



Public Comments on Proposed Rule Amendments to Implement New York City Local Law 144

January 23, 2023

Dear Commissioner Mayuga:

Thank you for the opportunity to comment on the New York City (NYC) Department of Consumer and Worker Protection's (DCWP or Department) proposed rule amendments implementing *Local Law 144 of 2021* (LL 144).

Workday is a leading provider of enterprise cloud applications for finance and human resources, helping customers adapt and thrive in a changing world. Workday applications for financial management, human resources, planning, spend management, and analytics have been adopted by thousands of organizations around the world and across industries—from medium-sized businesses to more than 50% of the Fortune 500. Workday advocates for thoughtful regulation to build trust in AI and has engaged with federal, state, and local governments, as well as governments abroad, on AI policy and regulatory best practices.

Workday supports LL 144's goal of addressing public concerns about unlawful discrimination in hiring and promotion. We believe that the successful implementation of LL 144 requires clear rules that offer deployers and developers of automated employment decision tools (AEDTs) a workable path to compliance.

We applaud DCWP's improvements to its proposed rules, including to its definition of an AEDT, which ensures that the LL 144 is targeted in scope. On the whole, however, the Department's amendments represent a step backwards from its original proposal due to its restrictive approach to independent evaluations, its continued misalignment with federal guidance on testing, and the privacy risks it poses to NYC's workers.

With the successful implementation of LL 144 in mind, we offer the following comments and recommendations.

Definition of an Automated Employment Decision Tool

When establishing a framework for regulating AEDTs, precise definitions are critical. We commend DCWP for refining the definition of AEDTs, as this will assist in bringing certainty to deployers and developers of AEDTs in New York.

Recommendation: DCWP should retain its amended definition of an AEDT.

Independent Auditors

LL 144 calls for an "impartial evaluation" of AEDTs by an "independent auditor." Unfortunately, DCWP's proposed amendments adopt a restrictive approach that bars employers from conducting internal independent evaluations.

We note that employers conducting internal audits have strong incentives to ensure that AEDTs are not used in a discriminatory manner, as these practices would result in significant legal, financial, and reputational repercussions. By contrast, third-party AI auditors do not have a respected independent professional body to establish baseline auditing criteria or police unethical practices among auditors. *Absent such professional standards, the advantages of the Department mandating audits be carried out by third parties is debatable and may be outweighed by the practical challenges and unintended consequences of a restrictive approach.*

We urge DCWP to recognize the immature state of the AI auditing field and retain the flexibility of its original proposed rules regarding independence.

Recommendation: We recommend the Department adopt the changes to its proposed amendments below.

“Independent Auditor. “Independent auditor” means a person or group that is capable of exercising objective and impartial judgment on all issues within the scope of a bias audit of an AEDT.

An auditor is not an independent auditor of an AEDT if the auditor:

- i. is or was involved in using, developing, or distributing the AEDT;
- ii. ~~at any point during the bias audit, has an employment relationship with an employer or employment agency that seeks to use or continue to use the AEDT or with a vendor that developed or distributes the AEDT; or~~
- iii. ~~at any point during the bias audit, has a direct financial interest or a material indirect financial interest in an employer or employment agency that seeks to use or continue to use the AEDT or in a vendor that developed or distributed the AEDT.”~~

Data Requirements

Workday urges DCWP to reconsider its proposed amendments in light of the following privacy and data protection considerations.

First, we caution DCWP against assuming that vendors have access to employers’ historical data. Cloud software providers such as Workday are legally and contractually limited in how and when they can access, use, and disclose the data of enterprise customers. These safeguards are in place to protect the privacy and security of personal information and underpin both modern privacy laws and the enterprise cloud software market.

Second, NYC employers seeking to comply with DCWP’s amended rules would have to give sensitive personal information of NYC employees and job candidates to third-party auditors. *We note, however, that DCWP’s proposed amendments do not prevent third-party auditors from reusing New Yorkers’ personal information for commercial purposes or from selling it to other third-parties.* Without such restrictions in place, DCWP’s proposed amendments pose privacy risks to NYC’s workers and job candidates.

Recommendation: The Department should convene stakeholders to discuss how unintended privacy risks posed by its proposed amendments may be avoided.

Bias Audit

DCWP's proposed rules for conducting a disparate impact analysis should align with federal guidelines.

Aligning with existing federal requirements provides two advantages. First, it allows employers to comply with a single, unified standard at the federal, state, and city level. Second, it does not commit the Department to an approach that may conflict with forthcoming federal guidance. We note that the U.S. Equal Employment Opportunity Commission (EEOC) is holding a hearing on January 31, 2023, to explore AEDTs in the context of federal law. Last year, the EEOC and the Department of Justice issued rules with respect to AEDTs and the Americans with Disability Act and is considering additional guidance.

Recommendation: The Department should align its amendments with federal guidelines, specifically, the Uniform Guidelines on Employee Selection Procedures, by removing intersectionality from its disparate impact testing requirement.

Public Disclosure Requirements

DCWP's proposed amendments require employers to publish a summary of the bias audit of an AEDT, including the selection rates and impact ratios for all categories. Releasing such raw data without context would create a situation ripe for misinterpretation. The risk of misinterpretation may drive employers to seek testing models that produce less candid results, undermining the aims of LL 144. Publishing an independent auditor's summary of the impact of the AEDT accomplishes the same objective.

Recommendation: The Department should revise the requirement to publish the selection rates and impact ratios for all categories and replace it with a requirement to publish a summary statement on any adverse impact identified by the audit.

We appreciate your consideration of our comments. Please contact Michelle Richardson, Senior Director, U.S. Public Policy, at michelle.richardson@workday.com, if Workday can provide further information as the Department finalizes these regulations.