November 12, 2024

Via Email Only, council@calcivilrights.ca.gov *and* Rachael.Langston@calcivilrights.ca.gov

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Councilmember Jonathan Glater
Councilmember Hellen Hong
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Civil Rights Council
2218 Kausen Drive, Suite 100
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RE: Proposed Modifications to Employment Regulations Regarding Algorithmic Decisionmaking Tools

Dear Chair Garcia and Councilmembers:

On behalf of The California Employment Lawyers Association (CELA), UFCW Western States Council, Tech Equity Collaborative, Oakland Privacy, The Greenlining Institute, Equal Rights Advocates, and Alphabet Workers Union-CWA, we write to comment on the latest Proposed Modification to Employment Regulations Regarding Algorithmic Decisionmaking Tools.

We continue to appreciate the efforts put forth by the Council to improve and enhance the existing regulations under the Fair Employment and Housing Act (FEHA). We remain engaged with the Council as an active stakeholder and we share the Council's goals of clarifying the coverage of existing law over emerging technologies in order to mitigate the risk of discrimination posed by these tools. As a general matter, the Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems continue to take positive steps to reach that goal. However, a handful of further revisions should be made to ensure clarity and consistency across the regulations.

§ 11008 Definitions

We are concerned that the proposed modification to the definition of "Adverse impact," specifically the addition of the phrase "substantial disparity," has the potential to create confusion

due to lack of consistency with existing law. We believe "substantial disparity" may have come from the definitions contained in the Uniform Guidelines for Employee Selection Procedure. [1]

The Uniform Guidelines, while instructive, are not binding on interpretation of state law. In fact, existing FEHA case law[2] and jury instructions[3] use the term "disproportionate adverse effect" rather than "substantial disparity." Moreover, the Council approved revised regulations earlier this year that define disparate impact with the term "adverse or disproportionate impact" in the context of Nondiscrimination in State-Supported Programs and Activities.[4]

We believe that adoption of the word "substantial" implies a higher standard than what is required under existing law. Therefore, in the interest of consistency, we urge the Council to replace the term "substantial disparity" with the term "disproportionate adverse effect" in the proposed Section 11008(a) in order to align with existing law and regulation.

Additionally we share the concerns raised by the Disability Rights Education & Defense Fund about the proposed definition of "adverse impact" in their comment submitted on October 16, 2024. We urge the Council to heed their suggestion to ensure the proposed regulations are aligned with existing law protecting applicants and employees with disabilities.

We are also concerned that the new proposed definition for "Agent" comes from a misreading of *Raines vs. U.S. Healthworks Medical Group*[5] and unnecessarily introduces confusion to the interpretation of FEHA.

In *Raines*, the California Supreme Court announced the scope of agent liability under FEHA. In its analysis, the Court looked for guidance from federal appellate decisions interpreting an analogous agent liability provision under Title VII. Several circuits found agency liability where the agent exercised duties traditionally reserved to the employer.[6] While these federal cases served as

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[1] Uniform Guidelines on Employee Selection, § 60-3.16(B) ("A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.")

[2] *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 ("...Prohibited discrimination may also be found on a theory of "disparate impact," i.e., that regardless of motive, a facially neutral employer practice or policy, bearing no manifest relationship to job requirements, in fact had a *disproportionate adverse effect* on members of the protected class.") (emphasis added).

[3] CACI No. 2502. Disparate Impact - Essential Factual Elements (Gov. Code, §12940(a)) ("3. That [name of defendant] had [an employment practice of [describe practice]/a selection policy of [describe policy]] that had a *disproportionate adverse effect* on [describe protected group - for example, persons over the age of 40];"). (emphasis added)

[4] 24 CCR § 14027(b)(3) ("Disparate impact discrimination is prohibited under Article 9.5, this subchapter, and other implementing regulations. "Disparate impact," "discriminatory effect," and "adverse impact" are used interchangeably. Disparate impact occurs when a facially neutral act or practice, regardless of intent, (a) has an adverse or disproportionate impact, or predictably results in an adverse or disproportionate impact, on members of a protected class; (b) creates, increases, reinforces, or perpetuates discrimination or segregation of members of a protected class; or (c) has the effect of violating any of the other prohibitions in Article 9.5, this subchapter, or other implementing regulations. A practice with a disparate impact may nevertheless still be lawful if supported by a legally sufficient justification, as set out in section 14029.").

