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VIA E-MAIL

Commissioner Vilda Vera Mayuga
New York City Department of Consumer and Worker Protection
42 Broadway, 8th Floor
New York, New York 10004
http://rules.cityofnewyork.us
Rulecomments@dcwp.nyc.gov

Re: Comments Regarding Proposed Rules to the Use of Automated Employment Decision Tools Under Local Law 144 of 2021

Dear Commissioner Mayuga:

Seyfarth Shaw LLP ("Seyfarth") is a full-service law firm with 17 offices in the U.S. and globally, including a strong presence in New York City. Seyfarth is recognized as one of the "go to" law firms for labor and employment law representation and counsel in the world. Seyfarth attorneys advise clients on nearly every type of issue that arises for employers, from day-to-day workplace matters to the most complex and sensitive situations, including issues that are on the forefront of technology, social issues, and legal trends.

Seyfarth has a deep institutional knowledge of the labor and employment matters that affect employers in this economy and brings this expertise to bear in its representation of clients across a vast range of industries in New York City, the United States, and globally. Seyfarth has a substantial People Analytics practice group that counsels employers on federal, state and local employment law requirements as it relates to data driven decision-making in the workplace. These technologies include the use of artificial intelligence, predictive analytics, and machine learning algorithms to address key processes including sourcing, hiring, retention, workforce planning, employee engagement, and diversity and inclusion efforts. Of particular relevance here, we counsel employers and vendors with regard to the legal implications of developing and implementing sophisticated algorithmic technologies in the workplace.

We submit these comments in relation to the proposed rules issued by the Department of Consumer and Worker Protection ("DCWP" or "Department") on September 23, 2022 that stand to implement New York City Local Law 144 of 2021 ("LL 144") regarding automated employment decision tools ("AEDT").

Based on our experience with employers of all sizes, across industries, and with a wide range of business circumstances, clarity in regulation is key for fostering compliance. Thus, by ensuring that the employer community has definitive guidance on which of their procedures or tools falls within the definition of AEDT, the Department ensures maximum adherence to the goals

and protections for New York City's employees that appear to underpin the basis for LL 144. In doing so, the Department may consider that saddling New York City's employers with rules, restrictions, and obligations that impede and stifle the development of technology stand to keep New York City employers *and* employees at the back of the pack in the global race for innovation.

1. The Definition of AEDT Should Clearly Identify the Specific "Computational Process[es]" That Will Require a Bias Audit

The definition of AEDT, as defined in LL 144 and further explained in the Department's proposed rules, remains ambiguous as to the types of computational processes are covered by this law.

Presently, LL144 § 20-870 defines AEDT as

> 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 term "automated employment decision tool" does not include a tool that does not automate, support, substantially assist or replace discretionary decision-making processes and that does not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

Section 5-300 of the proposed rules adds that "the phrase 'to substantially assist or replace discretionary decision making'" as used in LL 144 § 20-870, means to: (1) "rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other factors considered," or (2) "to use a simplified output as one of a set of criteria where the output is weighed more than any other criterion in the set," or "to use a simplified output to overrule or modify conclusions derived from other factors including human decision-making."

In addition, the proposed rules define "machine learning, statistical modeling, data analytics, or artificial intelligence" to mean 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.

Further, "simplified output," as used in LL 144 § 20-870,

> means a prediction or classification as specified in the definition for "machine learning, statistical modeling, 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 keywords, 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.

The definitions and explanations above discuss generalized concepts and use broad terminology, making it very difficult for the employer community to know with certainty which "computational process[es]" are covered, and which are not covered. Presumably, every recruitment, selection, and onboarding tool cannot be covered, as doing so would inflict crippling costs upon employers that would risk non-compliance, as well as abandonment of technology that would result in severe delays and administrative burdens associated with reversion to manual processes and tools that would dramatically impede business operations and frustrate recruitment and hiring efforts in New York City. Such definition and outcome helps no one. Presuming further that this law is the result of the City Council or Department seeking to address something that it considered to be a specific issue, problem, or danger, the City Council and Department are in the optimal position to identify, with specificity, the "computational process[es]" that are intended to be covered by the law. Leaving employers to guess, however, especially under threat of potentially business-ending penalties, needlessly creates peril and risk instead of fostering compliance.

As one example, certain employers might utilize tools that might be applied to candidates who have not applied for a specific position. There are a variety of automated tools that allow employers to find and reach out to candidates who might be interested in or qualified for a certain position but who have not yet applied for such position. For example, employers or third-party entities may have collected resumes or profiles and may use a search tool to find appropriate candidates for a position from such collection. Likewise, employers may rely on professional databases to conduct passive searches for candidates. By defining "candidates for employment" as "a person who has applied for a specific employment position by submitting the necessary information and/or items in the format required by the employer or employment agency," it appears that such resume/profile search tools would not be considered an AEDT because such tools are not used to screen anyone who has completed an application or applied for a specific position. The employer community would benefit from further clarification either in the definition of "AEDT" or elsewhere in the rules to confirm that tools applied to individuals who are neither (1) employees nor (2) persons who have applied for a specific position" are not covered by § 20-870. Specifically, § 5-301(a) should be revised to strike the undefined term "individuals" and replace it

with "candidates for employment." Likewise, § 5-301(b) should delete the term "applicants" and replace it with "candidates for employment."

As another example, certain employers, potentially utilizing a vendor or consumer reporting agency, may perform a background check (non-criminal and/or criminal) on candidates and employees, and as part of that process may utilize "computer-based techniques" that "generate a prediction … or classification" and "for which a computer … identifies the inputs, that relative importance placed on those inputs … in order to improve the accuracy of the prediction or classification," "for which the inputs and parameters are refined through cross-validation or by using training and testing data." Presumably, LL 144 was not intended to regulate such consumer reporting agencies or to regulate background checks that are performed by employers, however the text does not make this adequately clear.

