



**Transmitted via Electronic Mail**

October 6, 2026

**Kevin Kish, Director**

Civil Rights Department

State of California

651 Bannan Street, Suite 200

Sacramento, CA 95811

contact.center@calcivilrights.ca.gov

**Re: Complaint Against Criteria Corporation**

Dear Director Kish:

The American Civil Liberties Union (“ACLU”) Foundation and the ACLU Foundation of Northern California respectfully submit this complaint to the California Civil Rights Department (“the Department”) urging an investigation of Criteria Corporation (“Criteria”)’s development, sale, and administration of discriminatory assessments for hiring and other employment processes.

In particular, one of Criteria’s products is Emotify, an employment assessment purporting to test for “emotional intelligence” and “a candidate’s ability to perceive, understand, and manage emotions.”<sup>1</sup> Part of Emotify’s test displays images of faces and descriptions of emotions and asks candidates to identify if the faces match the given descriptors. Both with respect to the tasks Emotify utilizes and constructs that Emotify purports to assess, Emotify closely mirrors clinical assessments for autism and related neurodevelopmental conditions.

Emotify raises serious concerns under California’s Fair Employment and Housing Act (“FEHA”). First, Emotify parallels clinical diagnostic tools for autism so closely that it constitutes a disability-related inquiry or medical or psychological examination, which is prohibited by state law before an employment offer is made. Second, even if Emotify did not constitute a prohibited inquiry or medical examination, Emotify tends to screen out and disparately impact individuals with autism or other related conditions for non-job-related reasons. This violates state disparate impact prohibitions. Finally, Emotify fails to provide applicants with sufficient information to gauge whether to ask for an accommodation or

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<sup>1</sup> *Emotify Emotional Intelligence Assessment*, CRITERIA CORP., <https://www.criteriacorp.com/assess/emotional-intelligence/emotify> [<https://perma.cc/5NRQ-RLMD>] (last visited Aug. 31, 2026) [hereinafter *Emotify Assessment*].

alternative assessment. Emotify’s insufficient mechanism for facilitating accommodation requests or implementing alternative assessment methods makes it likely that neither Criteria nor employers who use its products are meeting reasonable accommodation obligations under state law.

Emotify is not the only Criteria product that raises concern. Criteria markets several products that discriminate based on disability, race, gender and other protected characteristics.

Criteria acts as an agent of employers under FEHA, and its products reflect a broader pattern in which emerging hiring technologies risk replicating or amplifying discrimination. California has long been a national leader in workplace equity and innovation, and hiring products with Emotify’s problems—that is, disproportionately screening out protected classes for non-job-related reasons and making targeted disability-related inquiries—undermine both the letter and spirit of California’s robust civil rights protections.

We ask that the Department investigate Criteria and its products detailed in this complaint pursuant to Cal. Code Regs. Tit. 2, § 10012. We would welcome a meeting with the Department to discuss this complaint and provide additional information about our investigation.

## **I. Background on Criteria and Emotify**

Criteria is a corporation organized and existing under the laws of the State of California, with its principal place of business in California. Criteria’s products are used by California employers as well as employers based elsewhere hiring for remote positions which include applicants from California. Criteria touts that its services are used by more than 4000 organizations.<sup>2</sup>

One of Criteria’s products is Emotify, a pre-employment assessment that claims to measure “emotional intelligence,” a purported measure of the “ability to perceive, understand and manage emotions.”<sup>3</sup>

Criteria markets to employers that they can “[u]se Emotify for any role, especially when interpersonal interaction is an important factor.”<sup>4</sup> Criteria’s website specifically recommends the product for “[a]ny jobs that require strong interpersonal, collaboration, and leadership skills” and notes that it is ideal for “managers, future leaders, graduate recruitment, sales, customer service, and roles that require emotional labor.”<sup>5</sup> Online discussion forums and our own investigation reflect its broader use for a wide range of job roles, such as software engineer, financial analyst,

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<sup>2</sup> *About Criteria*, CRITERIA CORP., <https://www.criteriacorp.com/about-us> [<https://perma.cc/TE3V-5ZRA>] (last visited Aug. 31, 2026).

<sup>3</sup> *Emotify Assessment*, *supra* note 1.

<sup>4</sup> *Emotify Emotional Intelligence Assessment Overview*, CRITERIA CORP., <https://www.criteriacorp.com/files/Criteria-Overview-Emotify.pdf> [<https://perma.cc/729K-KHDG>] (last visited Aug. 31, 2026) (emphasis added).

<sup>5</sup> *Emotify Assessment*, *supra* note 1.

and website designer roles. According to Criteria’s case studies, Emotify has been used by employers internationally in financial services, healthcare, insurance, human resources, professional services, digital marketing, and the automotive industry.<sup>6</sup>

Emotional intelligence assessment products like Emotify are a facet of the growing personality assessments industry, with 80% of Fortune 500 companies using personality tests, which sometimes incorporate emotional intelligence components.<sup>7</sup> As described below, because personality and emotional intelligence assessments used in employment assess constructs that overlap with autism and related neurodevelopmental conditions, they are inherently likely to violate anti-discrimination laws.<sup>8</sup> However, the manner in which Emotify assesses emotional intelligence—through an ability assessment that requires matching images of facial expressions to descriptions of emotions—is rare in the employment assessment context and raises particular risks of disability discrimination.

Emotify contains three parts: (1) “Matching Faces,” which purports to measure emotional perception; (2) “Emotional Ties,” which purports to measure emotional understanding; and (3) “Emotions in Action,” which purports to measure emotion management.<sup>9</sup>

Several parts of the assessment use facial expressions that are intended to depict varying emotions and are shown at different intensities. The literature on autism and facial emotion recognition generally characterizes “high-intensity expressions” as those that involve more

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<sup>6</sup> See *Fleetcare Future-Proof with Criteria's Emotify*, CRITERIA CORP., <https://www.criteriacorp.com/case-study/fleetcare-future-proof-criterias-emotify> [<https://perma.cc/ZDZ8-B99B>] (last visited Sep. 3, 2026); *How Emotify Helps CBHC Improve Patient Care with Emotional Intelligence*, CRITERIA CORP., <https://www.criteriacorp.com/case-study/how-emoji-helps-cbhc-improve-patient-care-emotional-intelligence> [<https://perma.cc/9L2X-S7JL>] (last visited Sep. 3, 2026); *Financial Institution Improves Recruitment Outcomes with Cognify and Emotify*, CRITERIA CORP., <https://www.criteriacorp.com/case-study/financial-institution-improves-recruitment-outcomes-cognify-and-emoji> [<https://perma.cc/D7FB-BQPQ>] (last visited Sep. 3, 2026); *Gallagher Bassett Optimizes Hiring with Assessments*, CRITERIA CORP., <https://www.criteriacorp.com/case-study/gallagher-bassett-optimizes-hiring-assessments> [<https://perma.cc/8DW7-TKH4>] (last visited Sep. 29, 2026); *G&A Partners Gains Valuable Insights into their Candidates with Criteria*, CRITERIA CORP., <https://www.criteriacorp.com/case-study/ga-partners-gains-valuable-insights-their-candidates-criteria> [<https://perma.cc/QT8T-FL37>] (last visited Sep. 29, 2026); *Professional Services Firm Hires More Diverse and Higher Performing Employees*, CRITERIA CORP., <https://www.criteriacorp.com/case-study/professional-services-firm-hires-more-diverse-and-higher-performing-employees> [<https://perma.cc/XQ49-H3DM>] (last visited Sep. 29, 2026); *Digital Marketing Agency Predicts Call Center Sales Rep Success*, CRITERIA CORP., <https://www.criteriacorp.com/case-study/digital-marketing-agency-predicts-call-center-sales-rep-success> [<https://perma.cc/95QC-BB3H>] (last visited Sep. 29, 2026) [hereinafter collectively, *Case Studies*].

<sup>7</sup> See, e.g., Vanessa Leikvoll, *80% of Fortune 500 Companies Use Personality Tests, But Are They Ethical?*, LEADERS, <https://leaders.com/articles/business/personality-tests/> [<https://perma.cc/92XG-ULYJ>] (last visited Aug. 31, 2026); see also Complaint from the Am. Civ. Liberties Union Found. to the Fed. Trade Comm’n Against Aon Consulting (May 2024), <https://www.aclu.org/documents/aclu-complaint-to-the-ftc-regarding-aon-consulting-inc> [<https://perma.cc/24CJ-F9PW>] [hereinafter *Complaint Against Aon Consulting*] (discussing personality assessment incorporating emotional intelligence component).

<sup>8</sup> See *infra* at II.A.b, B.a, III; see also *Complaint Against Aon Consulting*, *supra* note 7.

<sup>9</sup> *Emotify Assessment*, *supra* note 1.

exaggerated displays of emotion, while “low-intensity expressions” involve more subtle displays of emotion that are more difficult to recognize.<sup>10</sup>

In Emotify’s Task 1, “Matching Faces,” the candidate is shown images of people’s faces with a word describing an emotion and is asked whether the word and the face match. The test consists of 30 rounds, and each round has a 3 second time limit. If candidates do not answer the question within the time, a pop-up emerges saying “Time’s Up!” “Matching Faces” claims to test emotions ranging from “neutral,” “happiness,” “fear,” “surprise,” “anger,” “disgust,” “contempt,” and “sadness.” The faces generally appear to depict high-intensity expressions.

