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Source of document:	FOIA Request Assistant Legal Counsel Equal Employment Opportunity Commission Office of Legal Counsel FOIA Programs 131 M Street, N.E., Suite 5NW22B Washington, D.C. 20507 Fax: (202) 653-6034 Email: foia@eeoc.gov

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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August 1, 2017

Re: FOIA No.: 820-2017-002955 (EEOC Views and/or View Letters)

Your Freedom of Information Act (FOIA) request, received on July 5, 2017, is processed. Our search began on July 6, 2017. All agency records in creation as of July 11, 2017 are within the scope of EEOC's search for responsive records. The paragraph(s) checked below apply.

[ ] Your request is granted.

[ ] Your request is denied pursuant to the subsections of the FOIA indicated at the end of this letter. An attachment to this letter explains the use of these exemptions in more detail.

[ ] Your request is procedurally denied as [ ] it does not reasonably describe the records you wish disclosed, or [**X**] **no records fitting the description of the records you seek disclosed exist or could be located after a thorough search**, or [ ] the responsive records are already publically available. See the Comments page for further explanation.

[**X**] Your request is granted in part and denied in part. Portions not released are withheld pursuant to the subsections of the FOIA indicated at the end of this letter. An attachment to this letter explains the use of these exemptions in more detail.

[ ] Your request is closed for administrative reasons. An attachment to this letter further explains this closure.

[ ] A fee of $ 0.00 is charged. Charges for manual search and review services are assessed according to the personnel category of the person conducting the search a. Fees for search services range from $5.00 per quarter hour to $20.00 per quarter hour. Direct cost is charged for computer search and in certain other circumstances. Photocopying is .15 per page. 29 C.F.R. §1610.15. The attached Comments page further explains the direct costs assessed. The fee(s) charged is computed as follows:

[ ] Commercial use request: [ ] pages of photocopying; [ ] quarter hour(s) of [ ] review time; and [ ] quarter hour(s) of [ ] search time. Direct costs are billed in the amount of [ ] for [ ];

[ ] Educational or noncommercial scientific institution or a representative of the news media request: [ ] pages of photocopying. The first 100 pages are provided free of charge; and

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[ ] All other requests: [ ] pages of photocopying and [ ] quarter hour(s) of search time. Direct costs are billed in the amount of [ ] for [ ]. The first 100 pages and the first two hours of search time are provided free of charge.

[ ] Please submit payment of $ 0.00 by either:

(1) Credit card at **pay.gov.** Visa, MasterCard, American Express and Discover credit cards are accepted. Debit cards bearing the Visa or MasterCard logo are also accepted. We will finish processing your request after EEOC receives a copy of your pay.gov credit or debit card receipt or

(2) Check, payable to the United States Treasurer, to the address above.

[ ] The disclosed records are enclosed. No fee is charged because the cost of collecting and processing the chargeable fee equals or exceeds the amount of the fee. 29 C.F.R. § 1610.15(d).

[ ] The disclosed records are enclosed. Photocopying and search fees have been waived pursuant to 29 C.F.R. § 1610.14.

[ ] I trust that the furnished information fully satisfies your request. If you need any further assistance or would like to discuss any aspect of your request please do not hesitate to contact the FOIA Professional who processed your request or our FOIA Public Liaison (see contact information in above letterhead or under signature line).

[**X**] You may contact the EEOC FOIA Public Liaison for further assistance or to discuss any aspect of your request. In addition, you may contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer.

The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at (202) 741-5770; toll free 1-877-684-6448; or facsimile at (202)741-5769.

The contact information for the FOIA Public Liaison: (see contact information in the above letterhead or under signature line).

[**X**] If you are not satisfied with the response to this request, you may administratively appeal in writing. Your appeal must be postmarked or electronically transmitted in 90 days from receipt of this letter to the Office of Legal Counsel, FOIA Programs, Equal Employment Opportunity Commission, 131 M Street, NE, 5NW02E, Washington, D.C. 20507, or by fax to (202) 653-6034, or by email to FOIA@eeoc.gov. https://publicportalfoiapal.eeoc.gov/palMain.aspx. Your appeal will be governed by 29 C.F.R. § 1610.11.

Re: FOIA No.: 820-2017-002955

[**X**] See the attached Comments page for further information.

Sincerely,

/s/ Sdgarner

Stephanie D. Garner
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Comments

This is in response to your Freedom of Information Act (FOIA) request. You request a copy of each EEOC Views (or Views Letters), which are statements of the EEOC position, thoughts and comments on specific issues or legislation being considered by Congress for fiscal years 2015, 2016, and 2017 to date. Your request is granted in part and denied in part. There are no records available for 2016 and 2017.

Attached for your review is correspondence dated April 13, 2015 (17 pages).

This response was prepared by Tracy L. Smalls, Government Information Specialist, who may be reached at 202-663-4331.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Communications and Legislative Affairs
Washington, D.C. 20507

April 13, 2015

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walberg:

Please accept this statement for the record from the Equal Employment Opportunity Commission (EEOC) in response to the March 24, 2015, Education and Workforce, Subcommittee on Workforce Protections hearing on H.R. 550, "EEOC Transparency and Accountability Act of 2015," H.R. 549, "Litigation Oversight Act of 2014," H.R. 548, "Certainty in Enforcement Act of 2015," and HR 1189, the "Preserving Employee Wellness Programs Act." The EEOC has significant concerns about the proposed legislation and the record established at the hearing. We write to correct the public record and to share additional information to better inform members of the Subcommittee and the general public on the issues at hand.

