Testimony of the Center for Democracy & Technology on Senate Bill 957
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The Center for Democracy & Technology (CDT) thanks the Finance Committee for considering our testimony on this legislation. CDT is a nonprofit, nonpartisan organization fighting to advance civil rights and civil liberties in the digital age. My name is Matthew Scherer, and I lead CDT's Workers' Rights project, where I advocate for policymakers and employers to adopt policies that protect workers from the potentially harmful effects of emerging technologies in the workplace.

Companies increasingly use artificial intelligence (AI) tools and other automated employment decision systems (AEDSs) to make decisions that dramatically impact workers' lives and livelihoods. CDT has been closely watching as policymakers across the country grapple with how to manage the potential benefits and risks that AI and AEDSs pose.

We greatly appreciate the effort that Senator Hester and Delegate Bartlett put into this thoughtfully and precisely crafted legislation, which addresses the very real risk of discrimination and bias that AEDSs pose to workers in Maryland and across the country. I very much appreciate the bill's requirement that companies evaluate AEDSs to determine whether their use would likely result in unlawful discrimination, the prohibition against the use of AEDSs likely to result in such discrimination, and its provisions requiring companies to notify workers when they subject them to an AEDS.

The below recommendations will ensure that the bill's effects match its spirit. With a few amendments tightening its scope, notice, and enforcement requirements, we believe this bill could provide a strong foundation for ensuring algorithmic fairness in employment decisions.

Avoiding the failures of New York City's Local Law 144

My testimony is strongly guided by the experience with New York City's Local Law 144 (LL144), an ordinance regarding AI-driven hiring and promotion decisions that went into effect last summer. That experience is highly relevant to SB 957 and HB 1255, both of which share key features with New Jersey Assembly Bill 4909, which was, in turn, based on LL144. Fortunately, the New Jersey bill (and, by extension, SB 957 and HB 1255) addressed some of the flaws that undermined the New York City law. Most notably, the ordinance's "bias audit" requirement merely required employers to check for whether an AEDS would have a disparate impact on race, gender, or national origin. Companies need not check AEDSs for disparate treatment discrimination nor for any form of discrimination based on disability, age, or other protected

statuses. By contrast, SB 957 and HB 1255 appropriately require employers to conduct an impact assessment to determine whether using the system would likely result in *any* form of unlawful discrimination. We also greatly appreciate that the bill would prohibit companies from using AEDSs that are likely to result in unlawful discrimination, thus ensuring that employers fix any issues identified during impact assessments.

But without some small but crucial amendments, SB 957 and HB 1255 risk falling into a trap that has led to the apparent failure of New York City's ordinance, under which companies have managed to almost completely avoid compliance by exploiting the bill's narrow scope, inadequate disclosure requirements, and enforcement provisions that do not provide adequate deterrence.

The immediate decline and fall of New York City's LL144

The text of LL144, on its surface, appeared to provide a reasonable scope and require some meaningful, albeit modest, disclosures. LL144's definition of "automated employment decision tool" covers automated systems that "substantially assist or replace discretionary decision making." The "substantially assist" language would seem to extend to AEDSs that make recommendations that influence employment decisions and certainly to those that are a substantial factor in such decisions. On the transparency front, the text of LL144 requires companies to notify candidates that they will use an AEDS to assess them along with "job qualifications and characteristics" that the AEDS will use in its assessment. While this language is vague, it would at least alert candidates to the AEDS's existence before assessment.

Unfortunately, the New York City Department of Consumer and Worker Protection (DCWP) issued interpretive rules effectively gutting LL144's scope and notice provisions. Despite the plain meaning of "substantially *assist*," the DCWP rules state that LL144 applies only to AEDSs that dominate the decision-making process by being the sole basis for an employment decision, being the single most important factor in that decision, or overruling conclusions made by human decision-makers.[1] CDT warned in comments to the DCWP that this interpretation would allow employers to "evade the requirements of LL144 simply by casting [AEDS] outputs as 'recommendations' that human decision-makers either rubber-stamp or hesitate to contradict."[2]

Similarly, the DCWP rules undercut LL144's notice requirements by allowing employers to provide "notice" simply by posting the information on their website rather than including it in job listings or providing it directly to candidates. CDT likewise critiqued DCWP's notice rules as severely undermining the effectiveness of the notice provisions by placing the "onus . . . on workers to try to find these details on employers' websites or submit a written request for these details."[3]

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[1] Rules of New York City, tit. 5, § 5-300 (definition of "Automated Employment Decision Tool").
[2] CDT, Comments to the New York City Department of Consumer and Worker Protection re: Revised Proposed Rules to Implement Local Law 144 of 2021 on Automated Employment Decision Tools, at 2 (Jan. 23, 2023), https://cdt.org/wp-content/uploads/2023/01/2023-01-26-CDT-Comments-on-NYCs-Revised-AEDT-Rules.pdf.
[3] *Id.* at 6.