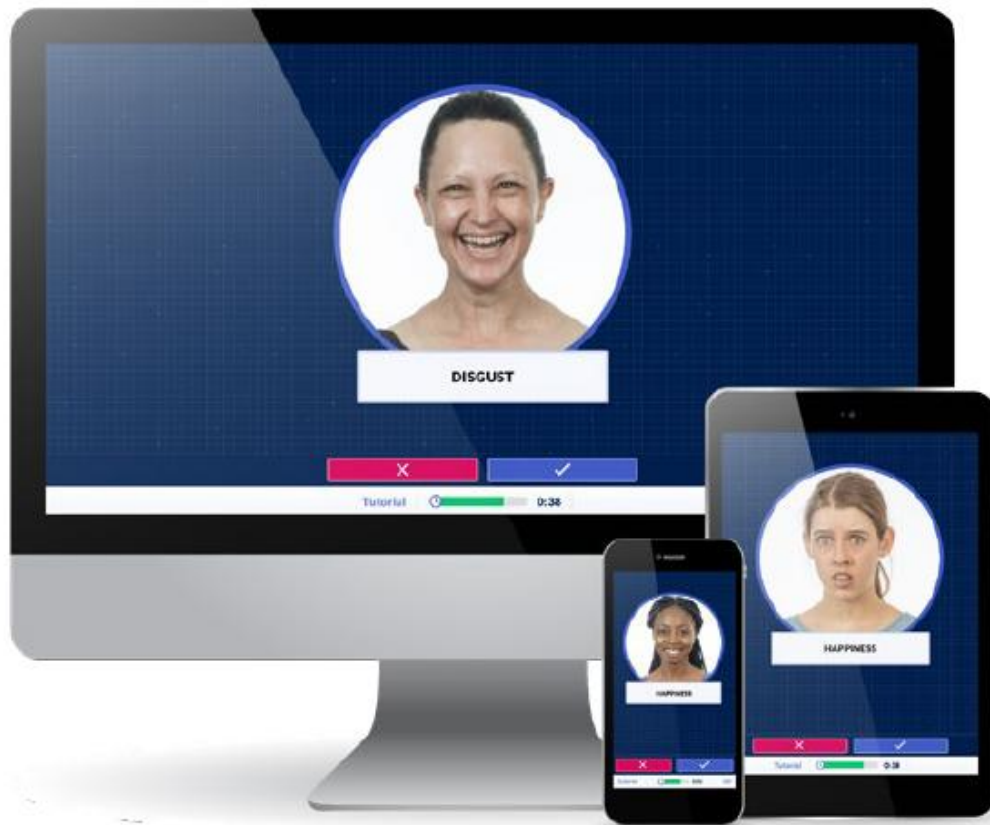
General feedback of the candidate’s performance as “Okay,” “Good,” “Great,” or “Excellent” is provided at the end of the “Matching Faces” task.

The following are images from the Matching Faces task:<sup>11</sup>

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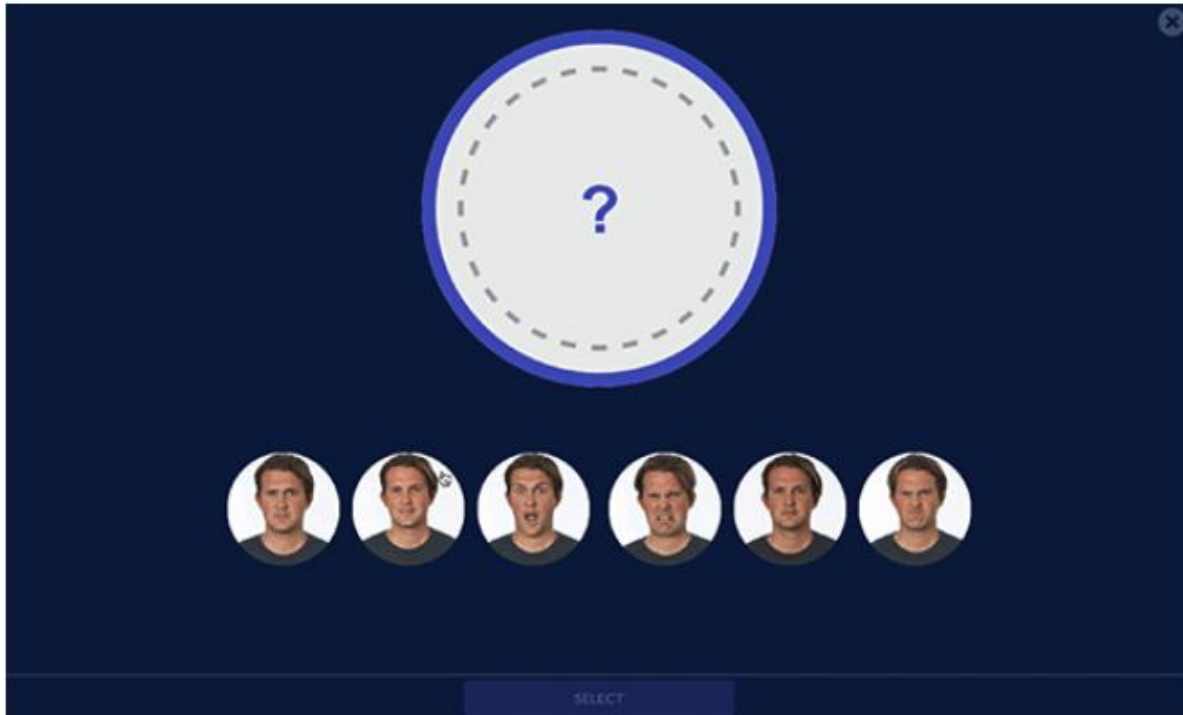
<sup>10</sup> High-intensity expressions involve more exaggerated displays of emotion, while low intensity expressions involve more subtle displays of emotion. See, e.g., Sarah Griffiths et al., *Impaired Recognition of Basic Emotions from Facial Expressions in Young People with Autism Spectrum Disorder: Assessing the Importance of Expression Intensity*, 49 J. AUTISM & DEV. DISORDERS 2768 (Mar. 2017), <https://link.springer.com/article/10.1007/s10803-017-3091-7> [<https://perma.cc/49GC-7APT>]; Ruth B. Grossman & Helen Tager-Flusberg, “Who said that?” *Matching of low- and high-intensity emotional prosody to facial expressions by adolescents with ASD*, 42 J. AUTISM & DEV. DISORDERS 2546, 2548 (Mar. 2012), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3540415/> [<https://perma.cc/LDG5-KXFW>]. Low-intensity expressions offer fewer emotional cues, are more difficult to recognize, and involve slower response times than more intense expressions. See, e.g., Tanja S. H. Wingenbach, Chris Ashwin & Mark Brosnan, *Validation of the Amsterdam Dynamic Facial Expression Set – Bath Intensity Variations (ADFES-BIV): A Set of Videos Expressing Low, Intermediate, and High Intensity Emotions*, PLOS ONE at 1, 14–20 (Jan. 2016), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0147112> [<https://perma.cc/CA6X-N8WM>].

<sup>11</sup> All of the images and much of the information regarding Criteria’s products, including Emotify, come from Criteria’s online and publicly-available resources. In addition, we conducted limited testing of our own to further our investigation into potential discriminatory practices. Some information on the details of Emotify derives from our own testing efforts.



In Emotify’s Task 2, “Emotional Ties,” the candidate reads a short description of a situation and selects an image of a facial expression among an array of expressions that matches how the person in the situation would be feeling. The task consists of two parts with a total of 10 rounds. In Part 1 of “Emotional Ties,” which consists of four rounds, two situations about a person are provided. Given a set of six images of the same person, the candidate then must decide how the person in the situation would be feeling and match each situation with an image. The same image cannot be used for the two situations. Candidates are given one minute for each of these first four rounds, and faces generally appear to depict low-intensity expressions.

The following are “Emotional Ties,” Part 1 images:



Part 2 of “Emotional Ties” consists of six rounds of additional situational emotion questions. In each round, three descriptions of situations are provided, and each situation involves a different person, indicated by their name. Given a set of six images of different people, the candidate then must match each situation with an image. The same image cannot be used for the three situations. Candidates are again given one minute for each round and faces generally appear to depict low-intensity expressions and are varied across perceived age and race.

In Emotify’s Task 3, “Emotions in Action,” the candidate reads scenarios within a larger narrative and selects the best response for managing emotions. The task asks the candidate to imagine that they are about to start a new job and are asked how they would manage their own emotions and those of others in certain situations. Candidates are given one minute per round, and are asked questions like “What should you do/say to help \_\_\_ feel better?” and “What should you think to feel less overwhelmed/embarrassed/stressed/angry?” Candidates must then select one answer from a set of four multiple-choice options.

## **II. How Emotify Illegally Discriminates Against Neurodiverse Candidates**

Emotify is discriminatory in violation of three distinct but overlapping theories of liability under California’s FEHA.<sup>12</sup>

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<sup>12</sup> This complaint discusses specific requirements of FEHA, and also addresses legal requirements of the Americans with Disabilities Act (“ADA”), which can aid in the interpretation of corresponding provisions of FEHA.

First, Emotify functions as an unlawful disability-related inquiry and/or medical or psychological examination because it measures an applicant’s capacity to perceive, interpret, and regulate emotional cues—abilities that are closely tied to recognized diagnostic criteria for neurodevelopmental conditions, including autism—and does so through a test that closely resembles diagnostic tools. By probing these mental and psychological processes, Emotify elicits information that is inextricably linked to protected disability status. Disability-related inquiries and medical or psychological examinations are strictly prohibited prior to an employer making an offer of employment. Under FEHA and analogous provisions of the ADA, employers may not use pre-offer hiring assessments that are reasonably likely to elicit information about a mental disability or psychological condition.

