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Artificial Intelligence In Employment: What New York City's Local Law 144 Means for Automated Employment Decision Tools

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Today's Agenda

01 Background and legislative history of New York City Local Law 144

02 What constitutes an "automated employment decision tool"

03 Jurisdictional scope

04 What is required for a "bias audit" and who is an appropriate auditor

05 Notice and disclosure requirements

06 Interplay between Local Law 144 and anti-discrimination laws, as well as federal law and EEOC guidance

Artificial Intelligence is already here and is changing the world.

- Technology doesn't need to think and understand like a human being in order to be considered "artificial intelligence."

- Algorithms are everywhere, and technology considered "AI" or machine learning is already part of our daily lives. The world is already changing rapidly because of AI!

- AI advances are possible because generally, they analyze large amounts of data to extract and use patterns in order to predict outcomes.

- In the employment context, these systems are sometimes called "**Automated Employment Decision-making Tools.**"

- There are labor and employment-specific pitfalls when using this technology to assist companies with personnel and management functions.
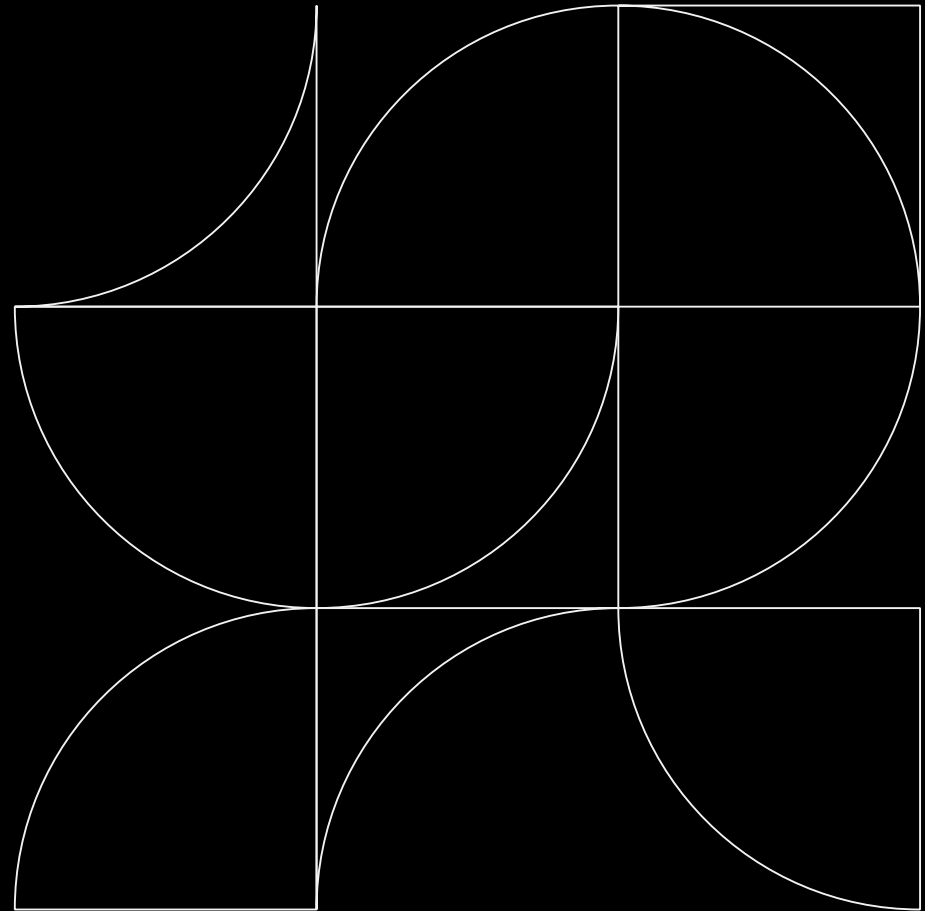
How is Automation Being Used in Employment?

- Many employers are already using AI or automation tools to support their HR function including, but not limited to, in following ways:

  - Sourcing and recruitment;

  - Background screening;

  - Onboarding;

  - Talent development and promotion;

  - Retention;

  - Payroll and compensation;

  - Leave and attendance management;

  - Benefits administration;

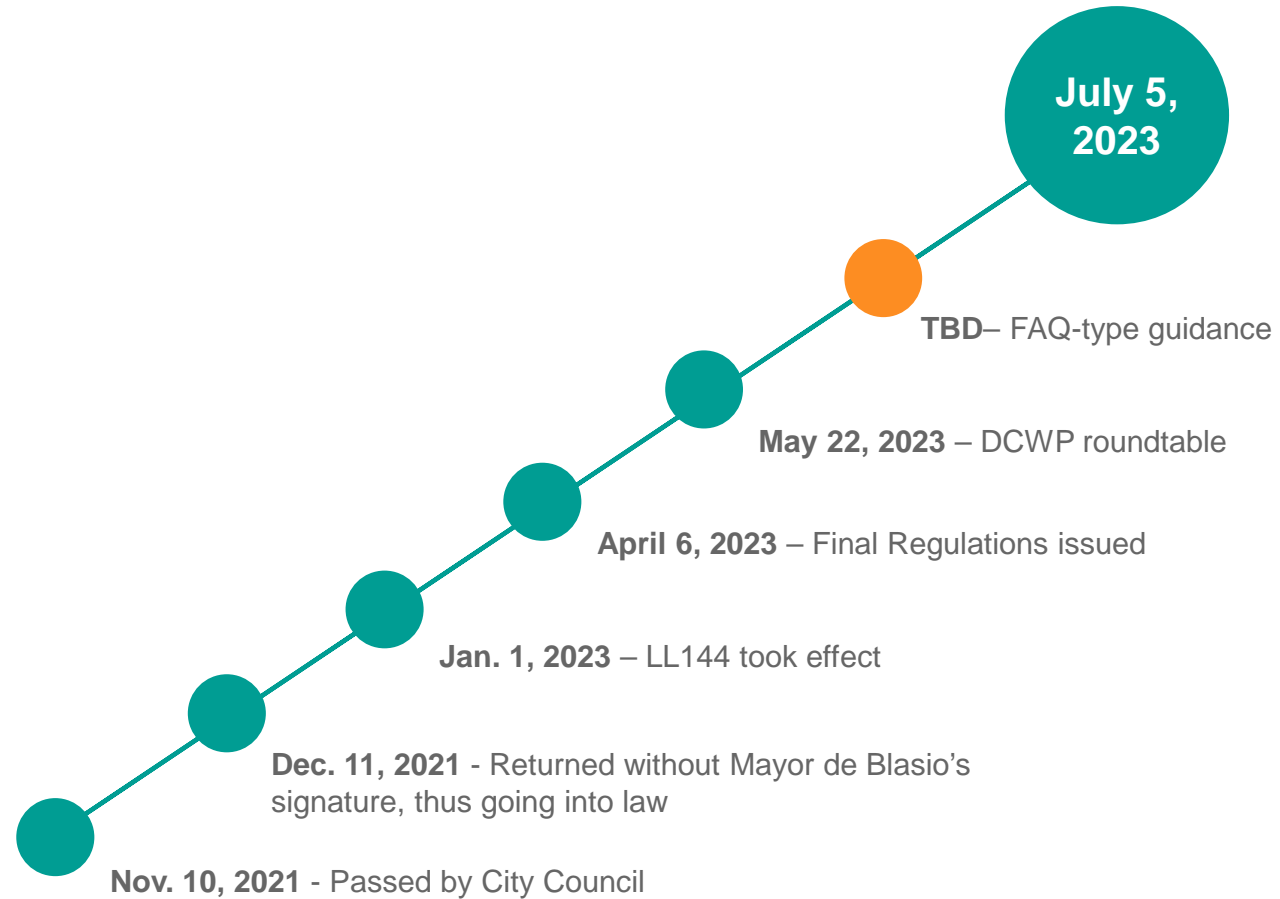 - Compliance management; and

  - Separation of employment.