This is a historic year for the EEOC as we approach our 50th anniversary as an agency this July 2nd. This July also marks the 25th Anniversary of the Americans with Disabilities Act, which we celebrate this July 26th. For EEOC, this anniversary year is a time for reflection and recommitment to expanding opportunity for all Americans.

For all the progress that has been made, our work remains unfinished. The ongoing challenge of combating discrimination in all its forms is what makes the EEOC as vital in 2015 as it was in 1965. At the EEOC, we are working every day to eliminate continuing barriers to equal employment opportunity and to build stronger workplaces. EEOC Chair Jenny R. Yang has made it a priority to partner with employers, employees, and other federal agencies to actively develop solutions to our most complex problems. For example, at the request of Chair Yang, EEOC Commissioners Victoria Lipnic and Chai Feldblum will co-chair an anti-harassment Task Force convening experts from the employer community, workers' advocates, attorneys, academics, and others to identify effective strategies to prevent and remedy harassment in the workplace.

The EEOC is responsible for enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, the Americans with

Disabilities Act of 1990, Sections 501 and 505 of the Rehabilitation Act of 1973, the Civil Rights Act of 1991, and the Genetic Information Nondiscrimination Act of 2008. Vested with this responsibility, the Commission is dedicated to achieving our national vision of justice and equality in the workplace by preventing, stopping, and remedying unlawful employment discrimination.

The EEOC strives to achieve its mission through public outreach and education, development and implementation of regulations and policy guidance, public meetings, mediation, investigation, and conciliation. When these steps are not successful, litigation is the enforcement step of last resort. Our mediation, settlement and conciliation efforts serve as prime examples of our investment in strategies to resolve workplace disputes efficiently and with lasting impact, without resort to litigation. In fiscal year 2014, these efforts secured more than $296 million in benefits for individuals. EEOC's mediation program successfully helped employers voluntarily resolve 77 percent of the 10,221 mediations conducted involving charges of discrimination.

The EEOC takes the concerns of Congress seriously and has worked with our partners in the House and Senate to address their questions about EEOC operations and policy. At the same time, we have significant concerns about the proposed legislation. The proposed legislation would divert Commission resources away from our statutory responsibility to investigate and endeavor to resolve charges of discrimination while also creating inefficiencies that would undermine our ability to enforce our nation's anti-discrimination laws.

During the March 24th Subcommittee hearing, the testimony of Paul Kehoe addressed the issue of EEOC resources and results. Mr. Kehoe states that "[d]espite a budgetary increase of over $23 million (6.7 percent) in fiscal year 2010, and essentially flat funding since, the EEOC's results have plummeted, and its backlog of unresolved charges remains near historical highs." This characterization is belied by the agency's record. Over the past several years, the agency has achieved significant results, including substantial increases in the percentage of successful conciliations over the past three years from 27 percent in fiscal year 2010 to 38 percent in fiscal year 2014, and an increase in targeted equitable relief to prevent future discrimination from 64 percent in fiscal year 2013 to 73 percent in fiscal year 2014. The Commission also secured a historic high of $372.1 million in relief for individuals through voluntary resolutions with employers prior to any litigation being filed in fiscal year 2013. Recently, EEOC and Local 28 of the Sheet Metal Workers' International Association, agreed to a partial settlement of race discrimination claims against the local union, which if approved by the U.S. District Court for the Southern District of N.Y., will create a back pay fund for a group of minority sheet metal workers. Pursuant to the settlement, it is estimated that the union will pay approximately $12.7 million over the next five years and provide substantial remedial relief to partially resolve claims made against the union by EEOC and others. In addition, the Commission obtained the highest jury verdict in the history of the ADA, as well as in the agency's history, against Henry's Turkey on behalf of 32 intellectually disabled men who were subjected to a hostile work environment, reduced pay, and other discriminatory working conditions for many years.

The EEOC continually strives to ensure that employees and employers involved in discrimination charges achieve a resolution as promptly as possible. Increases in the EEOC's

budget in fiscal years 2009 and 2010 enabled the agency to hire 164 investigators and mediators. Together with the training of these new staff and diligent charge management, these efforts generated nearly a 20 percent reduction in the charge workload in fiscal year 2011 and fiscal year 2012 – the first decreases in nearly 10 years.

These gains could not be sustained in fiscal year 2013 and fiscal year 2014 due to the loss of front-line staff coupled with a hiring freeze and due to sequestration in fiscal year 2013 when the EEOC was forced to furlough its entire workforce for five days. The government shutdown in the first quarter of fiscal year 2014 had repercussions of its own: time required to recover from the pent-up demand and workload, fewer charge resolutions and a concomitant lost opportunity to further reduce the workload.

The fiscal year 2014 appropriations allowed the EEOC to launch a critical mid-year hiring effort in order to rebuild its workforce, particularly those who provide direct services to the public in the 53 field offices and who investigate, mediate, conciliate, and litigate pending discrimination claims. During the third and fourth quarters of fiscal year 2014, the EEOC hired approximately 116 investigators and 12 mediators, helping to restore some of the prior years' losses to the front-line staffing levels and rebuild enforcement capacity in the field offices. We expect to see the benefits of this round of hiring in the third quarter of fiscal year 2015, as it typically takes at least six months for new investigators to become fully productive in charge management.

Over the past three years, the EEOC has worked with employers to voluntarily resolve, without litigation, a greater percentage of cases where the agency has found reasonable cause to believe discrimination has occurred than any time in recent history. In many of these resolutions, EEOC and employers agree to actions to prevent discrimination from reoccurring. Moreover, conciliation is just one component of an integrated system through which the EEOC works successfully to foster voluntary compliance with the equal employment laws. The EEOC works with employers and human resource professionals to provide ongoing training, outreach, and consultation, to assist employers with the adoption of good employment policies and the early and informal resolution of employment disputes.

