THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS

Tuesday, June 10, 2014
House of Representatives,
Subcommittee on Workforce Protections,
Committee on Education and the Workforce,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:01 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, Rokita, Hudson, Courtney, and Takano.

Staff present: Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Christie Herman, Professional Staff Member; Benjamin Hoog, Senior Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Zachary McHenry, Senior Staff Assistant; Daniel Murner, Press Assistant; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Loren Sweatt, Senior Policy Advisor; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Melissa Greenberg, Minority Labor Policy Associate; Eunice Ikene, Minority Labor Policy Associate; Brian Kennedy, Minority General Counsel; Leticia Mederos, Minority Director of Labor Policy; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority Staff Director; and Michael Zola, Minority Deputy Staff Director.

Chairman WALBERG. A quorum being present, the subcommittee will come to order. Good morning. I would like to welcome our guests and thank our witnesses for joining us today. We appreciate the time you have spared to be with us this morning. Today's hearing is part of our continued oversight of the Equal Employment Opportunity Commission.

Last year, we convened a hearing to broadly examine the Commission's regulatory and enforcement agenda. Members raised concerns with a number of EEOC policies that many believe are not in the best interest of workers and employers. For example, under President Obama's watch, EEOC has made it more difficult for employers to ensure the safety of their customers and clients. So-

called guidance issued in 2012 severely restricts employer use of criminal background checks during the hiring process.

All Americans expect employers to hire a safe and responsible workforce, especially when workers are employed in areas that require the public's trust, such as when they enter private homes, transport children to school, or care for aging relatives. Later, we will learn in disturbing detail why, in certain occupations, the background check of prospective employees is critical to public safety.

Ms. Bone, we are grateful that you have joined us this morning to share your family's personal story. The death of your sister, Sue, could have been prevented. We cannot fathom the pain you and your family are forced to bear. There isn't a member in Congress who wouldn't be outraged if his or her loved ones suffered the same fate as your sister. But because of EEOC overreach, there are now policies in place making it harder for employers to do what is right. Some employers will simply avoid the bureaucratic hassle of conducting background checks or risk of being second-guessed by the federal government, which means more Americans might be put in harm's way.

Adding insult to injury, EEOC denied the public an opportunity to comment on its radical change in policy. And we understand the commission is considering further guidance that would hinder employers' ability to look at the credit histories of prospective employees.

It is time for EEOC to stop this nonsense, withdraw its flawed guidance, and ensure employers use the tools available to protect the men and women they serve. Unfortunately, misguided regulatory schemes weren't the only concerns raised at our last EEOC hearing. We also discussed the commission's failed approach to enforcement.

Instead of commission members working together to resolve claims of discrimination raised by American workers, we have an unaccountable general counsel pursuing cases of systemic discrimination without any allegation of wrongdoing. The results have been disappointing, to say the least. The 6th Circuit Court of Appeals recently wrote, and I quote—"EEOC brought this case on the basis of a homemade methodology crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."

Another federal court described an EEOC case as, and I quote again—"theory in search of facts to support it." Other courts have found EEOC legal complaints as frivolous, unreasonable, and untenable. Last year, we raised these and other concerns to Commission Chair Berrien and urged her to change course. Unfortunately, our concerns continue to be ignored. I am hopeful that through today's hearing and our oversight of EEOC, the commission will adopt a more responsible approach that better serves the needs of workers and employers.

We are here today because we want to ensure these vital laws and the protections they provide American workers are properly enforced. Every American deserves a fair shot at finding a job, regardless of age, disability, sex, religion, or race. When they are de-

nied that fair shot, workers rely upon EEOC to make it right and hold bad actors accountable. That is the mission of this important agency, and it is our responsibility to make sure EEOC is getting the job done. Again, I want to thank our witnesses for joining us and for contributing to this important effort this morning.

With that, I will now yield to senior Democrat of the committee, my colleague, Representative Joe Courtney, for his opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning. I would like to welcome our guests and thank our witnesses for joining us. We appreciate the time you've spared to be with us this morning.

Today's hearing is part of our continued oversight of the Equal Employment Opportunity Commission. Last year we convened a hearing to broadly examine the commission's regulatory and enforcement agenda. Members raised concerns with a number of EEOC policies that many believe are not in the best interest of workers and employers.

For example, under President Obama's watch, EEOC has made it more difficult for employers to ensure the safety of their customers and clients. So-called guidance issued in 2012 severely restricts employer use of criminal background checks during the hiring process. All Americans expect employers to hire a safe and responsible workforce, especially when workers are employed in areas that require the public's trust, such as when they enter private homes, transport children to school, or care for aging relatives.

Later we will learn in disturbing detail why in certain occupations a background check of prospective employees is critical to public safety. Mrs. Bone, we are grateful you've joined us this morning to share your family's personal story. The death of your sister Sue could have been prevented. We cannot fathom the pain you and your family are forced to bear.

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The Sixth Circuit Court of Appeals recently wrote, "EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." Another federal court described an EEOC case as a "theory in search of facts to support it." Other courts have found EEOC legal complaints as frivolous, unreasonable, and untenable.

Last year, we raised these and other concerns to Commission Chair Berrien and urged her to change course. Unfortunately, our concerns continue to be ignored. I am hopeful that through today's hearing and our oversight of EEOC, the commission will adopt a more responsible approach that better serves the needs of workers and employers.

We are here today because we want to ensure these vital laws – and the protections they provide American workers – are properly enforced. Every American deserves a fair shot at finding a job – regardless of age, disability, sex, religion, or race. When they are denied that fair shot, workers rely upon EEOC to make it right

and hold bad actors accountable. That is the mission of this important agency, and it's our responsibility to make sure EEOC is getting the job done.

Again, I want to thank our witnesses for joining us and for contributing to this important effort. With that, I will now yield to the senior Democrat of the subcommittee, my colleague Representative Joe Courtney, for his opening remarks.

Mr. COURTNEY. Thank you, Mr. Chairman, for the opportunity to address the committee. And, again, I want to begin by thanking the witnesses for being here this morning. Particularly, again, as the Chairman, Ms. Bone, for your amazing courage to take a horrible tragedy and really try and turn it into a positive outcome in terms of educating the public and, certainly, people who are close to the workplace. So thank you for being here today.

I have to say, though, I am a little disappointed, Mr. Chairman, that, you know, in the name of oversight we are holding a hearing today, you know—and we heard sort of some of the opening flavor of this hearing, where the majority, for some reason, didn't feel that it was appropriate to invite the agency itself to come here and actually directly address the questions that are being raised this morning. It is true we had a hearing last year with the chairwoman who, again, had pretty much taken over just recently.

If there are concerns that members want to raise I totally support the fact that we should have these types of questions exchanged. But the problem is, is if you don't have the agency here to answer them, then I really am very puzzled at why we think this is somehow going to benefit the process. We have about 50 days left in this Congress which, again, is going to go down in history as one of the least productive congresses ever. The Do Nothing Congress of Harry Truman passed over 400 pieces of legislation. We barely got over the 100 mark in terms of measures that are going to get passed.

And, again, I have no problem with spending the time here this morning. But frankly, there are other issues which this subcommittee should be taking up that directly fall under our jurisdiction. Such as the fact that we have not raised the minimum wage since 2007. We have over 190 House members that have signed a discharge petition to just simply ask for a vote in the House. We have not even had a hearing on this issue in this subcommittee.

So yes, let's hold this hearing today. Let's flush out all the issues. But let's talk about other issues that members—your colleagues that are elected to represent their constituents—have been desperately pleading to have consideration. I see Ms. Olson here today from the U.S. Chamber of Commerce. A week ago last Friday I addressed the eastern Connecticut Chamber of Commerce, which is an affiliate of the Chamber. We have large companies like General Dynamics and Pfizer, small startups that are part of it. The number one workforce issue that they asked me is why has the House not taken up the bipartisan immigration reform issue.

Why are we still holding back the U.S. economy, which CBO has told us will grow if we pass the bipartisan Senate bill, cut the deficit, and solve tremendous workforce shortages in areas of hospitality, agriculture, in terms of some high-tech sectors of our economy; the pharmaceutical industry, which is, you know, very prevalent in the state of Connecticut. Again, 192 members of the House have signed a discharge petition to bring up that bill, and we have

not even had a hearing on the House in the last year-and-a-half; not one on that issue.

So yes, let's hold this hearing today. Let's talk about these issues. But the fact of the matter is, is this majority has cut off consideration of issues that directly affect working people in working families in terms of raising their wages for the first time in 7 years; helping employers deal with workforce shortages that the Immigration Reform Bill would directly address. And, again, the Chamber has been very strong in terms of saying that we should do this for the benefit of your members and for the country as a whole.

And as long as we are talking about background checks, I come from Connecticut, okay? Which is where the Sandy Hook shooting took place a year ago last December. We have a background check system that law enforcement has told us is broken in terms of people getting access to firearms who do not—who should not get that access because they do have felony records, they do have mental illness, they have conditions which we should be strengthening and systems that we should be strengthening to make sure that yes, we should have customers safe but we also should have the public safe.

We should have schoolchildren safe in this country. And, again, we have not had a single hearing in this Congress to deal with background checks for an issue which 80 percent of the public supports. So yes, let's have this hearing today and we will flush out these issues and talk about it. But, again, I would plead with the chairman that we should a) on this committee, take up issues that your colleagues have asked for consideration in terms of minimum wage.

That your leadership should take up immigration reform now so that we can help grow this economy.

And for the sake of all victims of violence in this country we should strengthen background checks for the purchase and acquisition and ownership of dangerous firearms.

I yield back the balance of my time.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, Senior Democratic Member, Subcommittee on Workforce Protections

Good morning. I want to thank Chairman Walberg for calling today's hearing to examine the important work of the Equal Employment Opportunity Commission.

I also want to thank the witnesses for being here this morning to testify on civil rights and the efforts of the EEOC.

As we go through the day's proceedings, I'd be remiss if I didn't note that we just celebrated the 50th Anniversary of the Civil Rights Act of 1964, which ushered in an era of significant opportunity and change.

The following year, 1965, the EEOC opened its doors, charged with the mission of ending employment discrimination through enforcement of the nation's equal employment opportunity laws.

The work of the EEOC remains as critical today as it was five decades ago, particularly when we look to the challenges facing the unemployed in our nation.

The economy has improved drastically since the depths of the recession. Last month, the overall unemployment rate stabilized at 6.3 percent. While this is still unacceptably high, the unemployment rate for minorities is even more appalling: 11.5 percent of African Americans and 7.7 percent of Hispanics in this country were out of work as of May.

And we know, as labor economists and experts point to, discrimination remains one of factors for the disparity.

For those who are skeptical about the mission of the EEOC, I would remind them that the EEOC's work is essential and responds to a serious problem in our country: workplace discrimination.

Every worker in this country—whether a job applicant or employee—has the right to be treated fairly in the workplace and judged solely upon his or her ability to do the job.

The foundation of our civil rights laws is to ensure that all Americans have the opportunity to participate in and contribute to society, while being able to provide for themselves and their families.

Unfortunately, far too often workers are not hired, paid less or fired from their jobs because they are female, or pregnant, or African American, or have a disability.

The EEOC plays a vital role in ensuring fairness and equal opportunity in the workplace. It enforces some of the country's most important federal laws, ones that prohibit discrimination against an employee or job applicant because of that person's race, color, religion, sex, national origin, age, disability or genetic information.

Despite these protections, nearly 93,000 new charges of discrimination were filed with the EEOC last year. Among those, the EEOC received:

* over 67,000 Title VII charges, alleging some forms of discrimination based on race, color, sex, religion, or national origin. 3,146 of those charges alleged color-based discrimination;

* over 300 Genetic Information Nondiscrimination Act (GINA) charges; and

* 1,019 Equal Pay Act charges;

And to be clear, the EEOC works diligently to settle many of these cases before they reach litigation. As I understand, litigation is always viewed as a last resort and is brought in less than 1% of charges with merit.

But litigation is sometimes necessary to ensuring compliance with our anti-discrimination laws, and to stopping and discouraging unlawful discriminatory practices.

Congress also has a responsibility to ensure that American workers, should they become victims of workplace discrimination, have means of seeking justice.

Here we are, six months away from the end of the 113th Congress, and we have yet to act on any meaningful update to our civil rights laws.

The fact is that, despite the progress we have made in the last 50 years, there is still much left to be done. And I believe there are many issues where Democrats and Republicans can join together to strengthen our civil rights laws.

The Employment Nondiscrimination Act, which I am proud to cosponsor, would prohibit discrimination in the workplace because of someone's sexual orientation or gender identity and enjoys support from both Democratic and Republican co-sponsors.

I urge Chairman Walberg and Chairman Kline to work with Representatives Polis and Ros-Lehtinen, the bill's bipartisan sponsors, to bring this long overdue legislation back before the Committee for immediate consideration.

In addition, the Paycheck Fairness Act—which has been passed twice by this House on a bipartisan basis—should be brought up for immediate consideration so that gender-based pay discrimination is finally put on equal footing with other civil rights violations in the workplace.

These efforts should be the topic of this hearing. We should be seeking opportunities to together to strengthen and update this nation's civil rights laws.

Thank you Mr. Chairman. And thanks again to our witnesses for your participation.

Chairman WALBERG. I thank the gentleman. And your points are duly noted. I would just add that this is a process. And as I said in my opening statements, we are still waiting for some of the action that we requested when we had the EEOC in front of us that still have not been dealt with.

As far as a do-nothing Congress, I would hesitate to use that term when, in fact, in a bipartisan way this House has done an awful lot of work, hundreds of bills sent to the Senate, many of which are bipartisan in effort and in vote.

So if we would amend that to be a bipartisan—or a do-nothing Senate, I would approve of it even more so. But that will be a debate for another day. Pursuant to committee rule 7(c), all members will be permitted to submit written statements to be included in

the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

And now I have the privilege of introducing our panel that have taken their time and submitted to our request to come here. And we appreciate that. First, Ms. Camille Olson is a partner at Seyfarth Shaw in Chicago, Illinois, my hometown, as we discussed earlier. She will be testifying on behalf of the U.S. Chamber of Commerce. Welcome.

Mr. Todd McCracken is the president of the National Small Business Association in Washington, D.C. Thanks for being here. Ms. Sherrilyn Ifill—did I get that right—Ifill is the president and director of the NAACP legal defense and educational fund in New York, New York. Welcome.

And finally, Ms. Lucia Bone is the founder of the Sue Weaver C.A.U.S.E. in Flower Mound, Texas. Welcome.

Before I recognize each of you to provide your testimony, most of you are aware that you will have a 5-minute time period to give your testimony. Your full testimony, written, is recorded and will be for our use. When you begin the light be at the green. When you see it turn yellow, that means you have approximately 1 minute left to conclude your comments. And I would ask you to try to keep within that 5-minute time period. The same will be for our committee, when we have the opportunity to question you. We will have 5 minutes, as well.

So now let me recognize our first witness, Ms. Olson? Microphone, is that on?

STATEMENT OF MS. CAMILLE OLSON, PARTNER, SEYFARTH SHAW LLP, CHICAGO, ILLINOIS

Ms. OLSON. Would you like me to start over? Thanks.

Good morning. Thank you, Chairman Walberg, Ranking Member Courtney, and other committee members. I am testifying on behalf of the U.S. Chamber of Commerce, the world's largest business federation. I chair the chamber's Employment Opportunity Policy Subcommittee, and I am also a partner with the law firm of Seyfarth Shaw.

The Chamber is a long-standing supporter of reasonable and necessary steps to achieve the goal of equal employment opportunity for all. However, the Chamber has serious concerns as to how federal nondiscrimination laws are currently being administered and enforced by the EEOC.

Loosely defined and overly broad, grants of authority to agency officers have resulted in an EEOC that prioritizes expansive enforcement, aggressive litigation and punishment over education, cooperation, and conciliation. The EEOC is failing in its fundamental roles, failing to properly and timely investigate charges, failing to conciliate in good faith and failing to effectively litigate. As a consequence, the EEOC is failing in its core mission: to effectively enforce Title VII and other nondiscrimination laws.

First, EEOC has not fulfilled its mandate to properly litigate and investigate charges. Investigation abuses include those experienced by Chamber members as well as those relied upon by courts to

grant summary judgment in an employer's favor in multi-plaintiff litigation initiated by the EEOC.

At EEOC meetings in 2012 and 2013, both plaintiff and management attorneys confronted EEOC commissioners with complaints that investigations were too long, inconsistent and of questionable quality. To date, the EEOC has failed to address those concerns by providing investigators with timeliness standards for a definition of a quality, limited investigation.

Second, too often the EEOC has prioritized litigation over its statutory mandate to conciliate, refusing to engage in meaningful conciliation negotiations and exchanges of information during conciliation. EEOC now contends that conciliation obligations are exempt from judicial review. *EEOC v. CRST* is one stark example of the damage done by the EEOC's misplaced priorities. The 8th Circuit Court of Appeals dismissed an EEOC case involving over 150 women because the EEOC's failure to conciliate and its, quote, unquote—"stonewalling," sanctioning the EEOC $4.7 million.

Third, numerous EEOC cases have been initiated without commission authorization. And many have been adjudged by federal district courts across the United States to be frivolous, unreasonable and without foundation. In the last two years alone, the EEOC has been ordered to pay employers over $5.6 million as a result of its litigation failures. A Michigan federal court described the EEOC's actions as, quote—"lacking foundation from the beginning." While a New York federal court criticized the EEOC for its, quote—"sue first, prove later approach."

In EEOC litigation challenging an employer's use of background checks, Ohio and Maryland federal courts independently criticized the EEOC for using a, quote—"homemade method of proof that the EEOC itself prohibits," noting that the EEOC was suing employers for the same type of background checks that the EEOC itself uses.

The Maryland court characterized the EEOC's analysis as containing a mind-boggling number of errors, laughable, skewed and an egregious example of scientific dishonesty.

Of particular concern is the EEOC's extensive delegation of authority to the general counsel in bringing litigation. Given the significant expenditure of resources by all parties in systemic and multi-plaintiff cases, and in light of the EEOC's recent history of litigation failures, the Chamber urges that all multi-plaintiff litigation be submitted to the commissioners for approval prior to initiation.

The EEOC does not report the results of one of its most important legal enforcement methods, the amicus curiae briefs it files in cases raising novel or important issues of law. In 2013, the EEOC's positions were rejected in eight of the 10 substantive positions it advanced through its amicus briefs. In four of these, the Supreme Court and courts of appeals also rejected relevant provisions in the EEOC's underlying enforcement guidance. In one case, the Supreme Court characterized the EEOC's underlying enforcement guidance as, quote—"a proposed standard of remarkable ambiguity," while in another the Supreme Court rejected EEOC's enforcement guidance, explaining it's positions were circular and unpersuasive.

The EEOC's amicus litigation program was an overwhelming failure, leaving employers searching as to where to find accurate, reliable guidance on their obligations under federal nondiscrimination laws. I have submitted for the record written testimony, as well as the Chamber's recently published paper that details the EEOC's unreasonable enforcement efforts and misplaced priorities in all three phases of its statutory mandate. For these reasons, the Chamber calls for increased oversight by the commissioners and a refocusing of EEOC's priorities toward its fundamental statutory responsibilities.

Thank you for the opportunity to share some of these concerns with you today.

[The statement of Ms. Olson follows:]

Statement of the U.S. Chamber of Commerce

ON: THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS

TO: THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

BY: CAMILLE A. OLSON, SEYFARTH SHAW LLP

DATE: JUNE 10, 2014

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business — manufacturing, retailing, services, construction, wholesaling, and finance — is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS

JUNE 10, 2014

Good morning Mr. Chairman and members of the Subcommittee. On behalf of the United States Chamber of Commerce, I am pleased to provide testimony of stakeholder concerns regarding recent Equal Employment Opportunity Commission ("EEOC") actions relating to its statutory mandate to: (1) properly investigate charges and reach a determination as promptly as possible, (2) endeavor to eliminate any alleged unlawful practice through informal methods including conciliation and persuasion, and (3) ensure compliance with federal equal employment opportunity laws through meritorious direct party litigation and amicus participation in federal courts as well as the promulgation of enforcement guidance containing legitimate interpretations of federal employment discrimination laws.[1]

Congress empowered the EEOC "to prevent unlawful employment practices by employers."[2] The EEOC administers Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Equal Pay Act ("EPA"), the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"), among other federal employment discrimination laws. The Chamber is a long-standing supporter of reasonable and necessary

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[1] I am Chairwoman of the Chamber's equal employment opportunity policy subcommittee. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector, and geographical region. I am also a partner with the law firm of Seyfarth Shaw LLP, where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national companies in federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their employment practices to ensure compliance with federal and local equal employment opportunity laws. I have represented business and human resource organizations as amicus curiae in landmark employment cases, including *Wal-Mart v. Dukes, et al.*, 131 S. Ct. 2541 (2011), and also teach federal equal employment opportunity law topics at Loyola University Chicago School of Law.

I would like to acknowledge Seyfarth Shaw LLP attorneys Lawrence Z. Lorber, Paul H. Kehoe, Richard B. Lapp, and Chris DeGroff, as well as Jae S. Um for their invaluable assistance in the preparation of this testimony.

[2] 42 U.S.C. § 2000e-5(a).

steps designed to achieve the goal of equal employment opportunity for all.[3] However, the Chamber has serious concerns as to how these laws are currently being administered and enforced by the EEOC. Loosely-defined and overly broad grants of authority to agency officers have created an administrative climate at the EEOC which prioritizes expansive enforcement, aggressive litigation and punishment over education, cooperation and conciliation.

Yet, a properly functioning EEOC is critical for employees and employers alike. An EEOC that timely investigates charges and objectively applies the law to the facts of each charge provides employees with critical information about their rights, and employers with critical guidance as to their obligations under applicable law. Congressionally-mandated *bona fide* EEOC conciliation and other dispute resolution processes can quickly eradicate and remedy an unlawful practice, while also instructing employers as to their legal obligations regarding individual employment decisions and compliant employment policies. The EEOC's vigorous pursuit of cases where unlawful discrimination has occurred as the end stage of enforcement protects affected workers and ensures employer compliance with federal laws.

As described by the Supreme Court, "[t]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, non-coercive fashion. Unlike the typical litigant . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties."[4]

Attached to my testimony is the Chamber's recently-published Paper entitled: "A Review of Enforcement and Litigation Strategy During the Obama Administration - A Misuse of Authority" (June 2014) ("Chamber's EEOC Enforcement Paper"). The Chamber's EEOC Enforcement Paper details unreasonable enforcement efforts by the EEOC during the Obama Administration as documented in federal court decisions and as conveyed to the Chamber by its members. The analysis reveals the EEOC's litigation priorities have included: pursuing investigations and settlements despite clear evidence that the alleged adverse action was not discriminatory and bringing and continuing litigation described as frivolous, unreasonable and without foundation by federal district court judges.[5] In addition, the Chamber's analysis of 2013 court cases reveals the EEOC's priority is often to advance dubious legal theories in both its

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[3] For example, the Chamber worked closely with the disability community to reach a compromise that resulted in the bi-partisan passage of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA").

[4] *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 368 (1977).

[5] Since January 2013 the EEOC has been increasingly criticized by numerous courts throughout the country that have sanctioned the EEOC for its overzealous litigation tactics, awarding nearly six million dollars in attorneys' fees and costs to employers as a result of the EEOC's inappropriate litigation.

enforcement guidance and *amicus* litigation program.[6] For these reasons, the EEOC and its priorities deserve greater attention and oversight. My testimony will include highlights of the Chamber's EEOC Enforcement Paper in two parts: The EEOC's Investigation and Conciliation Record and the EEOC's Private Party and *Amicus* Litigation Record.[7]

The EEOC's Investigation and Conciliation Record

EEOC Investigations

Title VII requires the EEOC to "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." Yet, Chamber members, as well as plaintiff and management attorneys and courts have uniformly criticized the EEOC for investigations that are dilatory, inconsistent and of questionable quality.[8]

Chamber members have voiced concern over numerous examples of EEOC enforcement tactics during the EEOC's investigation and attempts to resolve pending charges of discrimination.[9] Those abuses can be grouped in the following three categories: abuses relating to an investigator's conduct during an investigation; abuses relating to an investigator's conduct during a fact-finding conference; and abuses relating to an investigator's unwillingness to fairly mediate or negotiate a resolution of a charge.

Examples of EEOC enforcement abuses relating to an investigator's conduct during an investigation include: pursuing investigations despite clear evidence that an employee's termination was not discriminatory (including challenging a termination based on video capturing the charging party displaying pornography around the workplace); several examples of instances where employers have been required to submit detailed position statements,

[6] The EEOC's *amicus curiae* program ("*amicus*") is one of its most important legal enforcement methods. In 2013, the EEOC's amicus program was a complete failure – not only were the EEOC's *amicus* positions rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in the EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements under Title VII and the ADA. The courts' rejection of the EEOC's underlying regulatory guidance leaves employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. *See* 12-14 *infra* and Chamber's EEOC Enforcement Paper at 18-25.

[7] I request that the Subcommittee accept my written testimony as well as the Chamber's EEOC Enforcement Paper as part of the written record of today's Hearing.

[8] *See* Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm.

[9] *See* Chamber's EEOC Enforcement Paper at 2-4.

information and documents relating to employees' claims that they had been terminated unlawfully when they were either still employed or had resigned voluntarily (resulting in the expenditure of thousands of dollars in legal fees); requiring the production of workplace policies completely irrelevant to the underlying charge; serving subpoenas for information or documents that were not previously requested by the investigator; communicating directly with employer agents though notified that the employer was represented by counsel; refusing to grant extensions of time to produce information or documents requested because, as a blanket rule, "extensions are not granted"; refusing to provide charging parties or employers with information regarding the case status while it is open; and refusing to close cases that are several years old, preferring instead to continually send employers additional requests for information.

Some employers have gone on the offensive against inappropriate EEOC enforcement tactics, including Case New Holland ("CNH"). In *Case New Holland, Inc. v. EEOC*,[10] CNH filed a lawsuit against the EEOC claiming it violated the Administrative Procedure Act and the U.S. Constitution during its investigation of an alleged age discrimination complaint. Specifically, CNH challenged the EEOC's unannounced surprise delivery of 1300 spam-like emails to CNH managers and employees to "troll" for potential class members at the employees' work email addresses, demanding that they cease their work to communicate with the EEOC on an attached questionnaire.[11]

The Code of Federal Regulations sets forth express guidelines for the EEOC's investigation of charges of discrimination. It states:

> The agency must develop an ***impartial and appropriate factual record*** upon which to make findings on the claims raised by the complaint. An appropriate factual record is defined in the regulations as one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Investigations are conducted by the respondent agency.[12]

Various issues have also arisen with respect to EEOC enforcement abuses relating to an investigator's conduct during a fact-finding conference, including: requiring mandatory conferences; holding the conference prior to the start of the investigation and without first receiving an employer's position statement or statement of facts; conducting the conferences in a confrontational manner (aggressively questioning employer representatives, but not charging party); and refusing to allow an employer's representative to speak during the conference.

Additional EEOC enforcement abuses during settlement conversations include: urging an employer in writing to accept a mid-five figure settlement with respect to a charge based on a variety of alleged bad facts the EEOC claimed showed discrimination (though the EEOC had not at that time issued a determination letter), and, when the employer rejected the offer, days later dismissing the charge as without reasonable cause to believe discrimination existed; refusing to

[10] No. 13-cv-01176 (D.D.C. filed Aug. 1, 2013).

[11] Chamber's EEOC Enforcement Paper at 10-11.

[12] 29 C.F.R. § 1614.108(b) (emphasis added).

engage in a mediation with the employer, claiming the employer did not negotiate in good faith, notwithstanding the same investigator had a few months earlier mediated successfully with the same employer; demanding short turnarounds on any proposed conciliation counteroffers, even though the EEOC's response time for conciliation communications has taken several months; and refusals to provide employers in conciliation and settlement negotiations with information to support the underlying findings or requested relief or appropriate ways to revise policies or practices to comply with non-discrimination laws.

Consistent with the experience of Chamber members, at various Commission meetings aimed at developing the Commission's Strategic Enforcement Plan and Quality Control Plan, Commissioners were confronted with rare agreement between the plaintiff and management bars that the EEOC's investigations are too long, inconsistent, and of questionable quality.[13] The meeting attendees stressed that the EEOC should focus its resources on its priorities and introduced the concept of a "quality, limited investigation" for remaining charges. Unfortunately, the EEOC's recently-released draft Quality Control Plan ("QCP") that is intended to set quality standards for investigations and conciliations does not offer timeliness guidelines for quality investigations nor a definition of a "quality, limited investigation."[14]

Recently, and with more frequency, the sufficiency or the appropriateness of the EEOC's pre-suit obligations have been successfully challenged by employers in courts. "Before the EEOC is able to file a lawsuit in its name, it must establish that it has met four conditions precedent, namely: the existence of a timely charge of discrimination, the fact that EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit."[15] The most recent example of EEOC abuse in the investigation context occurred in *EEOC v. Sterling Jewelers, Inc.*, a nationwide class action alleging discriminatory pay practices against female employees.[16] While 19 female employees from various states filed charges with the EEOC claiming pay-related sex discrimination, the EEOC filed suit on behalf of a nationwide class. However, rather than conducting a *bona fide* investigation, the EEOC in making its reasonable causing finding simply relied on reports prepared by plaintiffs' counsel and "experts." The federal district court rejected this tactic and granted summary judgment in favor of Sterling because the EEOC failed to demonstrate that it had conducted *any* investigation into claims of company-wide pay and promotion discrimination on a nationwide basis as

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[13] *See* Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm.

[14] Instead, the QCP adopts an "I know it when I see it" standard that offers no guidance to the field other than to correctly fill out a charge form and apply the law to the facts.

[15] *Id.* at 359-60; 42 U.S.C. §2000e-5(b).

[16] *EEOC v. Sterling Jewelers, Inc.*, No. 08-706, 2014 WL 916450, at *1 (W.D.N.Y. Mar. 10, 2014).

opposed to merely being spoon fed unvetted information from plaintiffs' lawyers before filing a lawsuit.[17]

Notwithstanding the above failures in the EEOC's investigative processes, the EEOC is unwilling or unable to provide guidance to ensure investigations are run with the utmost professionalism, quality, and consistency throughout the country. The Chamber urges Congress to install much needed common sense safeguards within the EEOC if the EEOC continues to ignore these issues.

EEOC Conciliations

Before filing a suit, Title VII requires that the EEOC "endeavor to eliminate any... unlawful employment practice by informal methods of conference, conciliation, and persuasion."[18] That serves all sides – employees, employers and courts. Needless, expensive, protracted litigation should be avoided if compliance can be obtained through informal means.

Despite this statutory language, the EEOC rejects the notion that its statutory obligation is subject to judicial review; rather, the EEOC contends that courts must simply accept the EEOC's assurance it occurred. Courts, however, are empowered to enforce the law, review agency decisions and ensure that agencies do not exceed their statutory boundaries. Making compliance with a statute unreviewable is to make a violation of that statute irremediable. No legitimate reason exists to exempt the EEOC's statutory obligation to conciliate from judicial review, while other statutory requirements – charge requirements, time limits and notice rules – are routinely subject to judicial review.

In fact, when Congress amended Title VII in 1972 granting litigation authority to the EEOC, it considered exempting the EEOC's conciliation efforts from judicial review. For example, an early version of the bill expressly stated that the EEOC may proceed with a suit if it cannot secure "a conciliation agreement acceptable to the Commission, *which determination shall not be subject to review*."[19] (emphasis added.) However, as ultimately passed, the 1972 Amendments did not exempt conciliation from judicial review and Title VII does not contain that italicized language above, showing that Congress intended that there be appropriate judicial oversight of EEOC conciliation activities.[20]

For the last forty years, courts have routinely reviewed whether the EEOC has sufficiently complied with conciliation obligations. Recently, in *EEOC v. CRST Van Expedited, Inc.*,[21] the Eighth Circuit Court of Appeals largely affirmed a district court's dismissal of an

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[17] *Id.*

[18] 42 U.S.C. § 2000e-5(b).

[19] S. 2515, 92d Cong. § 4(f) (1971).

[20] 42 U.S.C. § 2000e-5(f)(1).

[21] 679 F.3d 657, 676-77 (8th Cir. 2012).

EEOC class action complaint which alleged sexual harassment of behalf of 154 women where the EEOC failed to identify the alleged victims during conciliation. The Eighth Circuit held that the EEOC stonewalled the company by making no meaningful attempt to conciliate and described the EEOC's tactic of seeking redress for victims identified after the beginning of litigation as follows:

> There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.[22]

As a result, the district court sanctioned the EEOC and awarded $4.7 million dollars to CRST for attorneys' fees and expenses.[23] In addition to taxpayers having to fund the sanction against the EEOC for abusing the very statute it enforces, 153 alleged victims' claims were dismissed without a hearing on the merits – a stark example of the harm caused by the EEOC's improper litigation tactics. Judicial review is a meaningful and real check and balance over agency abuse. Without it, tactics like those in the *CRST* case would go unchecked.

Yet a recent Seventh Circuit Court of Appeals case, *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013) rejected this safeguard and held conciliation was not subject to judicial review, creating a split among the Circuit Courts of Appeals regarding the issue of whether the EEOC's conciliation obligations are subject to judicial review, as courts in the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits[24] had all determined that the EEOC's conciliation obligations were subject to review under varying standards.

The House of Representatives recognized the dangers created where there is no meaningful, *bona fide* conciliation. Thus on May 30, 2014, it voted on a bipartisan basis to approve the fiscal year 2015 Commerce, Justice, Science Appropriations bill.[25] The report accompanying the bill provided as follows:

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[22] *Id.* at 676.

[23] *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478, at *21 (N.D. Iowa Aug. 1, 2013).

[24] The Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). As opposed to the EEOC's positions in these cases promoting a particular judicial standard of review of its conciliation efforts, today the EEOC asserts its efforts are not subject to judicial review.

[25] H. Rep. No. 113-448, at 83-84 (2014).

> The Committee is concerned with the EEOC's pursuit of litigation absent good faith conciliation efforts. The Committee directs the EEOC to engage in such efforts before undertaking litigation and to report, no later than 90 days after enactment of this Act, on how it ensures that conciliation efforts are pursued in good faith.[26]

The EEOC should not be permitted to ignore Title VII's plain language, nor should courts abdicate their responsibilities in determining whether an executive branch agency complied with its statutory requirements. Yet, that is what the EEOC argues in courts throughout the country and in its brief filed in response to Mach Mining's petition for writ of certiorari currently pending before the United States Supreme Court.[27] Courts have an important role in ensuring that any agency, including the EEOC, does not manipulate, abuse, or evade its statutory duty.

The EEOC's Private Party and *Amicus* Litigation Record

Recently, multiple federal courts have sanctioned the EEOC in connection with its investigatory and litigation tactics. In the last two years, the EEOC has been ordered to pay employers over $5.6 million dollars as a result of its improper litigation and conciliation efforts. Five recent cases are of immediate note in which courts sanctioned the EEOC for its: failure to follow appropriate procedures before instituting litigation, failure to appropriately litigate the case, and failure to reasonably assess the appropriateness of continuing its litigation once it became clear in discovery that its complaint's theory had no basis in fact.[28]

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[26] *Id.*

[27] On December 20, 2013, the Seventh Circuit Court of Appeals broke from over 40 years of jurisprudence by holding that the EEOC's pre-conciliation efforts were not subject to judicial review at all in *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013). *See* Brief for the Respondent at 7-13, *Mach Mining, LLC v. EEOC*, (No. 13-1019) (May 27, 2014).

[28] In *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013), the court ordered the EEOC to pay $4.7 million in attorneys' fees, expenses and costs to the employer it sued based on its failure to conciliate before instituting litigation. In *EEOC v. Bloomberg LP*, 2013 WL 4799150 (S.D.N.Y., Sept. 9, 2013), the court invited the employer to file a motion for attorneys' fees based on the EEOC's inappropriate conciliation and litigation conduct. In *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2014 WL 37860 (M.D.N.C., Jan. 6, 2014), a magistrate judge imposed sanctions of approximately $23,000 against the EEOC for spoliation of evidence where the claimant destroyed documents during litigation relevant to her duty to mitigate damages. In *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. Oct. 7, 2013), the court upheld a fee award of $751,942 for continuing to pursue litigation based on a blanket no hiring policy for ex-convicts where no such policy existed and the EEOC obtained information during discovery that disproved its factual basis for its complaint. In *EEOC v. TriCore Reference Laboratories*, No. 11-2096, 2012 WL 3518580 (10th Cir. 2012), the Tenth Circuit Court of Appeals affirmed summary judgment for the employer determining that no

The $5.6 million sanctions against the EEOC does not take into account the value of the Commission's resources (in attorney and other staff time, hard litigation and expert witness and other costs and the opportunity costs of pursuing frivolous cases). In addition, there are no available estimates on the resources expended by the EEOC in connection with a number of other high profile losses suffered by the EEOC on its most highly publicized cases during the last year, including most recently, the dismissal of EEOC's nationwide sex discrimination litigation against Sterling Jewelers for its failure to investigate the alleged systemic allegations in the case before initiating litigation (*EEOC v. Sterling Jewelers, Inc.* W.D.N.Y. No. 08-706 3/10/2014).

Reestablishing The Commission's Oversight of The Initiation of Multi-Plaintiff Litigation

Title VII confers authority to initiate litigation to the five-member Equal Employment Opportunity Commission. Title VII authorizes the EEOC's General Counsel to "conduct" litigation. Yet today, the overwhelming majority of EEOC-initiated litigation is initiated throughout the United States by EEOC Local District offices, without review and a grant of authority from the Commission.

This has not always been the case. In 1995, the Commissioners delegated their authority to initiate litigation to the General Counsel, who subsequently delegated much of that authority to the district offices. Since then, the Commission has only exercised authority to initiate litigation in some but not all cases involving a major expenditure of resources, cases presenting a developing area of the law, cases likely to present a public controversy, and cases where an EEOC amicus brief is sought.

In the early- to mid-2000s, as many as 75-80 litigation recommendations were submitted annually to the Commission for authorization. Yet, in recent years, the number has decreased dramatically. In the three-year period covering 2010, 2011 and 2012, a total of approximately 15 cases (of any type) were submitted to the Commission for authorization. In late 2012, the EEOC adopted its Strategic Enforcement Plan, which continued the EEOC's focus on systemic litigation, but slightly modified the delegation of authority to the General Counsel, which required "most" systemic cases to be submitted to the Commission for review. Overall, the Commission required a minimum of 15 cases, one from each district office, be presented for review each fiscal year. In fiscal year 2013, the EEOC filed 21 systemic cases and 21 non-systemic multi-plaintiff cases. Based on information provided before each public Commission meeting, it is clear that many of these cases were initiated by the district offices without approval from the Commission.

Given the significant expenditure of resources by both the EEOC and private employers in connection with multi-plaintiff cases in 2013, the Chamber urges that all multi-plaintiff litigation be submitted to the Commissioners for review and approval prior to initiation of litigation.

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material issue of fact remained, and awarded $140,571 in attorneys' fees to the employer based on the EEOC's pursuit of a failure to accommodate claim with no basis in fact.

Private Party Litigation Failures

Despite significant budgetary increases in 2009 and 2010,[29] and consistent funding at high levels since, EEOC litigation is down almost 55%.[30] Since April 2010, however, the number of cases that the EEOC has lost due to litigation abuses is troubling.[31]

For example, in a race discrimination case, the EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.[32] However, the company simply did not have a blanket no-hire policy. Despite becoming aware of the fatal false premise of its case during discovery, the EEOC continued to litigate anyway. The U.S. District Court for the Western District of Michigan determined that "this is one of those cases where the complaint turned out to be without foundation from the beginning." As a result, the court ordered the EEOC to pay a total of $751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees after the agency learned that the company did not have the blanket no-hire policy.

A federal court in New York dismissed a pregnancy discrimination lawsuit filed by the EEOC, granting summary judgment for the employer, ruling that the EEOC did not present sufficient evidence to establish that, once again, the employer engaged in a pattern or practice of pregnancy discrimination.[33] The EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The court ruled that the law does not mandate work-life balance. The court criticized the EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required."[34]

Similarly, in a case alleging discrimination under the ADA, the EEOC continued to litigate even when it became clear that the case had no merit.[35] Specifically, the EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but

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[29] *See* http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm. Between fiscal year 2008 and fiscal year 2010, the EEOC's budget increased by over $38M or 11.5%.

[30] *See* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm. In fiscal year 2008, the EEOC filed 290 merits cases. In fiscal years 2012 and 2013, the EEOC filed 122 and 133 merits cases, respectively.

[31] For additional analysis regarding the EEOC's litigation abuses, see the Chamber's EEOC Enforcement Paper at 7-11.

[32] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

[33] *EEOC v. Bloomberg LP*, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y., Sept. 9, 2013); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).

[34] *Id.*

[35] *EEOC v. Tricore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).

"continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed." Thus, the EEOC's claims were "frivolous, unreasonable and without foundation." The district court dismissed the claim and awarded the employer over $140,000 in attorneys' fees and costs. The Court of Appeals affirmed.[36]

While litigating disparate impact claims, which do not require that the EEOC prove intentional discrimination against any alleged victim, the EEOC has fared no better. For example, in an Ohio case alleging that an employer's use of credit background checks violated Title VII, the Sixth Circuit affirmed summary judgment because the EEOC lacked sufficient evidence to even form a prima facie case of discrimination. There, the EEOC used a novel "race rating" system to establish that the credit background check had a disparate impact against minority applicants. While castigating the EEOC for using a "homemade" method that the EEOC itself prohibits, the Sixth Circuit noted that "[i]n this case the EEOC sued defendants for using the same type of background check that the EEOC itself uses." *The Wall Street Journal* called the Sixth Circuit's opinion "The Opinion of the Year".[37]

In a Maryland case alleging that an employer's criminal background policy had a disparate impact on minorities, the EEOC attempted to prove its case through hiring statistics.[38] Unable to establish a prima facie case of discrimination, the court awarded summary judgment for the employer. The court found that EEOC's expert analysis contained a "mind-boggling number of errors." The court also found the EEOC's statistical evidence to be "skewed," "rife with analytical errors," "laughable," and "an egregious example of scientific dishonesty." Accordingly, the court dismissed the case, noting that, "The story of the present action has been that of a theory in search of facts to support it." When bringing costly litigation, the Government's representative needs to be held to a standard higher than "laughable" or "scientifically dishonest."

EEOC abuses can also be found during the discovery phase of litigation. For example, in *EEOC v. Honeybaked Ham*[39], a Colorado district court sanctioned the EEOC for its efforts to evade discovery where the EEOC was "negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court[.]" In *EEOC v. Womble Carlyle Sandridge & Rice, LLP,*[40] a North Carolina court sanctioned the EEOC almost $23,000 for the charging party's destruction of evidence after the EEOC had initiated litigation, laying blame for the destruction on the EEOC's attorneys.

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[36] *Id.*

[37] http://online.wsj.com/news/articles/SB10001424052702304512504579491860052683176.

[38] *EEOC v. Freeman*, 961 F. Supp. 2d 783, 797-799 (D. Md. 2013).

[39] *EEOC v. Original Honeybaked Ham Company of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb 27, 2013).

[40] *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. Jan. 6, 2014); see also *EEOC v. Womble Carlyle Sandridge & Rice*, LLP, 13-CV-46 (M.D.N.C. April 29, 2014).

The EEOC's Failed Amicus Program[41]

Not only has the EEOC been unsuccessful in its major cases in which it is a party, the EEOC's *amicus curiae* program was equally unsuccessful in 2013. One of the most important legal enforcement methods available to the EEOC is its *amicus curiae* program.[42] *Amicus* briefs are "friend of the court" briefs filed by the EEOC "in a case that raises novel or important issues of law" that fall within EEOC's expertise.[43] The EEOC has an exhaustive approval process for *amicus* participation, with all recommendations in favor of *amicus* participation approved by a majority of the five-member Commission. *Amicus* briefs are part of the EEOC's targeted and integrated approach to law enforcement, focused on the EEOC's priorities, and often seek judicial approval of EEOC positions contained in its enforcement guidelines and policy statements.

In 2013, the U.S. Supreme Court and five Courts of Appeals decided 13 cases in which the EEOC filed amicus briefs. To be sure, three of the 13 cases raised contested procedural issues on which the EEOC's *amicus* position prevailed.[44] Ten of the cases involved substantive issues of the appropriate interpretations of applicable federal law.[45] The EEOC's position was

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[41] For a more in depth analysis of the EEOC's failed amicus program, see the Chamber's EEOC Enforcement Paper at 18-25.

[42] The EEOC has not included information regarding its 2013 *amicus* record on its website, in its 2013 PAR, or in its General Counsel's Law360 article criticizing other analyses of the EEOC's litigation record as failing to perform a comprehensive review of all 2013 EEOC litigation efforts. Without considering the EEOC's 2013 *amicus* record, its General Counsel asserted that when one reviewed the EEOC's entire record instead of a few EEOC losses still on appeal, "...we [EEOC] have a record of success in reversing adverse decisions when a case moves to the appellate court."). P. David Lopez, *'EEOC Overreach' Analysis Distorted The Record*, LAW360 (Jan. 3, 2014, 12:17 PM).

[43] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE PROGRAM, (Jan. 15, 2014), available at http://www.eeoc.gov/eeoc/litigation/amicus.cfm.

[44] The EEOC prevailed on procedural arguments in the following three *amicus* cases in 2013: *Mandel v M&Q Packaging Corp.*, 706 F.3d 157 (3d Cir. Jan. 14, 2013) (adopting the EEOC position that the district court erred in refusing to consider evidence of harassment over 300 days old in this hostile work environment claim); *Boaz v. FedEx Customer Info. Svs., Inc.*, 725 F.3d 603 (6th Cir. Aug. 6, 2013) (adopting DOL & EEOC argument that an employment contract cannot shorten the statute of limitations under the EPA or FLSA); *Ellis v. Ethicon, Inc.*, 529 Fed. Appx. 310 (3d Cir. Jul. 9, 2013) (adopting the EEOC argument that reinstatement can be an appropriate remedy).

[45] The EEOC's substantive arguments were rejected in the following eight *amicus* decisions in 2013: *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance definition of "supervisor" under Title VII when determining vicarious liability for unlawful harassment); *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance that the motivating factor standard applies to

rejected in eight of the ten substantive positions it advanced in the appellate courts. In comparison, the United States Chamber of Commerce ("Chamber") filed *amicus curiae* briefs in three of these same cases, with a 100% success rate.[46]

The Supreme Court itself rejected two long-held EEOC guidance positions. First, in *Vance v. Ball State Univ.*, the Supreme Court rejected the EEOC's expansive definition of "supervisor" and held that an employer may be vicariously liable for an employee's unlawful harassment only when that employee has the employer's authorization to effect significant changes in employment status of the employee (such as hiring, firing, promoting, demoting or significantly changing their responsibilities or employee benefits).[47] Second, in *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, the Supreme Court rejected EEOC's amicus position and held that in a Title VII retaliation claim, the plaintiff must prove that the harm would not have occurred "but for" the employer's retaliatory motive.[48]

The Supreme Court's adverse rulings in 2013 striking down EEOC guidance were not an anomaly. In 2012, the Supreme Court unanimously rejected the EEOC's position that the

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retaliation claims); *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013) (rejecting EEOC Enforcement Guidance that attendance is not an essential function of the job); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013) (rejecting the position offered in a joint brief filed by the EEOC and DOL while the proceedings were before the NLRB that arbitration agreements are inconsistent with federal law); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (rejecting the EEOC's argument, filed jointly with the DOL, that arbitration agreements barring class claims are impermissible); *McKinley v. Skyline Chili, Inc.*, 2013 WL 4436537 (6th Cir. Aug. 21, 2013) (affirming summary judgment for the employer because loss of confidence and poor performance were not pretextual reasons for termination); *Foco v. Freudenberg-NOK Gen. P'ship*, 2013 WL 6171410 (6th Cir. Nov. 25, 2013) (affirming summary judgment for the employer as the pay disparity was based on something other than sex); *Bailey v. Real Time Staffing Servs., Inc.*, 2013 WL 5811647 (6th Cir. Oct. 29, 2013) (affirming summary judgment for the employer because the employee's failed drug test, even if caused by medication taken to treat HIV, was a legitimate, non-discriminatory reason for termination). The EEOC prevailed on substantive *amicus* arguments in only two cases in 2013: *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. Aug. 9, 2013) (adopting the EEOC's argument that a sexual harassment victim does not need to prove that the harassment unreasonably interfered with her work performance, only that work conditions were discriminatorily altered) and *Latowski v. Northwoods Nursing Ctr.*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013) (reversing summary judgment for employer on a pregnancy discrimination claim where a fact issue existed regarding whether the employer's proffered reason for terminating plaintiff was pretextual).

[46] The U.S. Chamber of Commerce filed *amicus* briefs in *Vance v. Ball State Univ.*, *Univ. of Texas Southwestern Med. Ctr. v. Nassar* and *DR Horton v. NLRB.*

[47] *Vance*, 133 S. Ct. at 2454.

[48] *Nassar*, 133 S. Ct. at 2533-34.

ministerial exception did not apply to ADA retaliation cases.[49] In 2009, the Supreme Court rejected the EEOC's position that the mixed motive instruction was permissible under the ADEA, which the EEOC had argued as amicus before the Eighth Circuit Court of Appeals and in which the Department of Justice appeared as amicus at the Supreme Court.[50]

In addition to the Supreme Court rejecting EEOC guidance, the Courts of Appeals rejected the EEOC's substantive positions found in its *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*[51] as well as the EEOC's *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes*.[52] For example, in *Basden v. Prof. Transportation, Inc.*,[53] the Seventh Circuit rejected the EEOC's much maligned position that attendance is not an essential function of a job. In *D.R. Horton v. NLRB*,[54] the Fifth Circuit Court of Appeals rejected the EEOC's policy position that arbitration agreements are inconsistent with federal civil rights laws.

Whether the EEOC's *amicus* program's success is measured on a pure numerical win/loss basis, or on the importance of the substantive interpretations of federal law it supported in its *amicus* efforts, one thing is clear: it was an overwhelming failure. More important, however, is that courts consistently rejected substantive policy positions adopted by the EEOC, which creates an untenable atmosphere for employers and employees, both of whom are left searching for reliable guidance on rights and obligations under federal employment civil rights laws. The EEOC has abandoned its role as neutral enforcer of the plain language of the law to an overly aggressive litigant, seeking to make law through cases, not legislation.

Expansive Enforcement Guidance

As is clear from the appellate courts' rejection of EEOC guidance, employers find themselves between a rock and a hard place when it comes to determining whether to revise policies and practices to conform to new EEOC enforcement guidance. Guidance represents not the law, but the EEOC's view of the law. Employers look to the EEOC for thought-based, reasonable guidance to assist their compliance efforts. An individual expects that the EEOC

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[49] *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 707 (2012).

[50] *Gross v. FBL Services, Inc.*, 557 U.S. 167, 173 (2009).

[51] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, (Oct. 17, 2002), available at http://www.eeoc.gov/policy/docs/accommodation.html.

[52] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), available at http://www.eeoc.gov/policy/docs/mandarb.html.

[53] 714 F.3d 1034, 1037 (7th Cir. May 8, 2013).

[54] 737 F.3d 344, 360 (5th Cir. Dec. 3, 2013).

provides reliable guidance outlining his or her rights under the statutes within its jurisdiction. However, when any enforcement guidance strays from the statutory intent and is ultimately struck down by the Supreme Court or a Circuit Court of Appeals, the EEOC has failed all of its stakeholders and its congressional mandate.

One potential reason for the continued disregard of EEOC guidance is because it adopts substantive policy positions that create compliance requirements without the benefit of public comment.[55] This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents. OMB's "Final Bulletin for Agency Good Guidance Practices" states:

> Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.[56]

For example, one intended audience for any EEOC enforcement guidance is the EEOC investigators, who are trained to implement the relevant guidance document in their day-to-day investigations. EEOC investigators will determine whether reasonable cause exists that discrimination occurred based on an employer's compliance with the relevant enforcement guidance, essentially equating compliance with a guidance document as compliance with a statute. During an investigation, employers are held to the standards set forth in the EEOC's guidance documents. As many guidance documents take expansive views of rights and obligations under the law, it allows investigators to build large systemic cases on questionable theories that force employers to settle before or in the early stages of litigation.

In April 2012, the EEOC adopted its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. This guidance was not issued for notice and comment pursuant to OMB's Final Bulletin for Agency Good Guidance Practices. The rule contained in this guidance is relatively simple – employers commit race discrimination if they choose to hire applicants without criminal

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[55] Notably, the EEOC placed complete drafts of its Strategic Plan and Strategic Enforcement Plan for public comment. *See* http://www.eeoc.gov/eeoc/newsroom/1-18-11a.cfm and http://www.eeoc.gov/eeoc/newsroom/release/9-4-12c.cfm. It did not provide a complete draft of either its draft Quality Control Plan, enforcement guidance related to the use of criminal convictions, anticipated guidance related pregnancy discrimination, or other draft guidance documents regarding credit background checks or under reasonable accommodation requirements under the ADA.

[56] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

histories over applicants with criminal histories unless the employer conducts a highly subjective individualized assessment of the applicant with a criminal history. If the applicant with a criminal history is excluded after an employer considers these factors, presumptively no race discrimination exists. If the applicant is excluded without an individualized assessment, presumptively race discrimination exists. However, there is no individualized assessment requirement under Title VII. The EEOC fails to provide any justification for this logical flaw – that an unsuccessful applicant who received an individualized assessment is not discriminated against while an unsuccessful applicant who did not receive an individualized assessment has been discriminated against.

A second flaw in the EEOC's guidance is its treatment of state laws. While Title VII does contain a provision that Title VII supersedes state law only where a state or local law requires or permits an act that would violate Title VII,[57] the EEOC provides no guidance on how an employer should weigh competing federal and state interests, other than to say that an employer will have to establish that a screen based on state law is job-related and consistent with business necessity. It is an expensive endeavor for a nursing home or other health care facility to show that not hiring a serial rapist or drug dealer pursuant to state law is job-related and consistent with business necessity, yet that is what this guidance contemplates.

Finally, the EEOC gives short shrift to common sense employer concerns – workplace safety and the hiring of violent felons, sexual harassment concerns and the hiring of rapists, trust and reliability in one's workforce. In classic "Do as I say not as I do" fashion, the EEOC itself conducts criminal background checks on potential hires because a history or pattern of criminal activity creates doubt about a person's judgment, honesty, reliability and trustworthiness.

In addition to the poor showings in court, the EEOC continues to send mixed signals regarding the efficacy of its guidance positions. For example, in the *State of Texas v. EEOC* litigation, the EEOC describes its guidance documents as "lack[ing] the force of law."[58] Yet, only months later, the Solicitor General of the United States asked that the Supreme Court not to grant a writ of certiorari in *Young v. United Parcel Service* because the EEOC is about to issue enforcement guidance on the issue.[59] Note the inherent inconsistency in those positions. Employers are forced to comply with policy positions set for in enforcement guidance documents, while the EEOC argues in court that those positions have no force of law, while at the same time the Department of Justice requests that the Supreme Court deny granting a writ of certiorari in *Young* because the EEOC's anticipated guidance will resolve the issue.

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[57] 42 U.S.C. § 2000e-7.

[58] *See* EEOC's Memorandum in Support of Motion to Dismiss, No. 5:13-CV-255 C, at 7 (N.D. Tex 2013).

[59] Amicus Brief for the United States at 21-22, *Young v. United Parcel Service, Inc.*, No. 12-1226 (May 19, 2014). Notably, the EEOC is not a signatory to that brief, indicating that at least three Commissioners do not with the argument set forth by the Department of Justice.

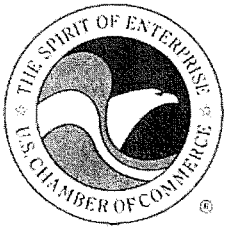
Conclusion

Combating discrimination in the workplace is a worthy goal and one that the U.S. Chamber of Commerce supports. However, the EEOC's abusive enforcement tactics must be addressed. While federal judges have pushed back in certain cases, the EEOC clearly has not received the message. Moreover, relying on federal court judges as the final check on EEOC enforcement is often a case of "too little, too late"; by that time, employers have already spent significant time and resources defending themselves against unmeritorious allegations and the EEOC's misplaced priorities and overzealous litigation tactics leave fewer resources and longer delays in investigating and resolving meritorious discrimination allegations and providing employers with accurate guidance around which to shape their workplace policies. We encourage the EEOC to adopt institutional procedures to provide for internal accountability, more efficient use of resources and adherence to its own statutory conciliation and other obligations. If the EEOC continues to ignore the problem, we encourage Congress to use its oversight authority to install much needed safeguards within the EEOC.

Mr. Chairman and members of the Committee, thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

cc: Randel K. Johnson, Esq.

A Review of Enforcement and Litigation Strategy during the Obama Administration—A Misuse of Authority



June 2014

Executive Summary

Much of the visible, public debate in Washington, DC over policy issues focuses on the machinations on Capitol Hill: what bill is introduced; what bill is defeated; what bill can't get past a motion to proceed; what bill may actually become law; and what bill is simply being offered to score political points against the opposing party with no real chance of passage. While sometimes the substance changes, the procedural back and forth largely remains the same.

This is perhaps more true for the employment area than many other areas, as new major employment laws are relatively rare. Indeed, the real day-to-day substantive "action" of employment law is far removed from the Congress and lies in the enforcement agencies and in the courts. On a continuum, agency action can primarily focus on the issuance of regulations, such as at the Department of Labor, or on the development of caselaw such as at the National Labor Relations Board, or somewhere in between. Policy interpretations which are neither regulations nor caselaw provide their own gloss of quasi legal requirements that employers must be aware of. Enforcement theories developed by the agencies and advanced in the courts under the claim of legitimate interpretation of the enabling statute, a regulation or past case underpin an agency's overall strategy to advance its views. This can be done in many ways but is typically done through direct party litigation or *amicus* briefs where an agency weighs in on cases to advance a certain legal proposition—in the hope a court will adopt it—and therefore lay the brick for future enforcement directions. Driving all these is an agency's general view of whether it is to be a relative neutral arbiter of the law or an aggressive advocate for one party or the other. And this view can and will change depending on whether the agency is pursuing a case, such as through the general counsel's office, or is sitting in review of a case.

Unfortunately, while developments on Capitol Hill are relatively easy to track and summarize, it is very difficult to track and analyze an agency's overall approach to enforcing the law, simply because agency actions are on multiple fronts across the entire country, often siloed into many individual cases.

This paper attempts to meet that challenge and create an understandable narrative providing an overview of the enforcement and litigation strategies of the Equal Employment Opportunity Commission ("EEOC" or "Commission") during the Obama Administration. The analysis reveals an agency which often advances questionable enforcement tactics and legal theories. We cannot claim that this analysis reviews every enforcement action or case brought by the EEOC, but the study certainly documents that this is an agency that deserves greater attention and oversight as it claims to promote its critical agenda of equal employment opportunity.

The first part of the paper examines unreasonable enforcement efforts of the EEOC, as detailed by federal courts and as conveyed to us by Chamber members. Some of the findings are as follows:

- EEOC will pursue investigations despite clear evidence that any alleged adverse action was not discriminatory—such as terminating an employee caught on videotape leaving pornography around the workplace.

- EEOC investigators propose large settlement figures, only to dismiss the case entirely upon rejection of the offer, making the whole basis of the original settlement offer intellectually dishonest and turning a supposedly neutral investigation into nothing more than a "shakedown."

- A federal case in which the judge criticized EEOC for using a "sue-first, prove later" approach.

- A federal case brought by EEOC which the judge described as "one of those cases where the complaint turned out to be without foundation from the beginning."

- A federal case in which the judge criticized EEOC for continuing "to litigate the . . . claims after it became clear there were no grounds upon which to proceed," describing the EEOC's claims as "frivolous, unreasonable and without foundation."

The second part of the paper reviews the EEOC's unsuccessful 2013 amicus program, in which its legal interpretations were rejected by federal courts approximately 80% of the time.

- In 2013, the United States Supreme Court, and five different federal courts of appeals collectively decided thirteen cases in which EEOC filed *amicus* briefs.

- With the exception of one case in which EEOC filed an *amicus* in support of neither party, all *amicus* briefs were filed by EEOC in support of a private plaintiff's position; none in support of a private employer's position.

- Ten of the cases involved substantive issues of the appropriate interpretations of applicable federal law. EEOC's position was rejected in eight of the ten substantive positions it advanced in the appellate courts.

- In four of the most important and far reaching discrimination and harassment interpretations advanced by EEOC's *amicus* participation -- not only was EEOC's *amicus* position rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements.

* * *

In closing, I would like to acknowledge the many members of the U.S. Chamber's Labor Relations Committee for their contributions to this report and, in particular, Camille Olson, Chair of the Chamber's Equal Employment Opportunity Subcommittee, for her

detailed comments and analysis. Lastly, I would be remiss not to thank James Plunkett, Director of Labor Policy for the Chamber, for his on-going efforts in bringing this report to completion.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee Benefits

Part I: EEOC Enforcement Results During the Obama Administration

The Equal Employment Opportunity Commission administers Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), among other laws. The purpose of these laws—to eliminate workplace discrimination—is strongly supported by the U.S. Chamber; employers therefore understand the need for EEOC to properly investigate charges and vigorously pursue cases where unlawful discrimination has occurred. However, when investigating allegations, EEOC also owes certain duties to employers. As described by one federal appeals court:

> The EEOC must vigorously enforce the Americans with Disabilities Act and ensure its protections to affected workers, but in doing so, the EEOC owes duties to employers as well: a duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit.[1]

It appears that, all too often, EEOC neglects theses duties. Employers often believe that EEOC is not objective in its investigation, has not made good faith efforts to conciliate, or has utilized uncalled-for heavy-handed enforcement or litigation strategies in unmeritorious cases. In other words, many employers feel that EEOC places too much emphasis on the end stage of enforcement—litigation—and too little on the critical steps of mediation and conciliation which serve to: (1) determine, at the outset, whether a particular case has merit; and (2) quickly and efficiently promote the statutory goals of preventing and ending discriminatory practices.

EEOC's Abusive Investigatory Tactics

EEOC abuses can happen during any stage of the enforcement process. Nevertheless, initial interactions with the EEOC investigator assigned to the particular case can set the tone for the entire case, and it is often during these early stages of an EEOC-initiated investigation where the EEOC's bullying enforcement tactics begin. This is critical, because it is during this stage where the EEOC's statutorily required duty to conciliate (and mediate), if effective, can lead to a quick resolution of the dispute. If, on the other hand, the investigator's tactics otherwise disrupt the conciliation process, this can lead to long, drawn out and expensive litigation.

It should be emphasized that such tactics can be difficult to summarize in an analysis such as this. Many concerns seem outrageous on their face. Others might not seem egregious standing alone, but repeated time and again or combined with other abuses, become more serious. With this in mind, set forth below are several examples of EEOC enforcement abuses that we have heard from our Members:

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[1] *EEOC v. Argo Distribution, LLC*, 555 F.3d 462, 473 (5th Cir. 2009).

- After the investigation, but before issuing a reasonable cause determination, EEOC investigators send the employer a letter, urging a mid-five figure settlement and outlining a variety of bad facts which show discrimination. Just days after the employer rejects these offers, the EEOC then dismisses the allegations entirely, making the whole basis of the original settlement letter intellectually dishonest and turning a supposedly neutral investigation into nothing more than a "shakedown."

- An investigator refused to allow the employer to mediate the charge, claiming that the company does not negotiate in good faith.[2] This position was blatantly inaccurate given that company had successfully mediated a matter with the *same investigator* only a few months earlier. The employer's request for the case to be reassigned to another investigator was denied.

- Several examples of instances where employees have claimed that they had been terminated unlawfully, when in fact they were either still employed or had resigned voluntarily. The employers were then obligated to respond to such allegations with a position statement in order to simply show that a termination had *not* occurred. This response requires the employer or its representatives to, among other things, review the complaint, obtain documents, interview managers, and draft the legal response. Some Members estimate that preparing such a response can easily cost up to $4000.

- Pursuing investigations despite clear evidence that any alleged adverse action was not discriminatory—such as terminating an employee caught on videotape leaving pornography around the workplace.

- Investigators refusing to close cases that are several years old by continually making additional requests for information.

- Investigators refusing to close cases, even where the employer, employee and union have all agreed to a private settlement of the matter.

