July 18th, 2024

California Civil Rights Department
c/o Rachel Langston, Assistant Chief Counsel
555 12th Street
Suite 2050
Oakland, CA 94607

RE: Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems

HR Policy Association ("HR Policy" or "Association") welcomes the opportunity to submit the following comments for consideration by the California Civil Rights Department ("CRD") in response to the CRD's published notice of proposed modifications to the employment regulations regarding automated-decision systems.

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in more than 350 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. Roughly two-thirds of Association members are federal contractors. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy, and accordingly, the Association submits the following comments for review by the CRD.

The Association and its member companies are fully committed to combatting workplace discrimination of all kinds, regardless of whether the method involves artificial intelligence or algorithmic decision-making. The Association therefore is supportive of the CRD's stated

purpose of preventing workplace discrimination, including that engineered by such technologies. If the CRD's Proposed Rule merely affirmed that existing anti-discrimination laws extend to such technologies, as they already do, the Association would be similarly supportive. Unfortunately, the Proposed Rule goes beyond this simple assurance and opens a Pandora's box of employment law liability and data privacy issues, among many other flaws. For these reasons, as articulated below, the Association strongly urges the CRD to withdraw or significantly amend its Proposed Rule.

- **HRPA member companies utilize new technologies to augment employee and customer experiences**

The Association represents companies who both utilize and develop artificial intelligence and automated and algorithmic decision-making technologies. While much has been made in recent years of the potential of artificial intelligence to erase thousands of jobs and its potential general threat to the workplace and beyond, like most employers, Association members are focused on employing AI and related technologies to improve internal functions in ways that benefit both employees and the consumer. These technologies are used to augment human intelligence, not to make decisions–in other words, to make the employee's job easier and more fulfilling. Particularly as it relates to human resources, these technologies are used to reduce routine and mundane tasks to make administrative processes more efficient for current and potential employees. Indeed, HRPA member company CHRO's identified enhancing efficiency and personalizing employee experiences as their top two priorities for AI use cases in the workplace, according to a recent membership survey.

AI and automated and algorithmic decision-making have immense promise for augmenting hiring and recruitment practices and processes in particular. While the CRD – among other

stakeholders – is primarily concerned with the potential misuse of these technologies to discriminate against individuals on the basis of protected characteristics, many Association companies in fact are using them to *expand* the reach of their potential talent pools by casting a wider net to attract candidates. This includes leveraging technology to help write job descriptions that advance a skills-first approach to create access to careers for those who have traditionally been excluded.

Association members have always been committed to ensuring their workplaces are diverse and inclusive of all, and that they are in full compliance with all labor and employment laws. This approach has not changed with the advent of technology, including AI. To that end, the Association and its member companies developed AI principles that ensure these technologies are being used transparently in ways that are equitable for all. Association members will continue to ensure that their employment practices are non-discriminatory and in full compliance with all relevant state and federal laws.

- **Discrimination through AI or any other technology is already unlawful, and the CRD's proposed modifications are unnecessary and/or premature**

As a threshold matter, the CRD's proposed modifications are simply unnecessary and therefore only serve to muddy the waters rather than provide clarification. Under both federal and California law, it is already unlawful for employers to discriminate against individuals in employment decisions on the basis of protected characteristics. These laws do not differentiate between – let alone exclude or include – the methods through which that discrimination occurs, at least beyond intentional and disparate impact discrimination. The purpose of these laws is to prohibit discrimination, period – the manner in which it is done is irrelevant.

Accordingly, discrimination resulting from automated-decision systems is already prohibited under these laws, and there is no need for the current rulemaking to clarify the same. Further, the California state legislature is currently considering several bills to address algorithmic decision-making-related discrimination in employment and to regulate AI in general. At minimum, the CRD should hold off on any regulatory efforts in this area prior to legislative action, particularly given that the conduct targeted by the present rule is already prohibited under state and federal law.

- **The Proposed Rule's definition of "agent" is unnecessarily broad and unreasonably expands the scope of an employer and/or developer's liability.**

The Proposed Rule creates a standalone definition of "agent" that includes all third parties that:

> provide services related to making hiring or employment decisions (such as recruiting, applicant screening, hiring, payroll, benefit administration, evaluations, and/or decision-making regarding requests for workplace leaves of absence or accommodations) or the administration of automated-decision making systems for an employer's use in making hiring or employment decisions.

The existing code language provides that covered employers are liable for the discriminatory actions of its agents (as defined above) "committed within the scope of their employment or relationship with the employer."

This extremely broad definition – in tandem with the existing code language that makes employers liable for the discriminatory actions of its agents – would appear (or at least, could be interpreted) to touch upon every third-party entity an employer uses for recruitment and hiring, let alone benefits and payroll management. For an employer to be responsible for its own hiring and recruitment practices is one thing; for the employer to be responsible for how it uses technology provided by a third party that is used for the same processes is also theoretically

reasonable, depending on the use and context. The definition of agent, however, would also make employers potentially liable for how third parties use such technologies or employ other practices that may be discriminatory, even though in such situations the employer has no control over such use or practices.

An employer could be liable, for example, for merely using a common job posting platform (such as Indeed), if it turned out that that platform was using technology or engaging in any other practice that was discriminatory against certain job applicants. In such situations, the employer has little to no control over what and how the platform uses technology or other methods to connect applicants with listings (or screen some out). Nor would the employer be similarly aware – or be reasonably expected to be – of any potentially discriminatory practices unless given notice by the third-party platform. Attaching liability to employers in such contexts is unreasonable and unnecessary, as it goes well beyond the root cause of the unlawful practice.

