Description of document:	A copy of each response to a Question for the Record (QFR) provided to Congress by the Equal Employment Opportunity Commission (EEOC), 2012-2014
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JUL 17 2014

Re: FOIA No.: 820-2014-202423

Your Freedom of Information Act (FOIA) request, received in this office on June 17, 2014 has been processed. Our search began on June 17, 2014. All agency records in creation as of June 17, 2014 are within the scope of the EEOC's search for responsive records.

You requested a copy of each response to a Question for the Record provided to Congress by the EEOC. Your request is granted for records from January 1, 2012 due to the voluminous amount of records as mentioned in your FOIA request. The requested records have been provided by email in PDF electronic format (29 pages).

We hope this information is helpful to you.

Sincerely,

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EEOC Responses to Questions for the Record

House Education and the Workforce Committee

Subcommittee on Workforce Protections

1. What new enforcement guidance is the EEOC considering issuing and can you provide a timetable for issuing any new guidance? Specifically, is the EEOC considering new guidance on reasonable accommodation under the Americans with Disabilities Act? Finally, can you give us your assurance that any future guidance will be provided to the public for comment prior to making it final? If not, why?

Response:

Members of the Commission have spoken publicly about their interest in issuing revised guidance on reasonable accommodation under the ADA. In particular, the existing guidance does not reflect changes to the definition of "disability" resulting from enactment of the ADA Amendments Act of 2008 (ADAAA). Additionally, a number of legal issues concerning reasonable accommodation have arisen in the more than 10 years since our existing guidance was last revised, and others are likely to arise as the question of whether an individual has a disability within the meaning of the ADA becomes less important as a result of the ADAAA. For example, in June 2011, the Commission held a meeting on the extent of an employer's obligation to provide leave as a reasonable accommodation. http://www.eeoc.gov/eeoc/meetings/6-22-11/index.cfm.

Other areas of interest for the Commission, as evidenced by public meetings we have held in the past two years include pregnancy discrimination, http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm , and the application of the ADA to employer-sponsored wellness programs. http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm. Some Commissioners and a number of stakeholders present at those meetings expressed the hope that the EEOC would issue guidance on these subjects.

However, I cannot say whether the Commission will decide to issue guidance on these or other topics. The specific guidance that the Commission decides to issue, its content, and the time frame within which it is issued are all the product of a deliberative process, and a majority of Commissioners must agree on the outcome.

We value the views and varying perspectives of our stakeholders, and routinely seek input from the public in developing guidance.

2. On May 8, 2013, the EEOC held a hearing regarding employer wellness programs under the varying requirements of federal non-discrimination laws, the *Health Insurance Portability and Accountability Act,* and the *Patient Protection and Affordable Care Act.* The health care law codifies and expands the existing rules for workplace wellness programs, and proposes to increase, from 20 to 30 percent, the amount by which health plans can vary their premiums for participation in wellness plans. The health care law also endorses the value of workplace wellness plans by requiring health plans offered through health care exchanges under the law to

include wellness and chronic disease management as a core benefit. In light of the health care law's treatment of wellness programs and the existing federal regulatory scheme governing their structure, does the EEOC plan to issue guidance on workplace wellness programs? If so, will the EEOC work with the Departments of Labor and Health and Human Services in promulgating this guidance? Will the EEOC allow for a notice and comment period on any wellness guidance they consider?

Response:

As noted in response to Question 1, Commissioners and stakeholders present at the May 8, 2013 Commission meeting on the ADA and wellness programs certainly expressed interest in the Commission issuing guidance on this subject. Again, whether guidance is issued and what the content of that guidance will be will need to emerge from the Commission's deliberative process.

In developing any guidance, the Commission will coordinate closely with the Departments of Labor, Health and Human Services, and the Treasury (Internal Revenue Service), all of whom have issued regulations under the Affordable Care Act concerning wellness programs. The Commission has had considerable experience working with these agencies to understand laws that are outside our area expertise, most notably as part of the process of issuing proposed and final regulations to implement Title II of the Genetic Information Nondiscrimination Act. We will also consider input from the public, and already have access to both the written testimony of participants at the Commission meeting as well as comments submitted during the 15 days following the meeting when the meeting record remained open for public comment.

3. The EEOC, along with other federal agencies, has specifically focused on gender pay discrimination. The EEOC is part of the National Equal Pay Task Force and provided compensation discrimination training to enforcement personnel across agencies. The Office of Federal Contract Compliance Programs (OFCCP) recently rescinded its enforcement guidance on pay discrimination and replaced it with broader investigation procedures, without providing much guidance to help employers determine proactively whether or not they are in compliance. What are the EEOC's current plans with regard to gender pay discrimination guidance and enforcement? How has the EEOC coordinated with other agencies, including OFCCP to ensure employers do not face conflicting or overly-burdensome regulation in this area?

Response:

The Commission's current Strategic Enforcement Plan (SEP) emphasizes the importance of "a concentrated and coordinated approach" to enforcement that focuses on six priority issues, one of which is gender pay discrimination. EEOC plans to continue its enforcement and outreach to promote compliance. This emphasis on coordination is particularly well-established with respect to gender pay discrimination, because the EEOC and the Department of Labor have two longstanding Memoranda of Understanding about coordinating on training and investigations. Indeed, in 2011 to 2012, the EEOC included OFCCP staff in its nationwide training about gender

pay discrimination, so that staff from both agencies learned the same principles. This training reached approximately 2000 people. The EEOC's Memoranda of Understanding can be found at http://www.eeoc.gov/laws/mous/index.cfm.

4. Several studies show a relationship between a poor credit history and risk of loss to a business, a customer, or a fellow employee. How does the EEOC plan to use empirical, scientific-based evidence in the development of new guidance, specifically credit history guidance?

Response:

The specific guidance that the Commission decides to issue, its content, and the time frame within which it is issued are all the product of a deliberative process, and a majority of Commissioners must agree on the outcome. Should the Commission decide to issue any guidance regarding employers' consideration of the credit histories of applicants and/or employees, it will consider the public input received from business and employee stakeholders as part of the October 2010 Commission meeting on credit histories, and will also consider relevant research in developing such guidance, as it does whenever it issues any policy or guidance.

5. Employers conduct credit checks to protect them, their customers, and other employees from financial harm. For example, the Association of Certified Fraud Examiners (ACFE) said in a recent report that the top two red flag warnings exhibited by perpetrators associated with fraud were instances in which the fraudster was living beyond his or her financial means or experiencing financial difficulties. Further, employee theft accounts for nearly $1 trillion annually. Employers are troubled by the prospect of limits on the use of credit histories for employment. Will the EEOC issue credit guidance? If the EEOC intends to issue credit guidance what is the timing? Will that guidance go through the APA, OMB, or Comptroller General review process? If not, why not?

