HIRED BY A MACHINE: CAN A NEW YORK CITY LAW ENFORCE ALGORITHMIC FAIRNESS IN HIRING PRACTICES?

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ABSTRACT

Workplace antidiscrimination laws must adapt to address today's technological realities. If left underregulated, the rapidly expanding role of Artificial Intelligence ("AI") in hiring practices has the danger of creating new, more obscure modes of discrimination. Companies use these tools to reduce the duration and costs of hiring and potentially attract a larger pool of qualified applicants for their open positions. But how can we guarantee that these hiring tools yield fair outcomes when deployed? These issues are just starting to be addressed at the federal, state, and city levels. This Note tackles whether a new city law can be improved to be a crucial stepping stone for federal and local governments to strengthen their regulatory apparatus to address AI in employment.

This Note discusses the issues that algorithmic employment practices raise regarding discrimination, privacy, and corporate independence in employment decisions. After reviewing these issues, this Note analyzes New York City's recently passed Local Law Int. No. 1894-A and proposes changes for effective implementation. The analysis finds significant gaps in the statutory language that threaten to undermine the legislative goals. This Note analyzes the bill's text and legislative history to suggest changes to the bill's delegated rulemaking authority and offers solutions to fill the significant gaps in the law's text. Practical regulatory guidance for improving hiring

algorithms ensures that algorithms are applied to counteract rather than reproduce bias in the workplace.

INTRODUCTION

Anti-discrimination laws in the workplace must adapt to the realities of the 21st century. Technological advancements have transformed workers' lives, having profound implications for civil rights. With the rise of algorithmic Human Resource Management ("AHRM"), technological systems are redefining employment practices and increasing the risk of employment discrimination.[1] These systems, which use artificial intelligence ("AI") to make decisions about hiring or evaluating workers,

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1.   *Ensuring a Future That Advances Equity in Algorithmic Employment Decisions: Before the Civ. Rights and Hum. Servs. Subcomm., Comm. on Educ. and Lab., U.S. H.R.*, 116th Cong. 2 (2020) (statement of Jenny R. Yang, Senior Fellow, Urban Institute).

raise significant legal questions about their fairness.[2] AHRM promises efficiency improvement upon existing practices; however, it also denies economic opportunities to workers and applicants.[3] These risks must be adequately studied and checked before they are deployed.

Until recently, employers have had minimal legal guidance or regulation of AI in making employment decisions.[4] However, individuals have been able to launch complaints with the Federal Trade Commission ("FTC"), which regulates consumer protection and the promotion of competition,[5] so there have been signs of federal agency involvement in regulating AI concerning consumers. While federal efforts to regulate AI have increased attention on algorithms, none of these efforts focus on algorithms in the employment context.[6] One notable exception comes from the Equal Employment Opportunity Commission ("EEOC"), the federal agency tasked with enforcing federal employment anti-discrimination laws, recently launched an initiative on "Artificial Intelligence and Algorithmic Fairness," which examines how technology impacts employment decisions to guide applicants, employees, employers, and technology vendors to ensure that the use of these technologies complies with federal equal employment opportunity laws.[7] Other efforts focus primarily on consumers rather than employees.[8]

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2.   *See generally*, Doaa Abu-Elyounes, *Contextual Fairness: A Legal and Policy Analysis of Algorithmic Fairness*, J.L. TECH. & POL'Y (forthcoming) (Sept. 1, 2019), https://www.ssrn.com/abstract=3478296.

3.   *See* Yang, *supra* note 1, at 2, 4.

4.   *See infra* Section I.B.

5.   *See, e.g.*, Ifeoma Ajunwa, *An Auditing Imperative for Automated Hiring Systems*, 34 HARV. J.L. & TECH. 622, 671 (2021).

6.   *See infra* Section I.C.

7.   *See* Press Release, U.S. Equal Employment Opportunity Commission, EEOC LAUNCHES INITIATIVE ON ARTIFICIAL INTELLIGENCE AND ALGORITHMIC FAIRNESS, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, (Oct. 28, 2021), https://www.eeoc.gov /newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness;   42 U.S.C. § 2000e.

8.   For example, in 2019, Lawmakers introduced the *Algorithmic Accountability Act*, which would require large companies to conduct assessments for bias of "high-risk systems that involve personal information or make automated decisions, such as systems that use artificial intelligence or machine learning[.]" The bill was the first federal legislative effort to regulate AI systems across industries in the United States. Congress hoped to address growing concerns about violations of privacy and data security and discrimination resulting from AI. It would direct the FTC to issue and enforce regulations that require companies to conduct automated decision system impact assessments when they use, store, or share personal information. This regulation is aimed at protecting consumers and does not directly address the protection of employees.

In 2021, over 30 bills focused on regulating algorithms were introduced into Congress.[9] DLA Piper lawyers note that the references to algorithms, AI, machine learning, and automated decision-making inserted in a wide range of appropriations and authorization bills reflect the prevalence of these technologies.[10] Recent legislative proposals expand the FTC's power to regulate AI.[11] While federal efforts to regulate AI are beneficial, those efforts are not tailored to machine learning in the employment and HR context. As a result of this regulatory vacuum, HR departments are turning to AHRM without oversight.

One local statute makes an earnest if incomplete, attempt to solve these concerns. New York City passed Local Law Int. No. 1894-A, the Automated Employment Decision Tools Law ("AEDT"),[12] taking effect on January 1, 2023, regulates the use of AHRM tools in hiring and promotion decisions.[13] However, it is unclear whether the bill has enough bite to meaningfully intervene in HR practices. The New York City Council, which adopted the bill, delegated enforcement authority to The New York City Law Department ("NYC Law Department"),[14] also known as the Office of the Corporation Counsel, which is the department of the government of New York City responsible for most of the city's legal affairs.[15] Importantly, while they delegated enforcement authority,

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9.   *See* Tony Samp, Steven R. Phillips & Danny Tobey, *US Congress Tries to Decode Algorithms*, DLA PIPER: INSIGHTS (Jan. 27, 2022), https://www.dlapiper.com/en/us/insights/publications/2022/1/us-congress-tries-to-decode-algorithms/.

10.   *See id.*

11.   *See id.; see also Platform Accountability and Consumer Transparency (PACT) Act*, S. 797, 117th Cong. (2021), a bipartisan bill that was introduced but did not advance, updating Section 230 to require that large online platforms remove court-determined illegal content and activity within four days and would exempt the enforcement of federal civil laws from Section 230 so that online platforms cannot use it as a defense when federal regulators like the FTC and the DOJ pursue civil actions. *The Social Media Disclosure and Transparency of Advertisements (DATA) Act of 2021* would require the FTC to issue regulations that require sizeable digital advertising platforms to maintain and grant academic researchers and the FTC access to ad libraries that contain specific data on advertisements. H.R. 3451, 117th Cong. (2021).

12.   Local Law Int. No. 1894-A.

13.   *See id.*

14.   *See id.*

15.   *See About the Law Department*, N.Y.C. L. DEP'T, https://www1.nyc.gov/site/law/about/about-the-law-department.page [https://perma.cc/PB8W-BPXU] (last visited Oct. 27, 2022).

New York City Council did not indicate rulemaking authority to any agency, leaving enforcement disorganized after a violation.

This Note addresses the gaps in the New York City statute and recommends other policies necessary to ensure the law satisfies its intended purpose. Part I discusses how employers use algorithmic employment tools and the issues these practices raise regarding discrimination, privacy, and corporate independence in employment decisions. Part II examines the New York City law and its shortcomings and recommends changes to the statute the city should promulgate. Part III proposes which agency authority is best suited to implement these suggestions. While this Note addresses how the NYC Law Department could use its newfound power, it ultimately argues that the New York City Commission on Human Rights (NYCCHR) is the best agency to bring anti-discrimination law into the 21st century. These rules can be a good blueprint for Congress and other city and state governments to follow to regulate AHRM.

I. IDENTIFYING THE PROBLEM WITH ALGORITHMIC HR

A. ALGORITHMIC HR – AN UNDERREGULATED PRACTICE

1. *The Basics of Algorithmic HR*

Until recently, employers had minimal legal guidance or regulation for using AHRM.[16] Scholars believe that existing legal doctrines are not well equipped to face the challenges posed by AI programs such as algorithmic decision-making tools.[17] This issue is compounded by the expected growth of virtual work, a product of the Covid-19 pandemic. As companies recover from the impacts of Covid-19, AI technology helps companies streamline hiring.[18] This section introduces AHRM practices and how they are used, explains how algorithms generally work to produce AI, and analyzes algorithms' use in the employment context.

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16.   *See* Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 533 (2018).

17.   *See* Talia B. Gillis & Jann L. Spiess, *Big Data and Discrimination*, 86 U. CHI. L. REV. 459, 460 (2019).

18.   *See* Nicol Turner Lee & Samantha Lai, *Why New York City Is Cracking Down on AI in Hiring*, BROOKINGS: TECHTANK (Dec. 20, 2021), https://www.brookings.edu /blog/techtank/2021/12/20/why-new-york-city-is-cracking-down-on-ai-in-hiring/ [https://perma.cc/44U4-VMRW].

Algorithms are procedures a computer follows to reach decisions.[19] AHRM vendors develop algorithms by analyzing datasets to yield functions that are deterministic mappings from a set of input values to one or more output values provided by the employer.[20] A dataset that contains past decisions trains the AHRM to make future decisions or predictions.[21] The employer offers the vendor-created AHRM system with an existing dataset and historical outcomes.

