

## Response by the Centre for Information Policy Leadership to the California Civil Rights Council First Modifications to Initial Text of Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems

November 18, 2024

The Centre for Information Policy Leadership (CIPL)<sup>1</sup> welcomes the opportunity to respond to the California Civil Rights Council’s (CCRC) proposed modifications to employment provisions of the Fair Employment and Housing Act regarding Automated Decision Systems.<sup>2</sup>

CIPL is a global think tank with more than 85 member companies around the world. For more than 20 years, CIPL has partnered with business leaders, regulators, and policy makers to develop global solutions for privacy and responsible data use. CIPL has also been a global leader on responsible artificial intelligence development and deployment. CIPL supports practical solutions to combat the potential for AI bias and discrimination, including in the employment context.

CIPL applauds the CCRC’s commitment to addressing employment discrimination that may arise from the use of automated-decision systems. We previously submitted comments to the CCRC on this matter,<sup>3</sup> and we welcome the opportunity to comment again, sharing our insights in the wake of evolving global regulations and policies related to the use of automated decision-making systems in the employment context and beyond.

CIPL encourages the CCRC to align its regulations with existing California law and with the regulations proposed by the California Privacy Protection Agency (CPPA) to ensure certainty and clarity for businesses operating in California. In particular, CIPL offers the following comments:

1. **The CCRC’s definition of “Automated-Decision System” is unduly broad.** The CCRC proposes to define “Automated-Decision System” to mean processes that **make or facilitate** human decision making regarding an employment benefit. This definition would significantly broaden the scope of technologies and tools that fall under the scope of the proposed regulation.<sup>4</sup> A more appropriate definition would limit the scope to processes that have **material legal** or **similarly significant effect** on the provision or denial of employment or an employment opportunity. Such a definition would better align with existing privacy law definitions and artificial intelligence law definitions of automated decisions or similar terms (e.g. “consequential decision” under the Colorado Artificial Intelligence Act<sup>5</sup>).

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<sup>1</sup> The Centre for Information Policy Leadership (CIPL) is a global privacy and data policy think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and 85+ member companies that are leaders in key sectors of the global economy. CIPL’s mission is to engage in thought leadership and develop best practices to ensure the responsible and beneficial use of data in the modern information age. CIPL’s work facilitates constructive engagement between business leaders, data governance and security professionals, regulators, and policymakers around the world. For more information, please see CIPL’s website at <https://www.informationpolicycentre.com/>. Nothing in this document should be construed as representing the views of any individual CIPL member company or of the law firm Hunton Andrews Kurth LLP. This document is not designed to be and should not be taken as legal advice.

<sup>2</sup> “Notice of 30-Day Comment Period on First Modifications to Text of Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems,” available at <https://civildrights.ca.gov/wp-content/uploads/sites/32/2024/10/CRD-Automated-Decision-System-Regulations-Notice-of-First-Modified-Text.pdf>.

<sup>3</sup> Please see [https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/response\\_by\\_the\\_cipl\\_to\\_the\\_ccrc%E2%80%99s\\_proposed\\_modifications\\_to\\_employment\\_regulations\\_regarding\\_automated-decision\\_systems.pdf](https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/response_by_the_cipl_to_the_ccrc%E2%80%99s_proposed_modifications_to_employment_regulations_regarding_automated-decision_systems.pdf).

<sup>4</sup> California Privacy Protection Agency, Proposed Text of Regulations, October 2024, § 7001(f), available at [https://cppa.ca.gov/meetings/materials/20241004\\_item6\\_draft\\_text](https://cppa.ca.gov/meetings/materials/20241004_item6_draft_text).

<sup>5</sup> SB 24-205, “Consumer Protections for Artificial Intelligence”, § 6-1-1701(3), available at [https://leg.colorado.gov/sites/default/files/2024a\\_205\\_signed.pdf](https://leg.colorado.gov/sites/default/files/2024a_205_signed.pdf) (enacted May 17, 2024). See also CIPL Discussion Paper,

2. **The CCRC should consider how its draft regulations implicate existing California privacy law.** The California Consumer Privacy Act of 2018 (CCPA, as amended by the California Privacy Rights Act) applies to the processing of “personal information,” which includes “professional or employment-related information.”<sup>6</sup> Additionally, the CPPA has formally initiated rule-making on regulations covering automated decision-making.<sup>7</sup> Given the potential regulatory overlap with the CCPA, CIPL encourages the CCRC to engage with the CPPA and the California legislature to consider how the CCRC’s proposed regulations may interact with existing privacy laws and, where possible, to modify its regulations to ensure consistency and clarity.
  - a. **Data Retention.** Under the CCPA, a business’s retention of personal information, including employment-related information, must be “reasonably necessary and proportionate” to achieve the purpose for which it was collected and processed, or for another disclosed purpose that is compatible with the context in which the personal information was collected, and not further processed in a manner that is incompatible with those purposes.<sup>8</sup> By allowing for a **contextual assessment** that considers privacy and security risks, the CCPA’s approach could be interpreted as a more flexible and privacy-protective retention standard than the CCRC’s proposed recordkeeping requirements, which prescribe that all “relevant records”—including “automated decision system data” created or received by an employer or other covered entity dealing with any employment practice—must be preserved for a period of **four years** from the date of the making of the record or the date of the personnel action involved, whichever occurs later. Because the CCPA provides a general exemption for compliance with other legal obligations,<sup>9</sup> the CCRC’s proposed four-year retention period could arguably expose data to greater privacy and security risks. By engaging with the CPPA, the CCRC could incorporate measures to help mitigate those risks.
  - a. **Allocation of Responsibilities Between Employers and their Agents.** The CCRC seeks to establish that “[a]n agent of an employer is also an ‘employer’ ” under the proposed regulations. As such, the proposed data retention requirements would also apply to an employer’s agent, requiring the agent—in addition to the employer—to preserve records for four years. This would necessarily increase the privacy and data security risks associated with that data, again implicating the CPPA.

As detailed in the “Notice of 30-Day Comment Period on First Modifications to Text of Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems,” CIPL looks forward to receiving the CCRC’s response to our comments.

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“Automated Decisionmaking and Profiling (ADM) Requirements in U.S. State Privacy Laws, and Current State of Play in State AI Regulations” May 2024, available at [https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/adm\\_profiling\\_requirements\\_us\\_privacy\\_law\\_cipl\\_may24.pdf](https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/adm_profiling_requirements_us_privacy_law_cipl_may24.pdf).

<sup>6</sup> CCPA, Cal. Civil Code § 1798.140(v)(1)(I).

<sup>7</sup> “CPPA Adopts New Regulations for Data Brokers and Advances ADMT Rulemaking Package”, California Privacy Protection Agency, November 8, 2024, available at [https://cppa.ca.gov/announcements/2024/20241108\\_2.html](https://cppa.ca.gov/announcements/2024/20241108_2.html).

<sup>8</sup> *Id.* at § 1798.100(c).

<sup>9</sup> *Id.* at § 1798.145(a).