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**New York City
Local Law 144 (2021)**

New York City Local Law 144 - History

July 5, 2023

TBD– FAQ-type guidance

May 22, 2023 – DCWP roundtable

April 6, 2023 – Final Regulations issued

Jan. 1, 2023 – LL144 took effect

Dec. 11, 2021 - Returned without Mayor de Blasio's signature, thus going into law

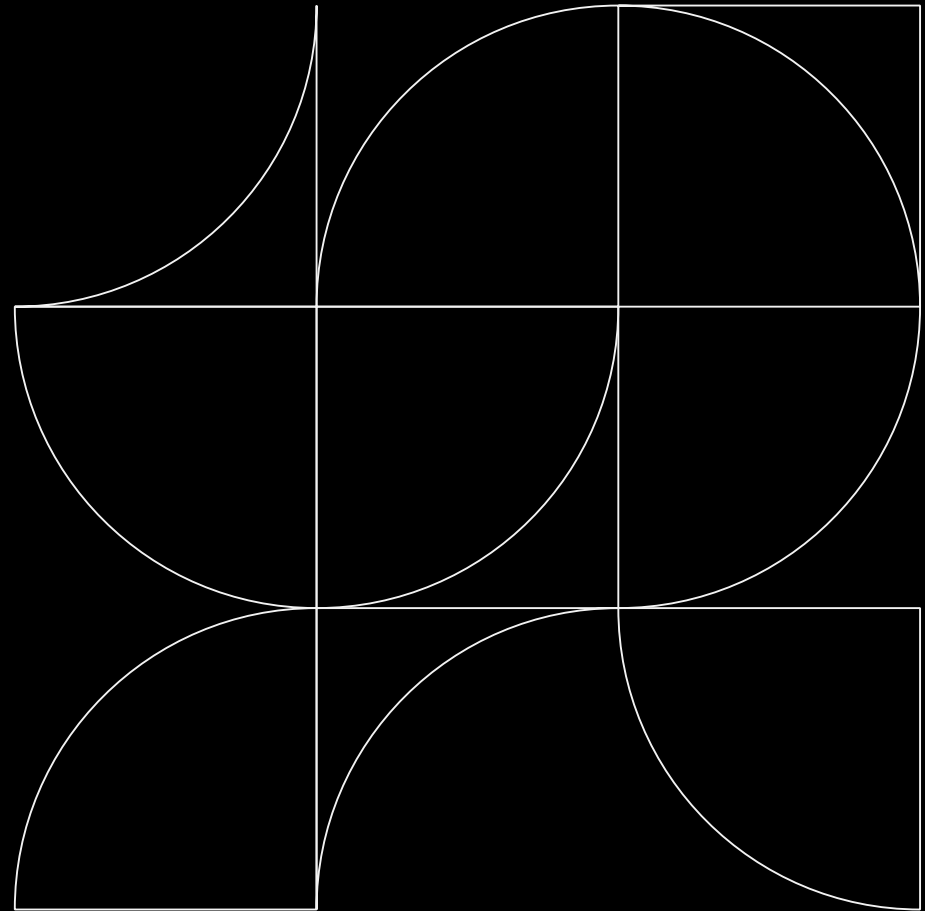**Nov. 10, 2021** - Passed by City Council

New York City Local Law 144

- NYC employers are prohibited from using tools which substantially assist or replace discretionary decision-making processes unless the tool
  - (1) underwent a "**bias audit**" within one year before its use, and
  - (2) provides **notice** to employees or candidates

- Bias Audit Minimum Requirements:
  - Gender & Race/Ethnicity & Intersectional;
  - Independent auditor;
  - Test for disparate impact before use;
  - Publish the results on website;
  - Conduct tests annually

- Notice must be provided 10 days before the AEDT is used, along with instructions for requesting an alternative process or accommodation

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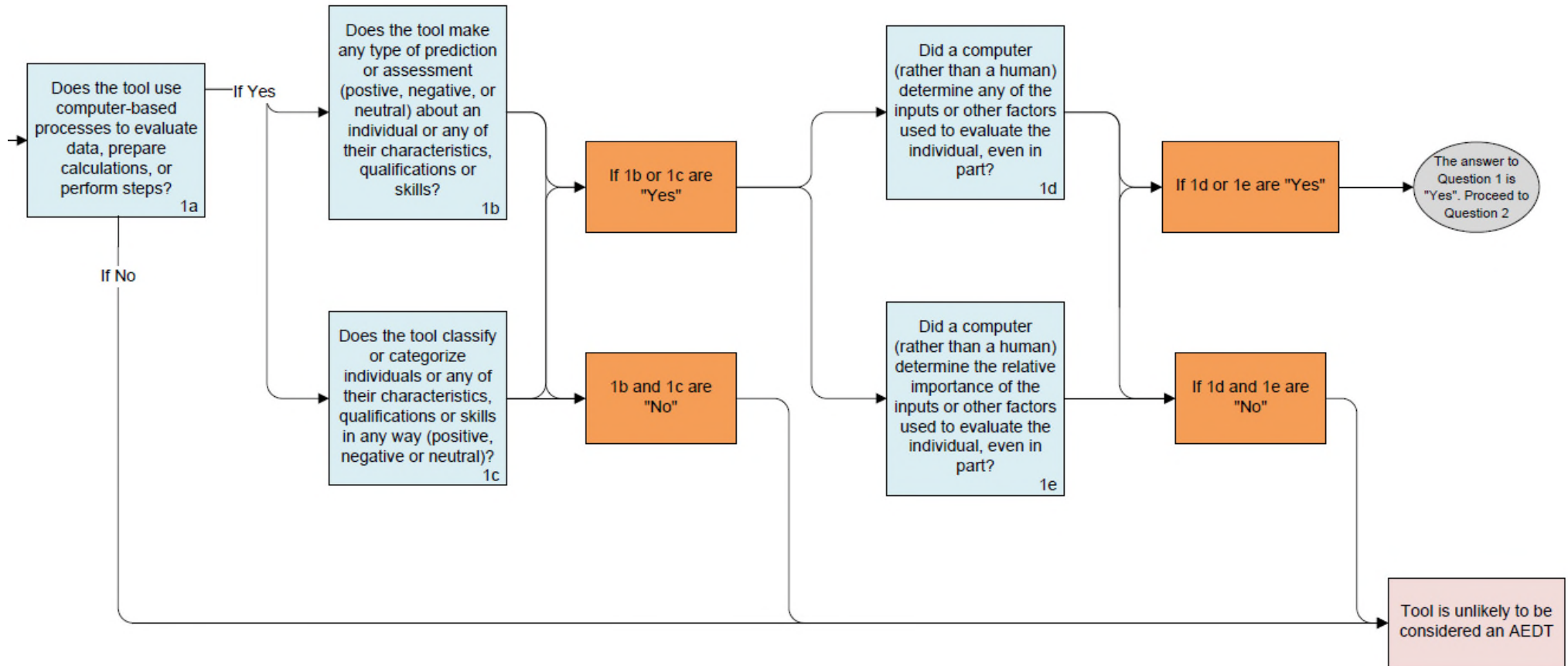**What constitutes an automated employment decision tool or "AEDT"?**