In its Initial Statement of Reasons for the Proposed Rule, the CRD itself explicitly acknowledges that "employers...are often not privy to the details of [automated-decision systems' programming nor what biases may result from that programming." The CRD further acknowledges that "such information is typically maintained by the [third-party]" and that "these third parties often treat this information as a trade secret." The CRD therefore clearly acknowledges that the employer is both generally unaware of and/or has no control over any bias that may result from the programming of such technologies or from how they are utilized by other parties. And yet, the Proposed Rule and existing code language would nevertheless make employers liable for unlawful biases stemming from the same actions.

Conversely, this language also inappropriately expands liability for AI developers as well. For the same reasons that employers (by the CRD's own admission) are generally not privy to

the design parameters of the programs or technologies they use, developers often have neither control nor visibility into how their tools are used by employers or other third parties. Again – being liable for design-related issues within the developer's control is one thing; being liable for how tools -- which by themselves have no bias-related issues -- are being used by third parties outside of the developer's control, is quite another.

The Proposed Rule's definition of agent is clearly designed to reach beyond just use cases of AI and algorithmic decision-making and to the developers of these technologies. In doing so, however, the definition could also potentially make employers and developers liable for practices of third parties over which they have little to no control, let alone access to data in part due to privacy and security issues. At minimum, the definition should be amended such that employers and developers cannot be held liable for technology uses beyond their control or visibility.

- **The Proposed Rule's recordkeeping requirements are overly burdensome and implicate significant privacy concerns**

The Proposed Rule requires providers of automated-decision systems or other selection criteria and those who use such systems on behalf of employers[1] to maintain "relevant records" of system data for at least four years following the last date on which the system was used by the employer or other covered entity. "System data" is defined broadly by the Proposed Rule and would include any data "produced from the application of an automated-decision system operation," as well as "data used by individual applicants or employees, or that includes information about individual applicants or employees." The Proposed Rule defines "automated-

[1] The language of the Proposed Rule could be interpreted such that employers using such technology are also subject to these recordkeeping requirements, in which case the same concerns articulated in this section apply. At minimum, the CRD should clarify exactly which parties are subject to the recordkeeping requirements.

decision systems" similarly broadly such that any "computational process" that even simply "facilitates human decision-making" is included.[2]

Collecting and maintaining the immense amount of data contemplated by the Proposed Rule will be at best extremely burdensome for developers and at worst impossible. In tandem with the Rule's broad definition of "automated decision systems," developers may be required to track, collect, and maintain data produced by a massive scope of use cases or applications – or rely on employers using their technology to do the same. As a practical matter, employers and/or developers will have difficulty tracking down every use case – including the last use, as is also required by the Proposed Rule – particularly given the increasing integration of these technologies into more and more workplace functions and processes.

Furthermore, the collecting and maintaining of much of this information implicates significant privacy concerns. The Proposed Rule specifically requires "information about individual applicants or employees" to be included, and potentially implicates particularly personal information such as health records or aptitude or intelligence scores generated by applicant testing. These requirements undercut workplace privacy concerns – including those protected by law, such as California's own Consumer Privacy Act. For much of the data required to be recorded and kept under the CRD's Proposed Rule, employers and/or developers would also be simultaneously required to report such recordkeeping to the individuals involved pursuant to the CCPA and/or CRPA.

- **The Proposed Rule's expanded definition of "medical or psychological examinations or inquiries" is unnecessarily broad and could prohibit even garden-variety interview questions**

[2] At minimum, the CRD should further clarify the definition of "facilitates human decision-making."

The existing code prohibits employers from conducting medical or psychological examinations pre-offer and limits the use of such examinations post-offer and during employment. The Proposed Rule adds new definitions and examples of such examinations that would be prohibited and/or limited, including "personality-based questions" and "puzzles, games, or other challenges that evaluate physical or mental abilities." The new definition includes those examinations "included in an automated-decision system" but is not exclusive to them.

In the first instance, the CRD should not utilize a rulemaking designed to target AI and algorithmic discrimination to make changes that would apply to circumstances outside of those contexts. Further, the new definition is overly broad and could potentially prohibit employers from asking commonplace, well-established questions of applicants during the interview process.

For example, is asking an applicant what they believe their strengths and weaknesses during a job interview a "personality-based question?" At best, it is unclear under the new definition. The Proposed Rule should not handcuff an employer's ability to lawfully and non-discriminatorily evaluate applicants. This definition should be limited to, at minimum, the scope of "selection procedures" as defined by the Uniform Guidelines on Employee Selection Procedures – a longstanding legal interpretation relied upon by employers and stakeholders.

- **The time period for stakeholder comments and compliance should be extended.**

As articulated above, the CRD's Proposed Rule would significantly rewrite and expand existing state discrimination law in ways that would also implicate other legal obligations for employers and/or developers. Given the breadth of the Rule and its potential impact, the CRD should take additional time to solicit and consider stakeholder feedback. Further, and for the

same reasons, the CRD should afford covered entities at least 180 days to come into compliance with any final rule.

Sincerely,

/s/ Gregory Hoff

Gregory Hoff
Assistant General Counsel, Director, Labor & Employment Law and Policy
HR Policy Association
4201 Wilson Blvd. St. 110-368
Arlington, VA, 22203