

**H.R. 4959, EEOC TRANSPARENCY AND
ACCOUNTABILITY ACT, H.R. 5422,
LITIGATION OVERSIGHT ACT OF 2014,
AND H.R. 5423, CERTAINTY IN
ENFORCEMENT ACT OF 2014**

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, SEPTEMBER 17, 2014

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**H.R. 4959: EEOC TRANSPARENCY AND
ACCOUNTABILITY ACT; H.R. 5422: LITIGATION
OVERSIGHT ACT OF 2014; AND H.R. 5423:
CERTAINTY IN ENFORCEMENT ACT OF 2014**

**Wednesday, September 17, 2014
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, D.C.**

The subcommittee met, pursuant to call, at 10:03 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [Chairman of the subcommittee] presiding.

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

Staff present: Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Callie Harman, Staff Assistant; Christie Herman, Professional Staff Member; Nancy Locke, Chief Clerk; James Martin, Professional Staff Member; Daniel Murner, Deputy Press Secretary; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Lauren Reddington, Deputy Press Secretary; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alissa Strawcutter, Deputy Clerk; Julianne Sullivan, Staff Director; Loren Sweatt, Senior Policy Advisor; Alexa Turner, Legislative Assistant; 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; and Leticia Mederos, Minority Director of Labor Policy.

Chairman WALBERG. A quorum being present, the Subcommittee on Workforce Protections will come to order. Good morning. Let me begin by welcoming our guests and thanking our witnesses for joining us today. We will discuss a number of legislative proposals that would bring greater transparency and accountability, I trust, to the Equal Employment Opportunity Commission (EEOC).

We are here because every member of this Committee recognizes the EEOC as a vitally important agency. It has a responsibility to protect the right of all workers to a fair shot at employment opportunities and a workplace free of discrimination. That is what America is about. This is a fundamental human right each and every one of us holds dear. No one should be denied a job, have their wages cut, or passed over for a promotion because of their race,

their gender, religion, or disability. We are here because we want the EEOC to do its job and, more importantly, to do its job effectively.

That is why, in recent months, we have made oversight of EEOC a priority. Because we know men and women are being discriminated against. We know bad actors would rather put their own hateful prejudice before the talent and the experience of each individual worker. It isn't right, and it is EEOC's mission to help stop that from happening. Unfortunately, in recent years the EEOC has shifted its focus away from that vital mission. Instead, it has spent a great deal of time and resources advancing a deeply flawed enforcement and regulatory agenda.

Employers have fallen under EEOC's intense scrutiny without any allegation of employment discrimination. Charges are being filed in federal court with little to no evidence of wrongdoing. Federal judges have harshly and appropriately criticized the agency for its shoddy legal work. Each day, the agency harasses employers without cause, and every case tossed out of court for legal malpractice is another lost opportunity to help victims of employment discrimination. It means the veteran, the injured and disabled, while serving our country, will continue waiting for his or her day in court. It means the single mom who worked long and hard to earn a promotion will continue waiting for her day in court.

More than 70,000 individual complaints are sitting in front of the Commission. The backlog represents thousands of private sector workers who believe their rights were violated and who are waiting anxiously for the Commission to do its job. As the old saying goes, justice delayed is justice denied. It is time to stop denying these men and women the justice they deserve. Not only is the EEOC dropping the ball with its misguided enforcement priorities, it is also pursuing a regulatory scheme that is making it more difficult for employers to protect employees and consumers.

In recent years, states and localities have adopted policies to protect Americans in vulnerable situations that come in contact with workers, such as at home and in the classroom. The EEOC has eviscerated these efforts. Quite simply, the agency's edict restricting the use of criminal background checks is putting people in harm's way, including women and children. It is time the agency changed course, and that is precisely what the legislation before us is intended to do. Among other provisions, the proposals will help shine more sunlight on EEOC activities, compel the agency to work with employers in good faith to resolve complaints, force the commissioners to do their job and oversee the agency's enforcement actions, and provide a safe harbor to employers complying with federal, state and local mandates, such as laws requiring criminal background checks during the hiring process.

These are common sense reforms and should enjoy overwhelming bipartisan support. By supporting the legislation, you are supporting transparency at a vitally important federal agency. By supporting the legislation, you are supporting the ability of states to promote a safe and responsible workforce. By supporting the legislation, you are supporting an effort to get this agency back on track to better protect the rights of America's workers. I urge my col-

leagues to support a more effective, accountable, Equal Employment Opportunity Commission by supporting this legislation.

I would like to thank my colleague, Representative Hudson, for his leadership on this important issue. Again, we are grateful to our witnesses for joining us, and I look forward to our discussion.

Before I recognize the senior Democrat of the Committee, I would like to ask for unanimous consent to include in the record letters from interested stakeholders supporting the bills we are discussing today, including letters from KinderCare learning centers and the Early Care and Education Consortium in support of H.R. 5423, the *Certainty in Enforcement Act of 2014*.

[The information follows:]



September 16, 2014

The Honorable Tim Walberg, Chairman
 Subcommittee on Workforce Protections
 Committee on Education and the Workforce
 United States House of Representatives
 Washington, DC 20510

Dear Chairman Walberg:

Knowledge Universe is pleased to offer its support for *The Certainty in Enforcement Act of 2014* (H.R. 5423). We thank you for introducing this important piece of legislation, especially as it relates to the conduct of criminal background checks by child care providers.

Serving children and families for over 40 years, Knowledge Universe is best known for its KinderCare Learning Centers. In addition to KinderCare, we also provide high-quality education and care through Children's Creative Learning Centers (CCLC), our employer-sponsored child development centers, and through Champions, our programs for before, after-school, and summer learning. We offer early childhood education and care through approximately 1,600 community-based centers and employer partnerships, and before- and after-school academic enrichment programs and summer camps through more than 300 sites nationwide. We currently operate in 39 states and the District of Columbia.

Knowledge Universe is honored to provide high-quality education and care to over 150,000 children across the United States who range in age from six weeks to 12 years of age. Nothing is more important to us than the safety and well-being of the children whom we serve. Criminal background checks are necessary for protecting vulnerable children from harm.

Recognizing the critical importance of conducting criminal background checks to ensure children's safety, many states, localities, as well as the federal government now require child care providers to conduct criminal background checks of prospective and current employees. Just yesterday, the U.S. House of Representatives approved by voice vote *The Child Care and Development Block Grant Act of 2014* which, upon expected enactment, will require states receiving funding under the Child Care and Development Block Grant (CCDBG) to conduct criminal background checks for child care workers and to prohibit employment in CCDBG funded programs of individuals convicted of violent and sexual crimes. Additionally, *The Child Care and Development Block Grant Act of 2014* contemplates that states, to protect their youngest citizens, may have additional disqualifying criminal criteria that they believe "bear upon the fitness of an individual to provide care for and have responsibility for the safety and well-being of children."

Neither employers nor the young children whom we serve should be caught between following state, local, or federal laws requiring criminal background checks and EEOC guidance. *The Certainty in Enforcement Act of 2014* (H.R. 5423) would provide a needed safe harbor and legal



The Knowledge Universe Family of Brands

certainty when we and other child care providers follow criminal background check requirements mandated by federal, state, or local law and enacted to ensure the safety of vulnerable populations such as children.

Thank you again for your attention to this important matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Celia H. Sims".

Celia Hartman Sims
Vice President, Government Relations



Early Care and Education Consortium

1313 L Street NW, Suite 120, Washington, DC 20005
 Phone (202) 408-9626 www.ececonsortium.org

September 16, 2014

Representative Tim Walberg
 2436 Rayburn HOB
 Washington, DC 20515

Dear Representative Walberg,

As the House Education and Workforce Committee prepares to consider H.R. 5423, The Early Care and Education Consortium (ECEC) wishes to voice our strong support for the bill's assurance that licensed, center-based child care providers are in compliance with Equal Employment Opportunity Commission enforcement guidelines when conducting criminal background checks on their employees required by federal, state, or local law.

As the nation's leading trade association of high-quality, non-profit and tax-paying, licensed child care centers, state child care associations, and educational services organizations, ECEC members share a commitment to high quality, meeting the needs of children from infants through school age, and supporting working families in communities across the country. Representing the voice of more than 7,400 centers operating in all 50 states and the District of Columbia, ECEC is also the largest organized alliance of licensed child care centers in the country. A substantial proportion of the children served by ECEC providers are able to access high-quality care because of the support of CCDBG subsidy dollars.

The Child Care and Development Block Grant (CCDBG), S. 1086, was recently passed by the House of Representatives and moves into the final phases of potential reauthorization this week. This bill strengthens a number of health and safety provisions for the program, including protocols for criminal background checks. New language calls for all providers funded through the subsidy program to be subject to comprehensive criminal background checks, including employment prohibitions on those convicted of violent felonies, certain violent misdemeanors against children, and drug felonies.

The potential CCDBG reauthorization language for the bill includes key policy reforms that strengthen the program's quality and accountability. ECEC supports H.R. 5423's assurance that child care employers are enabled to conduct comprehensive criminal background checks as a key safety measure. This bill provides a safe harbor for early care and education providers when conducting a background checks required by federal, state, or local law. We stand behind the bill as an important means of strengthening state accountability for CCDBG, which provides a critical pathway to the middle class for serving as a highly productive workforce of today and becoming the prepared and productive workforce of tomorrow.

Sincerely,

M.-A. Lucas
 Executive Director

Chairman WALBERG. With that, I will now yield to my friend and 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. Let me begin by welcoming our guests and thanking our witnesses for joining us. Today we will discuss a number of legislative proposals that would bring greater transparency and accountability to the Equal Employment Opportunity Commission.

We are here because every member of the committee recognizes the EEOC is a vitally important agency. It has a responsibility to protect the right of all workers to a fair shot at employment opportunities and a workplace free of discrimination. This is a fundamental human right each and every one of us holds dear. No one should be denied a job, have their wages cut, or be passed over for a promotion because of their race, gender, religion, or disability.

We are here because we want the EEOC to do its job, and more importantly, to do its job effectively. That is why in recent months we have made oversight of EEOC a priority, because we know men and women are being discriminated against; we know bad actors would rather put their own hateful prejudice before the talent and experience of each individual worker. It isn't right and it is EEOC's mission to help stop it from happening.

Unfortunately, in recent years, the EEOC has shifted its focus away from that vital mission. Instead, it has spent a great deal of time and resources advancing a deeply flawed enforcement and regulatory agenda. Employers have fallen under EEOC's intense scrutiny without any allegation of employment discrimination. Charges are being filed in federal court with little to no evidence of wrongdoing. Federal judges have harshly and appropriately criticized the agency for its shoddy legal work.

Each day the agency harasses employers without cause and every case tossed out of court for legal malpractice is another lost opportunity to help victims of employment discrimination. It means the veteran, injured and disabled while serving our country, will continue waiting for his day in court. It means the single mom, who worked long and hard to earn a promotion, will continue waiting for her day in court.

More than 70,000 individual complaints are sitting in front of the commission. The backlog represents thousands of private-sector workers who believe their rights were violated and who are waiting anxiously for the commission to do its job. As the old saying goes, "justice delayed is justice denied." It's time to stop denying these men and women the justice they deserve.

Not only is the EEOC dropping the ball with its misguided enforcement priorities, it is also pursuing a regulatory scheme that is making it more difficult for employers to protect employees and consumers. In recent years, states and localities have adopted policies to protect Americans in vulnerable situations who come in contact with workers, such as at home and in the classroom. The EEOC has eviscerated these efforts. Quite simply, the agency's edict restricting the use of criminal background checks is putting people in harm's way, including women and children.

It's time the agency changed course and that's precisely what the legislation before us is intended to do. Among other provisions, the proposals will help shine more sunlight on EEOC activities, compel the agency to work with employers in good faith to resolve complaints, force the commissioners to do their jobs and oversee the agency's enforcement actions, and provide a safe harbor to employers complying with federal, state, and local mandates, such as laws requiring criminal background checks during the hiring process.

These are commonsense reforms that should enjoy overwhelming bipartisan support. By supporting the legislation, you are supporting transparency at a vitally important federal agency. By supporting the legislation, you are supporting the ability of states to promote a safe and responsible workforce. By supporting the legislation, you are supporting an effort to get this agency back on track to better protect the rights of America's workers.

I urge my colleagues to support a more effective, accountable Equal Employment Opportunity Commission by supporting the legislation. I would like to thank my colleague, Representative Hudson, for his leadership on this important issue. Again, we are grateful to our witnesses for joining us and I look forward to our discussion.

Before I recognize the senior Democrat of the subcommittee, I would like to ask for unanimous consent to include in the record letters from interested stakeholders

supporting the bills we are discussing today, including letters from KinderCare Learning Centers and the Early Care and Education Consortium in support of H.R. 5423, the Certainty in Enforcement Act of 2014.

With that, I will now yield to my colleague, Representative Joe Courtney, for his opening remarks.

Mr. COURTNEY. Thank you, Chairman Walberg, and thank you to all the witnesses for finding time to join us here today. And again, at the outset just so I don't forget, I would just ask unanimous consent to submit a statement from Congresswoman Marcia Fudge, who is over at the Agriculture Committee. They are having a hearing today that conflicts with her attendance, but she was very adamant she wanted to make sure her passionate comments are entered for the record.

[The statement of Ms. Fudge follows:]

Fudge, Hon. Marcia, L., a Representative in Congress from the State of Ohio

Chairman Walberg, Ranking Member Courtney, and members of the Committee: I appreciate the opportunity to submit this statement for the record to express my opposition to this package of bills offered by the majority. These bills are aimed squarely at stifling the work of the Equal Employment Opportunity Commission (EEOC).

Fifty years ago we passed the Civil Rights Act of 1964, which established the EEOC. When employees believe they have been discriminated against at work, they rely on this Commission to investigate the merits of each allegation to the fullest extent. Although litigation is a critical component to the success of the EEOC's mission to stop and remedy unlawful employment discrimination, it is the last stage in a process that includes multiple attempts to resolve an allegation of discrimination. In fact, the EEOC has been able to consistently obtain monetary and nonmonetary relief for victims in 90% of its cases.

The package of bills proposed by the majority each place grave limitations on the ability of the EEOC to achieve its goals. While the intent of these bills is to prevent the EEOC from "overreach", the end result will simply make it harder for the agency to fulfill its statutory duties through administratively burdensome and duplicative information gathering. Of the most egregious bills offered, however, is H.R. 5423, The Certainty in Enforcement Act of 2014.

If enacted H.R. 5423 would amend Section 703 of the Civil Rights Act, going far beyond background checks and criminal background checks, to allow states and localities to exploit requirements currently protected under the Voter Rights Act. In effect, states and localities would be exempt from Title VII employment discrimination liability.

This is clearly a step backward in our civil rights laws.

Tasked with enforcing the federal laws which combat illegal discrimination against an employee on the basis of race, color, religion, sex, national origin, age, disability or genetic information, the EEOC has drastically expanded the diversity of America's workforce. It is my hope that as the Committee hears from today's witnesses, my colleagues will recognize the harm these bills will have on employers and businesses across the country.

Chairman WALBERG. Hearing no objection, and appreciating these comments, they will be entered.

Mr. COURTNEY. Thank you, Mr. Chairman. Mr. Chairman, this summer we celebrated the 50th anniversary of the 1964 *Civil Rights Act*, one of the most significant steps in the fight for equality in this nation's history. Title VII of this landmark law outlaws workplace discrimination on the basis of race, color, religion, sex, or national origin. These provisions help ensure that American workers are judged on the work they do, not on who they are, where they are from or what they look like. Yet even with all the

progress we have made in the last 50 years, there is much more work to be done.

Too many Americans suffer from discrimination by their employer even today. For example, just last year there were nearly 100,000 new charges of discrimination filed with the EEOC, including 1,019 *Equal Pay Act* charges and over 67,000 Title VII charges. I was hopeful when the subcommittee began to examine the work of EEOC last year we would look at ways to join together to strengthen our civil rights laws and build upon the critical improvements made through measures like the *Americans With Disabilities Act* amendments and the *Genetic Information Non-discrimination Act*. Instead, I would argue, we are wasting time here with a set of misguided bills that impede the operations of the EEOC and attempt to gut Title VII, turning the clock back on civil rights protections enacted more than 50 years ago.

These bills would decimate the EEOC's ability to safeguard American workers from discrimination, violate long-standing rules regarding attorney/client confidentiality and do a great disservice to the nation. We just heard opening comments talking about how justice delayed is justice denied. If you look at what these bills do, and I am 27 years as a litigator before I came to Congress, in the name of transparency it would cripple the ability of a client of the Commission to deal with their attorney in terms of engaging in any kinds of administrative action or litigation strategy. It would, in the name of oversight, basically force the Commission to micro-manage every decision in terms of commencing litigation. How that, on earth, would end delayed process makes any sense, again, I think just common sense tells you that would add additional steps and delay in terms of the agency being able to execute its duty.

And lastly, 5423—which basically turns the federal supremacy clause on its head and puts state laws as a preemptive safe harbor for employers—in my opinion, on the 50th anniversary of the Civil Rights Act, is grotesque. I mean, this is allowing a race to the bottom in terms of states who don't—haven't stepped up and enacted laws to protect people from racial discrimination, from gender discrimination. And those states exist out there. And to basically empower them to override the national commitment that we made 50 years ago to uphold equal treatment under the law for people who are simply trying to get ahead in their—in life—as employees. It is just unbelievable to me.

The process that we are engaged in here today, sadly, is par for the course in terms of the way this subcommittee has operated. Our side got notice of this hearing eight days ago. The 14-day courtesy rule for the Commission, which is well understood—you know, we know that for the last three and a half years—was deftly avoided by the majority. We get one witness that we can invite to testify, and I thank Mr. Foreman for being here to, again, in an unbalanced lineup, defend a position which I think, you know, we will hear loud and clear here today. But, you know, what is missing here today is the agency.

And all we had to do was, frankly, pick up the phone and call our side with enough notice and we could have accommodated that. And actually had a real dialogue today to talk about what is actu-

ally happening out there with the department. What I think we are gonna hear is that despite all the claims of, you know, overzealous litigation and ineffective outcomes, we are going to see an agency which did great work in 2013 in terms of recovering damages for workers who were discriminated against. That the number and percentage of cases that went all the way to litigation is less than 1 percent. So, frankly, we are chasing a problem which I am—certainly, from the standpoint of Congress doesn't exist.

If there are individual cases out there where people are unhappy with the agency, I think all of us are more than happy to accept those calls, accept that mail, intervene with the Secretary. You know, the Chairman knows we have had two instances this year where we have been successful in terms of getting the Secretary to pull back cases of overzealous enforcement of various laws. So it is not like we are dealing with an agency that refuses to respond or listen to reasonable points of view in terms of criticisms of the way they operate.

So, you know, I mean, we have 72 hours left before—everybody in this building knows we are going home until after the election. So we are bringing up legislation which, you know, it is just not the appropriate response to any of the, maybe, concerns that people are expressing here today to actually talk about passing a bill which would short-circuit a case that is pending before the Supreme Court. I mean, it is just—it is embarrassing, from my standpoint. This is not what Congress should be focused on right now in terms of people across this country who are struggling in terms of advancing themselves. And clearly, the middle class and working families are struggling in terms of a tough economy but, frankly, we should be knocking down the last remaining barriers to people that they face in terms of racial discrimination, gender discrimination, age discrimination.

That should be the focus of this subcommittee. So, again, we look forward to the witnesses' testimony. And, again, we hope, at some point, you know, we are gonna sort of realize that we are just sort of grinding our gears here with these types of hearings. And, hopefully, we can try and come up with a new model, if not in the lame duck session, with the next Congress so that we can, as a nation, take that 50th anniversary and celebrate it the right way—which is to advance equal treatment under the law under Title VII in the Civil Rights Act.

I yield back.

[The statement of Mr. Courtney follows:]

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

Good morning. Thank you Mr. Chairman. And thank you to the witnesses for being here.

This summer we celebrated the 50th anniversary of the 1964 Civil Rights Act, one of the most significant steps in the fight for equality in this nation's history.

Title VII of this landmark law outlaws workplace discrimination on the basis of race, color, religion, sex, or national origin. These provisions help ensure that American workers are judged on the work they do – not on who they are, where they are from, or what they look like.

Yet, even with all the progress we've made in the past 50 years, there is more work to be done as too many Americans suffer from discrimination by their employer even today. For example, just last year there were nearly 100,000 new charges of discrimination filed with the Equal Employment Opportunity Commis-

sion (EEOC)—including 1,019 Equal Pay Act charges and over 67,000 Title VII charges.

I was hopeful that when the subcommittee began to examine the work of the EEOC last year, we would look at ways to join together to strengthen our civil rights laws and build upon the critical improvements made through measures like the Americans with Disabilities Act Amendments and the Genetic Information Non-discrimination Act.

Instead, we are wasting valuable time with a set of misguided bills that impede the operations of the EEOC, and attempt to gut Title VII, turning back the clock on civil rights protections enacted more than 50 years ago. These bills would decimate the EEOC's ability to safeguard American workers from discrimination, violate longstanding rules regarding attorney-client confidentiality, and do a great disservice to the nation.

We should instead be finding opportunities to work together to bolster this nation's civil rights laws, focusing on legislation that combats prejudice and works to ensure that no person faces discrimination in the classroom or workplace because of their sexual orientation or gender identity. The Fair Employment Protection Act, Paycheck Fairness Act and Employment Non Discrimination Act would all help to strengthen our civil rights laws and should be the focus of this hearing.

Thank you Mr. Chairman, and thanks again to our witnesses for your participation. I yield back the balance of my time.

Chairman WALBERG. I thank the gentleman, and I detect a disagreement between you and me on this issue. But on Constitution Day, we are doing our constitutional responsibility. We have not been given a vacation yet. And I think that it is good that we are here and it is good to have disagreements. And we hopefully can work to satisfactory conclusions. And that means we continually work.

It is now my pleasure to introduce our panel of distinguished witnesses. First, Ms. Lynn Clements is director of regulatory affairs at Berkshire Associates of Columbia, Maryland. Prior to joining Berkshire Associates, she served in several positions at the Department of Labor and the Equal Employment Opportunity Commission, including as acting director, deputy director of the policy division for the Office of Federal Contract Compliance Programs. Welcome.

Mr. William Lloyd serves as general counsel for Deloitte LLP in New York, New York. As general counsel, Mr. Lloyd is responsible for managing the organization's legal affairs, including governance, employment litigation, and regulatory matters. Thank you for being here.

Mr. Michael Foreman is clinical professor of law and director of the Civil Rights Appellate Clinic at Penn State University's Dickinson School of Law in Carlisle, Pennsylvania. Mr. Foreman focuses on appellate representation in civil rights issues and employment discrimination. He has previously served as acting deputy general counsel for the U.S. Commission on Civil Rights. Welcome.

Mr. Eric Dreiband is a partner at Jones Day law firm in Washington, D.C. From 2003 to 2005, he served as the general counsel of the Equal Employment Opportunity Commission. Prior to his EEOC service, Mr. Dreiband served as deputy administrator of the U.S. Department of Labor's Wage and Hour Division. Welcome.

Thank you all for being here. Before I recognize each of you to provide your testimony, let me briefly explain our lighting system, which I think is familiar to you. If you have been on the highway, you have had red, green, and yellow lights. Green gives you your four minutes to speak, yellow gives a warning that a minute is left,

and red we hope that you wrap up your remarks as quickly and concisely as possible. I will hold our Committee members to the same in asking questions of you, following your statements. Again, we will each be given five minutes to ask the questions of you, following your five minutes of testimony.

And so now let me begin my recognizing Ms. Clements for your five minutes.

Press the button on your microphone, please, there.

STATEMENT OF MS. LYNN A. CLEMENTS, DIRECTOR, REGULATORY AFFAIRS, BERKSHIRE ASSOCIATES, INC., COLUMBIA, MD

Ms. CLEMENTS. Good morning, Mr. Chairman and members of the subcommittee. My name is Lynn Clements. I am the director of regulatory affairs at Berkshire Associates, a certified small business enterprise that helps other small businesses comply with their equal employment opportunity and affirmative action obligations. I very much appreciate the opportunity to share my perspectives with you today, and ask that my written testimony also be entered into the record.

For almost half of my career, I served as a staff member at the EEOC and the Office of Federal Contract Compliance Programs, where I joined a dedicated group of career staff who tirelessly work to open the door of opportunity. I have a deep respect for my former colleagues, these agencies, and their mission. It is my experience that employers are similarly dedicated to creating fair and inclusive workplaces and to complying with the multitude of laws that they must follow. This is increasingly a difficult task.

On an almost daily basis, I help employers answer real-life questions about their employment decisions and hiring practices. I have a better appreciation now for how difficult it is for an employer, especially a small employer, to understand and comply with the lengthy documents, policy documents, and rules that we publish as regulators. My experiences have shown me that an enforcement agency can only be truly effective when it is respected by the public it serves and regulates. A robust and thoughtful, deliberative process and neutral fact-finding are critical to earning that respect. Unfortunately, as an outsider now looking in, I believe that the EEOC has strayed from several of its original good government mandates.

Increasingly, I have found that the agency does not always investigate or conciliate in good faith, even though such efforts are statutorily required. I have worked with employers both large and small who have endured individual charge investigations spanning several years; surprise notice of a charge by hand delivery, with a request for immediate access by an army of investigators, much like an FBI raid; requests for extensive information, immediately followed by a predetermination settlement offer that sends a very clear message pay up or endure a burdensome investigation; and findings of class discrimination without a class investigation.

Most employers and, indeed, most employees are surprised to learn that the commissioners do not deliberate on the filing of most lawsuits. Understandably, the public expects that the full force of the federal government will only be brought to bear after careful deliberation.

In the case of the EEOC, Congress determined that the deliberative process should be handled by a group of five officials with diverse backgrounds, experiences, and perspectives. When I was at the Commission, it generally filed about 400 lawsuits each year. Due to the delegation of authority to its general counsel, also presidentially appointed, the commissioners generally reviewed between 50 and 75 of these litigation proposals.

I understand, however, that the current Commission only reviews a handful of cases; as few as 15 in almost a recent three year period. In the business world, a similar delegation of authority would really be the equivalent of unveiling a new product without the CEO ever even knowing about it. Quite simply, placing the imprimatur of the whole Commission on a proposed legal theory garners a level of respect by the regulated community that is simply not possible when decisions are made by a single general counsel or regional attorney, no matter their skill.

Perhaps most troubling is the impact on policymaking. Make no mistake about it, the agency is making policy when it decides to litigate. Thus, the process by which the EEOC arrives at those decisions is just as important as whether the agency ultimately prevails. The Commission's efforts in one particular area are instructive. In April of 2012, the Commission issued policy guidance regarding an employer's use of arrest and conviction records. Although this policy guidance was voted on, it was not subject to public comment. Unfortunately, the Commission failed to provide a clear path for employers, particularly those who must weigh the competing interests of the Commission's position and other state and local laws aimed at public safety.

What this means is that those hard decisions will now be made through litigation by the Commission, some of which may never be reviewed by the Commissioners before it is voted on. Ensuring equal opportunity is an important federal goal. How this work is accomplished matters, and shining more sunlight on the agency will help it grow and succeed at its mission of ensuring equal employment opportunity.

Thank you.

[The statement of Ms. Clements follows:]

TESTIMONY OF LYNN A. CLEMENTS

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

H.R. 4959, "EEOC Transparency and Accountability Act," H.R. 5422, "Litigation Oversight Act of 2014," and H.R. 5423, "Certainty in Enforcement Act of 2014"

SEPTEMBER 17, 2014

Good Morning Mr. Chairman and Members of the Subcommittee. For almost twenty years as an HR consultant, lawyer at several management-side law firms, and former staff member at the United States Equal Employment Opportunity Commission ("EEOC") and United States Department of Labor ("DOL"), I have dedicated my career to advancing equal employment opportunity.¹ I am pleased to share my experiences with you today as you consider several pending bills that would positively impact the way in which the EEOC does its important work: H.R. 5422, the "Litigation Oversight Act of 2014"; H.R. 5423, the "Certainty in Enforcement Act of 2014"; and H.R. 4959, the "EEOC Transparency and Accountability Act."

My remarks today will focus on three areas of the Commission's work: (1) the Commission's statutory mandate to properly investigate charges and to first eliminate any alleged unlawful practice through informal methods, including conciliation and persuasion; (2) the Commission's authority to enforce the law through litigation when necessary; and (3) the Commission's particular enforcement strategy as it relates to an employer's use of criminal background screens during the employment process.² My testimony today reflects my personal views, and not those of Berkshire Associates Inc., any particular employer or other organization.

While at the EEOC, I was fortunate enough to join a dedicated group of lawyers, investigators, and other professional staff who tirelessly worked towards opening the door of opportunity to all. I am proud of the time I spent at the agency and want to emphasize that, both

¹ I currently serve as the Director of Regulatory Affairs at Berkshire Associates Inc., a certified small business enterprise dedicated to helping employers comply with their equal employment opportunity and affirmative action obligations. Previously, I was a shareholder at a management-side law firm where I regularly represented both large and small employers before the EEOC, including in several systemic discrimination matters. From 2001 – 2006, I served as a senior legal advisor in the EEOC's Office of Legal Counsel and then as a Special Assistant to The Honorable Naomi C. Earp, who at the time was the EEOC's Vice Chairwoman. From 2006-2008, I served as Acting Director of the Division of Policy, Planning and Program Development in the DOL's Office of Federal Contract Compliance Programs.

² I request that the Subcommittee accept my detailed written testimony as part of the written record of today's Hearing.

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then and now, I share the agency's unwavering commitment to equal employment opportunity. It also is my experience that employers are similarly dedicated to creating fair and inclusive workplaces, where employment decisions are made without regard to race, color, gender, religion, national origin, age, disability, genetic information, or other protected basis. Indeed, my experiences have taught me that not only do most employers want to comply with the myriad of federal, state and local employment laws and regulations they must follow, most also want to do the right thing, even when not required by law.

The EEOC plays an important role in helping employers achieve these objectives. Created by Title VII of the Civil Rights Act of 1964 ("Title VII"), the five-member, bi-partisan Commission was charged with investigating charges of employment discrimination and, when EEOC believes discrimination occurred, attempting to "conciliate" disputes. For nearly seven years, the power of persuasion through this statutorily-required conciliation process was the Commission's only enforcement authority. In 1972, Congress amended Title VII to provide the Commission with the authority to litigate. It was not until almost 25 years later that the Commission delegated this important responsibility to the General Counsel. The goals of the delegation were "increasing strategic enforcement for the General Counsel and field attorneys, freeing the Commission to focus on policy issues, and increasing the efficiency and effectiveness of [the Commission's] litigation program."³

Unfortunately, over the last several years, as an outsider now looking in, I believe that the EEOC has strayed far from its original good government mandate of first conciliating disputes. All too often, the EEOC's investigations are long and drawn out, inconsistent, or lacking an overall, cohesive strategy in light of the agency's limited resources. It can become focused on

³ See Equal Employment Opportunity Commission National Enforcement Plan, at Section V, adopted February 8, 1996, available at http://www.eeoc.gov/eeoc/litigation/manual/1-3-b_nep_text.html. Consistent with these goals, the Commission retained its authority to review, deliberate and vote on "a) Cases involving a major expenditure of resources, e.g. cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases; b) Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals; c) Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and d) All recommendations in favor of Commission participation as amicus curiae which shall continue to be submitted to the Commission for review and approval." *Id.* From 1996 until about 2009, the Commissioners also reviewed all cases brought under the Americans with Disabilities Act of 1990 ("ADA"). That is no longer the case, even though the ADA was recently amended and the EEOC itself has indicated that "certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat" and "accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act" are "emerging or developing." U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016, available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>. The Commission recently reaffirmed its delegation in its latest strategic enforcement plan, and added the requirement that a "minimum of one litigation recommendation from each District Office shall be presented for Commission consideration each fiscal year", apparently because so few litigation recommendations were being presented to the Commissioners. *Id.*

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finding the proverbial “needle in a haystack” at the expense of the employer and, in some cases, even the interests of the charging party. Conciliation is often given short shrift, as employers find themselves facing large monetary demands without being given significant facts to evaluate the strength of the EEOC’s claims or its investigation. Perhaps most troubling is that some of the EEOC’s most recent high-profile work has been based on legal theories with far-reaching public policy implications that may never have been reviewed or approved by the Commissioners.

