

New York City Department of Consumer and Worker Protection

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The Department of Consumer and Worker Protection (“DCWP” or “Department”) is proposing to add rules to implement new legislation related to the use of automated employment decision tools. The proposed rules would clarify the requirements for the use of automated employment decision tools within New York City, the notices to employees and candidates for employment regarding the use of the tool, the bias audit for the tool, and the required published results of the bias audit.

When and where is the hearing? DCWP will hold a public hearing on the proposed rules. The public hearing will take place at 11:00am on Monday, October 24, 2022. The public hearing will be accessible by phone and videoconference.

- To participate in the public hearing via phone, please dial 646 558 8656
 - Meeting ID: 874 1701 0175
 - Password: 448584
- To participate in the public hearing via videoconference, please follow the online link:
<https://us02web.zoom.us/j/87417010175?pwd=SFNHVjY4aThLMUE1RXIIV2x0SVZQdz09>
 - Meeting ID: 874 1701 0175
 - Password: 448584

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to DCWP through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to Rulecomments@dcwp.nyc.gov.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rules at the public hearing must sign up to speak. You can sign up before the hearing by calling (212) 436-0396. You can also sign up on the phone or videoconference before the hearing begins at 11:00am on Monday, October 24, 2022. You can speak for up to three minutes.

Is there a deadline to submit comments? Yes. You must submit any comments to the proposed rules on or before Monday, October 24, 2022.

What if I need assistance to participate in the hearing? You must tell DCWP’s External Affairs division if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You may tell us by telephone at (212) 436-0396 or by email at Rulecomments@dcwp.nyc.gov. Advance notice is requested to allow sufficient time to arrange the accommodation. Please tell us by Monday, October 17, 2022.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, all comments received by DCWP on the proposed rules will be made available to the public online at <http://www1.nyc.gov/site/dca/about/public-hearings-comments.page>.

What authorizes DCWP to make this rule? Sections 1043 and 2203(f) of the New York City Charter and Section 20-104(b) of the New York City Administrative Code authorize the Department of Consumer and Worker Protection to make these proposed rules. This proposed rule was not included in the Department of Consumer and Worker Protection’s regulatory agenda for this Fiscal Year because it was not contemplated when the Department published the agenda.

Where can I find DCWP's rules? The Department's rules are in Title 6 of the Rules of the City of New York.

What laws govern the rulemaking process? DCWP must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose of Proposed Rule

The Department of Consumer and Worker Protection ("DCWP" or "Department") is proposing to add rules to implement new legislation regarding automated employment decision tools ("AEDT"). Local Law 144 of 2021 ("LL 144") prohibits employers and employment agencies from using an automated employment decision tool unless such tool has been subject to a bias audit within one year of the use of the tool, information about such audit is publicly available, and certain notices have been provided to employees or job candidates.

The proposed rules establish that a bias audit of an AEDT must calculate the selection rate for each race/ethnicity and sex category that is required to be reported on to the U.S. Equal Employment Opportunity Commission ("EEOC") pursuant to the EEO Component 1 report, and compare such selection rates to the most selected category to determine an impact ratio. These calculations are consistent with Section 1607.4 of the EEOC Uniform Guidelines on Employee Selection Procedures. See 29 CFR § 1607.4.

These proposed rules generally clarify obligations of employers and employment agencies under the new law.

Specifically, these proposed new rules would:

- Define terms;
- Clarify the requirements for a bias audit;
- Clarify the requirements for the published results of the required bias audit;
- Clarify the requirements for notices that employers and employment agencies must provide to employees and candidates for employment; and
- Clarify other obligations for the employer or employment agency.

Sections 1043 and 2203(f) of the New York City Charter and Section 20-104(b) of the New York City Administrative Code authorize the Department of Consumer and Worker Protection to make these proposed rules.

New material is underlined.

[Deleted material is in brackets.]