When conciliation efforts have failed and EEOC determines that further government enforcement is warranted, EEOC may pursue litigation. In fiscal year 2014, EEOC filed suit on fewer than 8 percent of the charges that did not resolve through conciliation. Where the Commission does file suit, our litigation program has a very high rate of success. In fiscal year 2014, the Commission successfully resolved 93 percent of litigation at the district court level. EEOC's litigation success rate at the district court level has been consistent, ranging from 87 to 93 percent between fiscal years 2010 and 2014. Similarly, our success rate in systemic litigation ranged from 82 to 97 percent between fiscal years 2010 and 2014.

Our specific concerns on the proposed legislation are set forth as follows.

H.R. 550, "EEOC TRANSPARENCY AND ACCOUNTABILITY ACT"

A. Section 2. Availability of Information About Cases on the EEOC Website
(Section 2(a)(1) - All Civil Actions)

This provision requires the EEOC to post information on its public website within 30 days after a judgment has been made on any cause of action in an EEOC lawsuit, "without regard to whether the judgment is final." Specifically, it requires that the following information be included in the posting: (1) the court in which the case was brought; (2) the name and case number of the case, nature of the allegation, causes of action, and the outcome of each cause of action; (3) whether the EEOC was ordered to pay fees and costs and the amount paid; (4) whether the case was authorized by the Commission or brought pursuant to the authority delegated to the General Counsel, including the reason the General Counsel believed submission to the Commission for authorization was not necessary; (5) whether a sanction was imposed on the EEOC, including the amount of the sanction and the reason for the sanction; and (6) any appeal and the outcome of the appeal.

This provision would require the EEOC to direct significant resources towards posting information on its website that is already available to the public. In addition, the EEOC already makes public significant information about cases through press releases and reports. The EEOC issues press releases for all suit filings, which include the court, civil action number, and claims. The EEOC provides data on all resolutions, including win/loss statistics, as well as data on the exercise of delegated litigation authority, in the annual reports issued by the Office of General Counsel.[1] At the Committee's request, the EEOC will include detailed information in those reports about those few cases in which the EEOC has been ordered to pay attorney's fees.

In addition, the requirement to post detailed information about non-final judgments may create more questions than it answers, as many members of the public may not understand the implications of a non-final judgment, including that it may not address all issues in the case, may be amended by the district court, or reversed on appeal. The EEOC has a high success rate in overturning adverse judgments on appeal including in such recent cases as *EEOC v. Baltimore County*, 747 F.3d 267 (4th Cir. 2014) (agreeing with EEOC's contention that pension system treated older new-hires less favorably because of their age by requiring them to make larger contributions than younger new-hires); *EEOC v. Houston Funding*, 717 F.3d 425 (5th Cir. 2013) (agreeing that discrimination on the basis of lactation is sex and pregnancy discrimination); *EEOC v. Boh Brothers Const. Co.*, 731 F.3d 444 (5th Cir. 2013) (gender stereotyping evidence can support same-sex harassment claim; reinstating jury verdict for EEOC) (en banc); *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012) (transfer accommodation of qualified individuals is mandatory absent undue hardship) (cert. petition denied); and *EEOC v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012) (pattern-or-practice hiring claim may be pursued under section 706) *reh'g & reh'g en banc denied, cert. denied*, 134 S. Ct. 92 (2013). Moreover, the Commission was

[1] The Office of General Counsel Annual Reports for fiscal years 2002 through 2011 are available at http://www.eeoc.gov/eeoc/litigation/reports/index.cfm. The Office of General Counsel has committed to producing annual reports for fiscal years 2012 through 2014 as quickly as possible.

successful in overturning the two largest attorney fee awards ever issued against it. *See Cintas*, 699 F.3d 884 (6th Cir. 2012); and *EEOC v. CRST*, 774 F.3d 1169 (8th Cir. 2014) (reversing fee award because defendant was not "prevailing party" on 67 claims dismissed for failure to meet conditions precedent and remanding for individual assessments by district court, under a very demanding standard, of circumstances supporting attorney's fees awards on claims dismissed on their merits) (*reh'g denied* Feb. 20, 2015). These cases illustrate the importance of allowing justice to take its course before requiring the posting of interim, non-final information.

The requirement to post information about cases containing multiple claims whenever one claim is dismissed but the remainder of the suit is in litigation, may also confuse and mislead the public. Posting information about the case at this time could provide the erroneous impression that the litigation is complete and has resulted in an unfavorable outcome for the EEOC, when in fact the litigation is ongoing and may ultimately result in a favorable outcome for the EEOC and those individuals who came forward.

Lastly, listing on our website whether a particular case was authorized by the Commission or pursuant to the authority delegated to the General Counsel is unnecessary. The Commission's 2013-2016 Strategic Enforcement Plan (SEP) lays out the delegation criteria, and this document is readily available to the public. To the extent that the Committee is interested in this information on a case-by-case basis, the EEOC has been and will continue to be cooperative and responsive in providing such information upon request.

B. Section 3. Good Faith Conference, Conciliation, and Persuasion

Although HR 550's apparent purpose is to improve the conciliation process, it is premised on a problem that does not exist and proposes a solution that will delay and hinder conciliations. Title VII requires the Commission to attempt to resolve cause findings through conciliation. This provision would amend Title VII to mandate "good faith efforts to endeavor" to resolve cause findings by "bona fide conciliation."