AI connects those algorithms to derive a more sophisticated set of outputs from the initial stage of inputs. The algorithm uses "training data to discover on their own what characteristics can be used to predict the target variable."[22] The AI in the initial algorithm processes the dataset and trains to find the best function to match the observed patterns. Another algorithm then uses these functions to make inferences out of new datasets.[23] A model for the AI emerges from the training of the algorithm, which captures patterns, associations, or correlations in a dataset, but the results from the model do not explain the cause or nature of these links.[24]

Employers deploy these technologies for the HR management of an organization.[25] Employers use the AI produced by algorithms to make and execute decisions affecting labor to augment decisions made by HR Management personnel.[26] For example, in the HR context, an AI model may identify a relationship between an input, such as past job experience, and an output, such as the likelihood that someone will experience success in each position, without specifying the algorithms within the AI that produces that association.[27] The vendors that create these systems and the

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19.   *See* Cecil Abungu, *Algorithmic Decision-Making and Discrimination in Developing Countries*, 13 J.L. Tech. & Internet 41, 44 (2022).

20.   *See id.*

21.   *See* Emlyn Bottomley, *Data and Algorithms in the Workplace: An Overview of Current Public Policy Strategies* (U.C. Berkley Labor Ctr., Working Paper, Tech. & Work Program, 2020).

22.   Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 Iowa L. Rev. 1257, 1264 (2020).

23.   *See* Abungu, *supra* note 19, at 45.

24.   *See* Thomas B. Nachbar, *Algorithmic Fairness, Algorithmic Discrimination*, 48 Fla. State Univ. L. Rev. 509, 521 (2020).

25.   *See* Jeroen Meijerink et al., *Algorithmic Human Resource Management: Synthesizing Developments and Cross-Disciplinary Insights on Digital HRM*, 32 Int'l J. Hum. Resource Mgmt. 2545 (2021).

26.   *See id.* at 2547.

27.   *See, e.g.,* Nachbar, *supra* note 24, at 521.

companies that use them do not disclose this information.[28] Supervised learning models like these do not attempt to demonstrate the cause or nature of the associations they produce.[29]

The pool of individuals represented in the dataset matters because that information will set the criteria for candidates entering the system.[30] In practice, "members of disadvantaged groups will usually be even more starkly underrepresented in the set of predictable best performers than in the set of actual ones."[31] Their future high performance is judged as more surprising in the algorithmic analysis because they tend to share less in common with historically high performers than they do with historically low performers.[32] Additionally, if a dataset under-represents a particular group and over-represents another group, the dataset will run on inaccurate information and make inaccurate predictive decisions for each group.[33] An employee screening algorithm will be designed using a dataset in line with existing human classifications of which candidate fits the description of a good employee and which does not.[34] For example, there are algorithms to find if the candidate has sufficient previous job qualifications or high educational attainment to help make hiring decisions.[35] The algorithm converts the large pool of candidate data and produces an output.[36]

Algorithms are a growing part of employment practices in corporations: an industry survey found that 55 percent of human resource management leaders in the United States use AHRM, given that algorithmic tools are available for almost every stage of the recruitment

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28.   N.Y. COMM. ON TECH. BRIEFING PAPER AND COMM. REP. ON INFRASTRUCTURE DIV. Int. No. 1894, at 8 (2020).

29.   *See* Nachbar, *supra* note 24, at 521.

30.   *See, e.g., id.* at 520.

31.   Benjamin Eidelson, *Patterned Inequality, Compounding Injustice, and Algorithmic Prediction*, 1 AM. J.L. & EQUITY 252, 264 (2021) ("On average, that is, even the members of disadvantaged groups who would be among the top *n* candidates ex post will not look as promising as the others in that class ex ante.").

32.   *See id.*

33.   Natalia Criado & Jose M. Such, *Digital Discrimination*, *in* ALGORITHMIC REGULATION 85 (Karen Yeung & Martin Lodge eds., 2019); *see also* Prince & Schwarcz, *supra* note 22, at 1273-81.

34.   *See* Abungu, *supra* note 19, at 45.

35.   *See* Ajunwa, *supra* note 5, at 623.

36.   *See* Alex Engler, *Auditing Employment Algorithms for Discrimination*, BROOKINGS (Mar. 12, 2021), https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/.

process.[37] Employer side attorneys have noticed this trend and are commenting on it.[38] In fact, these attorneys think "[t]he trend of using [AI] in hiring and recruitment decisions is expected to increase, especially in light of Covid-19 social distancing mandates."[39] Many companies and agencies also use the same private providers: over one-third of Fortune 100 companies use the same automated candidate screener, HireVue.[40]

Even though there is bias in AHRM, HR departments turn to these hiring tools because they are proven to be both cost-effective and efficient.[41] As the economy recovers from the devastating impacts of Covid-19, emerging technologies like AI have helped companies streamline mass hiring while reducing operational costs.[42] According to Deloitte Bersin, a research firm, companies in 2018, on average spent approximately $4,000 per candidate for interviewing, scheduling, and assessments.[43] The adoption of automated hiring makes the process much less costly.[44] The time companies devote to traditional hiring personnel is immense: a report by Ideal shows that, on average, companies spend 14 hours per week manually completing hiring tasks that could be automated, with 39 percent indicating that they spend 20 hours or more on such tasks.[45] In addition to greater efficiency and profitability, a crucial part of HR's responsibility to the company is to use the least bias to hire the best

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37. *See id.*

38. Adam S. Forman, Nathaniel M. Glasser & Christopher Lech, *Insight: Covid-19 May Push More Companies to Use AI as Hiring Tool*, BLOOMBERG LAW (May 1, 2020, 4:00 AM), https://news.bloomberglaw.com/daily-labor-report/insight-covid-19-may-push-more-companies-to-use-ai-as-hiring-tool [https://perma.cc/M8FS-U5AZ].

39. *See id.*

40. Kathleen Creel & Deborah Hellman, *The Algorithmic Leviathan: Arbitrariness, Fairness, and Opportunity in Algorithmic Decision Making Systems* 2 (Va. Pub. L. & Legal Theory Res. Paper No. 2021-13, 2021).

41. *See* Ajunwa, *supra* note 5, at 632.

42. *See* Lee & Lai, *supra* note 18.

43. Robin Erickson, *Infographic: Insights into a Highly Mature Talent Acquisition Team*, HR DAILY ADVISOR (Jan. 16, 2018), https://hrdailyadvisor.blr.com/ infographic/infographic-insights-highly-mature-talent-acquisition-team/ [https://perma.cc/NCR8-BHBB] (last visited Oct. 27, 2022); *see also* Gal Almog, *Traditional Recruiting Isn't Enough: How AI Is Changing the Rules in the Human Capital Market*, FORBES (Feb. 9, 2018, 8:50 AM), https://www.forbes.com/ sites/groupthink/2018/02/09/traditional-recruiting-isnt-enough-how-ai-is-changing-the-rules-in-the-human-capital-market/ [https://perma.cc/E8N2-9FGV?type=image].

44. *Id.*

45. Ajunwa, *supra* note 5, at 632.

talent.[46] Some scholars argue that the original intent of automated decision-making is "to improve upon human decision-making by suppressing biases to make the most efficient and least discriminatory decisions."[47] Human resource management ("HRM") is the process of employing people, training them, and developing policies relating to them.[48] Thus, from the perspective of HRM, who use these tools, automated HR's function is to improve manual human decision-making.[49]

2.   *How Employers Use These Tools*

AHRM tools are used for recruiting candidates to apply for open positions.[50] While not all uses of AHRM are problematic, some raise concerns about discrimination in the hiring process. The latter practices should be subject to more transparency-related regulation.

One widespread use of AHRM is social media platforms and digital career services for recruitment.[51] Digital services for recruitment, such as LinkedIn, base their data on users' descriptions, prior choices, and the behavior of similar users.[52] As a result, AHRM digital services like recommender systems propose ads to match recommendations and user preferences.[53] A recommender system suggests ads or content based on a user's preferences or work experience.[54] For example, if a user exhibits an interest in finance, a financial employer may use a digital service to track that behavior and ensure that the individual sees a recruitment ad. Employers from large corporations value these tools because they can deploy their recruiting dollars strategically, targeting ads to candidates who are most likely to have relevant skills and apply for the position.[55]

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46.   Jenny R. Yang, *Adapting Our Anti-Discrimination Laws to Protect Workers' Rights in the Age of Algorithmic Employment Assessments and Evolving Workplace Technology*, A.B.A. J. LAB. & EMP. L. 207, 225 (2021).

47.   Bornstein, *supra* note 16, at 520.

48.   HUMAN RESOURCE MANAGEMENT ch. 1.1 (Univ. Minn. Libraries Publ'g ed., 2016) (2011), https://open.lib.umn.edu/humanresourcemanagement/chapter/1-1-what-is-human-resources/.

49.   Ajunwa, *supra* note 5, at 634.

50.   HUMAN RESOURCE MANAGEMENT, *supra* note 48, at 3.

51.   Alina Köchling & Marius Claus Wehner, *Discriminated by an Algorithm: A Systematic Review of Discrimination and Fairness by Algorithmic Decision-Making in the Context of HR Recruitment and HR Development*, 13 BUS. RES. 795, 830 (2020).

52.   *Id.*

53.   *Id.* at 831.

54.   *See id.*

55.   *See id.*

The use of digital services for recruitment is so prevalent that "[i]n 2015, an overwhelming majority of employers surveyed—84 [percent]— reported using social media to recruit, and the proportion has likely gone up since then."[56] Because online advertising targets viewers based on their interests, preferences, and characteristics, Google, LinkedIn, and other platforms encourage advertisers to use personal attributes to choose who can see their ads and who will be excluded from viewing them.[57] Employers use these advertisements with the help of AHRM tools to attract specific candidates and hide job opportunities from others whom they deem as less qualified.[58]

Similarly, employers also use AHRM tools for recruitment with search engines like Google.[59] An employer can use an AI program to determine what postings candidates see on job search platforms, selecting those who search for services.[60] As the algorithm rates applicants, the recruiter sees and more likely clicks on those listed at the top of the pile.[61] These rankings consider the applicant's location, previous search keywords, and recent contacts in a user's social network.[62] The information taken from this data serves as indicators for other demographic information such as age, ethnicity, education level, work experience, etc.[63]

Not all uses of AHRM are problematic. Scholar Jenny R. Yang suggests that algorithmic hiring tools can assist employers in hiring from a more diverse pool of applicants.[64] Employers can use AI to move away from traditional hiring criteria and reach more applicants.[65] For example, a software company called Catalyte uses AI in online assessments to identify candidates from nontraditional backgrounds to find high-performing software developers.[66] These uses of AHRM are unlikely to be the target of regulation since they utilize the efficiency and cost-saving

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56.   Pauline T. Kim & Sharion Scott, *Discrimination in Online Employment Recruiting*, 63 ST. LOUIS U.L.J. 93, 94 (2018).

