection rate for a category divided by the selection rate of the most selected category or (2) the scoring rate for a category divided by the scoring rate for the highest scoring category.

$$\text{Impact Ratio} = \frac{\text{selection rate for a category}}{\text{selection rate of the most selected category}}$$

OR

$$\text{Impact Ratio} = \frac{\text{scoring rate for a category}}{\text{scoring rate of the highest scoring category}}$$

Machine learning, statistical modelling, data analytics, or artificial intelligence. "Machine learning, statistical modelling, data analytics, or artificial intelligence" means a group of mathematical, computer-based techniques:

i.   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

ii.   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

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

Scoring Rate. "Scoring Rate" means 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.

Screen. "Screen" means to make a determination about whether a candidate for employment or employee being considered for promotion should be selected or advanced in the hiring or promotion process.

Selection Rate. "Selection rate" means 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.

Example. If 100 Hispanic women apply for a position and 40 are selected for an interview after use of an AEDT, the selection rate for Hispanic women is 40/100 or 40%.

Simplified output. "Simplified output" means a prediction or classification as specified in the definition for "machine learning, statistical modelling, data analytics, or artificial intelligence." A simplified output may take the form of a score (e.g., rating a candidate's estimated technical skills), tag or categorization (e.g., categorizing a candidate's resume based on key words, assigning a skill or trait to a candidate), recommendation (e.g., whether a candidate should be given an interview), or ranking (e.g., arranging a list of candidates based on how well their cover letters match the job description). It does not refer to the output from analytical tools that translate or transcribe existing text, e.g., convert a resume from a PDF or transcribe a video or audio interview.

Test data. "Test data" means data used to conduct a bias audit that is not historical data.

§ 5-301 Bias Audit.

(a) An employer or employment agency may not use or continue to use an AEDT if more than one year has passed since the most recent bias audit of the AEDT.

(b) Where an AEDT selects candidates for employment or employees being considered for promotion to move forward in the hiring process or classifies them into groups, a bias audit must, at a minimum:
   (1) Calculate the selection rate for each category;
   (2) Calculate the impact ratio for each category; and
   (3) The calculations required in paragraphs (1) and (2) of this section must separately calculate the impact of the AEDT on:
      i. Sex categories (i.e., impact ratio for selection of male candidates vs female candidates),
      ii. Race/Ethnicity categories (e.g., impact ratio for selection of Hispanic or Latino candidates vs Black or African American [Not Hispanic or Latino] candidates)
      iii. intersectional categories of sex, ethnicity, and race (e.g., impact ratio for selection of Hispanic or Latino male candidates vs. Not Hispanic or Latino Black or African American female candidates).
   (4) Where an AEDT classifies candidates for employment or employees being considered for promotion into groups (e.g., leadership styles), the calculations in paragraphs (1), (2), and (3) of this subdivision must be performed for each group.

Example: An employer wants to use an AEDT to screen resumes and schedule interviews for a job posting. To do so, the employer must ensure that a bias audit of the AEDT was conducted no more than a year prior to the planned use of the AEDT. The employer asks the vendor for a bias audit. The vendor provides historical data regarding applicant selection that the vendor has collected from multiple employers to an independent auditor who will conduct a bias audit as follows:

Sex Categories			
	# of Applicants	# Selected	Selection Rate	Impact Ratio
Male	1390	667	48%	1.00
Female	1181	555	47%	0.979

Race/Ethnicity Categories				
	# of Applicants	# Selected	Selection Rate	Impact Ratio
Hispanic or Latino	408	204	50%	0.97
White (Not Hispanic or Latino)	797	412	52%	1.00
Black or African American (Not Hispanic or Latino)	390	170	44%	0.84
Native Hawaiian or Pacific Islander (Not Hispanic or Latino)	119	52	44%	0.85
Asian (Not Hispanic or Latino)	616	302	49%	0.95
Native American or Alaska Native (Not Hispanic or Latino)	41	18	44%	0.85
Two or More Races (Not Hispanic or Latino)	213	96	45%	0.87

Intersectional Categories						
-	-	-	# of Applicants	# Selected	Selection Rate	Impact Ratio
Hispanic or Latino		Male	205	90	43.9%	0.841
		Female	190	82	43.2%	0.827
Non/Hispanic or Latino	Male	White	412	215	52.2%	1.000
		Black or African American	226	95	42.0%	0.806
		Native Hawaiian or Pacific Islander	87	37	42.5%	0.815
		Asian	321	167	52.0%	0.997
		Native American or Alaska Native	24	11	45.8%	0.878
		Two or More Races	115	52	45.2%	0.866
	Female	White	385	197	51.2%	0.981
		Black or African American	164	75	45.7%	0.876
		Native Hawaiian or Pacific Islander	32	15	46.9%	0.898
		Asian	295	135	45.8%	0.877
		Native American or Alaska Native	17	7	41.2%	0.789
		Two or More Races	98	44	44.9%	0.860

(c) Where an AEDT scores candidates for employment or employees being considered for promotion, a bias audit must, at a minimum:
  (1) Calculate the median score for the full sample of applicants;
  (2) Calculate the scoring rate for individuals in each category;
  (3) Calculate the impact ratio for each category;
  (4) The calculations required in paragraphs (1), (2), and (3) of this section must separately calculate the impact of the AEDT on:
      i. Sex categories (i.e., impact ratio for selection of male candidates vs female candidates),
      ii. Race/Ethnicity categories (e.g., impact ratio for selection of Hispanic or Latino candidates vs Black or African American [Not Hispanic or Latino] candidates)
      iii. intersectional categories of sex, ethnicity, and race (e.g., impact ratio for selection of Hispanic or Latino male candidates vs. Not Hispanic or Latino Black or African American female candidates).