- Refusing to grant extensions of time to produce information or documents requested, because, as a blanket rule, "extensions are not granted."

- Failing to engage in good faith conciliation in order to pursue a case which EEOC eventually lost on summary judgment, costing the employer several hundred thousand dollars in attorneys' fees and costs.

- Continually attempting to communicate directly with supervisory employees rather than through employers' counsel.

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[2] The EEOC has a statutory duty to engage in conciliation before filing a formal complaint. *See* 42 U.S.C. § 2000e-5(b). The policy rationale behind this requirement is simple: needless litigation should be avoided and if compliance may be obtained through informal means, that is preferable to expending the significant resources litigation requires.

- Making overly-burdensome requests for information and issuing subpoenas which are sweeping in scope and not sufficiently related to the underlying investigation.

- Serving subpoenas for information or documents that were not previously included in EEOC Information Requests.

- Demanding that the employer turn over workplace policies that are completely irrelevant to the underlying charge.

- Various issues related to EEOC investigators' "fact-finding conferences," such as:

    - Making these conferences mandatory; and holding them prior to any investigation and prior to permitting the employer to submit a statement of position or a statement of facts.

    - Conducting these conferences in a confrontational and one-sided manner in which EEOC investigators aggressively question employers, but refuse to permit employers' counsel to speak.

    - Making unprofessional and prejudicial statements during conferences, such as exclaiming that, "it is well known that [employer] has a pattern and practice of discriminating and retaliating against its employees."

- Demanding short turnarounds on any proposed conciliation counteroffers even though EEOC's response time regarding conciliation communications may take months.

- Refusals to assist employers in conciliation and settlement contexts with information as to appropriate ways to revise policies or practices to comply with non-discrimination laws.

EEOC's Abusive Litigation Tactics

The anecdotes catalogued above were personally described to Chamber staff by concerned Members. However, there are also a myriad of *public* examples of EEOC's irresponsible enforcement efforts—particularly once they have entered the litigation stage.[3] These instances have most notably been demonstrated in a litany of federal court opinions in which federal judges have criticized the EEOC and awarded attorneys' fees and costs to employers who were subjected to EEOC's overzealous enforcement tactics.

[3] The Chamber has previously notified EEOC of its concern regarding the Commission's pursuit of meritless charges and suggested potential solutions. *See e.g.,* Johnson, Randel K. STATEMENT OF THE U.S. CHAMBER OF COMMERCE TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. *Small Business Realities, Discrimination Laws and the Equal Employment Opportunity Commission*, Hearing, December 9, 1998.

In one of the most well-known examples of EEOC's reckless enforcement agenda, the U.S. Court of Appeals for the 8th Circuit largely affirmed a district court's dismissal of an EEOC class action lawsuit which alleged sexual discrimination but failed to identify the alleged victims of discrimination.[4] The 8th Circuit agreed with the district court that EEOC stonewalled the company in explaining who it sought to represent and made no meaningful attempt at conciliation. As a result of EEOC's outrageous litigation strategy, the District Court ordered the agency to pay the employer almost $4.7 million in attorneys' fees and expenses.[5] The 8th Circuit noted the district court's description of EEOC's tactics in the case:

> There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

Additionally, a federal court in New York dismissed a pregnancy discrimination lawsuit filed by EEOC, granting summary judgment for the employer, ruling that the EEOC did not present sufficient evidence to establish that the employer engaged in a pattern or practice of pregnancy discrimination.[6] EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The court ruled that the law does not mandate work-life balance. The court criticized EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required."

In a race discrimination case, EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.[7] However, the company simply did not have a blanket no-hire policy. Despite becoming aware of this issue, EEOC proceeded with the litigation anyway. The U.S. District Court for the Western District of Michigan determined that "this is one of those cases where the complaint turned out to be without foundation from the beginning." As a result, the court ordered EEOC to pay a total of $751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees when the agency should have known that the company did not have the blanket no-hire policy.

Similarly, in a case alleging discrimination under the ADA, the EEOC continued to litigate even when it became clear that the case had no merit.[8] Specifically, EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but "continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed." Thus, EEOC's claims were "frivolous, unreasonable and without

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[4] *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).
[5] *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa Aug. 1, 2013).
[6] *EEOC v. Bloomberg LP*, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y., Sept. 9, 2013); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).
[7] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).
[8] *EEOC v. Tricore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).

foundation." The district court dismissed the claim and awarded the employer over $140,000 in attorneys' fees and costs. The Court of Appeals affirmed.

In some cases, EEOC does not even have to try to show that an employer intentionally discriminated, and instead attempts to litigate claims under a "disparate impact" theory of discrimination.[9] In one particular disparate impact case, EEOC was so steadfast in its efforts to browbeat an employer, it neglected to gather evidence to prove its case.[10] EEOC had alleged that an event planning company's policy of conducting criminal and credit background checks had a "disparate impact" on African-American, Hispanic and male job applicants. Because EEOC was trying to prove unintentional disparate impact discrimination, it tried to prove its case through hiring statistics. However, the court found that EEOC's expert analysis contained a "mind-boggling number of errors." The court also found EEOC's statistical evidence to be "skewed," "rife with analytical errors," "laughable," and "an egregious example of scientific dishonesty." Accordingly, the court dismissed the case, noting that, "The story of the present action has been that of a theory in search of facts to support it."

The EEOC's disparate impact claim was similarly rejected in *Kaplan*.[11] This time, EEOC alleged that an employer's credit check policy discriminated against African-Americans.[12] In a decision which the Wall Street Journal described as "The Opinion of the Year," the 6th Circuit Court of Appeals upheld the lower court's exclusion of EEOC's statistical evidence and methodology as unreliable. The Court of Appeals concluded, "The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."

Subpoena Authority

Although EEOC has a number of fact-finding processes at its disposal, one of the most aggressive is its subpoena power. This power gives EEOC the authority to compel testimony by a witness or the production of evidence with a penalty for failure to do so. But, even though EEOC's subpoena authority is broad, it is not without limits. In a 37-page opinion, a federal district court chastised EEOC for employing unreasonable and bad faith tactics in connection with subpoenas to a small business.[13]

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[9] As opposed to disparate treatment which alleges intentional discrimination, disparate impact claims involve policies or practices which are neutral on their face, but actually have a disproportionate impact on a protected class.

[10] *See EEOC v. Freeman*, No. RWT 09-cv-2573 (D. Md. Aug. 9, 2013). *See also EEOC v. Kaplan Higher Education Corp.*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013). Like *Freeman*, in *Kaplan*, the court excluded EEOC's expert reports and testimony of its expert because EEOC failed to show that the expert's methodology was reliable. The court went on to toss out EEOC's entire case because without expert testimony, EEOC could not prove its disparate impact theory.

[11] *EEOC v. Kaplan Higher Educ. Corp.*, No. 13-3408, 2014 WL 1378197 (6th Cir. Apr. 9, 2014).

[12] As the court of appeals noted, EEOC runs credit checks on applicants for 84 of 97 positions. Despite this fact, EEOC sued Kaplan for using the very same type of background screen.

[13] *EEOC v. HomeNurse, Inc.*, 2013 U.S. Dist. LEXIS 147686 (N.D. Ga. Sept. 30, 2013). HomeNurse, Inc. provides personal care attendants/aides, home health aides, companion/sitters and skilled nursing care in Georgia.

In *HomeNurse*, EEOC's investigation related to a single-claimant charge alleging discrimination and retaliation based on a number of protected categories. Instead of seeking information by way of requests for information, EEOC launched its charge investigation by "conducting a raid on [the employer's] office 'as if it were the FBI executing criminal search warrant.'" Without any notice to the employer whatsoever, EEOC allegedly showed up unannounced, intimidated the employer's staff, and allegedly confiscated certain documents from the employer's confidential personnel and patient files.

Over the next year and a half, EEOC continued to pursue tactics that the court held "constitute[d] a misuse of [the EEOC's] authority" including: "failure to follow its own regulations ... foot-dragging ... errors in communication which caused unnecessary expense for [the subpoenaed employer] ... and its dogged pursuit of an investigation where it had no aggrieved party." Given EEOC's arguably heavy-handed tactics, the court felt it was its duty to "stand as a bulwark" to protect the "nation's citizens" from "powerful government agencies" intent on "running roughshod over their rights." Finding a gross overstepping and misuse of authority, the court quashed EEOC's subpoena and refused to order enforcement.

This decision is a reminder to employers that federal courts can serve as an important and necessary check on federal agencies, even EEOC.

Preservation of Evidence

Parties to litigation must preserve potentially relevant information when not doing so may cause harm or prejudice. Destroying or significantly altering evidence, or failing to preserve property for another's use as evidence, is considered spoliation. [14] As such, parties are obligated to preserve what they know—or reasonably should know—will likely be requested in reasonably foreseeable litigation. In a lawsuit alleging failure to accommodate disability, EEOC blatantly ignored the legal standard of preservation of evidence but continued to litigate against an employer. [15]

Plaintiffs claiming wrongful discharge must make an effort to secure subsequent employment so as not to receive a windfall in their potential backpay by remaining unemployed. In *Womble Carlyle*, a former employee failed to retain materials—such as applications, cover letters or a work search log—related to her efforts to obtain subsequent employment after her termination. This failure to do so occurred *after* the EEOC lawsuit had been filed, meaning that EEOC attorneys should have notified the former employee of her duty to preserve evidence. Moreover, the EEOC continued to demand back pay even after it learned that the former employee had destroyed the pertinent evidence. In imposing nearly $23,000 in sanctions against EEOC, the court held that EEOC did not

[14] A finding of spoliation can result in sanctions, an adverse inference instruction to the jury, or in extreme cases, dismissal.
[15] *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. Jan. 6, 2014); *see also EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. April 29, 2014).

explain to the allegedly aggrieved party the context or instructions behind keeping these materials. Further, the court held that the timing of the destruction of documents supported a finding of culpability raising to the level of possible gross negligence on behalf of EEOC.

Fortunately, the court in this case held EEOC to compliance with evidence preservation rules which are applicable to all litigants. Like its efforts to sidestep its conciliation requirements, this case is another example of EEOC's attempts to disregard procedural rules.

Evasion of Federal Discovery Obligations

In *EEOC v. The Original Honey Baked Ham*[16], the District Court for the District of Colorado sanctioned EEOC for its efforts to evade discovery, noting that on several occasions, EEOC made the Defendant's discovery efforts more time consuming, laborious, and adversarial than it should have been. The court found that "in certain respects, the EEOC has been negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court. EEOC Counsel has prematurely made promises about agreed-upon discovery methodology and procedure when they apparently had no authority to do so . . . ." The court held that it had inherent power to sanction parties for unnecessary burdens, and thus it could sanction EEOC for its actions that negatively affected the Court's management of its docket and caused unnecessary burdens on the Defendant and delays in the Court's efforts to proceed with the case.

Wasting Resources in Challenging Uncontroversial Policies

EEOC has challenged several employers' workplace policies which have been in effect for years and have been voluntarily agreed to by all interested parties. In challenging these policies, EEOC has likely expended significant time and resources. Yet even if EEOC is eventually successful in invalidating these policies, any supposed benefits of its efforts will be dubious at best, as it is unclear who EEOC is protecting in these instances or why it is even involved at all.

Targeting Voluntary Partnerships

For example, the Wall Street Journal published a story on EEOC's investigation into PricewaterhouseCoopers ("PwC").[17] EEOC alleged that the firm's partners were actually employees, and that the firm's mandatory retirement policy therefore violated the ADEA. According to the Wall Street Journal, EEOC demanded that PwC eliminate the retirement policy.

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[16] 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb 27, 2013).

[17] *Discriminating Against Partnerships*, WALL STREET JOURNAL, June 3 2013, available at http://online.wsj.com/article/SB10001424127887323855804578511693604180764.html?mod=WSJ_Opinion_AboveLEFTTop

EEOC's legal theory conflicts with its own existing guidance on partnerships and misapplies the law on this issue as interpreted by the U.S. Supreme Court.[18] Even putting those issues aside, one wonders whether pursuit of such a case is the best use of EEOC's resources. After all, the challenged retirement agreement concerns partners who are retiring from a major U.S. accounting firm—hardly a vulnerable group in need of protection.[19] These individuals became partners knowing about and agreeing to this retirement policy, and have benefitted from the partnership structure while they were partners. Pursuant to the policy's terms, these partners enjoy a significant retirement pension supported by current partners. Moreover, individuals always have the option of retaining private counsel to pursue any alleged wrongdoing, rather than simply relying upon EEOC to take up their cause.

Challenging Workplace Safety Policies

In another case, EEOC challenged a company's common sense efforts to ensure a safe workplace in a potentially hazardous industrial environment.[20] In EEOC's case against U.S. Steel, the employer performed random drug and alcohol testing on its probationary employees pursuant to the terms set forth in the collective bargaining agreement it entered into with United Steelworkers of America (USW). EEOC challenged this policy as violative of the ADA.

Working conditions at the plant in question required strict adherence to safety rules. Employees worked on or near coke batteries, which contained molten coke as hot as 2,100 degrees Fahrenheit. The working areas were very narrow, were sometimes at dangerous heights and were located among large industrial machinery and gasses that were both toxic and combustible. Quite clearly, the drug and alcohol tests were performed in order to ensure a safe workplace. EEOC might have realized why such tests were so important—and why both the employer and union agreed to them—if investigators had simply asked about the reasons for the policy, or visited a U.S. Steel facility. EEOC investigators did neither.

Instead, EEOC blew through the conciliation process and failed to follow enforcement procedures. Rather, it filed suit against both U.S. Steel and USW alleging that the random drug and alcohol testing violated the ADA, which prohibits workplace medical exams that are not "job-related and consistent with business necessity."[21] U.S. Steel argued that the testing was appropriate as job-related and as a business necessity because it enabled them to detect impairment on the job. The district court agreed and granted summary judgment for the company. The court noted that "safety is a business necessity and the testing policy genuinely serves this safety rationale and is no broader or more intrusive than necessary."

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[18] *See Clackamas Gastroenterology v. Wells*, 538 US 440 (2003).
[19] The story notes that these partners are compensated in the "seven-figure range."
[20] *EEOC v. United States Steel Corp.*, 2013 U.S. Dist. LEXIS 22748 (W.D. Pa. Feb. 20, 2013).
[21] *See* 42 U.S.C. § 12112(d)(4)(A).

Challenging Workplace Religion Policies

Prayer during the workday is a constant struggle for employers to manage. EEOC, instead of promoting workplaces where *both* employees can have opportunities to pray and employers can keep businesses operating, pushes an all or nothing, no compromise approach to religious accommodation. In one case, EEOC claimed that certain employees required the ability to leave their stations along the assembly line in order to pray.[22] Further, the prayer time was to occur during unscheduled periods throughout the workday. The court agreed with the employer that these kind of unqualified requests are too burdensome and broad for an employer to comply with, and granted summary judgment in favor of the defendant on the systemic religious accommodation claim. The court held that the employer established the affirmative defense of undue hardship by showing that the accommodation requested would not only result in more than a *de minimis* cost to the company, but would also result in more than a *de minimis* imposition on non-Muslim coworkers.

In a similar vein, EEOC has vigorously—and publically—challenged the allowance of religious accommodation for employee dress and uniforms.[23] While a circuit court ruled in favor of the employer, holding that the burden is on the employee to prove whether a particular practice is religiously motivated and accommodation be necessary, EEOC is seeking reconsideration of this ruling. It is arguing that something less than an employer's particularized, actual knowledge should suffice. If this argument finds traction in the courts, it would put employers in an impossible position: an employer would be penalized for not acting on stereotypical assumptions regarding an applicant's or employee's religious beliefs, an outcome that is directly opposed to Title VII's goals.

Challenging EEOC's Tactics

Undoubtedly fed up with EEOC's enforcement tactics, it is no surprise that employers are going on the offensive. In *Case New Holland, Inc. v. EEOC*[24], the employer filed a lawsuit against EEOC which claimed that it violated both the Administrative Procedure Act and the U.S. Constitution during its investigation of the employer. Specifically, CNH's complaint alleges that in cooperating with an EEOC-initiated investigation concerning alleged violations of the ADEA, the company submitted over 66,000 pages of documents to EEOC. EEOC then sat on this information and made no effort to contact the employer for 18 months; no alleged discriminatee was identified nor were any specific allegations of wrongdoing leveled at CNH. Subsequently, one morning without prior notification to CNH, EEOC sent over 1300 spam-like emails to CNH managers and employees in an effort to troll for potential class members. The emails demanded that the workers "cease their work ... to the extent necessary" to complete and submit—"as soon as possible"—an attached questionnaire. According to the complaint, EEOC "has never before . . . sent out emails

[22] *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 150156 (D. Colo. Oct. 18, 2013).
[23] *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).
[24] No. 13-cv-01176 (D.D.C. filed Aug. 1, 2013).

through business email servers, without any prior notice to the respondent employer, in an attempt to unearth plaintiffs against the employer."

Issuing Sub-Regulatory Guidance on Employers' Use of Criminal Background Information

EEOC also pushes its enforcement agenda in the sub-regulatory arena. EEOC has issued guidance concerning employers' use of criminal background information entitled, *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* (the Guidance). Although having a criminal record is not specifically protected by Title VII, EEOC takes the position that because "incarceration rates are particularly high for African American and Hispanic men,"[25] employers' use of criminal background information when hiring may have a disparate impact on these individuals.

Unfortunately, EEOC did not publicly release a draft of its Guidance for the public to have an opportunity to provide comment. This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents.[26] Pre-adoption notice and comment would have helped EEOC arrive at Guidance that better reflects the law while limiting controversial elements of the proposal. This lack of transparency is even more troubling considering the fact that the Guidance became effective upon publication, giving employers no time to reconsider policies and practices in preparation for its implementation.

The Guidance contains substantive flaws as well, the first being the suggestion that employers should conduct "individualized assessments" of candidates before any final employment decision is made. According to the Guidance, the individualized assessment essentially gives excluded candidates an opportunity to explain why an employer's screening policy should not apply to them (e.g., that the background check yielded incorrect information). EEOC, as it must, did recognize that individualized assessments were not required in all instances largely because no statutory language requires it, further calling into question whether an individualized assessment is ever required.

Although the Guidance does not have the force of law, it is not unreasonable to assume that many employers will likely conclude that it *does*, and that individualized assessments are now required under federal law; or, at the very least, that failure to follow

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[25] *See* EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS (April 25, 2012), Section II.

[26] The Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007) states the following: "Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments."

the Guidance will be used as evidence of non-compliance. The Guidance is also not sufficiently specific as to under what circumstances an employer should utilize individualized assessments and how they are to be conducted. For instance, must a daycare employer conduct an individualized assessment of a job candidate who has been convicted of a violent crime against a child?

Furthermore, the Guidance notes that state and local laws are preempted by Title VII if they "require or permit the doing of any act which would be an unlawful employment practice under Title VII." In other words, the fact that an employer's criminal screening policy was issued in order to comply with state or local law will not be a defense to an allegation of disparate impact discrimination. In such an instance, the employer would be forced to establish through expensive litigation that following a state law is job-related and consistent with business necessity, an argument that EEOC will likely ignore during the investigation stage. Unfortunately, the Guidance offers *no* help to those employers in situations in which there is a potential conflict between state and federal law, and employers cannot be expected to perform their own preemption analyses. Although employers should not be subject to undue scrutiny by EEOC simply because they are complying with state laws, the Guidance indicates that this could be a real possibility.[27]

The Commission's Own Limitation on its Oversight Authority

The underlying problem with the enforcement abuses described above is the fact that EEOC has not implemented the appropriate safeguards to ensure it is not wasting resources by pursuing non-meritorious litigation. This may be because a significant amount of litigation authority placed by statute in the hands of the Commissioners has been delegated to the General Counsel. After multiple Commissioners voiced concerns about the broad delegation of authority, a majority voted to rescind a limited amount of that delegation in the 2012 Strategic Enforcement Plan. Given that virtually no oversight over the General Counsel's office or the field was conducted in recent years, and the only power to initiate litigation of the General Counsel stems from the delegation of authority, this was naturally met with significant resistance within EEOC. It may also be partially attributed to subsequent delegation of authority to District Offices. The Chamber questions whether EEOC is exercising sufficient oversight of that delegation and whether the continued scope of delegation is appropriate in light of the failure to address these problems. Indeed, the Commission severely restricts its ability to reign in the enforcement abuses described above.

What Will Happen to Conciliation?

Clearly, EEOC has become increasingly aggressive in its enforcement efforts, even as it claims its resources have dwindled, despite significant budget increases between 2009

[27] *See, e.g., Waldon v. Cincinnati Public Schools*, 1:12-CV-00677 (S.D. Ohio, April 24, 2013).

and 2011. With mounting pressure to purportedly "do more with less," EEOC is re-inventing itself. The agency appears to be moving away from its mandate to combat discrimination by encouraging employers' voluntary compliance and, instead, is focused on a "scorched earth" litigation agenda. Especially troubling are instances where EEOC has rushed to file high-profile lawsuits that splash allegations of systemic discrimination across headlines, only to have its claims dismissed altogether or whittled down to a single claimant. As this white paper has illustrated, in some instances, courts have stepped in to correct the balance and sanctioned EEOC for failing to do its homework.

Against this backdrop, the Seventh Circuit decision in *EEOC v. Mach Mining, LLC*,[28] is stunning. On December 20, 2013, the Seventh Circuit broke from a majority of the U.S. Courts of Appeals when it held that EEOC's pre-suit conciliation efforts are not subject to judicial review, at all.[29] This ruling has stark implications for employers in the Seventh Circuit—it arguably extinguishes the traditional failure to conciliate defense to an EEOC lawsuit. The ruling also creates a split among the Circuits.

The court's reasoning is puzzling. It defers entirely to EEOC's ability to police itself despite clear legislative history otherwise and rejects the notion that "field offices are so eager to win publicity or to curry favor with Washington by filing more lawsuits that they will needlessly rush to court." The opinion fails to address entirely the facts that have recently lead numerous courts to chastise the agency for precisely the type of conduct the Seventh Circuit characterizes as implausible.

The *Mach Mining* decision effectively condones EEOC's questionable tactics. Because of the legal importance of the issues involved and the Circuit split on this issue, the U.S. Supreme Court has been asked to weigh in on the issue. In the interim, all employers, and not just those in the Seventh Circuit, should expect EEOC to vigorously object to an employer's ability to challenge to the sufficiency of EEOC conciliation efforts.

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Combating discrimination in the workplace is a worthy goal and one that the Chamber supports. However, as Part One of this paper demonstrates, EEOC's abusive enforcement tactics can no longer be ignored. While some federal judges are pushing back in some cases, EEOC clearly has not received the message. Moreover, relying on judges as the final check on EEOC enforcement is often a case of "too little, too late": by that time, employers have already spent significant time and resources defending themselves against unmeritorious allegations. In other words, even when employers win, they lose. The time has come for EEOC to adopt institutional procedures to provide for internal accountability, more efficient use of resources and adherence to its own statutory conciliation requirement. If EEOC continues to ignore the problem, then Congress should use its oversight authority to install much needed safeguards within EEOC.

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[28] No. 13-2456, 2013 WL 6698515 (7th Cir. Dec. 20, 2013).

[29] According to the Seventh Circuit, the Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have accepted the failure to conciliate affirmative defense.

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Part II: EEOC's Unsuccessful 2013 Amicus Program

The Equal Employment Opportunity Commission's ("EEOC") is responsible for enforcing federal employment discrimination laws. But is it a neutral interpreter of the law? And how successful has it been in convincing federal courts that its interpretations are correct? In the EEOC's Fiscal Year 2013 Performance and Accountability Report ("2013 PAR") and accompanying press statements, EEOC representatives trumpet its self-proclaimed successful 2013 litigation program—including securing $39 million in monetary damages in 9 trial victories and other litigation settlements.[30]

Left unreported by EEOC are the results of one of its most important legal enforcement methods—EEOC's *amicus curiae* program ("*amicus*").[31] *Amicus* briefs are "friend of the court" briefs filed by EEOC "in a case that raises novel or important issues of law" that fall within EEOC's expertise.[32] EEOC has an intensive process for *amicus* participation, with all recommendations in favor of *amicus* participation approved by a majority of the five-member Commission. *Amicus* briefs are part of EEOC's targeted and integrated approach to law enforcement. They are focused on EEOC's priorities, and often seek judicial approval of EEOC positions contained in its enforcement guidelines and policy statements.

In 2013, the United States Supreme Court, and five different federal courts of appeals collectively decided thirteen cases in which EEOC filed *amicus* briefs. With the exception of one case in which EEOC filed an *amicus* in support of neither party,[33] all *amicus* briefs were filed by EEOC in support of a private plaintiff's position; none in support of a private employer's position. Three of the thirteen cases raised contested procedural issues on which EEOC's *amicus* position prevailed.[34] Ten of the cases involved substantive

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[30] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, (Dec. 16, 2013), p. 3, available at http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf. EEOC's General Counsel notes broadly that its "successes have been extensive and significant." P. David Lopez, *'EEOC Overreach' Analysis Distorted The Record*, LAW360 (Jan. 3, 2014, 12:17 PM).

[31] EEOC has not included information regarding its 2013 *amicus* record on its website, in its 2013 PAR, or in its General Counsel's Law360 article criticizing other analyses of EEOC's litigation record as failing to perform a comprehensive review of all 2013 EEOC litigation efforts. Without considering EEOC's 2013 *amicus* record, its General Counsel asserted that when one reviewed EEOC's entire record instead of a few EEOC losses still on appeal, "...we [EEOC] have a record of success in reversing adverse decisions when a case moves to the appellate court."). P. David Lopez, *'EEOC Overreach' Analysis Distorted The Record*, LAW360 (Jan. 3, 2014, 12:17 PM).

[32] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE PROGRAM, (Jan. 15, 2014), available at http://www.eeoc.gov/eeoc/litigation/amicus.cfm.

[33] Compare *amicus* brief submitted by EEOC (and Department of Justice) in *Vance v. Ball State Univ., 2012 WL 3864279 (U.S., 2012)* with EEOC *amicus* briefs in all other cases in notes 5 and 6 below. Though not filed on behalf of a private plaintiff, in *Vance* EEOC argued for an expansive interpretation of Title VII -- a position supporting private plaintiffs as opposed to private employers.

[34] EEOC prevailed on procedural arguments in the following three *amicus* cases in 2013: *Mandel v M&Q Packaging Corp.*, 706 F.3d 157 (3d Cir. Jan. 14, 2013) (adopting EEOC position that the district court erred in refusing to consider evidence of harassment over 300 days old in this hostile work environment claim); *Boaz v. FedEx Customer Info. Svs., Inc.*, 725 F.3d 603 (6th Cir. Aug. 6, 2013) (adopting DOL & EEOC argument that an employment contract cannot shorten the statute of limitations under the EPA or FLSA); *Ellis v. Ethicon, Inc.*,

issues of the appropriate interpretations of applicable federal law.[35] EEOC's position was rejected in eight of the ten substantive positions it advanced in the appellate courts. In comparison, the United States Chamber of Commerce ("Chamber") filed *amicus curiae* briefs in three of these same cases, with a 100% win rate.[36]

And, as detailed below, most telling, in four of the most important and far reaching discrimination and harassment substantive law interpretations advanced by EEOC's *amicus* participation—not only was EEOC's *amicus* position rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.[37]

In 2013 EEOC's *Amicus* Positions were Twice Rejected By The U. S. Supreme Court

In 2013, the United States Supreme Court resolved two contested issues regarding the substantive interpretation of Title VII of the Civil Rights Act of 1964, the primary federal law probibiting discrimination in the workplace. EEOC participated in both cases, filing *amicus* briefs advocating its longstanding positions regarding key issues of: (1) the

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529 Fed. Appx. 310 (3d Cir. Jul. 9, 2013) (adopting EEOC argument that reinstatement can be an appropriate remedy).

[35] EEOC's substantive arguments were rejected in the following eight *amicus* decisions in 2013: *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance definition of "supervisor" under Title VII); *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance that the motivating factor standard applies to retaliation claims); *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013) (rejecting EEOC Enforcement Guidance that attendance is not an essential function of the job); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013) (rejecting the position offered in a joint brief filed by EEOC and DOL while the proceedings were before the NLRB); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (rejecting EEOC argument, filed jointly with the DOL, that arbitration agreements barring class claims are impermissible); *McKinley v. Skyline Chili, Inc.*, 2013 WL 4436537 (6th Cir. Aug. 21, 2013) (affirming summary judgment for the employer because loss of confidence and poor performance were not pretextual reasons for termination); *Foco v. Freudenberg-NOK Gen. P'ship*, 2013 WL 6171410 (6th Cir. Nov. 25, 2013) (affirming summary judgment for the employer as the pay disparity was based on something other than sex); *Bailey v. Real Time Staffing Servs., Inc.*, 2013 WL 5811647 (6th Cir. Oct. 29, 2013) (affirming summary judgment for the employer because the employee's failed drug test, possibly caused by medication taken to treat HIV, was a legitimate, non-discriminatory reason for termination). EEOC prevailed on substantive *amicus* arguments in only two cases in 2013: *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. Aug. 9, 2013) (adopting EEOC argument that a sexual harassment victim does not need to prove that the harassment unreasonably interfered with her work performance, only that work conditions were discriminatorily altered) and *Latowski v. Northwoods Nursing Ctr.*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013) (reversing summary judgment for employer on a pregnancy discrimination claim).

[36] The U.S. Chamber of Commerce filed *amicus* briefs in *Vance v. Ball State Univ.*, *Univ. of Texas Southwestern Med. Ctr. v. Nassar* and *DR Horton v. NLRB.*

[37] EEOC's longstanding interpretations rejected by the United States Supreme Court in 2013 nevertheless remain on the EEOC's website as official EEOC Enforcement Guidance. *Compare Vance v. Ball State*, 133 S. Ct. at 2443 and *Univ. of Teas Southwestern Med. Ctr .v. Nassar*, 133 S.Ct. at *2543-44 with Enforcement Guidance: Vicarious Employer Liab. for Unlawful Harassment by Supervisors*, 1999 WL 33305874 (EEOC Guidance Jun. 18, 1999) (including a notice that the Supreme Court rejected in part the EEOC's definition of "supervisor"), *Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 1992 WL 1364355 (EEOC Guidance Jul. 14, 1992) at *6 n.14 (setting forth EEOC's longstanding rule that it will find liability whether or not retaliation is a motivating factor for an action).

definition of supervisor under Title VII; and (2) the applicable burden of proof to establish liability for a retaliation claim under Title VII.

EEOC supported its substantive *amicus* positions in these 2013 decisions by reference to its own previously published interpretations of federal law contained in EEOC guidance documents. EEOC argued to the Supreme Court that its positions contained in these guidance documents were "entitled to respect" as interpretations of federal law by the enforcing agency that "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance." EEOC argued that its prior interpretations contained in its guidance documents were both thorough and validly-reasoned, and thus, entitled to deference under longstanding Supreme Court precedent in *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944).[38]

The Supreme Court declined to exercise deference with respect to the EEOC guidance. Specifically, the Supreme Court rejected EEOC's substantive positions found in its *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* in *Vance v. Ball State*, as well as the EEOC's *Enforcement Guidance on Recent Developments in Disparate Treatment Theory* in *University of Texas Southwestern Medical Center v. Nassar*.

Vance v. Ball State Univ., 133 S. Ct. 2434 (Jun. 24, 2013)

In *Vance v. Ball State Univ.*, the Supreme Court decided the question of who qualifies as a "supervisor" when an employee asserts a Title VII claim for workplace harassment.[39] The term "supervisor" is not defined in Title VII, and had been left undefined by the Supreme Court since its decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998).

EEOC's *amicus* urged the Supreme Court to defer to EEOC's approach to supervisory status advocated by its *Enforcement Guidance on Vicarious Employer Liability*.[40] EEOC's Enforcement Guidance provides that an individual qualifies as a supervisor if: (1) the individual has authority to undertake or recommend tangible employment decisions affecting the employee, or (2) the individual has authority to direct the employee's daily work activities.

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[38] *Vance v. Ball State Univ.*, 2012 WL 3864279, 27 (U.S., 2012).

[39] Under Title VII an employer's liability for harassment may depend on the status of the harasser. An employer is liable for the harassing conduct of a co-worker only if the employer was negligent in controlling working conditions. Whereas, if the harasser is a supervisor, the employer is strictly liable for any harassment culminating in a tangible employment action. An employer is also strictly liable for the harassing conduct of a supervisor that does not result in a tangible employment action being taken unless it can establish an affirmative defense that the employer exercised reasonable care to prevent and correct harassment and the harassed employee unreasonably failed to take advantage of the opportunities that the employer provided to prevent or correct the harassment. *See Vance*, 133 S. Ct. at 2439.

[40] *Enforcement Guidance: Vicarious Employer Liab. for Unlawful Harassment by Supervisors*, 1999 WL 33305874 (EEOC Guidance Jun. 18, 1999).

The Supreme Court expressly rejected EEOC's *amicus* position and Enforcement Guidance definition of supervisor, describing it as "abstract" and "unpersuasive". In adopting the definition advocated by the Chamber, the Court held that an employer may be vicariously liable for an employee's unlawful harassment only when that employee has the employer's authorization to effect significant changes in employment status of the employee (such as hiring, firing, promoting, demoting or significantly changing their responsibilities or employee benefits).

EEOC's definition of supervisor, the Supreme Court explained, would inevitably lead litigants, courts, and perhaps jurors to undertake "nebulous" and "murky" examinations of the so-called supervisor's daily duties (including the number and perhaps importance of the tasks in question), which could be resolved only on case-by-case bases. The Supreme Court criticized EEOC's alternative Enforcement Guidance definition as including key components that "have no clear meaning...a proposed standard of remarkable ambiguity".[41]

In contrast, the Supreme Court noted its definition would be readily applicable and clear enough to resolve the issue of supervisory status even before litigation commences. As the Supreme Court explained, "supervisory" status now can be determined "generally by written documentation," thus allowing parties to "be in a position to assess the strength of a case and to explore the possibility of resolving the dispute" before any potential lawsuit is brought.

In *Vance*, the Supreme Court provided employers with much needed guidance on an important issue—guidance that expressly rejected EEOC's decade old policy that had left employers in a sea of ambiguity.

Univ. of Texas Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517 (Jun. 24, 2013)

Title VII makes it unlawful for an employer to retaliate against an employee who has filed a charge of discrimination, participated in a discrimination proceeding, or otherwise opposed discrimination. In *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, the Supreme Court rejected EEOC's *amicus* position and applied traditional principles of causation with respect to the question of a plaintiff's burden of proof in a Title VII retaliation claim. The Supreme Court held that a plaintiff must prove that their harm would not have occurred "but for" the employer's retaliatory motive.

EEOC's *amicus* again urged the Supreme Court to defer to its application of a burden of proof standard for retaliation claims found in EEOC's *Enforcement Guidance on Recent Developments in Disparate Treatment Theory* and compliance manual.[42] Under EEOC's more permissive standard, to prevail in a retaliation case, a plaintiff need only show that an employer's retaliatory motive was a motivating factor in the adverse action, even if it was not the "but for" cause of the harm.

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[41] 133 S. Ct. at 2449-50.

[42] *Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 1992 WL 1364355 (EEOC Guidance Jul. 14, 1992).

Once again, the Supreme Court expressly rejected EEOC's *amicus* position and declined to defer to its *Enforcement Guidance* and compliance manual interpretation. In refusing to defer to the EEOC's interpretation, the Court explained the EEOC's position lacked the requisite "persuasive force" necessary for such deference.

In particular, the Court faulted the EEOC's position for failing to address the plain language of the statute, which clearly requires "but for" causation in retaliation claims. Similarly, the Court rejected the EEOC's secondary positions as "circular" and "unpersuasive".

Thus, the Supreme Court rejected EEOC's policy position contained in its 1992 Enforcement Guidance. Despite this rejection, EEOC has not updated its Enforcement Guidance to be consistent with the Supreme Court's holding in *Nassar*.[43] Given EEOC statistics show retaliation as the most commonly-filed discrimination claim, the failure to reflect the Supreme Court's standard to analyze retaliation cases is significant.[44]

2013's adverse rulings by the Supreme Court striking down EEOC guidance is not an anomaly. In 2012, the Supreme Court rejected 9-0 the EEOC's position that the ministerial exception did not apply to ADA retaliation cases. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S.Ct. 694, 707 (2012). In 2009, the Supreme Court rejected the EEOC's position that the mixed motive instruction was permissible under the ADEA, which the EEOC had argued as *amicus* before the Eighth Circuit Court of Appeals and in which the Department of Justice appeared as amicus at the Supreme Court. *Gross v. FBL Services, Inc.*, 557 U.S. 167, 173 (2009).

Important EEOC Amicus Losses In The Courts of Appeals In 2013

In 2013, the Seventh and Fifth Circuit Courts of Appeals rejected EEOC's substantive positions found in its *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*[45] as well as EEOC's Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes.[46]

Seventh Circuit Rejects EEOC Amicus and Policy Statement Position that Attendance is not an Essential Function of A Job

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[43] However, EEOC's compliance manual now notes that the Supreme Court "rejected EEOC's position that retaliation is a basis for employer liability whenever it is a motivating factor for an adverse action" and "supplanted" EEOC's position that a legitimate motive for the challenged action would be relevant only to relief, not to liability.

[44] In FY 2012, the most recent data published by the EEOC, charging parties filed 37,836 retaliation claims.

[45] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, (Oct. 17, 2002), available at http://www.eeoc.gov/policy/docs/accommodation.html.

[46] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), available at http://www.eeoc.gov/policy/docs/mandarb.html.

In order to be protected under the ADA, an applicant or employee must be able to perform the essential functions of the job. The EEOC has long urged that attendance is not an essential function of a job. Despite at least nine Courts of Appeals rejecting this view,[47] the EEOC remained defiant and reaffirmed its position most recently in its 2002 *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, declaring in Footnote 65 that:

> *"Certain courts have characterized attendance as an 'essential function.' [EEOC recognizing certain court decisions]... Attendance, however, is not an essential function as defined by the ADA because it is not one of "the fundamental job duties of the employment position."*

Notably, even the Ninth Circuit Court of Appeals has rejected EEOC's expansive policy position on this issue.[48]

Yet, the EEOC continued to press its minority view in its amicus brief filed in *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013). The Seventh Circuit Court of Appeals, however, again rejected EEOC's position. Citing to its longstanding precedent, the court repeated what every court that has reviewed the issue has concluded: an employer is entitled to treat regular attendance as an essential job requirement. EEOC's continued adherence to its 2002 Enforcement Guidance blinds itself to the well-accepted rule—namely, that except in the unusual case where an employee can effectively perform

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[47] *See, e.g., Rios-Jimenez v. Principi*, 520 F.3d 31, 42 (1st Cir. Mar. 12, 2008) ("At the risk of stating the obvious, attendance is an essential function of any job. . . . [A]n employee who does not come to work cannot perform the essential functions of his job."); *Brenneman v. MedCentral Health System*, 366 F.3d 412, 419 (6th Cir. Apr. 26, 2004) ("[R]egular attendance is an essential function of the Pharmacy Technician position, which entails preparing and delivering medications to hospital patients, ordering, receiving, and stocking medications, and posting charges to patients' accounts. Clearly, plaintiff could not perform these duties when absent from defendant's premises."); *E.E.O.C. v. Yellow Freight System, Inc.*, 253 F.3d 943, 947 (7th Cir. Jun. 12, 2001) (*en banc*) (relying, in part, on finding that position of dockworker required physical presence to conclude that "regular attendance" was an "essential function" of the position); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899-900 (7th Cir. Jan. 7, 2000) ("Common sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job."); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. Aug. 17, 1999) ("[I]t is axiomatic that in order for [the plaintiff] to show that she could perform the essential functions of her job, [the plaintiff] must show that she is at least able to show up for work."); *Hypes on Behalf of Hypes v. First Commerce Corp.*, 134 F.3d 721, 726-27 (5th Cir. Feb. 12, 1998) (finding that loan review analyst position could not be performed from home to support the conclusion that "regular attendance" was an essential function of the job); *Tyndall v. National Educ. Centers, Inc. of California*, 31 F.3d 209, 213 (4th Cir. Aug. 3, 1994) ("Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise. Therefore, a regular and reliable level of attendance is a necessary element of most jobs. An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."); *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. May 20, 1994) (holding that coming to work regularly is an essential function of the job); *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir. Jun. 6, 1994) (plaintiff failed to prove he was "otherwise qualified" because he failed to satisfy the essential function of being present at his job.)

[48] *See Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. Apr. 11, 2012).

all work-related duties at home, an employee who does not physically go into work cannot perform any of his job functions, essential or otherwise.

Fifth Circuit Rejects EEOC Amicus and Policy Statement on the Enforceability of Class Action Waivers in Arbitration Agreements

Arbitration of employment disputes offers both employers and employees a quick and cost-effective method for settling employment disputes.[49] Unfortunately, EEOC takes a skeptical view of such agreements. Indeed, in a National Labor Relations Board (Board) case called *D.R. Horton, Inc. v. Cuda*, No 12-CA-25764, 2011 WL 11194 (ALJ Jan. 3, 2011), EEOC (along with the Department of Labor) filed an *amicus* brief advocating that the Board consider "the critical role of class or collective actions in enforcing employees' statutory rights and the unenforceability of waivers of class or collective actions in mandatory arbitration agreements that prevent an employee from effectively vindicating his or her statutory rights."[50] EEOC argued that "it is crucial that the courts and the relevant governmental agencies whenever possible preserve the right of aggrieved employees and applicants to pursue their claims of employment discrimination on a class basis."[51] EEOC further asserted that the ability to pursue discrimination claims on a class or collective basis was a "vital tool in enforcing each of the Commission's statutes."[52] Without the class or collective action option, EEOC argued, employees may not be able to effectively vindicate their federal rights because attorneys have less incentive to pursue individual, non-class claims of little monetary value.

While the Board sided with EEOC's position, on appeal in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013), the Fifth Circuit Court of Appeals rejected that policy position. The Fifth Circuit held employment arbitration agreements containing class waivers are enforceable.[53] It rejected EEOC's *amicus* argument that a class action waiver in a mandatory arbitration agreement is impermissible under federal law, including civil rights statutes. The Fifth Circuit noted that the argument paid little attention to the Federal Arbitration Act which permits employees and employers to agree to resolve disputes through individual rather than class arbitrations. The Fifth Circuit specifically noted that there are numerous decisions, including the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20,32, 111 S. Ct. 1647 (1991) holding there is no substantive right to class procedures under other federal employment laws, including non-discrimination laws enforced by EEOC such as the Age Discrimination in Employment Act.

Notably, the Fifth Circuit's *D.R. Horton* decision also rejects EEOC's *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes*. In it, though

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[49] *See Adams v. Circuit City Stores*, 532 U.S. 105, 123 (2001)("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts").

[50] Brief for Sec'y of Labor and the EEOC at 22, D.R. Horton v. Cuda (No. 12-CA-25764), 2011 WL 11194.

[51] *Id.* at 10.

[52] *Id.* at 8.

[53] As of the date of submission of this analysis the Board had not announced publicly whether it will seek review of the case by the United States Supreme Court. The Board has until March 3, 2014 to file a petition for review with the United States Supreme Court.

EEOC expressly recognized case law enforcing mandatory arbitration agreements, including Supreme Court precedent, EEOC details its position that arbitration agreements are inconsistent with federal civil rights laws. As a result of its policy position, EEOC puts employers on notice it will "closely scrutinize" all charges involving an arbitration agreement to see if it was entered into "under coercive circumstances (*e.g.*, as a condition of employment)."[54]

In 2013, the *D.R. Horton* decision continued the across-the-board record of courts of appeals[55] rejecting EEOC's Guidance and policy position regarding the enforceability of such arbitration agreements as a matter of public policy.

Conclusion

Whether EEOC's 2013 *amicus* program's success is measured on a pure numerical won/loss basis, or on the importance of the substantive interpretations of federal law it supported in its *amicus* efforts, one thing is clear: it was an overwhelming failure.

What's more, the courts' rejection of EEOC's underlying regulatory guidance leaves employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. And, with a fully staffed Commission several new guidance positions are possible on a broad range of topics including: wellness plans, reasonable accommodations, pregnancy and national origin discrimination and credit-related background checks. Of course, whether any future guidance would fare better than EEOC's 2013 track record is unknown. However, if the best predictor of future performance is past performance, in light of EEOC's 2013 *amicus* performance, it is unlikely.

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[54] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), p. 20, available at http://www.eeoc.gov/policy/docs/mandarb.html.

[55] *See, e.g., Richards v. Ernst & Young, LLP*, 11-17530, 2013 WL 6405045, n.3 (9th Cir. Dec. 9, 2013) (declining to rely on the Labor Board's *D.R. Horton* decision in part because "it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act (FAA)."); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (echoing the Eighth Circuit's rationale for rejecting the Labor Board's *D.R. Horton* decision); and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, (8th Cir. Jan. 7, 2013) (giving the Board's decision no deference holding that the Board does not have expertise in interpreting the Federal Arbitration Act.).

Chairman WALBERG. Thank you.
Mr. McCracken, you are recognized for 5 minutes.

STATEMENT OF MR. TODD MCCRACKEN, PRESIDENT, NATIONAL SMALL BUSINESS ASSOCIATION, WASHINGTON, D.C.

Mr. MCCRACKEN. Good morning, Mr. Chairman, members of the Committee. My name is Todd McCracken. I am the president of the National Small Business Association. Thank you for inviting us here today to discuss some of the many federal enforcement issues that confront our nation's small business community. Today, I am going to focus my comments on criminal background screening in general, and recent initiatives in this area by the Equal Employment Opportunity Commission, in particular.

Employers want to provide a safe place for their employees to work and to do their best to prevent workplace crime. They want to ensure that the employees that they send to customers' homes as technicians, repair people, or salespeople do not inflict harm on their customers. They need to take steps to prevent theft, fraud, and embezzlement. Criminal background screening is an important tool—nearly the only tool for small companies—that employers have to protect their customers, their employees, and themselves from criminal behavior.

For its part, the federal government—in this case, the EEOC—has an obligation to articulate rules that are comprehensible and can actually be implemented. It is fundamentally unfair and, in practice, counterproductive for the rules to be so opaque that few small business practitioners can understand them. Lack of crisp guidance leads to situations where enforcement is starkly arbitrary, and the rules, since they cannot be understood, are, effectively, ignored.

Today, small companies live with the threat that they may be sued for negligent hiring if they hire an unsuitable employee who subsequently commits a crime or tortious act in the workplace or in a customer's home or workplace. The complicated, confusing guidance discourages small businesses from relying on checks and, in tandem with EEOC's stepped-up enforcement in this area, means that small businesses face greater legal exposure.

Small businesses are caught between competing government priorities and perspectives among different federal agencies, the courts and state and federal governments. The 2012 EEOC guidance, for example, explicitly stated that the fact that a small business was complying with the state legal requirement to conduct a criminal background check or to bar a felon from a particular position would not prevent an EEOC enforcement action. With respect, it is ridiculous that a small business is forced to choose between two conflicting government requirements. If the EEOC has a problem with a state statute it should challenge the statute, not launch enforcement action against a business who complied with state law.

Unlike the federal government, small businesses have limited resources and defending such lawsuits can devastate the financial health of the business.

Neither the small business community nor the EEOC countenances discrimination. Small businesses are conducting background checks to help promote public safety, not for the pur-

poses of excluding minority employees. They are trying to hire qualified employees. They are trying to prevent their employees, their customers and, in the case of family-owned businesses, their own families from becoming victims of crime. They are trying to avoid liability for crimes committed by employees, and they are trying to limit theft, fraud, embezzlement, and other property crimes.

The vast majority of small firms are also trying to comply with the law and with EEOC guidance. In the current situation, they are unable to do so with any degree of confidence. I can assure that it is a rare small business owner who is going to be able to read, absorb and apply the 55-page, 167-footnote enforcement guidance on a consideration of arrest and conviction records in employment decision that are in Title VII of the Civil Rights Act of 1964, issued by the EEOC on April 25, 2012. More importantly, we have had discussions with sophisticated attorneys who grapple with these issues for a living, including those who work for large law firms advising large corporations.

They struggle with how to advise their clients, as well. If they are at a loss, then small firms and their generalist attorneys will fare no better.

Workplace violence is a significant problem. Workplace theft and embezzlement are also major problems. Both can be reduced through proper background screening. According to the Bureau's justice statistics, approximately 572,000 non-fatal violent crimes occurred against persons age 16 or older while they were at work in 2009. Workplace violence accounted for 15 percent of non-fatal violent crime against persons age 16 or older. In short, workplace violence remains a very serious problem, even though it has declined over the last 15 years.

I would also like to make the point that it is not fundamentally in an employer's interest to fail to hire an otherwise qualified applicant because of a long-past minor infraction. It is not in their interest, for example, to fail to hire someone who got into an altercation years ago and has otherwise had no problems with the law and has a good employment record. Since employers have every interest in keeping their pool of potential job candidates as large as possible, it does not take a major enforcement effort to achieve these results. We must find a way to provide clear guidance to small companies so that they can protect their employees, their customers and their workplaces without unduly burdening them.

Thank you for inviting us to testify today, and we look forward to continuing to work to address these important issues.

[The statement of Mr. McCracken follows:]

Testimony of

Todd McCracken
President

Before the

U.S. House Committee on Education and the Workforce
Subcommittee on Workforce Protections

Regarding

EEOC Enforcement and Criminal Background Screening

June 10, 2014

Mr. Chairman and Members of the Committee-

My name is Todd McCracken. I am President of the National Small Business Association (NSBA). Thank you for inviting us to be here today and to discuss some of the many federal enforcement issues that confront our nation's small business community. Today, I am going to focus my comments on criminal background screening in general and the recent initiatives in this area by the Equal Employment Opportunity Commission (EEOC) in particular.

NSBA was founded in 1937 to advocate for the interests of the nation's small businesses. NSBA is the oldest national small business organization, representing more than 65,000 small businesses throughout the country in virtually all industries and of widely varying sizes.

The EEOC enforces Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin; the Age Discrimination in Employment Act of 1967 which prohibits employment discrimination against individuals 40 years of age and older; the Equal Pay Act of 1963 which prohibits discrimination on the basis of sex regarding compensation, section 501 of the Rehabilitation Act of 1973 which prohibits employment discrimination against federal employees and applicants with disabilities; the Americans with Disabilities Act of 1990 which prohibits employment discrimination on the basis of disability; and the Genetic Information Non-Discrimination Act of 2008 which prohibits employment discrimination based on genetic information.

NSBA welcomes strong protection of the civil rights and liberties of all Americans.

Background Screening Enhances the Safety of Employees and Customers of Small Businesses

As we all know, not every individual is suited to be employed in every job. It is accepted that employers will qualify workers based upon credentials, experience, demonstrated skill, and other important factors. But it is also true that many factors related to employee character also play a role, particular for certain jobs or workplaces.

Employers want to provide a safe place for their employees to work and to do their best to prevent workplace crime. They want to ensure that the employees that they send to customers' homes as technicians, repair people, or sales people do not inflict harm on their customers. They need to take steps to prevent theft, fraud and embezzlement. Criminal background screening is an important tool – nearly the only tool – that employers have to protect their customers, their employees and themselves from criminal behavior.

Government has the Obligation to Provide Clear Rules

That said, small businesses are willing to comply with reasonable rules designed to ensure that criminal background screening is not having a disproportionate impact on protected groups, provided that those rules do not endanger their employees or customers, do not substantially increase their risk of being victims of property crimes or do not increase their risk of being found liable for the tort of negligent hiring.

For its part, the federal government—in this case, the EEOC—has an obligation to articulate rules that are comprehensible and can actually be implemented. It is fundamentally unfair and, in practice, counterproductive for the rules to be so opaque that few small business practitioners can understand them. Lack of crisp guidance leads to situations where enforcement is starkly arbitrary and the rules, since they cannot be understood, are effectively ignored.

As I will discuss in detail later, the EEOC guidance is not guidance at all. It provides no meaningful rules about how to proceed. It is really just a threat that the EEOC may proceed against employers if, in hindsight, it decides it wants to do so. Today, small businesses live with the threat that they may be sued for negligent hiring if they hire an unsuitable employee who subsequently commits a crime our tortious act in the workplace or in a customer's home or workplace. The complicated, confusing Guidance discourages small businesses from relying on checks, and—in tandem with the EEOC's stepped-up enforcement in this area—means that small businesses face greater legal exposure.

Small Businesses Caught between Competing Government Priorities

Small businesses are caught between competing government priorities and perspectives among different federal agencies, the courts and the state and federal governments. The 2012 EEOC guidance, for example, explicitly stated that the fact that a small business was complying with a state legal requirement to conduct a criminal background check or to bar a felon from a particular position would not prevent an EEOC enforcement action. With respect, it is ridiculous that a small business is forced to choose between two conflicting government requirements. If the EEOC has a problem with a state statute, it should challenge the statute, not launch an enforcement action against a small business who complied with state law. Unlike the federal government, small businesses have limited resources, and defending such lawsuits can devastate the financial health of the business.

Small businesses really want to know what the rules are so they can comply with them and go back to running their businesses. They want the state and federal governments, including the courts, the legislative branch and the executive branch to set forth consistent and comprehensible rules. That does not seem like it is asking for too much. The rules applying to small businesses should not place them at substantial legal risk no matter what they do.

The EEOC Should Focus on Areas Where Discrimination is an Important Problem

The EEOC should focus its enforcement efforts where unlawful discrimination is an important problem. A corollary of that proposition is that it should not expend its resources in areas where it is not an important problem. It should be particularly careful about focusing resources in areas that are not a demonstrated problem and where there are strong countervailing policy reasons for employers to engage in the activities that result in the alleged disparate impact.

One such area is criminal background screening.

NSBA has conducted a review of the legal and economics literature on these issues. We have discussed this with our members. We have found no evidence that criminal background screening is a significant civil rights problem.

On the other hand, preventing workplace violence, protecting customers and preventing property crime is a continuing and serious problem. Moreover, in the absence of criminal background screening, our members are subject to substantial risk of being successfully sued for the tort of negligent hiring.

The EEOC Needs to Seriously Rethink the Complexity of Its Guidance

Neither the small business community nor the EEOC countenances discrimination. But the issues that I am discussing today do not involve attempted bigotry. Small businesses are conducting background checks to help promote public safety, not for the purposes of excluding minority employees. They are trying to hire qualified employees. They are trying to prevent their employees, their customers and, in the case of family-owned businesses, their own families, from becoming victims of crime. They are trying to avoid liability for crimes committed by employees. And they are trying to limit theft, fraud, embezzlement and other property crimes.

The vast majority of small firms are also trying to comply with the law and with EEOC guidance. In the current situation, they are unable to do so with any degree of confidence.

I can assure you that it is a rare small-business owner who is going to be able to read, absorb and apply the 55 page, 167 footnote "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964" issued by the EEOC on April 25, 2012. More importantly, we have had many discussions with sophisticated attorneys who grapple with these issues for a living, including those who work for large law firms advising large corporations. They struggle with how to advise their clients as well. If they are at a loss, then small firms and their generalist attorneys will fare no better.

In the real world, small firms and their advisors are not going to be able to understand what the EEOC regards as permissible with respect to the use of criminal background checks. The reason is fairly straight forward. The EEOC has not **clearly** stated what it expects from the small business community. All the EEOC has done is indicate that it expects small firms to conduct a

complex individualized assessment weighing numerous factors regarding the use of conviction records in each hiring decision. How that is to be done in practice is anybody's guess.

The goal of the EEOC is to prevent discrimination. To do so, it must enunciate a coherent, intelligible policy that businesses, large and small, can actually understand and implement. I suspect that it would have done a far better job of developing such a policy had it provided for a notice and comment period prior to issuing guidance. Had it done so, I can assure you that the small business community would have provided the Commission with comments underscoring the need for straightforward rules that are understandable and practical.

The rules that business owners have to grapple with now are so opaque and complex that they will, in practice, have to be ignored. The clear and quite understandable concerns about tort liability and worker, customer, and family safety will take precedence over amorphous and ill-defined EEOC guidance. In short, the EEOC guidance does not achieve its objective.

Workplace Crime is a Significant Problem

We do not believe that criminal background checks are being misused to any significant degree for an unlawful discriminatory purpose.

Workplace violence, on the other hand, is a significant problem. Workplace theft and embezzlement are also major problems. Both can be reduced through proper background screening. According to the Bureau of Justice Statistics, approximately 572,000 nonfatal violent crimes (rape, sexual assault, robbery, and aggravated and simple assault) occurred against persons age 16 or older while they were at work in 2009.[1] Workplace violence accounted for 15-percent of nonfatal violent crime against persons age 16 or older. In short, workplace violence remains a very serious problem even though it has declined over the past 15 years.

A Westlaw search of the law reviews regarding negligent hiring indicate that the trial bar is quite busy filing negligent hiring lawsuits. Businesses have to take that risk into account when making hiring decisions. The EEOC needs to consider the tort law in its guidance and, based on its discussion in the guidance, does not appear to have done so. It is not right that complying with EEOC guidance (such as it is) can lead to substantial and potentially devastating tort liability for a business that does so.

It is not in an employer's interest to fail to hire an otherwise qualified applicant because of a long-passed minor infraction. It is not in their interest, for example, to fail to hire someone that perhaps got in an altercation years ago and has otherwise had no problems with the law and a good employment record. Since employers have every interest in keeping their pool of potential

[1] Workplace Violence, 1993-2009 National Crime Victimization Survey and the Census of Fatal Occupational Injuries, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, March, 2011. http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf

job candidates as large as possible, it does not take a major enforcement effort to achieve these results.

Thank you for inviting us to testify today. We look forward to continuing to work to address these important issues.

Chairman WALBERG. Thank you.

Ms. Ifill, you are recognized for your 5 minutes. Thank you.

STATEMENT OF MS. SHERRILYN IFILL, PRESIDENT AND DIRECTOR–COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, NEW YORK, NEW YORK

Ms. IFILL. Thank you. Good morning, Chairman Walberg, Ranking Member Courtney, members of the subcommittee. Thank you for the opportunity to testify this morning about the Equal Employment Opportunity Commission.

Next month, we will celebrate the 50th anniversary of the Civil Rights Act of 1964. Without question, that legislation is one of the most important pieces of civil rights legislation ever enacted by the United States Congress to ensure that our country keeps its promise of equality and justice.

It is perhaps best known for Title VII, which outlawed discrimination in employment on the basis of race, color, religion, sex or national origin. The creation of the EEOC as the agency charged with receiving, investigating and referring complaints of employment discrimination for litigation was a core aspect of the bipartisan compromise that resulted in Title VII.

Since the enactment of Title VII, the Legal Defense Fund has worked to enforce this landmark statute, challenging discriminatory practices of both private and public employers, and serving on the front lines of many great civil rights battles seeking equal opportunity in employment for all. From this vantage point, the Legal Defense Fund has had the unique opportunity to observe the work of the EEOC and to assess its effectiveness. There is no question that the EEOC has been incredibly successful in redressing various forms of employment discrimination. The commission has been a driving force in dismantling segregated workplaces, removing unnecessary and discriminatory employment barriers and obstacles, and ensuring that the promise of equality at work could be realized for millions of Americans.

Despite the tremendous progress we have made in ensuring equal opportunity in the workplace, sadly our work in eliminating discrimination is far from over. And the EEOC plays a critical role in the ongoing work of eradicating employment discrimination. One need only look to recent EEOC court victories to understand that even the most pernicious forms of racism on the job unfortunately still exist. In 2012, a Texas jury awarded punitive damages to three African-American manufacturing employees subjected to racially offensive slurs and a noose in the workplace, including the use of the N word by a top plant official who responded to complaints about the noose with the comment, "You people are too sensitive."

Last year, a North Carolina jury unanimously found that African-American truck drivers who were called the N word, monkey and boy, and threatened with nooses by a manager and coworker, were harassed and retaliated against because of their race.

And earlier this year, the EEOC secured relief for an African-American technician in Arkansas who was subjected to racially offensive language and visited at home, in it middle of the night, by

two white coworkers threatening to kill him if he complained about further racial harassment.

In fiscal year 2013 alone, the EEOC received nearly 94,000 charges of discrimination. Of those charges, 33,068 involved allegations of racial discrimination. Over 27,000 involved allegations of sex discrimination, over 25,000 of disability status. And over 21,000 involved allegations of age discrimination. And we know that the number of filed charges does not come close to fully representing the millions of Americans who still endure unlawful discrimination and mistreatment in the workplace. The recent downturn in the economy has only served as another painful reminder of the continued existence of employment discrimination in the workplace.

While nationwide the unemployment rate is around 6 percent, for Latino Americans the rate is 8 percent and for African-Americans, 12.2 percent. Given the scope of the problem, we commend the EEOC's decision to continue to prioritize the initiative revitalized under President George W. Bush's administration of focusing the commission's resources on redressing systemic discrimination.

We also applaud the EEOC's recent actions around the misuse of criminal background checks in employment. We believe it highlights the ways in which the commission is working to address and remedy discriminatory barriers that have disparate impacts on protected classes.

It is important to remember that the EEOC guidelines do not prohibit or discourage the use of background checks. Instead, they provide guidance to employers. All of us stand united in our commitment to a safe work environment. We stand in sympathy with the family of Susan Weaver, whose tragic death resulted from the failure to properly use criminal background checks. The EEOC's guidance is designed to help employers in the proper use of this important information, and to explain to employers how they can use this and keep their workplace safe.

The guidance is not only commendable, it is consistent with the growing national and bipartisan consensus that we need to rethink our criminal reentry systems in order to ensure that millions of Americans who have a criminal record, but who have paid their debt to society and do not pose a danger and are qualified for work, are not unjustly denied the opportunity to reintegrate back into society. The eve of the 50th anniversary of the Civil Rights Act of 1964 provides a timely opportunity to pause and consider the work of the EEOC.

That work is far from over. As Naomi Earp, who served as the chair under President George W. Bush remarked, "new times demand new strategies to stay ahead of the curve; these old evils are still around in new forms, and the commission intends to act vigorously to eradicate them." We agree with that statement.

Thank you for the opportunity to testify today, and I would be happy to answer your questions.

[The statement of Ms. Ifill follows:]

LDF
DEFEND EDUCATE EMPOWER

Testimony of Sherrilyn Ifill
President and Director-Counsel
NAACP Legal Defense and Educational Fund, Inc.

Before the United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

Hearing on
"The Regulatory and Enforcement Priorities of the EEOC:
Examining the Concerns of Stakeholders"

Rayburn House Office Building
Room 2175

June 10, 2014

Good morning Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee. My name is Sherrilyn Ifill. I am President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. ("LDF" or the "Legal Defense Fund"). Thank you for the opportunity to testify in this morning's hearing, which will allow stakeholders to express our perspectives about the United States Equal Employment Opportunity Commission's ("EEOC" or the "Commission") recent regulatory and enforcement priorities from the perspective of stakeholders. As I will explain in greater detail during my testimony, the EEOC has, throughout its nearly 50 year existence, played a pivotal role in assuring that all Americans have access to equal opportunity in the workforce and that there are adequate protections in place so that unlawful employment discrimination is quickly identified and remedied. Despite the tremendous strides we have made as a nation towards equal opportunity, the EEOC continues to remain an incredibly important and necessary federal agency.

LDF, which was founded by Thurgood Marshall in 1940, is the nation's oldest civil rights law organization. Throughout our history, we have relied on the Constitution, as well as federal and state civil rights laws, to pursue equality and justice for African Americans and other people of color, and have worked to create an anti-discrimination principle that applies to employment, public accommodations, education, housing, political participation, and criminal justice.

Next month, we will celebrate the 50th Anniversary of the Civil Rights Act of 1964. Without question, the Civil Rights Act of 1964 is one of the most important pieces of civil rights legislation ever enacted by Congress to ensure that our country keeps its promise of equality and justice. While the Civil Rights Act of 1964 included a number of anti-discrimination provisions, including the prohibition of discrimination in public accommodations, it is perhaps best known for Title VII, which outlawed discrimination in employment on the basis of race, color, religion, sex, or national origin.[1] As Professor Robert Belton, a former LDF lawyer who litigated some of the first cases under Title VII and became a renown employment discrimination scholar, observed: "Of the eleven titles in the Civil Rights Act of 1964, Title VII has emerged as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality."[2] The creation of the EEOC as the agency charged with receiving, investigating and referring complaints of employment discrimination for litigation, was a core aspect of the bipartisan compromise that resulted in Title VII.