An enforcement agency can only be truly effective when it is respected by the public it serves. Fifty years ago, Congress wisely recognized this when it created a bi-partisan Commission to lead the country’s fight to end racism, sexism and other forms of employment discrimination. Although we have made much progress, this country still needs an EEOC that garners the respect of both workers and the regulated community. Good government principles require that respect to be earned through sound policy-making decisions and thoughtful oversight by those charged with leading the agency.

Experiences During EEOC Investigations

Over the past several years, I have helped employers in varied industries ranging from manufacturing to security to health care respond to charges of discrimination filed with the EEOC. For many of these employers, their experience with the EEOC was their first and only experience with a federal law enforcement agency. I am happy to report that, in many cases, the EEOC investigation was handled professionally, objectively and efficiently.

In other cases, however, the employer was faced with strong-arm enforcement tactics that called into question whether the agency was serving as a neutral fact-finder. Unfortunately, the agency’s efforts did not seem to bear any relation to the merits of the underlying claim. These tactics included showing up unannounced at a secure facility with three investigators, demanding immediate access to investigate an alleged harassment claim - even though the alleged victim no longer worked at the facility and there was no threat of further harassment. Other investigations included requests for extensive information in response to an individual charge of discrimination, where the charging party did not even claim that the employer’s actions were for the protected reason the agency sought to investigate. In some of these cases, much of the information requested went unreviewed by the agency for months, leaving the employer to wonder whether its employment practices really needed to be changed. Still other investigations included burdensome requests for information followed by a pre-determination settlement demand. The message to the employer was clear – capitulate and pay up or spend money to fight. When the employer declined these alleged “good faith efforts” to informally resolve the matter, some of the charges of discrimination were dismissed shortly after, without further investigation and with a finding of no reasonable cause.

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Put yourself for a moment in the shoes of the small business owner, in its very first interaction with a federal enforcement agency. Do these types of investigatory and conciliation tactics garner your respect? Are they examples of good government? Do they advance the agency's statutory mandate to eradicate discrimination through informal methods first?

The Commission's Decision To Delegate Its Litigation Authority

Most employers, and indeed most employees, are surprised, and dare I say, dismayed, to learn that the Commissioners do not deliberate on the filing of most lawsuits brought by the EEOC. Understandably, the public expects that the full force of the Federal government will only be brought to bear after careful deliberation. In the case of the EEOC, Congress determined that the deliberative process should be handled by a group of five appointed officials with diverse backgrounds, experiences, and perspectives.

During my time at the agency in the mid-2000s, the Commission generally reviewed between 50-75 litigation proposals under the agency's delegated authority. Importantly, the number of lawsuits filed by the agency remained steady during this period with the EEOC filing approximately 400 lawsuits each year. Commissioner review did not significantly impede the litigation process or create "back seat driving" as some now allege. On the contrary, it enhanced the process. Quite simply, placing the imprimatur of the whole Commission on a proposed legal theory garners a level of respect that is simply not possible when decisions are made by a single Regional Attorney or even the General Counsel, no matter their skill. Action by the Commission sends the clear and unmistakable signal that the issues being raised are important ones, and that the employment practice being examined is one that is troubling to a diverse group of those committed to civil rights, regardless of party affiliation or business or worker rights experience.

It is my understanding, however, that in recent years, the Commissioners have indeed taken a "back seat" on the road to equal employment opportunity. From 2009-2012, the Commissioners reviewed only a handful of the hundreds of lawsuits filed by the EEOC. This is so even though the cases the Commission brings are getting larger and more expensive as a result of the agency's systemic discrimination initiative. Commissioner input also was minimized even though the EEOC was given authority over new types of employment discrimination and other anti-discrimination laws were amended, which provided the agency with the opportunity to shape the law in new areas.

I also believe that Commissioner review of litigation proposals results in a better allocation of scarce Commission resources. Quite simply, it is hard to understand why the Commission would retain its right to vote on certain procurement matters, such as purchases over \$100,000, while forsaking its fundamental obligation to review decisions about litigation that are likely to cost the regulated community, and in recent years, the government itself in

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cases of misconduct or poor litigation strategy, hundreds of thousands of dollars. In the business world, similar delegations of authority would be the equivalent of unveiling a new product without the chief executive officer ever knowing about it, or implementing a controversial treatment protocol for hospital patients without careful review by the medical review board.

Commissioner review also can lead to more robust conciliation efforts since the Commissioners regularly review the substance of any conciliation efforts during deliberations. In some cases during my tenure, Commissioner review was the difference between an early resolution and scorched earth litigation. Given some of the concerns I raised earlier about the agency's investigative and conciliation process, regular and thoughtful oversight of the field's conciliation efforts by the Commissioners will help ensure the agency meets its statutory obligation to conciliate charges in good faith.

Perhaps most troubling is the impact of delegated authority on the Commission's policy-making function, one of the stated goals of the agency's initial grant of delegated authority. It is my opinion that delegated litigation authority has not allowed the "Commission to focus on policy issues" nor has it increased the "effectiveness" of the agency's litigation program. In many cases, the agency is making policy through its litigation, announcing new theories of discrimination and novel enforcement positions in press releases issued on the courtroom steps.

The EEOC is not like a private litigant. As a Federal agency, it has a responsibility to consider the "bigger picture" when litigating. It must consider the broader implications of its positions from a policy, legal and practical perspective. It cannot focus solely on the individual litigant, or the merits of a particular case. Indeed, the process by which the EEOC arrives at the decision to litigate is just as important as whether the agency ultimately prevails on the legal theory being advanced. As a former Commissioner cautioned the Commission:

I am in no way suggesting that the Commissioners should substitute their authority or judgment for the operating arms of the EEOC, but rather the Commissioners must have an appropriate oversight and policy-making role and this is especially true for the systemic program. After all, it is the Commissioners who are responsible to Congress, and who are ultimately held accountable to the people for the actions of the agency.⁴

The Commission's Review Of The Use Of Criminal Background Screens By Employers

The Commission's efforts in one particular enforcement area reinforce the need for some of the good government principles I have discussed today. In April 2012, the Commission issued policy guidance regarding an employer's use of arrest and conviction records when

⁴ Testimony Of Leslie Silverman, EEOC Meeting of July 18, 2012, Public Input into the Development of EEOC's Strategic Enforcement Plan, available at <http://www.eeoc.gov/eeoc/meetings/7-18-12/index.cfm>.

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making hiring decisions.⁵ Although the policy guidance was voted on by the Commissioners, it was not subject to public comment even though the Office of Management and Budget instructs that “pre-adoption notice and comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial.”⁶ Moreover, the guidance was issued after the EEOC had already initiated several high profile litigation matters regarding this issue, resulting in policy-making at the expense of the employers who were the subject of those early lawsuits.

As this Subcommittee is aware from testimony during earlier hearings about this topic, the EEOC has not fared well with respect to its theory of discrimination in these cases. For example, in a case filed in Michigan in 2011, the agency challenged the employer’s alleged blanket policy of not hiring individuals with criminal records as having a disparate impact on African-Americans.⁷ The United States District Court for the Western District of Michigan ordered the EEOC to pay more than \$750,000 in attorneys’ fees and costs after the agency continued to pursue the case even after it learned that the company did not have a blanket no-hire policy. In a Maryland case challenging another employer’s use of criminal background screening under the same disparate impact theory, the court recently dismissed the agency’s lawsuit finding that its statistical evidence was “rife with analytical errors,” “laughable,” and “scientifically dishonest.”⁸

Unfortunately, even when the Commission did issue guidance, it failed to provide a clear path for employers who must weigh the competing interests of the agency’s position and other federal, state and local laws. For example, many states prohibit school districts from hiring individuals with certain criminal convictions for teaching positions. Similarly, under federal and state law, individuals who have been convicted of abuse, neglect or mistreatment of the elderly cannot be employed in most nursing home positions. These are common sense requirements. Yet, under the EEOC’s guidance, these employers are now stuck between a rock and hard place. Although they must follow the applicable state law, they also are supposed to conduct an “individualized assessment” of whether the state law requirement is job related and consistent with business necessity. In many cases, these difficult, costly and time-consuming decisions will

⁵ See Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, No. 915-002 (April 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

⁶ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

⁷ *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

⁸ *EEOC v. Freeman*, 961 F. Supp. 2d 783, 797-799 (D. Md. 2013).

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fall on small businesses, such as small home health care facilities or nursing homes, or school systems where educational dollars are already scarce.

The Commission could have provided these employers with more proactive guidance on how its requirement to conduct an individualized assessment would play out in these real world scenarios. Although I do not know for sure, I suspect one of the reasons that such guidance was not provided is that the underlying facts sometimes matter. Making policy in a vacuum without those underlying facts is challenging, particularly when you are seeking bi-partisan support for a position. What this means now, however, is that these difficult policy decisions may be made through litigation, and under the current system of delegated authority, quite possibly without review and approval by the Commissioners first. Unfortunately, this also means that these litigation policy decisions will be made at the expense of individual employers, many of them small businesses who often cannot afford to engage in expensive litigation with the Federal government.

Conclusion

Ensuring equal employment opportunity for all workers is an important Federal goal. Over the years, this country has made great strides in eliminating employment practices that discriminated against or disadvantaged employees on the basis of their race, color, gender, religion, national origin, age, disability, or other protected status. However, there is still much work to be done.

How that work is accomplished matters. Good government practices require that federal enforcement agencies be held to a higher standard than the private bar. The public rightly expects that an enforcement agency will provide notice of the types of practices that it finds problematic before bringing the full force of the government's litigation authority to bear. In the EEOC's case, Congress also decided that informal methods of conciliation and persuasion must be used first. If we are to succeed in the fight for equal employment opportunity, we need an EEOC that garners the respect of both workers and the regulated community, where the policy is first to "conciliate" in good faith and only then to litigate, and where a diverse group of Presidentially-appointed individuals make the decisions about how the important work of the agency will be done. I encourage Congress to use its authority to reinstate some of these much needed safeguards at the EEOC.

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to share my experiences with you today. I would be happy to answer any questions you may have.

Chairman WALBERG. Thank you.
Mr. Lloyd, we recognize your five minutes.

**STATEMENT OF MR. WILLIAM F. LLOYD, GENERAL COUNSEL,
DELOITTE LLP, NEW YORK, NY**

Mr. LLOYD. Thank you. Chairman Walberg, Ranking Member Courtney, members of the Committee—

Chairman WALBERG. I am not sure your mic is on there.

Mr. LLOYD. There we go. Sorry, I am a novice.

Chairman Walberg, Ranking Member Courtney, members of the Committee, thank you for inviting me to testify today. I am Bill Lloyd, the general counsel of Deloitte LLP. I am grateful for the invitation to testify because today's hearing is focused on a number of bills that I believe would improve the processes within, and the accountability of, the EEOC.

Deloitte is one of the world's largest professional services firms, providing audit, tax, and advisory services to individuals, businesses of all sizes, and to federal, state and local governments and community organizations. We have roughly 65,000 people in Deloitte, and about 4 percent of those are the owners of the business: partners. I want to make it clear that Deloitte strongly supports the goals of eliminating workplace discrimination and fostering true equality of opportunity. We also strongly support the EEOC's mission and we appreciate the dedication of its staff. Deloitte is proud that we have consistently been recognized as a leader in inclusion and in developing highly successful women and minorities in our large firm.

Although we are strong supporters of the EEOC's mission, our recent experience with the EEOC suggests that its processes and transparency could use some improvement. We need to ensure that the EEOC enforces its important mandate in ways that are consistent with what Congress contemplated in the respective statutes that the EEOC is tasked to enforce. And we need to ensure that important decisions about EEOC enforcement policy and allocation of scarce resources are made by the commissioners who are appointed by the President and confirmed by the Senate.

The EEOC staff has recently challenged the fundamental structure of Deloitte's business, our decision to organize as a limited liability partnership. The staff has alleged that Deloitte is not a true partnership and, therefore our retirement policy for partners violates the *Age Discrimination in Employment Act*. The impact of the EEOC's legal theory raises significant economic and policy questions for Deloitte and all limited liability partnerships across the country, which will negatively impact many businesses. Congress did not grant jurisdiction to the EEOC to act on behalf of owners of businesses. Yet that is exactly what the EEOC is doing.

Deloitte is a true partnership, and our partnership agreements and governance processes reflect that. State professional regulations require that we conduct our business as a partnership. Deloitte's partners voluntarily enter the partnership agreeing to retire at age 62, and each partner is highly compensated both during the period of partnership and after retirement. In fact, many partners choose to retire before age 62. Thus, the EEOC is seemingly advocating on behalf of this group of people in lieu of seeking out

true victims of discrimination, the very people about whom Mr. Courtney spoke.

For every case of questionable validity that the EEOC brings, it requires that the agency forego many worthy cases of discrimination on behalf of individuals who have fewer resources to pursue grievances and genuinely need the protection of regulators in the government.

I am also concerned by the Commission's extensive delegation of authority to the general counsel to initiate litigation. I am not a labor attorney, and I was very surprised to learn that the commissioners do not review the overwhelming majority of cases filed by the EEOC. After all, Title VII permits only the five-member commission to bring a civil action.

But my understanding is that, in practice, the general counsel determines whether any particular case is subject to review by the Commission. This practice, in my view, should concern all legislators and taxpayers. In the matter involving Deloitte, the EEOC has been conducting a directed investigation since 2010. We are concerned that if conciliation fails the general counsel will file a lawsuit under the delegation of authority without consideration and a vote of the commissioners, even though a similar matter involving a similar partnership came before the commissioners last year, and the commissioners elected not to file litigation.

This is not only a matter of great public controversy but, given the powers and rights of Deloitte's partners, it is a novel interpretation of law that the Commission itself clearly should consider and approve before any litigation is commenced.

We are not aware of any retired partner who has complained to the EEOC about age discrimination at Deloitte. And ironically, Deloitte's retiring partners are overwhelmingly white males, while newly-admitted partners over the past decade have been significantly more diverse. Eliminating the retirement age would ultimately limit the partnerships available to an increasingly diverse population of our employees.

I thank the Committee for the opportunity to share our perspective, and I will be happy to answer any questions. Thank you.

[The statement of Mr. Lloyd follows:]

STATEMENT OF DELOITTE LLP

ON: H.R. 4959, THE "EEOC TRANSPARENCY AND
ACCOUNTABILITY ACT"; H.R. 5422, THE "LITIGATION
OVERSIGHT ACT OF 2014"; AND H.R. 5423, THE "CERTAINTY
IN ENFORCEMENT ACT OF 2014"

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

BY: WILLIAM LLOYD, GENERAL COUNSEL

DATE: SEPTEMBER 17, 2014

Chairman Walberg, Ranking Member Courtney, Members of the Committee, thank you for inviting me to testify today. I am Bill Lloyd, the General Counsel for Deloitte LLP. We are one of the world's leading professional services firms. Among other things, we provide audit, tax, and advisory services to individuals and businesses of all sizes and to federal, state, and local governments and community organizations. We have about 65,000 people who provide these services in the United States, of whom about 2,870 (about 4%) are owners of the firm – Partners. I am grateful for the opportunity to testify because today's hearing is focused on three bills that would improve processes within, and the accountability of, the Equal Employment Opportunity Commission (EEOC).

I want to make it clear that Deloitte strongly supports the goals of eliminating workplace discrimination and fostering true equality of opportunity. We also strongly support the EEOC's mission, and we appreciate the dedication of its staff to that mission. Moreover, we are proud – but not satisfied – that Deloitte has regularly been recognized as a leader in inclusion efforts and in developing highly successful women and minorities who themselves are leaders in the profession. For example, during my nine-year tenure at Deloitte, I have had the pleasure of serving with a woman as our chairman and with a Hispanic CEO. I now serve with a chairman who was born in India. We have four major businesses. One is led by a woman and another by an African-American man. Most of these people are homegrown – they developed their professional and leadership skills at Deloitte.

Although we are strong supporters of the EEOC's mission, our recent experience with the EEOC suggests that its processes and transparency could use improvement. We need to insure that the EEOC enforces its important mandate in ways that are consistent with what Congress contemplated in the respective statutes that the EEOC is tasked to enforce. And we need to insure that important decisions about EEOC enforcement policy and allocation of scarce resources are made by the Commissioners who are appointed by the President and confirmed by the Senate.

The EEOC staff has recently challenged the fundamental structure, indeed the very existence, of Deloitte's business – our decision to organize as a limited liability partnership. For reasons related to state professional regulations, we must conduct our business as a partnership. Deloitte's Partners, each a sophisticated professional, voluntarily entered into a partnership agreeing to retire at age 62. Directors and employees are not subject to this retirement provision. Indeed, I am not a Partner, as I chose to become a Director when I joined Deloitte, which allowed me to work after age 62. The EEOC's allegations are relatively simple – that Deloitte is not a true partnership, and therefore, its mandatory retirement age violates the Age Discrimination in Employment Act. However, the impact of the EEOC's legal theory is decidedly more complicated, and ultimately raises significant economic and policy questions for Deloitte and all limited liability partnerships across the country, which will negatively impact many industries.

Congress did not grant jurisdiction to the EEOC to act on behalf of owners of businesses, yet that is exactly what the EEOC is doing. The EEOC seeks to extend statutory

protections to individuals who are owners of this type of organization, all under the theory that at some undetermined point, partnerships grow so large that they cease to be “true” partnerships.

Equally concerning is the Commission’s extensive delegation of authority to the General Counsel to initiate litigation. I was astounded to learn that the Commissioners do not review the overwhelming majority of cases filed by the EEOC. After all, Title VII permits only the five-member Commission to bring a civil action.¹ While the Commissioners ostensibly retain the authority to initiate litigation in cases involving a major expenditure of resources, cases presenting a developing area of the law, or cases presenting a public controversy, in practice, the General Counsel determines whether any particular case meets one of these criteria. In effect, the General Counsel decides whether any litigation should be subject to oversight by the Commission on whose behalf he litigates. The Commissioners are thereby excluded from the very function they were appointed to undertake. That structure should concern all legislators and taxpayers, and is a concern that could be partially alleviated by enacting the Litigation Oversight Act of 2014.

As the EEOC has limited resources, and the decision both to investigate and then to litigate allegations of systemic discrimination requires significant resources that cannot be used elsewhere, it would stand to reason that the Commissioners, upon whose behalf the General Counsel files suit, should review every case involving systemic litigation before it is filed, if not every case filed by the General Counsel. The people appointed by the President to make policy should make these important policy decisions.

As I mentioned, many of Deloitte’s businesses are highly regulated under state laws that require Deloitte to be structured as a partnership. Therefore, the EEOC’s recent focus on professional service organizations structured as limited liability partnerships and its emphasis on systemic litigation are very troubling for organizations such as ours. We understand that the EEOC attempted to initiate identical litigation against a peer partnership less than eighteen months ago, but after a public controversy, the Commission considered and rejected it.

For Deloitte, the EEOC began a directed investigation in 2010, meaning that no individual filed a charge with the EEOC alleging discrimination. To date, we are not aware of any retired Partner who has complained to the EEOC about age discrimination.

We recently received a reasonable cause determination from the EEOC finding age discrimination based upon Deloitte’s mandatory retirement age provision for Partners. This determination was accompanied by a demand that Deloitte eliminate the retirement provision, offer reinstatement to retired Partners to return to Deloitte, and create a fund of an undisclosed amount to compensate those retirees. This determination provides no basis whatsoever for the finding. We are concerned that if conciliation fails, the General Counsel will file a lawsuit under the delegation of authority without consideration and a vote of the Commissioners. This is not only a matter of great public controversy, but,

¹ 42 U.S.C. §§ 2000e-4(a), 2000e-5(f)(1).

given the powers and rights of Deloitte's Partners, it is also a novel interpretation of law that the Commission itself clearly should consider and approve before any litigation is commenced. H.R. 4959, the EEOC Transparency and Accountability Act, seeks to address some of these issues by providing those who are accused of having engaged in an unlawful employment practice with the legal and factual bases for the determination.

Deloitte is a true partnership. Partners are admitted based upon a vote of the Partners as a whole. Our Partners share in the profits and losses of the firm. Partners regularly vote on matters presented before the firm, and they elect a new slate of directors each year. Each Partner has the ability to bind the partnership. As owners, Partners enjoy extraordinary security. Unlike employees at Deloitte, they do not serve at will, and they cannot be "fired." Partners cannot be removed from the Partnership except by a vote of the whole Partnership, or except in very narrowly-defined circumstances involving immediate risk to the firm.

There are legitimate reasons why the Partnership needs a mandatory retirement age for its Partners. In a structure in which involuntary attrition is rare, agreeing to a date certain for retirement maintains the partnership at an optimal size, and provides certainty in succession planning, particularly in the management of client relationships. In a highly regulated industry, it insures a pool of Partners with appropriate training and experience to meet regulatory requirements, such as lead audit Partner rotations after five years as mandated by Sarbanes-Oxley, thus providing for future continuity and profitability of the organization. And, as noted, state regulators require registered CPA firms to be structured as partnerships.

In fact, many Partners retire before reaching age 62. The average age for retiring Partners is 58. These Partners are highly compensated before and after retirement. In the fiscal year that just ended, approximately 34 individuals retired under the mandatory-retirement provision. Yet, the EEOC seeks to protect this class of "victims" in lieu of seeking out true victims of discrimination. For every class case of questionable validity that the EEOC brings, it requires that the agency forego many worthy cases of discrimination on behalf of individuals who have fewer resources to pursue grievances and are genuinely in need of regulatory protection.

Pursuing this litigation strategy is a questionable use of limited agency resources, and the specific subject matter does not fit easily within the agency's priorities. There are no "victims" of age discrimination under Deloitte's partnership agreement. Each individual who becomes a Partner voluntarily chooses to do so, and formally agrees to all of the rights and obligations of partnership, including the retirement provision.

This is the wrong case at the wrong time for the EEOC to pursue, in light of the lack of true victims, agency budgetary constraints, the disruption of settled legal relationships in an important regulated industry, and the necessary tradeoffs that would confront the EEOC by litigating this matter. Ironically, Deloitte's retiring Partners are overwhelmingly white males, while the newly admitted Partners over the past decade have been significantly more diverse. Eliminating the retirement age would ultimately limit the partnerships available to an increasingly female and minority talent pool.

Many cases are filed by the EEOC with clear jurisdiction and a clear strategic purpose. However, recent decisions indicate that the agency may have wandered from its statutory roots in ways that can actually detract from its effectiveness in its core missions. The bills being discussed today can help insure the effectiveness of the EEOC's conciliation procedures on systemic cases, improve its processes and oversight in deciding to initiate systemic litigation, and enhance its accountability to the public. All of these issues are important, not just to Deloitte, but also to an entire industry and the broader American economy. At a minimum, all systemic litigation should be submitted to Commissioners for approval. Both the EEOC Transparency and Accountability Act and the Litigation Oversight Act of 2014 make common sense changes to the Commission that would benefit employees and employers alike.

I thank the Committee for the opportunity to share our perspective and will be happy to answer any questions.

Chairman WALBERG. Thank you.

Mr. Foreman, we will recognize you now for your five minutes.

STATEMENT OF MR. MICHAEL L. FOREMAN, DIRECTOR, CIVIL RIGHTS APPELLATE CLINIC, PENNSYLVANIA STATE UNIVERSITY, DICKINSON SCHOOL OF LAW, STATE COLLEGE, PA

Mr. FOREMAN. Thank you, Chairman Walberg, Ranking Member Courtney, and members of the Committee for the ability to testify on these pieces of legislation. I am sure there are good purposes behind them but, as my testimony reflects, they are premature, they are unnecessary. I think more importantly, they distort the function of what Title VII was passed to do and it will thwart any type of effective enforcement of the federal laws.

Now, I know two of my colleagues that are testifying today, and they both worked at EEOC. And they know first-hand the ugliness of employment discrimination, and they know first-hand that you need to have an effective enforcement agency to fight that evil. They know that. We may not agree on much, but I think we will agree on that point. Now, Mr. Dreiband said it best. Notwithstanding EEOC's achievement, we have much work ahead of us. Unlawful discrimination anywhere remains a threat everywhere. Accordingly, we will continue to strive to obtain meaningful relief for victims of discrimination and achieve equality in the workplace.

They are his words when he was general counsel of the EEOC, not mine. They were true then and they are true not—now. And these bills would strip EEOC's enforcement ability. For example, the Oversight Act would require a vote of commissioners, a disclosure publicly of that vote, and that vote would be posted within 30 days of starting of litigation. Now some may say, well, why is that a problem? Because much of that information is already available. Well, the reason it is a problem because that would create an affirmative defense for every employer in this country.

What if EEOC does not post? What if someone challenges the vote? That is subject to discovery. That is not hysteria. That is exactly what is happening in the Mach Mining case. The employer community is arguing that is an affirmative defense. And what is the remedy? The remedy is the case gets dismissed and the innocent victims never see the light of day. And that is what is troubling about those type of bills.

The Transparency Act would take resources—the limited resources—the EEOC has, and turn them into a data reporting and website management. There are so limited resources to fight employment discrimination, they should be directed toward fighting discrimination.

As Congressman Courtney pointed out, there are obvious constitutional problems with exempting state and local governments from Title VII. I give the example, in my written materials, that it would basically overrule a case like *Griggs v. Duke Power*—as it applies to state and local governments. It is something we should not be doing at this time.

These are basically a remedy in search of a problem. There is no pattern of EEOC abuse. If you look at the number of cases EEOC litigates, they are doing a wonderful job. Their enforcement record

should be applauded and more enforcement agencies should work like they do.

There are a few limited cases where they are sanctioned. And that shows that there is a process in place. EEOC is required to play by the same rules of all parties. And if they act improperly in a limited number of cases, rule 11 exists and there is a provision of Title VII that holds them accountable. And they can be sanctioned. So that shows the system works. We do not need to add another level of sanctions to EEOC thwarting their ability to do their effective job.

And then finally, several of the, quote—"key parts" of this legislation are before the courts now. Mach Mining has precisely the issue of what does the EEOC need to do in their conciliation efforts and what happens if they do not do it. That case has been briefed. My colleague, Mr. Dreiband, filed a brief this week in support of the business community. The court system has it, the Supreme Court will answer that question, and we will know what that means under Title VII. There should not be anticipatory legislation to deal with that.

Similarly, there is litigation in Texas that was filed challenging EEOC's promulgation of the criminal enforcement guidance. Let the judicial system work, and there will be a determination of whether EEOC had that authority and what that means. Don't short-circuit the process. And I would just end, if I could, The Wall Street Journal, in their summary of sort of this issue, made the quote about EEOC, "It is just not saber rattling anymore. The EEOC has shown that it means business." Isn't that the EEOC that Title VII expected? And isn't that the EEOC that every one of us wants—one that enforces the law? And these bills would hamper that ability.

Thank you for your time, and I am available to take any questions.

[The statement of Mr. Foreman follows:]



**TESTIMONY OF PROFESSOR MICHAEL FOREMAN
DIRECTOR, CIVIL RIGHTS APPELLATE CLINIC
PENNSYLVANIA STATE UNIVERSITY
DICKINSON SCHOOL OF LAW**

**BEFORE THE HOUSE COMMITTEE ON EDUCATION AND THE
WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
ON
HR 4959: EEOC TRANSPARENCY AND ACCOUNTABILITY ACT; HR
5422: LITIGATION OVERSIGHT ACT OF 2014; HR 5423: CERTAINTY
IN ENFORCEMENT ACT OF 2014**

**WEDNESDAY, SEPTEMBER 17, 2014
2175 RAYBURN HOUSE OFFICE BUILDING
10:00 A.M.**

**HR 4959: EEOC TRANSPARENCY AND ACCOUNTABILITY ACT; HR 5422:
LITIGATION OVERSIGHT ACT OF 2014; HR 5423: CERTAINTY IN
ENFORCEMENT ACT OF 2014**

Chairman Walberg, Ranking Member Courtney and members of the Subcommittee, I thank you for the opportunity to express my views on the proposed legislation. Unfortunately, however well intended, these proposed changes to the federal employment discrimination statutes are unnecessary, premature and in practical effect, would thwart the effective law enforcement function of the EEOC.

I am the Director of the Civil Rights Appellate Clinic at the Pennsylvania State University Dickinson School of Law where I also teach an advanced employment discrimination course. For over three decades, I have specialized in civil rights law and more specifically employment discrimination law. I have handled employment matters through all phases of their processing from the administrative filing, at trial and through appeal. I have represented both employers and employees. Perhaps as relevant I have worked at the EEOC in its appellate division, was the General Counsel for the Maryland Commission on Civil Rights and also prosecuted employment discrimination cases with the Pennsylvania Human Relations Commission. It is from this broad perspective that I provide my testimony.¹ I have a thorough understanding of what it takes to enable a government agency to effectively fulfill its statutory duty to fight the evil of workplace discrimination, and conversely what undermines the pursuit of this mission. The proposed legislative changes would stifle the EEOC's ability to serve as a law enforcement agency and undermine Congress' original intent of Title VII – to "...assure equality of employment opportunities and eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."²

I. SUMMARY OF THE PROPOSED LEGISLATIVE CHANGES

H.R. 4959: The EEOC Transparency and Accountability Act (hereinafter, "Transparency Act") requires the EEOC to post information to its website regarding charges and actions brought by the Commission. This information is to include: a description of each case brought in court, not later than 30 days after judgment is made with respect to any cause of action in the case, regardless of whether the judgment is final; the total number of charges of an alleged unlawful employment practice brought under section 706(b) of the Civil Rights Act of 1964, section 107(a) of the Americans with Disabilities Act of 1990, systemic discrimination cases, and any cases in which the EEOC was ordered to pay any fees or costs; and whether the case was authorized by Commission majority vote or the General Counsel. The proposed bill would amend Section 706(b) of the Civil Rights Act of 1964 to impose upon the EEOC requirements of "good faith" conference, conciliation, and persuasion, and "bone fide conciliation efforts" by the EEOC, subject to judicial review. The bill also requires the Inspector General of the Commission to report to Congress regarding cases in which the EEOC is ordered to pay fees and costs or sanctions within 14 days of the court's decision; conduct an investigation to determine why sanction, fees, or costs were imposed; and submit a report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor,

¹ A copy of my biography is attached.

² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

and Pensions of the Senate within 90 days.

