October 24, 2022

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:

The Society for Human Resources Management ("SHRM") is the nation's preeminent HR trade association. More than 95% of Fortune 500 companies rely on SHRM as their go-to resource for all things work and their business partner in creating next-generation workplaces. With more than 300,000 HR and business executive members in 165 countries, SHRM enhances the lives of more than 115 million workers and families globally. SHRM creates better workplaces where businesses and workers thrive together. As the voice of all things work, workers, and the workplace, SHRM is the foremost expert, convener, and thought leader on issues impacting today's evolving workplaces. The SHRM vision is to build a world of work that works for all.

Employers, like any other group, often look to technology as a path to innovation and progress. Technology may offer advanced tools that foster improved operations, create efficiencies, optimize interpersonal relations, and provide novel solutions to complex issues that arise within the workplace. During the past several decades, New Yorkers saw the workplace evolve as the use of fax machines, email, cloud computing, cellular phones, WiFi, GPS tracking, and other technologies changed and innovated how New Yorkers and the world worked. We now stand witness to the advent of artificial intelligence in the workplace.

SHRM submits these comments in response 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"). We offer these comments with the insight of human resources professionals so as to make the proposed rule more effective.

SHRM applauds the Department's efforts to clarify the obligations of employers and employment agencies under LL 144. SHRM agrees that clearly defined terms and clarity regarding the bias audit requirements, the notice requirements, and other obligations under LL 144 serve to promote compliance and reduce confusion about the nuances of this first-of-its-kind law.

SHRM also commends the Department for its focus on addressing ambiguities and providing specificity around the requirements and obligations of LL 144 while also refraining from expanding the scope of the rules to require obligations beyond those that already exist. *See* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2018); NYC Human Rights Law, N.Y.C. Admin. Code § 8-107. In particular, we recognize the Department's efforts to clarify that while employers have certain obligations to reasonably accommodate workers on the basis of a disability, there is no obligation to provide alternative selection or evaluation processes. *See* §§5-303 (c) and (e).

The Equal Employment Opportunity Commission has recently provided valuable guidance to employers on the issue of automated employment decision tools and the impacts on individuals with disabilities. *See* U.S. Equal Employment Opportunity Commission, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, 29 CFR Part 1630 & app. (May 12, 2022), *available at* https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence. SHRM submits that all NYC employers and employees will stand to benefit from that guidance even as NYC moves forward with the requirements set forth in LL 144.

While recognizing that the issues are complex and require thoughtful implementation, the proposed rules require additional clarification. In the sections that follow, we summarize the key areas where further clarification could assist employers as they work towards implementing LL 144.

A. THE DEFINITION OF AUTOMATED EMPLOYMENT DECISION TOOL IS OVERLY BROAD AND RISKS UNINTENDED APPLICATION

SHRM commends the Department on its effort to further clarify the definition of AEDT. As it stands, 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.

The Department's proposed rules, § 5-300, add 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."

Further, "machine learning, statistical modeling, data analytics, or artificial intelligence," as used in LL 144 § 20-870, as defined in the proposed rules, 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
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> 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 purpose of this law will be served best where employers have clear guidance as to when the law is triggered (i.e., which tools, processes, or systems are covered) and what, specifically, employers need to do to comply. While these further definitions seek to create clarity, SHRM observes that they nevertheless cast a very wide net as to the employer tools, processes, or systems that might fall into the definition of AEDT. This ambiguity is likely to lead to employers being left to guess as to what might or might not be covered by this definition. It is helpful that the definition excludes a "junk email filter, firewall, antivirus software, calculator,

spreadsheet, database, data set, or other compilation of data," however the broad and conceptual phrasing of these definitions insufficiently identifies specific, concrete, reliable criteria for determining what tools, processes, or systems are covered. We encourage the final regulations to explicitly exclude automated tools that carry out human-directed assessments.