Sadly, these fears regarding the impact of DCWP's rules appear to have come to fruition. In a recent study by researchers from Cornell University, Data & Society, and Consumer Reports (the LL144 Study), investigators searched for LL144 notices and disparate impact results on the websites of 267 employers who had posted positions in New York City in late 2023.[4] Even though several recent surveys indicate that AEDSs are "widespread" and that their use is "rapidly growing,"[5] the study found that only 5% of companies posted disparate impact analysis results, and only 4% included LL144 notices.[6] For companies that did publish the required information, the investigators often struggled to find the relevant notice information on their websites.[7]

The report's authors suggested that the scarcity of compliant publications of LL144 notices and audit results may be the result of a combination of weaknesses in the bill, including that it:

- Grants employers "near-total discretion over whether their system is in scope, and offers them many chances to move out of scope."
- Neither provides a private right of action nor gives the DCWP proactive investigative or discovery authority.
- Provides for very modest penalties, with companies facing a theoretical maximum annual penalty of $547,500 for violations of the law—far less than what it would face in damages from a class-action employment discrimination suit.

Moreover, examining the few cases where companies did post disparate impact analyses, the researchers found that almost no published reports showed a disparate impact on any protected groups, even though audit industry workers told researchers in interviews that "many, if not the majority" of AEDSs on the market have such disparate impacts.[8] This led the researchers to conclude that reporting bias was at work—that is, companies whose adverse impact analyses indicated a potential disparate impact may have decided simply not to report adverse results.[9] The result is that the publicly available "audit" results paint an implausibly rosy picture of AEDSs' fairness. That is likely to accelerate, rather than reverse, the spread of discriminatory AEDSs.

These compliance issues are exacerbated by the fact that LL144 does not clearly cover *passive candidate* screening. Passive candidates are workers who an employer (or a job platform or other entity acting on the employer's behalf) identifies as a potential recruitment target. Passive

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[4] Lucas Wright, et al., *Null Compliance: NYC Local Law 144 and the Challenges of Algorithm Accountability*, https://osf.io/4y7d2.
[5] *Id.* at 4. The authors acknowledged, however, that there is no "reliable source" on AEDSs' prevalence, *id.*, a fact that is doubtless a function of the AEDS transparency problem that LL144 was supposedly meant to address.
[6] *Id.* at 10.
[7] *Id.* at 10-11. Because of the degree of discretion LL144 affords employers to decide whether the law applies to them, the study's authors used the term *null compliance* (as opposed to non-compliance) to describe the results of their research. With null compliance, "the absence of evidence of compliance cannot be ascertained as non-compliance because the investigator lacks the information to determine if the regulated party's actions or products are in scope of the regulation." *Id.* at 5.
[8] *Id.* at 12.
[9] *Id.* at 13.

candidates may receive targeted communications, job advertisements, or other materials or documents that alert them to the existence of a job or encourage them to apply for the job. By using AEDSs to screen passive candidates, employers frequently fill job openings without ever posting the opening publicly. In such instances, passive candidate screening has the same practical effect as screening out job applicants. NYC's LL144 failed to cover this growing class of AEDSs, creating a loophole that allows companies to evade its regulations simply by shifting their personnel selection processes to focus on proactively identifying and reaching out to preferred candidates.

Applying the lessons of LL144 to SB 957 and HB 1255

The experience with LL144 suggests that transparency requirements—or, indeed, any substantive component of AEDS regulation—must be accompanied by a broad, clear scope and strong enforcement provisions to be effective. Indeed, a regulatory regime missing one or more of those components is likely to be harmful.

Consequently, we urge you to amend SB 957 and HB 1255 to strengthen its notice and disclosure requirements and clarify its key definitions to ensure companies cannot avoid disclosure (and, by extension, compliance with the bill) as they have under LL144. Our suggested amendments to the bill would accomplish that objective.

The specific amendments we suggest are as follows:

