



**resolution economics**

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January 23, 2023

Hon. Vilda Vera Mayuga, Esq.  
Commissioner  
Department of Consumer and Worker Protection  
42 Broadway  
New York, N.Y. 10004

RE: Comments on New Proposed Rules to Implement Automated  
Employment Decision Tools Law (Local Law 144)

Dear Commissioner Mayuga:

Resolution Economics, LLC, an international consulting firm with offices in New York, Los Angeles, Chicago, Washington, D.C, Charlotte, N.C., and London, 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 on December 15, 2022, regarding the revised Proposed Rules implementing the Automated Employment Decision Tools law (“AEDT law”), which the Department has announced it will begin enforcing on April 15, 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, employment, and litigation-related matters across every industry. Our professionals include highly trained and technical team members with PhDs, MAs, MBAs, CPAs, CFEs, and other qualifying expertise. Resolution Economics has been and is currently advising employers how to evaluate the impact and navigate compliance obligations around automated employment decision tools.

Based on our experience in this area, we submitted questions in October 2022 regarding the previous iteration of the Proposed Rule. We are pleased to see that the Department has addressed some of our concerns in the revised Proposed Rules. Improvements include:

- (a) A revised definition of “independent auditor” that makes clear that a bias audit must be conducted by a person or entity that is truly autonomous from and not subject to control by the employer and that plainly states that such audits are not permitted to be conducted by an employer’s employees; and
- (b) Clarification that separate impact ratios must be provided for race, for gender, and for intersectional categories.

However, the revised Proposed Rules leave some questions unanswered. Moreover, the revisions themselves raise additional issues and concerns about how the bias audits required by the AEDT law are to be conducted. We address a number of these issues and concerns below.

1. Use of Test/Synthetic Data

Section 5-302(a) of the new Proposed Rules states:

- (a) A bias audit conducted pursuant to section 5-301 of this Chapter must use historical data of the AEDT. If insufficient historical data is available to conduct a statistically significant bias audit, test data may be used instead.
- (b) If a bias audit uses test data, the summary of results of the bias audit must explain why historical data was not used and describe how the test data used was generated and obtained.

This Proposed Rule leaves unaddressed several key issues regarding the use of test (also known as “synthetic”) data for bias audits.

- a. Can test/synthetic data be used not only during the first year of an AEDT’s use but also later if the AEDT or the employer’s use of the AEDT changes?

The statement that test data may be used “if insufficient historical data is available” could be read as permitting the use of test data only during the first year – that is, only where the tool has not been used at all previously (or only very sporadically). However, test/synthetic data may be useful not only during the first year of an AEDT’s use but also throughout an AEDT’s use.

These tools will be evolving and their use likely will expand within a business or organization over time. Rather than waiting to determine *after the fact* that a change – either in the tool itself or in the way the tool is used by the employer – results in unintentional bias, it would be wise to use test/synthetic data to test the changes first in a controlled environment. The Proposed Rule should make clear that such use of test data is permitted.

- b. The Proposed Rules should clarify what types of test/synthetic data are permitted to be used for a bias audit

The new Proposed Rules provide a very rudimentary definition of “test data,” defining it only as “data used to conduct a bias audit that is not historical data.” (Section 530). This barebones definition may enable unscrupulous employers or vendors to skirt the very purpose of the AEDT law: ensuring a valid assessment of whether an AEDT produces biased outputs.

That is because test data can be fabricated to artificially produce “unbiased” results, thus making an AEDT appear to be unbiased even if it is actually biased. For example, if certain employment predictors used by the AEDT are simulated in the test data based on a different distribution than they have in reality, the AEDT would generate “unbiased” employment outcomes between protected and unprotected groups in the bias audit while such unbiasedness would not be achieved if the AEDT were applied to real historical data.

Given this reality, the Department may want to consider providing more specific requirements for the creation of test data that are to be used in a bias audit. Such requirements might include the number and the nature of simulated predictors that should be used in the audit test data and the criterion the test data need to satisfy to ensure the data’s similarity to real historical data. Specifically, the Department might consider requiring that all potential predictors used in the AEDT need to be in the test data and the test data need to be calibrated to external benchmarks to ensure the similarity of test data and real historical data.

## 2. Missing race and gender data

Not all AEDTs seek data regarding race, ethnicity or gender. And even where the AEDT does ask for such information, an increasing number of individuals choose not to disclose their race, ethnicity and/or gender. The new Proposed Rules do not provide any guidance as to how a bias audit should take account of such situations.

Is imputation allowed? Should individuals who choose not to identify race, ethnicity or gender be excluded from the respective race or gender analyses?

## 3. Allowing multiple employers to rely on the same bias audit

Section 502(c) of the new Proposed Rules states that

A bias audit of an AEDT used by multiple employers or employment agencies may use the historical data of any employers or employment agencies that use the AEDT. However, an employer or employment agency may rely on a bias audit of an AEDT that uses the historical data of other employers or employment agencies only if it provided historical data from its use of the AEDT to the independent auditor for the bias audit or if it has never used the AEDT.

The new Proposed Rules' Statement of Purpose indicates that this language is intended to "clarify[] that multiple employers using the same AEDT may rely upon the same bias audit so long as they provide historical data, if available, for the independent auditor to consider in such bias audit." But this new Proposed Rule raises a host of questions and potential problems.

These problems can be illustrated by looking at one of the examples provided in the new Proposed Rule itself. That example (appended to Section 5-301(b)), states:

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 no more than a year prior to the planned use of the AEDT. The employer asks the vendor for a bias audit. The vendor provides historical data regarding applicant selection that the vendor has collected from multiple employers to an independent auditor who will conduct a bias audit . . . .

Imagine that the resume screening tool in this example has a bias audit in place (done less than one year prior) that relied on historical data from two employers:

- + Employer A's data comes from the process that screens Registered Nurse resumes (a mostly female occupation)
- + Employer B's data comes from the process that screens air traffic controller resumes (a mostly male occupation)

Given the clear distinctions between the requirements for these two jobs, the AEDT will – or at least certainly *should* - have completely different algorithms in place, one to be used for one job and another for the other job. (In addition, of course, the labor market for these two occupations do not overlap at all.)

Now, imagine that Employer C wants to use the same AEDT to hire truck drivers. Because Employer C has not yet used the AEDT, it does not provide any of its own data to the independent auditor. Is Employer C even aware that the bias audit on which it is relying – and which it will post on its website as proof that the AEDT it is using is not biased – relies on RNs

and air traffic controllers? Does such a bias audit – conducted using data wholly unrelated to data that is germane to the job being filled by Employer C – even tell us anything about whether the AEDT is or is not biased as regards selections for truck drivers?

We urge the Department to address these matters before seeking to enforce the new AEDT law.

Sincerely,

A handwritten signature in black ink that reads "Paul J. White". The signature is written in a cursive style with a horizontal line underneath it.

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**Paul White,**  
Partner  
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