SB 1345 (SMALLWOOD-CUEVAS) – OPPOSE/JOB KILLER

April 4, 2024

TO: Members, Senate Judiciary Committee

SUBJECT: SB 1345 (SMALLWOOD-CUEVAS) EMPLOYMENT DISCRIMINATION: CRIMINAL HISTORY INFORMATION
OPPOSE/JOB KILLER – AS AMENDED MARCH 20, 2024

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE SB 1345 (Smallwood-Cuevas)** as a **JOB KILLER.** The California Fair Chance Act strikes a careful balance between removing barriers to the workforce for workers with a conviction history and the need to consider that history for certain job positions. **SB 1345** would eliminate employers' ability to run a background check or consider conviction history unless they meet one of the narrow exceptions, even if that conviction history is voluntarily disclosed to them or widely publicized. While we appreciate the intent behind **SB 1345**, the potential unintended consequences could have a significant impact on employees and customers.

SB 1345'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 1345** are significant. Outside of showing a "business necessity," which would be a difficult bar to meet as discussed below, the only other exception is those employers that are required to conduct a background check or consider conviction history by law. That tends to only apply to 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 1345**'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 1345**, companies would effectively 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 financial institutions. 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 1345** 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 may not be permitted to consider conviction history under **SB 1345**'s high bar.

The Burden Established Under SB 1345 is So High that It Effectively Bans Background Checks Unless the Employer is Required by Law to Conduct Them

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.

SB 1345 layers on a brand new law that effectively makes it impossible to run a background check or consider its contents during hiring, over the course of employment, or while working with someone on contract.

Under **SB 1345**, an employer is prohibited from requiring authorization to conduct a background check or otherwise taking any action relating to a job applicant, current employee, or independent contractor based on conviction history unless they can show a "business necessity". As defined, this would be such a high burden that it would likely be impossible to satisfy or, if a business tried, they would face litigation.

The company would need to show "clear and convincing evidence" that not hiring someone or not promoting them was necessary to protect against incidents of workplace harassment, violence, or theft of business property[1] and there was "no reasonable alternative." Typically, when a party has the burden of proving something is true, the standard is preponderance of the evidence. Clear and convincing evidence is a higher burden used in rare circumstances. It means the party with the burden must show that it is *highly probable* that the fact is true.[2] Clear and convincing evidence is rarely used in employment law and for good reason. To impose such a high burden of proof on an employer any time they make a personnel decision would inhibit their ability to adequately address workplace issues and open them up to endless litigation. The employer would have to meet this high burden to show that the action was both necessary and that there was no reasonable alternative.

SB 1345's high burden of establishing a business necessity opens the door for every decision to be challenged under the theory of what is "necessary" or whether there was a reasonable alternative available. Protecting employees and consumers from theft, harassment, or violence is a decision employers take seriously. Employers must make the best decision they can based on information available at the time about possible events that may occur if they hire or promote someone. The "clear and convincing evidence" standard would prevent employers from exercising appropriate diligence to protect other employees, customers, or members of the public. Employers should have the discretion to consider the safety and well-being of other employees or customers when making personnel decisions, based on the duties of the potential hired or promoted individual – even without explicit evidence concerning that specific individual. Putting the burden on the employers to meet a "clear and convincing evidence" standard is too high a bar to provide them with the both the moral comfort and legal protection should some unfortunate but foreseeable event occur.

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[1] This appears to apply only to theft of the *employer's* property, not a customer's property, which is a concern.

[2] See CACI No. 201 – Highly Probable – Clear and Convincing Evidence; Ninth Circuit Manual of Model Civil Jury Instructions 1.7 Burden of Proof – Clear and Convincing Evidence ("When a party has the burden of proving any claim or defense by clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true."}

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 1345** effectively prohibit most employers from conducting a background check, but there is no exception even if the information is 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, the employer may not be able to 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. If an employer was aware of a prior violent offense but believed they were unable to consider it under the law and an incident later happened, there could be a question as to whether the employer is liable for negligent hiring or not providing a safe workplace.

In 2022, 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.

SB 1345 Expands Restrictions on the Use of Conviction History to Independent Contractors

SB 1345 applies the same rules to independent contractors as it does employees. Similar to with employees, there may be situations in which a company should consider conviction history in deciding whether to hire a contractor. Independent contractors by definition are not under the same level of control as an employee. They may go in and out of a company's site as they wish, have access to customer information without supervision, or interact with customers. If a company becomes aware of a contractor's conviction history, they should be able to consider it.

Requiring the Employer's Assessment to be in Writing is Problematic, Especially for Small Businesses

Under existing law, 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 1345** would require an explanation of its position that it satisfies the "business necessity" requirement in writing. The concern here is that this would be used in litigation or enforcement actions. Because of the high clear and convincing evidence burden, this piece of writing would effectively need to be legally perfect. This is problematic, especially for smaller businesses with no legal counsel whose written statements will be picked apart by counsel in court.

For these and other reasons, we respectfully **OPPOSE SB 1345** as a **JOB KILLER.**

Sincerely,

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AH:am