- **Page 2, Line 1**: Add "OR ASSESSES" after "FILTERS"
- **Page 2, Line 2**: Replace "APPLICANTS OR POTENTIAL APPLICANTS" with "CANDIDATES"
- **Page 2, after Line 5**
    - Add the following as new Item (4): *(4) "CANDIDATE" MEANS AN EMPLOYEE, APPLICANT, OR POTENTIAL APPLICANT.*
    - Renumber Items (4)-(6) to (5)-(7) on lines 6, 8, and 13.
- Replace "APPLICANT(S)" with "CANDIDATE(S)" at the following locations:
    - **Page 2, Lines 5, 17, and 20**
    - **Page 3, Lines 7, 10, 15, and 25**
- Replace "$500" with "$1,000" at the following locations:
    - **Page 3, Lines 18 and 19**
- **Page 3, Line 21**: Add "A CANDIDATE WITH" after "PROVIDE"
- **Page 3, after Line 25**: Add the following as new sub (F): "A VIOLATION OF THIS ACT SHALL CONSTITUTE AN UNLAWFUL EMPLOYMENT PRACTICE FOR WHICH AN AGGRIEVED APPLICANT CAN BRING A CIVIL ACTION PURSUANT TO § 20-1013 OF TITLE 20, SUBTITLE 10 OF THE STATE GOVERNMENT ARTICLE."
- **Page 3, Line 26**: Replace "(F)" with "(G)"
- **Page 3, Lines 4-15**: Amend current text of subsection (D) so that it reads as follows (<u>underline</u> indicates added or revised language):

(D) IF AN EMPLOYER USES AN AUTOMATED EMPLOYMENT DECISION TOOL UNDER SUBSECTION (C) OF THIS SECTION, PRIOR TO THE USE OF THE AUTOMATED EMPLOYMENT DECISION TOOL, THE EMPLOYER SHALL DIRECTLY NOTIFY EACH CANDIDATE WITH RESPECT TO WHOM THE AUTOMATED EMPLOYMENT DECISION TOOL WILL BE USED. THE NOTICE SHALL INFORM THE CANDIDATE THAT AN AUTOMATED EMPLOYMENT DECISION TOOL WILL BE USED TO ASSESS THE CANDIDATE AND INCLUDE A PLAIN-LANGUAGE DESCRIPTION OF THE AUTOMATED EMPLOYMENT DECISION TOOL THAT:

(1) INCLUDES A STATEMENT THAT THE AUTOMATED EMPLOYMENT DECISION TOOL WAS SUBJECT TO AN IMPACT ASSESSMENT UNDER SUBSECTION (C) OF THIS SECTION;

(2) INCLUDES A DESCRIPTION OF THE JOB QUALIFICATIONS OR CHARACTERISTICS OF THE CANDIDATE THAT THE AUTOMATED EMPLOYMENT DECISION TOOL WILL ASSESS, THE METHOD BY WHICH THE AUTOMATED EMPLOYMENT DECISION TOOL MEASURES OR ASSESSES THOSE QUALIFICATIONS OR CHARACTERISTICS, HOW THOSE QUALIFICATIONS OR CHARACTERISTICS ARE RELEVANT TO THE DECISION FOR WHICH THE AUTOMATED DECISION TOOL WILL BE USED, THE AUTOMATED EMPLOYMENT DECISION TOOL'S OUTPUTS, AND HOW THOSE OUTPUTS ARE USED TO MAKE OR INFORM THAT DECISION; AND

(3) PROVIDES INFORMATION ON HOW CANDIDATES WITH DISABILITIES, OR OTHER CANDIDATES ENTITLED TO REASONABLE ACCOMMODATION UNDER APPLICABLE LAW, CAN REQUEST REASONABLE ACCOMMODATION OR AN ALTERNATIVE METHOD OF ASSESSMENT.

(4) IS:

(I) TRANSMITTED DIRECTLY TO THE CANDIDATE WHEN POSSIBLE, OR ELSE MADE AVAILABLE IN A MANNER REASONABLY CALCULATED TO ENSURE THAT THE CANDIDATE RECEIVES ACTUAL NOTICE;

(II) PROVIDED IN ENGLISH, IN ANY NON-ENGLISH LANGUAGE SPOKEN BY AT LEAST ONE PERCENT (1%) OF THE POPULATION OF THIS STATE AS OF THE MOST RECENT UNITED STATES CENSUS, AND IN ANY OTHER LANGUAGE THAT THE EMPLOYER REGULARLY USES TO COMMUNICATE WITH EMPLOYEES;

(III) WRITTEN IN CLEAR AND PLAIN LANGUAGE;

(IV) MADE AVAILABLE IN FORMATS THAT ARE ACCESSIBLE TO PEOPLE WHO ARE BLIND OR HAVE OTHER DISABILITIES; AND

(V) OTHERWISE PRESENTED IN A MANNER THAT ENSURES THE COMMUNICATION CLEARLY AND EFFECTIVELY CONVEYS THE REQUIRED INFORMATION TO THE CANDIDATE.

Another issue with LL144 is that the rules interpreting the law allow employers to conduct bias audits using historical data that *other* employers collected to assess candidates and for jobs on which the AEDS had never been used. The current text of SB957 uses passive language that does not specify the nature of the data that employers must use to complete impact assessments. This leaves open a distinct possibility that the MDOL or courts will interpret the bill as allowing employers to rely on impact assessments that are not based on the employer's own data and therefore do not capture the risks of that particular employer's use of the AEDS.

