COST DRIVER

April 2, 2025

TO: Members, Senate Labor, Public Employment and Retirement Committee

SUBJECT: SB 7 (MCNERNEY) EMPLOYMENT: AUTOMATED DECISION SYSTEMS OPPOSE/COST DRIVER – AS AMENDED MARCH 6, 2025

The California Chamber of Commerce and the organizations listed below are **OPPOSED** to **SB 7 (McNerney),** which has been labeled a **COST DRIVER.** The bill broadly targets businesses of all sizes, across every industry, and regulates even low-risk applications of automated decision systems (ADS) or where there is human involvement in a decision in addition to the ADS. Many of the bill's requirements are onerous and impractical, especially when it comes to the use of ADS in hiring. **SB 7** would impose significant compliance burdens and any misstep would lead to costly litigation for even the smallest of employers. While we appreciate concerns over employees being disciplined or terminated solely based on automated tools, **SB 7** is not tailored to those scenarios and does not consider the benefits of ADS technology. Unfortunately, we believe **SB 7** will have an undesired chilling effect on the technology and make it that much harder to develop the very tools that can help combat bias in decision making.

SB 7 Makes it More Difficult for Californians to Get Hired

The use of ADS in recruiting and hiring is quite distinct from the use of ADS in other aspects of employment. Many companies across industries use ADS to scan and filter resumes for open positions or use it to find "passive applicants" may not otherwise have applied to open positions. This has proven to be effective

because ADS can scan an entire resume whereas human resources professionals or managers usually do not have the bandwidth to review the dozens, hundreds, or thousands of applications they may receive.

Proposed Section 1527(c)(1) effectively bans any sort of resume filtering software because it bans primarily relying on ADS when making hiring decisions. Again, this would eliminate the most common use of ADS in employment. The Society for Human Resource Management surveyed its members and found that close to 90% of respondents using AI tools for hiring and recruitment increased efficiency. About half said that those tools allowed them to reduce the time it takes to fill open positions. Nearly a quarter believe that utilizing those tools reduced potential bias and allowed them to identify more diverse, underrepresented candidates. Hiring without ADS would be a step backwards.

Further, under **SB 7**, a "job applicant" would have the same rights and receive the same notices as current employees. This raises significant concerns and hiring therefore deserves distinct consideration:

- Notices: SB 7 would require employers to send disclosures to every job seeker who applies for a position. A 30-day pre-use notice would be impractical because that effectively creates a one-month waiting period before the company can even run a resume through an ADS tool. It also requires individualized responses with the notice to every single applicant, of which there may be thousands. Further, sometimes ADS tools are used to seek and recruit candidates that may otherwise not have applied. It would be impossible to give those people a pre-use notice. Regarding the post-use notices, that means the employer would be required to send every applicant who did not receive the job a notice. Not only is that impractical, but it completely obviates the reason for using the ADS in the first place.

- Appeals: Allowing a right to appeal in the hiring context obviates the usefulness of ADS. For example, say a medium-sized company receives 100 resumes for one position. It is likely that company has only one, maybe two human resources professionals. That person would be required to issue individualized notices to all 100 applicants. After the position is filled, they would be required to issue 99 more individualized notices. Those notices would include a 30-day right to appeal a decision about a job *that is now being performed by another person*. If anyone does appeal, the one HR professional must then respond in fourteen days and find someone who was not involved in the hiring process to evaluate the resume independently. That reviewer may not have looked at anyone else in the candidate pool. Not only does this add an extremely onerous process to hiring, but it is unclear exactly how the appeals process would play out because someone has been hired for the position. To overturn that decision would necessarily require revoking an offer or terminating a recently hired employee.

- Resumes contain information about political beliefs, religious beliefs, or other activities: Proposed Section 1526(a) provides that ADS cannot be used to obtain or infer a variety of information about employees, such as religious or political beliefs, veteran status, health status, and more. Practically speaking, this is not possible. For example, job applicants will have volunteer work, military service, or prior jobs on their resume that will include information about these topics. The political beliefs of a job applicant for the California Democratic Party with a work history for a Democratic Senator or College Democrats club will be apparent from their resume alone and the fact that they are applying for a job with a specific political party. And that makes sense because the applicant's political beliefs would be highly relevant to determining whether that applicant is well-suited for that position. The Fair Employment and Housing Act (FEHA) very clearly outlines which classes of people are protected from discrimination. If the use of ADS results in unlawful discrimination, employees already have the right to bring a claim under FEHA.

SB 7's ADS Pre-Use and Post-Use Notice Requirements Raise Several Concerns

As a general matter, we do not object to the concept of disclosing information about the use of ADS when that ADS can result in employee discipline or termination. However, we have concerns with the breadth of the notices required under **SB 7**. Examples include:

- **SB 7**'s applicability is exceptionally broad. It applies to any ADS that "directly or indirectly" impacts an employee and is used for the purpose of making an "employment-related decision," which is effectively anything related to employment under its definition. The "indirectly" language implies that the bill also applies to secondary or downstream impacts. Further, the definition of ADS includes language that we have consistently argued is too broad. It includes tools that "assist" human decision making. That language would encompass even something like simple scheduling software with minimal automation.

  Therefore, **SB 7** would result in such a high volume of notices that their usefulness would be diminished. For that reason, required notices should be limited to consequential, high-risk decisions such as termination or discipline that directly impact the employee.

