Published on *The National Law Review* https://natlawreview.com

# New York City Employers Beware: The Big Apple has Issued Its Final Rule Regulating AI Tools Used to Vet Job Applicants (Other Cities are Sure to Follow)

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At this point in the evolution of AI technology, while there is endless debate about nothing less lofty than AI's broad implications for humanity as a whole, it seems we can all agree on one small point. The use of AI models in the workplace to evaluate individuals for hiring, firing, and other employment decisions in between can be — to put it mildly — fraught.

We recently reported on some of the major issues that employers who use AI can confront — from concerns about coding human bias into AI models to keeping up with the rapidly evolving federal regulatory landscape. Similarly, employers who use AI must remain aware of and up to date on the many state regulations that are designed to monitor and limit the use of AI in the recruiting and hiring process. For example, Illinois and Maryland both have enacted laws that require employers to disclose to job applicants if their job candidacies will be evaluated by AI tools and mandated that the employers seek prior consent from the candidates for such use.

It seems that city governments also are now getting in on the regulatory action. Earlier this month, the New York City Department of Consumer and Worker Protection (DCWP) announced, after several postponements to allow for public hearings and comment on its implementing legislation, that it will begin enforcing Local Law 144. That law, which was passed in 2021, polices the use of "automated employment decision tools" (AEDTs) by requiring such tools to be audited for bias before they are used. Enforcement by the DCWP is set to begin on July 5, 2023, pursuant to DCWP's final rule. The application of this new rule certainly will add an additional layer of uncertainty and concern for employers using AI hiring tools in New York City. And, to the extent that other cities and local governments follow suit, which they often do, New York City's law ultimately may impact employers well beyond its borders.

The DCWP's implementing rule provides pages of detailed explanation — often with illustrative examples — of what it will look for come July 5 and how employers can comply with Local Law 144. Employers are well-advised to review the specifics of DCWP's rule but, at a high level, the rule does the following:

- Clarifies what Local Law 144 actually means when it states that it regulates the use of AEDTs that "substantially assist or replace discretionary decision for making employment decisions

that impact natural persons." In particular, the DCWP rule explains that an AEDT is subject to regulation if the tool generates "a simplified output (score, tag, classification, ranking, etc.) with no other factors considered" on which the employer relies exclusively or to which the employer gives outsized weight and value.

- Explains that regulated AEDTs must be audited for bias within one year prior to their use. Such an audit must be independently conducted and must include a calculation of a "selection rate" and an "impact ratio" for each gender, race, and ethnicity category as well as the intersectional categories for each of these groups. In other words, the auditor must look at the total number of applicants in each category against the number of applicants selected and determine how often that type of applicant is selected. The audit must be repeated yearly for the entire time the AEDT is used.

- Specifies the manner in which audit results must be communicated. Once the audit is complete, the results must be made publicly available on the employment section of the employer's website in a "clear and conspicuous manner." These results must remain available for at least six months from the last time the audited AEDT was used.

- Enumerates the ways in which an employer must provide notice to candidates and employees that an AEDT will be used in connection with the evaluation of their application. Notice can be provided on the employer's website or in a job posting or by mail (under certain circumstances).

While the DCWP's rule is specific in many respects, it leaves some basic questions unanswered. For example, it is unclear how an employer can comply with the publication of audit results requirements if it does not maintain a public website. Similarly, the rule does not address how to treat data associated with candidates who do not self-report their gender, race, or ethnicity for purposes of the required independent audit. These and other questions may provide fertile ground for confusion in the near term and litigation in the future.

No matter what, it is clear that employers should begin preparing for the implementation of Local Rule 144 now by determining if any of the tools they use to vet job candidates qualify as AEDTs and consulting with experienced employment counsel about how to mitigate risk in the face of the uncertainty ahead.



National Law Review, Volume XIII, Number 122