Response:

The specific guidance that the Commission decides to issue, its content, and the time frame within which it is issued are all the product of a deliberative process, and a majority of Commissioners must agree on the outcome. Since it has not been determined what form any such guidance would take were it to be issued, which review process might apply has not been determined. However, if and when the Administrative Procedure Act applies, the Commission will, as it has in the past, satisfy the requirements of the APA when issuing regulations.

6. Your guidance on criminal background screening is 55 pages long and contains 167 footnotes. It requires complex individualized assessments involving a multitude of amorphous factors. Even sophisticated attorneys may not know how to advise their clients. Please provide the questions you have received regarding this guidance and the responses to those questions provided by the EEOC.

Response:

The EEOC recognizes that many of our stakeholders, including small businesses, job applicants, and employees, need information about this Guidance and our laws in general, but do not want (and do not have the time) to read the longer, more legally complex document itself. Consequently, whenever the EEOC issues a substantive sub-regulatory guidance like the April 2012 Arrest and Conviction Guidance, it publishes one or more short, reader-friendly Q&A documents that serve two purposes: (1) to explain the most important points in the longer guidance in a straightforward manner; and (2) to respond directly to some of the most frequently asked questions about the longer document. While the EEOC does not archive all of the questions and comments received around the country, the most frequently-asked questions come to our attention and we strive to be responsive.

For the Arrest and Conviction Guidance, the EEOC issued two plain-language documents. First, the EEOC issued basic "Questions and Answers" shortly after the publication of the Guidance in April 2012. See http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm. There, the EEOC answered seven basic questions that reflect some of the comments and questions the Commission received after its July 2011 public meeting about arrest and conviction records as a hiring barrier. See http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm. This Question and Answer document begins by explaining how employment actions based on criminal background checks could become a Title VII issue, a question frequently raised by members of the public. Later, to respond to questions about the Guidance itself, the EEOC published a "What You Should Know" document. Here, the EEOC explained in two sentences how an employer could show that its criminal background check was consistent with Title VII under the Guidance. The EEOC also emphasized that the Guidance does not prevent employers from using criminal background checks to screen applicants and employees in a meaningful way, a point about which public discussion continued. See http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm.

7. The EEOC and the Federal Trade Commission are working together on FAQs to the EEOC's criminal background check guidance. Will the FAQs address employers' responsibility under the EEOC guidance and the Fair Credit Reporting Act? What is the status of the FAQs?

Response:

The EEOC and the FTC are working on two brief technical assistance publications with respect to background checks, one for employers and another for individuals. Written in plain language, the publications are designed to explain to employers what their responsibilities are under the equal employment opportunity laws and the Fair Credit Reporting Act with respect to background checks, and to explain to individuals what their rights are. The publications would

not focus only on criminal background checks or set forth any new policy. The agencies are still designing the publications but hope to finalize them in the spring of 2014.

8. Central to the EEOC's criminal background check guidance is the requirement that employers conduct an "individualized assessment" coupled with a targeted screen. While not mandating such, the guidance states that "although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII." It also states a targeted screen coupled with an opportunity for an individualized assessment is a circumstance in which the EEOC believes employers will consistently meet the "job related and consistent with business necessity" defense. How does the EEOC intend to enforce individualized assessments? By strongly urging employers to conduct "individualized assessments," the guidance imposes a new burden on responsible employers seeking to comply with it and avoid an EEOC investigation. Will enforcement in this area be driven by whether an employer has developed a screen and conducts individualized assessment, and, alternatively, will lack of any screen or individualized assessment be grounds for an EEOC investigation?

Response:

Enforcement in this area, like EEOC enforcement in other areas, generally will be driven by charges we receive. When the EEOC receives a charge of employment discrimination, we investigate the claim to gather relevant evidence. We first assess the potential merits of the charge, which includes a careful consideration of the underlying facts. As part of the investigative process, we provide the employer with the opportunity to respond to the allegations. In evaluating charges alleging that someone has been excluded from a job based on an arrest or conviction record, EEOC investigators will apply the legal standards in Title VII as explained more fully in the EEOC's guidance, including the principles favoring targeted screens and an opportunity for an individualized assessment. The outcome of a particular Title VII investigation will turn on the application of these principles to the unique facts of each case. Simply asserting that a screen is "targeted" or that the employer has conducted an individualized assessment will not in itself be determinative. The EEOC investigators will focus on evidence of how the screen or the individualized assessment has been implemented in practice.

9. Is there a time or point in the hiring process when the EEOC believes it is appropriate to conduct a criminal check? Is it ever appropriate to ask about criminal history on an application? Is it ever appropriate to consider criminal history prior to an interview?

Response:

EEOC's guidance explains how an employer may appropriately and legally consider the criminal history of an applicant or employee. The guidance is intended to assist job seekers, employees, employers, and many other agency stakeholders. As a "best practice," the Commission recommends in the Guidance that employers avoid asking about criminal history on the job application itself. The policy rationale is that an employer is more likely to objectively assess the relevance of a conviction if it becomes known after the employer is already knowledgeable about the individual's qualifications and experience.

The Guidance also recognizes that "[the employer's c]ompliance with federal laws and/or regulations is a defense to a charge of discrimination." The Guidance notes that "employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations." Employers may want to inform applicants early in the hiring process if one of these federal exclusions applies.

10. Regarding the EEOC's criminal background check guidance, what if an employer finds out an individual lied on his or her employment application regarding their criminal history? If that individual is fired for their lack of honesty about a prior conviction, could the employer still run afoul of the guidance?

Response:

Generally applicable and consistently implemented policies against falsifying or misrepresenting information in an application are enforceable. An employer whose practice is to terminate anyone whom it finds out has lied on an employment application may terminate someone who lies in response to a question about his or her criminal background. However, if the employee's prior arrest or conviction, not the fact that he or she lied about it on an application, is the reason that the employer terminated the employee, EEOC will apply the principles in the guidance to evaluate any charge of discrimination that is filed.

11. The general counsel is required to bring a case before the EEOC for a vote to proceed to litigation in four instances, including those in which the case would likely create public controversy. What types of cases would fall in this "public controversy" category? Given the high level of interest on the criminal history background checks guidance, and its controversy thus far, do you expect the general counsel to bring such cases before the commission for a vote to proceed prior to litigation?

Response:

The Commission does not maintain a list of types of cases that may generate public controversy because what is considered controversial necessarily changes over time. In deciding whether litigation of a particular case is likely to generate public controversy, the General Counsel considers various factors, including whether the litigation of similar cases in the past generated public controversy or adverse publicity, whether any issue in the litigation has been the subject of discussion in the Congress, and whether any issue in the case has been the subject of significant debate in the media. The Commission recognizes that, as things currently stand, cases challenging an employer's use of criminal history as an exclusionary criterion are likely to generate public controversy. The General Counsel accordingly has presented all such cases to the full Commission for a vote, and will continue to do so for the foreseeable future.