H.R. 5422: The Litigation Oversight Act of 2014 (hereinafter, “Oversight Act”) requires the Commission to approve by majority vote whether to file or intervene in litigation involving multiple plaintiffs, or an allegation of systemic discrimination or a pattern or practice of discrimination, and requires the Commission to post and maintain information on its website with respect to the litigation, including the vote of each Commissioner. The proposed bill also gives any member of the Commission the power to require a majority vote on any litigation.

H.R. 5423: The Certainty in Enforcement Act of 2014 (hereinafter, “Enforcement Act”) amends Title VII of the Civil Rights Act of 1964, and would create a broad exception for employment practices that are required by Federal, State, or local law.

II. THESE PROPOSED CHANGES UNDERMINE THE CORE PURPOSE OF TITLE VII

It is beyond dispute that “the primary objective of Title VII is to bring employment discrimination to an end.”³ When Title VII was passed it was a transformational law. When compared to many of the other civil rights laws passed around the same time Title VII has been described “as having the most significant impact in helping to shape the legal and policy discourse on the meaning of equality.”⁴

Congress created the EEOC as the law enforcement agency tasked to “vindicate ‘a policy that Congress considered of the highest priority.’”⁵ Title VII gives the Commission the power “to prevent any person from engaging in any unlawful employment practice.”⁶ When created in 1964 the enforcement power of the EEOC was severely limited. The Commission was empowered to use only “informal methods of conference, conciliation, and persuasion”⁷ to end employment discrimination. However, Congress quickly realized that the “failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII.”⁸ Indeed, because of this lack of enforcement power, the EEOC was characterized as a “poor enfeebled thing.”⁹

In response, Congress amended Title VII in 1972 to expressly give the EEOC the enforcement powers needed to fulfill the primary purpose of Title VII.¹⁰ The proposed legislation rather than furthering this national goal, will have a chilling impact on the EEOC’s ability to enforce the law and will divert what limited resources the EEOC has to data collection

³ *Ford Motor Company*, 458 U.S. 219, 228 (1982).

⁴ Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death and Resurrection of Disparate Impact Theory of Discrimination*, 22 Hofstra Lab. and Emp. L.J. 431, 432 (2005).

⁵ *Christiansburg Garment Co v. EEOC*, 434 U.S. 412, 412 (1978).

⁶ 42 U.S.C. § 2000e-5(a).

⁷ 42 U.S.C. § 2000e-5(b).

⁸ 7 S.Rep. No. 92-415, p. 4 (1971).

⁹ Michael I. Sovern, *Legal Restraints on Racial Discrimination In Employment* 205 (1966).

¹⁰ If “the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent.” 42 U.S.C. § 2000e-5(f)(1).

and website management.¹¹

Sadly our nation has not yet achieved Title VII's worthy goal. In 2013 the EEOC received 93,727 total discrimination charges.¹² The EEOC negotiated 5,927 settlements and successfully conciliated nearly 1,000 charges of discrimination with respect to Title VII alone.¹³ During that same period, the Commission litigated 148 lawsuits under the array of federal statutes it has authority to enforce, including Title VII (78 lawsuits) and the Americans with Disabilities Act ("ADA") (51 lawsuits), recovering nearly \$40 million in monetary benefits for victims of discrimination. This hardly paints a picture of a workforce free from unlawful discrimination.

Tragically, the courts also continue to see employment discrimination of the most vile kind. There is an ample number of these disturbing types of cases; I only highlight two brazen examples here. For example, in *May v. Chrysler*, a gruesome portrait of race and religious discrimination, the court observed:

More than fifty times between 2002 and 2005, Otto May, Jr., a pipefitter at Chrysler's Belvedere Assembly Plant, was the target of racist, xenophobic, homophobic, and anti-Semitic graffiti that appeared in and around the plant's paint department. Examples, unfortunately, are necessary to show how disturbingly vile and aggressive the messages were: "Otto Cuban Jew fag die," "Otto Cuban good Jew is a dead Jew," "death to the Cuban Jew," "f*** Otto Cuban Jew fag," "get the Cuban Jew," and "f*** Otto Cuban Jew n***** lover." In addition to the graffiti, more than half-a-dozen times May found death-threat notes in his toolbox. Different medium, same themes: "Otto Cuban Jew m**** f***** bastard get our message your family is not safe we will get you good Jew is a dead Jew say hi to your hore wife death to the jews heil hitler [swastika]." The harassment was not confined to prose. [it included] a dead bird wrapped in toilet paper to look like a Ku Klux Klansman (complete with pointy hat).¹⁴

Similarly *Smith v. Wilson* is another ugly reminder that extreme racial discrimination still exists.¹⁵ Testimony in that case revealed a troubling environment in the Police Department

¹¹ While employment discrimination continues to be an obstacle to the achievement of a society inclusive of everyone, the resources allocated to EEOC hamper its ability to aggressively enforce Title VII. From Fiscal Year 2000 through 2008, EEOC staffing and funding dropped almost 30%. While EEOC received some additional resources in 2009, these provided limited relief when funding was reduced and hiring freezes were implemented in Fiscal Year 2011 and Fiscal Year 2012. U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016, pg. 4. <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

¹² These broke down as: 33,068 race based, 27,687 sex based, 10,642 national origin based, 3,721 religion based, 3,146 color based, 38,539 retaliation based, 21,396 age based, 25,957 disability based, 1,019 EPA based, 333 GINA based. Equal Opportunity Employment Comm'n, Charge Statistics FY 1997-FY 2013 (2014), <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

¹³ 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>.

¹⁴ *May v. Chrysler Group LLC*, 716 F.3d 963, 963 (2012).

¹⁵ I recognize that this is a 42 USC §1981 claim but we believe it is a good example both with regard to the ugly racism that occurs in the workplace, and it highlights that this can occur in state and local government.

where racial slurs were used regularly in the workplace. The Police Chief “repeatedly referred to people of color as ‘n*****,’ ‘sand-n*****,’ ‘towel heads,’ and ‘spics.’”¹⁶ The workplace was laden with a litany of racist comments including but not limited to “[T]hat stupid n***** isn’t going to work or tow for me”; ‘I’m not letting that goddamn n***** tow for us’; ‘That goddamn n***** is not towing for us and that’s the bottom line’.”¹⁷ The Court of Appeals noted that at the city this type of racism “was unfortunately, not aberrational,” and described the evidence of racial bigotry presented at trial as both “staggering and regrettable.”¹⁸ While the Court of Appeals upheld a finding of no liability because of the heavy burden of proof that plaintiffs carry in discrimination cases, the Seventh Circuit concluded with the chilling observation that “[w]e would have liked to believe that this kind of behavior faded into the darker recesses of our country’s history many years ago.”¹⁹

There is obviously work to be done by the EEOC. The EEOC’s power to commit its limited resources to aggressive enforcement should not be diverted, nor should its ability to enforce the anti-discrimination statutes be constrained. The proposed legislation will have the effect of restricting the EEOC’s ability to enforce the law.

The proposed Oversight Act will weaken the EEOC’s effectiveness as a self-functioning federal enforcement agency. It would instead turn the enforcement of federal anti-discrimination law into a politically driven process. This process would feature politically appointed commissioners voting on who should (or should not) be sued for violating the law. Political opinions and affiliations have no place in the fair and impartial enforcement of the law. Further, the inefficiencies of the bill’s proposed process would deplete the limited resources available for enforcing the law. Title VII was passed and the EEOC was created to bring all employment discrimination to an end.

The proposed Enforcement Act strips the EEOC of its congressionally vested power to enforce and prevent all discriminatory employment practices. The enforcement ability of the EEOC would effectively turn on what laws state and local legislatures decided they wanted to implement. Unlawful employment practices enumerated in Title VII will become unenforceable if there is a Federal²⁰, State or local law requiring the employment practice. This would grant states and local legislatures unfettered discretion to circumvent Title VII leaving the EEOC without enforcement power. Congress should avoid adopting amendments to Title VII that directly contradict its enumerated purpose.

Finally, the Transparency Act, rather than provide transparency, would sap resources from the enforcement ability of the EEOC and the primary purpose Title VII to eliminate discrimination. The duplicative and burdensome reporting adds little of value to the public and much of the information is already provided. It instead diverts EEOC resources to reporting, and away from enforcement of the law.

¹⁶ *Smith v. Wilson*, 705 F.3d 674, 676 (2013).

¹⁷ *Smith v. Wilson*, 705 F.3d at 674, 677.

¹⁸ *Smith v. Wilson*, 705 F.3d at 674, 676-677.

¹⁹ *Smith v. Wilson*, 705 F.3d at 674, 682.

²⁰ Title VII already has an exemption for federal law. 42 U.S.C. § 2000e-2(n)(1)(A).

III. PROVISIONS OF THESE BILLS ARE INCONSISTENT WITH THE SUPREMACY CLAUSE AND EFFECTIVELY REPEAL VITAL PARTS OF TITLE VII

The Enforcement Act seeks to amend section 703 of Title VII by adding the following language: “it shall not be an unlawful employment practice” to comply with any local or state law created “in an area such as, but not limited to, health care, childcare, in-home services, policing, security, education, finance, employee benefits, and fiduciary duties.” If adopted, this provision would allow states and local governments to avoid Title VII scrutiny simply by implementing requirements ostensibly related to the areas listed in the bill. This would have obvious implications under the Supremacy Clause of the United States Constitution as it would hinge enforcement of federal law on the whims of local and state legislatures.

The Enforcement Act also would effectively repeal section 708 (2000e-7) conflict-with-state-law provision by making practices that offend Title VII outside Title VII’s scope of enforcement. When Title VII was passed and later amended, section 2000e-7 was written for a very obvious and important reason. Congress wanted it to be absolutely clear that Title VII covers local and state laws that were discriminatory. The Enforcement Act strips Title VII and the EEOC of precisely that power. Local and state governments could make laws that directly contradict the anti-discrimination purpose of Title VII and leave the EEOC powerless under section 2000e-7.

For example, a local government could pass legislation that prohibits anyone who has ever been arrested or convicted of any crime, regardless of how minor, from holding a public service job. This hypothetical legislation would have a disparate impact on minorities. Despite decades of developed law under Title VII as to how these types of restrictions should be analyzed, these laws would be exempt from examination under Title VII. More profoundly, the local government could pass a law requiring GEDs for anyone working in in-home service, which would be shielded from Title VII. These types of situations could become a reality despite the bedrock principle established by the Supreme Court in *Griggs v. Duke Power Co.*²¹ that Title VII covers employment practices that appear fair in form but discriminatory in operation. Never-the-less the EEOC would be powerless to address this blatantly discriminatory practice if the Enforcement Act is passed.

IV. THE OVERSIGHT ACT ALLOWS POLITICAL INFLUENCE TO DICTATE ENFORCEMENT OF FEDERALLY PROTECTED RIGHTS

The Oversight Act promotes political considerations in prosecution decisions, which is inconsistent with the justice that Title VII was designed to achieve. The Oversight Act requires commissioners to vote before the EEOC would be permitted to bring cases alleging systemic discrimination, a pattern or practice of discrimination, cases with multiple plaintiffs, or when the

²¹ 401 U.S. 424 (1971).

EEOC seeks to intervene.²² More troubling under the proposed bill, any member of the Commission will be given authority to call a required vote to proceed on “any litigation.” This would bring any meaningful enforcement activity to standstill as interested parties will lobby commissioners on whether EEOC should, or should not, pursue litigation.

The Oversight Act also requires that there be a disclosure of each commissioner’s vote within 30 days of commencing any approved litigation. Imagine if district attorneys had to have their litigation decisions all approved by a majority vote, or if indictment proceedings by grand juries were made public. These “second thought” provisions will result in party politics rather than seeking justice for injured parties. The blurred vision that is promoted by the mandatory votes and publications will dramatically alter the administration of justice by the EEOC and Title VII.

V. THE PROPOSED CHANGES ARE REDUNDANT, COSTLY, EXTRA LAYERS OF PROCEDURE WHICH DO NOTHING TO SECURE THE RIGHT TO BE FREE FROM EMPLOYMENT DISCRIMINATION

A. There is Not a Crisis of Abusive Litigation by the EEOC

There is no crisis or epidemic of abusive litigation by the EEOC. As EEOC general counsel David Lopez notes, litigation is an outcome in only 0.5% of all charges filed with the EEOC and only 5% of all charges in which the Commission issues a cause finding.²³ These numbers hardly reflect a pattern of overzealous and hasty litigation by the EEOC. Those who would argue the contrary, that a pattern of EEOC abusive litigation exists, rely on an insignificant number of cases when one considers how much the EEOC litigates in its effort to combat workplace discrimination.²⁴ All of these cases are reasonable good-faith efforts to

²² The EEOC already requires a vote for certain cases, but delegates the majority of the decision making to the General Counsel. The EEOC’s Strategic Enforcement Plan states: “The Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following: cases involving a major expenditure of resources, cases that present issues in a developing area of law, cases that the General Counsel reasonably believes to be appropriate for submission and all recommendations in favor of Commission participating as *amicus curiae*. U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016, pg. 20 <http://www.eeoc.gov/eeoc/plan/sep.cfm>.”

²³ <http://www.law360.com/articles/496715/eeoc-overreach-analysis-distorted-the-record>

²⁴ The cases repeatedly used to show abuse are as follows: In *EEOC v. CRST Van Expedited*, 679 F.3d 657 (8th Cir. Iowa 2012), the EEOC was sanctioned for failure to reasonably investigate and conciliate its claims prior to filing suit. A substantial number of the plaintiffs could not be found for deposition, were dropped for timeliness issues, or were found to have an insufficient basis for their claims. In *EEOC v. Kaplan Higher Education Corporation*, 790 F. Supp. 2d 619 (N.D. Ohio 2011), a partial motion to dismiss was granted for failure to timely file the charge, and the case was ultimately dismissed because the EEOC’s expert witness evidence was found inadmissible, rendering the EEOC unable to prove its case. These rulings indicate a failure to meet the burden of proof, rather than abusive litigation practices. In *EEOC v. PeopleMark*, 732 F. 3d 584 (6th Cir. 2013), the defendant was awarded fees and costs because the EEOC was unable to prove its allegations and withdrew the case; although the claim was ultimately found to be groundless, the Court noted that “the Commission’s case was not groundless when filed.” Incorrect statements by the defendant’s Vice President “gave the Commission a basis to file the complaint” but these statements later proved false. It is worth noting that the proposed legislation’s new requirements (to submit information to its website, vote on whether to intervene, and exempt practices required by Federal, state, or local law) would not have prevented these sort of outcomes.

enforce the law and vindicate victims' rights with the appropriate amount of zeal--perhaps not what the employer would deem preferable or reasonable, but certainly not as unfounded, baseless, and frivolous in its claims and methods as to constitute "abusive" litigation.

More importantly these criticisms ignore the EEOC's impressive record of enforcement of the discrimination laws. In fiscal year 2013, the EEOC secured \$372.1 million in monetary benefits through administrative enforcement activities including mediation, settlements, conciliations, and withdrawals with benefits.²⁵ These administrative enforcement successes secured benefits for more than 70,522 people. 209 merits lawsuits were resolved for a total monetary recovery of \$39 million. 300 systemic investigations were completed, resulting in 63 settlements or conciliation agreements, recovering approximately \$40 million. More than \$56.3 million was secured in relief for parties who requested hearings in the federal sector. Furthermore, EEOC General Counsel David Lopez has highlighted some of the recent landmark litigation by the agency in his recent Law360 article.²⁶ These are also set forth on the EEOC.gov public website and will not be repeated here.²⁷ The EEOC's enforcement record clearly shows that it is an effective enforcement agency.

Rather than handcuffing these efforts, the EEOC's zealous representation of the public interest in ending discrimination in the workplace should be applauded and encouraged. In those rare cases where a trial court finds that the EEOC did not play by the rules, the federal courts have the power, and the cases reflect the courts exercise this power, to address any overreach by the EEOC. There is no reason to add another layer of process or otherwise hamper the EEOC's enforcement power.

B. Title VII Provides a Means of Controlling Overzealous Litigants, Including the EEOC

In addition to the protections for defendants built innately into the standards of proof and division of burdens in litigation generally and Title VII's elements specifically²⁸, Title VII provides mechanisms for controlling overzealous litigation. Sec. 706(k) of the Civil Rights Act of 1964 provides "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United

²⁵ http://www.eeoc.gov/eeoc/plan/2013parhigh_discussion.cfm.

²⁶ <http://www.law360.com/articles/496715/eeoc-overreach-analysis-distorted-the-record>

²⁷ <http://www.eeoc.gov/eeoc/newsroom/>.

²⁸ Traditionally, plaintiffs bear the burden of proof, and litigation under Title VII is no exception. Plaintiffs always carry the burden of proving unlawful discrimination, and must first establish a *prima facie* case before the defendant must even defend their motives and decision, which ultimately the plaintiff bears the burden of proving to be pretext. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978). Similarly in disparate impact cases, the plaintiff bears the burden of first proving disparate impact occurred before the defendant must rebut with proof of business necessity, and only if the plaintiff ultimately proves the challenged practice was not a business necessity can they prevail. 42 U.S.C. § 2000e-2(k). In addition, section 705(g) of Title VII places limits on what remedies plaintiffs may obtain under certain circumstances (so even plaintiffs who "win" judgment may have drastically different substantive remedies available). 42 U.S.C. § 2000e-5(g). Taken together these constraints create a litigation environment in which Title VII plaintiffs, be they the EEOC or private parties, have a heavy burden to carry and cannot succeed on a claim without ample evidence, let alone a frivolous claim.

States shall be liable for costs the same as a private person.”²⁹ This provision makes it clear that the EEOC (as well as the United States) is subject to the same rules regarding liability for costs as private parties when acting as litigants in Title VII actions. In *Christiansburg Garment Co.*, the Court made clear that a defendant may be a “prevailing party” and thus be eligible to recover attorney’s fees as costs covered under sec. 706(k). “In sum, a district court may in its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought subjective bad faith.”³⁰ Thus Title VII authorizes a trial court to exercise its discretion and award attorney’s fees and costs to a defendant who prevails in suit brought by the EEOC if the EEOC is neglecting its statutory responsibilities and litigating improperly.

C. Federal Rule of Civil Procedure 11 Also Gives Courts the Power to Sanction Improperly Brought or Groundless Litigation

Claims by the EEOC, like all civil claims, are subject to the Federal Rules of Civil Procedure.³¹ Accordingly, the EEOC would also be subject to the strictures of Fed. R. Civ. P. 11 when filing pleadings, and to sanctions for any deviations from the requirements of Rule 11. When the EEOC files a complaint pursuing a claim of unlawful discrimination under Title VII it must certify that to the best of its knowledge, information, and belief that there is a valid basis for its claim(s) and that it has complied with all statutory duties and requirements to bring a valid claim. If the EEOC brings an action that violates any of these requirements Rule 11 sanctions would be available to deter the conduct and compensate for it, either by motion of the defendant or on the court’s own motion.

In short, to the extent that the EEOC may be engaging in overly aggressive litigation, which its enforcement record does not reflect, federal law provides employers all the protection that is needed and no additional legislation is needed.

VI. THE PROPOSED LEGISLATION CIRCUMVENTS THE COURTS’ CONSTITUTIONALLY MANDATED JOB OF JUDICIAL REVIEW AND INTERPRETATION.

It is a fundamental and basic concept of our American government that Congress enacts the laws and the Courts go on to interpret those laws. The “comingling” of the separate branches of the United States has long been an evil that legislators and judges alike have tried to avoid.³²

Today, as Congress considers these proposed legislative changes, two of the core issues supposedly meant to be addressed by the legislation are before the federal courts. One before the United States Supreme Court and the other working its way through the federal courts. Congress

²⁹ 42 U.S.C.A. § 2000e-5 (West).

³⁰ *Christiansburg Garment Co.* 434 U.S. at 421.

³¹ Although the application of certain rules may be distinct when the EEOC is a party. See *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) (treatment of EEOC claims by Fed. R. Civ. P. 23).

³² See *Mistretta v. United States*, 488 U.S. 361, 426-27 (1989) (Scalia, J., dissenting) (relying on the writings of the Framers in his dissent to make his argument for a strict separation of powers).

should not intervene before the courts have a proper chance to analyze the legal issues involved. This would be ill advised and bad public policy.

Separation of powers is a political doctrine originating in the writings of 18th Century French Political Philosopher Charles Montesquieu in his classic 1748 work The Spirit of the Laws, in which Montesquieu urged for three separate branches of government.³³ Montesquieu envisioned a system in which each of the three branches would have distinct capabilities to “check the powers” of the other branches. This philosophy heavily influenced the writing of the United States Constitution, according to which our Executive, Legislative and Judicial branches are kept particularly distinct in order to prevent abuses of power by any one branch. Congress has the power to legislate for the United States. The judicial power however, (that is the power to decide cases and controversies involving laws that the federal and state legislatures pass), is vested in the United States Supreme Court and any inferior federal courts established by Congress.

As discussed earlier, Section three of the proposed Transparency Act seeks to write into Title VII of the 1964 Civil Rights Act a “good faith conciliation standard” that the EEOC must meet in order to file suit against a company. The Transparency Act requires (1) good faith review, (2) exhaustion and (3) judicial review. The bill would insert into Title VII the following language:

No action or suit may be brought by the Commission under this title unless the Commission has in good faith exhausted its conciliation obligations as set forth in this subsection. No action or suit shall be brought by the Commission unless it has certified that conciliation is at impasse. The determination as to whether the Commission engaged in bone fide conciliation efforts shall be subject to judicial review.

This language mimics, almost verbatim, the language of a question presented currently before the United States Supreme Court. The issue in *Mach Mining, LLC v. EEOC* is “whether and to what extent a court may enforce the Equal Employment Opportunity Commission’s mandatory duty to conciliate discrimination claims before filing suit”.³⁴ The Court is also asked to deal with whether allowing judicial review of the EEOC’s conciliation requirement conflicts with the confidentiality provision of Title VII.³⁵ The question as to whether the EEOC’s conciliation requirement is subject to judicial review is best left to the judicial branch of government.

If the Supreme Court were to answer the question presented in *Mach Mining, LLC v. EEOC* in the affirmative, Section three of the proposed Transparency Act would be meaningless.

³³ See generally Charles Montesquieu, *The Spirit of the Laws*, (Prometheus Books, 2002).

³⁴ *Mach Mining, LLC v. EEOC*, 134 S. Ct. 2872 (U.S.2014) (cert granted June 30, 2014). The merits brief for Mach Mining has already been filed with the Court. The United States Brief will be filed late next month.

³⁵ In §2000e-5(b) of Title VII, Congress made it a crime (subject to \$1000 fine and imprisonment of up to a year) the act making conciliation records and procedures open to the public without written consent. It is possible (and the U.S Supreme Court will soon answer this exact question) that requiring judicial review of conciliation would force criminal activity in direct conflict with certain explicit provisions Title VII. See *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 175 (7th Cir. Ill.2013).

If the Court were to answer it in the negative, at that time (in light of a dispositive resolution by the judicial branch of government), it may be appropriate for the legislative branch to consider if a response is necessary and what the appropriate response should be. However, taking on such an issue before the Supreme Court has had a chance to answer a question currently in front of them would undermine a co-equal branch of government.

Similarly, the proposed Enforcement Act likewise seeks to present a premature legislative solution to a problem squarely in the court of the judicial branch currently. This bill would amend Section 703 of the Civil Rights Act, which outlines unlawful employment practices under the Act, to create an exception in cases where federal, state or local laws contradict the prohibited practices outlined in federal law.

On August 20, 2014 the state of Texas filed suit in the case of *Texas v. EEOC*. In its complaint, the state of Texas seeks a “declaration of its right to maintain and enforce its laws and policies that absolutely bar convicted felons from ... government service”.³⁶ This issue is the exact same issue that the Enforcement Act seeks to resolve. Indeed, if this is the new and accepted practice (where Congress will just seek to change laws before any Court even has an opportunity to interpret it) what is the role of the American Judicial Branch in the 21st Century?

Like the issue in *Mach Mining, LLC v. EEOC*, Congress should not take up this issue before the Judicial Branch of government has had a chance analyze the issues presented by the EEOC’s actions.

The Courts should be permitted to do their constitutionally mandated job. Before Congress explores dangerous anticipatory legislation that raises far more legal issues than it resolves and does so before Congress receives any reasoned analysis from the Courts which would provide important context on what if any changes in Title VII are warranted. The Transparency Act and Enforcement Act are solutions in search of a problem. Additionally, they are unwarranted legislative intrusions into the constitutional authority of an independent branch of government.

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

³⁶ Complaint at 2, *Texas v. EEOC*, (No. 5:13-cv-00255-C).

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Professor Michael Foreman focuses on appellate representation in civil rights issues and employment discrimination cases and directs Penn State's Civil Rights Appellate Clinic, which has served as counsel on numerous cases in United States Supreme Court and the federal appellate courts. He is involved in several cases currently pending. In 2012 he argued *Coleman v. Maryland Court of Appeals* before the United States Supreme Court. In addition to other work, the clinic has served as counsel on *amicus* briefs filed with the Supreme Court in many of the Court's recent employment cases including; *Nassar v. Southwestern Medical Center*, *Vance v. Ball State*, *Thompson v. North American Stainless, LP*, *Staub v. Proctor Hospital*, *Rent-A-Center, West, Inc. v. Jackson*, *Gross v FBL Financial Services, Inc.*, *Ricci v. DeStefano*, and *Pyett v. 14 Penn Plaza, LLC*.

Immediately prior to joining Penn State Law he served as the Deputy Director of Legal Programs for the Lawyers' Committee for Civil Rights Under Law, where he was responsible for supervising all litigation in employment discrimination, housing, education, voting rights, and environmental justice. Professor Foreman was also Acting Deputy General Counsel for the U.S. Commission on Civil Rights, where he also was the lead attorney for the commission's investigation of the voting irregularities in the 2000 presidential election. He was a partner in the Baltimore, Maryland, law firm Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., where he led the firm's Employment Law Group. Professor Foreman was also General Counsel for the Maryland Commission on Human Relations, an appellate attorney with the Equal Employment Opportunity Commission and regional counsel for the Pennsylvania Commission on Human Relations.

Professor Foreman's professional and scholarly focus has centers on civil rights issues and employment discrimination and he is frequently called upon to testify before Congress and the EEOC on the impact of the Supreme Court decisions affecting civil rights and employment issues.

He is a recipient of the Carnegie Medal for Outstanding Heroism. Professor Foreman has been honored by Shippensburg University with the Jesse S. Heiges Distinguished Alumnus Award. He was also selected by Harvard Law School as a Wasserstein Fellow, which recognizes dedicated service in the public interest. He is admitted to practice in Maryland, Pennsylvania, the District of Columbia, Texas, numerous federal courts and the U.S. Supreme Court.

Chairman WALBERG. Mr. Foreman, thank you.
Mr. Dreiband, we recognize you for your five minutes.

**STATEMENT OF MR. ERIC S. DREIBAND, PARTNER, JONES DAY,
WASHINGTON, D.C.**

Mr. DREIBAND. Good morning, Chairman Walberg, Ranking Member Courtney, and members of the subcommittee. Thank you for inviting me to testify today. My name is Eric Dreiband, and I am a partner at the law firm of Jones Day here in Washington, D.C. Mr. Chairman, as you noted, I previously served as the general counsel of the United States Equal Employment Opportunity Commission. And in that role, I was privileged to work with Lynn Clements and many other talented and dedicated EEOC officials. It is with this background that I appear today at your invitation to speak about three bills that are pending before this subcommittee.

First, I will start by discussing the *Litigation Oversight Act of 2014*. This bill would ensure that the EEOC cannot bring major or controversial litigation without a full up or down vote by a majority of the EEOC's five-member bipartisan Commission. Congress has vested the EEOC's attorneys with the authority to appear for, and represent, the Commission in any case in court, but to do so only at the direction of the Commission. As a result, the Commission has historically considered, deliberated about, and voted on whether to file lawsuits recommended by the Commission's general counsel.

In recent years, however, the number and percentage of litigation matters presented to the commissioners has diminished significantly. According to one current EEOC commissioner, the Commission voted on three of 122 lawsuits filed during an entire year. These numbers give the impression of a commission made up of potted plants and disinterested bystanders.

The available evidence suggests that the current strategy is not as effective as past practices. For example, the amount of money recovered by the EEOC's litigation program in the last two fiscal years is lower than at any point since the EEOC started reporting this data. Moreover, the EEOC has recently suffered several embarrassing losses. Several courts have dismissed all, or significant parts of, several EEOC lawsuits.

Other courts have sanctioned the EEOC, and the taxpayers are on the hook for the cost of these cases and for paying sanctions. And these kinds of embarrassing losses and sanctions damage the commission's credibility. The Litigation Oversight Act may help restore the commission's oversight of the agency's litigation program.

The second bill before this subcommittee, the *EEOC Transparency and Accountability Act*, would provide for judicial review of the EEOC's pre-suit conciliation efforts. The civil rights laws generally authorize the EEOC to file a lawsuit only after it has been unable to secure a pre-suit conciliation agreement from a potential defendant. In December of 2013, a U.S. court of appeals in Chicago became the first court to hold that EEOC's compliance with this congressionally-mandated obligation is subject to virtually no judicial review, and the Supreme Court is now considering the issue.

The *EEOC Transparency and Accountability Act* would settle the issue by statute. The bill would require the EEOC to engage in bona fide conciliation, including by identifying its claims and any putative victims thereof before EEOC files a lawsuit. These provisions may preempt the sue first, ask questions later mentality that has troubled several federal judges and led to humiliating dismissals of several EEOC lawsuits.

The third bill pending before this subcommittee is the *Certainty in Enforcement Act of 2014*. This bill would provide that an employer does not violate the *Civil Rights Act* if it complies with another federal, state or local law in particular areas.

Some laws restrict employers from hiring persons with criminal convictions, and the EEOC recently issued enforcement guidance to suggest that such blanket hiring restrictions may violate the Civil Rights Act. The *Certainty in Enforcement Act* may provide a useful fix to this conflict in times—in many times, employers feel like they are caught between choosing to comply with one law and risk violating the *Civil Rights Act*.

Nonetheless, for purposes of greater clarity, the subcommittee might consider a few amendments to the bill as it is presently drafted. First, you may consider limiting the bills to laws that require employers to conduct criminal background checks or credit history checks. This seems to be the primary concern of the bill.

Second, you might also consider limiting the bill to allow employers to follow laws that are targeted to hiring practice in certain safety-sensitive areas like health care and child care, where people are serving very vulnerable individuals like children and the sick and injured. Third, adding the language that specifically addresses disparate impact liability—that is, so-called unintended discrimination—may help clarify that the *Certainty in Enforcement Act* is in no way intended to sanction intentional discrimination.

Thank you for the opportunity to testify here today, and I look forward to your questions.

[The statement of Mr. Dreiband follows:]

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

**Hearing on H.R. 4959, "EEOC Transparency and Accountability Act," H.R. 5422,
"Litigation Oversight Act of 2014," and H.R. 5423, "Certainty in Enforcement Act of 2014"**

Wednesday, September 17, 2014

10:00 a.m.

2175 Rayburn House Office Building

I. Introduction

Good morning Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee. Thank you all for the privilege of testifying today. My name is Eric Dreiband, and I am a partner at the law firm Jones Day here in Washington, D.C.

