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Hon. Vilda Vera Mayuga, Esq.
Commissioner
Department of Consumer and Worker Protection
42 Broadway, 9th Floor
New York, NY 10004
Rulecomments@dcwp.nyc.gov (By Email Only)

RE: Comments to Proposed Rules for Local Law 144 of 2021

Dear Commissioner Mayuga:

Resolution Economics, LLC, an international consulting firm with offices in New York, Los Angeles, Chicago, Washington, DC, and Charlotte, NC, makes this submission in response to the Notice of Public Hearing and Opportunity to Comment that was issued by the New York Department of Consumer and Worker Protection regarding the Proposed Rules implementing the Automated Employment Decision Tools law ("AEDT law") that goes into effect on January 1, 2023.

Resolution Economics provides economic and statistical analysis, investigations and advisory services, tailored technology, and analytical solutions as well as expert testimony to law firms, companies, and government agencies. We specialize in global labor and employment and financial services matters, including in litigation settings, across every industry. Our professionals include highly trained and technical team members with PhDs, JDs, MAs, MBAs, CPAs, CFEs, and other qualifying expertise. Resolution Economics has been and is currently advising employers on how to evaluate the impact and navigate compliance obligations around automated employment decision tools.

Based on our review of the AEDT law and proposed regulations and our experience in this area, Resolution Economics submits the following questions regarding the Proposed Rules:

1. <u>What type of analysis is required in order to be in compliance with the bias audit requirement and not subject to penalties under the AEDT?</u>

Section 5-301 of the Proposed Rules raises several issues regarding the type of analysis required for a "bias audit."

a. That Section indicates that a bias audit must "calculate *the impact ratio*" for certain categories. (§ 5-301(a) and (b)). The definition of "bias audit" in Local Law 2021/144, however, specifies that the bias audit must include testing "to assess the tool's *disparate impact* on persons" within those categories. (AEDT law § 20-870).

The concept of "disparate impact" encompasses a much broader analysis than simple impact ratio calculations. How are these two different types of analyses to be reconciled? More

specifically: If an impact ratio is outside the 0.8 and 1.25 range, is use of the tool automatically a violation of the law that subjects the employer to penalties pursuant to § 20-872 of the AEDT law? Or does the employer have the opportunity to show that there are business or job related legitimate reasons for the observed differences, as would occur under disparate impact analysis?

b. The impact ratio tables (§ 5-301(a) or (b)) given as an example in the Proposed Rules calculate the impact ratios for the intersection of race and gender categories. Does this mean that race-only and gender-only impact ratios are not required?

2. What level of specificity is required for a bias audit?

Generally, an analysis to determine whether a selection tool has a particular impact must be performed on a use case basis – that is, be based on data that is specific to a certain population and time period and that is specific to the employer's particular application of the tool. For example, if an employer were using a selection tool in relation to filling two positions at different times – say, one for a front desk clerk in February and another for a warehouse worker six months later – separate analyses would need to be performed for each of these different applications of the tool.

It is not clear if the Proposed Rules require this type of analysis for AEDTs or instead permit some sort of single "generic" study that applies to all uses of a given tool. The example given under § 5-301 (a) says "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...".* Does this mean that the vendor may use historical data collected from other employers that used this AEDT to carry out the bias audit? Furthermore, may different employers that plan to use the AEDT from the same vendor use the same bias audit conducted by the vendor using historical data from other employers to comply with the proposed rule? Or is it required that the data used for a bias audit be specific to a particular employer and to the specific application of the AEDT at issue?

The language of § 5-302(a) (Published Results) raises this same issue. It states that employers must make the results of an AEDT bias audit publicly available *prior* to use of the AEDT. It would seem, however, that an employer would need to first implement an AEDT for some period of time to collect the data necessary as an input to the bias audit. Is it the case, therefore, that an employer needs to conduct some sort of pilot study with the AEDT prior to relying upon it to make employment decisions? Or may the employer (a) rely on a generic audit done by the vendor; and/or (b) use synthetic data – that is data that is generated partially or completely artificially, rather than being measured or extracted from real-world events – to conduct a bias audit prior to actual use of the AEDT?

3. What level of autonomy is required for the person/group performing the bias audit?

The AEDT Law states that the bias audit must be done by "an independent auditor." (§ 20-870). Although the AEDT Law does not provide a definition of "independent," Merriam-Webster defines independent as "(1): not subject to control by others; self-governing; (2): not affiliated with a larger controlling unit." In the context of financial statement audits by public accounting firms, employees of an audited entity are not generally considered to qualify as "independent auditors." See, e.g., 17 C.F.R. § 210.2-01(c)(2) ("An accountant is not independent if, at any point during the audit and professional engagement period, the accountant has an employment relationship with an audit client").

The Proposed Rules define "independent auditor" as "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." Where an employer is required to conduct a bias audit, does the Department intend this definition to allow the bias audit to be performed by an employee or group of employees of the employer?

Thank you for considering these questions.

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