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Testimony of Daniel Schwarz
On Behalf of the New York Civil Liberties Union
Before the New York City Department of Consumer and Worker Protection
Regarding the New Proposed Rules to Implement Local Law 144 of 2021

January 13, 2023

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony regarding the proposed rules to implement Local Law 144 of 2021. The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU’s mission is to defend and promote the fundamental principles, rights, and values embodied in the Bill of Rights, the U.S. Constitution, and the Constitution of the State of New York. The NYCLU works to expand the right to privacy, increase the control individuals have over their personal information, and ensure civil liberties are enhanced rather than compromised by technological innovation.

The New York City Council enacted Local Law 144 of 2021 (“LL 144”) which laudably attempts to tackle bias in automated employment decision tools (“AEDT”). AEDT, similar to automated decision systems in other areas, are in urgent need of transparency, oversight, and regulation.¹ These technologies all too often replicate and amplify bias, discrimination, and harm towards populations who have been and continue to be disproportionately impacted by bias and discrimination: women, Black, Indigenous, and all people of color, religious and ethnic minorities, LGBTQIA people, people living in poverty, people with disabilities, people who are or have been incarcerated, and other marginalized communities. And the use of AEDT is often accompanied by an acute power imbalance between those deploying these systems and those affected by them, particularly given that AEDT operate without transparency or even the most basic legal protections.

¹ See: Testimony on Oversight and Regulation of Automated Decision Systems, NEW YORK CIVIL LIBERTIES UNION (2020), <https://www.nyclu.org/en/publications/testimony-oversight-and-regulation-automated-decision-systems>.

Unfortunately, LL 144 falls far short of providing comprehensive protections for candidates and workers. Worse, the rules proposed by the New York City Department of Consumer and Worker Protection (“DCWP” or “Department”) would stymie the law’s mandate and intent further by limiting its scope and effect. The NYCLU submitted comments in response to the first proposed rules by the Department on October 24, 2022. Disappointingly, the subsequent update to the proposed rules did not ameliorate the many shortcomings we identified. We therefore resubmit our comments with minor revisions to respond to these changes.

The DCWP must strengthen the proposed rules to ensure broad coverage of AEDT, expand the bias audit requirements, and provide transparency and meaningful notice to affected people in order to ensure that AEDT do not operate to digitally circumvent New York City’s laws against discrimination. Candidates and workers should not need to worry about being screened by a discriminatory algorithm.

Re: § 5-300. Definitions

LL 144 defines AEDT as tools that “substantially assist” in decision making. The proposed rules by DCWP further narrow this definition to “one of a set of criteria where the output is weighted more than any other criterion in the set.” This definition goes beyond the law’s intent and meaning, risking coverage only over certain scenarios and a subset of AEDT. In the most absurd case, an employer could deploy two different AEDT, weighted equally, and neither would be subject to this regulation. More problematically, an employer could employ an AEDT in a substantial way that doesn’t meet this threshold, while still having significant impact on the candidates or workers.² The Department should revise this definition to be consistent with the statute.

The proposed definition of “simplified output” would exclude “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.” However, existing transcription tools are known to have racial bias,³ and their outputs could very well be used as inputs to other AEDT systems, resulting in biased results.

Re: § 5-301 Bias Audit

The definition for bias the audit in LL 144, § 20-870, explicitly lists disparate impact calculation as a component but not the sole component (“include but not be limited to”). The

² Aaron Rieke & Miranda Bogen, *Help Wanted*, UPTURN (2018), <https://upturn.org/work/help-wanted/>.

³ Allison Koenecke et al., *Racial disparities in automated speech recognition*, 117 PNAS 7684 (2020).

examples given in section 5-301 of the proposed rules do not account for an AEDT's impact on age and disability, or other forms of discrimination.

At a minimum, in addition to an evaluation of disparate impact of the AEDT, any evaluation that could properly qualify as a bias audit would need to include an assessment of:

- the risks of discriminatory outcomes that an employer should be aware of and control for with the specific AEDT, including risks that may arise in the implementation and use of the AEDT;⁴
- the sources of any training/modeling data, and the steps taken to ensure that the training data and samples are accurate and representative in light of the position's candidate pool;
- the attributes on which the AEDT relies and whether it engages in disparate treatment by relying on any protected attribute or any proxy for a protected attribute;
- what less discriminatory alternative inputs were considered and which were adopted;
- the essential functions for each position for which the AEDT will be used to evaluate candidates, whether the traits or characteristics that the AEDT measures are necessary for the essential functions, and whether the methods used by the AEDT are a scientifically valid means of measuring people's ability to perform essential job functions.