Second, even if Emotify was not found to be a prohibited disability-related inquiry and/or medical or psychological examination, its use independently has an unlawful disparate impact on individuals with autism and related conditions. The structure of Emotify’s assessment—particularly its reliance on rapid identification of subtle or low-intensity expressions and normative judgments about emotional responsiveness—systematically disadvantages and screens out individuals whose neurological profiles affect social communication and emotional processing. As a result, the product disproportionately screens out qualified applicants with disabilities, absent any showing that these specific testing criteria are job-related and justified by business necessity.

Third, based on Emotify’s design and the information provided to employers and applicants, Criteria and employers utilizing Emotify are likely not meeting legal obligations for providing reasonable accommodations. Criteria is well aware of Emotify’s discriminatory impacts—admitting so in its own “Accessibility Quick Guide”<sup>13</sup>—yet does not provide applicants with that information or an apparent mechanism within Criteria’s systems to request accommodations, instead providing them with only general information about Emotify and telling applicants needing an accommodation to contact employers for assistance. This is legally insufficient.

## **A. Disability-Related Inquiry/Medical or Psychological Examination**

### **a. Disability-Related Inquiries and Medical or Psychological Examinations Are Unlawful Pre-Offer**

Under FEHA, employers are prohibited from conducting disability-related inquiries or medical or psychological examinations of applicants prior to a conditional offer of employment.<sup>14</sup> While an employer “may inquire into the ability of an applicant to perform job-

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<sup>13</sup> See *Accessibility Quick Guide*, CRITERIA CORP., 3 (2021), <https://www.criteriacorp.com/files/CriteriaAPAC-AssessmentGuide-Accessibility.pdf> [<https://perma.cc/MR63-KSYT>].

<sup>14</sup> CAL. GOV. CODE § 12940(e)(1) (2025).

related functions,” FEHA specifically makes it unlawful for an employer “to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition.”<sup>15</sup>

California regulations also state that “[i]t is unlawful for an employer or other covered entity to conduct a medical or psychological examination or inquiries of an applicant before an offer of employment is extended to that applicant.”<sup>16</sup> A “medical or psychological examination” is defined in the regulations as “a procedure or test performed by a health care provider that seeks or obtains information about an individual’s physical or mental disabilities or health.”<sup>17</sup> Regulations do not specifically define a disability-related inquiry. But a medical or psychological examination or a disability-related inquiry “may include a test, question, puzzle, game, or other challenge that is likely to elicit information about a disability.”<sup>18</sup>

The ADA similarly bars pre-offer disability-related inquiries and medical examinations.<sup>19</sup> Prior to a conditional offer of employment, “a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”<sup>20</sup> Instead, a covered entity may only make pre-offer inquiries “into the ability of an applicant to perform job-related functions.”<sup>21</sup> The Equal Employment Opportunity Commission (“EEOC”) defines a disability-related inquiry as “a question (or series of questions) that is likely to elicit information about a disability,”<sup>22</sup> and includes both direct questions about whether someone has a disability and “questions that are closely related to disability.”<sup>23</sup> The ADA also prohibits subjecting job applicants to pre-offer medical examinations, which the EEOC defines as “a procedure or test that seeks information about an individual’s physical or mental impairments or health.”<sup>24</sup> EEOC guidance states that “[p]sychological examinations are medical if they provide evidence that would lead to

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<sup>15</sup> *Id.* § 12940(e)(1), (2).

<sup>16</sup> 2 CAL. CODE REGS. tit. 2, § 11071(a) (2025).

<sup>17</sup> *Id.* § 11065(m).

<sup>18</sup> *Id.* § 11071(e).

<sup>19</sup> *See* 42 U.S.C. § 12112(d)(2)(A).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 12112(d)(2)(B); *see also* 29 C.F.R. §§ 1630.13(a), 1630.14(a).

<sup>22</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2000-4, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (July 26, 2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees> [<https://perma.cc/KE7C-Q2FD>] [hereinafter *Enforcement Guidance 2000*]; *see also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-1995-3, ENFORCEMENT GUIDANCE ON PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (Oct. 10, 1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical> [<https://perma.cc/K5G7-VSZZ>] [hereinafter *Enforcement Guidance 1995*].

<sup>23</sup> *Enforcement Guidance 1995*, *supra* note 22.

<sup>24</sup> *Enforcement Guidance 2000*, *supra* note 22; *Enforcement Guidance 1995*, *supra* note 22; 42 U.S.C. § 12112(d)(2)(A).

identifying a mental disorder or impairment,” providing one example of a hypothetical test “which reflects whether applicants have characteristics that lead to identifying whether the individual has excessive anxiety, depression, and certain compulsive disorders (DSM-listed conditions).”<sup>25</sup> By contrast, a test is not a medical examination if it “is designed and used to measure only things such as honesty, tastes, and habits.”<sup>26</sup> Under both state and federal law, disability-related inquiries and medical or psychological examinations are strictly prohibited prior to an offer of employment.<sup>27</sup> Neither law provides a business necessity defense for such inquiries before an offer of employment is made.

#### **b. Emotify Parallels Standard Clinical Tests for Neurodevelopmental Conditions**

Emotify constitutes a medical or psychological examination and/or a disability-related inquiry under both state and federal law. Emotify does not ask questions limited to the ability to perform job-related functions or even measure simple personality traits such as “honesty,” “tastes,” and “habits.”<sup>28</sup> Instead, the answers that job applicants provide to Emotify test questions are likely, individually and in the aggregate, to provide information about a disability. That is sufficient to make Emotify a prohibited disability-related inquiry. Likewise, because Emotify tests for constructs that correspond with autism and uses inquiries that closely mirror tools used diagnostically in clinical settings, Emotify constitutes an unlawful medical or psychological examination.

Emotify is specifically designed to measure emotional perception, social interpretation, emotional regulation, and interpersonal processing abilities that are closely associated with a core cluster of characteristics in the medical understanding of autism. Autism is a neurodevelopmental condition characterized by differences in communication, social interaction, sensory processing, and behavioral expression. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5-TR) identifies “[p]ersistent deficits in social communication and social interaction” as a core diagnostic domain of autism, including differences in “social-emotional reciprocity” and “nonverbal communicative behaviors used for social interaction,” such as facial expression and eye contact.<sup>29</sup> Autistic people are thus known to have differences in various aspects of “emotional intelligence,” including perceiving emotions, using emotions, understanding emotions, and managing emotions, which directly correlate with what Emotify is

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<sup>25</sup> *Enforcement Guidance 1995*, *supra* note 22.

<sup>26</sup> *Id.*

<sup>27</sup> 2 CAL. CODE REGS. tit. 2, § 11071(a) (2025); 42 U.S.C. § 12112(d)(2)(A).

<sup>28</sup> *See Enforcement Guidance 1995*, *supra* note 22.

<sup>29</sup> AM. PSYCHIATRIC ASS’N, *Autism Spectrum Disorder Diagnostic Criteria*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5-TR 56, 56–57 (5th ed. 2022) [hereinafter *Autism Spectrum Disorder Diagnostic Criteria*].

measuring.<sup>30</sup> And notably, autistic people can receive lower scores than allistic (non-autistic) individuals on assessments testing the perception of facial expressions from images, especially for low-intensity expressions and under strict time constraints.<sup>31</sup>

Criteria claims that Emotify is based on the Mayer-Salovey-Caruso ability-based model of emotional intelligence, which was used to create the Mayer-Salovey-Caruso Emotional Intelligence Test (“MSCEIT”). A comparison of Emotify and MSCEIT reveals that the two assessments share many similarities. Like Emotify, MSCEIT evaluates the ability to perceive, understand, and manage emotions by presenting images of facial expressions, and several parts of Emotify mirror MSCEIT components.<sup>32</sup> Emotify’s Task 1, “Matching Faces,” closely tracks the MSCEIT Identifying Emotions component, as both involve matching emotions to a facial expression.<sup>33</sup> Emotify’s Task 3, “Emotions in Action,” mirrors the MSCEIT Managing Emotions component, as both involve regulating emotions in oneself and others.<sup>34</sup> The MSCEIT Managing Emotions component is used in the Measurement and Treatment Research to Improve Cognition

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<sup>30</sup> Compare, e.g., John D. Mayer et al., *The Ability Model of Emotional Intelligence: Principles and Updates*, 8 EMOTION REV. 1, 6 (Aug. 2016), [https://scholars.unh.edu/cgi/viewcontent.cgi?article=1319&context=psych\\_facpub](https://scholars.unh.edu/cgi/viewcontent.cgi?article=1319&context=psych_facpub) [<https://perma.cc/J6F9-7C8G>] (describing the “Four-Branch Model of Emotional Intelligence” as involving the following abilities: “(a) perceiving emotions . . . (b) facilitating thought by using emotions, (c) understanding emotions, and (d) managing emotions in oneself and others”) (citation omitted), with *Autism Spectrum Disorder Diagnostic Criteria*, *supra* note 29, at 56–58 (listing “[p]ersistent deficits in social communication and social interaction” as a cluster of diagnostic criteria for autism, including in “social-emotional reciprocity,” “nonverbal communicative behaviors used for social interaction,” and “developing, maintaining, and understanding relationships”).