I previously served as the General Counsel of the United States Equal Employment Opportunity Commission ("EEOC" or "Commission"). As EEOC General Counsel, I directed the federal government's litigation under the federal employment antidiscrimination laws. I also managed approximately 300 attorneys and a national litigation docket of approximately 500 cases. I was privileged to work with many public officials who dedicated their careers to serving the public, enforcing the civil rights laws, rooting out unlawful discrimination, and working to ensure that our nation reaches the ideal of equal opportunity for everyone. These individuals continue their important work. They investigate charges of discrimination. They mediate and conciliate disputes and work with individuals, unions, and employers to resolve very difficult and often painful problems. They pursue enforcement through litigation in the federal courts, at every level up to and including the Supreme Court of the United States. And, these very able EEOC officials have the awesome power of the United States government to back them up.

Any law enforcement agency can make mistakes, no matter how well intentioned its officials. And, any law enforcement agency can, at times, become so convinced of the righteousness of its work and its motives that it can become prone to excess in certain circumstances. This includes the EEOC, which is a federal law enforcement agency that is charged with enforcing very important federal laws against discrimination on the basis of race, color, sex, religion, national origin, age, disability, and genetic information, among others.

It is with this background that I appear here today, at your invitation, to speak about three bills that are pending before this Subcommittee: H.R. 4959, the "EEOC Transparency and Accountability Act"; H.R. 5422, the "Litigation Oversight Act of 2014"; and H.R. 5423, the "Certainty in Enforcement Act of 2014."

Before I address the specific provisions of these bills, a little background on the structure and powers of the EEOC will be helpful.

II. The EEOC's Structure And Authority

Congress created the Commission when it enacted the Civil Rights Act of 1964.¹ The Commission is "composed" of five members who are appointed by the President with the advice and consent of the Senate.² No more than three of these members can be members of the same political party, and they serve staggered five year terms.³ The President "shall designate" one member to serve as Chair and one member to serve as Vice-Chair of the Commission.⁴ The statute vests the administrative operations of the agency in the Chair, and she has authority to appoint attorneys, administrative law judges, and other employees.⁵ The Commissioners other than the Chair have authority to vote on policy matters presented to them by the Chair; litigation recommendations presented by the General Counsel; petitions to revoke or modify subpoenas; and a few other matters. The Commissioners other than the Chair do not have operational authority over the EEOC's investigators, litigators, or anyone other than their immediate staffs.

When Congress enacted Title VII of the Civil Rights Act, the statute did not authorize the EEOC to sue anyone. The EEOC could receive charges, provide notice of the charges to those named in the charge, investigate charges, and attempt to reach a settlement. The Attorney General's litigation authority was limited to intervening in cases that involved matters of public importance and to bringing pattern or practice lawsuits, which are akin to class action lawsuits that the government can bring to remedy widespread, egregious unlawful discrimination.⁶

In 1972, Congress amended Title VII in multiple ways and, among other things, authorized the EEOC to file lawsuits in federal court. Congress retained Title VII's multi-step administrative enforcement scheme and determined that the EEOC must satisfy several administrative prerequisites before it can file a lawsuit. Congress tied the EEOC's litigation authority to charges of discrimination, and it required the EEOC to notify the respondent of the charge within 10 days and to investigate charges.⁷ Congress also required that "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁸ As a

¹ 42 U.S.C. § 2000e-4(a).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Civil Rights Act of 1964, Title VII, §§ 705-07, 78 Stat. 241, 258-62 (1964).

⁷ 42 U.S.C. § 2000e-5(b).

⁸ *Id.*

result, the EEOC must “refrain from commencing a civil action until it has discharged its administrative duties.”⁹

In 1972, Congress also transferred to the EEOC the Attorney General’s authority to bring pattern or practice cases and to intervene in pending litigation against private sector employers and unions.¹⁰ Congress assigned the Attorney General with the responsibility to bring litigation against state governments and agencies, and subdivisions of state governments.¹¹

The 1972 amendments to Title VII also created the position of General Counsel of the EEOC. The General Counsel would be “appointed by the President, by and with the advice and consent of the Senate, for a term of four years.”¹² Congress assigned “responsibility for the conduct of litigation” to the General Counsel and authorized the Commission to “prescribe” other duties for the General Counsel.¹³ Congress also directed the General Counsel to “concur with the Chairman of the Commission on the appointment and supervision of regional attorneys.”¹⁴

Notwithstanding the General Counsel’s responsibility for the conduct of litigation, the Congress vested the Commission with the authority to direct the agency’s attorneys to “appear for and represent the Commission in any case in court.”¹⁵ The EEOC has generally interpreted this to mean that the Commission retains the ultimate authority to authorize the Commission to litigate cases.

In 1996, the Commission adopted its “National Enforcement Plan” (“NEP”). The goal was to “free[] the Commission to focus on policy issues.”¹⁶ To accomplish this goal, the NEP delegated nearly all of the Commission’s litigation authority to its General Counsel.¹⁷

Specifically, the NEP “delegat[ed] to the General Counsel the decision to commence or intervene in litigation in all cases except the following”:

⁹ *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

¹⁰ 42 U.S.C. § 2000e-6(c)-(e).

¹¹ See 42 U.S.C. § 2000e-6(c).

¹² 42 U.S.C. § 2000e-4(b).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ U.S. Equal Employment Opportunity Commission, *National Enforcement Plan* (1996), available at <http://www.eeoc.gov/eeoc/plan/nep.cfm> (last visited Sept. 11, 2014).

¹⁷ *Id.*

- A. Cases involving a major expenditure of resources, *e.g.* cases involving extensive discovery or numerous expert witnesses and many pattern-or-practice or Commissioner's charge cases;
- B. Cases which present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;
- C. Cases which, because of their likelihood for public controversy or otherwise, the General Counsel reasonably believes to be appropriate for submission for Commission consideration; and
- D. All recommendations in favor of Commission participation as *amicus curiae* which shall continue to be submitted to the Commission for review and approval.¹⁸

These standards are quite vague and therefore give the General Counsel a great deal of discretion in determining whether to send litigation recommendations to the full Commission for an up-or-down vote. More recently, it appears that the number of matters presented to the Commission by the General Counsel has diminished significantly. One current EEOC Commissioner has explained:

Most people I talk to assume that when the Commission files a lawsuit, that lawsuit has first been reviewed, studied, deliberated, discussed and voted on by the Commissioners. People are shocked when I tell them that, in fact, most lawsuits are filed without the Commissioners' knowledge. For example, last year – [Fiscal Year 2012], 122 lawsuits were filed in the name of the Commission, but under the rules of the Delegation to the General Counsel, only 3 of the 122 lawsuits were sent up to the Commissioners for their review and vote. All the rest were filed without a vote by the Commission.¹⁹

These numbers give the impression of a Commission made up of potted plants and disinterested bystanders.

In December 2012, the Commission adopted its "Strategic Enforcement Plan." That Plan largely reaffirmed the NEP's delegation of authority to the General Counsel. It also required that each District Office – of which there are fifteen – "present[]" a "minimum of one litigation recommendation" for "Commission consideration each fiscal year."²⁰ The Strategic Enforcement Plan does not articulate any criteria for this "minimum."

¹⁸ *Id.*

¹⁹ Commissioner Constance S. Barker, Comments for the Record, Public Commission Meeting on the Implementation of the EEOC's Strategic Plan for Fiscal Years 2012-2016 (February 20, 2013).

²⁰ U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan* (2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm> (last visited September 11, 2014).

This approach does not appear to have worked. To be sure, the Commission's litigation program has had some impressive victories in the last few years, thanks in large part to the very fine work of some highly talented and dedicated lawyers. For example, in 2013, a jury in Iowa returned a multi-million dollar verdict in the Commission's favor after it found that the defendant subjected a group of 32 men with intellectual disabilities to severe abuse and discrimination for a multi-year period. My friend and former colleague, EEOC Regional Attorney Robert Canino successfully tried that case, and I commend him and his colleagues for a very important victory.²¹

Regrettably, however, the Commission has suffered several embarrassing losses.

For example, a federal judge in Iowa dismissed the EEOC's claims for 67 alleged victims of sexual harassment after the judge determined that the EEOC did not comply with its presuit investigation, reasonable cause, and conciliation obligations. The U.S. Court of Appeals for the Eighth Circuit substantially affirmed the district court's decision, and then, in August 2013, the district court sanctioned the EEOC approximately \$4.7 million dollars.²² Unless an appellate court overturns that decision, the American people will have to pay this sanction.

In another case, the Commission brought a very high profile race discrimination class action that alleged that the defendant unlawfully denied employment opportunities to applicants who had poor credit histories. The case was so flimsy that the district court judge dismissed it after she found that the EEOC could not offer admissible evidence that proved any violation. On April 9, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision and chastised the EEOC because it sued defendants for "using the same type of background check that the EEOC itself uses" and because the EEOC brought the 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."²³

In another high profile class action, the Sixth Circuit affirmed a district court's decision to dismiss an EEOC class action and to sanction the EEOC approximately \$750,000. The court found that the EEOC incorrectly claimed that an employer had a policy that excluded anyone with a criminal record and then continued to litigate the case, even though it knew that the employer did not, in fact, maintain the discriminatory policy that the EEOC alleged in its complaint.²⁴

²¹ See EEOC Press Release, "Jury Awards \$240 Million for Long-Term Abuse of Workers with Intellectual Disabilities" (May 1, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm>

²² *EEOC v. CRST Van Expedited*, No. 07-00095, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013).

²³ *EEOC v. Kaplan*, 748 F.3d 749, 750, 754 (6th Cir. 2014).

²⁴ *EEOC v. Peoplemark*, 732 F.3d 584 (6th Cir. 2013).

These cases are not isolated examples:

- The Commission brought a class action lawsuit against an employer that it alleged unlawfully excluded applicants who had a criminal record. The district judge threw the case out after he determined that the EEOC had no admissible evidence of any violation.²⁵
- The U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of a class action age discrimination suit that challenged an employer's decision to maintain an age 60 retirement policy for pilots.²⁶
- A district court in Alabama dismissed the EEOC's challenge to an employer's policy about hairstyles after it determined that no Title VII precedent supported the Commission's claim and that the employer's policy was lawful.²⁷
- The U.S. Court of Appeals for the Fourth Circuit affirmed an award of nearly \$200,000 in sanctions against the EEOC after it found that the EEOC filed suit against an employer even though its years-long delay in investigating the allegations, and the employer's decision to close the facility where the alleged discrimination occurred, meant that no monetary or injunctive relief would have been possible.²⁸
- A district court in North Carolina sanctioned the EEOC after it found that the EEOC failed to preserve evidence.²⁹
- Federal courts in New York, Arizona, Colorado, Hawaii, California, and Texas, among others, dismissed all or significant portions of EEOC's class action lawsuits because the Commission did not comply with Title VII's multi-step administrative enforcement scheme before it filed suit.³⁰

²⁵ *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. Aug. 9, 2013), *appeal pending*, No. 13-02365 (4th Cir. Nov. 7, 2013).

²⁶ *EEOC v. Exxon Mobil Corp.*, 560 Fed. Appx. 282 (5th Cir. 2014).

²⁷ *EEOC v. Catastrophe Mgmt. Solns.*, No. 13-00475, 2014 U.S. Dist. LEXIS 50822 (S.D. Ala. Mar. 27, 2014).

²⁸ *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014).

²⁹ *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, No. 13-00046, 2014 U.S. Dist. LEXIS 38219 (M.D.N.C. Mar. 24, 2014), *report and recommendation adopted by* 2014 U.S. Dist. LEXIS 58938 (Apr. 29, 2014).

³⁰ *EEOC v. Sterling Jewelers, Inc.*, No. 08-00706, 2014 U.S. Dist. LEXIS 304 (W.D.N.Y. Jan. 2, 2014), *report & recommendation adopted by* 2014 U.S. Dist. LEXIS 31524 (W.D.N.Y. Mar. 10, 2014), *appeal pending* No. 14-1782 (2d Cir. May 15, 2014); *Arizona v. GEO Grp., Inc.*, No. CV 10-1995-PHX-SRB, 2012 U.S. Dist. LEXIS 102950 (D. Ariz. Apr. 17, 2012), *appeal pending*, No. 13-16292 (9th Cir. Jun. 24, 2013); *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005 (D. Ariz. 2013); *EEOC v. The Original Honeybaked Ham Co. of Georgia, Inc.*, 918 F. Supp. 2d 1171 (D. Colo. 2013); *EEOC v. Am. Samoa Gov't*, No. 11-00525, 2012 U.S. Dist. LEXIS 144324 (D. Haw. Oct. 5, 2012); *EEOC v. Dillard's Inc.*, No. 08-CV-1780, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011); *EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499 (S.D. Tex. 2012).

The available data does not present a better picture. The EEOC publicizes annual cumulative information about its litigation program that dates back to 1997. According to the EEOC, the Commission recovered \$44.2 million dollars during the fiscal year that ended in September 2012 and \$38.6 million during the fiscal year that ended in September 2013. These are the lowest amounts reported for any fiscal year that is available. By contrast, when I served at the EEOC, the Commission's litigation program recovered an average of about \$140 million each year for victims of unlawful discrimination.³¹

The EEOC sometimes brings hundreds of cases each year. The agency cannot be judged only on those cases in which it was unsuccessful. Nor should anyone suggest that the EEOC's career staff lack a commitment to the agency's core mission of stopping and remedying unlawful employment discrimination. Nonetheless, it takes only a handful of cases in which a court finds that the EEOC used "homemade methodology"³² or submitted statistics with a "mind-boggling number of errors"³³ before the EEOC begins to lose credibility with the courts and, ultimately, with the public.

Two of the bills you are considering today would provide safeguards to ensure that the EEOC does not diminish its credibility as the nation's foremost protector of civil rights in employment. Under current law, the EEOC's General Counsel and Regional Attorneys have almost unchecked discretion to initiate or intervene in lawsuits on behalf of the Commission. H.R. 4959 and H.R. 5422 would limit this discretion and provide for greater reporting of the EEOC's litigation results, in order to hold the agency publicly accountable.

In addition, H.R. 4959 addresses the EEOC's statutory obligation to facilitate dispute resolution prior to litigation. That Bill provides that the EEOC's conciliation efforts before it files a lawsuit must be "bona fide" and "in good faith." Moreover, under H.R. 4959, the EEOC's conciliation efforts would indisputably be reviewable by a court.

III. H.R. 5422 May Restore The Commission's Oversight Of Enforcement

H.R. 5422 would ensure that the EEOC cannot bring major or controversial litigation without a full up-or-down vote by a majority of the Commission. First, it would require the Commission to approve or disapprove by majority vote any cases involving multiple plaintiffs, allegations of systemic discrimination, or pattern or practice claims.³⁴ Second, it would give each EEOC Commissioner the power to require a majority vote on the commencement of any litigation.³⁵ Implementation of these measures would mean that the EEOC's decision to file

³¹ EEOC Litigation Statistics, FY 1997 through FY 2013, *available at* <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

³² *Kaplan*, 748 F.3d at 754.

³³ *Freeman*, 961 F. Supp. 2d at 796.

³⁴ H.R. 5422, § 2.

³⁵ *Id.*

lawsuits would be determined after consideration and deliberation by the five bipartisan members of the EEOC.

H.R. 5422 would neither impede the EEOC's efficient prosecution of civil rights litigation nor interfere with the Commission's ability to focus on policy. As an initial matter, the bill would make Commission approval mandatory only for cases with multiple potential victims. The bill would not require that Commissioners vote on dozens of small-dollar or uncontroversial cases before the Commission files suit.

The bill would, however, increase significantly the number of cases presented to the Commission for a vote. This is not unreasonable. After all, the American taxpayers pay Commissioners and their staff millions of dollars every year, and it is not too much to require that they actually consider whether additional taxpayer resources should be spent litigating EEOC lawsuits. Nor is there any reason to suspect that increased deliberation by the Commission would hinder enforcement. When I served as the EEOC's general counsel, I regularly sent litigation recommendations to the Commissioners for a vote. Nonetheless, the Commission obtained relief for thousands of discrimination victims during my tenure, and the EEOC's litigation program recovered more money for discrimination victims than at any other time in the Commission's history.

IV. H.R. 5422 And H.R. 4959 May Enhance The EEOC's Accountability For Litigation Decisions

H.R. 5422 and H.R. 4959 would both require the EEOC to post data publicly, in an effort to increase public accountability for the agency's litigation decisions. The EEOC already posts some litigation data, and these bills would increase the reporting requirements. Specifically, H.R. 5422 would require the Commission to post information about every lawsuit that it brings pursuant to a vote of the Commissioners, including each Commissioner's vote on the litigation.³⁶

H.R. 4959 has a much more extensive series of reporting requirements specifically related to cases in which the EEOC is sanctioned or ordered to pay fees and costs. The Bill would require the EEOC to track and publicly post data on these cases in conjunction with information regarding whether the litigation was submitted to the Commission for an up-or-down vote.³⁷ These figures would ultimately allow the Commission and Congress to determine statistically whether the Commission's delegation of authority to the General Counsel is undermining the agency's integrity.

H.R. 4959 also contains reporting requirements to Congress. Specifically, in any case where a court orders the EEOC to pay fees and costs or imposes sanctions, the agency's Inspector General would be required to notify the House Committee on Education and the Workforce, as well as the Senate Committee on Health, Education, Labor, and Pensions, and

³⁶ *Id.*

³⁷ H.R. 4959, § 2(a)(1).

conduct an extensive investigation to determine why such an order was imposed.³⁸ This investigation would entail interviews with the EEOC staff involved on the case, estimates of the resources used in prosecuting the case, an explanation of whether the case was brought to a full vote by the Commission, and other relevant information.³⁹ The Bill also would require the Commission to submit a report to Congress about the steps it is taking to reduce instances in which it is ordered to pay fees or is sanctioned.⁴⁰

Increased record-keeping and reporting requirements always run the risk that they may serve no purpose other than to compound bureaucracy. Nonetheless, this legislation would require the EEOC to take a break after a negative outcome in litigation, to step back, and to evaluate why a court sanctioned the Commission. It would also enable the Congress and the public to understand better what happened and why.

V. H.R. 4959 May Hold The EEOC Responsible For Meeting Its Conciliation Obligations

H.R. 4959 would prevent the EEOC from rushing to litigation in another way: it specifically provides for court review of the sufficiency of the agency's conciliation efforts. In addition, it makes clear that the EEOC cannot file a lawsuit without first clearly identifying its claims, and any putative victims thereof, to a putative defendant.

The provisions of H.R. 4959 merely clarify obligations that are already written into Title VII. Title VII outlines a multi-step process that the EEOC must satisfy before it can file a lawsuit. This process requires the EEOC to provide prompt notice of the charge to the employer, investigate the charge, and make a reasonable cause determination if it finds that a violation occurred. Thereafter, the EEOC must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁴¹ The EEOC may file a lawsuit only after it "has been unable to secure from the [employer] a conciliation agreement acceptable to the Commission."⁴²

From 1972 to December 2013, the federal courts policed the EEOC's compliance with its presuit obligations, including the obligation that the Commission conduct meaningful conciliation proceedings as part of an effort to settle any dispute and that the EEOC file suit only if conciliation proves impossible. In December 2013, the U.S. Court of Appeals for the Seventh Circuit became the first court "to reject explicitly the implied affirmative defense of failure to

³⁸ *Id.* at § 4(a).

³⁹ *Id.*

⁴⁰ *Id.* at § 4(b).

⁴¹ See 42 U.S.C. § 2000e-5(b).

⁴² 42 U.S.C. § 2000e-5(f)(1).

conciliate.”⁴³ The case, *EEOC v. Mach Mining*, is pending before the Supreme Court of the United States, and that Court may settle the issue once and for all. A decision is expected by June 2015.⁴⁴

H.R. 4959 would settle the issue by statute.⁴⁵ The Bill would require the EEOC to use “good faith efforts” to engage in “bona fide” conciliation.⁴⁶ Section 3(3) of the Bill would require the Commission, at a minimum, to give accused employers:

all information regarding the legal and factual bases for the Commission’s determination that reasonable causes exist as well as all information that supports the Commission’s requested monetary and other relief (including a detailed description of the specific individuals or employees comprising the class of persons for whom the Commission is seeking relief and any additional information requested that is reasonably related to the underlying cause determination or necessary to conciliate in good faith).⁴⁷

Finally, H.R. 4959 expressly provides that an employer may use documents related to the conciliation process in proceedings to test the validity of the EEOC’s conciliation efforts.⁴⁸

Undoubtedly, H.R. 4959 would provide important protections for employers, by requiring the EEOC to give them all of the information necessary to evaluate properly the agency’s settlement demands. In addition, the legislation would pre-empt the “sue first, ask questions later” mentality that has led to highly-publicized EEOC defeats.⁴⁹ By requiring the EEOC to provide all factual and legal bases for its reasonable cause determination and to identify with specificity each employee who was allegedly wronged, H.R. 4959 will ensure that the EEOC returns its focus to conciliation first, and then litigation, as required by the statute.

VI. H.R. 5423 – The Certainty In Enforcement Act Of 2014

I would also like to say a few words about the third piece of legislation this Subcommittee is now considering: the Certainty in Enforcement Act, or H.R. 5423. This Bill responds to new enforcement guidance that the EEOC issued in 2012 about the use of arrest and

⁴³ 738 F.3d 171, 182 (7th Cir. 2013). See also Press Release, U.S. EEOC, *In Landmark Ruling, Seventh Circuit Holds Employers Cannot Challenge EEOC Conciliation* (Dec. 20, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-20-13b.cfm> (last visited May 20, 2014).

⁴⁴ The docket number for this case is 13-1019.

⁴⁵ H.R. 4959, § 3.

⁴⁶ *Id.* at § 3(1).

⁴⁷ *Id.* at § 3(3).

⁴⁸ *Id.* at § 3(2).

⁴⁹ See *EEOC v. CRST Van Expedited*, No. 07-00095, 2009 U.S. Dist. LEXIS 71396, at *64 (N.D. Iowa Aug. 13, 2009).

conviction records to make employment decisions. Under the EEOC's guidance, the EEOC presumes that employer use of criminal history information creates a disparate impact that violates Title VII. According to the EEOC, national data shows that African Americans and Hispanics are arrested and incarcerated "at rates disproportionate to their numbers in the general population."⁵⁰ Therefore, the EEOC asserts, "criminal record exclusions have a disparate impact based on race and national origin."⁵¹

The EEOC would impose on the employer the burden of rebutting this presumption during an investigation and would give the employer "an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s)."⁵² This so-called "opportunity" is inconsistent with the burdens of proof enacted by Congress, and it saddles employers with the burden of *disproving* discrimination. The message is clear: if an employer excludes anyone because of a person's criminal history – including convictions – the EEOC will assume that the employer has violated Title VII unless and until the employer proves otherwise.

The EEOC's enforcement guidance was not enacted by notice-and-comment rulemaking, and it is unclear whether the federal courts will endorse it. Nonetheless, many are concerned that the guidance adopts an interpretation of Title VII that would have that statute preempt State and local laws that prohibit the hiring of convicted felons for safety-sensitive positions, such as child care. The Commission's guidance says that "an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question."⁵³ But what the EEOC believes makes an individual "unfit for the position in question" is not clear. The Commission's guidance gives only a few examples of what it believes this standard permits, and the Commission's litigation program raises the specter of class action litigation any time an employer excludes any criminals.

For example, in one pending case, the EEOC is suing an employer for violating the "equal employment opportunities" of applicants because the employer allegedly excludes from its workforce those convicted of "Murder, Assault & Battery, Rape, Child Abuse, Spousal Abuse (Domestic Violence), Manufacturing of Drugs, Distribution of Drugs, [and] Weapons Violations," as well as "theft, dishonesty, and moral turpitude."⁵⁴ Does a conviction for murder, rape, and theft make an individual "unfit"? According to the EEOC, an employer must show that its criminal conviction policy "operates to effectively link specific criminal conduct, and its dangers,

⁵⁰ See U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited July 23, 2013) [hereinafter "EEOC Criminal Record Enforcement Guidance"].

⁵¹ *Id.*

⁵² *Id.* But see 42 U.S.C. § 2000e-2(k).

⁵³ See EEOC Criminal Record Enforcement Guidance.

⁵⁴ Compl., *EEOC v. BMW Mfg. Co.*, No. 13-01583 ¶¶ 19-20 (D.S.C. June 11, 2013).

with the risks inherent in the duties of a particular position.”⁵⁵ But there are no statistical studies showing that a convicted rapist is more likely to embezzle funds from an employer or that a convicted embezzler is more likely to endanger fellow employees. No company can realistically meet this evidentiary burden.

Worse still, the EEOC’s policy makes it impracticable, if not impossible, to justify consideration of prior felonies as a legitimate employment concern, even though the federal government itself takes account of such prior convictions in its own personnel decisions. The EEOC’s guidance also repudiates what the federal government’s own employment practices make obvious: a person’s history of compliance with the law is relevant to any job. Indeed, the Supreme Court recently upheld the federal government’s inquiry into whether employees of federal contractors used drugs because “the Government is entitled to have its projects staffed by reliable, law-abiding persons” and “[q]uestions about illegal-drug use are a useful way of figuring out which persons have these characteristics.”⁵⁶ The Court emphasized that questions about an applicant’s “violations of the law,” like other questions going to the applicant’s “honesty or trustworthiness,” are “reasonably aimed at identifying capable employees who will faithfully conduct the Government’s business.”⁵⁷

As further proof that prior criminal activity is a legitimate, nondiscriminatory employment criterion, the federal government routinely performs criminal background checks on applicants for the federal workforce. Government regulations require a “suitability” review, which includes consideration of “[c]riminal or dishonest conduct,” because this bears on “a person’s character or conduct that may have an impact on the integrity or efficiency of the service.”⁵⁸ Although the extent to which criminal convictions automatically disqualify former criminals from federal employment is unclear, the relevant point remains: even the federal government believes that prior criminal convictions are presumptively valid and nondiscriminatory factors that are directly tied to the job-related issue of a potential employee’s “character or conduct.”

If the government is entitled to have law-abiding workers, then surely private employers are as well. And it is all the more necessary for employers to exclude risky criminals from its workforce because employers may be ultimately liable, under principles of vicarious liability, for the work-related misconduct of their employees. That private employers might be more reluctant to expose their customers and employees to former criminals provides no basis for condemning such prudence as unlawful discrimination, at least when there is no intent to discriminate against anyone because of their race or other protected characteristic.

Adding to this problem is the fact that several federal, state, and local laws place restrictions on employers’ decisions about whether to hire persons with criminal convictions.

⁵⁵ See EEOC Criminal Record Enforcement Guidance.

⁵⁶ *NASA v. Nelson*, 131 S. Ct. 746, 759-60 (2011).

⁵⁷ *Id.* at 761.

⁵⁸ 5 C.F.R. §§ 731.101, 731.202.

The EEOC's guidance says that "if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability."⁵⁹

All of this presents employers with a Catch-22. They must either hire criminals and risk violating these other laws and exposing themselves to lawsuits for negligent hiring. Or, if they do not hire such criminals, they risk an EEOC investigation and class action lawsuit.

H.R. 5423 attempts to address these problems by making it clear that it "shall not be an unlawful employment practice for an employer . . . to engage in an employment practice that is required by Federal, State, or local law, in an area such as, but not limited to, health care, childcare, in-home services, policing, security, education, finance, employee benefits, and fiduciary duties."⁶⁰ This Bill may provide a useful fix that will prevent EEOC's informal guidance from trumping certain State and local laws.

If H.R. 5423 becomes law, the Equal Protection Clause of the Fourteenth Amendment, as well as the equal protection component of the Fifth Amendment, will limit the discretion of Federal, State, and local governments to pass laws that would require employers to engage in discriminatory conduct. Nonetheless, for the purpose of greater clarity, this Subcommittee might consider three amendments to the Bill as it is presently drafted.

First, the Subcommittee may consider revising H.R. 5423 to limit it to laws requiring employers to conduct criminal background checks or credit history checks. This seems to be the primary concern of the Bill and amending it this way would clarify the issue.

Second, the Subcommittee may also consider limiting the bill to allow employers to follow Federal, State or local laws that have a disparate impact on a protected class, so long as the laws are targeted to hiring practices in sensitive industries like healthcare and childcare.

⁵⁹ See EEOC Criminal Record Enforcement Guidance.

⁶⁰ H.R. 5423, § 3. Congress should be aware that two provisions of the Civil Rights Act already speak to pre-emption of State and local laws.

Section 708 of Title VII provides:

"Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment [282] practice under this title." 42 U.S.C. § 2000e-7.

In addition, Section 1104 of Title XI of the Civil Rights Act of 1964 applies to all titles of the Civil Rights Act, including Title VII and establishes the following standard for pre-emption:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

See also *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281-282 (1987), which discusses these statutes.

Third, H.R. 5423 appears to respond to the EEOC's expansive interpretation, in its enforcement guidance, of what may be a disparate impact violation of Title VII. Adding language that specifically addresses disparate impact may help clarify that H.R. 5423 is in no way intended to sanction intentional discrimination.

VII. Conclusion

Thank you again for the opportunity to testify here today. I look forward to your questions.

Chairman WALBERG. Thank you, and thanks to each of the witnesses for your statements. And we look forward to those being broadened under questioning. Before I move to recognize my colleagues for questions, 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 such statements and other extraneous material referenced during the hearing to be submitted for the official hearing record.

I would also like to ask for unanimous consent to include in the record a letter of support signed by 19 stakeholders for all three bills we are discussing today, including professional organizations, health care organizations, construction, food service, you name it.

[The information follows:]

[Additional submission by Chairman Walberg follows:]

September 17, 2014

Dear Chairman Walberg, Ranking Member Courtney and Members of the U.S. House of Representatives Subcommittee on Workforce Protections:

The undersigned organizations write to thank the Subcommittee for holding today's hearing on the Equal Employment Opportunity Commission (EEOC or Commission) Transparency and Accountability Act (H.R. 4959), the Litigation Oversight Act of 2014 (H.R. 5422), and the Certainty in Enforcement Act of 2014 (H.R. 5423). Our organizations and members, who represent millions of employers that provide tens of millions of jobs, are committed to ensuring equal employment opportunities in the workplace. While we have no tolerance for unlawful discrimination, we are very troubled by the EEOC's current litigation tactics. We strongly support all three bills, which will provide much needed transparency and oversight of the Commission's litigation efforts.

Over the past several years, the EEOC has pursued a litigation strategy that has wasted government resources and subjected businesses to unnecessary, costly and time consuming court battles. The Commission has aggressively pursued cases that clearly lack merit, refused to share vital information with parties, neglected its duty to engage in meaningful conciliation and frequently subjected businesses to overly burdensome requests for information or overreaching subpoenas.¹ The EEOC's strategy has been widely criticized by federal courts and has cost taxpayers millions of dollars in legal fees as courts have ordered the Commission to reimburse to defendants because of the EEOC's litigation of clearly unmeritorious claims and inadequate conciliation efforts.