Since the enactment of Title VII, LDF has worked to enforce this landmark statute, challenging discriminatory practices of both private and public employers, and serving on the front lines of many great civil rights battles seeking equal opportunity in employment for all.[3] From this vantage point, the Legal Defense Fund has had an unique opportunity to observe the work of the EEOC and to assess its effectiveness and indeed, beginning in 1965 when the EEOC opened its doors for the first time, we litigated many of the seminal cases that initially interpreted

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[1] 42 U.S.C. §§2000e et seq.

[2] Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. and Emp. L.J. 431, 432 (2005).

[3] *See, e.g., Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

the meaning and scope of Title VII, including *Griggs v. Duke Power Company*[4] and *Albemarle Paper Company v. Moody*.[5] And within the first year of the EEOC's operation, LDF filed nearly a thousand complaints of racial discrimination with the Commission.[6] As such, we fully understand and appreciate the role that Title VII has played in literally changing the face and composition of the American workforce.

Today, we too often accept the integration of the American workforce without recognizing the role that the EEOC and Title VII have played in helping to open doors to employment and opportunity that were closed simply because of an applicant or worker's race or gender. We forget that it is only within the last 50 years—a period shorter than my lifetime and perhaps than many of yours—that American workers have enjoyed legal protection from discrimination based on race, sex, national origin and color. Just as the Civil Rights Act of 1964 made possible the diversity we have come to take for granted in restaurants, here at Union Station in Washington, D.C, and in courthouses and hotels throughout this country, so too did Title VII and the EEOC make possible the diversity in the American workforce that is reflected in offices, factories, stores and businesses throughout this country.

The EEOC, like Title VII more generally, was designed to achieve its goals, as much as possible, through cooperation, voluntary compliance, and informal conciliation.[7] However, it has also been long recognized, especially by the Equal Employment Opportunity Act of 1972,[8] which significantly expanded the EEOC's enforcement authority, that the Commission also needs to rely on litigation as another tool to ensure that employers are compiling with federal anti-discrimination laws.

There is no question that the EEOC has been incredibly successful in redressing various forms of employment discrimination. The Commission has been a driving force in dismantling segregated workplaces, removing unnecessary and discriminatory employment barriers and obstacles, and ensuring that the promise of equality at work could be realized for millions of Americans. The EEOC's local and regional offices have often been relied upon by communities of color and other historically marginalized populations for redressing discrimination and harassment often suffered on a daily basis. For example, in Birmingham, Alabama, the local EEOC office was known to many in the African-American community, not by its title or as a government agency, but simply as the "2121 Building," because this was the address one visited in downtown Birmingham if one was seeking protection from discrimination on the job. In fiscal year 2013, the EEOC negotiated 5,927 settlements and successfully conciliated nearly 1,000 charges of discrimination with respect to Title VII alone.[9] During that same period, the

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[4] 401 U.S. 424 (1971).

[5] 422 U.S. 405 (1975).

[6] Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution*, 304-05 (1994).

[7] *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) ("Congress, in enacting Title VII, chose cooperation and voluntary compliance . . . as the preferred means of achieving its goals.") (internal quotation marks and citation omitted).

[8] 42 U.S.C. §2000a.

[9] Equal Opportunity Employment Comm'n, Title VII of the Civil Rights Act of 1964 Charges (including concurrent charges with ADEA, ADA and EPA) FY 1997-FY 2013 (2014), http://eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm.

Commission litigated 148 lawsuits under the array of federal statutes it has authority to enforce, including Title VII (78 lawsuits) and the American with Disabilities Act ("ADA") (51 lawsuits), recovering nearly $40 million in monetary benefits for victims of discrimination.[10]

Despite the tremendous progress made in ensuring equal opportunity in the workplace, sadly our work in eliminating discrimination in the American workplace is far from over. The EEOC plays a critical role in the ongoing work of eradicating employment discrimination. This work goes to the very core of what we aspire to be as a nation—a place where no one can be barred from employment simply based on stereotypes about their fitness for work, racial animus or hostility. The ability to obtain employment, to be promoted at one's place of employment based on the successful performance of work, and to be appropriately and equally compensated for that work as similarly situated workers, goes to the principle of dignity that Title VII was designed to protect.

But discrimination still remains a pervasive problem in far too many workplaces all across the country. One need look only to recent EEOC court victories to understand that even the most pernicious forms of racism on the job unfortunately still exist. In 2012, a Texas jury awarded punitive damages to three African-American manufacturing employees subjected to racially offensive slurs and a noose in the workplace, including use of the "N" word by a top plant official who responded to complaints about the noose with the comment, "You people are too sensitive."[11] Last year, a North Carolina jury unanimously found that African-American truck drivers, who were called the "N" word, "monkey" and "boy" and threatened with nooses by a manager and a co-worker, were harassed and retaliated against because of their race.[12] Earlier this year, the EEOC secured relief for an African-American technician in Arkansas who was subjected to racially offensive language and visited at home in the middle of the night by two white co-workers threatening to kill him if he complained further about racial harassment.[13]

As an organization with an active employment discrimination docket, we at Legal Defense Fund know only too well that employment discrimination against African Americans and other protected classes continues to exist. We recently settled a class action employment discrimination case against the national women's clothing retailer Wet Seal; the lawsuit alleged that top executives at Wet Seal directed senior managers to get rid of African-American store management and replace them with white employees for the sake of its "brand image."[14] For example, one senior Wet Seal executive ordered a district manager to "clean the entire store out" after observing numerous African-American employees working there.[15] We also recently successfully concluded our representation of thousands of African Americans in Chicago who were unlawfully denied jobs as firefighters in a case that worked its way up to the United States

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[10] Equal Opportunity Employment Comm'n, EEOC Litigation Statistics, FY 1997 through FY 2013 (2014), http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

[11] Press Release, Jury Says AA Foundries Must Pay $200,000 for Creating Racially Hostile Work Environment (Sept. 27, 2012), http://www.eeoc.gov/eeoc/newsroom/release/9-27-12g.cfm.

[12] Press Release, Federal Court Grants Injunction Against A.C. Widenhouse in EEOC Race Harassment Case (Mar. 8, 2013), http://www.eeoc.gov/eeoc/newsroom/release/3-8-13.cfm.

[13] Press Release, MMR Constructors Settles EEOC Racial Harassment Lawsuit (Jan. 27, 2014), http://www.eeoc.gov/eeoc/newsroom/release/1-27-14.cfm.

[14] Complaint at 8, *Cogdell v. Wet Seal*, No. 12-01138 (C.D. Cal. July 7, 2012).

[15] *Id.* at 7.

Supreme Court.[16] And not long ago, the United States Court of Appeals for the Eleventh Circuit agreed with our position in *Ash v. Tysons Foods* that a white supervisor calling a black employee "boy" was evidence of racial animus that could support a finding of employment discrimination.[17] Sadly, these are only a few of the countless other recent and present-day examples of continued discrimination and harassment in the workplace.

In fiscal year 2013 alone, the EEOC received nearly 94,000 charges of discrimination.[18] Of those charges, 33,068 (or 35.3%) involved allegations of racial discrimination, 27,687 (or 29.5%) involved allegations of sex discrimination, 25,957 (or 27.7%) involved of discrimination based on disability status, and 21,396 (or 22.8%) involved allegations of age discrimination.[19] The number of filed charges, however, does not come close to fully representing the millions of Americans who still endure unlawful discrimination and mistreatment in their workplaces. For example, recent national surveys show that approximately one out of every four working women and one out of every ten working men have experienced some form of harassment while on the job.[20] Many of those workers, however, never report that harassment or file a charge of discrimination.

The recent economic downturn has only served as another painful reminder of the continued existence of employment discrimination in the workplace. While nationwide, the unemployment rate is around 6.0%; for Latino-Americans the rate is 8.6%, and for African-Americans it is 12.2%. Discrimination in hiring remains a key factor for these large and unacceptable racial disparities. For example, an empirical study has demonstrated that resumes with "white sounding" names were 50% more likely to receive a callback than comparable resumes with African-American sounding names.[21] Similarly, racial minorities receive inferior initial and final offers from employers than their white counterparts.[22]

We commend the EEOC's decision to continue to prioritize the initiative revitalized under President George W. Bush's administration of focusing the Commission's resources on redressing systemic discrimination—i.e., pattern or practice, policy and/or class-wide investigations and litigation where the alleged discrimination has a widespread impact on an industry, employer, or geographic area. The EEOC's Systemic Task Force, which was established in 2005 under the direction of then-EEOC Chair Cari Dominquez and led by then-Commissioner Leslie Silverman, was premised on "the recognition that the Commission cannot

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[16] *Lewis v. City of Chicago, Ill.*, 560 U.S. 205 (2010).

[17] *Ash v. Tyson Foods, Inc.*, 664 F.3d 883 (11th Cir. 2011).

[18] Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 through FY 2013, (2014), http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

[19] *Id.*

[20] Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS, Nov. 16, 2011, http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/.

[21] Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV., 991, 998 (2004).

[22] John A. List, *The Nature and Extent of Discrimination in the Marketplace: Evidence from the Field*, 119 Q. J. OF ECON. 49 (2004).

effectively combat discrimination without a strong nationwide systemic program."[23] We could not agree more.

While individual claims have a place on the Commission's docket, it is imperative that the EEOC continue to maximize its impact by prioritizing systematic enforcement and litigation. The litigation of systemic discrimination claims is very costly, often complicated and is regularly protracted and hotly contested. Simply put, they are some of the hardest and most complex cases to litigate. And that is why they are precisely the types of cases which the federal government should be bringing. Our country cannot hope to rid the workplace of employment discrimination on an individual case-by-case basis. Moreover, many of these cases would never be prosecuted by the private bar or civil rights organizations with limited resources, especially when the discrimination is occurring in underserved communities or the likelihood of obtaining significant monetary relief is minimal. An emphasis on systemic enforcement makes perfect sense strategically because it allows the EEOC to address and remedy workplace discrimination on a large scale. As such, the EEOC was wise to recently develop a new Strategic Enforcement Plan, which will allow the Commission to focus its own limited resources on the areas where discrimination remains entrenched and far-too-common.[24]

The Commission's recent victory in *EEOC v. Hill Country Farms, Inc.*,[25] serves as a powerful reminder of the impact of the EEOC's focus on systemic and strategic enforcement. In that litigation, the EEOC represented 32 men with intellectual disabilities who were subjected, over the course of more than two decades, to harassment and discrimination, including verbal and physical abuse and sub-standard and otherwise deplorable living conditions.[26] As a result of the EEOC's advocacy, an Iowa jury awarded the men damages totaling $240 million. And earlier this year, the EEOC reached a $1.4 million settlement with JPMorgan Chase over allegations that the company maintained a sexually hostile work environment towards female mortgage bankers who worked at an Ohio location.[27] The settlement also requires JPMorgan to revise its data retention procedures in order to prevent future harassment.

We also applaud the EEOC's continued reliance on disparate impact liability as a tool through which to prove unlawful discrimination. The United States Supreme Court, in its landmark decision, *Griggs v. Duke Power Co.*, recognized that Title VII not only prohibits overt racial discrimination, but also "practices, procedures, or tests neutral on their face, and even neutral in terms of intent" that "operate to 'freeze' the status quo of prior discriminatory

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[23] Equal Employment Opportunity Comm'n, Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission, http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

[24] In the Strategic Enforcement Plan, the Commission identified six areas of enforcement priorities, including: (i) eliminating barriers in recruitment and hiring; (ii) protecting immigrant, migrant, and other vulnerable workers; (iii) enforcing equal pay laws; and (iv) preserving access to the legal system. Equal Employment Opportunity Comm'n, Strategic Enforcement Plan FY 2013-2016, http://www.eeoc.gov/eeoc/plan/sep.cfm.

[25] *EEOC v. Hill Country Farms*, Inc., 13-2796, 2014 WL 1813434 (8th Cir. May 8, 2014).

[26] Press Release, Equal Opportunity Employment Comm'n, Jury Awards $240 Million for Long-Term Abuse of Workers with Intellectual Disabilities (May 1, 2013), http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm.

[27] Press Release, Equal Opportunity Employment Comm'n, JPMorgan Chase Will Pay $1,450,000 to Resolve EEOC Class Sex Discrimination Lawsuit (Feb. 3, 2014), http://www.eeoc.gov/eeoc/newsroom/release/2-3-14.cfm.

employment practices."[28] Disparate impact is now more important than ever, especially given that subtle and sophisticated types of discrimination are more commonplace in today's society than instances of overt racial animus. The success of the Civil Rights Movement and the legislation it produced means that racial discrimination is no longer socially acceptable. This cultural change has helped reduce some racial discrimination. In other instances, however, discrimination has been driven underground, where it is vibrantly practiced but masked by code-words and pretexts. As the United States Court of Appeals for the Third Circuit has explained:

> Anti-discrimination laws and lawsuits have "educated" would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial "smoking gun" behind.[29]

Disparate impact cases are often extremely challenging and can be very costly, especially given that they often involve analyzing large sets of data and require the retention of legal experts. But, if we are committed to ridding our nation's workplaces of unlawful discrimination, these are precisely the types of cases the EEOC needs to be litigating.

The EEOC's recent actions around the misuse of criminal background checks in employment highlight the ways in which the Commission is working to address and remedy discriminatory barriers that have disparate impacts on protected classes. In recent decades the number of Americans who have some sort of criminal record has increased significantly. Incarceration rates in the United States have more than tripled since the 1980s.[30] As a result of this increase, the United States currently constitutes approximately five percent of the world's population but holds 25% of the world's prison population.[31] This rapid increase is largely attributable to the increased incarceration of non-violent drug offenders over the last three decades. Racial minorities have been hit hardest by this national trend. The prevalence of arrest rates and criminal convictions are far higher among African Americans and Latinos than for whites.[32] These racial disparities are not explained by disproportionate rates of criminal

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[28] 401 U.S. at 430 (1971). Congress codified disparate impact liability under Title VII in the 1991 Civil Rights Act. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166.

[29] *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

[30] U.S. Dep't of Justice, Bureau of Justice Statistics, Correctional Populations in the United States 1998 (2002); Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, Bureau of Justice Statistics, Prisoners in 2003 (2004).

[31] Marc Mauer, *Race to Incarcerate*, 15-14 (1999).

[32] Recent statistics from the FBI show that African Americans accounted for more than 3 million arrests in 2009 (28.3% of total arrests), even though they represented just 12.9% of the general population; whites, who formed 75.6% of the general population, accounted for fewer than 7.4 million arrests (69.1% of total arrests). Crime

activity—one study found that in 2005, African Americans represented 14% of current drug users, yet they constituted 33.9% of persons arrested for drug offenses[33]—but rather, demonstrate the roles that racial profiling and discriminatory criminal justice policies have played and continue to play in our criminal justice system.[34]

In response to this growing trend, two years ago, the EEOC, in a bipartisan manner, issued enforcement guidance on employers' consideration of arrest and conviction records when making employment decisions.[35] The EEOC's guidance was designed to consolidate, clarify, and update prior guidelines the Commission had promulgated on the topic, guidelines—initially issued in 1987 when now-Supreme Court Justice Clarence Thomas was serving as Chair—that had become outdated and did not reflect recent factual and legal developments.[36] It is important to note that the EEOC's guidance does not prevent or discourage the use of criminal background checks. Instead, it clearly sets forth how employers' use of criminal history information can, in some instances, violate Title VII. First, the EEOC, relying on social science research showing that African-American job applicants without criminal records are less likely than white applicants with criminal records to get called back for interviews or receive offers of employment, [37] discusses how employers can violate Title VII's disparate treatment provision if

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in the United States, 2009 U.S. Department of Justice — Federal Bureau of Investigation (Sept. 2010) tbl. 43, http://www2.fbi.gov/ucr/cius2009/arrests/index.html. Among persons arrested on felony charges in 2006, 29% were white, while 45% were black and 24% were Latino. Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, app. tbl. 2 (2010). Similar disparities are seen in conviction rates as well. One recent estimate found that nearly one-fourth of the black adult male population (23.3%) has at least one felony conviction but is not currently under any form of criminal justice supervision, while that figure is only 9.2% for the adult male population as a whole. Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy and the Civic Reintegration of Criminal Offenders*, 605 Annals Am. Acad. Pol. & Soc. Sci. 281, 288 & tbl. 2 (2006); *see also* Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, 3 (2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf (finding African Americans incarcerated 5.6 times rate of whites, Hispanics incarcerated at 1.8 times rate of whites).

[33] Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, Am. Bar Ass'n (2010). A recent report by the American Civil Liberties Union ("ACLU") found that "Black people are 3.7 times more likely to be arrested for marijuana possession than white people despite comparable usage rates." Press Release, ACLU, *New ACLU Report Finds Overwhelming Racial Bias in Marijuana Arrests* (June 4, 2013), https://www.aclu.org/criminal-law-reform/new-aclu-report-finds-overwhelming-racial-bias-marijuana-arrests.

[34] *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Marc Mauer, *Mass Imprisonment and the Disappearing Voters, in* Invisible Punishment 53 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing war on drugs).

[35] Equal Employment Opportunity Comm'n, *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* et seq. (April 25, 2012).

[36] *See* Equal Employment Opportunity Comm'n, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964* (Feb. 4, 1987); Equal Employment Opportunity Comm'n, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment* (July 29, 1987); Equal Employment Opportunity Comm'n, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Sept. 7, 1990).

[37] One study, demonstrated that White job applications with a criminal record who had the same qualifications as African-American applicants without criminal record were three times more likely to be invited for interviews than the African-American applicants. Devah Pager, *The Mark of a Criminal Record*, 108 Am. Journal of Sociology 937, 957-60 (2003). The results of that study, which provides powerful evidence that some employers may be discriminated against African American applicants, and especially those with criminal records, has been replicated in other research. *See, e.g.*, Devah Pager, Bart Bonikowski, & Bruce Western, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 Am. Sociological Rev. 777, 785 (2009).

they treat similarly situated individuals with criminal histories differently because of their race. The guidance goes on to explain that even criminal records policies that are facially race-neutral can result in disparate impact liability if they disproportionately impact racial minorities (or other protected groups) and are neither job related nor consistent with business necessity. In order to avoid violating Title VII, the guidance recommends employers, when developing criminal records policies, consider three sensible factors: (i) the nature and gravity of the prior criminal conduct, (ii) the time that has elapsed since the prior criminal conduct, and (iii) the nature of the job held or sought.[38] The EEOC's guidance makes clear that consideration of these factors is important for ensuring that exclusions based on criminal records are not overly broad, but are related to the positions at issue and necessary from a business perspective.

The EEOC's work on the guidance is not only commendable, it is also consistent with the growing national and bipartisan consensus that we need to rethink our criminal reentry systems to ensure that millions of Americans who have a criminal record, but who have paid their debt to society and are qualified for work, are not unjustly denied the opportunity to reintegrate back into society by the misuse of criminal background checks. To allow the presence of an arrest or conviction record to bar an individual from meaningful employment forever, would deny to millions that most powerful and important American opportunity—a second chance. For the Legal Defense Fund, ensuring that those with criminal records are not arbitrarily barred from employment opportunities, is a key focus of our employment discrimination work. We regard the EEOC's leadership in this area as just one example of how the Commission continues to carefully and thoughtfully recalibrate its regulatory and enforcement agenda to respond to trends and shifts in employment discrimination.

The eve of the 50th anniversary of the Civil Rights Act of 1964 provides a timely opportunity to pause and consider the regulatory and enforcement priorities of the EEOC. Undoubtedly, the EEOC should be applauded for the tremendous role it has played in helping to ensure that American workers are not being denied equal opportunity based on race, national origin, sex, age, religion, disability, or any other protected category. But, the EEOC's work is far from over. The Commission must continue its work of developing new and innovative ways to combat unlawful discrimination. As Naomi Earp, who served as Chair of the EEOC under President George W. Bush once remarked: "New times demand new strategies to stay ahead of the curve. These old evils are still around in new forms and [the Commission] intend[s] to act vigorously to eradicate them."[39] As such, we should also take this opportunity to ensure that the EEOC has the resources it needs to continue its critically important work, including systemic enforcement, to make sure that no one in this country is denied equal opportunity and fair treatment in the workplace.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

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[38] The these factors, also known as the "*Green* factors," are based on a 1975 decision by the United States Court of Appeals for the Eighth Circuit. *See Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). In that decision, the court concluded that an employer's policy that disqualified applicants for employment for any criminal conviction other than a minor traffic offense violated Title VII's disparate impact protections.

[39] Press Release, Equal Employment Opportunity Comm'n, Naomi C. Earp Takes Office as EEOC Chair (Sept. 6, 2006), http://eeoc.gov/eeoc/newsroom/release/9-6-06.cfm.

Chairman WALBERG. Thank you, Ms. Ifill.
Ms. Bone, you are now recognized.

STATEMENT OF MS. LUCIA BONE, FOUNDER, THE SUE WEAVER C.A.U.S.E., FLOWER MOUND, TEXAS

Ms. BONE. Good morning, Chairman Walberg and Ranking Member Courtney and other members of the subcommittee. It is a great privilege for me to appear before the House Subcommittee on Workforce Protections in honor and in memory of my sister, Sue Weaver, and for the other victims whose tragic deaths could have been prevented had an employer done a proper criminal background check before hiring those individuals.

My name is Lucia Bone, and I am the founder of the Sue Weaver C.A.U.S.E., Consumer Awareness of Unsafe Service Employment. In 2004, we were founded, and C.A.U.S.E. is a non-profit organization proactively keeping you and your families safe by promoting the importance of proper annual criminal background checks on anyone hired to work in our homes or with vulnerable populations. C.A.U.S.E. does not actually conduct criminal background checks. We are an honorary member of the National Association of Professional Background Screeners.

At one time or another, we all need to invite strangers into our home for maintenance or delivery. Most of us trust the companies that we hire to send safe workers into our home. But how do we know if that trust is well-placed? My sister, Sue Weaver, thought it was. She was wrong. My sister hired a reputable Florida department store to have her air ducts cleaned. No criminal background checks were done on the workers they sent into customers' homes.

The work was subcontracted out, and two convicted felons were sent into Sue's home to do the service work: a single woman, home alone, two convicted felons. Six months later, one of the workers returned. He was a twice-convicted sex offender on parole. He raped Sue, he murdered her, he set her body and her home on fire in an effort to destroy the DNA evidence. Had a criminal background check been done, the employer would have known that these men were not suitable to be working in customers' homes due to their criminal history, and my sister might still be alive today.

Since Sue's death in 2001, I have campaigned tirelessly to educate and bring awareness to the importance of proper background investigations and the importance of knowing whom you hire. Not only do background checks make good business sense, they save lives. It is absurd that a person with multiple convictions for violent sexual assault should be engaged as a home repairman, yet it happens over and over again. Everyone has the right to work, but not every job is right for everyone.

Criminal background investigations provide employers an invaluable tool to help them place employees in job-appropriate positions, better protecting coworkers and customers. Background checks prevent tragedies.

In the last decade, we have witnessed a dramatic upsurge in laws mandating background checks in many areas, often to better screen those working with children or vulnerable populations. Unfortunately, we must ask ourselves if the EEOC's focus isn't on helping ex-offenders seeking employment without regard to con-

sumer safety. Everyone deserves a second chance, but not at the expense of innocents such as my sister.

Employers need to know who they are hiring, and background checks are an appropriate risk-mitigation tool that helps them do so. I am gravely disappointed that no victims were represented at the July 2011 meeting of the EEOC that preceded the issuance of the guidance. The Commission did not consider the victims' side, but solely focused their attention on the plight of the ex-offenders.

Background checks were singled out as the leading cause of why minority ex-offenders fail to find jobs. They ignored other challenges, such as drug and alcohol addictions, lack of education or vocational training and lack of family structure, and ignored the consumer safety and risk mitigation benefits of background screening.

I am not an expert in the workings of Congress and regulatory agencies, but common sense leads me to believe that the EEOC needs to suspend implementation of its guidance and hold the type of transparent, inclusive proceeding that it should have conducted in the first place. This time, they need to listen to victims and their families, and victims' rights organizations, and those representing the vulnerable populations. All views need to be heard and considered before a new policy goes into effect.

When weighing the risks and benefits of the proposed policy guidance, they must balance the safety of the public and the innocent consumers against the employment concerns of ex-offenders. While, sadly, it is too late for my sister, it is not too late for all the others who might become victims. By discouraging background checks used to qualify individuals that work near our families, we are knowingly risking the safety of ourselves and our loved ones.

Under the guidance, it is more difficult for employers to make informed hiring decisions, placing employees and consumers in unsuitable situations and jeopardizing the safety of our families, our homes and our workplace.

Thank you.

[The statement of Ms. Bone follows:]

Testimony of

Lucia Bone

Before the United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

June 10, 2014

Chairman Walberg and Ranking Member Courtney, it is a great privilege for me to appear before the House Subcommittee on Workforce Protections in honor and in memory of my sister, Sue Weaver, and, for other innocent victims whose tragic deaths could well have been prevented had an employer done a criminal background check before hiring an individual.

My name is Lucia Bone, and I am the Founder of The Sue Weaver C.A.U.S.E., Consumer Awareness of Unsafe Service Employment. Founded in 2004, C.A.U.S.E. is a non-profit organization proactively keeping you and your family safe by preventing tragedy one service worker at a time.

The Sue Weaver C.A.U.S.E. promotes the importance of proper annual criminal background checks on anyone working in our homes or with vulnerable populations. We educate you, the consumer, on the importance of knowing whom you hire to work in or near your home and your family.

The Sue Weaver C.A.U.S.E. does not actually conduct criminal background checks. We are an honorary member of the National Association of Professional Background Screeners (NAPBS), a trade association of professional background screening companies who conduct background checks for employment purposes. We have worked closely with NAPBS to develop our C.A.U.S.E. Certified background screening guidelines. C.A.U.S.E. Certification is a free resource for consumers to search for safer workers in their area that have been properly vetted through an annual criminal background investigation conducted by a professional background screening company.

At one time or another, we all need to invite a stranger into our home for maintenance or delivery. Did you know that your safety or the safety of your family might be endangered the next time you need service work done? Many people believe hiring a company that is "bonded and insured" protects them. In truth, it is only an insurance policy and it does not mean the employer has done criminal background checks on their workers. Regardless, most of us trust the company we hire to send safe workers into our homes. But how do we know if that trust is well-placed? My sister, Sue Weaver, thought it was. She was wrong.

My sister hired a reputable Florida department store, Burdines, to have her air ducts cleaned. No criminal background checks were done on the workers they sent into their customers' homes. The work was subcontracted out and two convicted felons were sent into Sue's home to do the service work. A single woman, home alone, two convicted felons. ... Six months later one of the workers, Jeffrey Hefling, a twice-convicted sex offender on parole, returned to rape and murder Sue. He then set her body and home on fire in an attempt to destroy the DNA evidence. Had a criminal background check been conducted it would have shown that both men were not suitable to be working in customers' homes due to their criminal history and my sister might still be alive today.

Since Sue's death in 2001, I have campaigned tirelessly to educate and bring awareness to the importance of proper background investigations and the importance of knowing whom you hire. Not only do background checks make good business sense, they save lives. It is absurd that a person with multiple convictions for violent sexual assaults should be engaged as a home repairman, yet it happens over and over again.

Everyone has the right to work—but not every job is right for everyone. Criminal background investigations provide employers an invaluable tool to help them place employees in job appropriate positions, better protecting coworkers and customers. Background checks prevent tragedies.

Although we still have a long way to go, legislators do understand the importance of criminal background checks and the need to mandate appropriate guidelines for certain positions. In the last decade, we have witnessed a dramatic upsurge in federal, state and local laws mandating background checks in many areas, often to better screen those working with children or other vulnerable populations. Unfortunately, we must ask ourselves if the EEOC gets it.

I believe the EEOC focused its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions ("Guidance") on helping ex-offenders seeking employment, without regard to consumer safety. Everyone deserves a second chance, but not at the expense of innocents such as my sister. Employers need to know who they are hiring and background checks are an appropriate risk mitigation tool that help them do so.

On more than one occasion, I have written to the EEOC. The following is a excerpt from a letter I wrote 9 months before the issuance of the EEOC Guidance (July 11, 2011) to EEOC Chairwoman Jacqueline Berrien:

> As you conduct your upcoming Commission Meeting on Arrest and Conviction Records as a Barrier to Employment, I ask that you consider the other side of the coin and remember my sister's case. As the Commission considers revising its guidance on the use of arrest and conviction records, consider that background checks are beneficial for employers and they should be conducted more often, not less! Sue didn't commit the heinous crimes that her killer committed. Burdines should have known about Hefling's criminal past and not sent him into consumers' homes. Is this too much to ask, that employers take appropriate steps to ensure the safety of their customers from their employees? Unfortunately, my sister paid the ultimate price because a background check wasn't conducted... . That doesn't mean her perpetrator couldn't have been hired, just that armed with the knowledge of this criminal history, Burdines shouldn't have sent him to my sister's or anyone's home.

I am gravely disappointed that no victims were represented at the July 2011 meeting of the EEOC that preceded the issuance of the Guidance. The Commission did not consider the victims' side, but solely focused their attention on the plight of the ex-offenders. Unfortunately, the EEOC erroneously: (1) singled out background checks as the leading cause of why minority ex-offenders fail to find a job, ignoring other challenges such as drug or alcohol addictions, lack of education or vocational training and lack of family structure; and (2) ignored the consumer safety and risk mitigation benefits of background screening.

It is my opinion that the EEOC has paid little or no attention to critical issues such as:

a) Why employers rely on background checks to ensure a safer workforce and workplace;

b) How its revised criminal record guidance would discourage use of background checks;

c) The confusion among employers - especially small businesses - engendered by the adoption of a 52 page, footnote-laden document, to replace its far shorter predecessor;

d) The need to balance the competing interests of ex-offenders re-entering the workplace and the need to protect public safety; and

e) How victims' advocacy groups felt about any change in policy. I personally attended the 2011 hearing and was greatly disappointed that the EEOC showed no interest in hearing from any victims. It was apparent the hearing was only a formality; their focus was on protecting ex-offenders seeking employment.

In addition, the EEOC made a serious error by failing to allow the public to view and comment on the Guidance before it was issued. I agree wholeheartedly with EEOC Commissioner Constance Barker who dissented from the issuance of the Guidance and bemoaned this lack of transparency.

> The proposed revision before us today represents a major shift in the advice we have given the American public for the last 22 years. Yet, we are about to approve this dramatic shift in our interpretation of the rights of job applicants and the obligations of America's businesses under Title VII without ever circulating it to the American public for review and discussion. There is absolutely no justification for totally excluding the American people from this process or for this blatant failure to be transparent in how we conduct our business. ...We are public servants. We work for the American people. What could possibly justify keeping them from knowing what is in this document before we approve it?

I am not an expert in the workings of Congress and regulatory agencies. But common sense leads me to believe that the EEOC needs to suspend implementation of its Guidance and hold the type of transparent, inclusive proceeding that it should have conducted in the first place. This time they need to listen to victims and their families and victims' rights organizations and those representing the vulnerable populations. All views need to be heard and considered *before* a new policy goes into effect. When weighing the risk and benefits of the proposed policy guidance, the Guidance must balance the safety of the public and innocent consumers against the employment concerns of ex-offenders!

While sadly it is too late for my sister, it is not too late for all the others who might become victims. By discouraging background checks used to qualify individuals that work or care for our families or do service work in our home, we are knowingly risking the safety of ourselves and our loved ones.

Sue was no different than your sister, your aunt, your daughter, your neighbor or your best friend. She was my best friend, my inspiration, my idol and my big sister.

Common sense says you wouldn't hire a drug dealer to work in a pharmacy, a thief to work in a bank or a sex-offender to work with vulnerable populations. But under this Guidance the EEOC has made it more difficult for employers to make informed hiring decisions, placing employees and consumers in unsuitable positions and jeopardizing the safety of our families, our homes and workplaces.

Transcript of April 25, 2012 Meeting of the EEOC (comments of Commissioner Barker), available at http://www.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm.

Chairman WALBERG. I thank you for your testimony. I thank each of you for the testimony.

And now I recognize, to open our questioning, the Chairman of our full Committee, Education and the Workforce, the gentleman from Minnesota, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman. And thank the witnesses for being here today. Really expert testimony from all of you.

I want to—I think we could all agree, in fact I am sure of it, on both sides of the aisle, that it is important, when we look at nondiscrimination issues and Title VII, that we do so mindful of what it was supposed to do.

What I see here, listening to Mr. McCracken's testimony, is a situation where we are making things more and more complicated and, therefore, harder to actually comply with the intent of the law. So in looking at the criminal background checks guidance—I think, Mr. McCracken, you indicate it is 55 pages long, and my notes say 157 footnotes, I think you said 167—that is a lot, in a time when we see uncertainty and a blizzard of rulemaking descending on businesses, large and small.

We have small businesses—for example, trying to figure out whether they have got 50 employees or 49 employees, or whether they are working 30 hours or 29 or 39 hours a week—how are they gonna comply with the Affordable Care Act? And now they have got guidance from the EEOC that is 55 pages long and has 157 footnotes. It seems to me that would be pretty difficult to comply with if you are a small business owner. Would it not, Mr. McCracken?

Mr. MCCRACKEN. I would say yes, because the companies that I am most—we are most concerned about are those, as you suggest, 50 or so and less, where they don't have a dedicated HR person on staff. A lot of these issues are handled directly by the small business owner him-or herself. And we also have to realize that it is particularly in smaller workplaces employees often handle a wide variety of tasks, and jobs can change rather quickly. And so doing the individualized assessments is even more complex and difficult in a small business setting than it is in a large employer setting. And coupled with that, they have far less available expertise with which to accomplish that.

Mr. KLINE. Right. So they are going to have difficulty complying with this if they don't have the resources to hire an attorney. Is there any safe harbor in here?

Mr. MCCRACKEN. Not that I am aware of, no.

Mr. KLINE. I mean, I suppose they could just not do background checks. But then they would be in violation of other statute. So under that circumstance, it seems to me that this would add to uncertainty on the part of employers and would make it less likely that they would make new hires. And at a time when we are looking at a workforce participation rate that is as low as we have seen in decades, another factor making it more difficult for employers to make decisions to hire is exactly the wrong thing that we need right now.

But it looks to me as though this guidance is going to do just that. And so whether you are a potential new hire that is a minority or not a minority, protected class or not, less likely to have an

opportunity to be hired under this guidance. Is that the way I—that is the way I understand your testimony. I am just trying to—

Mr. MCCRACKEN. I think that is a good analysis. Another point that I would bring up that hasn't been specifically mentioned is, it also creates incentives for companies of all sizes to subcontract out many of these functions so they don't do the hiring themselves. And to the extent those companies, or small businesses with fewer than 50 employees, these laws don't apply. So there is a significant—the more complex you make these things, the more difficult they are for employers of all sizes, the more the very underpinnings of the goals of the rules are undercutting themselves.

Mr. KLINE. So it has the perverse effect of actually putting up employment barriers, which we were trying in the first place to eliminate employer barriers, employment barriers, barriers to employment by the original act.

All right, Mr. Chairman, I yield back. Thank you.

Chairman WALBERG. I thank the gentleman.

I now recognize the ranking member, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. And, again, unfortunately because the agency was not invited today so that we could actually have a real dialogue and, you know, I actually think that would be a way to sort of shed light in terms of trying to get to real oversight, you know, we are going to have to sort of rely on sort of indirect, third-party contributions to sort of, at least partially, recreate some balance in the record here.

And so, Mr. Chairman, first of all I would like to enter into the record a statement by David Lopez, who is general counsel for the EEOC, who makes a few points, which he did just recently again, in response to some of the claims that we have heard here this morning. Number one, he sets the record straight in terms of the percentage of litigation that actually has materialized in 2013. And, again, Ms. Ifill sort of alluded to that in terms of some of the statistics that she cited. But it is about 0.5 percent, less than a percent, of cases that actually went to litigation.

In addition, he cited some other court rulings, Mach Mining and others, who were at odds with the case that was cited earlier here. Again, there is clearly a conflict between the two circuits about the—you know, the handling of the conciliation process by the agency, which is a good thing. Again, I practiced law for 27 years, and understood well that, you know, judges, like everybody else, can sometimes disagree in terms of interpreting statutes. And, again, I think, you know, having that discussion here today is fine.

Again, it is too bad that the party to the litigation is not present in terms of being able to just, you know, articulate their point of view on this. But again, we were deprived of that by the way in which this hearing was organized. So, again, I would like to have Mr. Lopez's statement entered into the record. Which, again, I think sheds some facts for the record in response to some of the claims that were being made here.

[The information follows:]

[Additional Submissions by Mr. Courtney follow:]

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

JUL - 1 2014

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

Dear Chairman Walberg:

Please accept this statement for the record from the Equal Employment Opportunity Commission (EEOC) in response to the June 10, 2014, hearing entitled, "The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders," and concerns raised during the hearing about the agency's enforcement and regulatory priorities. There were several issues discussed during the hearing that we believe would benefit from additional information.

As you know, 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, Section 501 of the Rehabilitation Act of 1973, the Civil Rights Act of 1991, the Genetic Information Nondiscrimination Act of 2008, the ADA Amendments Act of 2008, and the Lilly Ledbetter Fair Pay Act of 2009. 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 mission of the Commission is the eradication of employment discrimination and we have made great strides over the years. However, on the eve of its 50th anniversary, it is important to note that the Commission's work is far from complete. 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. The Commission litigates less than one quarter of one percent of the charges filed with the Agency.

EEOC Guidance on the use of Arrest and Conviction records in employment:

On April 25, 2012, the Commission, in a 4-1 bi-partisan vote, issued its *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. The Guidance is firmly rooted in Title VII and the relevant case law and updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's Race and Color Discrimination Compliance Manual Chapter. The Guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff. During the hearing there were several concerns raised about the Guidance.

I. ***The Guidance is so long, so vague, and so complex that small employers -- and even some sophisticated counsel -- cannot glean clear directions from it.***

It is important to understand that the Guidance was written for several audiences in addition to employers. The federal courts that decide Title VII cases were an important audience. Indeed, in 2007, a federal circuit court of appeals directed the Commission to update its 1987 version of this Guidance to provide more in-depth legal analysis of criminal background exclusions. The court found that the earlier version lacked explanation and statutory analysis. *See El v. Southeastern Pennsylvania Transp. Authority*, 479 F.3d 232 (3d Cir. 2007). The Commission sought to rectify this in 2012. Because of the detailed nature of the Guidance the EEOC also drafted several documents that succinctly and clearly summarize the Guidance for employees, job applicants, employers and counsel:

- The Guidance itself begins with a bulleted Summary that is 1.5 pages long and provides 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

Additionally, the EEOC has been part of the Interagency Reentry Council, a diverse set of federal agencies assembled by the U.S Attorney General, to support the federal government's efforts to increase public safety, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration. One of the first products of this collaboration is an initial set of "Reentry MythBusters," designed to clarify existing federal policies that affect formerly incarcerated individuals and their families in areas such as public housing, access to benefits, parental rights, employer incentives, and

more. Among others, there is a Reentry MythBuster that addresses the Title VII implications of using arrest and conviction records in employment.

Finally, the EEOC made educating the public about the Guidance a point of emphasis. This is reflected in a comprehensive report of our efforts to educate the public concerning the Guidance. A copy of that report is attached as Appendix A to this letter. Following the adoption of the updated guidance, the agency has conducted an extensive outreach effort that has reached over 80,000 people nationwide through over 900 events.

II. ***The Guidance effectively discourages small employers from using background checks, their only tool for preserving the safety of their workers and clients.***

The Guidance recognizes employers' safety concerns, both by discussing these concerns in the background section and by including numerous hypothetical examples where safety risks justify exclusions based on an applicant's recent conviction records. Like the EEOC's Title VII guidance on this same subject first issued in 1987, this updated 2012 Guidance is based on the premise that employers can best manage the risk of crime in the workplace by screening applicants or employees in a targeted and fact-based way. The updated Guidance provides practical advice to employers on balancing workplace security with civil rights.

Indeed, an increasing number of businesses have explicitly adopted the principles laid out in the guidance. According to a recent survey of 600 employers (provided as Appendix B), a year ago just 32 percent of respondents said they had adopted the principles contained in the 2012 EEOC guidance. This year, 88 percent report they have done so. Moreover, 64 percent of the surveyed companies report 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.

III. ***Adding insult to injury, EEOC denied the public an opportunity to comment on its radical change in policy.***

The EEOC did not deny the public an opportunity to comment. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission held the hearing record open and established a process for receiving input. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Promi-

nent 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, and the Equal Employment Advisory Council. Additionally, a letter from Ms. Lucia Bone, who testified at the Committee's June 10th hearing about her sister's tragic murder, was included in this record.

The Guidance is not a radical change in policy. Since at least 1969, the Commission has received, investigated, and resolved discrimination charges involving criminal records exclusions, and federal courts have analyzed the civil rights law as applied to criminal record exclusions since the 1970s. In 1987, when Justice Clarence Thomas was chair, the EEOC first issued guidance saying that criminal background checks, like other hiring requirements that exclude people, should relate to the job. The EEOC, following court precedent at the time, 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 stretch the law in 1987; it simply followed the law and continued to do so in its 2006 Race and Color Discrimination Compliance Manual Chapter and in its 2012 Guidance.

IV. ***Conflict between Title VII and State Law***

Title VII is a federal law, that specifically provides that state and local laws or regulations are preempted by Title VII if they "purport to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7. Therefore, Title VII itself requires the preemption of contrary state laws, not the Commission. Indeed, the U.S. District Court for the Southern District of Ohio last year held that Title VII, pursuant to § 2000e-7, may preempt a state law requiring background checks and the termination of long-term, successful employees due to remote and minor convictions. *Waldon v. Cincinnati Public Schools*, 941 F. Supp. 2d 884, 890 (S.D. Ohio 2013) ("Moreover, the Court cannot conclude that Defendant was compelled to implement the policy, when it saw that nine of the ten it was terminating were African-American. . . . Title VII trumps state mandates, and Defendant could have raised questions with the state board of education regarding the stark disparity it confronted."). The Court Order in *Waldon* is attached as Appendix C to this letter.

Moreover, the 2012 Guidance makes clear that schools can exclude an individual based on a criminal record pursuant to state law when doing so would be consistent with Title VII:

"**Example 11: State Law Exclusion Is Job Related and Consistent with Business Necessity.** Elijah, who is African American, applies for a position as an office assistant at Pre-School, which is in a state that imposes criminal record restrictions on school employees. Pre-School, which employs twenty-five full- and part-time employees, uses all of its workers to help with the children. Pre-School performs a background check and learns that Elijah pled guilty to charges of indecent exposure two years ago. After being rejected for the position because of his conviction, Elijah files a Title VII disparate impact charge based on race to challenge Pre-School's policy. The EEOC conducts an investigation and finds that the policy has a disparate impact and that the exclusion is job related for the position in question and consistent with business necessity because it addresses serious safety risks of employment in a position involving regular contact with children. As a result, the EEOC would not find reasonable cause to believe that discrimination occurred."

V. ***Ms. Lucia Bone, of C.A.U.S.E., testified to her sister's rape and murder at the hand of a service worker contracted by a large, local department store that neglected to conduct or require a criminal background check. If they had done so, they would have learned that he was twice convicted of sex offenses and then on parole. Ms. Bone testified that, "by discouraging background checks," the EEOC is knowingly risking the safety of people like her sister in the interests of reemploying ex-offenders.***

Mr. Chairman, the EEOC is united with the Committee in our commitment to a safe working environment for employers, workers and customers. The EEOC offers our sincere sympathy to the tragedy suffered by Ms. Bone in the death of her sister, Sue Weaver. The department store and/or its contractor could have conducted a full criminal background check of the service worker. It is important to note that the guidance does not ban criminal background checks. To put it plainly, there is nothing in the guidance — either then or now — that would preclude the employer or the contractor from conducting a criminal background check on the employee.

EEOC Small Business Outreach:

The EEOC understands that we must work to prevent employment discrimination before it occurs. Investigations, conciliations and litigation are only some of the means by which the EEOC fulfills its mission and vision. In Title VII, Congress expressly required the agency to engage in education and outreach activities, including providing training and technical assistance, for those with rights and responsibilities under employment antidiscrimination laws.

Educational and outreach programs, projects, and events are also cost effective law enforcement tools because they promote understanding of the law and voluntary compliance with the law. All parties, including the American taxpayer, benefit when the workplace is free of discrimination and everyone has access to equal employment opportunity. To that end, the Commission developed a performance measure in our Strategic Plan for FY 2012-2016 that calls on the Agency to develop and increase the number of significant partnerships with organizations that represent small or new businesses.

The FY 2013 target for this measure was to increase the number of significant partnerships with organizations that represent small or new business communities (or with businesses directly) by 10 percent nationally over the 2012 baseline, or to 78 total partnerships. Concurrent with the January 2013 notification issued by the agency for the previous measure, discussions were also held in January and February 2013 with district directors and program analysts on how to maximize outreach efforts and partnership development strategies within the small and new business communities. Guidance was issued to District Offices that included approaches for identifying potential partners and outreach activities, as well as methods for reporting results. As a result, the number of partnerships increased by 10 (or 14 percent), making the current total number of significant partnerships 81 for FY 2013.

Moreover, the agency has consistently received an "A" rating from the Small Business Administration National Ombudsman for our efforts with small businesses. We have a small business outreach program precisely to connect with small businesses on this and other areas of our enforcement and to enhance our work in this area EEOC has a Small Business Task Force led by Commissioner Constance Barker. We also are a partner with the SBA through the Interagency Reentry Council and are exploring ways in which we can partner with that agency on outreach.

EEOC Conciliation Efforts:

The EEOC is statutorily required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5. When the evidence gathered during the investigation establishes that there is "reasonable cause" to believe that discrimination has occurred, the EEOC invites the parties to participate in conciliation discussions. During conciliation, the investigator works with the company and the charging party to develop an appropriate remedy for the discrimination.

We strongly encourage the parties to take advantage of this final opportunity to resolve the charge informally and prior to the EEOC considering the matter for litigation. Conciliation is a voluntary process. The discussions are negotiations and counter-offers may be presented. Conciliation agreements remove the uncertainty, cost and animosity surrounding litigation.

The Commission's record demonstrates that we have made significant strides in successfully conciliating cases where the EEOC has found discrimination. Conciliation is one of our most effective tools to resolve discrimination cases before filing litigation.

With respect to the EEOC's pre-suit obligations, we successfully conciliated 1,437 cases in FY 2013. In the last three years, the EEOC improved its conciliation results significantly, with successful conciliations now at a rate of 41% of all cases that are conciliated, up from 31% in FY 2011. This means that more and more often, employers are coming to the table after an investigation where we conclude that there is reason to believe that employment discrimination occurred, and are agreeing to resolve those complaints voluntarily without the need for protracted litigation.

Voluntary resolution through conciliation can enable the company charged with discrimination to move forward with improved workplace policies and practices in compliance with the law. In conciliation or settlement discussions, the EEOC seeks targeted, equitable relief that remedies the discrimination and ensures that discrimination will not recur. The EEOC's overarching objective in its conciliation efforts is to ensure compliance with the law and to carry out the public interest in stopping and remedying discrimination.

Even before conciliation efforts take place, approximately 14,000 charges annually are settled with EEOC or in private settlements. Litigation is the last resort and represents less than 0.5 percent of all charges filed and around 5 percent of charges where the commission has issued a cause finding. The following chart shows our efforts to resolve discrimination charges at various stages of the process:

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Charges Filed	93,277	99,922	99,947	99,412	93,727
Total Resolutions	85,980	104,999	112,499	111,139	97,252
Pre-decision Settlements	8,634	9,777	10,234	9,524	8,625
Withdrawals with benefits	4,892	5,391	5,689	5,438	5,497
Successful Conciliations (All Conciliations)	1,240 of 3,902, 32%	1,348 of 4,981, 27%	1,351 of 4,325, 31%	1,591 of 4,207, 38%	1,437 of 3,515, 41%
Litigation filed	281 suits	250 suits	261 suits	122 suits	131 suits

EEOC Litigation:

Unlike the investigation, conciliation, and mediation functions, the Commission litigates in the public spotlight, allowing the Agency to further its law enforcement mission through public education and deterrence. This also means the public is able to evaluate these efforts, both the successes and the losses. This was discussed by the Chamber of Commerce in its report titled *A Review of Enforcement and Litigation Strategy during the Obama Administration – a Misuse of Authority* released in conjunction with the hearing

By any reasonable measure, the public record shows the EEOC's litigation program is successful and has undoubtedly had an enormous impact on equality of employment opportunity in the American workplace. The Commission has consistently secured monetary and non-monetary remedies, such as policy changes and training, in at least 90 percent of the cases litigated for many years. These include major recent systemic successes across the spectrum of statutes, such as:

- *Interstate Distributor* (D. Colo. 2012) A $4.85 million settlement, along with revised ADA policy,
- *Verizon* (D. Md. 2011) A $20 million settlement, representing EEOC's largest ADA settlement, plus requirement revised attendance plans, policies and ADA policy to include reasonable accommodations,
- *Presrite* (N.D. Ohio 2013) A $700,000 settlement, plus priority consideration to at least 40 female job applicants as well as new measures designed to prevent future discrimination,
- *Yellow/YRC* (N.D. Ill. 2012) An $11 million settlement in Title VII race harassment case,
- *Pitre* (D.N.M. 2012) A $2 million settlement, plus new policies and practices to provide a work environment free of sexual harassment and retaliation, evaluation of managers on compliance with anti-discrimination laws, and a compliance monitor,
- *ABM* (E.D. Cal. 2010) A $5.8 million settlement, along with outside EEO monitor, training for investigators of harassment complaints, tracking future discrimination complaints, employee training in English and Spanish, internal compliance audits, and periodic annual reports to the EEOC, and
- *Republic Services* (D. Nev. 2010) A $3 million settlement, plus hiring of EEO compliance officer, internal audit policies and procedures, training and reports to EEOC, tracking of future discrimination complaints.

In the event that a case is not settled, the Commission has had an enormously successful trial program, with verdicts for the Commission in 9 out of 10 jury trials during FY 2013, and a trial success rate well above 50% for the last four years. Among these recent trials was the $240 million jury verdict against Henry's Turkeys, the second largest verdict ever achieved under the fed-

eral anti-discrimination statutes along with other major trial victories involving age discrimination, sex harassment, and racial harassment. It would be difficult to underestimate the law enforcement and public education value of these cases in local communities and across the Nation.

The EEOC's Appellate Services Division also has a longstanding record of success in the courts of appeals, including in such recent cases as *EEOC v. Ford Motor*, 2014 WL 1584674 (6th Cir. Apr. 22, 2014) (telework as an accommodation); *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. Mach Mining*, 738 F.3d 171 (7th Cir. 2013) (unreviewability of conciliation efforts), cert petition pending; *EEOC v. Houston Funding*, 717 F.3d 425 (5th Cir. 2013) (discrimination on the basis of lactation is sex and pregnancy discrimination); and *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; *EEOC v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012) (pattern-or-practice hiring claim may be pursued under section 706), cert petition denied.
Rather than addressing the full spectrum of the EEOC's litigation outcomes, Ms. Camille Olson's criticisms on behalf of the U.S. Chamber of Commerce are based on misleading and highly selective anecdotes.

Investigation and Conciliation

In testimony by Ms. Olson on behalf of the Chamber of Commerce, there are a number of misstatements about EEOC's failure to fulfill its statutory duty to investigate, conciliate and litigate cases. Ms. Olson greatly exaggerates our loss rate and, as noted above, focuses on a few Commission litigation losses without giving consideration to the Agency's litigation record as a whole. The losses we have had over the past few years are but a small part of the full story of the EEOC's highly successful litigation program.

Ms. Olson states that many EEOC cases have been adjudged "frivolous, unreasonable and without foundation." However, in the only specific example she gives of attorney's fees being awarded against the agency, she incorrectly states that an award of $4.7 million in *EEOC v. CRST*, a case filed by the Commission in FY 2007, was issued by the Eighth Circuit Court of Appeals. In fact, that award was issued by the district court and is currently on appeal to the Eighth Circuit. This single fee award constitutes the bulk of the $5.6 million in attorney's fees Ms. Olson cites in her testimony. The EEOC acknowledges the seriousness of any attorney's fees award against the agency, but such awards unfortunately are one of the risks involved in the agency's exercise of its responsibility to develop the law in areas where private litigants do not have the financial incentives to pursue claims involving primarily public interest issues.

In *EEOC v. CRST*, the district court dismissed the EEOC's sexual harassment class case and 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 seeking relief for them in litigation. This ruling departed greatly from prior settled law governing the EEOC's pre-suit administrative prerequisites and was, thus, unforeseen at the time the case was filed. A divided panel of the 8th Circuit upheld much of the lower court decision, but revived two individual claims and thus set aside the fees as defendant was not a prevailing party. After remand to the district court, the EEOC and defendant entered into a settlement of the remaining claim and defendant then filed a new petition for fees which the district court granted. We strongly believe the case cannot meet the standard for granting fees because the merits ruling is based on a newly established principle of law and there is a strong dissenting opinion. We remain optimistic that the 8th Circuit will rule in our favor and reverse the fees.

Ms. Olson cites the *CRST* decision as an example of EEOC's ongoing problem of poor quality investigations and conciliations and its failure to address this problem. It should be noted that the Commission filed the *CRST* lawsuit in 2007; conciliation was conducted and failed in 2006. The only other fee case she mentions is *EEOC v. Peoplemark*, which was filed in 2008. The EEOC dismissed that case voluntarily after the court refused to allow an extension of the discovery schedule for EEOC's expert to complete the expert report. The district court awarded defendant over $750,000 in fees and a divided panel of the Sixth Circuit affirmed the fee award. These two cases, which were investigated and conciliated many years ago, provide weak evidence of a current problem with EEOC's fulfillment of its administrative responsibilities.

Ms. Olson alludes to *EEOC v. Bloomberg*, a case filed in 2008, in support of her argument. This case was one of the few district courts to adopt the *CRST* conciliation ruling, and is still in litigation. Ms. Olson fails to note that almost every other district court to consider it has rejected the *CRST* conciliation standard. In *EEOC v. Cintas*, approved by the General Counsel in 2005, a class sex (female) failure to hire case, the district court dismissed the EEOC's suit relying in part on *CRST*'s ruling that EEOC must identify and conciliate for all claimants prior to filing suit. We appealed the case to the Sixth Circuit, which reversed the lower court entirely, and the Supreme Court denied certiorari. Additionally, the Seventh Circuit recently held in *EEOC v. Mach Mining*, that judicial review of conciliations is not permitted under the plain language of Title VII. The petition for certiorari is pending with the Supreme Court.

Delegation of Litigation Authority

Ms. Olson complains that too many cases have been initiated without Commission authorization. Delegation of litigation authority to the General Counsel was first established by a unanimous Commission under the Agency's 1996 National Enforcement Plan (NEP). Delegation makes sense because the EEOC's General Counsel, like the Commissioners themselves, is appointed by the President of the United States and confirmed by the Senate. Moreover, the EEOC's General Counsel is charged by statute with the conduct of litigation. Delegation serves to further organizational efficiency, reduce delay and streamline bureaucracy while freeing up the Commission to focus on policy issues. The Commission reaffirmed this delegation in the 2012 Strategic Enforcement Plan (SEP). Under the SEP, the Commission has provided specific criteria where Commission approval is required for litigation, including the requirement that at least one case from each office be submitted each year. Additionally the Office of General Counsel and other offices must submit quarterly reports assessing the delegated authority and the Commission convenes a quarterly meeting to assess how delegation is working. In the past five years, the Commission has disapproved only one case for litigation, and the General Counsel withdrew his recommendation to litigate one other case. In FY 2013, the Commission approved 15 of 16 cases presented for authorization. These facts provide little support for Ms. Olson's view that delegation of litigation authority is somehow improper or inappropriate.

The EEOC's litigation record confirms there is simply no demonstrable difference between the success in Commission approved cases and those delegated to the General Counsel. The Commission is generally successful regardless of the level of approval but has also lost cases approved by the Commission or the General Counsel. For example, the Agency won 9 out of 10 jury trials in FY 2013 – all of these cases were delegated to the General Counsel. Simply put, Ms. Olson makes no attempt to construct an empirically-based argument that additional Commission review would have any effect on the outcome of EEOC litigation.

The history of the review process for Americans with Disabilities Act (ADA) litigation demonstrates the flaws of Ms. Olson's arguments. In 1999, following a trilogy of Supreme Court decisions limiting coverage under the ADA, the General Counsel agreed to depart from the delegation of authority set forth in the NEP and to send all ADA cases to the Commission. The delay resulting from the additional layers of review by the Commissioners and their staffs of otherwise uncontroversial cases created a disincentive to develop these cases and the numbers declined accordingly. Yet, in FY 2009 when then-General Counsel Ronald Cooper stopped sending ADA cases to the Commission and returned to the delegation originally set forth in the 1996 NEP, the number of cases enforcing the ADA increased significantly without any change in quality or success. Due in part to the streamlined litigation approval process, during the first years of the Americans with Disabilities Act Amendments Act (ADAAA), the Commission has been able to dramatically increase its enforcement of the ADA on behalf of discrimination victims, including

those with impairments often difficult to cover prior to the ADAAA, such as diabetes, cancer, epilepsy, and some intellectual disabilities.

In criticizing the delegation of authority to the General Counsel, Ms. Olson refers to the *Kaplan* and *Freeman* cases, involving the use of credit and conviction record checks in employment. It is true that both cases were dismissed by the district courts which rejected EEOC's expert reports. However, both cases were approved by the Commission – *Freeman* in 2009 and *Kaplan* in 2010. The *Freeman* case is pending appeal to the 4th Circuit. The *Peoplemark* case, which also involved conviction records and was filed in 2008, was also approved by the Commission. Ms. Olson criticizes the filings of *Dollar General* and *BMW*, two pending Commission disparate impact cases involving criminal background checks. Both of these cases were approved by the Commission in 2012 and filed in 2013.

Ms. Olson also makes reference to 15 different offices authorizing litigation. However, all litigation must be submitted to the Office of General Counsel for approval. Thus the General Counsel has controls in place for review of all delegated litigation authority. These decisions are not made by 15 different managers in the field. As part of the review process, OGC examines the conciliation efforts in the case and, on occasion, will return cases to the field for further conciliation if it appears those efforts will further the Commission's enforcement efforts.

Finally, Ms. Olson states that 75 to 80 cases were approved by the Commission during the years 2000 to 2005. However, public information available on the EEOC's external website shows that her figures are incorrect. The Commission indeed approved 73 cases in FY 2001, but only approved 51 to 58 cases from FY 2002 to 2005. During this same period, the Agency filed 431 lawsuits in FY 2001 and 332 to 383 in FY 2002 to 2005. These figures must be placed in perspective to have meaning. The Agency filed many more cases in those years than it has in more recent years. Moreover, during the FY 2000-2005 period cited by Ms. Olson, the General Counsel was sending all ADA cases to the Commission solely based on the Supreme Court rulings sharply limiting the definition of disability. These two factors led to a large number of cases submitted to the Commission for approval during this time period. As previously mentioned, the General Counsel changed this procedure in FY 2009, after the ADAAA was enacted. In that year and in later years, the number of cases sent to the Commission decreased substantially. This explains Ms. Olson's observation that the General Counsel submitted more cases to the Commission in years past. And while Ms. Olson observed that the Commission only authorized 15 cases from FY 2010 to 2012, she fails to mention that in FY 2013, the first year after the SEP was enacted, the Commission authorized 15 cases for litigation.

Appellate and Amicus Program

As noted above, the Appellate Services Division has been a critical and highly successful part of the Commission's direct litigation efforts since the Agency opened its doors. In addition to handling appeals in Commission cases, Appellate Services files *amicus curiae* briefs on behalf of the Commission, and the ability to present the Commission's views in private cases is one of the EEOC's most important legal enforcement tools. By way of background, it is important to note that the Commission's *amicus* participation and the positions advanced in court are authorized by the full Commission. For the dozen cases cited by the Chamber that were decided in FY 2013, participation was unanimously approved in eight cases, and in three others participation was approved by three out of four Commissioners, and in one participation was approved by three out of five Commissioners. We disagree with the Chamber's standards for measuring the success of the Commission's *amicus* efforts, and have several observations to offer about the Chamber's conclusions about the cases decided in FY 2013.

First, it is important to realize that the private cases in which the Commission files briefs are cases in which there will be an appeal and a decision from an appellate court whether the EEOC participates in the case or not, and thus we participate as *amicus curiae* in some cases which we, as an enforcement agency, might not have brought, or appealed, in the first instance. We choose to weigh in on specific legal issues that may not be dispositive in the case simply because we want courts to be aware of the Commission's view of the proper analysis of that particular legal issue. Thus, some cases where the outcome is not favorable for the plaintiff nevertheless represent successes to us because the court agreed with our position on one of the issues we addressed. For example, although the Chamber counts the decision in *McKinley v. Skyline Chili, Inc.*, 2013 WL 5811647 (6th Cir. Oct. 29, 2013) as a "loss" for the Commission, we consider it a partial victory because the court of appeals agreed with the Commission's view that the plaintiff's complaint to Human Resources could constitute protected opposition under the anti-retaliation provisions of Title VII and the ADEA. Advocating an expansive interpretation of what constitutes protected conduct for purposes of the anti-retaliation provisions is obviously of the highest priority to the Commission because enforcement depends, for the most part, on people being willing to come to the enforcement agencies to complain about discrimination; thus this "win" was quite significant to our overall program efforts.

Second, we would emphasize that persuading courts we are right about the procedural arguments we advance is just as important, and just as much a priority, as persuading them to accept our arguments about substantive interpretations of the statutes we enforce or the governing legal standards that should be applied to claims brought by victims of discrimination. Thus, we would not separate out the three cases in FY 2013 in which we persuaded the courts on procedural points as did the Chamber, and it is not at all clear to us why the Chamber has made that distinction. One of these decisions is a case that addressed both procedural and substantive points of

concern to the Commission. See *Mandel v. M&Q Packaging*, 706 F.3d 157 (3d Cir. 2013) (court agreed with EEOC that under *National Railroad Passenger Corp. v. Morgan*, all acts of harassment should have been considered; that an affidavit attached to an EEOC charge contains admissible facts that should have been considered by the court; and that the welcomeness question should have gone to the jury). In *Ellis v. Ethicon*, 529 Fed. Appx. 310 (3d Cir. 2013), which the Chamber discounts as addressing a "procedural" issue, the court of appeals decided a significant question about appropriate remedies in an ADA case, which is a substantive, not a procedural question. There, the court held that reinstatement can be an appropriate remedy despite an ADA plaintiff's failure to mitigate her damages by seeking comparable employment after termination. Finally, although it is probably accurate to describe the result in *Boaz v. FedEx Customer Info. Sys., Inc.*, 725 F3d. 603 (6th Cir. 2013), as addressing a procedural issue, because the court held that an employment contract cannot shorten the statute of limitations under the Equal Pay Act, the Commission is as proud of its success on that procedural point as it is of persuading the courts on substantive interpretations. It has long been a Commission priority to file briefs that will ensure individuals are not unfairly denied the opportunity to litigate their claims in court because of procedural technicalities, particularly erroneous applications of limitations rules.

Confining our survey to the decisions reported in FY 2013 then, the Commission would say it had a 50% success rate rather than the 80% failure rate the Chamber ascribes to our efforts. Our math is a little different from the Chamber's because we did not file a brief in *DR Horton v. NLRB* in the Fifth Circuit, and thus the total number of decisions is twelve rather than thirteen, and counting the "procedural" and partial "wins" together with the two substantive "wins" the Chamber notes, means that we had prevailing arguments in six of the twelve cases in which we participated.