<sup>31</sup> See Miriam J. Law Smith et al., *Detecting subtle facial emotion recognition deficits in high-functioning autism using dynamic stimuli of varying intensities*, 48 NEUROPSYCHOLOGIA 2777 (Jul. 2010), <https://pubmed.ncbi.nlm.nih.gov/20227430/>; Maryam Masoomi et al., *Emotion recognition deficits in children and adolescents with autism spectrum disorder: a comprehensive meta-analysis of accuracy and response time*, FRONTIERS CHILD & ADOLESCENT PSYCHIATRY, 1 (Jan. 2025), <https://doi.org/10.3389/frcha.2024.1520854> [<https://perma.cc/MN8A-8GCJ>]; Eva Loth et al., *Facial expression recognition as a candidate marker for autism spectrum disorder: how frequent and severe are deficits?*, MOLECULAR AUTISM, 1 (Jan. 2018), <https://doi.org/10.1186/s13229-018-0187-7> [<https://perma.cc/73SX-AFSN>].

<sup>32</sup> *Emotional Intelligence and Game-Based Assessment: The Perfect Fit*, REVELIAN, 8, [https://au.res.keymedia.com/files/file/HCA/REVELIAN\\_EI-and-Game-Based-Assessment\\_whitepaper.pdf](https://au.res.keymedia.com/files/file/HCA/REVELIAN_EI-and-Game-Based-Assessment_whitepaper.pdf) [<https://perma.cc/YR44-FV3F>] (last visited Aug. 31, 2026); *Emotify Information Brief*, CRITERIA CORP., 4 (2025), <https://www.criteriacorp.com/files/Criteria-InfoBrief-Emotify.pdf> [<https://perma.cc/4N49-LVZE>] (describing “Criteria’s approach to assessing EI [emotional intelligence] has been guided by the ability-based model first proposed by two prominent EI researchers, Mayer and Salovey in 1997.”).

<sup>33</sup> Mike Gosling, *Mayer-Salovey-Caruso Emotional Intelligence Test*, 5, <https://mikegosling.com/pdf/MSCEITDescription.pdf> (last visited Oct. 1, 2026).

<sup>34</sup> *Id.* at 8–10.

in Schizophrenia (“MATRICS”) battery<sup>35</sup>, and both the MSCEIT and the MATRICS battery are used in treatment evaluation for schizophrenia research<sup>36</sup> and sometimes for autism research.<sup>37</sup>

Notably, Emotify is also strikingly similar to screening tools commonly used by clinicians to screen or assess for autism.

As one example, Emotify closely parallels the Social Perception Domain of NEPSY-II, an assessment “created to enhance the assessment of children with autism spectrum disorders.”<sup>38</sup> According to NEPSY-II’s “Design and Purpose” guide, NEPSY-II measures skills needed to understand other people’s feelings and perceptions and “is important for the diagnosis . . . of a number of disorders including Asperger’s Disorder and Autistic Disorder.”<sup>39</sup> NEPSY-II’s Social Perception Domain includes two subtests: “Affect Recognition” (“AR”) tasks and “Theory of Mind” (“TOM”) tasks<sup>40</sup> that have significant overlap with Emotify.

Emotify’s Task 1, “Matching Faces,” most closely tracks NEPSY-II AR Task 1. Both involve matching facial expressions with emotions through the use of high-intensity expressions in a very short time period (5 seconds for NEPSY-II vs. 3 for Emotify).<sup>41</sup> Both assess recognition of basic emotions like happiness, sadness, neutrality, fear, anger, and disgust.<sup>42</sup>

These examples illustrate the similarity in these tasks:

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<sup>35</sup> See Keith H. Nuechterlein et al., *The MATRICS Consensus Cognitive Battery, Part 1: Test Selection, Reliability, and Validity*, 165 AM. J. PSYCHIATRY 203, 210 (Feb. 2008), <https://doi.org/10.1176/appi.ajp.2007.07010042> [<https://perma.cc/L3W6-3REW>] (describing that the “managing emotions component of the Mayer-Salovey-Caruso Emotional Intelligence Test was selected” for the final battery of MATRICS).

<sup>36</sup> Shaun M. Eack et al., *Cognitive Enhancement Therapy Improves Emotional Intelligence in Early Course Schizophrenia: Preliminary Effects*, 89 SCHIZOPHRENIA RSCH. 308 (Oct. 2006), <https://pmc.ncbi.nlm.nih.gov/articles/PMC2921636/> [<https://perma.cc/6YYP-56QK>]; Beatrice Frajo-Apor et al., *Emotional Intelligence deficits in schizophrenia: The impact of non-social cognition*, 172 SCHIZOPHRENIA RSCH. 131 (Apr. 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5744853/> [<https://perma.cc/J9BG-QKRU>].

<sup>37</sup> Susan S. Kuo et al., *Establishing a standard emotion processing battery for treatment evaluation in adults with autism spectrum disorder: Evidence supporting the Mayer–Salovey–Caruso Emotion Intelligence Test (MSCEIT)*, 278 PSYCHIATRY RSCH. 116 (May 2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9671709/> [<https://perma.cc/44LL-ZCBZ>].

<sup>38</sup> See MARIT KORKMAN, URSULA KIRK & SALLY KEMP, *Chapter 2: Design and Purpose of the NEPSY-II*, THE NEPSY, 9 (2d ed. 2007), <https://www.pearsonassessments.com/content/dam/school/global/clinical/us/assets/nepsy-ii/nepsy-ii-design-and-purpose.pdf> [<https://perma.cc/G9FT-H9UA>] [hereinafter *NEPSY-II Design and Purpose*].

<sup>39</sup> *Id.* at 17.

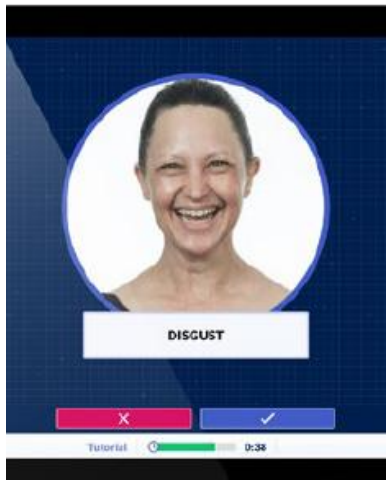
<sup>40</sup> *Id.* at 3.

<sup>41</sup> See *id.* at 17 (stating that in AR Task 1, “the child simply states whether or not two photographs depict faces with the same affect”); SALLY L. KEMP & MARIT KORKMAN, *ESSENTIALS OF NEPSY-II ASSESSMENT*, 60 (Alan S. Kaufman & Nadeen L. Kaufman eds. 2010), <https://ndl.ethernet.edu.et/server/api/core/bitstreams/edbdbc6b6-9a22-4117-bab4-aa71e2981eb3/content> [<https://perma.cc/Z8L6-ZXRX>] (stating “Present each stimulus for 5 seconds” under “Summary of Affect Recognition Administration Rules”).

<sup>42</sup> See *NEPSY-II Design and Purpose*, *supra* note 38, at 5 (stating that the AR “subtest is designed to assess the ability to recognize affect (happy, sad, anger, fear, disgust, and neutral”).

## Emotify

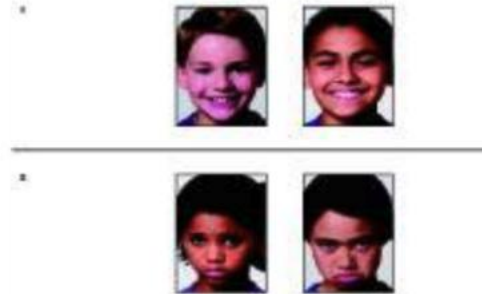
### Task 1 “Matching Faces”



## NEPSY-II

### Affect Recognition Task 1

Do these two children look as if they feel the same way?



43

Emotify’s Task 2, “Emotional Ties,” similarly combines elements of NEPSY-II tasks, including (1) selecting an image from an array of low-intensity facial expressions that matches an emotion, similar to NEPSY-II AR Task 3, and (2) predicting the emotional response to a given scenario, similar to the NEPSY-II TOM Verbal Assessment.<sup>44</sup> Both Emotify Task 2 and these NEPSY-II subtasks assess the understanding of basic emotions, and both Emotify Task 2 and NEPSY-II AR Task 3 use time limits.<sup>45</sup>

These examples likewise illustrate the similarity in these tasks:

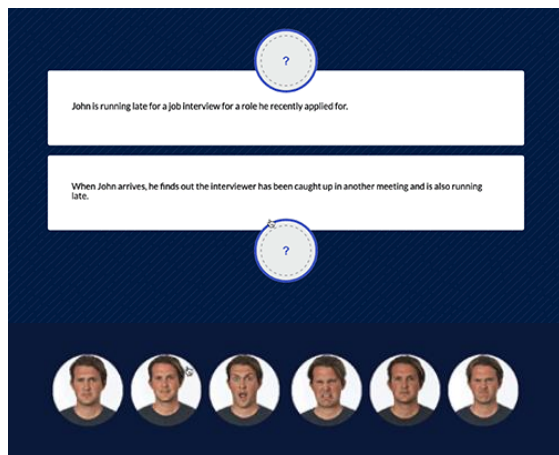
<sup>43</sup> Daniel C. Miller, *NEPSY-II Presentation - TASP Fall Conference*, 50, Slide 296 (2015), <https://www.scribd.com/document/793178232/miller-nepsyii-tasp>.

<sup>44</sup> See *NEPSY-II Design and Purpose*, *supra* note 38, at 17 (stating that in NEPSY-II AR Task 3, “the child is shown a page with five faces and selects one of the four faces that depicts the same affect as a face at the top of the page” and that in NEPSY-II TOM Verbal Assessment, “the child is read various scenarios or shown pictures and is then asked questions that require knowledge of another individual’s perspective to answer correctly” including “the ability to understand mental functions, such as belief, intention, deception, emotion, imagination, and pretending”).