[5] *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268.

[6] *Spirt v. Teachers Ins. Annuity Ass'n* (2nd Cir. 1982) 691 F.2d 1054, 1063; *Williams v. City of Montgomery* (11th Cir. 1984) 742 F.2d 586, 589; *DeVito v. Chicago Park Dist.* (7th Cir. 1996) 83 F.3d 878.

helpful interpretive guides for the California Supreme Court to find that agents of an employer may be directly liable for FEHA violations as employers, the Court explicitly declined to identify the specific scenarios in which an agent will be subject to FEHA liability.[7] Instead, the Court held that "a business-entity agent can bear direct FEHA liability only when it carries out FEHA-regulated activities on behalf of an employer."[8]

The Council's proposed definition stretches further than the California Supreme Court was ready to go in *Raines*. Instead of unnecessarily enshrining Title VII standards into FEHA regulations, the proposed modifications should hew to the rule outlined by this state's high court. To that end, we suggest the following amendment to the proposed modification:

> (b) "Agent" An agent includes any person acting on behalf of an employer, directly or indirectly, who carries out FEHA-regulated activities ~~to exercise a function traditionally exercised by the employer~~, which may include applicant recruitment, applicant screening, hiring, promotion, or decisions regarding pay, benefits, or leave. An agent may include, in appropriate circumstances, a third party that creates an automated-decision system used by or for an employer, or a third party that uses an automated-decision system on behalf of an employer. An agent may include, in appropriate circumstances, a third party that conducts administrative services for an employer, such as payroll and benefits administration. An agent of an employer is also an "employer" for purposes of the Act.

We appreciate the Council removal of the term "technically neutral" from the proposed modification of the definition of "Proxy" but we reiterate our caution against the use of the term "correlated" to describe the relationship between the neutral characterstic or category and a protected basis. Requiring correlation in this context might suggest that the relationship need to be proved up to a mathematical standard. We suggest that the Council add the phrase "or associated with" to capture the broad range of neutral characteristics that, alone or taken together, may serve as a proxy for a protected characteristic.[9]

Furthermore, we are concerned that the new proposed modification fails to accurately capture how ADS may use singular or multiple data point(s) to serve as a proxy for a basis protected by FEHA. As currently drafted, the proposed language would only apply in a scenario where a single characteristic or category could serve as a proxy (e.g., zip code as a proxy race). But realistically, algorithmic decision systems are likely using an immensely large pool of data that may ultimately be used to infer characteristics associated with bases protected by the Act. While discerning how an ADS makes these connections may be difficult, that should not prevent the Council from accurately defining "proxy" to include the real-world functionalities of ADS. This change would also align with the recent change to FEHA that recognized "intersectional discrimination" – discrimination based on a combination of protected characteristics.

In addition to the substantive change to the definitions, we also suggest the Council consider rejecting the "closely" as a modifier for "correlated" and restore "basis" in place of "characteristics.

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[7] *Raines* 15 Cal.5th at 288.
[8] *Ibid.*
[9] S.B. 113, 2024 (enacted); Gov. Code §12926(o)

"Closely" injects unnecessary vagueness to the clause, since the regulations do not further specify how closely a non-protected characteristic must be correlated to a protected basis in order to be considered a proxy. Also, the replacement of "basis" with "characteristic" is unusual because the term "basis" is the most common term used to describe the protected categories of FEHA, including in the sections of regulation that the Council proposes to modify.[10]

Taken the above comments together, we propose the following modification to the proposed Section 11008(m)

> (m) "Proxy." A characteristic or category, or a combination of characteristics or categories, that is ~~closely correlated~~ associated with a basis ~~characteristic~~ protected by the Act.

