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Civil Rights Department
c/o Rachael Langston
Council@calcivilrights.ca.gov
Assistant Chief Counsel
555 12th Street
Suite 2050
Oakland, CA 94607

Re: Proposed modifications to employment regulations regarding automated-decision systems

Dear Rachael Langston,

I write on behalf of the Consumer Data Industry Association (CDIA)¹ to oppose changes to the proposed rule. CDIA's highly regulated background check member companies are not "employment agencies" and should not be considered as such in Proposed § 11008(h). The proposal stretches the proposed definition beyond statutory definitions and commonly held understandings of employment agencies. The definitional change also lacks statutory authority. We do not believe the Civil Rights Council (Council) intended to include background screening companies in the definition of an employment agency. If the Council adopts a definition of an employment agency that includes "screen[ing]," greater clarity around screening is necessary to ensure that it excludes background check companies.

The Council proposed to amend the § 11008 definitions of employment agencies as follows:

~~(f)~~(h) "Employment Agency." Any person undertaking, for compensation, services to identify, screen, and/or to procure job applicants, employees or opportunities to work, including persons undertaking these services through the use of an automated-decision system.

The proposal will, but should not, make background check companies an "employer or other covered entity" under § 11008(g) and an "employment agency" under § 11008(g). Once defined as these entities, the proposal would impose obligations on them. In its explanation for the rule change, the Council deems the changes

necessary to clarify the scope of actions that may be performed by an employment agency. The second addition is necessary to clarify that "employment agency" includes persons that perform the services of an employment agency through the use of automated-decision systems. In the

¹ The Consumer Data Industry Association (CDIA) is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity all over the world, helping ensure fair and safe transactions for consumers, facilitating competition and expanding consumers' access to financial and other products suited to their unique needs.

Council's expertise, these services are increasingly performed by employment agencies on behalf of particular employers.²

However, more precision is needed in the definition.

1. Background check companies are highly regulated, and while they are important to the hiring process, they are not employment agencies.

A. Background check companies, In general

In general, in the work context, a background check company, sometimes called a background screening company, provides information to an employer or contractor that allows that employer or contractor to make a more informed decision about an applicant's eligibility for a job.³ In the background check process, the employer or contractor sets the parameters of the background check. Once the criteria are established, the employer or contractor selects a company to conduct background checks on its behalf. The employer or contractor will then seek an applicant's consent to conduct a background check, as required by federal and state law.⁴ The employer or contractor provides the background check company with the names and identifying information that it has selected for a screen, and the screening company provides the results of that screen to the employer or contractor. As discussed below, but important to note here, at no point in the process does a background check company provide names of possible candidates to an employer or contractor. Nor does a background check company work with applicants to place them into positions.

B. Background checks are highly regulated.

The federal Fair Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agency Act (ICRAA) strictly regulate background checks in California.⁵ Among other things, background check companies, also known as consumer reporting agencies (CRAs), must maintain reasonable procedures to assure maximum possible accuracy.⁶

In addition to the general protections above, there are protections specific to the use of consumer reports for employment purposes. The FCRA allows employers to review the criminal histories of prospective and existing employees.⁷ However, this legal privilege comes with certain obligations. In short, under § 1681b(b) of the FCRA:

² Civil Rights Council Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems, Initial Statement of Reasons, 4.

³ Background checks are completed for many reasons, including compliance with licensing and employment laws and regulations. Additionally, employers use background checks to make informed placement decisions, retain the most qualified candidates, and mitigate the risk in selecting the wrong candidate. Workplace violence, fraud, embezzlement, and theft are a multi-billion dollar drain businesses, especially small businesses. Losses can be avoided by background checks.

⁴ 15 U.S.C. § 1681b(b), Cal Civ Code § 1786.16.

⁵ *Id.*

⁶ *Id.*, § 1681e(b).

⁷ *Id.*, § 1681b(a)(3)(B).

- An employer must certify to the consumer reporting agency that the employer has and will comply with the employment screening provisions of the FCRA, and that the information from the consumer report will not be used in violation of any applicable federal or state EEO laws or regulations.
- Prior to requesting a consumer report, an employer must provide to the prospective employee a written disclosure that a consumer report may be obtained for employment purposes and the consumer must authorize the employer's use of a consumer report. The disclosure document provided to the consumer must contain only the disclosure.
- Prior to taking an adverse action, the employer must provide the consumer with a copy of the consumer report and the summary of rights mandated by the FTC. The employer must provide a second adverse action notice if an adverse action is taken.

The ICRAA offers additional protections to job applicants and further obligations beyond those in the FCRA.

2. The proposed rule change is inconsistent with statutory definitions and common understandings of "employment agencies."

The Council's proposed definition of an employment agency stretches the proposed definition beyond statutory definitions and commonly held understandings of employment agencies.

A. The proposed rule change is inconsistent with statutes

The California Civil Code is replete with definitions of an "employment agency" far narrower than the proposed rule. According to the Civil Rights Division of the Government Code, an "employment agency" is "any person undertaking for compensation to procure employees or opportunities to work."⁸ Here, an employment agency is one that

(A) (i) Procures, offers, promises, or attempts to procure employment or engagements for others or employees for employers.