12. Should the EEOC decide to pursue litigation that considers partners as "employees," would you expect the commissioners to vote on whether to commence any such litigation? For example, do you believe the litigation would have a high likelihood for public controversy? Would it involve a major expenditure of resources? Would it present issues in a developing area of law?

Response:

A case in which the applicable legal standards are settled law, such as whether partners were covered as employees, would generally not be submitted to the Commission. The Supreme Court set out the factors to be considered in making such a determination ten years ago, and the Commission has litigated the issue in the context of law firms without generating public controversy. The decision whether any such case involves a developing area of the law, a major expenditure of resources, or is likely to generate public controversy is decided on a case-by-case basis.

13. In 2012, 122 lawsuits were filed in the name of the EEOC, but only three of those were submitted for the commission's consideration. Do you feel this is an appropriate proportion? Were fewer than 3 percent of the lawsuits brought in the commission's name last year appropriate for submission to the commission?

Response:

Prior to the Commission's adoption of a Strategic Enforcement Plan in December 2012, there was no number or proportion of cases which were to be submitted to the full Commission. One of the primary purposes of the Commission's delegation of litigation authority to the General Counsel in the 1995 National Enforcement Plan (NEP) was to drastically reduce the number of litigation recommendations submitted to the Commission to free up the Commissioners to focus on larger policy issues. Delegation of authority to the General Counsel to approve litigation is especially appropriate for EEOC since EEOC has a presidentially appointed and Senate confirmed General Counsel whom Congress made responsible for the conduct of litigation on behalf of the Commission. The Commission carefully reviewed the delegation under the NEP and reaffirmed delegation under the Strategic Enforcement Plan in December 2012 with the addition that one litigation recommendation from each District Office be submitted to the Commission each fiscal year, including litigation recommendations which otherwise meet the criteria for Commission approval.

14. Courts have recently found several cases brought by the EEOC to be meritless. For example, the EEOC was ordered to pay the defendants' costs and attorneys' fees in the *Peoplemark* and *CRST Van Expedited* cases. Did the commissioners approve the commencement of litigation in those cases and if not, why not? Given that the EEOC as a whole is ultimately accountable for outcomes in litigation, do you agree the commissioners should play a greater role in approving cases that proceed to litigation?

Response:

The Commission approved litigation in the *Peoplemark* case in September 2008. *CRST* was approved for litigation by the General Counsel in September 2007. While both of these cases were filed during the prior administration, it is clear that *CRST* was not a Commission-level case when the case was authorized for litigation.

The EEOC appealed the district court's award of attorney's fees in Peoplemark. The case has been briefed and argued and is currently awaiting decision by the United States Court of Appeals for the Sixth Circuit. The EEOC argued on appeal that Peoplemark is not entitled to attorney's fees because it failed to show that the EEOC's suit, at any time during the litigation, was frivolous, unreasonable, or without foundation – the standard the United States Supreme Court has established for awarding fees to a defendant in a Title VII action.

The EEOC appealed *CRST* to the 8th Circuit and although a divided panel upheld much of the lower court decision, it revived two individual claims and thus set aside the fees as the defendant was not a prevailing party. The CRST ruling held that the Agency must, at least in non-pattern-or-practice class cases, identify and conciliate for each claimant in the administrative process before filing suit on their behalf. This ruling departed from prior settled law and practice and was thus unforeseen at the time the case was filed. The EEOC later dismissed one claim and settled the one remaining claimant case this year. On remand, CRST filed a new petition for fees, which the district court granted, awarding $4.7 million in attorney's fees, expenses, and costs. EEOC anticipates that it will appeal the fees order.

Peoplemark, CRST and the few other losses we have suffered over the past few years are but a small part of the EEOC's highly successful litigation program. For example in 2012, we resolved 253 merits lawsuits for a total of $44,205,586 in monetary relief. Our success rate in litigation has been more than 90 percent for the past 5 years at least. This year we conducted **10** trials and won **8** of them, all of the victories involving cases filed pursuant to the Commission's delegated authority.

As noted above, the Commission has carefully reviewed the delegation of litigation authority to the General Counsel and reaffirmed that delegation under the Strategic Enforcement Plan in December 2012 with the addition that one litigation recommendation from each District Office be submitted to the Commission each fiscal year.

15. The commission has delegated authority to district directors to negotiate settlements and conciliation agreements, and to make reasonable cause determinations in a wide range of circumstances. How does the commission exercise oversight of that delegation and what limits are imposed on the discretion of the district directors?

Response:

The EEOC has received nearly 100,000 charges each year for the last three years. Agency staff, including District Directors, is responsible for investigating and resolving charges. Delegation to the District Directors is critical to an efficient charge resolution system, as without it, the inventory of charges would increase dramatically.

There is no express limitation on the exercise of delegated authority by District Directors, but they are guided in their exercise of delegated authority by the agency's Strategic Plan and Strategic Enforcement Plan (both were Commission-approved). The Chair is responsible for overall management of agency operations and personnel; various intermediate personnel directly supervise agency staff. The Director of the Office of Field Programs (OFP) is responsible for day-to-day supervision and oversight of the work of the District Directors. Among his regular interactions with the Chair and members of the Commission, the Director of OFP briefs the Commission quarterly on the administrative enforcement program of the agency (which includes

investigation and resolution of private sector charges through mediation or conciliation), as provided in the Strategic Enforcement Plan. As members of the Senior Executive Service, District Directors' performance is evaluated at least annually by the Director of the Office of Field Programs, and reviewed by a group of Senior Executives from within and outside the EEOC who are appointed by the Chair in accordance with Office of Personnel Management guidelines.

In addition, as part of the agency's Strategic Plan, a Quality Control Plan (QCP) is being developed that establishes specific criteria for evaluating the quality of EEOC investigations and conciliations and provides for an expanded review system to conduct assessments of investigations and conciliations in each district.

16. President Obama has commented on the importance of transparency in government. The EEOC's commissioner charges generally result in broad-based systemic investigations of an employer's business practices and can be based on a commissioner reading a newspaper article about a company or a company's hiring statistics. Is the EEOC required to explain or articulate any basis for the charge or what led to the charge before the employer is subjected to a broad-based systemic investigation by the EEOC? Do you believe the approach is consistent with the importance of transparency in government and due process in our legal system?

Response:

The EEOC uses Commissioner charges under Title VII of the Civil Rights Act and the Americans with Disabilities Act when there is reason to believe discrimination has occurred. Congress authorized the use of Commissioner charges when it enacted Title VII in 1964 and they have been used for decades for investigations of varying scope, from individual to class-based. In 1972, Congress broadened the Commissioner charge authority, removing a requirement that there be "reasonable cause" to investigate. In 1984, the Supreme Court upheld the authority of the Commission to issue and investigate Commissioner charges, under the same standards applicable to charges filed by members of the public, to determine whether the law has been violated. *Equal Employment Opportunity Commission v. Shell Oil Company*, 466 U.S. 54 (1984). The Supreme Court stated that this authority was essential to achieving the purposes of Title VII. *Id.* at 77.