H.R. 550 would amend § 706(b) of Title VII as follows (added language in bold, deleted language in strike through):

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall **use good faith efforts to** endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, **bona fide** conciliation, and persuasion. Nothing said or done during and as a part of such informal **good faith** endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the ~~persons concerned~~ **employer, employment agency, or labor organization, except for the sole purpose of allowing a party to any pending litigation to present to the reviewing court evidence to ensure the Commission's compliance with its obligations under this section prior to filing suit. No action or suit may be brought by the Commission under this title unless the Commission has in good faith exhausted its conciliation obligations as set forth in this subsection. No**

action or suit shall be brought by the Commission unless it has certified that conciliation is at impasse. The determination as to whether the Commission engaged in bone (sic) fide conciliation efforts shall be subject to judicial review. The Commission's good faith obligation to engage in bona fide conciliation shall include providing the employer, employment agency, or labor organization believed to have engaged in an unlawful employment practice with all information regarding the legal and factual bases for the Commission's determination that reasonable causes (sic) exist as well as all information that supports the Commission's requested monetary and other relief (including a detailed description of the specific individuals or employees comprising the class of persons for whom the Commission is seeking relief and any additional information requested that is reasonably related to the underlying cause determination or necessary to conciliate in good faith).

The EEOC takes its obligation to conciliate each charge seriously and seeks to avoid protracted litigation whenever possible. If EEOC can obtain this relief through conciliation, it endeavors to do so. EEOC conciliates first and litigates only when an acceptable conciliation agreement cannot be reached. The EEOC's record demonstrates its commitment to using conciliation. In fact, the rate of successful conciliations increased from 27 percent in fiscal year 2010 to 38 percent in fiscal year 2014. The success rate for systemic charges is even higher – at 47 percent, which has even greater significance as these charges are complex and have the potential to impact an industry or to change a workplace practice. One of the reasons why the rate of successful conciliations has increased is due to EEOC's investment in investigators and training.

In the last three years, EEOC and employers agreed to include changes in employer policies in nearly 850 conciliation agreements. Furthermore, when combined with resolutions, settlements, and mediations, EEOC has worked with employers to secure policy changes in 1,724 cases in the last three years and has obtained nonmonetary benefits for nearly 92,000 workers. Examples of these changes include adoption of: anti-harassment policies; objective promotion policies; and reasonable accommodation policies. These new policies will help prevent discrimination from occurring in the first place.

HR 550 would unnecessarily add burdens to EEOC's effective conciliation program. Requirements such as turning over all information regarding the legal and factual bases on which reasonable cause is based, describing all members of a class before the discovery process in court, and certifying that conciliation is at an impasse, among others, will not only make it more difficult to secure speedy justice for individuals who have been discriminated against, but also entail a lengthier and much more costly process for employers. It would upend decades of a conciliation process that has worked well.

The most onerous aspect of H.R. 550 would subject the Commission's conciliation efforts to an unprecedented level of judicial examination. That examination would extend to whether the Commission had exhausted its conciliation obligations and certified that impasse had been reached before filing suit. The result would be extensive and prolonged litigation over whether conciliations meet the bill's standards, which would overly burden the courts, employers,

employees, and the EEOC – a prospect that would undermine the purpose of the conciliation process.

Courts would be required to determine whether the Commission engaged in "bona fide" conciliation efforts. The bill specifies that the Commission's "good faith" obligation to engage in "bona fide" conciliation includes providing respondents with "all" information relating to the "legal and factual bases" for cause determinations, "all" information that supports the Commission's requested relief including a "detailed description of the specific individuals or employees comprising the class for which the Commission is seeking relief," and any other "reasonably related" information requested by respondents. This information is potentially vast; it might be construed to encompass documents now covered by attorney work product and the deliberative process privileges – documents that are currently not even available to employers after suit is filed.

If H.R. 550 were to pass, EEOC would need to obtain vastly more documents and witness testimony from employers to show that its conciliation efforts were in good faith and bona fide. This would require the EEOC to request significantly more material from employers during the conciliation process, increasing the costs and burdens on employers. Importantly, these requests would impact every employer in the conciliation process, a much higher number than where the EEOC files suit. Thus, these obligations create substantial and burdensome barriers to reaching voluntary resolutions through conciliation – achieving the reverse of this bill's legislative aims.

Although many courts have conducted judicial review of conciliation for decades, the level of review contemplated by the bill is more searching than anything ever contemplated before. Under the bill, a court would be required to examine essentially everything said and done in conciliation and to measure the Commission's efforts against the standards of "good faith," "bona fide," "impasse," and "exhaust[ion]." The court's review would be focused entirely on the Commission's actions, with no review of whether the respondent acted in good faith. This searching review of the Commission's actions would promote protracted and costly litigation in the great majority of Commission lawsuits over the ancillary issue of whether EEOC conciliated enough before filing a lawsuit. Even after extensive scrutiny by a court, neither the Commission nor employers would be able to predict with any reasonable certainty how any particular judge would view the Commission's conciliation efforts. In fact, courts that have applied a "good faith" standard in judging EEOC conciliations have come to widely divergent opinions about the sufficiency of the EEOC's efforts when evaluating similar circumstances. Indeed, some courts have expressly noted the difficulty for judges in determining whether a party has acted in "good faith."

The bill would also provide an enormous incentive to employers to undermine the conciliation process. As the government pointed out before the Supreme Court in the *Mach Mining* case, some defense counsel candidly admit that they already advise clients to treat the conciliation process as an opportunity to set up a future defense. The apparently strict yet difficult to apply standards proposed in the bill, combined with close judicial scrutiny of the Commission's efforts, provide an even greater incentive for employers or defense counsel to undermine the process.

