

ARE YOU COMPLIANT WITH NYC'S NEW RULES FOR USING AI IN THE WORKPLACE? ANSWERS TO YOUR TOP 7 QUESTIONS

Insights
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Businesses that use artificial intelligence tools to hire and promote employees in the Big Apple are navigating uncharted waters as they grapple with significant compliance obligations. New York City's first-of-its-kind law aims to prevent bias when using AI and requires employers to take several critical steps, such as arranging for an independent bias audit and complying with notice requirements. You should note that the details of NYC's Local Law 144 changed several times from when we first started writing about this development to when the rules were finalized and enforcement began on July 5. So, it's a good idea to carefully review your plan again for compliance with the most up-to-date information. Here are the answers to your top seven compliance questions, including five steps you should consider taking immediately. *[To learn more about this issue, [register today for the AI Strategies @ Work Conference](#) where we'll discuss this and many other issues impacting the modern business environment.]*

1. What Does the Law Require?

Employers that use software to screen candidates or employees in New York City must comply with [Local Law 144 of 2021](#), which regulates the use of automated employment decision tools (AEDTs). What exactly is an AEDT? The law defines it as a computer-based tool that:

- Uses machine learning, statistical modeling, data analytics, or artificial intelligence;

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- Helps employers and employment agencies make employment decisions; and
- Substantially assists or replaces discretionary decision-making.

Specifically, the local law requires employers to take the following actions when using these tools to screen candidates for employment or employees for promotion:

- Select an independent auditor to perform an annual, independent bias audit of your AEDTs used during the hiring or promotion process to assess disparate impact based on race, ethnicity, and sex;
- Publish the audit results; and
- Provide notice about your use of AEDTs to candidates or employees that reside in NYC.

The bias audit of an AEDT must be performed before the system is used and cannot be relied on for more than one year. You must publish results of the bias audit for 10 business days prior to using it.

2. Who Must Comply with the Law?

The local law impacts most businesses in New York City. All employers – regardless of size – must be audited if they use AEDTs to hire or promote employees **in the city**.

But what does “**in the city**” mean?

- The New York City Department of Worker and Consumer Protection (DCWP) — the agency tasked with enforcing the law and creating related rules — has said that the local law applies only if the position is located in NYC. This means coverage is not based on the employee’s residence, and the rules do not apply unless the employer is physically located in NYC. For example, the law does not apply if a job candidate lives in NYC and is applying for a position outside of the city. The law does apply, however, if the employee works full-time, part-time, or in a hybrid position in NYC.
- What about full-time remote work? If the job is **fully remote**, the law applies when the role is associated with a NYC office of a multi-location employer, or the employer has offices only in NYC.

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- An **employment agency** that uses AEDTs is covered if the agency is located in NYC, or the job (whether remote or in-person) is attached to an NYC office. An employment agency is broadly defined. It includes all people who, for a fee, provide vocational guidance and help applicants obtain employment, arrange interviews, make contacts with prospective employers to help applicants find a job, and have knowledge of job openings not available to the general public.

Notably, the law applies only when using AEDTs to assess job candidates and employees who apply for a specific position. It does not apply when AEDTs are used for general outreach to invite job candidates to apply for jobs or to scan a resume bank.

3. What Are the Key Components of a Bias Audit?

While a vendor can conduct a bias audit on the tools it creates, the employer or employment agency bears responsibility for following the local law and making sure they do not use an AEDT for screening job candidates and employees without first conducting a bias audit.

Bias audits must be conducted by an independent auditor no more than one year before the AEDT's use, and the results must be published. The 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 for each category (i.e., race/ethnicity and 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.

While employers should understand bias audit requirements to ensure the independent auditor is compliant with the law and proposed rules, 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.

You will be required to publicly share the date of the most recent bias audit, a summary of the results with **specific information included**, and the date you began using the AEDT. This information must be posted in a clear and conspicuous manner on your website or through a hyperlink to a website with the relevant information.