H.R. 4959, H.R. 5422 and H.R. 5423 will help ensure the EEOC better directs its resources towards its mission of ending unlawful discrimination. H.R. 4959 will require the EEOC to publish on its website each case it has brought to court, the fees or costs the Commission has been ordered to pay in the case, and whether the litigation was approved by the Commission. It also will strengthen the requirement that the EEOC must conciliate in good faith prior to bringing a case to court and ensure that those conciliation efforts are subject to judicial review. H.R. 5423 protects employers that are engaging in employment practices required by Federal, state, or local laws from EEOC prosecution.² H.R. 5422 will require the Commission to vote on whether or not the EEOC will commence or intervene in litigation involving multiple plaintiffs

¹ A detailed analysis of the Commission's litigation tactics and the costs to taxpayers and businesses is contained in a June 2014 report by the U.S. Chamber of Commerce, which can be found at <https://www.uschamber.com/sites/default/files/documents/files/EEOC%20Enforcement%20Paper%20June%202014.pdf>.

² The EEOC's recent guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights of 1964 states employers complying with state or local background check laws may nonetheless be subject to suits under Title VII, including suits by the EEOC.

or where the agency is alleging systemic discrimination. All of these bills will provide more transparency, accountability and certainty for employers and employees alike.

For aforementioned reasons, the undersigned organizations strongly support H.R. 4959, H.R. 5422 and H.R. 5423. Thank you for your consideration of this important issue, and we look forward to working with you.

Sincerely,

American Hotel & Lodging Association
Assisted Living Federation of America
Associated Builders and Contractors
Associated General Contractors
College and University Professional Association for Human Resources
Consumer Data Industry Association
HR Policy Association
Independent Electrical Contractors
International Foodservice Distributors Association
National Association of Manufacturers
National Association of Professional Background Screeners
National Association of Wholesaler-Distributors
National Council of Chain Restaurants
National Federation of Independent Business
National Grocers Association
National Retail Federation
Retail Industry Leaders Association
Society for Human Resource Management
U.S. Chamber of Commerce

Chairman WALBERG. So without objection, hearing none, they will be included in the record.

I will now recognize the Chairman of the full Committee, Education and Workforce, the gentleman from Minnesota, Chairman Kline.

Mr. KLINE. Thank you, Mr. Chairman. Thanks very much to the witnesses for being here today for your testimony.

Ms. Clements, let me start with you because I want to get at this issue of preemption, federal law, state law, and all that sort of thing that was raised by the Ranking Member and others. The EEOC's criminal background checks guidance states that the fact a criminal background check was conducted in compliance with a state or local jurisdiction requirement does not shield the employer from liability. That is your testimony, and what we are talking about here. And yet there are numerous federal, state, and local laws requiring the use of criminal background checks.

For example, the Senate passed in March, and the House passed this week, the *Child Care and Development Block Grant Act*, which requires states to have policies and practices in place requiring background checks for child care providers and prohibiting employment in federally-funded child care programs of those convicted of violent or sexual crimes. So in this case, we passed, and we hope the President will sign and all that, a law that requires states to have such practices and policies in place. So how is a child care provider, or another small business, supposed to choose between following state law and subjecting itself to EEOC prosecution?

It just seems like that is really between a rock and a hard place. I want to give you the opportunity to expand on that for just a minute.

Ms. CLEMENTS. I absolutely agree with you. It is those types of examples that really illustrate the difficult position that the EEOC's enforcement guidance put employers in. It is a Hobson's choice, with no good answer at this point. And really, I would ask what exactly is an employer supposed to do if they conduct the individualized assessment that is contemplated by the EEOC's guidance and determine that the state or local requirement is not job-related? They still have to follow it. And if the EEOC's answer is that this will never happen, that these types of requirements will always be job-related, then they should have said so in the guidance so that employers could avoid—especially small employers—could avoid this costly individualized assessment.

I don't think these difficult decisions should be made on the backs of private employers. They are simply trying to follow the law. They don't make the law.

Mr. KLINE. Thank you.

Mr. Lloyd, according to your testimony, in its reasonable cause determination the EEOC demanded elimination of the retirement provision, extension of offers to reinstate retired partners, and the creation of a compensation fund for those retirees forced to retire early. Could—we just probably have a couple of minutes here on the clock. Could you sort of briefly describe Deloitte's business model and what the effect of this would be on that? And just—I am very concerned when you get something like the EEOC dictating

what your business model should be. But explain why this is a problem.

Mr. LLOYD. Thank you, Chairman Kline. It is a big problem for us. As I said, we have an ownership structure, partners who are about 4 percent of our total population. And I could go into great detail about why they are real partners. And we are required to have that model. Not necessarily 4 percent, but to be a partnership under various state regulations relating to certified public accountants and the way they can organize. Beyond that, the retirement system we have in place helps ensure that we have appropriate succession planning, that we can plan for the future. Because under many statutes, such as Sarbanes-Oxley in the audit practice for example, we have to rotate people into the positions of leading the audits for independence purposes.

And thus, it is very important to us that we have virtual certainty about how long people can serve in the role as partner, these leadership positions of all sorts within the firm, and plan so that we have orderly transitions and we groom people to move into those positions to comply with the regulations that we are subject to.

Mr. KLINE. Okay, I am about to run out of time here, Mr. Chairman.

I will yield back. Thank you.

Chairman WALBERG. I thank the gentleman, and I recognize the Ranking Member of this Committee, the gentleman from Connecticut, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman.

Mr. Foreman, just to sort of focus for a second on the background check guidance activity by the Commission. Again, just for the record—and I am pretty sure you have followed this pretty closely—but the Commission, as a whole, did actually act on this. This was not something, again, that delegated staff created in terms of that guidance. Isn't that correct?

Mr. FOREMAN. Yes, that is correct.

Mr. COURTNEY. Yes, and it was a bipartisan vote of the Commission. And again, it was trying to get at what is a real-life impact out there, which is that criminal background checks if not used, you know, sensibly, can have the net effect of harming or excluding people from employment who—particularly the African-American and Latinos. And, again, that is something that the Commission studied before it moved forward. Isn't that correct?

Mr. FOREMAN. Yes, absolutely. The data on that point is not in dispute that if you implement either arrest records or criminal background histories, and screen based upon that, you are going to screen out statistically significant parts of minority populations. I mean, the data is uncontroversial on that.

Mr. COURTNEY. But it also made clear that employers are not required to just ignore it entirely. I mean, there was clear latitude that, you know, that sort of guidance allows for common sense decision-making by employers. So that the nature and gravity of prior criminal conduct, the time that has elapsed, the nature of the job, and how—I mean, it all provides safe harbor for employers who—you know, again, if they have got somebody they know is a violent offender that they should not be in a, you know, child care center

or a health care facility or, frankly, almost any employment setting.

I mean, isn't that correct? I mean, they recognize common sense opportunities for employers not to be helpless with information they know about individuals.

Mr. FOREMAN. And absolutely in the guidance did not plow any new ground. I mean, if I could just take a moment, it actually started based upon a case called *Green v. Missouri Railroad*, where they said you can take these into consideration, but there needs to be an individual determination. Does this really impact the persons to do the job? EEOC then issued guidance that was approved by, then—now associate justice Clarence Thomas, saying yes, that makes perfect sense. The case went to the *Third Circuit, El v. Septa*. And the Third Circuit said we would like more guidance from EEOC on this so that we could actually defer.

And then EEOC does hearings and develops very detailed guidance, but has its foundation in *Green* and what Associate Justice Clarence Thomas said was good policy, and is simply out there now so that employers know what the rules are.

Mr. COURTNEY. So, again, all I would just say is that, you know, if there are issues that, you know, you feel are still a problem out there, Ms. Clemens—I mean, frankly, you know, that is something that I think that all of us up here are more than happy to present to the Commission and support in terms of them to reexamine or reevaluate how it is being implemented. But 5423 is a blunt instrument which even Mr. Dreiband's testimony acknowledged, you know, kind of sets in motion a mechanism which sweeps up a much more damaging path as far as the—what it could do to individuals, who have nothing to do with the issue of criminal background checks.

My few remaining seconds here. Mr. Foreman, can you talk about the claim of litigation crisis again in terms of what the real numbers are out there? I mean, we heard sue first, ask questions later. I mean, again, what I am seeing is really almost the opposite in terms of how much actually goes to court.

Mr. FOREMAN. Well, again, the data is out there that EEOC has done a tremendous job in recouping damages and filing all suits. There are several cases that repeatedly get played back as EEOC gone awry. And one thing I think this Committee really needs to understand, if you talk about Kaplan, if you talk about People Mart, I think Crist is one of those also. That all of these bills would not have changed the outcome in those cases at all. Why do I say that? Because Kaplan and Peoplemark were approved by the commissioners. So it went through the process and they approved that litigation.

And in Crist, I think also went through the system, but I am not 100 percent sure on that. And as the conciliation failure, EEOC's position is they engaged in good faith reasonable negotiation and so it would not have changed the outcome at all. But what it would do is provide another layer of litigation and another cost, and prevent innocent victims of discrimination from ever getting in the court if there is some procedural dismissal on the case.

Thank you.

Chairman WALBERG. I thank the gentleman. I recognize myself now for my five minutes of questioning.

Mr. Dreiband, thank you for your comments. Thank you for your suggestions, as well. That is what a subcommittee process is for. And our full Committee chair will appreciate us doing deliberative work here. But early this year I met with General Counsel Lopez, and followed up with a request for documents regarding EEOC's litigation policies. I had EEOC provide me with all the class action and systemic complaints filed between 2009 and 2014. In that, I discovered that only 8 percent of these cases were pursued through Commission approval.

Can you explain to the Committee how a Commission that has designed to implement the nondiscrimination policies of EEOC is barely involved in multiple plaintiff litigation?

Mr. DREIBAND. Well, it has certainly been a change since my time at the Commission. I think that the current approach has essentially been to delegate, in practice and in fact, nearly all authority to the general counsel to make a decision about whether or not to go forward with a lawsuit. That is not how the Commission operated when I served at EEOC. As Ms. Clements noted, I sent dozens if not hundreds of cases to the Commission for a vote. And I found that by doing that, it enabled us to speak with one voice, to send a message to actual or putative defendants, that the Commission's litigation was backed by the full Commission. And I think the results speak for themselves.

I am flattered that Mr. Foreman saw fit to quote my remarks at one time when I served as general counsel. But when I served, with full support of the Commission, we recovered more money for victims of discrimination through our litigation program than ever in the history of the EEOC. And what we have seen in the last couple of fiscal years is that both filings are down, as well as recovery through the litigation program, and down significantly to the lowest levels since the Commission started reporting this data.

So, you know, the Commission is currently free to operate how it wants to. The bills would require more involvement by the Commission. And I suppose my question would be, for anybody who opposes more Commission oversight in deliberation about Commission litigation recommendations exactly what they think these commissioners should do. I mean, the chair of the Commission has the operational authority of the EEOC by statute, but the other four commissioners have no operational authority at all. They don't supervise investigations, they don't direct litigation. All they do is vote on policy matters presented to them by the chair on litigation matters presented by the general counsel or, on occasion, subpoena enforcement actions. And that is it.

Chairman WALBERG. So, would you think that this potential—this policy, as it is being carried out right now—speaking as a former general counsel, creates the possibility of abuse of power by the general counsel in this whole process?

Mr. DREIBAND. Well, I think that the current general counsel is a friend and former colleague of mine. And I think he is well-intentioned and doing the best job he can do. I don't—but I don't think, though, that having oversight by the commissioners does anything other than strengthen the litigation program by the Commission.

It sends a message to the public, to potential defendants, that the Commission stands behind the decision to commit resources and to file the lawsuit. And simply creates a review of potential litigation, including some of these embarrassing losses that the Commission has suffered lately that may or may not have occurred, of course, as Mr. Foreman pointed out.

But in the same way that the grand jury reviews an indictment presented by the prosecutor, the Commission has served that function very well, certainly during my tenure and at various other times in the history of the agency.

Chairman WALBERG. Thank you. Let me move over.

Mr. Lloyd, recently EEOC investigated PriceWaterhouseCoopers for including a mandatory retirement age in its partnership agreements, sounding familiar to your situation. The EEOC general counsel submitted that case to the Commission, but the Commission by a three-to-two vote did not approve litigation. Why is EEOC investigating Deloitte for the same type of partnership agreement that PriceWaterhouseCoopers has, when the Commission already decided the issue did not merit litigation?

Mr. LLOYD. Mr. Chairman, I have to say I have no idea. I am sorry that I can't answer that question.

Chairman WALBERG. I figured that would be your first response. But are legal issues any different in the two cases?

Mr. LLOYD. No, the legal issues are no different. If anything, our partnership agreement provides for more participation by partners than PriceWaterhouse's does. But essentially, we are in the same business, we have the same business model, we have the same partnership structure generally. Our age is 62 for mandatory retirement, their age is 60. So in that sense, there is a slight difference. But we have not been given, thus far, any notification of the basis of the staff's determination that we violate the *Age Discrimination Act* other than they believe any mandatory retirement policy based on age is inappropriate.

Chairman WALBERG. So then do you believe the Commission's rejection of the PriceWaterhouseCoopers case set a precedent the agency should follow unless it provides a compelling explanation of why it is abruptly reversing course?

Mr. LLOYD. I do believe that, yes, sir.

Chairman WALBERG. And that is the challenge that you have, then, in dealing with something that is now seemingly a precedent-setter. But going over what they have already said.

Mr. LLOYD. It is. And, you know, one thing that we very much would like is an opportunity to discuss with the commissioners themselves the reasons why they did not elect to proceed against PriceWaterhouse and the reasons why they should not elect to proceed against Deloitte.

Chairman WALBERG. Okay, thank you. My time is up.

I now represent—I now ask the representative—where has he gone? Oh, there he is, right here. Representative Takano, who has stepped into the Ranking Member's position here, for your five minutes of questioning.

Mr. TAKANO. Thank you, Mr. Chairman.

Mr. Foreman, could you comment on this colloquy on the role of the Commission and Deloitte's interest in having its interests re-

viewed by the entire Commission? And maybe just comment on what you think the role of the Commission ought to be.

Mr. FOREMAN. Yes. And I will give my disclaimer that I am not an expert on the facts of the specific case. But what I think this represents, and what we have heard today, is that everybody supports the discrimination laws except when they are aimed at their client. And then they come before you and say it is not fair that we are being targeted. And why do I say that? And Chairman Walberg, you used the term “precedent-setting.” Here is the reason I say that. That case is based on a precedent that was set by EEOC years ago, where they sued a law firm—Sidley & Austin—arguing that their partners were employees.

That was litigated—a litigation that was approved and brought by my colleague, General Counsel—then-General Counsel Dreiband, and approved by the Commission. So they had a policy of doing exactly what they are doing with PriceWaterhouse. So there is not some change of the rules. They are taking existing precedent and challenging it. And at some point, the courts and the Supreme Court will say are these individuals employees for purposes of coverage, or are these employees partners?

Mr. TAKANO. Well, I want to shift topics a little bit. The majority seems to be using the EEOC’s recent guidance on background checks as justification for acting on H.R. 5423. It is my understanding that the EEOC guidance allowed for flexibility based on the nature of the employment. I know that we had some of this discussion with Mr. Courtney, but can you elaborate on that? The scope of H.R. 5423 seems to go well beyond the issue of background checks. What kinds of repercussions could a bill of this breadth have on the EEOC?

Mr. FOREMAN. Again, and it was talked about earlier, if you apply that bill as written it applies to intentional discrimination, disparate impact discrimination. A state or local government could pass a law that says women could not do X. It would be exempted by—under that bill. Now, there is a recognition that maybe it should be limited to criminal history backgrounds, but even that presents a problem because you are elevating local and state law over federal law. Title VII was written to do exactly the opposite.

Mr. TAKANO. So as you covered in some of your testimony, I am still curious about 5423, some of the problems it would cause. In your opinion, if we went back to the quote, unquote—“states rights schema” to root out discrimination in the job, what are some of the challenges that workers would face? And you named a lot of them just now.

I am just curious. Mr. Lloyd, given Deloitte Touche’s commitment to the mission of the Commission, is H.R. 5423 something that you could support, knowing what you know now?

Mr. LLOYD. Sir, I think that we support all the bills that are proposed. I think some of them could be improved, as Mr. Dreiband suggested. But there are—there is guidance issued by the EEOC that is problematic in practice. And we think that things can be improved. The processes and guidance from the EEOC can be improved, sir.

Mr. TAKANO. One last question. H.R. 4959 would mandate, quote—“good faith efforts to endeavor” to resolve charges by,

quote—"bona fide conciliation." In doing so, it would at least, in part, deal with issues set forth by the Seventh Circuit in *EEOC v. Mach Mining*, which is pending before the Supreme Court. Should Congress be getting involved in this issue? I think you already answered that, Mr. Foreman.

Mr. FOREMAN. My view is absolutely not. That we have a Supreme Court, we have exactly that issue there. The business community is making their arguments. The United States government will be making their arguments. And probably by June we will have a decision on what that conciliation provision means in Title VII. Why change it now?

Mr. TAKANO. And what exactly do good faith and bona fide mean, as used in this legislation?

Mr. FOREMAN. Well, that is part of the underlying litigation. Why the Seventh Circuit said that you cannot utilize that as an affirmative defense. Because, one, EEOC has absolute discretion as to whether it fulfills—the settlement fulfills the duty of Title VII. So is one more offer required, is one more dollar required? And if EEOC says no, we are gonna fail conciliation, is that bad faith conciliation? And the court says you cannot adopt a workable standard, and that is the reason we can't make an affirmative defense as this bill would attempt to do and as the employers are arguing in *Mach Mining*.

Mr. TAKANO. All right, thank you, sir.

My time has run out.

Chairman WALBERG. I thank the gentleman.

I now recognize my colleague from Indiana, Mr. Rokita.

Mr. ROKITA. I thank the chair, and I thank the witnesses for their testimony. I always learn a lot at these hearings, and I think that is what they are about. And perhaps unlike some others that were here earlier, I try not to prejudge them. But having said that, I do want to start off by offering some time to Mr. Lloyd. In Indiana, we have a saying that it is a pretty thin pancake that don't have two sides. And I think the actual quote is "don't" instead of "doesn't." But if you had anything else to add to the recent comments of Mr. Foreman, you are welcome to say them now, for a couple seconds.

Mr. LLOYD. Thank you. I actually know the facts of the *Sidley* matter better than Mr. Foreman because I was partner at *Sidley & Austin* and on the executive committee at the time the EEOC brought that litigation. And I think Mr. Dreiband made an error in suing *Sidley*. But in any event, I can tell you that on the one hand we have the *Sidley* matter—where the Commission approved, going forward, and I understand why. And we have the PWC matter, where based on very different facts the Commission made the decision not to go forward. And our facts are very similar to the PWC situation, and very dissimilar from the *Sidley* situation.

And I would like the opportunity, as I would have, for example, at the SEC if the staff made a recommendation to proceed, to submit, in one form or another—and maybe even visit with—to the commissioners the facts so that they can make an informed decision about whether it makes sense as a policy matter, as a matter of whether this is a novel issue of law, and as a resource allocation matter. I mean, who are we going to protect here by initiating this

litigation and tying up our staff time on this? And I can tell you, we take votes. Sidley partners did not vote, for example. That is a very important difference.

And my guess is that if at Sidley we would have had votes taken by the partners on a routine basis for such things as electing leadership that the EEOC, at the time, would have made a different decision and would not have authorized proceeding against Sidley.

Mr. ROKITA. Thank you, Mr. Lloyd.

Mr. LLOYD. Thank you.

Mr. ROKITA. And this is to you and Mr. Dreiband. In my prior public service, I was Indiana secretary of state. In that great job, I had the opportunity to oversee several boards, appoint several boards, create into statute boards. Some boards, you know, were politically divided equally: two Republicans, two Democrats. That usually ended in a disaster. But some were all my appointments, as a person being directly elected by the people. And then some had different varied degrees of political appointments. But they weren't necessarily partisan. It was just a way to decide things and to reflect the will of the people through their elected representatives.

It seems to me, in hearing this discussion, that if you are having unelected attorneys, bureaucrats—whatever word you want to use—make these decisions, you are kind of tipping the scale of what the statute might have intended and the legislature might have intended in terms of the political appointments and how these decisions were supposed to be, really, made. Can you comment on that briefly, Mr. Lloyd? And then Mr. Dreiband, same question?

Mr. LLOYD. Yes, I would be happy to respond. I agree wholeheartedly. And it has nothing to do with the competence of the attorney or the good faith of the attorney. Speaking as a general counsel myself, you know, I many times have oversight that sometimes I wish I didn't have. But I have found that, over time, that oversight and getting differing opinions from people who are experienced and have different insight—come from different backgrounds, have different points of view—is extremely valuable. I learn things, I then make different decisions on occasion from what I would normally do.

Mr. ROKITA. And then Mr. Dreiband, in the time I have remaining. Thank you, Mr. Lloyd.

Mr. DREIBAND. Sure. Any law enforcement agency, no matter who they are, can become prone to overzealousness and excess. That is true of prosecutors, that is true of police departments. And, at times, it is true even of the EEOC. To deal with this issue, Congress created the Commission; a bipartisan Commission of five people, appointed by the President, confirmed by the United States Senate, to serve staggered five year terms. No more than three of those five members can be of the same political party. As a result, the Commission, in the statute itself, is responsible for authorizing attorneys appointed by Title VII of the Civil Rights Act to appear in court at the direction of the Commission.

Congress did not intend, and there is nothing in the—any statute to suggest that Congress did intend, for the Commission to delegate all of its authority about litigation entirely to other people in the agency. And that appears, in practice, to what has happened

at the EEOC. In the same way as I said earlier that grand juries provide a check on prosecutors, even the most well intentioned prosecutors, the Commission can serve, and has historically served, that same function at the EEOC.

Mr. ROKITA. Thank you, Mr. Dreiband.

Seeing my time has expired, Mr. Chairman, I am yielding back. But I also would like to note for the record that the Ranking Member indicated that the hearing was only noticed for eight days. That is actually a day long—extra day than what the rules actually require. And I would hope that the Ranking Member, with 25 years of law practice, would have read our rules.

Chairman WALBERG. I appreciate the former secretary of state's attention to detail. And yes, it was eight days, while we were only required seven days.

I now have pleasure of recognizing the gentleman from Virginia, Representative Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Foreman, we have talked about the background checks. The case I remember from—was the Griggs case, where they required high school diplomas, which had nothing to do with your ability to do the job. And it had a disparate impact in the community without having any relationship to the jobs. Now, this background check thing comes into practice with what is called that box you have to check. And there is a campaign to ban the box because when you check the box your application summarily goes into the trash.

Now, we have heard of situations where you—it would be illegal to hire people who have been convicted of violent crimes or sexual—or people who have—sexual abuse. Would it be improper to have a box on the application that states violent crime or sexual abuse as opposed to a box that generally any felony or any arrest or anything else that would be generally applicable? It seems to me that the general box, any felony, would be over-broad and would include a lot of people that would not be prohibited from being employed. And you would have the—you are back to the disparate impact without any job relation. Is that true, Mr. Foreman?

Mr. FOREMAN. I mean, that would be one way to attempt to address it. I mean, you are absolutely right on banning the box. I mean, what happens is, many employers will adopt a policy that says have you ever been arrested or convicted of a crime. If the answer is yes, you are out of the screening process and there is no individualized assessment. And part of what EEOC's guidance is trying to do is say let's look at the person. Is this person rehabilitated? Is it proper—can this person do the job? Is it reasonably related to the job? That is really all the guidance is trying to do.

In going back, as you said, to *Griggs v. Duke Power*, that was a GED that screened out minority employees. And the court there found that it was discriminatory, developed a disparate impact analysis, and we discovered there are other things that do that. And that is what the criminal guidance is supposed to do. The problem with the proposed bill, then, it then takes and exempts state and local governments from basically the requirements of Title VII. When it was passed, that was vital to Title VII. So let's not understate what the proposed bills are doing. You are rewriting

one of the most historic civil rights statutes of our history in a way that doesn't add any benefit.

Mr. SCOTT. Mr. Foreman, can you state the present law on discrimination cases as they relate to sex discrimination, what you can recover, as opposed to other forms of discrimination—race, religion, national origin? Are there differences in what you can recover?

Mr. FOREMAN. Well, they are absolutely different in terms of what EEOC can recover as opposed to an individual who may bring a claim under—and I don't want to get bogged down in terminology, but 42-USC-Section 1981 there are uncapped damages. You—the jury will award whatever the damages are that were the cause of the discrimination. Whereas under Title VII, they are capped according to the size of the employer.

Mr. SCOTT. Well, is it different in Title VII from other forms of race discrimination? They are uncapped under 1981, but not uncapped in others?

Mr. FOREMAN. Well, 1981 only applies to race discrimination-based claims. So if you bring a race-based claim under Title VII in an employment context you are capped. But you are also capped in sex discrimination, any of the protected coverages under Title VII. Did that answer your question?

Mr. SCOTT. I think—yes. Well, does the—we have the *Fair Pay Act* for sex discrimination cases. Can you say what they would do to improve the situation, the *Equal Pay Act*?

Mr. FOREMAN. Well, the *Equal Pay Act* has a different regimen that does not have the same level of damages. I mean, the reality is that the discrimination law should provide whatever damages the person suffered, whether it is sex-based discrimination, race-based discrimination. And I think the *Fair Pay Act* is attempting to get at that to say if you are—if you prove that you are a victim of intentional discrimination, then you should be entitled to whatever economic damages that discrimination caused you.

Chairman WALBERG. The gentleman's time has expired. Thank you.

And now I recognize the sponsor of H.R. 4959, my colleague from North Carolina, Mr. Hudson.

Mr. HUDSON. Thank you, Mr. Chairman.

Mr. Lloyd, I have read your testimony and I have to tell you I am really deeply concerned that at a time when—with limited resources EEOC has, what, some 77,000 pending claims they are looking at, that they have just—that they have made a decision to go after your firm and the mandatory retirement age, when no one has filed any sort of complaint or there have been damages. This is a decision made by a group of partners who manage this firm. And the irony of it is, if the firm decided to comply with the lawyers at the EEOC's request it would require a vote of the partners to make the change. Frankly, it is outrageous to me.

But my question to you is, do you believe that if the EEOC continues to pursue this line, this matter, that it would involve a major expenditure of resources by the EEOC and/or trigger the public controversy test requiring a vote of the Commission?

Mr. LLOYD. Well, I strongly believe that it would meet those tests, as well as the tests that this would be a novel application of

the law for reasons we discussed. It would require extensive expenditure of resources by the EEOC. Not court costs and things like that. But when you think of valuable staff time, this would be major litigation. We would defend ourselves vigorously because we think they are wrong as a matter of law and as a matter of fact. And so the EEOC staff devoted to that litigation would be fairly extensive. And those people would not be able to pursue those 100,000 claims, or charges, that they get of individuals who need real protection.

I mean, we are talking about, at Deloitte, people who are real partners but, beyond that, very highly compensated. And we have done a study in response to this that shows that our partners who have retired, been required to retire in the last five years, have been overwhelmingly—as I said in my testimony—white males. And yet our population coming along through the staff and eligible to be admitted to the partnership is much more diverse. And over the last five years, while our white males have been retiring, 88 percent of our retiring partners have been white males over that last five years and only 12 percent women and minorities.

On the other hand, the newly-admitted partners during that same period of time have been 41 percent women and minorities and 59 percent white males. And so the operation of the mandatory retirement system has actually caused our partnership to become more diverse, and it clearly will in the future.

Our population of people below the partner level is incredibly diverse, and they are wonderful performers and they are going to advance to partnership. But if we were not able to have this mandatory retirement provision that we do have, age 62, then—we have a limited number of partnerships—and so the opportunities for the women and minorities would be limited. Not foreclosed, but they would be limited. And, to me, that is a perverse result when you think of all of the objectives of the statutes that the EEOC is tasked to enforce, and objectives that we believe in quite strongly. I mean, we do our own internal disparate impact analyses, and we make sure that we are doing the best job we possibly can to provide equal opportunities and development opportunities for our women and minorities. And this would hinder that.

Mr. HUDSON. I appreciate that. And, Mr. Chairman, I do believe the cost involved, as well as the public controversy test certainly comes in play here. And I would hope that the EEOC, if they choose to pursue this, will move to a vote of the Commission. Because I think that is what the statute requires.

Changing direction here quickly, Mr. Dreiband, my bill, H.R. 4959, has a provision clarifying the EEOC's conciliation efforts must be in good faith and are subject to judicial review. Professor Foreman's testimony criticizes this provision as undermining the separation of powers because the Supreme Court has granted review on this very issue in the *EEOC v. Mach Mining*. Do you believe it is appropriate for Congress to clarify what the duty of the conciliation entails?

Mr. DREIBAND. Well, I don't see anything wrong with Congress clarifying the matter if Congress decides to do that. Congress is an independent branch of the United States government, and it is not

in any way limited by the fact that a lawsuit is pending before any particular court, including the Supreme Court of the United States.

Mr. HUDSON. Appreciate that. Trying to use my time as efficiently as I can.

Ms. Clements, thank you for your testimony. I have read that, as well. You described instances of what could be characterized as abusive investigatory tactics at EEOC. You also described situations where EEOC would make a predetermination settlement demand, and when the employer declined the EEOC would quickly drop some of the charges. The *EEOC Transparency and Accountability Act*, which I have introduced, clarifies the EEOC must conciliate in good faith and provide specific information to the employer about the factual basis of the allegations and the effect on employees, and the EEOC's conciliation efforts are subject to court review. How would these provisions alleviate the problems you have seen at EEOC investigations and mandatory conciliations?

Chairman WALBERG. Seeing that time has expired, and yet being a sponsor of the piece of legislation I will ask you to respond as quickly as possible, and the rest could be put in writing.

Ms. CLEMENTS. I think it is important for the Committee and the EEOC to recognize that employers, when faced with appropriate information from the Commission, are more than willing to come to the table and try to fix problems that the Commission sees. What is happening now is that employers don't have enough information to really evaluate the strength of the EEOC's findings. And it makes it difficult for employers to pursue negotiations in good faith. And so one of the things that I think your bill would help is provide that information so that both parties can come to the table in good faith with the same information about the employment practices that are at issue.

Mr. HUDSON. Great. I thank the Chairman for his magnanimity and discretion there. Thank you.

Chairman WALBERG. How is that defined in North Carolina? I am not sure about Michigan either, so thank you. I thank the gentleman. And thanks to the panel. We appreciate your very considered testimony, answers to question, ideas. And that, again, is the purpose of this subcommittee.

And now I would ask my Ranking Member to conclude with his concluding remarks.

Mr. COURTNEY. Thank you, Mr. Chairman. Again, thank you to all the witnesses for the time you devoted here this morning. Again, I understand that while I was over at the Agriculture Committee someone raised a question about whether or not I was challenging whether the Committee had followed the rules. That was not my point earlier. There is no question seven days is the rule. The issue, really, is that this is, I think, our third hearing or possibly our fourth hearing on EEOC over the last two years or so. Once the chair was the witness, but since then the scheduling of the hearing process has basically effectively excluded the Commission from participating in a—in what I think would be a helpful dialogue in terms of trying to express frustrations that members may have, constituents may have.

Because in my opinion, you know, a legislative response, which is really, you know, what is on the agenda here today—is a fool's

errand. I mean, the chances of any of these bills getting enacted in the 113th Congress are about as remote as the Red Sox getting into the playoffs. And if any of you follow the standings, they have been mathematically eliminated. So that is impossible. And so, you know, we have this exercise for whatever purpose. And, again, it is gonna accomplish nothing in terms of changing the law. And what I think would be a better use of time would be to actually engage with the Commission and the department.