57.   *Id.* at 94-95.

58.   Köchling & Wehner, *supra* note 51, at 813.

59.   *See, e.g., id.* at 830.

60.   *See, e.g., id.* at 831.

61.   *Id.* at 832.

62.   Köchling & Wehner, *supra* note 51, at 832.

63.   Ajunwa, *supra* note 5, at 636.

64.   Yang, *supra* note 46, at 212.

65.   *Id.*

66.   *Id.*

aspects of AHRM, but these tools are designed to remove systemic barriers in hiring practices rather than perpetuate them.

In contrast, AHRM tools that scan resumes and CVs for selection among candidates and telephone and video analysis for interviews are examples of practices that should be the target of regulation.[67] For example, Amazon has a screening CV tool using text mining to identify the presence or absence of specific words of interest.[68] The recruitment and selection process provides an algorithmic evaluation of applicants before a face-to-face meeting.[69] For telephone or video interviews, employers may use AI to transcribe recorded text statements, then analyze those textual responses with natural language processing ("NLP").[70] Applicant responses are collected algorithmically using cameras and microphones.[71] The data is then transcribed to text using human verbal and nonverbal behavior, facial expression processing ("FEP"), and NLP.[72] The algorithm then takes that text data and produces some output.[73] Some vendors, such as HireVue and TalView, have used facial analysis in these interviews.[74] In early 2020, only HireVue discontinued its facial analysis screening tools that they sell to companies[75] but continued to use facial characteristics to determine employability in preexisting models for 2021.[76] Another form of algorithmic evaluation for selected candidates is gamification, where the game's performance counts

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67.   McKenzie Raub, *Bots, Bias and Big Data: Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices*, 71 ARK. L. REV. 529, 538 (2018); *see also* Artificial Intelligence Video Interview Act, H.R. 2557, 101st Gen. Assemb., Reg. Sess. (Ill. 2020) (regulating how employers use AI to analyze video interviews).

68.   Köchling & Wehner, *supra* note 51, at 832-33.

69.   *Id.* at 832.

70.   Engler, *supra* note 36.

71.   See Köchling & Wehner, *supra* note 51, at 833.

72.   *Id.*

73.   *Id.*

74.   Engler, *supra* note 36.

75.   *HireVue Leads the Industry with Commitment to Transparent and Ethical Use of AI in Hiring*, AP NEWS (2021), https://apnews.com/press-release/globe-news wire/technology-political-issues-government-and-politics-artificial-intelligence-political-ethics-37d0fe232bcce86da20a5596cc840552 [https://perma.cc/39UD-YU8M] (last visited Oct. 27, 2022).

76.   Alex Engler, *Outside auditors are struggling to hold AI companies accountable*, FAST COMPANY, https://www.fastcompany.com/90597594/ai-algorithm-auditing-hirevue (last visited Nov. 13, 2022).

toward the evaluation: applicants take quizzes or play games that assess problem-solving skills, motivation, and work ethic.[77]

After getting hired, there is evidence that AHRM tools still play a significant role in using data to predict retention, salaries, and promotion.[78] Individualized data about current employees helps HR management identify when employees are likely to leave their jobs and how they may select future leaders.[79] These on-the-job analytics are also used to look for patterns across workers' data retrieved on company computers used by employees to spot trends in attendance, staff morale, and health issues at the organizational level.[80]

The growing virtual workforce makes these tools more popular,[81] and new legal issues arise from their use, creating a greater need for regulation in this area. While not all uses of AHRM should be the target of regulation, some uses—such as scanning resumes and CVs, or telephone and video interview analysis—raise concerns about discriminatory hiring practices.

B. PRIVACY AND DISCRIMINATION ISSUES THAT ARISE FROM AHRM

Technological advancement has profound implications for civil rights. Two of the most important federal protections are discrimination and privacy, covered by Title VII of the Civil Rights Act of 1964[82] and the Americans with Disabilities Act ("ADA").[83] Title VII prohibits discrimination in hiring, firing, compensation, and other "terms, conditions, [and] privileges" of employment for protected classes, including race and sex.[84] The ADA prohibits discrimination against individuals with disabilities in all areas of life, including the workplace.[85] This Section examines the issues with these federal protections for AHRM from the employees perspective.

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77.   *See* Köchling & Wehner, *supra* note 51, at 833; *see also* Raub, *supra* note 67, at 539.

78.   Engler, *supra* note 36.

79.   Phoebe V. Moore, *The Mirror for (Artificial) Intelligence: In Whose Reflection?*, 41 COMP. LAB. L. & POL'Y J. 47, 55 (2019).

80.   *Id.*

81.   Engler, *supra* note 36.

82.   42 U.S.C. § 2000e.

83.   42 U.S.C. § 12111.

84.   42 U.S.C. § 2000e-2(a)(1).

85.   42 U.S.C. § 12111.

1. *Legal Issues from the Employee Perspective*

The Supreme Court interpreted Title VII in *McDonnell Douglas*, to require that the plaintiff demonstrate a causal connection between a discriminatory outcome and a specific practice to establish a prima facie case of discrimination under the *McDonnell Douglas* burden-shifting framework.[86] Disparate impact claims occur when the plaintiff-employee establishes a prima facie case that an employer has utilized a practice that appears neutral but has a discriminatory effect based on a protected characteristic.[87] If the defendant-employer provides evidence of a non-discriminatory reason for the employment decision, the plaintiff-employee must show that a discriminatory effect still exists despite the employer's non-discriminatory reason.[88] The Supreme Court first articulated the standard for disparate impact claims in *Griggs v. Duke Power Co.*, where the Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[89] With the rise in algorithmic HR, there is an increased "risk that employment discrimination may be masked through ineffective accountability structures and increasing information asymmetry."[90] Under the existing law, it is unclear how Title VII claims should be handled.[91] Causation has been a murky ever-evolving standard for courts and legal scholars to interpret.[92] But algorithmic decision-making in HR presents a new challenge and another thorn in an already prickly situation.

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86. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 792-93 (1973); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-58, 660 (1989) (establishing a "specific causation requirement" for disparate impact claims under Title VII of the Civil Rights Act of 1964 and shifting the burden to plaintiffs to prove that business necessity was lacking).

87. *McDonnell Douglas*, 411 U.S. at 806; Jenna Jonjua, *Racist Robots? The Future of Title VII Disparate Impact Cases in the World of Artificial Intelligence Notes*, 30 MINN. J. INT'L. L. 329, 334 (2020).

88. *McDonnell Douglas*, 411 U.S. at 807; Jonjua, *supra* note 87.

89. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

90. Yang, *supra* note 46, at 208.

91. 42 U.S.C. § 2000e.

92. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 982-85 (1988) (dealing with a disparate impact claim arising from discretionary and subjective promotion policies). The future of these types of class action cases is uncertain given *Wal-Mart Stores, Inc v. Dukes*, which held that, in a suit alleging discrimination in Wal-Mart's employment promotion policies, class certification was improper because an employer's discretionary decision-making is a "presumptively reasonable way of doing business"

In Title VII claims for algorithmic discrimination, it is exceedingly difficult to prevail when plaintiff-employees do not have access to the algorithm and how it is trained or do not have the expertise to determine whether an algorithm was discriminatory.[93] While the algorithm relies on human intuition in its creation; AI does not clearly show how the human intuition it depends on connects to the input data and the target variable in the model.[94] Proving causation is even more difficult because these systems, including their inputs and outputs, are complex and often unreviewable to the employee.[95] As discussed in the Section above, companies lack transparency in disclosing information about their algorithmic employment practices.[96] Since AI can present biases, "it is unclear how existing law would address whether an algorithm is truly non-discriminatory, whether dependence on such an algorithm (biased or not) would be a defense for employers, or how liability should be assigned in such a scenario."[97]

For instance, with the variety of data collected and masked proxies, like zip codes, an algorithm may still conclude an individual's race or other protected categories even if those variables are not included as inputs in the final model created by the algorithm.[98] In other words, the algorithm may be able to make conclusions about an applicant's race or gender based on information from the other variables in the model.[99] Therefore, it would be difficult to prove that such an algorithm produced a discriminatory result when the variables used do not make the model prima facie discriminatory. In this way, it is easier for parties to justify the use of algorithms than for individuals discriminated against to provide evidence of workable solutions.[100] Academic literature shows that "approaches for preventing discrimination in algorithms which require proof of causation, and significant correlation or exclusion of inputs are no longer tenable, meaning that detection of discrimination requires

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and "merely showing that [a company's] policy of discretion has produced an overall sex-based disparity does not suffice" to establish a claim. 564 U.S. 338, 352–57 (2011).

93.   *See generally* Deven R. Desai & Joshua A. Kroll, *Trust but Verify: A Guide to Algorithms and the Law*, 31 HARV. J.L. TECH. 1 (2017).

94.   Prince & Schwarcz, *supra* note 22, at 1263-64.

95.   *See* Yang, *supra* note 46.

96.   *See* Abungu, *supra* note 19, at 48.

97.   Jonjua, *supra* note 87, at 330.

98.   Lee & Lai, *supra* note 18.

99.   *See id.*

100.   *See* Abungu, *supra* note 19, at 42-43.

complicated examination of processes."[101] There is an incongruity between the requirements to prove causation and the information the courts can ascertain about algorithms.