C. Sec. 4. Reporting to Congress when EEOC is Ordered to Pay Fees and Costs or Sanctions

Section 4(a) requires the EEOC Inspector General to submit a report to certain committees of the House and Senate on court orders regarding fees, costs, and sanctions and to conduct an investigation to determine why such fees, costs, or sanctions were imposed. The IG is obligated by the Act to interview and obtain affidavits from "each member and staff person . . . involved in the case." Section 4(b) requires that for each case where fees, costs, or sanctions are imposed by the court, a report must be submitted to certain committees of the House and Senate detailing the steps being taken to reduce instances in which the court orders fees and costs or imposes sanctions, and requires that the report be posted to the website.

The Commission believes it should be held to high standards and that fees and sanctions are unacceptable. Because of this belief, the General Counsel has developed and implemented systems for attorneys in the Office of General Counsel to conduct a thorough analysis of relevant judicial decisions and assess where EEOC could have performed more effectively. These steps include a personal review of cases by the General Counsel where the EEOC has been subject to fees; discussions with the attorneys involved; a discussion of the cases on monthly regional attorney calls including lessons for the program; an adjustment of any internal practices, if appropriate, to ensure we improve our law enforcement performance; and a broader discussion of the issues in formal training sessions during, for example, our annual Regional Attorneys meetings. Additionally, significant adverse decisions are circulated to all attorneys.

Still, when examined in full context, the cases discussed at the hearing where EEOC has been subjected to fees are a small fraction of cases, and can hardly be treated as a systemic problem. Since fiscal year 2010, the EEOC has averaged a favorable outcome in over 90 percent of its suits. Even in its systemic litigation, which is more complex, the EEOC has achieved a favorable outcome ranging from 82-100 percent of its suits in each fiscal year since fiscal year 2010 under the current General Counsel. Over the four-year period from fiscal year 2011 through fiscal year 2014, the EEOC resolved 875 lawsuits, while during the same time period, the agency received a final order to pay fees based on a finding that its suit lacked adequate grounds in less than 1 percent of lawsuit resolutions, which was only 5 suits. These cases do not represent a pattern of malfeasance by EEOC, or suggest a crisis situation justifying the exceptionally close scrutiny contained in H.R. 550.[2] Indeed, that the EEOC was successful in overturning the only two

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[2] Paul Kehoe's statement at the Committee hearing on behalf of the U.S. Chamber of Commerce that "there are dozens of cases where the EEOC has been sanctioned and had their cases thrown out of court" (see hearing transcript at p. 24) has no basis in fact even if applied to the entire 42-year history of EEOC litigation under Title VII. At the hearing, Mr. Kehoe also referred to "many large cases" in which the EEOC "can't even establish a prima facie case of discrimination" (see hearing transcript at p. 24); however, this has happened only twice in the past five years, and Mr. Kehoe identified both such cases in his written testimony - *Freeman* and *Kaplan*. Mr. Kehoe suggests that such outcomes could have been avoided if the EEOC had used its "immense subpoena power to get this information before filing any sort of litigation," (see id.); however, in both cases, the defendant failed to maintain the data EEOC needed to establish a prima facie case of discrimination. Thus, the authority to issue subpoenas has no bearing on the outcomes in these cases. In his written testimony, Mr. Kehoe also suggests that the proposed legislation is necessary because EEOC has diverted its resources to focus on "novel and questionable

multi-million dollar fee awards ever imposed against it indicates that those orders were not justified by the facts of the cases.

The General Counsel has agreed to include in its annual report detailed information about the cases in which the EEOC has been ordered to pay attorney's fees. Further, any court order of fees or sanctions is a publicly available document. Those documents invariably provide the court's reason for imposing fees or sanctions. Prior to issuing an order on fees or sanctions, the court conducts a comprehensive review of the facts and considers public filings by both the EEOC and the defendant. Additional investigation by the IG of cases where sanctions were imposed is unnecessary. Moreover, parts of section 4(a) appear to infringe on the EEOC's government deliberative process privilege, specifically Section 4(a)(2)(A) and (D).

H.R. 549, "LITIGATION OVERSIGHT ACT OF 2014"

This bill would amend Title VII by adding a new subsection (l) at the end of § 705 of Title VII. Subsection (l)(1) provides that, before EEOC can commence or intervene in litigation involving "multiple plaintiffs" or allegations of "systemic discrimination or a pattern or practice of discrimination," a majority vote by the Commissioners must approve the litigation or intervention. Subsection (l)(2) authorizes any Commissioner "to require the Commission to approve or disapprove by majority vote whether the Commission shall commence or intervene in any litigation." Under subsection (l)(3), the authority vested in each Commissioner by subsections (l)(1) and (l)(2) cannot be delegated by the Commission or a Commissioner "to any other person." Within 30 days of the commencement of, or intervention in, litigation contemplated by subsection (l), EEOC must post on its public website the following: 1) the court in which the case was brought; 2) case name and number; 3) "[t]he nature of the allegation;" 4) [t]he causes of action brought;" and 5) "[e]ach Commissioner's vote on commencing or intervening in the litigation."