Investigations initiated through these mechanisms are consistent with requirements of transparency in government and due process. As required by statute, the EEOC advises the employer of the alleged discrimination in the Commissioner charge, and explains its findings at various stages in the process, including in the predetermination interview, Letter of Determination, and conciliation. The employer is given opportunities to resolve the findings

voluntarily through conciliation, and the employer is not bound by the EEOC's findings in the administrative process but has the right to a trial de novo in court.

While the employer is apprised of the alleged discrimination, the statute limits the bounds of transparency. Title VII explicitly prohibits the agency and its staff from making "public in any manner whatever information" the Commission may obtain in an investigation, including the existence of an investigation. 42 U.S.C. § 2000e-8(e).

17. Why has the EEOC focused on conducting directed investigations, as opposed to investigations initiated in response to a complaint? How does the EEOC decide whether to spend resources on directed investigations in light of the substantial backlog of complaints?
Response:

The EEOC devotes the vast majority of its resources to investigations initiated in response to charges filed by members of the public. In contrast, directed investigations comprise a small portion of the Commission's resources. For example, in FY 2012, almost 100,000 charges were filed with EEOC, and over 111,000 were resolved. In contrast, the agency initiated only 24 directed investigations in FY 2012.

The authority for directed investigations is found in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(a) and (b), and the Equal Pay Act (EPA), 29 U.S.C. § 206(d), both of which give the EEOC the authority to investigate under sections 9, 11 and 17 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 209, 211 and 217. The term "directed investigation" is not a statutory term but is used by the EEOC to refer to investigations initiated by the agency under these provisions, which authorize the EEOC to investigate without an existing charge of discrimination filed by a member of the public. The ADEA language grants the EEOC the power to make investigations when "necessary or appropriate for the administration" of the ADEA, 29 U.S.C. § 626(a). Section 11 of the FLSA gives the EEOC the authority to "investigate such facts, conditions, practices, or matters as [it] may deem necessary or appropriate to determine whether any person has violated any provision of this chapter or which may aid in the enforcement of the provisions of this chapter . . . ." 29 U.S.C. § 211(a).

The EEOC exercises its statutory authority to initiate directed investigations and Commissioner charges to maximize the effectiveness of its law enforcement efforts when the agency has reason to believe that discrimination has occurred, even though an individual member of the public may not have come forward to file a charge. Congress authorized Commissioner charges and directed investigations in order to provide the EEOC with a mechanism to address possible discriminatory acts that otherwise might go unaddressed.

The EEOC uses these tools to investigate situations where individuals may for various reasons be unwilling or unable to file charges, for example when the employee fears retaliation should he or she file a charge. Other cases may be initiated on behalf of victims who are in underserved

communities, have been totally excluded from the workplace, or are unaware of discriminatory hiring or job referral barriers, such as racial, gender or age preferences covertly used by employment agencies at the behest of an employer. Commissioner charges and directed investigations are methods of seeking relief for these victims of discrimination.

In 2006, the Commission unanimously voted to reaffirm the importance of Commissioner charges and directed investigations as a central component of the EEOC's systemic program. In adopting the recommendations of its Systemic Task Force, led by Vice Chair Leslie Silverman, the Commission approved a series of measures to strengthen the agency's efforts to address pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location. The Task Force found that Commissioner charges and directed investigations "are important tools in the effort to combat systemic discrimination, as many victims of discrimination do not come to EEOC because they fear retaliation, do not know about their rights, or are unaware of the discrimination (particularly where the issue is hiring)."

18. In many cases, the EEOC engages in a "conciliation" or settlement process, regularly demanding the statutory maximum in terms of a monetary settlement offer and insisting on sweeping changes to the employer's human resource operations. Frequently, the settlement demands have no relationship to the historical jury verdicts in the region, and generally do not take the employer's defenses into consideration. What steps are you taking to ensure the EEOC is engaging in effective, good-faith conciliation prior to litigation?

Response:

Conciliation is the statutorily required process by which the EEOC attempts to resolve discrimination through "informal means of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5. The purpose of conciliation is to remedy the violation, as required by statute. If a particular policy or practice was found to be discriminatory, the EEOC would seek to have the employer change its practices to end the discrimination and to prevent further discrimination from occurring. Conciliation occurs only after the investigation of a charge has been completed, and the EEOC has reached a determination that the evidence establishes that there is "reasonable cause" to believe that discrimination occurred.

The percentage of successful conciliations has been increasing during the Chair's tenure. Successful conciliation rates: FY 2010 - 27 percent; FY 2011 - 31 percent; FY 2012 - 38 percent; FY 2013 (midyear) - 40 percent. Specific data is reflected below

Fiscal Year	Cause Resolutions	Conciliations	Percentage
FY 2010	4,981	1,348	27.1%
FY 2011	4,325	1,351	31.2%
FY 2012	4,207	1,591	37.8%

One of the steps the Commission is taking to insure effective, good-faith conciliations is the development of a Quality Control Plan that establishes criteria for evaluating the quality of investigations and conciliations. The proposed Quality Control Plan was developed by a staff work group with extensive public and internal input. It is currently under consideration by the Commission.

Further, the Commission disagrees with the notion that it fails to consider employer defenses or insists upon excessive monetary demands in conciliation. The Commission is responsible for furthering the public interest in remedying discriminatory conduct and that is our primary consideration in framing our relief demands.

EEOC has consistently taken steps to ensure effective and fair conciliations. The Office of the General Counsel and the Office of Field Programs routinely train employees on conciliations and

issued field guidance on issues raised by recent case law concerning the Agency's conciliation obligations. As part of the litigation review, the Office of the General Counsel and the Commission, as appropriate, review the conciliation history of each case prior to authorizing litigation. If conciliation is insufficient legally or otherwise, the case is returned to the local office to conduct further conciliations or is disapproved for litigation.

19. For years, the EEOC has litigated challenges to proper conciliation with varying degrees of success. Currently, the EEOC is taking two completely new litigation positions: (1) courts have no authority to review the EEOC's conciliation efforts; and (2) no information about conciliation can be put before a court unless the EEOC consents. These positions make the EEOC accountable to no party or court for its conciliation efforts. After almost 40 years of litigating the issue of conciliation, why is the EEOC now attempting to take that issue off the table? Please provide any and all documentation regarding this EEOC position.