Just as courts may struggle in the future to interpret Title VII when it comes to algorithmic fairness, government entities may not fully grasp how these systems work to regulate misconduct. According to the EEOC's Uniform Guidelines, employers can justify a disparate impact by demonstrating the predictive validity of their selection procedures.[102] This creates a catch-22 for plaintiff-employees with Title VII claims because models produced by machine learning are built to ensure predictive validity.[103] While plaintiff-employees might challenge whether the machine's validation process is itself valid, it is unclear when traditional forms of validation are insufficient, even if they have been executed properly.[104] The Uniform Guidelines do not specify how you measure the validity of the models produced by machine learning.[105]

Additionally, under Section 705(g)(5) of Title VII, the EEOC has the authority "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public."[106] This includes the EEOC exploring its limitations in authority when it comes to accessing corporate data when responding to employment discrimination charges.[107] A lack of transparency is also a considerable problem for agency enforcement because analyzing these models cannot occur without the government gaining access to the data used for these algorithmic systems.[108] 10 Senators recently wrote to the EEOC to ask about its ability to investigate companies that build employment algorithms.[109] One of the questions the letter asked was if the EEOC could request access to algorithmic hiring tools and applicant data from employers or AHRM vendors to conduct tests regarding the possibility of disparate impacts.[110]

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101. *Id.* at 42.

102. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5 (2018).

103. *See* Bornstein, *supra* note 16, at 520.

104. *Id.* at 538.

105. *See* 29 C.F.R. § 1607.

106. 42 U.S.C. § 2000e–4(g)(5).

107. Engler, *supra* note 36.

108. Abungu, *supra* note 19, at 42.

109. Engler, *supra* note 36.

110. Letter from Michael F. Bennet et al., U.S. Senate, to Janet Dhillon, Chair, EEOC (Dec. 8, 2020), https://www.bennet.senate.gov/public/_cache/files/0/a/0a439d4b-e373-

Some algorithmic hiring practices, like companies' use of pre-employment personality tests, may have a disparate impact on applicants with mental disabilities.[111] The purpose of the ADA is to "ensure that individuals with disabilities are not barred from jobs they can perform."[112] Under the ADA, employers are "prohibited from discrimination on the basis of disability in the hiring and employment process, yet technology that screens video interviews, applications, and other employee and prospective employee materials demonstrate bias and does not select disabled job candidates."[113] Although employers can use AI evaluation "tests with a disparate impact on persons with mental disabilities if the tests are job-related and a business necessity, the evidence is mixed regarding how well personality tests predict job performance."[114] Even if vendors often claim that their algorithms comply with the ADA because they compare the personality traits of each applicant to those of existing top performers in a particular job, individuals with mental disabilities are underrepresented in the workplace.[115] Therefore, a test designed to "replicate the personality traits of a company's top performers may perpetuate exclusion and inequality."[116]

This also might be true of other underrepresented groups like racial minorities and applicants in a higher age bracket. The Age Discrimination in Employment Act (ADEA) offers labor market protections for workers over 40 years of age.[117] Audit studies revealed the potential for age bias and discrimination in employment recruitment on hiring platforms.[118] A study by ProPublica and The New York Times found that many

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4451-84ed-ba333ce6d1dd/672D2E4304D63A04CC3465C3C8BF1D21.letter-to-chair-dhillon.pdf [https://perma.cc/RG88-RWM9].

111. *See generally* Kelly Cahill Timmons, *Pre-Employment Personality Tests, Algorithmic Bias, and the Americans with Disabilities Act*, 125 PA. STATE L. REV. 389 (2021).

112. *Id.* at 390.

113. Haley Moss, *Screened Out Onscreen: Disability Discrimination, Hiring Bias, and Artificial Intelligence*, 98 DENV. L. REV. 775, 775 (2021).

114. Timmons, *supra* note 111, at 390.

115. *Id.*

116. *Id.*

117. Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 631(a) (1967).

118. Ifeoma Ajunwa, *Age Discrimination by Platforms*, 40 BERKELEY J. EMP. LAB. L. 1, 4-5 (2019) (citing Julia Angwin, et al., *Facebook Job Ads Raise Concerns About Age Discrimination*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html [https://perma.cc/CZY7-TJ7L]).

employers, such as Verizon, Amazon, Goldman Sachs, Target, and Facebook, targeted applicants by age.[119] Excluding individuals over 40 is a violation of the ADEA.[120] Underrepresented groups need to be represented more regularly within data sets, namely in the hiring space. AI technology has an important relationship with race, gender, disability, and age and poses concerns about hiring biases.[121]

C.   BILLS AND INITIATIVES TO ADDRESS ALGORITHMIC FAIRNESS IN EMPLOYMENT

The following Section explains why federal, state, and local governments have begun to regulate this area, and the steps they have taken to do so. This Section first explores recent actions by the federal government and bills introduced or passed by states and municipalities. As discussed in the Section above, AI must comply with employment anti-discrimination laws, including Title VII[122] and ADA.[123]

While governments at all levels have slowly begun to regulate this technology, in November 2021, the EEOC announced that the agency is launching an initiative to ensure that the use of AI at all stages of the employment cycle complies with federal anti-discrimination laws.[124] Employer-side lawyers note that the EEOC's initiative will be the first attempt by the agency to examine the technology and enforce compliance with currently existing anti-discrimination laws.[125] EEOC chair Charlotte A. Burrows said about the initiative that AI "tools have great potential to improve our lives, including in the area of employment," however, "the EEOC is keenly aware that these tools may mask and perpetuate bias or

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119.   *Id.* at 5 (citing Julia Angwin, *supra* note 118).

120.   *See id.*

121.   *See* Moss, *supra* note 113, at 793; Bornstein, *supra* note 16, at 523.

122.   *See* Jonjua, *supra* note 87, at 342; Yang, *supra* note 46, at 223.

123.   *See* Timmons, *supra* note 111, at 390; Yang, *supra* note 46, at 223.

124.   Press Release, U.S. Equal Employment Opportunity Commission, EEOC LAUNCHES INITIATIVE ON ARTIFICIAL INTELLIGENCE AND ALGORITHMIC FAIRNESS, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, (Oct. 28, 2021), https://www. eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.

125.   Joseph C. O'Keefe, Edward C. Young & Tony S. Martinez, *EEOC Targeting Artificial Intelligence & Algorithmic Bias in Hiring*, NAT'L L. REV. (Nov. 15, 2022) https://www.natlawreview.com/article/eeoc-prepares-to-tackle-artificial-intelligence-and-algorithmic-bias [https://perma.cc/JWX7-F3ZZ].

create new discriminatory barriers to jobs."[126] Burrows also said that bias in employment arising from the use of algorithms and AI falls squarely within the EEOC's duties and that the "agency is committed to helping employers understand how to benefit from these new technologies while also complying with employment laws."[127] The EEOC's initiative appears to be geared towards employer and employee relationships with these technologies.[128]

In addition to federal action, states and municipalities have started to regulate employer AI use, particularly for recruitment and hiring.[129] Illinois was the first state to pass a law to regulate AI HR practices, and its statute took effect in January 2020. The Illinois Artificial Intelligence Video Interview Act regulates how employers use AI to analyze video interviews.[130] Maryland also recently passed House Bill 1202, which regulates facial recognition during pre-employment interviews, and took effect in October 2020.[131] Additionally, in 2021, Attorney General for the District of Columbia, Karl A. Racine, introduced legislation to the City Council that would hold businesses accountable for using biased AI algorithms in education, employment, and housing through mandatory audits.[132]

Similarly, California has introduced regulation recently: California's proposed law, the Talent Equity for Competitive Hiring (TECH) Act, is far more extensive than the Illinois law and creates anti-discrimination criteria for all AI technology used in selection procedures.[133] The California bill would create a presumption that an employer's decision relating to hiring or promotion based on AI technology is not

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126.   Press Release, U.S. Equal Employment Opportunity Commission, *supra* note 124.

127.   *Id.*

128.   *Id.*

129.   *See, e.g.,* Forman et al., *supra* note 38.

130.   *See* H.R. 2557, 101st Gen. Assemb., Reg. Sess. (Ill. 2020). The act requires that an employee consent to the use of AI for recorded video interviews and that the employer explains the characteristics and uses of the AI. The Act also requires employers to destroy applicant data within 30 days of receiving a request from the applicant. *Id.*

131.   An Act Concerning Labor and Employment – Use of Facial Recognition Services – Prohibition, MD. CODE ANN., LAB. & EMPL. § 3-717 (West 2020).

132.   Press Release, Office of the Attorney General for the District of Columbia, AG Racine Introduces Legislation to Stop Discrimination In Automated Decision-Making Tools That Impact Individuals' Daily Lives (Dec. 9, 2021), https://oag.dc.gov/release/ag-racine-introduces-legislation-stop [https://perma.cc/ES65-QPRD].

133.   S.B. 1241, 2019-2020 Leg., Reg. Sess. (Cal. 2020).

discriminatory and compliant with anti-discrimination rules if it meets specified criteria before deployment.[134] These enacted and proposed laws address different areas of concern for algorithmic fairness in employment decisions.

D. NEW YORK CITY LOCAL LAW INT. NO. 1894-A: AEDT

The following section analyzes the AEDT Law and explores some strengths and weaknesses in the legislative text. In light of this analysis, the section also outlines some legal and practical concerns for implementing proper AHRM tools from the employer's perspective. New developments in HR technology add more complexity to employers' legal obligations in the hiring space. The ambiguous regulatory language, namely in the auditing requirement, makes it difficult for employers to comply with the new law and existing rules.

New York City recently passed the AEDT Law, taking effect on January 1, 2023, which regulates the use of "automated employment decision tools" in hiring and promotion decisions.[135] The law aims to establish algorithmic fairness to prevent or mitigate disparate impacts that may arise from machine learning.[136] The Bill defines an "automated employment decision tool" as any computational process derived from machine learning, statistical modeling, data analytics, or AI that issues a simplified output…that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons."[137] The AEDT Law addresses "job qualifications and characteristics" used by the tool, the sources and types of data used, and the applicable data-retention policy to be made public or upon the

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134.   *See id.*; Forman, Glasser & Lech, *supra* note 38. AI would be considered compliant with anti-discrimination rules if: (1) prior to deployment, it is tested and found not likely to have an adverse impact on the basis of gender, race, or ethnicity; (2) the outcomes are reviewed annually and show no adverse impact or an increase in diversity at the workplace; and (3) the use is discontinued if a post-deployment review indicates an adverse impact. The District of Columbia also proposed legislation to the city council, which would hold businesses accountable for the use of biased AI algorithms in education, employment, finance, and more through mandatory audits.