More significantly, we think the Chamber's emphasis on a single year's decisions provides an unhelpful and not particularly representative snapshot of the Commission's *amicus* program. We have surveyed the decisions in cases in which we participated as *amicus curiae* since FY 2009, and have found that in the 97 cases that culminated in decisions, the courts adopted EEOC's positions in 62, which represents a success rate of 64%. In thinking about the overall success of the *amicus* program, it is crucial to remember that the Commission advances the same legal interpretations in courts all over the country, and the same argument may be persuasive to one circuit and not to another. Thus the rejection of a particular position by one court in one year really cannot be a referendum on the success of the program or the soundness of the EEOC's interpretations of the statutes it enforces. While one might be tempted to think the Supreme Court's rejection of EEOC interpretations reflects the final word about the correct reading of the statutes, so that the Court's opinions in FY 2013 in *Vance v. Ball State* and *University of Texas Southwestern Medical Center v. Nassar* could be read as more significant rejections of Commission views, it is important to keep even those losses in perspective. Over the last thirty years, there have been a huge number of Supreme Court decisions that deferred to and/or unanimously endorsed

EEOC interpretations of the laws it enforces, particularly in the areas of sexual harassment and retaliation, as well as all of the procedural questions that have reached the Supreme Court. See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems*, 507 U.S. 959 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Ellerth v. Burlington Industries*, 524 U.S. 951 (1998); *Oncale v. Sundowner Offshore Services*, Inc., 523 U.S. 75 (1998); *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Crawford v. Metropolitan Government of Nashville*, 555 U.S. 271 (2009); *Thompson v. North American Stainles*, 131 S.Ct. 863 (2011).

On the other hand, in the cases in which the Court has rejected Commission views, in virtually every case, there has been an immediate or subsequent legislative override of the Court's interpretation of the statutes EEOC enforces. Thus, Congress enacted the Pregnancy Discrimination Act after the Court rejected the Commission's interpretation of the scope of the prohibition on sex discrimination in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Congress enacted various provisions of the Civil Rights Act of 1991 in direct response to the Court's rejection of Commission interpretations of the law (some of which were not presented in *amicus curiae* briefs filed by the Government) in, for example, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Congress rejected the Court's reading of the ADEA's prohibition of discrimination in fringe benefits in *Public Employees Retirement system of Ohio v. Betts*, 492 U.S. 158 (1989) and codified the EEOC's equal cost/equal benefit rule in the Older Workers Benefit Protection Act. Congress rejected the Court's view of the time for filing a pay discrimination claim in *Ledbetter v. Goodyear tire & Rubber*, 550 U.S. 618 (2007), and codified the EEOC's preferred rule when it enacted the Lily Ledbetter Fair Pay Act in 2009. Although the Court rejected the Commission's interpretation of the definition of disability under the ADA in a trilogy of cases, *Sutton v. United Air Lines*, 527 U.S. 471 (1999), *Murphy v. UPS*, 527 U.S. 516 (1999), and *Albertson's v. Kirkingburg*, 527 U.S. 555 (1999), Congress enacted amendments in 2008 restoring the original intent of the coverage provisions and codified the very "mitigating measures" rule the Commission had advocated in those cases.

Our point is simply that a one-year snapshot does not give a meaningful picture of the EEOC's *amicus* enforcement efforts, and that a focus on whether particular courts of appeals have accepted or rejected Commission positions does not tell the most important part of the story if one is interested in whether the Commission advocates enforcement views consistent with the intent of Congress in enacting the anti-discrimination statutes.

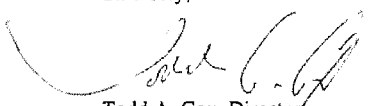
Conclusion:

We all understand that 50 years in the eyes of history is a significant but brief window of the progress that the EEOC has made in achieving our goal of achieving equal opportunity in our

nation's places of work. By many indicators, that movement has been seismic and our progress evident. As we noted previously, the EEOC's mission to eradicate discrimination from our nation's workplaces has not yet been realized. Until then, the Commission will continue to prevent, stop and remedy unlawful employment discrimination.

We appreciate the opportunity to comment on our efforts and to provide additional information on the EEOC's enforcement and regulatory priorities for the hearing record. We look forward to continuing to work with Congress to ensure the nation's workplaces are free of discrimination.

Sincerely,



Todd A. Cox, Director
Office of Communications
and Legislative Affairs

Appendix A: Appropriations Report Arrest and Convictions Outreach

Report to the Committees on Appropriation

Public Outreach and Education Efforts Concerning EEOC Guidance on Arrest and Convictions Records

July 2013

Equal Employment Opportunity Commission

1. Introduction

On March 26, 2013, President Obama signed the continuing resolution funding government operations for the remainder of the fiscal year (PL 113-006). In addition to providing funding for the Equal Employment Opportunity Commission's (EEOC) operations for the rest of FY 2013, the House and Senate Committees on Appropriations included several reporting requirements that went into effect upon enactment. The Committees directed EEOC to report on the agency's public education and outreach efforts aimed at alleviating confusion about its guidance on the use of arrest and conviction records in employment decisions. The Committee language on the reporting requirement said:

> *Guidance on criminal background checks.*—Section 544 of H.R. 5326 of the 112th Congress is not included. The EEOC recently finalized new guidance regarding the use of criminal record checks, without regard for a directive proposed by the Senate that such guidance should be circulated for public comment at least six months before adoption. The EEOC is directed to report to the Committees on Appropriations within 120 days of enactment of this Act detailing the steps it has taken to alleviate confusion about the new guidance.

The EEOC has a comprehensive outreach program in place to educate employers and workers about the applicability of its updated guidance on the use of arrest and conviction records in employment.

2. Background

On April 25, 2012, the Commission, in a 4-1 bi-partisan vote, issued its *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. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's Race and Color Discrimination Compliance Manual Chapter. The Guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

While Title VII does not prohibit an employer from requiring applicants or employees to provide information about arrests, convictions or incarceration, it is unlawful to discriminate in employment based on race, color, national origin, religion, or sex. The guidance approved in 2012 builds on longstanding guidance documents that the EEOC issued over twenty years ago. The Commission originally issued three separate policy documents in February and July 1987 under Chair Clarence Thomas and in September 1990 under Chair Evan Kemp explaining when the use of arrest and conviction records in employment decisions may violate Title VII.

The Commission also held public meetings on the subject in 2008 and 2011. The 2012 Enforcement Guidance is predicated on, and supported by, federal court precedent concerning the application of Title VII to employers' consideration of a job applicant or employee's criminal history and incorporates judicial decisions issued since passage of the Civil Rights Act of 1991. The guidance also updates relevant data, consolidates previous EEOC policy statements on this issue into a single document and illustrates how Title VII applies to various scenarios that an

employer might encounter when considering the arrest or conviction history of a current or prospective employee. Among other topics, the guidance discusses:

- How an employer's use of an individual's criminal history in making employment decisions could violate the prohibition against employment discrimination under Title VII;
- Federal court decisions analyzing Title VII as applied to criminal record exclusions;
- The differences between the treatment of arrest records and conviction records;
- The applicability of disparate treatment and disparate impact analysis under Title VII;
- Compliance with other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records; and
- Best practices for employers.

The Guidance was developed by the Commission with input from many members of the public. Representatives of employers, individuals with criminal records, and other federal agencies testified at public EEOC meetings in November 2008 and July 2011. The Commission also received and reviewed approximately 300 written comments from members of the general public and stakeholder groups that responded to topics discussed during the July 2011 meeting. The stakeholders that provided statements to express their interests and concerns include prominent organizations such as the NAACP, the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), 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, among others.

Additionally, 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. Groups involved providing input to EEOC personnel during the development of this guidance included the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, the National Employment Law Project, and the Equal Employment Advisory Council.

3. Media Outreach

With the approval of the Enforcement Guidance in April 2012 the EEOC used this opportunity to begin a coordinated effort to educate the public about this issue. To reach as broad an audience as possible with information concerning the use of arrest and conviction records in employment, the EEOC distributed a press release announcing the approval of the revised guidance to more than 500 members of the media, posted the information on our public website (www.eeoc.gov) and utilized the social media tool, Twitter. The press release included links directly to the guidance, as well as to a question-and-answer document addressing frequently asked questions in a user-friendly plain-English format. The press release is available

at www.eeoc.gov/eeoc/newsroom/release/4-25-12.cfm and the question-and-answer document is at http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

Staff provided these materials to reporters and responded to inquiries – answering questions and providing information on the guidance and EEOC's position – numerous times since the guidance was approved. EEOC's efforts resulted in numerous stories – reaching millions of subscribers and readers nationwide. Highlights of the news coverage include:

- New Gov't Guidance on Employee Background Checks
  AP / The Washington Post, Bloomberg Business Week and others, April 25, 2012
  www.businessweek.com/ap/2012-04/D9UC7I0G2.htm
- Equal Opportunity Panel Updates Hiring Policy
  The New York Times, April 25, 2012
  www.nytimes.com/2012/04/26/business/equal-opportunity-panel-updates-hiring-policy.html
- US Gives Employers Fresh Advice on Background Checks
  Reuters / The Chicago Tribune and others, April 25, 2012
  http://articles.chicagotribune.com/2012-04-25/business/sns-rt-usa-employmentbackgroundchecksl2e8fp9u1-20120425_1_background-checks-job-seekers-employers
- How do we respond to arrests and convictions?
  HR.BLR.com, July 20, 2012 http://hr.blr.com/HR-news/Staffing-Training/Background-Checks/How-do-we-respond-to-arrests-and-convictions/
- New Rules Set on Background Checks for Job Seekers
  MSNBC, April 25, 2012
  http://bottomline.msnbc.msn.com/_news/2012/04/25/11394190-new-rules-set-on-background-checks-for-job-seekers?lite
- EEOC Revises Rules on Job Seekers With Criminal Records
  McClatchy Newspapers / The Miami Herald, the Pittsburgh Post-Gazette and others, April 25, 2012
  www.miamiherald.com/2012/04/25/2767832/eeoc-revises-rules-on-job-seekers.html#storylink=cpy
- EEOC Issues New Guide on How Employers Should Screen Job Candidates' Criminal Records *The Minneapolis Star Tribune, April 25, 2012*
  www.startribune.com/blogs/148971705.html
- Employers Advised on Considering Arrest Records
  The Wall Street Journal / MarketWatch, April 25, 2012
  www.marketwatch.com/story/employers-advised-on-considering-arrest-records-2012-04-25
- New Gov't Guidance on Employee Background Checks
  *CBSNews.com, April 25, 2012*www.cbsnews.com/8301-505245_162-57421493/new-govt-guidance-on-employee-background-checks/

Similarly, EEOC staff provided editorial writers with information and materials that led to several pieces in major daily newspapers:

- A Second Chance for Ex-Offenders (editorial)
  The New York Times, June 19, 2013
  http://www.nytimes.com/2013/06/20/opinion/a-second-chance-for-ex-offenders.html
- A Fair Shot at a Job (editorial)
  The New York Times, April 21, 2012
  http://www.nytimes.com/2012/04/22/opinion/sunday/a-fair-shot-at-a-job.html?_r=1
- After They Check the Box (editorial)
  The New York Times, April 29, 2012
  http://www.nytimes.com/2012/04/30/opinion/after-they-check-the-box.html?_r=1&pagewanted=all
- Criminal Record Shouldn't Be a Barrier to Work: Maryland Missed a Chance to Improve Opportunities for Workforce Reentry (editorial)
  The Baltimore Sun, May 2, 2012
  http://www.baltimoresun.com/news/opinion/oped/bs-ed-worker-reentry-20120502,0,4693407.story

Despite our best efforts, there was some misinformation circulating on the internet and in the media in the weeks following the vote to approve the guidance. To combat this misinformation, the EEOC developed a short *What You Should Know* document that was posted on the EEOC website, distributed through social media and used by EEOC staff to answer inquiries. The *What You Should Know* document is available at www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm

Additionally, the EEOC responded to negative editorials in an effort to correct misinformation.

- No major change in EEOC guidelines
  Victoria A. Lipnic, EEOC Commissioner
  The Washington Examiner, June 11, 2012
  http://washingtonexaminer.com/article/706776
- There's No Peril in Following EEOC's Hiring Guidance
  Peggy Mastroianni, EEOC Legal Counsel
  The Wall Street Journal, March 5, 2013
  http://online.wsj.com/article/SB10001424127887323978104578334672164551446.html
- We Don't Ban Background Checks
  Jacqueline A. Berrien, EEOC Chair
  The Wall Street Journal, June 21, 2013
  http://online.wsj.com/article/SB10001424127887323893504578555722405188406.html

The press release, *Questions and Answers* and the *What You Should Know* have been attached as Appendix A.

4. Congressional Outreach

Due to immense public interest in the guidance, the Commission engaged in a robust congressional outreach campaign to educate Members of Congress and their staffs with an emphasis on members who have taken leadership roles on this issue. The campaign featured targeted distributions to the agency's key congressional partners to assist them in responding to constituent inquiries and employer concerns about the Guidance. The efforts helped to increase public awareness about important details of the guidance and mitigate misinformation about what the Guidance does and does not permit.

Highlights of EEOC's outreach included:

- Coordinating/conducting congressional staff briefings on the Guidance.
- Coordinating/conducting congressional member briefings on the Guidance.
- Responding to congressional requests for information on the Commission's updated Guidance.
- Circulating informational materials to members of the agency's appropriations and authorizing committees in the House and Senate.
- Information dissemination to supporters of the Second Chance Reauthorization Act of 2011.
- Providing educational materials to congressional caucuses who have an ongoing concern in the issue.

5. Public Testimony

On December 7, 2012, in testimony before the U. S. Commission on Civil Rights (USCCR), Carol Miaskoff, Acting Associate Legal Counsel for the EEOC, summarized the EEOC's enforcement guidance. She noted that the 2012 Enforcement Guidance is rooted in a long line of EEOC administrative and federal court decisions that applied Title VII analysis to determine if individuals with known convictions experienced unlawful employment discrimination when they were not hired. The EEOC Commissioners' first administrative decisions on such Title VII private sector charges were issued in the late 1960s and 1970s, and continued into the 1980s when the EEOC Commissioners delegated this authority to staff as the number of charges increased. Federal courts, in turn, issued Title VII opinions assessing such alleged discrimination starting in 1970 and, most recently, in 2007. The application of Title VII to criminal record screening, under both disparate treatment and disparate impact analysis, is clearly established.

She described how the EEOC decided in 2012 to issue its updated Enforcement Guidance for several reasons. First, the EEOC's 1987 and 1990 documents were issued before enactment of the Civil Rights Act of 1991. This Act amended Title VII to expressly incorporate the elements and the burdens of proof for disparate impact analysis, including interpreting the employer's burden of showing that its policy or practice is job related and consistent with

business necessity in light of the Supreme Court's decision in *Griggs v. Duke Power Co.*[1] Second, in 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority*[2] called upon the EEOC to update its three 1987 and 1990 documents. The Third Circuit also analyzed how to harmonize the risk-based analysis of criminal records exclusions with Supreme Court disparate impact precedent that largely focuses on the relevance of test results to job qualifications.

Third, statistics show that the number of Americans with criminal records in the working-age population has increased significantly since 1990, meaning that substantially more people now face the challenges of entering the workforce after an arrest or conviction than in 1990. Finally, with the advent of the Internet, criminal records are easily available to employers but, at the same time, still include data that may be inaccurate, incomplete, or misleading. The 2012 Enforcement Guidance takes account of all of these factors.

Ms. Miaskoff's testimony summarized the 2012 enforcement guidance – deliberately and thoughtfully explaining the guidance and touching on issues of concern or confusion. She also took questions from Members of the USCCR and supplied supplemental answers as well as a time-line for the record. The testimony and supplemental materials are attached in Appendix B.

It is also important to note that EEOC Commissioner Victoria A. Lipnic provided a statement to the USCCR for the December 7, 2012, hearing. She noted that "it is my view that having issued the Revised Guidance, the Commission should now undertake efforts to let employers know, with specificity, what they *can* lawfully do with respect to developing criminal history policies, not merely what we believe they cannot. Since adoption of the Revised Guidance earlier this year, I have championed, and will continue to champion, such an effort, as it is my belief that where any administrative agency is going to hold a stakeholder to a standard, through the investigatory or litigation process, it is incumbent upon the agency to make that standard clear and explicit. In my view, the EEOC should be as much about educating employers about compliance with the law as it is about investigating and litigating charges."

6. Public Outreach

To increase public awareness and educate stakeholders, including the business community, about the *Enforcement Guidance*, the Commission has conducted a significant amount of outreach and technical assistance since its approval on April 25, 2012. The EEOC headquarters program offices as well as our 53 field offices joined in the effort. For the period April 25, 2012 to June 30, 2013, the Commission has conducted over 500 events on the topic and reached almost 45,000 individuals. This is in addition to the nearly 3,500 phone calls our Intake

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[1] 401 U.S. 424 (1971). *See* 42 U.S.C. 2000e-2(k)(1)(A); 137 CONG. REC. 15273 (1991) (statement of Sen. Danforth).

[2] 479 F.3d 232 (3d Cir. 2007).

Information Group responded to on the topic and the several hundred inquiries received directly by the field offices.

The Commission's Office of Legal Counsel (OLC) alone has averaged 4-8 presentations each month that include the arrest and conviction topic. OLC staff have spoken to various audiences, but mainly the employer and the legal community around the country. In addition, the EEOC Training Institute which provides the bulk of the services to the employer community has already held 14 technical assistance seminars in FY 2013 where specific training was provided on the *Enforcement Guidance*. This is significant because these seminars range in attendance from 75-400 participants. For example, EEOC General Counsel David Lopez presented on the topic at two technical assistance seminars this year - in Albuquerque, New Mexico and Lexington, Kentucky - reaching approximately 300 people. Acting Associate Legal Counsel Carol Miaskoff gave a presentation on the *Enforcement Guidance* at the Commission's last national training conference, August 2012, in Dallas, Texas, with approximately 400 attendees.

Specific Sample Outreach Activities

The list below highlights events conducted around the country to various audiences concerning the use of arrest and convictions records and the *Enforcement Guidance*. Notably, EEOC Updates from the Office of Legal Counsel always include discussion about the use of arrest and conviction records.

- Legal Counsel Peggy Mastroianni made an EEOC Update presentation during a seminar sponsored by the law firm of Capell and Howard and the Society for Human Resource Management (SHRM) in Montgomery, AL. In addition, she gave an EEOC Update and a Case Law Update at the Upper Midwest Employment Law Conference held in St. Paul, MN.

- Legal Counsel Mastroianni made a presentation on the *Enforcement Guidance* to the National Association of Attorneys General.

- Acting Associate Legal Counsel Carol Miaskoff gave an EEOC Update to the International Foodservice Distributors Association in Washington, D.C. and at an event sponsored by the Research Triangle Industry Liaison Group in Chapel Hill, NC.

- Senior Attorney Advisor Tanisha Wilburn made a presentation on the *Enforcement Guidance* during an event entitled "Breakfast Briefing: When Using Criminal Background Checks is Discriminatory." The event was sponsored by the Women's Bar Association of the District of Columbia. In addition, she also made a presentation in Chicago on the Commission's *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII* to a Task Force on Inventorying Employment Restrictions impaneled by the State of Illinois.

- Assistant Legal Counsel Corbett Anderson gave an EEOC Update and a general overview of laws enforced by the Commission to business executives of PBS and public radio stations at the annual conference of the Public Media Business Association in Washington, DC. He

also along with Senior Attorney Advisor Davis Kim made separate presentations at a TAPs sponsored by the Washington Field Office in McLean, Virginia where he gave an overview of the EEOC's Strategic Enforcement Plan and made a Legal Update presentation that included discussion of the Enforcement Guidance.

- Senior Attorney Advisor Jeanne Goldberg made an EEO update presentation on the new RFOA regulation, the new Enforcement Guidance on Arrest and Conviction Records, and a variety of other topics to the Industry Liaison Group and the Northwest EEO/Affirmative Action Association in Portland, OR.

- Carol Miaskoff and Senior Attorney Advisor Tanisha Wilburn made presentations at the FEPA conference in St. Louis on the new Enforcement Guidance on Arrest and Conviction Records.

- Charlotte District Office Trial Attorney Edward Loughlin spoke about harassment and EEOC's guidance on arrest and conviction records at the annual meeting of Sibley Hospital/Johns Hopkins Medicine.

- Los Angeles District Office Program Analyst Christine Park-Gonzalez provided training on the new arrest and convictions guidance issued by the EEOC to a group of about 10 re-entry service providers in conjunction with the WorkSource center in South Los Angeles. Ms. Park-Gonzalez co-presented with Jane Suhr, L.A. District Director for the DOL Office of Federal Contract Compliance Programs on services that both the EEOC and DOL can offer their clients who have trouble obtaining employment due to their criminal histories. In addition, she also conducted a presentation on the new EEOC guidance on arrest and conviction records for approximately 30 staff for the New Start WorkSource program in Los Angeles. The staff specializes in providing services for ex-offenders.

- St. Louis District Office Director James Neely, Deputy L. Jack Vasquez and Dana Engelhardt, Supervisory Investigator, represented the Commission at OFCCP's all day seminar, *Building Partnerships through Education and Outreach*, in St. Louis, Missouri where they presented on the ADAAA, Arrest and Conviction Records and LGBT issues.

- Seattle Field Office, Program Analyst Rodolfo Hurtado presented a workshop on "Case Processing and Mistakes Made by Employers." The workshop included an overview of the recently published "Enforcement Guidance on Arrest and Conviction Records" in Lewiston, ID.

- Tampa Field Office Director Georgia Marchbanks and Enforcement Manager Edwin Gonzalez-Rodriguez conducted a training workshop for attendees of the 5th Annual Re-Entry Expo at the Hillsborough County Lee Davis Neighborhood Service Center in Tampa FL. The presentation covered all the laws enforced by the EEOC with a focus on arrest and conviction records and the EEOC's investigative process.

- New Orleans Field Office Program Analyst Tydell Whitfield, met with five stakeholders representing the Justice & Accountability Center of Louisiana. The topic for this meeting

was the EEOC's guidance on arrest and conviction records. The stakeholders assist young adults/student workers who have been arrested and or convicted in getting their records expunged in order to have a better opportunity in obtaining employment.

- A presentation entitled Reentry: Arrest, Conviction and Credit Background Checks in the Workplace were provided before clients of Good Seed Good Ground, Inc. (a non-profit organization for troubled youth in Newport News, VA.) The presentation covered the origin and application of the adverse/disparate impact theory of employment discrimination, highlighted EEOC's guidance on pre-employment inquiries – such as arrest, conviction, and credit histories, the charge processing procedures and discussed all of EEOC's anti-discrimination in employment laws.

- Tampa Field Office Enforcement Supervisor Tracy Smith provided the members of the Task Force of Citrus County an overview of the Commission's guidance on Arrest and Conviction Records in Inverness, FL.

- In Orlando, Tampa Field Office Senior Trial Attorney Gregory McClinton covered the use of Arrest and Conviction Records in his Technical Assistance Program Seminar (TAPS) presentation entitled, "*Hiring, Firing and Best Practices in the FaceBook, LinkedIn and Google Generation*". *In addition,* in Gainesville, Florida, the City of Gainesville Office of Equal Opportunity invited Miami District Office Senior Trial Attorney Muslima Lewis to speak on the topic of Arrest and Conviction Records at their Employment Law Seminar.

- San Francisco District Office Trial Attorney Sirithon Thanasombat presented on the EEOC's Enforcement Guidance on arrest and conviction records in employment decisions to the San Francisco Reentry Council. (Maurice Ensellem of National Employment Law Project spoke on the ETA guidance.) There were 20 distinguished council members representing the offices of the mayor, DA, law enforcement, city supervisors and advocacy groups) and about 70 public audience members. Reentry Policy Coordinator Verónica Martínez received several calls from people who thought the presentation was excellent and much needed, and there are requests to share the information with the California Reentry Council Network.

- Atlanta District Office Program Analyst Terrie Dandy participated, with a host of civic organizations, advocates and CBOs, in the "Ban-the-Box" program at the Atlanta City Hall, in recognition of Mayor Kasem Reid's commitment to ban-the-box for the City of Atlanta. The City of Atlanta is the first employer to ban-the-box in the State. Participating organizations include 9to5 (lead), NELP, GA Justice Project, NAACP, churches, The Center for Working Families, and others. Local media covered the event. In addition, in partnership with the Center for Working Families, PA Terrie Dandy conducted workshops on the use of arrest and conviction records in employment for ex-offenders.

- Birmingham District Office Program Analyst Eddi Abdulhaqq made a presentation to approximately 50 inmates scheduled for release from the Pensacola Federal Prison Camp. She provided information about the EEOC's laws, procedures, and guidance on the use and consideration of arrest and conviction records. In addition, she was also one of three

presenters at a re-entry workshop for inmates scheduled for release from the St. Clair County Correctional Facility.

- The Charlotte District Office Program Analyst Marilyn Booker provided two oral presentations on EEOC's "Employer Best Practices" as outline in the 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 before the employment committee, as well as, the general membership of the Norfolk Reentry Council. The employment committee met prior to the full Reentry Council. In addition, Ms. Booker also gave a presentation entitled "Arrest and Conviction Records in Employment Decisions: What YOU Need to Know" before the forty (40) clients of the staff of Virginia CARES, in Fredericksburg, VA.

- EEOC participated as a panelist during the Prisoner Re-entry: Issues and Initiatives workshop which was a part of the 3-day Spring 2013 Joint Conference. Marilyn S. Booker, Program Analyst provided a presentation covering considerations of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. The BRPO-POSSESS-VASWP is a network of Benefit Program Specialists' and Social Work Practitioners' groups across the Commonwealth of Virginia.

- EEOC information relative to arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964 (namely the Arrest and Conviction Records in Employment Best Practices brochure) was distributed to approximately fifty vendors who participated in the Apprenticeship Career Fair in Charlotte.

- Carolyn King, Charlotte CRTIU Supervisor disseminated the following handouts to the attendees at the Restoration of Rights Forum: "What you Should Know About the EEOC and Arrest and Conviction Records", "Pre-Employment Inquiries and Arrest & Conviction", and "Facts About Race/Color Discrimination" (Title VII).

- John Hendrickson, Chicago District Office Regional Attorney, participated as a co-presenter at the "Indiana Journal of Law and Social Equality Symposium" held at the Indiana University Maurer School of Law in Bloomington, IN. The EEOC presentation on "Hot Button Issues in EEOC Litigation under the New Strategic Enforcement Plan" covered hiring issues and the EEOC's newer guidance on the use of arrest and conviction records and drew 100 attorney participants, nationwide, from the plaintiff's bar.

- In an ongoing partnership with the Wisconsin Department of Corrections, Maria Flores, Program Analyst, Milwaukee Area Office, conducted workshops on May 22, 2013 and June 19, 2013 to incarcerated offenders, an underserved population, participating in job-readiness programs at State correctional facilities. The workshop was conducted at one facility and was simultaneously video cast to multiple institutions across the state and in geographically underserved areas, reaching a total of 257 male and female offenders, including a significant number of African-Americans. In addition, Ms. Flores was also interviewed by the host of the radio program "Community Concepts" on the LocalJobNetwork.com radio station in Milwaukee. The purpose of the radio interview was to review EEOC's enforcement guidance on the use of arrest and conviction records in employment decisions under TVII.

- Dallas District Office Enforcement Supervisor Belinda McCallister talked about arrest and conviction records at a, Teens in Crisis, event in Dallas.

- Detroit Field Office Director Gail Cober presented to 35 members of the Statewide Re-Entry Group Workgroup on the EEOC Conviction Record Policy Guidance. Ms. Cober reviewed the policy with the group and discussed how the EEOC investigates and analyzes such cases.

- Indianapolis-Marion County City Council invited EEOC to conduct a presentation on EEOC's guidelines on the re-entry program on Arrests & Convictions. Indianapolis District Office Program Analyst Phyllis Wells conducted a presentation on EEOC's Best Practices on the re-entry program for 43 employers and 25 City Council Members. She also conducted a presentation on Arrests and Convictions for 75 HR members of the chamber and surrounding rural communities at the Richmond Chamber of Commerce in Richmond, Indiana.

- Reviving the Heart of Workforce Development: Cincinnati Area Director Wilma Javey conducted a presentation on the proper use of utilizing criminal background checks when past felons and offenders are looking for employment opportunities to a group of 64 employers and the Hamilton County Office of Re-entry and also how to adopt a fair hiring policy.

- Los Angeles Enforcement Manager Patricia Kane represented the EEOC at the Jericho Training Center in Los Angeles for a collaborative partners meeting centered on services for the ex-offender community in the greater Los Angeles area.

- Los Angeles District Office Investigator Richard Burgamy gave a presentation at the Cal State Reentry Initiative in San Bernardino, California, a community-based organization focused on assisting ex-offenders with re-entry into society. The training was also conducted in conjunction with the DOL WHD West Covina District.

- Memphis Investigator Michael Hollis gave a presentation to the Community Outreach Board of the U. S. Bureau of Prisons on background checks and Arrest and Conviction Records of formerly incarcerated individuals to 30 attendees. The meeting was held at the U. S. Federal Prison at Camp Millington, TN.

- Tampa Field Office Enforcement Supervisor Tracy Smith spoke before an audience of 65 people at the Florida Council for Community Mental Health Human Resource forum on the topic of Arrest and Conviction Records.

- Miami District Office District Resource Manager Michael Bethea, Chief Administrative Judge Patrick Kokenge and Investigator Sergio Maldonaldo participated in the quarterly South Unit Re-entry Fair at the South Florida Reception Center in Miami FL. The eight different organizations in attendance, including EEOC, gave presentations about the assistance that could be provided to the soon to be ex-offenders. In total, there were approximately 100 inmates present from different prisons around south Miami-Dade County.

Each inmate was given a handout on the laws we enforce and myth-busters handouts to assist them in their future endeavors.

- Denver Program Analyst Patricia McMahon met with advocates from the Colorado Criminal Justice Reform Coalition to provide an EEOC overview and guidance on criminal records and background check.

- Washington Field Office Program Analyst Andrea Okwesa attended the monthly meeting of the DC Criminal Justice Coordinating Council (CJCC), Employment/Training Workgroup, and continuing efforts to assist the Reentry Committee in drafting a model, local arrest & conviction policy to provide guidelines for DC employers addressing the hiring of people with criminal records. She also attended the 9th Community Reentry & Expungement Summit in Washington, DC, sponsored by the DC Public Defender Service. It featured presentations & exhibit/resource.

- New York District Office Trial Attorney Jeffrey Burstein spoke about the Commission's Guidance on arrest and conviction records at a program sponsored by Law Seminars International.

- On September 26, Senior Attorney Advisor Tanisha Wilburn made a presentation on the recently issued Enforcement Guidance on the "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" and on the Federal Interagency Reentry Council during an event entitled "Time for Excellence" in Chicago, IL. The event was sponsored by Illinois State Representative La Shawn K. Ford and was targeted for individuals with criminal records and organizations that provide services to such individuals.

- Dallas District Director Janet Elizondo and CRTIU Supervisor Belinda McCallister attended the Felony/Misdemeanor Friendly Career Fair in Dallas. They discussed the latest EEOC guidance on arrest and conviction records and the EEOC's involvement in the Federal Inter-Agency Re-entry Council. The event drew approximately 80 attendees, along with State Senator Royce West, Mayor Mike Rawlings, Representative Eric Johnson, and County Commissioner Elba Garcia.

- Indianapolis District Office Senior Trial Attorney discussed the Commission's enforcement guidance on arrest and conviction records at an event sponsored by Taft Stettinius & Hollister. In addition, Trial Attorney Aimee McFerren discussed background checks in employment decisions and EEOC's guidance on arrest and conviction records with the Louisville Metro Human Relations Commission.

- Miami District Office Regional Attorney Robert E. Weisberg spoke about EEOC's enforcement guidance on arrest and conviction records with the Hillsborough County Bar Association.

Descriptions of additional outreach and education events that included information about the use of arrest and conviction records in employment are attached in Appendix C.

7. Coordination and Collaboration

As reflected in many of the outreach events mentioned in this document, the EEOC has worked with other agencies and organizations to expand public awareness on the issues associated with arrest and conviction records in employment.

The EEOC is part of the Federal Interagency Reentry Council. The Federal Interagency Reentry Council represents 20 federal agencies, working toward a mission to:

- make communities safer by reducing recidivism and victimization,
- assist those who return from prison and jail in becoming productive citizens, and
- save taxpayer dollars by lowering the direct and collateral costs of incarceration.

The Reentry Council, represents a significant executive branch commitment to coordinating reentry efforts and advancing effective reentry policies. A chief focus of the Reentry Council is to remove federal barriers to successful reentry, so that motivated individuals – who have served their time and paid their debts – are able to compete for a job, attain stable housing, support their children and their families, and contribute to their communities. In particular, the Reentry Council is working to reduce barriers to employment, so that people with past criminal involvement – after they have been held accountable and paid their dues – can compete for appropriate work opportunities in order to support themselves and their families, pay their taxes, and contribute to the economy. The EEOC is an important contributor to this effort and is leveraging this relationship and collaboration to deepen and expand its efforts to educate employers, job applicants, and workers.

For example, we are a constant resource for our partner agencies on the applicability of Title VII in this area in both the private and federal sectors. The EEOC enforcement and our guidance on the use of arrest and conviction records are important models for our agency partners, who relying in part on our guidance, are taking steps to ensure their constituent employers, workers, and job applicants are educated about the use of criminal records in the context of the various services provided by their agencies. The EEOC is providing technical assistance to them on the applicability of the updated EEOC guidance to their various programs and providing specific technical assistance as they develop their own parallel guidance.

One of the first products of this collaboration is an initial set of "Reentry MythBusters," designed to clarify existing federal policies that affect formerly incarcerated individuals and their families in areas such as public housing, access to benefits, parental rights, employer incentives, and more. Among others, there is a Reentry MythBuster that addresses the Title VII implications of using arrest and conviction records in employment. In July of this year, the council released a series of Snapshots, including one for employment, briefly describing the issue, summarizing Reentry Council accomplishments to date, laying out the Council's priorities moving forward, and pointing to key resources and links.

These Reentry MythBusters and the other materials included on the Reentry Council website are examples of how the Council is working to develop coordinated reentry strategies to

reduce crime and enhance community well-being. These efforts build on the considerable resources that the federal government is already investing in states and localities to support successful reentry and reintegration. More information about the Reentry Council, its goals, initial activities, and agency contacts is available at http://www.nationalreentryresourcecenter.org/reentry-council. The Mythbuster, Snapshot and other Federal Interagency Reentry Council materials are attached as Appendix D.

The EEOC is exploring further collaborating with these reentry council agency partners on joint trainings, presentations and the development of education materials. To this end, the Director of the Office of Communications and Legislative Affairs has been asked to join the steering committee of the Integrated Reentry and Employment Strategies project, a partnership that includes DOJ, DOL and the Annie E. Casey Foundation. The agency is also working with stakeholder groups to help expand outreach and education efforts regarding the *Enforcement Guidance*. Several of our field staff also participate in local versions of this collaborative effort.

8. Internal Training

The Commission wanted to ensure that all staff, especially those who conduct outreach and/or communicate directly with the public, are well-versed on the *Enforcement Guidance*. Therefore, the Office of Legal Counsel and the Office of Communications and Legislative Affairs, working with the Office of Field Programs, has conducted numerous internal training sessions. For example, on July 25, 2012, Assistant Legal Counsel Carol Miaskoff made a training presentation to an iClass audience comprised of over 400 EEOC investigators and litigators. A week later, she also trained the nearly 60 Intake Information Representatives who answer public inquiries through our internal call center. OLC also developed an internal training module about how to efficiently investigate Title VII charges stemming from the overbroad or unfair use of criminal background screens to deny employment, in light of the Commission's *Enforcement Guidance*.

9. Conclusion

The EEOC has a comprehensive outreach program in place and will continue its efforts to conduct outreach and education about the *EEOC 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 et seq. issued on April 25, 2012. We believe that it is very important for the employer, advocate and legal communities to understand our policies on this topic. We are confident that our continued public education efforts will advance understanding of this issue and minimize the need to use our very limited resources in adversarial proceedings.

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EEOC ISSUES ENFORCEMENT GUIDANCE

Commission Updates Guidance on Employer Use of Arrest and Conviction Records

WASHINGTON — The U.S. Equal Employment Opportunity Commission (EEOC) today issued an updated Enforcement Guidance on employer use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended (Title VII). The Commission today voted 4-1 to approve the guidance document. The Commission also issued a Question-and-Answer (Q&A) document about the guidance. The Enforcement Guidance and Q&A document will be available on the EEOC's website at www.eeoc.gov.

"When the Commission met publicly to discuss this subject in July, 2011, I said that I hoped the meeting would help to inform the Commission's consideration of revisions to existing EEOC guidance. We had excellent testimony from two public meetings and hundreds of written comments submitted by a diverse group of commenters to inform our deliberations concerning the new guidance," said EEOC Chair Jacqueline A. Berrien. Chair Berrien added, "The new guidance clarifies and updates the EEOC's longstanding policy concerning the use of arrest and conviction records in employment, which will assist job seekers, employees, employers, and many other agency stakeholders."

While Title VII does not prohibit an employer from requiring applicants or employees to provide information about arrests, convictions or incarceration, it is unlawful to discriminate in employment based on race, color, national origin, religion, or sex. The guidance builds on longstanding guidance documents that the EEOC issued over twenty years ago. The Commission originally issued three separate policy documents in February and July 1987 under Chair Clarence Thomas and in September 1990 under Chair Evan Kemp explaining when the use of arrest and conviction records in employment decisions may violate Title VII. The Commission also held public meetings on the subject in 2008 and 2011. The Enforcement Guidance issued today is predicated on, and supported by, federal court precedent concerning the application of Title VII to employers' consideration of a job applicant or employee's criminal history and incorporates judicial decisions issued since passage of the Civil Rights Act of 1991. The guidance also updates relevant data, consolidates previous EEOC policy statements on this issue into a single document and illustrates how Title VII applies to various scenarios that an employer might encounter when considering the arrest or conviction history of a current or prospective employee. Among other topics, the guidance discusses:

-more-

- How an employer's use of an individual's criminal history in making employment decisions could violate the prohibition against employment discrimination under Title VII;
- Federal court decisions analyzing Title VII as applied to criminal record exclusions;
- The differences between the treatment of arrest records and conviction records;
- The applicability of disparate treatment and disparate impact analysis under Title VII;
- Compliance with other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records; and
- Best practices for employers.

The materials for the public meetings held on the use of arrest and conviction records, including testimony and transcripts, are available at http://eeoc.gov/eeoc/meetings/index.cfm.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.

# # #

U.S. Equal Employment Opportunity Commission

Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its *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. The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1. How is Title VII relevant to the use of criminal history information?

There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some state laws provide protections to individuals related to criminal history inquiries by employers.

3. Is it a new idea to apply Title VII to the use of criminal history information?

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969,[1] and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission's E-RACE (Eradicating Racism and Colorism from Employment) initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

4. Why did the EEOC decide to update its policy statements on this issue?

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority*[2] decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

5. Did the Commission receive input from its stakeholders on this topic?

Yes. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. 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.

6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?

No. The Commission will continue its longstanding policy approach in this area:

- The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.
- Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission's 1987 policy statement on Conviction Records.
- National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
- A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

7. How does the Enforcement Guidance differ from the EEOC's earlier policy statements?

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

- The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.
- The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971 Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424 (1971), continuing to subsequent Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third Circuit Court of Appeals' decisions applying disparate impact analysis to criminal record exclusions.
- The Enforcement Guidance explains how the EEOC analyzes the "job related and consistent with business necessity" standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.
  - There are two circumstances in which the Commission believes employers may consistently meet the "job related and consistent with business necessity" defense:
    - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
    - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (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.).
- The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.
- The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.

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[1] *See, e.g.*, EEOC Decision No. 70-43 (1969) (concluding that an employee's discharge due to the falsification of his arrest record in his employment application did not violate Title VII); EEOC Decision No. 72-1497 (1972)

(challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

[2] 479 F.3d 232 (3d Cir. 2007).

U.S. Equal Employment Opportunity Commission

What You Should Know About the EEOC and Arrest and Conviction Records

Background: On April 25, 2012, the Commission, in a 4-1 bi-partisan vote, issued its *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. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's Race and Color Discrimination Compliance Manual Chapter. The Guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1) Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees?

No. The EEOC does not have the authority to prohibit employers from obtaining or using arrest or conviction records. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

2) How could an employer use this information in a discriminatory way?

There are two ways in which an employer's use of criminal history information may be discriminatory. First, the relevant law, Title VII of the Civil Rights Act of 1964, prohibits employers from treating job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination).

Second, the law also prohibits disparate impact discrimination. This means that, if criminal record exclusions operate to disproportionately exclude people of a particular race or national origin, the employer has to show that the exclusions are "job related and consistent with business necessity" under Title VII to avoid liability.

3) How would an employer prove "job related and consistent with business necessity"? Is it burdensome?

Proving that an exclusion is "job related and consistent with business necessity" is not burdensome. The employer can make this showing if, in screening applicants for criminal conduct, it (1) considers at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and (2) gives an applicant who is excluded by the screen the opportunity to show why he should not be excluded.

4) Is the Guidance a new Commission policy?

No. The Guidance follows the text of the law about disparate treatment and disparate impact discrimination. Since at least 1969, the Commission has received, investigated, and resolved discrimination charges involving criminal records exclusions, and federal courts have analyzed the civil rights law as applied to criminal record exclusions since the 1970s. In addition, in 1987 and 1990, the EEOC issued three policy statements on this issue, and it also referenced the topic in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the EEOC's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII to the use of criminal history information in employment decisions is well-established.

5) Why update this policy now?

In the twenty years since the Commission issued its three policy statements, there have been important legal and social changes. In 1991, Congress amended the Civil Rights Act to add Title VII disparate impact analysis, among other things. Since the 1990s, technology has made criminal history information much more accessible to employers. The number of working-aged individuals with criminal records in the population significantly increased

during this period, especially in the African American and Hispanic communities.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority* decision that the Commission should provide more in-depth legal analysis and updated research on this issue. Therefore, in updating the Guidance, the Commission incorporated social science and criminological research, court decisions, and information about various state and federal laws to help employers better assess the impact of using criminal records in employment decisions.

6) Did the Commission receive input from advocates, the business community and the public on this topic?

Yes. Representatives of employers, individuals with criminal records, and other federal agencies testified at public EEOC meetings in November 2008 and July 2011. The Commission also received and reviewed approximately 300 written comments from members of the general public and stakeholder groups that responded to topics discussed during the July 2011 meeting. The stakeholders that provided statements to express their interests and concerns include prominent organizations such as the NAACP, the U.S. Chamber of Commerce, the Society for Human Resource Management (SHRM), 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, among others.

Additionally, 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, and the Equal Employment Advisory Council.

More information about the EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, including Questions and Answers about the Guidance, is available at www.eeoc.gov.

STATEMENT OF CAROL R. MIASKOFF,
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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE
U.S. COMMISSION ON CIVIL RIGHTS
DECEMBER 7, 2012

I. Introduction

Chairman Castro, distinguished members of the Commission, thank you for the opportunity to appear before you at this briefing titled "The Impact of Criminal Background Checks and the EEOC's Conviction Records Policy on the Employment of Black and Hispanic Workers."

I am Carol Miaskoff, Acting Associate Legal Counsel for the U.S. Equal Employment Opportunity Commission. The EEOC is comprised of five presidentially-appointed and Senate-confirmed Commissioners, including the Chair. The EEOC's congressionally-mandated role is to enforce Title VII of the Civil Rights Act of 1964, as amended, in addition to the other federal equal employment opportunity laws. Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The statute was last amended in 1991 and it is the subject of judicial construction and EEOC policy.

My statement today summarizes the EEOC's *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.*[1] The EEOC's Commissioners approved this Guidance on April 25, 2012 with a bipartisan, 4-1 vote, after two public hearings and over 300 written submissions.[2] This Enforcement Guidance supersedes the EEOC's four prior policy statements on the topic from 1987, 1990, and 2007.[3] In short, the updated Guidance stands for the proposition that conviction records may be considered in employment decisions as evidence of past conduct that may be relevant to an individual's suitability for employment, in the context of all the facts. The updated Guidance does not prohibit employers' use of criminal background checks or criminal history

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[1] The 2012 Enforcement Guidance is available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm .

[2] Three members of the United States Commission on Civil Rights submitted written comments in their individual capacities.

[3] *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964*, U.S. Equal Emp't Opportunity Comm'n (Feb. 4, 1987), http://www.eeoc.gov/policy/docs/convict1.html; *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, U.S. Equal Emp't Opportunity Comm'n (July 29, 1987) .http://www.eeoc.gov/policy/docs/convict2.html; *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII*, U.S. Equal Emp't Opportunity Comm'n (Sept. 7, 1990), http://www.eeoc.gov/policy/docs/arrest_records.html; *Compliance Manual Section 15: Race & Color Discrimination*, U.S. Equal Emp't Opportunity Comm'n. § 15-VI.B.2 (April 19, 2006), http://www.eeoc.gov/policy/docs/race-color.pdf.

information to make employment decisions. The Guidance does, however, outline how employers can use such background checks and the information they yield in a fact-based and targeted way that is consistent with Title VII.

The 2012 Enforcement Guidance is rooted in a long line of EEOC administrative and federal court decisions that applied Title VII analysis to determine if individuals with known convictions experienced unlawful employment discrimination when they were not hired. The EEOC Commissioners' first administrative decisions on such Title VII private sector charges were issued in the late 1960s and 1970s,[4] and continued into the 1980s when the EEOC Commissioners delegated this authority to staff as the number of charges increased.[5] Federal courts, in turn, issued Title VII opinions assessing such alleged discrimination starting in 1970[6] and, most recently, in 2007.[7] The application of Title VII to criminal record screening, under both disparate treatment and disparate impact analysis, is clearly established.

The EEOC decided in 2012 to issue its updated Enforcement Guidance for several reasons. First, the EEOC's 1987 and 1990 documents were issued before enactment of the Civil Rights Act of 1991. This Act amended Title VII to expressly incorporate the elements and the burdens

[4] *See, e.g.*, EEOC Decision No. 70-43, 1969 EEOC LEXIS 16 (July 14, 1969) (finding no reasonable cause where employee was discharged based on a criminal background check reporting a larceny conviction and several other arrests for which disposition was not shown, where employee had denied having a criminal record on his job application and employee also was recently charged with assault with intent to commit murder); EEOC Decision No. 71-1902, 1971 EEOC LEXIS 73 (April 28, 1971)(finding reasonable cause where employer discharged a White woman dating an African American man due to the suspicion that she had engaged in criminal activity, even though she had not had any contact with the criminal justice system); EEOC Decision No. 77-30, 1977 EEOC LEXIS 30 (Aug. 15, 1977) (finding reasonable cause where employer automatically rejected African American man for employment as a brakeman because he disclosed a narcotics conviction at the interview; employer did not consider job-relatedness of the conviction or his past employment record, among other circumstances); EEOC Decision No. 79-18, 1978 WL 5810 (Dec. 5, 1978) (finding no reasonable cause where a city rejected individual for employment as a uniformed Special Officer, after fingerprint check came back with five convictions including forgery, robbery, and grand larceny).

[5] *See, e.g.*, EEOC Decision No. 81-15, 1981 EEOC LEXIS 1 (Feb. 2, 1981) (finding reasonable cause where retail employer justified termination of African American man based on conviction for theft of $18 sunglasses where the conviction was almost four years old, it was his only conviction, and it predated two other periods when he was employed by the same store as a Management Trainee); EEOC Decision No. 81-6, 1980 WL 8896 (Nov. 7, 1980) (finding reasonable cause where trucking company refused to rehire Hispanic man as a casual truck driver due to single five-year-old conviction for possession of marijuana and there was evidence that he had worked successfully as a driver since the conviction; the employer did not submit evidence that the exclusion was job related); EEOC Dec. No. 80-12, 1980 WL 8881 (Aug. 1, 1980) (finding reasonable cause where shipping company terminated employment of African-American man after 2 and a half years of successful work as a part-time dock worker because a background check returned evidence of 15 misdemeanors, mostly for public drunkenness and disorderly conduct between eight and ten years earlier; employer did not offer evidence of job-relatedness to rebut evidence of prior successful job performance).

[6] Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (CD Cal. 1970) (arrest record); *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1293 (8th Cir. 1975) ("Green I"); Green v. Mo. Pac. R.R., 549 F.2d 1158, 1160 (8th Cir. 1977) ("Green II").

[7] El v. S.E. Pa. Transp. Auth., 479 F.3d 232 (3d Cir. 2007).

of proof for disparate impact analysis, including interpreting the employer's burden of showing that its policy or practice is job related and consistent with business necessity in light of the Supreme Court's decision in *Griggs v. Duke Power Co.*[8] Second, in 2007, the Third Circuit in *El v. Southeastern Pennsylvania Transportation Authority*[9] called upon the EEOC to update its three 1987 and 1990 documents. The Third Circuit also analyzed how to harmonize the risk-based analysis of criminal records exclusions with Supreme Court disparate impact precedent that largely focuses on the relevance of test results to job qualifications.

Third, statistics show that the number of Americans with criminal records in the working-age population has increased significantly since 1990,[10] meaning that substantially more people now face the challenges of entering the workforce after an arrest or conviction than in 1990. Indeed, arrest and incarceration rates are now especially high for African American and Hispanic men.[11] Finally, with the advent of the Internet, criminal records are easily available to employers but, at the same time, still include data that may be inaccurate, incomplete, or misleading.[12] The 2012 Enforcement Guidance takes account of all of these factors.

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[8] 401 U.S. 424 (1971). *See* 42 U.S.C. 2000e-2(k)(1)(A); 137 CONG. REC. 15273 (1991) (statement of Sen. Danforth).

[9] 479 F.3d 232 (3d Cir. 2007).

[10] *See* THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, at 3 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf [hereinafter Prevalence of Imprisonment] ("Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000."); SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006, STATISTICAL TABLES 1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting that between 1990 and 2006, there has been a 37% increase in the number of felony offenders sentenced in state courts); *see also* PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf [hereinafter One in 31] ("During the past quarter-century, the number of prison and jail inmates has grown by 274 percent . . . .[bringing] the total population in custody to 2.3 million. During the same period, the number under community supervision grew by a staggering 3,535,660 to a total of 5.1 million."); PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf ("[M]ore than one in every 100 adults is now confined in an American jail or prison."); Robert Brame et al., *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 Pediatrics 21, 25, 26 (2012) (finding that approximately 1 out of 3 of all American youth will experience at least 1 arrest for a nontraffic offense by the age of 23).

[11] *See, e.g., Prevalence of Imprisonment, supra* note 8, at 5, Table 5; *cf.* Pew Ctr. on the States, Collateral Costs: Incarceration's Effect on Economic Mobility 6 (2010), http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653 ("Simply stated, incarceration in America is concentrated among African American men. While 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12.").

[12] *See* Dennis A. DeBacco & Owen M. Greenspan, Bureau of Justice Statistics, U.S. Dep't of Justice, Survey of State Criminal History Information Systems, 2010, at 2 (2011), https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf [hereinafter State Criminal History] (Major Findings: Criminal history files; Overview of state criminal history record systems, December 31, 2010); SEARCH, Interstate

II. Summary of the 2012 Enforcement Guidance

After an introductory section, the 2012 Enforcement Guidance provides the Commission's interpretation of Title VII as applied to criminal background exclusions from employment.

A. Disparate Treatment Analysis

In contrast to the 1987 and 1990 policy documents, the 2012 Enforcement Guidance includes EEOC's analysis of Title VII disparate treatment discrimination. The EEOC included this analysis in light of studies over the last twenty years demonstrating that racial assumptions about criminality may impact hiring decisions, both when the employer lacks criminal background check information about job applicants (and may assume that people have criminal records based on their race)[13] and, significantly, also when the employer has information from applicants about their actual criminal history (based on self-disclosure on the job application).[14] In the latter

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Identification Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General 21, 22 (1999), www.search.org/files/pdf/III_Name_Check.pdf ("A so-called 'name check' is based not only on an individual's name, but also on other personal identifiers such as sex, race, date of birth and Social Security Number. . . . [N]ame checks are known to produce inaccurate results as a consequence of identical or similar names and other identifiers."); *id.* at 7 (finding that in a sample of 82,601 employment applicants, 4,562 of these individuals were *inaccurately* indicated by a "name check" to have criminal records, which represents approximately 5.5% of the overall sample). Additionally, if applicants deny the existence of expunged or sealed records, as they are permitted to do in several states, they may appear dishonest if such records are reported in a criminal background check. *See generally Debbie A. Mukamal & Paul N. Samuels, Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501, 1509-10 (2003) (noting that 29 of the 40 states that allow expungement/sealing of arrest records permit the subject of the record to deny its existence if asked about it on employment applications or similar forms, and 13 of the 16 states that allow the expungement/sealing of adult conviction records permit the subject of the record to deny its existence under similar circumstances).

[13] A 2006 study demonstrated that employers who are averse to hiring people with criminal records sometimes presumed, in the absence of criminal background checks, that African American men applying for jobs have disqualifying criminal records. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & Econ. 451 (2006), http://www.jstor.org/stable/pdfplus/10.1086/501089.pdf; *see also* Harry Holzer et al., Urban Inst., Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles 6-7 (2003), http://www.urban.org/UploadedPDF/410779_ExOffenders.pdf (describing the results of an employer survey where over 40% of the employers indicated that they would "probably not" or "definitely not" be willing to hire an applicant with a criminal record).

[14] A 2003 study demonstrated that White applicants who had disclosed the same qualifications and criminal records as Black applicants were three times more likely to be invited for interviews than the Black applicants. *See* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 958, Figure 6 (2003), www.princeton.edu/~pager/pager_ajs.pdf. Pager matched pairs of young Black and White men as "testers" for her study. The "testers" in Pager's study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. The same study showed that White job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who *did not have* a criminal record. *Id.* at 958. *See also* Devah Pager et al., *Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers*, 623 Annals Am. Acad. Pol. & Soc. Sci., 199 (2009), www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf (finding that among Black and White testers with

studies, results demonstrated worse treatment of qualified African American job applicants who disclosed the same criminal history as White applicants with equivalent qualifications. Both of these scenarios could support allegations of disparate treatment discrimination based on race under Title VII.

The EEOC's 2012 Enforcement Guidance discusses circumstances where an employer treats individuals with the same criminal history information differently, based on their race or national origin. The Guidance provides hypothetical examples to illustrate such discrimination, and also discusses the types of evidence that may indicate that this kind of discrimination has occurred.

B. Disparate Impact Analysis

The 2012 Enforcement Guidance provides a more in-depth statutory interpretation of Title VII disparate impact analysis than did the earlier EEOC policy documents. The Guidance analyzes the statute as amended by the 1991 Civil Rights Act,[15] which provides that:

> An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . . .[16]

The 2012 Enforcement Guidance notes that Congress stated both in the purpose section of the 1991 Civil Rights Act and in its authoritative interpretive memorandum that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts announced by the

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similar backgrounds and criminal records, "the negative effect of a criminal conviction is substantially larger for [B]lacks than [W]hites . . . . the magnitude of the criminal record penalty suffered by [B]lack applicants (60 percent) is roughly double the size of the penalty for [W]hites with a record (30 percent)"); *see id.* at 200-01 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma by establishing rapport with the hiring official).

[15] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105; *see also* Lewis v. City of Chicago, 130 S. Ct. 2191 (2010) (reaffirming disparate impact analysis); Ricci v. DeStefano, 557 U.S. 557 (2009) (same).

[16] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis supplied). Title VII states that if an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, the plaintiff has the opportunity to demonstrate that there is a less discriminatory "alternative employment practice" that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

Supreme Court in" *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989).[17]

The Enforcement Guidance turns to a step-by-step analysis of each element of a Title VII disparate impact case, with an emphasis on how these play out in EEOC administrative investigations of criminal record exclusions.

The first step of disparate impact analysis is to identify the particular policy or practice that allegedly caused the disparate impact. The Enforcement Guidance provides examples of relevant information to consider when making this determination.

The second step is to determine whether the particular policy or practice caused the disparate impact on a Title VII-protected basis. For this step, the Commission cites to extensive national criminal justice data to demonstrate that Blacks and Hispanics are arrested and incarcerated in numbers greatly disproportionate to their representation in the general population.[18] The EEOC concluded that this data provides a basis for the agency, in its administrative investigations, to consider such disparate impact claims. The EEOC makes clear, however, that during its investigations, the employer is welcome to provide relevant evidence to demonstrate that its specific policy or practice does not have a disparate impact on Title VII-protected individuals. For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer's own applicant data may also show that its policy or practice did not cause a disparate impact.

If it is determined that a particular policy or practice has a disparate impact, then, under the third step in the analysis, the employer can avoid liability for discrimination by demonstrating that its policy or practice is job related for the position in question and consistent with business necessity.

Finally, under the fourth step, evidence of a less discriminatory alternative is considered.

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[17] 137 Cong. Rec. S15, 273-01 (daily ed. Oct. 25, 1991) (statement of Sen. Danforth); *see also* Civil Rights Act of 1991, §§ 3(2) & 105(b) (adopting the *Griggs* definition of "business necessity" and stating that only the interpretative memorandum quoted may be used in construing the Act).

[18] *See, e.g.*, UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2010, at Table 43a (2011), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-43/10tbl43a.xls (reporting that in 2010, 28% of all arrests were of African Americans); MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 – STATISTICAL TABLES, at 6, Table 1.4 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf (reporting that from October 1, 2008 to September 30, 2009, 45.5% of drug arrests made by the DEA were of Hispanics or Latinos); THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1, 3, 8 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf (estimating in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.) is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged; this rate climbs to 1 in 6 (or 17.2%) for Hispanic men and 1 in 3 (or 32.2%) for African American men).

C. Disparate Impact -- Job Related and Consistent with Business Necessity

The discussion of Title VII's business necessity standard is the most detailed section in the Guidance, because of its importance for employers. Using a screen or selection procedure that has an unintended disparate impact on a protected group is not unlawful under Title VII if the employer shows that it was job related for the position in question and consistent with business necessity, and there is no evidence of a less discriminatory alternative.

First, the Guidance reaffirms the differences between arrest and conviction records, as previously stated in the EEOC's 1987 and 1990 policy documents. The fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, standing alone, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position. In contrast, a conviction record will usually serve as sufficient evidence that a person engaged in particular conduct.[19]

The Guidance then summarizes Supreme Court precedent[20] and focuses on the job-related and consistent with business necessity standard as applied to criminal record exclusions by the Eighth Circuit in *Green v. Missouri Pacific Railroad*[21] and the Third Circuit in *El v. SEPTA*.[22]

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[19] A conviction record shown to have factual errors or omissions may not, however, serve as sufficient evidence that a person engaged in the specified criminal conduct. The persuasiveness of the conviction record will depend on the nature of the errors, omissions, or circumstances.

[20] *See, e.g.*, *Griggs*, 401 U.S. 431, 436 (stating that it is the employer's burden to show that its policy or practice is one that bear[s] a demonstrable relationship to successful performance of the jobs for which it was used" and "measures the person for the job and not the person in the abstract"); Albermarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975) (endorsing the EEOC's position that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to predict or correlate with "'important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated'" (quoting 29 C.F.R. § 1607.4(c))); Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977) (concluding that using height and weight as proxies for strength did not satisfy the business necessity defense because the employer failed to establish a correlation between height and weight and the necessary strength, and also did not specify the amount of strength necessary to perform the job safely and efficiently).

[21] 523 F.2d 1290, 1293 (8th Cir. 1975) (*Green I*). "In response to a question on an application form, Green [a 29-year-old African American man] disclosed that he had been convicted in December 1967 for refusing military induction. He stated that he had served 21 months in prison until paroled on July 24, 1970." *Id.* at 1292, 93. Based on this record, the employer found that he was not qualified for employment. *Id.* at 1293. Turning to the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Eighth Circuit analyzed whether this exclusion was job related and consistent with business necessity. *Id.* at 1295-96.

Subsequently, in *Green v. Missouri Pac. R. Co.* 549 F.2d 1158, 1160-61 (8th Cir. 1977) (*Green II*), the Eighth Circuit ordered "that defendants shall be enjoined from disqualifying and denying employment to an applicant solely and automatically for the reason that the applicant has been convicted of a criminal offense; provided, however, that nothing herein shall prevent defendant . . . from considering an applicants' [sic] prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."

The EEOC reiterates the *Green* court's conclusion that, where there is disparate impact, it violates Title VII for an employer to deny employment "solely and automatically" based on a conviction; however, an employer may consider a prior criminal record if it "takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."[23] In the 2012 Enforcement Guidance, the EEOC applies these three factors in light of the *El* court's conclusion that Title VII requires employers to justify criminal record policies or practices that have a disparate impact by demonstrating that they "accurately distinguish between applicants [who] pose an unacceptable level of risk [in the workplace] and those [who] do not."[24] The Third Circuit indicated that empirical data may be relevant to making this assessment, including recidivism data.[25]

Building on these fact-based approaches, the Guidance discusses the two ways in which the EEOC believes employers will consistently meet the business necessity standard, and thereby avoid Title VII liability:

- The first way of meeting the business necessity standard involves validation of the policy under the Uniform Guidelines on Employee Selection Procedures if relevant data is available and validation is possible.[26]

- The second way of meeting the business necessity standard involves (1) developing a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*[27]), and then (2) providing an opportunity for an individualized assessment for those people targeted for exclusion, to determine if the policy as applied is job related and consistent with business necessity.

    - "Individualized assessment" generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly

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[22] 479 F.3d 232 (3d Cir. 2007).

[23] 549 F.2d 1158, 1160-61.

[24] 479 F.3d. at 245.

[25] *Id.* at 247 (stating that the outcome of the case might have been different if the plaintiff had, "for example, hired an expert who testified that there is a time at which a former criminal is no longer any more likely to recidivate than the average person. . . . [so] there would be a factual question for the jury to resolve").

[26] *See* 29 C.F.R. § 1607.5 (describing the general standards for validity studies).

[27] 549 F.2d 1158 (8th Cir. 1977).

apply to him; and considers whether additional information shows that the policy as applied is not job related and consistent with business necessity. The individual's showing may include information that he is not correctly identified in the criminal record, or that the record is otherwise inaccurate.

- Other relevant individualized evidence presented may include, for example:

  - The facts or circumstances surrounding the offense or conduct;
  - The number of offenses for which the individual was convicted;
  - Older age at the time of conviction or release from prison;
  - Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
  - The length and consistency of employment history before and after the offense or conduct;
  - Rehabilitation efforts, e.g., education/training;
  - Employment or character references and any other information regarding fitness for the particular position; and
  - Whether the individual is bonded under a federal, state, or local bonding program.

If the individual does not respond to the employer's attempt to gather additional information about his background, the employer may make its employment decision without the information.

In the 2012 Enforcement Guidance, the EEOC illustrates the application of these standards. First, the EEOC provides examples of exclusions that would violate Title VII because they do not apply this analysis at all; rather, they use automatic, across-the-board exclusions from all employment because of any criminal conduct. When such exclusions have a disparate impact, they are inconsistent with Title VII because they do not consider the dangers associated with particular criminal conduct and the risks in particular positions.

Second, the EEOC provides examples of "targeted exclusions" supplemented by individualized assessment. One of the examples shows a targeted exclusion and individualized assessment that satisfies Title VII; the other example describes a targeted exclusion and individualized assessment that is inconsistent with Title VII.

The EEOC also explains that individualized assessment is not always required:

> An employer may be able to justify a targeted criminal records screen solely under the *Green* factors. Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question. Title VII thus does

not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business neeessity.[28]

D. Disparate Impact -- Federal, State and Local Restrictions

In the last two sections of the Guidance, the EEOC discusses federal, state, and local restrictions concerning the use of criminal records in employment decisions. The EEOC recognizes that many employers are subject to federal laws that prohibit them from employing people with certain convictions in specified jobs. The EEOC states that an employer's compliance with such federal laws – such as those regulating aspects of the transportation and financial industries – will prevent Title VII liability.

At the state or local level, however, the text of Title VII itself – the statute as written by Congress – compels a different result. Title VII prohibits disparate impact discrimination and it also includes language that preempts state or local laws when those laws "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under the statute.[29] Therefore, if an employer's exclusionary policy or practice has a disparate impact and is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law does not shield the employer from Title VII liability.

At the end of the 2012 Guidance document, the EEOC lists several best practices for employers who consider criminal record information when making employment decisions. Some of these best practices include: eliminating exclusions that prohibit the employment of individuals based on any or all criminal records; developing a narrowly tailored written policy and procedure for considering criminal records; and training hiring officials and decisionmakers on how to implement the policy and procedure consistent with Title VII.

III. The Enforcement Guidance's Impact on the Employment of Black and Hispanic Workers

A large number of people in the working-age population have criminal records, and the number is expected to grow.[30] This coincides with increased employer reliance on criminal background

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[28] 2012 Enforcement Guidance at V.B.8. The Enforcement Guidance then sets forth the fourth and final analytic step: determining if there is a less discriminatory alternative that the employer declined to use.

[29] 42 U.S.C. § 2000e-7.

