

NYC Workplace AI Regulation Has Been Largely Insignificant

By Reid Skibell and Nathan Ades

New regulations on artificial intelligence in the workplace are on the horizon. A study released by researchers at Cornell University last month, however, calls into question the effectiveness of one of the first laws in this area. The findings and implications of that study are instructive for understanding how regulation in this area is likely to progress.

By way of background, employers have been increasingly integrating emerging technologies into their employment decision-making processes, which has raised employee concerns related to transparency, bias and protection of individual rights.

Specifically, businesses have adopted the use of algorithmic systems known as automated employment decision tools, or AEDTs, to automate and streamline hiring and promotion decisions.

To assist in making hiring decisions, AEDTs permit employers to collect data on previous employment experience, educational background and key terms, and use that data to select and filter applicants to determine who would most likely be successful at the company.

There are a variety of off-the-shelf products that are available in this space, which include automated resume screeners, matchmaking algorithms, social media scrapers, AI-based chatbots, algorithmic video platforms and logic games that are designed to identify qualities like risk-taking and generosity.[1]

Moreover, AEDTs can similarly streamline and collect data to analyze individual performance and productivity to select candidates for promotion.

Because these decisions are made via complex algorithms that are shaped by a wide range of inputs and are often protected by confidentiality or trade secret status, the use of AEDTs for employment decision making is ripe for potential abuse, bias and discrimination.

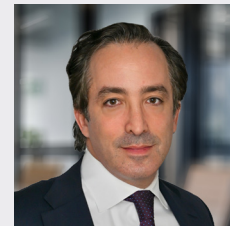
And relatedly, there is the perception that AEDTs can lead to these abuses, which can be disheartening to applicants and potentially disruptive for the workplace. Further, two lawsuits related to employee bias have already been filed, a putative class action against an AEDT provider and one by the U.S. Equal Employment Opportunity Commission, which is indicative of employee concerns.[2]

New York City Local Law 144

New York City is one of the first jurisdictions to attempt to regulate the use of AEDTs. In 2021, New York City passed Local Law 144, and it was the first piece of legislation globally to establish and set safeguards over the use of AI and AEDTs in the workplace.

There was significant controversy when it was initially passed, and enforcement was postponed twice to take public feedback into account.

Many argued that the law cast its net too broadly, and would effectuate sweeping and burdensome new obligations. Others felt the law was too narrow in application, and would not give job seekers the protections they needed.



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While the final version of Local Law 144 significantly narrowed the local law's scope in comparison to initial drafts of the bill when it went into effect in July 2023, the law was also the first of its kind to specifically address AI in the workspace, and the use of AEDTs in automating employment decision making when hiring and promoting employees.

The law only applies to employers that use AEDTs with a physical office in New York City for jobs either located there or for remote positions associated with any such office. As far as applicability, the law broadly covers employment decisions at any point in the process, including screening for hire or potential promotion.

The law prohibits employers from using AEDTs unless the tool has been subject to a bias audit, a summary of which is publicly published. The law also requires that employers provide certain notices to employees or job candidates that AI was used in the decision-making process and include instructions on how a person can request an alternative selection process or reasonable accommodation. But there is no separate requirement for the establishment of an alternative selection process.

As defined under Local Law 144, the bias audit is a required test that a business must undertake after a year of using an AEDT.

The audit must calculate the rate at which individuals in certain categories are either selected to move forward in the hiring process or assigned a classification by an AEDT, and compare the results to determine an impact ratio of sex categories, race and ethnicity categories, and intersectional categories of sex, ethnicity and race.

After the audit is complete, a summary of the results must be publicly published on a business's website. Further, the law is intended to spur a new market for auditors and compliance monitoring, and thereby create an enforcement infrastructure that will guide the deployment and use of this technology in the workplace.

Local Law 144 provides for civil penalties ranging from \$500 to \$1,500 per violation per day for failure to comply with the notice or audit provisions. However, there is no private right of action, and the law does not grant the city's Department of Consumer and Workplace Protection investigatory powers separate from responding to complaints. Accordingly, enforcement is dependent on the submission of complaints.

The Cornell Study on Local Law 144

Although earlier iterations of the proposed local law included a broad application of Local Law 144, the final regulation substantially narrowed the law's scope.