135.   LOCAL LAW INT. NO. 1894-A.

136.   Eli Z. Freedberg, Niloy Ray & James A. Paretti, Jr., *New York City Enacts Law that Hinders Use of Automated Tools in Hiring and Promotion Decisions*, LITTLER MENDELSON P.C. (Dec. 28, 2021), https://www.littler.com/publication-press/publication/new-york-city-enacts-law-hinders-use-automated-tools-hiring-and [https://perma.cc/7Y3G-4VY2].

137.   LOCAL LAW INT. NO. 1894-A.

candidate's written request.[138] The law does not explain if publishing the data retention policy includes publishing the hiring data in general.[139] The law also states that candidates should be able to opt out of using these tools and request an alternative selection process or accommodation.[140] Importantly, much like the laws introduced by other states and municipalities mentioned in the section above, the law has notice requirements and requires employers to retain an "independent auditor" to assess whether the selection criteria result in disparate impact based on race, ethnicity, or sex.[141]

As discussed above, the algorithm's training is crucial to the success of its predictive capabilities and its ability to produce fair outcomes. When drafting AEDT,[142] part of the legislative history, namely a committee report from November 2020, shows that city council members were aware of the importance of understanding the algorithm's training, mentioning "the main problem with algorithmic bias is the data that is used to 'train' the AI."[143] The city council members also underscored the lack of transparency, noting that most automated decision systems and AI developers "neither disclose their predictive models or algorithms nor publish the source code for their software, making it impossible for the consumer to inspect the system."[144] There is pushback from developers and corporations to disclose this information: requests for disclosure of the algorithms and information about how they are trained are "generally resisted on the grounds that these formulas are confidential business data that the companies are entitled to protect."[145] The committee report also states that these algorithms are "so complex" that "the government is unable to regulate them properly."[146] The expanding use of AI in many industries "heightens concerns that the technology is effectively shielded

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138.   *Id.*
139.   *Id.*
140.   *Id.*
141.   *Id.*
142.   *Id.*
143.   Briefing Paper and Committee Report of the Infrastructure Division 7 (2020),
https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915 D-A9AC-451E-81F8-6596032FA3F9.
144.   *See id.* at 8.
145.   *Id.*
146.   *Id.*

from scrutiny by the complexity of the algorithms."[147] In this way, it is hard for lawmakers and consumers to understand how these algorithms are used, how machine learning may impact them, and the issues that may arise from their use.[148]

There are many advantages to enacting this bill. For the first time, a city with a significant workforce will impose fines for undisclosed or biased AI use, charging up to $1,500 per violation on employers and vendors.[149]

Vendors now incur a legal risk if they provide tools that perpetuate algorithmic bias, especially if they advertise and sell their products claiming that they prevent bias.[150] Before this bill, employers could incur liability for blind reliance on an algorithmic analysis provided by a third-party vendor,[151] without the vendor receiving any legal consequences.[152] Before regulatory consequences like the fines introduced in this bill, no external vendors have been willing to indemnify their employer-customers when a vendor's algorithm is questioned in a litigation action.[153] Additionally, the FTC is "overstretched with limited and specific powers," so this bill provides alternative avenues of enforcement.[154]

Legal issues from the employer's perspective highlight some of the disadvantages of the bill. From the employer's perspective, there are concerns about the overregulation of their business practices and difficulty complying with the ambiguous statutory language.[155] Employers also face confusion in attempting to comply with Title VII.[156] Terms like fairness and validity used to determine problematic disparities

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147.   *Id.*

148.   *Id.*

149.   LOCAL LAW INT. NO. 1894-A.

150.   Chris Opfer, *AI Hiring Could Mean Robot Discrimination Will Head to Courts*, BLOOMBERG LAW (Nov. 12, 2019, 6:01 AM), https://news.bloomberglaw.com/daily-labor-report/ai-hiring-could-mean-robot-discrimination-will-head-to-courts [https://perma.cc/3WHH-CXAS].

151.   Ben Dattner et al., *The Legal and Ethical Implications of Using AI in Hiring*, HARV. BUS. REV. (Apr. 25, 2019) https://hbr.org/2019/04/the-legal-and-ethical-implications-of-using-ai-in-hiring [https://perma.cc/A9RB-QD3U].

152.   Opfer, *supra* note 150.

153.   *Id.*

154.   Jonjua, *supra* note 87, at 348.

155.   Freedberg, Ray & Paretti, *supra* note 136.

156.   *See* Kelly Trindel, Sara Kassir & Jason Bent, *Fairness in Algorithmic Employment Selection: How to Comply with Title VII*, 2 A.B.A. J. LAB. & EMP. L. 241 (2021).

in Title VII cases are not explicitly defined in regulation.[157] New developments in HR technology add more complexity to employers' legal obligations. Before the advent of algorithmic HR, "novel employment selection procedures were released only sporadically, meaning that the courts would often answer questions of lawfulness," but businesses today need "real-time guidance on the legality of these solutions, so that they can proactively consider any legal risks presented by the technology."[158]

The lack of updates in the EEOC's Uniform Guidelines, inconsistencies in judicial decisions,[159] and ambiguities in the bill make the fair implementation of AHRM confusing for employers.[160] Employment defense lawyers say that the New York City law "will make it challenging, if not infeasible, to use a broad swath of algorithmic, computerized tools to review, select, rank, or eliminate candidates for employment or promotion."[161] The New York City law "empowers New York City's corporation counsel (or its designee) to enforce the provisions of this law by allowing it to file suit in any court of competent jurisdiction," to file claims with authorized agencies to seek recovery of civil penalties, and provides a private right of action for affected applicants and employees.[162] These penalties from regulation and unclear guidance may result in "employers being extremely hesitant to adopt new approaches to employment selection."[163] The ambiguity in the regulatory language does not provide employers with a well-defined pathway for compliance.

The ambiguity in the regulatory language is most significant in the auditing requirement.[164] The New York City law requires employers to retain an "independent auditor" to assess whether the selection criteria result in disparate impact based on race, ethnicity, or sex.[165] Professor of law at Washington University School of Law, Pauline T. Kim, contends that auditing is an important strategy for examining whether the outcomes of automated hiring systems comply with equal opportunity in

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157.   *Id.* at 245.

158.   *Id.* at 248.

159.   *Id.*

160.   LOCAL LAW INT. NO. 1894-A. It is not explicitly stated whether this bill includes the use for termination or reductions in workforce.

161.   Freedberg, Ray & Paretti, *supra* note 136, at 1.

162.   *Id.*

163.   Trindel et al., *supra* note 156, at 248.

164.   LOCAL LAW INT. NO. 1894-A.

165.   *Id.*

employment guidelines.[166] Professor Kim states that auditing can reduce discrimination and is an "essential strategy for detecting unintended bias and prompting the reexamination and revision of algorithms."[167] However, while having an auditing requirement in the law is advantageous, the law provides no details on what this "bias audit" is supposed to examine.[168] The law also does not mention how the audit is expected to account for all potential job classes an employer might hire, how its findings are to be utilized, whether the tool must "pass" such an audit, and what the passing criteria are.[169] The only requirement outlined in the law is that such an audit be conducted annually by a third party and a summary of its results be published on the employer's or employment agency's website along with the "distribution date" of the tool.[170] It is also unclear whether employers that use third parties to screen candidates will be required to post those contractors' bias audits on their website or if they provide the information directly to current and future applicants in the hiring process.[171] There is also ambiguity about what expertise the law requires from the auditor.[172] It appears the auditor would need knowledge of HR practices as well as a background in computer science[173] to evaluate these systems in the employment context. Those evaluating the algorithms need an understanding and access to the machine learning techniques, training, operational data, and machine learning outputs.[174] For the credible evaluation of new technological systems, further training is necessary for those who examine those systems. Notably, there are many gaps in the regulatory language regarding the general auditing system that employers expect.[175]

There is also no solution in the law to account for any issues with auditor independence issues if the company selects, hires, and pays for them.[176] Additionally, there is no mention of auditor independence in the legislative history, so, perhaps, this was an issue the drafters did not

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166.   Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 U. PA. L. REV. ONLINE 189, 191 (2017).

167.   *Id.* at 202.

168.   LOCAL LAW INT. NO. 1894-A.

169.   *Id.*

170.   *Id.*

171.   *Id.*

172.   LOCAL LAW INT. NO. 1894-A.

173.   Desai & Kroll, *supra* note 93, at 17.

174.   *Id.* at 21.

175.   LOCAL LAW INT. NO. 1894-A.

176.   *Id.*

consider.[177] This is not the first area of law where legislation mandates independent auditing. In the auditing of financial statements required by securities law, the company is able to select their own auditor.[178] Federal securities law requires issuers to disclose general information about the auditor.[179] Professors Martin Gelter & Aurelio Guerra-Martinez's article on financial auditing poses a parallel problem in the context of a company's financial disclosures.[180] There may be incentives for auditors to show favorable findings to be rehired by the company.[181] In the context of financial disclosures, "auditors can be seen as a bonding mechanism introduced by the agent to credibly testify that they are doing their job well and reduce agency cost."[182] Inevitably, a similar situation will occur for repeat players in an AI audit for a company's employment decisions. This issue directly impacts HR personnel, given that management usually selects auditors.[183] The issue of auditor independence raises questions about the credibility of the findings the auditor publishes, especially with few guidelines from the law.[184]

II. EFFECTIVE ENFORCEMENT OF NYC'S ALGORITHMIC FAIRNESS LAW

While the bill gives enforcement authority to Corporate Counsel, it does not delegate rulemaking authority to any agency to evaluate its audit requirements.[185] Experts called to testify whether such a law should be passed say that the issue the law addresses is an open field.[186] The New

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177.   *See* BRIEFING PAPER AND COMMITTEE REPORT OF THE INFRASTRUCTURE DIVISION, *supra* note 143.