[30] *See* JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 12 (2010), www.cepr.net/documents/publications/ex-offenders-2010-11.pdf ("In 2008, ex-prisoners were 2.9 to 3.2 percent of the total working-age population (excluding those currently in prison or jail) or about one in 33 working-age adults. Ex-felons were a larger share of the total working-age population: 6.6 to 7.4 percent, or about one in 15 working-age adults [not all felons serve prison terms]."); *see id.* at 3 (concluding that "in the absence of

checks as a screening tool.[31] The EEOC updated its Enforcement Guidance in part to provide more clarity and analysis on these issues so that employers have a better roadmap for Title VII compliance as they make assessments based on an applicant's or employee's criminal history information. However, some have argued that the Guidance will hurt the employment prospects of Black and Latino workers. For example, some have incorrectly asserted that the Guidance prohibits criminal background checks and that it therefore will have a negative effect on minority employment. These arguments are misguided.

As I stated at the beginning of my remarks, the updated Guidance does not prohibit employers' use of criminal background checks or criminal history information to make employment decisions. The Guidance does, however, outline how employers can use such background checks and the information they yield in a fact-based and targeted way that is consistent with Title VII.

While background checks can help employers gain a better understanding of an individual's prior conduct, this tool has its limitations. Several studies have documented that criminal records may be inaccurate or incomplete.[32] In the 2012 Enforcement Guidance, the EEOC construes Title VII to allow for consideration of criminal records in the context of facts about the criminal conduct, the job, the individual's work experience, and other relevant information or data.

Conclusion

Thank you again for inviting me here today to testify about this very important issue.

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some reform of the criminal justice system, the share of ex-offenders in the working-age population will rise substantially in coming decades").

[31] SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS, slide 3 (Jan. 22, 2010), http://www.slideshare.net/shrm/background-check-criminal?from=share_email [hereinafter CONDUCTING CRIMINAL BACKGROUND CHECKS] (73% of the responding employers reported that they conducted criminal background checks on all of their job candidates, 19% reported that they conducted criminal background checks on selected job candidates, and a mere 7% reported that they did not conduct criminal background checks on any of their candidates). The survey excluded the "not sure" responses from its analysis, which may partly account for the 1% gap in the total number of employer responses. *Id.*

[32] *See, e.g.*, U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 17 (2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf (reporting that only 50% of arrest records in the FBI's III database were associated with a final disposition); SEARCH, INTERSTATE IDENTIFICATION NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 21–22 (1999), www.search.org/files/pdf/III_Name_Check.pdf (reporting that criminal background checks may produce inaccurate results because criminal records may lack "unique" information or because of "misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities").

SUPPLEMENTARY STATEMENT OF CAROL R. MIASKOFF
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
TO THE U.S. COMMISSION ON CIVIL RIGHTS
REGARDING 12/7/2012 BRIEFING AND
THE EEOC'S *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*

I. Introduction

This supplementary statement outlines in plain language discrete points about the EEOC's Enforcement Guidance, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, to address issues raised in the December 7, 2012 Briefing. The full written statement submitted on behalf of the EEOC before the Briefing provides context for these basic points. The Guidance itself provides the full legal analysis, factual background, best practices, and references.

II. Background

- On April 25, 2012, the EEOC, in a 4-1 bi-partisan vote, issued the *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 et seq.*

- Neither Title VII nor the Guidance prohibits employers from considering criminal history when they make employment decisions.

- The Guidance describes how employers considering criminal history in a targeted, fact-based way can avoid Title VII liability. It is consistent with how many employers already assess criminal history.

- What is important is that people have an opportunity to apply and be considered for jobs for which they are qualified and for which their criminal records are not relevant or predictive.

- Permanently excluding people from the workforce because of contact with the criminal justice system is inconsistent with Title VII.

III. The Guidance

A. Arrests vs. Convictions

- An arrest is an accusation, not proof that an individual committed a crime. An employer should not rely on an arrest, standing alone, as the basis for an employment decision.
    - However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position.
    - The conduct, not the arrest, is relevant to employment.
- A conviction record will usually serve as sufficient evidence that a person engaged in particular conduct.
    - However, there still may be evidence of an error in the conviction record. For example, a database may continue to report a conviction that was later expunged.

B. Disparate Treatment

- Employers should not treat individuals with the same criminal history and qualifications differently based on their race, national origin, or another protected basis. For a discussion of Disparate Treatment, see Guidance at § IV.
- For example, terminating the employment of a qualified African American employee, while retaining a White employee who has been convicted of the same offense, could support an allegation of disparate treatment based on race under Title VII.

C. Disparate Impact

- Title VII prohibits disparate impact discrimination at 42 U.S.C. § 2000e-2(k).
- The Guidance provides a step-by-step legal analysis of each element of a Title VII disparate impact case. See Guidance at § V (Disparate Impact Discrimination and Criminal Records).

- The EEOC encourages employers who consider employees' and applicants' criminal background information to develop and use targeted and fact-based screens. When this screening identifies an individual as having the targeted criminal history, the EEOC encourages employers to consider supplemental information provided before rejecting the individual, in order to avoid Title VII disparate impact liability.

- How targeted screens and individualized assessment work:

    - A **"targeted screen"** considers at least the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977):
        - the nature and gravity of the crime,
        - the time elapsed, and
        - the nature of the job.

    - **"Individualized assessment"** generally means that an employer:

        - informs the individual that he may be excluded because of past criminal conduct, based on the nature of the crime, the time elapsed, and the nature of the job;

        - provides the individual an opportunity to demonstrate that the exclusion does not properly apply to him (for example, that he is incorrectly identified in the criminal record, or that the record is otherwise inaccurate), and

        - considers whether additional information shows that the policy as applied is not job related and consistent with business necessity (in other words, that it does not merit excluding the person from this job at this time).

    - **Individualized assessment is not always required.**

        - An employer may be able to justify a targeted criminal records screen solely under the three *Green* factors (*i.e.*, nature of the crime, time elapsed, nature of the job).

- The screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.

D. Federal Laws or Regulations That Require Criminal Background Checks and Employment Exclusions

- When an employer rejects an applicant because a federal law prohibits people with his or her criminal background in the position, the employer is shielded from Title VII liability.

- For example, federal law bars people with certain convictions from banking jobs.

E. State or Local Laws That Require Criminal Background Checks and Employment Exclusions

- State or local laws also bar people from jobs when they have certain criminal records.

- Congress stated, in the text of Title VII, that any state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice." 42 U.S.C. § 2000e-7.

- Title VII does not preempt all state or local laws that require employers to screen criminal records or exclude people with specific criminal records.

  - Example 11 in the Guidance describes an employer's compliance with a state law criminal background exclusion for child care workers; that Title VII challenge fails because the preschool's action is consistent with Title VII.

- An employer defense based on state or local laws will not always succeed, because of this Title VII provision. Title VII was approved by Congress and the President. The EEOC, an administrative agency, cannot change it.

IV. Conclusion

- Qualified individuals with criminal records should have an opportunity to compete for employment when their criminal records are not relevant or predictive.

- A criminal record should not prevent all future employment.

- Employers who consider criminal background information should do so in a targeted and fact-based way, in light of the nature and severity of the crime, the time elapsed, and the nature of the job. The EEOC encourages employers to provide an opportunity for an individualized assessment, but Title VII does not require individualized assessment in all circumstances.

Timeline:
Equal Employment Opportunity Commission
Policy Guidances and Public Meetings About
Title VII and Consideration of Arrests and Convictions in Employment Decisions

- **February 4, 1987**: The Equal Employment Opportunity Commission (Commission or EEOC) issued *EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.*

    - The first paragraph of this Policy Statement states that the Equal Employment Opportunity Commission actually had approved the legal position set forth in this document more than a year earlier, at a meeting in November 1985:

        > *At the Commission meeting of November 26, 1985, the Commission approved a modification of its existing policy with respect to the manner in which a business necessity is established for denying an individual employment because of a conviction record. The modification, which is set forth below, does not alter the Commission's underlying position that an employer's policy or practice of excluding individuals from employment on the bosis of their conviction records has an adverse impact on Blacks[1] and Hispanics[2] in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity.[3] " (Emphasis supplied)*

        EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., at 1 (2/4/87).

- **July 29, 1987**: The Commission issued *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*

- **September 7, 1990**: The Commission issued *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.*

- **November 20, 2008**: The Commission held a public meeting: *Employment Discrimination Faced by Individuals with Arrest and Convictions Records*.

    Panel 1: Barriers Experienced by People with Criminal Records

    - Devah Pager, Professor, Princeton University
    - Diane Williams, President and CEO, Safer Foundation

Panel 2: Stakeholder Perspectives and Litigation Issues

- Michael Foreman, Professor, Dickinson School of Law
- Donald Livingston, Partner, Akin Gump Strauss Hauer & Feld LLP
- Janet Ginzberg, Senior Attorney, Community Legal Services of Philadelphia

Panel 3: New Research Developments

- Shawn Bushway, Professor, State University of New York at Albany

Panel 4: Employer Practices

- Rae T. Vann, General Counsel, Equal Employment Advisory Council
- Laura Moskowitz, Staff Attorney, Second Chance Labor Project at National Employment Law Project

- **July 26, 2011:** The Commission held a public meeting: *Arrest and Conviction Records as a Hiring Barrier.*

Panel 1: Best Practices for Employers

- Michael F. Curtin, CEO, DC Central Kitchen
- Victoria Kane, Area Director, Labor Relations & Integration, Portfolio Hotels & Resorts
- Robert Shriver, Senior Policy Counsel, U.S. Office of Personnel Management

Panel 2: An Overview of Local, State, and Federal Programs and Policies

- Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice
- Professor Stephen Saltzburg, Criminal Justice Section Delegate and Past Chair, American Bar Association
- Cornell Brooks, Executive Director, New Jersey Institute for Social Justice

Panel 3: Legal Standards Governing Employers' Consideration of Criminal Arrest and Conviction Records

- Juan Cartagena, President and General Counsel, Latino Justice
- Barry Hartstein, Shareholder, Littler Mendelson, P.C.
- Adam Klein, Partner, Outten & Golden LLP

In addition to these panelists, we invited Everett Gillison, who at that time was the Deputy Mayor for Public Safety in Philadelphia. He was unable to attend due to a scheduling conflict.

The Commission held open the record of this meeting for 15 days to receive written public comments. Over 300 public comments were received.

- **April 25, 2012:** With a 4-1 vote, the Commission adopted and issued *Enforcement Guidonce on the Considerotion of Arrest ond Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.*

STATEMENT OF
THE HONORABLE VICTORIA A. LIPNIC
COMMISSIONER
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

"THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EEOC'S CONVICTION RECORDS POLICY ON THE EMPLOYMENT OF BLACK AND HISPANIC WORKERS"

UNITED STATES COMMISSION ON CIVIL RIGHTS
DECMBER 7, 2012

To the Chairman and Members of the United States Commission on Civil Rights ("USCCR"):

In April 2012, the United States Equal Employment Opportunity Commission ("EEOC" or "Commission") approved, on a bipartisan basis, "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 *et seq.*" (the "Revised Guidance" or "2012 Guidance"). I voted to approve the Revised Guidance, which updated existing Commission policy on the use of criminal history in making employment decisions, and which is the principal topic of today's briefing. I welcome the opportunity to share my reasons for doing so with the USCCR.

As I noted during debate on this issue at the Commission, it is important to note that in approving the 2012 Guidance, the EEOC was not writing on a blank slate. Since 1987, the Commission had published guidance relating to employers' use of both arrest and conviction records. In my opinion, that existing guidance generally had worked well over the last twenty-five years, and when the Commission first began to consider its revision, I made clear to my fellow Commissioners my view that a wholesale revision of our criminal history guidance was unnecessary, and not something that I could support. What I could support was an effort to update and amplify existing guidance in light of the societal, technological, and legal developments of the last two-and-a-half decades. I believe that is what the Revised Guidance does.

As practitioners in this area know, for twenty-five years it has been the EEOC's policy that an employer should avoid blanket, one-size-fits-all criminal record policies, and instead adopt policies tailored to the specific workplaces and job positions at hand. The Revised Guidance builds on and supplements this preexisting policy. Most notably, and as discussed more fully below, the Revised Guidance maintains the long-standing and well-established test for determining whether the specific use of criminal history is "job related and consistent with business necessity," as required by Title VII of the Civil Rights Act of 1964.

By way of brief background, in 1971, the U.S. Supreme Court held in *Griggs v. Dukes Power Co.*, 401 U.S. 424 (1971), that Title VII not only prohibits intentional discrimination, but also "disparate impact" discrimination – that is, discrimination which occurs when the use of a

neutral policy (such as a criminal background check) disproportionately impacts members of a protected class, such as sex or race.

In light of *Griggs*, in 1987, under then-Chairman Clarence Thomas, the EEOC first issued guidance to employers who use criminal history in making employment decisions on how to do so lawfully– that is, how to demonstrate that the use of criminal history in a particular circumstance is "job related and consistent with business necessity" as required under the law.

The 1987 guidance set forth a three-factor test for evaluating whether a particular policy is job-related and consistent with business necessity, drawing from a test first articulated in 1975 by the Eighth Circuit in *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975) (the "*Green* factors"). The *Green* factors include the gravity and severity of the crime; the nature of the job at issue; and how long ago a crime was committed. The *Green* factors were, in the 1987 guidance, and remain under the Revised Guidance, the touchstone in examining criminal record use policies. As such – and despite the claims of some critics – the 2012 Guidance does not represent a sea-change in EEOC policy or a bold departure from its existing precedent. Rather, the Revised Guidance simply provides a more robust explanation of existing principles and their legal underpinning, and offers greater examples of their factual application. As such, I believe the Revised Guidance serves to provide increased clarity to employers and employees, while not imposing dramatically new requirements or changes in employer practices.

In the wake of the adoption of the 2012 Guidance, some have asked whether, or why, such revision was necessary. For several reasons, I believe that it was. Foremost, the digital workplace of 2012 is far different from the pen-and-ink workplace of the 1980s – through the explosive growth of online services, industry, and social media, employers have far greater access, at far less cost, to background information on employees and applicants. As you will no doubt hear in the testimony of others offered today, trends suggest that in light of this greater access, employers are using criminal history more frequently in making employment decisions. At the same time, we have today a greater understanding of the demographics of our criminal justice system – indeed, current data on incarceration rates and the criminal justice system more broadly show a marked racial disparity in arrests and convictions. Finally, the EEOC's prior guidance had not been afforded great deference by courts – indeed, in 2007, the Third Circuit held in *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007), that then-existing Commission guidance was not entitled to "great deference" insofar as it did "not substantively analyze the statute." In response, the Revised Guidance includes far more detailed and substantive legal analysis, and accordingly should be afforded greater weight by reviewing courts.

I also believe that the Commission's revision of its guidance will, in time, inure to the benefit of all stakeholders, including employers. Prior to the 2012 Guidance, employers had little specific guidance as to how they could lawfully use criminal history, and were subject to lawsuits by both the private bar and the EEOC challenging their use of this information. Recognizing that each case will always be fact-specific, the 2012 Guidance offers a clearer roadmap for employers, building on and amplifying existing guidance. It includes more, and more robust, examples, and sets forth guidance on the interaction of state and federal laws governing the use of criminal history in making employment decisions, requirements for security clearances and licensing, and

similar topics. It, for the first time, includes "best practices" for employers. Finally, the Revised Guidance rejects any "bright line" rule limiting employers' ability to use criminal history to only a certain amount of time in the past, or to a specified list of offenses. Rather, the Revised Guidance favors a fact-specific analysis of any given policy, which allows for consideration of the specific nature of any single employer, policy, occupation, and job setting – in my view, a better choice. To be clear, I fully acknowledge and understand the need of employers to assess and manage the risk of criminal conduct in their workplace – it is exactly the assessment and management of that risk which the "job related and consistent with business necessity" standard contemplates.

The 2012 Guidance is not flawless, and were I its sole author, I might have written some of it differently. For example, the Revised Guidance recommends that as a "best practice," an employer using a criminal history review to screen out applicants and employees should include in its policy a provision for "individualized assessment." In simpler terms, that means that when using a criminal record to screen out a candidate, an employer should, where appropriate, consider providing an opportunity for an individual to address any concerns before being immediately screened out. That may mean, for example, giving Sally Jones the opportunity to explain that the record of a past transgression in the employer's hands is, in fact, an error – it's the record for the wrong Ms. Jones. Alternately, it may mean giving an applicant the opportunity to explain why a disorderly conduct arrest twenty years ago in college has no bearing on his ability to work on the plant floor today.

I think in many instances this is a wise and prudent business practice. However, it is important to make clear that Title VII does not *require* an employer to provide such an individualized assessment in any instance – a fact explicitly recognized in the Revised Guidance, and a point about which I feel very strongly. This means that there can, and will, be times when particular criminal history will be so manifestly relevant to the position in question that an employer can lawfully screen out an applicant without further inquiry. Again, in simpler terms – and a point that bears emphasis – a day care center need not ask an applicant to "explain" a conviction of violence against a child, nor does a drug store have to bend over backward to justify why it excludes convicted drug dealers from working in its pharmaceutical lab. I had hoped that the Revised Guidance would have included clearer examples of such lawful, targeted practices. It does not, but as I made clear during the Commission's debate on this matter, the lack of such examples should not be taken to mean that that they do not in fact exist.

In that light, it is my view that having issued the Revised Guidance, the Commission should now undertake efforts to let employers know, with specificity, what they *can* lawfully do with respect to developing criminal history policies, not merely what we believe they cannot. Since adoption of the Revised Guidance earlier this year, I have championed, and will continue to champion, such an effort, as it is my belief that where any administrative agency is going to hold a stakeholder to a standard, through the investigatory or litigation process, it is incumbent upon the agency to make that standard clear and explicit. In my view, the EEOC should be as much about educating employers about compliance with the law as it is about investigating and litigating charges.

With respect to issues concerning the interaction of federal and state law, I had hoped that the Revised Guidance could have been clearer in providing real-world practical guidance to employers facing potential conflicts between federal and non-federal law. In the wake of its adoption, some have criticized the Revised Guidance for not including a blanket "safe harbor" provision for an employer's use of criminal history at the direction of a state law. While I fully recognize and understand that concern, as a legal matter, it does not appear to me that such a broad blanket exception could be squared with the explicit statutory language of Title VII, which specifically exempts individuals from federal liability for compliance with state law, unless such law "purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]." 42 U.S.C. § 2000e-7.

That Title VII standards preempt conflicting non-federal employment law requirements is beyond serious debate; insofar as that raises policy concerns, they are concerns properly brought to Congress. That said, I would make two observations to concerned stakeholders on this point. First, as a practical matter, I am unaware that the Commission has been presented with a state law requirement which it believes would not pass muster under Title VII. Second – and perhaps more important – as a matter of enforcement in the field, and of the Commission's exercise of its investigatory and prosecutorial discretion, I do not reasonably foresee a set of facts under which the EEOC uses its scarce resources to pursue employers whose use of criminal history directly arises out of state law obligations.

Throughout the revision process, a number of stakeholders asked that the agency make public any proposed draft guidance and solicit comments on specific proposals. I think that such a request for greater transparency is valid, and that, in general, any proposed guidance – regulatory or sub-regulatory, from any agency – benefits from the review and input of as broad a range of stakeholders as possible. Indeed, that is what the Office of Management and Budget's "Good Guidance Practices" – adopted by the Bush Administration and maintained in the Obama Administration – expect with respect to significant guidance documents. In this instance, however, because I believe that the Revised Guidance closely tracks well-established Commission policy, because of the public hearings the EEOC has held on this issue in recent years, and because I know that the Members of the Commission fully engaged a range of stakeholders, I was comfortable supporting the Revised Guidance without a full public notice-and-comment process.

I would make one final point, which I expect will be the subject of some discussion at today's hearing. Some critics of the Revised Guidance have argued that certain data suggests that employers that do not use criminal background checks may be less likely to hire certain minority groups, the theory being, presumably, that in the absence of an actual criminal background report, these employers are using race as a proxy for past criminal history. Thus, these critics argue, limitations on the use of criminal history may in fact result in lowering the hiring rates of some minorities.

I cannot say whether this is in fact true or not, and I look forward to reviewing the testimony of the witnesses at today's meeting on the point. What I can say is two things. First, it is not the statutory mandate of Title VII, nor the duty of the Commission, to raise the hiring rate of any particular race, gender, or creed. Rather, it is our sworn obligation to ensure that every

individual is afforded the equal opportunity to seek and obtain employment free from the unlawful consideration of these factors. Second – and perhaps more to the point – where, in fact, in the absence of a criminal background check an employer chooses to use race as a proxy for criminal history, *that employer is patently violating federal civil rights law*. Were such a charge brought to the Commission and found to be true, I would have no difficulty bringing the full force of the agency to bear on such a transgressor.

In closing – and once more, as I stated publicly when I voted to approve the Revised Guidance – I fully recognize the consequences of the Commission's actions – both on a societal front and on an individual front. As a Commissioner of the EEOC, appointed by the President and confirmed by the Senate, I take very seriously our agency's mandate to ensure equal employment opportunity. This may mean, for some employers, a modestly-increased burden in the hiring process, which may seem, in the first instance, unwarranted. I believe, however, that it also means that many individuals who have paid their debt to society, and do not present an undue risk to a workplace, will not be prematurely screened out from all employment opportunity. That is the policy choice contained in the Revised Guidance, which I supported upon its adoption, and which I continue to support today.

Appendix C:
Additional descriptions of outreach and education concerning the use of arrest and conviction records in employment

Small Business - On October 7, 2011, Maria Flores, Milwaukee Program Analyst, conducted a presentation on hiring barriers, focusing on criminal records, to approximately 35 small business representatives, primarily African-American, in Milwaukee, WI. The event was sponsored by the Word of Hope Ministries, a faith-based, nonprofit agency which receives funding from the U.S. Dept. of Labor to provide reintegration services, including employment training, to persons in prerelease and post release from correctional facilities.

SHRM - On November 17, 2011, Maria Flores, Milwaukee Program Analyst, conducted an EEO update to 33 employer representatives, primarily small business, in Kenosha, WI at a meeting of the SHRM Racine & Kenosha Area Chapter. Topics included the ADAAA, GINA, Equal Pay and issues related to race/color in hiring such as arrest/conviction records.

Legal Services - On March 6, 2012, Laurie Vasichek, Minneapolis Senior Trial Attorney, conducted a presentation on "Collateral Consequences of a Conviction" to approximately 50 representatives of organizations that deliver legal services.

Prison Outreach - In an ongoing partnership with the Wisconsin Department of Corrections, Maria Flores, Milwaukee Program Analyst, conducted workshops to incarcerated offenders, an underserved population, participating in job-readiness programs at State correctional facilities. The EEOC workshops focused on hiring issues related to race and color, including criminal records, as well as gender issues such as equal pay and pregnancy. A total of five in-person workshops were conducted during the period October 1, 2011 through March 29, 2012. The workshops were conducted at an institution in Plymouth, WI and were simultaneously video cast to multiple institutions across the state and in geographically underserved areas, reaching a total of 551 male and female offenders, primarily African-American.

Re-Entry Councils - EEOC provided the program during March meeting of the Norfolk Reentry Council at the Norfolk Department of Human Services – Workforce Development Center. The oral presentation entitled Reentry: Arrest, Conviction and Credit Background Checks in the Workplace covered the origin and application of the adverse/disparate impact theory of employment discrimination and highlighted EEOC's guidance on pre-employment inquiries – such as arrest, conviction, and credit histories, the charge processing procedures and an overview of EEOC's laws. The audience was comprised of approximately 60 reentry council members from various community-based agencies, businesses, non-profits, civic groups and faith-based organizations involved in post release services. Marilyn S. Booker, Program Analyst provided the program and is partnering with this local reentry council -- collaborating with the

Employment-Workgroup which meets every-other month prior to the full meeting of the Norfolk Reentry Council.

Small Business ILG - On Thursday February 9, 2012, a workshop entitled "Current EEOC Developments" was provided to the Industry Liaison Group of Hampton Roads during its quarterly meeting. The workshop included an overview of national and local EEOC charge receipt and charge resolution statistics, a review of local and national Fair Pay initiatives under the National Equal Pay Enforcement Task Force, insight into and progress towards the objectives of the Reentry Council – including a summary of the Title VII implications of using arrest and conviction records in employment, as well as, EEOC's efforts to better collaborate with small businesses to ensure compliance with anti-discrimination laws. The conference was held at AMSEC LLC (main conference room) in Virginia Beach, Virginia.

Arrest Records – In line with EEOC's partnership with the FIRC (Federal Interagency Reentry Council), at the outset of the fiscal year outreach has focused on providing technician assistance to the following stakeholders which service reentry individuals:

- Norfolk Reentry Council, Norfolk Department of Human Services – Coming Home
- Virginia CURE (Citizens United for Rehabilitation of Errant's – Virginia, Inc.)
- Onesimus Ministries, and
- Second Chances Program, a division of STOP (Southern Tidewater Opportunity Program of Hampton Roads)

Outreach has entailed either conducting informational meetings to discuss EEOC's laws, pre-employment selection inquiries guidelines and theory-elements of adverse impact discrimination; or providing oral presentations entitled "Responding to Workplace (Adverse Impact) Discrimination: Arrest, Conviction and Credit History Background Inquiries" to first-line staff who counsel/seek employment for ex-offenders

NAACP - On December 19, 2011, Tampa Field Office Director Georgia Marchbanks and Program Analyst Elaine McArthur provided a presentation for the NAACP - Columbia County branch in Lake City FL concerning the laws enforced by EEOC, the Commission's initiative regarding Arrest and Conviction Records, and information about the charge filing process. A lengthy question and answer session followed the presentation.

Outreach to an Organization - On January 10, 2012, Tampa Field Office Program Analyst Elaine McArthur provided a presentation for the Center for Independent Living in Lecanto FL concerning an overview of EEOC laws, with special emphasis on the ADAAA and reasonable accommodation process, and Arrest and Conviction records.

Black Heritage Festival - On January 17, 2012, the Tampa Field Office sponsored an outreach event at the John F. Germany Public Library Auditorium as part of the 2012 Tampa Bay Black Heritage Festival. Director Georgia Marchbanks, Enforcement Manager Edwin Gonzalez-Rodriguez, and Enforcement Supervisor Tracy Smith spoke before an audience of approximately 25 people concerning EEOC initiatives, the Systemic Program, and Arrest and Conviction Records in hiring. Mediator Clyde Lo Chin additionally presented information concerning the Commission's ADR Program.

NELA Winter Conference - On February 10, 2012, Miami District Office Director Malcolm Medley and Tampa Field Office Director Georgia Marchbanks participated in the Florida NELA Winter Conference in Daytona Beach FL. Mr. Medley's presentation to a crowd of 50 attorneys included a discussion of numerous EEOC initiatives, to include ADAAA, GINA, the Systemic program, and Arrest and Conviction records. Additionally, Mr. Medley's discussion of the EEOC's stance on LGBT issues was met with thundering applause. Ms. Marchbanks followed up by provided further information to the gathering regarding recent court filings, Alternative Dispute Resolution, and Outreach programs.

Fee-Based On-Site Training - On February 1, 2012, Tampa Field Office Program Analyst Elaine McArthur conducted a two (2) hour Customer Specified Training session (Job Number 12SMIA11) for 27 human resource managers of Orlando Health in Orlando FL, which included a discussion of Arrest and Conviction Records in Hiring. Orlando Health is one of Florida's most comprehensive private, not-for-profit healthcare networks, and is Central Florida's fifth largest employer, with over 14,000 employees and more than 2,000 affiliated physicians

University Outreach – On 01/30/12, at part of the District's on-going partnership with the University of North Texas, Acting District Director, Janet Elizondo, and Program Analyst, Rodney Klein, guest lectured at two upper division HR courses (Selection and Employment Law). Approximately fifty students attended the two classes. Among the topics covered were unconscious bias, arrest and conviction records, credit reports, caregiver discrimination, religion, retaliation and GINA.

Clergy Roundtable - The New York District Office attended the Bronx Clergy Roundtable a faith based community gathering to discuss crime and credit record issues in minority community. The roundtable proves help to youth in obtaining jobs and assistance. Program Analyst Bryan White represented the agency and provide information about the EEOC training programs and assistance to the community about "Knowing your rights" in an underserved area.

Black Contractors Association - On December 1, 2011, Program Analyst Christine Park-Gonzalez met with Abdur-Rahim Hameed, President of the National Black Contractors Association (NBCA) in San Diego, California. Mr. Hameed and Ms. Park-Gonzalez exchanged

information about their respective organizations and discussed in particular the plight of Black construction workers who have difficulty with hiring onto construction jobs in the San Diego area. While the NBCA represents Black contractors who have difficulty with winning contracts in the construction field, they have since expanded to focus on the hiring of qualified Black construction workers onto projects. They discussed systemic implications as well as the issue of criminal and credit background checks as factors in employment, and agreed to work more closely together with respect to potential training and case referrals in the future.

Criminal Records Roundtable – On October 21, 2011, Seattle, WA, Enforeement Supervisor, Roderick Ustanik, presented an update on the agency's ongoing interest and potential policy development in conviction andarrest records under the statutes enforced by the EEOC. The October meeting of the Criminal Records Roundtable was attended by 15 participants. At that meeting a spokesman from the Seattle Office of Human Rights reported the results of a testing survey that shows widespread disparate treatment of applicants based on race and disability. The survey found that African Americans were uniformly informed that they would be subjected to credit and criminal checks; similarly situated white applicants were not.

Program Analyst, Billy C. Sanders, made an Oral Presentations including a Q & A session with 15 Ex-Convicts enrolled in the Exodus Foundations Ex-Offenders Program. They were educated on the Laws Enforced by EEOC and their rights and responsibilities in the workplace

Underserved Population (Reentry Populace): On November 9, ATDO Deputy Director Manuel Zurita trained attorneys of the Georgia Justice Project (GJP) Coming Home Program on the EEOC and anti-discrimination employment laws, with a focus on the rights of those with arrest and conviction records. Also shared information on interagency efforts to address issues confronting the re-entry population, through the Re-entry Council. The GJP provides free legal services and a full range of social and employment services to the indigent criminally accused and reentry population.

Also, this topic was covered during the following:
-- In March for outreach and expanded presence in Americus/Sumter County (underserved area), at a NAACP community forum.
-- In February, Roundtable for Results, a joint outreach with OFCCP and Wage and Hour for employers and CBOs.
-- In February, stakeholder meeting with plaintiffs' attorneys (GA-NELA)
-- In January, outreach to a Half-way House in Columbus, GA

Live webcasts – On 12/15/11, Program Analyst, Rodney Klein, partnered with Joe Bontke and Marty Ebel of the Houston District, along with Katrina Grider, private attorney in delivering two

live webcasts for the State Bar of Texas. The topics were social media and background investigations (arrests and convictions were discussed at length).

ILG- On 1/19/12 - Acting District Director, Janet Elizondo, spoke at a meeting of the North Texas ILG. She spoke about issues currently being considered by the Commission, such as arrest and conviction records, gender stereotyping, and ADAAA and leave. Approximately, 50 people attended. The meeting is part of the District's on-going partnership activities with OFCCP.1. University Outreach – On 02/02/12, Program Analyst, Rodney Klein, spoke with twelve students enrolled in an Employment Law class at the University of Texas at San Antonio. He gave an overview of the EEOC and Title VII, along with discussions about arrest and conviction records, ADR and GINA. This session was part of an on-going partnership between UTSA and the San Antonio Field Office.

Re-Entry Council – On 213/12, Senior Trial Attorney Eduardo Juarez made a presentation on "Criminal Records and the Equal Opportunity to Employment," to the Bexar County Commissioners Court Re-Entry Council – a group of about 20 leaders from various local organizations providing rehabilitative services to the formerly incarcerated. The audience included Bexar County Commissioner Tommy Adkinson. Mr. Juarez's presentation included an overview of the EEOC's policy statements on the use of arrest and conviction records as well as an overview of the law on disparate impact discrimination involving employer criminal record policies. Mr. Juarez provided the audience with copies of the Re-Entry Myth Busters, a series of fact sheets about federal policies affecting formerly incarcerated individuals. These fact sheets were created by the federal Cabinet-level inter-agency Re-Entry Council of which the EEOC is a member.

SHRM – On 2/14/12, Program Analyst, Rodney Klein, spoke with 200 members of SAHRMA, the San Antonio SHRM chapter. Mr. Klein discussed hiring and glass ceiling issues, along with systemic investigations, arrest and conviction records and credit reports.

Farm Workers – On 3/07/12, Program Analyst, Rodney Klein, spoke with 70 outreach workers and intake specialists working for Workforce Solutions in the lower Rio Grande Valley. These workers take complaints directly from farm workers and migrants. Mr. Klein trained the group on systemic issues, arrests and convictions, wage issues, GINA, ADAAA, national origin issues, and sexual harassment.

NAACP – On 03/08/12, Acting Field Director, Travis Hicks, and Program Analyst, Rodney Klein, spoke at a meeting of the San Antonio NAACP chapter. They discussed race discrimination, systemic, arrest and conviction records, credit reports, and ADR. Approximately 15 members attended the meeting.

Workforce Solutions – On 3/09/12, Program Analyst, Rodney Klein, partnered with Workforce Solutions in Uvalde, Texas to provide training to its outreach workers on the civil rights acts. These outreach workers take complaints from the migrant and farm worker communities along the U.S./Texas border. Mr. Klein gave an overview of the statutes. He also discussed systemic investigations, arrests and convictions, sexual harassment, ADAAA and GINA. Approximately 20 outreach workers and one stop managers attended.

Lawfirm Employment Law Update - On 11/0/311 and 11/04/11, Nashville Area Director Sarah Smith, Enforcement Supervisor Sylvia Hall and Trial Attorney Sally Ramsey participated in a two day Employment Law Update sponsored by the law firm of Wimberly Lawson in Knoxville, TN. Both days were panel discussions on EEOC laws, Arrest and Conviction Records, Student Workers, ADAAA, GINA, Systemic Initiative and Legal Issues. Approximately 75 employers were in attendance at both sessions.

Employer Outreach Committee - On 11/2/11, District Resource Manager Edmond Sims addressed the Madison/Chester County Workforce Employer Outreach Committee in Jackson, TN. There were approximately 47 HR professionals, state and local government and attorneys present. This is a partnership with the TN Department of Workforce & Labor. He covered Charge Processing Information and items on the radar at EEOC, including Arrest & Conviction Records, ADAAA and Veterans & Disabilities.

SHRM - On 2/14/12, Program Analyst Deb Moser-Finney addressed the monthly meeting of the Tri-State SHRM in Texarkana, AR-TX. 48 members were present at the meeting. A 45 minute presentation entitled "Seven Mistakes Employers Make When They Receive a Charge of Discrimination" was well received. It generated several questions and comments. There was a brief discussion about "What's New at EEOC" that included information on the Strategic Plan, use of Arrest & Conviction Records and charge statistics relating to GINA and ADA(AA). The 48 members represented private employers, employment agencies, small businesses, colleges and chambers of commerce.

SHRM - On 3/27/12, Program Analyst Deb Moser-Finney was the guest speaker at the monthly meeting of the North Arkansas SHRM group in Harrison, AR. 33 members were present and represented private employers, small businesses and a local community college. Ms. Moser-Finney gave a presentation entitled "What's New at EEOC" and covered topics such as Mediation, Arrest & Conviction Records, the Reentry Council, Strategic Plan, ADAAA, Systemic, Veterans & Disabilities, Human Trafficking and Charge Statistics. She answered questions on charge processing, on-sites, responding to a charge and recordkeeping.

HR Association - On December 7, 2011, Denver Program Analyst Patricia McMahon gave a presentation on the ADAAA to the Colorado Human Resource Association (CHRA). Included in

her presentation was information about background checks and discrimination against individuals with felony convictions.

University Outreach - On March 1, 2012, Denver Program Analyst Patricia McMahon gave a presentation on background checks and discrimination against individuals with felony convictions in two senior-level classes at the University of Colorado-Boulder campus.

Blind Entrepreneurs - On March 17, 2012, Denver Program Analyst Patricia McMahon gave a presentation on background checks and discrimination against individuals with felony convictions at the Blind Entrepreneurs Annual Meeting.

Student Outreach - On January 11, 2012, Seattle, WA, Enforcement Supervisor Rod Ustanik partnered with the Seattle Office for Civil Rights (SOCR) to present at the Seattle Vocational Institute. The session attended by 25 students covered an overview of the EEOC, the charge handling process, and a discussion of criminal records issues. The SOCR also provided an overview of the law their agency enforces and discussed criminal records in relation to housing.

Record Clearance Project – On November 3, 2011, Supervisory Trial Attorney Marcy Mitchell gave a presentation on employment discrimination and criminal convictions for the San Jose State University Record Clearance Project. The target audience was job seekers with criminal convictions.

Statewide Reentry Conference - December 5-6, 2011 - Investigators Adriana Gómez and Malcolm Loungway represented EEOC at a statewide Reentry Conference, where their participation was very much appreciated by county representatives and community organizations from Los Angeles, San Bernardino, Contra Costa, Alameda and San Francisco (about 80 participants). In addition to sharing information about Title VII, particularly race and national origin based discrimination they also contributed to the discussion of ways to effectively respond and integrate individuals who are being released from jail or prison. Gómez suggested that the Coalition (formed at this conference) use the ADA as a model and push for legislation that would require employers to make a conditional job offer prior to inquiring about criminal records. From a law enforcement stand point, this would help isolate the employer's reasons for refusing to hire someone. The EEOC was also invited to participate in the advisory reentry task forces that have recently been formed, particularly in Alameda and Contra Costa County. People also expressed interest in having EEOC provide their organizations with a presentation

Jack Vasquez, Jr., Deputy Director, St. Louis District Office addressed thirty (30) Equal Opportunity officers of the Missouri Department of Economic Development's Workforce Investment act (WIA) program at the quarterly equal opportunity conference on the subjects of equal pay/fair pay, systemic and the use of arrest(s), conviction(s) and credit records in

employment decisions in the governor's office building in Jefferson City, Missouri. The WIA program is under the auspices of the USDOL civil rights center.

Company Outreach - Sylvia Smith, District Resources Manager, gave a best practices in management presentation to ten (10) managers of Mark Lemp Footwear in St. Louis, Missouri which included information on background checks. She also presented another session on an EEOC overview to fifty (50) employees of the same company.

SHRM - Jack Vasquez, Jr., Deputy Director, addressed the Missouri Society for Healthcare Human Resources Administration (a SHRM) on commission developments and trends at the Missouri Hospital Association's 89th annual convention focusing on the subjects of equal pay/fair pay, systemic and the use of arrest(s), conviction(s) and credit records in employment decisions. There were thirty-five (35) HR professionals, attorneys and healthcare executives present. The convention was held at Osage Beach, Missouri.

University Outreach - Jack Vasquez, Jr., Deputy Director, spoke to one hundred fifty (150) students of the 1L (first year) Class at Washington University School of Law on, *Professionalism, Government Service and The Cutting Edge of the Law* inclusive of Equal Pay/Fair Pay, Systemic and the use of arrest(s), conviction(s) and credit records in employment decisions.

State Agency - Jack Vasquez, Jr., Deputy District Director, spoke with managerial and non-managerial employees of the Missouri Secretary of State's Office in Jefferson City, Missouri on the subjects of (a) Fair/Equal Pay, Use of Arrests, Convictions and Credit Histories, (c) Harassment and (d) Retaliation and 3/13/12 and 3/23/12.

On December 19, 2011, Tampa Field Office Director Georgia Marchbanks and Program Analyst Elaine McArthur provided a presentation for the NAACP - Columbia County branch in Lake City FL concerning the laws enforced by EEOC, the Commission's initiative regarding Arrest and Conviction Records, and information about the charge filing process. A lengthy question and answer session followed the presentation.

On February 1, 2012, Tampa Field Office Program Analyst Elaine McArthur conducted a two (2) hour Customer Specified Training session for 27 human resource managers of Orlando Health in Orlando FL, which included a discussion of Arrest and Conviction Records in Hiring. Orlando Health is one of Florida's most comprehensive private, not-for-profit healthcare networks, and is Central Florida's fifth largest employer, with over 14,000 employees and more than 2,000 affiliated physicians.

On February 16, 2012, Miami District Office Chief Administrative Judge Patrick Kokenge partnered with the U.S. Department of Justice, Federal Bureau of Prisons to participate in a meeting with the National Association of Criminal Defense Lawyers' (NACDL) Task Force on the Restoration of Rights and Status after Conviction. The purpose of the task force is to undertake an inquiry into how legal mechanisms for relief from the collateral consequences of conviction are actually working in state and federal systems, and develop comprehensive proposals for reform. Chief Judge Kokenge and the U.S. Department of Justice, Federal Bureau of Prisons are presently working with the wardens in the Miami Federal Bureau of Prisons system and State of Florida Prison systems to begin implementation of an educational program to inform the convicts, who are close in time to their release into society, and employers about their respective rights and responsibilities concerning employment of persons with arrest and conviction records, as part of the Miami District Office's Re-entry Program.

On February 16, 2012, Tampa Field Office Enforcement Supervisor Tracy Smith provided a presentation to 21 members of the National Association of African Americans in Human Resources (NAAAHR) on Arrest and Conviction Records in Hiring.

On March 5, 2012, Miami District Office Trial Attorney Muslima Lewis spoke about the Impact of Credit Checks and Conviction Records in Employment to an audience of 60 people as a part of the Diversity Week program sponsored by Florida International University in Miami FL. Ms. Lewis also distributed information published by the Federal Interagency Reentry Council which clarifies existing federal policies that affect formerly incarcerated individuals and their families.

On March 9, 2012, San Juan Office Director William Sanchez met with Mr. Jerry Martinez, Warden, Metropolitan Detention Center, Guaynabo PR, to discuss Arrest and Conviction Records and the EEOC's participation in the federal interagency Reentry Council.

On March 15, 2012, Tampa Field Office Enforcement Supervisor Tracy Smith spoke to attorneys of the Sarasota County Bar Association, Labor and Employment Section, on Arrest and Conviction Records in Hiring at their monthly meeting in Sarasota FL.

On March 29, 2012, Tampa Field Office Program Analyst Elaine McArthur conducted a four (4) hour Customer Specified Training event for OSI Restaurant Partners, which included a training presentation on Arrest and Conviction Records in Hiring in Tampa FL. OSI Restaurant Partners is one of the largest casual dining restaurant companies in the world, and their portfolio of brands consists of Outback Steakhouse, Carrabba's Italian Grill, Bonefish Grill, Fleming's Prime Steakhouse & Wine Bar, Roy's Hawaiian Fusion Cuisine and A La Carte Pavilion.

July 21: Andrea Okwesa, PA, attended, and made a presentation on "Arrest and Conviction Records" at a special media event for 30 leaders of local faith-based churches and nonprofits,

reps of DC Mayor's Interfaith Council and Interfaith Conference of Metro Washington, hosted by DCTV, to discuss how we could interact/partner with that community, via media and other modalities.
August 3: Andrea Okwesa, PA, attended the monthly meeting of the Re-entry Committee of the Government of the District of Columbia's Criminal Justice Coordinating Council. She addressed the group and distributed EEOC materials on Arrest & Conviction Records. She also established a partnership with the Committee's Employment Workgroup to collaborate on future efforts.

July 18, 2012: Sylvia Smith, District Resources Manager, and Consuela Cantrell, District Resources Management Assistant, St. Louis District Office, gave a presentation covering Arrest and Conviction Records to fifty (50) attendees at Penmac's Staffing's breakfast seminar in conjunction with the Springfield Mayor's Office in Springfield, Missouri.

On August 8, 2012 a meeting/orientation was held with the staff of the H.O.P.E. Village (a facility of the Salvation Army) due to the frequency that employers are denying employment or terminating their clients with criminal records. During the meeting/orientation Marilyn S. Booker, Program Analyst provided an overview of Title VII of the Civil Rights Act, and answered questions about EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII and EEOC's charge processing procedure. H.O.P.E. Village is a transitional housing program that offers a job and supportive services to low and moderate income single women and women with children in need living in a residential style community.

District Director, Janet Elizondo, spoke at a meeting of the North Texas Industry Liaison Group in Dallas. She discussed arrest and conviction records and systemic investigations. Approximately 50 people attended the event.

Program Analyst Rodney Klein provided training to 10 members of the San Antonio NAACP Chapter on disparate treatment, arrest and conviction records, systemic investigations and retaliation claims. This is the second in a series of educational sessions for members of the San Antonio chapter.

On July 26, 2012, the Cleveland Field Office partnered with the Ohio Department of Jobs and Family Services and participated in their state-wide job fair held at the 2012 Ohio State Fair in Columbus. EEOC hosted an exhibit table with materials on the EEOC charge process, Federal Laws Prohibiting Job Discrimination, and the Enforcement Guidance on the Consideration of Arrest and Conviction Records.

On August 14, 2012, PA Eddi Abdulhaqq participated in the Alcorn State University convocation activities in Alcorn (Lorman), MS. Eddi was asked to provide information on the

"Do's and Don'ts of Hiring" to university supervisors and managers. Eddi included information about the EEOC's revised guidanee on sex discrimination and the use of arrest and conviction records in the hiring process. Eddi was also able to meet with the vice president of academic affairs to discuss the EEOC's HBCU and Small Business/Employer Compliance initiatives.

Program Analyst Deb Moser-Finney and Enforcement Supervisor Virginia Pollard met with various stakeholders and provided information on EEOC and general information pamphlets to the following; Sacred Heart Community Organization in Walls, MS, WIN Job Center in Tunica, MS, Workforce Development Center in Helena, AR and the Mayor's Office – City of Hughes, AR (Arrest and Convictions). The Mayor had requested information on Arrest and Conviction Guidance and wants to schedule a community meeting in his town for EEOC to present on this topic and answer questions. (Arrest & Convictions, ADAAA, Underserved Geographical Area and Underserved Population and Communities)

On July 17, 2012, Tampa Field Office Enforcement Supervisor Tracy Smith provided the members of the Task Force of Citrus County an overview on the Commission's guidance on Arrest and Conviction Records in Inverness FL. The event was attended by approximately 18 people who had many questions regarding this subject matter.

Atlanta PA spoke at the "Male Empowerment Workshop: Overeoming the Odds, Success Strategies for Black Men" about EEO laws, their rights, and how to exercise those rights in an informed and constructive manner. Also, addressed guidance on arrest and convictions records, the importance of education, training and skills acquisition

Atlanta-spoke to the Henry County SHRM Chapter to provide an EEOC update to include ADA, guidance on arrest and conviction records, and retaliation

Norfolk Local Office Program Analyst, Marilyn S. Booker, was one of several speakers at the Virginia CURE Hampton Roads Chapter general meeting. EEOC's presentation discussed the 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. Reentry Myth Buster on Hiring Policies and Q and A on EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions were distributed. Other speakers were

Natividad Rodriguez, Staff Attorney from the National Employment Law Project (remote), Tracy Velázquez, Executive Director from the Justice Policy Institute, Carolyn LeCroy, Virginia Dept of Corrections, BJ Hice, Sr Parole Examiner. Approximately 43 persons were in attendance.

Dallas District Director Janet Elizondo and CRTIU Supervisor Belinda McCallister attended the Felony/Misdemeanor Friendly Career Fair in Dallas. The event drew approximately 80 attendees, along with State Senator Royce West, Mayor Mike Rawlings, Representative Eric Johnson, and County Commissioner Elba Garcia. Ms. Elizondo and Ms. McCallister discussed the latest EEOC guidance on arrest and conviction records and the EEOC's involvement in the Federal Inter-Agency Re-entry Council.

Consuela Cantrell, DRMA, St. Louis District Office, presented an EEOC Overview at the St. Patrick Center for twenty (20) re-entry individuals in St. Louis, Missouri.

On August 28, 2012 a follow-up conference was held with the GSGG Executive Director and GSGG clients relative to local employers' use of arrest/conviction records as pre-employment screening inquiries to received documentation for potential systemic/class charges against five (5) area employers relative to blanket criminal records pre-employment inquiries/discharges/failure to hires. EEOC charge processing procedures was reviewed with the group and the documentation was categorized and forwarded to EEOC enforcement personnel (i.e. Enforcement Mgr, District and Local Directors and CRTIU Supervisor.

On August 22, 2012, Denver Program Analyst Patricia McMahon gave a presentation at the Colorado Healthcare Source User Group Conference on what employers should know about EEOC and arrest and conviction records. Nine different health care organizations attended the conference with the purpose of learning the most recent guidance on recruitment and best employment practices.

On August 22, 2012, Program Analyst Christine Park-Gonzalez conducted a presentation on the new EEOC guidance on arrest and conviction records for approximately 40 staff for the New Start WorkSource program in Los Angeles. The staff specializes in providing services for ex-offenders and was particularly intrigued by the EEOC's position and guidance. This was the third in a series of three training sessions for various WorkSource staff on the topic in conjunction with the program.

Louisville Area Office Investigator Marian Ahl made a presentation to the Center for Accessible Business Advisory Council on September 20, 2012 on the ADA Reasonable Accommodations; the main topic was on Arrest & Convictions and LGBT to an audience of 45 attendees.

Atlanta District Office Program Analyst Terrie Dandy participated, with a host of civic organizations, advocates and CBOs, in the "Ban-the-Box" program at the Atlanta City Hall, in recognition of Mayor Kasem Reid's commitment to ban-the-box for the City of Atlanta. The City of Atlanta is the first employer to ban-the-box in the State. Participating organizations

include 9to5 (lead), NELP, GA Justice Project, NAACP, churches, The Center for Working Families, and others. Local media covered the event.

On April 3 and 10, in partnership with the Center for Working Families, PA Terrie Dandy conducted workshops on the use of arrest and conviction records in employment for ex-offenders.

Birmingham District Office Program Analyst Eddi Abdulhaqq made a presentation to approximately 50 inmates scheduled for release from the Pensacola Federal Prison Camp. She provided information about the EEOC's laws, procedures, and guidance on the use and consideration of arrest and conviction records. In addition, she was also one of three presenters at a re-entry workshop for inmates scheduled for release from the St. Clair County Correctional Facility.

On April 17, 2013 the Charlotte District Program Analyst Marilyn Booker provided two oral presentations on EEOC's "Employer Best Practices" as outline in the 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 before the employment committee, as well as, the general membership of the Norfolk Reentry Council. The employment committee met prior to the full Reentry Council. Approximately fifteen Council members attend the committee meeting and about 30 attended the general meeting.

On April 25, 2013, Marilyn S. Booker, Program Analyst provided an oral presentation entitled "Arrest and Conviction Records in Employment Decisions: What YOU Need to Know" before the forty (40) clients of the staff of Virginia CARES, in Fredericksburg, VA. Virginia CARES operates a statewide network of ex-offender reentry programs to provide transitional assistance, financial aid, job readiness training, temporary employment, job search and career development, human relations & self-awareness training, and ongoing support services to prisoners, ex-offenders, and their families in Virginia.

On May 7, 2013 EEOC participated as a panelist during the Prisoner Re-entry: Issues and Initiatives workshop which was a part of the 3-day Spring 2013 Joint Conference. Marilyn S. Booker, Program Analyst provided a presentation covering considerations of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. The BRPO-POSSESS-VASWP is a network of Benefit Program Specialists' and Social Work Practitioners' groups across the Commonwealth of Virginia. Approximately seventy individuals attended the workshop which was held in Williamsburg, Virginia.

On April 30, 2013 EEOC information relative to arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964 (namely the Arrest and Conviction

Records in Employment Best Practices brochure) was distributed to approximately fifty vendors who participated in the Apprenticeship Career Fair.

On April 18, 2013 Carolyn King, Charlotte CRTIU Supervisor disseminated the following handouts to the attendees at the Restoration of Rights Forum: "What you Should Know About the EEOC and Arrest and Conviction Records", "Pre-Employment Inquiries and Arrest & Conviction", and "Facts About Race/Color Discrimination " (Title VII). The event was held at the Six Mount Zion Church in Richmond, VA and approximately 60 persons attended.

On May 21, 2013 the Charlotte District Program Analyst attended the employment committee meeting of the Norfolk Reentry Council. The employment committee met to discuss and work on establishing base-line area/regional statistics of prisoners reentering society, number employed, how long unemployed, etc.

On May 23rd, Charlotte Program Analyst participated in a full day of outreach activities during the Scope Your Future in the World of Registered Apprenticeships Informational packages composed of Arrest and Conviction Records in Employment Best Practices, OFCCP's Criminal Record Restrictions and Discrimination policy guidance to federal contractors and subcontractors, EEOC's Q&A on the Application of Title VII and ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault or Stalking, Pregnancy Discrimination Fact Sheet, Employer's Guide on Veterans with Service-Connected Disabilities and the ADA, etc. were given to each of the +80 Exhibitors. Exhibitors were employers from the shipbuilding and repair, manufacturing, construction and skill trades, services and educational industries. Additionally, an informational booth -- containing fact sheets, brochures, information about arrest and conviction records, domestic or dating violence, pregnancy, and veterans with service-connect disabilities in employment decisions, and bookmarks about the EEOC charge processing procedure and the various types of employment discrimination, was manned. There were many discussions throughout the day with individuals who believed they may have been victimized by employment discrimination.

On June 26, 2013 the Charlotte District Program Analyst participated in the Virginia Beach Reentry Town Hall Meeting. The event included a Resource Fair and Reentry Panel Discussion. Approximately eighty (80) persons attended.

On April 5, 2013, John Hendrickson, Chicago Regional Attorney, participated as a co-presenter at the "Indiana Journal of Law and Social Equality Symposium" held at the Indiana University Maurer School of Law in Bloomington, IN. The EEOC presentation on "Hot Button Issues in EEOC Litigation under the New Strategic Enforcement Plan" covered hiring issues and the EEOC's newer guidance on the use of arrest and conviction records and drew 100 attorney participants, nationwide, from the plaintiff's bar.

In an ongoing partnership with the Wisconsin Department of Corrections, Maria Flores, Program Analyst, Milwaukee Area Office, conducted workshops on May 22, 2013 and June 19, 2013 to incarcerated offenders, an underserved population, participating in job-readiness programs at State correctional facilities. The workshop was conducted at one facility and was simultaneously video cast to multiple institutions across the state and in geographically underserved areas, reaching a total of 257 male and female offenders, including a significant number of African-Americans.

Dallas District Office Enforcement Supervisor Belinda McCallister talked about arrest and conviction records at a, Teens in Crisis, event in Dallas.

Detroit Field Office Director Gail Cober presented to 35 members of the Statewide Re-Entry Group Workgroup on the EEOC Conviction Record Policy Guidance. Ms. Cober reviewed the policy with the group and discussed how the EEOC investigates and analyzes such cases.

Indianapolis-Marion County City Council invited EEOC to conduct a presentation on EEOC's guidelines on the re-entry program on Arrests & Convictions. Indianapolis District Office Program Analyst Phyllis Wells conducted a presentation on EEOC's Best Practices on the re-entry program for 43 employers and 25 City Council Members. She also conducted a presentation on Arrests and Convictions for 75 HR members of the chamber and surrounding rural communities at the Richmond Chamber of Commerce in Richmond, Indiana.

Reviving the Heart of Workforce Development: Cincinnati Area Director Wilma Javey conducted a presentation on the proper use of utilizing criminal background checks when past felons and offenders are looking for employment opportunities to a group of 64 employers and the Hamilton County Office of Re-entry and also how to adopt a fair hiring policy.

On May 7, 2013, Los Angeles Enforcement Manager Patricia Kane represented the EEOC at the Jericho Training Center in Los Angeles for a collaborative partners meeting centered on services for the ex-offender community in the greater Los Angeles area.

On June 7, 2013, Los Angeles District Office Investigator Richard Burgamy gave a presentation at the Cal State Reentry Initiative in San Bernardino, California, a community-based organization focused on assisting ex-offenders with re-entry into society. The training was also conducted in conjunction with the DOL WHD West Covina District.

Memphis Investigator Michael Hollis gave a presentation to the Community Outreach Board of the U. S. Bureau of Prisons on background checks and Arrest and Conviction Records of

formerly incarcerated individuals to 30 attendees. The meeting was held at the U. S. Federal Prison at Camp Millington, TN

Tampa Field Office Enforcement Supervisor Tracy Smith spoke before an audience of 65 people at the Florida Council for Community Mental Health Human Resource forum on the topic of Arrest and Conviction Records.

On May 22, 2013, Miami District Office District Resource Manager Michael Bethea, Chief Administrative Judge Patrick Kokenge and Investigator Sergio Maldonaldo participated in the quarterly South Unit Re-entry Fair at the South Florida Reception Center in Miami FL. The eight different organizations in attendance, including EEOC, gave presentations about the assistance that could be provided to the soon to be ex-offenders. In total, there were approximately 100 inmates present from different prisons around south Miami-Dade County. Each inmate was given a handout on the laws we enforce and myth busters handouts to assist them in their future endeavors.

Denver Program Analyst Patricia McMahon met with advocates from the Colorado Criminal Justice Reform Coalition to provide an EEOC overview and guidance on criminal records and background check.

Washington Field Office Program Analyst Andrea Okwesa attended the monthly meeting of the DC Criminal Justice Coordinating Council (CJCC), Employment/Training Workgroup, continuing efforts to assist the Reentry Committee in drafting a model, local arrest & conviction policy to provide guidelines for DC employers addressing the hiring of people with criminal records. She also attended the 9th Community Reentry & Expungement Summit in Washington, DC, sponsored by the DC Public Defender Service. It featured presentations & exhibit/resource tables by community based service providers addressing the needs of attendees from DC with criminal records.

REENTRY

MYTH BUSTER!

Criminal Histories and Employment Background Checks

A Product of the Federal Interagency Reentry Council

MYTH: An employer can get a copy of your criminal history from companies that do background checks without your permission.

FACT: According to the Fair Credit Reporting Act (FCRA), employers must get one's permission, usually in writing, before asking a background screening company for a criminal history report. If one does not give permission or authorization, the application for employment may not get reviewed. If a person does give permission but does not get hired because of information in the report, the potential employer must follow several legal obligations.

Key Employer Obligations in the FCRA

An employer that might use an individual's criminal history report to take an "adverse action" (e.g., to deny an application for employment) must provide a copy of the report and a document called ***A Summary of Your Rights under the Fair Credit Reporting Act*** before taking the adverse action.

An employer that takes an adverse action against an individual based on information in a criminal history report must tell the individual – orally, in writing, or electronically:

- the name, address, and telephone number of the company that supplied the criminal history report;
- that the company that supplied the criminal history information did not make the decision to take the adverse action and cannot give specific reasons for it; and
- about one's right to dispute the accuracy or completeness of any information in the report, and one's right to an additional free report from the company that supplied the criminal history report, if requested within 60 days of the adverse action.

A reporting company that gathers negative information from public criminal records, and provides it to an employer in a criminal history report, must inform the individual that it gave the information to the employer or that it is taking precautions to make sure the information is complete and current.

If an employer violation of the FCRA is suspected, it should be reported it to the Federal Trade Commission (FTC). The law allows the FTC, other federal agencies, and states to take legal action against employers who fail to comply with the law's provisions. The FCRA also allows individuals to take legal action against employers in state or federal court for certain violations.

For More Information:

See ***Credit Reports and Employment Background Checks*** from the Federal Trade Commission (http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre36.pdf).

The FTC works to protect consumers from violations of the FCRA and from fraudulent, deceptive, and unfair business practices in the marketplace, and to educate them about their rights under the FCRA and other consumer protection laws.

To file a complaint or get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261.

Watch a video, ***How to File a Complaint***, at **ftc.gov/video** to learn more.

What is a REENTRY MYTH BUSTER?

This myth buster is one in a series of fact sheets intended to clarify existing federal policies that affect formerly incarcerated individuals and their families. Each year, more than 700,000 individuals are released from state and federal prisons. Another 9 million cycle through local jails. When reentry fails, the social and economic costs are high – more crime, more victims, more family distress, and more pressure on already strained state and municipal budgets.

Because reentry intersects with health and housing, education and employment, family, faith, and community, and being many federal agencies are focusing on initiatives for the reentry population. Under the auspices of the Cabinet-level Interagency Reentry Council, federal agencies are working together to enhance community safety and well-being, assist returning adult citizens and juvenile offenders, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.

For more information about the Reentry Council, go to www.nationalreentryresourcecenter.org/reentry-council

REENTRY
MYTH BUSTER!

On Hiring Criminal Records Guidance

A Product of the Federal Interagency Reentry Council

MYTH: People with criminal records are automatically barred from all employment.

FACT: An arrest or conviction record does NOT automatically bar individuals from all employment

On April 25, 2012, the U.S. Equal Employment Opportunity Commission issued its *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 (Title VII), 42 U.S.C. § 2000e. The Guidance updates, consolidates, and supersedes the Commission's 1987 and 1990 policy statements on this issue, as well as the relevant discussion in the EEOC's 2006 Race and Color Discrimination Compliance Manual Chapter. These rules apply to all employers that have 15 or more employees, including private sector employers, the federal government, and federal contractors. Below are answers to common questions about the Guidance.

1) Does this Guidance prohibit employers from obtaining and using criminal background reports about job applicants or employees? No, the Guidance does not prohibit employers from obtaining or using arrest or conviction records to make employment decisions. The EEOC simply seeks to ensure that such information is not used in a discriminatory way.

2) How could an employer use criminal history information in a discriminatory way? Two ways -- First, Title VII prohibits disparate treatment discrimination. Employers should not treat job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination). Second, Title VII prohibits disparate impact discrimination. Employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, it is not "job related and consistent with business necessity."

3) How would an employer prove "job related and consistent with business necessity"? Is it burdensome? Proving that a criminal record exclusion is "job related and consistent with business necessity" is not burdensome. The employer can prove this if it (1) considers at least the nature of the crime, time since the criminal conduct occurred, and the nature of the job in question, and (2) gives an individual who may be excluded by the screen an opportunity to show why he or she should not be excluded.

4) Why should an arrest record be treated differently than a conviction record?
An arrest record does not establish that a person engaged in criminal conduct. Arrest records may also be inaccurate (e.g., mistakenly identify the arrestee) or incomplete (e.g., do not state whether charges were filed or dismissed against the arrestee). Thus, an arrest record alone should not be used by an employer to take an adverse employment action. But, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action.

For More Information:

EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII:
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

EEOC Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII:
http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm

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Because reentry intersects with health and housing, education and employment, family, faith, and community well-being, many federal agencies are focusing on initiatives for the reentry population. Under the auspices of the Cabinet-level interagency Reentry Council, federal agencies are working together to enhance community safety and well-being, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.

For more information about the Reentry Council, go to: www.nationalreentryresourcecenter.org/reentry-council

Federal Interagency
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June 2013
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Employment

Two out of every three men were employed before they were incarcerated, and many were the primary financial contributors in their households. Individuals who have been incarcerated can expect future annual earnings to be reduced by some 40 percent after they return to their communities and the societal and economic impacts are substantial. The Reentry Council is working to reduce barriers to employment, so that people with past criminal involvement – after they have been held accountable and paid their dues – can compete for appropriate work opportunities in order to support themselves and their families, pay their taxes, and contribute to the economy.

Accomplishments to Date

- Reentry Council agencies have published five Reentry MythBusters that tackle both employer obligations and incentives. On the incentives side, for example, the Department of Labor (DOL) offers federal bonding protection for employers who hire people with a criminal record. On the employer obligation side, the Myth Busters focus on how employers may lawfully consider a criminal record in their hiring decisions, and protections for job seekers when it comes to background checks.

- The Equal Employment Opportunity Commission (EEOC) updated enforcement guidance on the use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.

- The DOL's Employment and Training Administration (ETA) and Civil Rights Center (CRC) issued a joint guidance for the public workforce system regarding employer job postings that contain hiring exclusions or restrictions based on arrest and conviction history. DOL's Office of Federal Contract Compliance Programs (OFCCP) issued a directive advising federal contractors and subcontractors of their nondiscrimination obligations regarding the use of criminal records as an employment screen.

- The Federal Trade Commission (FTC) announced an enforcement action against a background screening company, alleging that the company failed to ensure that criminal history information it reported was accurate and up to date, as required by the Fair Credit Reporting Act (FCRA). The FTC has also created a number of educational brochures and videos for employers and the public on the use of consumer reports.

- DOL and the Department of Justice awarded REXo and Second Chance Act grants to support job training and placement for individuals returning to their communities after incarceration. In addition, grantees may use these federal funds to pay for legal assistance to secure driver's licenses, litigate inappropriate denials of housing or employment and violations of the FCRA, modify child support orders, and expunge criminal records.

