

# Lawyer Insights

## Are Your Clients Complying With New York City's AEDT Law?

A discussion of New York City's new law regulating automated employment decision tools, or "AEDT's" and what the law means for employers

By Robert Quackenboss and James La Rocca  
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It seems no one can escape artificial intelligence (AI) these days, not even—and now especially—New York employers...and their lawyers. At the start of this year, a NYC law regulating the use of automated employment decision tools (AEDTs) took effect. In late April, the Department of Consumer and Worker Protection (DCWP) finalized rules providing some clarification of the law. The rules became enforceable last month.

### Identifying an AEDT

The definition of an AEDT is somewhat technical and wordy, but it can be broken down into the following four components. (At a high-level, think AI to assist with hiring and promotion decisions.)

- 1. A computational process** derived from a group of mathematical computer-based techniques
- 2. which generate a prediction or assign an observation to a group** based (at least in part) on a computer's identification of inputs, each input's importance, and other parameters to improve accuracy
- 3. that issues a simplified output** (e.g., categorizing a candidate's resume based on key words, assigning a skill or trait to a candidate, or recommending that a candidate advance to an interview)
- 4. to substantially assist or replace discretionary decision making when it comes to hiring and promotional decisions with respect to individuals who have applied for a specific employment position by submitting information required by the employer** (i.e., relying solely on the simplified output, giving more weight to the simplified output than any other criterion in a set, or using the simplified output to overrule conclusions derived from other factors, such as a human's decision).

AI is quickly becoming more and more sophisticated. Generative AI already can provide fairly polished responses to plain language prompts within a matter of moments. It is therefore conceivable that employers in the not so distant future may be able to more consistently find the right person for the job with greater frequency and much faster than they currently do. AEDTs have a bright future.

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### **Using an AEDT**

Despite the potential upswing in AEDTs, an employer using (or eager to use) such technology in NYC must proceed with caution. The law prohibits an employer or employment agency ("employer") from using an AEDT in NYC for purposes of making decisions with respect to hiring and promoting candidates, unless the following three conditions have been met.

- The AEDT must have undergone a bias audit before and within one year of use.
- The employer must publish the date of the most recent bias audit, a summary of the results, and the date the employer began using the AEDT in a clear and conspicuous manner on the employment section of its public facing website for at least six months following each use of the AEDT.
- The employer must provide a candidate at least 10 business days' notice before using the AEDT.

In addition, an employer must disclose to a candidate who requests the type of data being collected for the AEDT, the source of the data, or the employer's AEDT data retention policy with this information—or an explanation as to why the disclosure of such information would violate the law or interfere with a law enforcement investigation—within 30 days of a written request for such information. (The rules issued by the DCWP further suggest an employer may need to post this information and instructions for requesting such information in a clear and conspicuous manner on the employment section of its public facing website.)

### **Being in NYC**

According to guidance issued by the DCWP, the law applies if the location of the job is (at least part of the time) an office in NYC, the job is fully remote but the location associated with the job is an office in NYC, or the location of the employment agency using the AEDT is NYC.

### **Bias Audit**

**Understanding the Requirements.** A bias audit is an impartial evaluation by an independent auditor that includes an assessment of the AEDT's disparate impact on ethnicity/race and sex. Ethnicity/race is based on categories set forth on the U.S. Equal Employment Opportunity Commission's "Employer Information Report EEO-1" (e.g., "Hispanic or Latino," "White (Not Hispanic or Latino)," etc.).

There are certain calculations that must be included in the audit for each decision made in the hiring or promotional process, including decisions to advance a candidate to the next stage of the process. The types of calculations can vary depending on whether the AEDT is used for decisions to advance candidates through the hiring process, classify candidates into groups (e.g., leadership styles), or score candidates. Each calculation must be performed considering ethnicity/race only, sex only, and ethnicity/race and sex inter-sectionally. If the AEDT classifies candidates into groups, calculations must be done for each specified group.

For decisions to advance candidates to the next stage of the hiring process or to classify candidates into groups, the audit must calculate: (1) the selection rate (i.e., the rate at which candidates belonging to an ethnicity/race and sex are advanced in the process or assigned a classification by an AEDT); and (2) the selection rate impact ratio (i.e., the selection rate divided by the selection rate of the most selected candidates belonging to an ethnicity/rate and sex). In the event of scoring, the audit must calculate the median score for all applicants, the scoring rate (i.e., the rate at which candidates belonging to an ethnicity/race and sex receive a score above the sample's median score), and the scoring rate impact

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ratio (i.e., the scoring rate divided by the scoring rate of the candidates belonging to an ethnicity/race and sex that scored the highest).

The bias audit must include the number of individuals assessed that are not included in the calculation because they fall within an unknown category. And, the audit may exclude an ethnicity/race and sex that represents less than two percent of the data being used for the audit from a required impact ratio.