We have tangible results in the last nine months since Secretary Perez has taken over, where he has listened to bipartisan concerns that members have raised with the department in terms of department operations. And he has responded to those with real tangible results.

And, again, I think, you know, having legislation which was just filed, you know, in certainly the last case, you know, within just a week ago, and expect that to somehow advance the ball here in terms of, you know, really trying to improve the agency's performance, again I just think is—with the productivity of this Congress in terms of the amount of legislation that has actually been enacted, you know, just not, in my opinion, the most effective use of time.

And so, again, the 50th anniversary of the *Civil Rights Act* is something that we observed as a nation this year. I think, again, Mr. Foreman, helped try and sort of rebalance the record here today into showing that there still are people who suffer from racial and civil rights violations in this country. The EEOC has a very necessary role in our economy, in our country. And what, I think, hopefully this committee will do is come up with strategies that, in my opinion, does not trample on the mission of Title VII and the *Civil Rights Act* but, in fact, in a measured, balanced way move our country forward. Which is really the best way to celebrate the 50th anniversary of the *Civil Rights Act*.

And with that, I yield back.

Chairman WALBERG. I thank the gentleman, and I take his points. We are also celebrating Constitution Day today. That is an important document as well that I think gives an awful lot of direction for what we are to do in Congress. You mentioned Boston, I will mention the Tigers right now. And we are hopeful that they have a better opportunity of being in the World Series. But that is not certain. It could change this weekend.

There are 384—at least 384 bills that sit over in the Senate right now that have been passed after significant effort, after this body has spoken. Much of that wealth of legislation is bipartisan, to some degree. It sits over in the Senate without any action. We don't reasonably expect them to take action on it, sadly. But we certainly expect us—and as we have opportunity we expect us—to take action here, and address issues that have perked to the top with great concern. And that has been the case. We have had the EEOC over here. We have had—I have had the EEOC in my office. We have sent letters. We continue to have concerns that are expressed.

The overriding intent of Congress in putting the EEOC into operation was to clearly give the opportunity to make sure that unnecessary—well, let me change that. That—I was going to say unnec-

essary time was not spent. But I am going to say that all necessary time would be spent on making sure that discrimination did not happen, that people were afforded—regardless of who they are, what they believe, the color of their skin, their gender, their disabilities, were not discriminated against. And that complaints were brought before a Commission. And we established a Commission to be a Commission with some latitude to decide how they function, to some degree. But a Commission to clearly make decisions that had impact upon equal rights and opportunity and the way businesses functioned.

And so I guess today is, I hope, not an exercise in futility, but a laying down and establishing a claim by Congress on its concern that issues of concern be addressed. And if there are better ways of dealing—and enhancing this legislation that has been put forward, we are certainly willing to look at it. But when you have 70,000 complainants expecting some response by a Commission that is a backlog right now, and you have other complaint—other cases that are being initiated without complaint—I think that is a problem we ought to ask questions, at the very least, about. And that the EEOC ought to know that there are members of Congress on this subcommittee, on the full Committee and in Congress at large that want those issues of concern addressed and not just carrying on the same old, same old.

When you have actions without employee complaint, when you have uncertainty, inconsistency being brought into the mindset of businesses, employers, and employees attempting to understand the system, we ought to address that concern. At least ask questions. And hopefully the EEOC is listening. They certainly have an opportunity to respond—and I am sure they are listening—respond in letter to us expressing concerns, expressing ideas; some that have been addressed today here already by our witness panel of suggestions on how legislation could be addressed to go forward.

The hearing at least, as I said, lays a claim to carrying on our concern. Whether it is successfully concluded with this session of Congress, or whether it establishes a base to pursue more aggressively to conclusion in the next Congress, I think that is an important opportunity and responsibility of this subcommittee. Having said all of that, we will look forward to the response, as well as carrying on further.

I again want to thank the panel for being here. I thank my committee members for their attention today.

And there being no further business, the subcommittee stands adjourned.

[Additional submission by Mr. Courtney follows:]

Appendix A

Attached is a July 2013 report prepared for the Committees on Appropriations titled "Public Outreach and Education Efforts Concerning EEOC Guidance on Arrest and Convictions Records." Since this report was developed EEOC staff have continued to present material to explain the guidance: reaching over 80,000 people nationwide through over 900 outreach events. This is an increase from the almost 45,000 individuals and 500 events discussed in the July 2013 report.

**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/D9UC710G2.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-employmentbackgroundchecks12e8fp9u1-20120425_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

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 Title VII.

- 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 Maldonado 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.

Appendix B



EmployeeScreenIQ®
Smarter Screening. Intelligent Hiring.™

SURVEY REPORT 2014

The Unvarnished Truth:

2014 Top Trends in Employment Background Checks

Conducted and Reported by EmployeeScreenIQ





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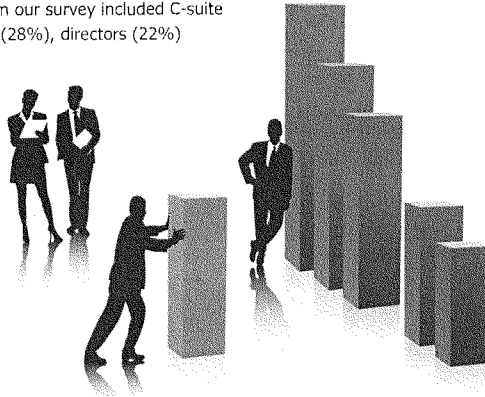
ABOUT THE SURVEY 2014

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

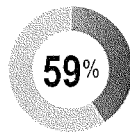
Individuals who participated in our survey included C-suite executives (10%), managers (28%), directors (22%) and others.





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.



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.

**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.

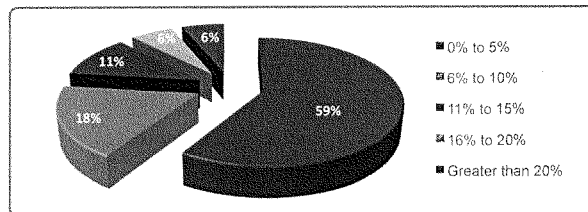


QUESTIONS & RESPONSES 2014

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.

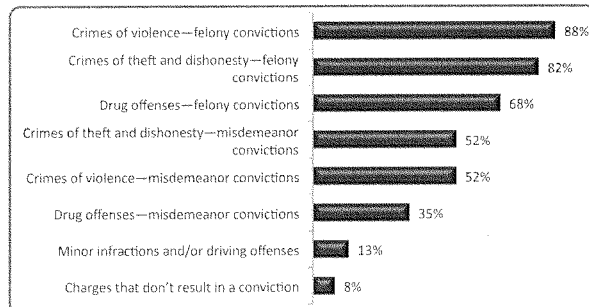
Employers who use less-exhaustive background checks could be putting their organizations at serious risk with lower quality results



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.



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."

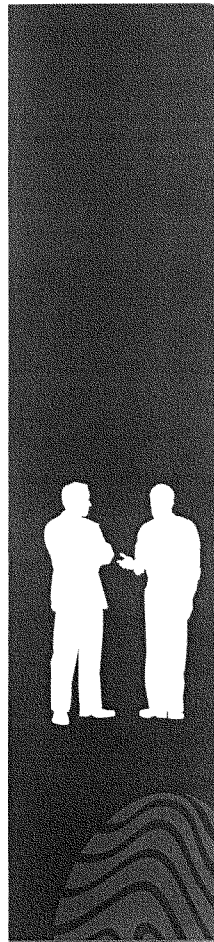
"We have a contract with our clients that we will not hire any felons and anyone having misdemeanor dealing with theft, fraud or violence."

"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."

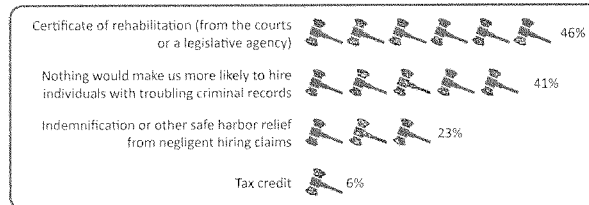
"We are a law enforcement agency, so we do not hire people with felony convictions or convictions of crimes involving violence or dishonesty."

"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."



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'."



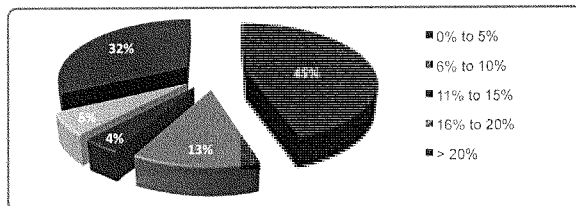
"Too many qualified candidates looking for jobs. Don't need to be involved with people with a troubled legal history."

"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.



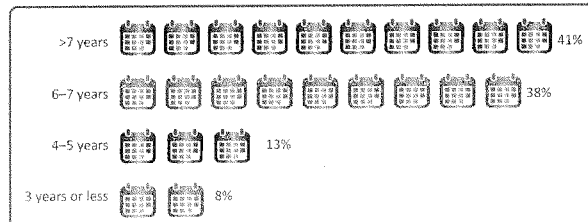
Employers aren't simply disqualifying vast numbers of job candidates out of hand due to criminal convictions

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.



Most employers want to consider as much data as possible to make an informed hiring decision

Question 5: When determining the hiring eligibility of your candidates, how far back in time do you search for criminal convictions?

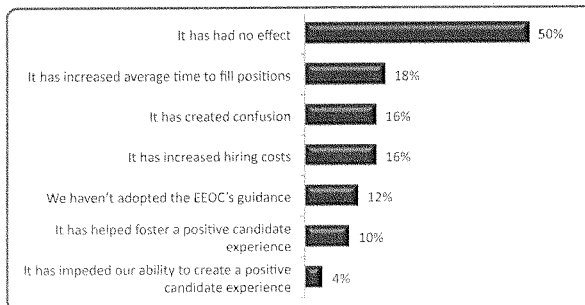


These results are extremely similar to those of last year's survey. Almost half of the respondents go beyond seven years in their criminal background checks, an ongoing indication of the heightened care employers are applying to their hiring practices. However, based on the responses to Question 1 of 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.

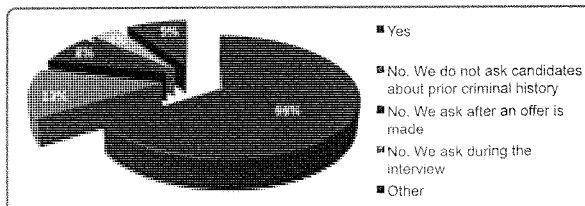
Question 6: How has the adoption of the EEOC's guidance on employers' use of criminal background checks affected your hiring process? (Select all that apply.)

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.



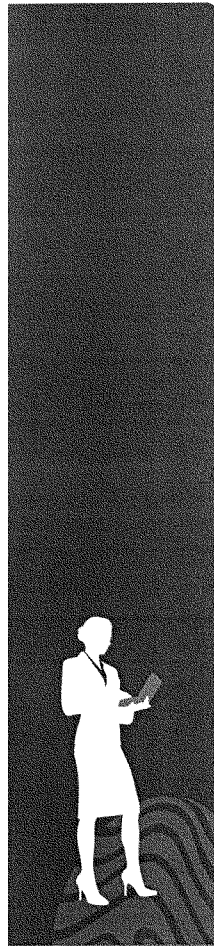
Overall, 88% of respondents this year indicated that they've adopted the EEOC's guidance as opposed to just 32% of respondents at the time of last year's survey.

Question 7: Do you ask candidates to self-disclose past criminal convictions on their job applications?



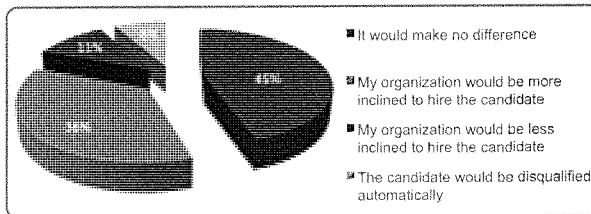
In spite of the EEOC's recommendation to remove the question that asks applicants to self-disclose past criminal convictions and a myriad of similar state and municipal laws, 66% of respondents continue to ask candidates to self-disclose past criminal convictions on job applications—and a total of 78% 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



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."

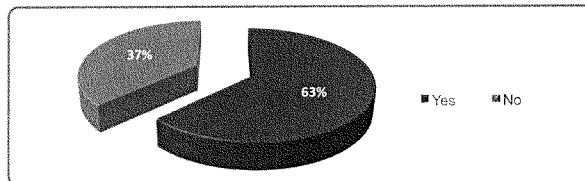


Those not in compliance with the FCRA do not realize they're executing the process improperly

"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?



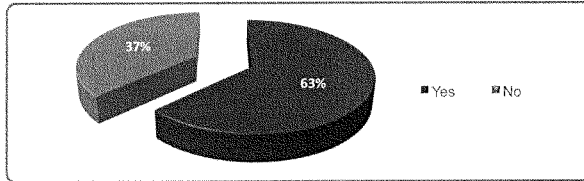
Frankly, we're concerned that nearly 40% of respondents *do not* send a pre-adverse action notice to candidates who are not hired based in part on a criminal conviction. These respondents are, by their own admission, violating the law and putting their organizations at risk for violating a basic principle 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

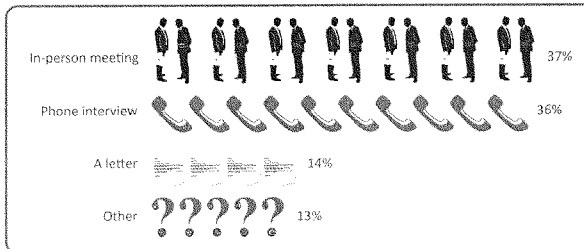


EEOC. We believe the adoption rate will continue to grow in the coming years unless the courts reject the guidance.



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?

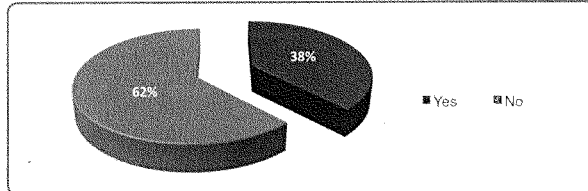


While no governmental or legal body has yet clarified how individualized assessments are to be conducted (or what the "preferred" method might be), the majority of respondents are using either in-person or telephone interviews. Regardless of how you conduct these assessments, we suggest that you clearly document your policy and process.



The business world's enthusiastic embrace of online media does not translate to the hiring process

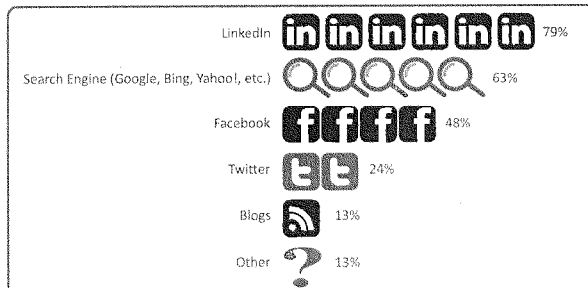
Question 12: Does your organization conduct online media searches for candidates as part of your hiring process?



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.

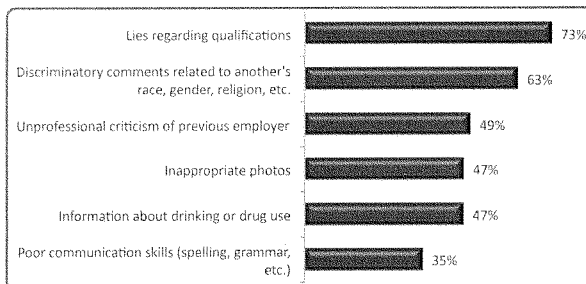
Question 13: If you answered "yes" to question 12, which sites do you use? (Select all that apply.)





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

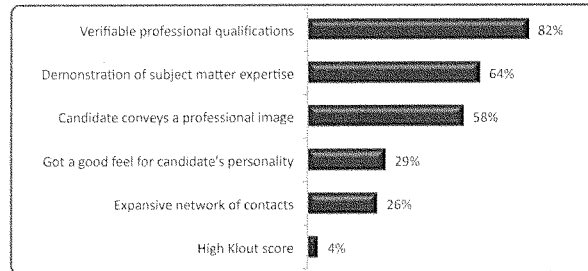
While lies about qualifications are the most troubling details that respondents find online, the majority would also disqualify candidates for discriminatory comments—and almost half disqualify candidates for unprofessional criticism of past employers, information related to drug and alcohol use, and 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.)

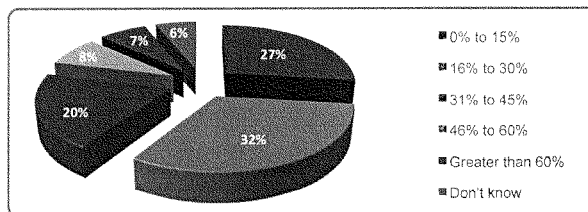
Again, there are no real surprises in these results but they reinforce the notion that qualifications and professionalism are paramount in employers' ultimate selection of job candidates. These results also support the



contention that employers are not using online searches only to disqualify candidates but to help validate their hiring decisions.

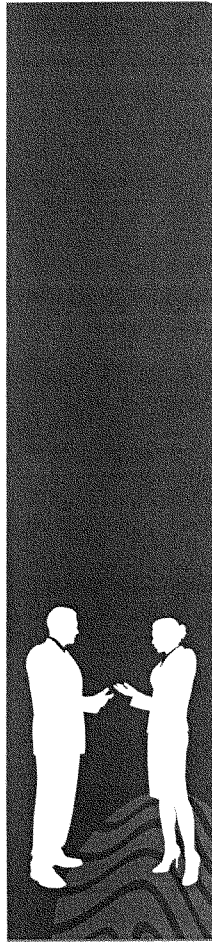


Question 16: What percentage of your candidates do you estimate distort information on their resumes?

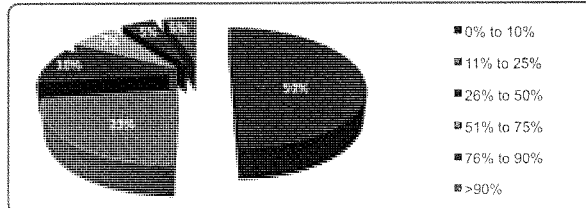


When comparing this year's results to last year's, the largest share of respondents shifted from the first category (0% to 15%) to the second category (16% to 30%), despite the total of both categories remaining almost identical. Perhaps employers are becoming more aware of the widespread problem of 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.



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."

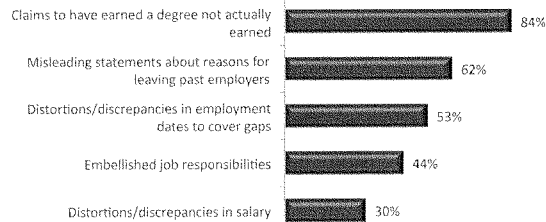


"If someone blatantly misrepresented themselves we would not hire them. Most people attempt to increase their salary."

"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.)

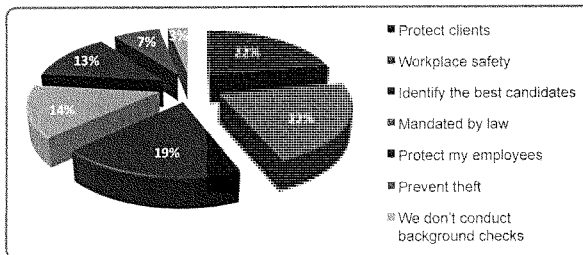


Only about 8% of candidates actually lie about their degree on their resumes

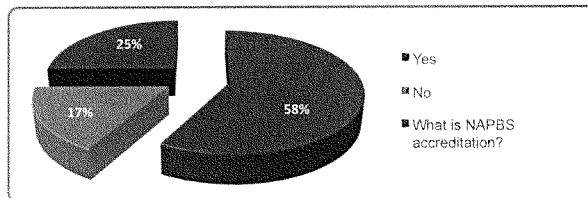
Although lying about earning a degree topped respondents' concerns (84%), our experience shows that only about 8% of candidates actually lie in this way on their resumes. The findings also show that respondents are far less troubled by candidates distorting their salaries or job responsibilities than 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.



Question 20: Is it important that your employment background screening provider be accredited by the National Association of Professional Background Screeners (NAPBS)?

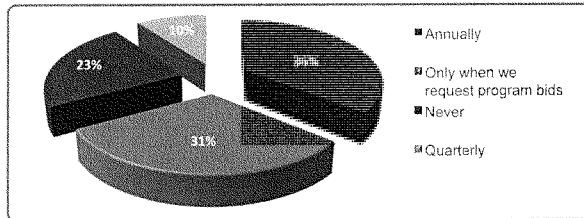


While the majority of respondents (58%) indicated they consider NAPBS accreditation important for their screening providers, more than 40% of respondents have no idea what this important accreditation is or they don't care about it. For those who do not know, it's a critical "seal of approval" that has 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.



Employers should regularly audit their screening programs to help protect themselves and their people

Question 21: How often do you evaluate your employment background screening program for quality, compliance, accuracy, etc.?

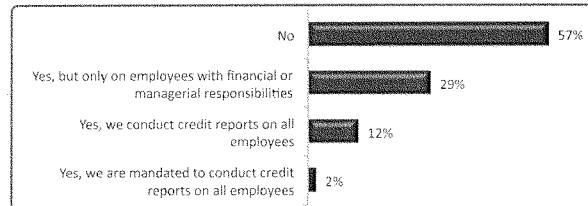


The good news is that a combined 46% of respondents are evaluating their background screening programs on a regular basis—annually (36%) or quarterly (10%). The bad news is that 54% of respondents are not taking this prudent step to protect their organizations, with a startling 23% saying they *never* 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.

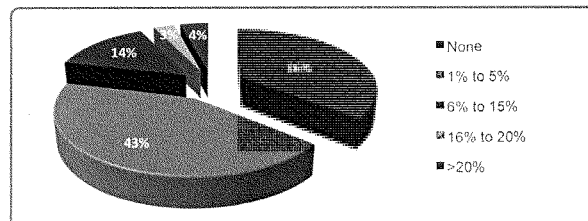


Question 22: Does your organization utilize employment credit reports in your hiring process?



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?

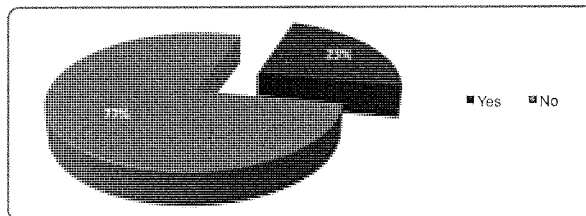


Of the respondents who do utilize credit reports as a hiring tool, a combined 79% frequently do *not* deny employment to candidates because of these checks. Again, this may fly in the face of conventional wisdom. Only 4% of respondents said that they deny employment 20% of the time or more based on credit reports.

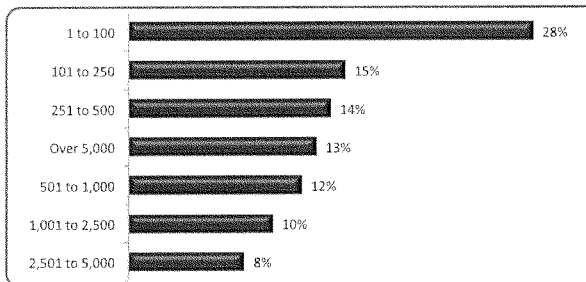


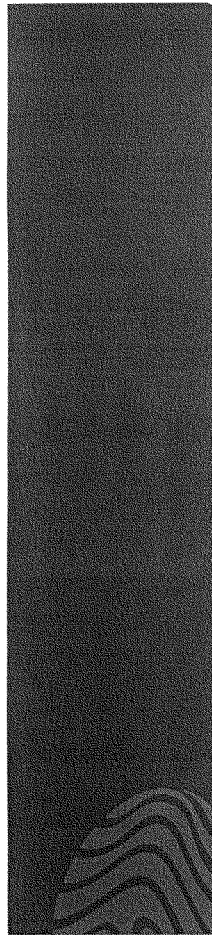
Demographics

Are you an EmployeeScreenIQ client?



How many people does your company employ?





15 YRS MILLIONS OF CHECKS COMPLETED	99.5% CLIENT RETENTION	28% CRIMINAL HIT RATE	LESS THAN 2% ARE ACCREDITED
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With EmployeeScreenIQ, you'll never worry about the quality, accuracy and comprehensiveness of your criminal background searches. And you'll enjoy all of these critical benefits:

- ✓ Strict Oversight and Reporting Accuracy
- ✓ Data Protection and Security
- ✓ Rigorous Compliance and Best Practices
- ✓ A Better Candidate Experience
- ✓ Flexibility and Customization
- ✓ Award-Winning Client Service

Learn more about **EmployeeScreenIQ:**



About EmployeeScreenIQ

EmployeeScreenIQ helps employers make smart hiring decisions. The company achieves this through a comprehensive suite of employment background screening services including the industry's most thorough and accurate criminal background checks, resume verification services and substance abuse screening. EmployeeScreenIQ is accredited by the National Association of Professional Background Screeners (NAPBS), a distinction earned by less than two percent of all employment screening companies. For more information, visit www.EmployeeScreen.com.



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

October 9, 2014

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

Dear Chairman Walberg:

Please accept this statement for the record from the Equal Employment Opportunity Commission (EEOC) in response to the September 17, 2014, hearing to consider H.R. 4959, "EEOC Transparency and Accountability Act," H.R. 5422, "Litigation Oversight Act of 2014," and H.R. 5423, "Certainty in Enforcement Act of 2014," and concerns raised during the hearing about the agency's enforcement and regulatory priorities. The EEOC has significant reservations about the proposed legislation discussed at the hearing and believes that the public record 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, and the Genetic Information Nondiscrimination Act of 2008. Vested with this responsibility, the Commission is dedicated to achieving our national vision of justice and equality in the workplace by preventing, stopping, and remedying unlawful employment discrimination.

As noted at the hearing, the Commission has made great strides over the years toward eradicating discrimination in the workplace. 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. This is demonstrated by EEOC's own data. Over the past two years, the EEOC has resolved a greater percentage of cause cases without litigation than any time in recent history. In contrast, the EEOC only litigates less than 5% of cause cases.

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The EEOC takes the concerns of Congress seriously and has worked with our partners in the House and Senate to address their questions about EEOC operations and policy. However, we have significant concerns about the legislation discussed at the Subcommittee hearing. The legislation would draw already stretched Commission resources away from investigating and resolving charges of discrimination and would undermine our ability to enforce the Nation's laws prohibiting employment discrimination. Additionally, as is supported by the data, we are committed to our statutory obligation to conciliate and are concerned that the proposed legislation may actually hinder efforts to settle cases and avoid litigation, and instead would likely impose additional administrative costs on the agency and result in litigation over the EEOC's pre-suit activities. Our specific concerns are set forth below.

H.R. 4959, "EEOC Transparency and Accountability Act"

A. Section 2. Availability of Information About Cases on the EEOC Website

1. Section 2(a)(1) – All Civil Actions

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

Section 2(a)(1) appears to target what Representatives Walberg and Hudson believe is "EEOC overreach." The bill asserts that this section, as well as other parts of H.R. 4959, will "help ensure the EEOC pursues worthwhile cases in good faith to prevent actual discrimination rather than abusing its powers of litigation in search of a problem."

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This provision would require the EEOC to engage in duplicative and confusing public postings. First, the bill would require EEOC to post whenever “a judgment is made with respect to any cause of action in the case, without regard to whether the judgment is final.” In practice, this means that in a case with multiple causes of action, EEOC would have to post on its website if one cause of action ends (whether through dismissal or settlement of the claim), while the rest of the case proceeds. The posting requirement applies to court orders regarding fees, costs, and sanctions. Such information could be interpreted by members of the public to mean that the case is resolved -- or that fees, costs, or sanctions have been imposed -- when the case is still pending and such decisions are not final. Thus, it would lead to confusion about the status of our cases and potentially lead to the dissemination of misinformation and inaccurate information by members of the public who utilize our site. The bill’s posting requirement means that EEOC will likely have to post information about the same case multiple times (the bill’s posting requirement does not apply only when EEOC is ordered to pay fees or costs, or when a sanction is imposed, but also when EEOC prevails).

Second, much of the information listed in Section 2(a)(1) of this bill is already provided on the EEOC website. For all cases filed, EEOC issues a press release announcing the filing of the case that includes the court, the name and case number, the nature of the allegations, and the causes of action. The EEOC also currently issues a press release when litigation ends for most cases.

Third, we fail to see the public value in listing on the website whether a case was authorized by the Commission or pursuant to the authority delegated to the General Counsel. The 2013-2016 Strategic Enforcement Plan (SEP) lays out the delegation criteria and this document is readily available to the public. Indeed, the bill’s requirement that the General Counsel publicly justify why a case was not submitted to the Commission is contrary to the delegation provided for in the SEP.

In conclusion, we believe Sec. 2(a)(1) will impose an undue burden on EEOC, confuse the public, and possibly impede EEOC litigation activities, thereby adversely affecting EEOC’s core enforcement functions.

2. Sec. 2(a)(2) – Commissioner Charges

Under this section, EEOC would be required to post on its public website the total number of Commissioner charges filed during the preceding fiscal year. The EEOC also would be required

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to post the “total number of resolutions of such charges disaggregated by type of resolution.” “Disaggregation” means that, of the total number of Commissioner charges filed in the preceding fiscal year, EEOC must post the number of Commissioner charges filed in each State, and within each State, the number of charges that allege discrimination based on race, sex, national origin, religion, color, age, disability, or retaliation, or that allege a violation of the Equal Pay Act. *See* Sec. 2(b).

The bill does not define what constitutes a resolution. Posting information about Commissioner charges that are resolved short of litigation may prove problematic from a confidentiality standpoint. Title VII (and by incorporation the ADA and GINA) prohibits EEOC from making public any information about a charge unless and until it is the subject of a civil action. Posting the number of administrative resolutions by state, including the basis or bases of discrimination alleged, could easily make public the charge itself. In any given fiscal year, in many states no more than one Commissioner charge (if any) will be investigated and resolved. If, for example, EEOC posts that a Commissioner charge based on sex and disability was filed in Wyoming and resulted in a settlement favorable to the Commission, this information may be all that is needed to identify the employees and employer involved and breach the confidentiality provisions of Title VII. In contrast, the current practice of disclosing only the total number of Commissioner charges filed nationwide in a given fiscal year does not raise any confidentiality issues.

3. Sec. 2(a)(3) – Directed Investigations

EEOC would be required to post on its public website the total number of charges filed during the preceding fiscal year resulting from EEOC’s use of its “directed investigation authority” under § 7(a) of the ADEA and § 11(a) of the Equal Pay Act. As with Commissioner charges, EEOC would have to also post “the total number of resolutions of such charges disaggregated by type of resolution.” It is important to note that EEOC’s charge inventory contains only a relatively small number of “directed investigation” charges in a particular fiscal year. This raises privacy concerns similar to those concerning Commissioner charges.

4. Sec. 2(a)(4) – Systemic Civil Actions

Sec. 2(a)(4) requires the posting of information regarding systemic cases filed under section 706 or 707 of Title VII. Much of this information is already provided in the press releases EEOC issues when a suit is filed. Thus, a separate such posting for systemic cases would be duplicative. Additionally, because this legislation focuses on Title VII cases only, such

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information could be misleading to the public since it implies that systemic cases only arise under one of the statutes we enforce.