This bill would supersede the bipartisan decision of the Commission regarding delegation of litigation authority. As part of its Strategic Enforcement Plan for 2013-16, the Commission revisited the issue of delegation and, with a few modifications, reaffirmed the delegation set forth in the 1996 National Enforcement Plan. Under the current delegation rules, the Commission

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theories" (see written testimony at p. 4). However, many of the examples he sets forth are well-established in Title VII itself. Specifically, Congress gave the EEOC the authority to initiate an investigation based on a Commissioner's charge, and Congress codified disparate impact theory in 1991. Finally, Mr. Kehoe claims the EEOC is focusing litigation on challenges to mandatory arbitration agreements, citing (in his written testimony at p. 10), *EEOC v. Doherty*, which is a challenge to an employer's requirement that applicants and employees prospectively waive their right to file a charge with the EEOC as a condition of employment. Although this requirement is contained in a mandatory arbitration agreement, the complaint and the EEOC's briefs make clear that the suit poses no challenge to the requirement to arbitrate any claims.

delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

1. Cases involving a major expenditure of resources, e.g., cases involving extensive discovery or numerous expert witnesses and many systemic, pattern -or- practice or Commissioner's charge cases;

2. Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;

3. Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood for public controversy or otherwise (e.g., recently modified or adopted Commission policy);

4. All recommendations in favor of Commission participation as amicus curiae, which shall continue to be submitted to the Commission for review and approval.

Also, under the Strategic Enforcement Plan, a minimum of one litigation recommendation from each EEOC District Office must be presented for Commission consideration each fiscal year, including litigation recommendations based on the above criteria.

This bill will severely limit the Commission's ability to delegate litigation authority to the General Counsel (GC). It will prohibit the Commission from delegating to the GC litigation and intervention authority in "multiple plaintiff," systemic, and pattern or practice cases, even where such cases are small in scale, inexpensive to litigate, and raise no novel issues. Indeed, all cases involving as few as two victims of discrimination will have to be approved by the Commission.

Although nothing in the bill prevents the Commission from delegating litigation authority to the General Counsel in single charging party cases, subsection (1)(2) vests each Commissioner with veto authority. Thus, the five-member, bipartisan Commission's decision to delegate can be nullified by any individual Commissioner, at any time, in any case. Indeed, the bill seems to empower any individual Commissioner to require all proposed litigation to be submitted for a Commission vote, on a wholesale basis. This bill would allow a return to a process the Commission tried years ago and found to be inherently inefficient. If used sufficiently often, this veto authority would effectively eliminate delegation and significantly reduce the impact of the agency's effective litigation program.

In fiscal year 2014 the EEOC achieved favorable results in approximately 93 percent of all district court resolutions. A total of 1,593 individuals received monetary relief as a direct result of EEOC lawsuit resolutions in fiscal year 2014. Additionally, the Commission received a favorable resolution in approximately 82 percent of systemic cases in fiscal year 2014 (14 of 17) and 83 percent in fiscal year 2013 (24 of 29).

The impact of this bill would also reverse longstanding and bipartisan efforts to streamline the EEOC litigation process and make decisions about the allocation of scarce enforcement resources more predictable. The Commission has premised delegation on good government principles of using streamlined administrative processes and efficiency. When the Commission unanimously delegated litigation authority, in most cases, to the General Counsel in its 1996 National Enforcement Plan, the Commission made this determination "with the goals of increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on broad policy issues, and increasing the efficiency and effectiveness of our litigation program." When the Commission reaffirmed the delegation rules in its Strategic Enforcement Plan in 2012, with the slight modification to submit one case from each district office, the Commission reaffirmed the delegation criteria "with the goal of increasing the efficiency and effectiveness of the agency's enforcement programs." The Commission also established quarterly reports to assess the effectiveness of delegated authority.

For many years, EEOC General Counsels submitted all ADA cases for a Commission vote, although they were not strictly required to do so under any delegation rules. In 2009, after the expansion of ADA coverage through the ADAAA, former General Counsel Ronald Cooper discontinued the practice because it was in conflict with the goals of effective and efficient government. This resulted in a significant decline in the number of cases submitted to the Commission. This move was widely viewed as effectively streamlining the approval process without sacrificing quality or accountability.

It is important to note that the current General Counsel has scrupulously followed the delegation rules during the course of his tenure. This includes submitting for a vote high-profile matters involving felony conviction screens, credit screens, partnership status, language policies, and wellness programs. Moreover, the Commission has regularly concurred with the General Counsel's litigation recommendations. Of the 48 cases that were submitted to the Commission from fiscal year 2011 through fiscal year 2014, only one was rejected by the Commission and one was withdrawn by the General Counsel following a tie vote.

In his written testimony to the Committee, Paul Kehoe makes the statement that by delegating litigation authority to the General Counsel, "[t]he EEOC has taken the confirmed Commissioners out of the litigation process" (Statement of the U.S. Chamber of Commerce at p. 11). As noted earlier, the decision to delegate litigation authority to the General Counsel was made by the sitting Commissioners in 1996, has survived several administrations, and was reaffirmed in a bipartisan vote in 2012.

Mr. Kehoe also argues that the Commissioners should have greater oversight of litigation filings, and in particular "large-scale" litigation. In his oral testimony, he states that Commissioner oversight of litigation filings "absolutely has the potential to ensure that better cases are being brought." Moreover, in his written testimony, he notes that many more cases had been submitted for a Commission vote in the past, and argues on this basis that sending more cases for a Commission vote would not hinder the litigation program. See written testimony at 6. However, Mr. Kehoe fails to mention that most of the adverse cases he cites in his testimony were actually approved for filing by a vote of the full Commission, including *Peoplemark*,

Kaplan, and *Freeman*. Moreover, although a larger raw number of cases were submitted to the Commission for a vote in the 2000s, Mr. Kehoe fails to note that the vast majority were not systemic or large multi-victim cases. Rather, most of them were individual ADA cases which, at that time, required a Commission vote. Indeed, the only significant difference in the litigation approval process for multi-victim and systemic cases between now and then is that the current General Counsel submits more of them for Commission approval.

