

January 23, 2023

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 for Implementing Local Law 144 of 2021

To the Department of Consumer and Worker Protection:

Gibson, Dunn & Crutcher, LLP (“Gibson Dunn”) is a go-to global law firm for novel and high-stakes matters, providing full-service representation through the most challenging labor and employment issues. Gibson Dunn’s prominent Labor & Employment and Artificial Intelligence & Automated Systems Practice Groups—among others—routinely work to provide cross-disciplinary expertise and counsel to employers regarding federal, state, and local requirements, including as they relate to the use of automated decision-making tools.

Gibson Dunn submits on behalf of a client these comments to the proposed rules issued by the Department of Consumer and Worker Protection (the “Department”) on December 23, 2022 that seek to implement New York City Law 144 of 2021 (“Local Law 144”) regarding the use of automated employment decision tools (“AEDT”) by employers in hiring and promotion decision making (the “Proposed Rules”). Our client urges the Department to further clarify the scope and applicability of the Department’s most recent definition of AEDT under Local Law 144, as refined by the Proposed Rules.

I. The Revised Definition Of AEDT Should Be Narrowly Tailored So Algorithmic Tools That Merely Assist Employers In Sorting, Filtering, Or Reviewing Candidates Are Not Unintentionally Included.

Our client encourages the Department to revise the definition of AEDT to more clearly capture the intended scope: to exclude automated organizational tools that are used to help employers simplify their review of candidates for employment through the use of recommendations or suggestions, or the ability to sort, filter, organize or review such candidates, but whose outputs are not, with respect to making employment decisions, used as or intended to be (i) the sole factors considered, (ii) weighted more heavily than any other criteria, or (iii) overruling conclusions from other factors.

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We believe the Department’s inclusion of “test data” in the Proposed Rules further supports this narrowed definition and interpretation, as tools excluded by this definition of AEDT likely cannot be reliably audited using test data in the manner Local Law 144 requires.

A. Revisions To The Definition Of AEDT In The Proposed Rules Help To Define The Scope Of Included Tools, But Additional Clarification Should Be Provided.

AEDT are defined within Section 20-870 of Local Law 144 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” (emphases added).

In Section 5-300 of the Proposed Rules, the phrase “to substantially assist or replace discretionary decision making” is further refined as follows (changes **bolded** as compared to the September 23, 2022 version):

(i) to rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other factors considered; (ii) to use a simplified output as one of a set of criteria where the simplified output is weighted more than any other criterion in the set; or (iii) to use a simplified output to overrule ~~or modify~~ conclusions derived from other factors including human decision-making.

Our client appreciates the Department’s efforts to modify the definition of AEDT in the Proposed Rules to make it more focused.¹ Removal of “or modify” in the third prong of the revised definition is a helpful and necessary clarification that *excludes* simplified outputs that would merely “modify” conclusions derived from other factors, including human decision-making. For further confirmation, the Department should revise the second prong (prong (ii)) of the aforementioned definition to specify that a covered AEDT would only “substantially assist or replace discretionary decision making” if it uses “a simplified output as one of a set of criteria where the simplified output is weighted **substantially** more than any other criterion in the set.” By including “substantially,” the definition appropriately tracks the terminology of the original definition, which requires that the tool either wholly replace, or “*substantially* assist” the employer’s decision-making. Importantly, this would more clearly narrow the scope to tools in which the simplified output is meaningfully being used in an employer’s *decision-making*—not

¹ See Statement of Basis and Purpose of Proposed Rule (“Various issues raised in the comments have resulted in changes to the proposed rules. These changes include . . . [m]odifying the definition of AEDT to ensure it is focused.”).

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tools which merely sort or organize a simplified output for the employer to then engage in its own decision-making process.

Local Law 144's definition recognizes as much, and identifies certain tools that may be used to assist review, but do not "substantially assist or replace discretionary decision-making processes," such as "a junk email filter," "calculator," "spreadsheet," "or other compilation of data." In view of this, the Department should additionally confirm in the Proposed Rules the list of examples that covered AEDT do *not* include, such as: (1) tools performing automated searching of resumes or other relevant documents to identify qualifications about candidates for employment, including relevant skills or experience; or (2) any automated organizational tools that are used to assist in the searching, identifying, sorting, filtering, labeling, analyzing, or organizing of candidates for employment for further human review.

The Department's confirmation of the types of tools included within the scope of Local Law 144 is necessary to ensure that automated tools that merely *assist* employers in hiring and promotion review process, but do not overrule the *end decision-making*, are excluded from the law, as these are not the tools the Department sought to govern.

