

# FAQs regarding New York City's workplace AI law

June 12, 2023



In December 2021, the New York City Council passed a novel, first-of-its-kind law ([Law No. 2021/144](#)) addressing the use of artificial intelligence – specifically, automated employment decision tools – by businesses to make employment decisions. The law, which has the potential to seismically change how employers approach employment decisions, essentially bars businesses from using automated employment decision tools when making such decisions unless several criteria are first satisfied, including that the tool at issue has undergone an independent bias audit. After multiple delays, city regulators will begin enforcing the law on July 5, 2023.

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### What does the law say?

The law as drafted prohibits employers from using an automated employment decision tool (AEDT) to screen job candidates or employees when making employment decisions unless:

- The tool has been subjected to an independent bias audit within the year prior to such use;
- A summary of the most recent bias audit results, as well as the distribution date of the tool to which such audit applies, has been made publicly available on the employer’s website prior to the use of such tool; and
- The employer provides prior written notice regarding use of the tool to any job applicants and employees who will be subject to screening by it.

If one or more of these three criteria is not satisfied, then an employer’s use of an AEDT with respect to employment decisions will constitute an unlawful employment practice under the New York City Human Rights Law, which is one of the country’s most employee-friendly anti-discrimination laws.

### When does the law take effect?

The law, which was passed in December 2021, technically took effect on January 1, 2023. Enforcement of the law was delayed, however, pending publication of final administrative rules by city regulators. That publication finally occurred on April 6, 2023, when the New York City Department of Consumer and Worker Protection (DCWP) issued a [final rule](#) implementing the law (the Final Rule) and, correspondingly, announced that the agency would begin enforcing the law on **July 5, 2023**.

### What is an “automated employment decision tool?”

The law defines an AEDT as follows:

“[any computational process] derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making”.

The Final Rule further defines “machine learning, statistical modeling, data analytics, or artificial intelligence” as follows:

“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, if applicable, other parameters for the models in order to improve the accuracy of the prediction or classification.”

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Excluded from the definition of an AEDT are tools that do not automate, support, substantially assist, or replace discretionary decision-making processes and that do not materially impact natural persons, including, but not limited to, a junk email filter, firewall, antivirus software, calculator, spreadsheet, database, data set, or other compilation of data.

## What is an “employment decision?”

Under the law, the term “employment decision” means to screen candidates for employment or employees for promotion within New York City. In other words, an employment decision is one that helps decide whether to hire, fire, or promote a potential or current employee.

Based on the Final Rule, it appears that the law will apply to employment decisions that may be based (1) solely on the AEDT’s output; (2) on multiple factors, but with the AEDT’s output outweighing other factors; or (3) on the AEDT’s output overruling other factors, including human decision-making.

## What sort of notice needs to be provided regarding the employer’s AEDT?

As noted above, an AEDT may only be used with regard to employment decisions if, among other things, the employer has provided prior written notice to the job candidate(s) or employee(s) who will be subject to screening by said tools. More specifically, the law requires that the notice inform candidates and employees of the following:

- That an AEDT will be used in connection with the assessment or evaluation of such employee or candidate if they reside in the city;
- That the candidate may request an alternative selection process or accommodation; and
- The job qualifications and characteristics that such AEDT will use in the assessment of such candidate or employee.

Employers can provide the requisite notice to job candidates and employees in the following manner:

- Providing notice on the employment section of their website in a clear and conspicuous manner at least 10 business days before use of an AEDT;
- Providing notice in a job posting at least 10 business days before use of an AEDT; or
- Providing notice to candidates for employment via U.S. mail or email at least 10 business days before use of an AEDT.

Additionally, if not disclosed on the employer’s website, information about the type of data collected for the AEDT, the source of such data, and the employer’s data retention policy shall be available upon written request by a candidate or employee.

## What is a “bias audit?”

The law defines the term “bias audit” as “an impartial evaluation by an independent auditor.”<sup>1</sup> Essentially, a bias audit is an impartial review by a third-party for potential biases that may be involved and/or may impact an employment decision. These biases include, but are not limited to, race, ethnicity, gender, and/or intersectionality.

The law states that such bias audit shall include, but not be limited to, the testing of an AEDT to assess the tool’s disparate impact on persons within any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the U.S. Code as specified in part 1602.7 of title 29 of the Code of Federal Regulations.

The Final Rule further sets forth the following minimum requirements for a bias audit: (1) calculation of the selection rate for each race/ethnicity and a sex category; (2) comparison of such selection rates to the most selected category to determine the impact ratio; and (3) identification of the number of individuals assessed who are not included because they fall within an unknown category.

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<sup>1</sup> The Final Rule defines “independent auditor” as “a person or group that is capable of exercising objective and impartial judgment on all issues within the scope of a bias audit of an AEDT.”

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## What data should be used to conduct a bias audit?

As discussed above, the law provides a very general, broad definition of what constitutes a bias audit. However, the law does not set forth any specific steps or measures that must be taken to complete the bias audit, including with respect to the data used in conducting the audit.

The Final Rule requires the use of “historical data” to conduct a bias audit. “Historical data” is defined as “data collected during an employer or employment agency’s use of an AEDT to assess candidates for employment or employees for promotion.” An employer or employment agency may also use the historical data in the following circumstances:

## Which employers are impacted by the law?

The law applies to employers located in New York City that use an AEDT to hire or promote New York City residents for jobs that are located in the Big Apple. Neither the law itself nor the Final Rule specifies whether the law applies to employers that are located outside of New York City.

## Who will enforce the law?

The DCWP is charged with enforcing the law.

## Are there any penalties for failure to comply?

Employers found to have violated the law will face civil penalties of up to \$500 for a first violation and each additional violation occurring on the same day as the first violation. Each subsequent violation will incur a penalty between \$500 and \$1,500. Each day the AEDT is used in violation of the law is deemed a separate violation, and failure to provide notice is also a separate violation.

Violations for which penalties will be incurred include:

- A sale or an offer to sell an AEDT that does not comply with the law; and
- A failure to provide the required notice to a candidate within 30 days in violation of the law.

Furthermore, the commissioner of the DCWP may initiate, in any court of competent jurisdiction, any action or proceeding that “may be appropriate or necessary for correction of any violation issued pursuant to [the law], including mandating compliance with the provisions of [the law] or such other relief as may be appropriate.”

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