<sup>45</sup> See KEMP & KORKMAN, *supra* note 41, at 60 (stating “Present each stimulus for 5 seconds” under “Summary of Affect Recognition Administration Rules”).

## Emotify

### Task 2 “Emotional Ties”



## NEPSY-II

### Affect Recognition Task 3



Emotify’s Task 3, “Emotions in Action,” most closely parallels NEPSY-II’s TOM Verbal Assessment. Both involve reading a scenario and answering questions based on the scenario to assess 1) the ability to understand others’ perspectives, 2) the relationship between emotions and social context, and 3) the ability to assess emotional response in social situations.<sup>47</sup>

In addition to NEPSY-II, Emotify is also similar to other diagnostic and clinical tools connected to neurodevelopmental conditions.

Emotify is similar to the Social Responsiveness Scale (“SRS-2”), a diagnostic tool used clinically to “identif[y] the presence and severity of social impairment within the autism spectrum and differentiate[] it from that which occurs in other disorders.”<sup>48</sup> Emotify and SRS-2 both assess social awareness, social cognition, and social communication.<sup>49</sup>

Likewise, Emotify parallels the Monteiro Interview Guidelines for Diagnosing the Autism Spectrum (“MIGDAS-2”), a popular qualitative diagnostic interview for autism often used for adults and children, which evaluates “[s]ocial [r]elationships and [e]motional

<sup>46</sup> Miller, *supra* note 43, at 50, Slide 298.

<sup>47</sup> See *NEPSY-II Design and Purpose*, *supra* note 38, at 17 (stating that in NEPSY-II TOM Verbal Assessment, “the child is read various scenarios or shown pictures and is then asked questions that require knowledge of another individual’s perspective to answer correctly” and that “[t]hese items assess the ability to understand mental functions, such as belief, intention, deception, emotion, imagination, and pretending, as well as the ability to understand that others have their own thoughts, ideas, and feelings that may be different from one’s own”).

<sup>48</sup> See *About This Product* [(SRS®-2) Social Responsiveness Scale, Second Edition], WPS, <https://www.wpspublish.com/srs-2-social-responsiveness-scale-second-edition.html> [<https://perma.cc/BBK5-YSDV>] (last visited Aug. 31, 2026); JOHN N. CONSTANTINO, (SRS®-2) SOCIAL RESPONSIVENESS SCALE (2d ed. 2012).

<sup>49</sup> See *Additional Details* [(SRS®-2) Social Responsiveness Scale, Second Edition], PAR, <https://www.parinc.com/products/SRS-2> [<https://perma.cc/XHK9-J2LS>] (last visited Aug. 31, 2026).

[r]esponses” for diagnosis.<sup>50</sup> Emotify and MIGDAS-2 both evaluate emotional competencies, including those related to self-awareness, perception of self in relation to others, and emotion management.<sup>51</sup>

These parallels are legally significant because they demonstrate that Emotify is likely to extract information concerning neurological and psychological functioning rather than simply evaluating ordinary workplace skills. The assessment’s stated central purpose is to measure how applicants perceive emotional cues, process social information, interpret interpersonal behavior, and regulate emotional responses—all domains that are clinically associated with autism and other neurodevelopmental conditions.

Furthermore, because Emotify closely resembles diagnostic tools, Emotify scores are likely to reveal test-takers’ disabilities and other medical information. Point values based on test-takers’ individual responses on Emotify tasks are aggregated, and test-takers’ final scores on Emotify are normed based on responses from the general population to create percentile rankings between 0 and 100.<sup>52</sup> Criteria then classifies assessment-takers’ percentile rankings relative to an expected value—scores are expressed as far above, above, at, below, or far below the “average” level.<sup>53</sup> Notably, the diagnostic NEPSY-II Social Perception Domain likewise appears to express scores in terms of percentiles and classify assessment-takers’ scores relative to an “Expected Level.”<sup>54</sup>

Emotify does not need to be used in clinical settings in order to fall within the FEHA and ADA prohibitions. Since Emotify asks questions that are likely to provide information about a disability, it is a disability-related inquiry. Moreover, because Emotify tests for constructs that correspond with autism and it closely tracks NEPSY-II and other diagnostic tools, it is a medical or psychological examination. Therefore, Criteria’s Emotify product, which is used in pre-offer hiring, violates both California and federal law.

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<sup>50</sup> See (MIGDAS™-2) Monteiro Interview Guidelines for Diagnosing the Autism Spectrum (Second Edition), WPS, <https://www.wpspublish.com/migdas-2-monteiro-interview-guidelines-for-diagnosing-the-autism-spectrum-second-edition.html> [<https://perma.cc/K6CQ-CULL>] (last visited Aug. 31, 2026).

<sup>51</sup> See Marilyn J. Monteiro, *Autism Evaluations: Using the MIGDAS-2 Process to Individualize the Diagnosis*, 15, 29 (Nov. 4, 2021), <https://www.txasp.org/assets/WS02%20Monteiro%20Handout.pdf> [<https://perma.cc/XQX4-WTQK>] (depicting the following questions in the MIGDAS-2 questionnaire: “Describe how your child manages anger and frustration. What situations trigger anger or agitation in your child? How does your child express anger or agitation? What helps your child to calm down when angered or agitated?”; and describing the evaluation of “self-awareness of anger and agitation triggers” and “perception of self in relation to others” in MIGDAS-2).

<sup>52</sup> See *Emotify Emotional Intelligence Assessment: Score Report Guide*, CRITERIA CORP., 3, <https://www.criteriacorp.com/files/Criteria-ScoreReportGuide-Emotify.pdf> [<https://perma.cc/482Z-GE8P>] (last visited Aug. 31, 2026) [hereinafter *Emotify Score Report Guide*] (“The Results Summary provides the applicant’s Percentile ranking compared to our global norming group.”).

<sup>53</sup> See *id.* at 4.

<sup>54</sup> See Pearson Education, Inc., *NEPSY-II: Clinical Sample Report* (2008), <https://www.pearsonclinical.asia/content/dam/school/global/clinical/us/assets/nepsy-ii/nepsy-ii-clinician-sample-report.pdf> [<https://perma.cc/EK5C-9K3U>].

## **B. Disparate Impact/Tendency to Screen Out**

Even if Emotify were not deemed a prohibited disability-related inquiry or medical or psychological examination, its use in hiring independently violates FEHA because it disproportionately excludes or “screens out” autistic individuals and applicants with related neurodevelopmental conditions.

Pursuant to California’s implementing regulations for FEHA, as amended in 2025,

it is unlawful for an employer or other covered entity to use a qualification standard, employment test, proxy, or other selection criteria—including but not limited to those administered through the use of an automated-decision system—that screens out or tends to screen out, or otherwise has an adverse impact on an applicant or employee or a class of applicants or employees on the basis of disability. However, such standard, test, or other selection criteria, as used by the employer or other covered entity, is not unlawful under this subsection when job-related for the position in question, consistent with business necessity, and there is no less discriminatory standard, test, or other selection criteria that serves the employer’s goals as effectively as the challenged standard, test, or other selection criteria.<sup>55</sup>

Further, California’s implementing regulations bar the use of “testing criterion” “that discriminates against applicants or employees with disabilities, unless . . . the test score or selection criterion used is shown to be job-related for the position in question” and “an alternative job-related test or criterion that does not discriminate against applicants or employees with disabilities is unavailable or would impose an undue hardship on the employer.”<sup>56</sup> The ADA contains parallel provisions.<sup>57</sup>

### **a. Emotify Likely Has a Disparate Impact on Neurodiverse Job Applicants**

In the context of products like Emotify, the risk of disparate impact is acute because Emotify’s assessment criteria map closely onto clinically recognized features of autism. As discussed above, the DSM-5-TR identifies “persistent deficits in social communication and social interaction” as a core diagnostic domain of autism, including differences in perceiving, using, understanding and managing emotions.<sup>58</sup> An assessment that evaluates these traits in particular—especially under time pressure or with ambiguous stimuli—effectively measures and results in manifestations of the disability itself.

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<sup>55</sup> 2 CAL. CODE REGS. tit. 2, § 11072(b)(1) (2025).

<sup>56</sup> *Id.* § 11072(b)(3).

<sup>57</sup> See 42 U.S.C. § 12112(b)(3), (6).

<sup>58</sup> *Autism Spectrum Disorder Diagnostic Criteria*, *supra* note 29, at 56–58.

Academic research further demonstrates that autistic individuals process images of facial expressions differently than allistic individuals.<sup>59</sup> Several studies have found that autistic individuals can receive lower scores than allistic individuals on assessments that require test-takers to perceive facial expressions from images, and that expression intensity and timing factors can play a significant role.<sup>60</sup> Autistic individuals may perform worse on assessments that use both high-intensity and low-intensity expressions for some emotions, but the disparity is especially pronounced for low-intensity expressions of negative emotions like disgust and sadness.<sup>61</sup> Studies have found that this discrepancy exists when facial expressions are shown for a brief amount of time, and that autistic individuals may take longer to respond than allistic individuals, especially for negative emotions.<sup>62</sup>

Some studies have found that with adequate time and relatively high-intensity facial expressions, autistic individuals can perform similarly to allistic individuals.<sup>63</sup> This distinction is critical in the hiring context, as tools that emphasize nuanced or ambiguous cues are more likely to amplify group differences and, in turn, produce exclusionary outcomes.