178.   *See* Peter K.M. Chan, *Breaking the Market's Dependence on Independence: An Alternative to the "Independent" Outside Auditor*, 9 FORDHAM J. CORP. & FIN. L. 347, 351 (2004).

179.   *See id.*; *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 201, 116 Stat. 775 (codified at 15 U.S.C. § 7232).

180.   *See generally* Martin Gelter & Aurelio Gurrea-Martínez, *Addressing the Auditor Independence Puzzle: Regulatory Models and Proposal for Reform*, 53 VAND. L. REV. 787 (2019).

181.   *Id.* at 798-99.

182.   *Id.* at 791.

183.   *Id.*

184.   *See infra* Section II.B.1.

185.   LOCAL LAW INT. NO. 1894-A.

186.   *See generally Oversight – Ethical Implications of Using Artificial Intelligence and Automated Decision Systems: Hearing Before the N.Y.C. Council Comm. On Tech.*,

York City Chief Technology Advisor ("CTO"), John Paul Farmer, explained in a hearing before the Technology Committee that this is an emerging field and that they do not know what the audit will look like: he testified that they are "start[ing] from scratch,"[187] and when discussing audits, that there is "no standard definition of exactly how those should work or what they should be."[188] Farmer also admitted that, as of yet, he had not been involved in any conversations about regulating the use of AI in hiring.[189]

This Part proceeds in two sections. Section A analyzes the bill's text and legislative history to understand legislative priorities in passing the law and how lawmakers hoped the law would be enforced. Although earlier drafts delegated rulemaking authority to the New York City Human Rights Commission (NYCCHR), the final bill instead empowers New York City's corporation counsel to bring suits against violators.[190] Section B describes the major gaps in the law's text and offers administrative solutions to make it more effective.

A. LEGISLATIVE INTENT AND ENFORCEMENT OF THE AEDT LAW

The enforcement mechanism in the AEDT Law is inadequate to effectuate the legislatures' original goals. The bill was proposed by Councilwoman Laurie Cumbo, a Democrat from Brooklyn, to prohibit the sale of these automated tools unless the software had been audited for bias.[191] Given the increasing use of AHRM tools, Councilwoman Alicka Ampry-Samuel, a bill co-sponsor, said in an interview that lawmakers want to ensure that technology is helping rather than exacerbating employment discrimination: "we want to make sure that the tools that they are using are used in a way that really speaks directly to the reduction of discrimination and bias."[192]

(N.Y., Nov. 13, 2020) (available at https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=811939&GUID=E4BEEF03-3486-4EEE-88CC-84977FB661C7)   [hereinafter *Transcript of the Minutes of the Committee on Technology*].

187.   *Id.* at 43.

188.   *Id.* at 40.

189.   *Id.* at 49.

190.   LOCAL LAW INT. NO. 1894-A; Int. No. 1894, Minutes of the Proceedings for the Stated Meeting, 295, 663 (Feb. 27, 2020).

191.   Kate King, *New York City Bill Aims to Regulate AI Hiring Tools*, WALL ST. J. (Feb. 27, 2020, 3:14 PM), https://www.wsj.com/articles/new-york-city-bill-aims-to-regulate-ai-hiring-tools-11582801200 [https://perma.cc/UQE6-QHHV].

192.   *Id.*

The bill was initially introduced to the Human Rights Committee but was transferred to the Technology Committee.[193] This transfer in authority and the legislative history demonstrate that the initial intention may have been to place this bill under the Human Rights Commission's purview so that they would have the authority to promulgate rules to evaluate this law. After a hearing in November 2020, the city council took out the section that gave the commission authority to promulgate the rules and transferred responsibility for suing violators to the corporate counsel, lawyers' offices, or the city.[194]

The bill currently does not give NYCCHR the authority to clarify and expand on the bill's provisions.[195] This was different from the initially proposed bill, which gave "the commission on human rights and any other agency designated by the mayor" authority to "promulgate such rules as it deems necessary to implement and enforce the provisions of this subchapter."[196] Instead, the enacted bill states that "[t]he provisions of this subchapter shall not be construed . . . to limit the authority of the commission on human rights to enforce the provisions of title 8, in accordance with law."[197] In the summary of the AEDT Law, the box for "agency rulemaking required" is unchecked, which further suggests that the council abandoned efforts to delegate enforcement authority to a city administrative agency.[198]

There were also concerns with the statutory language before the bill passed: the Center for Democracy and Technology (CDT) sent an open letter cosigned by 20 local and national civil society organizations to New York City Council Majority Leader Laurie A. Cumbo with

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193.   Int. No. 1894, Minutes of the Proceedings for the Stated Meeting, 295, 663 (Feb. 27, 2020); Loc. L. Int. No. 1894-A.

194.   *See Transcript of the Minutes of the Committee on Technology*, *supra* note 186 at 39-40. The committee members discuss the potential role of the NYCCHR with the Deputy Commissioner of the NYCCHR, Brittny Saunders. She expresses some concerns with the Comissions resources if they assume this new responsibility. *See also* Local Law Int. No. 1894-A. The newer version of the bill transfers responsibility to the NYC Law Department.

195.   Local Law Int. No. 1894-A.

196.   Int. No. 1894, Minutes of the Proceedings for the Stated Meeting, 295, 663 (Feb. 27, 2020).

197.   Local Law Int. No. 1894-A.

198.   *Plain Language Summary of Int. No. 1894-A*, N.Y. City Council https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915 D-A9AC-451E-81F8-6596032FA3F9 [https://perma.cc/A7X2-LDES].

recommendations to amend the law to include people with disabilities.[199] The letter illustrates concerns that statistical auditing cannot produce the same accuracy for disability as it may for race or gender "because it cannot capture the vast range of disabilities or people's different experiences of the same disability."[200] They suggest that vendors must describe their design to account for bias that statistical audits will not capture and demonstrate how their design improves the tools' outcomes.[201]

Based on the legislative history and the available news on the introduction of the bill, the lawmakers intended to effectuate broad, comprehensive anti-discrimination protections for workers.[202] Lawmakers wanted an agency that issues human rights guidance to be responsible for enforcing the law.[203] Lawmakers also intended to provide more transparency regarding the use of algorithms in employment through an auditing system.[204] Considering the gaps in the law discussed above, the following recommendations are designed to accomplish the lawmakers' original vision.

B. ADDRESSING MAJOR GAPS IN THE AEDT LAW

Significant gaps in the statutory language threaten to undermine the legislative goals discussed above. The following Section discusses two critical gaps in the AEDT law and makes suggestions to amend the law for effective implementation. Often city and state governments will look to the federal government for guidance, but the EEOC has yet to implement its initiative, and the federal government has yet to regulate AI in the employment context.[205] Therefore, this Note will make recommendations using elements of the EEOC's initiative and recommend guidance by drawing parallels between this law's issues and those addressed in other statutory contexts. First, this Section discusses

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199.   *CDT Leads Letter to New York City Council on Pending Automated Employment Tools Bill*, CTR. FOR DEMOCRACY & TECH. (2021), https://cdt.org/insights/cdt-leads-letter-to-new-york-city-council-on-pending-automated-employment-tools-bill/ [https://perma.cc/593Q-EDS2] (last visited Mar. 21, 2022).

200.   *Id.*

201.   *Id.*

202.   *See generally Transcript of the Minutes of the Committee on Technology*, *supra* note 186.

203.   *See, e.g., id.* at 38.

204.   *Id.* at 97.

205.   O'Keefe, Young & Martinez, *supra* note 125.

the auditing requirement, and second, it addresses compliance with anti-discrimination laws.

1. *Clarifying the Vague Auditing Requirement*

A source of one of the most significant gaps in the AEDT law is the audit requirement, which is extremely vague. AEDT requires a "bias audit," which is defined as "an impartial evaluation by an independent auditor," and that the audit "shall include but not be limited to the testing of an automated employment decision tool to assess the tool's disparate impact on persons."[206] Critics of the law express concern over the lack of specificity regarding the standard for compliant bias audits,[207] which need only consist of an "impartial evaluation."[208] While AI regulation is new, auditing requirements in statutes are not.[209] Auditing requirements often appear in the context of financial regulations.[210] One of the ways to fill the gaps in regulatory guidance is by importing existing audit requirements in financial regulation to this new context using the existing scholarship on financial audits. Professor Rory Van Loo identifies factors indicating a need for regulatory monitoring: these include "information asymmetries, and a lack of faith in self-regulation."[211] Monitoring these tools is a significant part of determining compliance and affecting governance. The auditing systems must support that oversight.[212] This Section will describe what can be learned from the auditing requirements in financial regulations to give teeth to the AEDT law.

First, and perhaps most importantly, the auditor should be an independent party with no loyalties to the company. Auditor

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206.   Local Law Int. No. 1894-A. The persons protected under this law are "persons of any component 1 category required to be reported by employers pursuant to subsection (c) of section 2000e-8 of title 42 of the United States code."

207.   Colby Berman & Peter Shapiro, *NYC Adopts New Law To Combat Perceived Threat Of Discrimination Via Use Of AI-Powered Employment Decision Tools - Employment and HR - United States*, Mondaq (Jan. 10, 2022), https://www.mondaq .com/unitedstates/discrimination-disability-sexualharassment/1147128/nyc-adopts-new-law-to-combat-perceived-threat-of-discrimination-via-use-of-ai-powered-employment-decision-tools [https://perma.cc/3VYE-PXG8].

208.   Loc. L. Int. No. 1894-A.

209.   *See, e.g.,* Gelter & Gurrea-Martínez, *supra* note 180, at 795-96.

210.   *See id.*; *see also* Yang, *supra* note 46, at 227.

211.   Ajunwa, *supra* note 5, at 667 (quoting Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 Vand. L. Rev. 1563 (2019)).