Response:

With regard to judicial review of the Commission's efforts to obtain a conciliation agreement, the Commission recently has addressed the issue in several judicial districts where there are no controlling appellate decisions on whether Title VII authorizes judicial review of EEOC conciliations. The Commission has relied upon the plain language of Title VII, which allows the Commission to declare conciliation unsuccessful if it has been "unable to secure from the respondent a conciliation agreement acceptable to the Commission." The Commission has argued in its cases that this language evidences an intent to commit conciliation, which the statute describes as an "informal" method of achieving an agreement, to the discretion of the Commission and to make it non-reviewable by a court. 42 USC § 2000e-5(f)(1). Similarly, the plain language of 42 USC § 2000e-5(b) states that nothing said or done in conciliation may be made public or used as evidence in a subsequent proceeding without the consent of the persons concerned. The Commission has argued that this statutory provision reflects congressional intent to keep the negotiations of the conciliation process, like those in any settlement process, generally confidential and unrestrained by the concern of subsequent judicial scrutiny.

Significantly, some appellate courts have recognized that other parts of the EEOC's administrative process – namely its investigation and reasonable cause determination – are judicially unreviewable. *See, e.g. EEOC v. Caterpillar*, 409 F.3d 831 (7th Cir. 2005).

The EEOC recognizes that it has a duty to attempt to conciliate before bringing a civil action and, moreover, it has an enormous incentive to conciliate effectively. Over the last five years, the EEOC has attempted conciliation in 4,000 to 6,000 cases a year. As stated in response to Question 18, many matters are successfully conciliated by the Commission each year, but when conciliation fails, the EEOC is able to pursue litigation in only a small fraction of those cases.

20. Why do certain EEOC regional directors refuse to share information about what the EEOC learned during its investigation during the conciliation process even though they ultimately must do so in litigation if conciliation fails? Wouldn't sharing relevant information with the target of the investigation help resolve more cases and accomplish the goal of compliance with Title VII?

Response:

There are multiple opportunities to provide and receive information concerning a pending investigation. An investigation typically begins when an individual files a charge of employment discrimination alleging that the employer discriminated against him/her because of a basis prohibited by the statutes EEOC enforces. In EEOC's 53 field offices, our staff sends a copy of the charge to the employer and then investigates the allegations contained in the charge, collecting documentary evidence and in some cases interviewing witnesses. The employer has an opportunity to submit a position statement in response to a charge and information may be shared with the employer at various points during the investigation if doing so facilitates the investigation. As the investigation ends, the EEOC investigator holds a Pre-Determination Interview (PDI) with the employer, in most cases, by phone. During the PDI, the investigator reviews with the employer or the employer's representative the evidence collected and also asks the employer whether it wishes to submit any additional evidence which might be relevant to EEOC's analysis of the evidence. If EEOC concludes based on the evidence that there is "reasonable cause to believe discrimination has occurred," the agency issues a Letter of Determination, which details the legal and factual bases for the "reasonable cause" finding.

During the conciliation process, which begins only after a Letter of Determination has been issued, the charging party, the employer and EEOC discuss how the matter might be resolved. Conciliation focuses on two issues: (1) how the charging party can be made "whole," i.e., what relief is necessary to place the charging party as near as possible in the situation he or she would have been if the discrimination had not occurred, and (2) what steps the employer should take to end the discrimination and prevent further discrimination. During conciliation, the central focus of the discussion is the appropriate relief to remedy the discrimination, rather than liability issues. EEOC staff share information with the employer during the Pre-Determination Interview and during conciliation.

21. Private lawyers who sue employers engage in a cost-benefit analysis to determine whether the cost and risk of going forward to trial is warranted by the potential financial outcome. As the steward of taxpayer dollars, do you believe the EEOC should do this too? What are the EEOC's procedures for resolving cases in a timely manner to reduce costs to employers, and ultimately the taxpayer?

Response:

Unlike private litigation, the potential financial outcome is not the only or even the primary benefit the Commission considers. Advancing the public interest in stopping and remedying discrimination is the most important consideration for EEOC as a law enforcement agency. In many cases, broad-based injunctive relief is an equally or more important benefit than the financial outcome. The pace of EEOC litigation, like all litigation in the federal courts, depends upon numerous factors, including factors beyond the litigants' control. However, the Commission generally makes early attempts to settle cases and continues to identify settlement opportunities throughout the litigation.

22. The EEOC's Strategic Enforcement Plan states the EEOC has superior access to data, documents, and potential evidence of discrimination in recruitment and hiring, and therefore is better situated to eliminate barriers in recruitment and hiring than are individuals or private attorneys, who have difficulties obtaining such information. In determining whether to bring other systemic litigation, does the EEOC consider whether the individuals affected have the means and ability to seek redress through private civil litigation? In your view, should it do so?

Response:

Yes, in all litigation decisions the Commission considers whether the affected individuals have the resources to seek redress. As a federal law enforcement agency with extensive responsibilities and limited resources, however, the Commission also considers broader law enforcement interests. In systemic cases in particular, the Commission has a strong interest in securing broad-based injunctive relief to prevent future discrimination, and must consider whether private enforcement efforts would result in such relief or whether the Commission's participation in the litigation is necessary to ensure that adequate remedies, including targeted equitable relief, are obtained.

23. In litigation, the EEOC claims an attorney client privilege with charging parties and claimants. But in practice the EEOC does not consider their wishes when deciding whether to settle a case or go to trial. Why should the EEOC be able to have it both ways unlike attorneys in other litigation?

Response:

As a law enforcement agency supported by tax dollars, the EEOC, unlike private attorneys, not only has an obligation to seek relief for aggrieved individuals, but must also ensure that the public interest is served when it conducts litigation. EEOC does consider the interests of charging parties in its litigation. Although EEOC determines the conditions under which it will resolve litigation it brings, the monetary relief it will accept in a settlement often depends on what the claimant(s) believes is satisfactory. But even where there is agreement among EEOC, claimants, and the defendant on the amount of monetary relief to be paid to the claimants, EEOC will not settle a case unless adequate injunctive and affirmative relief are also provided.

EEOC files suits in its own name, and unless a charging party or other claimant intervenes, it is the only plaintiff. Like any other party, EEOC has sole discretion regarding the terms on which to resolve the claims it brings. Although EEOC usually seeks relief for one or more individuals in its suits, its primary purpose in bringing litigation is to further the public interest in eliminating employment discrimination. Charging parties are informed prior to the initiation of an EEOC suit that although EEOC will be seeking particular relief for them, its first obligation is to the public interest, and thus at some point in the litigation EEOC may act in a manner that the charging party believes is contrary to his or her interests. In Title VII, ADA, and GINA suits, charging parties also are informed of their right to intervene in EEOC's suit.