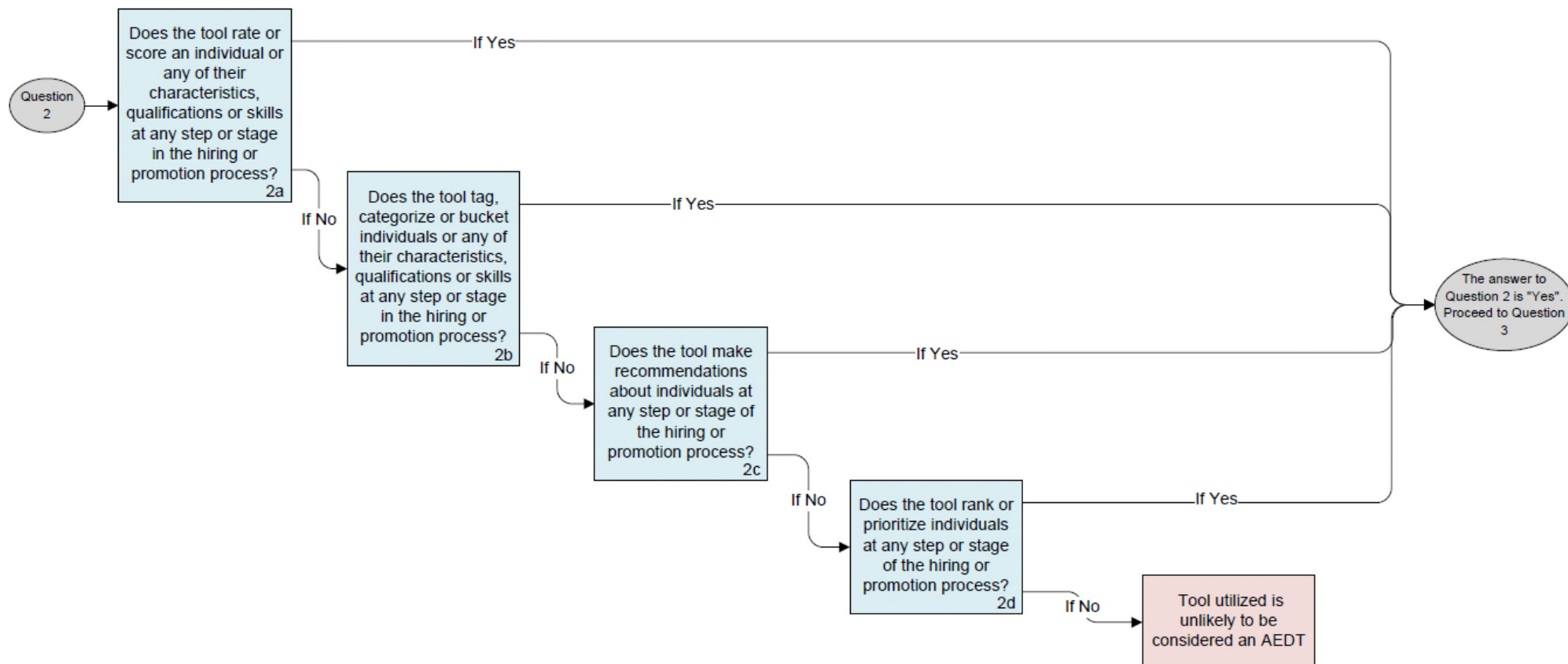## Automated Employment Decision Tools (AEDT) Under NYC LL144 - Definition

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
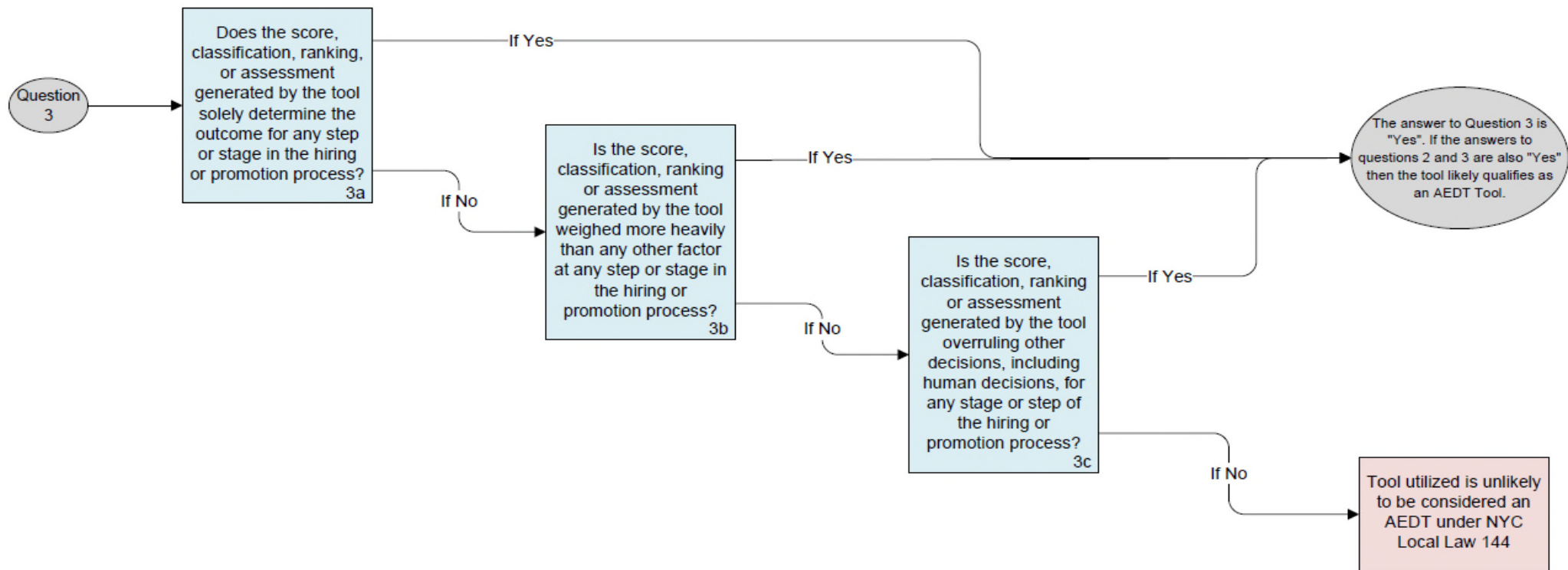
Question 1: Is the tool a computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence?

Does the tool use computer-based processes to evaluate data, prepare calculations, or perform steps? **1a**

— If Yes →

Does the tool make any type of prediction or assessment (postive, negative, or neutral) about an individual or any of their characteristics, qualifications or skills? **1b**

Does the tool classify or categorize individuals or any of their characteristics, qualifications or skills in any way (positive, negative or neutral)? **1c**

If 1b or 1c are "Yes"

1b and 1c are "No"

Did a computer (rather than a human) determine any of the inputs or other factors used to evaluate the individual, even in part? **1d**

Did a computer (rather than a human) determine the relative importance of the inputs or other factors used to evaluate the individual, even in part? **1e**

If 1d or 1e are "Yes"

If 1d and 1e are "No"

The answer to Question 1 is "Yes". Proceed to Question 2

If No

Tool is unlikely to be considered an AEDT

Question 2: Does the tool issue a simplified output, including a score, classification, or recommendation?