Similar essential components are outlined in the federal EEOC guidance, which recommends including "information about which traits or characteristics the tool is designed to measure, the methods by which those traits or characteristics are to be measured, and the disabilities, if any, that might potentially lower the assessment results or cause screen out."⁵

The bias audit should clearly state the origin of the data used for the statistics reported. This includes where the data was gathered from, by who, when, and how it was processed. It should also provide justification for why the source of the data for the bias audit model population is believed to be relevant to this specific deployment of the AEDT.

The proposed rules for the ratio calculations also make no mention of appropriate cutoffs when a specific candidate category (per EEO-1 Component 1) has a small or absent membership that could result in unrepresentative statistics.

⁴ See: Algorithmic Discrimination Protections, THE WHITE HOUSE OSTP (2022), <https://www.whitehouse.gov/ostp/ai-bill-of-rights/algorithmic-discrimination-protections-2/>.

⁵ The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees, US EEOC (2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

Re: § 5-303 Published Results

The disclosure of the bias audit on employers' and employment agencies' websites should not be limited to the selection rates and impact rates results described in §5-301. It should include all the elements mentioned in our comments on the bias audit. The summary should describe the AEDT appropriately and include information on traits the tool is intended to assess, the methods used for this, the source and types of data collected on the candidate or employee, and any other variables and factors that impact the output of the AEDT. It should state whether any disabilities may impact the output of the AEDT.

Additionally, the published results should list the vendor of the AEDT, the specific version(s) of product(s) used, and the independent auditor that conducted the bias audit. The DCWP should provide examples that include such information.

The "distribution date" indicated in the proposed rules for the published results should also describe which particular part of the employment or promotion process the AEDT is used for on this date. It is insufficient to note "an AEDT with the bias audit described above will be deployed on 2023-05-21" unless there are already clear, public indicators that describe which specific employment or promotion decision-making process happened on that date. Any examples should be updated to include a reasonable deployment/distribution description.

Published results should include clear indicators about the parameters of the AEDT as audited and testing conditions, and the regulations should clarify that employers may not use the AEDT in a manner that materially differs from the manner in which the bias audit was conducted. This includes how input data is gathered from candidates or employees compared to how the comparable input data was gathered from the model population used for the bias audit. For example, if testing of an AEDT used a specific cutoff or weighting scheme, the cutoff or weighting scheme used in the actual deployment should match it as closely as possible, and the publication should indicate any divergence and the reason for it. A tool may not show a disparate impact when cut offs or rankings are set at one level and show a disparate impact with other levels. Likewise, if one input variable is hours worked per week, the model population for the bias audit derives those figures from internal payroll data, but candidate data will come from self-reporting, then the publication should indicate that divergence and provide commentary on the reason for the divergence and an assessment of the impact the divergence is likely to have on the relevance of the bias audit.

Lastly, the rules should clarify that the published results must be disclosed in machine readable and ADA compliant formats in order to be accessible to people with various assistive technologies.

Re: § 5-304 Notice to Candidates and Employees

Section 20-871(b)(2) of LL 144 requires the disclosure of the job qualifications and characteristics that the AEDT will use in the assessment. The rules should clarify that candidates or employees should be provided with as much information as possible to meaningfully assess the impact the AEDT has on them and whether they need to request an alternative selection process or accommodation.⁶

The law also requires that the employer “allow a candidate to request an alternative selection process or accommodation.” The regulations should provide employers with parameters of how to provide alternative selection processes or accommodations, including what processes may be used to give equal and timely consideration to candidates that are assessed with accommodations or through alternative processes. By merely stating in the regulations that “Nothing in this subchapter requires an employer or employment agency to provide an alternative selection process,” the regulations suggest that the law provides an empty protection to candidates to be solely allowed to make a request for an alternative without any obligation on the part of the employer to in any way consider or honor that request.

Conclusion

In conclusion, the NYCLU thanks the Department of Consumer and Worker Protection for the opportunity to provide comments to the new proposed rules. The Department’s rulemaking is instrumental in ensuring a productive implementation of Local Law 144 and making clear that discriminatory technology has no place in New York. We strongly urge the Department to amend and strengthen the proposed rules to deliver on the law’s promise to mitigate bias and provide people with the protections and information they need.

⁶ See: Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring, BETA.ADA.GOV (2022), <https://beta.ada.gov/resources/ai-guidance/>.