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<sup>59</sup> See, e.g., Dominic A. Trevisan et al., *Considerations About How Emotional Intelligence can be Enhanced in Children With Autism Spectrum Disorder*, FRONTIERS EDUC. 1, 1–4 (Apr. 2021), <https://doi.org/10.3389/feduc.2021.639736> [<https://perma.cc/73NE-P6TA>] (describing that “Existing literature suggests that people with ASD have lower [emotional intelligence] on average in the domains of perceiving emotions from the environment and body language, using emotions to relate to other’s experience, understanding emotions based on contextual cues, and managing emotions in the self and others.”); Daniel P. Kennedy & Ralph Adolphs, *Perception of emotions from facial expressions in high-functioning adults with autism*, 50 NEUROPSYCHOLOGIA 3313 (Sep. 2012), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3518664/> [<https://perma.cc/4FRC-KN8W>]; Law Smith et al., *supra* note 31.

<sup>60</sup> See, e.g., Roxanne M. D. Boily, *Emotional Intelligence in Adolescents with Autism Spectrum Disorders* 37 (2015) (M.A. thesis, University of Manitoba), <https://mspace.lib.umanitoba.ca/server/api/core/bitstreams/8ddaccae-ce62-48b3-8295-e8c86355782d/content> [<https://perma.cc/H7PL-AGML>] (“some suggest that the degree of intensity of the emotions represented in the different facial recognition tasks could account for some of the variability in the results reported” and “[o]ther factors that may have facilitated emotion recognition on this particular task are the fact . . . that the adolescents were able to examine the faces for as long as necessary.”).

<sup>61</sup> See, e.g., Law Smith et al., *supra* note 31; see also Gregory L. Wallace et al., *Diminished Sensitivity to Sad Facial Expressions in High Functioning Autism Spectrum Disorders is Associated with Symptomatology and Adaptive Functioning*, 41 J. AUTISM & DEV. DISORDERS 1475 (Nov. 2011), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3448486/> [<https://perma.cc/3HXF-Q3JZ>] (similar findings for sadness).

<sup>62</sup> See, e.g., Law Smith et al., *supra* note 31 (this study of “real-life expression recognition” includes a “short presentation time” and found “highly significant mean group differences for accuracy” and that the “ASD group also had significantly increased mean reaction times overall”); Masoomi et al., *supra* note 31, at 4, 9–11 (this meta-analysis study describes that response time analysis was conducted for “fear, anger, disgust, happiness, sadness, and surprise” and that “[f]or overall response times, individuals with ASD demonstrated significantly longer response times compared to neurotypical individuals,” with “no significant differences in response times” for recognizing “fear,” “anger,” and “happiness” with moderate heterogeneity observed across studies, and significant differences in response times for recognizing other emotions like “disgust,” “sadness,” and “surprise”).

<sup>63</sup> See, e.g., Kerian M. Rump et al., *The Development of Emotion Recognition in Individuals with Autism*, 80 CHILD DEV. 1434 (Sep. 2009), <https://pmc.ncbi.nlm.nih.gov/articles/PMC3085906/> [<https://perma.cc/4AC4-FFF5>] (describing that “when individuals with autism of all ages are given unambiguous, relatively prototypic stimuli and sufficient processing time, they are capable of performing at levels similar to control groups” and that “other research shows that individuals with autism have difficulty when the stimuli are either shown only briefly . . . or are more subtle”).

Because of Emotify’s strict timing constraints, use of low-intensity expressions, and similarity to diagnostic tools, autistic individuals are likely to score lower on Emotify than allistic individuals. Criteria also uses scores from the general population to norm Emotify scores,<sup>64</sup> which is likely to further disadvantage autistic individuals.

By embedding criteria that are neurologically based and mirror clinical constructs, Emotify disproportionately disadvantages applicants with autism and related conditions, “tend[ing] to screen out” a protected class within the meaning of FEHA and the ADA.<sup>65</sup> Importantly, the discriminatory effect arises not from overt exclusion, but from the selection of evaluative criteria. A hiring product does not need to explicitly reference disability or disability status to produce unlawful disparate impact; it is sufficient that the criteria it employs are so closely aligned with the manifestations of a disability that they function to exclude those who have it. Here, the overlap between Emotify’s characteristics and scoring dimensions and established markers of autism creates this discriminatory effect.

Emotify’s tasks and constructs directly mirror those found in clinical assessments for autism, including NEPSY-II and other diagnostic tools like MIGDAS-2 and SRS-2, and can thus screen out autistic candidates. Both NEPSY-II and Emotify show respondents images of facial expressions; require cognitive skills such as inferring mental states and choosing appropriate responses; and assess emotion recognition, emotion regulation, and theory of mind, which are core domains in autism assessments.

Indeed, the few areas where Emotify differs from diagnostic tools only increase the risk of disparate impact. For example, NEPSY-II Affect Recognition Task 1 presents images of facial expressions for 5 seconds, while Emotify reduces this to 3 seconds for Task 1 “Matching Faces.”<sup>66</sup> This shorter time makes Emotify even harder than NEPSY-II, especially for autistic individuals, who have been shown to identify some emotions less accurately under time pressure.<sup>67</sup> Likewise, while NEPSY-II allows for open-ended responses and clinical judgment,<sup>68</sup> Emotify uses a rigid multiple-choice format and a rigid rule such as Task 2’s requirement that “the same image cannot be used” by candidates to distribute emotions across scenarios, disproportionately penalizing autistic candidates who may see multiple scenarios evoking the

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<sup>64</sup> See *Emotify Score Report Guide*, *supra* note 52, at 3 (“The Results Summary provides the applicant’s Percentile ranking compared to our global norming group.”).

<sup>65</sup> 2 CAL. CODE REGS. tit. 2, § 11072(b)(1) (2025).

<sup>66</sup> KEMP & KORKMAN, *supra* note 41, at 60 (stating “Present each stimulus for 5 seconds” under “Summary of Affect Recognition Administration Rules”).

<sup>67</sup> See, e.g., Emese Nagy, Louise Prentice & Tess Wakeling, *Atypical Facial Emotion Recognition in Children with Autism Spectrum Disorders: Exploratory Analysis on the Role of Task Demands*, 50 PERCEPTION 819 (Sep. 2021), <https://journals.sagepub.com/doi/10.1177/03010066211038154> [<https://perma.cc/77GS-42GF>].

<sup>68</sup> KEMP & KORKMAN, *supra* note 41, at 60–61 (stating that examiners administering NEPSY-II AR tasks record “[b]ehavioral [o]bservations” such as “spontaneous comments made” and that “[t]hese comments may provide diagnostic information about how the child identifies emotions, and his or her response to specific emotions”); *id.* at 118–19 (noting that examiners administering NEPSY-II TOM ask questions with no time limits).

same emotion or may benefit from a process that allows for nuance or clarification, especially those who are literal, honest, or process information differently. This structure increases the likelihood that atypical but reasonable interpretations of a social scenario will be marked as incorrect, not because they are substantively wrong but because they do not conform to the model of expected responses embedded in Emotify's design.

### **b. Emotify's Disparate Impact Is Not Justified**

Under FEHA and the ADA, a design that disparately disadvantages autistic applicants—like Emotify—is unlawful unless it is proven to be job-related and consistent with business necessity. As discussed further in part IV below, Criteria acts as an agent of employers under FEHA when it carries out hiring process functions for that employer, and must justify the use of Emotify as job-related and a business necessity just as an employer would. While an employer may have legitimate interests in evaluating particular aspects of interpersonal communication skills in the workplace for certain roles, Criteria's Emotify tool does not provide such an evaluation, and in any case those interests do not justify use of Emotify's highly restrictive or speed-based testing mechanisms.

To justify the use of an employment assessment that has a disparate impact based on disability, an employer or other covered entity would need to show that “the selection practice is job-related and consistent with business necessity.”<sup>69</sup> California regulations define “business necessity” as “an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills the business purpose it is supposed to serve.”<sup>70</sup> EEOC guidance likewise states that to prove a practice is “job-related and consistent with business necessity,” the challenged policy or practice must be “necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants’ or employees’ skills, the challenged policy or practice must evaluate an individual’s skills as related to the particular job in question.”<sup>71</sup>

Here, the breadth and rigidity of Emotify's evaluative structure measures generalized emotional processing capacity and efficiency rather than evaluating any necessary job competencies. Compounding this poor design, Criteria markets Emotify by telling employers that they should “[u]se Emotify for any role,” even while noting that it is ideal “especially when interpersonal interaction is an important factor.”<sup>72</sup> While Criteria's marketing notes that the product is ideal for “managers, future leaders, graduate recruitment, sales, customer service, and

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<sup>69</sup> 2 CAL. CODE REGS. tit. 2, § 11017(e) (2025).

<sup>70</sup> *Id.* § 11010(b).

<sup>71</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2007-2, EMPLOYMENT TESTS AND SELECTION PROCEDURES (Dec. 1, 2007), <https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures> [<https://perma.cc/6XGG-988F>] [hereinafter *Enforcement Guidance 2007*].