Question 2

Does the tool rate or score an individual or any of their characteristics, qualifications or skills at any step or stage in the hiring or promotion process? 2a

— If Yes ⟶

If No ⟶

Does the tool tag, categorize or bucket individuals or any of their characteristics, qualifications or skills at any step or stage in the hiring or promotion process? 2b

— If Yes ⟶

If No ⟶

Does the tool make recommendations about individuals at any step or stage of the hiring or promotion process? 2c

— If Yes ⟶

If No ⟶

Does the tool rank or prioritize individuals at any step or stage of the hiring or promotion process? 2d

— If Yes ⟶

If No ⟶

The answer to Question 2 is "Yes". Proceed to Question 3
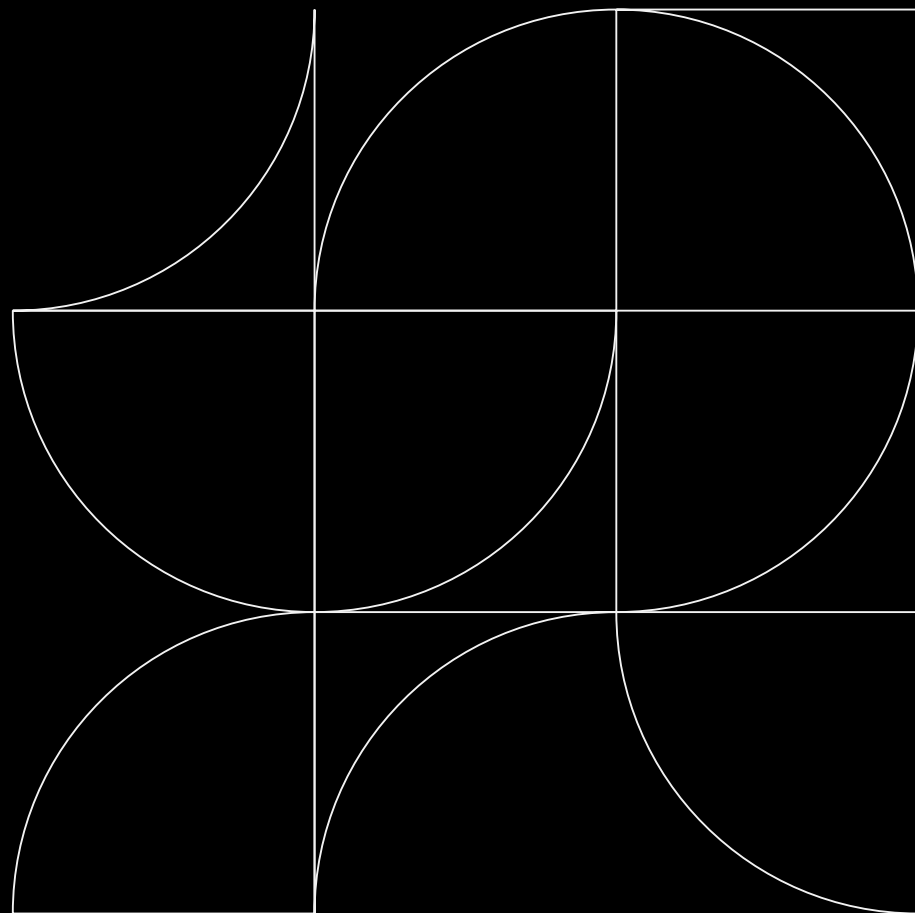
Tool utilized is unlikely to be considered an AEDT

Question 3: Is the tool being used to substantially assist or replace discretionary decision making when making employment decisions?


Question 3

Does the score, classification, ranking, or assessment generated by the tool solely determine the outcome for any step or stage in the hiring or promotion process?
3a

If Yes

If No

Is the score, classification, ranking or assessment generated by the tool weighed more heavily than any other factor at any step or stage in the hiring or promotion process?
3b

If Yes

If No

Is the score, classification, ranking or assessment generated by the tool overruling other decisions, including human decisions, for any stage or step of the hiring or promotion process?
3c

If Yes

If No

The answer to Question 3 is "Yes". If the answers to questions 2 and 3 are also "Yes" then the tool likely qualifies as an AEDT Tool.

Tool utilized is unlikely to be considered an AEDT under NYC Local Law 144

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Jurisdictional Scope

Applies "in the City"

- Focus: **Location** of the **Position**

- Position located **in NYC**
  - Bias audit & notice to NYC residents required

- Position located **outside NYC**

  - Bias audit and notice NOT required

- **Fully remote** position

  - Employer only has a NYC office

    - Bias audit & notice required

  - Employer does not have a NYC office

    - Bias audit & notice NOT required

  - Employer has offices in NYC **and** outside NYC

    - Fact-specific analysis

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What is required for a "bias audit" and who is an appropriate auditor ?
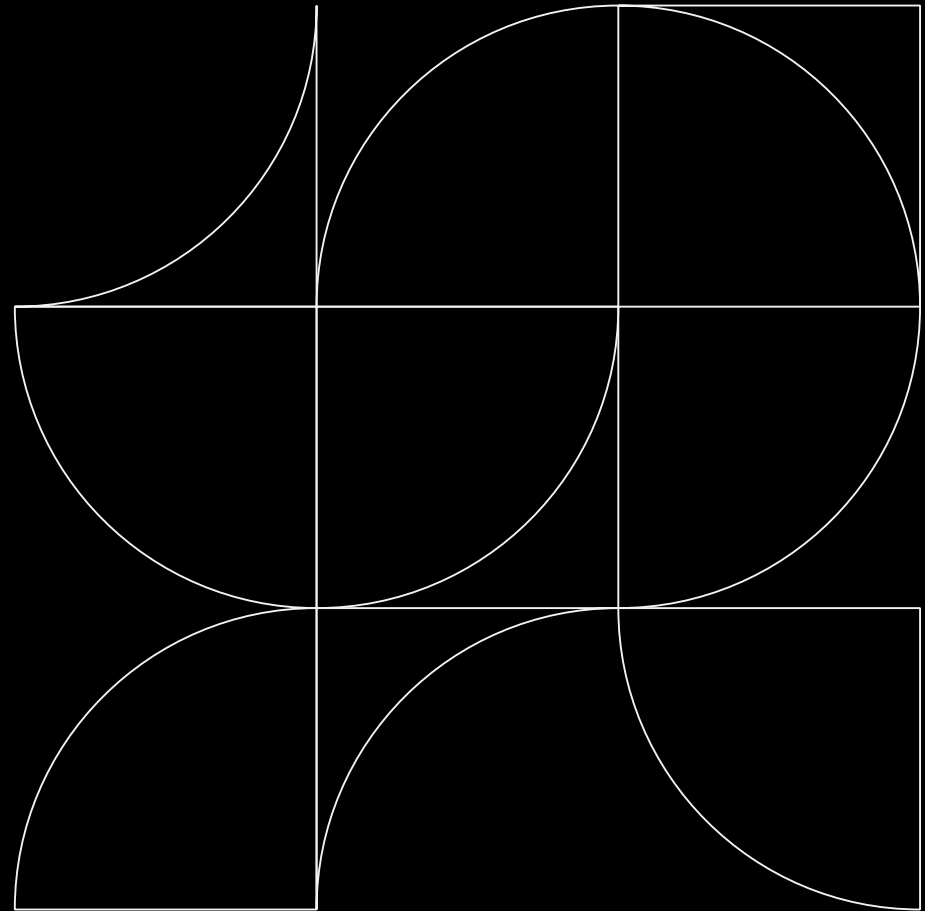
What is a "bias audit?"