4. What Are the Notice and Recordkeeping Requirements?

The local law creates several requirements for employers and employment agencies to provide notice about their use of AEDTs, as follows:

- **Notice to resident of NYC.** You must notify job candidates and employees who are NYC residents about the use of an AEDT and the qualifications and characteristics that will be accessed through the system. The notice must include instructions on how an individual can request an alternative selection process or reasonable accommodation under other laws. According to DCWP's rules, you are not required to provide an alternative selection process. The notice may be distributed in the following ways:
 - **Notice to candidates for employment** can be provided on the employment section of your website in a clear and conspicuous manner, in a job posting, or mailed/emailed directly to candidates at least 10 business days before use of the AEDT.
 - **Notice to employees** can be provided in a written policy or procedure given to employees at least 10 business days before use of the AEDT or provided in a job posting or mailed or emailed directly to the employee at least 10 business days before use of the AEDT.

If you post notice to candidates on your website or to employees in a written policy, it does not have to be position specific.

- **Required disclosures.** Be prepared to share information about your AEDT retention policy, the type of data collected for the AEDT, and the source of such data. You have the following compliance options:
 - Post the information in a clear and conspicuous manner on your website;
 - Inform candidates or employees about how they can make a written request for the information. Written requests must be responded to within 30 days of receipt;
 - If such information cannot be disclosed, you should provide an explanation why disclosure would violate local, state, or federal law or interfere with a law enforcement investigation.

You'll also want to ensure compliance with the local law's recordkeeping rules. DCWP advises employers to keep records of all electronic tools used to assist in hiring or promotion, how electronic tools were used, other methods used to evaluate candidate or employee, and all notices and methods used to provide notice in accordance with the local law.

5. What Are the Penalties for Non-Compliance?

Employers who violate local law will be assessed a civil penalty of not more than \$500 for the first violation. Subsequent violations can reach up to \$1,500. Each day the automated employment decision tool is used in violation of the law counts as a separate violation. The same penalties apply to notice violations. And a failure to provide notice is treated as a separate violation.

There is no cap on civil penalties, which means employers can rack up significant fines if they fail to abide by the provisions of this law. NYC's Office of Administrative Trials and Hearings or another designated agency will oversee the recovery of civil penalties, while the City's Corporation Counsel (or a designee) has enforcement power.

6. What If the Audit Discovers Bias?

You should note the NYC's law does not require employers stop using a biased AEDT, but audit results may run afoul of other laws or open employers up to liability. Indeed, employers can be liable under Title VII for using biased

AEDTs. For example, the U.S. Equal Employment Opportunity Commission (EEOC) released a technical assistance document in May of this year. Through this guidance, the EEOC makes it clear that the EEOC will use the 80% or 4/5 rule for analyzing whether an AEDT potentially violates Title VII. NYC's law does not impose or mandate compliance with the 80% rule. Under the NYC law, employers can still use the AEDT even if the tool violates the 80% rule. But the use of an AEDT that violates the 80% rule can run afoul of Title VII. You can read more about this EEOC guidance, the 80% rule, and its potential impact on AEDTs [here](#).

7. What Steps Should Employers Take Now?

Now that enforcement of NYC's AI anti-bias law has begun, and we have some clarity on your obligations, here are five steps to consider taking in order to put yourself in the best compliance position:

1. According to some estimates, more than 80% of HR departments are using some form of an AEDT. Employers must conduct internal assessments to see what tools they are using that may qualify as an AEDT under the NYC law. This is critical not only for complying with the NYC law, but also for complying with Title VII and other employment laws.
2. If your business plans to use these tools to evaluate and assess candidates, you must vet and/or retain an independent auditor to conduct the bias audit.
3. 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.
4. You will need to train any employees responsible for the collection and preservation of this information.
5. 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.

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[Register today for the AI Strategies @ Work Conference](#) taking place this September 27-28 in Washington, D.C., where we'll discuss the intersection of artificial intelligence and the modern business environment.

We'll meet just steps from where lawmakers and regulators are debating AI to discuss how impending regulation will impact businesses and human capital management. We'll also explore AI's transformative impact across various industries by providing practical use case scenarios, highlighting how to seize competitive advantages, and showing how you can position yourself as a leader in the era of AI.

Conclusion

We will continue to monitor AI developments, as well as updates to NYC's 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 [Artificial Intelligence Practice Group](#) or [New York City](#) office.