EEOC does not claim an attorney-client relationship with claimants, and therefore there is no inconsistency in its refusal to settle a case even though monetary relief has been offered that is satisfactory to the claimants -- a situation that rarely occurs. EEOC believes that in providing the agency with litigation authority in 1972 for the purpose of both "implement[ing] the public interest [and] bring[ing] about more effective enforcement of private rights," *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 (1908), Congress could not have intended that claimants in EEOC suits would be denied the right to communicate confidentially with EEOC attorneys, putting them in a worse position than if they had filed separate actions, which Congress believed many could not afford to do. Thus, EEOC takes the position that although it does not have an attorney-client relationship with claimants, the elements of the attorney-client privilege apply to EEOC's interactions with claimants that are necessary for the agency to litigate its claims effectively. This means not only that communications between EEOC attorneys and claimants are protected from disclosure, but ex parte contacts by opposing attorneys with claimants are prohibited.

24. The EEOC is required to establish or make available an Alternative Dispute Resolution (ADR) program that may be available for the pre-complaint process and the formal complaint process. The EEOC, however, may make a determination regarding whether to offer ADR in a particular case.

a. Once a decision has been made by EEOC as to whether to offer ADR, are the parties involved notified of that decision prior to further administrative contact? If not, why not?

b. What percentage of cases does the EEOC offer ADR in the pre-complaint process?

c. What percentage of cases does the EEOC offer ADR in the formal complaint process?

d. Does the EEOC offer ADR during initial counseling of the complainant? If not, what informal methods of resolution does the EEOC counselor offer?

e. How does the EEOC decide whether to offer ADR in a particular case?

f. In deciding whether to offer ADR in a particular case, does the EEOC take into account a claimant's desire to mediate, litigate, or settle?

Response:

The procedures applicable to discrimination charges filed against private and state and local government employers differ from the procedures applicable to complaints filed against the federal government as an employer. This question appears to confuse the Federal complaint process (complaints against federal agencies) with the system EEOC uses to process complaints against private sector and state and local government employers. We are providing a general explanation as to how EEOC uses mediation to resolve disputes involving employees and employers in the private and public sectors.

EEOC uses mediation extensively as part of its processing of charges filed against private and state and local government employers. Participation in mediation is strictly voluntary and at no cost to the parties. EEOC supplies the neutral who leads the discussion between the charging party and employer as they seek to come to a mutual agreement as to how to resolve the matter. Mediation is offered to approximately 65 to 70 percent of all charging parties. Once the charging party accepts the offer, we then ask the employer whether they wish to mediate the dispute. As shown below, the majority of employers do not agree to mediation:

2010 Respondent acceptance rate: 24.4%

2011 Respondent acceptance rate: 25.6%

2012 Respondent acceptance rate: 25.5%

If the parties agree to mediate, the success rate is extremely high: more than 70 percent of the mediations result in resolution of the charge.

2010	73.7%
2011	73.4%
2012	76.6%

In addition, the agency encourages the employer community to enter into Universal Agreements to Mediate (UAMs). These agreements reflect employers' commitment to participate in mediation. At the conclusion of FY 2012, the agency had secured a cumulative multi-year total of 2,140 UAMs, which is a 7.1 percent increase from FY 2011.

For complaints against federal agencies as employers, complainants must first participate in counseling by an EEO counselor employed by the federal agency. The federal sector process delineates between a pre-complaint process (counseling), during which ADR is routinely offered, and the formal complaint process. Accordingly, we cannot provide specific answers to questions A-F.

26. In fiscal year 2012, how many lawsuits did the EEOC win outright, through jury verdict or summary judgment?

Response:

In FY 2012, the Commission resolved 13 litigation cases through a favorable court order (judgment following a verdict, default judgment, or summary judgment for the Commission).

27. The EEOC claims process has a costly effect on small businesses, especially when the case is litigated. What are the EEOC's internal procedures for resolving cases in a timely manner to reduce costs to employers, and ultimately consumers?

Response:

EEOC is sensitive to the concerns of small business and devotes significant resources to educating small businesses so that they do not run afoul of the EEO laws. In fact, the Small Business Administration Ombudsman has given EEOC a rating of "A" or "A-" for every year of this last decade for its efforts in responding to small business concerns. EEOC's administrative enforcement procedures provide small business with opportunities to resolve charges efficiently. EEOC offers mediation to both parties at the beginning of a charge. If both the employer and employee agree to mediation, over 75 percent of those charges are resolved successfully in the mediation process, and those resolutions occur in an average of 90 days. Likewise, employers are encouraged to settle charges prior to the completion of our investigation and to provide timely information to EEOC to rebut the allegations in a charge. Either can ensure efficient resolution of a charge.

EEOC has created fact sheets, brochures and compliance guidance which are available through the EEOC website. Small businesses can obtain these materials free of charge through EEOC's publication center. Copies may be ordered through EEOC's website at http://www/eeoc.gov/eeoc/publications/index.cfm or via a toll free telephone number (1-800-669-3362). EEOC has also developed fact sheets and publications specifically for small employers, such as "Small Employers and Reasonable Accommodation" and "Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors." To help small employers understand newly enacted laws, the EEOC has posted "Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008" and "Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008" on its website. These documents also invite small employers to contact our Small Business Liaisons to obtain confidential assistance with compliance in specific workplace situations.

Also, EEOC provides no-cost outreach and education programs as well as fee-based training and technical assistance to all employers. The training and materials we provide to small employers have been designed to give them the information they need to comply with the federal anti discrimination laws enforced by EEOC.

In FY 2012, EEOC conducted 577 free outreach events directed toward small businesses, which reached about 63,000 small business representatives. An additional 4,654 small business representatives attended fee-based events. The most popular topics for small business audiences were Mediation, An Overview of EEOC, Sexual Harassment, Charge Processing, Title VII of the Civil Rights Act and the Americans with Disabilities Act.

A Small Business Liaison is assigned to every EEOC office. Small Business Liaisons answer questions about the laws EEOC enforces, our mediation program and what to expect during an investigation. When a charge of discrimination is filed with EEOC against a small business, our field offices send a letter informing the employer of the availability of the Small Business Liaison. The letter invites small businesses to visit our website and informs small employers that

any inquiry or request for assistance directed to the Small Business Liaison will not adversely affect the investigation of the charge.

Mindful of the importance of continuing to improve our outreach to small businesses, EEOC's Small Business Task Force, led by Commissioner Constance S. Barker, was established at Chair Berrien's request in FY 2011.

28. As the Supreme Court noted in Clackamas Gastroenterology Assocs. v. Wells, the definition of "employee" in anti-discrimination laws-that it is "an individual employed by an employer"-is "completely circular and explains nothing." Thus the determination as to whether partners in a particular partnership are "employers" or "employees" is based on a multi-factored, facts-and-circumstances test. To the extent the statute needs clarification, do you believe litigation is the proper avenue through which to define partnerships?