- DOL has developed a non Internet-based version of the new electronic career exploration tool, My Next Move. The tool is available on CD-ROM and was specifically created for use by inmates in correctional institutions where Internet connectivity is unavailable or prohibited.

- The Small Business Administration (SBA) has posted on its website and shared with its Resource Partners (Small Business Development Centers, Women's Business Centers and SCORE chapters) the recent federal guidance relating to consideration of criminal records in employment, as it applies to small businesses.

- The Federal Bureau of Prisons (BOP) is standardizing materials and resources for institution Career Resource Centers that will be hosted on an inmate LAN system. These resources will include keyboarding, computer literacy, simulated Internet navigation, financial literacy, resume writing, and other career development and employment resources.

- The Court Services and Offender Supervision Agency (CSOSA) expanded its quarterly Community Resource Day Video-Conference Program to reach 18 facilities within the federal prison system housing inmates from the District of Columbia. During these events, the inmates hear presentations about employment readiness, vocational training, and job placement.

- The Office of Personnel Management (OPM) has developed a best practices guide that addresses employment fitness adjudication for federal contractor applicants and their employees.

Snapshot

Agenda Moving Forward

Improve Employment Practices of Public and Private Employers

Reentry Council agencies will continue to monitor and provide guidance to public, federal, and private sector employers and workers, federal contractors, grantees, and entities in the workforce system regarding the use of criminal records in employment to ensure compliance with civil rights laws and other protections. Reentry Council agencies will also, where appropriate, enforce applicable laws. In addition, agencies will explore coordinating joint guidance or publications for the employee, employer, and workforce development communities, and engage in further outreach and technical assistance.

Make the Federal Government a Model Employer

Reentry Council agencies will assess policies and develop best practices with respect to hiring individuals with criminal records. The Reentry Council will also study mechanisms, like certificates of rehabilitation, which can help facilitate the employment of individuals and will consider whether a similar model might be applicable at the federal level.

Review Federal Policies for Excessive Collateral Consequences

Agencies will continue to review federal hiring policies and regulations to determine whether revision to those policies and regulations should be incorporated into the Reentry Council's Collateral Consequences Review and/or the Administration's legislative, regulatory, or policy agenda.

Strengthen Evidence-Based Programmatic Initiatives

Reentry Council agencies will continue their robust commitment to programs and initiatives providing employment-centered reentry services and, wherever possible, link these programs to research partners that can document, measure, and highlight recidivism reductions produced by programmatic work.

Key Resources (Employment)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters
http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center – Employment
http://csgjusticecenter.org/reentry/issue-areas/employment/

EEOC Updated Guidance on Use of Criminal Records in Employment Decisions
http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

DOL Guidance and Directive
http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9230
http://www.dol.gov/ofccp/regs/compliance/directives/Dir306.htm

OPM Contractor Fitness Adjudication Best Practices Guide
http://chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5585

FTC Consumer Protection Documents: For Employers and Employees
http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know
http://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0096-fair-credit-reporting-act.pdf

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Education

In a major federal study of individuals released from state prisons, 94 percent of incarcerated adults nearing release identified education as a key reentry need. Most incarcerated adults did not complete high school, although many have subsequently earned equivalency diplomas. Education is a core resource for release preparation, and is an evidence-based tool for reducing recidivism among adults and juveniles. For example, empirical research in the federal prison system, where literacy education programming is mandatory for most inmates, has demonstrated that participation in education programming is associated with a 16-percent reduction in recidivism. Education is also a critical building block for increasing employment opportunities.

Accomplishments to Date

- Reentry Council agencies have published two Reentry MythBusters that address access to education post release. One addresses misconceptions about student financial aid eligibility for formerly incarcerated persons. The second addresses barriers to youth educational integration.
- The Department of Education (ED) undertook a Department-wide review of reentry-related issues. Consensus was reached on broad priorities including the prevention of initial criminal justice system contact, enhancing in-facility educational opportunities (quality and access), and supporting transitions into community-based educational programs and services for formerly incarcerated youth and adults.
- ED initiated an ongoing process of engagement with external stakeholders (formerly incarcerated individuals, program providers, and the advocacy community) on correctional education and reentry. The engagement provided direction for ongoing strategy development and implementation.
- With the assistance and participation of agency partners, ED engaged subject matter experts in a process to develop a research-based Reentry Education Model.
- With financial support provided though an interagency agreement between ED and the Department of Justice (DOJ), ED awarded grants to two community colleges and one Intermediate School District to test implementation of the Reentry Education Model.
- ED is working with privately funded demonstration projects to amplify findings on strong reentry programs. Through coordination with the Vera Institute for Justice, post secondary reentry education programs have been initiated in three states to expand and connect pre- and post-release college programs for state inmates. ED is working with Vera to provide forums for all grantees to share ideas and findings.
- ED developed and has put forward reauthorization proposals for the Workforce Investment Act, calling for greater and more reentry-focused financial support for correctional education from the Title II program for reentry education.
- ED and DOJ worked together to support implemetation of a Second Chance Act-funded National Study of Correctional Education. The study will provide a definitive meta-analysis of the recidivism benefit of correctional education, identify trends in correctional education, and provide guidance to the field to improve correctional education services and outcomes.

Agenda Moving Forward

Create Pre- and Post-Release Opportunities for Educational Participation

ED and DOJ are closely coordinating with private foundations to support reentry education model projects, through direct support of demonstration projects, technical assistance, and national evaluations. ED and Reentry Council agencies will support federal, state, and local correctional officials and their partners to expand and improve educational opportunities (including access to high-quality special education and related services) for incarcerated persons. There will be particular emphasis on educational opportunities that span the moment of release and allow incarcerated persons to continue movement toward personal educational goals throughout the release process and upon return to the community. ED is addressing the need for transitional support involving records transfer and cost management.

Engage a Broad Range of Educational Entities about the Service Needs of the Reentry Population

ED will conduct outreach to multiple groups in the educational community to encourage engagement with correctional entities and expansion and improvement of services to formerly incarcerated individuals. This will especially include the Office of Vocational and Adult Education portfolio of education communities, including Career Technology Education Programs, Adult Education and Family Literacy Act funded programs, and community colleges. ED will identify and utilize bully pulpit opportunities.

Build and Disseminate Research-Based Innovations to Expand Educational Programs and Improve Their Outcomes

Two important elements of this work will include (1) bringing technology to bear on improving access, quality and connectedness of educational opportunities for the incarcerated and formerly incarcerated, and (2) facilitating partnerships that connect academic education, career technology education, industry relevant credentialing, work experiences, and related services to help formerly incarcerated individuals obtain employment within an occupational area and be positioned to advance to higher levels of future education and employment in that area.

Key Resources (Education)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters
http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center
http://csgjusticecenter.org/nrrc/

Office of Vocational and Adult Education
http://www2.ed.gov/about/offices/list/ovae/resource/index.html

Reentry Education Model
http://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/reentry-model.pdf

Student Financial Aid Information
http://studentaid.ed.gov/eligibility/criminal-convictions

"Take Charge of Your Future, Get the Education and Training You Need," a guide for incarcerated individuals
http://www.edpubs.gov/document/ed005354p.pdf?ck=131

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Housing

Stable housing with appropriate supportive services is a key factor for those coming out of incarceration in preventing or ending homelessness and reducing recidivism. Reentry Council agencies are collaborating to advance policies, programs, and models that support stable housing and reentry services for those with criminal histories so they can successfully reenter their communities, and where appropriate, reunite with their families. Agencies are working together to reduce barriers to public and subsidized housing, and advance promising models that improve outcomes for people who repeatedly use corrections and homeless services.

Accomplishments to Date

- **Department of Housing and Urban Development (HUD) Letters** – HUD developed a Reentry MythBuster and sent letters to executive directors of public housing authorities (PHAs) and to multi-family home owners across the country, clarifying HUD's position on the limited categories of ex-offenders who are permanently barred from HUD properties. The letters encourage the development of policies and procedures that allow formerly incarcerated individuals to rejoin their families in HUD-assisted housing while maintaining safety for residents, stating, "People who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future. Part of that support means helping ex-offenders gain access to one of the most fundamental building blocks of a stable life – a place to live."
- **HUD Training and Outreach** – An orientation of HUD Regional and Field Office Points of Contact regarding HUD's reentry efforts was conducted and will support consistent responses to inquiries from government partners.
- **Promising Strategies Dissemination** – The U.S. Interagency Council on Homelessness (USICH) and the Department of Justice (DOJ) Access to Justice Initiative published "Searching Out Solutions: Constructive Alternatives to Criminalization," which includes a focus on effective housing strategies for the reentry population. USICH and Reentry Council staff are working together to reach the field with promising dissemination and education strategies, including through the DOJ guide, "Reducing Homeless Populations' Involvement in the Criminal Justice System."
- **Solutions Database** – USICH launched its online "Solutions Database" of proven and promising solutions and innovations that will help end homelessness. Organized by the objectives of "Opening Doors," the federal strategic plan to end homelessness, the database includes several promising innovations under the "Access to Justice" objective that address the needs of justice-involved people experiencing homelessness.
- **Funding Collaboration** – HHS awarded $6 million for Community-Centered Responsible Fatherhood Ex-Prisoner Reentry Pilot Projects to implement comprehensive community-centered services to reentering fathers and their families. These projects will coordinate federal resources from HHS, DOJ, DOL, HUD, and local PHAs, and provide responsible fatherhood and healthy relationship activities, employment services, housing, and other interventions to help stabilize formerly incarcerated individuals and their families.
- **Reentry Housing Innovations' Roundtable** – Reentry Council agencies organized a roundtable with organizations that were developing, supporting, and researching various housing programs that were successfully integrating formerly incarcerated individuals into communities.

Snapshot

Agenda Moving Forward

Promote Effective Program Models and Technical Assistance Strategies

Reentry Council agencies will identify proven and promising reentry housing models such as permanent supportive housing. Agencies will also promote technical assistance strategies and align funding opportunities to connect housing to needed health care, treatment, and supportive services, including new opportunities provided by the Affordable Care Act.

Build Knowledge about What Works in Reentry/Housing

Reentry Council agencies will build knowledge about what housing models, interventions, and practices are proven to produce positive outcomes related to recidivism and housing. The agencies will seek opportunities to support research and evaluations that can examine the impact of housing on recidivism, economic stability, family reunification, and other outcomes. In addition, the agencies will collect, summarize, and disseminate findings from studies currently under way by multiple agencies that involve housing interventions focused on formerly incarcerated people.

Improve Policies to Enhance Reentry/Housing Outcomes

HUD will identify and develop strategies to reduce possible collateral consequences caused by federal housing policy and local housing provider discretion. HUD will take appropriate actions, which may include but are not limited to guidance, notice, training, and/or regulation/statute amendment.

Disseminate Information and Engage Stakeholders

Other efforts under development include an inventory of PHA reentry programs, a cross-training plan, and a webinar targeting HUD field offices, PHAs, and other reentry stakeholders.

Key Resources (Housing)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters
http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center – Housing
http://csgjusticecenter.org/reentry/issue-areas/housing/

HUD Secretary letters on Public and Multi-Family Housing
http://csgjusticecenter.org/nrrc/reentry-council-products-resources/

USICH Solutions Database
http://www.usich.gov/usich_resources/solutions/

Searching Out Solutions: Constructive Alternatives to Criminalization
http://www.usich.gov/issue/alternatives_to_criminalization

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Reservation Communities

The Reentry Council aims to identify the additional challenges faced by individuals reentering reservation communities due to the increased poverty and isolation often found there and to then identify and develop policies, programs, and services that will support the cultural-social fabric and increase the employment, education, and health and housing opportunities for this population.

Problem Statement

There exist serious public safety challenges in reservation communities in the United States. American Indian people are incarcerated at higher rates than the general population: at midyear 2009, tribal, federal, and state authorities incarcerated American Indian or Alaska Native individuals at a rate 25 percent higher than the overall national incarceration rate. Due to federal criminal jurisdiction on many reservations, juveniles detained in federal facilities are predominantly American Indian males, generally between 17 to 20 years of age, with an extensive history of drug and/or alcohol use/abuse and violent behavior and who have often been sentenced for sex-related offenses.

Of further concern is the rate of violent crime that exists in some reservation communities and the fact that this violence is often directed at the most vulnerable members of the community at rates that far exceed the rates off the reservations. For instance, it is a grim fact that an American Indian female has a one-in-three chance of being sexually assaulted in her lifetime. American Indian women also experience homicide at rates almost 50 percent greater than Caucasian women.

Finally, violence in the form of sexual assault and domestic violence against American Indian women also occurs at heightened rates. The response to the heightened violent crime rates in reservation communities must be multi-pronged and culturally appropriate. Certainly vigorous enforcement of criminal laws by federal law enforcement and federal support for viable crime prevention programs are key. But the public safety challenges faced by reservation communities are exacerbated by the unique challenges that an American Indian who is returning to his or her home community faces after serving a federal prison sentence for a crime of violence. Indian country unemployment rates reportedly average 49 percent, even in better economic times. High unemployment compounded with a lack of affordable and adequate housing magnifies challenges for returning individuals.

Further, community confinement housing facilities actually located in a reservation community are uncommon, which may be for cultural as well as economic reasons. This too often results in an American Indian spending his or her final months of incarceration in a halfway house facility that is located a great distance from the reservation community to which the individual will eventually return. In addition, their home communities are far from health and employment services that are critical to successful reentry.

Snapshot

Agenda Moving Forward

Expand Data Collection

Much appears to be unknown about the "flow" of American Indians through the federal criminal system. Data needs to be gathered as to the number of American Indians by:

- the reservations where they committed their feberal crimes;
- the Bureau of Prisons facilities in which they serve their sentences; and
- the reservations to which they return and serve their supervision under United States Probation and Pre-trial Services.

Increase Coordination

Because the Department of Justice and the Department of Interior's Bureau of Indian Affairs often have primary criminal jurisdiction over certain serious crimes committed on reservations, they have a broad and deep expertise on the public safety challenges that these communities face. The Reentry Council has expertise in the implementation of successful reentry programs in non-reservation communities. Finally, United States Probation and Pre-trial Services has expertise in the day-to-day supervision of offenders reentering reservation communities. Increased coordination among these centers of varied expertise is essential to understanding and then positively impacting the issue of reentry in Indian country.

Explore Transition Assistance

Currently too many American Indians who are transitioning out of federal prisons to community confinement settings are doing so in non-reservation communities many miles from the reservation communities to which they will be returning. Enhanced understanding of resource availability and need is required to address this issue.

Focus on Employment, Education, Health and Housing Opportunities

American Indians reentering reservation communities can face employment, education, health, and housing challenges that are unique given the high unemployment rates and isolation of some reservation communities. These challenges need to be further considered by the Reentry Council agencies and efforts redoubled to find creative and effective methods to address these challenges.

Key Resources (Reservation Communities)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters
http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center – Tribal Affairs
http://csgjusticecenter.org/reentry/issue-areas/tribal-affairs/

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Women and Reentry

Justice-involved females, like males, face a host of challenges when they leave jail or prison and return to their communities. However, the current systems do not always address the specific challenges faced by women. For example, while many justice-involved females struggle with both substance abuse and mental health problems – often linked to their history of physical or sexual abuse beginning in childhood and extending into adulthood – most state and local reentry programs lack a significant trauma-informed behavioral health component. And while a primary consideration for many justice-involved women who are mothers is to determine why and how to successfully reestablish a relationship with their children when they leave prison, most state and local systems are not focused on supporting this important aspect of reentry. These and many other factors point to the need to better identify effective strategies to help women overcome these challenges as they transition to their communities.

Accomplishments to Date

- The Department of Health and Human Services (HHS), in conjunction with other Reentry Council agencies and community partners, sponsored a two-day conference, "Meeting the Reentry Needs of Women: Policies, Programs, and Practices." The conference brought together researchers, practitioners, federal employees, and advocates to discuss how federal, state, and local systems can work to improve reentry outcomes for women.
- In 2012, the Department of Labor (DOL) funded grants to provide employment and support services to justice-involved females using a comprehensive case management strategy. Nine grants were awarded – seven serving adults and two serving youth. Additional grants will be funded in 2013.
- HHS has commissioned a research review on justice-involved women to help inform the development of interventions designed to promote healthy relationships and successful reentry for this population. The research review will examine characteristics, pathways, and the evidence base for interventions.
- Reentry Council agencies have convened seven listening sessions across the country to hear from service providers and justice-involved women on the challenges and successes of returning to their communities and families. These listening sessions will provide input for materials being developed for service providers and women reentering the community from prisons and jails.

Snapshot

Agenda Moving Forward

Increase Information and Resources Available to Meet the Needs and Challenges Facing Justice-Involved Women

Reentry Council agencies are working together to identify new opportunities to improve outcomes for justice-involved women. In addition to funding opportunities, policy guidance, regional collaboration, and outreach related to access to health care are being pursued.

Identify and Address Barriers to Successful Reentry for Women

Through listening sessions and expert consultations, Reentry Council agencies are identifying barriers that justice-involved women face during the reentry process and are developing topical resource materials for service providers and for women reentering their communities.

Increase Evidence-Based and Research-Informed Program Practices

In addition to the HHS-funded research review on justice-involved women (due to be completed in the fall of 2013), Reentry Council agencies are working together to identify opportunities that would facilitate the development of evidence-based and research-informed practices and to ensure that information about such practices is widely disseminated.

Develop a Public-Private, Cross-Discipline Communications Network

Reentry Council agencies are working together to add more community-based programs that serve justice-involved women to the National Institute of Correction (NIC) searchable directory, build a database of intermediary networks that focus on improving outcomes for justice-involved women, and develop a communications network that links the public and private program providers, intermediary networks, and federal partners in order to improve the flow of critical information about policy and practice related to justice-involved women.

Key Resources (Women and Reentry)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

National Reentry Resource Center
http://csgjusticecenter.org/nrrc/

National Institute of Corrections
http://nicic.gov/WomenOffenders

National Resource Center on Justice-Involved Women
http://cjinvolvedwomen.org/

SAMHSA's Gains Center for Behavioral Health and Justice Transformation
http://gainscenter.samhsa.gov/topical_resources/women.asp

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Child Support

The Child Support Program serves one in four of all children in the United States and one in two of all poor children and their families, serving those families from a child's birth until adulthood. Child Support is a national program but policies and practices vary from state to state. Child support is particularly important to reentry because child support obligations typically do not automatically stop during incarceration or unemployment. Realistic child support policies help parents provide for their families and facilitate successful reentry and can provide an on-ramp to many other supportive services.

Accomplishments to Date

- The U.S. Department of Health and Human Services (HHS) Office of Child Support Enforcement (OCSE) published six fact sheets on establishing realistic child support orders, modification practices, state-specific modification policies and programs regarding incarcerated parents, federal prisoners with child support obligations, and access to justice innovations.
- OCSE provided factsheets and guidance to Veterans Affairs (VA) staff members in the Veterans Justice Outreach Program and Health Care for Reentry Veterans Program, to the Bureau of Prisons (BOP) Reentry Affairs Coordinators in each federal prison, and to Reentry Council agencies' contacts.
- OCSE produced policy guidance on the U.S. Supreme Court case Turner v. Rogers, including guidance on alternatives to incarceration for nonpayment of child support.
- OCSE wrote items for the Administrative Office of the Courts (AOC) and BOP's newsletters about the fact sheets; provided a guide for the BOP called "Four Basic Facts About Child Support," and provided materials to the National Reentry Resource Center Newsletter about the connection between child support and reentry.
- OCSE staff organized and presented at national conferences on child support and reentry innovations in concert with experts from the states.

Snapshot

Agenda Moving Forward

Disseminate Child Support Information

The Child Support subcommittee intends to create materials about child support and reentry for a variety of audiences, including corrections, child support, and reentry professionals. This includes creating new Reentry MythBusters to highlight the connections between reentry and the core mission of the Child Support Program, especially the relationship between child support and employment. One priority project moving forward is to create a simple, accessible state-by-state guide to child support modification processes. The Child Support subcommittee also intends to create talking points on the importance of child support for reentry caseworkers and case managers.

Improve Court Practice and Improve Access to Justice

The Child Support subcommittee intends to identify ways to improve court practices including creating specialized resources and collaborating with attorneys and judges in the criminal justice area. They will create materials for federal judges, such as a bench card, on the importance of child support to reentry; collaborate with legal associations and organizations; publicize a variety of models for service delivery, such as specialized courts; and improve access to justice and strengthen *pro se* initiatives. Another strategy is to encourage the identification of child support responsibilities in pre-sentence reports and identify other pre-trial services that could assist federal prisoners with child support services.

Coordinate Communications about Reentry

The Child Support subcommittee intends to identify additional opportunities to promote the intersection of child support and reentry through conference presentations, newsletter articles, and web-based learning. The subcommittee plans to improve materials available to non-child support personnel working with reentry populations by facilitating revisions to federal program and agency operating procedures, manuals, or guides to include current and specifically tailored information on child support. The Child Support subcommittee also intends to identify and promote promising practices in states and promote new grants and new partnerships.

Key Resources (Child Support)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters
http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center
http://csgjusticecenter.org/nrrc/

Office of Child Support Enforcement (OCSE)
http://www.acf.hhs.gov/programs/css

OCSE Fact Sheet on Realistic Orders for Incarcerated Parents and State-By-State Chart
http://www.acf.hhs.gov/programs/css/resource/realistic-child-support-orders-for-incarcerated-parents

OCSE Facts Sheet on Collaborations with Criminal Justice Agencies
http://www.acf.hhs.gov/programs/css/resource/child-support-collaboration-with-federal-criminal-justice-agencies

OCSE Fact Sheet on Access to Justice Innovations
http://www.acf.hhs.gov/programs/css/resource/access-to-justice-innovations

OCSE Turner v. Rogers Policy Guidance
http://www.acf.hhs.gov/programs/css/resource/ alternatives-to-incarceration and http://www.acf.hhs.gov/programs/css/resource/turner-v-rogers-guidance

Federal Interagency
REENTRY COUNCIL
June 2013
The Cabinet-level Reentry Council is working to enhance community safety and well-being, assist those returning from prison and jail becoming productive citizens, and save taxpayers dollars by lowering the direct and collateral costs of incarceration

Justice-Involved Veterans

Veterans are not overrepresented in the criminal justice system, but their numbers are significant. An estimated one of every ten criminal defendants and inmates has served in the U.S. military. Most justice-involved Veterans are likely eligible for health care and other benefits from the U.S. Department of Veterans Affairs (VA), although their eligibility is suspended or reduced while they are incarcerated.

Accomplishments to Date

- VA has reached more than 100,000 justice-involved Veterans through direct outreach in prisons, jails, and criminal courts – including over 1,000 state and federal prisons, and the estimated 168 Veterans Treatment Courts. The purpose of this outreach is to connect Veterans with needed mental health, substance abuse, and other clinical services, where possible as an alternative to incarceration.
- VA revised its administrative policy that limited VA prison outreach to the six months prior to a Veteran's release. The revised policy allows for assessment and release planning with incarcerated Veterans earlier than six months before release, thus enhancing the odds of successful reentry.
- VA built a web-based system that will allow prison, jail, and court staff to quickly and accurately identify Veterans among their inmate or defendant populations. Called the Veteran Reentry Search Service (VRSS), the system will also prompt VA field staff to conduct outreach to the identified Veterans.
- VA produced a brief outreach video intended for Veteran jail and prison inmates, and distributed it for viewing in all state and federal prisons, as well as more than 500 local jails (and counting). Titled "Suits," the video was directed by an Operation Iraqi Freedom Veteran. It encourages incarcerated Veterans to use their time wisely by taking an active role in the reentry planning process, and informs them how to contact a VA outreach specialist for help.
- VA expanded eligibility for its health care services to include Veterans in halfway houses, work-release centers, or other reentry-focused correctional settings. These Veterans must often waive access to health care from the incarcerating authority to participate in such programs.

Snapshot

Agenda Moving Forward

Support Continued Expansion of Veterans Treatment Courts

The Veterans Treatment Court (VTC) model is an increasingly popular means for communities to come together to deliver needed services to Veterans in crisis. VTCs build on drug courts' demonstrated success at reducing recidivism and saving communities money, adding a peer mentoring component to harness the power of one Veteran helping another. Access to VA health care and other benefits is an integral part of the VTC concept, and VA forms part of the treatment team in all VTCs. As their numbers grow, VA will continue to support VTCs both operationally and at the national level, for example, by collaborating to develop innovative training protocols.

Partner with Criminal Justice Stakeholders to Identify and Assist Justice-Involved Veterans

VA's Veterans Reentry Search Service provides prison, jail, and court staff with a user-friendly online tool to quickly and accurately identify Veterans among their inmate or defendant populations. Widespread use of VRSS will not only inform correctional and court staff's interactions with Veterans they serve, but will enhance VA's ability to provide efficient, targeted outreach and reentry planning assistance to Veterans in these systems. Working with local and national partners, VA will promote this valuable new resource nationwide.

Access to Legal Services

Veterans, particularly those who are homeless or at risk of homelessness, have a significant and too-often unmet need for legal services. On a recent national VA survey, homeless and formerly homeless Veterans indicated that legal services for eviction or foreclosure proceedings, child support issues, and outstanding warrants or fines accounted for three of their top ten unmet needs. Although VA cannot provide legal services directly, VA medical centers are making space available so that local legal service providers can work with Veterans where they receive health care. To date, 37 providers (including law school clinical programs, legal aid offices, and local pro bono consortia) are serving Veterans in 34 VA medical centers. VA will continue to expand its facilities' role as a place where Veterans can address their unmet legal needs.

Key Resources (Veterans)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

Reentry MythBusters
http://csgjusticecenter.org/nrrc/projects/mythbusters/

National Reentry Resource Center
http://csgjusticecenter.org/nrrc/

VA Veterans Justice Outreach (VJO) Program
http://www.va.gov/HOMELESS/VJO.asp

VA Health Care for Reentry Veterans (HCRV) Program
http://www.va.gov/HOMELESS/Reentry.asp

Veterans Crisis Line
1-800-273-8255, Press 1; or www.VeteransCrisisLine.net

National Call Center for Homeless Veterans
1-877-4AID-VET (1-877-424-3838); or http://www.va.gov/homeless/nationalcallcenter.asp

Federal Interagency
REENTRY COUNCIL

June 2013

The Cabinet-level Reentry Council is working to enhance community safety and well-being, assist those returning from prison and jail becoming productive citizens, and save taxpayers dollars by lowering the direct and collateral costs of incarceration

Public Safety
(State/Local Focus)

Approximately two million adults are incarcerated in state prisons and local jails, costing U.S. taxpayers more than $75 billion each year. The vast majority of these individuals eventually return to their home communities. In fact, each year nearly 700,000 individuals are released from state prisons; millions more cycle through local jails. Nationally, two out of every three people released from state prisons are rearrested for a new offense and about half are reincarcerated within three years. When reentry fails, the societal and economic costs are high. Reducing recidivism – a central goal of the Reentry Council – is critical for increasing long-term public safety and lowering corrections costs.

Accomplishments to Date

- Since FY09, there have been nearly 500 Second Chance Act (SCA) grant awards that total over $250 million, supporting reentry efforts in 48 states.
- A national forum on reentry and recidivism reduction was convened in December 2011. Teams of policymakers from all 50 states attended this results-oriented event to set goals and develop strategies for reducing recidivism.
- In FY12, a new Statewide Recidivism Reduction (SRR) grant track was established, funding seven state corrections agencies to plan and implement statewide recidivism reduction strategies.
- The Department of Justice's (DOJ) Bureau of Justice Assistance (BJA) also established the SMART Probation program, funding nine sites in FY12 to pilot innovative evidence-based strategies to reduce recidivism among probationers.
- Since its inception, the Justice Reinvestment Initiative's (JRI) bipartisan, interbranch, and data-driven approach has helped policymakers from over 27 states and 18 counties increase public safety and reduce corrections costs.
- The BJA-supported National Reentry Resource Center (NRRC) released a policy brief in September 2012 highlighting seven states that reported significant declines in their three-year recidivism rates.
- A series of "Recidivism Reduction Checklists" were recently released to help state leaders evaluate strengths and weaknesses in their reentry efforts and develop recidivism reduction plans.
- The Office of Community Oriented Policing Services (COPS) and the Council of State Governments Justice Center released *Planning and Assessing a Law Enforcement Reentry Strategy* to help policing personnel and their partners facilitate successful reentry in their jurisdictions.
- The National Institute of Corrections (NIC) funded intensive technical assistance for seven sites to develop the capacity to implement "Evidence-Based Decision Making in Local Criminal Justice Systems." The delivery of technical assistance and tools have led criminal justice stakeholders to increased use of research and data to guide their criminal justice decisions, resulting in system improvements that include decreased jail and prison bed utilization.
- NIC funded intensive technical assistance to six sites for the Transition from Jail to Community Initiative (TJC). The TJC model is designed to advance collaboration between jails and communities to enhance public safety, reduce recidivism, and improve reintegration processes.

Snapshot

Agenda Moving Forward

Ensure that Reentry Efforts Generate Reductions in Recidivism

The BJA-supported NRRC will continue to develop and disseminate tools and resources to help state officials implement recidivism reduction strategies. NRRC staff are working intensively with the seven SRR grantees to help them develop statewide recidivism reduction plans, and will document important lessons learned from those states to help inform the broader field.

Promote Cost-Effective Approaches to Enhancing Public Safety

Americans have made it clear they want a correctional system that holds people accountable and keeps communities safe, and in a way that makes the most of their tax dollars. A primary goal of JRI is ensuring that the millions of dollars in cost savings from justice reinvestment legislative changes are effectively reinvested in programs and policies that strengthen public safety. A new JRI "lessons learned" report can help inform the work in future JRI sites, as well as in the broader corrections field.

Strengthen Community Corrections Policies and Practices

Recognizing that about five million individuals (or one in fifty) are on probation or parole in the U.S., strengthening community corrections is a priority for the DOJ and the NRRC. Grantee work will continue to focus on promoting effective community supervision practices that increase public safety.

Highlight Effective Law Enforcement Reentry Strategies

A new report, *Lessons Learned: Planning and Assessing a Law Enforcement Reentry Strategy*, developed with support from the COPS Office, describes how four law enforcement agencies used the principles outlined in *Planning and Assessing a Law Enforcement Reentry Strategy* to engage in local-level reentry partnerships in order to reduce crime and increase public safety. DOJ will continue to assist law enforcement agencies in engaging in reentry efforts in their jurisdictions.

Key Resources (Public Safety)

Reentry Council
http://csgjusticecenter.org/nrrc/projects/firc/

National Reentry Resource Center
http://csgjusticecenter.org/nrrc/

The National Summit on Justice Reinvestment and Public Safety
http://csgjusticecenter.org/justice-reinvestment/report/

Planning and Assessing a Law Enforcement Reentry Strategy Online Toolkit
http://whatworks.csgjusticecenter.org/law_enforcement_toolkit

Recidivism Reduction Checklist
http://csgjusticecenter.org/reentry/reentry-checklists/

Lessons from the States: Reducing Recidivism and Curbing Corrections Costs through Justice Reinvestment
http://csgjusticecenter.org/jr/publications/lessons-from-the-states/

States Report Reductions in Recidivism
http://csgjusticecenter.org/nrrc/publications/states-report-reductions-in-recidivism-2/

National Institute of Corrections
www.nicic.gov

Appendix B: EmployeeScreenIQ Survey Report 2014

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SURVEY REPORT 2014

The Unvarnished Truth:
2014 Top Trends in Employment Background Checks

Conducted and Reported by EmployeeScreenIQ

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Question 12: Does your organization conduct online media searches for candidates as part of your hiring process? 17

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Question 14: What information found during an online media search would cause you to disqualify a candidate? (Select all that apply.) Only respond if you answered "yes" to question 12. 18

Question 15: What information found in an online media search would help support your decision to hire a candidate? (Select all that apply.) 18

Question 16: What percentage of your candidates do you estimate distort information on their resumes? 19

Question 17: What percentage of candidates do you estimate are hired in spite of distortions on their resumes? 20

Question 18: What types of resume distortions/discrepancies would cause you not to hire a candidate? (Select all that apply.) 21

Question 19: What is the primary reason you conduct employment background checks? 21

Question 20: Is it important that your employment background screening provider be accredited by the National Association of Professional Background Screeners (NAPBS)? 22

Question 21: How often do you evaluate your employment background screening program for quality, compliance, accuracy, etc.? 23

Question 22: Does your organization utilize employment credit reports in your hiring process? 24

Question 23: If you answered "yes" to question 22, what percentage of candidates do you estimate are denied employment based on the results of credit reports? 24

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Are you an EmployeeScreenIQ client? 25

How many people does your company employ? 25

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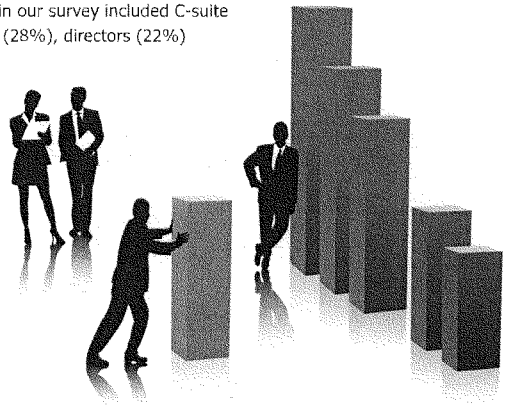
ABOUT THE SURVEY 2014

Once again, we present the findings of EmployeeScreenIQ's annual survey of U.S.-based employers regarding their use of employment background checks. Nearly 600 individuals representing a wide range of companies completed the survey in late 2013 and early 2014. These employers use a variety of national and regional firms to conduct their background checks.

As with the past four surveys, the 2014 survey was designed to provide a reliable snapshot of:

- How participants currently utilize background checks
- How they respond to adverse findings on background checks
- Their paramount screening-related concerns
- Their practices concerning Fair Credit Reporting Act responsibilities, Equal Employment Opportunity Commission (EEOC) guidance and candidates self-disclosing criminal records

Individuals who participated in our survey included C-suite executives (10%), managers (28%), directors (22%) and others.



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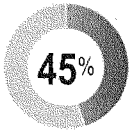
MAIN FINDINGS 2014

The 2014 survey results again confirm that employers continue to rely upon background checks to protect themselves, their workforces and their customers. Here are a few high-level findings from this year's survey:

Criminal Convictions Under-Reported?

59% said that criminal convictions are reported on just 5% or less of their background checks. This estimate is significantly lower than the average "hit rate" (23%) of thousands of employers worldwide whom EmployeeScreenIQ serves. We believe this discrepancy is largely due to two possibilities: 1) a lack of thoroughness in the information that some screening providers offer to participants, and 2) the desire by some companies to save money or expedite turnaround time by conducting less exhaustive background searches.



Looking Beyond Criminal Records

Almost half of respondents (45%) said that job candidates with criminal records are not hired due to their indiscretions a mere 5% of the time or less. As in our past surveys, this finding again supports employers' longstanding assertions that they often look beyond an applicant's criminal past and that qualifications, references, and interviewing skills also greatly influence hiring decisions.

Adoption Rates for EEOC Guidance on the Rise

A majority of this year's respondents (88%) have adopted the EEOC's guidance on the use of criminal background checks. This is a significant jump from last year's survey, which found that just 32% of respondents adopted the guidance at that time.

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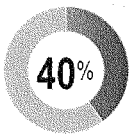
Still Asking for Self-Disclosure

Despite the rise in adoption of the EEOC's guidelines, a majority of respondents (66%) continue to ask candidates to self-disclose past criminal convictions on job applications—and a total of 78% ask at some point during the hiring process. This continues despite the EEOC's recommendation to refrain from asking for self-disclosure on the job application in addition to state and municipal laws that outright ban the practice.

Employers Appreciate Knowing

Just 8% of respondents indicated that job candidates are automatically disqualified when they self-disclose a criminal conviction prior to an employment background check.



Organizations at Risk

Nearly 40% of respondents do not send pre-adverse action notices to candidates who are not hired based in part on a criminal conviction. This is a direct violation of a federal statute—the Fair Credit Reporting Act (FCRA) and puts organizations at risk for class action lawsuits and other legal actions.

Giving Candidates a Chance To Explain

A total of 64% of respondents perform individualized assessments for candidates who have conviction records. While the 36% who do not perform individualized assessments may not be violating the letter of the law, they are at risk for claims of discrimination under title VII according to the EEOC guidance.

Online Snooping Isn't Widespread

A substantial portion of respondents (38%) search online media for information about their candidates as part of the hiring process. It's not an insignificant portion but the vast majority of employers forego this activity. 80% of those who check online sites turn to LinkedIn for information.

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Resume Lies Becoming a Deal-Breaker

Half of all respondents reject 90% or more candidates when lies are discovered on their resumes. Another 23% of respondents estimate they hire candidates only 11% to 20% of the time when resume distortions are found. These findings strongly depart from those of last year's survey, which indicated that employers were rather lenient regarding resume distortions.

Pervasive Credit Reports? No Way!

Contrary to the popular belief that employers check the credit history of everyone they hire, only 14% of respondents said they run credit checks on all new hires. A whopping 57% of respondents do not use credit reports as part of their hiring process. There are now 10 states that have enacted regulations curbing the use of credit reports, which could be partly responsible for their less widespread use.

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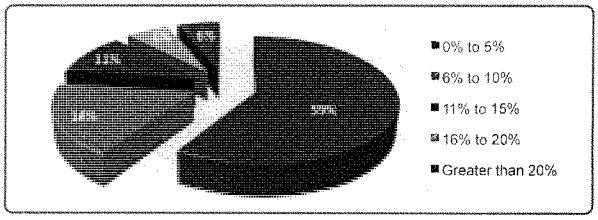
QUESTIONS &RESPONSES 2014

Question 1: What percentage of your candidates do you estimate have criminal convictions reported on their employment background checks?

As with last year's survey, the vast majority of respondents said that criminal convictions are rarely reported on their job candidates' background checks. Specifically, 59% said that criminal convictions are reported on just 5% or less of their background checks, while 18% said that convictions are reported on 6% to 10% of their checks. These estimates are significantly lower than the "hit rate" of thousands of employers worldwide who work with EmployeeScreenIQ. Collectively, our clients averaged a 23% criminal conviction hit rate in 2013.

Employers who use less-exhaustive background checks could be putting their organizations at serious risk with lower quality results



This discrepancy could be due to less thorough information gathering practices used by some screening providers or employers conducting their own background searches in order to save money or expedite turnaround time. No matter the reason, employers who use less-exhaustive background checks could be putting their organizations at serious risk with lower quality results.

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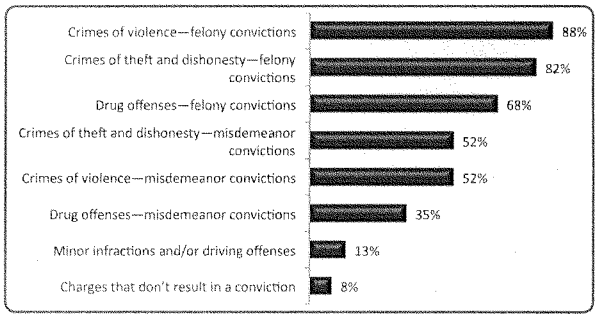
Question 2: What types of conviction records would disqualify a candidate from employment at your company? (Select all that apply.)



There is a significant decrease in concerns related to drug offenses

As we have reported in past years, it's not surprising that respondents expressed greater concern over convictions (particularly felony convictions) related to crimes of violence, theft, and dishonesty. However, there is a significant decrease in concerns related to drug offenses. Based on the findings, the bottom line is that an overwhelming majority of respondents are hesitant to hire candidates who have felony convictions in their past. And while felonies are seemingly of greatest concern, this data also supports the notion that misdemeanor convictions matter to employers. Nearly half of all employers are concerned about misdemeanor convictions related to crimes of violence or theft and dishonesty.

Notably, the percentages in almost every category rose over those of last year's results. This may indicate a generally heightened sense of awareness and/or concern regarding incidents of workplace violence, employee theft, and negligent hiring lawsuits.

An interesting takeaway from the respondents' comments for this question is that many employers desire to be more flexible in their hiring decisions. However, external factors such as federal and state regulations or client contractual obligations sometimes hinder their flexibility. This is somewhat

ironic, as some governmental bodies are going after employers for being inflexible, while others are creating rules for stricter hiring standards.

A selection of respondents' comments:

"We pride ourselves on high integrity in the organization. Safety is paramount. Felony convictions in the above areas could put not only our employees but the public at risk."

"There are no automatic disqualifiers for us. We look at the whole picture to determine whether the candidate is hired. We consider how long ago the convictions were, employment history, relevance of offense to job (in theft instances), etc. First, however, is the issue of whether the candidate discloses the convictions on their employment application."

"Every candidate's record is reviewed on a case-by-case basis as related to the specific job for which they are applying. For example, if they apply for a cashier's position, they cannot have any theft convictions."

"We have a contract with our clients that we will not hire any felons and anyone having misdemeanor dealing with theft, fraud or violence."

"We review each applicant individually. We don't automatically disqualify a candidate for the above—rather, we make individual decisions based on interview, attitude, history, etc. We believe in second chances but are very concerned about the safety of our employees and company too."

"We are a law enforcement agency, so we do not hire people with felony convictions or convictions of crimes involving violence or dishonesty."

"We have employees who work in close quarters and handle and/or are exposed to dangerous work conditions that require strict compliance with safety standards and reporting. We cannot afford to employ folks whose background indicate a propensity for violence, dishonesty or use of controlled substances that could impair good judgment."

"The candidates we hire will have direct patient care and would have access to various types of drugs including controlled substance drugs. We have to be very selective with candidates that may have been violent and have a history of drug convictions."

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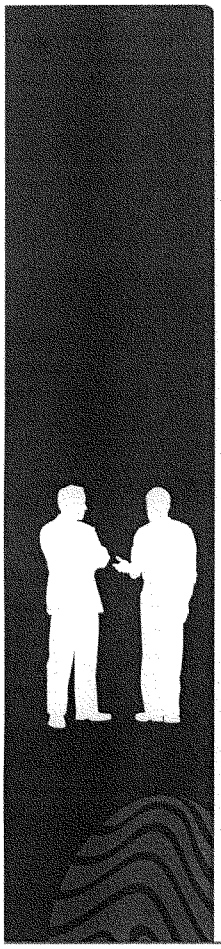
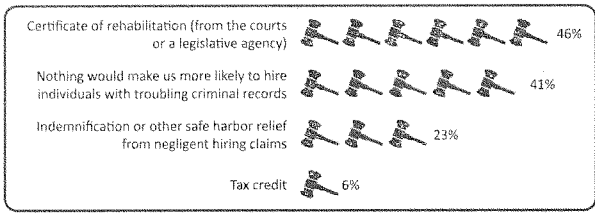


Question 3: If you were considering hiring a candidate whose background check contained a troubling criminal conviction, which of the following would make your organization more likely to hire him/her? (Select all that apply.)



Although employers are increasingly concerned about protecting their organizations and not exposing themselves to unnecessary risks, there are programs that make hiring individuals with criminal records a less risky proposition. While these programs exist, it is widely held that they are fairly limited and woefully underutilized.

A selection of respondents' comments:

"We would be more likely to hire someone for their actions after the criminal conviction. Did they change their life around? Are they making better decisions? What were the circumstances surrounding the conviction."

"It really depends. We are a health care organization so we can't take any chances with patient safety, but we do have lots of jobs that do not involve direct patient care, so we may be more lenient on some of those roles."

"We are mandated by State and Federal laws that require us to not hire these individuals."

"As mentioned, it is mandated by state law that certain convictions disqualify a candidate. This answer does depend on the nature of the crime. Some can be hired if rehabilitated."

"We are highly regulated. We cannot hire someone with a felony conviction."

"The need for an employee is not worth the risk of hiring someone with a 'troubling criminal conviction'."

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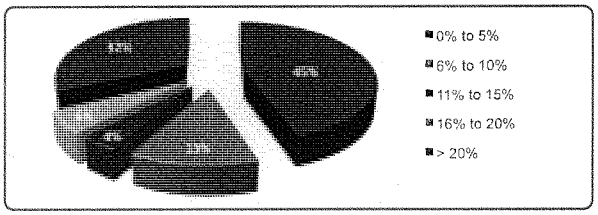
"Too many qualified candidates looking for jobs. Don't need to be involved with people with a troubled legal history."

"If the conviction was deemed a disqualifying event, then we would not hire the person. When potentially disqualifying information is revealed, we do an individual review to consider the offense and its job relatedness and confer with the hiring manager and an attorney in our Law Department."

"There is too high a risk that the person could resort to prior behaviors risking fellow employees and thus presenting considerable liability issues for the Company. We are in a no-win situation with current legislation and litigation risks.

"A certificate or tax credit wouldn't affect us one way or the other. Our main concern is providing a safe working and learning environment, and we take that obligation seriously."

Question 4: Of your candidates who are found to have criminal convictions, estimate the percentage that you disqualify as a result of those convictions.



Employers aren't simply disqualifying vast numbers of job candidates out of hand due to criminal convictions

These results reinforce the impression that employers aren't simply disqualifying vast numbers of job candidates out of hand due to criminal convictions. It appears from the vast majority of comments we received in Question 2 that employers are considering other factors, including the severity of the crimes, the crimes' relation to the job applied for, the time passed since the conviction and whether the candidate is a repeat offender. In fact, these are all considerations that the EEOC recommends employers use when making hiring decisions.

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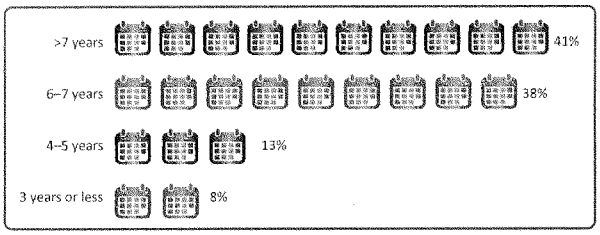
Question 5: When determining the hiring eligibility of your candidates, how far back in time do you search for criminal convictions?



Most employers want to consider as much data as possible to make an informed hiring decision

These results are extremely similar to those of last year's survey. Almost half of the respondents go beyond seven years in their criminal background checks, an ongoing indication of the heightened care employers are applying to their hiring practices. However, based on the responses to Question 1 of the survey—in which 77% of respondents estimate that they saw convictions for 10% or less of their candidates—we wonder how many of these employers are finding the records they're interested in evaluating. According to our research, 67% of all criminal records that we report have occurred within the past seven years. Twelve percent of all records reported are seven to 10 years old, 18% reported are 11 to 20 years old and the remaining 3% are older than 20 years.

The survey responses make one thing obvious: most employers want to consider as much data as possible to make an informed hiring decision.

Question 6: How has the adoption of the EEOC's guidance on employers' use of criminal background checks affected your hiring process? (Select all that apply.)

While half of all respondents indicated that the EEOC's guidance has had no impact on their hiring process—and another 12% haven't adopted the guidance—the remainder are pretty clearly split in their assessment of the guidance. Ten percent said it has had a positive impact but 54% said that it has a negative impact on costs, time-to-fill, clarity, or the candidate experience in general.

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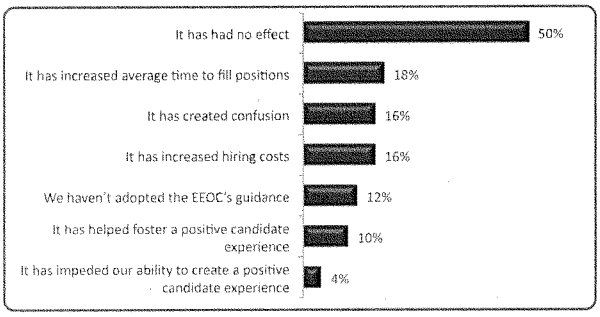
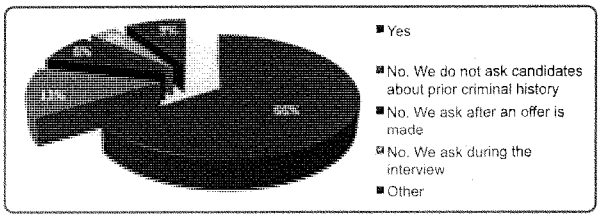


Overall, 88% of respondents this year indicated that they've adopted the EEOC's guidance as opposed to just 32% of respondents at the time of last year's survey.

Question 7: Do you ask candidates to self-disclose past criminal convictions on their job applications?



In spite of the EEOC's recommendation to remove the question that asks applicants to self-disclose past criminal convictions and a myriad of similar state and municipal laws, 66% of respondents continue to ask candidates to self-disclose past criminal convictions on job applications—and a total of 78% ask at some point during the hiring process.

It is important to point out that asking about criminal history on a job application is still legal in most jurisdictions—but there are a growing

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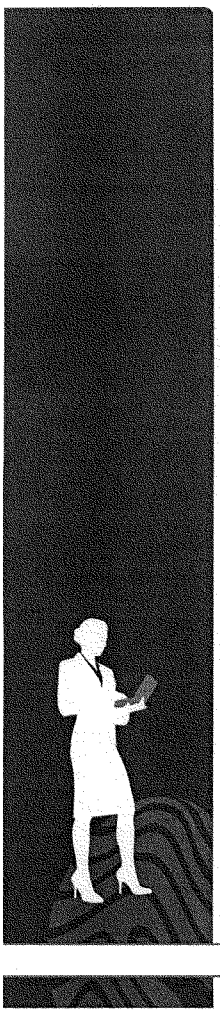
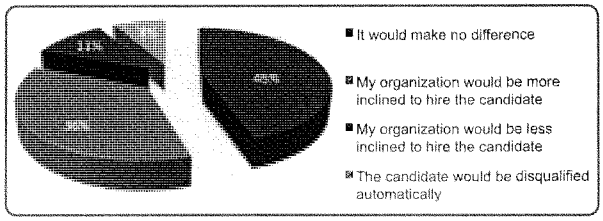


number of states and cities prohibiting the practice. Our sense is that these so-called ban the box laws will continue to be adopted throughout the country at both the state and city level. And while these laws may force employers to remove the question from the job application, our advice for employers is to ask the question later in the hiring process.

Question 8: If a candidate self-disclosed a criminal conviction prior to an employment background check:



These percentages are fairly similar to those from last year's survey but there are notable variances. "It would make no difference" jumped up by 5% over 2013's survey, while the "more inclined to hire" response fell by 16%. Only 8% of respondents indicated that the candidate would be automatically disqualified. Overall, the majority of employers are indicating that self-disclosure doesn't hurt a candidate's chances of employment—and may, in fact, improve them.

A selection of respondents' comments:

"We rescind offers for failure to disclose so self-disclosing any criminal conviction is a requirement."

"We look for honesty in considering candidates. Being up-front and honest about convictions is important."

"If they do not disclose and background hits, then it is falsifying the application."

"Although I would appreciate their honesty, if a candidate had a disqualifying conviction, we would not hire."

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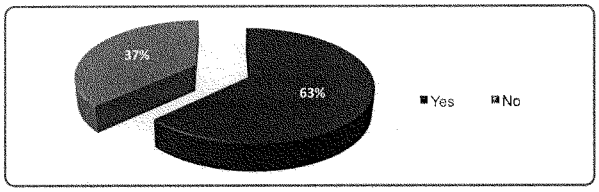
"It raises a 'red-flag' regardless since it's just as easy to be scammed by someone who exhibits an open response. You just cannot be sure the person has been rehabilitated."

"Even with bringing it up before if it is one of the ones we don't allow it will not pass. Letting me know before hand is good but doesn't make you exempt."

Question 9: If you decide not to hire a candidate based in part on a criminal conviction, do you send a pre-adverse action notice to them?



Those not in compliance with the FCRA do not realize they're executing the process improperly

Frankly, we're concerned that nearly 40% of respondents *do not* send a pre-adverse action notice to candidates who are not hired based in part on a criminal conviction. These respondents are, by their own admission, violating the law and putting their organizations at risk for violating a basic principle of the Fair Credit Reporting Act (FCRA). And make no mistake—a significant number of class action lawsuits are related to employers violating this tenet of the FCRA. We spend a considerable amount of time educating employers on this process and our general sense is that those not in compliance do not realize they're executing the process improperly. All employers who do not send pre-adverse action notifications should seek immediate guidance from their background screening partner or in-house legal counsel.

Question 10: Do you perform individualized assessments for candidates with conviction records (so they can explain the circumstances of their records)?

Clearly, employers already had practices in place or are adapting their hiring practices to incorporate the recommendations suggested by the

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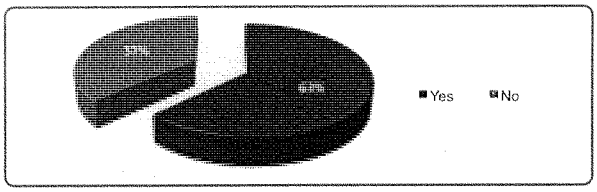
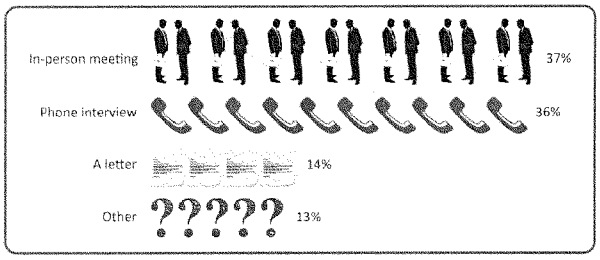
EEOC. We believe the adoption rate will continue to grow in the coming years unless the courts reject the guidance.



Similar to the ban the box issue, the EEOC guidance on individualized assessments was a *recommendation*, not a mandate. Therefore, those who have not developed a process in this regard are not violating any laws. Even so, we would be remiss if we didn't point out that demonstrating compliance with this recommendation is the clearest path to insulating yourself from discrimination claims.

Question 11: If you answered "yes" to question 10, how do you perform the individualized assessment?



While no governmental or legal body has yet clarified how individualized assessments are to be conducted (or what the "preferred" method might be), the majority of respondents are using either in-person or telephone interviews. Regardless of how you conduct these assessments, we suggest that you clearly document your policy and process.

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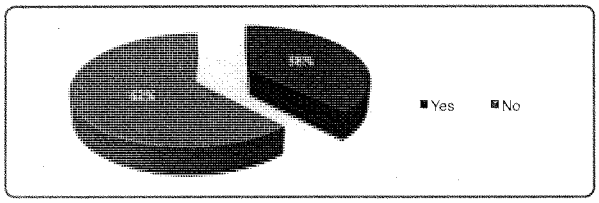
The business world's enthusiastic embrace of online media does not translate to the hiring process

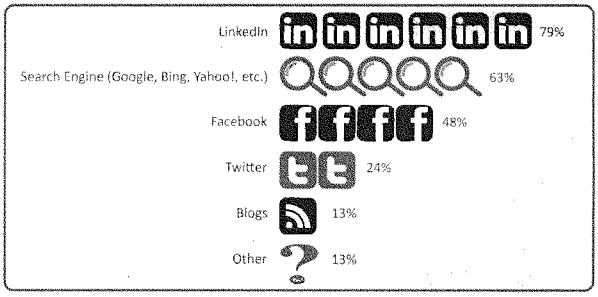
Question 12: Does your organization conduct online media searches for candidates as part of your hiring process?



Once again, we see that the business world's enthusiastic embrace of online media does *not* translate to the hiring process. As in last year's survey, nearly two-thirds of respondents say they do not consult online media when researching their candidates. However, 38% of employers—a significant portion—do consult some form of online media.

We must point out that other surveys have shown that employers are checking up on potential employees through Google and other online searches. Whether or not employers consider these searches "background checks," the FTC has ruled that some social media data aggregators are, in fact, subject to the same laws as traditional background checks.

Question 13: If you answered "yes" to question 12, which sites do you use? (Select all that apply.)



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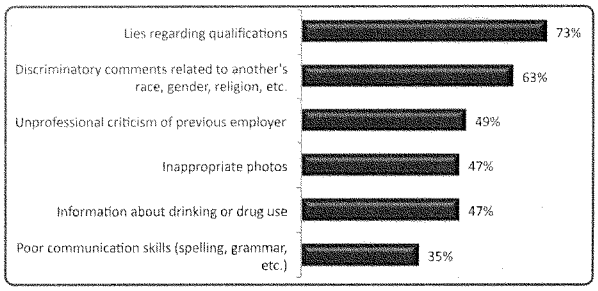
As you might expect, LinkedIn is the go-to site for most employers when it comes to screening job candidates, which is understandable when you consider that employers are most concerned about lies regarding qualifications (see Question 14). A vast majority of these employers also turn to search engines such as Google, Bing, and Yahoo! Also noteworthy is the use of both Facebook and Twitter.

Question 14: What information found during an online media search would cause you to disqualify a candidate? (Select all that apply.) Only respond if you answered "yes" to question 12.



The majority would disqualify candidates for discriminatory comments

While lies about qualifications are the most troubling details that respondents find online, the majority would also disqualify candidates for discriminatory comments—and almost half disqualify candidates for unprofessional criticism of past employers, information related to drug and alcohol use, and inappropriate photos. Clearly, employers are looking for clues about negative traits that could cross over into the workplace or tarnish their companies' reputations.

Question 15: What information found in an online media search would help support your decision to hire a candidate? (Select all that apply.)

Again, there are no real surprises in these results but they reinforce the notion that qualifications and professionalism are paramount in employers' ultimate selection of job candidates. These results also support the

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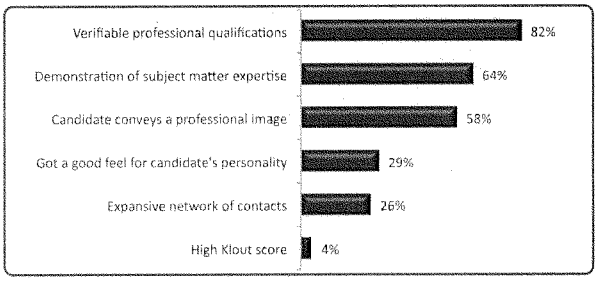
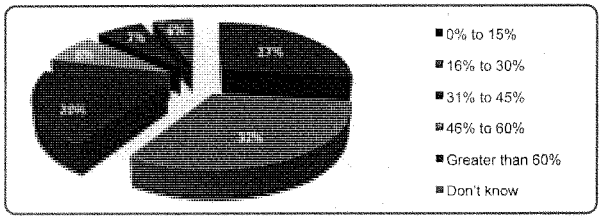
contention that employers are not using online searches only to disqualify candidates but to help validate their hiring decisions.



Question 16: What percentage of your candidates do you estimate distort information on their resumes?



When comparing this year's results to last year's, the largest share of respondents shifted from the first category (0% to 15%) to the second category (16% to 30%), despite the total of both categories remaining almost identical. Perhaps employers are becoming more aware of the widespread problem of job seekers distorting the truth on resumes.

Interestingly, most job seekers are well aware that employers use background checks to review potential new hires. Even so, individuals continue to "tweak" their resumes and hope they won't be caught. Clearly, employers must remain vigilant in their screening practices.

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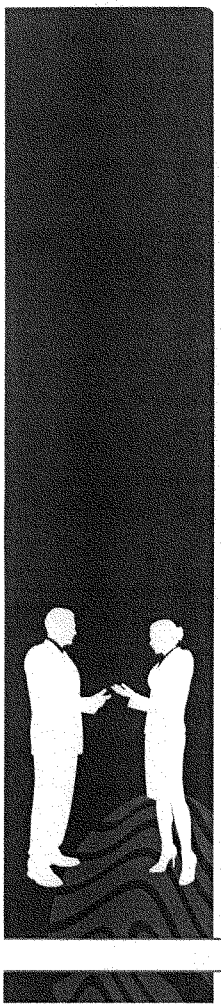
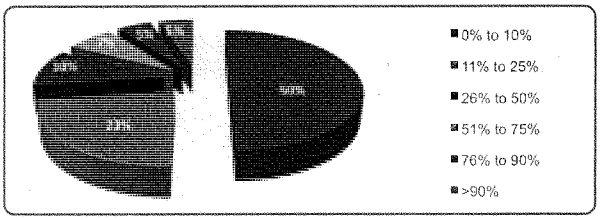


Question 17: What percentage of candidates do you estimate are hired in spite of distortions on their resumes?



This year's findings indicate that employers consider resume distortions as a serious breach of trust and confidence, which directly impacts a candidates' chances of getting hired. In fact, this data suggests employers are more concerned about resume distortions than criminal convictions. According to half of the respondents, only a small percentage (10% or less) of candidates get hired in spite of resume lies. And only 10% of employers hire these candidates with any frequency (76% of the time or more). This data strongly departs from our 2013 findings, in which more than half of all respondents indicated that very few candidates who distorted information on their resumes were not hired. This year's findings show that the situation has reversed dramatically.

A selection of respondents' comments:

"The distortion would have to be fairly minor—for example, dates of employment off by a month or two; job title might be inflated from Supervisor to Manager; etc."

"We generally don't hire candidates with major distortions on their resumes. I query minor distortions and verify them."

"If we are aware of a purposeful distortion of resume information, we will likely not proceed with that candidate due to dishonesty."

"If we know of distortions of qualifications or work history, we would likely not hire them. Distortions of skills and knowledge often do not become clear until after a hire."

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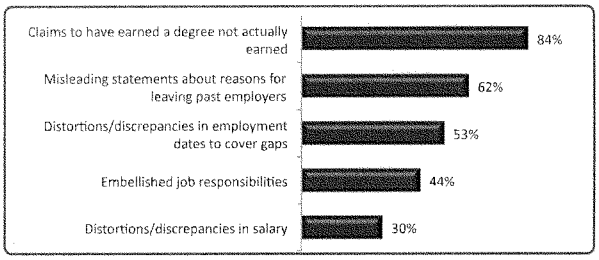
"If someone blatantly misrepresented themselves we would not hire them. Most people attempt to increase their salary."

"If the distortion is relatively immaterial in comparison to the greater sum of their experience/background (such as a date being off by a few months, etc.), it makes little sense to penalize the candidate for what may be a simple oversight."

"We would not hire someone that lies on their resume. Not a good sign of character."

Question 18: What types of resume distortions/discrepancies would cause you not to hire a candidate? (Select all that apply.)



Only about 8% of candidates actually lie about their degree on their resumes

Although lying about earning a degree topped respondents' concerns (84%), our experience shows that only about 8% of candidates actually lie in this way on their resumes. The findings also show that respondents are far less troubled by candidates distorting their salaries or job responsibilities than they are about distorting the reasons for leaving past employers or lying about earning a degree. Covering up gaps in employment dates fell right in the middle of the spectrum.

Question 19: What is the primary reason you conduct employment background checks?

This question revealed that respondents are conducting employment background checks for a number of different reasons—and no single reason is an overwhelming favorite.

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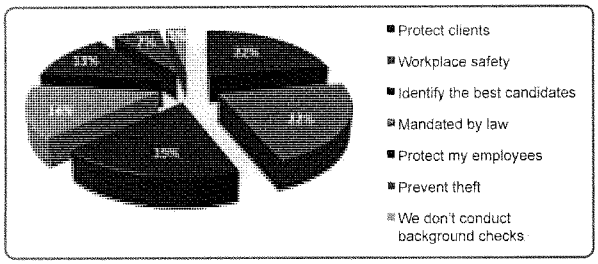
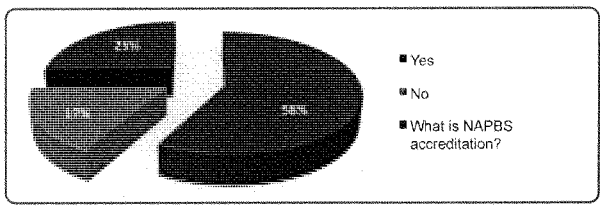


Question 20: Is it important that your employment background screening provider be accredited by the National Association of Professional Background Screeners (NAPBS)?



While the majority of respondents (58%) indicated they consider NAPBS accreditation important for their screening providers, more than 40% of respondents have no idea what this important accreditation is or they don't care about it. For those who do not know, it's a critical "seal of approval" that has been achieved by less than 2% of all background screening providers, and it ensures that these providers are using practices and procedures that comply with industry best practices. You can learn more about the NAPBS and accreditation at the organization's website, www.napbs.com.