Impartial evaluation by an <u>independent auditor</u>

- o A person or group that is capable of exercising objective and impartial judgment on all issues within the scope of the audit

Auditor NOT "independent" if:

- o involved in using, developing, or distributing the AEDT

- o has an employment relationship with an employer or employment agency that seeks to use or continue to use the AEDT

- o a vendor that developed or distributes the AEDT, OR

- o has a direct financial interest or a material indirect financial interest in:
    1. an employer or employment agency that seeks to use or continue to use the AEDT or
    2. a vendor that developed the AEDT

At a minimum, a "bias audit" must:

- Calculate selection or scoring rates of an AEDT and determine the impact ratio for each
  - Sex Category
  - Race/Ethnicity Categories
  - Intersectional Categories

- Calculations must be performed for each group/category an AEDT classifies individuals into
  - A race/ethnicity or sex category that represents less than 2% of the data being used may be excluded from the required impact ratio calculations
  - If excluded, the summary of results must include the "justification for the exclusion, as well as the number of applicants and scoring or selection rate for the excluded category"

- Bias audit disclosures are also required and include:
  1. "the source and explanation" of the data used to conduct the bias audit,
  2. the date of the last audit,
  3. number of applicants or candidates,
  4. the selection or scoring rates,
  5. the impact ratio by race/ethnicity, sex, and intersectional categories, and
  6. the number of individuals with unknown race/ethnicity and sex that were assessed by the tool.
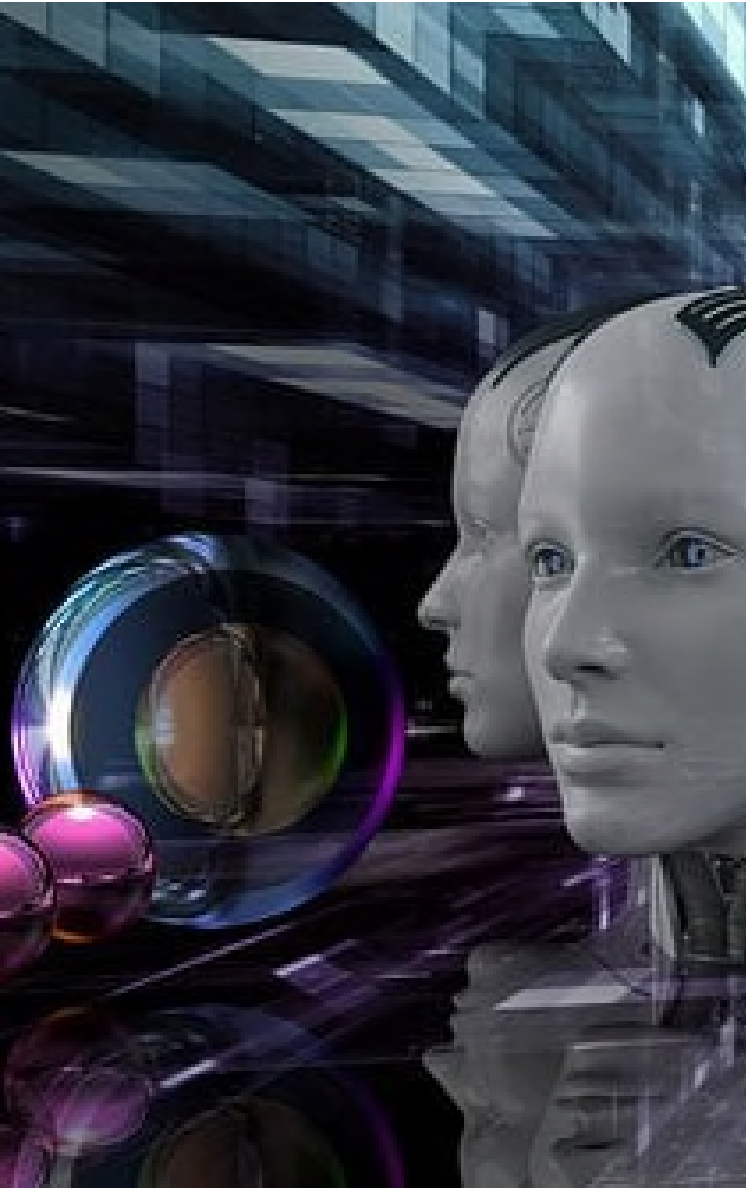
Data for a "bias audit" …

Historical data:

- A bias audit must use historical data of the AEDT
- Can be from 1 or more employers or employment agencies that use the AEDT
- BUT: an individual 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 in the following circumstances:
  - if such employer or employment agency provided historical data from its own use of the AEDT to the independent auditor conducting the bias audit or
  - if such employer or employment agency has never used the AEDT

Test data:

- An employer or employment agency may rely on a bias audit that uses test data …
- … if insufficient historical data is available to conduct a **statistically significant** bias audit.
- 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

Bias Audit Data Use Considerations

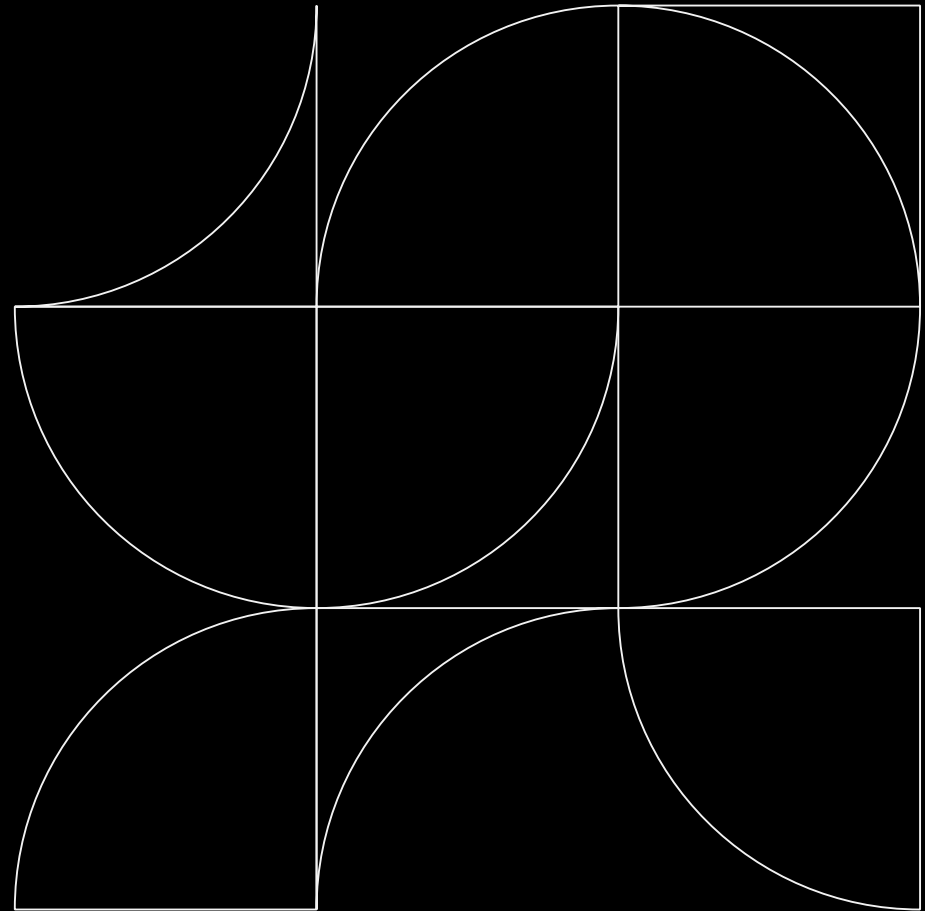| First time using an AEDT	AEDT used for 6 months and a bias audit was conducted 10 months ago using test data	AEDT used for 3 years and employer has statistically significant set of data
May rely on a bias audit: 1. using historical data of other employers, or 2. using test data	• Employer will need an updated audit once 12 months have passed • **BUT!** the data from 6 months of use is not sufficient on its own to conduct a statistically significant bias audit • Employer may rely on a bias audit using historical data of other employers if this employer provides its 6 months of historical data to the independent auditor to use OR • The employer may rely on a bias audit of test data	May rely on a bias audit: 1. using its own historical data, or 2. historical data from multiple employers if it provides its 3 years of historical data to the independent auditor for use and consideration • **BUT!** employer may not rely on test data

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## Notice and disclosure requirements

New York City
Local Law 144

Published results

- Employer 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, including
  - the source and explanation of the data used to conduct the bias audit,
  - the number of individuals the AEDT assessed that fall within an unknown category, and
  - the number of applicants or candidates, the selection or scoring rates, as applicable, and the impact ratios for all categories;
  - and,
- (2) The distribution date of the AEDT.