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Proposed Rule Amendments

Section 1. Chapter 5 of Title 6 of the Rules of the City of New York is amended to add Subchapter T as follows:

Subchapter T: Automated Employment Decision Tools

§ 5-300. Definitions.

As used in this subchapter, the following terms have the following meanings:

Automated Employment Decision Tool. “Automated employment decision tool” or “AEDT” means “Automated employment decision tool” as defined by § 20-870 of the Code where the phrase “to substantially assist or replace discretionary decision making” means to rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other factors considered, or to use a simplified output as one of a set of criteria where the output is weighted more than any other criterion in the set, or to use a simplified output to overrule or modify conclusions derived from other factors including human decision-making.

Bias Audit. “Bias audit” means “Bias audit” as defined by § 20-870 of the Code.

Candidate for Employment. “Candidate for employment” means a person who has applied for a specific employment position by submitting the necessary information and/or items in the format required by the employer or employment agency.

Category: “Category” means any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code as specified in part 1602.7 of title 29 of the code of federal regulations, as designated on the Equal Employment Opportunity Commission Employer Information Report EEO-1.

Distribution Date. “Distribution date” means the date the employer or employment agency began using a specific AEDT.

Employment Decision. “Employment decision” means “Employment decision” as defined by § 20-870 of the Code.

Employment Agency. “Employment agency” means “Employment agency” as defined by 6 RCNY § 5-249.

Independent Auditor. “Independent auditor” means 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.

Impact Ratio. “Impact ratio” means either (1) the selection rate for a category divided by the selection rate of the most selected category or (2) the average score of all individuals in a category divided by the average score of individuals in the highest scoring category.

Impact Ratio =
$$\frac{\text{selection rate for a category}}{\text{selection rate of the most selected category}}$$

OR

Impact Ratio =
$$\frac{\text{average score of individuals in a category}}{\text{average score of individuals in the highest scoring category}}$$

Machine learning, statistical modelling, data analytics, or artificial intelligence. “Machine learning, statistical modelling, data analytics, or artificial intelligence” means a group of mathematical, computer-based techniques:

- i. that generate a prediction, meaning an expected outcome for an observation, such as an assessment of a candidate’s fit or likelihood of success, or that generate a classification, meaning

- an assignment of an observation to a group, such as categorizations based on skill sets or aptitude; and
- ii. for which a computer at least in part identifies the inputs, the relative importance placed on those inputs, and other parameters for the models in order to improve the accuracy of the prediction or classification; and
- iii. for which the inputs and parameters are refined through cross-validation or by using training and testing data.

Screen. “Screen” means to make a determination about whether someone should be selected or advanced in the hiring or promotion process.

Selection Rate. “Selection rate” means the rate at which individuals in a category are either selected to move forward in the hiring process or assigned a classification by an AEDT. Such rate may be calculated by dividing the number of individuals in the category moving forward or assigned a classification by the total number of individuals in the category who applied for a position or were considered for promotion.

Example. If 100 Hispanic women apply for a position and 40 are selected for an interview after use of an AEDT, the selection rate for Hispanic women is 40/100 or 40%.

Simplified output. “Simplified output” means a prediction or classification as specified in the definition for “machine learning, statistical modelling, data analytics, or artificial intelligence”. A simplified output may take the form of a score (e.g., rating a candidate’s estimated technical skills), tag or categorization (e.g., categorizing a candidate’s resume based on key words, assigning a skill or trait to a candidate), recommendation (e.g., whether a candidate should be given an interview), or ranking (e.g., arranging a list of candidates based on how well their cover letters match the job description). It does not refer to the output from analytical tools that translate or transcribe existing text, e.g., convert a resume from a PDF or transcribe a video or audio interview.

§ 5-301 Bias Audit

(a) Where an AEDT selects individuals to move forward in the hiring process or classifies individuals into groups, a bias audit required by § 20-871 of the Code must, at a minimum:

- (1) Calculate the selection rate for each category;
- (2) Calculate the impact ratio for each category; and
- (3) Where an AEDT classifies individuals into groups, the calculations in paragraphs (1) and (2) of this subdivision must be performed for each such classification.