Response:

Although the anti-discrimination statutes do not provide an extensive definition of the term employee, the Supreme Court has observed in several decisions that "'when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.'" *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992)). In *Clackamas*, the Court relied on EEOC Guidelines that "discuss both the broad question of who is an 'employee' and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees." *Id.* at 448-49 (citing 2 Equal Employment Opportunity Commission, Compliance Manual §§ 605:0008–605:00010 (2000)).

Like many federal employment and labor statutes, the statutes EEOC enforces broadly define employee. Court decisions and EEOC Guidelines provide a sufficiently clear framework for assessing the factually-intensive question of whether particular individuals are employees covered by the anti-discrimination statutes.

29. Today, most partnerships, particularly large partnerships, adopt internal management practices such as governing boards that allow them to delegate managerial functions while maintaining partner ownership of the firm, control over professional work product, and voice on issues critical to the partnership. In your view, does the delegation of partnership authority to internal governing boards transform the partners of a firm into employees rather than employers? What factors, in the EEOC's view, are most critical to determining whether and when such a delegation transforms partners into "employees?"

Response:

As the Commission has explained in its Compliance Manual, the determination of whether an individual is an employee, rather than an independent contractor, partner, or other non-employee, is fact-specific. This determination depends on the actual working relationship between the individual and the partnership. The relevant question is whether the individual acts independently and participates in managing the organization (not an employee), or whether the individual is subject to the organization's control (an employee). The EEOC has identified six non-exhaustive factors relevant to making this determination:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- Whether the individual shares in the profits, losses, and liabilities of the organization.

In *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449-50 (2003), the Supreme Court approved of the EEOC's emphasis on "the common-law touchstone of control" when determining whether an individual with the title of partner is an employee under the EEO laws. The Court noted that whether shareholder-directors in that case were employees could not be determined by asking if the director-shareholder position "is the functional equivalent of a partner" because "there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners." *Id.* at 445-46. The Court adopted the six-factor control test from EEOC's guidance, emphasizing that the coverage determination depends on "all the incidents of the relationship . . . with no one factor being decisive." *Id* at 451.

Thus, if a determination were made in a particular case that individuals holding the title of "partner" are actually employees, it would be a factual determination guided by existing law.

30. In the last decade the EEOC brought a highly publicized lawsuit against the law firm Sidley Austin, alleging its partners were employees and its retirement policy for partners therefore violated the Age Discrimination in Employment Act. What, in the EEOC's view, were the most significant characteristics of Sidley's partnership structure that led the EEOC to conclude that its partners were "employees?"

Response:

In its brief to the U.S. Court of Appeals for the Seventh Circuit, the EEOC looked at a number of factors that led it to conclude that at least some of Sidley's partners could properly be considered employees. In particular, the Commission's brief discussed remuneration, noting that the extent to which partners share in the firm's profits varies tremendously, and many received most of their pay in a form that resembled salary. The brief discussed ownership, and noted that the amount of each partner's required capital contribution varied considerably from individual to individual. Finally, the Commission's brief discussed management. Sidley was governed by a 36-member executive committee; members of that committee owned almost 80 percent of the firm. The executive committee, and its 8-member management committee, made all of the firm's critical decisions, including partnership admission, partner expulsion, pay/ownership allocations, practice group head appointments, opening and closing of offices, and who will join the executive committee.

31. Is the EEOC currently pursuing directed investigations of mutually agreed upon retirement policies for partners that were not commenced following a charge filed by a partner? If so, what factors did the EEOC consider in deciding to prioritize those investigations over the tens of thousands of backlogged cases involving employee complaints?

Response:

There are currently two pending directed investigations of alleged violations of the Age Discrimination in Employment Act (ADEA) based upon policies which mandate retirement at a specified age for person employed in various positions, including as partners.

32. The EEOC's Strategic Enforcement Plan lists six enforcement priorities. Do you intend to make mutually agreed upon retirement policies in legal and accounting professional partnerships a focus of the EEOC's enforcement efforts? If so, which of the six enforcement priorities identified in the Strategic Enforcement Plan make mutually agreed upon retirement policies for partners an EEOC priority?

Response:

Retirement policies are not a priority issue under the EEOC's Strategic Enforcement Plan. Whether individuals are employees under the federal civil rights laws is an important issue of access to justice that is a priority (#5) for the agency under the Strategic Enforcement Plan. While the establishment of priorities in the SEP is designed to provide focused attention and resources in order to have greater impact, the SEP does not preclude the agency from addressing other issues of discrimination.

Questions regarding the EEOC's interaction with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP)

34. Did the EEOC comment on the OFCCP's rescission of the agency's 2006 Compensation Standards and the issuance of OFCCP Directive 307? Why not? The EEOC agreed with the 2006 Compensation Standards. Has the EEOC's position changed?

Response:

The EEOC reviewed OFCCP's notice of proposed rescission of the 2006 compensation standards in January 2011 after it was published in the Federal Register; reviewed a draft notice of final rescission in January 2012 pursuant to EO 12067; and reviewed draft notices of final rescission in November and December of 2012 as part of the Office of Management and Budget's EO 12866 interagency review process. The EEOC commented on the notice of rescission in November 2012. The EEOC did not review Directive 307 and therefore did not comment on it. The substance of the EEOC's interagency comments and conversations is protected from disclosure by the deliberative process privilege.

The EEOC's position in 2006 that the OFCCP's compensation standards were consistent with Title VII has not changed. However, the EEOC also does not disagree with the OFCCP's decision to rescind the standards and to adopt new standards that are also consistent with Title VII and that give the agency more flexibility to enforce EO 11246 in a manner consistent with Title VII.

35. As you know, Executive Order (EO) 12067 requires the EEOC to ensure coordination of federal equal employment opportunity enforcement efforts. In particular, EO 12067 requires the EEOC "to develop uniform standards, guidelines, and policies defining the nature of employment discrimination" and "develop uniform standards and procedures for investigations and compliance reviews." Did the EEOC review OFCCP's notice of rescission of the 2006 Compensation Standards and the issuance of Directive 307 under EO 12067? Did the EEOC provide any feedback to OFCCP about the approach contained in Directive 307? Please provide any and all correspondence between the EEOC and OFCCP on this subject.

Response:

As stated in the answer to Question 34 above, EEOC did review OFCCP's notice of rescission and provided feedback to OFCCP. The EEOC did not review Directive 307 and therefore did not comment on it. Attached are copies of nonprivileged correspondence between OFCCP and EEOC on this subject.

36. Under the EEOC's Compensation Manual, published in 2000, the EEOC instructs investigators to "determine the similarity of the jobs by ascertaining whether the jobs generally involve similar tasks, require similar skill, effort, and responsibility, working conditions, and are similarly complex or difficult." The EEOC's Compensation Manual continues, "[t]he actual content of the jobs must be similar enough that one would expect those who hold the jobs to be paid at the same rate or level." Does the EEOC interpret OFCCP Directive 307 to be altogether consistent with these instructions?

