JOB KILLER

April 12, 2023

TO: Members, Senate Judiciary Committee

SUBJECT: **SB 809 (SMALLWOOD-CUEVAS) CALIFORNIA FAIR EMPLOYMENT HOUSING ACT: FAIR CHANCE ACT OF 2023: CONVICTION HISTORY**
OPPOSE/JOB KILLER – AS INTRODUCED FEBRUARY 17, 2023

The California Chamber of Commerce and the organizations listed below are **OPPOSED** to **SB 809 (Smallwood-Cuevas)** which has been labeled a **JOB KILLER. SB 809** undermines the years of negotiations that culminated in the existing California Fair Chance Act, which struck a careful balance between removing barriers to the workforce and the need to consider conviction history for certain job positions. **SB 809** would eliminate employers' ability to consider conviction history unless they meet one of the narrow exceptions, even if that conviction history is voluntarily disclosed to them or widely publicized. Further, provisions causing delays in hiring and excessive penalties would exacerbate the rising costs of doing business in California and further impact affordability. While we appreciate the intent behind **SB 809**, the potential unintended consequences will have a significant impact on employees and customers.

SB 809 Dismantles Negotiations on AB 1008 (2017) – The California Fair Chance Act

California employers are anxious to hire qualified and willing residents, including job applicants exiting the justice system. In 2017, California enacted AB 1008 (McCarty)- the California Fair Chance Act. AB 1008 was the result of years long discussions between various stakeholders and legislators regarding the use of conviction history in employment decisions.

The California Fair Chance Act prohibits employers from inquiring about or relying on a job applicant's conviction history in making a hiring determination until a conditional offer is made. Legislators led stakeholders in extensive negotiations regarding AB 1008 to ensure the law struck a careful balance between workplace safety and providing applicants who have a conviction history with a fair opportunity to participate in the workforce.

Just five years after AB 1008's effective date, **SB 809** repeals the California Fair Chance Act in its entirety. **SB 809** would replace this carefully negotiated law with an untenable framework under which no employer may ever inquire about or rely on conviction history unless an existing law explicitly permits them to do so.

SB 809's Unintended Consequences Negatively Impact the Workplace and Customers

While we agree with the importance of ensuring that applicants with a conviction history are provided with fair access to the job market, the potential unintended consequences of **SB 809** are significant. The exceptions are extremely limited and tend to only cover heavily regulated industries (such as banking or healthcare) or jobs the government has perceived to be sensitive in nature (schools or security guards). But **SB 809**'s flaw is that many of the same rationales that served as the impetus for laws directing certain industries to conduct background checks, such as interacting with children or access to consumer financial information, apply to businesses not covered by those laws. For example, youth sports/organizations operated through a park & recreation league or school district qualify for an exception, but private youth sports organizations do not.

Under **SB 809**, companies would be prohibited from considering conviction history in the following scenarios:

- Home delivery: there are many industries in which deliveries are made directly to a customer's home address such as food delivery, furniture delivery, and more. Not only do delivery personnel have access to the customer's personal address, but in some circumstances, they are entering customers' homes or receiving payment from the customer at their home, leaving the customer in a vulnerable position.
- Access to sensitive personal information: as technology improves and more transactions take place online or in software platforms, there are many positions in which employees have access to sensitive personal information. This is not limited to regulated industries like banks. For example, IT personnel often have access to a large breadth of private data within a company. An IT employee or contractor dealing with consumer-facing software will inevitably have access to consumer information in carrying out their duties and will also have access to sensitive company information that could be easily misappropriated. Consumers are relying on companies offering these services to keep their data secure and private. **SB 809** is at odds with California's strict laws related to data

privacy because it removes a company's ability to reject an applicant or employee who may pose a risk to that privacy.

- Vulnerable populations: employers that manage accommodations open to the public often have employees who regularly interact with vulnerable populations, such as children or the elderly. It is critical for an employer to know if an employee has committed acts in the past against children or the elderly or has any tendencies towards violence.
- Hospitality: Employees in the hospitality industry regularly interact with customers, sometimes on a one-on-one basis. Consider a hotel, where employees have keys to rooms and may be regularly entering a guest's room for food service or maintenance. Hotels would not be permitted to consider conviction history under **SB 809**.

Certain Convictions Are Relevant to Every Workplace

It is every employer's goal to create a safe working environment for their workers and customers. Prohibiting an employer from becoming aware of or reacting to convictions for violent crimes, sex offenses, theft, or other serious crimes can undermine that goal. Not only does **SB 809** prohibit most employers from conducting a background check, but proposed Government Code section 12954.2.02 also prohibits an employer from considering conviction history even if voluntarily disclosed to the employer, publicly available online, or otherwise made known to the employer. This puts an employer in an impossible position of knowing that an applicant or existing employee up for promotion has in fact committed a violent crime and not being able to consider it at all, potentially putting both fellow employees and customers at risk. Further, proposed sections 12954.2.02(a)(4)(A), 12954.2.04, and 12954.2.05 provide that an employer could not terminate an existing employee or contractor upon learning that they committed a violent crime or other serious offense that could undermine workplace safety. While we agree that one prior act is not conclusive that a person would commit a second offense, these are important considerations employer should be able to evaluate in light of the nature of the position.