**Deciding What Data To Use.** Generally, the audit must use historical data collected in connection with the employer's use of the AEDT, but can also include historical data from other employers who use the AEDT. There are a couple of exceptions. If the employer has never used the AEDT, the employer can rely on an audit that only uses the historical data of other employers. If insufficient historical data is available to conduct a statistically significant audit, an employer can rely on an audit that uses test data.

**Selecting an Independent Auditor.** An independent auditor is a person or group capable of exercising objective and impartial judgment on all issues within the scope of the audit. This would expressly exclude any person or group that: (1) is or was involved in developing, distributing, or using the AEDT; (2) has an employment relationship with either the employer that seeks to use (or continue to use) the AEDT or the vendor that developed or distributed the AEDT; or (3) has a direct or material indirect financial interest in either the employer that seeks to use the AEDT or the vendor that developed or distributed the AEDT. According to the DCWP, a vendor can have an independent auditor conduct the bias audit on its AEDT, albeit employers ultimately are responsible for ensuring the required audit was conducted before using the AEDT.

### **Audit Results Summary**

The audit results summary that an employer must publicly post on its website—along with the date of the most recent audit and the date the employer began using the AEDT—needs to include the following:

1. The source and explanation of the data used to conduct the audit, including if and why test data was used in lieu of historical data and how such test data was generated and obtained.
2. The number of candidates assessed by the AEDT broken down by ethnicity/race and sex.
3. The scoring or selection rates (as applicable) and the impact ratios.
4. The number of candidates assessed by the AEDT that fall into an unknown category.

If the audit excludes an ethnicity/race and/or sex that represents less than two percent of the data being used for the audit from a required impact ratio, the summary must also include the auditor's justification for the exclusion, the number of applicants excluded, and the scoring rate or selection rate of the excluded ethnicity/race and/or sex.

### **Notice to Candidate**

The notice an employer must provide a candidate needs to identify the characteristics and qualifications that the AEDT uses to assess candidates, and include instructions for the candidate to request an alternative selection process or accommodation under other laws, if available.

An employer can provide the notice by including it in the job posting, by email to the candidate, or by U.S. mail to the candidate. In the hiring context, an employer also can satisfy its obligation to provide the

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notice with a clear and conspicuous post on the employment section of its website. In the context of promotions, an employer can satisfy its obligation to provide the notice in a written policy or procedure.

### **Non-Compliance**

A failure to comply with the law can be costly. An initial violation and any other violation occurring on the same day each comes with a civil penalty of up to \$500. The civil penalty for subsequent violations ranges between \$500 and \$1,500. Each day an employer uses an AEDT while not in compliance constitutes an independent violation. And, each time an employer fails to provide a candidate with the requisite notice or disclosure is a separate violation.

A proceeding to recover a penalty would commence in the NYC Office of Administrative Trials and Hearings (or any City agency designated to conduct such a proceeding). NYC corporation counsel (or its designee) may commence an action in court to correct violations, including mandating compliance or such other relief as may be appropriate.

### **Takeaways**

With the law already in effect, NYC employers using—or contemplating using—an AEDT to assist with employment decisions should consider the following if they have not done so already:

- Research the AEDT options available to select a tool that best meets their needs.
- Ensure a bias audit by an independent auditor who is well-versed in the law's requirements is conducted on the AEDT before and within one year of its use. Employers searching for an independent auditor should consider reaching out to industry groups, such as the Society for Human Resource Management, which has a local New York City chapter, for insights.
- Calendar subsequent audits of the AEDT to make sure they take place at least annually.
- Coordinate with relevant stakeholders to post a legally-compliant summary of the audit in a clear and conspicuous manner on the employment section of its public facing website.
- Draft legally-compliant notices to candidates and coordinate with relevant stakeholders for their distribution and posting.

### **Conclusion**

AI in the employment arena is quickly evolving. In addition to the city law, there now is state legislation pending. New York employers using AI to assist with employment decisions should consult with counsel to ensure compliance and keep abreast of the latest developments.

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**Robert Quackenboss** is a partner in the firm's Labor & Employment group in the firm's Washington D.C. office. Bob is a litigator who represents businesses in resolving their complex labor, employment, trade secret, non-compete and related commercial disputes. He can be reached at +1 (202) 955-1950 or [rquackenboss@HuntonAK.com](mailto:rquackenboss@HuntonAK.com).

**James La Rocca** is a counselor in the firm's Labor & Employment group in the firm's New York office. James represents employers in labor and employment matters, providing strategic advice and counsel to employers facing union organizing campaigns and representing their interests in representation cases and unfair labor practice proceedings before the National Labor Relations Board (NLRB). He can be reached at +1 (212) 309-1395 or [jarocca@HuntonAK.com](mailto:jarocca@HuntonAK.com).

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