§ 11009 Principles of Employment Discrimination

We reiterate the preference we expressed in our previous comment that the new Section 11009(f) clause related to anti-bias testing is better suited for Section 11010, which addresses Affirmative Defenses to Employment Discrimination. If the treatment of anti-bias testing must remain in this section, then we would request that the clause be amended to include the absence of anti-bias testing or proactive efforts relevant to claims of discrimination under this section.

We believe the solution should be simple and propose the following modification to the last sentence of proposed Section 11009(f):

> (f) Relevant to any such claim or available defense is evidence, or lack of evidence, of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.

§11013 Recordkeeping

We are curious why the third-party record keeping requirement was struck because we believe third parties, including developers for ADS tools, are often best positioned to understand, and have records of, how their tools function. We request the Council reconsider the deletion of Section 11013(c)(8).

§11016 Pre-Employment Practices

The proposed Section 11016(d)(1) references possible reasonable accommodation to an applicant with disability but makes no mention of accommodation for religious creed. ADS systems that analyze physical characteristics may capture an applicant or employee wearing religious garb. Current regulations already require employers to make accommodations for the known religious creed of an employee and applicant.[11] We urge the Council to add a reference to the existing requirements to proposed Section 11016(d)(1).

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[10] *See e.g.,* § 11009(c) ("Discrimination is established if a preponderance of the evidence demonstrates that an enumerated *basis* was a substantial motivating factor in the denial of an employment benefit to that individual by the employer or other covered entity, and the denial is not justified by a permissible defense") (emphasis added); *See also*, §§11010(a), 11014, 11016(a).

[11] 2 CCR § 11062.

§11020 Aiding and Abetting

As outlined in our comment regarding proposed Section 11009(f) anti-bias testing above, we urge the Council to revise proposed Section 11020(a)(6)(ii) to include the relevance of the lack of anti-bias testing.

> (ii) Relevant to a claim of employment discrimination or an available defense of that claim is evidence, or lack of evidence, of anti-bias testing or similar proactive efforts to avoid unlawful discrimination, including the quality, efficacy, recency, and scope of such effort, the results of such testing or other effort, and the response to the results.
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> We also recommend that other similar language in proposed Sections 11032(b)(4), 11033(f), 11038(b), 11039(a)(1)(J)(ii), 11063(b) be similarly amended.

§11070 Pre-Employment Practices

Proposed Section 11070(e) attempts to regulate ADS-based medical or psychological examinations, but the examples this section provides only contemplates examinations that "leads to the identification of a disability." Similar to the examples for how ADS uses large data sets to create proxies for FEHA-protected characteristics without explicitly using that same characteristic in its decision-making, an ADS-based medical or psychological examination need not lead to the identification of a disability in order to make an inference that a disability exists. An ADS may make a recommendation based on such an inference without ever identifying the existence of a disability to the end user.

§ 11072 Employee Selection

In each of the second sentences of proposed Sections 11072(b)(1) and (b)(2), the language should be changed from "... such standard, test, or other selection criteria … is lawful…" to "may be lawful." This is because use of the standards referenced in this section might be unlawful for reasons other than those contemplated by the regulations.

In conclusion, we would like to thank the Council for considering our comment. Our organizations also endorse the comments made on behalf of the Disability Rights Education and Defense Fund that was submitted on October 16, 2024.

If the Council has any questions or concerns about this letter, please do not hesitate to contact Ken Wang at 415.994.0952 or ken@cela.org.

Respectfully submitted,

California Employment Lawyers Association
Equal Rights Advocates
UFCW Western States Council
Tech Equity Collaborative
The Greenlining Institute

Oakland Privacy
Alphabet Workers Union-CWA