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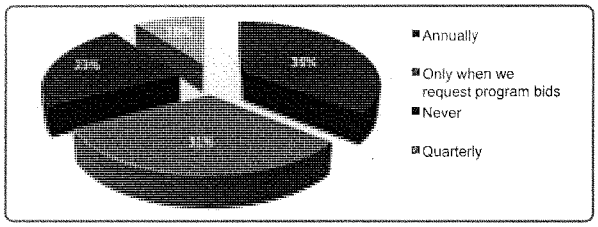
Question 21: How often do you evaluate your employment background screening program for quality, compliance, accuracy, etc.?



Employers should regularly audit their screening programs to help protect themselves and their people

The good news is that a combined 46% of respondents are evaluating their background screening programs on a regular basis—annually (36%) or quarterly (10%). The bad news is that 54% of respondents are not taking this prudent step to protect their organizations, with a startling 23% saying they *never* do so. Employers should regularly audit their screening programs to help protect themselves and their people. Take note: Not long ago, a large and well-known consumer reporting agency was assessed $2.6 million in penalties by the Federal Trade Commission for failing to use reasonable procedures to assure the accuracy of its criminal background checks—a violation of the Fair Credit Reporting Act. If you'd like suggestions on how to better protect your company, download a copy of our article, *HR's Guide to Effective Evaluation of Background Screening Providers*.

In comparison to last year's survey results, the largest fluctuation was in the percentage of respondents who said "annually" (which rose by 10% this year) and the percentage of respondents who said "never" (which dropped by 9% this year). There was almost no comparative change in the other responses.

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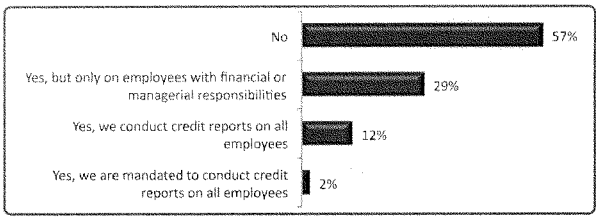
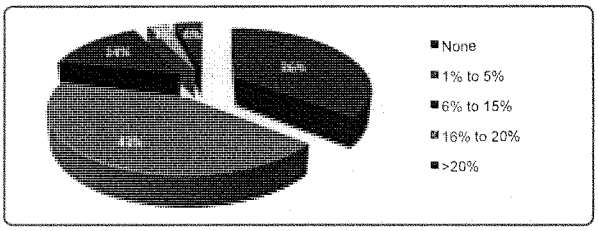
Question 22: Does your organization utilize employment credit reports in your hiring process?



More than half of all respondents indicated that they do not use credit reports as part of their hiring process, and only 14% say that they always use credit reports. These findings are notable because they fly in the face of "common wisdom" and quite a few media reports, which hold that employers everywhere commonly use credit reports when looking into the backgrounds of job candidates. Obviously, this is not the case.

Question 23: If you answered "yes" to question 22, what percentage of candidates do you estimate are denied employment based on the results of credit reports?



Of the respondents who do utilize credit reports as a hiring tool, a combined 79% frequently do *not* deny employment to candidates because of these checks. Again, this may fly in the face of conventional wisdom. Only 4% of respondents said that they deny employment 20% of the time or more based on credit reports.

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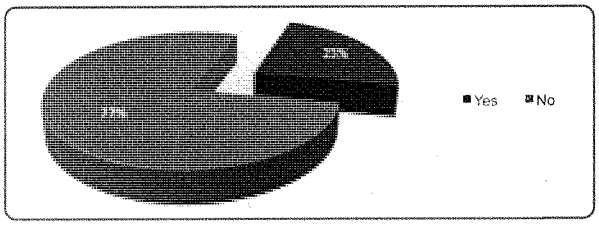
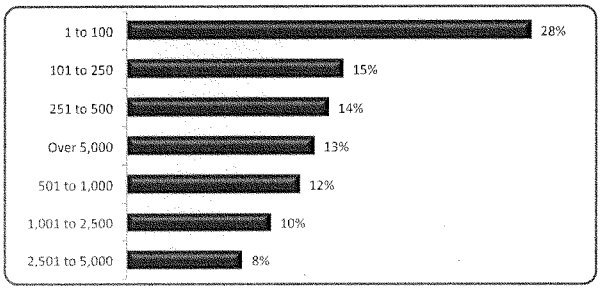
Demographics

Are you an EmployeeScreenIQ client?



How many people does your company employ?



Appendix C: Court Order in *Waldon v Cincinnati Public Schools*

941 F.Supp.2d 884, 118 Fair Empl.Prac.Cas. (BNA) 188, 298 Ed. Law Rep. 278
(Cite as: 941 F.Supp.2d 884)

H

United States District Court,
S.D. Ohio,
Western Division.
Gregory WALDON, et al., Plaintiffs,
v.
CINCINNATI PUBLIC SCHOOLS, Defendant.

No. 1:12–CV–00677.
April 24, 2013.
Order Denying Motion to Certify Appeal May 28, 2013.

Background: After being discharged pursuant to a state law that required the termination of school employees who had been convicted of specified crimes, former public school employees, who were African-American, filed suit, alleging disparate impact employment discrimination in violation of Title VII. School moved to dismiss for failure to state a claim.

Holdings: The District Court, S. Arthur Spiegel, Senior District Judge, held that:
(1) discharged employees adequately pleaded a case of disparate impact employment discrimination, and
(2) school failed to show that its practice was job related and consistent with business necessity.

Motion denied.

West Headnotes

[1] Civil Rights 78 ⇐1140

78 Civil Rights
78II Employment Practices
78k1140 k. Disparate impact. Most Cited Cases

"Disparate impact," a type of Title VII employment discrimination, results from facially neutral employment practices that have a disproportionately negative effect on certain protected groups and which cannot be justified by business necessity; disparate impact does not require a showing of discriminatory motive, since the claim is based on statistical evidence of systematic discrimination. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[2] Civil Rights 78 ⇐1140

78 Civil Rights
78II Employment Practices
78k1140 k. Disparate impact. Most Cited Cases

Former public school employees, who were discharged as a result of public school's implementation of state law requiring termination of school employees who had been convicted of specified crimes, adequately pleaded a case of disparate impact employment discrimination in violation of Title VII; of the 10 employees terminated, nine, including the plaintiffs, were African-American. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[3] Civil Rights 78 ⇐1140

78 Civil Rights
78II Employment Practices
78k1140 k. Disparate impact. Most Cited Cases

Where facially neutral employment practice allegedly has a disparate impact under Title VII, then plaintiffs have alleged a prima facie case. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[4] Civil Rights 78 ⇐1703

78 Civil Rights
78V State and Local Remedies
78k1703 k. Federal preemption. Most Cited Cases

States 360 ⇐18.49

360 States

360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.49 k. Discrimination; retaliatory discharge. Most Cited Cases

State law need not "purport" to discriminate in order to be trumped by Title VII. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[5] Civil Rights 78 ⇐1140

78 Civil Rights
78II Employment Practices
78k1140 k. Disparate impact. Most Cited Cases

Civil Rights 78 ⇐1529

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1529 k. Defenses in general. Most Cited Cases

Public school failed to show that its implementation of state law requiring termination of school employees who had been convicted of specified crimes was job related and consistent with a business necessity defense after African-American employees made a prima facie showing of disparate impact employment discrimination under Title VII; policy operated to bar employment when plaintiffs' offenses were remote in time and they had demonstrated decades of good performance, plaintiffs posed no obvious risk due to their past convictions and were valuable and respected employees, and school could have raised questions with the state board of education regarding the stark disparity it confronted. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[6] Civil Rights 78 ⇐1529

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1529 k. Defenses in general. Most Cited Cases

"Business necessity," as a defense against a prima facie showing of disparate impact employment discrimination, is a narrow concept, and normally an employment practice must have a manifest relationship to the employment in question. Civil Rights Act of 1964, § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e–2(k)(1)(A)(i).

[7] Federal Courts 170B ⇐3373

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(C) Decisions Reviewable
170BXVII(C)4 Certification and Leave to Appeal
170Bk3372 Particular Actions and Rulings
170Bk3373 k. In general. Most Cited Cases
(Formerly 170Bk660.5)

Order denying public school's motion to dismiss former African-American employees' Title VII disparate impact claim based on their discharge under state law that required the termination of school employees who had been convicted of specified crimes would not be certified for interlocutory review; there was no significant difference of legal opinion as to whether Title VII liability extended to implementation of facially neutral state mandates, and an interlocutory appeal was as likely to cause material delay as it is to cause material advancement of the termination of the litigation. 28 U.S.C.A. § 1292(b); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

***885** David Scott Mann, Michael T. Mann, Cincinnati, OH, for Plaintiffs.

Mark Joseph Stepaniak, Ryan Michael Martin, Taft Stettinius & Hollister, Cincinnati, OH, Daniel Joseph Hoying, Cincinnati Public Schools, Cincinnati, OH, for Defendant.

941 F.Supp.2d 884, 118 Fair Empl.Prac.Cas. (BNA) 188, 298 Ed. Law Rep. 278
(Cite as: 941 F.Supp.2d 884)

OPINION AND ORDER

S. ARTHUR SPIEGEL, Senior District Judge.

This matter is before the Court on Defendant Cincinnati Public Schools' Motion to Dismiss (doc. 6), Plaintiffs' Response in Opposition (doc. 7), and Defendants' Reply (doc. 8). For the reasons indicated herein, the Court DENIES Defendant's motion.

***886 I. Background**

The state of Ohio enacted legislation, H.B. 190, effective November 14, 2007, which amended Ohio law to require criminal background checks of current school employees, even those whose duties did not involve the care, custody, or control of children (doc. 1). If an employee had been convicted of any of a number of specified crimes, no matter how far in the past they occurred, nor how little they related to the employee's present qualifications, the legislation required the employee to be terminated (*Id.*).

Plaintiffs Gregory Waldon and Eartha Britton both worked for many years and provided Defendant Cincinnati Public Schools with excellent service (*Id.*). In late 2008, Defendant discharged Plaintiffs pursuant to the new law, based on criminal matters that were decades old (*Id.*).[FN1] Both Plaintiffs are African–American (*Id.*). At the time of Plaintiffs' discharge there was no exception allowing for Plaintiffs to demonstrate rehabilitation so as to preserve their employment (*Id.*).[FN2] Defendant terminated a total of ten employees, nine of whom were African–American.

FN1. In 1977, Plaintiff Gregory Waldon was found guilty of felonious assault and incarcerated for two years (doc. 1). Defendant's civil service office supported Waldon in proceedings before the Ohio Parole Board, indicating it would be happy to offer Waldon employment, which it did in early 1980 (*Id.*). Waldon worked for nearly thirty years for Defendant, most recently as a "systems monitor," with no contact with school children (*Id.*). Waldon's performance was excellent and of value to Defendant and to the public (*Id.*).

Plaintiff Eartha Britton was convicted in 1983 of acting as a go-between in the purchase and sale of $5.00 of marijuana (*Id.*). She worked for Defendant for eighteen years as an instructional assistant (*Id.*).

FN2. However, after their termination the rule was amended so as to allow those in Plaintiffs' shoes to demonstrate rehabilitation. O.A.C. 3301–20–03. In fact, Plaintiffs were both eligible to apply for reemployment, but did not.

Plaintiffs bring claims for racial discrimination in violation of federal and state law, contending their terminations were based on state legislation that had a racially discriminatory impact (doc. 1). Defendant filed the instant motion to dismiss, contending Plaintiffs have failed to state a claim for which relief can be granted, essentially because it was merely complying with a state mandate (doc. 6). Plaintiffs have responded, and Defendant has replied (docs. 7, 8) such that this matter is ripe for decision.

II. Applicable Legal Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) requires the Court to determine whether a cognizable claim has been pled in the complaint. The basic federal pleading requirement is contained in Fed.R.Civ.P. 8(a), which requires that a pleading "contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir.1976); *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). In its scrutiny of the complaint, the Court must construe all well-pleaded facts liberally in favor of the party opposing the motion. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A complaint survives a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Courie v. Alcoa Wheel & Forged Products*, 577 F.3d 625, 629–30 (6th

Cir.2009), *quoting Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

***887** A motion to dismiss is therefore a vehicle to screen out those cases that are impossible as well as those that are implausible. *Courie*, 577 F.3d at 629–30, citing Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 887–90 (2009). A claim is facially plausible when the plaintiff pleads facts that allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged. *Iqbal*, 129 S.Ct. at 1949. Plausibility falls somewhere between probability and possibility. *Id.*, citing *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955. As the Supreme Court explained,

> "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950.

The admonishment to construe the plaintiff's claim liberally when evaluating a motion to dismiss does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions. Wright, Miller & Cooper, Federal Practice and Procedure: § 1357 at 596 (1969). "In practice, a complaint ... must contain either direct or inferential allegations respecting all of the material elements [in order] to sustain a recovery under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1984), quoting *In Re: Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir.1981); Wright, Miller & Cooper, Federal Practice and Procedure, § 1216 at 121–23 (1969). The United States Court of Appeals for the Sixth Circuit clarified the threshold set for a Rule 12(b)(6) dismissal:

> [W]e are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir.1988).

III. Discussion

Defendant contends the Court should dismiss Plaintiffs' Complaint because it simply followed Ohio law when it terminated Plaintiffs' employment (doc. 6). Defendant contends it maintained no particular employment practice that caused a disparate impact, and that it was a business necessity for it to follow Ohio law (*Id.*). Defendant further argues should this case proceed, it will be in the position of defending a criminal records policy it had no role in creating (*Id.*). Moreover, Defendant argues it had no way of knowing whether the facially-neutral criminal records requirement resulted in a statewide disparate impact (*Id.*). Finally, Defendant indicates its efforts in assisting Waldon with his release on parole some thirty years ago, shows it harbored no animus toward him, and that but for the state mandate, Waldon would not have been let go (*Id.*).

Plaintiffs respond that Title VII trumps state law, such that their terminations amount to "unlawful employment practices" based on disparate impact (doc. 7). Compliance with a state law, according to Plaintiffs, is no defense, because a violation is a violation (*Id.*). In plaintiffs' view, ***888** whether Defendant was complying in good faith to state law goes to the remedy the Court should ultimately craft, and not to whether the terminations were in violation of Title VII (*Id.*).

The parties devote substantial argument in their briefing as to the question of whether it is even possible to attack a facially-neutral policy based on a state mandate. In Defendant's view, Title VII does not require preemption of a facially neutral state law unless such law "purports" to discriminate (doc. 6, *citing* 42 U.S.C. § 2000e–7). Plaintiff responds that such interpretation ignores language regarding "the doing of any act ... which would be an unlawful employment practice," and is inconsistent with the purposes of Title VII (*Id. citing* 42 U.S.C. § 2000h–4). Moreover, Plaintiff cites *Ridinger v. General Motors Corp.*, 325 F.Supp. 1089 at 1094 (S.D.Ohio, 1971) in which the Court noted that Congress "intended to supersede all provisions of State law" which are inconsistent with Title VII.

The Supreme Court has recognized two distinct types of Title VII employment discrimination: "disparate treatment," and "disparate impact." Disparate treatment is not alleged in this matter, as it is based on proof of discriminatory motive. Plaintiffs do not contend Defendant intentionally fired them because of their race; Defendant indicates Plaintiffs were good employees and it only fired them due to the state mandate.

[1] Disparate impact results from facially neutral employment practices that have a disproportionately negative effect on certain protected groups and which cannot be justified by business necessity. *International Bhd. of Teamsters*, 431 U.S. at 335–36 n. 15, 97 S.Ct. 1843 (1977). Unlike disparate treatment, disparate impact does not require a showing of discriminatory motive, since the claim is based on statistical evidence of systematic discrimination. *Id.* The classic example of such a claim arose in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), in which the Defendant required employees to have high school diplomas and pass intelligence tests as a condition of employment in or transfer to certain jobs. Although the practice appeared neutral on its face, its effect was to freeze the status quo such that African–American employees were disqualified at a higher rate and the practice had no real relationship to successful job performance.

[2][3][4] The Court finds no question that Plaintiffs have adequately plead a case of disparate impact. Although there appears to be no question that Defendant did not intend to discriminate, intent is irrelevant and the practice that it implemented allegedly had a greater impact on African–Americans than others. The Court rejects Defendant's view that the state law must "purport" to discriminate in order to be trumped by Title VII. Such a view would gut the purpose of Title VII, and would run contrary to *Griggs*, as well as subsequent authorities in which state mandates were challenged. *Palmer v. General Mills*, 513 F.2d 1040 (6th Cir.1975), *Gulino v. New York State Educ. Dept.*, 460 F.3d 361, 380 (2d Cir.2006). Where, as alleged here, a facially-neutral employment practice has a disparate impact, then Plaintiffs have alleged a *prima facie* case.

[5][6] An employer may defend against a *prima facie* showing of disparate impact only by showing that the challenged practice is "job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e–2(k)(1)(A)(i). Plaintiff correctly signals that "business necessity" is a narrow concept, and that normally an employment practice must have a manifest relationship to the employment in question (doc. 7, *citing Griggs*, 401 U.S. 424, 431–432, 91 S.Ct. 849). However, here the employment practice did not ***889** seek to measure technical aptitude or ability but served as an ultimate bar to employment due to some prior unlawful act committed by the employees. Courts have viewed this sort of exclusion differently. *Douglas El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 242–45 (3d Cir.2007) (criminal conviction hiring policies concern the management of risk, a policy making distinctions among crimes upheld); *Ahmed v. Kmart, Sears*, No. 08–CV–10454, 2008 WL 4683440, at *4–5, 2008 U.S. Dist. LEXIS 114937, fn. 1 *6 (E.D.Mich., October 2, 2008)

(noting business necessity defense could apply to criminal conviction policy since it appears to distinguish between applicants that pose an unacceptable level of risk and those that do not); *EEOC v. Carolina Freight Carriers Co.*, 723 F.Supp. 734 (S.D.Fla.1989) (upholding policy barring those with prior theft records from truck driver position; decided under definition of "business necessity" *abrogated by statute* as explained in *Douglas El*, 479 F.3d 232, 241); and *Buck Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir.1975) (Defendant enjoined from using criminal convictions as an absolute bar to employment).

The Court finds instructive the analysis of the Eighth Circuit in *Buck Green*, 523 F.2d 1290, 1296. The *Buck Green* court examined the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), noting that the high court made a distinction between the *Griggs* sort of neutral testing requirements that had a disparate impact and the case where the applicant had engaged in a seriously disruptive act. Justice Powell's opinion for a unanimous court added a caveat to its holding with these words:

> Petitioner [McDonnell Douglas] does not seek his [Green's] exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some *sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to the applicants's personal qualifications as an employee.* 411 U.S. at 806, 93 S.Ct. 1817 (emphasis added).

The *Buck Green* decision perceived such comment "to suggest that a sweeping disqualification for employment resting on solely past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis." 523 F.2d at 1296.

The Court finds the policy at issue in this case a close call. Obviously the policy as applied to serious recent crimes addressed a level of risk the Defendant was justified in managing due to the nature of its employees' proximity to children. However, in relation to the two Plaintiffs in this case, the policy operated to bar employment when their offenses were remote in time, when Plaintiff Britton's offense was insubstantial, and when both had demonstrated decades of good performance. These Plaintiffs posed no obvious risk due to their past convictions, but rather, were valuable and respected employees, who merited a second chance. "To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden." *Buck Green*, 523 F.2d at 1298.[FN3] Under these circumstances, the ***890** Court cannot conclude as a matter of law that Defendant's policy constituted a business necessity.

> FN3. The Court further notes that though the Equal Employment Opportunity Commission Guidelines are not entitled to great deference, Section 605 of its Compliance Manual addresses the issue of arrest and conviction records. It states that an applicant may be disqualified from a job based on a previous conviction only where the employer takes into consideration the nature of the job, the nature and the seriousness of the offense, and the length of time since it occurred.

Moreover, the Court cannot conclude that Defendant was compelled to implement the policy, when it saw that nine of the ten it was terminating were African–American. As stated above, Title VII trumps state mandates, and Defendant could have raised questions with the state board of education regarding the stark disparity it confronted.

IV. Conclusion

Having reviewed this matter, the Court concludes that Plaintiffs' Complaint raises plausible allegations of disparate impact discrimination. Defendant's implementation of the state mandate, as

alleged, could very well amount to a violation of Title VII. Accordingly, the Court DENIES Defendant Cincinnati Public Schools' Motion to Dismiss (doc. 6).

SO ORDERED.

OPINION AND ORDER

This matter is before the Court on Defendant Cincinnati Public Schools' Motion to Certify Order for Immediate Appeal (doc. 18), Plaintiffs' Memorandum in Opposition (doc. 21), and Defendant's Reply (doc. 22). For the reasons indicated herein, the Court DENIES Defendant's motion.

I. Background

The Court recently issued an Order denying Defendant's Motion to Dismiss (doc. 16), and in the instant motion, Defendant seeks an immediate interlocutory appeal of such decision (doc. 21). In its Order the Court found Plaintiffs had adequately pleaded a case for disparate impact employment discrimination where Defendant implemented a policy requiring the termination of employees with particular criminal records (doc. 16). The Court noted that nine of the ten employees that Defendant discharged pursuant to the policy were African–American (*Id.*). The Court further found questionable any legitimate business justification where Plaintiffs' offenses were extremely remote in time, where Plaintiff Britton's offense was insubstantial, and where both had demonstrated decades of good performance (*Id.*).

Defendant contends the Court should certify its Order for immediate appeal pursuant to 28 U.S.C. 1292(b) because its termination of Plaintiffs was compelled by a facially neutral state statute (doc. 22). It contends it will argue on appeal that it cannot be held liable under Title VII when it was merely complying with a state mandate (*Id.*). Plaintiffs respond that in their view Defendants meet none of the statutory requirements for interlocutory review, and as such, the Court should deny Defendant's motion (doc. 21).

II. The Applicable Standard

Section 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable ... shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall state so.

28 U.S.C. § 1292(b). The Supreme Court has stated, "[r]outine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally ***891** retaining for federal courts a firm final judgment rule." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996). In the Sixth Circuit, "[r]eview under § 1292(b) is granted sparingly and only in exceptional circumstances." *In re City of Memphis*, 293 F.3d 345 at 350 (6th Cir.2002).

III. Discussion

[7] Defendant argues the Court's Order involves a controlling question of law, that is, the question of whether an employer can be held liable for disparate impact litigation where it was compelled to terminate employees by a facially neutral state statute (doc. 18). Plaintiffs respond this is not a pure question of law, because there are facts to be discovered that could affect Defendant's liability: whether Defendant took note of the disparity it confronted, whether it communicated with the state board of education, what actions it took after the rules were changed so Plaintiffs could demonstrate rehabilitation, and whether Plaintiffs applied or were considered for re-employment (doc. 21).

The second prong of the statute requires that there be substantial grounds for a difference of opinion regarding the relevant legal issue. Defendant cites to the fact that the Solicitor General from the last presidential administration filed a brief criticizing the decision in *Gulino v. New York State*

Educ. Dept., 460 F.3d 361 (2nd Cir.2006), the only relevant authority holding that compliance with state law was not a defense to Title VII liability (docs. 18, 22). Plaintiffs respond that the Solicitor General conceded the *Gulino* decision did not conflict with any Supreme Court or court of appeals decision (doc. 21). Plaintiffs further argue that Defendants contend this is an issue of first impression in the Sixth Circuit, and that the fact an issue is one of first impression "does nothing to demonstrate a difference of opinion as to the correctness of the ruling" (*Id. quoting U.S. v. Atlas Lederer Co.*, 174 F.Supp.2d 666 at 669 (S.D.Ohio, 2001)).

The final statutory requirement is that an interlocutory appeal would materially advance the termination of the litigation. Plaintiffs essentially concede that, as in any case, an appeal could cut both ways depending on the outcome of any appeal—but that if the Court's Order were affirmed, the main impact would be a delay in justice (doc. 21). Defendant contends Plaintiffs concerns about delay are "disingenuous," because Plaintiffs filed this lawsuit in 2012 after being terminated in 2008, and they were eligible for re-employment since September 2009 (doc. 22).

Having reviewed this matter, the Court does not find this case one of such exceptional circumstances so as to merit interlocutory review. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996), *In re City of Memphis*, 293 F.3d 345 at 350 (6th Cir.2002). If anything, the exceptional circumstances of this case are that Plaintiffs, long-serving good employees, were among the nine out of ten African–American employees Defendant terminated under the policy.

Although it may be a close question whether there is a controlling question of law at issue, the Court simply finds no significant difference of legal opinion as to whether Title VII liability extends to implementation of facially neutral state mandates. The only relevant legal authority answers in the affirmative, and the fact this is an issue of first impression does not constitute grounds for interlocutory appeal. *Gulino*, 460 F.3d 361, *Atlas Lederer Co.*, 174 F.Supp.2d at 669. Moreover, as noted in its Order, the Court's conclusion is consistent with the language of Justice Powell in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as explained by the Eighth Circuit in ***892***Buck Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 at 1296 (8th Cir.1975) ("a sweeping disqualification for employment resting on solely past behavior can violate Title VII where that employment practice has a disproportionate racial impact and rests on a tenuous or insubstantial basis.")

Finally the Court finds well-taken Plaintiffs' position that an interlocutory appeal is as likely to cause material delay as it is to cause material advancement of the termination of the litigation. The Court rejects Defendant's characterization of Plaintiffs' concerns about delay as "disingenuous." The record does not show Plaintiffs have slept on their rights, but to the contrary that they have made repeated efforts in other judicial fora to address their terminations. There is no record evidence that Defendant ever alerted Plaintiffs they were re-eligible for rehire, or that Plaintiffs knew of such possibility to demonstrate rehabilitation as of September 2009.

Accordingly, the Court does not find that Defendant has established a basis for interlocutory review pursuant to 28 U.S.C. § 1292(b), and therefore it DENIES Defendant Cincinnati Public Schools' Motion to Certify Order for Immediate Appeal (doc. 18).

SO ORDERED.

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END OF DOCUMENT

Chairman WALBERG. Without objection, the item will be entered.

Mr. COURTNEY. In addition, I would like to enter the Wall Street Journal article of February 9. The title is "EEOC Sues Less, but Tactics Draw Flack." Again, which shows kind of the discussion here today. Which is that, clearly, the numbers show that, you know, the notion that there is like this avalanche of litigation out there in fact just is not sustained by a true analysis of 2013 data. But there is—the tactics are being criticized, and that is certainly what is happening here today.

But again, I think this article shows some balance which, again, the fact that we don't have the agency, the party defendant to some of the claims that are being made present here today, unfortunately we have to rely on a third party. So again, I would ask that the Wall Street Journal article—

[The information follows:]

LAW JOURNAL
HTTP://ONLINE.WSJ.COM/NEWS/ARTICLES/SB10001424052702303874504579373274123953040

EEOC Sues Less, but Tactics Draw Flak

By
JACOB GERSHMAN

A federal judge last year ordered the EEOC to pay $4.7 million in attorneys' fees and other costs to trucking firm CRST Van Expedited, which was accused of failing to protect female workers from sexual harassment. *Associated Press*

Far fewer companies these days are getting sued by the federal government for employment discrimination. But that doesn't mean employers and the Equal Employment Opportunity Commission are getting along.

The federal agency that enforces laws against job discrimination is extracting more monetary awards from companies than ever before. In the fiscal year ended Sept. 30, private-sector employers shelled out a record $372 million in negotiated settlements to resolve complaints and ward off potential litigation.

Discrimination complaints have begun to ebb after peaking just below 100,000 a year after the financial crisis, as layoffs fueled grievances. They totaled about 94,000 in 2013, still well above historical averages, buoyed by a record number of complaints by employees alleging illegal

retaliation for such things as complaining about discrimination or requesting special accommodations.

In the past year, workers filed 38,539 retaliation complaints, roughly 700 more than in 2012 and 70% more than they did a decade ago.

Employees who otherwise might have been reluctant to come forward have been emboldened by the EEOC, which has shown a willingness to crack down on such behavior, says R. Scott Oswald, a Washington lawyer for the Employment Law Group who represents victims of workplace retaliation.

Mr. Oswald expects the trend to continue, despite a U.S. Supreme Court ruling last year that raised the hurdle for bringing such claims in front of juries. "While it's harder for a jury to accept the concept that discrimination is alive and well in 2013 and 2014, they get the fact that employers retaliate when an employee discloses what they in good faith believe is discrimination," Mr. Oswald said.

The EEOC had a number of high-profile successes last year, but the agency also took some bruises. The most contentious cases had to do with so-called "systemic" investigations.

That is what the EEOC calls its more sweeping probes of companies suspected of engaging in a pattern of illegal practices, sometimes involving dozens of alleged victims. The EEOC has made such cases a priority.

"You're resolving a big problem at one time, instead of looking at this charge or that charge," said Nicholas Inzeo, the director of the EEOC's Office of Field Programs.

But the more expansive cases have attracted complaints from defense attorneys about the agency's tactics.

"It appears that the EEOC may have initiated more complex employment litigation matters than its staff can manage or adequately supervise," wrote Charles F. Knapp, an employment litigator at Faegre Baker Daniels LLP, in a widely circulated essay in November for Law360, a legal trade publication.

"It's not about winning or losing," Mr. Knapp said in an interview. "It's about whether they're exceeding their mandate as a federal agency and the methods that they're using."

"The EEOC is engaging in these overreaching, open-ended investigations that go beyond the individual charge of discrimination or issue they're investigating," he said. Such an approach, Mr. Knapp said, is "causing employers across the country incredible expense and unnecessary business disruption."

He highlighted several cases last year in which judges rebuked the EEOC for failing to substantiate its claims. A federal judge in Iowa last year ordered the EEOC to pay $4.7 million in attorneys' fees, expenses and costs to CRST Van Expedited Inc., a trucking company accused of failing to protect hundreds of its female employees from sexual harassment.

All of the government's claims in the lawsuit were dismissed or withdrawn, many for lack of evidence and others on procedural grounds. "The EEOC cannot avoid liability for attorneys' fees simply by artfully crafting a complaint using vague language to hide frivolous allegations," U.S. District Judge Linda R. Reade wrote in her ruling. The EEOC has appealed the decision to the Eighth U.S. Circuit Court of Appeals.

An Atlanta magistrate judge dealt the agency another blow last year by refusing to enforce a subpoena against a Georgia nursing company accused of discriminating and retaliating against home-health aides because they were black, disabled, older or had a pre-existing genetic condition.

The judge said the EEOC had conducted an "inappropriate," FBI-like raid of the company and expressed alarm that the worker who filed the charge against the company "is not disabled, is under age 40, has no pre-existing genetic conditions and is Caucasian." The judge called the agency's actions a "misuse of its authority."

P. David Lopez, general counsel for the commission, said the complaints about the agency overreaching distorts the EEOC's record. He pointed to a $240 million verdict that a jury handed down last year against a turkey plant for subjecting 32 "intellectually disabled" workers to pay discrimination and verbal abuse.

The award against Hill Country Farms Inc., the largest in agency history, shrank to $1.6 million because of a statutory cap on damages.

"When we experience litigation losses, as with our victories, we hold ourselves accountable and seek to glean lessons learned in order to move our mission forward," Mr. Lopez wrote last month in response to Mr. Knapp's essay. He said the EEOC's overall effort against workplace discrimination "has helped the country move in the right direction."

Bigger cases have helped the agency punch above its weight, said Steven Pearlman, co-head of the whistle-blowing and retaliation practice group at Proskauer Rose LLP.

With an annual budget shy of $400 million, the EEOC is a small agency by Washington standards. Over the past decade, it has shed about 15% of its full-time employees due to hiring freezes and attrition.

"It's not just saber-rattling anymore," Mr. Pearlman said." The EEOC has shown that it means business," Mr. Pearlman said.

Write to Jacob Gershman at jacob.gershman@wsj.com

Chairman WALBERG. Without objection—

Mr. COURTNEY.—the record.

Chairman WALBERG.—it will be entered.

Mr. COURTNEY. Now, Ms. Ifill, you described, again, the fact that prejudice and discrimination still exists in this country, sadly. And, frankly, we have had some sad examples of that in the media, with Mr. Sterling out in California, the Nevada rancher. But again, there, in fact, are many, many instances where EEOC's role, even 50 years later, is still, you know, very important to the great strength of this country, which is the diversity of its population.

But one thing I also think is important to note is that, you know, this agency is not growing like Topsy. In terms of the staffing of the agency, it is actually smaller than it—today than it was even in a short time ago. And I was wondering if, again, you could sort of confirm that in terms of your experience with the department.

Ms. IFILL. Yes, indeed, that is correct. And as I alluded to in my testimony, the complaints that are being received by the EEOC remain still, sadly, at a very high level. And so the agency is really charged with figuring out how to address the thousands of complaints that they receive with, in fact, a very limited staff.

You know that the statute requires the EEOC to engage in conciliation first, which they do. And you also probably know that, certainly, the figures that we have been able to identify demonstrate that the vast majority of cases in which the EEOC participates are resolved through conciliation or through settlement, and a very small fraction actually involve cases that go to trial or are litigated.

And so the EEOC, at least from our view, is doing precisely what the statute required it to do. Which is to, the first line of attack, attempt to resolve problems of discrimination in the workplace without litigation. With regard to that litigation record, well, I am a little cautious about cherry-picking through a record to determine whether, in fact, the EEOC is unsuccessful, as has been suggested by some of the testimony here. In fact, if you look at the last year and the cases that have gone to trial, the EEOC has won nine of 10 jury trials. I can tell you, as the leader of a civil rights organization, it is not an easy thing to win a jury trial in an employment discrimination case. But the EEOC has won nine of the 10 of them.

If I might, I wanted to say something about just the comment that was made earlier about background checks. Am I out of time?

Chairman WALBERG. Let's reserve. The time is up. I thank the gentleman. I now recognize myself for 5 minutes of questioning.

Going back to the issue, Mr. McCracken, of a safe harbor. EEOC's enforcement guidance says that if a state law requiring a criminal background check is inconsistent with the guidance, complying with the state law will not shield an employer from Title VII liability. Nor will complying with the guidance necessarily protect an employer from tort liability for negligently hiring a person who goes on to commit a crime against the customer, as in the case of Ms. Weaver. In your opinion, what would be an appropriate safe harbor in relationship to these guidances?

Mr. MCCRACKEN. Well, we certainly think that it would be appropriate when there is a direct conflict between different levels of government in terms of a requirement on a company that there be a safe harbor until those various levels of government can work out

their dispute. But it—we don't think it should be worked out by putting, essentially, small companies in a vise and hearing different things from different parts of the government.

So I—we think that it would be appropriate for the EEOC to create an exception or a carve-out in that particular circumstance. And then proceed to work out the disagreement with the state or the city or whomever else has that requirement.

Chairman WALBERG. Okay. But there isn't that possibility now, as you under—

Mr. MCCRACKEN. That is not my understanding.

Chairman WALBERG. There is no flexibility there.

Ms. Olson, you are shaking your head.

Ms. OLSON. That is correct. The EEOC has made that very clear. In fact, there is a lawsuit that has been brought by the state of Texas in connection with that specific issue. And the EEOC's response to the state of Texas' concern regarding conflicts between state law and the EEOC guidance has been you can't sue based on the guidance; it doesn't have the force of law. Leaving employers in a quandary of being potentially subject to significant litigation, as we have discussed today, where the EEOC is actually pushing enforcement of the theories and the guidance and yet, at the same time, potentially being subject to state litigation and litigation by private parties if it doesn't do the background checking that is required under state law.

Chairman WALBERG. So the costliness of that to the employer encourages them to just back away.

Ms. OLSON. Right.

Chairman WALBERG. Let me go on, Ms. Olson. Beginning in 1996, the EEOC delegated litigation authority decisions to its office of general counsel. We expressed concern and questions about that when we had the EEOC in front of us last year. In 2012, EEOC reinforced a delegation of litigation decisions to the general counsel, with three exceptions. These three exceptions are not always clear, and still allow the general counsel considerable discretion as to which cases to bring before the commission for a vote. Do you believe this delegation of litigation authority affords the general counsel too much discretion, and why?

Ms. OLSON. I do believe it does. The extent of delegation to the general counsel, and then the further delegation by the general counsel to the district offices, represents a retreat from the responsibilities that both the commissioners, as well as the general counsel were confirmed to carry out.

In this context, there is no question that litigation is policy. The policy of the EEOC is more often than not established by the cases it brings. We have heard, today, testimony universally from witnesses that litigation is important; an important policy issue, as well as an important enforcement issue, for the EEOC.

These are the decisions that are properly within the purview of the confirmed commissioners, not bureaucrats that are spread throughout 15 different offices. And if you look at the history of the EEOC during the years 2000 to 2005, EEOC commissioners confirmed, or initiated and authorized, litigation in approximately 75 to 80 cases per year. If you look back to the years 2010, 2011 and

2012 the record makes clear they have—in those three years combined only authorized litigation in 15 cases.

Chairman WALBERG. So hence, possibly, the Wall Street Journal article, which gives a, I would say, clear misrepresentation of the purpose of the EEOC and how it is being carried out, and doesn't note that it has become more bureaucratic with the office of general counsel doing the litigation. Am I correct?

Ms. OLSON. Another great example are the two recent cases that were brought by the EEOC with respect to criminal background checks: the BMW case and the Dollar General case. In both those cases, those employers are being sued on an alleged theory that there is a disparate impact because the employers did not do individualized assessments and are being criticized for not having done individualized assessments in those cases. And yet Commissioner Berrien, on behalf of the EEOC, has said individualized assessments are not required. A complete disconnect between policy and litigation.

Chairman WALBERG. Okay, thank you. My time has expired.

I recognize Mr. Takano for your 5 minutes.

Mr. TAKANO. Thank you, Mr. Chairman.

Ms. Ifill, would you like to—I would like to give you some time to comment on the background check response.

Ms. IFILL. Thank you, very much. I wanted to respond because I want to make clear that neither criminal background checks nor guidance or standards that relate to how to properly use criminal background checks are entirely new. The guidance that was developed and promulgated by the EEOC actually is based on law that comes out of federal courts dating back to 1975. The guidance that the EEOC offers as it relates to criminal records and criminal background checks, as I said earlier, neither discourages or suggests that background checks of this sort should not be used.

Instead, what it does is it provides precisely what the word says, "guidance" to assist, support and help employers figure out how to properly use that information. It draws a distinction between, for example, records of arrest and records of conviction. It suggests that when there is a conviction on the record the employer should engage in what is being called an "individualized assessment," which sounds incredibly onerous but, in fact, actually consists of three common sense factors.

That finding a conviction on record, the employer should ask three questions. One, what was the nature and gravity of the offense or conduct for which the conviction was received. Two, what is the amount of time that has passed since the offense or conduct and/or completion of the sentence. And three, what is the nature of the job held or sought.

In the circumstance we heard described earlier with the tragic death of Susan Weaver, for example, knowing that the job requires people to enter a home would be a relevant factor. The fact that there was a conviction on the record for a violent crime would be a relevant factor. The time distance between the crime and the employment would be a relevant factor.

Earlier, Mr. McCracken suggested that it is not logical for employers to exclude employees based on these records if, in fact, the crime is not relevant. But it does happen. We represent a woman

named Barbara Harrison. Right now in Texas, a 58-year-old grandmother who applied to be a school crossing guard, when her background check was done, a charge came up from 40 years earlier of a fight she had with another girl when she was 18 years old. And despite the fact that Ms. Harrison has worked for the city of Dallas for 28 years, the job offer that had been extended to her to serve as a school crossing guard was withdrawn.

And the guidance is meant to help employers make distinctions between those kinds of situations and the situations that appropriately require the exclusion of a potential employee.

Mr. TAKANO. Thank you, Ms. Ifill. The example just brought up sort of resonates with some of the findings I have had traveling through my district, speaking to both employers and frustrated prospective employees. That sort of disparity between—I mean, that is also a common sense instance. I mean, Ms. Bone, you talk about representing common sense, and I recognize the common sense that your represent. But I think we could agree that a situation of a 40-year-old offense, I mean, much time has passed. I mean, these are reasonable guidelines and standards.

Are we—you know, Ms. Ifill, I have become aware that many states, at least 12 states, have adopted much of—in their laws governing this topic of background checks, the guidelines of the EEOC. And so the conflict between states and federal government that Mr. McCracken talks about is the trend seems to be moving toward adopting what you have just, let's say, are common sense guidelines. Can you comment on that?

Ms. IFILL. Twelve states and 60 jurisdictions have adopted ban the box rules, the idea being to move the issue of background checks further in the process of employment. We all know that this country is hurting. That workers, potential workers, are hurting. And the effort here is to ensure that those who deserve a fair chance at a job have an opportunity to get that job without being excluded based on records that are irrelevant to the job, charges that are too old and that do not pose or demonstrate that the employee poses a danger.

And so many states have recognized this. And increasingly, businesses are recognizing this as well. Target, as you may know, has decided to ban the box. That is, the box that asks about criminal records early in the application process, and instead moves it to later where the employer has an opportunity to engage in the kind of assessment that the EEOC guidelines suggest.

Mr. TAKANO. Thank you.

I believe my time is up, Mr. Chairman.

Chairman WALBERG. Thank you.

I recognize now the gentleman from North Carolina, Mr. Hudson.

Mr. HUDSON. Thank you, sir. And I want to thank the witnesses for being here today. This is a very illustrative debate on this issue. And particularly, Ms. Bone, I appreciate you and want—I was moved by your testimony, and I want to offer my condolences on behalf of your sister. And thank you for the work you are doing. I think it is important.

My question to you today, some have argued that the EEOC in its guidance gave short shrift to the reasons behind why background checks are necessary for informing hiring decisions. And

also their importance in public safety—this—and, you know, do you—I guess my question to you is, do you think the EEOC failed to strike a balance between its aims to help protect, you know, ex-offenders, but also is striking that balance on behalf of public safety? And what recommendations would you make in terms of trying to find a better balance?

Ms. BONE. I do believe that they did not listen to the victims' side on several occasions. Not only did I write to the EEOC sharing Sue's story, but I was at the hearing. There was absolutely no representation at all from any of the victims' sides. I think they took the rights of the perpetrators way over the rights of the victims. And although I did say in my testimony that I do believe that everyone does have the right to work and there is a job for everyone, I do not think that the perpetrators' rights should go before the victims' rights.

I would very much like to see them suspend this guidance and have an open hearing that weighs both sides and that all parties are well-represented. And that they need to stop demonizing background checks and strike a balance so that it is fair to all parties.

Mr. HUDSON. I appreciate that, and I think that is a good recommendation. You know, I am just struck—I am just trying to grapple with why the guidance is devoid of any real discussion of the importance of background checks. Particularly when the EEOC, other government agencies, rely on background checks in their hiring, and a lot of our local and state counterparts. So I agree with you, and appreciate your assessment on that.

I would now like to jump over to Ms. Olson, if you don't mind. You mentioned in your testimony a couple court cases. One where EEOC had to pay $4.7 million in attorneys' fees, another $752,000 in attorneys' fees. Is it of concern that courts have repeatedly found these claims frivolous? Should taxpayers be concerned, and I guess my ultimate question here, do these court orders indicate EEOC legal theories and systemic cases are off the mark?

Ms. OLSON. It does. It indicates that the theories that are being brought are not well grounded in either the facts or in the law. There is no question about it. You have got to remember, it is very rare for a court to actually sanction a litigant that loses a case. So the fact that you see millions of dollars here—and the opportunity costs in terms of these are generally big systemic or multi-plaintiff cases that are being brought on dubious legal theories, attempting to stretch the contours of the—or the statutes that the EEOC is administering.

As opposed to the type of cases that Ms. Ifill is describing, where there are individuals who have charges that are pending for multiple years that haven't been investigated and haven't been included. Charges where there may be discrimination, those individual cases that aren't being pursued. Imagine how many individual cases could be litigated by the EEOC for the $5 million to $6 million that the EEOC has had to pay over to employers. And this really doesn't account for the cases that the EEOC has lost, that the courts did not apply sanctions in terms of a repaying of the employers' attorneys' fees and cost.

Mr. HUDSON. Appreciate that. It seems in these cases—many of these cases brought by EEOC under disparate impact theory, in

which a facially neutral policies challenges have a disproportionate impact on a protected class of applicants or employees, and is not of business necessity. Is there a common theme to these losses? Do these losses—these cases indicate that EEOC needs to reassess the kinds of disparate impact cases it brings?

Ms. OLSON. Yes. The common theme, if you look at—and there have only been three cases brought by the EEOC that have been decided with respect to background checks: Peoplemark, Kaplan and Freeman. The EEOC—this is not cherrypicking—has lost all three cases. And why? Because the cases were not well grounded in facts, yet alone the law. If you look at the additional testimony that is being submitted by the EEOC general counsel, he describes the fact that, in fact, the legal theories were not even tested.

Those courts found that the EEOC was not even able to state a prima facie case of discrimination. That is the law and that is the facts, and the EEOC is failing on both.

Mr. HUDSON. Thank you, Mr. Chairman. I see my time has expired.

Chairman WALBERG. I thank the gentleman. And I thank the witnesses for being here today. And, again, this is just part of the process. But these are questions that are important for the lifeblood of our country, not simply its economy, not simply its business opportunities, but for individuals themselves. And we need information that we can work from. So thank you for being here.

I now recognize the ranking member, Mr. Courtney, for any closing remarks that he might have.

Mr. COURTNEY. Thank you, Mr. Chairman. And at the outset, I wanted to make sure, let it be noted, that Chairman Walberg actually gave some mild criticism to the Wall Street Journal, which is quite a—and the roof didn't fall in. So, you know, it was quite a moment to witness.

And, again, I want to thank all the witnesses for their testimony here today. And again, I think, you know, there are some—as I said at the outset, I mean, I think there are some important questions that we discussed here. Some of which, again, is reflected in divided opinions of the circuit courts. And that, you know, is kind of interesting to hear about. And again, this question of whether or not the—this new program and guidance is being, you know, appropriately implemented.

Again, I think is something that is of great public interest. And Ms. Bone, your testimony today I think really helped us frame this the right way. What I—again, am still mystified is that why, you know, if we are trying to learn about what is going on in the courts or how this guidance is being implemented, why the agency is not participating in this hearing is still something that puzzles me. If they had been here, as I said, we would have at least had some, I think helpful debate about their track record in terms of litigation and the process that they use to authorize it.

I think the statement we have submitted is an attempt to at least partially address that point. I think we also would have heard about some of the outreach that is going on with business in terms of the implementation of the guidance. Again, there have been, I think, a bona fide effort to do frequently asked questions. Much more intelligible than the regs that were issued. And I completely

agree that sometimes the stuff that comes out of the Federal Register for the average business who is just trying to, you know, make a living and sell their product or their service, you know, that is very difficult.

But again, the agency actually has tried to translate that into the English language, and actually have held outreach sessions. And I think there is some indication, in terms of what the agency has been able to tabulate, that there actually has been some take-up in a positive way.

But again, the—a record has been made here today. And the EEOC staff is in the room. And I am sure they are making good notes. And hopefully, we will have an opportunity to get, you know, some more feedback from the department in terms of steps they are taking to make sure that, you know, these—this program is being implemented in a thoughtful, common-sense, balanced way.

And Mr. Lopez, in this comments that I submitted for the record, made it clear that, yes, when a court rules against you and imposes penalties, that is not—that is something they are paying attention to. That is the whole intent of it in terms of when courts do that. However, you can't deny what Ms. Ifill said—that—when your batting average is nine out of 10 for jury trials, there aren't many trial lawyers that can really claim that kind of success rate.

And so, again, it is a gray area in many of these questions that are here today. And it was somewhat helpful to get the—you know, very helpful in terms of what the witnesses testified. But again, I don't think it had the right balance, to be perfectly honest. And I think that is unfortunate. But again, hopefully, you know, the subcommittee will use this information in a positive way so that I think we get to the place where everybody wants to be. Again, the witnesses have said they agree with the mission of the agency, which is to eradicate discrimination in this country once and for all.

And also to protect people. But we also—it is a balancing act. And that is really the never-ending struggle that we have to go through. But I do think if there was enough overlap, if you really read everybody's testimony closely, to see that, you know, there really is more common ground than, I think, division that is here in this room. And, hopefully, in that spirit we can, again, get to the place that we all want to be. Which is a society free of discrimination, but that also provides for the public safety of its citizens.

And with that, I yield back.

Chairman WALBERG. I thank the gentleman. And I would concur that I think there is plenty of agreement in this room. It is the process by which we set priorities that move forward. And that is the issue. Priorities that go as far as just simple misunderstanding, confusion, or disagreement to priorities that deal specifically with life and death itself. And that is, of course, our purpose in doing oversight in this Subcommittee.

It will never be perfect, as long as humans are involved with all the processes. But we want to move forward. Certainly every American deserves a fair shot at finding a job, every American. Every American, regardless of age, disability, sex, religion or race—every American deserves a fair shot at finding a job.

And that should be the preeminent responsibility of the EEOC. But there are concerns. When we read—let me just read them again. The 6th Circuit Court of Appeals recently wrote, as I said in my opening statement and I quoted—"EEOC brought this case on the basis of homemade methodology, crafted by witnesses"—these are strong words—"crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one and accepted only by the witness himself."

Another case stated that the EEOC case was a theory in search of facts to support it. Doing their basic job is—I don't think there is much disagreement here. But when we see them fishing for opportunities to make a case, that is a concern to us. Humanity and its amazing diversity offers challenges that seem to mandate the acquiring of good counsel.

So to hear, subsequent to our hearings when we had Ms. Berrien in the room by herself to testify, and subsequently under our questioning and requests—to see those really not dealt with in that ensuing time to the present is a concern.

To hear that the public, and specifically victims and their families and those with concern, were not brought into the room to give valid testimony, to give valid counsel, to give valid direction on what is necessary to make this EEOC work well for employer and employee alike, that is a concern. And to have guidance that is confusing and out of the realm of reality and what people deal with on both sides of the ledger in the real world is a concern to us. And so this will continue to be a process.

This is just the second. And it does give us an indication of what could be done if we make this a priority. To do the oversight that is necessary, but to do it in a helpful, positive, constructive way to move ourselves forward.

I would also make mention, as my good friend and colleague brought up the third or fourth time, as well, that we should have had Ms. Berrien in the room again, or EEOC represented again. Well, there was the opportunity for the minority to request her to testify here. This, again, in our mind was an opportunity to talk to the assertions that she had made earlier.

And I hope that this panel has given that opportunity, and we will see, as we move forward, how the EEOC addresses our concerns and addresses the concerns expressed in this Subcommittee hearing today.

Having said that, there being no further business for this Subcommittee the Committee stands adjourned.

[Additional Submissions by Mr. Courtney follow:]

LAW360

'EEOC Overreach' Analysis Distorted The Record

http://www.law360.com/articles/496715/eeoc-overreach-analysis-distorted-the-record

Law360, New York (January 03, 2014, 12:17 PM ET) --


David Lopez

As we reflect on the year and a season of thanks, if you want to talk turkey, as Charles Knapp did in his 11/27/13 analysis of the EEOC's litigation, you need to look at the entire turkey farm. By highlighting a few losses still on appeal and mentioning allegations of "abuse" raised in litigation but for the most part, not adjudicated, the article leaves a highly distorted impression about the current effectiveness of the agency's law enforcement efforts.

Indeed, if we are talking "turkey," Knapp should have at least mentioned the EEOC's landmark trial victory in its case against Hill Country Farms (d/b/a Henry's Turkey), a food processing plant in Iowa, brought to vindicate the civil rights of 32 intellectually disabled workers under the Americans with Disabilities Act. In September 2012, the court entered partial summary judgment for the EEOC on its claim that the company subjected the workers to pay discrimination when it paid the men only $65 per month for full-time work, and ordered the company to pay 32 class members over $1.3 million in back pay (excluding prejudgment interest) for work they performed between 2007 and 2009. In May 2013, a jury was impaneled for a trial on the harassment/terms and conditions claims. At trial, the EEOC established that the company subjected the men to abusive verbal and physical harassment, restricted their freedom of movement, required them to live in deplorable and sub-standard living conditions, and failed to provide adequate medical care. The jury returned a verdict of $240 million for the class (reduced by the court to $1.6 million because of the ADA's damages cap). The court ordered payment to the claimants and the defendant has appealed.

As a public law enforcement agency, we operate proudly in the public sunshine and, unlike the outcome of much private anti-discrimination litigation resolved confidentially or arbitrated privately, our successes (and losses) are all a matter of public record. The same sunshine that permits public scrutiny (and, on occasion, in our view, one-sided criticism), also allows the agency to leverage the significant public education and deterrent value from our successes so central to combating discrimination proactively without litigation. These

successes have been extensive and significant. Here is what the full record shows.

First, our litigation is a critical component to the success of the EEOC's mission to stop and remedy unlawful employment discrimination, but it is the last stage in a process that includes investigation and conciliation. With respect to the commission's presuit obligations, we successfully conciliated 1,437 cases in fiscal year 2013. This means that employers are coming to the table after an investigation where we conclude that there is reason to believe that employment discrimination occurred, and resolving those complaints without the need for protracted litigation. Litigation is the last resort and represents less than 0.5 percent of all charges filed, and around 5 percent of charges where the commission has issued a cause finding.

Despite this record of successful prelitigation resolutions, Knapp correctly notes that the commission's presuit administrative efforts have become the subject of considerable litigation activity since the Eighth Circuit's 2-1 decision in EEOC v. CRST Van Expedited Inc., affirming the dismissal by the United States District Court for the Northern District of Iowa of the commission's sexual harassment claim seeking relief for 68 claimants, many of whom had alleged extremely egregious abuse, based on the commission's failure to meet its administrative presuit requirements. The district court in New York in EEOC v. Bloomberg LP is one of the very few courts that have adopted the CRST reasoning in whole. The commission is mindful of these decisions in its ongoing efforts to improve its critical conciliation process. The fact, however, that the district court's decision in Bloomberg dismissing the EEOC's suit pointedly mentioned that victims of discrimination may be left without a remedy due to its ruling, illustrates why the challenges to the commission's pre-suit obligations have accelerated and intensified.

Fortunately, the EEOC has been successful in fending off similar challenges as most courts have refused to adopt what U.S. Circuit Judge Diana Murphy, dissenting in CRST, characterized as a "new requirement" adopted by the majority. For instance, in case absent from the analysis, the commission prevailed before the Sixth Circuit in EEOC v. Cintas, a case involving, among other issues, EEOC's presuit obligations. The Cintas case generated enormous adverse commentary when the district court issued its decision that dismissed the suit and awarded fees against the agency relying extensively on the district court decision in CRST. The Sixth Circuit reversed the district court in full on several issues. With respect to the commission's presuit requirements, the court concluded that even though the company relied "heavily on an opinion from the U.S. District Court for the Northern District

of Iowa" to make its case, "it is clear that the EEOC satisfied its administrative prerequisites to suit." The Supreme Court has denied Cintas's petition for certiorari review of the case.

Last week, the Seventh Circuit in EEOC v. Mach Mining, in a major decision approved by the entire court, provided a welcome shift in the right direction on this issue for those who care about remedying the enormous harm discrimination sometimes causes to victims and their families, as well as ensuring accountability for this discrimination. The court held "[t]he language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that the alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." According to the court, this defense "invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the conciliation process seriously as an opportunity to resolve the dispute." With respect to the courts that have dismissed cases based on this alleged defense, the court noted, even if judicial review of conciliation is not precluded, there is "no sound basis for dismissing a case on the merits." The court reasoned, "the remedy for deficiency of process is more process, not letting one party off the hook in its entirety." For the public to whom we are accountable, this approach means that shrinking resources will be devoted to the merits of the case and ultimately, the eradication of discrimination instead of fighting and disposing of preliminary procedural motions based on affirmative defense at odds with the text and structure of the statute.

Second, highlighting a few of the EEOC's litigation losses, some involving operative facts going back several years, really offers little insight into the effectiveness of current oversight efforts. A broader and more relevant context shows that 90 percent of our cases in litigation are resolved for monetary and nonmonetary relief to ensure the discrimination does not recur. Indeed, as a law enforcement agency, our ability to obtain substantial nonmonetary relief in our settlements is as critical as the monetary relief.

Three examples illustrate this point: First, last year we resolved an ADA case against Interstate Distributor Company for $4.85 million and a consent decree that requires the company to develop a new reasonable accommodation policy and prevents the company from refusing to allow an employee to return to work based solely on the employee's use of 12 weeks of leave or residual medical restrictions. Second, we recently resolved a national origin class case against Del Monte for $1.2 million where the farm agreed to establish state-of-the-art procedures to ensure that farm labor contractors disseminate policies and procedures prohibiting discrimination to their local work force and to H2-A guest workers in

a language they understand and designate a compliance officer for oversight of Title VII compliance. Del Monte is the latest in the widely-recognized leadership role in combating discrimination against immigrant workers and others working in the shadows who are often the most vulnerable to discrimination and abuse. Finally, in two cases resolved against Abercrombie & Fitch involving Muslim women denied a religious accommodation, the company agreed to modify its "look" policy to establish a procedure permitting reasonable accommodation based on religion.

As with these examples, most cases we file ultimately settle. Still, when we file cases, we recognize that, if necessary, we may need to try the case. By any measure, the EEOC has compiled a remarkable record at trial in recent years. The EEOC took 13 cases to trial in 2013, including 11 jury trials and two bench trials. Although going to trial is always a risk, the EEOC prevailed in nine out of 10 jury trials during the year and resolved another case by consent decree during trial. The EEOC tried cases on various bases across the country.

We believe the Henry's Turkey verdict is the largest ever awarded under the ADA, the second largest under any federal anti-employment discrimination statute, and the largest ever obtained by the EEOC. Also worth mention is the sexual harassment verdict on behalf of four women against New Breed in Memphis, Tenn., for $1.5 million, as well as significant and impactful victories in egregious race harassment cases in Winston-Salem, N.C., and San Antonio, Texas. The deterrent and educational impact of these verdicts, in the local communities and beyond, is profound. These trial successes, in turn, have improved agency efforts to conciliate and resolve cases without litigation costs to either party.

Our litigation efforts — whether we win or lose — do not always end at the trial court level. Many of the cases routinely cited by management attorneys as "wins" for employers, are pending in the appellate courts. These include EEOC v. Kaplan, EEOC v. Freeman, and the fee decisions in EEOC v. CRST and EEOC v. PeopleMark. We believe all parties should exercise caution in rendering premature judgments about cases until they are completed. We therefore limit our comment to point out that we have a record of success in reversing adverse decisions when a case moves to the appellate court. This includes not only the Cintas and Mach Mining cases mentioned above, but four consecutive reversals in the Fifth Circuit, including groundbreaking decisions in EEOC v. Houston Funding, which held, for the first time by any circuit, that lactation, is an "aspect of female physiology ... affected by pregnancy" that "seems to readily fit" within the PDA's scope, and EEOC v. Boh Brothers, which held that a plaintiff alleging same-sex harassment can demonstrate that the

harassment occurred because of sex by showing that it was motivated by the harasser's subjective perception that the victim failed to conform to gender stereotypes. We have also enjoyed several significant appellate decisions affirming the scope of the EEOC's subpoena authority.

Finally, the commission may prevail in these appeals and may lose some cases at the trial court level. As any litigator will tell you, however, the only way to ensure you don't lose any cases is not to file any cases or only file the "easy" cases. As a law enforcement agency accountable to the public, this is not an option. We have an obligation to move beyond the "safe" cases, and to identify and address less familiar discriminatory barriers emerging from changes in the economy, technology, and demographics. We also have an obligation to assess — on an ongoing basis — how to have the greatest law enforcement impact with the limited resources we have available.

Thus, while we prosecute successfully many straightforward cases of discrimination, some of our suits involve complex and highly-contested issues. Indeed, the complexity of some of the issues raised in cases such as CRST and PeopleMark, purportedly showing insufficient oversight, is illustrated by the difficulty courts have had grappling with these issues, as well as sharp opinions rendered by dissenting judges in these cases. These dissents illustrate that the underlying issues are at least subject to vigorous debate, and that the commission's positions are certainly not frivolous.

When we experience litigation losses, as with our victories, we hold ourselves accountable and seek to glean lessons learned in order to move our mission forward. A full measure of these efforts is reflected in our strong record of enforcing the employment anti-discrimination laws. The EEOC has helped the country move in the right direction. As we approach the fiftieth anniversary of the Civil Rights Act of 1964, the public deserves no less.

—By P. David Lopez, U.S. Equal Employment Opportunity Commission

P. David Lopez is general counsel for the U.S. Equal Employment Opportunity Commission where he oversees the commission's federal court litigation conducted by the 15 EEOC district offices on behalf of victims of employment discrimination, as well as the defensive internal litigation on behalf of the agency.

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[Additional Submissions by Olson follow:]

Statement of the U.S. Chamber Of Commerce

ON: THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS

TO: THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON EDUCATION AND THE WORKFORCE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

BY: CAMILLE A. OLSON
SEYFARTH SHAW LLP

DATE: JUNE 10, 2014

The Chamber's mission is to advance human progress through an economic,

Political and social system based on individual freedom,

Incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business — manufacturing, retailing, services, construction, wholesaling, and finance — is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY OF CAMILLE A. OLSON

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC: EXAMINING THE CONCERNS OF STAKEHOLDERS

JUNE 10, 2014

Good morning Mr. Chairman and members of the Subcommittee. On behalf of the United States Chamber of Commerce, I am pleased to provide testimony of stakeholder concerns regarding recent Equal Employment Opportunity Commission ("EEOC") actions relating to its statutory mandate to: (1) properly investigate charges and reach a determination as promptly as possible, (2) endeavor to eliminate any alleged unlawful practice through informal methods including conciliation and persuasion, and (3) ensure compliance with federal equal employment opportunity laws through meritorious direct party litigation and amicus participation in federal courts as well as the promulgation of enforcement guidance containing legitimate interpretations of federal employment discrimination laws.[1]

Congress empowered the EEOC "to prevent unlawful employment practices by employers."[2] The EEOC administers Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Equal Pay Act ("EPA"), the Americans with Disabilities Act ("ADA"), and the Age Discrimination in Employment Act ("ADEA"), among other federal employment discrimination laws. The Chamber is a long-standing supporter of reasonable and necessary

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[1] I am Chairwoman of the Chamber's equal employment opportunity policy subcommittee. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector, and geographical region. I am also a partner with the law firm of Seyfarth Shaw LLP, where I chair the Labor and Employment Department's Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national companies in federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their employment practices to ensure compliance with federal and local equal employment opportunity laws. I have represented business and human resource organizations as amicus curiae in landmark employment cases, including *Wal-Mart v. Dukes, et al.*, 131 S. Ct. 2541 (2011), and also teach federal equal employment opportunity law topics at Loyola University Chicago School of Law.

I would like to acknowledge Seyfarth Shaw LLP attorneys Lawrence Z. Lorber, Paul H. Kehoe, Richard B. Lapp, and Chris DeGroff, as well as Jae S. Um for their invaluable assistance in the preparation of this testimony.

[2] 42 U.S.C. § 2000e-5(a).

steps designed to achieve the goal of equal employment opportunity for all.[3] However, the Chamber has serious concerns as to how these laws are currently being administered and enforced by the EEOC. Loosely-defined and overly broad grants of authority to agency officers have created an administrative climate at the EEOC which prioritizes enforcement, litigation and punishment over education, cooperation and conciliation.

Yet, a properly functioning EEOC is critical for employees and employers alike. An EEOC that timely investigates charges and objectively applies the law to the facts of each charge provides employees with critical information about their rights, and employers with critical guidance as to their obligations under applicable law. Congressionally-mandated bona fide EEOC conciliation and other dispute resolution processes can quickly eradicate and remedy an unlawful practice, while also instructing employers as to their legal obligations regarding individual employment decisions and compliant employment policies. The EEOC's vigorous pursuit of cases where unlawful discrimination has occurred as the end stage of enforcement protects affected workers and ensures employer compliance with federal laws.

As described by the Supreme Court, "[t]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, non-coercive fashion. Unlike the typical litigant . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties."[4]

Attached to my testimony is the Chamber's recently-published Paper entitled: "A Review of Enforcement and Litigation Strategy During the Obama Administration - A Misuse of Authority" (June 2014) ("Chamber's EEOC Enforcement Paper"). The Chamber's EEOC Enforcement Paper details unreasonable enforcement efforts by the EEOC during the Obama Administration as documented in federal court decisions and as conveyed to the Chamber by its members. The analysis reveals the EEOC's litigation priorities have included: pursuing investigations and settlements despite clear evidence that the alleged adverse action was not discriminatory and bringing and continuing litigation described as "frivolous, unreasonable and without foundation" by federal district court judges.[5] In addition, the Chamber's analysis of 2013 court cases reveals the EEOC's priority is often to advance questionable legal theories in

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[3] For example, the Chamber worked closely with the disability community to reach a compromise that resulted in the bi-partisan passage of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA").