These examples, and likely a plethora of others, highlight the need for clarification and further guidance as to the specific "computational process[es]" that fall within the definition of AEDT and are thus regulated by LL 144.

2. <u>The Proposed Rules Do Not Provide Sufficient Guidance Regarding the Scope of Bias Audit</u>

Employers need further clarity regarding the scope of the candidate pool that is required to be included in a bias audit. In particular, it is not clear whether such audits may include information regarding candidates outside of NYC or conversely based on a sample set of data. Employers should be expressly permitted to rely on robust data that is not limited to NYC candidates for employment or employees.

To the extent the regulations do not allow employers to use broad data or sample data for purposes of the required bias audit, NYC employers will be stifled in any attempt to implement new AEDTs. That is because NYC employers would have no prior data upon which to perform a bias audit on the AEDT. This would have the unintended consequence of effectively barring the use of new AEDT tools for NYC employers. This issue could be addressed by explicitly providing that employers can rely on bias audits that rely on broad data sets or even sample test data to meet the bias audit requirements under LL 144.

3. <u>The Proposed Impact Ratio Methodology Based on Average Scores is Flawed</u>

The Impact Ratio metric that relies simply on "average scores" is flawed in that it does not adequately consider variability in scores. Based on our discussions with labor economists and I/O psychologists, the proposed methodology does not provide the requisite insight needed to make any inferences about whether there is "bias" in the AEDT scores.

The use of the "average scores" impact ratio analysis will likely be required in all AEDT bias audits. While the proposed rules put forth two impact ratio methodologies,[1] it is difficult to conceive of an AEDT that "selects individuals in the hiring process or classifies individuals into

[1] 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 average score of all individuals in a category divided by the average score of individuals in the highest scoring category.

groups" as set forth in § 5-301(a), without scoring "candidates for employment" or employees in some way as described in § 5-301 (b).

Given the concerns with the proposed methodology, we strongly encourage the Department to work with I/O psychologists, labor economists, and statisticians who have deep expertise with employment decision-making tools to evaluate and assess the viability and reliability of the proposed impact ratio methodologies set forth in the proposed rules.

4. <u>The Proposed Rules Do Not Provide Guidance On Conducting a Bias Audit on an AEDT that Does Not Capture or Retain Data on Gender, Race, or Ethnicity</u>

Not every "computational process" utilized by employers captures or retains data about every "candidate for employment's" gender, race, or ethnicity. Section 5-301 of the proposed rules, expanding on § 20-870 and -871, requires that a bias audit, "at a minimum," calculate selection rates and impact ratios based gender, race, and ethnicity, presumably on candidates for employment.

Considering that (1) LL 144 is scheduled to go into effect January 1, 2023, (2) employers who utilize "computational process[es]" that presently do not capture gender, race, and ethnicity data on every "candidate for employment" have insufficient opportunity to obtain such data between now and the effective date upon which to conduct a bias audit, and (3) once § 20-871(a) goes into effect, employers are prohibited from "us[ing] an [AEDT] … unless" the AEDT "has been the subject of a bias audit conducted no more than one year prior to the use of such [AEDT]." Thus, it follows that such employers will be effectively barred from using such AEDT as of January 1, 2023, and will further be barred from obtaining the data necessary to conduct the bias audit on the AEDT, thereby making the bar permanent.

Presumably, this law was not intended to force employers to scrap potentially useful and universally beneficial "computational process[es]" simple because developers did not fully predict LL 144's bias audit requirement, which is not yet in final form. Moreover, there is no requirement in NYC to attempt to collect gender, race and ethnicity data on "candidates for employment."

Thus, clarification and guidance to address this issue is warranted to assist the employer community with compliance with these requirements.

5. <u>Effective Date and Enforcement Needs to Be Deferred to Allow Employers Sufficient Time To Comply With the Rules, Once They Are Finalized</u>

LL 144 is scheduled to "take[] effect on January 1, 2023." LL 144 § 2. Presently, final rules and guidance has not been promulgated by the Department to clarify the requirements, standards, or criteria for compliance with LL 144, and the effective date is approximately two months away. For example, LL 144 requires a "bias audit," however there remains no reliable clarification of what criteria must be met to complete a bias audit that complies with LL 144. Conducting the required bias audits will be a significant undertaking and employers simply do not have the requisite clarification as noted in these comments.

There are very few organizations that currently employ the appropriate staffing and expertise to complete such bias audits. With proposed regulations providing guidance on how to perform the bias audit and final regulations still unknown, it is very unlikely that any employer will have sufficient time to complete a satisfactory bias audit of their AEDT's prior to January 1, 2023. Thus, we recommend that any enforcement of LL 144 be deferred until a date that is at least 90 follow the publication of final regulations by the Department. Failure to postpone enforcement may lead employers, where possible, to avoid considering for employment any residents of New York City.

In closing, we appreciate the opportunity to submit comments and feedback to the Department regarding the proposed rules. Recognizing that LL 144 pushes New York City law and the Department's regulation into novel and uncharted territory, we welcome any opportunity to collaborate or otherwise provide feedback to the Department to assist in its efforts for the benefit of all New Yorkers, employers and employees alike. The Department should not hesitate to contact the undersigned.

We thank the Department for its time and attention to our submission.

> *If you have an apple and I have an apple and we exchange these apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas.*
>
> — George Bernard Shaw[2]

[2] George Bernard Shaw was a playwright, critic, polemicist, and political activist, and in 1925 was awarded the Nobel Prize in Literature. Mr. Shaw has no affiliation or connection with Seyfarth Shaw LLP.

Respectfully,

SEYFARTH SHAW LLP

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