When Title VII was first enacted, Congress created a five-member, bipartisan Commission, leaving it to the Commission's judgment to determine the best way to fulfill its mission. Congress did not make operational decisions for the Commission. The system set up by Congress has worked well for the past 50 years. In sum, there is no reason to restrict the ability of the Commission to decide how to operate, and even less reason to undermine the bipartisan process by creating a single Commissioner veto.

H.R. 548, "CERTAINTY IN ENFORCEMENT ACT OF 2014"

The Certainty in Enforcement Act, HR 548, was prompted by the Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e (Guidance), and by EEOC litigation challenging criminal and credit screens. The bill amends Section 703 of the Civil Rights Act to carve out an exception from Title VII's original, 1964 conflict-with-state-law provision in Section 708 (section 2000e-7) for applicant screening based on criminal or credit records or information.

I. Text of H.R. 548

A. Findings (Section 2)

The first sentence in Finding 2 is overly broad. It states: "In 1964 Congress consciously denied the EEOC the power to issue regulations pursuant to title VII of the Civil Rights Act of 1964 and has refrained from granting it that power ever since." However, in 1964, Congress gave the EEOC the power to issue procedural regulations. Section 713(a) states:

The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5 [*originally, the Administrative Procedure Act*].

42 U.S.C. § 2000e-12.

Finding 3 is incorrect. It asserts that: "[i]n 2012 the EEOC promulgated enforcement guidance regarding the use of criminal background checks that put employers in the position of acting contrary to Federal, State, and local laws that require employers to conduct or act on criminal background checks for certain positions, such as public safety officers, teachers, and daycare providers." The Guidance does not, however, determine employers' obligations or rights.

Rather, it sets forth the Commission's views on how employers' use of criminal history records in employment decisions may implicate Title VII's prohibitions against discrimination. The legal consequences resulting from an employer's use of criminal history records flow from Title VII, not the Guidance.

- *Federal law already shields employers.* Title VII does not preempt ... federally imposed restrictions. Specifically, the 2012 Guidance explains:

> Federal laws and regulations govern the employment of individuals with specific convictions in certain industries or positions in both the private and public sectors. For example, federal law excludes an individual who was convicted in the previous ten years of specified crimes from working as a security screener or otherwise having unescorted access to the secure areas of an airport. There are equivalent requirements for federal law enforcement officers, child care workers in federal agencies or facilities, bank employees, and port workers, among other positions.

- *Compliance with State and Local Laws*: Contrary to the statement in Finding 3, Title VII clearly states that: "this subchapter *does not exempt or relieve* any person from" their responsibilities under state or local law. 42 U.S.C. 2000e-7 (emphasis supplied). The only exception to this rule is if the state or local law "purport[s] to require or permit the doing of any act which would be unlawful" under Title VII. Id. In other words, as long as states or localities avoid enacting discriminatory laws, Title VII expects all employers and other covered entities to comply.

B. Amendment to Title VII (Section 3)

The Amendment would provide:

Notwithstanding any other provision of this title, the consideration or use of credit or criminal records or information, as mandated by Federal, State, or local law, by an employer, labor organization, employment agency, or joint labor management committee controlling apprenticeships or other training or retraining opportunities, shall be deemed to be job related and consistent with business necessity under subsection (k)(1)(A)(i) as a matter of law, and such use shall not be the basis of liability under any theory of disparate impact.

The Amendment covers "the consideration or use of credit or criminal records or *information*" (emphasis supplied). The addition of the term "information" renders the Amendment dangerously open-ended. It encompasses credit and criminal "information" from any source (reliable or not), that is obtained in any way (gossip, social media postings, unverified databases), as long as its use is plausibly "mandated" by Federal, State, or local law.

The Amendment provides that such screening is always "job related and consistent with business necessity." The Amendment effectively says, in light of the meaning of "job related and consistent with business necessity," that *all* legally required criminal or credit information is

inevitably and immutably predictive of job success, regardless of its timeliness, veracity, or source. For example, mistaken credit or criminal information would be treated as predictive of job success, and therefore excluding an applicant based on such information would be legal.

II. Flawed Basis for This Legislation

This bill responds to the Commission's *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions* and seems to be based on fundamental misunderstandings and mischaracterizations. On April 25, 2012, the Commission, in a 4:1 bi-partisan vote, approved and issued the Guidance. The Guidance is firmly rooted in Title VII, not a change in policy, and is not itself binding. The Guidance does not foreclose employers from performing criminal background checks during the hiring process; rather, the Guidance clarifies how such background checks can be performed. Title VII does not prevent employers from using criminal background checks, as long as they do so without regard to a person's race, national origin, or other legally-protected characteristic.

The Guidance provides the EEOC's interpretation of Title VII's prohibition against intentional discrimination in the use of background checks as well as on neutral policies that have a disparate impact on protected classes as applied to an employer's use of arrest and conviction records. Title VII does not automatically deem discriminatory those uniformly-applied background checks that disproportionately screen out people based on race or another legally-protected characteristic. However, when there is such a disparate impact, an employer carries the burden under Title VII to show that their particular background check is justified because it is in fact job related for the position in question and consistent with business necessity. If an employer makes this showing, then Title VII deems the background check nondiscriminatory (unless the employee demonstrates that there is a less discriminatory alternative which the employer refuses to adopt). If the employer does not make this showing, then and only then, is the background check unlawful. The Guidance recognizes that employers can best manage the risk of workplace crime by screening employees and applicants in a targeted and fact-based way that is not discriminatory.