[4] *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 368 (1977).

[5] Since January 2013 the EEOC has been increasingly criticized by numerous courts throughout the country that have sanctioned the EEOC for its overzealous litigation tactics, awarding over six million dollars in attorneys' fees and costs to employers as a result of the EEOC's inappropriate litigation.

both its enforcement guidance and *amicus* litigation program.[6] For these reasons, the EEOC and its priorities deserve greater attention and oversight. My testimony will include highlights of the Chamber's EEOC Enforcement Paper in two parts: The EEOC's Investigation and Conciliation Record and the EEOC's Private Party and *Amicus* Litigation Record.[7]

The EEOC's Investigation and Conciliation Record

EEOC Investigations

Title VII requires the EEOC "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." Yet, Chamber members, as well as plaintiff and management attorneys and courts have recently criticized the EEOC for investigations that are too long, inconsistent and of questionable quality.[8]

Chamber members have voiced concern over numerous examples of EEOC enforcement tactics during the EEOC's investigation and attempts to resolve pending charges of discrimination.[9] Those abuses can be grouped in the following three categories: abuses relating to an investigator's conduct during an investigation; abuses relating to an investigator's conduct during a fact-finding conference; and abuses relating to an investigator's unwillingness to fairly mediate or negotiate a resolution of a charge.

Examples of EEOC enforcement abuses relating to an investigator's conduct during an investigation include: pursuing investigations despite clear evidence that an employee's termination was not discriminatory (including challenging a termination based on video capturing the charging party displaying pornography around the workplace); several examples of instances where employers have been required to submit detailed position statements,

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[6] The EEOC's *amicus curiae* program ("*amicus*") is one of its most important legal enforcement methods. In 2013, the EEOC's amicus program was a complete failure – not only were the EEOC's *amicus* positions rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in the EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements under Title VII and the ADA. The courts' rejection of the EEOC's underlying regulatory guidance leaves employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. *See* 12-14 *infra* and Chamber's EEOC Enforcement Paper at 18-25.

[7] I request that the Subcommittee accept my written testimony as well as the Chamber's EEOC Enforcement Paper as part of the written record of today's Hearing.

[8] *See* Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm.

[9] *See* Chamber's EEOC Enforcement Paper at 2-4.

information and documents relating to employees' claims that they had been terminated unlawfully when they were either still employed or had resigned voluntarily (resulting in the expenditure of thousands of dollars in legal fees); requiring the production of workplace policies completely irrelevant to the underlying charge; serving subpoenas for information or documents that were not previously requested by the investigator; communicating directly with employer agents though notified that the employer was represented by counsel; refusing to grant extensions of time to produce information or documents requested because, as a blanket rule, "extensions are not granted"; refusing to provide charging parties or employers with information regarding the case status while it is open; and refusing to close cases that are several years old, preferring instead to continually send employers additional requests for information.

Some employers have gone on the offensive against inappropriate EEOC enforcement tactics, including Case New Holland ("CNH"). In *Case New Holland, Inc. v. EEOC,*[10] CNH filed a lawsuit against the EEOC claiming it violated the Administrative Procedure Act and the U.S. Constitution during its investigation of an alleged age discrimination complaint. Specifically, CNH challenged the EEOC's unannounced surprise delivery of 1300 spam-like emails to CNH managers and employees to "troll" for potential class members at the employees' work email addresses, demanding that they cease their work to communicate with the EEOC on an attached questionnaire.[11]

The Code of Federal Regulations sets forth express guidelines for the EEOC's investigation of charges of discrimination. It states:

> The agency must develop an ***impartial and appropriate factual record*** upon which to make findings on the claims raised by the complaint. An appropriate factual record is defined in the regulations as one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Investigations are conducted by the respondent agency.[12]

Another EEOC practice during the investigations phase that is troubling both in theory and in practice is the EEOC legal staff's involvement in agency investigations from the start. In many instances, a team of one or more EEOC investigators and an EEOC attorney are assigned to a charge. The attorneys are often-times closely involved with all phases of the investigation, including charge intake and on-site interviews at employer locations. Yet, these may also be the same lawyers who will litigate related lawsuits against these employers. This practice of tag-teaming between legal and investigatory staff compromises the EEOC's requirement to implement "impartial" investigations. It is inappropriate for an investigation to be, in actuality, a pre-litigation vehicle to discovery, the scope of which would not ordinarily be allowed by any federal action governed by Fed. R. Civ. P. 26 and 37.

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[10] No. 13-cv-01176 (D.D.C. filed Aug. 1, 2013).

[11] Chamber's EEOC Enforcement Paper at 10-11.

[12] 29 C.F.R. § 1614.108(b) (emphasis added).

Various issues have also arisen with respect to EEOC enforcement abuses relating to an investigator's conduct during a fact-finding conference, including: requiring mandatory conferences; holding the conference prior to the start of the investigation and without first receiving an employer's position statement or statement of facts; conducting the conferences in a confrontational manner (aggressively questioning employer representatives, but not charging party); and refusing to allow an employer's representative to speak during the conference.

Additional EEOC enforcement abuses during settlement conversations include: urging an employer in writing to accept a mid-five figure settlement with respect to a charge based on a variety of alleged bad facts the EEOC claimed showed discrimination (though the EEOC had not at that time issued a determination letter), and, when the employer rejected the offer, days later dismissing the charge as without reasonable cause to believe discrimination existed; refusing to engage in a mediation with the employer, claiming the employer did not negotiate in good faith, notwithstanding the same investigator had a few months earlier mediated successfully with the same employer; demanding short turnarounds on any proposed conciliation counteroffers, even though the EEOC's response time for conciliation communications has taken several months; and refusals to provide employers in conciliation and settlement negotiations with information to support the underlying findings or requested relief or appropriate ways to revise policies or practices to comply with non-discrimination laws.

Consistent with the experience of Chamber members, at various Commission meetings aimed at developing the Commission's Strategic Enforcement Plan and Quality Control Plan, Commissioners were confronted with rare agreement between the plaintiff and management bars that the EEOC's investigations are too long, inconsistent, and of questionable quality.[13] The meeting attendees stressed that the EEOC should focus its resources on its priorities and introduced the concept of a "quality, limited investigation" for remaining charges. Unfortunately, the EEOC's recently-released draft Quality Control Plan ("QCP") that is intended to set quality standards for investigations and conciliations does not offer timeliness guidelines for quality investigations nor a definition of a "quality, limited investigation."[14]

Recently, and with more frequency, the sufficiency or the appropriateness of the EEOC's pre-suit obligations have been successfully challenged by employers in courts. "Before the EEOC is able to file a lawsuit in its name, it must establish that it has met four conditions precedent, namely: the existence of a timely charge of discrimination, the fact that EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit."[15] The most recent example of EEOC abuse in the investigation context

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[13] *See* Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm.

[14] Instead, the QCP adopts an "I know it when I see it" standard that offers no guidance to the field other than to correctly fill out a charge form and apply the law to the facts.

[15] *Id.* at 359-60; 42 U.S.C. §2000e-5(b).

occurred in *EEOC v. Sterling Jewelers, Inc.*, a nationwide class action alleging discriminatory pay practices against female employees.[16] While 19 female employees from various states filed charges with the EEOC claiming pay-related sex discrimination, the EEOC filed suit on behalf of a nationwide class. However, rather than investigating the claims on a class-wide basis, the EEOC instead found reasonable cause that discrimination occurred based on reports conducted by plaintiffs' counsel and "experts." The court granted summary judgment in favor of Sterling because the EEOC failed to demonstrate that it had conducted *any* investigation into claims of company-wide pay and promotion discrimination on a nationwide basis prior to filing a lawsuit.[17]

Notwithstanding the above failures in the EEOC's investigative processes, the EEOC is unwilling to provide guidance to ensure investigations are run with the utmost professionalism, quality, and consistency throughout the country. The Chamber urges Congress to install much needed common sense safeguards within the EEOC if the EEOC continues to ignore these issues.

EEOC Conciliations

It is not surprising that in the last five years, we have seen the EEOC primarily focus on large-scale, high-impact and high-profile investigations and cases. The EEOC reported that, "[w]hile . . . [the EEOC's past] focus has primarily been on individual cases of discrimination, the agency has stated its bipartisan desire to shift emphasis to combating systemic discrimination."[18]

However, litigation is clearly established as a means of last resort. Before filing a suit, Title VII requires that the EEOC "endeavor to eliminate any... unlawful employment practice by informal methods of conference, conciliation, and persuasion."[19] Needless, expensive, protracted litigation should be avoided if compliance can be obtained through informal means.

Despite this statutory language, the EEOC now contends federal courts cannot review whether it complied with a statutory obligation; rather, they must accept the EEOC's contention that it has done so. Courts, however, are empowered to enforce the law, and to ensure that agencies do not exceed their statutory boundaries. Making compliance with a statute unreviewable is to make a violation of that statute irremediable. No legitimate reason exists to exempt the EEOC's statutory obligation to conciliate from judicial review, while other statutory

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[16] *EEOC v. Sterling Jewelers, Inc.*, No. 08-706, 2014 WL 916450, at *1 (W.D.N.Y. Mar. 10, 2014).

[17] *Id.*

[18] *U.S. Equal Employment Opportunity Commission: FY 2011 Congressional Budget Justification, Submitted to the Congress of the United States February 2010*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/plan/upload/Final-FY-2011-Congressional-Budget-Justification.pdf (last visited July 13, 2012).

[19] 42 U.S.C. § 2000e-5(b).

requirements – charge requirements, time limits and notice rules – are routinely subject to review, including by the Supreme Court.

In fact, when Congress amended Title VII in 1972 granting litigation authority to the EEOC, it considered exempting the EEOC's conciliation efforts from judicial review. For example, an early version of the bill expressly stated that the EEOC may proceed with a suit if it cannot secure "a conciliation agreement acceptable to the Commission, *which determination shall not be subject to review*."[20] (emphasis added.) However, as ultimately passed, the 1972 Amendments did not exempt conciliation from judicial review and Title VII does not contain that italicized language above, showing that Congress intended that there be appropriate judicial oversight of EEOC conciliation activities.[21]

For the last forty years, courts have routinely reviewed whether the EEOC has sufficiently complied with conciliation obligations. Recently, in *EEOC v. CRST Van Expedited, Inc.*,[22] the Eighth Circuit Court of Appeals largely affirmed a district court's dismissal of an EEOC class action complaint which alleged sexual harassment of behalf of 154 women where the EEOC failed to identify the alleged victims during conciliation. The Eighth Circuit found that the EEOC stonewalled the company by making no meaningful attempt to conciliate and described the EEOC's tactic of seeking redress for victims identified after the beginning of litigation as follows:

> There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.[23]

As a result, the district court sanctioned the EEOC and awarded $4.7 million dollars to CRST for attorneys' fees and expenses.[24] In addition to taxpayers being assessed $4.7 million dollars for a federal agency failing to comply with the law that it enforces, 153 alleged victims' claims were dismissed without a hearing on the merits – a stark example of the harm caused by the EEOC's improper litigation tactics.

A recent Seventh Circuit Court of Appeals case, *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013) created a split among the Circuit Courts of Appeals regarding the issue of whether the EEOC's conciliation obligations are subject to judicial review, as courts in the

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[20] S. 2515, 92d Cong. § 4(f) (1971).

[21] 42 U.S.C. § 2000e-5(f)(1).

[22] 679 F.3d 657, 676-77 (8th Cir. 2012).

[23] *Id.* at 676.

[24] *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478, at *21 (N.D. Iowa Aug. 1, 2013).

Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits[25] had all determined that the EEOC's conciliation obligations were subject to review under varying standards.

The House of Representatives recognized these concerns with the EEOC's pursuit of litigation absent good faith conciliation efforts on May 30, 2014, when it voted on a bipartisan basis to approve the fiscal year 2015 Commerce, Justice, Science Appropriations bill.[26] The report accompanying the bill provided as follows:

> The Committee is concerned with the EEOC's pursuit of litigation absent good faith conciliation efforts. The Committee directs the EEOC to engage in such efforts before undertaking litigation and to report, no later than 90 days after enactment of this Act, on how it ensures that conciliation efforts are pursued in good faith.[27]

The EEOC should not be permitted to ignore Title VII's plain language, nor should courts abdicate their responsibilities in determining whether an executive branch agency complied with its statutory requirements. Yet, that is what the EEOC argues in courts throughout the country and in its brief filed in response to Mach Mining's petition for writ of certiorari currently pending before the United States Supreme Court.[28] Courts have an important role in ensuring that any agency, including the EEOC, does not manipulate, abuse, or evade its statutory duty.

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[25] The Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). As opposed to the EEOC's positions in these cases promoting a particular judicial standard of review of its conciliation efforts, today the EEOC asserts its efforts are not subject to judicial review.

[26] H. Rep. No. 113-448, at 83-84 (2014).

[27] *Id.*

[28] On December 20, 2013, the Seventh Circuit Court of Appeals broke from over 40 years of jurisprudence by holding that the EEOC's pre-conciliation efforts were not subject to judicial review at all in *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013). *See* Brief for the Respondent at 7-13, *Mach Mining, LLC v. EEOC*, (No. 13-1019) (May 27, 2014).

The EEOC's Private Party and *Amicus* Litigation Record

Recently, the EEOC has been sanctioned by multiple courts in connection with its investigatory and litigation procedures in various EEOC-initiated lawsuits. In the last two years, the EEOC has been ordered to pay employers over $5.6 million dollars as a result of its improper litigation and conciliation tactics. Five recent cases are of immediate note in which courts sanctioned the EEOC for its: failure to follow appropriate procedures prior to instituting litigation, failure to appropriately litigate the case, and failure to reasonably access the appropriateness of continuing its litigation once it became clear in discovery that its complaint's theory had no basis in fact.[29]

The $5.6 million sanctions against the EEOC does not take into account the value of the Commission's resources (in attorney and other staff time, hard litigation and expert witness and other costs and the opportunity costs of pursuing frivolous cases). In addition, there are no available estimates on the resources expended by the EEOC in connection with a number of other high profile losses suffered by the EEOC on its most highly publicized cases during the last year, including most recently, the dismissal of EEOC's nationwide sex discrimination litigation against Sterling Jewelers for its failure to investigate the alleged systemic allegations in the case prior to initiating litigation (*EEOC v. Sterling Jewelers, Inc.* W.D.N.Y. No. 08-706 3/10/2014).

[29] In *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013), the court ordered the EEOC to pay $4.7 million in attorneys' fees, expenses and costs to the employer it sued based on its failure to conciliate, prior to instituting litigation. In *EEOC v. Bloomberg LP*, 2013 WL 4799150 (S.D.N.Y., Sept. 9, 2013), the court invited the employer to file a motion for attorneys' fees based on the EEOC's inappropriate conciliation and litigation conduct. In *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2014 WL 37860 (M.D.N.C., Jan. 6, 2014), a magistrate judge imposed sanctions of approximately $23,000 against the EEOC for spoliation of evidence where the claimant destroyed documents during litigation relevant to her duty to mitigate damages. In *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. Oct. 7, 2013), the court upheld a fee award of $751,942 for continuing to pursue litigation based on a blanket no hiring policy for ex-convicts where no such policy existed and the EEOC obtained information during discovery that disproved its factual basis for its complaint. In *EEOC v. TriCore Reference Laboratories*, No. 11-2096, 2012 WL 3518580 (10th Cir. 2012), the Tenth Circuit Court of Appeals affirmed summary judgment for the employer determining that no material issue of fact remained, and awarded $140,571 in attorneys' fees to the employer based on the EEOC's pursuit of a failure to accommodate claim with no basis in fact.

Reestablishing The Commission's Oversight of The Initiation of Multi-Plaintiff Litigation

Title VII confers authority to initiate litigation to the five-member Equal Employment Opportunity Commission. Title VII authorizes the EEOC's General Counsel to "conduct" litigation. Yet today, the overwhelming majority of EEOC-initiated litigation is initiated throughout the United States by EEOC Local District offices, without review and a grant of authority from the Commission.

This has not always been the case. In 1995, the Commissioners delegated their authority to initiate litigation to the General Counsel, who subsequently delegated much of that authority to the district offices. Since then, the Commission has only exercised authority to initiate litigation in some but not all cases involving a major expenditure of resources, cases presenting a developing area of the law, cases likely to present a public controversy, and cases where an EEOC amicus brief is sought.

In the early- to mid-2000s, as many as 75-80 litigation recommendations were submitted annually to the Commission for authorization. Yet, in recent years, the number has decreased dramatically. In the three-year period covering 2010, 2011 and 2012, a total of approximately 15 cases (of any type) were submitted to the Commission for authorization. In late 2012, the EEOC adopted its Strategic Enforcement Plan, which continued the EEOC's focus on systemic litigation, but slightly modified the delegation of authority to the General Counsel, which required "most" systemic cases to be submitted to the Commission for review. Overall, the Commission required a minimum of 15 cases, one from each district office, be presented for review each fiscal year. In fiscal year 2013, the EEOC filed 21 systemic cases and 21 non-systemic multi-plaintiff cases. Based on information provided before each public Commission meeting, it is clear that many of these cases were initiated by the district offices without approval from the Commission.

Given the significant expenditure of resources by both the EEOC and private employers in connection with multi-plaintiff cases in 2013, the Chamber urges that all multi-plaintiff litigation be submitted to the Commissioners for review and approval prior to initiation of litigation.

Private Party Litigation Failures

Despite significant budgetary increases in 2009 and 2010,[30] and consistent funding at high levels since, EEOC litigation is down almost 55%.[31] Since April 2010, however, the number of cases that the EEOC has lost due to litigation abuses is troubling.[32]

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[30] *See* http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm. Between fiscal year 2008 and fiscal year 2010, the EEOC's budget increased by over $38M or 11.5%.

[31] *See* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm. In fiscal year 2008, the EEOC filed 290 merits cases. In fiscal years 2012 and 2013, the EEOC filed 122 and 133 merits cases, respectively.

For example, in a race discrimination case, the EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.[33] However, the company simply did not have a blanket no-hire policy. Despite becoming aware of the fatal false premise of its case during discovery, the EEOC continued to litigate anyway. The U.S. District Court for the Western District of Michigan determined that "this is one of those cases where the complaint turned out to be without foundation from the beginning." As a result, the court ordered the EEOC to pay a total of $751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees after the agency learned that the company did not have the blanket no-hire policy.

A federal court in New York dismissed a pregnancy discrimination lawsuit filed by the EEOC, granting summary judgment for the employer, ruling that the EEOC did not present sufficient evidence to establish that, once again, the employer engaged in a pattern or practice of pregnancy discrimination.[34] The EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The court ruled that the law does not mandate work-life balance. The court criticized the EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required."[35]

Similarly, in a case alleging discrimination under the ADA, the EEOC continued to litigate even when it became clear that the case had no merit.[36] Specifically, the EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but "continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed." Thus, the EEOC's claims were "frivolous, unreasonable and without foundation." The district court dismissed the claim and awarded the employer over $140,000 in attorneys' fees and costs. The Court of Appeals affirmed.[37]

While litigating disparate impact claims, which do not require that the EEOC prove intentional discrimination against any alleged victim, the EEOC has fared no better. For example, in an Ohio case alleging that an employer's use of credit background checks violated Title VII, the Sixth Circuit affirmed summary judgment because the EEOC lacked sufficient evidence to even form a prima facie case of discrimination. There, the EEOC used a novel "race rating" system to establish that the credit background check had a disparate impact against

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[32] For additional analysis regarding the EEOC's litigation abuses, see the Chamber's EEOC Enforcement Paper at 7-11.

[33] *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

[34] *EEOC v. Bloomberg LP*, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y., Sept. 9, 2013); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).

[35] *Id.*

[36] *EEOC v. Tricore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).

[37] *Id.*

minority applicants. While castigating the EEOC for using a "homemade" method that the EEOC itself prohibits, the Sixth Circuit noted that "[i]n this case the EEOC sued defendants for using the same type of background check that the EEOC itself uses." *The Wall Street Journal* called the Sixth Circuit's opinion "The Opinion of the Year".[38]

In a Maryland case alleging that an employer's criminal background policy had a disparate impact on minorities, the EEOC attempted to prove its case through hiring statistics.[39] Unable to establish a prima facie case of discrimination, the court awarded summary judgment for the employer. The court found that EEOC's expert analysis contained a "mind-boggling number of errors." The court also found the EEOC's statistical evidence to be "skewed," "rife with analytical errors," "laughable," and "an egregious example of scientific dishonesty." Accordingly, the court dismissed the case, noting that, "The story of the present action has been that of a theory in search of facts to support it."

EEOC abuses can also be found during the discovery phase of litigation. For example, in *EEOC v. Honeybaked Ham*[40], a Colorado district court sanctioned the EEOC for its efforts to evade discovery where the EEOC was "negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court[.]" In *EEOC v. Womble Carlyle Sandridge & Rice, LLP,*[41] a North Carolina court sanctioned the EEOC almost $23,000 for the charging party's destruction of evidence after the EEOC had initiated litigation, laying blame for the destruction on the EEOC's attorneys.

The EEOC's Failed Amicus Program[42]

Not only has the EEOC been unsuccessful in its major cases in which it is a party, the EEOC's *amicus curiae* program was equally unsuccessful in 2013. One of the most important legal enforcement methods available to the EEOC is its *amicus curiae* program.[43] *Amicus* briefs

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[38] http://online.wsj.com/news/articles/SB10001424052702304512504579491860052683176.

[39] *EEOC v. Freeman*, 961 F. Supp. 2d 783, 797-799 (D. Md. 2013).

[40] *EEOC v. Original Honeybaked Ham Company of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb 27, 2013).

[41] *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. Jan. 6, 2014); see also *EEOC v. Womble Carlyle Sandridge & Rice*, LLP, 13-CV-46 (M.D.N.C. April 29, 2014).

[42] For a more in depth analysis of the EEOC's failed amicus program, see the Chamber's EEOC Enforcement Paper at 18-25.

[43] The EEOC has not included information regarding its 2013 *amicus* record on its website, in its 2013 PAR, or in its General Counsel's Law360 article criticizing other analyses of the EEOC's litigation record as failing to perform a comprehensive review of all 2013 EEOC litigation efforts. Without considering the EEOC's 2013 *amicus* record, its General Counsel asserted that when one reviewed the EEOC's entire record instead of a few EEOC losses still on appeal, "...we [EEOC] have a record of success in reversing adverse decisions when a case moves to the

are "friend of the court" briefs filed by the EEOC "in a case that raises novel or important issues of law" that fall within EEOC's expertise.[44] The EEOC has an intensive approval process for *amicus* participation, with all recommendations in favor of *amicus* participation approved by a majority of the five-member Commission. *Amicus* briefs are part of the EEOC's targeted and integrated approach to law enforcement, focused on the EEOC's priorities, and often seeking judicial approval of EEOC positions contained in its enforcement guidelines and policy statements.

In 2013, the U.S. Supreme Court and five Courts of Appeals decided 13 cases in which the EEOC filed amicus briefs. Three of the 13 cases raised contested procedural issues on which the EEOC's *amicus* position prevailed.[45] Ten of the cases involved substantive issues of the appropriate interpretations of applicable federal law.[46] The EEOC's position was rejected in

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appellate court."). P. David Lopez, *'EEOC Overreach' Analysis Distorted The Record*, LAW360 (Jan. 3, 2014, 12:17 PM).

[44] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE PROGRAM, (Jan. 15, 2014), available at http://www.eeoc.gov/eeoc/litigation/amicus.cfm.

[45] The EEOC prevailed on procedural arguments in the following three *amicus* cases in 2013: *Mandel v M&Q Packaging Corp.*, 706 F.3d 157 (3d Cir. Jan. 14, 2013) (adopting the EEOC position that the district court erred in refusing to consider evidence of harassment over 300 days old in this hostile work environment claim); *Boaz v. FedEx Customer Info. Svs., Inc.*, 725 F.3d 603 (6th Cir. Aug. 6, 2013) (adopting DOL & EEOC argument that an employment contract cannot shorten the statute of limitations under the EPA or FLSA); *Ellis v. Ethicon, Inc.*, 529 Fed. Appx. 310 (3d Cir. Jul. 9, 2013) (adopting the EEOC argument that reinstatement can be an appropriate remedy).

[46] The EEOC's substantive arguments were rejected in the following eight *amicus* decisions in 2013: *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance definition of "supervisor" under Title VII when determining vicarious liability for unlawful harassment); *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance that the motivating factor standard applies to retaliation claims); *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013) (rejecting EEOC Enforcement Guidance that attendance is not an essential function of the job); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013) (rejecting the position offered in a joint brief filed by the EEOC and DOL while the proceedings were before the NLRB that arbitration agreements are inconsistent with federal law); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (rejecting the EEOC's argument, filed jointly with the DOL, that arbitration agreements barring class claims are impermissible); *McKinley v. Skyline Chili, Inc.*, 2013 WL 4436537 (6th Cir. Aug. 21, 2013) (affirming summary judgment for the employer because loss of confidence and poor performance were not pretextual reasons for termination); *Foco v. Freudenberg-NOK Gen. P'ship*, 2013 WL 6171410 (6th Cir. Nov. 25, 2013) (affirming summary judgment for the employer as the pay disparity was based on something other than sex); *Bailey v. Real Time Staffing Servs., Inc.*, 2013 WL 5811647 (6th Cir. Oct. 29, 2013) (affirming summary judgment for the employer because the employee's failed drug test, even if caused by medication taken to treat HIV, was a legitimate, non-discriminatory reason for

eight of the ten substantive positions it advanced in the appellate courts. In comparison, the United States Chamber of Commerce ("Chamber") filed *amicus curiae* briefs in three of these same cases, with a 100% win rate.[47]

The Supreme Court itself rejected two long-held EEOC guidance positions. First, in *Vance v. Ball State Univ.*, the Supreme Court rejected the EEOC's expansive definition of "supervisor" and held that an employer may be vicariously liable for an employee's unlawful harassment only when that employee has the employer's authorization to effect significant changes in employment status of the employee (such as hiring, firing, promoting, demoting or significantly changing their responsibilities or employee benefits).[48] Second, in *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, the Supreme Court rejected EEOC's amicus position and held that in a Title VII retaliation claim, the plaintiff must prove that the harm would not have occurred "but for" the employer's retaliatory motive.[49]

The Supreme Court's adverse rulings in 2013 striking down EEOC guidance were not an anomaly. In 2012, the Supreme Court unanimously rejected the EEOC's position that the ministerial exception did not apply to ADA retaliation cases.[50] In 2009, the Supreme Court rejected the EEOC's position that the mixed motive instruction was permissible under the ADEA, which the EEOC had argued as amicus before the Eighth Circuit Court of Appeals and in which the Department of Justice appeared as amicus at the Supreme Court.[51]

In addition to the Supreme Court rejecting EEOC guidance, the Courts of Appeals rejected the EEOC's substantive positions found in its *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*[52] as well as the

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termination). The EEOC prevailed on substantive *amicus* arguments in only two cases in 2013: *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. Aug. 9, 2013) (adopting the EEOC's argument that a sexual harassment victim does not need to prove that the harassment unreasonably interfered with her work performance, only that work conditions were discriminatorily altered) and *Latowski v. Northwoods Nursing Ctr.*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013) (reversing summary judgment for employer on a pregnancy discrimination claim where a fact issue existed regarding whether the employer's proffered reason for terminating plaintiff was pretextual).

[47] The U.S. Chamber of Commerce filed *amicus* briefs in *Vance v. Ball State Univ.*, *Univ. of Texas Southwestern Med. Ctr. v. Nassar* and *DR Horton v. NLRB.*

[48] *Vance*, 133 S. Ct. at 2454.

[49] *Nassar*, 133 S. Ct. at 2533-34.

[50] *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 707 (2012).

[51] *Gross v. FBL Services, Inc.*, 557 U.S. 167, 173 (2009).

[52] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH

EEOC's *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes*.[53] For example, in *Basden v. Prof. Transportation, Inc.*,[54] the Seventh Circuit rejected the EEOC's much maligned position that attendance is not an essential function of a job. In *D.R. Horton v. NLRB*,[55] the Fifth Circuit Court of Appeals rejected the EEOC's policy position that arbitration agreements are inconsistent with federal civil rights laws.

Whether the EEOC's *amicus* program's success is measured on a pure numerical win/loss basis, or on the importance of the substantive interpretations of federal law it supported in its *amicus* efforts, one thing is clear: it was an overwhelming failure. More important, however, is that courts consistently rejected substantive policy positions adopted by the EEOC, which creates an untenable atmosphere for employees and employers, both of whom are left searching for reliable guidance on rights and obligations under federal employment civil rights laws.

Expansive Enforcement Guidance

As is clear from the appellate courts' rejection of EEOC guidance, employers find themselves between a rock and a hard place when it comes to determining whether to revise policies and practices to conform to new EEOC enforcement guidance. Guidance represents not the law, but the EEOC's view of the law. Employers look to the EEOC for thought-based, reasonable guidance to assist their compliance efforts. An individual expects that the EEOC provides reliable guidance outlining his or her rights under the statutes within its jurisdiction. However, when any enforcement guidance strays from the statutory intent and is ultimately struck down by the Supreme Court or a Circuit Court of Appeals, the EEOC has failed all of its stakeholders and its congressional mandate.

One potential reason for the continued disregard of EEOC guidance is because it adopts substantive policy positions that create compliance requirements without the benefit of public comment.[56] This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents. OMB's "Final Bulletin for Agency Good Guidance Practices" states:

DISABILITIES ACT, (Oct. 17, 2002), available at http://www.eeoc.gov/policy/docs/accommodation.html.

[53] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), available at http://www.eeoc.gov/policy/docs/mandarb.html.

[54] 714 F.3d 1034, 1037 (7th Cir. May 8, 2013).

[55] 737 F.3d 344, 360 (5th Cir. Dec. 3, 2013).

[56] Notably, the EEOC placed complete drafts of its Strategic Plan and Strategic Enforcement Plan for public comment. *See* http://www.eeoc.gov/eeoc/newsroom/1-18-11a.cfm and http://www.eeoc.gov/eeoc/newsroom/release/9-4-12c.cfm. It did not provide a complete draft of either its draft Quality Control Plan, enforcement guidance related to the use of criminal convictions, anticipated guidance related pregnancy discrimination, or other draft guidance

> Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.[57]

For example, one intended audience for any EEOC enforcement guidance is the EEOC investigators, who are trained to implement the relevant guidance document in their day-to-day investigations. EEOC investigators will determine whether reasonable cause exists that discrimination occurred based on an employer's compliance with the relevant enforcement guidance, essentially equating compliance with a guidance document as compliance with a statute. During an investigation, employers are held to the standards set forth in the EEOC's guidance documents. As many guidance documents take expansive views of rights and obligations under the law, it allows investigators to build large systemic cases on questionable theories that force employers to settle before or in the early stages of litigation.

In April 2012, the EEOC adopted its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. This guidance was not issued for notice and comment pursuant to OMB's Final Bulletin for Agency Good Guidance Practices. The rule contained in this guidance is relatively simple – employers commit race discrimination if they choose to hire applicants without criminal histories over applicants with criminal histories unless the employer conducts a highly subjective individualized assessment of the applicant with a criminal history. If the applicant with a criminal history is excluded after an employer considers these factors, presumptively no race discrimination exists. If the applicant is excluded without an individualized assessment, presumptively race discrimination exists. However, there is no individualized assessment requirement under Title VII. The EEOC fails to provide any justification for this logical flaw – that an unsuccessful applicant who received an individualized assessment is not discriminated against while an unsuccessful applicant who did not receive an individualized assessment has been discriminated against.

A second flaw in the EEOC's guidance is its treatment of state laws. While Title VII does contain a provision that Title VII supersedes state law only where a state or local law requires or permits an act that would violate Title VII,[58] the EEOC provides no guidance on how

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documents regarding credit background checks or under reasonable accommodation requirements under the ADA.

[57] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).
[58] 42 U.S.C. § 2000e-7.

an employer should weigh competing federal and state interests, other than to say that an employer will have to establish that a screen based on state law is job-related and consistent with business necessity. It is an expensive endeavor for a nursing home or other health care facility to show that not hiring a serial rapist or drug dealer pursuant to state law is job-related and consistent with business necessity, yet that is what this guidance contemplates.

Finally, the EEOC gives short shrift to common sense employer concerns – workplace safety and the hiring of violent felons, sexual harassment concerns and the hiring of rapists, trust and reliability in one's workforce. In classic "Do as I say not as I do" fashion, the EEOC itself conducts criminal background checks on potential hires because a history or pattern of criminal activity creates doubt about a person's judgment, honesty, reliability and trustworthiness.

In addition to the poor showings in court, the EEOC continues to send mixed signals regarding the efficacy of its guidance positions. For example, in the *State of Texas v. EEOC* litigation, the EEOC describes its guidance documents as "lack[ing] the force of law."[59] Yet, only months later, the Solicitor General of the United States asked that the Supreme Court not to grant a writ of certiorari in *Young v. United Parcel Service* because the EEOC is about to issue enforcement guidance on the issue.[60] Note the inherent inconsistency in those positions. Employers are forced to comply with policy positions set for in enforcement guidance documents, while the EEOC argues in court that those positions have no force of law, while at the same time the Department of Justice requests that the Supreme Court deny granting a writ of certiorari in *Young* because the EEOC's anticipated guidance will resolve the issue.

[59] *See* EEOC's Memorandum in Support of Motion to Dismiss, No. 5:13-CV-255 C, at 7 (N.D. Tex 2013).

[60] Amicus Brief for the United States at 21-22, *Young v. United Parcel Service, Inc.*, No. 12-1226 (May 19, 2014). Notably, the EEOC is not a signatory to that brief, indicating that at least three Commissioners do not with the argument set forth by the Department of Justice.

Conclusion

Combating discrimination in the workplace is a worthy goal and one that the U.S. Chamber of Commerce supports. However, the EEOC's abusive enforcement tactics must be addressed. While federal judges have pushed back in certain cases, the EEOC clearly has not gotten the message. Moreover, relying on federal court judges as the final check on EEOC enforcement is often a case of "too little, too late"; by that time, employers have already spent significant time and resources defending themselves against unmeritorious allegations and the EEOC's misplaced priorities and overzealous litigation tactics leave fewer resources and longer delays in investigating and resolving meritorious discrimination allegations and providing employers with accurate guidance around which to shape their workplace policies. We encourage the EEOC to adopt institutional procedures to provide for internal accountability, more efficient use of resources and adherence to its own statutory conciliation and other obligations. If the EEOC continues to ignore the problem, we encourage Congress to use its oversight authority to install much needed safeguards within the EEOC.

Mr. Chairman and members of the Committee, thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

cc: Randel K. Johnson, Esq.

[Additional Submissions by Mr. Walberg follow:]

June 13, 2014

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
House Committee on Education and the Workforce
Washington, DC 20515

To Whom It May Concern:

My name is Nick Fishman and I am the co-founder, Chief Marketing Officer and Executive Vice President at EmployeeScreenIQ, a company that provides employment background checks to employers throughout the country. I wanted to thank you for holding your hearing on the regulatory and enforcement priorities of the EEOC and how their guidance on the use of criminal background checks has affected employers across the country.

Our business is based on our core belief that background checks are necessary for employers to have the information they need to make informed hiring decisions. The cost of a bad hire due to a lack of organizational fit or qualifications is substantial enough. But if you add up the cost of negligent hiring lawsuits, employee theft, negative employee morale and the potential human cost and loss that can occur in the workplace, we believe that employers would be negligent in *not* performing employment background checks.

When I testified at the U.S. Commission of Civil Rights hearing concerning the impact of the EEOC's guidance in December of 2012, I focused my remarks on employers' need to conduct criminal background checks as both a public safety issue as well a responsible exercise in general risk management.

We remain concerned that the EEOC neglected to carefully consider all sides of the equation nor seek feedback from all stakeholders before publishing their guidelines. As Lucia Bone pointed out in her testimony to your committee, there are real consequences for not conducting background checks; both for employers and the customers they serve.

Beyond the obvious safety issue is the cumbersome and confusing process the EEOC expects employers to execute. Todd McCracken astutely pointed out in his testimony that the guidance has caused tremendous confusion among employers that have no intention of discriminating against candidates. And for those that have figured out the process, there is still no guarantee that they are insulated from EEOC scrutiny.

It is my hope that your committee will continue to highlight these concerns and raise more awareness among your colleagues in Congress that the EEOC has exceeded their authority.

Thank you in advance for your time and consideration.

Sincerely,

Nick Fishman
Executive Vice President, Chief Marketing Officer

June 24, 2014

The Honorable Tim Walberg
Chairman
Committee on Education and the Workforce
Subcommittee on Workforce Protections
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman,

The National Association of Professional Background Screeners (NAPBS) welcomes the opportunity to submit the following comments with respect to your Subcommittee's June 10, 2014 hearing entitled "The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders." We respectfully request that these comments be made part of the Subcommittee's formal hearing record.

NAPBS applauds the Subcommittee for continuing its examination of the EEOC's enforcement practices involving the use of criminal background checks. NAPBS appreciates this committee's continued focus on the EEOC's 2012 *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Guidance),* particularly the ensuing litigation and enforcement tactics currently plaguing employers. The Subcommittee's focus on the EEOC's enforcement practices is especially timely given some significant judicial defeats involving use of criminal histories suffered by the EEOC since the Subcommittee held its May 2013 hearing on this subject matter.

NAPBS currently represents 689 companies engaged in employment and tenant background screening across the United States dedicated to providing the public with safe places to live and work. We are the voice of the background screening industry, and our member companies range from Fortune 100 companies to small local businesses, conducting millions of pre-employment and tenant background checks each year. NAPBS member companies are defined as "consumer reporting agencies" pursuant to the Fair Credit Reporting Act (FCRA) and are regulated by both the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB).

NAPBS's overarching goal is to provide employers, residential managers, non-profit entities, volunteer organizations, and public sector employers, among others, with a tool—the criminal background check—that enables them to make better decisions that help keep workplaces and residences safer. As a federal court noted recently "[c]areful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process

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of employers throughout the United States." *EEOC v. Freeman*, 961 F. Supp. 2d 783, 786 (D. Md. 2013).

NAPBS submits these comments to expand on some of the key points made at the June 10th hearing by Lucia Bone, Founder, the Sue Weaver C.A.U.S.E., Todd McCracken, President, the National Small Business Association and Camille Olson, Partner, Seyfarth Shaw, on behalf of the U.S. Chamber of Commerce. More specifically, we are writing to emphasize (1) the important public safety interests served by these checks, interests that the EEOC failed to properly consider or balance: and (2) demonstrate briefly how the Commission's flawed process has created a statement of enforcement "policy" that has placed employers in a "catch 22"; and (3) commend the Committee for subjecting the Commission's enforcement overreaches to the public scrutiny they deserve.

1. The Necessity of Criminal Background Checks.

If there were a single overarching takeaway from the June 10th hearing it was Lucia Bone's dramatic and heart wrenching explanation of why criminal background checks are so important, and tragically, what can happen if an employer fails to conduct a screen. Ms. Bone's horrific story brings home the reality that employers are less capable of evaluating the overall suitability of a prospective employee if they do not rely on criminal history information. In the hiring context, more, not less information, serves the governmental interest in protecting the safety of its citizens. We agree emphatically with Ms. Bone that "[e]veryone has the right to work—but not every job is right for everyone. Criminal background investigations provide employers an invaluable tool to help them place employees in job appropriate positions, better protecting coworkers and clients. Background checks prevent tragedies." [1]

Policymakers around the country recognize the benefits of background checks. Especially since 9/11, we have witnessed an upsurge of federal, state and local laws mandating background checks in myriad settings, especially those involving vulnerable populations such as the elderly, medical patients, children and the disabled. The federal government, including the EEOC itself, requires its employees to undergo background screening. NAPBS believes that in enacting such laws, policymakers are acting consistent with the public perceptions about the benefits of checks. As a broad group of screeners and employers told the United States Civil Rights Commission (USCCR) in December 2012, there are many reasons why the public deems checks to be critical:

> Checks help parents know whether a convicted sexual predator is working at their child's day care center, is driving their child's school bus, is a counselor at their summer camp or a coach in their son's or daughter's little league. Family members want assurances that parents will be safe when they move to an assisted living facility. Companies providing in-home services rely on checks because homeowners and apartment dwellers expect to be safe when opening their front door to a repairman, installer or deliveryman. Hotels use checks to help ensure guests that the worker with key access is not a violent ex-offender. Checks also give customers and patients' peace of mind that the individual filling their prescriptions at the local

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[1] The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders, Hearing Before the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, 113 Cong. (2014) (Statement of Lucia Bone, C.A.U.S.E.)

pharmacy or the healthcare provider tending to their illness does not have a criminal history that renders them unsuitable for that position.[2]

Policymakers should encourage, not discourage the responsible use of criminal background checks. Unfortunately, in its Guidance and in the steps that led to the issuance of this new policy statement, the EEOC paid little heed to the governmental responsibility in protecting the safety of its citizenry.

2. The EEOC Failed to Balance the Competing Interests of Helping Ex-offenders Re-Enter the Workforce and Protecting Safety in the Workplace and in Residences.

When a governmental entity attempts to regulate the use of criminal histories in employment, it must weigh the legitimate interest in minimizing the obstacles facing job seeking ex-offenders and the compelling interest in ensuring that ex-offenders do not obtain jobs where their past criminal acts present an undue safety risk. Unfortunately, when drafting the Guidance, the EEOC gave short shrift to vital public safety purposes served by background checks. As the witness testimony underscored, the Guidance, despite its length, is devoid of any "discussion of the public safety benefits attributable to the use of criminal background checks." Not surprisingly, given this defect, the Guidance is unbalanced.

NAPBS promotes fair employment practices and strives to ensure that its members and end users of criminal history checks follow applicable equal employment opportunity laws. Its members are sensitive to the daunting challenges that face ex-offenders as they attempt to re-enter the workforce. Regrettably, the EEOC focused exclusively on the interests of ex-offenders at the expense of public safety. We agree with Ms. Bone that it is time for the EEOC to "stop demonizing background checks and strike a balance that is fair to all parties."

3. The Procedure Followed by the EEOC in Developing and Issuing Its 2012 Criminal History Guidance Was Flawed.

The EEOC rejected requests from the private and public sectors to see the Guidance prior to issuance—including a directive from the Senate Appropriations Committee and a request from a United States Senator.[3] Its failure to receive public comments based on the guidance in its draft form, resulted in a flawed, non-transparent process that has produced a bad policy result. The Committee is well aware of the profound difference between public hearings, stakeholder meetings and written comments addressed at a general topic, and those that are directed at the actual regulatory or legislative language or in this instance sub regulatory guidance as it was referred to by the EEOC. Here, *all* of the EEOC's "transparency" preceded public access to the text of the Guidance and dealt with the general *topic* of criminal histories.

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2 Letter from ACRAnet, et al. to the United States Commission on Civil Rights 6 (December 4, 2012).

3 Prior to the release of the Guidance, the Senate Appropriations Committee in its report accompanying S. 2323, the Senate Appropriations Committee directed that the "new guidance on the use of criminal background checks . . . be circulated for public input at least 6 months before adoption." S. Rep. No. 112-158, at 115 (2012). Senator Michael Enzi (R-Wyo.) in a letter to the EEOC declared that the Commission's decision proceed without public review "confirms our view that this process has been done behind closed doors and the result will be an unwelcome surprise for conscientious employers hoping to expand hiring." Letter from Michael Enzi, Sen., to Jacqueline Berrien, Chair, EEOC 1 (Apr. 19, 2012). Earlier in August 2011, the United States Chamber of Congress urged the EEOC to provide a notice and comment period. U.S. Chamber of Commerce, Comments in the Record, July 26, 2011 Meeting to Examine Arrest and Conviction Records as a Hiring Barrier (Aug. 10, 2011).

One is left to wonder how much less problematic and more responsive to the needs of employers and the public at large the Guidance would have been had the Commission allowed for a proper notice and comment period. It is also fair to wonder why the Commission, *after* issuance of the Guidance has felt compelled to devote so much time and taxpayer money to educating employers and the public about the meaning of the Guidance–e.g., myriad meetings around the country, a frequently asked question document, and a joint missive with the FTC—*if* the guidance is merely a continuation of what came before; if that were the case there would be no need for an extensive damage control effort to quiet justified public concern.

4. The Guidance's Treatment of State Law Puts Employers in an Untenable Position.

As the Subcommittee heard at its June 10th hearing, many employers, especially those who run small businesses, are confused by language in the Guidance threatening to investigate businesses for following state hiring requirements. The Guidance states that "state and local laws or regulations are preempted by Title VII if they purport[] to require or permit the doing of any act which would be an unlawful employment practice under Title VII."[4]

Our discussions with the employer community confirm the testimony that the Subcommittee heard, namely that employers are caught in an impossible situation: the criminal history policies they adopted to meet the requirements of such a state or local could well subject them to an EEOC investigation. Complicating this problem and heightening uncertainty among employers worried about meeting their state law obligations, is the fact that the EEOC has given no indication how it would apply this preemption language.

Todd McCracken got it right when he told the Subcommittee:

> With respect, it is ridiculous that a small business is forced to choose between two conflicting government requirements. If the EEOC has a problem with a state statute, it should challenge the statute, not launch an enforcement action against a small business that complied with state law. Unlike the federal government, small businesses have limited resources, and defending such lawsuits can devastate the financial health of the business.[5]

5. The Individual Assessment Requirement Sets A Trap for Businesses.

Unlike its two-page predecessor, the 2012 Guidance stretches to 52 pages and contains 167 footnotes. We agree with Mr. McCracken's assertion that the EEOC failed to meet its "obligation to articulate rules that are comprehensible and can actually be implemented." He continued that "[l]ack of crisp guidance leads situations where enforcement is starkly arbitrary and the rules, since they cannot be understood, are effectively ignored."[6] Of especial concern to employers is the "suggestion" in the Guidance that they undertake an individualized assessment of those applicants with criminal histories to review the nature of the offense and other relevant issues. While such assessments are not mandated by Title VII, the Guidance leaves little doubt

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[4] EEOC, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, 915.002, at 24 (2012) (alteration in original) (internal quotation marks and citations omitted), http://www.eeoc.gov/laws/guidance/arrestconviction.cfm.

[5] The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders, Hearing Before the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, 113 Cong. (2014) (Statement of Todd McCracken, President, National Small Business Association)

[6] *Id.*

that employers who refrain from offering such assessments are more likely to catch the attention of the EEOC.

Such assessments are particularly problematic and burdensome for businesses that rely on seasonal employees as well as small businesses. A large entity may, as some have done, hire an employee whose sole job it is to make an individual assessment based on the applicant's file and nothing else. While there is no guarantee that this kind of firewall will protect employers from an EEOC investigation and lawsuit, smaller businesses do not have that luxury. Hiring decisions are usually just one of an employee's duties. The result is a compliance trap: the business that has an employee conduct the interview, review the background screen, and conduct an "individual assessment" creates the potential of a disparate treatment claim. If the business does not do the check, negligent hiring suits loom. Nonetheless, the effect of the guidance on some employers has been to discourage them from performing checks in some situations.

6. The EEOC's Guidance and Its Litigation Practices Are Finally Receiving the Public Scrutiny They Deserve.

Given the failure of the EEOC to subject the draft Guidance to public review, we commend the Subcommittee for giving the EEOC's Guidance and its enforcement activities the public scrutiny they deserve. This Subcommittee has played a key oversight role by holding not only the June 10th hearing but also its May 2013 hearing, at which time EEOC Chairwoman Berrien was queried about the Guidance and the EEOC's overall enforcement activities. We also note that last summer, nine state attorneys general criticized two disparate impact lawsuits involving criminal checks launched by the Commission, *EEOC v. BMW Manufacturing Co., LLC (Case No. 7:13-cv-01583, U.S. District Court District of South Carolina)* and *EEOC v. Dolgencorp LLC (Case No. 1:13-cv-04307, U.S. District Court Northern District of Illinois)*. The letter argued that these lawsuits and "and [the EEOC's] application of the law as articulated in [the EEOC's] enforcement guidance, are misguided and a quintessential example of federal overreach."[7]

Nonetheless, the most significant development since the Subcommittee's 2013 hearing are the stinging defeats that the EEOC suffered in *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013) and *EEOC v. Peoplemark*, 732 F.3d 584 (6th Cir. 2013), both of which deal with disparate impact claims involving criminal history policies.[8] In *Freeman*, now on appeal to the United States Court of Appeals for the Fourth Circuit, a federal court in a scathing opinion threw out allegations that an employer's use of background checks was discriminatory. NAPBS's concern is that its Guidance, like these cases, stems from "a theory in search of facts to support it." Freeman, *supra*, at 802. In our view, the Commission's enforcement Guidance creates the same problem that the District Court recognized in *Freeman*: "[b]y bringing actions of this nature, the EEOC has placed many employers in the 'Hobson's choice' of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and

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[7] Letter from Patrick Morrissey, Attorney General, West Virginia, et al. to Jacqueline A. Berrien, Chair, Equal Employment Opportunity Commission (July 24, 2013) available at http://www.wvago.gov/pdf/2013-7-24,%20EEOC%20(bw).pdf.

[8] The EEOC suffered another sharp rebuke in a disparate impact case, *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749, 6th. Cir. (2014), where the United States Court of Appeals criticized the methodology used by the Commission in a failed effort to prove that an employer's use of credit checks had an illegal disparate impact on African Americans.

fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers." *Id.* at 803.

Hopefully, these developments will prove to be important steps in ensuring that public debate will focus less on how to restrict the use of criminal background checks in employment, and more on how the public and private sector can help ameliorate the multiple factors—*e.g.*, lack of education and vocational training—that face job-seeking ex-offenders.

In conclusion, Mr. Chairman, we agree with you that it is time for the EEOC to "withdraw its flawed Guidance."[9] This time the EEOC should allow the public to review any draft guidance *prior* to its issuance and to issue new Guidance that strikes a fair and appropriate balance between the competing, legitimate interests of helping ex-offenders seeking employment and those of employers and victim's rights groups promoting public safety in the workplace. In any event, we applaud the Committee for turning its attention to this issue of critical importance to the safety of employers, tenants, and the general public.

Thank you for considering our views.

Respectfully submitted,

Judith A. Gootkind

Chair

National Association of Professional Background Screeners

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[9] The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders, Hearing Before the House Committee on Education and the Workforce, Subcommittee on Workforce Protections, 113 Cong. (2014) (Statement of Chairman Walberg)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Commissioner
Victoria A. Lipnic

June 18, 2014

The Honorable Tim Walberg
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Subcommittee on Workforce Protections
Committee on Education and the Workforce
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The Honorable Joe Courtney
Ranking Member
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Committee on Education and the Workforce
U.S. House of Representatives
2101 Rayburn HOB
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Courtney:

Pursuant to the order of Chairman Walberg at the Subcommittee's hearing on June 10, 2014, I write to set forth my views on certain matters raised during the hearing. I respectfully ask that my letter be included in the Subcommittee's formal hearing record, and be circulated to the Members of the Subcommittee.

My name is Victoria A. Lipnic, and I am one of the five Commissioners of the United States Equal Employment Opportunity Commission ("EEOC" or "Commission"). Prior to joining the Commission, I served as Assistant Secretary of Labor for Employment Standards during the George W. Bush Administration; Labor Policy Counsel to the House Committee on Education and Labor Republicans; and in-house counsel at the United States Postal Service. I have also practiced management-side labor and employment law in the private sector, at Seyfarth Shaw, one of the nation's leading labor and employment law firms.

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As Members of the Subcommittee are aware, in April 2012, the Commission approved "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 *et seq.*" (the "Revised Guidance" or "2012 Guidance"). I voted to approve the Revised Guidance, which updated existing Commission policy on the use of criminal history in making employment decisions. I welcome the opportunity to share my reasons for doing so with the Subcommittee, and offer the benefit of my perspective on several issues that were raised at the June 10 hearing.

Background

On April 12, 2012, the Commission held a public meeting at which it debated, and ultimately approved, the Revised Guidance. As I noted during debate at that time, it is important to recognize that in approving the 2012 Guidance, the EEOC was not writing on a blank slate. Since 1987, the Commission has published guidance relating to employers' use of both arrest and conviction records. In my opinion, that existing guidance generally had worked well over the last twenty-five years, and when the Commission first began to consider its revision, I made clear to my fellow Commissioners my view that a wholesale revision of our criminal history guidance was unnecessary, and not something that I could support. What I could support was an effort to update and amplify existing guidance in light of the societal, technological, and legal developments of the last two-and-a-half decades. I believe that is what the Revised Guidance does.

As practitioners in this area know, for twenty-five years it has been the EEOC's policy that an employer should avoid blanket, one-size-fits-all criminal record policies, and instead adopt policies tailored to the specific workplaces and job positions at hand. The Revised Guidance builds on and supplements this preexisting policy. Most notably, and as discussed more fully below, the Revised Guidance maintains the long-standing and well-established test for determining whether the specific use of criminal history is "job related and consistent with business necessity," as required by Title VII of the Civil Rights Act of 1964.

By way of brief background, in 1971, the U.S. Supreme Court held in *Griggs v. Dukes Power Co.*, 401 U.S. 424 (1971), that Title VII not only prohibits intentional discrimination, but also "disparate impact" discrimination – that is, discrimination which occurs when the use of a neutral policy (such as a criminal background check) disproportionately impacts members of a protected class, such as sex or race.[1]

In light of *Griggs*, in 1987, under then-Chairman Clarence Thomas, the EEOC first issued guidance to employers who use criminal history in making employment decisions on how to do so lawfully– that is, how to demonstrate that the use of criminal history in a particular circumstance is "job related and consistent with business necessity" as required under the law.

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[1] Congress later amended Title VII to codify the concept of disparate impact via the Civil Rights Act of 1991 (Pub. L. No. 102-166).

The 1987 guidance set forth a three-factor test for evaluating whether a particular policy is job-related and consistent with business necessity, drawing from a test first articulated in 1975 by the Eighth Circuit in *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290 (8th Cir. 1975) (the "*Green* factors"). The *Green* factors include the gravity and severity of the crime; the nature of the job at issue; and how long ago a crime was committed. The *Green* factors were, in the 1987 guidance, and remain under the Revised Guidance, the touchstone in examining criminal record use policies. As such – and despite the claims of some critics – the 2012 Guidance does not represent a sea-change in EEOC policy or a bold departure from its existing precedent. Rather, the Revised Guidance simply provides a more robust explanation of existing principles and their legal underpinning, and offers greater examples of their factual application. As such, I believe the Revised Guidance serves to provide increased clarity to employers and employees, while not imposing dramatically new requirements or changes in employer practices.

The 2012 Guidance

In the wake of the adoption of the 2012 Guidance, some have asked whether, or why, such revision was necessary. For several reasons, I believe that it was. Foremost, the digital workplace of 2012 is far different from the pen-and-ink workplace of the 1980s – through the explosive growth of online services, industry, and social media, employers have far greater access, at far less cost, to background information on employees and applicants. At the same time, we have today a greater understanding of the demographics of our criminal justice system – indeed, current data on incarceration rates and the criminal justice system more broadly show a marked racial disparity in arrests and convictions. Finally, the EEOC's prior guidance had not been afforded great deference by courts – indeed, in 2007, the Third Circuit held in *El v. Southeastern Pennsylvania Transportation Authority*[2] that then-existing Commission guidance was not entitled to "great deference" insofar as it did "not substantively analyze the statute." In response, the Revised Guidance includes far more detailed and substantive legal analysis, and, accordingly, should be afforded greater weight by reviewing courts.

I also believe that the Commission's revision of its guidance will, in time, inure to the benefit of all stakeholders, including employers. Prior to the 2012 Guidance, employers had little specific guidance as to how they could lawfully use criminal history, and were subject to lawsuits by both the private bar and the EEOC challenging their use of this information. Recognizing that each case will always be fact-specific, the 2012 Guidance offers a clearer roadmap for employers, building on and amplifying existing guidance. It includes more, and more robust, examples, and sets forth guidance on the interaction of state and federal laws governing the use of criminal history in making employment decisions, requirements for security clearances and licensing, and similar topics. It, for the first time, includes "best practices" for employers. Finally, the Revised Guidance rejects any "bright line" rule limiting employers' ability to use criminal history to only a certain amount of time in the past, or to a specified list of offenses. Rather, the Revised Guidance favors a fact-specific analysis of any given policy, which allows for consideration of the specific nature of any single employer, policy, occupation, and job setting – in my view, a better choice. To be clear, I fully acknowledge and understand the need of employers to assess and manage the risk of criminal conduct in their workplace – it is

[2] 479 F.3d 232 (3d Cir. 2007).

exactly the assessment and management of that risk which the "job related and consistent with business necessity" standard contemplates.

The 2012 Guidance is not flawless, and were I its sole author, I might have written some of it differently. For example, the Revised Guidance recommends that as a "best practice," an employer using a criminal history review to screen out applicants and employees should include in its policy a provision for "individualized assessment." In simpler terms, that means that when using a criminal record to screen out a candidate, an employer should, where appropriate, consider providing an opportunity for an individual to address any concerns before being immediately screened out. That may mean, for example, giving Sally Jones the opportunity to explain that the record of a past transgression in the employer's hands is, in fact, an error – it's the record for the wrong Ms. Jones. Alternately, it may mean giving an applicant the opportunity to explain why a disorderly conduct arrest twenty years ago in college has no bearing on his ability to work on the plant floor today.

I think in many instances this is a wise and prudent business practice. However, it is important to make clear that Title VII does not *require* an employer to provide such an individualized assessment in any instance – a fact explicitly recognized in the Revised Guidance, and a point about which I feel very strongly. This means that there can, and will, be times when particular criminal history will be so manifestly relevant to the position in question that an employer can lawfully screen out an applicant without further inquiry. Again, in simpler terms – and a point that bears emphasis – a day care center need not ask an applicant to "explain" a conviction of violence against a child, nor does a drug store have to bend over backward to justify why it excludes convicted drug dealers from working in its pharmaceutical lab. I had hoped that the Revised Guidance would have included clearer examples of such lawful, targeted practices. It does not, but as I made clear during the Commission's debate on this matter, the lack of such examples should not be taken to mean that that they do not in fact exist.

In that light, it is my view that having issued the Revised Guidance, the Commission should now undertake efforts to let employers know, with specificity, what they *can* lawfully do with respect to developing criminal history policies, not merely what we believe they cannot. Since adoption of the Revised Guidance, I have championed, and will continue to champion, such an effort, as it is my belief that where any administrative agency is going to hold a stakeholder to a standard, through the investigatory or litigation process, it is incumbent upon the agency to make that standard clear and explicit. In my view, the EEOC should be as much about educating employers about compliance with the law as it is about investigating and litigating charges.

Compliance with State Law/Safe Harbor

An area of particular interest with respect to the Revised Guidance, and one which was discussed at some length at the Subcommittee's hearing, is the intersection of federal and state law, specifically, state (or local) laws which may, *e.g.*, mandate a background check into an employee's or applicant's criminal history, or prohibit employment of certain individuals with certain criminal history in certain jobs.

With respect to these issues, I had hoped that the Revised Guidance would have been clearer in providing real-world practical guidance to employers facing potential conflicts between federal and non-federal law. In the wake of its adoption, some have criticized the Revised Guidance for not including a blanket "safe harbor" provision for an employer's use of criminal history at the direction of a state law. While I fully recognize and understand that concern, as a legal matter, it does not appear to me that such a broad blanket exception could be squared with the explicit statutory language of Title VII, which specifically exempts individuals from federal liability for compliance with state law, unless such law "purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]."[3]

Put more simply, by its express terms – unchanged since the statute's enactment in 1964 – Title VII preempts conflicting non-federal employment law. Insofar as this raises valid policy concerns, such as here, I believe it would be beyond the scope of our agency to ignore statutory language debated and adopted by Congress. To do so would go far beyond interpretation or administration of the law, and put EEOC squarely in the realm of legislating. Rather, I believe that the concerns raised by stakeholders regarding Title VII's federal preemption of state law with respect to criminal history are concerns properly brought before Congress (as at the Subcommittee's hearing). Indeed, if the Subcommittee is interested in exploring a legislative response to this question, my staff and I stand ready to assist you in any capacity.

Finally, as I noted during debate on the Revised Guidance, as a matter of enforcement in the field, and of the Commission's exercise of its investigatory and prosecutorial discretion, I do not reasonably foresee a set of facts under which the EEOC uses its scarce resources to pursue employers whose use of criminal history directly arises out of state law obligations. I certainly would be inclined to strongly oppose such an effort.

Additional Safe Harbor

It has been more than two years since the Commission adopted and published the Revised Guidance. During that time, I have spoken to countless stakeholders, across the spectrum of interests, regarding their experiences, or issues the Revised Guidance has presented. These conversations have led me to conclude that EEOC should consider amending the Revised Guidance to include an additional safe-harbor for good-faith compliance. Under this safe harbor, if an employer could demonstrate that it adopted and applied a narrowly-tailored criminal background screen that incorporated the *Green* factors discussed above (seriousness of crime; temporality; nature of job); provided a meaningful opportunity for an individual assessment of criminal history; and applied its policy in a non-discriminatory fashion, that employer would be shielded from liability under Title VII for its ultimate hiring decision. I believe it is within the power of the Commission to adopt this safe harbor by way of regulation – in similar fashion to safe harbors contained in other federal employment laws.[4] That said, Congress undoubtedly has the power to adopt this safe harbor by way of legislation, and again, if the Subcommittee is interested in exploring this option, I would be pleased to offer my assistance.

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[3] 42 U.S.C. §2000e-7.

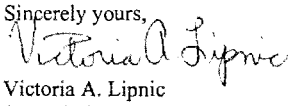
[4] *See, e.g.*, 29 C.F.R. §541.603(d) (providing safe harbor for good-faith compliance with Fair Labor Standards Act).

Conclusion

In closing – and once more, as I stated publicly when I voted to approve the Revised Guidance – I fully recognize the consequences of the Commission's actions – both on a societal front and on an individual front. As a Commissioner of the EEOC, appointed by the President and confirmed by the Senate, I take very seriously our agency's mandate to ensure equal employment opportunity. This may mean, for some employers, a modestly-increased burden in the hiring process, which may seem, in the first instance, unwarranted. I believe, however, that it also means that many individuals who have paid their debt to society, and do not present an undue risk to a workplace, will not be prematurely screened out from all employment opportunity. That is the policy choice contained in the Revised Guidance, which I supported upon its adoption, and which I continue to support today.

I thank you for the opportunity to share my views with you on this matter.

Sincerely yours,



Victoria A. Lipnic
Commissioner

cc: The Honorable Jacqueline A. Berrien, Chair
U.S. Equal Employment Opportunity Commission

BOYS & GIRLS CLUBS
OF AMERICA

June 24, 2014

The Honorable Timothy L. Walberg
Chairman
Subcommittee on Workforce Protections
House Committee on Education and the Workforce
Washington, D.C. 20515

Dear Chairman Walberg:

On behalf of Boys and Girls Clubs of America, I am writing to thank you for convening the recent hearing on "The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders." I request that this letter be made part of the Subcommittee's formal hearing record on this topic.

In our view, your recent hearing served an important public service by highlighting the vital role criminal background checks play in helping protect the public, particularly our nation's youth and other vulnerable populations. Access to comprehensive background checks is of special importance to Boys and Girls Clubs of America, as we represent over 1,000 local Boys and Girls Club organizations that employ over 50,000 staff and utilize more than 200,00 volunteers, serving and protecting over 4 million school-age children in after-school programs. We and other youth serving organizations (YSOs) rely on criminal background checks to provide critical information about a candidate's history—information that must be weighed, when deciding if that person should be granted access to children.

As you heard during last week's hearings, there are costs associated with a "bad hire," such as the costs associated with negligent hiring suits, employee theft and the impact of bad hires on employee morale. But in our view these business concerns are in no way comparable to the harm that an inappropriate hire could inflict on the physical and emotional well-being of a young person. Any YSO would be negligent if it did not perform background checks and thoughtfully evaluate the potential of that person to harm a child.

Again, thank you for alerting both policymakers and the public-at-large to the vital role criminal background checks play in promoting public safety.

Sincerely,

R. Leslie Nichols
National Vice President, Child and Club Safety

[Whereupon, at 11:13 a.m., the subcommittee was adjourned.]

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