- Compliance can 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

- Employer must keep the summary of results and distribution date posted for at least 6 months after its latest use of the AEDT for an employment decision
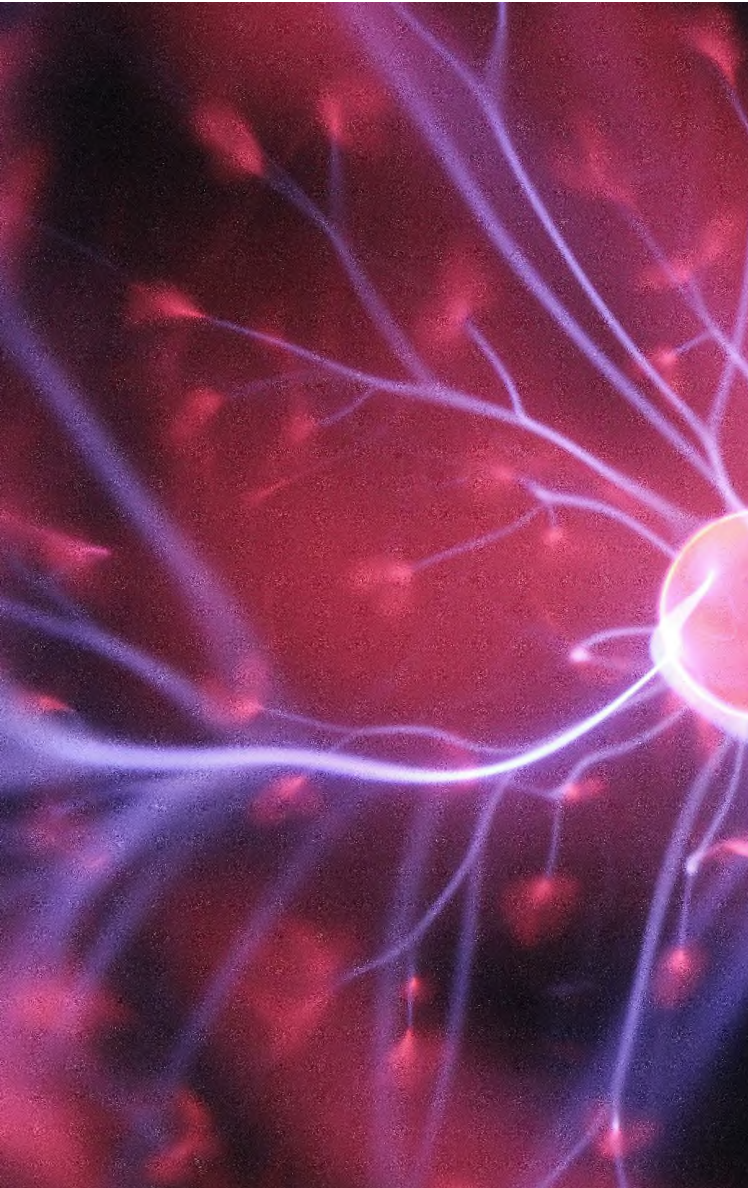
Notice to candidates

- Notice must include instructions for how an individual can request an alternative selection process or a reasonable accommodation under other laws, if available.

- Employer may provide notice to a candidate for employment who resides in the city:

  - In the job posting itself;

  - U.S. mail or e-mail; or

  - Job applicants: Employment section of its website in a clear & conspicuous manner;

  - Candidates for promotion: Internal written policy or procedure;

- Notice must be **10 business days** before use of an AEDT

Notice to candidates

- Must inform employees or candidates that reside in NYC:
  - Of the use of AEDTs; and
  - The job qualifications and characteristics the AEDT will assess.