212.   Desai & Kroll, *supra* note 93, at 64.

independence will decrease the pressure for auditors to report favorable findings due to their connection to a company. Auditor independence can be increased by auditor rotation and auditor prepayment.[213] For auditor rotation, a new auditor must be selected for each annual report.[214] Thus, the law's implementation should heavily enforce auditor and audit firm rotation: when the audit partner leading the audit process changes and the audit firm hired by the corporation also changes.[215] In the financial context, this rotation is sometimes mandated by law or regulation.[216]

Another suggestion to increase auditor independence is auditor pre-payment. The guidance for the law should require the auditor payment before the audit is conducted because when an algorithmic hiring developer contracts with an algorithmic auditor, that auditor is often financially dependent on the client for whom they provide the service.[217] That financial dependency can fundamentally undermine the credibility of the audit's findings and the public value of the audit.[218]

Legal scholar Ifeoma Ajunwa suggests teams of auditors in the employment setting should be composed of "both lawyers and either software engineers or data scientists . . . to prevent some of the tunnel-vision problems associated with technology created without consideration for legal frameworks."[219] I agree with her recommendation, but I also take her suggestion a step further by recommending that one of the auditors evaluating the system should have HR expertise so they will also be familiar with corporate management. To determine the auditing criteria, those with authority would have to employ individuals with computer science and HR expertise and develop a system over time.

Clarifying the contents of the audit will also be very important for the meaningful implementation of the law. With disclosure requirements from the AHRM vendor, the audit should disclose the dependent variable that the algorithm seeks to predict, such as the likelihood of success on the job. The audit should also describe how this variable is constructed in

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213. *See* Gelter & Gurrea-Martínez, *supra* note 180, at 806.

214. LOCAL LAW INT. NO. 1894-A. The audit must be conducted annually by a third party and a summary of its results be published on the employer's or employment agency's website along with the "distribution date" of the tool.

215. *See, e.g.,* Gelter & Gurrea-Martínez, *supra* note 180, at 806. Describing in the financial context the issue where the audit partner leading the audit process changes but the audit firm hired by the corporation remains the same.

216. *Id.* at 806.

217. Engler, *supra* note 36.

218. *Id.*

219. Ajunwa, *supra* note 5, at 668.

the training dataset and how it is defined.[220] You would ideally need thousands of data points for the predictive algorithm to work well,[221] so it makes sense for the contents of the audit to have information about the size of the data. The Audit should also disclose the demographics of the dataset that the training and testing data come from: whether they come from previous employees hired by the firm or elsewhere.[222] In the HR setting, the data the algorithm trains on comes from the companies' past hiring decisions.[223] For example, up until 2018, Amazon's hiring algorithm was trained on data from resumes submitted to the company over a 10-year period.[224] Most of these resumes came from men, "a reflection of male dominance across the tech industry."[225] Therefore, the HR datasets like these would likely replicate *past* hiring practices or existing employees' features.

Auditor transparency is important so that the governing authority and the public know that the assessment of the system is credible.[226] Robust auditor transparency measures make it possible for policymakers to assess the risks and benefits of AHRM.[227] Currently, the law requires that an employer or employment agency make the audit results and data publicly available on their website; however, they do not need to publicly provide information about the data collected.[228] For further transparency, employers that use third parties to screen candidates should be required to post those contractors' bias audits on the employer's website. This guidance should also be available to the public.

The timing of the audit will also be important for meaningful enforcement. The statutory language requires "a bias audit conducted no more than one year prior to the use of such tool."[229] The enforcement

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220.   *See* Kimberly A. Houser, *Can AI Solve the Diversity Problem in the Tech Industry? Mitigating Noise and Bias in Employment Decision-Making*, 22 STAN. TECH. L. REV. 290, 340 (2019).

221.   *See* Ajunwa, *supra* note 5, at 648.

222.   *See* Houser, *supra* note 220, at 353.

223.   *See generally* Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 8, 2018) https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G   [https://perma.cc/K6Y6-BLXR].

224.   *Id.*

225.   *Id.*

226.   *See* Bottomley, *supra* note 21, at 6.

227.   *See id.*

228.   LOCAL LAW INT. NO. 1894-A.

229.   *Id.*

authority for this law should not only rely on the mandatory audit evaluation cycle. Under federal securities law, a firm must disclose when an auditor resigns, declines to stand for reelection, or is dismissed.[230] The firm must also disclose whether the auditor had issued an adverse or qualified audit opinion.[231] The disclosures must also describe any disagreements between the auditor and the hiring firm during their business relationship.[232] In this way, securities law tracks and regulates auditor behavior and their relationships with their employers. There should also be disclosure documents in the employment setting for every auditor-company relationship.

Further, applying the methods of auditing used by the Internal Revenue Service (IRS), an IRS audit can be random and based on suspicious activity.[233] Like the IRS, the auditors should have the enforcement authority to scan for inconsistencies across systems and automatically trigger an HR audit when disparate treatment is thought to have occurred. This will allow for more consistent monitoring by auditors and provide an incentive for companies that use these tools to ensure they comply with the law and continually monitor their use. Emulating disclosure and monitoring in the financial context to these new situations will improve the credibility of HR audits.

This Note suggests modeling the contents of the audit after a case study presented in a conference paper on a cooperative audit for Pymetrics, a vendor that offers employment assessment tools.[234] The following is an example of the contents of the audit for a candidate screening tool inspired by the case study.[235] The contents of the audit will address: (1) whether the model training source code correctly implement adverse impact testing as described publicly by the company and other public documentation?;[236] (2) whether the trained models use

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230. Regulation S-K, 17 C.F.R. § 229.304(a)(1) (1998).

231. § 229.304(a)(1)(i)-(ii).

232. § 229.304(a)(1)(iv).

233. *IRS Audits*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/irs-audits [https://perma.cc/7SG3-HEAY] (last visited Oct. 28, 2022).

234. Christo Wilson et al., *Building & Auditing Fair Algorithms: A Case Study in Candidate Screening*, *in* PROCEEDINGS OF THE 2021 ACM CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 666, 666 (2021), https://dl.acm.org/doi/10.1145/3442188.3445928. A cooperative audit is a framework for external algorithm auditors to audit the systems of willing private companies. *Id.*

235. *Id.* at 670.

236. *Id.* at 669.

demographic data directly as input, or is the demographic data only used for post-training adverse impact testing?;[237] (3) whether there any way for training data that is erroneously corrupted, thus resulting in an unfair model, to be released?;[238] and (4) whether the vendor and employer have checks in place to avoid human errors that may result in the release of an unfair model?[239] With the authority to promulgate these rules, the NYCCHR can devote time with the Cities Coalition for Digital Rights ("CCDR")[240] to research and develop a uniform system of passing criteria for the hiring tools with a clearer framework for the contents of the audits.

2. *Effectively Deterring Discrimination*

Without more specific guidance, it will be hard for this law to advance its goals effectively. In particular, the audit is specifically addressed to reveal gender and ethnicity biases, but it is unclear whether an HR audit would adequately capture other possible discrimination factors such as age or disabilities in its screening.[241] The scope of the provisions should be expanded to ensure that age and disability are captured clearly in the HR audit. In the fiscal year of 2021, of the 61,331 charges brought by the EEOC, 12,965 were for age discrimination, and 22,843 were for discrimination based on a disability.[242] In total, the age and disability complaints constituted more than 58 percent of the complaints.[243] Since over half of the complaints involve these issues in the digital age, they require more apparent enforcement attention to implement the bill.

Employers must provide the notice required under Int. No. 1894-A to applicants before an automated tool is used.[244] The notice should explain the tool's characteristics and the mechanisms it uses to measure them so that applicants know if they may require reasonable

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237. *Id.*

238. *Id.*

239. *See id.* at 670.

240. *See infra* Section III.B.

241. *See* Berman & Shapiro, *supra* note 207.

242. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2021), https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021 [https://perma.cc/VT6K-MKP2] (last visited Oct. 28, 2022).

243. *Id.*

244. *See* LOCAL LAW INT. NO. 1894-A.

accommodations to use the tool. Employers should not use automated tools without providing effective alternatives, including non-automated tests, to measure the same characteristics. Law 1894-A has not yet provided any guidance on this alternative process.[245] Further, employers should be prepared with an alternative selection process or accommodation should a candidate opt out of the automated process. Opt-out options should be available during evaluations if applicants realize their disabilities affect their engagement with the tools.

The guidance should also include a non-retaliation provision for workers or applicants who exercise their rights protected under this bill.[246] This provision should be included in agency guidance. Agency guidance has the authority to add a non-retaliation provision, much like the New York State Department of Labor included an anti-retaliation provision in their guidance for the HERO Act.[247] City agency guidance should be able to do the same.

III. WHO SHOULD ENFORCE THE AEDT LAW

This Part evaluates whether corporation counsel or the NYCCHR is best equipped to implement the regulations proposed in Section B. By imagining what enforcement would look like under each agency's authority, this Note offers suggestions for making corporation counsel's enforcement more effective, but ultimately reasons that NYCCHR should enforce the law.

A. WHAT CORPORATE COUNSEL SHOULD DO TO IMPLEMENT THE ABOVE SUGGESTIONS

Given that the NYC Law Department is the only agency with enforcement authority, this Section suggests what the agency should do within its powers to implement the suggestions in Section B. Under

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245.   *See id.*

246.   *See Transcript of the Minutes of the Committee on Technology*, *supra* note 186, at 116. Daniel Schwarz testified on behalf of the New York Civil Liberties Union that the legislation must include a non-retaliation provision for workers or applicants who exercise their rights protected under this bill. *Id.*

247.   *See* N.Y. STATE DEP'T OF LAB., NY HERO ACT, MODEL AIRBORNE INFECTIOUS DISEASE EXPOSURE PREVENTION PLAN 9 (2021), https://dol.ny.gov/system/files/documents/2022/02/mock-p765_ny-hero-act_model-airborne-exposure-prevention-plan_02-10-22_0.pdf [https://perma.cc/7ECD-2UMJ].