Specifically, the law provides that AEDT usage will only fall under Local Law 144 if the AEDT "substantially assist[s] or replace[s] discretionary decision making."^[3]

In other words, Local Law 144 will only apply to AEDTs if an employer relies solely on the algorithmic output, with no other human decision making involved in the process.

Based on this all-or-nothing discretionary opt-out, employers can theoretically avoid compliance with the local law even where AEDTs are central to their employment decisions.

There is also arguably an incentive to avoid compliance beyond the burdens associated with an audit because there is no safe harbor for compliance.

As pointed out by researchers at Cornell University, public audits would demonstrate if AEDTs were having a disparate impact on certain groups, thus creating potential liability under discrimination laws.^[4]

While it is more likely that auditing firms would inform employers of this potential issue and offer to help them address it proactively, it is true that employers could avoid this situation altogether by deciding that Local Law 144 is inapplicable to their circumstances.

To evaluate whether employers were opting out of the Local Law 144 regime, researchers at Cornell University had 155 student investigators test 391 New York employers by mimicking the behavior of a job seeker.[5]

Out of that dataset, only 18 employers had published audit reports required under the law, with some not even including the necessary transparency notices.[6]

Of the 26 firms that responded to follow-up surveys, 23 reported that Local Law 144 did not apply to their circumstances, with two providing what the Cornell study characterized as a bias audit.[7]

These findings suggest that the large majority of employers found the local law inapplicable to their circumstances or were ignorant of the law's requirements.

In response to media reports on the Cornell study, the Department of Consumer and Workplace Protection has stated that it had received no complaints under Local Law 144 since the law had gone into effect.[8]

While this could imply that future complaints may increase compliance to some degree, it is also consistent with the enforcement mechanism of public complaints being wholly ineffective.

In any event, the Cornell study's results indicate that Local Law 144 is not having its intended effect. Although the law purports to increase transparency in this area, its initial promise has proven to be illusory.

Moving Forward

The most significant impact of Local Law 144 may end up being how the New York City experience shapes future lawmaking.

It seems inevitable that new regulations are coming, as the issue of AEDTs remains in the public consciousness and how to draft new laws is being debated.

The European Union AI Act is in its final stages of being drafted, and potential AI legislation is being discussed globally.[9]

Moreover, there is evidence that the bias auditors that Local Law 144 hoped to spur are emerging, as even some AEDT providers are working this into their product offerings. In other words, there appears to be a demand for additional regulations on AEDTs.

While public opinion was previously split on whether Local Law 144 was unduly burdensome on employers or whether the law did not go far enough to protect employees, the results of the Cornell study suggest that businesses are simply disregarding the law. At this juncture, it is hard to dispute that Local Law 144 was so watered down that any effect on AI in the workplace is insignificant.

Regulation without any substantive impact is not the goal of either side in the public debate on AEDTs and AI. Accordingly, it is likely that proponents of regulation will use Local Law 144 as a platform to justify more regulation in the AI space, such as more onerous enforcement mechanisms like private rights of action or dedicated enforcement agencies, or for laws that lack discretionary opt-outs.

These proponents will have a persuasive argument that encouraging transparency alone is insufficient in this area, particularly given that any showing of disparate impact could open the door to discrimination lawsuits. Accordingly, while the future of AEDT regulation is unknown, it is likely to look different from Local Law 144.

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[1] <https://qz.com/americas-first-law-regulating-ai-bias-in-hiring-takes-e-1850602243>.

[2] Equal Employment Opportunity Commission v. iTutorGroup, Inc., et al., Case No. 1:22-cv-02565 (E.D.N.Y.); Mobley v. Workday, Inc., Case No. 4:23-cv-00770 (N.D. Cal. 2023).

[3] <https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf>.

[4] <https://osf.io/4y7d2>.

[5] Id.

[6] Id.

[7] Id.

[8] <https://www.nysscpa.org/article-content/new-york-city-s-law-for-disclosure-of-ai-in-hiring-falls-short-study-finds-012224#sthash.m6D9tXIL.dpbs>.

[9] https://iapp.org/media/pdf/resource_center/global_ai_legislation_tracker.pdf.