



January 20, 2023

VIA E-MAIL: Rulecomments@dcwp.nyc.gov

City of New York
Department of Consumer and Worker Protection
42 Broadway
Manhattan, New York 10004

Re: Letter of Comment on the DCWP Updated Proposed Rules for NYC Local Law 144

Dear Sir/Madam:

The Institute for Workplace Equality (“IWE” or “The Institute”) submits the following comments in response to the New York City (“NYC” or the “City”) Department of Consumer and Worker Protection’s (“DCWP” or the “Department”) invitation. The Department’s Notice of Proposed Rules is seeking to clarify the requirements set forth by NYC’s Local Law 144 that will regulate the use of automated employment decision tools (“AEDT”) wherein hiring or promotion decisions are made or substantially assisted by algorithmically-driven mechanisms.

Background on The Institute for Workplace Equality

The Institute is a national, non-profit employer association based in Washington, D.C. The Institute’s mission includes the education of federal contractors as to their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions representing many of the nation’s largest and most sophisticated federal contractors.

The Institute recognizes the responsibility of all employers to create a nondiscriminatory workplace. To that end, NYC’s DCWP has an important role in enforcement efforts related to Local Law 144 and additional rules to clarify the requirements for compliance. This is critical to ensuring that employers understand their requirements and can effectively comply with the law beginning April 15, 2023.

Comments on Proposed Rules for Local Law 144

The Institute appreciates the efforts taken by the DCWP to update the proposed rules for Local Law 144 by incorporating some of the written and verbal comments previously provided by the Institute as well as other individuals and organizations. The clarifications and additions to the

definition section, the clarifications for the bias audit, published results, and notices, and the addition of the data requirements section all enhance the ability for employers and auditors to understand and meet the requirements of Local Law 144. Our members found these updates to be very useful. However, the Institute would ask that the DCWP consider adding some important additional clarifications to the new section, §5-302 Data Requirements.

As context for the points on which we seek clarification, we suggest that there are four (4) use cases that will define the vast majority of bias audits required by Local Law 144. These use cases are as follows:

1. Implementing an AEDT where sufficient employer (historical) data are available, and vendor (test) data are not available.
2. Implementing an AEDT where sufficient employer (historical) data are not available, but sufficient cross-employer vendor (test) data are available.
3. Implementing an AEDT where sufficient employer (historical) data are available, and cross-employer vendor (test) data are also available.
4. Implementing an AEDT where there are no data available.

Section §5-302 Data Requirements contains three components. The first two components (a & b, listed below) suggest that an audit should be comprised of an employer’s historical data where sufficient, and test data where historical data are insufficient—and where test data are used, an explanation of why and how should be provided.

“§ 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. ...”

If one considers these two components of the Data Requirements in isolation, it suggests auditors do the following for each use case:

- Use Case #1 – auditors should use employer, historical data.
- Use Case #2 – auditors should use vendor, cross-employer, test data.
- Use Case #3 – auditors should use employer, historical data.
- Use Case #4 – the data to be used are less clear here, however, an auditor might work with the employer (and/or vendor) to consider alternative sources of test data (e.g.,

data from a validation study, data from a pilot study, simulated data) to serve as the basis for the bias audit, until such time as sufficient employer historical data became available (presumably in the following year's audit).

The third component listed in Section §5-302 (c, listed below), however, introduces ambiguity related to the data to be used in Use Case #3.

“§ 5-302 Data Requirements.

... (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.”

This impacts the use case (#3) for which there is both sufficient employer (historical) data and sufficient cross-employer vendor data where the same AEDT is being used. The third component allows the bias audit to either, 1) be based solely on an analysis of the employer's (historical) data, or 2) be based on an analysis of a vendor's, cross-employer dataset, so long as the employer's data comprise part of the dataset.

This may have been intentionally introduced to provide employers with multiple options for having an auditor complete their bias audit. However, if this is unintentional, then the specific parameters of this section should be revised accordingly.

There are four questions that the Institute sees as important to clarify to ensure that auditors, employers, and vendors are properly interpreting the intention of the city as it relates to the newly added section (§ 5-302 Data Requirements) in the proposed rules:

Question 1: Will the city provide guidance on what constitutes sufficient (versus insufficient) historical data, or will this be left to the judgment of the independent auditor?

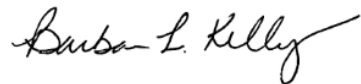
Question 2: In Use Case #3 (where both employer historical data and vendor cross-employer data are available and sufficient), must the bias audit be conducted solely on the employer historical data, or may a cross-employer dataset provided by a vendor, which includes data from the specific employer, serve as the basis for the bias audit instead?

Question 3: Will the city provide parameters for identifying appropriate test data for Use Case #4 (where no historical or vendor cross-employer data are available), or will the city defer to the judgment of the independent auditor and employer?

Question 4: May a bias audit for Use Case #4 use a simulated set of test data?

Thank you in advance for your consideration of The Institute's comments. We are happy to provide any additional information you may need, or to answer any questions you may have.

Best wishes,

A handwritten signature in cursive script that reads "Barbara L. Kelly". The signature is written in black ink and is positioned to the left of the typed name.

Barbara L. Kelly
The Institute for Workplace Equality Director