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NYC Publishes Final Rules for Use of Automated Employment Decision Tools

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The New York City Department of Consumer and Worker Protection (DCWP) issued a Final Rule on April 6, 2023 in an effort to provide guidance to employers subject to the City's Automated Employment Decision Tool (AEDT) Law, which it will begin enforcing on July 5, 2023.

Background

In December 2021, the city passed the AEDT Law, which makes it unlawful for an employer to use an AEDT to screen a candidate or employee for an employment decision (such as a promotion) unless:

- An independent auditor has completed a bias audit at least one year before the use of such employment tools
- And a summary of the results of the most recent bias audit has been made publicly available on the employer's website

For more information on the basics of the AEDT Law, such as notice requirements to job applicants and employees and penalties for violation of the law, please review our previous alert [here](#).

Clarifying the AEDT Law's Requirements

Passage of the AEDT Law created much confusion for employers, who asked:

- What exactly is an "automated employment decision tool?"
- What does the "bias audit" consist of?
- Who is an "independent auditor?"
- How does an employer provide adequate notice to a job applicant or employee that an AEDT will be used in the decision-making process?

After much dialogue between employers and the city, the DCWP's new [Final Rule](#) hopes to provide answers to these questions.

What is an Automated Employment Decision Tool?

Per the Final Rule, an AEDT is a tool that "substantially assists or replaces" an employer's discretion in making employment-related decisions. An AEDT that "substantially assists or replaces" an employer's discretionary decision making is one that does any of the following:

- Scores, classifies or ranks job applicants or employees based on one particular factor (e.g., rating a candidate's technical skills, scoring job applicants' resumes based on key words, or arranging a list of candidates based on how well their cover letters match the job description)

- Uses multiple factors in the decision-making process, but places a greater weight on one particular factor over the others
- Uses multiple factors in the decision-making process, with one particular factor being able to overrule the conclusions of all other factors

In other words, the Final Rule does not explain clearly what qualifies as an AEDT. Employers that use any form of software to assist in employment-related decisions are thus ***strongly encouraged*** to retain an independent auditor to complete a bias audit prior to using such software in the decision-making process.

What Is a Bias Audit?

The purpose of the bias audit is to assess an AEDT's disparate impact on a group of job applicants or employees based on a particular protected characteristic, such as sex, race, and ethnicity. The Final Rule states that a bias audit must calculate the "impact ratio" of each protected category.

To calculate the impact ratio, you divide the number of candidates belonging to a subcategory (e.g., Hispanic or Latino) of a particular protected category (e.g., race/ethnicity) that are selected for employment (or promotion) by the total number of applicants in the same subcategory. After you determine that percentage, you then divide it by the selection rate of the most "selected" subcategory within the protected category.

For example, a bias audit would analyze the selection of applicants based on race/ethnicity:

Race/Ethnicity Categories				
Subcategories of Race/Ethnicity	# of Applicants	# Selected	Selection Rate	Impact Ratio
Hispanic or Latino	408	204	50%	0.97
White	797	412	52%	1.00
Black or African American	390	170	44%	0.84
Native Hawaiian or Pacific Islander	119	52	44%	0.85
Asian	616	302	49%	0.95
Native American or Alaska Native	41	18	44%	0.85
Two or more Races	213	96	45%	0.87

To determine the impact ratio for, say, Native American or Alaska Native job applicants, you would divide the selection rate (44%) by the most selected race/ethnicity (White – 52%) to get the impact ratio (0.85).

Completing a bias audit using the proper calculations is complex and confusing. Fortunately, employers are not required to perform the bias audit (and are in fact prohibited from doing so). Instead, an independent auditor must complete the bias audit.

Who is an Independent Auditor?

The Final Rule clarifies that an “independent auditor” is a person or group that is capable of exercising “objective and impartial judgment on all issues within the scope of the bias audit.” An independent auditor cannot be a person or group that:

- Is involved in using, developing or distributing the AEDT
- Has an employment relationship with the employer that intends to use the AEDT
- Has a direct financial interest or a material indirect financial interest in the use of the AEDT

How Do I Provide Notice to Job Applicants and Employees of My Use of an AEDT?

Employers must inform job applicants and employees that an AEDT will be used in connection with the employment decision (and *how* that tool will be used in assessing the applicant or employee) no less than 10 business days before its use. The Final Rule clarifies that an employer can provide such notice in one of three ways:

- Publishing it on the employment section of the employer’s website in a clear and conspicuous manner
- Including it in the relevant job posting
- Sending it to a job applicant or employee via U.S. mail or e-mail

Employers must also include in the notice instructions for how a job applicant or employee can request an alternative selection process. While the AEDT Law states that an employer must provide an applicant or employee with the opportunity to object to the use of an automated tool, the Final Rule clarifies that nothing in the law ultimately *requires* an employer to provide an alternative method. Nor does it clarify what an alternative selection process would look like in the event that an employer chooses to do so.

Takeaway

The city has certainly not written the AEDT Law’s requirements in simple, understandable terms. As expected, companies have already begun advertising their services as “independent auditors” to conduct bias audits for employers, and we expect this space to become more saturated as we get closer to the July 5 enforcement date.

Employers utilizing software to assist in the hiring process and other employment-related decisions are strongly encouraged to consult with vendors to determine whether their automated tools are subject to the AEDT Law’s requirements and, if so, to complete an audit bias prior to the enforcement date.

While the AEDT Law does not provide for a private right of action, employers that violate the law (including its notice requirements) will be subject to fines of up to \$500 for their first violation and up to \$1,500 for each subsequent violation. If an employer engages an independent auditor, they are advised to review the vendor agreement and its accompanying indemnification provisions to understand whether they will be liable in the event of a violation of the AEDT Law.

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