

4-STEP PLAN FOR EMPLOYERS AS NYC PROPOSES RULES TO CLARIFY THE USE OF AI IN THE WORKPLACE

Insights
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New York City employers should breathe a sigh of relief as the City recently issued rules to clarify a groundbreaking law about to go into effect aimed at protecting employees from unlawful discrimination when artificial intelligence tools are used in the hiring process. The proposed rules were issued by the Department of Consumer and Worker Protection (DCWP) on September 23 in advance of a public hearing that will take place in the coming days. The proposed rules were welcomed by employers who have been grappling to understand obligations that will kick in once the statute takes effect on January 1, 2023. This insight summarizes the four key things employers need to know about the proposed rules – and provides a four-step plan you should consider in advance of the looming new compliance date.

Summary of the Law

The upcoming law, [which is summarized here](#), mandates an audit of the Automated Employment Decision Tools (AEDT) used to screen candidates for employment or employees for promotion for gender and race/ethnicity-based biases before the tool's use. Employers also have to provide candidates for employment and employees that reside in New York City with notification about the tool's use and the job qualifications and characteristics that will be used by the AEDT to make its assessment or evaluation. Employers that fail to comply may be fined.

The Proposed Rules

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There are four key topics covered by [the proposed rules](#) that you will want to track.

1. Bias Audit Requirements

Bias audits must be conducted by an independent auditor no more than one year before the AEDT's use. The proposed rules detail minimum calculations the bias audit must make depending on the AEDT's evaluative use.

- Employers using an AEDT to select individuals to move forward in the hiring process or classify individuals into groups must calculate the selection rate and impact ratio (defined in the proposed rules) for each category (i.e. race/ethnicity, sex). If the AEDT is used to classify individuals into groups, the audit must also calculate the selection rate and impact ratio for each classification.
- Employers using an AEDT to score applicants or candidates must calculate the average score for individuals in each category and the impact ratio.

The rules provide two example charts of hypothetical data to show how the audit data could be compiled and presented for each use. While employers should understand bias audit requirements to ensure the independent auditor is compliant with the law and proposed rules (should they be passed), the procured auditor will likely handle the technical details. Employers will, however, have to make sure they are collecting and then providing the independent auditor with the required demographic information so that the auditor can effectuate the audit. The independent auditor may use historical data it has collected from employers that use the tool to complete the audit. Accordingly, the audit results, which will be open to the public, will be wholly dependent on the good (or bad) data employers provide.

2. Independent Auditor Defined

Under the proposed rules, an independent auditor is defined as a "a person or group that is not involved in using or developing an AEDT that is responsible for conducting a bias audit of such AEDT." This definition, references to vendors in the proposed rules, and the requirement in the statute for impartiality, suggests an intention that neither the employer nor the entity that created the AEDT used by the employer conduct the bias audit of the tool. The rules do not, however, create a specific prohibition on internal review of the tool by

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these entities as a whole, just of those persons or groups who were involved with its use or development. The City's intent will require further clarification. Regardless, it's off to the races for the AI auditor industry, which can expect an influx of new business in the coming years from employers that won't want to retain control over the bias audit process.

3. Alternative Selection Process

Under the law, employers must provide an employee or candidate with notice of the AEDT that will be used for assessment or evaluation. The notice must allow the employee or candidate to request an alternative selection process or accommodation. The statute did not provide any guidance on acceptable alternative processes or accommodations and created an opportunity for applicants and employees to broadly circumvent the AEDT, potentially rendering the tool useless.

DCWP has offered employers a huge reprieve in its proposed rules, which specifically state there is no requirement employers provide an alternative selection process.

4. Published Results and Notices

Before using an AEDT, employers must publicize on their websites a summary of the results of the most recent bias audit and the date the employer started using the tool (distribution date). Instead of providing a summary of the bias audit results on the website, however, the proposed rules give employers the option to post an active hyperlink on the careers or jobs section of an employer's website to another website containing the required summary and distribution date. The summary of results and distribution date must be posted for at least six months after AEDT's last use.

Notice requirements in the law mandate employers give candidates 10 business days advance notice of the use of an AEDT and the job qualifications and characteristics to be assessed. For employers looking to quickly hire employees and individuals seeking immediate employment, a 10-business-day wait period could be particularly burdensome.

Job Candidates

The proposed rules provide employers with some breathing room. Employers can meet notice requirements for candidates by:

- Including notice on the careers or jobs section of their website in a clear and conspicuous manner;
- Including notice in a job posting; or
- Providing notice to candidates by mail or email.

While employers must still provide notice of at least 10 business days prior to its use of an AEDT, posting the notice on a website or in a job posting would limit the inherent wait period built into the law for most employers.

Current Employees

For employers using AEDT on current employees, notice can be provided:

- in a written policy or procedure that given to employees;
- a job posting; or
- in person, via mail, or email at least 10 business days prior to use of an AEDT.

4-Step Plan for New York City Employers

There are still a few months until the law on AEDTs goes into effect on January 1, 2023. Now that we have some clarity on your obligations, here are four steps to consider in order to put yourself in the best compliance position.

1. If your business uses these tools to evaluate and assess candidates, now is the time to vet and/or retain an independent auditor to conduct the bias audit.
2. Since the auditor will need demographic and selection/evaluative information to conduct the audit, you will also need to develop policies and procedures to collect and preserve this information.
3. You will need to train any employees responsible for the collection and preservation of this information.
4. Finally, since the bias audit is not a one-time requirement, be prepared for annual review of the AEDT and periodic updates to your website.

We will continue to monitor developments to this legislation and provide updates as appropriate, so make sure you are subscribed [to Fisher Phillips' Insight System](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [New York City](#) office.