Example: An employer wants to use an AEDT to screen resumes and schedule interviews for a job posting. To do so, the employer must ensure that a bias audit of the AEDT was conducted within a year from the use of the AEDT. The employer asks the vendor for a bias audit. The vendor uses historical data it has collected from employers on applicants selected for each category to conduct a bias audit as follows:

-	-	-	<u># of Applicants</u>	<u># Selected</u>	<u>Selection Rate</u>	<u>Impact Ratio</u>
<u>Hispanic or Latino</u>	<u>Male</u>		<u>205</u>	<u>90</u>	<u>43.9%</u>	<u>0.841</u>
	<u>Female</u>		<u>190</u>	<u>82</u>	<u>43.2%</u>	<u>0.827</u>

<u>Non/Hispanic or Latino</u>	<u>Male</u>	<u>White</u>	<u>412</u>	<u>215</u>	<u>52.2%</u>	<u>1.000</u>
		<u>Black or African American</u>	<u>226</u>	<u>95</u>	<u>42.0%</u>	<u>0.806</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>87</u>	<u>37</u>	<u>42.5%</u>	<u>0.815</u>
		<u>Asian</u>	<u>321</u>	<u>167</u>	<u>52.0%</u>	<u>0.997</u>
		<u>Native American or Alaska Native</u>	<u>24</u>	<u>11</u>	<u>45.8%</u>	<u>0.878</u>
		<u>Two or More Races</u>	<u>115</u>	<u>52</u>	<u>45.2%</u>	<u>0.866</u>
	<u>Female</u>	<u>White</u>	<u>385</u>	<u>197</u>	<u>51.2%</u>	<u>0.981</u>
		<u>Black or African American</u>	<u>164</u>	<u>75</u>	<u>45.7%</u>	<u>0.876</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>32</u>	<u>15</u>	<u>46.9%</u>	<u>0.898</u>
		<u>Asian</u>	<u>295</u>	<u>135</u>	<u>45.8%</u>	<u>0.877</u>
		<u>Native American or Alaska Native</u>	<u>17</u>	<u>7</u>	<u>41.2%</u>	<u>0.789</u>
		<u>Two or More Races</u>	<u>98</u>	<u>44</u>	<u>44.9%</u>	<u>0.860</u>

(b) Where an AEDT scores applicants or candidates, a bias audit required by § 20-871 of the Code must, at a minimum:

- (1) Calculate the average score for individuals in each category;
- (2) Calculate the impact ratio for each category;

Example: An employer uses an AEDT to score applicants for “culture fit”. To do so, the employer must ensure that a bias audit of the AEDT was conducted within a year from the planned use of the AEDT. The employer uses historical data on average “culture fit” score of applicants for each category to conduct a bias audit as follows:

-	-	-	<u>Average Score</u>	<u>Impact Ratio</u>
<u>Hispanic or Latino</u>		<u>Male</u>	<u>76</u>	<u>0.884</u>
		<u>Female</u>	<u>47</u>	<u>0.547</u>
<u>Non/Hispanic or Latino</u>	<u>Male</u>	<u>White</u>	<u>86</u>	<u>1.000</u>
		<u>Black or African American</u>	<u>76</u>	<u>0.884</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>65</u>	<u>0.756</u>
		<u>Asian</u>	<u>71</u>	<u>0.826</u>
		<u>Native American or Alaska Native</u>	<u>69</u>	<u>0.802</u>
		<u>Two or More Races</u>	<u>84</u>	<u>0.977</u>
	<u>Female</u>	<u>White</u>	<u>68</u>	<u>0.791</u>
		<u>Black or African American</u>	<u>56</u>	<u>0.651</u>
		<u>Native Hawaiian or Pacific Islander</u>	<u>74</u>	<u>0.860</u>
		<u>Asian</u>	<u>67</u>	<u>0.779</u>
		<u>Native American or Alaska Native</u>	<u>52</u>	<u>0.605</u>
		<u>Two or More Races</u>	<u>86</u>	<u>1.000</u>