Chapter 17 §394(c) of the New York City Charter Rules (NYCC), the NYC Law Department:

> [S]hall have the right to institute actions in law or equity and any proceedings provided by law in any court, local, state or national, to maintain, defend and establish the rights . . . or demands of the city . . . or to collect any money, debts, fines or penalties or to enforce the laws.[248]

The Department's role in the city government is as a generalist office tasked with representing the city, elected officials, and many agencies in all affirmative and defensive civil litigation.[249]

Section 20-873 of the law currently authorizes the Department or anyone the agency designates to initiate an action or proceeding for any law violators.[250] This means that corporate counsel has the enforcement authority to, for example, bring a suit against an employer using algorithmic hiring tools who violate the statute. The NYC Law Department does not issue guidance because it is not a regulatory agency; however, it may issue statements of policy and authority like its counterparts at the state and federal levels about the new legislation.[251] Therefore, the NYC Law Department should direct its resources to guidance documents. Much like the Department of Justice ("DOJ") at the federal level, the Department should issue memoranda explaining how they will enforce the laws.[252] The purpose of the memoranda would be to ensure compliance with the law and provide guidance to shield corporate employers from future liability. Importantly, these memoranda should be available to the public on the agency's and the employer's websites.

Given that The Law Department's power to enforce is through lawsuits, its leaders should direct the attorneys to best implement the AEDT law through memoranda clarifying and enforcing legal compliance

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248.   *See* N.Y.C., NY CHAPTER 17 § 394(c).

249.   *See About the Law Department*, *supra* note 15.

250.   *See* LOCAL LAW INT. NO. 1894-A, § 20-873 Enforcement ("The corporation counsel or such other persons designated by the corporation counsel on behalf of the department 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 this subchapter, including mandating compliance with the provisions of this chapter or such other relief as may be appropriate.").

251.   *See* N.Y.C., NY CHAPTER 17 § 394(c).

252.   *See* U.S. DEP'T. OF JUST., *Guidance Documents*, https://www.justice.gov/guidance [https://perma.cc/C5NQ-DBBZ] (last visited Mar. 25, 2022).

with Title VII when companies use algorithms for hiring and recruitment. Computer and information science scholars found a lack of consensus on formal definitions of bias and fairness with companies using AI employment tools, which have "enabled tech companies to define and address algorithmic bias on their own terms."[253] Issuing clear statements of policy and authority regarding Title VII compliance in this area will compel a standard for employers to meet. It will provide a policy framework for the NYC Law Department to bring suits against violators. The NYC Law Department should also include a policy statement regarding auditors' independence. The Department should employ the suggestions mentioned in Section B and bring suits against those who do not follow the auditing policy in their guidance documents. The guidance documents will provide the Department with uniform standards so that they will have a roadmap to assess the behavior of violators so that they know when to bring a suit.

Enforcing this law would be difficult for the NYC Law Department, given that it is a generalist office with a wide range of legal responsibilities. One of the central ambiguities in the bill is the criteria a tool must meet to pass an HR audit inspection.[254] Agencies with enforcement authority must issue guidance so that the responsibility is not left to corporations to self-regulate and determine, for example, how detailed assessments should be or what methods may be used to assess the risks associated with using the tools. Delegating the enforcement authority to the NYC Law Department would create mandates for assessments within the bill's text without an accompanying roadmap on how to complete them.

B. It Will Be Better to Delegate Enforcement Authority to NYCCHR.

Instead, the enforcement authority for the bill should be under the NYCCHR. The legislative history demonstrates that the City Council originally envisioned the bill to be under a human rights agency's authority.[255] The NYCCHR would be able to promulgate regulations for

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253.   *See* Jonjua, *supra* note 87, at 342-43 (citing Louis DiPietro, *Are Hiring Algorithms Fair? They're Too Opaque to Tell, Study Finds*, Cornell Chron. (Nov. 20, 2019), https://news.cornell.edu/stories/2019/11/are-hiring-algorithms-fair-theyre-too-opaque-tell-study-finds [https://perma.cc/8F99-HVKT].

254.   *See* Local Law Int. No. 1894-A.

255.   *See* Int. No. 1894, Minutes of the Proceedings for the Stated Meeting, 295, 663 (Feb. 27, 2020).

auditor and auditing criteria, notice requirements, and anti-retaliation guidance with on-the-ground research assistance from the CCDR. The budget office should prioritize filling these lines so the NYCCHR can enforce the law. The budget office can confidently allocate funding to the NYCCHR to enforce this law with the suggested guidance in the Section below. This way, the commission has the proper guidelines to make the job the agency fills administrable.

"The New York City Commission on Human Rights is charged with enforcing the Human Rights Law, Title 8 of the Administrative Code of the City of New York, and with educating the public and encouraging positive community relations."[256] This authority outlined in the original bill would have allowed the Commission to guide corporate employers and other relevant parties to flesh out the bill's audit and notice requirements.

The CTO, John Paul Farmer, also referred to the CCDR as a critical player to help determine best practices for implementation.[257] The CCDR, an international alliance of global cities, was formed in 2018 by city councils in Barcelona, Amsterdam, and New York City, working with interested local governments, academics, and other experts on an initiative to apply and operationalize digital rights related to specific city systems and programs.[258] The CCDR was created due to the need for cities to be acknowledged as the "closest democratic institutions to citizens and communities" and as those best situated to deal with the "growing consequences of digital rights violations."[259] At the time of the committee

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256.   *Inside the NYC Commission on Human Rights*, NYC COMMISSION ON HUMAN RIGHTS, https://www1.nyc.gov/site/cchr/about/inside-cchr.page [https://perma.cc/W9YB-QQD8] (last visited Oct. 30, 2022) ("The Commission is divided into two major bureaus[:] Law Enforcement and Community Relations . . . . [T]he Law Enforcement Bureau is responsible for the intake, investigation, and prosecution of complaints alleging violations of the Law . . . [and the] Community Relations Bureau provides public education about the Human Rights Law.").

257.   *See Transcript of the Minutes of the Committee on Technology*, *supra* note 186, at 28-29.

258.   *See* Igor Calzada et al., *People-Centered Smart Cities: An Exploratory Action Research on the Cities' Coalition for Digital Rights*, J. URBAN AFF., Nov. 2021, at 1, 3-4, https://www.tandfonline.com/doi/full/10.1080/07352166.2021.1994861 (one of the first multi-city efforts to operationalize Digital Rights at the local level).

259.   *See About Us*, CITIES COALITION FOR DIGITAL RTS. (Sept. 18, 2022), https://citiesfordigitalrights.org/thecoalition [https://perma.cc/RXX3-9E3M].

hearing in November 2020, New York City was "serving as an advisor, facilitator for structuring the initiatives."[260]

While not implemented yet, the EEOC's initiative lays out a path that may be helpful for the city to emulate.[261] The EEOC has begun to regulate the same conduct at the federal level, and there are elements of their initiative that can be replicated in the city. When issuing guidance, aspects of the EEOC's regulatory initiatives, even in its early stages, in this area can help inform the NYCHRR's enforcement. In its new initiative on AI and algorithmic fairness, the EEOC will "[e]stablish an internal working group[;] . . . [l]aunch a series of listening sessions with key stakeholders about algorithmic tools and their employment ramifications; [g]ather information about the adoption, design, and impact of hiring and other employment-related technologies; [i]dentify promising practices; and issue technical assistance to provide guidance."[262]

For the city, the budget allocated can establish an internal working group within the NYCCHR. Additionally, that internal working group can coordinate with the CCDR to meet with key stakeholders about using algorithmic tools and their employment ramifications. This way, the internal working group within the agency and the coalition can gather data. The internal working group can also use the data already acquired by the coalition from its experience examining the use of these tools in other cities to identify promising practices. "[T]he EEOC's systemic investigators also received extensive training in 2021 on using AI in employment practices."[263] This internal working group within the NYCCHR should have similar training with the help of the coalition, given its relationships and the data it's gathered from "local governments, academics, and other experts on an initiative to apply an operationalized digital right related to specific city systems and programs."[264]

The working group established within the NYCCHR should issue the same guidance suggested for corporate counsel and enforce independent rotating auditors for the HR audits.[265] Even with the elimination of repeat players in the HR audit, the internal working group within the NYCCHR

260.   *See Transcript of the Minutes of the Committee on Technology*, *supra* note 186, at 20-21.

261.   *See generally* Press Release, U.S. Equal Emp't Opportunity Comm'n, *supra* note 124.

262.   *Id.*

263.   *Id.*

264.   *See Transcript of the Minutes of the Committee on Technology*, *supra* note 186, at 21.

265.   *See* Gelter & Gurrea-Martínez, *supra* note 180, at 806.

should review data and documentation collected by the auditors for their possible biases.[266] The NYCCHR should also provide detailed guidance regarding what the bias audit is supposed to examine and what the passing criteria are for these hiring tools.

CONCLUSION

There are many issues that algorithmic employment practices raise regarding discrimination, privacy, and corporate independence in employment decisions. These issues are starting to be addressed at the federal, state, and city levels. Examining the New York City AEDT Law, this Note has described the shortcomings of the New York City law and recommended that regulations are needed to implement the practical solutions the law is designed to achieve. These recommendations include clarifying the audit requirement to ensure these tools comply with Title VII. Increasing auditor independence is crucial for the credible reporting and monitoring of AHRM tools. Lastly, this Note offered suggestions for making the NYC Law Department's enforcement more effective, but ultimately reasoned that NYCCHR should enforce the law. NYCCHR guidance will best effectuate the purposes of the law.

The AEDT law marks a promising step to better confront the impacts of technological advancements on corporations and the world of work. The AEDT law has the potential to make positive changes in the modern hiring space if lawmakers fill in gaps in the legislative text and set it up for solid enforcement. In that case, it can be a great model for future federal and local lawmakers to tackle regulating algorithmic hiring tools.

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266.   *See generally* Engler, *supra* note 36.