For example, some employers might use a scheduling tool that captures employee availability for purposes of both shift scheduling and candidate evaluation. That tool may "generate a prediction" where "a computer … identifie[d] the inputs" and decided the "relative importance placed on those inputs … in order to improve the accuracy of the prediction or classification," which involved "inputs and parameters" that were "refined through cross-validation or by using training and testing data." And the purpose of this tool may be "to screen candidates for employment" by virtue of determining and calculating how to best schedule individuals to work. Moreover, with large candidate pools, employers rely on automation to screen candidates based on core job-related decision points such as educational attainment or relevant licensure. Presumably, these types of tools are not intended to be covered by this law, as subjecting this type of tool to the requirements of LL 144 would likely create a severe burden upon employers, and the continued use of such tools would be untenable in the face of the requirements and penalties under LL 144.

Furthermore, nearly 1 in 4 organizations use automation or AI to support HR-related activities, with 79% of the organizations utilizing AI in recruitment and hiring. Mostly extra-large organizations with 5,000+ employees (42%) and large employers with 500-4,999 employees (26%) are utilizing AI to support HR. In the next five years, 1 in 4 organizations plan to start using or increase their use of AI in the recruitment and hiring process. These tools will become more essential to communicating with candidates, reviewing resumes, and identifying skills. These tools will provide more opportunities and employment for untapped talent pools – veterans, opportunity youth, older workers, individuals living with disabilities, and people with criminal records.

Clarity and specificity will foster compliance with LL 144, which in turn will promote the goals and objectives of LL 144. Thus, SHRM recommends further specificity and clarity to assist New York City employers in compliance with this new law.

B. THE BIAS AUDIT PROVISIONS REQUIRE FURTHER CLARITY

SHRM commends the Department on its effort to provide clarity regarding the criteria for a "bias audit." However, additional clarification on the bias audit requirements is needed.

First, the scope of the candidate pool required to be tested is unclear. Specifically, it is not clear whether employers are required, or conversely, permitted, to conduct a bias audit on all candidates globally (i.e., in and outside of New York City in the case of multijurisdictional employers), only New York City candidates, or a sample set of either category. Presumably, the jurisdictional reach of LL 144 does not extend outside of New York City. Otherwise, multijurisdictional employers with significant workforces outside of New York City could be unreasonably burdened by the requirements and obligations of LL 144.

Employers should be expressly permitted to use broad data for the required bias audit purposes. For instance, § 5-302 requires that "[p]rior to the use of an AEDT, employers and employment agencies in the city must make … publicly available" "the date of the most recent bias audit of such AEDT and a summary of the results," as well as "the distribution date of the AEDT to which such bias audit applies." This requirement appears to create a "chicken-or-the-egg" problem. An NYC employer looking to implement a new AEDT (or an updated version of existing AEDT, as discussed below) would have no prior data upon which to perform a bias audit, at least not in the first year, and thus could not begin to use the AEDT to obtain such data. The effect appears to be a de facto prohibition on implementing new AEDT tools. This issue would be easily addressed if the proposed rules were revised to clarify that NYC employers with operations outside the jurisdiction of NYC are permitted to include candidate data from other jurisdictions or alternately to use sample test data to conduct a bias audit of the AEDT to comply with LL 144.

Second, the proposed rules should clarify the timing implications with regard to the cadence of any required bias audits. At least one potential issue arises for employers who update or otherwise improve an AEDT. There should be a good faith standard to assess compliance in those instances. So long as a bias audit has been conducted on the tool itself, employers should not be required to conduct a new audit whenever enhancements are introduced. This is particularly true given that AEDT tools are continuously evolving.

Given that AEDTs are being used in the context of rapidly changing technological advancements, as well as the potential for penalties even in spite of employers' good faith and best efforts, SHRM recommends that the Department include a safe-harbor provision that permits employers to be deemed to have complied with LL 144 based on good faith efforts toward compliance. The Department should further consider providing that this safe harbor permits an AEDT to remain in use for the remainder of the time period during which the last bias audit was conducted.

Third, SHRM respectfully submits that the Impact Ratio metric that relies simply on "average scores" is a flawed methodology that does not adequately consider the effect size or the magnitude of the difference in scores. It appears to be a novel approach that, while seemingly simple to calculate, does not appear to be readily used by statisticians, labor economists, or industrial-organizational psychologists in the employment context. Indeed, we have been unable to find any interpretative guidance or peer-reviewed literature to support the use of the proposed "average score" methodology to determine an impact ratio result.