§ 5-302 Published Results

- (a) Prior to the use of an AEDT, employers and employment agencies in the city must make the following publicly available on the careers or jobs section of their website in a clear and conspicuous manner:
 - (1) the date of the most recent bias audit of such AEDT and a summary of the results, which shall include the selection rates and impact ratios for all categories; and,
 - (2) the distribution date of the AEDT to which such bias audit applies.
- (b) The requirements of subdivision (a) of this section may be met with an active hyperlink to a website containing the required summary of results and distribution date, provided that such link is clearly identified as a link to results of the bias audit.
- (c) Employers and employment agencies must keep the summary of results and distribution date posted for at least 6 months after last using such AEDT for an employment decision.

§ 5-303 Notice to Candidates and Employees

- (a) For the purpose of compliance with § 20-871(b)(1) and (2) of the Code, an employer or employment agency may provide notice to a candidate for employment who resides in the city by:
 - (1) Including notice on the careers or jobs section of its website in a clear and conspicuous manner at least 10 business days prior to use of an AEDT;
 - (2) Including notice in a job posting at least 10 business days prior to use of an AEDT; or,
 - (3) Providing notice to candidates for employment via U.S. mail or e-mail at least 10 business days prior to use of an AEDT.
- (b) For the purpose of compliance with § 20-871(b)(1) and (2) of the Code, an employer or employment agency may provide notice to an employee who resides in the city by:
 - (1) Including notice in a written policy or procedure that is provided to employees at least 10 business days prior to use of an AEDT;
 - (2) Including notice in a job posting at least 10 business days prior to use of an AEDT; or,
 - (3) Providing written notice in person, via U.S. mail or e-mail at least 10 business days prior to use of an AEDT.
- (c) The notice required by § 20-871(b)(1) of the Code must include instructions for how to request an alternative selection process or accommodation.
- (d) For the purpose of compliance with § 20-871(b)(3) of the Code, an employer or employment agency must:
 - (1) provide notice to an employee or candidate who resides in the city by:
 - i. Including notice on the careers or jobs section of its website in a clear and conspicuous manner; or,
 - ii. Providing written notice in person, via U.S. mail or e-mail within 30 days of receipt of a written request for such information.
 - (2) where notice is not included on its website, post instructions for how to make a written request for such information on the careers or jobs section of the employer or employment agency's website in a clear and conspicuous manner.
 - (3) Provide an explanation to a candidate or employee for refusing to provide information pursuant to § 20-871(b)(3) of the Code where disclosure of information required by the notice would violate local, state, or federal law, or interfere with a law enforcement investigation.
- (e) Nothing in this subchapter requires an employer or employment agency to provide an alternative selection process.

NEW YORK CITY LAW DEPARTMENT

DIVISION OF LEGAL COUNSEL

100 CHURCH STREET

NEW YORK, NY 10007

212-356-4028

CERTIFICATION PURSUANT TO

CHARTER §1043(d)

RULE TITLE: Requirement for Use of Automated Employment Decisionmaking Tools

REFERENCE NUMBER: 2022 RG 061

RULEMAKING AGENCY: Department of Consumer and Worker Protection

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN

Acting Corporation Counsel

Date: September 19, 2022

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS

253 BROADWAY, 10th FLOOR

NEW YORK, NY 10007

212-788-1400

CERTIFICATION / ANALYSIS

PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Requirement for Use of Automated Employment Decisionmaking Tools

REFERENCE NUMBER: DCWP-21

RULEMAKING AGENCY: Department of Consumer and Worker Protection

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro

Mayor's Office of Operations

September 19, 2022

Date