U.S. Chamber of Commerce

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SUBMITTED ELECTRONICALLY

Re: CIVIL RIGHTS COUNCIL PROPOSED MODIFICATIONS TO EMPLOYMENT REGULATIONS REGARDING AUTOMATED-DECISION SYSTEMS

To Ms. Langston:

The U.S. Chamber of Commerce ("Chamber") appreciates the opportunity to provide the California Civil Rights Council ("CCRC" or "Council") feedback on its proposed modification to employment regulations regarding automated-decision systems.[1]

We believe automated decision systems ("ADS") can benefit many sectoors of the economy, particularly for small businesses. Last year, the Chamber released a report titled "Empowering Small Business: The Impact of Technology on U.S. Small Business[2]" which highlighted that almost one in four small businesses have adopted Artificial Intelligence ("AI"), leading to improved performance. Those small businesses that adopted AI experienced a 12-percentage point increase in their likelihood of profit growth over non-AI users.

Given this potential, we believe it essential for regulators to implement a risk-based approach to AI regulation that enables innovation and the promise of AI for society but also ensures that AI augments human intelligence and respects civil rights.

I. General Comments

A. Legal Authority

[1] Noticed of Proposed Rulemaking, "Modifications to Employment Regulations Regarding Automated-Decisions Systems," (May 17, 2024) *available at* https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2024/05/CRD-Automated-Decision-Regulations-Notice.pdf.
[2] Chamber Technology Engagement Center, "Empowering Small Business: The Impact of Technology on U.S. Small Business," (September 2023) *available* at https://www.uschamber.com/small-business/smallbusinesstech.

The Chamber is deeply concerned about the CCRC's proposed modifications, which appear to fall outside the Council's regulatory and legal authority. The proposed changes would drastically expand the Fair Employment and Housing Act (FEHA) scope without specific legislative authorization, and would simultaneously expanding the Civil Rights Department's authority within the State. We are further concerned that any such changes may be duplicative and premature. We believe CCRS should first undertake a legal gap analysis to determine what authorities FEHA either possesses or lacks to safeguard protected classes against harm with respect to ADSs.[3]

B. Fiscal and Economic Impact

We are also concerned that CCRC has not conducted the necessary fiscal or economic impact analysis and due diligence around the proposed modifications. The Council claims, for example, that "[n]o additional costs or savings beyond those imposed by existing law; therefore, the agency is not aware of any costs impacts that representative private person would necessarily incur in reasonable compliance with the proposed action.[4]" This statement simply ignores the direct costs to California businesses that utilize automated decision systems in the workplace, including the significant costs associated with the proposal's data retention requirements and increased compliance and litigation costs associated with such a dramatic expansion of FEHA's scope.

The Council inadequately accounts for the costs to the State of California. A recent analysis in the California State Assembly found that a similar proposal would cost State agencies, in aggregate, potentially "hundreds of millions of dollars annually ongoing." The same analysis found costs of "tens of millions to hundreds of millions of dollars annually" for local agencies to comply, as well as "possibly tens of millions of dollars annually" for the Civil Rights Department to enforce the proposal."[5]

CCRC should conduct a fiscal and economic analysis is necessary regarding the proposed regulations before further promulgation activity.

II. Private Right of Action & Lack of "Safe Harbor"

The Chamber is concerned that the proposed modifications would exponentially expand litigation against vendors and developers of automated decision tools in California by subjecting them to FEHA regulatory orders, which include private rights of action. As currently drafted, changes would allow individual plaintiffs to bring suit against "employment agencies" and "agents" which have been defined to include any vendor and developer within the

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[3] *See* e.g. Cal. Gov. Code § 12921(a).
[4] *Supra* n.1 at 3.
[5] Appropriations Analysis of AB 2930 (May 8, 2024) *available at* https://trackbill.com/s3/bills/CA/2023/AB/2930/analyses/assembly-appropriations.pdf.

proposed modifications, including those providing services indirectly. While highly problematic because of the potential for abusive litigation, the problem this change would create will be compounded by the lack of a "safe harbor" against liability for companies who have taken reasonable risk-mitigation efforts in the proposal.

III. Definitions & Scope

The Chamber believes that the proposed "modification" to definitions are problematic and change the scope of current authorities of regulatory agencies without express legislative consent from the legislative branch. The Chamber highlights the following concerns on the matter:

- *Automated Decision Systems* (ADS): While the proposal has an exceptions list indicating what does not qualify as an ADS, the Chamber has significant issues with the overly broad definition that would capture any "computational process" that "facilitates human decision making that impacts applicants or employees." This broad definition would cover nearly all software tools that do not fall within the Council's narrow exceptions, most of which would not be considered Artificial Intelligence ("AI") in any other context. The broad definition accompanied by a narrow list of exclusions will put many AI systems that were not intended to be in the scope of this regulation under its jurisdiction, causing unnecessary and ill-fitting compliance burdens and uncertainty for many businesses and innovators using those tools.

- *Employment Agency*: The proposed rule's broad definition of "employment agency" and the addition of "employment agency" as a "covered entity" wrongfully implicates companies that are not directly involved in an organization's use of any ADS to make employment decisions. Such change set a dangerous precedent of liability being forced upon those not directly within the value chain when an incident or adverse employment action transpired.

- *Agent*: The proposed rule would establish a new definition of "agent," which would capture any third-party providing services "related to" a hiring or employment decision, including businesses offering payroll services, benefits administration, and the administration of any ADS. This extraordinarily broad definition of agent would significantly expand FEHA's scope to capture businesses otherwise not engaged in a hiring or employment decision and subject them to liability under FEHA, including to its private right of action.

IV. Records Preservation Requirements Violate Privacy Obligations

The proposed rule's requirements for retaining "employment records" and data are counter to the spirit and letter of companies' current privacy obligations. Changes in the regulation would now require companies and organizations to maintain data that has

traditionally been owned and controlled by employers. This requirement may unwarrantedly pit companies and businesses against their requirements under the California Privacy Protection Act (CPPA), which includes their right to opt out of their information being shared with third parties.[6] We are further concerned that these requirements fail to consider that ADSs are constantly evolving, which would make data retention on the system problematic or infeasible.

The Chamber appreciates the opportunity to provide the Council with feedback on its proposed modifications.

Sincerely,

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[6] Cal Civ. Code § 1798.120.