- Notice regarding data collection must:
  - Provide information on the employment section of its website in a clear and conspicuous manner about:
    - The AEDT data retention policy;
    - The type of data collected for the AEDT; and
    - The source of the data.
  - Post instructions on the employment section of its website in a clear and conspicuous manner how to make a written request for such information
    - If a written request is received, information should be provided within 30 days
  - Provide and explanation to a job candidate or employee being considered for promotion on why disclosure of such information would violate local, state, or federal law, or interference with a law enforcement investigation
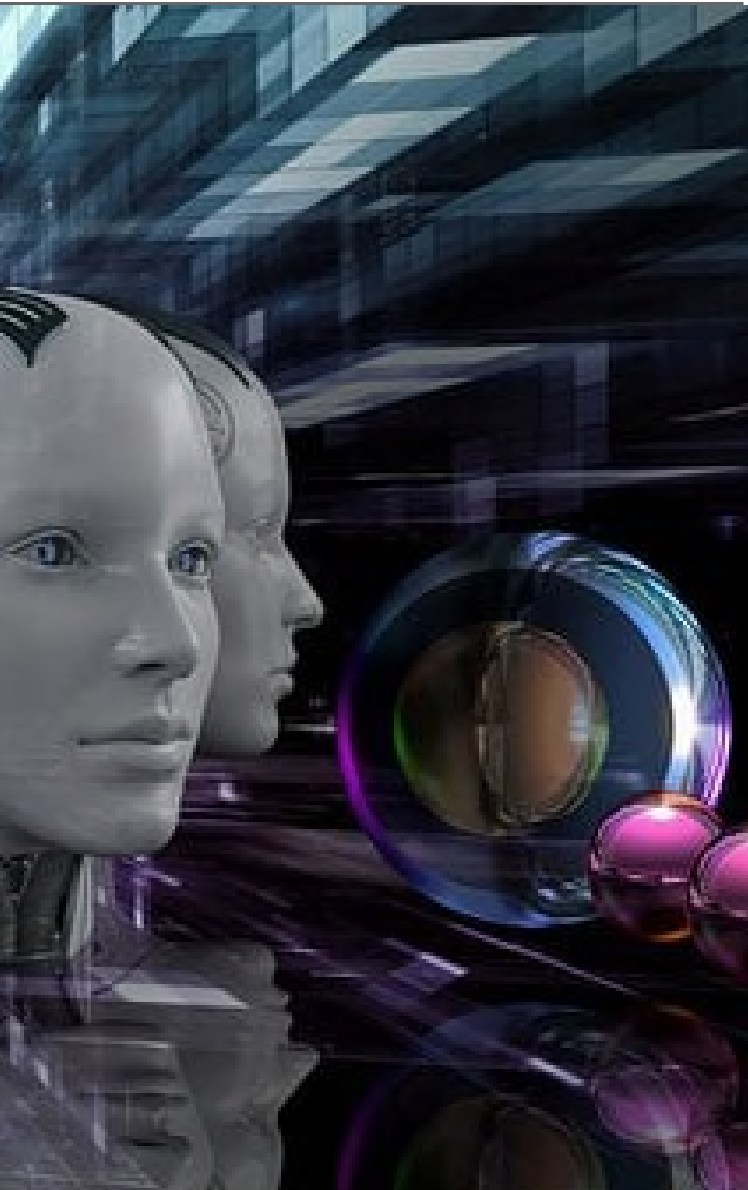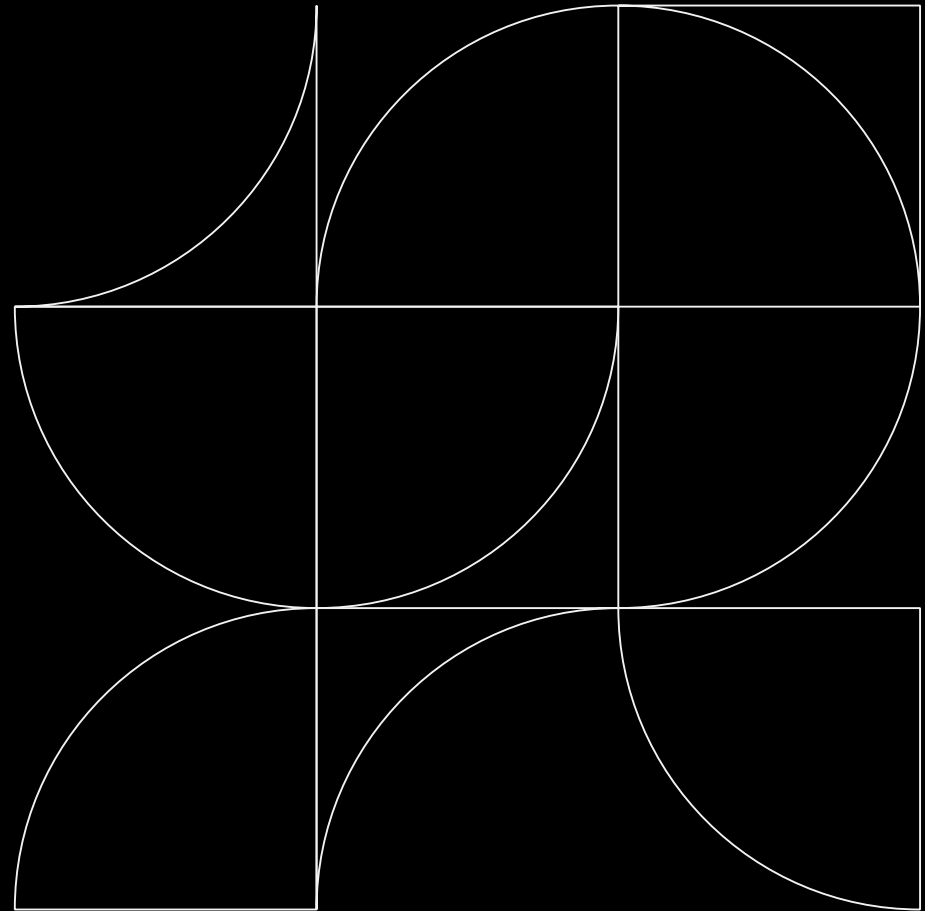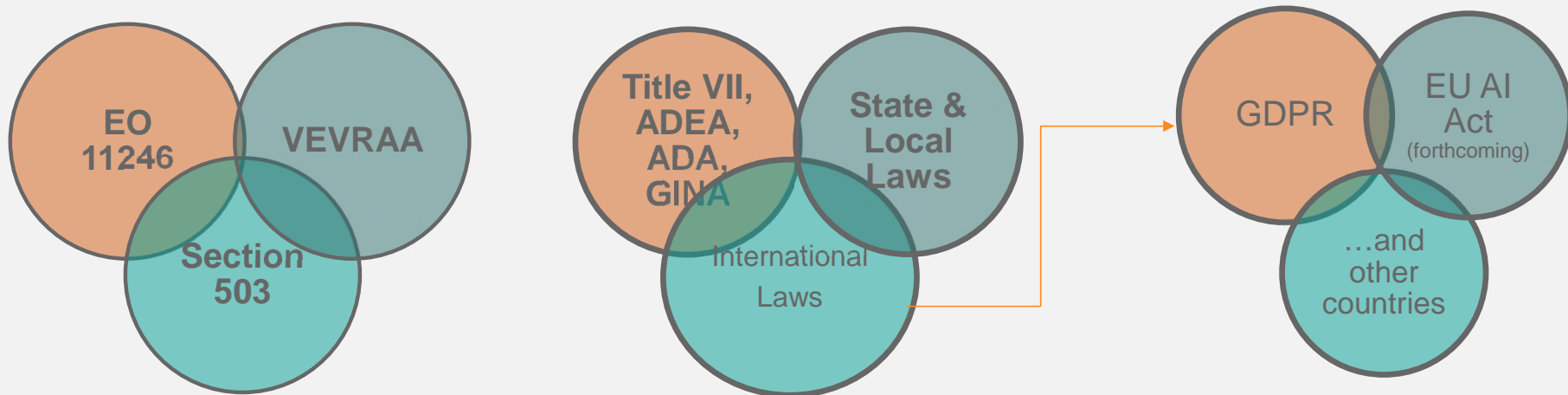
DCWP Best Practices:

- Employers or employment agencies should keep records of:
  - All electronic tools used to assist in hiring or promotion;
  - How electronic tools were used, and what other methods were used to evaluate candidates or employees;
  - All notices and methods of notice provided to candidates.

- For an AEDT that assesses employee performance:
  - Inform all staff of the use of the AEDT 10 business days prior to ensure sufficient notice is given to use the output of the performance tool as part of the promotion process

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Interplay with other laws

AI in the Employment Context
Touches On Multiple Laws

EO 11246 · VEVRAA · Section 503

Title VII, ADEA, ADA, GINA · State & Local Laws · International Laws

GDPR · EU AI Act (forthcoming) · …and other countries

Other New York Laws Alone…

- New York State Human Rights Law

- New York City Human Rights Law

- New York Fair Chance Act

- New York Fair Workweek Law

- New York Paid Sick Leave

Federal Government Efforts to Regulate AI

- "AI is one of the most powerful technologies of our time, with broad applications. President Biden has been clear that in order to seize the opportunities AI presents, we must first manage its risks."
- -- May 23, 2023 White House statement

- October 2022: Biden's Office of Science & Technology Policy (OSTP) releases the "Blueprint for an AI Bill of Rights" articulating high-level principles regarding the use of AI.
- January 2023: National Institute of Standards and Technologies (NIST) issues an AI Risk Management Framework along with a companion AI RMF Playbook
- …and many other Executive Branch agencies have also weighed in.

EEOC

- Existing federal and state civil rights laws apply to the use of AI and other technology tools, and regulators start by applying principles from our existing civil rights laws, some of which have been around since the 1960's or before.

- Besides public listening sessions and a hearing in January 2023, the EEOC has issued technical assistance regarding AI and employment tools:

  - **May 12, 2022**: "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees"
  - **May 18, 2023**: "Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964"

- These technical assistance documents apply principles under our existing laws to the use of AI.

EEOC ADA TA (May 2022)

- Reminds employers that the use of AI (or other algorithmic decision-making tools) may violate the ADA. For instance:
  - failing to reasonably accommodate an employee's disability;
  - algorithm "screens out" qualified individuals with disabilities screening out qualified individuals with disabilities; and
  - posing "disability-related inquiries" or seeking information that qualifies as a "medical examination"

EEOC Title VII TA (May 2023)

- EEOC's May 2023 technical assistance reminds employers that Title VII's prohibitions against disparate treatment and disparate impact apply to selection procedures that use AI.

- The EEOC's May 2023 technical assistance emphasizes the applicability of the 1978 Uniform Guidelines on Employee Selection Procedures ("UGESP") under Title VII.

