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From: **Shea Brown, Ph.D.**
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To: **NYC Department of Consumer and Worker Protection**
Rulecomments@dca.nyc.gov

Re: **Public Comments on the Proposed Rules for Local Law 144 of 2021**

January 23, 2023

To Whom It May Concern:

On behalf of the team at BABL AI, I thank the department for the opportunity to provide public comments on the proposed rules for enforcing Local Law 144 requiring annual bias audits for automated employment decision tools (AEDTs).

We commend the department for providing guidance and clarity on many aspects of the proposed rules. In particular, we are pleased that the new proposed rules

1. Tightened the requirements for independence,
2. Required disclosure of intersectional analysis,
3. Established data requirements for auditing, and
4. Limited the generalizability of audit results.

As a company that audits algorithms for ethical risk, effective governance, bias, and disparate impact, BABL AI believes that the spirit of this law furthers our mission to ensure safe and fair algorithms that prioritize human flourishing.

Although the new rules directly address many of our previous concerns, we would like to comment on three specific areas:

(1) Definition and scope of AEDT: The current definition of AEDT is overly stringent. In particular, the bar an automated tool must meet to qualify as being able to “substantially assist or replace discretionary decision making” is excessively high.

In our experience it is extremely rare that an automated system is deployed in such a manner that would (1) provide users with no other factors besides one simplified output, (2) have the simplified output be the primary factor in user decision making, or especially, (3) overrule conclusions by human decision-making.

Quite the contrary, the majority of the automated systems both involving and not involving AI/ML are intended to *assist* users—e.g., recruiters and hiring managers. They do so often by providing a plethora of information about candidates, including perhaps a “simplified output” by the AI/ML component, among other non-AI/ML-based data regarding the candidates such as their inputted profile or assessment scores. For example, AI interview tools not only display results from their AI/ML components such as their computed personality trait scores¹, but also give immediate access to the candidate's non-AI/ML-based data—available on the same screen or a click away. Employers and vendors of these tools can thus claim exemption from a bias audit simply because their tools' outputs (1) are not the only factor being considered by the recruiters—evidenced by there being other pieces of information they can examine, (2) can be argued not to be the primary influencing factor, and (3) do not overrule recruiter decision-making—by design. **Under this current AEDT definition, such paradigmatic automated tools whose harm of bias and discrimination is intended to be prevented by the proposed rules would risk being exempt from a bias audit.**

We strongly urge the Department to remove the expanded definition of “substantially assist or replace discretionary decision making.” We believe that employers procure these tools because they believe they will substantially assist in their employment decisions, and further attempts to clarify these words will unnecessarily narrow the scope.

(2) Definition of “machine learning, statistical modeling, data analytics, or artificial intelligence”: As the current scope of AEDT tends to focus on AI- and ML-based methods, the department should be cautious that **an automated tool does not need AI or ML to result in bias or discrimination**. The current definition of “machine learning, statistical modeling, data analytics, or artificial intelligence,” despite being precise, focuses primarily on methods which are based on training and optimization of parameters. We believe the overemphasis on this technical aspect of ML would exempt many simple algorithms and automated systems that nonetheless likely exacerbate bias. We provide more details in this video² where we illustrate the ways simple algorithms can amplify discrimination and give a concrete example of how one can design a simple algorithm around the requirements of the proposed rules that do not rely on training and parameter-optimization.

We suggest that the Department remove the new definition of “machine learning, statistical modeling, data analytics, or artificial intelligence.” What is currently written does not cover the extent of what these words mean, nor what the spirit of the law intended.

(3) Number of applicants for the scoring rate method: The examples provided in the proposed rules only show the number of applicants for the selection rate method but not

¹ <https://www.technologyreview.com/2021/07/07/1027916/we-tested-ai-interview-tools/>

² <https://www.youtube.com/watch?v=3VAYGnMLLS8>

for the scoring rate method. The number of applicants is important because it gives readers of public summaries, regardless of level of technicality—some information about the uncertainty and generalizability of the impact ratios. Omission of such numbers creates an information asymmetry, and lowers the level of transparency for one of the methods.

We encourage the department to include disclosure of the number of applicants in the example for the scoring rate method. This should equalize the requirements for disclosure for the two methods of impact ratio calculation and provide greater transparency for readers of the resulting summaries.

Again, we would like to thank the NYC Department of Consumer and Worker Protection for providing us the opportunity to comment on the proposed rules of Local Law 144 of 2021, and we would be happy to provide further clarification on any of the above comments.

Contact

A handwritten signature in black ink, consisting of a stylized 'S' followed by a 'B' and a trailing flourish.

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