<sup>72</sup> See *Emotify Emotional Intelligence Assessment Overview*, *supra* note 4.

roles that require emotional labor,”<sup>73</sup> online discussion forums and our own investigation reflect its use for a wider range of job roles, such as software engineer and website designer. According to Criteria’s case studies, Emotify has been used by employers in financial services, healthcare, insurance, human resources, professional services, digital marketing, and the automotive industry.<sup>74</sup> Pre-employment evaluations should focus on specific job positions within particular industries and measure competencies that are a business necessity for employees to have in those positions—not inject discrimination into broad swaths of employment opportunities.<sup>75</sup> The use of Emotify for a wide range of industries and job positions makes plain that the test has not been tailored for any particular job competency. Absent evidence that rapid emotional decoding under strict time constraints is essential to the performance of the job positions Criteria has marketed its tool for, Emotify’s exclusionary effects cannot be justified under FEHA and the ADA. Accordingly, Emotify’s use in hiring results in an unlawful disparate impact on neurodiverse applicants in violation of FEHA and the ADA.

### **C. Criteria’s Product Likely Sidesteps Reasonable Accommodation Requirements**

Based on Emotify’s design and the information provided to employers and applicants, it appears that Criteria does not provide required reasonable accommodations for applicants with autism and related disabilities who are subject to the Emotify assessment. Nor does Criteria provide the kind of information that would allow applicants to know when they need accommodations and for employers to know when and how to provide them. These failures may result in discriminatory denials of accommodations under FEHA, violations for which both employers and vendors such as Criteria can be jointly liable, as discussed below. FEHA requires that applicants with disabilities be provided with reasonable accommodations and engagement in a “timely, good faith, interactive process” to determine appropriate accommodations.<sup>76</sup> These obligations apply during the hiring process, including the administration of pre-employment assessments and screening tools.

The ADA similarly requires reasonable accommodations for qualified applicants and employees with disabilities, absent undue hardship.<sup>77</sup> The EEOC’s regulations likewise note that an “informal, interactive process” with the individual may be necessary to identify appropriate accommodations.<sup>78</sup>

Despite this, Emotify provides no apparent mechanism through which applicants can use Criteria’s systems to request accommodations, disclose that a disability may affect their performance, or obtain an alternative method of evaluation. Instead, Criteria simply advises

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<sup>73</sup> See *Emotify Assessment*, *supra* note 1.

<sup>74</sup> *Case Studies*, *supra* note 6.

<sup>75</sup> See 2 CAL. CODE REGS. tit. 2, §§ 11010(b), 11017(e) (2025); *Enforcement Guidance* 2007, *supra* note 71.

<sup>76</sup> CAL. GOV. CODE § 12940(m)(1)–(n) (West 2025).

<sup>77</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>78</sup> 29 C.F.R. § 1630.2(o)(3).

applicants who believe they may need an accommodation to contact the employer for assistance in the hiring process, without telling them that accommodations to Emotify itself or an alternative assessment format are available.<sup>79</sup> And Criteria provides applicants with only general information regarding the nature of the assessment—particularly its evaluation of emotion recognition, affective interpretation, and related social-cognitive competencies—that gives applicants with disabilities little guidance on whether they may require an accommodation.<sup>80</sup>

Indeed, Criteria acknowledges that Emotify may disadvantage applicants with certain disabilities. In accessibility materials that it provides to client employers, Criteria acknowledges that Emotify and similar products “may not be suitable” for autistic individuals and applicants with related neurodevelopmental conditions, including Developmental Coordination Disorder, Attention Deficit Hyperactivity Disorder, and Tourette syndrome.<sup>81</sup> However, Criteria does not provide this same information directly to applicants.

Because applicants are not adequately informed about the nature of the assessment and the types of questions that may implicate conditions like autism, they may not know they need an accommodation before completing the Emotify assessment. However, if Emotify is used as an initial screening device, applicants may be rejected based on disability-related limitations even before they can engage in the interactive process or request an alternative assessment.

### **III. Criteria’s Other Hiring Products**

Although this complaint is focused on Emotify, there are other pre-employment hiring products that Criteria sells—including the cognitive aptitude assessment Cognify, Interview Intelligence, AI proctoring, and personality assessments—which raise concerns around discrimination based on disability, race, and sex that merit further investigation.

Cognify is “an immersive, game-based assessment of cognitive aptitude that measures a candidate’s problem solving skills, critical thinking, and verbal knowledge.”<sup>82</sup> Cognify includes up to six mini-games and our investigation found that it is used by several large companies, including ones with operations in California. A 2022 study by the developers of Cognify found that an early version of Cognify with seven mini-games (the six mini-games in Criteria’s current version of Cognify plus an additional one) produced statistically significant and practically

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<sup>79</sup> See *Disability Accommodations*, CRITERIA CORP., <https://criteriacandidates.helpdocs.io/article/qxyaa8wels-disability-accommodations> [<https://perma.cc/3U6Q-VN2U>] (last visited Aug. 31, 2026).

<sup>80</sup> See *Emotify Assessment*, *supra* note 1.

<sup>81</sup> *Accessibility Quick Guide*, *supra* note 13, at 3.

<sup>82</sup> *Cognitive Ability Tests*, CRITERIA CORP., <https://www.criteriacorp.com/assess/cognitive-aptitude> [<https://perma.cc/9NBW-C49Z>] (last visited Aug. 31, 2026).

meaningful disparities based on race (for Black assessment-takers vs. White assessment-takers) and gender (for female assessment-takers vs. male assessment-takers).<sup>83</sup>

Criteria also offers video and image-based hiring products. Interview Intelligence (“IIQ”) and AI Scoring can be used with the company’s video interviewing offering and includes features such as an AI-generated summary of the interview, AI-assisted question creation to guide the interviewer, and AI-powered automated scoring based on the interview transcripts.<sup>84</sup> Criteria also provides AI Proctoring, used with Criteria’s pre-employment assessments, with features such as image capture, image analysis, screen and audio sampling, and comprehensive reporting to “detect suspicious behavior.”<sup>85</sup>

The types of technologies underpinning IIQ, AI Scoring, and AI Proctoring have a high risk of introducing or exacerbating bias in the hiring process. Independent research has shown that AI-based proctoring products risk flagging disabled people as suspicious based on disability-related movement, speech, and cognitive processing.<sup>86</sup> Research has also shown that AI systems used to transcribe and analyze speech perform significantly worse at transcribing the speech of speakers with accents, speech disabilities, and/or other disabilities, and can be largely dysfunctional when processing deaf and hard of hearing speech.<sup>87</sup> These systems also perform significantly worse at transcribing the speech of non-white speakers compared to white speakers,

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<sup>83</sup> See Richard N. Landers et al., *Theory-driven game-based assessment of general cognitive ability: Design theory, measurement, prediction of performance, and test fairness*, 107 J. APPLIED PSYCH. 1655, 1693, 1699–1700, 1702 (2022), <https://psycnet.apa.org/record/2021-94174-001>.

<sup>84</sup> See *AI Scoring Add-On*, CRITERIA CORP., <https://www.criteriacorp.com/interview/interview-intelligence> [<https://perma.cc/BJ4Y-DVEW>] (last visited Aug. 31, 2026); *Introducing Interview Intelligence: Predictive and Precise Hiring, Powered by AI*, CRITERIA CORP., <https://www.criteriacorp.com/blog/introducing-interview-intelligence-IIQ> [<https://perma.cc/Z7BB-TCVT>] (last visited Aug. 31, 2026).

<sup>85</sup> See *AI Proctoring*, CRITERIA CORP., <https://www.criteriacorp.com/ai-proctoring> [<https://perma.cc/U5K3-L9Y2>] (last visited Aug. 31, 2026).

<sup>86</sup> See, e.g., Ly Xīnzhèn M. Zhǎngsūn Brown, *How Automated Test Proctoring Software Discriminates Against Disabled Students*, CTR. DEMOCRACY & TECH. (Nov. 16, 2020), <https://cdt.org/insights/how-automated-test-proctoring-software-discriminates-against-disabled-students/> [<https://perma.cc/65RL-B3EB>].

<sup>87</sup> See, e.g., Robin Zhao et al., *Quantification of Automatic Speech Recognition System Performance on d/Deaf and Hard of Hearing Speech*, 135 LARYNGOSCOPE 191 (2024), [https://koenecke.infosci.cornell.edu/files/Laryngoscope\\_Zhao2024.pdf](https://koenecke.infosci.cornell.edu/files/Laryngoscope_Zhao2024.pdf) [<https://perma.cc/X2MT-X4N3>] (finding that several automated speech recognition systems perform ten times worse for the deaf and hard of hearing population, and that on average, every other word spoken by deaf and hard of hearing speakers is transcribed incorrectly); see also, e.g., Abraham Glasser, *Automatic Speech Recognition Services: Deaf and Hard-of-Hearing Usability*, EXTENDED ABSTRACTS OF THE 2019 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, <https://dl.acm.org/doi/pdf/10.1145/3290607.3308461> [<https://perma.cc/DTE3-VSRZ>] (last visited Sep. 3, 2026); Julio C. Hidalgo Lopez et al., *Quantifying and Improving the Performance of Speech Recognition Systems on Dysphonic Speech*, 168 OTOLARYNGOLOGY HEAD & NECK SURGERY 1130 (May 2023), <https://pubmed.ncbi.nlm.nih.gov/36939576/>; Matthew L. Rohlfing et al., *Hey Siri: How Effective are Common Voice Recognition Systems at Recognizing Dysphonic Voices?*, 131 LARYNGOSCOPE 1599 (July 2021), <https://pubmed.ncbi.nlm.nih.gov/32949415/>.

including Black, Latine, and Indigenous speakers of English.<sup>88</sup> Automated scoring—that relies on these transcripts—will thus incorporate and may exacerbate this bias.