B. Organizational Tools Assist Employers In Identifying Qualified Candidates, But Are Not The Sole Factor In The Decision, Do Not Substantially Outweigh Any Other Criterion, And Do Not Overrule Human Decision-Making.

As additional background on why we believe the Department reasonably excluded these automated organizational tools, and why the additional suggested revisions provide important context: many automated tools seek to provide recommendations and suggestions for employers about candidates for employment, or identify and organize candidates for further review. These tools may help play a vital role in simplifying an employer's review of such candidates, but they are in no way intended to "overrule" an employer's conclusion, be the sole or most heavily weighted criteria or factor in the hiring or promotion process, or even to be involved in the *decision* at all.

Rather, these tools are used for the mere searching, identifying, sorting, filtering, analyzing, organizing, or suggesting of candidates as a way to simplify an employer's review, with humans not only overseeing the use of such processing, but also making the actual decision-making downstream of these processes.

For example, certain types of tools may engage in algorithmic matching by identifying applicants who are potential high-match candidates for a given position. This matching is based on a limited universe of factors concerning the job posting (such as a job's title, location, and description) and the candidate (such as the candidate's general employment background, location,

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skills, and/or certifications). Similarly, a “spreadsheet” (which is excluded from the primary definition of an AEDT) may be used by the employer to automatically filter or search based on keywords or categories. These types of automated organizational tools are just that, organizational, and intended to streamline and improve the efficiency of an employer’s recruiting process.²

Such tools do not remove candidates for employment from the employer’s applicant pool, do not replace, overrule, or otherwise serve as the sole or primary decision-making criterion, and do not overrule conclusions derived from other factors. In practice, how automated organizational tools are used, and the *subsequent* employment *decision*-making, are incredibly employer-specific (for example, the definitions clearly recognize the issue with a spreadsheet that can be filtered, but does not explicitly account for various other tools that present similar complexities). Accordingly, we believe the Department intended to exclude such automated organizational tools from the definition of an AEDT because the ultimate employment decision is largely driven by the employer’s human decision-making.

C. The Definition Of “Test Data” Further Supports The Clarified Scope Of AEDT.

Automated organizational tools should also be outside the scope of this law because such tools lack the very type of inputs and algorithms Local Law 144 seeks to govern, and therefore cannot be reliably audited for bias in the manner proposed, even as most recently edited.

Section 5-302 of the Department’s revised Proposed Rules specifies that bias audits may use test data if “insufficient historical data is available to conduct a statistically significant bias audit.” Section 5-300 defines “historical data” as “data collected during an employer or employment agency’s use of an AEDT to assess candidates for employment or employees for promotion,” and “test data” as “data used to conduct a bias audit that is not historical data.” The permissibility of test data to conduct a bias audit as a theoretical concept is welcome as it will ensure that the innovation of new tools necessarily lacking historical data is not inhibited.

Nevertheless, it is difficult to identify in practice what “test data” may be used for automated organizational tools, and the limitations would make conducting such a bias audit confusing or inapplicable, if not impossible. For example, where a “tool” is neither intended to collect sex, race/ethnicity, or intersectional categories in the first instance, nor uses any of that information as part of its matching or organizational algorithms, it is not clear what (if any) test data could (let alone *should*) be used to calculate potential disparate impact. Indeed, even if a tool endeavored to request such information, applicants have the ability to decline to provide it, which

² On average, each corporate opening attracts 250 resumes. See Glassdoor, *50 HR & Recruiting Stats That Make You Think* (2015), <https://www.glassdoor.com/employers/blog/50-hr-recruiting-stats-make-think/>.

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may skew the findings of any bias audit given the inconsistency of such information being provided.

Moreover, where an employer's use of the tool for any downstream review process is largely employer- (or even job-) specific, a tool developer has little or no insight into such process. This user-specificity renders it infeasible (if not impossible) to test every permutation of potential employer use and the outcomes of downstream and unknowable employment decisions—similar to the concerns presented by a spreadsheet tool with filtering. Each of the practical considerations that make the definition of “test data” difficult to apply in these instances support these tools being appropriately classified as outside the scope of an AEDT.

II. Conclusion

The Proposed Rules should further clarify that Local Law 144 intends to exclude automated organizational tools that solely provide recommendations or suggestions to employers, or the ability to search, identify, sort, filter, label, analyze, or organize candidates for employment but are not (i) the sole factor considered, (ii) weighted substantially more than any other criterion, or (iii) overruling conclusions from other factors. Further, the types of data that the law seeks information about is unavailable or inapplicable for these tools. As such, we urge the Department to more clearly identify the scope of tools reasonably covered—and, more importantly, not covered—by the definition of an AEDT.

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Please do not hesitate to contact us if you believe additional information would be of assistance. Thank you for your time and attention to our submission.