- An employer may not know all of the information required under proposed Section 1524, especially if they are a small business. For example, an employer may not know what logic is used in the ADS or the names of all individuals, vendors, or entities that created the ADS unless that information is provided by the developer. Even if an employer can communicate with the developer, the developer or their vendors may consider that information proprietary.

- Proposed Section 1524's requirements will be overly complex for many small businesses. Small businesses often do not have an HR department or legal counsel. If they use anything like a scheduling software or resume screening software, they would be covered under **SB 7**. Not only would it be difficult for them to track down information like the logic used or names of every vendor that developed the ADS, but to spend the time synthesizing such complex information would be a significant burden.

SB 7's Ban on Certain ADS Uses Will Have Unintended Consequences

Proposed Section 1527(c)(1) provides that an employer cannot make hiring, promotion, discipline, or termination decisions that rely "primarily" on ADS. Consider that there are many scenarios in which ADS is used for safety purposes. For example, some tools can detect when an employee is not utilizing proper PPE or other safety measures and reports that information internally. While we understand there may be errors and an employee may contest that decision, if there is a scenario where it is happening repeatedly, under SB 7 an employer would never be allowed to discipline an employee for their actions unless they can independently corroborate the violations via human supervision, resulting in safety concerns.

Another example would be work productivity. Unless a supervisor is micro-managing every one of their employees, many workplaces will rely "primarily" on productivity-type tracking that may fall under the definition of ADS. A human would still be involved prior to a disciplinary action or termination. This bill would ban those types of scenarios, which is simply not practical. Similarly, the ban on using customer ratings as a "primary" input data to make an employment decision does not always make sense. An employee who is consistently receiving complaints from customers is likely to receive a disciplinary action. There are scenarios where a manager or someone else is not always present with an employee and therefore must primarily rely on data like consumer ratings or reviews. Relying "primarily" on such data does not mean there is no human review component to that decision and it should not be treated as such. We appreciate the desire to address scenarios where employees have been terminated based on ADS output alone, but this bill goes far beyond that.

Further, there is concern about a complete ban of the use of ADS to predict behaviors. For example, financial institutions sometimes use ADS for predictive purposes for assessing risk of fraud or other unlawful activities. Any security breaches or fraud would have detrimental impacts on consumers. ADS tools help protect against those types of activities. Also, it should be noted that proposed Section (a)(3) does not specifically say that it applies only to workers and not consumers. We assume the intent is that it applies only to workers, but it is unclear.

As drafted, proposed Section (a)(5) is vague and it is unclear which scenarios it is trying to prevent. We want to ensure, for example, that it would not prohibit situations like rewarding top performers based on productivity (although (c)(1) does appear to prohibit this). To the extent this is related to paying workers less based on ADS outputs unrelated to their job performance, California has existing laws that already cover discrimination of this type, such as FEHA or the Equal Pay Act.

SB 7's Right of Access, Correction, and Appeal is Problematic

SB 7 allows a worker to access and correct worker data collected by an ADS. Given the breadth of the definitions in the bill, the access requirement could result in a high volume of documents and may necessarily include information about other employees and/or confidential, proprietary, or privileged information. It is also unclear what it means to "correct" information. For example, the CCPA contains clear guidelines regarding how and under what circumstances a consumer can request access to data or correct inaccurate data. Importantly, the CCPA and accompanying regulations include exceptions as well as make clear that data should only be provided "upon receipt of a verifiable consumer request from the consumer" to prevent bad actors from obtaining private data.[1] This is also a reason why an "authorized representative" should not be in the definition of "worker" and given this right to access other people's information.

Regarding the right to appeal, it just does not make sense given the breadth of circumstances to which **SB 7** applies. Every single scheduling decision, for example, would require a post-use notice and could be appealed under this 65-day appeals process outlined in proposed Section 1532. And our understanding is that the appeal right would apply even where ADS was hardly used at all in the decision-making process. This would grind workplaces to a halt and create unnecessary hurdles to everyday decisions.

Even in scenarios where a right for the worker to challenge the decision may be appropriate, it is unrealistic that small businesses can have someone who was not involved at all in the original decision evaluate the appeal. A small restaurant with just a few employees likely has one manager who may also be the owner. That person would be involved in all decisions. Under **SB 7,** they would have to contract out with someone to review the appeal, which would be a significant cost.

Independent Contractors Should Not Be Included in The Definition of "Worker"

The bill's definition of "worker" includes independent contractors, which should be removed from the bill. Contractors are often limited-term workers who are performing a specific job for a company. Their contract will dictate the terms of that job, under what circumstances the relationship may be terminated, and more. They do not need to receive disclosures or have a lengthy appeals process as outlined in **SB 7**. It does not make sense to include them in this bill.

Proposed Section 1536(d) is Vague

Proposed section 1536(d) describes where a civil action under **SB 7** may be brought. It includes a provision that states the civil action may be filed "wherein the *person* resides or transacts business." It is unclear who a "person" is under this subdivision and appears to be more broad than existing California Code of Civil Procedure Section 395 regarding proper venue. We want to ensure that this provision does not broaden the scope of where civil actions can be filed beyond existing venue rules so as not to encourage forum shopping.

For these reasons, we **OPPOSE SB 7 (McNerney)** as a **COST DRIVER.**

[1] See Civil Code Section 1798.110, 1798.130, and accompanying regulations, which are available at: California Consumer Privacy Act Regulations

Sincerely,

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