The use of the "average scores" impact ratio analysis is particularly problematic because it appears that it will be required in virtually all AEDTs. While two impact ratio methodologies are defined in the proposed rules and are seemingly designed to be used in the alternative,[1] it is difficult to conceive of an AEDT that "selects individuals in the hiring process or classifies

[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.

individuals into groups" as set forth in § 5-301(a), without scoring applicants or candidates in some way as described in § 5-301 (b). Accordingly, under the proposed rules, NYC employers will be required to conduct a bias audit based on a flawed methodology that lacks an adequate benchmark for assessment purposes.

Fourth, while SHRM generally supports transparency efforts, there is some concern that the required notices could risk disclosure of candidates' personal identifiable information ("PII") or other information that is otherwise protected from disclosure. It is presumed that neither LL 144 nor the proposed rules require or otherwise seek disclosure of such information. SHRM thus recommends that the Department consider providing clarification in § 5-302 that "Nothing in this subchapter requires an employer or employment agency to disclose any personal identifiable information or any other protected or confidential information of any candidate or employee."

Finally, SHRM commends the Department on the flexibility it has offered employers in determining who is considered to be an "independent auditor" of AEDTs. As NYC employers move quickly to come into compliance, being able to rely on a broad range of individuals or companies to implement the appropriate audit mechanisms will be of critical importance.

C. THE DEPARTMENT SHOULD GUARD AGAINST THE DANGERS OF STIFLING INNOVATION

SHRM commends the Department on its efforts to propose rules to create protections for candidates while providing clear, workable obligations for employers in this developing area where technology and law intersect.

The development and enhancement of advanced technologies in the workplace require flexibility to ensure that optimal processes benefit both the employer community, and candidates and employees in New York City. The war for talent, particularly after the pandemic, has created unique challenges for employers, including increased complexities due to the ever-evolving remote workforce.

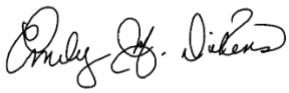
As employers continue to navigate these real challenges, employers are exploring the use of AEDTs in myriad ways, including quickly sourcing and expanding candidate pools, identifying skills gaps, enhancing talent pipelines, reducing turnover, increasing productivity, and bolstering diversity equity and inclusion goals. Nearly 80% of employers report that candidates that score highly on a pre-employment assessment but do not meet the minimum experience requirement are likely to advance in the application and hiring process. Nearly 70% report the same for candidates that fail to meet the minimum education requirements for a position and are more likely to advance with high skills assessments. When carefully developed and implemented, employers and workers alike experience the positive benefits of AEDTs. Employers experience improved efficiencies which in turn benefits workers by optimizing the selection of candidates to ultimately place them in jobs that provide increased fulfillment and opportunities for success while enhancing career progression and movement in the workforce.

In light of the key benefits that AEDTs offer, SHRM submits that the requirements and obligations contained in the proposed rules should be viewed through the lens of minimizing limitations on the growth and advancements that could benefit everyone. SHRM champions the

creation of better economic opportunities for overlooked and untapped talent pools, including veterans, older workers, individuals living with disabilities, opportunity youth, and people with a criminal record. The availability of AEDTs to better recognize the knowledge, skills, and abilities of these workers provides an important tool for organizations seeking to build a more equitable and inclusive workplace. SHRM promotes the value of untapped talent as more than a matter of social responsibility or goodwill; these groups of workers are proven to show high returns on investment and skills for employers. Appropriate safeguards must be balanced against heavy-handed regulatory restrictions that will set key HR functions back and impede the ability to create and identify broader, more inclusive talent pipelines. To do otherwise will only dampen innovation and stifle creativity within the confines of employment for NYC workers.

SHRM commends the Department on its efforts to propose rules that pioneer the realm of artificial intelligence and machine learning, making these rules among the first of their kind. We appreciate the opportunity to present our views on the proposed rules and would welcome the opportunity to assist the Department as it continues its rule-making process. If you should have any questions or require any additional information, please feel free to contact James Redstone at James.Redstone@shrm.org or C. Mitch Taylor at Mitch.Taylor@shrm.org.

Sincerely,



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