Example: An employer uses an AEDT to score applicants for "culture fit." To do so, the employer must ensure that a bias audit of the AEDT was conducted no more than a year from the planned use of the AEDT. The employer provides historical data on "culture fit" score of applicants for each category to an independent auditor to conduct a bias audit as follows:

Sex Categories		
	Scoring Rate	Impact Ratio

Male	54.3%	1.00
Female	44.7%	0.82

Race/Ethnicity Categories		
	Scoring Rate	Impact Ratio
Hispanic or Latino	64.2%	1.00
White (Not Hispanic or Latino)	37.5%	0.58
Black or African American (Not Hispanic or Latino)	50.0%	0.78
Native Hawaiian or Pacific Islander (Not Hispanic or Latino)	62.5%	0.97
Asian (Not Hispanic or Latino)	41.7%	0.65
Native American or Alaska Native (Not Hispanic or Latino)	62.5%	0.97
Two or More Races (Not Hispanic or Latino)	50.0%	0.78

Intersectional Categories				
-	-	-	Scoring Rate	Impact Ratio
Hispanic or Latino		Male	75%	1.00
		Female	50%	0.67
Non/Hispanic or Latino	Male	White	35%	0.47
		Black or African American	50%	0.67
		Native Hawaiian or Pacific Islander	75%	1.00
		Asian	58.3%	0.78
		Native American or Alaska Native	62.5	0.83
		Two or More Races	50%	0.67
	Female	White	40%	0.53
		Black or African American	50%	.67
		Native Hawaiian or Pacific Islander	50%	0.67
		Asian	25%	0.33
		Native American or Alaska Native	62.5%	0.83
		Two or More Races	50%	0.67

§ 5-302 Data Requirements.

(a) A bias audit conducted pursuant to section 5-301 of this Chapter must use historical data of the AEDT. If insufficient historical data is available to conduct a statistically significant bias audit, test data may be used instead.

(b) If a bias audit uses test data, the summary of results of the bias audit must explain why historical data was not used and describe how the test data used was generated and obtained.

(c) A bias audit of an AEDT used by multiple employers or employment agencies may use the historical data of any employers or employment agencies that use the AEDT. However, an employer or employment agency may rely on a bias audit of an AEDT that uses the historical data of other employers or employment agencies only if it provided historical data from its use of the AEDT to the independent auditor for the bias audit or if it has never used the AEDT.

§ 5-303 Published Results.

(a) Prior to the use of an AEDT, an employer or employment agency in the city must make the following publicly available on the employment section of their website in a clear and conspicuous manner:
    (1) The date of the most recent bias audit of the AEDT and a summary of the results, which shall include the source and explanation of the data used to conduct the bias audit and the selection rates and impact ratios for all categories; and,
    (2) The distribution date of the AEDT.

(b) The requirements of subdivision (a) of this section may be met with an active hyperlink to a website containing the required summary of results and distribution date, provided that the link is clearly identified as a link to results of the bias audit.

(c) An employer or employment agency must keep the summary of results and distribution date posted for at least 6 months after last using the AEDT for an employment decision.

§ 5-304 Notice to Candidates and Employees.

(a) The notice required by § 20-871(b)(1) of the Code must include instructions for how an individual can request an alternative selection process or a reasonable accommodation under other laws, if available. Nothing in this subchapter requires an employer or employment agency to provide an alternative selection process.

(b) To comply with § 20-871(b)(1) and (2) of the Code, an employer or employment agency may provide notice to a candidate for employment who resides in the city by doing any of the following:
    (1) Provide notice on the employment section of its website in a clear and conspicuous manner at least 10 business days prior to use of an AEDT;
    (2) Provide notice in a job posting at least 10 business days prior to use of an AEDT; or,
    (3) Provide notice to candidates for employment via U.S. mail or e-mail at least 10 business days prior to use of an AEDT.

(c) To comply with § 20-871(b)(1) and (2) of the Code, an employer or employment agency may provide notice to an employee being considered for promotion who resides in the city by doing any of the following:
    (1) Provide notice in a written policy or procedure that is provided to employees at least 10 business days prior to use of an AEDT;
    (2) Provide notice in a job posting at least 10 business days prior to use of an AEDT; or,
    (3) Provide notice via U.S. mail or e-mail at least 10 business days prior to use of an AEDT.

(d) To comply with § 20-871(b)(3) of the Code, an employer or employment agency must:
    (1) Provide information on the employment section of its website in a clear and conspicuous manner about its AEDT data retention policy, the type of data collected for the AEDT, and the source of the data;
    (2) Post instructions on the employment section of its website in a clear and conspicuous manner for how to make a written request for such information, and if a written request is received, provide such information within 30 days; or.
    (3) Provide an explanation to a candidate for employment or employee being considered for promotion why disclosure of such information would violate local, state, or federal law, or interfere with a law enforcement investigation.

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

CERTIFICATION PURSUANT TO

CHARTER §1043(d)

RULE TITLE: Requirement for Use of Automated Employment Decisionmaking Tools

REFERENCE NUMBER: 2022 RG 061

RULEMAKING AGENCY: Department of Consumer and Worker Protection

        I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

(i)   is drafted so as to accomplish the purpose of the authorizing provisions of law;

(ii)   is not in conflict with other applicable rules;

(iii)   to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and

(iv)   to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN   Date: December 15, 2022
Senior Counsel

CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Requirement for Use of Automated Employment Decisionmaking Tools

REFERENCE NUMBER: DCWP-21

RULEMAKING AGENCY: Department of Consumer and Worker Protection

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

(i)   Is understandable and written in plain language for the discrete regulated community or communities;

(ii)   Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and

(iii)   Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro   _December 15, 2022_
Mayor's Office of Operations   Date