Response:

There is no conflict between the EEOC Compliance Manual language quoted above, which appears in the Guidance section about disparate treatment, and the relevant language in OFCCP Directive 307. In particular, Directive 307 states at pp. 12-13: "For purposes of evaluating compensation differences, employees are similarly situated where it is reasonable to expect they should be receiving equivalent compensation absent discrimination. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors." In addition, the EEOC's Compliance Manual's disparate treatment subsection also states that the method suggested for conducting a comparative compensation analysis is not intended as an exclusive method, and subsequent subsections detail other methods for determining whether compensation discrimination or discrimination in practices that affect compensation have occurred -- topics that are also addressed in Directive 307.

37. As you know, in August, 2012, the National Research Council of the National Academies of Sciences (NAS) released a report entitled, "Collecting Compensation Data from Employers." This report was commissioned by the EEOC. The report contained two primary recommendations:

Recommendation 1: In conjunction with the Office of Federal Contract Compliance Programs of the U.S. Department of Labor and the Civil Rights Division of the U.S. Department of Justice, the U.S. Equal Employment Opportunity Commission should prepare a comprehensive plan for use of earnings data before initiating any data collection.

Recommendation 2: After the U.S. Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the U.S. Department of Justice complete the comprehensive plan for use of earnings data, the agencies should initiate a pilot study to test the collection instrument and the plan for the use of the data. The pilot study should be conducted by an independent contractor charged with measuring the resulting data quality, fitness for use in the comprehensive plan, cost and respondent burden.

a. What is the status of the EEOC's implementation of these recommendations? Has the EEOC and OFCCP developed a comprehensive plan? If so, please provide a copy of the comprehensive plan. If not, why not, and when will it be completed?

b. Has an independent contractor been selected for a pilot project?

c. How will the EEOC ensure coordination with OFCCP with regard to these recommendations?

d. Has the EEOC had any discussions with OFCCP about the comments OFCCP received in response to the Advance Notice of Proposed Rulemaking on a Comprehensive Data Collection Tool, 76 Fed. Reg. 49398 (Aug. 10, 2011)?

e. Will EEOC commit to using its authority under EO 12067 to require OFCCP to adhere to the NAS recommendations before issuing any proposed regulations on collecting compensation data?

Response

a. EEOC is thoroughly considering the NAS Study recommendations and will take them into account before proceeding with new collections of compensation data. As part of the review and consideration of the NAS Study recommendations, EEOC staff has discussed the recommendations with representatives of the U.S.D.O.J. Civil Rights Division and OFCCP, as well as agency stakeholders such as the National Industry Liaison Group.

b. EEOC has neither sought nor selected an independent contractor for a pilot project.

c. See responses to a and b, above.

d. EEOC has reviewed comments received by OFCCP in response to its ANPRM. We have not had formal discussions with OFCCP about those comments.

e. Pursuant to E.O. 12067, EEOC will, as it has to date, communicate with OFCCP and continue to work closely with the OFCCP concerning the collection of compensation data.

There is a case in which an employee filed a gender discrimination case against her employer. When the employer tried to meet with the EEOC representative and the employee for consultation, the employer instead found the EEOC representative acting as a prosecuting attorney for the employee instead of a negotiator between the parties. The employer was not notified prior to the meeting of the terms of these discussions, and whether or not the EEOC representative would be used in a mediating role or prosecuting role, leaving the impression these meetings were informal negotiations.

a. To what extent does the EEOC give a notice of the terms to all parties involved prior to in person consultations?

b. In other cases is it protocol for an EEOC representative to play negotiator/mediator and prosecutor during an investigation?

c. If employers are not notified of the status of the consultation meeting, what are their administrative rights to have counsel present and/or delay the meeting until counsel is present?

Response:

a. It is unclear from the questions at what stage of the EEOC investigation the consultation meeting occurred. Generally, employers and employees may meet in a mediation, which is a confidential process separate from the investigation. (See answer 25). Parties to an EEOC mediation generally do not, in advance of the mediation session, share positions or terms to which they would agree. There is considerable sharing of terms of settlement during the mediation.

They may also meet during conciliation, which only occurs after the investigation if the agency has made a determination that there is reasonable cause to believe discrimination has occurred. (See answer 20.) In conciliation, EEOC invites both parties to meet, either in person or over the phone. EEOC generally conducts conciliation in one of two ways, i.e., the EEOC office shares the details of the proposed conciliation terms in advance in a letter, or plans to share the terms during the conciliation conference so they can be explained and questions answered.

b. During an investigation of a charge, the EEOC acts as a neutral fact-finder and gathers and evaluates evidence. The investigator may also seek to resolve the charge through a settlement agreement prior to a determination on the merits of the charge. At the end of the investigation, the EEOC makes a determination on whether the evidence establishes that there is "reasonable cause" to believe that discrimination occurred. If the evidence establishes a violation, the investigator now shifts roles. As required by the statutory

conciliation process, the investigator must represent the EEOC's interest in obtaining an appropriate remedy for the discrimination found.

c. Employers are notified of the status and scheduling of a conciliation conference and have the right to have counsel present. Scheduling of the conference is done at a mutually agreeable time. The EEOC's Compliance Manual provides that conciliation with respondents should generally occur face-to-face, or by phone if this cannot be arranged or if the proposed agreement is straightforward and brief. It also provides that whenever possible, conciliation should occur with respondent officials who have authority to enter into an agreement.

2. As you know, the EEOC's Chicago District Office is currently investigating PricewaterhouseCoopers regarding their partnership agreement and mandatory retirement age. The six-factor partnership test adopted by the Supreme Court in *Clackamas* would presume the partners at PricewaterhouseCoopers are not subject to the ADEA.

a. Should the EEOC decide to pursue litigation of this case, do you believe it would involve a major expenditure of resources or have a high likelihood for public controversy?

b. Given the Strategic Enforcement Plan's objective of retaining the decision to commence litigation over cases that (1) will involve a major expenditure of resources; (2) present issues in a developing area of law; or (3) cases with a high likelihood for public controversy, would you expect the commission, and not the general counsel, to vote on whether to commence litigation against PricewaterhouseCoopers?

Response:

The Supreme Court's decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 446 (2003) held that "there are partnerships that include hundreds of members, some of whom may well qualify as 'employees." The Court endorsed the multi-factor, fact-based approach set forth in EEOC's Compliance Manual as the correct approach to determining whether a person impacted by a mandatory retirement policy should or should not be considered an employee. *See also* Responses 28-29 above.

The General Counsel sought Commission approval for litigation against PriceWaterhouseCoopers based upon the findings of the Chicago District Office's direct investigation of the firm's mandatory retirement policy for partners. The Commission voted to disapprove the recommended litigation.