(ii) Registers persons seeking to procure or retain employment or engagement.

(iii) Gives information as to where and from whom this help, employment, or engagement may be procured.

(iv) Provides employment or engagements.

(B) procure[s] employment for any person who will pay for its services, or that collects dues, tuition, or membership or registration fees of any sort, if the main object of the person paying those fees is to secure employment.

(C) ... procures, offers, promises, provides, or attempts to procure babysitting or domestic employment for others or domestics or babysitters for others.⁹

This code section is built around protecting consumers who work with employment agencies, not background check companies that service business customers.

⁸ Cal. Gov't Code § 12926(e).

⁹ Cal Civ Code § 1812.501(a)(1).

The Education Code uses the term “employment agency” in contemplation of and permission for governing boards of certain school districts to “contract with temporary–help employment agencies to fill vacancies of management and confidential employees...”¹⁰ Again, an employment agency is more of a placement agency than a background check company.

The Health and Safety Code, using the Cal Civ Code § 1812.501(a)(1) definition of an employment agency, confirms that an employment agency is a referral service.¹¹ Similarly, the Unemployment Insurance Code speaks to employment agencies as placement agencies.¹²

In all the examples above, the employment agency supplies an employer or contractor with the names of job candidates, informs those candidates where they can find work or assigns work to a job candidate from an employer or contractor. None of these scenarios describe a background check company that conducts a criminal background check, allowing an employer or contractor to make its own decision.

B. The proposed rule change is inconsistent with common understandings of “employment agencies.”

An employment agency represents the “brokerage of labor for a fee paid by the applicant for employment or by the prospective employer.”¹³ With this construct in mind, it is commonly “recognized that the state may, in the proper exercise of its police power, license and impose reasonable regulations upon the business of a private employment agency or emigrant agency, for the purpose of protecting applicants for employment against moral as well as financial exploitation.”¹⁴ This leading authority on employment agencies again points to an employment agency as a business-to-consumer operation that provides leads to employers and contractors.

A common dictionary definition of an “employment agency” is one “whose business is to find jobs for people seeking them or to find people to fill jobs that are open.”¹⁵ Like legal authorities on employment agencies, dictionaries note that an employment agency is a business-to-consumer operation that provides leads to employers and contractors.

3. The proposed rule change lacks statutory authority.

The Council does not have the authority to create a new definition of an employment agency when the weight of statutory definitions for such an agency is contrary to those proposed by the Council.¹⁶ While the Council may “interpret, implement, and apply all provisions of this part, Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 of Division 3 of Title 2 of this code,” deviating from the legislative definitions of an employment agency is not within the scope directed by the legislature.

¹⁰ Cal. Educ. Code § 45140.

¹¹ Cal. Health & Safety Code § 1596.65.

¹² Cal. Unemp. Ins. Code § 13005.7.

¹³ Regulation of private employment agencies, 20 A.L.R.3d 599, 15 (citations omitted).

¹⁴ Regulation of private employment agencies, 20 A.L.R.3d 599, 2.

¹⁵ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/employment%20agency> (last visited, June 14, 2024).

¹⁶ See *infra*, at 3-4.

4. If the Civil Rights Council (Council) adopts a definition of an employment agency that includes “screen[ing],” greater clarity around and exemptions to screening is necessary to ensure that it excludes background check companies.

As this comment shows, there are sharp differences between employment agencies that screen and background screening companies that screen. Employment agencies either screen resumes to determine which candidates to provide to employers and contractors or work with applicants to help place them with employers or contractors. In these cases, employment agencies qualify applicants for work. By contrast, background screening companies use the candidate information *supplied by employers or contractors* to disqualify candidates for work opportunities, should there be information in a lawfully conducted background check that could eliminate a candidate.

With these sharp differences in mind, if the Council adopts a definition of an employment agency that includes “screen[ing],” greater clarity around screening is necessary to ensure that it excludes background check companies. We do not believe the Council intended to include background screening companies in the definition, and we respectfully request that a final rule be more precise.

To assist in that precision, the Council should clarify that screening means examining an applicant’s claimed education, experience, or other qualifications to determine whether that applicant might meet the minimum qualifications for a position. Conversely, screening does not mean services that provide information to employers or contractors other than the applicant.

5. Conclusion

There are clear differences between employment agencies and background check companies (also called background screening companies). If the Council adopts a definition of an employment agency that includes “screen[ing],” greater clarity around screening is necessary to ensure that it excludes background check companies. As written, the proposal stretches the statutory definitions and commonly held understandings of employment agencies beyond the bounds of statute and industry practices. The definitional change also lacks statutory authority. We do not believe the Council intended to include background screening companies in the definition of an employment agency. We are confident that a final rule will be more reflective of the concerns outlined in this comment.

Thank you very much for your consideration.

Sincerely,



Eric J. Ellman
Senior Vice President, Public Policy & Legal Affairs