Since at least 1969, the Commission has received, investigated, and resolved discrimination charges under Title VII involving criminal records exclusions. The federal courts have analyzed Title VII as applied to criminal record exclusions since the 1970s. In 1987, when Justice Clarence Thomas was EEOC Chair, the Commission first issued guidance saying that criminal background checks, like other hiring requirements that disproportionately affect a protected group, should relate to the job. Following already-established court precedent, this 1987 guidance listed three factors that employers should consider during the screening process: the nature of the offense, when it occurred and the nature of the job. The EEOC did not expand the law in 1987; it simply followed the law and continued to do so in its 2012 Guidance.

The EEOC drafted the 2012 Guidance in part because a federal circuit court of appeals ruling in a Title VII criminal background check case called for the EEOC to analyze Title VII in more depth with reference to criminal background checks in particular. In *El v. Southeastern Pennsylvania Transp. Authority*, 479 F.3d 232 (3d Cir. 2007), the Third Circuit commented that

the Commission's 1987 guidance was short and rudimentary, and that the courts would benefit from more legal explication of Title VII statutory analysis with reference to criminal background exclusions.

The 2012 Guidance also reflects the Commission's consideration of extensive public input on this topic. In both November 2008 and July 2011, the Commission held public meetings on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. After the 2011 hearing, the Commission received and reviewed approximately 300 written comments from stakeholders. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project. Throughout the process of drafting the Guidance, individual Commissioners and staff met with representatives from various stakeholder groups to obtain more focused feedback on discrete and complex issues such as the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, the National Employment Law Project, the Lawyers' Committee for Civil Rights Under Law, and the Equal Employment Advisory Council.

The EEOC has continued to interact with the public since the issuance of the 2012 Guidance in order to provide clear explanations to employers and other stakeholders. EEOC staff around the country participated in conferences and public events to explain the Guidance: as of late 2014, the agency had reached over 80,000 people nationwide through over 900 outreach events. The EEOC also issued several short, plain-language documents that clearly summarize the Guidance for employees, job applicants, employers and counsel:

- The Guidance itself begins with a bulleted Summary that is 11.5 pages long and explains the main points in the Guidance.

- Questions and Answers were issued the same day as the Guidance, in April 2012. See http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm

- A plain language, "What You Should Know" about the Guidance was issued shortly after the main document. See http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm

Finally, the EEOC contributed to plain-language materials called "Reentry MythBusters," including one on the *Title VII implications of using arrest and conviction records in employment*, through its membership in the federal Interagency Reentry Council, organized by the Attorney General.

An increasing number of businesses have explicitly adopted the principles laid out in the Guidance, demonstrating their acceptance of it. According to a 2014 survey by screening company EmployeeScreenIQ, 88 percent of the almost 600 respondents said they had adopted

the principles contained in the 2012 EEOC Guidance. Moreover, 64 percent of the companies surveyed in 2014 reported that they perform individualized assessments for candidates who have conviction records, as recommended by the Guidance. Finally, in the wake of the issuance of the updated Guidance, several companies and jurisdictions have adopted so-called "ban-the-box" policies, delaying the consideration of criminal records until later in the employment process, a policy recommended by the EEOC guidance. Indeed, there are 14 states that have statewide ban-the-box policies, Georgia (2015), Delaware (2014), Nebraska (2014), Illinois (2014 and 2013), New Jersey (2014), California (2013), Maryland (2013), Minnesota (2013), Rhode Island (2013), Colorado (2012), Connecticut (2010), Massachusetts (2010), New Mexico (2010), and Hawaii (1998).

H.R. 1189: THE PRESERVING EMPLOYEE WELLNESS PROGRAMS ACT

On March 20, 2015, the EEOC sent to the Office of Management and Budget (OMB) a draft Notice of Proposed Rulemaking (NPRM) that addresses the Americans with Disabilities Act's application to employer wellness programs. During the development of the draft NPRM, EEOC consulted with the federal agencies who have responsibility for enforcing and implementing the provisions of the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act related to wellness programs – the Department of Labor, the Department of Health and Human Services, and the Department of the Treasury. We will continue to work with those and other agencies through OMB, pursuant to Executive Order 12866, to finalize the proposed rule, and we anticipate that it will be published in the *Federal Register* shortly for public comment. After issuance of the NPRM on the ADA and wellness programs, EEOC also anticipates issuing an NPRM amending its regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA) addressing the extent to which employers may offer financial incentives to promote participation in wellness programs by employees' spouses and other family members.

In light of these pending NPRMs, EEOC will not comment in detail on the specifics of the proposed legislation. We look forward to working with the Subcommittee to ensure that these protections are preserved. Once the NPRMs are finalized, we welcome the opportunity to answer any questions or concerns that Subcommittee members may have regarding the new NPRMs and their impact on employer wellness programs.

CONCLUSION

The EEOC has accomplished much in the past 50 years and that impact can be seen in virtually every area of American society. It is through our shared commitment to fairness in the workplace that we have made such significant progress.

But, for all that has been achieved, much work remains. It is only through our joint efforts and diverse perspectives, that we can identify solutions that will end unlawful employment discrimination and widen opportunity for all. The EEOC remains committed to working with Congress to ensure we continue to achieve justice and equality in the workplace.

We appreciate the opportunity to provide additional information on the EEOC's enforcement priorities for the hearing record and to share our comments on this legislation pending before the Committee. We look forward to continuing to work with Congress to build strong workplaces that are free of discrimination.

Sincerely,

Brett A. Brenner, Acting Director
Office of Communications
and Legislative Affairs