Last year, this Legislature passed SB 731 (Durazo), which expanded automatic review and granting of record relief to felony arrest records and additional convictions. Due to similar concerns that were raised, an amendment was added excluding serious, violent, and sex felonies from automatic relief. Similar considerations must be given here, especially considering that an incident at the workplace could be preventable if the employer was allowed to know or react to a person's past tendency towards serious or violent crime. This is why the existing California Fair Chance Act strikes the correct balance in our view: it allows employers to become aware of these prior offenses but puts guardrails on when they are permitted to know and when they can use such an offense as a reason to deny employment.

Proposed Section 12954.2.02(a)(10) Makes Compliance Impossible

For employers who are permitted to run background checks pursuant to 12954.2.02(b), section 12954.2.02(a)(10) provides that they cannot take an adverse action against someone on the basis of delay in obtaining or failure to obtain information regarding the person's conviction history. An adverse action could include not hiring someone or denying a promotion.

This is impossible to comply with because delays or failures to complete background checks are out of an employer's control. This is true now more than ever in light of the background check delays caused by *All of Us or None of Us- Riverside Chapter v. Hamrick*, 64 Cal. App. 5th 751 (2021). That case prohibited searching records by drivers' license numbers or date of birth, which are necessary to filter records between people with the same name. It has become nearly impossible in certain counties to decipher which records pertain to the applicant and which pertain to a different person with the same name.[1] Employers are experiencing delays of up to 8-12 weeks in hiring, with some background checks being returned as incomplete. Proposed section 12954.2.02(a)(10) essentially says that if there is a delay or the background

[1] According to the 2010 Census Data, over 14 million people in the United States share the top ten most common last names.

check cannot be completed, that cannot be a basis on which to reject an applicant or promotion. Not only are these delays or incomplete checks out of the employer's control, but this means that employers covered by the exceptions in subsection (b) would be required to disobey whichever statute or law is placing a restriction on who can be hired for a specific position. This section is therefore impossible to comply with and forces employers to violate other laws.

Proposed Section 12954.2.02 Will Cause Unnecessary Hiring Delays

Under current law, employers who are required to conduct background checks or to restrict employment based on criminal history need not wait until after a conditional offer to consider conviction history. This makes sense because if a law clearly states that someone who has been convicted of fraud may not work in a certain position, then the employer and applicant should know as soon as possible whether a prior conviction is disqualifying. Proposed Section 12954.2.02 instead would require the applicant to continue through the entire interview process just to discover that they are legally not allowed to hold that position. This will lead to delays in hiring and is not beneficial to the applicant seeking the job.

Several Provisions of the Individualized Assessment Portion of the Bill Are Not Feasible

- **Requiring all individualized assessments to be in writing:** Under the existing California Fair Chance Act, the employer may, but is not required to, explain its reasoning for denying an applicant in writing. That portion of the statute was the result of stakeholder and legislator concerns regarding liability. **SB 809** would require an explanation in writing, which could be used in litigation or enforcement actions. This is problematic, especially for smaller businesses with no legal counsel whose written statements will be picked apart by counsel in court.
- **Presumption**: Proposed section 12954.2.03(c)(1) provides that if the applicant is not currently incarcerated or has completed a sentence for the conviction, there is a presumption that there is no direct and adverse relationship between the applicant's conviction and the applicant does not pose a risk to public safety. It is likely that this presumption would apply to most applicants. Therefore, this presumption effectively makes it impossible for an employer to disqualify an applicant for a position. This provision essentially renders the portion of the bill allowing for an individualized assessment meaningless. And as discussed above, someone with a conviction of a violent crime would be considered not to pose a risk to public safety under this provision.
- **Excusing failure to provide documentation**: Proposed section 12954.2.03(e)(3) provides that if the applicant fails to provide any documentation or information in response to the preliminary decision, the employer cannot use that as a basis to disqualify the applicant from employment or promotion. In effect, this means that the applicant can dispute the decision with no supporting evidence and the employer must acquiesce. While in some circumstances we understand it may be difficult to obtain documentation, to excuse providing documentation in every instance means an employer has no ability to question the validity of the applicant's response.

SB 809's Penalty Structure is Unnecessarily Punitive

SB 809 provides for civil penalties for "each violation" of the proposed statute. The proposed statute is a myriad of complex requirements where it is easy for any employer to accidently misstep. To levy a penalty for every possible small violation could expose an employer to tens of thousands of dollars in penalties. Further, it is unclear whether a "second" violation penalty is triggered by two mistakes regarding the same applicant or a second applicant. The former would exacerbate liability quickly, resulting in exceptionally high penalties.

Further, proposed section 12954.2.09's structure regarding when payments are due, the bond process, and judgments is overly prescriptive with infeasible timelines. A violation of one of those short timelines could result in the employer owing their assessed liability plus the cost of the required bond. This includes situations where they parties have entered into a settlement agreement, which often provide far more than

ten days to issue payment due to the time it may take a company's financial department to process and issue the required amounts.

For these and other reasons, we respectfully **OPPOSE SB 809** as a **JOB KILLER.**

Sincerely,

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