To address this, we recommend the following addition to the bill's text:

- **Page 2, Line 14**: Add the following text to the end of the sentence: "SPECIFIC TO THE EMPLOYER AND THE POSITION(S) FOR WHICH THE ALGORITHMIC DECISION SYSTEM WILL BE USED"

Require that impact assessments be conducted by an independent third party

One final recommendation concerns the issue of who should conduct the impact assessments the bill requires. Currently, the bill would allow an employer to conduct an in-house assessment with no independent verification of the methodology or results of that assessment. Allowing a company that uses an AI system to conduct its own AI audit creates a conflict of interest where the company has no incentive to actually unearth or solve any problems with their system. And because most information about the AI system will be private and confidential, it is incredibly difficult for outside parties to find such problems. For example, there have already been multiple instances where vendors published misleading impact assessments, in which the company either conducted the impact assessment themselves and seemed to cherry-pick the data points to present or retained a third party that was only granted partial access to relevant data. Such an impact assessment is not reliable. Third party auditors that have full access to AI systems and are free of conflicts of interest are more likely to analyze and publish truthful assessments. On this front, the rules issued by the New York City enforcement agency regarding LL144 provide a solid definition of "independence" in the context of audits, and our recommended language is based on that definition.

To address this, we recommend the following amendments:

- **Page 3, Line 4**: Add the following as a new item to Subsection (C):

(3) THE IMPACT ASSESSMENT REQUIRED UNDER ITEM (1) OF THIS SUBSECTION IS CONDUCTED BY AN INDEPENDENT PERSON OR ENTITY WHO EXERCISES OBJECTIVE AND IMPARTIAL JUDGMENT ON ALL ISSUES WITHIN THE SCOPE OF THE IMPACT

ASSESSMENT. THE EMPLOYER MUST PROVIDE THE INDEPENDENT PERSON OR ENTITY WHO CONDUCTS THE IMPACT ASSESSMENT WITH ALL INFORMATION AND DATA REGARDING THE DESIGN, FUNCTIONALITY, TESTING, AND PERFORMANCE OF THE AUTOMATED DECISION TOOL. A PERSON IS NOT INDEPENDENT FOR PURPOSES OF THIS ITEM IF THEY:

> (1) ARE OR WERE INVOLVED IN USING, DEVELOPING, OFFERING, LICENSING, OR DEPLOYING THE AUTOMATED DECISION TOOL;
>
> (2) AT ANY POINT DURING THE IMPACT ASSESSMENT, HAS AN EMPLOYMENT RELATIONSHIP WITH A DEVELOPER OR DEPLOYER THAT USES, OFFERS, OR LICENSES THE AUTOMATED DECISION TOOL; OR
>
> (3) AT ANY POINT DURING THE IMPACT ASSESSMENT, HAS A DIRECT FINANCIAL INTEREST OR A MATERIAL INDIRECT FINANCIAL INTEREST IN A DEVELOPER OR DEPLOYER THAT USES, OFFERS, OR LICENSES THE AUTOMATED DECISION TOOL.[10]

Conclusion

It is not merely possible but imperative to regulate AEDSs well. To that end, we urge Committee members to consider the recommendations in this document, as well as those submitted by other labor and consumer advocates, as it considers this bill. The changes we recommend would resolve ambiguities and strengthen the bill's transparency requirements, ensuring that candidates receive clear, effective, and affirmative notice of AEDS decisions and that companies are held accountable for discriminatory AEDSs. These changes will ensure that the bill lives up to its highly commendable spirit and great promise.

Please do not hesitate to contact Matthew Scherer, Senior Policy Counsel on CDT's Privacy & Data Project, at mscherer@cdt.org if you have any questions regarding this testimony or if we can provide additional resources or information that will assist in your consideration of this legislation. Thank you for your attention.

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[10] These independence requirements are adapted from the Lawyers' Committee for Civil Rights Under Law's *Online Civil Rights Act*, which has been endorsed by the NAACP, National Urban League, and several other leading civil rights organizations. Lawyers' Committee on Civil Rights Under Law, Online Civil Rights Act § 2(12) (2023), https://www.lawyerscommittee.org/wp-content/uploads/2023/12/LCCRUL-Model-AI-Bill.pdf. That, in turn, was based on the definition of "independent auditor" in the rules issued by the New York DCWP interpreting LL144. *See* Rules of NYC, tit. 6, § 5-300. Our recommended language differs only in that it recommends that auditors be at least 5 years removed from having a disqualifying relationship (as opposed to merely not having an active disqualifying relationship), thus ensuring that auditors are not hampered by recent relationships that may affect the impartiality of the impact assessment.