EEOC Technical Assistance

- The EEOC's May 2022 ADA TA and its May 2023 Title VII TA emphasize that long-standing principles apply even to new technologies

- The EEOC takes a broad view of the types of technology it has the authority to cover

  - any software, algorithm, AI, or other automated tool that is used to make "selection decisions" such as hiring, promotion and terminations, must be used in a manner consistent with EEO statutes

  - Examples of potentially covered technology from the EEOC's TA include:

    - Screening applications with resume scanning software that prioritizes certain keywords;

    - Online interviews with virtual assistants or "chatbots" that screen for pre-determined candidate responses;

    - Computerized tests that measure applicants' abilities, personalities, traits or characteristics, including through the use of games; and

    - Video interviewing that evaluates candidates based on their facial expressions or speech patterns

EEOC Technical Assistance

- January 2023, EEOC draft Strategic Enforcement Plan published in the Federal Register includes as an enforcement priority "the use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, or make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups

- May 2023, the Daily Labor Report published an email from the EEOC Chair saying that the EEOC was conducting staff training "about AI in the employment context, how our front line staff can identify AI-related issues in our enforcement work, and what to do when you identify an AI-related issue in your work."

EEOC Technical Assistance

Takeaway #1

- Employers can be responsible for tools designed and administered by others, including software vendors

- Must ask vendors whether steps have been taken to evaluate whether use of the tool causes a substantially lower selection rate for those in protected groups

  – BUT, an employer cannot rely solely on the representations of its vendors and may still be liable where disparate impact results

- Consider vetting tools provided by third parties before implementation and develop audit procedures designed to monitor the results of using those tools to guard against any adverse impact

EEOC Technical Assistance

Takeaway #2

- According to the EEOC, the "four-fifths rule" may not be used as a sole measure to assess bias in a selection tool

  – is one measure used to assess whether selection rates of two groups are "substantially" different

- Many vendors and employers have used the four-fifths rule as a threshold analysis in bias audits

- Courts have agreed that use of the four-fifths rule is not always appropriate, especially where it is not a reasonable substitute for a test of statistical significance

- Audit strategies now may need to include standards that evaluate both statistical significance *and* practical significance, using the four-fifths test or other "practical significance" methodologies

EEOC Technical Assistance

Takeaway #3

- Employers should be proactive in determining whether an algorithmic decision-making tool results in a disparate impact

- EEOC encourages employers to conduct self-critical analyses before implementing any new tool, and periodically after implementation to ensure that the tool is operating free of bias

- EEOC expects that if an employer discovers that a tool would have an adverse impact, corrective action will be taken or a different tool will be utilized going forward

Trends We Are Starting to See

Our Prediction: NYC Local Law 144 bias audit results will be used to identify targets for private litigants and government enforcement.

- Plaintiffs' firms have already filed a class-action case alleging unlawful discrimination based on the use of technology.

- Civil-rights groups are giving increased scrutiny.

  - Not just progressive organizations!

- EEOC has started issuing Requests for Information asking about AI and algorithms.

EEOC Request For Information

Section 2: Request for a for a Description of Data-Driven Algorithms, Artificial Intelligence[1], or Machine Learning Used for Recruitment, Screening, Selection, or Promotion

I. Indicate whether Respondent uses algorithms, AI, or other automated technology system(s) that rate, rank, or assess/test individuals that are used in any of Respondent's recruitment, screening, selection, or promotion processes (hereafter "employment processes") such as rating or scoring applicants or employees, recommending pay rates or increases, selecting individuals for promotion.

   If yes, provide the following:

   a. Identify the dates for which the algorithms, AI or other automated technology system(s) were used by the Respondent and to the extent that the use has changed over time, include the dates of each change and describe what changes were made and why;

   b. Describe the purpose or objective(s) of the algorithms, AI or other automated technology system(s), including identifying each point in the process where it is used in the employment process or in decision-making; and,

   c. Identify which entity maintains the algorithms, AI or other automated technology system, e.g. the Respondent or Third-Party vendor.

   _____

[1] The term 'artificial intelligence' often means a machine-based system that can, for a given set of human-defined objectives, such as application screening and selection, make predictions, recommendations or decisions.
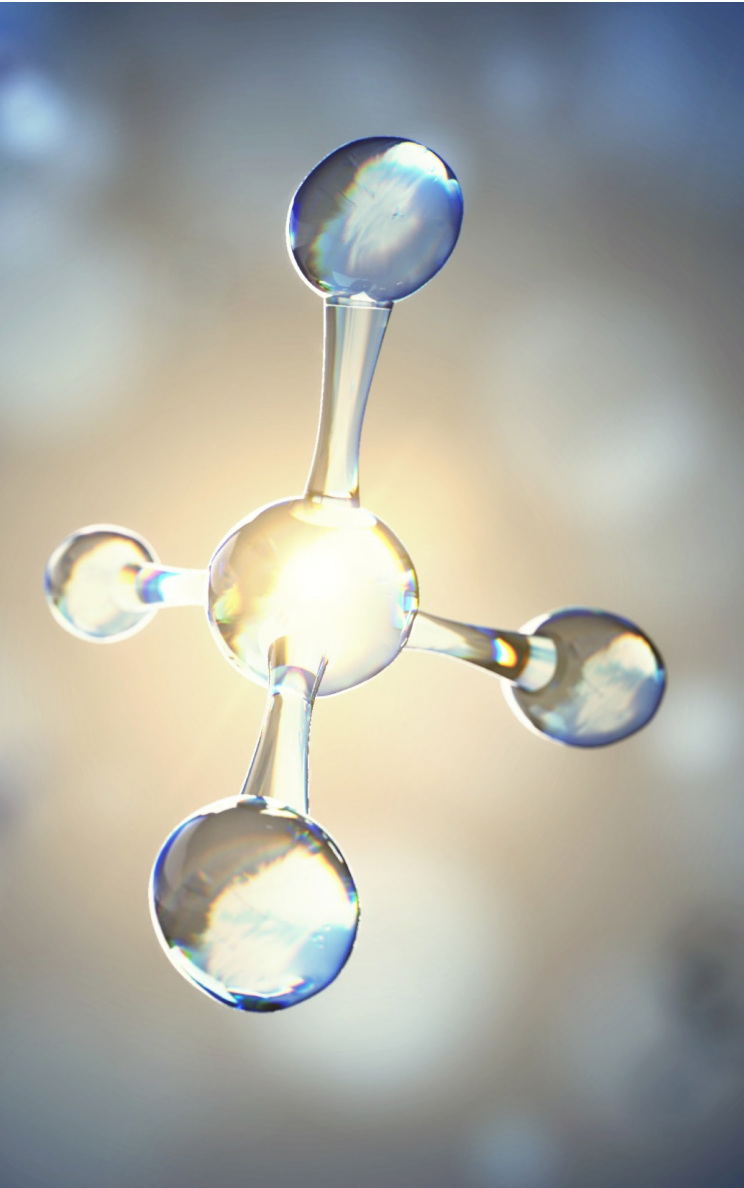
Questions To Keep In Mind
Before Implementing AI

1. Does the tool work?

2. How has the vendor/employer demonstrated that the tool does what they say it does?

3. What has the vendor/employer done to analyze potential bias against protected categories?

4. What is the scope of the analysis? How does it play out in your organization?

5. Do you, as an HR or business professional, have the technical expertise to assess the vendor's representations? (If not, partner with others to help you.)

6. What structures does your organization have in place to evaluate the benefit and risks of AI? What resources and processes do you have in place to help you identify and manage these risks?

Session Recap

- No uniform definition of "artificial intelligence"

- Definitions and concepts are broad and designed to be inclusive of various tools used to assist in employment decisions that in some way automate the process

- Developing patchwork of laws across states, counties, municipalities

- Federal law and EEOC guidance applies in all US jurisdictions

thank you

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