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

Title VII requires the Commission to attempt to resolve cause charges through conciliation. This provision would amend the statute to mandate “good faith efforts to endeavor” to resolve [cause] charges by “bona fide conciliation.” In doing so, it would – at least in part – reverse the Commission’s victory in the Seventh Circuit in *EEOC v. Mach Mining*, which is pending before the Supreme Court.

HR 4959 would amend § 706(b) of Title VII as follows (added language in **bold**, deleted language in strike through):

If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall **use good faith efforts to endeavor** to eliminate any such alleged unlawful employment practice by informal methods of conference, ~~bona fide~~ conciliation, and persuasion. Nothing said or done during and as a part of such informal **good faith** endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the ~~persons concerned~~ **employer, employment agency, or labor organization**, except for the sole purpose of allowing a party to any pending litigation to present to the reviewing court evidence to ensure the Commission’s compliance with its obligations under this section prior to filing suit. No action or suit may be brought by the Commission under this title unless the Commission has in good faith exhausted its conciliation obligations as set forth in this subsection. No action or suit shall be brought by the Commission unless it has certified that conciliation is at impasse. The determination as to whether the Commission engaged in ~~bone~~ (sic) fide conciliation efforts shall be subject to judicial review. The Commission’s good faith obligation to engage in bona fide conciliation shall include providing the employer, employment agency, or labor organization believed to have engaged in an unlawful employment practice with all information regarding the legal and factual bases for the Commission’s determination that reasonable causes (sic) exist as well as all information that supports the Commission’s requested monetary and other relief (including a detailed description of the specific individuals or employees comprising the class of persons for whom the Commission

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is seeking relief and any additional information requested that is reasonably related to the underlying cause determination or necessary to conciliate in good faith).

The EEOC has serious concerns about these provisions. The EEOC engages in good faith efforts when it attempts to conciliate a charge. Indeed, the General Counsel reviews the conciliation efforts before approving or recommending litigation and, where appropriate, has sent cases back for further conciliation. Protracted litigation is not something EEOC desires; rather, it seeks timely relief for the charging party. If EEOC can obtain this relief through conciliation, it endeavors to do so. These provisions would affect the EEOC's ability to process and resolve charges. They impose "good faith" and "bona fide" standards on EEOC's attempts to resolve cases through conciliation, without defining those phrases, thereby holding EEOC staff to unspecified but assumedly demanding standards. This will needlessly formalize a process that Congress meant to be "informal" and thus quick and effective for the parties. Instead, these requirements will frustrate and block efforts to resolve charges efficiently, effectively, and inexpensively through the informal conciliation process.

The requirement that staff collect and provide respondents with *all* information relating to the reasons for cause determinations would consume significant EEOC resources, as would identifying every individual in a class. The process of conciliation would undoubtedly be prolonged. Conciliation itself would become ineffective because anything said in conciliation could be entered in court and become part of the public record. Frank discussions during conciliation would be chilled as a result, potentially increasing the likelihood that conciliation would fail. Furthermore, the requirement that EEOC provide information to the respondent, but not the charging party, regarding the legal and factual bases for its cause determination and request for relief is on its face unfair to the charging party. Finally, the type of information EEOC will be required to provide is protected, privileged information that would not otherwise be available by law in response to civil discovery or a FOIA request. The reasons for finding cause and asking for certain relief necessarily include confidential, deliberative information and may include attorney work product. It is settled law that such information does not have to be disclosed to the public, opposing counsel, a charging party, or a respondent. This provision will turn that law on its head, by increasing litigation, not due to the merits of whether discrimination occurred, but due to the contours of the new statutory language.

This provision also would invest courts with subject matter jurisdiction over the question of whether EEOC engaged in bona fide conciliation efforts, thereby encouraging both dissatisfied charging parties and respondents to countersue EEOC whenever it files enforcement actions.

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While encouraging such litigation, the bill fails to specify what relief will be available to a prevailing party under this provision. Will a court order EEOC to engage in further conciliation? And, if conciliation fails a second time, can the same party sue again? Or will a court dismiss the charge, or order relief for the charging party? We cannot imagine that the district courts will welcome the open-ended civil actions this provision encourages.

Judicial review of conciliation could also tie up an enormous amount of investigative staff resources. The time and effort required to show that enforcement staff had conducted *bona fide* conciliations in *good faith* would divert EEOC's limited staff resources from the intake of charges, and from investigating and resolving them. Investigators who conducted or participated in conciliation would be subject to subpoena and required to testify in court as to the nature of conciliation and the intent of themselves and others in seeking resolution of charges in conciliation. Such testimony could result in imprudent use of resources as well as intrusive inquiries regarding the inner workings of conciliation efforts.

The implications of H.R. 4959 go further. This provision not only pertains to conciliation of the cases filed in court, which number 100 to 200 per year, but also to every case that progresses through the conciliation process. Which cases will remain unresolved and which will be litigated is unknown at the time of conciliation. Staff would need to be prepared to show that all conciliations met the undefined standards in the Act.

EEOC conducts literally thousands of conciliations each year. In FY 2013, for example, staff conducted more than 3,500 conciliations: 1,437 were successfully resolved and 2,078 were not resolved. For staff to provide *all* information on the bases for cause decisions in *all* conciliations conducted each year would stymie efforts to process the nearly 100,000 charges filed with EEOC each year. Most importantly, H.R. 4959 would not only siphon off staff time and effort from investigating and resolving cases but would also drain resources away from the Commission's strategic enforcement priorities, which are essential to determining where the EEOC's limited resources should be channeled. This provision could easily increase EEOC's investigative and litigation responsibilities to the point where the agency would be overwhelmed.

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The number of conciliations conducted in FY 2012 and FY 2013 is shown below:

	FY 2012	FY 2013
Conciliations successful	1,591	1,437
Conciliations unsuccessful	2,616	2,078
Total Conciliations Conducted	4,207	3,515

Staff would be required to lay the groundwork to defend each and every one of these conciliations and demonstrate that they were conducted in good faith and were bona fide. The bill's requirements for formalizing and documenting each step of the conciliation process can only translate into significant administrative delays and barriers to the 1,500 successful conciliations the EEOC achieves each year. These new requirements are likely to result in a reduction in the number of successful conciliations. The end result will be fewer individuals receiving a remedy for the discrimination they have suffered, and fewer employers able to reach a prompt and private resolution of the violation found by the government. Cases will be prolonged needlessly in the administrative process. This is not what Congress intended by requiring that the EEOC informally endeavor to conciliate discrimination charges and use litigation as a last resort.

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

1. Section 4(a) – Report by the IG

Section 4(a) requires the EEOC Inspector General to submit a report to certain committees of the House and Senate on court orders regarding fees, costs, and sanctions and to conduct an investigation to determine why such fees, costs, or sanctions were imposed. The IG is obligated by the Act to interview and obtain affidavits from "each member and staff person . . . involved in the case." Other provisions concern the Commission or the IG reporting to Congress on the investigation, on each case in which sanctions were imposed, and on the steps being taken to reduce the imposition of sanctions.

First, the focus on cases involving fees, costs, or sanctions suggests that these instances are numerous and unwieldy. The agency's record shows otherwise. Representative Kline, in

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championing this bill, notes that “courts have levied large sanctions against the EEOC for bringing lawsuits that were frivolous, unreasonable, or groundless.” Cases in which courts have imposed in fact represent less than 1% of EEOC’s ongoing litigation activity. They do not represent a pattern or practice of malfeasance by EEOC, and especially do not justify the suffocating oversight of EEOC’s enforcement activities that would be imposed by HR 4959. Two or three cases questioned by the courts do not create a crisis situation or justify the exceptionally close scrutiny contained in HR 4959. The investigation of cases where sanctions were imposed would constitute another diversion of sparse staff resources from investigating and processing charges to responding to IG inquiries of each person involved in the case.

Second, the court order, which is a publicly available document, provides the court’s reason for imposing fees, costs or sanctions. Indeed, the filings by both the EEOC and the defendant provide the views of both parties and those documents are part of the public record. Third, parts of this provision appear to intrude on the EEOC’s government deliberative process privilege, specifically Section 4(a)(2)(A) and (D).

2. Section 4(b)

Section 4(b) requires that, for each case where fees, costs, or sanctions are imposed by the court, a report must be submitted to certain committees of the House and Senate detailing the steps being taken to reduce instances in which the court orders fees and costs or imposes sanctions, and requires that the report be posted to the website. Again, we fail to see how this information will assist either Congress or the general public in better understanding or monitoring the EEOC. Such information would lead to confusion since those orders may not yet reflect the final outcome of the case and OGC typically appeals such orders and is frequently successful in those appeals.

CONCLUSION

The bill appears to rely on misunderstandings about our operations and our statutory authority. The rationale for the bill – that EEOC “has operated in the shadows for far too long” – is not grounded in fact. The EEOC publishes a significant amount of operational information. Every case EEOC litigates is a matter of public record and therefore is subject to public and Congressional inspection and review.

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Details concerning EEOC's pre-suit activities, such as charge processing and conciliation efforts, are not disclosed because Title VII requires that these activities not be made public. Discussions that lead to a decision to litigate a particular charge are confidential because they are protected by universally recognized privileges that protect the deliberative process, attorney-client consultations, and attorney work product. The existence and use of long-standing confidentiality provisions does not equate to "operating in the shadows."

In general, this bill appears to place draconian and duplicative reporting burdens on the agency that are more likely than not to lead to confusion about the status of matters in litigation and divert the EEOC's resources away from its mission to stop and remedy unlawful employment discrimination.

H.R. 5422, "Litigation Oversight Act of 2014"

As part of its Strategic Enforcement Plan for 2013-16, the Commission revisited the issue of delegation and, with a few modifications, reaffirmed the delegation set forth in the 1996 National Enforcement Plan. This bill would overrule this bipartisan decision and amend Title VII by adding a new subsection (1) at the end of § 705 of Title VII, 42 Section § 2000e-4. Subsection (1)(1) provides that, before EEOC can commence or intervene in litigation involving "multiple plaintiffs," or litigation involving allegations of "systemic discrimination or a pattern or practice of discrimination," a majority vote by the Commissioners must approve the litigation or intervention. Subsection (1)(2) authorizes any Commissioner "to require the Commission to approve or disapprove by majority vote whether the Commission shall commence or intervene in any litigation" (emphasis supplied). The authority vested in each Commissioner by subsections (1)(1) and (1)(2) cannot be delegated by the Commission or a Commissioner "to any other person." See § (1)(3).

Finally, within 30 days of the commencement of, or intervention in, litigation contemplated by subsection (1), EEOC must post on its public website the following: 1) the court in which the case was brought; 2) case name and number; 3) "[t]he nature of the allegation;" 4) "[t]he causes of action brought;" and 5) "[e]ach Commissioner's vote on commencing or intervening in the litigation."

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Impact on EEOC Operations

Under the current Commission-approved delegation of authority to the General Counsel, certain litigation and interventions require a majority of the Commissioners to pre-approve. This bill will adversely affect the Commission's ability to delegate litigation authority to the General Counsel (GC). This measure prohibits the Commission from delegating to the GC litigation and intervention authority regarding multiple-plaintiff, systemic, and pattern or practice cases. Thus, any delegation that currently exists involving these cases will become null and void.

In addition, while the bill does not expressly prohibit the Commission from delegating litigation authority to the GC with respect to other types of cases, it allows any Commissioner to call for a Commission vote with respect to these cases. As a practical matter, this means that any delegation to the GC can be revoked by any Commissioner on a case-by-case basis.

Although the Commission delegates litigation authority to the GC by majority vote, subsection (1)(2) vests each Commissioner with veto authority, and as such, the majority's delegation can be nullified by any Commissioner, at any time, regarding any case. The impact of this provision would reverse longstanding and bipartisan efforts to streamline the litigation process at the EEOC and make decisions about the allocation of scarce enforcement resources more predictable. Delegation has been critical to freeing up the Commissioners to perform their critical policy-making function.

This legislation would reinstate a process the Commission has found to be inherently inefficient. If used sufficiently often, this veto authority will effectively eliminate delegation and deter the agency's litigation program.

A. Flawed basis for the legislation

As noted by the witnesses in the hearing, the delegation of the commencement of litigation to the Presidentially-appointed, Senate-confirmed General Counsel was adopted unanimously in 1996 as part of the National Enforcement Plan. In the EEOC's SEP approved in December 2012, the Commission reaffirmed the existing delegation of litigation authority to the General Counsel and also moved toward greater interaction with the litigation program. The Commission currently delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

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1. Cases involving a major expenditure of resources, e.g., cases involving extensive discovery or numerous expert witnesses and many systemic, pattern-or-practice or Commissioner's charge cases;
2. Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;
3. Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood for public controversy or otherwise (e.g., recently modified or adopted Commission policy);
4. All recommendations in favor of Commission participation as *amicus curiae*, which shall continue to be submitted to the Commission for review and approval.

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

Eric Drieband, a former EEOC General Counsel and a witness at the hearing, suggested that more cases had been sent to the Commission for approval in the past and sending more cases to the Commission for approval in the future would not prove burdensome. However, his testimony was based on critical factual errors and flawed reasoning:

- Nearly every case cited by Mr. Drieband to support his argument that the Commission should vote on more cases was actually approved for filing by a vote of the full Commission, including: *Peplemark*, *Kaplan*, *Freeman*, *Catastrophe Management*, *Sterling*, *Bass Pro*, and *Dillard's*.
- Several of the cases Mr. Drieband cites in support of the need for more Commission oversight were resolved by a consent decree favorable to EEOC (*American Samoa Government*, *Honeybaked Ham*); some are currently on appeal (*Geo. Swisport*); one was dismissed but is currently under review by the EEOC for appeal (*Womble*); and one was vacated, overruled and has a red flag on Westlaw (*Bass Pro*). Thus, the outcomes in these cases have no relation to his argument that more Commission oversight in determining whether litigation should be commenced is needed.
- Mr. Drieband's own conduct as General Counsel provides no support for the argument that more cases should be submitted to the Commission for authorization. Although Mr.

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Dreiband submitted a large raw number of cases to the Commission for a vote during his tenure, the vast majority were not class or systemic cases. Rather, most of them were individual ADA cases which, during Mr. Dreiband's tenure, required a Commission vote. In fact:

- Of the 122 cases Mr. Dreiband submitted to the Commission from August 2003 to 2005, only 19 (or 5.5%) involved multiple victims; the other 103 were individual ADA cases.
- In FY 2004, Mr. Dreiband submitted only 6 of 147 filed multi-victim cases for a Commission vote (or approximately 4 % of the cases).
- In FY 2005, Mr. Dreiband submitted only 12 of 136 multi-victim cases for a Commission vote (or nearly 9% of the cases).
- There is no meaningful difference in the outcomes of the cases submitted to the Commission under Mr. Dreiband than those delegated to the field. Commission approved cases included those having significant impact on scope of the law (e.g. *Sidley Austin*) and included those resulting in significant adverse decisions (e.g. *Agro*).
- The EEOC recovers significant monetary benefits for victims of discrimination through conciliation, and these benefits have increased significantly since Mr. Dreiband was General Counsel. For example, in FY2004 when Dreiband was General Counsel, the EEOC obtained \$251 million in monetary benefits through conciliation compared to \$372 million obtained in conciliation in FY2013.

Finally, it should be noted that, while he was General Counsel, Mr. Dreiband operated under the delegation rules regarding class and systemic cases that were similar to the current delegation -- not under the rules he is now suggesting should become law. In fact, in FY2013, the Commission approved 15 cases or approximately 11% of the 131 cases filed. Thirteen of the 15 cases approved by the Commission were systemic or multi-victim cases.

HR 5423, "Certainty in Enforcement Act of 2014"

This bill amends Section 703 of the Civil Rights Act of 1964 to provide that "it shall not be an unlawful employment practice" under Title VII to comply with a Federal, State, or local law "in

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an area such as, but not limited to, health care, childcare, in-home services, policing, security, education, finance, employee benefits, and fiduciary duties.” Bill, Sec. 3. This language effectively repeals Title VII’s conflict-with-state-law provision in Section 708 (section 2000e-7) by providing that practices compliant with such state or local laws cannot be unlawful employment practices subject to Title VII.

A. Scope of Legislation

This bill responds to the Commission’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, 42 U.S.C. § 2000e (Guidance). Although the bill’s introductory Findings focus on criminal background checks, the legislative language itself is applicable to all employment practices. For example, were this legislation to become effective, a locality could pass a law excluding Muslims from certain jobs, and employers complying with the local law would be exempted from Title VII liability. This is analogous to the Congress inviting states and localities to adopt voter literacy requirements or poll taxes, with the federal assurance that they would be shielded from all exposure under the Voting Rights Act. The broad scope of this bill cannot be overstated.

B. Findings

Finding 3 is incorrect. It states: “In 2012 the EEOC promulgated enforcement guidance regarding the use of criminal background checks that put employers in the position of acting contrary to Federal, State, and local laws that require employers to conduct criminal background checks for certain positions, such as public safety officers, teachers, and daycare providers.”

The 2012 Guidance is based on the premise that employers do criminal background checks for legitimate reasons and can best manage the risk of crime in the workplace by screening applicants or employees in a targeted and fact-based way that is not discriminatory.

- Federal Laws Provide an Employer Defense: The EEOC’s 2012 Guidance states: “Title VII does not preempt ... federally imposed restrictions” and that “[i]n some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. Compliance with federal laws and/or regulations is a defense to a charge of discrimination. Nothing in the Guidance prohibits background checks.

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- State and Local Laws Apply to Employers Unless The Laws Discriminate: Congress stated in Title VII that: “this subchapter does not exempt or relieve any person from” their responsibilities under state or local law. 42 U.S.C. 2000c-7. The only exception is state or local laws that “purport to require or permit the doing of any act which would be unlawful” under Title VII. *Id.* As long as states and localities enact laws that are not discriminatory, then Title VII expects compliance with them. Indeed, Example 11 in the Guidance concerns a nondiscriminatory exclusion from a childcare position of an applicant who pled guilty to an indecent exposure charge two years ago.

Findings (4) and (5) incorrectly reference *Peplemark* and *Kaplan*. They imply that the courts in these cases sanctioned or ruled against the Commission because the employers complied with state law. Compliance with state laws was not at issue in either the *Kaplan* or *Peplemark* cases.

In *Peplemark*, because the EEOC was not able to present statistical evidence of disparate impact through an expert, the EEOC decided to voluntarily dismiss its suit. *Peplemark* agreed to a Joint Stipulation of Dismissal with Prejudice, which designated *Peplemark* as the prevailing party with respect to any entitlement to costs or attorney’s fees.

In *Kaplan*, the district court dismissed the Commission’s case after concluding that the EEOC’s efforts to identify the race of the relevant applicants were legally deficient and the Sixth Circuit affirmed this evidentiary ruling.

C. Flawed Basis for This Legislation

This bill responds to the Commission’s *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions* and seems to be based on fundamental misunderstandings and mischaracterizations. On April 25, 2012, the Commission, in a 4-1 bipartisan vote, approved and issued the Guidance. It is firmly rooted in Title VII, is not a radical change in policy, and is not itself binding. Instead, it provides the EEOC’s interpretation of Title VII’s prohibition on neutral policies that have a disparate impact on protected classes as applied to an employer’s use of arrest and conviction records. It sets forth the basic premise that employers can best manage the risk of workplace crime by screening employees and applicants in a targeted and fact-based way that is not discriminatory. Indeed, a recent survey revealed that the vast majority of employers polled reported that they have adopted the principles set out in the Guidance.

Since at least 1969, the Commission has received, investigated, and resolved discrimination charges involving criminal records exclusions. The federal courts have analyzed Title VII as applied to criminal record exclusions since the 1970s. In 1987, when Justice Clarence Thomas

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was EEOC Chair, the Commission first issued guidance saying that criminal background checks, like other hiring requirements that exclude people, should relate to the job. Following already-established court precedent, this 1987 guidance listed three factors that employers should consider during the screening process: the nature of the offense, when it occurred and the nature of the job. The EEOC did not stretch the law in 1987; it simply followed the law and continued to do so in its 2012 Guidance.

The EEOC drafted the 2012 Guidance in part because a federal circuit court of appeals ruling in a Title VII criminal background check case called for the EEOC to analyze the Title VII implications of criminal background checks in more detail. In *El v. Southeastern Pennsylvania Transp. Authority*, 479 F.3d 232 (3d Cir. 2007), the Third Circuit commented that the Commission's 1987 guidance was short and rudimentary, and that the courts would benefit from the agency providing more in-depth legal analysis of Title VII statutory analysis and criminal background exclusions.

The 2012 Guidance also reflects the Commission's consideration of considerable public input. In both November 2008 and July 2011, the Commission held public meetings on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. After the 2011 hearing, the Commission received and reviewed approximately 300 written comments from stakeholders. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project. Throughout the process of drafting the Guidance, individual Commissioners and staff met with representatives from various stakeholder groups to obtain more focused feedback on discrete and complex issues such as the U.S. Chamber of Commerce, SHRM, HR Policy Association, College and University Professional Association for Human Resources, the National Employment Law Project, the Lawyers' Committee for Civil Rights Under Law, and the Equal Employment Advisory Council. The Commission also considered written comments from individuals, including Ms. Lucia Bone, who testified at this Committee's June 10, 2014 hearing about her sister's tragic murder and the need for criminal background checks for in-home service workers. To be sure, the Guidance does not foreclose employers from performing criminal background checks; rather, the Guidance clarifies how such background checks can be performed in compliance with the law.

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The EEOC has continued to interact with its stakeholders since issuance of 2012 Guidance. EEOC staff around the country participated in conferences and public events to explain the Guidance: the agency reached over 80,000 people nationwide through over 900 outreach events since 2012. A report on these outreach events is included here in Appendix A. The EEOC also issued several short, plain-language documents that clearly summarize the Guidance for employees, job applicants, employers and counsel:

- The Guidance itself begins with a bulleted Summary that is 1.5 pages long and explains the main points in the Guidance.
- *Questions and Answers* were issued the same day as the Guidance, in April 2012. See http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm
- A plain language, "What You Should Know" about the Guidance was issued shortly after the main document. See http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm

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

In the last year, an increasing number of businesses have explicitly adopted the principles laid out in the Guidance, demonstrating their acceptance of it. 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.

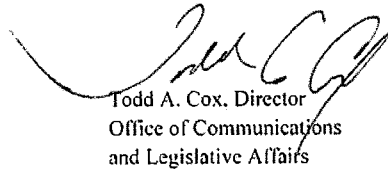
Conclusion

We appreciate the opportunity to comment on our efforts to promote equal employment opportunity and to provide additional information on the EEOC's enforcement and regulatory

The Honorable Tim Walberg
Page Eighteen

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

cc: The Honorable Joe Courtney
Ranking Member

[Additional submission by Ms. Fudge follows:]

MARCIA L. FUDGE
11TH DISTRICT OF OHIO

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RANKING MEMBER, SUBCOMMITTEE ON
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Statement for the Record

Submitted to:

**House of Representatives Subcommittee on Workforce Protections
September 17th Legislative Hearing on:**

“H.R. 4959, EEOC Transparency and Accountability Act; H.R. 5422, Litigation Oversight Act of 2014; and H.R. 5423, Certainty in Enforcement Act of 2014”

Chairman Walberg, Ranking Member Courtney, and members of the Committee:

I appreciate the opportunity to submit this statement for the record to express my opposition to this package of bills offered by the majority. These bills are aimed squarely at stifling the work of the Equal Employment Opportunity Commission (EEOC).

Fifty years ago we passed the Civil Rights Act of 1964, which established the EEOC. When employees believe they have been discriminated against at work, they rely on this Commission to investigate the merits of each allegation to the fullest extent. Although litigation is a critical component to the success of the EEOC's mission to stop and remedy unlawful employment discrimination, it is the last stage in a process that includes multiple attempts to resolve an allegation of discrimination. In fact, the EEOC has been able to consistently obtain monetary and nonmonetary relief for victims in 90% of its cases.

The package of bills proposed by the majority each place grave limitations on the ability of the EEOC to achieve its goals. While the intent of these bills is to prevent the EEOC from “overreach”, the end result will simply make it harder for the agency to fulfill its statutory duties through administratively burdensome and duplicative information gathering. Of the most egregious bills offered, however, is H.R. 5423, The Certainty in Enforcement Act of 2014.

If enacted H.R. 5423 would amend Section 703 of the Civil Rights Act, going far beyond background checks and criminal background checks, to allow states and localities to exploit requirements currently protected under the Voter Rights Act. In effect, states and localities would be exempt from Title VII employment discrimination liability.

This is clearly a step backward in our civil rights laws.

Tasked with enforcing the federal laws which combat illegal discrimination against an employee on the basis of race, color, religion, sex, national origin, age, disability or genetic information, the EEOC has drastically expanded the diversity of America's workforce. It is my hope that as the Committee hears from today's witnesses, my colleagues will recognize the harm these bills will have on employers and businesses across the country.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia L. Fudge". The signature is fluid and cursive, with the first name "Marcia" being more legible than the last name "Fudge".

Marcia L. Fudge
Member of Congress

[Additional submission by Chairman Walberg follows:]



Andra L. Devo, MSN, MBA, RN
Chairman of the Board

NATIONAL ASSOCIATION FOR HOME CARE & HOSPICE
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Val J. Halamandaris, JD
President

September 25, 2014

Chairman Tim Walberg
Ranking Member Joe Courtney
Subcommittee on Workforce Protections
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Courtney:

Thank you for the opportunity to present our views on background checks in connection with your September 17, 2014 hearing on H.R. 5423, the Certainty in Enforcement Act of 2014. The issues involved in screening prospective employees for criminal record backgrounds have been longstanding in home care, presenting a myriad of challenges in complying with state and federal laws regulating the home care community as health service providers, engaging in best practices in employment and service, and fully respecting the civil rights of applicants for employment as well as existing employees. My testimony focuses on the recent 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 Equal Employment Opportunity Commission.

At the outset, it must be stated that the National Association for Home Care & Hospice (NAHC) and its members fully support efforts to ensure all civil rights guaranteed to employees and applicants for employment. Likewise, NAHC supports all appropriate efforts to protect the highly vulnerable patient population served in home care along with the integrity of the numerous federal and state programs that finance this essential care.

In that regard, NAHC strongly supports the use of criminal background checks as an employment screen for individuals who have direct patient contact, access to health

information on patients, or responsibilities related to health care financing, including payments by federal and state health care programs. Comprehensive criminal background checks are an essential tool for home care providers in meeting their responsibilities to protect patients, payers, and their organization.

Background on Home Care

Home care is a very diverse set of services provided to every age group throughout the nation. It is estimated that over 12 million people receive home care from non-family members each year. The patients and clients range from newborns to those in their end of life. Pediatric home care includes high tech services such as ventilator care to newborns and much more. Developmentally disabled youths and adults receive extensive skilled and personal care services. Persons with physical disabilities also rely on extensive home care to remain in the community. The elderly population is the predominant recipient of home care, much of it funded by Medicare, Medicaid, the Administration on Aging, state programs, and through private payment. Medicare alone covers 3.5 million beneficiaries each year under its home health benefit. Medicaid covers many more with nearly \$60 billion in spending for skilled and personal care services

Typically, home care patients/clients are confined to their home due to the severity of their illness, injury, mental limitations or functional incapacity. Many of the elderly patients/clients live alone or with their aged spouse. Home care patients/clients are among the most vulnerable citizens in the country, subject to acute and chronic infirmities, dependent upon others for their recovery or maintenance of activities of daily living. As such, they are at high risk of abuse—physically, emotionally, and financially. In addition, many patients/clients use multiple prescription medications thereby creating an opportunity for others to acquire drugs otherwise not available to them. Finally, many home care patients/clients receive funding for their care from government programs, creating a risk of fraud by the provider.

The risks referenced above are heightened by the fact that in many instances the home care caregiver is alone with the patient/client. While supervision does occur, it is periodic rather than continuous and may not even occur with the caregiver present.

It is estimated that the total professional and nonprofessional caregivers in home care is approximately 2 million persons. The US Department of Labor estimates the nonprofessional workers at nearly 1.7 million and growing rapidly. While the actual number of paid individual caregivers is unknown, California, for example, uses several hundred thousand in a Medicaid program known as “In-Home Supportive Services.”

The nonprofessional caregivers are personal care assistants, homemaker-home care aides, and home health aides. Under Medicare home health and hospice benefits, home health aides are

credentialed through training, competency testing, and ongoing in-service training. These aides are employed by Medicare participating home health agencies and hospices that adhere to comprehensive Conditions of Participation. Outside of the Medicare services, the nonprofessional staff may be comparably credentialed through state licensure requirements, payer standards, or on a voluntary basis. However, not all aides are credentialed.

Professional staff includes nurses, physical therapists, speech-language pathologists, occupational therapists, respiratory therapists, dietitians, medical social workers and others. The vast majority of these professional workers are subject to state licensing requirements.

Home care providers range from individuals to small “mom and pop” sized companies to large public companies to international franchise operations. Some home care companies are affiliated with a health care institution or health system. Others are freestanding. There are over 12,000 Medicare participating home health agencies, over 3,000 Medicare hospices, and estimated 15-20,000 private pay enterprises across the country.

While the situational and environmental risks may be high, home care providers have taken their responsibilities to protect the patient/client and the payers of the services very seriously. Among the valuable tools available to mitigate the risks are criminal background checks on existing and prospective staff.

USE OF BACKGROUND CHECKS

State Requirements

According to the National Conference of State Legislatures, all states except Louisiana, Montana, Nevada, and North Dakota have laws governing criminal background checks for some level of in-home direct care workers. “State Policies on Criminal Background Checks for In-Home Direct Care Workers,” National Conference of State Legislatures, prepared for AARP Public Policy Institute, December 18, 2008. In California, Kansas, South Dakota, Tennessee, and Vermont the background checks are discretionary for some or all of the employees listed in the state statute. However, the voluntary nature may be illusory as some states, such as California, preclude Medicaid payment for those convicted of certain crimes. The state requirements vary widely, with many states limiting the background checks to “home health agencies,” while others requiring checks for all licensed home care providers and services financed through programs such as Medicaid.

Most states prohibit employment automatically if designated criminal offenses are revealed by a criminal history. Only a few states allow employers to decide whether a background warrants disqualification or do not mention disqualifying crimes in the statute. For example, North Carolina lists a number of crimes such as homicides, sex-related offenses, offenses against

vulnerable individuals, drug-related offenses, and fraud, but gives the home health agency complete discretion on whether to disqualify the individual based on these offenses. Where disqualification is automatic, the offenses vary from state to state, but generally include homicide and other violent crimes, fraud, and drug-related crimes.

The time period for automatic disqualifications varies as well. Some offenses such as homicide or criminal sexual assault can lead to a lifetime employment ban. Others have time limitations, such as a 15 year ban following completion of sentence or probation in Minnesota for fraud against federal health programs.

Many states offer waiver or appeal rights that can give an opportunity to reconsider an employee applicant despite the criminal record. NCSL reports that 25 states outline some type of waiver or appeal process. In some of these states, a disqualification can be overturned upon evidence of successful rehabilitation. Accuracy appeals are also available.

Finally, some states allow for conditional employment pending the outcome of the criminal background check. Conditional employment may be time-limited or subject to direct supervision.