Criteria also markets a host of more traditional personality assessments, including products such as the Employee Personality Profile (“EPP”) and the Criteria Personality Inventory (“CPI”) that are based on the “Big Five” model of personality.<sup>89</sup> Like Emotify, such assessments test for personality constructs and characteristics that are closely related to diagnostic criteria for autism as well as other mental health disabilities such as depression and anxiety, and people with such disabilities are likely to be disadvantaged on tests using these measures. Indeed, numerous studies have been conducted finding that autistic people and people with various mental health disabilities score at the extreme ends of the scales on several traits in the Big Five model and the related Five Factor Model of Personality (“FFM”).<sup>90</sup> For example, a 2019 meta-analysis found that autism correlates with lower scores on “Emotional Stability” and the other traits tested.<sup>91</sup> Another meta-analysis found that depression and anxiety were correlated with high scores on “Neuroticism” (the reverse of “Emotional Stability”) and low scores on “Conscientiousness” as well as correlations with several other mental health conditions.<sup>92</sup>

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<sup>88</sup> See Allison Koenecke et al., *Racial disparities in automated speech recognition*, 117 PNAS 7684 (Apr. 2020), <https://www.pnas.org/doi/epdf/10.1073/pnas.1915768117> [<https://perma.cc/73JH-CZ6Y>]; Alicia Beckford Wassink, Cady Gansen & Isabel Bartholomew, *Uneven success: automatic speech recognition and ethnicity-related dialects*, 140 SPEECH COMM’N 50 (May 2022), <https://www.sciencedirect.com/science/article/abs/pii/S0167639322000486> [<https://perma.cc/82TN-LWS3>].

<sup>89</sup> See *Employee Personality Profile (EPP)*, CRITERIA CORP., <https://www.criteriacorp.com/assess/personality/employee-personality-profile-epp> [<https://perma.cc/7N4Y-2WXW>] (last visited Aug. 31, 2026) (stating that “[t]he EPP is based on the most widely validated system of classifying personality, the ‘Big Five’ or ‘Five Factor’ model”); *Criteria Personality Inventory (CPI)*, CRITERIA CORP., <https://www.criteriacorp.com/assess/personality/criteria-personality-inventory-cpi> [<https://perma.cc/HT48-URTP>] (last visited Aug. 31, 2026) (“The Criteria Personality Inventory (CPI) is . . . grounded in the theory of the most widely accepted taxonomy of personality, the ‘Big Five’ personality traits: Extroversion, Conscientiousness, Agreeableness, Openness, and Stress Tolerance.”); *Personality Tests*, CRITERIA CORP., <https://www.criteriacorp.com/assess/personality> [<https://perma.cc/62XP-JKCY>] (last visited Aug. 31, 2026) (stating that “[m]any of our personality assessments are based on the ‘Big Five’ or ‘Five Factor’ Model of understanding personality. . .”).

<sup>90</sup> Both the Big Five and FFM are commonly used personality models that define personality in five “domains” of “Openness,” “Conscientiousness,” “Extraversion,” “Agreeableness,” and “Neuroticism.” See Timothy J. Kutta, Thomas J. Preston & Heather M. Maranges, *Goldberg vs Costa/McCrae Five Factors*, THE WILEY ENCYCLOPEDIA OF PERSONALITY AND INDIVIDUAL DIFFERENCES: CLINICAL, APPLIED, AND CROSS-CULTURAL RESEARCH (Bernardo J. Carducci & Christopher S. Nave eds., 2000). Some studies reverse the direction of “Neuroticism” and refer to the antonym “Emotional Stability.” See, e.g., Jennifer Lodi-Smith et al., *Meta-Analysis of Big Five Personality Traits in Autism Spectrum Disorder*, 23 AUTISM 556 (2019), <https://doi.org/10.1177/1362361318766571>. Criteria’s reference to “Stress Tolerance” (*What are the Big Five Personality Traits (Five Factor Model)?*, CRITERIA CORP., <https://www.criteriacorp.com/resources/glossary/big-five-personality-traits> [<https://perma.cc/95BB-PAGR>] (last visited Aug. 31, 2026)) appears to map onto the trait “Emotional Stability” (the reverse of “Neuroticism”).

<sup>91</sup> See Lodi-Smith et al., *supra* note 88.

<sup>92</sup> See Roman Kotov et al., *Linking “Big” Personality Traits to Anxiety, Depressive, and Substance Use Disorders: A Meta-Analysis*, 136 PSYCH. BULL. 768, 799 (Sep. 2010), <https://doi.org/10.1037/a0020327>; see also Kelly Cahill Timmons, *Pre-Employment Personality Tests, Algorithmic Bias, and the Americans with Disabilities Act*, 125 PENN ST. L. REV. 389, 426–28 (Jan. 2021), <https://elibrary.law.psu.edu/pslr/vol125/iss2/2/> [<https://perma.cc/R73B-R8NQ>].

#### IV. Criteria Acts as an Agent of California-Based Employers

The Department has jurisdiction to investigate Criteria's use of Emotify, and any other products Criteria markets, because Criteria performs core hiring functions for California employers as well as nationwide employers for remote positions which include applicants from California. Criteria therefore acts as an agent of these employers. Moreover, Criteria is a corporation organized and existing under the laws of the state of California, with its principal place of business in California, and has more than 5 employees.

California law recognizes direct liability for business entities acting as agents of employers when the business entity has the requisite number of employees and carries out FEHA-regulated activities on the employer's behalf, including hiring process functions.<sup>93</sup> In *Raines*, plaintiff job applicants were required to undergo health screenings conducted by U.S. Healthworks Medical, a third-party agent of the prospective employers. The California Supreme Court held these inquiries to fall squarely within FEHA-regulated activities, and, because U.S. Healthworks Medical Group met the minimum five-employee threshold required for direct liability, ruled that it could be "directly liable" for its delegated hiring activities.<sup>94</sup> Here, Criteria is subject to FEHA liability as an agent because it is a California company with five or more

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(listing studies finding high "Neuroticism" and low "Conscientiousness" scores for people with anxiety and depression; higher "Neuroticism" and "Openness" and lower "Extraversion," "Conscientiousness," and "Agreeableness" for people with bipolar disorder; high "Neuroticism" for people diagnosed with various personality disorders; and low "Extraversion" for people diagnosed with "avoidant personality disorder, obsessive-compulsive personality disorder, and schizotypal personality disorder"). In fact, the relation between the Big Five or FFM personality constructs and the realm of mental health conditions is evidenced by the growing use of such models in medical settings, as reflected in the current version of the DSM-5-TR, which includes an Alternative Model of Personality Disorders using "personality dimensions with clear ties to basic personality structure from the FFM to make personality disorder diagnoses." See Arturia Melson-Silimon et al., *Personality Testing and the Americans with Disabilities Act: Cause for Concern as Normal and Abnormal Models Are Integrated*, 12 INDUS. & ORG. PSYCH. 119, 120 (2019), <https://www.cambridge.org/core/journals/industrial-and-organizational-psychology/article/abs/personality-testing-and-the-americans-with-disabilities-act-cause-for-concern-as-normal-and-abnormal-personality-models-are-integrated/FACED2C3C1F8415347F774FAC92DA1C0>. The DSM-5-TR also notes that the Alternative Model of Personality Disorders "includes five broad domains of personality trait variation—Negative Affectivity (vs. Emotional Stability), Detachment (vs. Extraversion), Antagonism (vs. Agreeableness), Disinhibition (vs. Conscientiousness), and Psychoticism (vs. Lucidity)" and that these "five broad domains are maladaptive variants of the five domains of the extensively validated and replicated personality model known as the 'Big Five,' or Five Factor Model of personality (FFM)." AM. PSYCHIATRIC ASS'N, *Alternative DSM-5 Model for Personality Disorders*, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-5-TR 882, 894 (5th ed. 2022).

<sup>93</sup> See *Raines v. U.S. Healthworks Medical Group*, 534 P.3d 40 (Cal. 2023); see also CAL. GOV. CODE § 12926(d) (2026) (defining "Employer" as "any person acting as an agent of an employer, directly or indirectly").

<sup>94</sup> See *Raines*, 534 P.3d at 54; see also *Mobley v. Workday*, No. 23-cv-00770, Dkt. No. 360 (N.D. Cal. June 22, 2026), available at <https://storage.courtlistener.com/recap/gov.uscourts.cand.408645/gov.uscourts.cand.408645.360.0.pdf> [<https://perma.cc/6GAS-FB4J>] (applying *Raines* to hold that allegations that a California company designed, developed and operated discriminatory hiring products was sufficient to plead liability under FEHA as an employer agent).

employees and markets and administers Emotify and other products through which it evaluates, screens, and ultimately makes recommendations about applicants in the context of hiring.

Federal law also recognizes that entities that are delegated traditional hiring functions may be subject to anti-discrimination enforcement. In *Mobley v. Workday*, the Northern District of California held that Workday, a company that designed and administered an AI-powered applicant screening platform, could be held liable as an agent of employers under Title VII, the Age Discrimination in Employment Act, and the ADA because the employers delegated traditional hiring functions to Workday's automated decision-making system—including screening, evaluating and recommending applicants.<sup>95</sup> Criteria is likewise subject to liability under federal law.

## V. Conclusion

For the foregoing reasons, Criteria's products, including Emotify, raise serious and overlapping concerns under California law. Accordingly, we respectfully request that the Department investigate the development, marketing, and use of Emotify and other Criteria hiring tools and initiate a director's complaint pursuant to Cal. Code Regs. Tit. 2, § 10012.

Sincerely,



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<sup>95</sup> See *Mobley v. Workday, Inc.*, 740 F. Supp. 3d 796, 805 (N.D. Cal. 2024).