NCSL concludes that “[t]he widespread use of mandatory criminal background checks for in-home direct care workers suggests states view the process as an important screening tool for hiring qualified workers for older people and people with disabilities.” NAHC agrees with this view.

Federal Requirements and Activity

While most laws requiring criminal background checks in home care originate at the state level, these state laws are given federal effect through Medicare laws that require providers of services to comply with all applicable State laws and regulations including any state and local licensing requirements. See, e.g. 42 USC 1395x(o)(4); 42 CFR 484.12 (Medicare Conditions of Participation for Home Health Agencies).

Specific federal activity involving criminal background checks in home care is growing and evidences a strong Congressional and Administration interest in using the checks as a tool to protect patients and federal payment programs. Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (PL 108-173) created a pilot program within the Department of Health and Human Services “to establish a program to identify efficient, effective, and economical procedures” for conducting state and federal checks on prospective home care employees. Seven states originally participated in the pilot program. The program’s success led to a congressionally-authorized nationwide expansion under Section 6201 of the recent Patient Protection and Affordable Care Act (ACA). Section 6201 establishes

federal minimum standards on the use of background checks while allowing states to establish certain parameters including the addition of disqualifying crimes. Overall, the program is a strong indication that national policy favors the use of criminal background checks in home care. The program established under MMA and expanded under the ACA creates a framework for federal home care programs while allowing states to tailor the background check requirements to meet their unique goals and standards.

The original pilot program indicated effectiveness while not triggering wholesale disqualifications. The report on the pilot revealed that of the 204,339 background checks, 158,476 employees were cleared for employment with 269 of those cleared based on rehabilitation review and appeals processes. "Evaluation of the Background Check Pilot Program—Final Report," Abt Associates, Inc., August 2008. The pilot disqualified 7,463 applicants with an additional 38,400 records withdrawn prior to a final fitness determination decision. Abt suggests that the withdrawn may include those deterred based on an expectation of disqualification or unrelated reasons.

Any concern about the disparate racial or ethnic impact of using disqualifying criminal background checks in home care is likely misplaced. Home care is the fastest growing occupation in the US according to the Bureau of Labor Statistics (BLS). Among the areas employment projected to grow the most is personal care attendants, home care aides and nurses. In many parts of the country there already is a staff shortage. That is not an environment for improper or illegal discrimination. Also, the facts currently demonstrate that employed home caregivers are 48% white non-Hispanic, 31% African American, 15% Hispanic and Latino, and 7% other race/ethnicity.

It is notable that in six of the seven pilot states, the fitness determination was made not by the employer but by analysts that worked either for the State health care provider regulatory agency or the State central repository. In such a process, the risk of discriminatory rejection of employment by the employer is no concern.

Further federal support for the use of criminal backgrounds checks in home care is found in the Medicare hospice program. Since 2008, Medicare has required all participating hospices to obtain a criminal background check on all hospice employees who have direct patient contact or access to patient records, 42 CFR 418.114(d). Subcontractor staff are also subject to the same requirement. Under the rule, hospices must obtain the background in accordance with state law. In the absence of state law requirements, the hospice must obtain criminal background information within 3 months of the date of employment for all states that the individual has lived or worked in the past 3 years.

EEOC GUIDANCE

As stated, NAHC strongly supports full compliance with all civil rights law related to employment. At the same time, NAHC supports appropriate use of criminal background checks in the screening of workers who provide direct patient care in the home and those who have access to sensitive health care or identity-related information.

The recent EEOC guidance is a thoughtful effort to provide direction to employers that must comply with civil rights laws along with laws requiring or encouraging prospective employee criminal background checks to protect vulnerable consumers and others. However, the guidance presents complexities and confusion for most home care businesses and could benefit from simplification.

It is always difficult for businesses to comply with state and federal laws that may actually require conduct that is inconsistent or in conflict. With home care services, that difficulty is readily apparent as most states require criminal background checks that either mandate the exclusion of a prospective employee from employment or strongly encourage such while the EEOC guidance appears to establish a position that such exclusion is presumptively a violation of civil rights laws.

The guidance is useful in distinguishing between acceptable and unacceptable uses of criminal background checks in hiring processes and decisions. However, it presents itself in a nature and form that renders it useful only for a small segment of the population capable of digesting its complex, 52-page legal analysis.

Most home care businesses are small operations without in-house legal staff or access to the resources necessary to consult expert legal counsel on hiring policies and decisions. Certainly, it is not feasible for most home care companies to render compliant “individualized” hiring determinations involving applicants with criminal backgrounds supported by expert legal representation and guidance. The volume of hiring decisions alone make such impractical and uneconomical.

The NAHC membership consists of the wide range of home care companies presented by the industry at large. In recent weeks, we consulted with various members to determine how they have reacted to the new EEOC guidance. While admittedly anecdotal, the information gathered indicates that the vast majority of smaller companies are unaware of the guidance and do not routinely employ legal counsel on hiring policies, practices, or decisions. Those companies aware of the guidance expressed confusion triggered by the complexities of the guidance, particularly with respect to discretionary employment disqualifications.

Most home care companies consulted expressed that the hiring decisions are primarily guided by state law when employment disqualification is required. They cite the vulnerable population that they service and the program integrity responsibilities they have to the various third-party payers. This operational approach may be summarized as one where doubts about whether to hire someone with a criminal background are resolved by favoring disqualification in order to protect patients and payers.

At the same time, the home care companies consulted indicate that they do hire individuals with criminal records when not otherwise specifically prohibited from doing so under state law. With these, the companies take a variety of factors into account including the nature of the offense subject to conviction, post-conviction activities of the person, and the length of time since the conviction.

The approaches taken to criminal records may be fully compliant with the guidance. However, its denseness and complexity can leave one with too many uncertainties for comfort.

HR 5423

NAHC supports HR 5423 in that it provides a bright-line standard for in home care providers subject to state and/or federal requirements on criminal background checks. By providing a “safe harbor” under employment rights laws for certain employers obligated to follow state and/or federal criminal background check requirements, the bill would alleviate the complexity and confusion now caused by the EEOC guidance and enforcement actions that may create uncertainties in relation to existing health care provider regulations. Our experience is that the existing background check laws offer a reasonable balance in protecting the civil rights of prospective employees while providing essential protection to the vulnerable patients and clients served in home care. In addition, we would recommend that the Committee

1. Encourage the EEOC to collaborate with the Centers for Medicare and Medicaid Services and the US Department of Health and Human Services to develop coordinated, simple compliance guidance in laypersons’ terms along with a communications plan to educate health care providers on their responsibilities relative to criminal background checks;
2. Encourage the EEOC to collaborate with federal and state health care regulators to develop model standards that achieve joint compliance with laws that are designed to protect health care consumers and payers and the laws designed to protect the civil rights of employees and job applicants;
3. Develop overall guidance regarding the use of criminal background checks in hiring that is in plain English.

NAHC believes that the best solution to concerns raised regarding the EEOC guidance on the use of criminal background checks, in health care employee hiring, is to collaborate with the regulators of health care entities on the state and federal level. The “safe harbor” created by HR 5423 will definitely achieve a clarity and consistency between health care requirements on criminal background checks and employment rights laws. Implementing HR 5423 and applying the existing laws requiring background checks will be most successful through a collaborative and coordinated effort of EEOC and federal/state health care regulators.

CONCLUSION

Thank you for the opportunity to offer this testimony. Please do not hesitate to call on us if you need further information on the home care perspective.

Respectfully submitted,

William A. Dombi
Vice President for Law
National Association for Home Care & Hospice

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October 1, 2014

Hon. Tim Walberg, Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Walberg:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the Subcommittee's September 17th legislative hearing on the "EEOC Transparency and Accountability Act (H.R. 4959)," the "Litigation Oversight Act of 2014 (H.R. 5422)," and the "Certainty in Enforcement Act of 2014 (H.R. 5423)." The Chamber supports all three of these bills and believes that they will restore much needed accountability and transparency to the Equal Employment Opportunity Commission ("EEOC" or "Commission"). Accordingly, we wish to thank you for holding a hearing on this important subject.

I. Background

On June 10, 2014, Camille Olson testified on behalf of the Chamber at the Subcommittee's hearing entitled, "The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of the Stakeholders." As part of her testimony for the Chamber, Ms. Olson submitted a Chamber report entitled, "A Review of EEOC Enforcement and Litigation Strategy During the Obama Administration – A Misuse of Authority" ("Chamber's EEOC Enforcement Report").¹ In both the Chamber's EEOC Enforcement Report, as well as our June 6, 2013 letter to you,² we noted our

¹ Available at:

https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20enforcement%20paper.pdf. The Chamber's EEOC Enforcement Report includes examples of EEOC litigation positions and EEOC Guidance regarding employer's use of background checks that supports passage of all three bills, and in particular, the Certainty in Enforcement Act of 2014. For brevity sake, that discussion will not be repeated here.

² Available at:

<https://www.uschamber.com/sites/default/files/documents/files/USCC%2520EEOC%2520Oversight%2520Letter%25206-6-13.pdf>

concern with the EEOC's investigation into PricewaterhouseCoopers ("PwC") and its mandatory retirement policy.

While that case fortunately never materialized, as noted in the testimony of William Lloyd, General Counsel, Deloitte LLP, at the September 17th hearing, the EEOC continues to misallocate time, money and resources by investigating the voluntarily-agreed-to retirement policies of limited liability partnerships. This is not an efficient use of the Commission's resources, unnecessarily threatens the legal partnership structure and may have unintended consequence of limiting professional opportunities available to minority candidates. Fortunately, the "EEOC Transparency and Accountability Act" and the "Litigation Oversight Act of 2014," provide reasonable and modest safeguards that will help to ensure that if litigation is pursued against Deloitte or any other limited liability partnership over its retirement policy, it is fully supported by the Commission itself and initiated only after all good-faith conciliation efforts have been exhausted.

II. The Investigation into Deloitte Raises Serious Legal and Policy Concerns

Although a thorough analysis of the facts and law at issue in the Deloitte case is beyond the scope of this letter, it suffices to say that the EEOC's legal position has the potential to impermissibly stretch the parameters of the law. Congress chose to create numerous exemptions in our anti-discrimination laws for various reasons. For example, the small business exemptions that apply under many of these statutes were created "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail."³

Similarly, the Age Discrimination in Employment Act ("ADEA") only applies to *employees*, and does *not* cover owners or partners of businesses. *See* 29 U.S.C. § 630(f) ("The term 'employee' means an individual employed by any employer"). It makes perfect sense that Congress only empowered EEOC to act on behalf of employees and not owners of companies. Indeed, the EEOC's own guidance states that, "In most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees."⁴ Expanding the law beyond what is prescribed by Congress in order to cover partners or owners of businesses is simply not sound policy.

Additionally, pursuing this case against Deloitte or other limited liability partnerships for their retirement policies cannot be the best use of the Commission's resources. Because the pertinent inquiry in the Deloitte situation (whether partners are actually employees) is intensely fact-based, any litigation is likely to be drawn out and

³ *See Papa v. Katy Indus.*, 166 F.3d 937, 940 (7th Cir. Ill. 1999).

⁴ 2011 EEOC Compliance Manual § 2-III.A.1.d.

expensive. Moreover, the challenged retirement agreement in Deloitte concerns partners who are retiring from a major U.S. accounting firm – hardly a vulnerable group in need of protection. If a partner or partners feel that they have been aggrieved, they have the option of pursuing claims on their own accord. In addition, public accounting firms have legal responsibilities prescribed by federal law with respect to certification of audits and other required filings. These certifications must be signed by partners of the firm. The EEOC apparently disregards these requirements in its pursuit of these types of cases.

If the EEOC chooses to sue Deloitte, the litigation will not aid or protect vulnerable workers but may simply force the company to abandon a policy that its partners themselves agree is in the business' best interest. Moreover, such litigation would not only threaten Deloitte, but also other accounting firms, law firms, medical practices and any other professions who organize themselves under partnership structures.

III. EEOC's Delegation of Authority Limits its Own Oversight Responsibility

As noted in the Chamber's EEOC Enforcement Report, the steadily growing list of EEOC litigation missteps and courtroom embarrassments are due, in part, to the fact that a significant amount of litigation authority placed by statute in the hands of the Commissioners has been delegated to the General Counsel. The Commission's 2012 Strategic Enforcement Plan ("SEP") reaffirmed its delegation of litigation authority to the General Counsel, as well as "its decision to give the General Counsel the authority to re-delegate to regional attorneys the authority to commence litigation."⁵ Pursuant to the SEP, the General Counsel is only required to bring the following types of cases to the Commission for approval prior to filing suit:

1. Cases involving a major expenditure of resources;
2. Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;
3. Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood for public controversy.

The investigation into Deloitte as described in Mr. Lloyd's testimony clearly satisfies the "public controversy" exception. First, the EEOC's actions are already

⁵ In her comments for the record, Commissioner Barker noted that she is "very concerned about the Commission's delegation of most of its litigation authority to the General Counsel." See COMMENTS FOR THE RECORD, February 20, 2013 Public Commission Meeting on the Implementation of the EEOC's Strategic Plan for Fiscal Years 2012-2016.

being questioned by the House Committee on Appropriations.⁶ Second, the actions are nearly identical to those taken against PwC last year, which generated significant public controversy.⁷ Therefore, at a minimum, the General Counsel should seek approval from the Commission prior to the initiation of any lawsuit against Deloitte or any other limited liability partnership for their retirement policies.

Unfortunately, whether a case satisfies the “public controversy” standard set forth in the SEP is entirely up to the General Counsel. So while a lawsuit against Deloitte *should* meet this standard for the reasons described above, the General Counsel could forego the Commission’s review and initiate litigation if, in his opinion, he does not “reasonably believe” the case will result in public controversy. The Litigation Oversight Act will help to restrain this unchecked power of the General Counsel by requiring the Commissioners to approve, by a majority vote, whether EEOC will “commence or intervene in litigation involving multiple plaintiffs, or an allegation of systemic discrimination or a pattern or practice of discrimination.” H.R. 5422 would be a positive step forward in reigning in the enforcement abuses described in both Mr. Lloyd’s testimony as well as the Chamber’s EEOC Enforcement Report.

IV. EEOC Should be Held to its Statutory Requirement to Engage in Pre-Suit Conciliation

Title VII requires the EEOC to engage in conciliation prior to filing suit against an employer.⁸ The conciliation requirement helps to ensure mutually agreeable and efficient resolutions to employment disputes prior to the initiation of expensive and drawn-out litigation. Therefore, the conciliation requirement benefits employers, employees and our over-crowded courts.

Despite this clear, statutory pre-suit conciliation requirement, EEOC has been criticized of late for eschewing this obligation and proceeding immediately to litigation. In one of the most well-known examples of EEOC’s failure to conciliate, 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.⁹ The 8th Circuit agreed with the district court that

⁶ See letter dated September 18, 2014 to EEOC Chair Jenny Yang from Rep. Hal Rogers, Chairman of the Committee on Appropriations and Rep. Frank Wolf, Chairman of the Subcommittee on Commerce, Justice, Science and Related Agencies (noting “[t]he actions that we understand are being contemplated would present a high likelihood for public controversy”).

⁷ *Discriminating Against Partnerships*, WALL STREET JOURNAL, June 3 2013, available at http://online.wsj.com/article/SB10001424127887323855804578511693604180764.html?mod=WSJ_Opinion_AboveLEFTop

⁸ 42 U.S.C. § 2000e-5(b) (“the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion”).

⁹ *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

EEOC stonewalled the company in explaining who it sought to represent and made no meaningful attempt at conciliation.¹⁰

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.

Worse, in *Mach Mining*, the Seventh Circuit recently 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.¹¹ At least in the Seventh Circuit, this essentially eviscerates EEOC's statutory conciliation requirement, meaning that the EEOC can proceed immediately to litigation. EEOC's regional attorney in Chicago, John Hendrickson, admitted as much when, commenting on the *Mach Mining* decision, he said, "Going forward, conciliation is no longer going to be an issue because the [Seventh Circuit] has determined it is not judicially reviewable."¹²

Perhaps emboldened by *Mach Mining* and otherwise left unchecked, it is likely that the EEOC will be quicker to initiate litigation in cases which may have otherwise been settled through conciliation. This is why the House of Representatives has already expressed concerns with EEOC's attempts to circumvent the statutory conciliation requirement in the report accompanying the Fiscal Year 2015 Commerce, Justice, Science Appropriations bill. The Committee Report stated:

'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.

Building on the Committee Report, the EEOC Transparency and Accountability Act (H.R. 4959) would help to ensure that EEOC engages in bona fide

¹⁰ 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. See *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa Aug. 1, 2013). Similarly, other federal courts have ordered the EEOC to pay employers' attorneys' fees when the Commission engaged in other unacceptable litigation practices. See, e.g., *EEOC v. Tricare Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012) (awarding \$140,000 in fees); *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011) (awarding \$751,942.48 in fees).

¹¹ 738 F.3d 171 (7th Cir. 2013).

¹² Kevin P. McGowan, "No Affirmative Defense Under Title VII On EEOC Conciliation Efforts, Court Rules" BNA'S DAILY LABOR REPORT (December 23, 2013).

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conciliation prior to filing suit, that employers have an understanding of the legal and factual basis of the allegations against them, and that the EEOC's efforts to conciliate are reviewable in court. All employers – including Deloitte – should be afforded the opportunity, as required by statute, to engage in meaningful conciliation discussions with the EEOC prior to the initiation of expensive and time-consuming litigation. H.R. 4959 will help to ensure that opportunity, which will work to the benefit of employers, employees and the courts.

V. Conclusion

We wish to thank you for taking the time to hold this important hearing on EEOC oversight. We believe that the EEOC Transparency and Accountability Act, the Litigation Oversight Act of 2014, and the Certainty in Enforcement Act of 2014 will go a long way to solving some of the institutional issues that currently plague the Commission and which have led to some of the courtroom embarrassments that we outlined in the Chamber's EEOC Enforcement Report. We look forward to working with you as you continue to examine these important issues. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,



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



James Plunkett
Director
Labor Law Policy



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The Honorable John Kline, Chair, House Education and the Workforce Committee
 The Honorable George Miller, Senior Member
 The Honorable Tim Walberg, Chair, Subcommittee on Workforce Protections
 The Honorable Joe Courtney, Ranking Member

October 22, 2014

Dear Distinguished Members of Congress:

We write today as two members of the United States Commission on Civil Rights, and not on behalf of the Commission as a whole¹, to offer some comments on two recent bills. One, the Certainty in Enforcement Act of 2014 (H.R. 5423), amends Title VII of the Civil Rights Act of 1964 to exclude the application of that law to employment practices that are required by federal, state, and local laws. The second, the Litigation Oversight Act of 2014 (H.R. 5422), would require the Equal Employment Opportunity Commission ("EEOC") as a body to approve commencing or intervening in certain litigation matters. For the reasons discussed below, we believe that passage of both of these bills would significantly improve the EEOC's enforcement of federal employment anti-discrimination laws, but we have an important suggestion for modifying the former of the two.

I. The Certainty in Enforcement Act of 2014

Recently, the Commission published a report titled *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy* ("Assessing the Impact of Criminal Background Checks").² It studied in depth the EEOC's April 2012 Guidance limiting employers' use of criminal background checks. According to the Guidance, because members of some racial groups are more likely than members of other groups to have criminal arrests and convictions, employer criminal background checks may violate Title VII's ban on race discrimination in employment unless job-related and justified by business necessity. It does not matter to the EEOC if the employer's decision to use background checks was not motivated by racial bias or discriminatory intent; EEOC claims that such checks come within Title VII's ambit merely because of their disparate impact (or disproportionate effect) on racial minorities. Furthermore, the EEOC takes a narrow view of what constitutes business necessity and recommends that, as a best practice, employers "[e]liminate policies or practices that exclude people from employment based on any criminal record."

¹ The U.S. Commission on Civil Rights was established, among other things, to "make appraisals of the laws and policies of the Federal Government with respect to . . . discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." 42 U.S.C. § 1975(a).

² U.S. Commission on Civil Rights (December 2013).



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The Commission's report was based on a nearly day-long briefing that included seventeen speakers—including a high-ranking EEOC official, scholars, attorneys, social scientists, personnel executives, a former offender who is now policy director of an advocacy and job placement service, a family member of a victim slain by an unscreened ex-convict sent to the victim's home as a contractor, ex-felon advocacy groups, business associations representing home care, small business and retail, and a security company currently under investigation by the EEOC. It also contains analysis by individual Commissioners.

The Guidance purports to trump state and local laws that require employers to run background checks on some employees – a major flaw in the Guidance that witnesses emphasized over and over again to the Commission. They pointed out that the Guidance puts employers in a double bind.³ If they don't run background checks on employees within the required categories, they face the possibility of a lawsuit from their state or local government. But if they do check these employees' criminal backgrounds, they might be investigated and perhaps eventually sued by the EEOC.

Some commentators defend disparate impact liability because it is supposedly necessary to smoke out racial discrimination that would otherwise be well-hidden.⁴ According to these commentators, some employers want to discriminate based on race, but are savvy enough to hide their biases and instead adopt facially race-neutral employment policies that will nonetheless have the same racially adverse effect. It is important to note that an employer who claims that "State law requires me to check these employees' criminal records" is unlikely to be making this claim to conceal a hidden discriminatory motive. Prudent employers generally want to stay on the right side of the law. Such an employer's asserted reason for using criminal background checks is likely also her actual reason.

H.R. 5423 liberates employers from this double bind. It tells them that they may use criminal background checks when required by state, local or other law and thus fixes an important problem with the EEOC's Guidance. We nevertheless believe that the bill would be

³ See, e.g., *Assessing the Impact of Criminal Background Checks* at 169 (Statement of Nick Fishman, Co-Founder, Chief Marketing Officer, and Executive Vice President of Employee Screen IQ); Id. at 206 (Statement of Todd McCracken, President of the National Small Business Association); Id. at 213 (Statement of Richard Mellor, Vice President of Loss Prevention, National Retail Foundation); Id. at 237 (Statement of Montserrat Miller, Partner at Arnall Golden Gregory and counsel for the National Association of Professional Background Screeners); Id. at 245 (Statement of Julie Payne, General Counsel, G4S Secure Solutions USA); and Id. at 269 (Statement of Jonathan A. Segal, Partner and Managing Principal, Duane Morris Institute, On Behalf of the Society for Human Resource Management).

⁴ See, e.g., Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 520, 523 (2003) (suggesting that disparate impact might have been regarded by Congress as a "prophylactic measure that is necessary because deliberate discrimination can be difficult to prove" but ultimately rejecting the argument).



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improved by clarifying that it applies only to disparate impact cases. We have attached a copy of our proposal to this letter.

2. The Litigation Oversight Act of 2014

The Litigation Oversight Act of 2014 requires the EEOC to approve or disapprove by majority vote litigation involving multiple plaintiffs, an allegation of systemic discrimination, or a pattern or practice of discrimination. Individual members of the Commission shall also have the power to require the Commission to decide by majority vote whether the Commission shall commence or intervene in any litigation.

First, a bit of history: when Congress first created the EEOC in 1964, it did not have the power to litigate. It instead only had the power to investigate charges of employment discrimination and conciliate disputes. Proposals that would have given the EEOC more power were rejected. Congress only granted EEOC litigation powers in 1972.⁵ In 1995, however, the EEOC adopted a National Enforcement Plan that delegated this important power to the Office of the General Counsel.⁶

The EEOC is a bipartisan commission; no more than three of its five members may be from the same political party and nominations must be approved by the Senate.⁷ This structure helps ensure that the EEOC pursues enforcement policies that reflect the actual law and would receive broad support. Taking decisions about litigation out of the five Commissioners' hands undermines the structure that Congress so carefully designed and decreases accountability. Or, as Lynn Clements, a former EEOC attorney, put it in written testimony to the House Subcommittee on Workforce Protections: "Placing the imprimatur of the whole Commission on a proposed legal theory garners a level of respect that is simply not possible when decisions are made by a single Regional Attorney or even the General Counsel, no matter their skill. Action by the Commission sends the clear and unmistakable signal that the issues being raised are important ones, and that the employment practice being examined is one that is troubling to a diverse group of those committed to civil rights, regardless of party affiliation or business or worker rights experience."⁸

Unfortunately, in our work overseeing the EEOC as members of the Commission on Civil Rights, we have been troubled by many of the EEOC's litigation decisions – including some approved by the EEOC itself.⁹ *Assessing the Impact of Criminal Background Checks*

⁵ See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

⁶ Equal Opportunity Commission, National Enforcement Plan, available online at <http://www.eeoc.gov/eeoc/plan/nep.cfm>.

⁷ 42 U.S.C. 2000e-4(a).

⁸ Testimony of Lynn Clements at 4, available at http://edworkforce.house.gov/uploadedfiles/clements_testimony.pdf.

⁹ Further, the EEOC has adopted a Strategic Plan which encourages the agency to stray from its core mission of mediating disputes over allegations of actual employment discrimination and instead to pursue



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catalogues some such decisions regarding criminal background checks. In *EEOC v. Peoplemark*, for example, the EEOC charged that Peoplemark categorically refused to hire anyone with a criminal record, even though Peoplemark supplied evidence showing this contention was untrue. The court agreed with Peoplemark and eventually required the EEOC to pay them attorneys' fees.¹⁰ In another criminal background check case, a federal court in Maryland ruled that the EEOC's statistical evidence was "rife with analytical errors," "laughable" and "scientifically dishonest."¹¹ Similarly, in *EEOC v. Kaplan*, a case about an employer who checked employees' credit scores, the Sixth Circuit reprimanded the EEOC for bringing the suit "on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, tested by no one, and accepted only by the witness himself."¹² These are just the cases in which a court published a decision.

Further, the EEOC has pursued equally questionable litigation regarding employer policies that require employees to communicate only in English at work. In 2009, the Commission on Civil Rights published a report, *English Language Policies in the Workplace*, examining the EEOC's investigations and litigation against such employers. The EEOC claims that such policies constitute national origin discrimination because of their disparate impact on certain ethnic groups. Courts, however, have generally rejected this interpretation, at least with regard to bilingual employees who would have no difficulties complying with English-only policies.¹³ The EEOC has nonetheless pursued it aggressively. Thus, Timothy Riordan, counsel for Synchro-Start Products, an electronics manufacturer, testified about his "frustration with the EEOC's persistence in pursuing a case where the initial employee plaintiff lost interest, the English-only policy was rescinded, and there was no evidence of discriminatory intent."¹⁴ Richard Kidman, the owner of a small drive-in restaurant in Arizona, similarly testified that the EEOC rebuffed his efforts to settle his case by modifying his English-in-the-workplace policy and instead pushed forward with litigation.¹⁵

novel and sometimes questionable legal theories. We expressed these concerns in a formal Comment sent to the EEOC on September 18, 2012 on the then-proposed Strategic Plan in 2012: "In the EEOC's proposed Strategic Enforcement Plan for Fiscal Years 2012-2016, however, things other than the mediation and investigation of individual complaints appear to take precedence. We note that the first 'Strategic Enforcement Priority' is 'Eliminating Systemic Barriers in Recruitment and Hiring.' This is a lot to bite off. But 'Eliminating Systemic Barriers in Recruitment and Hiring' is not the same thing as enforcing laws against employment discrimination. A lot of employment discrimination is the result of individual wrongdoers, not systemic barriers (and many systemic barriers to recruitment and hiring have nothing to do with employment discrimination). We believe that the tendency to conflate the EEOC's actual mission, which is the enforcement of laws against employment discrimination, with the elimination of systemic barriers to recruitment and hiring has led to serious 'mission creep.'"

¹⁰ 2011 WL 1707281 (W.D. Mich. Mar. 31, 2011).

¹¹ *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013).

¹² 748 F. 3d 749, 754 (6th Cir. 2014).

¹³ See, e.g., *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993) and *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980.)

¹⁴ *English Language Policies in the Workplace* at 8.

¹⁵ *Id.* at 29, 52-53.



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Mandatory review of litigation proposals by EEOC Commissioners may well prevent some of the more questionable cases from going forward. We recommend that Congress seriously consider the Litigation Oversight Act of 2014 as a mechanism for increasing accountability at the EEOC. Indeed, we believe that further action may also be necessary.

Thank you for your consideration of these matters. If you would like to discuss the work of the Commission on Civil Rights on related questions, you may reach Gail Heriot at gheriot@usccr.gov and Peter Kirsanow at pkirsanow@usccr.gov. You may also mail either of us letters at 1331 Pennsylvania Avenue, Suite 1150, Washington, DC, 20425.

Sincerely,

Gail Heriot
Member

Peter Kirsanow
Member



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Appendix: Proposed Modifications to the Certainty in Enforcement Act

A BILL

To amend title VII of the Civil Rights Act of 1964 to designate employment compliance with Federal regulations, State and local laws as “business necessity” as a matter of law.

1. Short title

This Act may be cited as the “Certainty in Enforcement Act of 2014 ”.

2. Findings

The Congress finds the following:

- (1) The Equal Employment Opportunity Commission (EEOC) is one of several agencies responsible for enforcing Federal laws against employment discrimination, but there are concerns about the enforcement and policy approach adopted by the EEOC, raising questions about whether the best interests of workers and employers are being served.
- (2) In 1964, Congress consciously denied the EEOC the power to issue regulations pursuant to Title VII and has refrained from granting it that power ever since. Nevertheless, like any other agency charged with enforcement, the EEOC may promulgate guidance under the statutes it enforces, but that guidance cannot require more than the statute it is enforcing requires and does not have the force of law, and in some cases the EEOC’s guidances have been rejected by the courts.
- (3) In 1971, the Supreme Court, in *Griggs v. Duke Power Co.*, in large part in deference to the EEOC, interpreted Title VII of the Civil Rights Act of 1964 to prohibit not just discrimination, but also employment practices that have a disparate impact unless they can be justified by business necessity. In passing the Civil Rights Act of 1991, Congress refined the law applicable to causes of action brought under a disparate impact theory without specifically endorsing the Court’s conclusion in *Griggs* or adopting that theory of liability as its own.
- (4) In 2012, the EEOC promulgated an enforcement guidance regarding the use of criminal background checks that put employers in the position of acting contrary to Federal, State, and local laws that require employers to conduct and/or act on criminal background checks for certain positions, such as public safety officers, teachers, and daycare providers.
- (5) In *EEOC v. Peoplemark, Inc.*, a case challenging Peoplemark’s use of criminal background checks in making employment decisions, the Court of Appeals for the Sixth Circuit in October



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2013 affirmed an award of \$751,942 against the EEOC for prevailing defendant Peoplemark's attorney's and expert fees.

(6) In EEOC v. Kaplan Higher Education Corporation, a case challenging Kaplan's use of credit reports in the hiring process, the Court of Appeals for the Sixth Circuit affirmed the district court's decision granting summary judgment in favor of Kaplan and stated that the EEOC brought a 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".

3. Amendment

Section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)) is amended by adding at the end the following:

(4) Notwithstanding any other provision of this title, an employer, labor organization, or employment agency, or a joint labor management committee controlling apprenticeships or other training or retraining opportunities, shall be deemed to be acting from business necessity as a matter of law when it engages in an employment practice that is required by Federal, State, or local law and may not be held liable under any theory of disparate impact.

[Whereupon, at 11:32 a.m., the subcommittee was adjourned.]

